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Remedial Commandeering

Rebecca Aviel[*]

Protecting the right to vote and ensuring the integrity of elections. Safeguarding reproductive rights. Reducing and redressing racialized police misconduct. Threaded through some of the most ambitious and controversial reform proposals currently vying for attention in political and scholarly spheres is a common structural element, one that has distinct constitutional significance: the issuance of direct commands to state officials. Scholars of the Court's federalism doctrines will readily understand why, at first blush, this seems to raise constitutional concerns — after all, the Court has now repeatedly warned Congress that it may not commandeer state officials in this manner. As this Article shows, however, these anti-commandeering principles do not restrain Congress in the exercise of its powers under the Reconstruction Amendments. When Congress is engaged in what this Article terms "remedial commandeering," it is free to conscript unwilling state officials in a manner that would be impermissible were it legislating pursuant to other sources of power. With the scope of the commandeering constraint having expanded dramatically over the past three years, it is more urgent than ever to clarify that its reach does not encompass legislation enacted to enforce the substantive provisions of the Fourteenth and Fifteenth Amendments.

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INTRODUCTION

The federalism revolution, having celebrated its twenty-fifth year in a state of excellent health,[1] includes among its many planks a restraint on the *manner* in which Congress may legislate to advance its regulatory agenda. Inferred from both the Tenth Amendment and the overarching structure of constitutional federalism, this set of principles prohibits Congress from conscripting state governments as unwilling instruments of federal programs, even when Congress is working to address subject matter that unquestionably lies within its enumerated powers.[2] Congress may not command state legislatures to enact legislation,[3] nor may it require state executive officers to implement federal legislation.[4] In its most recent and far-reaching pronouncement on the anti-commandeering restraint, the Court has ruled that Congress may not prohibit states from enacting new laws,[5] although how that can be fully harmonized with conditional preemption principles is far from clear.[6] As this Article will show, the anti-commandeering rule in its newly expanded form now threatens to collide with Congress's power to enforce the Reconstruction Era Amendments.[7] The good news is that the damage can readily be prevented.

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[1] *See, e.g.*, Ernest A. Young, *Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival After* Gonzales v. Raich, 2005 SUP. CT. REV. 1, 1 (identifying *United States v. Lopez*, 514 U.S. 549 (1995), as the opening date of the Rehnquist Court's "federalist revival").

[2] As the Court has acknowledged, the Tenth Amendment is "essentially a tautology" that "confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States." New York v. United States, 505 U.S. 144, 157 (1992).

[3] *Id.* at 161.

[4] Printz v. United States, 521 U.S. 898, 925 (1997).

[5] Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1478 (2018).

[6] *See* Vikram David Amar, *"Clarifying" Murphy's Law: Did Something Go Wrong in Reconciling Commandeering and Conditional Preemption Doctrines?*, 2018 SUP. CT. REV. 299, 300 (noting that "[a]t times *Murphy* defined unconstitutional commandeering in incredibly broad terms," capacious enough to include "every congressional enactment that properly accomplishes federal preemption"); *see also* Matthew A. Melone, Murphy v. NCAA *&* South Dakota v. Wayfair, Inc.*: The Court's Anticommandeering Jurisprudence May Preclude Congressional Action with Respect to Sales Taxes on Internet Sales*, 67 DRAKE L. REV. 413, 426 (2019) (explaining that the Court's reasoning in Murphy "leaves in doubt the scope of federal power to preempt state law").

[7] This Article focuses on legislation enacted pursuant to the Fourteenth and Fifteenth Amendments, rather than legislation enacted pursuant to the Thirteenth Amendment, because the latter is less vulnerable to commandeering challenge. The Thirteenth Amendment, prohibiting slavery and involuntary servitude, is unique among constitutional obligations in its application to both state and private actors. Legislation enacted pursuant to the Thirteenth Amendment therefore can — and usually does —

This Article takes anti-commandeering principles as a doctrinal given,[8] arguing that whatever their wisdom, coherence, or constitutional virtue, they do not restrain Congress in the exercise of its remedial powers under the Reconstruction Era Amendments. While other federalism scholars have expressed support for this idea,[9] this Article is the first to train the spotlight exclusively on what is described here as *remedial commandeering*: federal lawmaking that enforces the Fourteenth and Fifteenth Amendments by imposing direct obligations on state governments. It is also the first to address the issue in light of the upheaval wrought by recent developments in the doctrines that govern congressional power.[10]

impose obligations on both state and private actors. As will be further developed herein, the imposition of generally applicable obligations on both state and private actors is a form of regulation that is not considered commandeering. *See* Reno v. Condon, 528 U.S. 141, 151 (2000).

[8] For a critique of commandeering doctrine, see Evan H. Caminker, Printz*, State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 248 [hereinafter *Limits of Formalism*] (criticizing *Printz* for "its lack of constitutional grounding"); Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1007 (1995) (describing the Court's decision in *New York* as "symbolism, nothing more; a line drawn in the sand for the sake of drawing a line"); Adam B. Cox, *Expressivism in Federalism: A New Defense of The Anti-Commandeering Rule?*, 33 LOY. L.A. L. REV. 1309, 1310-11 (2000) ("According to the bulk of current commentary, the New York- Printz rule is nothing more than a powerful illustration of the Supreme Court's federalism fetish."); Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1632 (2006) (explaining the numerous ways in which "[c]ommentators have exposed vulnerabilities in the Court's anticommandeering logic").

[9] *See, e.g.*, Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180, 2210-11 (1998) ("The text of the post-Civil War Amendments, as well as the Court's decisions upholding federal voting rights statutes mandating affirmative state acts to adopt voting changes, pose formidable barriers to the Court's applying any broad rule against federal compulsion of state governments to legislation enacted pursuant to those amendments.").

[10] It is the first to assess remedial commandeering after *Murphy*, 138 S. Ct. at 1461, and one of the few to do so after *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), both of which wrought sufficient changes in federalism doctrine to destabilize previous understandings. The most in-depth treatments of the Reconstruction exemption to the anti-commandeering rule tackled the issue in the immediate aftermath of *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997), before *Lopez v. Monterey County*, 525 U.S. 266 (1999). *See* Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism:* New York*,* Printz*, and* Yeskey, 1998 SUP. CT. REV. 71, 72-75; Caminker, *Limits of Formalism*, *supra* note 8, at 199; *see also* Jackson, *supra* note 9, at 2208-09. Other scholars have touched upon the issue more recently but still in the pre-Murphy era, and rather briefly. *See* Robert A. Mikos, *Can the States Keep Secrets from the Federal Government?*, 161 U. PA. L. REV. 103, 171 (2012) ("Congress may commandeer the states pursuant to its powers under the Reconstruction Era Amendments.").

This Article provides a comprehensive account of remedial commandeering — demonstrating its constitutional legitimacy; identifying its existence and implied acceptance by the Court; and explaining its importance to solving some of our most pressing and challenging contemporary problems. It does so against a backdrop of profound uncertainty about the range of legislative tools available to Congress. With shifts in conditional spending, commandeering, and preemption doctrines threatening to destabilize longstanding suppositions about Congressional power, it is essential that we have a clear and current picture of what is beyond the scope of the anti-commandeering prohibition — and why. The question is, of course, illuminated by our foundational understanding that the Reconstruction Amendments transformed the relationship between the states and the federal government.[11] But in the face of considerable doctrinal and political upheaval, it is worth pushing harder, fortifying this general premise with a particularized analysis of Congress's prerogative to issue direct orders to state government officials when legislating pursuant to the Reconstruction Amendments.

The most straightforward explanation for Congress's remedial commandeering power is a textual one. If, as the Court announced in its most recent ruling,[12] commandeering occurs whenever Congress issues direct orders to state legislatures, then the text of the Fourteenth Amendment provides clear support for the proposition that Congress can do this when acting to enforce the Amendment's substantive provisions.[13] Ironically, the clearest exposition of this idea is in the *Civil Rights Cases*, typically thought of as a low point for Congress's Reconstruction power.[14] Interpreting Section 5 of the Fourteenth

[11] *See* Adler & Kreimer, *supra* note 10, at 120 ("The proposition that the Reconstruction Amendments are exceptional, for federalism purposes, is not newly minted for the anticommandeering cases. The Supreme Court has long held that legislation adopted pursuant to the Reconstruction Amendments stands on a uniquely strong ground vis-à-vis the claims of federalism.").

[12] Murphy, 138 S. Ct. at 1478 ("Neither respondents nor the United States contends that Congress can compel a State to enact legislation, but they say that prohibiting a State from enacting new laws is another matter. . . . This distinction is empty. It was a matter of happenstance that the laws challenged in New York and Printz commanded 'affirmative' action as opposed to imposing a prohibition. The basic principle — that Congress cannot issue direct orders to state legislatures — applies in either event.").

[13] *See* U.S. CONST. amend. XIV ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . . The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

[14] *See* Civil Rights Cases, 109 U.S. 3, 10-12 (1883).

Amendment, the Court held that it gave Congress the power "to provide modes of relief against State legislation, or State action."[15] The Court's insistence that this was *all* that Congress was permitted to do has inflicted lasting damage on Congress's ability to enforce the substantive provisions of the Fourteenth Amendment.[16] But it nonetheless provides a solid foundation for the proposition that when acting pursuant to its Reconstruction powers Congress can indeed issue direct orders to state legislatures of the sort that would qualify as commandeering. Whatever tension this creates with the Tenth Amendment's anti-commandeering rule can be resolved by applying the principle that the later enactment controls. The Court has accepted precisely this logic when it comes to Congress's power to abrogate the state sovereign immunity principles embodied by the Eleventh Amendment.[17] If the ratification of the Fourteenth Amendment modified the scope of Eleventh Amendment, as the Court has said, then it is reasonable to conclude that it did the same for the Tenth Amendment.[18]

There's more to it, however, than simply reasoning from text or borrowing the "later-enacted" argument from the Eleventh Amendment. Some of the assumptions undergirding commandeering doctrine make little or no sense in the context of remedial legislation enacted to enforce the substantive provisions of the Reconstruction amendments. States might "object to being pressed into federal service"[19] for regulation that merely reflects Congress's current view of

[15] *Id.* at 11.

[16] *See, e.g.*, United States v. Morrison, 529 U.S. 598, 601-02 (2000) (ruling that Congress may not invoke its power under Section 5 of the Fourteenth Amendment to provide a civil remedy for victims of gender-motivated violence, relying in part on the *Civil Rights Cases*); *see also* Evan H. Caminker, *Private Remedies for Public Wrongs Under Section 5*, 33 LOY. L.A. L. REV. 1351, 1359 (2000) (explaining and critiquing the claim that "the language and structure of the Fourteenth Amendment's provisions limit Congress to enforcement measures that directly regulate state conduct"); Samuel Estreicher & Margaret H. Lemos, *The Section 5 Mystique,* Morrison*, and the Future of Federal Antidiscrimination Law*, 2000 SUP. CT. REV. 109, 115, 143-51 (arguing that the Court in *Morrison* misunderstood the state action limitation in Section 1 of the Fourteenth Amendment).

[17] *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) ("[W]e think that the Eleventh Amendment, and the principle of state sovereignty which it embodies . . . are necessarily limited by the enforcement provisions of [Section] 5 of the Fourteenth Amendment.").

[18] *Id.*; *see also* City of Rome v. United States, 446 U.S. 156, 179 (1980) ("We agree with the court below that *Fitzpatrick* stands for the proposition that principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments 'by appropriate legislation.' Those Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty.").

[19] Printz v. United States, 521 U.S. 898, 905 (1997).

effective interstate commerce or immigration policy, but surely states don't have the same leeway for regulation that implements the substantive requirements of the Reconstruction Amendments, by which states are directly bound. There is a difference, in other words, between an ordinary federal agenda and a constitutional one. This is especially true now that the Court is imposing rigorous limits on what types of legislation can be considered "appropriate" exercises of remedial power under the Reconstruction Amendments.[20] Congress has been instructed that it may only legislate to enforce constitutional obligations that the Court has already articulated, and it may only impose enforcement mechanisms that are congruent and proportional to a pattern of constitutional violations as defined by the Court.[21] After *City of Boerne v. Flores*,[22] the Court has kept Congress tightly tethered to the Court's own view of what the substantive provisions require, repeatedly insisting that Congress may not "attempt to substantively redefine the States' legal obligations."[23]

If Congress has satisfied *City of Boerne*'s congruence and proportionality test, then it is imposing regulation that hews very closely to the substantive, self-executing provisions of the Fourteenth Amendment. In that posture, Congress should be — and to this point always has been — free to regulate in a manner that issues direct orders to state actors. To put the point differently, anti-commandeering principles and the congruence and proportionality test operate upon different spheres of congressional lawmaking — they never have been (and never should be) applied simultaneously. Consistent with this principle, the Court has on multiple occasions examined Fourteenth and Fifteenth Amendment legislation that conscripts state officials without ever applying the commandeering rule, suggesting that the Reconstruction exemption is already at work in the Court's understanding of commandeering.[24]

The Article proceeds as follows. Part I offers an overview of the commandeering doctrine, starting from its origins in *New York* and *Printz*. It then shows how recent developments, both doctrinal and

[20] *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 532-33 (1997) (holding that the Religious Freedom Restoration Act was an unconstitutional exercise of Congress's Section 5 enforcement power).

[21] *See id.* at 519-20.

[22] *Id.* at 511.

[23] Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 728 (2003) (quoting Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 88 (2000)).

[24] *See, e.g.*, Lopez v. Monterey County, 525 U.S. 266, 284-85 (1999); Young v. Fordice, 520 U.S. 273, 284 (1997); *see also* other cases discussed *infra* Part II.C.

political, have raised the doctrine's salience and expanded its parameters, making it more important than ever to understand why the anti-commandeering rule does not apply to Reconstruction power. Part II takes on that task, examining the text of the Fourteenth Amendment; analogizing to the abrogation of Eleventh Amendment sovereign immunity; and revealing how premises essential to the logic of commandeering are categorically untrue for remedial legislation enacted to enforce the substantive provisions of the Reconstruction Amendments. Part III shows that remedial commandeering is present in a wide range of current proposals to protect and enforce constitutional rights — from voting to abortion to freedom from police brutality. Offering a brief overview of these various proposals, Part III then explains that the common thread of commandeering across all of these proposals is no accident: remedial commandeering, as an alternative to the slow and costly process of case-by-case litigation, is most important where state disregard of constitutional rights has been most pronounced and persistent.

