# Purchasing Submission

## *Conditions, Power, and Freedom*

PHILIP HAMBURGER

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regulatory conditions typically are specified by agencies, the agencies end up with a dangerous combination of legislative, prosecutorial, and judicial power—a combination in which their judging is often a further expression of their legislative and prosecutorial policies. This is the very opposite of the Constitution's separation of powers and a perfect illustration of why the separation of powers matters.

The dangers are even greater when judicial power gets devolved by regulatory conditions to state or private institutions. When imposing regulatory conditions on states and private institutions, the federal government often asks them to impose such conditions on persons within their control and then to adjudicate the conditions—a familiar example being Title IX tribunals in state and private universities. Judicial power is thereby not merely divested, but defederalized and even privatized, and (as will be seen in Chapters 7 and 15) the resulting regulatory adjudications are often untamed by even the most basic due process or other procedural rights.

Like the displacement of legislative powers, this displacement of judicial power is a question not merely of structure, but of freedom. Just as the Constitution guarantees Americans the freedom of living under laws made by their elected legislature, so it guarantees them a freedom to be held to account only in the courts, with all of the process due in the courts. By divesting the underlying powers, however, conditions, especially regulatory conditions, throw these most basic freedoms to the winds.

### Consent Decrees and Other Settlements

The displacement of Congress's legislative power often comes in the form of settlements. Many commentators have noted the abuse of consent decrees and other settlements; less well recognized is that such agreements can be unconstitutional.

Rather than use benefits to impose regulatory conditions, some agencies or state attorneys general sue in federal court and then settle

in exchange for regulatory conditions, which the courts embody in "consent decrees." For example, after forty-six state attorneys general sued the tobacco industry, they settled on the condition that the tobacco firms submit to a consent decree imposing advertising restrictions. Such restrictions would have faced political and constitutional objections had the regulation come through Congress, but now they are imposed by a court's consent decree.

In an administrative version of such tactics, some agencies stay out of court, relying instead on harsh administrative proceedings to secure consent to regulatory conditions. The Federal Trade Commission, for example, uses this approach to get submission to regulatory conditions it could not have imposed by law (as will be seen in Chapter 14). Mimicking the "consent decrees" of the courts, the commission embodies its regulatory conditions in administrative "consent orders."

Yet another variation can be found in nonprosecution agreements. Instead of prosecuting and then getting a settlement approved by some sort of tribunal, federal prosecutors and agencies, such as the Securities and Exchange Commission (SEC), often secure settlements merely by threatening prosecution. They thereby use their power in court to impose regulatory conditions without going to court—indeed, often without disclosure to a court or the public.[12] Similarly, the government often seeks deferred prosecution agreements. Though these settlements are at least filed with the courts, they face very limited review.

Regardless of whether regulatory conditions come through consent decrees, consent orders, or non- or deferred-prosecution agreements, such conditions divest Congress of its legislative powers and vest such powers in prosecutors or agencies. The wayward conditions mostly confine how Americans can conduct their businesses, charities, and other organizations, and they mostly impose restrictions beyond what is required by law—all without working through the legislative process.

Adding to the danger from such settlements, many also require defendants to refrain from seeking any judicial reconsideration in court, or even disputing the settlements in public—notwithstanding that this may be the only way to hold government accountable for its unlawful use of conditions. The SEC, for example, requires settling defendants to submit to gag orders. One advantage for an agency in using consent decrees (judicial or administrative) is that the agency can treat each violation of a decree as a contempt. The effect is to avoid regular judicial processes, even abbreviated administrative processes, and instead impose the summary process available when imposing sanctions for contempt.

Magnifying the constitutional problems, the settlements that appear in consent decrees often lead judges to go beyond judicial power. Far from being merely settlements, consent decrees are judgments of courts. The Constitution vests judicial power in the courts, and the judges have what James Iredell called "the duty of the power," which, he explained, was the duty "to decide in accord with the laws."[13]

On this foundation, there has long been concern about consent decrees containing conditions that depart from law. As put already by an English court, judges should not "give a judgment which they know would be against the law, although the plaintiff and defendant do agree to have such a judgment given."[14] That is, judges have a duty to follow the law, and they therefore cannot, even with the parties' consent, issue decrees that they know depart from law. So when a court enters a consent decree containing a condition that the judge knows (or should know) to be less or more than is required by law, the condition should be considered beyond judicial duty, and thus beyond the judicial power and unlawful and void.*

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*Among these illicit conditions in consent decrees are those requiring payments not required by law—whether made to a prosecuting party or to a third party who did not participate in the underlying lawsuit. Attorneys general often seek these distributions in order to mobilize political support and finance political allies. Such settlements,

But the most basic problem with settlements that impose regulatory conditions is that they divest Congress of legislative power. This alone—apart from violations of rights and of judicial power—is enough to render them unconstitutional.

### Necessary and Proper

Can the divestiture of legislative and judicial powers be justified by the Necessary and Proper Clause? This clause authorizes Congress to make such laws as are "necessary and proper" for carrying out other governmental powers, and it is often interpreted to mean that Congress can do whatever it considers expedient. But this interpretation is contrary to the Constitution's text and would enable Congress to undo the Constitution's allocation of powers.

The Constitution authorizes the president to recommend to Congress such measures as he judges "necessary and expedient." This phrase is revealing, for in contrast, the Constitution empowers Congress to enact what is "necessary and proper." The Constitution thus clearly limits Congress, in its pursuit of what is necessary, to what is proper. At a minimum, this means Congress cannot rely on a claim of necessity to justify divesting Congress or the courts of the powers that the Constitution vests in them, or to justify vesting such powers elsewhere. However expedient it may seem to Congress, such things are not constitutionally proper.

The Necessary and Proper Clause, moreover, speaks of "vested" powers and thereby specifically avoids authorizing any divestiture of such powers. It is often assumed that this clause gives Congress the power to enact what is necessary and proper to carry out other government powers in the abstract—a breadth that might justify

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however, impose sanctions that Congress did not authorize and subsidize persons for whom Congress did not appropriate funds.

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: a general welfare power.



Fifth, the argument on behalf of strategic ambiguity and a possible general welfare power would have one believe that the relevant paragraph zigzagged—that it began with a taxing power, switched to a power to pay debts and provide for the general welfare, and then doubled back to qualify the taxing power with a uniformity requirement. It is as if the Constitution were written by a drunk driver.

5. *South Dakota v. Dole*, 483 U.S. 203, 210 (1987).

6. *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012). Note also the Supreme Court's opinion in *Butler*: "If the taxing power may not be used as the instrument to enforce a regulation of matters of state concern with respect to which the Congress has no authority to interfere, may it, as in the present case, be employed to raise the money necessary to purchase a compliance which the Congress is powerless to command?" *United States v. Butler*, 297 U.S. 1, 70 (1936).

7. *Massachusetts v. United States*, 435 U.S. 444 (1978).

8. *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 295 (1958).

9. *South Dakota v. Dole*, 483 U.S. 203, 208 (1987).

10. *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012).

11. *South Dakota v. Dole*, 483 U.S. 203, 207 and n2 (1987).

12. *South Dakota v. Dole*, 483 U.S. 203, 17 (1987).

13. James L. Buckley, *Saving Congress from Itself: Emancipating the States and Empowering Their People* (New York: Encounter Books, 2014), 19–56.

## *Chapter 5: Divesting and Privatizing Government Powers*

1. Gillian E. Metzger, "Privatization as Delegation," *Columbia Law Review* 103 (2003): 1367; Jon Michaels, *Constitutional Coup: Privatization's Threat to the American Republic* (Cambridge, MA: Harvard University Press, 2017).

2. For these jurisdictional qualifications, see Philip Hamburger, *The Administrative Threat* (New York: Encounter Books, 2017), 47–50.