I. COMMANDEERING'S ORIGINS AND EXPANSIONS

This Part offers a comprehensive account of the constitutional principles that form the remedial commandeering landscape. It starts by reviewing the anti-commandeering doctrine, showing that recent developments, both doctrinal and political, have raised commandeering's salience and heightened the need to understand its parameters.

A. Commandeering's Early Years

As will be familiar to many, commandeering doctrine in its current form originated in the unusual circumstances surrounding the Low-Level Radioactive Waste Policy Amendments Act of 1985.[25] A bit of background helps illuminate the nature of the problem that Congress was trying to solve. By 1979, five of the nation's six facilities for radioactive waste disposal had closed, leaving only South Carolina to shoulder the burden of the entire country's radioactive waste. The governor of South Carolina, "understandably perturbed," ordered a fifty percent reduction in the amount of waste the facility would accept.[26] Congress, concerned that the nation would be left with no disposal sites, enacted legislation in 1980 that announced a federal policy of holding

[25] *See* New York v. United States, 505 U.S. 144, 149 (1992).

[26] *Id.* at 150.

each state responsible for securing its own needed waste disposal capacity. The mechanism that Congress chose to effectuate this policy — regional compacts between states that would allow states to restrict their facilities to member states — didn't work, and so Congress went back to the drawing board in 1985, producing the three provisions that were challenged in *New York v. United States*.[27]

The Court had little difficulty upholding two different monetary incentives intended to encourage states to provide for the disposal of radioactive waste generated within their borders, but struck down a third provision as violative of the Tenth Amendment. The "take title" provision, aptly named, required states to take title to the waste for which they had failed to make disposal arrangements — and along with title, possession or liability for damages incurred as a result of the state's failure to take possession.[28] The Court characterized the provision as one that "offers state governments a 'choice' of either accepting ownership of waste or regulating according to the instructions of Congress."[29]

The problem with the "take title" provision, the Court explained, was not that Congress lacked authority to regulate the interstate market in waste disposal — on the contrary, the Court made clear that this is "well within Congress's authority under the Commerce Clause."[30] The problem was that instead of "directly regulating the generators and disposers of waste . . . Congress has impermissibly directed the States to regulate in this field."[31] The Court elaborated upon the importance of this distinction at length, concluding that "the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States . . . . We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts."[32] The Court pointed to earlier cases in which it had upheld federal regulation against challenge by signaling that the result would be different for legislation "that commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."[33]

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[27] *Id.* at 151.

[28] *Id.* at 153-54.

[29] *Id.* at 175.

[30] *Id.* at 159-60.

[31] *Id.* at 160.

[32] *Id.* at 166.

[33] Hodel v. Va. Surface Min. & Reclamation Ass'n, Inc., 452 U.S. 264, 288 (1981); *see also* Fed. Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 761-62 (1982)

This restraint came with three important caveats. First, the Court distinguished the take title provision, with its direct instruction to state governments, from generally applicable obligations that apply to both state and private actors.[34] Second, the Court differentiated the mandatory nature of the take title obligation from the wide array of duties that states knowingly accept as a condition of receiving federal funds.[35] And third, the Court emphasized Congress's prerogative to make itself the sole regulator in a field where it has an enumerated power by preempting contrary state regulation.[36]

The Court recommitted to these parameters in its next commandeering case even as it expanded the reach of the prohibition in other ways. In *Printz v. United States*, state and local law enforcement officials challenged interim provisions of the Brady Act requiring their participation in background checks for handgun purchasers.[37] Defending the Act, the federal government urged the Court to attend to the difference between commandeering state legislatures to make policy and requiring state executive officials to implement clear and final federal directives. The Court rejected any such distinction as illusory and in any event immaterial — or perhaps even aggravating — to the intrusion upon state sovereignty that occurs when unwilling state officials are "pressed into federal service."[38] *Printz* thus built upon *New York* by making clear that Congress may not conscript either legislative or executive officials, no matter how important the federal purpose, nor

("[T]his Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations.").

[34] It therefore said there was no need to revisit *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), or any of its other holdings concerning Congress's power to "subject[] a State to the same legislation applicable to private parties." *New York*, 505 U.S. at 160.

[35] *See id.* at 166-67.

[36] *Id.* at 167-68.

[37] Printz v. United States, 521 U.S. 898, 902-04 (1997).

[38] The Court distinguished federal statutes that merely require the provision of information to the federal government — but in light of the subsequent controversy over immigration provisions, it may have underestimated the extent to which these implicated the state sovereignty values it was seeking to protect. *See id.* at 918 (observing that statutes "which require only the provision of information to the Federal Government, do not involve the precise issue before us here, which is the forced participation of the States' executive in the actual administration of a federal program"). As states and localities have argued, in the immigration context the provision of information to the Federal government *is* the forced participation of state and local officials in the actual administration of a federal program.

how trivial or temporary the duty.[39] To resolve the conundrum presented by the well-established principle that state courts cannot refuse to apply federal law,[40] *Printz* also made clear that commandeering concerns arise only in the conscription of state legislative and executive officials, not judicial officers.[41]

In *Reno v. Condon*, the next installment in the commandeering chronology, the Court considered whether Congress had run afoul of these principles with the Drivers' Privacy Protection Act, which regulates the handling of personal information collected by state motor vehicle departments.[42] The Court upheld the Act, emphasizing that its constraints on the nonconsensual disclosure of personal information applied both to state entities and to private parties later obtaining the information.[43] This feature of the case, in the Court's view, made it more akin to *South Carolina v. Baker*, in which the Court had previously upheld a statute that functioned as a prohibition on the issuance of unregistered bonds.[44] Whether a state is being regulated as the issuer of unregistered bonds or as the owner of a data base, the Court explained, in neither case does the federal statute "require the States in their sovereign capacity to regulate their own citizens."[45] Elaborating upon this key principle, the Court emphasized that the Drivers' Privacy Protection Act did not require any state "to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals."[46] *Condon* thus confirmed the importance of the general applicability limiting principle, suggested in *New York v. United States*, on the reach of commandeering doctrine. As Professor Sullivan observes, "*Condon* explained that the federal government may not tell the states how to

[39] *Printz* also offered a separation of powers justification for the anticommandeering rule, noting that if Congress can conscript state officers then it can function just as effectively without the President, raising Article II concerns. *See id.* at 922-23.

[40] *See* Testa v. Katt, 330 U.S. 386, 394 (1947).

[41] Adler & Kreimer, *supra* note 10, at 75 (explaining that in *Printz*, the "Court reaffirmed that this principle did not apply to statutes imposing federal duties on state judges, and clarified that any state official performing judicial functions was also subject to commandeering").

[42] Reno v. Condon, 528 U.S. 141, 143 (2000).

[43] *Id.* at 146, 151.

[44] South Carolina v. Baker, 485 U.S. 505, 513-15 (1988).

[45] *Condon*, 528 U.S. at 151.

[46] *Id.*

regulate their own citizens, but is free to regulate the states themselves in the same way it regulates private entities."[47]

These cases establish the basic contours of the commandeering doctrine. As distilled by Professors Matthew Adler and Seth Kreimer in their formative work on the early commandeering cases, the doctrine precludes federal statutes that (1) are targeted at state executive or legislative officials rather than generally applicable to state and private parties alike; (2) consist of mandatory obligations rather than conditions attached to federal funds; and (3) impose duties of action rather than duties of inaction.[48] The last element, while less directly evident in the language of the cases than the first two, is necessary to make sense of the distinction the Court appeared to be drawing between impermissible commandeering and ordinary preemption.[49] As Adler and Kreimer explain,

> [T]here is a good conceptual, interpretive, and normative case for construing the preemption/commandeering distinction as a distinction between inaction and action. If the Court is to craft a jurisprudence that prohibits commandeering, but permits the kind of federal duties for state officials that the preemption case law has long recognized, then it should define impermissible commandeering as a targeted, coercive duty for state legislative or executive officials that requires action on the part of the officials, and permissible preemption as a duty (perhaps targeted, perhaps coercive, and perhaps addressed to nonjudicial officials) that does not require official action.[50]

Scholars made short work of doctrine's logical and normative shortcomings.[51] But until quite recently, they were also able to write it

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[47] Kathleen M. Sullivan, *From States' Rights Blues to Blue States' Rights: Federalism After the Rehnquist Court*, 75 FORDHAM L. REV. 799, 804 (2006); *see also* Siegel, *supra* note 8, at 1642 ("Anticommandeering doctrine thus disables the federal government from using the states as regulators; it does not preclude the federal government from treating the states as regulated entities.").

[48] Matthew D. Adler, *State Sovereignty and the Anti-Commandeering Cases*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 158, 164 (2001).

[49] Adler & Kreimer, *supra* note 10, at 93 ("So the action/inaction distinction (at least certain versions of it) can do the conceptual work of sorting between the Commandeering Paradigm and the Preemption Paradigm.").

[50] *Id.* at 95 (emphasis omitted).

[51] *See* sources cited and text accompanying *supra* note 8.

off as likely to be little more than "a practical nullity."[52] With so few constraints on Congress's ability to regulate states by attaching conditions to federal funds,[53] and none whatsoever on Congress's ability to preempt state regulation unless states agree to regulate consistent with federal standards,[54] commandeering doctrine for a while amounted to little more than a "meaningless formality."[55] As we will see in the next section, recent developments — both doctrinal and political — have profoundly destabilized these assumptions.

B. Recent Developments — Doctrinal and Political

1. Doctrinal Change: *NFIB v. Sebelius* and *Murphy v. NCAA*

As it developed the anti-commandeering rule in *New York* and *Printz*, the Court was clear that the prohibition it was announcing did not apply to conditions imposed on state receipt of federal funds. The opinion in *New York* emphasized that in such a circumstance, states who did not wish to comply with applicable conditions were free to reject the funds; the Court thus upheld a set of incentives structured in this manner, finding them "well within the authority of Congress under the Commerce and Spending Clauses."[56] In *Printz*, the Court reiterated the constitutionally significant distinction between "mandates to the States" and "conditions upon the grant of federal funding."[57] One could go so far as to say that the prohibition on commandeering was developed in conceptual opposition to the conditional spending alternative, permissible as long as Congress followed the guidelines laid out in *South Dakota v. Dole*.[58] During a twenty-five year period in which Congress

[52] *See* Adler & Kreimer, *supra* note 10, at 106 (observing that "[t]he constitutional permissibility of conditional spending and conditional preemption threatens to make the anticommandeering rule of *Printz* and *New York* a practical nullity.").

[53] The then-operative test for conditional spending, articulated in *South Dakota v. Dole*, was reliably easy to satisfy. *See* Andrew B. Coan, *Commandeering, Coercion, and the Deep Structure of American Federalism*, 95 B.U. L. REV. 1, 15 n.86 (2015) (collecting sources making this point).

[54] *See* Adler & Kreimer, *supra* note 10, at 105 ("As for the area of conditional preemption, the Court has yet even to announce a doctrinal refinement analogous to the *Dole* "germaneness" test — let alone a workable and coherent one.").

[55] Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 921 (1998).

[56] New York v. United States, 505 U.S. 144, 173 (1992).

[57] Printz v. United States, 521 U.S. 898, 917 (1997).

[58] South Dakota v. Dole, 483 U.S. 203, 207-08 (1987). Conditional spending programs must advance the general welfare, announce the conditions unambiguously, comply with all other constitutional obligations, reflect some relationship between the

managed to do so without fail,[59] it seemed that Congress could engage the assistance of state officials in administering federal programs whenever it was willing to pay for it.

All this changed, of course, with *NFIB v. Sebelius*, in which the Court struck down the Medicaid expansion provisions of the Affordable Care Act, invalidating for the first time ever an exercise of conditional spending on the grounds that it was unduly coercive of the states.[60] As Professor Andrew Coan has captured so effectively, to understand this aspect of the decision we can sidestep much of the complexity of the Affordable Care Act, focusing instead on "one key point: the Act requires states to participate in a substantial expansion of Medicaid in order to remain eligible to receive any federal Medicaid funds."[61] As Coan goes on to explain, the plurality opinion authored by Justice Roberts emphasizes the magnitude of the funds at stake and the states' "long-term reliance on pre-existing Medicaid funds" to conclude that the bargain was impermissibly coercive.[62] The choice offered to states, to participate in the Medicaid program in its expanded form or not at all, was tantamount to "a gun to the head."[63]

Although the Medicaid expansion provisions struck down in *NFIB v. Sebelius* did not qualify as commandeering according to the formulation articulated in *New York*, *Printz*, and *Reno*, the case nonetheless has a potentially transformative effect on the commandeering doctrine.[64] As Coan and other scholars have noted, the Court's first-ever invalidation

conditions imposed and the federal program supported by the funds, and not be unduly coercive. *Id.*

[59] *See* Coan, *supra* note 53, at 10 (noting that "the consensus view of commentators, supported by twenty-five years of decisions following *Dole*, was that the decision represented a virtual blank check to Congress"); *see also* Eloise Pasachoff, *Conditional Spending After* NFIB v. Sebelius*: The Example of Federal Education Law*, 62 AM. U. L. REV. 577, 593 (2013) ("It has long been thought that Congress can accomplish almost anything with conditional spending under the Spending Clause, even when it cannot accomplish its goals with more direct regulation.").

[60] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 625 (2012).

[61] Coan, *supra* note 53, at 11.

[62] For other perspectives on this aspect of *NFIB*, see Amar, *supra* note 6, at 334-35 (focusing on the lack of notice).

[63] *Sebelius*, 567 U.S. at 581.