3. See *United States v. Am. Library Association*, 539 U.S. 194, 203 (2003) (plurality opinion), remarking that "Congress has wide latitude to at-

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# Federalism

Federalism is the system by which Americans govern themselves in layers. Rather than have a single central government, which directs subordinate geographic departments—as in France—Americans share a federal government for some national issues and have fifty state governments for other matters. And to police the boundary between federal and state power, the Constitution elevates federal statutes above state law.

The federal government, however, no longer confines itself to using its statutes to trump state laws in areas of federal power; more ambitiously, it uses mere conditions to control the states—even in matters that the Constitution reserves to them. As a result, quite apart from the expansion of the federal government's substantive powers, the purchase of state submission threatens to defeat much federalism.

In colloquial terms, the "layer cake" of federalism has become a more vertically amalgamated "marble cake," in which federal money and conditions run down into the states and localities. Put more academically, states have become "integrated" into national policymaking.[1] Though they can negotiate some wiggle room within the federal chokehold, they feel little choice but to adopt and carry out

federal policies. It is thus a relationship in which the federal government is the "aggressive" actor and the states are on the "defensive."[2] In almost comic euphemism, this is called "cooperative federalism."[3]

Yet rather than mean that Americans must give up on federalism, these developments suggest federalism's continued significance. It has never been more important to recognize the value of the Constitution's federalism and the unconstitutionality of subverting it by purchase.

## Federalism's Value

Federalism is not as popular a feature of American government as are constitutional rights, but it, too, is essential.

Structurally, state power counterbalances centralized power. Just as the federal government can limit narrow local interests and prejudices in the states, so the states can sometimes push back against the centralized interests and prejudices that flourish in Washington.

Even more profoundly, federalism structurally secures Americans from a combination of general and centralized power—a peculiarly dangerous amalgam that is apt to intrude deeply while cutting off exit. At the same time that the generality of such power permits it to encroach into the most private spheres of life, its centralization precludes any relief through emigration to another state. Federalism protects Americans from this totalizing possibility by allowing only specialized federal power. Americans thus are subject to general power only in their own states and can escape local oppression by moving to another state. Put sociologically, the division of power among many governments is a valuable "obstacle in the way of accumulation of power by a single class or group, even a majority class or group."[4]

In multiple ways, therefore, as put by the Supreme Court, "the Constitution divides authority between federal and state governments for the protection of individuals."[5] Though federalism operates structurally, it secures personal freedom.

Theoretically, federalism leaves room for policy experimentation in the states. There is some truth to this—to which one might add another, less optimistic truth: that federalism disperses the costs of policy errors. One way or another, federalism is valuable for its recognition of the limits of human understanding.

Federalism is also a foundation of financial prudence. Although federal funding is often assumed to enrich the states and the lives of their peoples, it more clearly has moved many states toward fiscal irresponsibility. Many federal grants come with conditions requiring states to provide matching funds or at least to maintain their own spending. So it is not state profligacy alone that has led numerous states to slide into debt and near bankruptcy.

Federalism limits competing demands on the federal government's energy and resources. It creates a specialized federal government, which has different functions than the states. If this specialization were maintained, the federal government would not have to compromise on its specialized roles—for example, military preparedness—in order to satisfy demands for federal funding of other activities. In other words, federalism protects the federal government's specialized goals from competing demands to support general governmental ends.

Even in what is said to be an age of individualism, many Americans still want a sense of community, and federalism allows Americans to govern themselves in communities small enough that individuals can feel connected to each other. In many states, local connectedness, knowledge, and identity remain profoundly important, and the resulting communal strength is advantageous not only personally but also politically, as it enables locals to hold their government to account.

Federalism, moreover, goes far in solving the problem of geographic diversity. States have different characters. By way of illustration, Connecticut and California, Vermont and Texas, South Dakota and Florida, South Carolina and Massachusetts are not merely different places; they also are different states of mind; they offer different poli-

cies and visions of life, which appeal to different people. And when Americans are on the move, they sometimes cluster with others of similar tastes, making location an expression of elective affinities. For such reasons, geographic difference cannot be understood in merely geographic terms; it is also a manifestation of personal and political preferences, different visions of community, and other sorts of diversity. Federalism is therefore essential for reconciling diverging tastes and identities—whether on matters of religion, sex, taxes, guns, farm policy, industrial policy, or the environment.

Even at the federal level, federalism is baked into the very method of making law. Acts of Congress are the choices of both national and state communities. On the one hand, statutes are enacted by legislators directly chosen by the peoples of the states, and congressional legislation thus must satisfy lawmakers who are keenly attuned to the distinctive preferences of their different jurisdictions. On the other hand, being enacted by a body of lawmakers drawn from across the nation, federal statutes are the choices of the entire nation—of all the people and all the nation's territory, including all the states. This solution, which takes account of layered preferences, is crucial if Americans are to govern themselves both nationally and through a mechanism that reflects their diversity.

For all of these reasons, it is deeply troubling that conditions slice through federalism. And as will now become apparent, their threat to federalism is unconstitutional for multiple reasons.

## Co-opting State Opposition

Although the danger of buying off political opposition has already been discussed (in Chapter 6), it becomes especially serious for federalism when the federal government gives grants in aid to the states. Ordinarily, the federal government spends directly for its own programs. But increasingly it also spends to support state programs, and then its money subverts the political independence of the states.

Robert Cover eloquently explains how the states are compromised:

> If the exercise of the spending power can, in general, disarm and diffuse political opposition by compensating those subject to regulation, it can have more complex and potentially more dangerous consequences when federal funds are employed in cooperative schemes, in which the federal government provides grants-in-aid to state and local governments. Intrusive federal programs that establish independent federal bases for patronage and impinge on areas of traditional state and local concern will normally be opposed by local elites, which tend to benefit from the control of their own affairs. Cooperative programs, in contrast, co-opt this potential opposition. They actually increase the patronage exercised by local elites and retain local elite domination over beneficiary groups. As a result, state and local political figures and party organizations are "bought off," co-opted from pursuing opposition to national governmental programs.
>
> By debilitating, if not disarming, the alternative sources of political power in our federal structure, "cooperative federalism" undermines the only viable restraint on the congressional exercise of enumerated powers: the political process. Thus, cooperative ventures should be considered of dubious constitutionality.
>
> "Combative federalism," under which federal programs are exclusively federal, presents a desirable alternative, fully consistent with [Chief Justice John] Marshall's theory of enumerated powers. To protect the feedback mechanism that permits states to react to federal actions, the federal government ought to do more itself; it ought to provide funds directly, and be responsible for the administration of the programs it funds. Only the ensuing combat, prompted by the reactions of the states, can guarantee an effective political check on the exercise of national power.[6]

The federal government, in short, can often purchase its way out of state opposition.

Of course, as Cover recognized, states occasionally refuse to be bought off—as when fourteen states flatly declined federal funding tied to Medicaid expansion. But most federal efforts to purchase compliance do not encounter such impediments. Lubricated with federal funds, "cooperative federalism" tends to avoid substantial friction.[7]

## Supremacy

A second threat to federalism is that conditions on states are assumed to come with the supremacy of federal law—an assumption reinforced by judicial doctrine.[8] For example, when the Department of Health and Human Services uses conditions on funding to require state universities to establish institutional review boards (IRBs), it is taken for granted that the federal conditions defeat state constitutional guarantees of speech and the press, which otherwise would bar such universities from licensing inquiry and publication. But can federal conditions really nullify contrary state laws?

Tellingly, the Constitution's Supremacy Clause says nothing about conditions. Laws have long been understood to have legal obligation—the binding force of law—because they come with the consent of the people. On this principle, laws made by the elected legislature of a state are binding in that state, and laws made by Congress are binding across the United States. Moreover, because federal laws come from a legislature drawn from across the nation, they are of higher legal obligation than state laws.[9] The Supremacy Clause recognizes this when it elevates three types of federal enactments as the supreme law of the land: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." The Constitution,

statutes enacted by Congress, and treaties ratified by the Senate are the supreme law of the land and so render contrary state laws unlawful and void.

But what about federal conditions—at least those that are not also legal requirements? Do they defeat state laws? First, consider the special problems with conditions enunciated by federal agencies.

Although a higher law can render a lesser law unlawful and void, this is not true of things that are not law, for only laws (and court orders carrying out the laws) have legal obligation. The Constitution accordingly recognizes acts of Congress, not conditions adopted by agencies, as the supreme law of the land. It follows that federal statutes, rather than federal agency conditions, are the measure of when state law is unlawful and void. A federal agency condition cannot defeat state law.

Reinforcing this conclusion is that statutes traditionally enjoy the obligation of law precisely because they have been adopted by a legislative body representative of the people. Without such consent, such enactments would not bind the people or their states. It is therefore difficult to understand how mere agency conditions can defeat state law.

Moreover, agency conditions purport to defeat state laws without complying with what Bradford Clark has called the "procedural safeguards of federalism."[10] The Constitution establishes the supremacy of not just any laws, but those "made in Pursuance thereof"—that is, by Congress—thereby ensuring that state laws can be defeated only by such federal enactments as are adopted by representatives elected from the states. In contrast, when state law is trumped by agency conditions, this mechanism for safeguarding the concerns of the states gets pushed aside.[11]

In defense of the trumping effect of federal agency conditions, one might imagine that what defeats state law is not any condition set by an agency but rather the federal statute that authorized the agency to specify the condition. From this perspective, everything important

has already been said by the statute, and the condition is of little significance, being merely the execution of the statute and thus a matter of executive power. Accordingly, where a state law conflicts with a federal condition, what voids the state statute is really the underlying authorizing statute, not the condition.

This, however, is a notorious fiction. When a similar argument was made on behalf of administrative power, it provoked James Landis (a prominent advocate of such power) to say that "it is obvious that the resort to the administrative process is not, as some suppose, simply an extension of executive power" and those who "have sought to liken this development to a pervasive use of executive power" are "confused."[12] Similarly, it is fictitious and confused to say that an agency's elaboration of a condition is merely an executive specification of the underlying statute and that the statute is what really defeats state laws. A legal sham is a poor excuse for erasing federalism.

Having considered the conditions spelled out by agencies, now let's turn, second, to an even more basic obstacle to permitting federal conditions to trump state statutes—an impediment that affects all such conditions, even those fully specified by Congress. No federal condition, by whatever means adopted, should be understood to defeat the obligation of contrary state law, because conditions do not purport to bind, let alone in the manner of law. In other words, regardless of whether a condition is specified by an agency or Congress, it does not profess to bind and so should not render state law void.

To understand this point, one should keep in mind that not everything in a statute is legally binding. For example, when a federal statute merely suggests a deadline or a process, without requiring it, such things are not binding as law and so do not defeat state law. Similarly, where a federal statute does not directly require compliance with, say, the equal time rule, but merely makes it a condition, that provision is not binding as law—it does not have legal obligation—and so should not be understood to deprive state law of its obligation.

Put succinctly, when federal conditions are not also legal requirements, they do not even purport to bind and therefore should not be said to bind the states. What is not binding federal law should not be understood to overthrow or void state law.

Of course, in some instances, a federal statute may propose the terms of a contractual promise, which, if accepted, will be binding as a promise to the federal government. But promissory obligation is not legal obligation. Contract law has the obligation of law, but under that law, contractual promises have only a lesser sort of commitment or obligation. Accordingly, when a federal statute does not directly require adherence to its provisions, but instead proposes them as the terms of a contractual promise, it is not giving them the obligation of law. Such proposals for contractual promises therefore cannot defeat state law.

Indeed, far from claiming the obligation of law for its conditions, the federal government usually insists that its conditions are not even contracts but rather are mere assurances. That is, most federal conditions are not even binding in the manner of enforceable promises; on the contrary, as noted above, they are merely the circumstances that the federal government requires to be in existence if it is to give, or not withdraw, its support. From this point of view, federal conditions do not legally or even contractually oblige anyone to do anything. Instead, they merely stipulate what the government expects from recipients if it is to pay them or, later, not withhold further payment and demand its money back. It thus is all the more clear that even when fully recited in statutes, federal conditions do not come with legal obligation and should not be thought to defeat the obligation of state law.

In fact, the federal government tends to act through conditions precisely to avoid the constitutional restrictions that would come into play if it worked through binding laws or rules. The government thus finds itself in a contradiction. For purposes of trumping state laws,

the government says that its conditions are legally binding or constraining, but for purposes of avoiding charges that it is abridging the Bill of Rights and other constitutional limits, it says that its conditions are merely consensual and so not binding or constraining.

The government cannot have it both ways—that conditions are both legally binding and not legally binding. Either conditions are binding as a matter of law and are therefore often clearly in violation of various constitutional freedoms, or they are not binding as law and consequently do not render contrary state laws unlawful and void.

## Commandeering

A third constitutional problem is commandeering. According to the Supreme Court, the federal government may not commandeer the states. Yet all too often, federal conditions do precisely this.

Although the anti-commandeering doctrine is often said to have been created by the Supreme Court, it arises more fundamentally from the Constitution, which does not displace the states' sovereign character. States are independent governments, which draw their authority from below, from their own peoples, and in this sense, they are sovereign. Of course, they are only partly sovereign, for the people of all the states have granted some sovereign powers to the government of the United States, which thus enjoys a superior sovereignty in these spheres—such as war and peace and the regulation of interstate commerce. But where federal sovereignty ends, the states remain sovereign.

And underlying state sovereignty is the freedom of Americans to govern themselves through these lesser jurisdictions—a freedom of localized self-government that individuals enjoy through the election of state lawmakers in republican forms of government. Commandeering doctrine thus reflects fundamental structural elements of the US Constitution, including not only the limited but

independent sovereignty of the states but also, underlying this, the freedom of Americans to govern themselves in these relatively intimate jurisdictions.

Indeed, the doctrine would seem to have a textual foundation in the Constitution's requirement that "the United States shall guarantee to every State in this Union a Republican Form of Government." When the federal government, directly or by conditions, dictates policy to the states, it is interfering with their republican self-government. This chapter will later return to the guarantee of a republican form of government, but already here it suggests the depth of constitutional authority for the anti-commandeering doctrine.

Commandeering is especially dangerous because it undermines accountability. The Supreme Court in 1992 in *New York v. United States* explained: "Where the federal government compels states to regulate, the accountability of both state and federal officials is diminished." This is obvious enough for state officials, but it would also appear to be true at the federal level, for "where the federal government directs the states to regulate, . . . the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision."[13]

The court in *New York* concluded that Congress cannot direct states in their governance. It cannot require them to carry out specific federal regulations; nor can it "require the States to govern according to Congress' instructions." Indeed, "the Constitution simply does not give Congress the authority to require the States to regulate."[14] Although the acts of Congress, within its constitutional authority, are binding throughout the United States and are therefore binding on the states, the federal government lacks a power to direct or command the states to adopt regulatory, spending, or other policies. Put generally, whether the federal government proceeds by statute or administrative edict, it cannot direct the states in their governmental policy decisions—be they legislative or executive.