[64] Coan, *supra* note 53, at 3 (explaining that in *NFIB*, "the Court held coercive exercises of the conditional spending power and commandeering amount to the same thing"); Bradley W. Joondeph, *The Health Care Cases and the New Meaning of Commandeering*, 91 N.C. L. REV. 811, 811 (2013) ("[I]n finding the ACA's Medicaid expansion provisions coercive, the Court has effectively re-conceptualized what constitutes a federal command to the states, and consequently re-defined the scope of the anti-commandeering principle.").

of an exercise of conditional spending power necessarily has implications for commandeering doctrine because it changes the landscape of Congress's regulatory alternatives.[65] Congress can no longer circumvent the prohibition on direct commandeering by purchasing compliance from the states if the conditions are perceived by the Court as excessively coercive.

After *Sebelius* softened the boundary between impermissible commandeering and conditional spending, *Murphy v. NCAA* next blurred the distinction between impermissible commandeering and preemption.[66] *Murphy*, described by one observer as "probably the most-ever discussed Supreme Court case on ESPN,"[67] was the culmination of a series of disputes over the Professional and Amateur Sports Protection Act ("PASPA"). Congress described PASPA as "an Act to prohibit sports gambling under State law."[68] True to this description, rather than making sports gambling a federal crime, PASPA made it unlawful for a *state* "to sponsor, operate, advertise, promote, license, or authorize by law or compact" any gambling that is based on competitive sporting events.[69]

New Jersey, which had prohibited sports gambling at the time PASPA was enacted, had a "change of heart," and in 2012 enacted a law authorizing it.[70] The 2012 law was immediately attacked by the NCAA and professional sports leagues, who sought to enjoin it on the grounds that it violated PASPA.[71] New Jersey defended against the challenge by asserting that PASPA was unconstitutional under the anti-commandeering principles announced in *New York* and *Printz*.[72] The NCAA and fellow plaintiffs "countered that PASPA is critically different

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[65] *See* sources cited and accompanying text *supra* note 55.

[66] Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1481 (2018).

[67] Melone, *supra* note 6, at 415.

[68] 28 U.S.C. § 3702 (2018).

[69] *Id.* The Court notes that the structural regulatory choice Congress made in PASPA — to forego the criminalization of sports gambling under federal law — meant that the statute "thus was not anticipated to impose a significant law enforcement burden on the Federal Government." Perhaps this is a form of commandeering that is particularly pernicious for federalism values — Congress, rather than expending federal funds to enforce all the laws it wishes to enact, attempts to transfer the burden to the states.

[70] New Jersey's Sports Wagering Law of 2012 allowed for licensed "wagering at casinos and racetracks on the results of certain professional or collegiate sports or athletic events." 2011 N.J. Sess. Law Serv. 231, codified at N.J. REV. STAT. § 5:12A-1-6 (2013), invalidated by Nat'l Collegiate Athletic Ass'n v. Governor of N.J., 730 F.3d 208, 236 (3d. Cir. 2013).

[71] *Murphy*, 138 S. Ct. at 1471.

[72] *Id.*

from the commandeering cases because it does not command the states to take any affirmative act."[73] The district court rejected the state's anticommandeering claims and the Third Circuit agreed, emphasizing that "PASPA does not require or coerce the states to lift a finger."[74] New Jersey sought review in the Supreme Court, and the United States, opposing certiorari, opined that "PASPA does not require New Jersey to 'leave in place the state-law prohibitions against sports gambling that it had chosen to adopt prior to PASPA's enactment. To the contrary, New Jersey is free to repeal those prohibitions in whole or in part.'"[75] The Supreme Court denied review, leaving in place the permanent injunction against New Jersey's 2012 attempt to authorize sports gambling.[76]

New Jersey went back to the drawing board in 2014, ostensibly "picking up on the suggestion that a partial repeal would be allowed."[77] The New Jersey legislature thus enacted a law that merely repealed certain provisions of state law that had prohibited sports gambling for many years.[78] The result was to leave unregulated the placement and acceptance of wagers at facilities in Atlantic City by those twenty-one years of age or older. The stage was thus set for a dispute over whether this partial repeal could be said to "authorize" gambling in a manner prohibited by PASPA. Signaling the legislature's desire that the law be deemed to coexist with PASPA rather than violate it, the 2014 Act "declares that it is not to be interpreted as causing the State to authorize, license, sponsor, operate, advertise, or promote sports gambling." These efforts were for naught, however, as the NCAA and co-plaintiffs challenged the new law on the ground that it also violated PASPA. The district court agreed and the Third Circuit affirmed, concluding that New Jersey's selective removal of its previous criminal prohibitions amounted to an "authorization" within the meaning of PASPA. Rejecting New Jersey's challenge to PASPA's constitutional validity, the Third Circuit once again emphasized that PASPA "does not command states to take affirmative actions."[79]

Retracing this chronology in its somewhat tedious detail illustrates the two central questions teed up for the Supreme Court in *Murphy*: (1) What exactly is the range of regulatory options foreclosed to states by PASPA?

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[73] *Id.*

[74] *Id.*

[75] *Id.* at 1472.

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.* at 1473.

(2) Can the resulting landscape be said to require states to take affirmative actions, in a way that anticommandeering doctrine does not permit? It also helps explain the perhaps counterintuitive incentives that each party had in pushing its interpretation of PASPA: New Jersey construing the statute very broadly, so as to sweep in formulations that would infect the statute with commandeering defects;[80] the NCAA and other leagues, joined by the United States, arguing for a narrower interpretation that would redeem PASPA by leaving the obviously impermissible instructions outside the statute's coverage. Everyone agreed that Congress could not prohibit total repeal or require that states maintain their existing laws without alteration, as to do so would be tantamount to requiring an affirmative action, namely the maintenance of an unwanted statutory scheme.[81] The NCAA and the federal government, however, asserted that PASPA simply forecloses a narrower range of state laws — such as New Jersey's 2014 law — that "empower" specified actors and "endow" them with "the authority to conduct sports gambling operations."[82]

The Court concluded that PASPA had to be read as New Jersey had urged: any state law that partially or completely repealed old laws banning sports gambling would "authorize" gambling and therefore violate PASPA.[83] But in any event, the Court concluded, regardless of which interpretation it selected, the statute was impermissible under the anti-commandeering rule:

> [The] provision unequivocally dictates what a state legislature may and may not do . . . . [S]tate legislatures are put under the direct control of Congress. It is as if federal officers were installed in state legislative chambers and were armed with the

[80] To the Court, New Jersey argued that PASPA's "antiauthorization provision requires states to maintain their existing laws against sports gambling without alteration." *Id.* The United States expressly conceded that the provision would be unconstitutional if interpreted in this way.

[81] For a scholarly discussion of this point in the marijuana context, see Erwin Chemerinsky, Jolene Forman, Allen Hopper & Sam Kamin, *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 103 (2015) ("The federal government cannot command any state government to criminalize marijuana conduct under state law. From that incontrovertible premise flows the conclusion that if states wish to repeal existing marijuana laws or partially repeal those laws, they may do so without running afoul of federal preemption.").

[82] *Murphy*, 138 S. Ct. at 1466.

[83] The Court rested heavily on the regulatory landscape for sports gambling as it appeared when PASPA was enacted, reasoning that against a backdrop of near universal prohibition, partial or complete repeals do confer an authority to act that did not exist before. *Id.*

> authority to stop legislators from voting on any offending proposals. A more direct affront to state sovereignty is not easy to imagine.[84]

The parties' carefully drawn competing interpretations, and the reasoning of the courts below on both rounds of litigation, suggested a sort of consensus — one that scholars had shared — about the importance of the distinction between affirmative and negative duties to commandeering doctrine.[85] The Court rejected this out of hand, announcing that "this distinction is empty."[86] The Court explained that this was neither logically required by the Court's previous commandeering cases, which just by "happenstance commanded 'affirmative' action as opposed to imposing a prohibition," nor could this distinction find support by treating PASPA as a valid preemption provision.[87] Preemption, the Court explained, "is based on a federal law that regulates the conduct of private actors, not the States."[88] PASPA, in contrast, is in no way a regulation of private actors and cannot be understood "as anything other than a direct command to the States . . . exactly what the anticommandeering rule does not allow."[89] PASPA could not be read as legitimate federal regulation that preempts contrary state law because it in fact provides nothing in the way of regulation — all it did was forbid the states from certain types of enactments.

To sum up this important aspect of *Murphy*: rather than simply adopting an interpretation of the statute that included affirmative commands to the states and thereby rendered the statute invalid under the pre-*Murphy* consensus, the Court sought to dispel the previously accepted supposition that commandeering principles apply only to affirmative obligations imposed on state governments.[90] This, in turn,

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[84] *Id.* at 1478.

[85] *See* Adler & Kreimer, *supra* note 10, at 83 (positing a significant distinction between negative and affirmative duties).

[86] *Murphy*, 138 S. Ct. at 1478.

[87] *Id.*

[88] *Id.* at 1481.

[89] *Id.*

[90] *Murphy* is also significant for its introduction of a new — and troubling — way of thinking about commandeering doctrine. In previous explanations of the commandeering principle, the Court had treated as immaterial whether it was viewed as an external limit on the scope of enumerated power, operating in much the same way as the First Amendment might, or as an internal limit, reflecting the idea that the enumerated powers must be interpreted in a way that is consistent with our general ideas about federalism and state sovereignty. As expressed by Justice O'Connor, "[J]ust as a cup may be half empty or half full, it makes no difference whether one views the question at issue in these cases as one of ascertaining the limits of the power delegated

required it to rebuild the wall dividing acceptable preemption from impermissible commandeering. And it rebuilt this distinction by clarifying that Congress's preemption power is limited to federal laws that regulate the conduct of *private* actors.[91]

At a certain level of abstraction, PASPA could certainly be described in terms that sound in preemption: it was a statute displacing state authority to allow activity that the federal government wants to prohibit. But because PASPA did not itself directly regulate private parties while displacing contrary state law, instead ordering state lawmakers to retain the laws that produced the federally desired result, it constituted impermissible commandeering rather than permissible preemption.[92]

Murphy's effect on the commandeering landscape was immediately apparent, showing up in the multiple challenges brought by states and localities across the country to federal immigration statutes 8 U.S.C. §§ 1373 and 1644.[93] These provisions prohibit states and localities from

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." New York v. United States, 505 U.S. 144, 159 (1992). The *Murphy* opinion, in contrast, explains anti-commandeering doctrine by observing that "conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States." *Murphy*, 138 S. Ct. at 1476. This framing can be read to embrace a metastasized version of what scholars have called "limiting enumerationism," the idea that "the Constitution limits federal powers to those enumerated." David S. Schwartz, *A Question Perpetually Arising: Implied Powers, Capable Federalism, and the Limits of Enumerationism*, 59 ARIZ. L. REV. 573, 575 (2017); *see also* Richard Primus, *"The Essential Characteristic": Enumerated Powers and the Bank of the United States*, 117 MICH. L. REV. 415, 418-19 (2018) (positing three distinct enumerationist propositions: the idea "that Congress can legislate only on the basis of powers enumerated — that is, affirmatively written — in the Constitution . . . that the sum total of what Congress's enumerated powers entitle it to do is less than Congress would be authorized to do if it enjoyed general legislative jurisdiction . . . that the limitation of Congress to its constitutionally enumerated powers is no trivial or peripheral matter; it is a central and foundational feature of the system"). For further discussion of enumerationism and an overview of the scholarly literature devoted to its critique, see Jonathan Gienapp, *The Myth of the Constitutional Given: Enumeration and National Power at the Founding*, 69 AM. U. L. REV. F. 183, 185 (2020) (gathering sources). I thank Richard Primus for emphasizing the significance of *Murphy*'s enumerationist framing.

[91] Murphy, 138 S. Ct. at 1481.

[92] *Id.*

[93] *See* City of Chicago v. Barr, 405 F. Supp. 3d 748, 752-54 (N.D. Ill. 2019) (listing challenges pending around the country), *aff'd on other grounds and remanded*, 961 F.3d 882 (7th Cir. 2020). For additional discussion of *Murphy*'s impact on these cases, see Edward A. Hartnett, *Distinguishing Permissible Preemption from Unconstitutional Commandeering*, 96 NOTRE DAME L. REV. 351, 385 (2020).

enacting rules "which prevent their employees from sharing a person's immigration status with federal officials."[94] Portland, San Francisco, Chicago, Philadelphia, and New York City, along with their corresponding states, have challenged these provisions as impermissible commandeering, and those suits brought after *Murphy* have been remarkably successful.[95] As captured in one district court decision, "every court to have considered the issue after *Murphy*" has been in agreement that the provisions "issue direct orders to [state legislatures]" and therefore violate the anti-commandeering rule.[96]

Defending the provisions, the federal government tried to cling to the demarcations that once seemed secure, arguing that the prohibitions were constitutionally permissible because they did no more than direct state and local governments to "refrain from enacting" certain types of legislation.[97] But *Murphy*'s instruction on this point proved unrelenting: quoting extensively from *Murphy*, the district court explained that "the Supreme Court has made clear that any distinction between action and inaction is 'empty' and fails to recognize that the same 'basic principle . . . applies in either event.'"[98] The same result transpired with regards to the federal government's argument that the challenged provisions were simply valid preemption provisions. Again quoting extensively from *Murphy*, the district court observed that:

> [T]he provisions create no rights or restrictions applicable to private actors; rather, by their terms, Sections 1373 and 1644 affect only state and local government "entit[ies]" and "official[s]." Thus, there is simply no way to understand the provision[s] . . . as anything other than . . . direct command[s] to the States.[99]

[94] *See* Oregon v. Trump, 406 F. Supp. 3d 940, 950 (D. Or. 2019) (summarizing 8 U.S.C. §§ 1373 and 1644).

[95] *See, e.g.*, *id.* (showing how Portland successfully challenged these provisions following *Murphy* and referencing similar challenges in San Francisco, New York, Chicago, and Philadelphia).

[96] *Id.* at 971 (citing *Murphy* and explaining how it has been determinative in the litigation over 8 U.S.C. §§ 1373 and 1644). *But see* State v. Dep't of Just., 951 F.3d 84, 116 (2d Cir. 2020), *cert. dismissed*, No. (R46-15 / OT 2020), 2021 WL 1081225 (U.S. Mar. 4, 2021), *and cert. dismissed sub nom.* City of New York v. Dep't of Just., No. (R46-16 / OT 2020), 2021 WL 1081227 (U.S. Mar. 4, 2021) (holding that 8 U.S.C. § 1373 "does not violate the anticommandeering principle of the Tenth Amendment as applied here to a federal funding requirement.").