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But what about when the federal government acts through conditions on benefits and other privileges? Long ago, in *Steward Machine Co. v. Davis* (1937), the Supreme Court said that the key consideration was whether the federal government "by suit or other means" can "supervise or control" the states. On this basis, the court held that although a federal contract could impair state sovereignty, a mere condition could not.[15]

Whether conditions were really less controlling than contracts in the 1930s, they certainly nowadays encroach on state sovereignty and localized self-government. They drive much state policy, including regulatory and spending policy. Federal conditions have these effects, moreover, almost across the full range of state governance—in matters of health, education, policing, housing, welfare, the environment, and so forth. The reality of federal conditions is that they repeatedly turn states into French-style instruments for carrying out centralized policy, thus depriving Americans of a significant element of their freedom to govern themselves.

Acknowledging that conditions nowadays regularly deprive states of their sovereignty, Chief Justice Roberts in *National Federation of Independent Business v. Sebelius* echoed the line (in *New York*) that "the Constitution simply does not give Congress the authority to require the states to regulate," and then added: "That is true whether Congress directly commands a state to regulate or indirectly coerces a state to adopt a federal regulatory system as its own."[16]

Elaborating how conditions defeat state sovereignty, Roberts explained that when conditions threaten to "terminate other significant independent grants"—that is, when they are cross collateralized—they "cannot be justified" as mere spending. Instead, they "are properly viewed as a means of pressuring the states to accept policy changes."[17]

These conclusions should be no surprise, for the Constitution protects federalism. The judges therefore must "ensur[e]" that any

sovereignty is the freedom of Americans to enjoy localized self-government. The term *commandeering* is therefore a distraction and its suggestion of force must be put aside.

If the question were about a constitutional right, then some sort of force would ordinarily matter—at least in any initial analysis—because force is prototypically necessary for a violation of a right. The question here, however, is not about rights. Nor even is it about the enumerated federal powers as limits on the federal government. Instead, it is more broadly about how those powers are being employed. Is the federal government using them to direct states in ways that undermine state sovereignty and the nation's layered federal system of self-government? If so, force is not necessarily relevant.

Chapter 13 will show that all conditions against public policy (including those that commandeer the states) should be considered void without regard to questions of force or other pressures. But for now the point is simply that force is not as central to commandeering as may be thought. "Commandeering" is ultimately a question about state sovereignty and localized self-government, and the Constitution's federal structure can be as much undermined by federal conditions as by federal force.

Chief Justice Roberts was therefore correct in *Sebelius* when he urged that judges must ensure that conditions do "not undermine the status of the states as independent sovereigns in our federal system."[20] At stake is federalism itself—one of the most basic elements of the Constitution's form of government. Judges thus cannot ignore the reality of what many federal conditions do to state sovereignty and the freedom of Americans to govern themselves through their states.

## State Consent to Commandeering and an Abnegation of Judicial Duty

Currently, when faced with commandeering, the Supreme Court tends to be satisfied with consent. As summarized in *Sebelius*, "we

condition "does not undermine the status of the states as independent sovereigns in our federal system."[18] Indeed, the judges must ensure that federal conditions do not deprive Americans of their freedom of self-government through the states.

### Force Required for Commandeering?

In analyzing federal conditions that commandeer the states and thus threaten their sovereignty, the Supreme Court has suggested that a showing of something like force is necessary. The underlying assumption is that consent and force are mutually exclusive. In *Sebelius*, for example, Chief Justice Roberts contrasted a mere "inducement" (where a state has a "legitimate choice" whether to accept a federal condition) and a "gun to the head" (where the state has "no choice").[19]

All of this fails to recognize (as will be seen in Chapter 11) that the question is not merely one of force, but of constitutionally significant federal action, which can run the gamut from coercion and the obligation of law to mere economic pressure and sometimes not even such pressure. It also fails to understand (as explained in Chapter 12) that there can be force or other significant pressure amid consent—both in the inducement and in enforcement. It further does not perceive (as detailed in Chapter 13) that questions of force and pressure are altogether irrelevant for determining whether a condition is void and unenforceable for undue influence and contradicting public policy. All of this means that a "gun to the head" and similar ideas of coercion, let alone compulsion, dramatically misunderstand what can constitute legally significant federal action.

More specifically, it must be doubted whether a showing of any degree of force is necessary for commandeering. The label *commandeering* suggests coercion, but the underlying concern is the structural integrity of the Constitution's federal system, in which states enjoy sovereignty derived from their own peoples, and underlying this

look to the states to defend their prerogatives by adopting 'the simple expedient of not yielding' to federal blandishments when they do not want to embrace the federal policies as their own."[21]

But can a state's consent relieve the federal government of its constitutional limitations? A full answer must await Chapter 9, but already here it must be anticipated. Money can undermine state sovereignty and self-government as much as overt force, and if the federal government has no authority to direct the states in their policies, it makes no difference that the states have consented. As put by the Supreme Court in *New York*, "Where Congress exceeds its authority relative to the states, . . . the departure from the constitutional plan cannot be ratified by the 'consent' of state officials."[22]

In leaving the states to defend themselves, moreover, the court is failing to do its duty of enforcing the Constitution's limits on the federal government. Those limits are the barriers that define and protect state power, and the states have as much of a right to have constitutional limits enforced in court as anyone else.

When the Supreme Court refuses to protect states from federal commandeering, it is not only the states who suffer. The people of the United States enjoy a freedom under the Constitution to govern themselves through their states. They have a constitutional freedom not to be subject to power that violates the Constitution's structures, and the consent of their state does not cure the damage to the freedom that is guaranteed to *them* by the Constitution.

The harm to individuals and other private parties becomes especially clear when Congress funds states (as will be seen in Chapter 15) on the condition that they regulate or control individuals—often, indeed, at the cost of their constitutional rights of speech, juries, due process, and so forth. For example, when the federal government in its funding of state universities requires IRBs or Title IX tribunals, it is dangerously violating the rights of individuals. It thus is irrelevant that the states have decided to cooperate with the federal government.

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No amount of agreement between the federal government and the states can justify the federal government in commandeering the states in violation of the Constitution, let alone in ways that deny individuals their rights. The court's suggestion that "we look to the states to defend their prerogatives" is therefore a shocking abnegation of judicial duty.

## The Reality of Commandeering

To understand the failures of current doctrine on commandeering, one need only examine the reality of federal-state relations. The federal government regularly uses conditions to direct state and local governments in their regulatory and spending policies.

Its conditions do this both by barring and by mandating state policies. The Clean Air Act, for example, uses federal highway funding to impose conditions on state environmental policies—limiting and mandating how states regulate.[23] Such conditions are at the very least regulatory. But quite apart from that, the conditions also direct or commandeer the states in their environmental policies.

When the federal government makes grants to states on the condition that they spend the money in pursuit of a federally favored policy, this looks generous. And one might assume that the conditions do not actually direct state policy, as the states agree to follow the federal policy and in some instances are already pursuing a version of it. But for at least half a century, there have been few illusions about the federal government's use of conditions. Martha Derthick writes: "A whole new perception of the state governments as subordinates of the national government, properly subject to command, had taken root, laying the basis for the regulation that spread like kudzu through the garden of American federalism in the 1970s."[24] As explained by Jessica Bulman-Pozen—a defender of the new "federalism"—states have been reduced to "component parts of the national administrative apparatus."[25]

The federal government is quite candid that it aims to direct the states. According to a 2013 Congressional Budget Office (CBO) report, federal grants "provide a mechanism for federal policymakers to promote their priorities at the state and local levels."[26] The result is a "grant system"—a mode of control distinct from binding laws—with which the federal government can shape state and local policies.[27]

The CBO acknowledges that "less federal control" would be advantageous. If the federal government lightened up its conditions, this "would produce efficiency gains" from local knowledge and flexibility. Without the homogenizing effect of controlling federal conditions, moreover, people could "vote with their feet" by moving to the states that "offer the combination of programs that best suits their circumstances and preferences."[28] The federal government, however, is more interested in imposing "federal policymakers' goals."[29]

States usually prefer their own policies, but the federal government has gradually made the states financially dependent. They therefore often go along with policies they would otherwise reject.[30]

Federal conditions distort state and local policy not only in regulation but also in spending. As cautiously put by the CBO, they "may cause state and local governments to spend more on a program than they otherwise would," which in turn "may constrain their ability to spend their own revenues according to their own policy priorities."[31] Recognizing the depth of the distorting effects, the CBO observes that when federal conditions require multiple state contributions, "the cumulative effect of those requirements on a state's budget may be substantial, constraining the state's ability to use its funds in a manner that addresses its own current priorities."[32] No kidding.

Notwithstanding the realities of federal commandeering, one might protest that some states, especially in the past decade, have occasionally refused federal funding or at least have successfully litigated against the associated conditions. What is unlawful, however, is the federal action in directing or commandeering the states, and a

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refusal to follow a command does not mean there was no unlawful federal command.

State rejection of federal funding, moreover, is by far the exception, not the rule. Though states can sometimes negotiate flexibility within federal conditions, they rarely reject funding on account of the associated conditions. Moreover, as aptly observed by Heather Gerken and Jessica Bulman-Pozen, the states' occasional pushback is often more akin to the noncooperation of a "servant" than the power of a sovereign.[33] Overall, notwithstanding sporadic repudiations of federal funds, commandeering is the overwhelming reality.

Although the Supreme Court has shut its eyes to this, a wide range of scholars over the past half century have not been so blind. It is recognized that "the priorities and programs of state and local governments have increasingly come to reflect federal decisions."[34] Martha Derthick more pungently observes that states have become "service stations" of federal policy.[35] Recognizing the implications, Jessica Bulman-Pozen generalizes that the states are now "disaggregated sites of national governance, not separate sovereigns."[36] This is the reality of commandeering.

### Commandeering that Restructures State and Local Government

Even worse, federal conditions shape how Americans govern themselves in their states. As put by Martha Derthick, the conditions have consequences for "both policy making and administration."[37] Nor is this a surprise. It has long been a federal objective "to influence the structure of state decision-making processes in such a way as to produce results that will serve federal objectives."[38] This was already explicit in the 1960s, when Richard N. Goodwin—a leading assistant to President Lyndon Johnson—said that the federal government sought the "blended goal" of altering state "structure and policy alike."[39]

Underlying the federal intrusions on how states govern themselves have been conflicting visions of the nation. The America envisioned by the federal government, according to Derthick, is "bureaucratic and rationalistic. It values symmetry in the ordering of public institutions; universalism as the guiding principle of public programs . . . ; efficiency in the conduct of public business; and professionalism in public personnel." In contrast, state and local America has been "traditional rather than rationalistic." It "conducts public business in ways that vary from one locale to another, through institutions and processes that have developed largely through custom and habit and are nowhere highly systematic." And it places less value on "professionalism in personnel" than on "identification with the local community."[40]

The federal government has responded by reconfiguring the states in the image of federal agencies. It has used conditions to render state and local governance more administrative, more centralized in the states and therefore less local, and ultimately more responsive to federal policy. The effect has been to undercut elected political authority, and thus effective self-governance, at both the state and the local level.

The federal government sometimes very nearly sidesteps the states and their localities. By means of its funding conditions, the federal government has taken "a prime role" in getting states and localities to establish substate planning bodies to advance specialized federal policies.[41] Through such organizations, the Department of Housing and Urban Development has pursued metropolitan planning; the Department of Agriculture, resource conservation and development; the Department of Labor, cooperative area manpower planning; the Justice Department, law enforcement planning; and so forth.[42] Whatever the merits of what these substate institutions have done, they have had "adverse effects on state and local governments"—typically by shifting planning and the formation of policy out of elected local and state governments into bodies more responsive to federal goals.[43]

When federal agencies must work through the states themselves, the federal agencies often go around state governors and legislatures

by offering money directly to state or local agencies. Federal agencies, in other words, circumvent elected state officials to make deals with fellow bureaucrats.[44] Nor is this an accident. Richard Cappalli observes that this approach to funding "may be a way of getting around local political opposition to federal policies," and in any case, state administrators often have interests and ideals roughly aligned with those of federal administrators.[45] The resulting conditions not merely commandeer states, but directly link the federal government to state and local agencies, thereby undermining the authority of elected branches and officers.

The federal government typically aims to funnel its money and control through a single local or state entity. From the perspective of a typical federal grant program, its provincial partner must be sufficiently consolidated to ensure consistency and easy auditing, must be powerful enough to carry out federal ambitions, and must be adequately aligned with the federal government to resist any possible pushback from elected political bodies. Federal agencies have therefore demanded that states or localities centralize the power relevant to a federal grant program in a single state agency—sometimes by expanding the jurisdiction and rulemaking power of an existing agency and sometimes even by creating a new agency.[46] Fortified with a combination of federal resources and exaggerated state or local authority, such agencies tend to become more or less independent of other state agencies and even of state legislatures and governors.[47]

By consolidating state power in state agencies, federal conditions have (in Derthick's words) "encourage[d] the formation of special-purpose units of government that are independent of general-purpose units and often of the local electorate."[48] Indeed, federal conditions have extended "merit" hiring and promotion to many state and local employees.[49] In such ways, the purchase of submission (like administrative power) shifts power from popularly accountable generalists in a legislature or governor's mansion to unelected specialists in mere agencies.

The empowering of bureaucrats in relation to elected officials has been intertwined with the expansion of state power in relation to local government. In Massachusetts, for example, federal conditions on public assistance in the mid-1960s shifted the distribution of public assistance from the towns to the state, and from elected selectmen to centrally appointed college-educated professional bureaucrats—a federal intervention that "permanently altered the structure of policy-making and administration" in Massachusetts.[50]

Of course, something may be gained when federal agencies use conditions to impose their centralizing administrative values on state and local agencies. But something is also lost—not least the power of states, localities, and their peoples to govern themselves and even to choose how they will be governed.

The federal commandeering that has restructured state and local government has not been unknowing. The point is not that there has been a coordinated federal policy, let alone conspiracy, to restructure the states and their localities. Rather, there has been a new ideal of federal dominance, which has animated much, even if not all, federal policy. As might be expected, this elevated vision of federal direction has thrived alongside a dismissive view of state and local decision-making—graphically expressed by the Advisory Commission on Intergovernmental Relations when it declared that part of the "agenda for the seventies" would be "civilizing the local government structural jungles."[51]

The reassuring euphemism for the new vision, positive and negative, has been "cooperative federalism." But the reality, as recognized already by Daniel P. Moynihan, has been "New Varieties of Government."[52]

The reconstruction of the states along federal lines was not without logic. When state legislatures could not be paid off, the federal government directly subsidized state agencies; when this was not adequate, it worked through localities; when more was needed, it supported the creation of substate and even nonstate organizations to

effectuate federal policy. The overall effect was to transform American government—to recreate it in ways that profoundly undercut the independence of states, the power of their lawmakers and other elected officials, and the cohesion of their communities. And rather than a bug, this was a feature.[53]

The deliberate reconfiguration of state and local governments through federal conditions has not been sufficiently recognized, but once the reality is understood, it becomes painfully apparent how much the federal government has commandeered the states.[54] In a model of understatement, the Advisory Commission on Intergovernmental Relations described all of this in 1970 as an "intrusion into state organization and procedures."[55] More precisely, federal conditions have dictated a massive restructuring of state and local government, thereby commandeering the states not merely in their policies, but in their very modes of governance—the result being to move the states away from popular self-government and toward centralized control by agency specialists.