[97] Oregon v. Trump, 406 F. Supp. 3d at 971.

[98] *Id.* at 972.

[99] *Id.*

This conclusion is particularly significant because commandeering challenges brought against 8 U.S.C. §§ 1373 and 1644 prior to *Murphy* had failed, foundering on the shoals of the affirmative/negative duty distinction.[100] As explained by one district court, pre-*Murphy* caselaw upholding the immigration reporting provisions had rested on the previously accepted distinction in commandeering doctrine "between affirmative obligations and proscriptions."[101] *Murphy*, the district court explained, "deprives" that reasoning of its "central support," necessitating a different outcome: "[i]n the end, Section 1373 requires local policymakers to stand aside and allow the federal government to conscript the time and cooperation of local employees. This robs the local executive of its autonomy and ties the hands of the local legislature. Such affronts to State sovereignty are not countenanced by the anticommandeering principle of the Constitution."[102] In sum, prior to *Murphy*, lower courts and scholars alike had simply not expected that federal statutes making certain kinds of lawmaking off limits to state governments would be treated as impermissible commandeering.[103]

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[100] *See* City of New York v. United States, 179 F.3d 29, 35 (2d Cir. 1999) (rejecting commandeering challenge to 1372 and 1644 because "Congress has not compelled state and local governments to enact or administer any federal regulatory program. Nor has it affirmatively conscripted states, localities, or their employees into the federal government's service. These Sections do not directly compel states or localities to require or prohibit anything. Rather, they prohibit state and local governmental entities or officials only from directly restricting the voluntary exchange of immigration information with the INS").

[101] City of Chicago v. Sessions, 321 F. Supp. 3d 855, 873 (N.D. Ill. 2018), *aff'd on other grounds and remanded*, 961 F.3d 882 (7th Cir. 2020).

[102] *Id.* Similarly notable, the Northern District of Illinois, ruling on the preliminary injunction motion prior to *Murphy*, had at first ruled that Chicago was unlikely to succeed because "[u]nder current case law, however, only affirmative demands on states constitute a violation of the Tenth Amendment." City of Chicago v. Sessions, 264 F. Supp. 3d 933, 949 (N.D. Ill. 2017), *reconsideration denied*, No. 17 C 5720, 2017 WL 5499167 (N.D. Ill. Nov. 16, 2017), *aff'd*, 888 F.3d 272 (7th Cir. 2018), *reh'g en banc granted in part*, *opinion vacated in part*, No. 17-2991, 2018 WL 4268817 (7th Cir. June 4, 2018), *vacated*, No. 17-2991, 2018 WL 4268814 (7th Cir. Aug. 10, 2018). After *Murphy*, the Northern District took up reconsideration and came to the opposite conclusion, recognizing that the difference between affirmative obligations and proscriptions was "the same distinction that motivated this Court's earlier finding that Chicago was not likely to succeed on its anticommandeering argument, and it is the same distinction the Supreme Court has since deemed 'empty.'" *Sessions*, 321 F. Supp. 3d at 873.

[103] *See, e.g.*, Richard L. Hasen, *The Uncertain Congressional Power to Ban State Felon Disenfranchisement Laws*, 49 HOW. L.J. 767, 770 (2006). In an article considering whether Congress has the power to bar state felon disenfranchisement laws, Professor Hasen concludes that it is uncertain because of the New Federalism, but considers only *City of Boerne* and its progeny — not the commandeering cases.

Sebelius and *Murphy* taken together, and to their logical conclusions, suggest that commandeering's reach is expanding into realms that would have once been considered permissible exercises of conditional spending or preemption power. Congress may now be guilty of commandeering whenever it attempts to buy cooperation on terms that states find excessively demanding,[104] or when it endeavors to displace state authority to permit activity that Congress wishes to prohibit.[105] If the category of impermissible commandeering includes any direct orders to state legislative or executive officials, regardless of form, and the functional equivalents that inhere in coercive spending arrangements, then impermissible commandeering may well cover much more terrain than had been previously assumed.[106]

The full combined effect of these developments remains to be seen, but a few observations are in order.[107] Commandeering can no longer be considered a regulatory technique that is limited to a discrete set of oddball statutes that have already been exposed to scrutiny,[108] much less can we continue to treat it as a "practical nullity."[109] Its doctrinal

[104] *But see* Amar, *supra* note 6, at 334-35 ("[A] careful reading of *Sebelius* indicates that a sufficient reason Obamacare was deemed coercive was that Congress was imposing new terms onto a preexisting deal . . . any federal coercion present was a function of a lack of meaningful notice to, and thus consent by, the states, not necessarily a function of any substantive unfairness that enforcing the terms of an agreed-upon deal would visit upon the states.").

[105] Scholars have already begun to forecast other exercises of federal power that might be threatened by *Murphy*. *See* Melone, *supra* note 6, at 415.

[106] Courts and scholars alike have repeatedly mused that instances of commandeering in federal legislation are rare. *See* New York v. United States, 505 U.S. 144, 177 (1992) ("The take title provision appears to be unique. No other federal statute has been cited which offers a state government no option other than that of implementing legislation enacted by Congress."). The construct of "implementing legislation enacted by Congress" is a narrower formulation of commandeering than what the Court has come to adopt, one that wouldn't capture PASPA or § 1373.

[107] For an argument that both *Murphy* and *Sebelius* can both be read as imposing robust notice requirements on Congress, see Amar, *supra* note 6, at 335.

[108] To illustrate: while PASPA was enacted in 1992 and § 1373 was enacted in 1996, a period when anti-commandeering as a newly articulated principle of federalism was being actively discussed, courts and scholars during that time period didn't recognize them as potential targets for the anticommandeering rule. *See* Caminker, *Limits of Formalism*, *supra* note 8, at 200 (describing the impact of *Printz* as "relatively minor," and explaining in a footnote that there are "only a handful of other recent commandeering statutes that clearly fall within the decision's ambit").

[109] *See* Adler & Kreimer, *supra* note 10, at 106 (observing that "the constitutional permissibility of conditional spending and conditional preemption threatens to make the anticommandeering rule of *Printz* and *New York* a practical nullity").

reach is expanding at the same time that its political valence is changing, as explained in the next section.

2. Political Change: Commandeering Doctrine as a Progressive Instrument

Earlier diagnoses of commandeering doctrine as practically insignificant would also have been unable to account for political changes that have made commandeering principles the subject of active debate and ongoing deployment. As other commenters have noted, commandeering has taken on a renewed salience in a landscape where the division between state and federal power remains heavily contested, but the ideological alignment has flipped, with liberal states asserting their sovereign prerogative to pursue progressive policies that are at odds with federal regulatory objectives.[110] Scholars and advocates have used the anti-commandeering rule, for example, to explain why Congress may not force unwilling states to criminalize marijuana[111] or turn undocumented migrants over to federal authorities.[112] Deployed in these heated and very live battles, commandeering is rapidly losing any association with conservative values. The anti-commandeering rule is now serving as a bulwark against the conscription of state officials whose constituents favor policies more progressive than what the federal government would impose. As discussed above, the post-*Murphy* victories in the realm of immigration enforcement suggest that the use of commandeering principles in service of progressive values is a story with additional chapters yet to come.

Reflecting on current disputes about marijuana policy and immigration enforcement reveals another reason to be confident that

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[110] Ilya Somin, *Making Federalism Great Again: How the Trump Administration's Attack on Sanctuary Cities Unintentionally Strengthened Judicial Protection for State Autonomy*, 97 TEX. L. REV. 1247, 1249 (2019).

[111] Sam Kamin, *Cooperative Federalism and State Marijuana Regulation*, 85 U. COLO. L. REV. 1105, 1107 (2014) ("The anti-commandeering doctrine clearly prohibits the federal government from requiring the states to criminalize marijuana or from forcing reform states to repeal their decriminalization laws."); David S. Schwartz, *High Federalism: Marijuana Legalization and the Limits of Federal Power to Regulate States*, 35 CARDOZO L. REV. 567, 570-71 (2013).

[112] *See* Somin, *supra* note 110, at 1249 ("The sanctuary cities cases are among the recent developments indicating that we can no longer assume that federal power is necessarily the friend of minorities, and state and local authorities their enemies. In these cases, liberal 'blue' jurisdictions have been relying on Supreme Court federalism precedents, authored by conservative Justices, to protect (primarily) Latino undocumented immigrants against a Republican administration asserting a broad view of federal power historically associated with the left.").

commandeering is no longer "a practical nullity" or a doctrine destined to suffer "quiet obscurity."[113] Congress simply doesn't have the resources to enforce its own drug or immigration policies, making the spending and preemption workarounds doctrinally apparent but not practically available, even in their more expansive pre-*Sebelius* and pre-*Murphy* form.[114] The use of state officials to implement these federal programs will therefore continue to be attractive to Congress, ensuring the ongoing relevance of commandeering principles as long as there are states that disagree with these heavily contested federal policies.[115]

For all of these doctrinal and political reasons, it is essential to engage with commandeering doctrine in its current form and understand its metes and bounds. As we will explore in the next Part, whatever else one might think about the doctrine's constitutional virtues or political utility, it does not restrain Congress in the exercise of its remedial powers.

II. COMMANDEERING'S IRRELEVANCE TO RECONSTRUCTION POWER

This Part begins with the general premise that Reconstruction transformed American federalism, and then shows that the text of the Fourteenth Amendment provides specific support for Congress's power to issue direct orders to state officials. It argues that the rationale with which the Court has explained Congress's power under the Fourteenth Amendment to abrogate state sovereign immunity translates easily to Tenth Amendment commandeering doctrine.[116] Building upon that foundation, this Part demonstrates that premises central to the Court's rationale for the anti-commandeering rule make little to no sense when applied to remedial legislation — especially in light of the Court's insistence that such enactments must be congruent and proportional to the constitutional harms they are meant to remedy. This Part finishes with an overview of cases in which the Court has considered legislation

113 Coan, *supra* note 53, at 9.

114 *Id.* at 2-3 ("[W]ithout the active cooperation of state law enforcement, the vast majority of offenses in legalization states seem likely to go unprosecuted. Federal law enforcement simply lacks the resources to undertake such an effort on its own.").

115 I acknowledge that there are important differences between drug and immigration policy, including the need for uniformity — while the nation needs one uniform immigration policy, it can (and does) have multiple and divergent drug policies.

116 Ronald D. Rotunda, *The Powers of Congress Under Section 5 of the Fourteenth Amendment After* City of Boerne v. Flores, 32 IND. L. REV. 164, 185 (1998) (observing in passing that Section 5 of the Fourteenth Amendment "modifies the Tenth Amendment").

enacted under Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment. A close look at this chronology demonstrates that the Court has implicitly accepted Congress's power to issue direct orders to state officials when legislating pursuant to the Reconstruction powers.

A. Reconstruction Transformed American Federalism

1. The General Premise

Few principles are as thoroughly established in contemporary constitutional law as the idea that the boundaries between state and federal power were transformed by the Reconstruction Amendments. First articulated by the Court 140 years ago, the idea is now deeply embedded in our understanding of federalism itself:

> The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial. Such enforcement is no invasion of State sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact.[117]

Nearly one hundred years later, the Court recognized that this principle had been "carried forward" by subsequent cases:

> There can be no doubt that this line of cases has sanctioned intrusions by Congress, acting under the Civil War Amendments, into the judicial, executive, and legislative spheres of autonomy previously reserved to the States. The legislation considered in each case was grounded on the expansion of Congress' powers with the corresponding diminution of state sovereignty found to be intended by the Framers and made part of the Constitution upon the States' ratification of those Amendments.[118]

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[117] *Ex parte* Virginia, 100 U.S. 339, 346 (1879).

[118] Fitzpatrick v. Bitzer, 427 U.S. 445, 455-56 (1976). The Court invokes this general premise again and again. *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 468 (1991) ("[T]he principles of federalism that constrain Congress' exercise of its Commerce Clause powers are attenuated when Congress acts pursuant to its powers to enforce the Civil War Amendments.").

As suggested in both of these foundational passages and elucidated by generations of scholars, the Fourteenth Amendment reworks the federalism landscape both with the substantive, self-executing provisions of Section 1, directly enforceable against the states, and with its explicit grant to Congress of enforcement power in Section 5.[119] In fact, as scholars have observed:

> Given our tendency to think of the Court as the primary protector of individual rights, it is easy to forget that the main purpose of the Reconstruction Amendments was to enlarge the power of Congress. Although the drafters of the amendments were careful to ensure that the judiciary would have the power to compel adherence to the self-enforcing provisions of these amendments, they believed that federal legislation pursuant to the amendments' enforcement provisions was necessary in order to make them "fully effective."[120]

Putting the point in short form: "Increasing congressional power at the expense of the states was the whole point of the new constitutional structure that followed the Civil War."[121]

We can confidently say, then, that not only did the Reconstruction Amendments transform the relationship between federal and state governments, but they did so specifically by giving Congress power that it did not have before — power that it would wield against the states.[122] A state protesting congressional incursions into its sovereignty will stand on a different footing when the challenged legislation is grounded on Congress's Reconstruction powers.

This firmly established principle is an important starting point for a discussion about whether legislation enacted pursuant to Congress's Reconstruction powers is exempted from the anti-commandeering rule. At that level of abstraction, however, the idea doesn't do as much as work as we need it to — the Court certainly doesn't abandon concerns about state sovereignty when evaluating statutes enacted pursuant to

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119 *See* Estreicher & Lemos, *supra* note 16, at 116.

120 *Id.*

121 Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1809 (2010).

122 As scholars have noted, an earlier version of the Fourteenth Amendment would have included only the latter instrument — plenary power to Congress. *See generally id.*; Michael Zuckert, *Congressional Power Under the Fourteenth Amendment — The Original Understanding of Section 5*, 3 CONST. COMMENTARY 123 (1986) (discussing the overall development of congressional power under the Fourteenth Amendment).

the Reconstruction powers, as it has repeatedly made clear.[123] Fortunately, our particular question finds newly emergent textual support in the language of the Fourteenth Amendment, as explained in the next section.

2. Textual Support for Remedial Commandeering

Prior to *Murphy*, the text of the Fourteenth Amendment did not seem to provide much insight into whether Congress was exempt from the anti-commandeering rule when legislating pursuant to Section 5. The Fourteenth Amendment's substantive provisions speak in prohibitory terms, seemingly imposing on states only negative duties, and so one could imagine that any federal legislation enforcing these negative duties would also be of a sufficiently negative character to avoid the commandeering defect. After all, prior to *Murphy*, only obligations of an affirmative character were thought to constitute impermissible commandeering.[124] *Murphy*'s expansion of the commandeering terrain to cover all direct orders to states, regardless of affirmative or negative form, allows for a textualist assessment of remedial commandeering that wasn't possible before, when only affirmative obligations were thought to trigger the defect.

By declaring that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,"[125] Section 1 of the Fourteenth Amendment "unequivocally dictates what a state legislature may and may not do."[126] The commandeering nature of this direct instruction, self-executing upon the states, does not by itself

[123] *Ashcroft*, 501 U.S. at 468 ("By its terms, the Fourteenth Amendment contemplates interference with state authority: 'No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.' U.S. CONST. amend. XIV. But this Court has never held that the Amendment may be applied in complete disregard for a State's constitutional powers.").

[124] Professors Adler and Kreimer capture this point when they anticipate the argument that "interventions under the Fourteenth Amendment do not require commandeering of the sort condemned by *New York* and *Printz*. One might argue that, since the Constitution protects only against government action rather than government inaction, the only legislation required to implement the Fourteenth Amendment will impose negative duties and will thus be a permissible exercise of the federal preemption power." *See* Adler & Kreimer, *supra* note 10, at 124. They go on to refute this supposition by explaining that "equality norms will often, in effect, require affirmative action by the state." As much as we might vigorously endorse this proposition, we now understand from *Murphy* that even negative instructions can constitution commandeering, implicating the full range of action that Congress might take under the Reconstruction Amendments.

[125] U.S. CONST. amend. XIV, § 1.

[126] Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1478 (2018).

answer the question of *Congress*'s power to conscript state officers, but for that we turn to Section 5 of the Fourteenth Amendment. Acknowledging and sidelining for a moment the considerable discord and complexity regarding what Section 5 authorizes Congress to do, we can safely say that by giving Congress the power to enforce Fourteenth Amendment provisions "by appropriate legislation," Section 5 contemplates federal legislation that speaks directly to state officers.[127] Without direct orders to the states, how might one "enforce" the prohibition on *state law* that abridges, deprives, or denies the substantive rights articulated in Section 1?[128] For the paradigmatic exposition of this idea, we can turn to the *Civil Rights Cases*,[129] in which the Court began by noting that Section 1 of the Fourteenth Amendment:

> is prohibitory in its character, and prohibitory upon the States. . . . It is State action of a particular character that is prohibited. . . It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty, or property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this, but, in order that the national will, thus declared, may not be a mere *brutum fulmen*, the last section of the amendment invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited State law and State acts, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it.[130]

The Court went on to specify that this gives Congress the power "to provide *modes of relief against State legislation*, or State action."[131]

It may seem odd to invoke this language as support for an assertion of congressional power — after all, the *Civil Rights Cases* are hardly celebrated as an expansive moment for the enforcement of Fourteenth Amendment principles. For the Court, the textual analysis excerpted

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[127] *See* Civil Rights Cases, 109 U.S. 3, 10-12 (1883) (holding that Section 5 authorizes Congress "to provide modes of relief against State legislation, or State action.").

[128] U.S. CONST. amend. XIV, § 1.

[129] 109 U.S. 3.

[130] *Id.* at 10-11.

[131] *Id.* at 11 (emphasis added).

above was an entrée to the conclusion that Congress may not regulate private conduct under Section 5 of the Fourteenth Amendment, and on that basis, the Court struck down the Civil Rights Act of 1875. But if we can manage to put to one side the lasting damage that this parsimonious view of the Fourteenth Amendment has wrought, and re-read the language of the cases for our specific inquiry, it is clear that Congress may issue direct orders to state governments when legislating pursuant to Section 5 of the Fourteenth Amendment.

We might be tempted to say that there is in fact no way to enforce Section 1 of the Fourteenth Amendment without issuing direct orders to state governments of the sort that would qualify as commandeering, except for one wrinkle: Congress could, and does, enact legislation resting on multiple sources of authority that imposes anti-discrimination obligations on both state and private actors.[132] Such "generally applicable" obligations do not offend the anti-commandeering rule, as discussed above.[133] But surely that can't be the only mode of permissible legislation under Section 5: it would be strange to suggest that Congress must simultaneously regulate both private and state actors in order to escape the constraints of the commandeering rule. Such a requirement would pose multiple problems. First, it would limit Congress to regulating conduct that both state and private actors engage in, such as making employment decisions.[134] No one can doubt that this is an important category, and one for which federal legislation has been an essential tool to eradicate discrimination, but it would leave Congress without the authority to regulate conduct that *only* states engage in — like running elections,[135] or building courthouses for the administration of justice.[136] Second,

[132] The Family Medical Leave Act and the Civil Rights Act as amended in 1970 are two prominent examples. *See* Franita Tolson, *The Spectrum of Congressional Authority over Elections*, 99 B.U. L. REV. 317, 329 n.34 (2019) [hereinafter *Spectrum of Congressional Authority*] ("Congress enacted Title VII of the Civil Rights Act of 1964 pursuant to its authority under the Commerce Clause, but in 1972, extended the reach of the statute to authorize money damages against state governments under the Fourteenth Amendment. Fitzpatrick v. Beazer, 427 U.S. 445 (1976).").

[133] Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1478 (2018).

[134] Civil Rights Act of 1964, Pub. L. No. 88-352 (codified as amended in scattered sections of U.S.C.); Americans with Disabilities Act, 42 U.S.C. § 12101 (2018).

[135] Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 52 U.S.C. §§10301 to 10313 (Supp. II 2015)).

[136] Americans with Disabilities Act, 42 U.S.C. § 12132 (2018) (providing that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity"). In *Tennessee v. Lane*, 541 U.S. 509 (2004), the Court concluded that this

since Congress cannot regulate private actors under the Fourteenth Amendment, requiring Congress to regulate state actors only by generally applicable legislation would require Congress to have parallel authority in another enumerated provision, such as the Commerce Clause, to support the inclusion of private actors in the regulatory regime. Again, this is something that Congress has managed to do in enacting statutes like the Civil Rights Act and the Family Medical Leave Act, but that doesn't mean that we should read the Fourteenth Amendment to *require* it.

In sum, the best reading of the text of the Fourteenth Amendment is one that allows for Congress to (1) target states *as states* without also including private actors; and (2) impose direct orders on states of the sort that would qualify as commandeering under the Court's current view. Whatever tension this creates with the anti-commandeering principle lodged in the Tenth Amendment can be resolved by applying the principle that the later enactment controls.[137] As explained in the next section, the Court has accepted precisely this idea when it comes to Congress's Reconstruction power to abrogate the state sovereign immunity principles embodied by the Eleventh Amendment.

3. Lessons from the Eleventh Amendment: The Later Enactment Controls

The idea that Reconstruction transformed the balance between state and federal power manifests in a specific principle that allows Congress to abrogate state sovereign immunity when legislating pursuant to Section 5 of the Fourteenth Amendment — and only then.[138] In *Fitzpatrick v. Bitzer*, the Court unanimously announced that "the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of section 5 of the Fourteenth Amendment."[139] Explaining why Eleventh Amendment state sovereign immunity principles were limited by the Fourteenth Amendment, and not the other way around, the Court's reasoning was remarkably broad, grounded on the same general concept of a transformed federalism described above:

provision could be enforced against a state that had required a paraplegic man to answer criminal charges on the second floor of a courthouse that had no elevator.

[137] *Cf.* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) ("[W]e think that the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of s 5 of the Fourteenth Amendment.").

[138] *See* Seminole Tribe v. Florida, 517 U.S. 44, 59 (1996).

[139] *Fitzpatrick*, 427 U.S. at 456.

> In that section Congress is expressly granted authority to enforce "by appropriate legislation" the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority.[140]

What is remarkable about this passage is that the reasoning is in no way limited to the precise issue of state sovereign immunity from private suit in federal court. The Court does not point to specific evidence that the Fourteenth Amendment was intended to revive the set of private suits against states or state officials that had been put to rest by the Eleventh Amendment.[141] Nor does it explain in functional terms why the Fourteenth Amendment should be read to roll back this particular attribute of state sovereignty. The Court instead simply invokes the considerably broader idea that state authority is simultaneously diminished by both the substantive terms of the Fourteenth Amendment and the provisions that grant enforcement power to Congress.

On this capacious rationale, the Court concluded that "Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts."[142] The idea that remedial legislation simply requires a categorically different sort of federalism analysis is driven home by observing that *Fitzpatrick v. Bitzer* was decided the same year as *National League of Cities v. Usery*, in which the Court announced the since-repudiated principle that Congress may not "displace the States' freedom to structure integral operations in areas of

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[140] *Id.*

[141] The text of the Eleventh Amendment only protects states against suits brought in federal court by citizens of other states. In *Hans v. Louisiana*, 134 U.S. 1, 14-15, 20-21 (1890), however, the Supreme Court extended state sovereign immunity to suits brought by a state's own citizens. As scholars have explained, the "language of the Eleventh Amendment hardly compels the holding in *Hans*, but the Court has given no indication that it intends to back away from that decision, which is now more than a century old." Ronald D. Rotunda, *The Eleventh Amendment,* Garrett*, and Protection for Civil Rights*, 53 ALA. L. REV. 1183, 1183 n.2 (2002).

[142] *Fitzpatrick*, 427 U.S. at 456.

traditional governmental functions."[143] Both the *Usery* and *Fitzpatrick* opinions were written by Justice Rehnquist, who left little doubt about his commitment to federalism.

But what does this mean specifically for commandeering? As scholars have observed:

> This reasoning seems every bit as applicable to commandeering of state officials as to overriding state immunity from suit. Both might be appropriate means in particular contexts of ensuring state fidelity to Fourteenth Amendment norms. The text of Section 5 does not specifically override federalism objections to private suits against states any more than to commandeering; no clear intent of the Fourteenth Amendment's framers could be marshaled to support any distinction between the two; and with reference to the federalism values at stake, it is unclear why the default anti-commandeering rule should be considered any more fixed or fundamental than the default anti-suit rule.[144]

Caminker concludes that "persuasive arguments can be made" that the Fourteenth Amendment, and perhaps other provisions as well, "are best interpreted as also authorizing Congress to conscript state officials in certain contexts."[145] Caminker is joined by a number of other scholars, manifesting varying degrees of predictive confidence, who similarly conclude that the commandeering restraint does not apply when Congress is legislating pursuant to the Reconstruction Amendments.[146] As one scholar explains, the "basis for this exception is straightforward: the Reconstruction Amendments changed Congress's relationship vis-à-vis the states."[147]

These are absolutely persuasive observations, applying time-honored precepts of the post-Reconstruction constitutional order, and they have long been thought sufficient to dispel the possibility that anti-commandeering principles inferred from the Tenth Amendment apply

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[143] Nat'l League of Cities v. Usery, 426 U.S. 833, 852 (1976).

[144] Caminker, *Limits of Formalism*, *supra* note 8, at 239.

[145] *Id.* at 242; *see also* Jackson, *supra* note 9, at 2211 (1998) (explaining Congress's authority to abrogate state sovereign immunity under Section 5 and observing that "[l]ikewise, to the extent that the anticommandeering rule derives from a historic bargain in the 1787 Constitution, it could be found superseded by later-enacted amendments . . . . The line apparently drawn in the Eleventh Amendment caselaw, between Article I powers and powers granted by later-enacted amendments, offers a plausible stopping point for the Court's anticommandeering rule.").

[146] *See* Jason Mazzone & Stephen Rushin, *From Selma to Ferguson: The Voting Rights Act as a Blueprint for Police Reform*, 105 CALIF. L. REV. 263, 331 (2017).

[147] Mikos, *supra* note 10, at 171.

to remedial lawmaking.[148] But with profound instability in our current understanding of congressional power,[149] it is worth pushing harder, fortifying these settled understandings to whatever extent possible. *Sebelius* and *Murphy*, as detailed above, have reshaped the commandeering landscape. Changes are afoot for remedial power as well, as anyone who was surprised to learn about the Constitution's "equal sovereignty" principle can attest.[150] In *Shelby County v. Holder*, the Court made clear that even the Voting Rights Act, which has survived constitutional challenge so many times,[151] is not immune from being struck down on federalism grounds "in light of current conditions."[152] The Court has already been asked to rule that the preclearance requirement of the Voting Rights Act (VRA) constitutes impermissible commandeering — and that was before *Murphy* blew open the terrain.[153] These developments make it critical to dig deeper into the multiple and particularized ways that key elements of commandeering doctrine are profoundly mismatched with essential attributes of legislation enacted pursuant to the Reconstruction

[148] *See* Mazzone & Rushin, *supra* note 146, at 333.

[149] *See infra* Part II.B.2.

[150] *See* Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 100 (2013) ("[T]he equal dignity requirement may be of questionable original constitutional pedigree. . . ."). For additional criticism of the equal sovereignty principle, see Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207, 1212 (2016) ("The equal sovereignty principle is not cleanly derived from any source that is widely recognized by courts or commentators as a valid basis for constitutional rules. The principle is not articulated in the constitutional text, its historical roots are thin, and it potentially undermines other principles of structure that are embodied in the Constitution at a similar level of generality, such as federalism and nationalism. Nor has equal sovereignty been established through a pattern of congressional practice or more gradually spelled out by courts over time."); Zachary Price, Namudno's *Non-Existent Principle of State Equality*, 88 NYU L. REV. ONLINE 24, 26 (2013).