### Republican Form of Government

The commandeering points to a fourth constitutional difficulty. It has already been suggested that the anti-commandeering doctrine has a textual foundation in the Constitution's guarantee of a republican form of government. Now it can be added that the threat to a republican form of government becomes especially acute when federal conditions induce states to shift their regulation and other policymaking from their legislatures to state administrative agencies. Even more than other commandeering, such conditions seem to violate the Constitution's provision that "the United States shall guarantee to every State in this Union a Republican Form of Government."

The leading case to interpret this clause is *Luther v. Borden* (1849). Many residents of Rhode Island had attempted in 1842 to displace the state's old 1663 charter with a new constitution, and Luther—an

adherent of the new constitution—suggested that the old charter failed to establish a republican form of government. The Supreme Court held that this was a "political question"—meaning one that the Constitution left to the political branches of the federal government rather than the courts, so that the court could not hold against the old charter. But was the court really confronting a political question—one that had to be left to Congress? And are all Guarantee Clause claims nonjusticiable?

Far from simply securing a right, the guarantee of a republican form of government imposes a duty—a duty not merely on the political branches, but generally on the United States, including the courts. Moreover, the guarantee does not secure the states in any particular republican form of government. The court in *Luther* therefore had good reason, at least under this guarantee, to avoid choosing between two more-or-less republican forms of government—not because this was a political question reserved to Congress, but because both Rhode Island constitutions were republican in form, albeit not equally democratic. Last but not least, nothing in the guarantee of a republican form of government requires a court to order one of the political branches to act. This was not even an issue in *Luther*, and if there ever were a request for such an order, the court would ordinarily be bound by traditional equitable principles to refuse it. Accordingly, in one way or another, it may be doubted whether, as suggested in *Luther*, the question of republican government is really a political question or otherwise nonjusticiable. As noted by the Supreme Court in *New York v. United States* (1992), "perhaps not all claims under the Guarantee Clause present nonjusticiable political questions."[56]

This is especially clear when the federal government, which is bound by the clause, pressures states to abandon their republican forms of government. The clause imposes a duty on the United States, and violations of constitutional duties can be resolved by the courts—at least when the violations are sufficiently determinate.[57]

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Of course, in many instances, the federal government's violation of the Guarantee Clause will be difficult to measure. At least in some instances, however, the question will not be so unclear. A republican form of government is an elective government—one in which officials are elected, and the people are governed by laws made by their elected legislature. A republican form of government, moreover, stands in contrast to absolutist or administrative forms of government. It is therefore difficult to avoid the conclusion that administrative governance, let alone the purchase of submission, deviates from a republican form of government. Even when imposed under statutory authorization, administrative power or the purchase of submission is not what traditionally was understood as a republican form of government.

This is not to say that the courts should necessarily hold Congress or the president accountable for their inaction—for their failure to secure a republican form of government in a state. Leaving aside the obstacles in equitable principles, it would often be difficult for the courts to ascertain exactly how and when the federal government should act under the Guarantee Clause. But when Congress or the executive branch actively interfere in the states' republican self-governance by directing them in their policies, it is another matter. Especially when federal conditions require a state to work through administrative power or through the purchase of submission, it is clear that the federal government is violating its duty to guarantee the states a republican form of government. In such circumstances, the courts do not face the usual objections to judicial enforcement of this duty.

## Beyond Federal Powers

The threats to federalism discussed thus far—whether from co-opting state opposition, claiming supremacy for conditions, commandeering the states, or violating the Constitution's guarantee of a republican form of government—are sobering enough. And they are all the more

serious because of a fifth problem: the Supreme Court allows conditions to escape the Constitution's enumeration of federal powers.

The Constitution enumerates only limited federal powers for the federal government, and it further confines that government by enumerating rights. Beyond these boundaries, it leaves power to the states. Pressing this point home, the Tenth Amendment declares, "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." Put another way, the powers that the Constitution does not give to the federal government (and that the Constitution does not take from the states) remain in the states or the people.

To be sure, the Supreme Court has so broadly interpreted federal powers—notably, Congress's power over interstate commerce—that the federal government nowadays enjoys a nearly general legislative power, akin to that of the states. And this expansive vision of the enumerated powers already severely threatens federalism. But that is not all.

Recall that under Supreme Court doctrine, federal conditions are not even confined to the federal government's judicially expanded powers. As put by the court in *South Dakota v. Dole*, "We have . . . held that a perceived Tenth Amendment limitation on congressional regulation of state affairs did not concomitantly limit the range of conditions legitimately placed on federal grants."[58] Conditions are thus not even theoretically limited by the federal government's enumerated powers.

Federal conditions can therefore carve through the full range of state law. Although federal statutes and administrative commands are nowadays only marginally limited by the Constitution's enumeration of powers, conditions are even less confined. They can defeat almost any state laws, without concern as to whether the conditions fit within the Constitution's enumeration of federal powers.

This unconstrained reach of federal conditions makes them especially dangerous for federalism. In one of its more lucid moments, in

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*United States v. Butler* (1936), the Supreme Court recognized the problem. Where Congress has "no power to enforce its commands," it "may not indirectly accomplish those ends by taxing and spending to purchase compliance." Moreover: "If, in lieu of compulsory [that is, binding] regulation of subjects within the states' reserved jurisdiction, which is prohibited, the Congress could invoke the taxing and spending power as a means to accomplish the same end, clause 1 of §8 of Article I [meaning the taxing power, including the alleged spending power] would become the instrument for total subversion of the governmental powers reserved to the individual states."[59] Nonetheless, the federal government now regularly uses conditions to regulate far beyond even the judicially expanded federal powers.

The threat is ultimately to freedom. Most basically, in cutting through constitutionally protected state power, federal conditions stifle the localized self-government protected by the Constitution's enumeration of federal powers. In addition, such conditions overturn lawful state constitutions and statutes that would ordinarily protect inquiry, science, speech, and so forth—a danger all too evident from the federal conditions imposing IRB censorship on human subjects research. By liberating federal conditions from the Constitution's enumeration of powers, the judges have made federal conditions a threat to the full range of freedom that federalism protects.

Federal conditions slash through the Constitution's foundations for federalism. They co-opt state opposition and thereby undermine a key structural limit on federal power; they violate the Supremacy Clause; they commandeer the states; they violate the guarantee of a republican form of government; indeed, they candidly eviscerate the enumeration of federal powers and the Tenth Amendment. The result is a dramatic erosion of federalism, including its structural limits on centralized power, its financial accountability, its dispersion of policy

errors, its freedom for localized self-government and community, and its opportunities for Americans in different communities to pursue their diverse visions and identities.

More generally, Part II has shown that, even when conditions do not impose unconstitutional restrictions, they run afoul of the Constitution by creating an unconstitutional conduit for power. Conditions thereby often violate the government's authority to spend or otherwise distribute privileges. Moreover, regulatory conditions divest and privatize the government's legislative and judicial powers, short-circuit the political process, enable government to deny due process, jury, and other procedural rights, and frequently violate federalism. Conditions thus carve out a profoundly unconstitutional pathway.

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. 403 U.S. 602, 621 (1971).
tections, "Institutional Review
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*v. Randall*, 357 U.S. 513, 524–525

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On revocations of licenses, see
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rd approval for sharing or other-
information. See 45 C.F.R. pts.
ı Insurance Portability and Ac-
91, 110 Stat. 2021–2031 (1996).



More typically, however, the shift of adjudicatory decisions is accomplished by means of conditions.

17. Charles Reich talks about procedures that "in varying degrees, represent short-cuts that tend to augment the power of the grantor at the expense of the recipient." Charles A. Reich, "The New Property," *Yale Law Journal* 73 (1964): 733, 751.

18. For the administrative side of this problem, see Philip Hamburger, "The Administrative Evasion of Procedural Rights," *New York University Journal of Law & Liberty* 11 (2018): 915, 960.

19. Hamburger, "The Administrative Evasion of Procedural Rights," 915, 960.

20. U.S. Department of Education, Dear Colleague Letter (April 4, 2011), https://www2.ed.gov/print/about/offices/list/ocr/letters/colleague-201104.html.

21. Robert L. Shibley, *Twisting Title IX* (New York: Encounter Books, 2016), 35.

22. For details of the bias among administrative law judges at the Securities and Exchange Commission, see Brief of the New Civil Liberties Alliance as Amicus Curiae in Support of Petitioners, *Lucia v. Securities and Exchange Commission*, on Writ of Certiorari to the U.S. Court of Appeals for the District of Columbia Circuit, No. 17–130.

23. Recall Martha Derthick's comments about the administrative "flexibility" arising from the fact that "federal requirements are typically stated in general terms." Martha Derthick, *The Influence of Federal Grants: Public Assistance in Massachusetts* (Cambridge, MA: Harvard University Press, 1970), 210.

## *Chapter 8: Federalism*

1. Jessica Bulman-Pozen, "From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism," *Yale Law Journal* 123 (2014): 1920.

2. Martha Derthick, *The Influence of Federal Grants: Public Assistance in Massachusetts* (Cambridge, MA: Harvard University Press, 1970), 210.

3. For the euphemism "cooperative federalism" and the possibility that it was coined by Edwin Corwin in 1937, see Richard B. Cappalli, *Federal*

*Grants and Cooperative Agreements: Law, Policy, and Practice* (Wilmette, IL: Callaghan, 1982), chap. 1, 13, §1:06. Jonathan Adler writes, "Though generally described as 'cooperative federalism,' the relationship between the states and federal government in environmental policy is typically anything but 'cooperative.' To the contrary, many state officials 'resent what they believe to be an overly prescriptive federal orientation toward state programs, especially in light of stable or decreasing grant awards.'" Jonathan H. Adler, "Letting Fifty Flowers Bloom: Using Federalism to Spur Environmental Innovation," in *The Jurisdynamics of Environmental Protection: Change and the Pragmatic Voice in Environmental Law*, ed. Jim Chen (Washington, DC: Environmental Law Institute, 2003), 265.

4. Derthick, *The Influence of Federal Grants*, 220 (Cambridge, MA: Harvard University Press, 1970).

5. *New York v. United States*, 505 U.S. 144, 181 (1992).

6. Robert Cover, "Federalism and Administrative Structure," *Yale Law Journal* 92 (1983): 1342, 1342–1343.

7. Cover was worried about the full range of federal spending in aid to the states, not merely that which regulates or asks states to regulate. But the costs for Americans are all the greater when the federal government uses its spending to secure regulation.

8. See, for example, *Carleson v. Remillard*, 406 U.S. 598 (1972); *Townsend v. Swank*, 404 U.S. 282 (1971). See also Cappalli, *Federal Grants and Cooperative Agreements*, chap. 1, 16–17, §1:09; Paul G. Dembling and Malcolm S. Mason, *Essentials of Grant Law Practice* (Philadelphia: ALI-ABA, 1991), 23.

9. [Alexander Hamilton], "Federalist No. 33," in *The Federalist*, ed. Jacob E. Cooke (Middletown, CT: Wesleyan University Press, 1961), 207.

10. Bradford R. Clark, "The Procedural Safeguards of Federalism," *Notre Dame Law Review* 83 (2008): 1681, 1711–1712.

11. Jessica Bulman-Pozen argues that executive preemption threatens "values of diversity, contestation, and political community." Jessica Bulman-Pozen, "Preemption and Commandeering without Congress," *Stanford Law Review* 70 (2018): 2029, 2051. Although she largely confines her argument to rules issued without notice and comment, her concerns are more broadly relevant. Bulman-Pozen, "Preemption and Commandeering without Congress," 2042. Note also Thomas W. Merrill, "Preemption and Institu-

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errill, "Preemption and Institu-





tional Choice," *Northwestern University Law Review* 102 (2008): 727; Ernest A. Young, "Executive Preemption," *Northwestern University Law Review* 102 (2008): 869.

12. James M. Landis, *The Administrative Process* (New Haven, CT: Yale University Press, 1938), 15.

13. *New York v. United States*, 505 U.S. 144, 168–169 (1992).

14. *New York v. United States*, 505 U.S. 144, 162, 178 (1992).

15. *Steward Machine Co. v. Davis*, 301 U.S. 548, 595 (1937).

16. *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012).

17. *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012).

18. *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012).

19. *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012).

20. *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012).

21. *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012). The phrase echoed in *Sebelius* about "the simple expedient of not yielding" developed as mere dictum in *Massachusetts v. Mellon*, 262 U.S. 447, 482 (1923) and became a holding in *Oklahoma v. United States Civil Service Commission*, 330 U.S. 127, 143 (1947). See Cappalli, *Federal Grants and Cooperative Agreements*, chap. 1, 12, §1:06.

22. *New York v. United States*, 505 U.S. 144, 182 (1992). Similarly, the court said, "State officials . . . cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution." *New York v. United States*, 505 U.S. 144, 182 (1992).

23. 42 U.S.C. §7509(a)–(b). See Jonathan H. Adler, "Judicial Federalism and the Future of Federal Environmental Regulation," *Iowa Law Review* 90 (2005): 377, 449–450; Samuel R. Bagenstos, "The Anti-Leveraging Principle and the Spending Clause after NFIB," *Georgetown Law Review* 101 (2013): 861, 916–917.

24. Martha Derthick, "Crossing Thresholds: Federalism in the 1960s," in *Keeping the Compound Republic: Essays in American Federalism* (Washington, DC: Brookings Institution Press, 2001), 149. Derthick writes that in

the 1960s, "one after another, constitutional thresholds were crossed. By the mid-1970s, American federalism had become something very different from what it had been fifteen years before. Place had lost much of its importance in the American polity." Derthick, "Crossing Thresholds," 138. She adds, "The change in American federalism . . . in the 1960s was more profound than any that occurred in the New Deal." Derthick, "Crossing Thresholds," 151. "It was one thing for the national government to make radically broadened claims for authority to regulate commerce, and another to make rules applying to the states governments' own conduct." Derthick, "Crossing Thresholds," 151. Anita Harbert writes:

> Before the 1960s, the typical grant-in-aid programs were not used to resolve problems of national concern but were established to help state or local governments accomplish their respective objectives—"to help them get farmers out of the mud." . . . In general, federal agencies saw their role as one of technical assistance rather than of control; they offered advice and worked with the states to improve programs initiated by the states, and they did not substitute their policy judgment for those of state and local agencies. . . . Federal review and control of grant distribution in earlier decades was designed to accomplish the objectives of efficiency and economy in order to safeguard the federal treasury, and was not generally intended to affect the substance of grant programs.

Anita S. Harbert, *Federal Grants-in-Aid: Maximizing Benefits to the States* (New York: Praeger, 1976), 4. That changed in the 1960s.

25. Bulman-Pozen, "From Sovereignty and Process to Administration and Politics," 1920, 1932, 1957.

26. Congressional Budget Office, *Federal Grants to State and Local Governments* (Washington, DC: CBO, 2013), 10, https://www.cbo.gov/sites/default/files/113th-congress-2013-2014/reports/03-05-13federalgrantsonecol.pdf.

27. Derthick, *The Influence of Federal Grants*, 7.

28. Congressional Budget Office, *Federal Grants to State and Local Governments*, 23.

29. Congressional Budget Office, *Federal Grants to State and Local Governments*, 23.

30. Richard Cappalli writes that "the lever of federal funds had pried open state and local agencies to federal policies which they would have rejected or would have accepted only grudgingly and slowly." Cappalli, *Federal Grants and Cooperative Agreements*, chap. 1, 12, §1:06.