[151] *See, e.g.*, Lopez v. Monterey County, 525 U.S. 266, 282-83 (1999) (upholding the constitutionality of section 5 of the Voting Rights Act against challenges that the provision impedes on powers reserved to the States); City of Rome v. United States, 446 U.S. 156, 182-83 (1980) (affirming the holding in *South Carolina v. Katzenbach* that the Voting Rights Act is an "appropriate means for carrying out Congress' constitutional responsibilities"); Georgia v. United States, 411 U.S. 526, 535 (1973) (reaffirming that the Voting Rights Act "is a permissible exercise of congressional power" and applying preclearance requirement to the Georgia House of Representatives' reapportionment plan); South Carolina v. Katzenbach, 383 U.S. 301, 337 (1966) (holding that the contested portions of the Voting Rights Act were a valid means of carrying out the Fifteenth Amendment).

[152] Shelby Cty. v. Holder, 570 U.S. 529, 550 (2013).

[153] Appellant's Motion to Dismiss or Affirm, Riley v. Kennedy, 553 U.S. 406 (2008) (No. 07-77), 2007 WL 3118324 (discussing commandeering challenge to preclearance).

Amendments. As we will see, the very logic of commandeering relies upon assumptions that simply do not hold true for Section 5 legislation.

B. The Fundamental Misfit Between Remedial Power and the Rationale of Commandeering

To appreciate fully why the application of commandeering principles to remedial legislation is so inapt, we need to understand that commandeering doctrine rests on two critical assumptions about congressional power: (1) that the program at issue is one where the federal government has the authority to regulate private parties; and (2) that the program at issue is one in which state governments would be free to regulate however they see fit were it not for relevant federal legislation. As explained in this section, both of these are categorically untrue for legislation enacted pursuant to the Reconstruction Amendments, rendering the application of commandeering principles more or less incoherent.

1. Regulating Primary Conduct Under the Preemption Prerogative

Whenever the Court has examined a statutory provision for impermissible commandeering, it has always assumed that Congress was legislating pursuant to an enumerated power that gives the federal government the authority to regulate private parties. To be sure, the commandeering cases to date have all involved legislation enacted pursuant to the Commerce Clause, where the authority to regulate private parties is beyond question.[154] But the private party assumption ought not be dismissed as simply an incidental byproduct of the fact that the existing cases mostly arise under Commerce Clause legislation: the private party premise serves a load-bearing function. The Court relies on it both to justify the anti-commandeering rule as a modest limit on congressional power, and to differentiate this impermissible form of regulation from acceptable preemption.

[154] As the Court has explained in extraordinary detail, the Constitutional Convention was motivated in no small part by a specific intention to correct the structural defect in the Articles of Confederation that gave the federal government no power to regulate primary conduct. *See* New York v. United States, 505 U.S. 144, 163 (1992) ("[T]he question whether the Constitution should permit Congress to employ state governments as regulatory agencies was a topic of lively debate among the Framers. Under the Articles of Confederation, Congress lacked the authority in most respects to govern the people directly."); *see also* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1447 (1987).

In *New York*, for example, the Court did not just strike down the take title provision as an invalid command, but carefully explained the permissible alternatives "by which Congress may urge a State to adopt a legislative program consistent with federal interests."[155] The Court first differentiated the influence that Congress can buy with conditional spending, and then specified that "where Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation."[156] As described above, *Murphy* upped the ante by making the direct regulation of private parties a *necessary* component of a valid preemption provision.[157] *Murphy* explained that in order for a federal law to preempt state law, it must satisfy two requirements. First, it must be shown to be an exercise of a power within the scope of Congress' constitutional authority. Second, it must be best read as a statute that regulates private actors rather than States.[158]

A doctrine defined by repeatedly invoking Congress's power to directly regulate private parties will be categorically inapplicable to Section 5 legislation. As has been exhaustively (and justifiably) critiqued,[159] Congress's power under Section 5 of the Fourteenth Amendment is the reverse of commerce power: it can *only* operate upon state actors, not private parties. As the Court has put it, "Just as § 1 of the Fourteenth Amendment applies only to actions committed 'under color of state law,' Congress' § 5 authority is appropriately exercised only in response to state transgressions."[160] Section 5 legislation is thus at a profound disadvantage in passing the first prong of the anti-commandeering test: is the challenged regulation "generally applicable" to both states and private parties?[161] Transposing this requirement into

155 *New York*, 505 U.S. at 166.

156 *Id.* at 167.

157 Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1479-80 (2018).

158 *Id.* at 1479.

159 *See, e.g.*, Evan H. Caminker, "*Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 STAN. L. REV. 1127, 1142 (2001) [hereinafter *"Appropriate" Means-Ends*] (discussing Section 5 jurisprudence and explaining that the Court views "the Enforcement Clauses as authorizing Congress to regulate only state and not private conduct"); Estreicher & Lemos, *supra* note 16, at 115 (critiquing the Court's "reading of the 'state action' limitation of the Fourteenth Amendment as it bears on congressional enforcement authority.").

160 Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 368 (2001).

161 *See Murphy*, 138 S. Ct. at 1478 ("The anticommandeering doctrine does not apply when Congress even-handedly regulates an activity in which both States and private actors engage.").

the realm of remedial legislation would, perversely, seem guaranteed to eviscerate Congress's authority to provide relief against unconstitutional state action.

It is a harder question than at first appears because Congress will regularly draw upon multiple enumerated powers that provide overlapping authority for federal legislation.[162] Consider, for example, statutes like the American Disabilities Act ("ADA") and Family Medical Leave Act ("FMLA"), for which congressional authority to regulate private parties arises under the Commerce Clause, while the authority to regulate state actors may arise under Section 5 of the Fourteenth Amendment.[163] Would such a scheme qualify as "generally applicable" for purposes of inoculating a statute from commandeering defect? I presume so, but this conclusion would not salvage provisions grounded *only* upon Reconstruction powers that apply *only* to state actors — the Voting Rights Act being a prominent example.[164] Section 5 legislation will tend to "target states as states" because that is, according to the Court, *what it is supposed to do*.[165] What the Court treats as a defect in the commandeering cases is a *mandate* in the Section 5 context.

That Section 5 legislation is supposed to regulate state actors rather than private parties makes it difficult to see how *Murphy*'s formulation of permissible preemption provisions could ever translate to remedial regulation.[166] Recall that under *Murphy*'s logic, where Congress has the authority to regulate in a given area, we distinguish permissible preemption from impermissible commandeering by assessing whether the federal law "regulates the conduct of private actors, not the States."[167] That's never going to be the case under Section 5 legislation, suggesting that the boundary the Court is articulating between

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[162] *See* Tolson, *Spectrum of Congressional Authority*, *supra* note 132, at 40 n.127.

[163] It isn't that Congress can't regulate state actors alongside private parties under the Commerce Clause, see Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 554 (1985), but that it might wish to specifically invoke Section 5 to allow for damages suits against states that would otherwise be forbidden by state sovereign immunity principles. *See* Alden v. Maine, 527 U.S. 706, 750 (1999); Seminole Tribe v. Florida, 517 U.S. 44, 59 (1996).

[164] *See* South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966).

[165] *See* United States v. Morrison, 529 U.S. 598, 620-21 (2000) (invalidating civil remedy for gender-motivated violence because "the Fourteenth Amendment, by its very terms, prohibits only state action").

[166] Congress can regulate states where private parties are also included, but it cannot use states as "implements of regulation." See New York v. United States, 505 U.S. 144, 161 (1992). In the Fourteenth Amendment context, it is not so easy to discern the difference between regulating states and using states as implements of regulation.

[167] Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1481 (2018).

commandeering and preemption applies only where the underlying congressional power is meant to be wielded against *individuals*. That, in turn, raises another difficulty: commandeering has always been defined against the preemption alternative. To develop and enforce an anti-commandeering rule without acknowledging that Congress retains the power to preempt state law is to undermine the force of the Supremacy Clause.[168]

One response is to observe that we usually do not describe remedial legislation as "preempting" contrary state law.[169] Take, for example, *Katzenbach v. Morgan*.[170] Where a provision of the Voting Rights Act barring literacy tests conflicted with New York state law, the sole question addressed by the Court was whether the VRA provision was a valid exercise of Congress's remedial power. Once that was determined in the affirmative, there was no additional preemption analysis. The Court simply concluded that the provision was "a proper exercise of the powers granted to Congress by Section 5 of the Fourteenth Amendment and that by force of the Supremacy Clause, Article VI, the New York English literacy requirement cannot be enforced to the extent that it is inconsistent."[171] *Katzenbach* is in fact somewhat unusual among Section 5 cases in that it explicitly mentions the Supremacy Clause, albeit only in passing. In other Section 5 cases, once the enactment is determined to be "appropriate," its supremacy is simply assumed.[172] Because remedial legislation speaks to the states, explicitly directing their conduct, it does not lend itself to an ordinary preemption analysis, in which we try to assess whether Congress intended to allow states to continue regulating alongside the federal government with regards to the conduct of private parties.[173]

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[168] *Id.* at 1479 (explaining that preemption is "a rule of decision," based on the Supremacy Clause, which "specifies that federal law is supreme in case of a conflict with state law.").

[169] *See, e.g.*, Tennessee v. Lane, 541 U.S. 509, 533-34 (2004) (upholding an application of the ADA to the states without ever mentioning preemption or the Supremacy Clause); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 740 (2003) (concluding that challenged provision of FMLA regulating states was "congruent and proportional to its remedial object" without mentioning preemption or the Supremacy Clause).

[170] 384 U.S. 641, 641 (1966).

[171] *Id.* at 646-47.

[172] *See supra* note 169.

[173] Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Emps. v. Lockridge, 403 U.S. 274, 285-86 (1971) ("The constitutional principles of pre-emption, in whatever particular field of law they operate, are designed with a common end in view: to avoid conflicting regulation of conduct by various official bodies which might have some authority over the subject matter."); *see also Murphy*, 138 S. Ct. at 1480 (explaining that

Impermissible commandeering, in sum, is constructed against the acceptable alternative of preemption, whereby Congress retains the prerogative to be the sole regulator of primary conduct. But this construct does not work for remedial legislation enacted to enforce the substantive provisions of the Fourteenth or Fifteenth Amendments, which is necessarily addressed to state actors rather than private parties.

2. The Default Degree of State Discretion

The second assumption baked into the commandeering doctrine is that the challenged federal statute drops in on a landscape where states would otherwise have discretion to regulate in divergent ways — to respond to their own constituencies' priorities and preferences. Let's call this the "default discretion" argument.[174] The default discretion assumption appeared in commandeering discussions even before *New York v. United States*. Consider this passage from *FERC v. Mississippi*, in which the Court upheld against Tenth Amendment challenge a provision that simply directed state regulatory commissions to consider, but not necessarily adopt, federal regulatory standards:

> . . . having the power to make decisions and to set policy is what gives the State its sovereign nature. . . . It would follow that the ability of a state legislative (or, as here, administrative) body — which makes decisions and sets policy for the State as a whole — to consider and promulgate regulations of its choosing must be central to a State's role in the federal system.[175]

The Court upheld the federal law because it left intact a state's prerogative to pursue policies "of its own choosing," and thus did not offend this central premise of federalism.

The default discretion assumption is at the crux of the political accountability argument, offered in *New York* as a key justification for the anti-commandeering rule. Explaining why commandeering was more constitutionally troubling than conditions on federal grants that produce essentially identical results, the Court observed that with conditional spending, "the residents of the State retain the ultimate

any federal law with preemptive effect works in the same way: "[i]t confers on private entities . . . a federal right to engage in certain conduct subject only to certain (federal) constraints.").

[174] For a full development of the constituency relations justification for the commandeering doctrine, see Coan, *supra* note 53.

[175] Fed. Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 761 (1982).

decision as to whether or not the State will comply."[176] We see it as well in *NFIB v. Sebelius*, when the Court observes sympathetically that states must have the prerogative to resist "federal blandishments when they do not want to embrace the federal policies as their own."[177]

As these examples reveal, commandeering doctrine rests on the premise that states must be free to articulate state policies in contradistinction to what the federal government would impose. States might have to suffer the preemptive effect of federal legislation, the reasoning goes, but at least in that posture states do not risk being associated with a federal policy deemed "contrary to local interests."[178] The implication is that even with state law preempted, states have retained a constitutionally essential freedom to express divergence from federal policy.[179] Commandeering, on the other hand, creates a forcible alignment between state and federal policy that stamps out the constitutionally required default of state choice.

All of this rests on the assumption that states would have unfettered discretion to develop their own policies in a given area (including no policy at all) were it not for the challenged federal regulation. But this is simply not the case for legislation enacted by Congress to enforce the substantive provisions of the Thirteenth, Fourteenth, and Fifteenth Amendments, which obviously constrain the states even in the absence of congressional action. States might "object to being pressed into federal service"[180] for regulation that merely reflects Congress's current conception of effective interstate commerce or immigration policy, but surely states don't have the same leeway for regulation that implements the substantive requirements of the Reconstruction Amendments, by which states are directly bound.[181] When reflecting upon the need to preserve state choice there is a difference, in other words, between an ordinary federal agenda, against which we might celebrate and protect

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

177 Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 579 (2012).

178 *See New York*, 505 U.S. at 168.

179 For scholarship that imagines the commandeering doctrine as a sort of protection against compelled expression, see Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1256 (2008).

180 Printz v. United States, 521 U.S. 898, 905 (1997).

181 *Cf.* Adler & Kreimer, *supra* note 10, at 127 (noting that "after *Boerne*, legislation grounded upon Section 5 must be commensurate with a threatened or past violation of the Constitution recognized by the Court itself. Whereas Commerce Clause statutes may serve any plausible account of the national interest, statutes under the Fourteenth Amendment must be keyed to preserving the rights of individuals under the Due Process or Equal Protection Clauses.").

state dissent,[182] and a constitutional one, for which we do not.[183] It is rather obvious to observe that we do not celebrate state resistance to obligations that are constitutionally grounded, but the significance this has for remedial commandeering bears some emphasis.

The appropriate scope of Congress's power to enforce the Reconstruction Amendments has been a subject of doctrinal instability and intense scholarly debate, much of which we will sidestep here.[184] For our purposes, we simply need to recall the basic point that legislation enacted pursuant to Congress's Reconstruction powers enforces constitutional obligations that operate on the states independently, making the idea of "state choice" profoundly inapt in this realm. That was true even in the era when the Court afforded Congress considerably more leeway to impose remedial obligations on state actors that were more expansive than what the Court itself had required. Recall that in *Katzenbach v. Morgan*, the Court considered whether a provision of the VRA prohibiting the use of literacy tests was an appropriate exercise of Congress's power under Section 5 of the Fourteenth Amendment.[185] While the Court itself had previously ruled that voter literacy tests did not categorically violate the Fourteenth and Fifteenth Amendments, it nonetheless upheld the statutory provision prohibiting their use, reasoning that it was for Congress "to assess and weigh the various conflicting considerations" in determining whether the prohibition was necessary to safeguard equal protection and voting rights.[186] Even at the highwater mark of this power, Section 5 legislation

[182] *See, e.g.*, Bulman-Pozen & Gerken, *supra* note 179, at 1259 (discussing how states often use regulatory power to dissent from federal law in areas such as immigration, healthcare, and education).

[183] *See, e.g.*, Cooper v. Aaron, 358 U.S. 1 (1958) (rejecting a claim by school officials in Little Rock, Arkansas that they could lawfully delay school desegregation in the wake of *Brown v. Board of Education* because there was "no duty on state officials to obey federal court orders"); Miller v. Caudill, 936 F.3d 442 (6th Cir. 2019) (awarding attorney's fees to same-sex couples denied marriage licenses by a Kentucky county clerk who acted in contravention of constitutional principles expressed in *Obergefell v. Hodges*).

[184] *See, e.g.*, Steven G. Calabresi & Nicholas P. Stabile, *On Section 5 of the Fourteenth Amendment*, 11 U. PA. J. CONST. L. 1431 (2009) (arguing that the Court should not be overly deferential in Section 5 cases, "in disagreement with both a number of key Supreme Court decisions in this area and with some scholars"); Caminker, *"Appropriate" Means-Ends*, *supra* note 159 (describing the evolution and critiques of judicial scrutiny under Section 5 of the Fourteenth Amendment, and advocating for a less rigorous level of scrutiny than the Court favored).

[185] Katzenbach v. Morgan, 384 U.S. 641, 648 (1966).

[186] *Id.* at 653. The Court has since reiterated that "Congress's Section 5 power is not restricted to legislating against those state actions a court would find unconstitutional

had to be grounded upon Congress's rational view that a particular mechanism was necessary to safeguard Fourteenth Amendment rights.[187] Where there is a rational link between the legislation at issue and the constitutional duties imposed directly upon states by virtue of the self-executing portions of the Fourteenth Amendment itself, the idea of a state needing to be free to "retain the ultimate decision as to whether or not the State will comply" starts to become perverse.[188]

As has been thoroughly discussed elsewhere, the Court has come to require a much closer fit between Section 5 legislation and what the substantive provisions of the Fourteenth Amendment require of their own accord.[189] In *City of Boerne v. Flores*, the Court struck down the application of the Religious Freedom Restoration Act ("RFRA") to the states because there was insufficient constitutional grounding for the statute's requirement that generally applicable laws burdening religious exercise be subjected to strict scrutiny.[190] Quite the contrary: the Court had already held, in *Smith v. Employment Division*, that the First Amendment did not so require,[191] suggesting that RFRA was an improper attempt to "alter[] the meaning of the Free Exercise

if asked," Estreicher & Lemos, *supra* note 16, at 112, but often does so while proceeding to strike down the challenged legislation. *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000) (striking down the civil remedy provision of the Violence Against Women Act on the basis that, *inter alia*, Section 5 limits Congress to regulating state action rather than private conduct); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (invalidating abrogation of states' Eleventh Amendment immunity contained in the Age Discrimination in Employment Act).

[187] *See, e.g.*, South Carolina v. Katzenbach, 383 U.S. 301 (1966) (upholding particular remedies for voting discrimination applied against a small number of states under the Voting Rights Act of 1965, on the basis that Congress rationally calculated where such remedies were necessary).

[188] New York v. United States, 505 U.S. 144, 168 (1992).

[189] *See, e.g.*, Ellen D. Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 MICH. L. REV. 2341, 2343 (2003) (finding that the Rehnquist and Waite Courts resulted in a "disaggregation" of Congress' power under the Reconstruction Amendments, with broad remedial authority over state political processes and "far more limited authority to combat . . . discrimination at the state and local level"); Douglas Laycock, *Conceptual Gulfs in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 743, 745 (1998) ("Congress's power to protect liberty in the states appears to have shrunk dramatically."); Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 156 (1997) (arguing that the "same institutional constraints that lead the courts, in many cases, to adopt . . . a more modest judicial role should have led the Court to be more respectful" of the Religious Freedom Restoration Act as an exercise of Section 5 powers).

[190] City of Boerne v. Flores, 521 U.S. 507, 517-20 (1997).

[191] Emp't Div., Dep't of Human Res. of Ore. v. Smith, 494 U.S. 872, 882-85 (1990).

Clause."[192] Nor could Congress's effort to reinstate the compelling interest test be justified as a prophylactic measure appropriate to the goal of rooting out intentional, targeted religious persecution — conduct that does indeed violate the First Amendment.[193] Viewed in this alternative light, it was a measure completely out of proportion to the constitutional problem it purported to solve. The Court announced that permissible Section 5 legislation had to be congruent and proportional to the scope of constitutional violations as defined by the Court itself.[194]

By keeping Congress tethered so tightly to its own view of what the substantive provisions require,[195] the Court has minimized the gap between what Section 5 legislation might command and the duties imposed by the Fourteenth Amendment itself. As the Court has insisted, when legislating to enforce the substantive provisions of the Fourteenth Amendment Congress "may not attempt to substantively redefine the States' legal obligations."[196] This makes the default discretion premise all but incoherent when it comes to Section 5 legislation. Because Section 5 legislation must track so closely with what the Fourteenth Amendment itself imposes, in this context the idea of state discretion to diverge from federal policy quickly verges into state defiance of constitutional duty. There's very little open terrain for a state's citizens to legitimately "view federal policy as sufficiently contrary to local interests"[197] when the "federal policy" is Section 5 legislation that passes

192 *City of Boerne*, 521 U.S. at 519.

193 *See id.* at 532.

194 *Id.* at 533; *see also* Allen v. Cooper, 140 S. Ct. 994, 1004 (2020) (reiterating that "what Congress has done must be in keeping with the Fourteenth Amendment rules it has the power to 'enforce.'").

195 *See, e.g.*, Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (holding that Congress acted beyond its Section 5 power in attempting to impose liability on state employers under the Americans with Disabilities Act because it had not identified a pattern of irrational state discrimination against the disabled); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000) (holding that the Age Discrimination in Employment Act could not be sustained as a Section 5 measure because its substantive requirements did not reflect the Court's instruction that "States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest"); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999) (holding that Congress's attempt to subject states to patent infringement suits was not a valid exercise of Section 5 power because much of the infringing conduct addressed by the statute was unlikely to be unconstitutional); Oregon v. Mitchell, 400 U.S. 112 (1970) (holding that Section 5 did not authorize Congress to compel states to lower the voting age to eighteen for state and local elections).

196 Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 722 (2003).

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

the congruence and proportionality test. The default discretion assumption, so deeply embedded in commandeering jurisprudence, simply cannot transfer to Reconstruction enforcement legislation.

C. The Court's Implicit Acceptance

Although the Court has not yet openly engaged with the observations posed above, we can discern elements of an implicit understanding that the anti-commandeering rule does not apply to Reconstruction legislation. First, the Court's commandeering cases are replete with cues that the principles being announced apply only to Article I powers. For one key example, consider this formulation from *New York*: "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."[198] Scholars have thus quite reasonably concluded that "the Court left open the possibility that particular constitutional provisions outside of Article I, Section 8 might still authorize congressional commandeering, but the Court provided little guidance for determining when this would be so."[199] As happened again most recently in *Murphy*, the Court repeatedly invokes the "sharp break from the Articles of Confederation" that took place at the Constitutional Convention when the drafters chose "a plan under which Congress would exercise its legislative authority directly over individuals rather than over States."[200] This is clearly a reference to the powers that are given to Congress in Article I, and is a rationale that does not transfer to the Reconstruction powers.

Moreover, the commandeering constraint may not even apply to all of Congress's Article I powers, as illustrated by the curious companion case of the Elections Clause.[201] The Elections Clause provides that "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."[202] Congress

198 *Id.* at 157.

199 Caminker, *Limits of Formalism*, *supra* note 8, at 202.

200 Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1476 (2018) (internal quotations omitted).

201 U.S. CONST. art. I, § 4, cl. 1.

202 *Id.* The Clause has long been interpreted to allow Congress to override state decision-making that pertains to federal elections. *Ex parte* Siebold, 100 U.S. 371, 396-97 (1879) ("[W]here the regulations of Congress conflict with those of the State, it is the latter which are void, and not the regulations of Congress; and that the laws of the State, in so far as they are inconsistent with the laws of Congress on the same subject,

repeatedly regulates by commandeering when enacting legislation pursuant to the Elections Clause, and these efforts have so far withstood constitutional challenge.[203] Multiple scholars have argued persuasively that Congress has the power to conscript state officials when legislating pursuant to the Elections Clause.[204] While uncertainty remains about the Supreme Court's willingness to ratify a categorical exception to commandeering principles for Elections Clause legislation,[205] there is nonetheless reason to believe that the Elections Clause stands on a different footing than other Article 1 powers. The phenomenon is worth a bit more exploration as we consider whether Congress may commandeer state officials pursuant to the Reconstruction powers.

cease to have effect as laws."). Most importantly for our purpose, scholars have described this case as one in which "the Court upheld Congress's power to commandeer state officials' services pursuant to Congress's power to regulate the 'time, place, and manner' of federal elections." Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 889 (1998); *see also* Oregon v. Mitchell, 400 U.S. 112, 122 (1970) (noting that Congress used its power under the Elections Clause "to prevent States from electing all Congressmen at large").

[203] *See, e.g.*, Ass'n of Cmty. Orgs. for Reform Now v. Miller, 129 F.3d 833, 837 (6th Cir. 1997) (holding that the National Voter Registration Act does not violate the Tenth Amendment and is a constitutional exercise of congressional power under the Elections Clause); Voting Rights Coal. v. Wilson, 60 F.3d 1411, 1416 (9th Cir. 1995) (same).

[204] *See, e.g.*, Caminker, *Limits of Formalism*, *supra* note 8, at 237 (arguing that a "fair reading" of the Elections Clause "suggests that Congress may still require the same state election officers to implement the federally altered scheme, unless Congress chooses instead to replace them by authorizing the appointment of federal election officials"); Franita Tolson, Election Law "Federalism" and the Limits of the Antidiscrimination Framework, 59 WM. & MARY L. REV. 2211, 2218 (2018) (asserting that the text of the Elections Clause "empowers Congress to engage in the quintessentially 'anti-'federalism action of displacing state law and commandeering state officials toward achieving this end"); Tolson, *Spectrum of Congressional Authority*, *supra* note 132, at 324 (reiterating that Congress has lawmaking power under the Elections Clause, "which includes the authority to legislate independent of any action on the part of the states and, arguably, to commandeer state officials in the course of administering federal elections"); *Anticommandeering — Gerrymandering — House Passes Bill that Would Require States to Adopt Independent Redistricting Commissions for Congressional Maps. — H.R. 1, 116th Cong. (2019)*, 133 HARV. L. REV. 1806, 1810 (2020) [hereinafter *Anticommandeering — Gerrymandering*] (asserting that Congress has commandeering authority under the Elections Clause); *see also* Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 109 (2013) (characterizing Elections Clause legislation as "direct federal regulation" and arguing that as such, it "is unaffected by the concern for impermissible federal commandeering of state functions presented by congressional attempts to compel state undertakings for federal programs directly.").

[205] Nicholas O. Stephanopoulos, *The Anti-*Carolene *Court*, 2019 SUP. CT. REV. 111, 154 (considering the possibility that the anti-commandeering doctrine applies to the Elections Clause).

In 1997, when the Court decided *Printz*, it noted an absence of executive commandeering cases not only in the early years of the Republic but in recent decades as well.[206] Scholars have also observed that instances of commandeering are rare,[207] but for that to be uncontrovertibly true we would need to exclude the repeated instances of commandeering that occur in statutory provisions related to voting: legislation like the Voting Rights Act, the National Voter Registration Act of 1993 ("NVRA"), and Help America Vote Act of 2002 ("HAVA").[208] We will table for the moment the VRA, enacted pursuant to Congress's power under Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment, as we will soon consider it extensively. For now, it is worth noting that the NVRA and the HAVA, enacted pursuant to Congress's power under the Elections Clause, are filled with direct instructions to state officials.[209] And we can readily understand why: statutory regimes protecting the right to vote and ensuring the integrity of elections provide the paradigmatic case for remedial commandeering. Private parties do not run elections, and so any duties Congress wishes to impose will not be generally applicable to states and private parties alike. It isn't terribly difficult to imagine state officials who would turn down federal funding for election reform that might threaten their own ability to retain their offices, making it evident why Congress might not choose to use conditional spending as a regulatory instrument in this context. And perhaps most crucially, setting the conditions for fair elections requires "direct orders to the governments of the States."[210] Courts have nonetheless upheld these statutes against constitutional challenge, suggesting that Congress can

206 Printz v. United States, 521 U.S. 898, 905-16 (1997).

207 *See, e.g.*, Caminker, *Limits of Formalism*, *supra* note 8, at 200 n.6 (noting that "there are only a handful of other recent commandeering statutes that clearly fall within the decision's ambit.").

208 National Voter Registration Act (NVRA) of 1993, Pub. L. No. 103–31, 107 Stat. 77; Help America Vote Act (HAVA) of 2002, Pub. L. No. 107–252, 116 Stat. 1666.

209 *See, e.g.,* 52 U.S.C. §§ 20503-20507 (2018); Arizona v. Inter Tribal Council of Ariz., 570 U.S. 1, 4 (2013) ("Over the past two decades, Congress has erected a complex superstructure of federal regulation atop state voter-registration systems. The [NVRA] . . . 'requires States to provide simplified systems for registering to vote in *federal* elections.' . . . The Act requires each State to permit prospective voters to 'register to vote in elections for Federal office' by any of three methods: simultaneously with a driver's license application, in person, or by mail." (quoting Young v. Fordice, 520 U.S. 273, 275 (1997))).