31. Congressional Budget Office, *Federal Grants to State and Local Governments*, 3.

32. Congressional Budget Office, *Federal Grants to State and Local Governments*, 20.

33. Heather K. Gerken and Jessica Bulman-Pozen, "Uncooperative Federalism," *Yale Law Journal* 118 (2009): 1256, 1259, 1265.

34. Bill W. Thurman, Paul L. Posner, and Stephen M. Sorett, "Federal Grants and Intergovernmental Relations," in *Federal Grant Law*, ed. Malcom S. Mason (Chicago: American Bar Association, 1982), 213 ("the priorities and programs of state and local governments have increasingly come to reflect federal decisions" and that federal grants "alter state and local government policies toward federally favored ends"). State policies thereby end up "different, probably very different, from what they would be in the absence of federal action." Derthick, *The Influence of Federal Grants*, 214.

35. Derthick, *The Influence of Federal Grants*, 235, quoting Walter W. Heller.

36. Bulman-Pozen, "From Sovereignty and Process to Administration and Politics," 1920, 1932, 1957.

37. Derthick, *The Influence of Federal Grants*, 193.

38. Derthick, *The Influence of Federal Grants*, 237.

39. Derthick, *The Influence of Federal Grants*, 223, quoting Richard N. Goodwin, a speech writer for President Johnson. Derthick notes that "if the influence on structures and processes is extensive and enduring enough, the result must be to influence policy outcomes as well—*all* policy outcomes, not just those in which the federal government is actively interested." Derthick, *The Influence of Federal Grants*, 207. Richard Cappalli writes that "the federal grant has been used to structure state and local governments along the lines of federal policy and practice." Cappalli, *Federal Grants and Cooperative Agreements*, chap. 11, 54, §11:24.

40. Cappalli, *Federal Grants and Cooperative Agreements*, chap. 11, 11, §11:24.

41. Advisory Commission on Intergovernmental Relations, *Contracting with America: ACIR Recommendations 1961–1995* (Washington, DC: ACIR, c. 1996), 52.

42. Advisory Commission on Intergovernmental Relations, *Twelfth Annual Report: Federalism in 1970* (Washington, DC: ACIR, January 31, 1971), 17.

43. Advisory Commission on Intergovernmental Relations, *Contracting with America*, 52.

44. Emmett McGroarty, Jane Robbins, and Erin Tuttle, *Deconstructing the Administrative State: The Fight for Liberty* (Washington, DC: American Principles Project, 2017), 235–243. Similarly, "direct federal-city relations . . . bypassed the states." Harbert, *Federal Grants-in-Aid*, 7.

45. Cappalli, *Federal Grants and Cooperative Agreements*, chap. 11, 55, §11:24.

46. Derthick, *The Influence of Federal Grants*, 203, 205, 241. Such conditions typically require "a single state or local government department, agency, board or commission, as the single administrative focal point of an aided program" and even sometimes "dictate a specific headquarters-field administrative relationship within a state or substate governmental department or agency." Advisory Commission on Intergovernmental Relations, *Twelfth Annual Report*, 56. For examples, see Dembling and Mason, *Essentials of Grant Law Practice*, 53.

47. Derthick, *The Influence of Federal Grants*, 205, 241. At the same time, some block grants have required state legislative action, thus preventing states from leaving such matters to their executives. Cappalli, *Federal Grants and Cooperative Agreements*, chap. 1, 96, §1:42.

Incidentally, Derthick observes that when federal administrators are pursuing their administrative ends, they are most likely to go beyond their congressional authorization:

> Administrators, whose proposals to Congress and whose day-to-day conduct are dominant in determining the content of such conditions, attach high priority to attainment of administrative ends. Although they concentrate on such ends partly because Congress has given them the authority to do so, it is in pursuit of administrative ends that they are most likely to test the bounds of congressional tolerance. When public

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assistance administrators stretch statutory provisions it is generally for the sake of reforming state administrative structure procedure. One such case was their attempt, between 1935 and 1939, to require the states to set up merit systems even though Congress in 1935 had declined to enact such a requirement. In general the pursuit of professionalization, including imposition of the educational requirement, was carried on without explicit sanction from Congress. Another example was the decision to interpret the requirement of statewide operation as if it were a requirement of statewide uniformity.

Derthick, *The Influence of Federal Grants*, 198.

48. Derthick, *The Influence of Federal Grants*, 241.

49. 5 U.S.C. §1501-08, upheld in *Oklahoma v. United States Civil Service Commission*, 330 U.S. 127 (1947). See also Derthick, *The Influence of Federal Grants*, 206, 216, 222; Cappalli, *Federal Grants and Cooperative Agreements*, chap. 1, 11, §1:06; chap. 1, 102, §1:43; chap. 18, 15–23, §18.06-09.

50. Derthick, *The Influence of Federal Grants*, 158–189, 194, 216. Derthick notes, "An alliance between federal and state administrative agencies, formed and perfected through the working of the grant system, can become a powerful force in state politics, perhaps the dominant force in the making of policy for the program in question." Derthick, *The Influence of Federal Grants*, 206.

Derthick is careful to note that it "cannot be shown that federal action caused these changes," in the sense of being the sole cause. She adds:

> It is perfectly clear, however, that the changes were accelerated and in important ways shaped by federal action. Change took place faster than it would have in the absence of federal participation, and took specific forms and directions that it might not otherwise have taken. Had federal influence not been felt, the Massachusetts public assistance program in 1965 would have been far different: less legal, less uniform, less centralized, less bureaucratized, and less professionalized. Although the state role in policymaking and the supervision of administration would surely have grown, it would not have grown so much. It is most unlikely that state administration would have been adopted by 1967. In the absence of federal insistence to the contrary, selectmen in

the smallest Massachusetts towns to this day might be administering the towns' few public assistance cases themselves.

Derthick, *The Influence of Federal Grants*, 194.

51. Advisory Commission on Intergovernmental Relations, *Twelfth Annual Report*, 2. Note also President Johnson's distaste for the "irrationalities of present state and local jurisdictional boundaries." Jill M. Fraley, "Stealth Constitutional Change in the Geography of Law," *Drexel Law Review* 4 (2012): 467, 469; quoted by Jessica Bulman-Pozen, "Our Regionalism," *University of Pennsylvania Law Review* 166 (2018): 377, 408.

52. Daniel P. Moynihan, "The Future of Federalism," in *American Federalism: Toward a More Effective Partnership* (Washington, DC: Advisory Commission on Intergovernmental Relations, 1975), 94.

53. See note 51.

54. Commenting on the deliberate character of the change, Derthick writes, "What was distinctive about the 1960s was that, for the first time in a century, changing federalism became an end in itself, consciously pursued by numerous holders of national power who were trying to reconstruct American society and politics. It was not just an incidental by-product of war or modernization." Derthick, "Crossing Thresholds," 152. Even decentralization in the grant system was a mode of control: "Decentralization was conceived . . . as a way of making state governments and their subdivisions better administrators of federal programs." Derthick, *The Influence of Federal Grants*, 234.

55. Advisory Commission on Intergovernmental Relations, *Twelfth Annual Report*, 56.

56. *New York v. United States*, 505 U.S. 144, 185 (1992).

57. For example, the Supreme Court has held that the president may not violate his duty to take care that the laws are faithfully enforced. See U.S. Constitution, Article II, §3; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Kendall v. United States ex rel. Stokes*, 37 U.S. 524 (1838); Jack Goldsmith and John F. Manning, "The Protean Take Care Clause," *University of Pennsylvania Law Review* 164 (2016): 1849–1851.

58. *South Dakota v. Dole*, 483 U.S. 203, 210 (1987).

59. *United States v. Butler*, 297 U.S. 1, 75 (1936). Justice Anthony Kennedy has written that "the Spending Clause power, if wielded without con-