210 Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1476 (2018) (describing the anti-commandeering principle generally).

commandeer state officials when legislating pursuant to the Elections Clause.[211]

The text of the Elections Clause, affording Congress the authority "to provide a complete code for congressional elections," provides a straightforward explanation for these results.[212] Nonetheless, to recognize that the commandeering of state and local officials is permissible under the Elections Clause is to recognize that commandeering constraints do not apply uniformly across each of Congress's enumerated powers — even those within Article I.[213] Appreciating the extent to which Congress commandeers state and local officials under the Elections Clause is to acknowledge a realm of direct

[211] *See, e.g.*, Ass'n of Cmty. Orgs. for Reform Now v. Miller, 129 F.3d 833, 837 (6th Cir. 1997) (holding that the NVRA does not violate the Tenth Amendment and is a constitutional exercise of congressional power under the Elections Clause); Voting Rights Coal. v. Wilson, 60 F.3d 1411, 1416 (9th Cir. 1995) (same); *cf.* Branch v. Smith, 538 U.S. 254, 302 (2003) (O'Connor, J., concurring in part and dissenting in part) (expressing concern that the plurality's reading of a statute enacted pursuant to the Elections Clause raised commandeering concerns, but noting that the Court did not need to definitely resolve "[w]hether the anticommandeering principle of *New York* and *Printz* is as robust in the Article I, § 4 context (the font of congressional authority here) as it is in the Article I, § 8, context (the source of congressional authority in those cases) . . . ."). The plurality had rebuffed the dissent's commandeering concerns by emphasizing the unique nature of statutes enacted pursuant to the Elections Clause: "the dissent fails to recognize that the state legislature's obligation to prescribe the 'Times, Places and Manner' of holding congressional elections is grounded in Article I, § 4, cl. 1 of the Constitution itself and not any mere statutory requirement." Branch v. Smith, 538 U.S. 254, 279-80 (2003). The plurality went on to explain that in enacting the apportionment regulations that were at issue, "Congress was not placing a statutory obligation on the state legislatures as it was in New York v. United States, 505 U.S. 144 (1992); rather, it was regulating (as the Constitution specifically permits) the manner in which a State is to fulfill its pre-existing constitutional obligations under Article I, §§ 2 and 4." *Id.* at 280.

[212] *Inter Tribal Council of Ariz.*, 570 U.S. at 8-9 (quoting Smiley v. Holm, 285 U.S. 355, 366 (1932)). Professor Issacharoff characterizes this case as "the most expansive account to date of federal power under the Elections Clause. The opinion put the Elections Clause on a higher rung of full federal power than even the Commerce Clause, 'the other enumerated power whose exercise is most likely to trench on state regulatory authority.'" Issacharoff, *supra* note 204, at 111 (quoting *Inter Tribal Council of Arizona*, 570 U.S. at 14 n.6).

[213] *See* Janet R. Carter, *Commandeering Under the Treaty Power*, 76 N.Y.U L. REV. 598, 599 (2001) (arguing that "Congress may enact statutes pursuant to treaties that would, if enacted as purely domestic legislation under Article I, violate the Tenth Amendment."); *see also* Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403, 423-28 (2003) (exploring the debate on the applicability of the commandeering principle to Congressional action under the Treaty Power).

instruction to state officials that exists alongside the Court's repeated and "forceful affirmation of anticommandeering principles."[214]

We can better understand this by emphasizing that commandeering concerns jump into action where Congress does not have the authority to regulate states directly, as political entities — meaning, to control lawmaking or executive conduct. In *Murphy*, the Court reiterated its observation in *New York* that the commandeering doctrine is premised upon the principle that the Constitution "confers upon Congress the power to regulate individuals, not States." What gets obscured in discussions of commandeering is that this quality, so well established for Commerce Clause power, does not describe every enumerated power. As explored above, it is categorically untrue for Congress's power under Section 5 of the Fourteenth Amendment, which has the exact opposite quality — it allows Congress to regulate only states, not private individuals.[215] Our focus here is the particular status of the Reconstruction Amendments,[216] but Congress may in fact have commandeering power whenever it regulates pursuant to a provision that gives it authority to directly regulate states, such as the Elections Clause,[217] Article IV's Full Faith and Credit Clause, or Article I, Section 10, providing that state laws imposing import or duties "be subject to the revision and control of the Congress."[218]

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[214] Vikram David Amar, *"Clarifying"* Murphy*'s Law: Did Something Go Wrong in Reconciling Commandeering and Conditional Preemption Doctrines?*, 2018 SUP. CT. REV. 299, 346 (2019).

[215] United States v. Morrison, 529 U.S. 598, 621 (2000). *See generally* Michael P. Zuckert, *Congressional Power Under the Fourteenth Amendment — The Original Understanding of Section Five*, 3 CONST. COMMENT. 123 (1986) (exploring the origins of Section 5 as an assertion of "congressional power to reach private conduct").

[216] I note that similar analysis would apply to Section 2 of the Nineteenth Amendment, giving Congress the power to enforce "by appropriate legislation" the right to vote regardless of sex.

[217] *But see* Stephanopolous, *supra* note 205, at 154.

[218] "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing it's inspection laws: and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress." U.S. CONST. art. I, § 10, cl. 2. Other examples include U.S. CONST. amend. XXIV, § 2 (giving Congress the power to enforce the abolition of poll taxes in elections for federal officials) and U.S. CONST. amend. XXVI, § 2 (giving Congress the power to enforce the prohibition on age-based denial of voting rights for citizens over the age of eighteen). Justice Scalia mentions the Extradition Clause in *Printz*, which is an example of a constitutional provision authorizing direct orders to state officials, but not one that confers power on Congress. Printz v. United States, 521 U.S. 898, 909 (1997).

What is most probative for our purposes, and truly essential to emphasize, is the fact that the Court has on multiple occasions examined Reconstruction legislation that conscripts state officials without ever applying the anti-commandeering rule. Those who study congressional power will be familiar with the caselaw that comprises this history — it has received a great deal of scholarly attention because of the dramatic changes in the Court's approach to determining what is considered "appropriate" remedial legislation.[219] This chronology is retraced here with the specific purpose of demonstrating that throughout these profound changes in the Court's approach, the Court has never layered the commandeering constraint atop the primary assessment of whether the legislation at issue is "appropriate," even where the challenged statute issues direct instruction to state officials. To see this, we will need to appreciate (1) the extent to which remedial statutes considered by the Court have commandeering qualities, and (2) the consistency with which the Court has nonetheless applied other analytical frameworks to either uphold or strike down the challenged statute.

The place to begin is undoubtedly the VRA, enacted in 1965 pursuant to Congress's power under Section 2 of the Fifteenth Amendment[220] and described as "the most successful civil rights statute in the country's history."[221] While any kind of comprehensive assessment is well beyond the scope of this project, with just a brief summary of the VRA's core provisions we can readily discern that central elements of the VRA have commandeering qualities.[222] Indeed, one could say that the primary

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[219] *See, e.g.*, Estreicher & Lemos, *supra* note 16, at 115 (discussing these transformations); *see also* Caminker, *"Appropriate" Means-Ends*, supra note 159, at 1158-59 (collecting sources); Katz, *supra* note 189, at 2342; Laycock, *supra* note 189, at 745; McConnell, *supra* note 189, at 153-54.

[220] South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966) ("Congress assumed the power to prescribe these remedies from § 2 of the Fifteenth Amendment, which authorizes the National Legislature to effectuate by 'appropriate' measures the constitutional prohibition against racial discrimination in voting."). Subsequent amendments to the Act have been enacted under Section 5 of the Fourteenth Amendment. *See* Michael J. Pitts, Georgia v. Ashcroft*: It's the End of Section 5 as We Know It (and I Feel Fine)*, 32 PEPP. L. REV. 265, 266 (2005).

[221] Mazzone & Rushin, *supra* note 146, at 266*; see also* Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 COLUM. L. REV. 2143, 2144 (2015) ("Widely lauded as one of the most effective statutes ever enacted, the Voting Rights Act . . . finally made good on the promise of the Fifteenth Amendment.").

[222] *See* Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 889

innovation of the VRA was to eschew reliance on case-by-case litigation in favor of pervasive commandeering.[223] Section 2 of the VRA instructs that "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color."[224] Section 4's coverage formula worked to identify states and subdivisions with a history of discriminatory practices, and Section 5 then requires those jurisdictions to obtain preclearance from either the Attorney General or a three judge district court prior to making any changes in voting procedure. Importing the key inquiries from commandeering doctrine into this realm, we can see that the provisions target state governments as states rather than announcing duties that are generally applicable to state and private actors alike, and they clearly impose obligatory mandates rather than attaching conditions to federal funds that states are free to reject.[225]

That the VRA regime commandeers state governments has only become clearer since *Murphy* — we no longer need to wrestle with the ever-troublesome question of whether a particular legislative command should be considered to impose a negative duty or an affirmative one. As with most such instances, it takes little effort to characterize preclearance in either form: "do not change voting procedure without prior approval" can easily become "obtain prior approval before changing voting procedure." *Murphy* tells us instead to assess whether the provision "dictates what a state legislature may and may not do."[226] Whether one treats preclearance as a regime imposing affirmative or negative duties, the direct instruction to state officials is clear. Nonetheless, from *South Carolina v. Katzenbach*[227] to *City of Rome v.*

(1998) (noting that "the Court has upheld provisions of the Voting Rights Act of 1965 that arguably commandeer the electoral process of state governments.").

[223] For one discussion of the failures of piecemeal litigation, see *South Carolina v. Katzenbach*, 383 U.S. at 309-11 ("Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment.").

[224] Voting Rights Act of 1965 § 2, 52 U.S.C. § 10301 (2018).

[225] Professors Jason Mazzone and Stephen Rushin summarize the combined effect by noting that the Voting Rights Act "works as a significant commandeering of the states and an interference with state delegation of authority to localities. The VRA suspended state and local laws governing voting, required the adoption of new state government administrative measures, and required states and localities to obtain federal approval before new voting policies could take effect." Mazzone & Rushin, *supra* note 146, at 332.

[226] Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1478 (2018).

[227] 383 U.S. 301.

United States,[228] and multiple instances in between and since,[229] the Court has repeatedly upheld the preclearance regime and other aspects of the VRA scheme against constitutional challenge.[230]

We cannot dismiss these cases as merely products of a bygone era, before the commandeering doctrine assumed its present shape. In 1992, the same year *New York* was decided, the Court considered whether resolutions passed in various Alabama county commissions required preclearance under Section 5 of the VRA, without ever questioning the constitutional validity of the preclearance provisions.[231] In 1996, the Court interpreted the VRA to require preclearance for state changes in primary election procedure, again without questioning the constitutional validity of the preclearance regime.[232] In 1997, the same year that *Printz* was decided, the Court required preclearance for changes that Mississippi had made to comply with another federal law.[233] In 1999, two years after *Printz*, the Court again upheld the preclearance provisions against constitutional challenge, stating frankly that: "the Voting Rights Act, by its nature, intrudes on state sovereignty. The Fifteenth Amendment permits this intrusion, however, and our holding today adds nothing of constitutional moment to the burdens that the Act imposes."[234] The author of the opinion was Justice

[228] 446 U.S. 156 (1980).

[229] *E.g.*, Chisom v. Roemer, 501 U.S. 380, 385 (1991) (assessing a violation of § 2 of the Voting Rights Act as amended in 1980); Georgia v. United States, 411 U.S. 526, 531 (1973); Katzenbach v. Morgan, 384 U.S. 641, 652 (1966) ("There can be no doubt that s 4(e) may be regarded as an enactment to enforce the Equal Protection Clause.").

[230] In multiple cases, the Court applied or interpreted provisions of the VRA without questioning its constitutional validity. *See, e.g.*, McDaniel v. Sanchez, 452 U.S. 130, 153 n.35 (1981); NAACP v. New York, 413 U.S. 345, 356 (1973); Georgia, 411 U.S. at 531, 535; Perkins v. Matthews, 400 U.S. 379, 394 (1971); Allen v. State Bd. of Elections, 393 U.S. 544, 548 (1969), *abrogated by* Ziglar v. Abbasi, 137 S. Ct. 1843 (2017); Gaston County v. United States, 395 U.S. 285, 287 (1969).

[231] Presley v. Etowah Cty. Comm'n, 502 U.S. 491, 500-01 (1992).

[232] *See* Morse v. Republican Party of Va., 517 U.S. 186, 207 (1996).

[233] Young v. Fordice, 520 U.S. 273, 284 (1997); *see also* Reno v. Bossier Par. Sch. Bd., 520 U.S. 471, 480 (1997) (holding that preclearance under section 5 should be denied when there is evidence of retrogressive intent or effect).

[234] Lopez v. Monterey County, 525 U.S. 266, 284-85 (1999). The state of California cited *New York* four times in its appellate brief, but appears not to have specifically argued the commandeering point. Brief for State Appellees on the Merits at 28, 39, 40, 42, *Lopez*, 525 U.S. 266 (No. 97-1396). In an amicus brief, conservative activist group Pacific Legal Foundation provided an extended discussion of *New York* and *Printz* in support of its assertion that the application of preclearance to the particular changes at issue in that case would violate Tenth Amendment principles. *See* Brief Amicus Curiae of Pac. Legal Found. in Support of Appellee, State of Cal. at 10, 12-14, *Lopez*, 525 U.S. 266 (No. 97-1396). But even they acknowledged: "Despite the restrictions placed on

O'Connor, who also wrote the opinion in *New York*. The state of California and its amicus had cited *New York* repeatedly in their briefs, but the commandeering doctrine's "pioneering case"[235] was completely absent from the opinion.

I belabor the point to illustrate that the anti-commandeering rule announced in *New York* and further developed in *Printz* had absolutely no effect on an active, contemporaneous body of caselaw concerning the VRA's preclearance regime. Eventually, in 2008, the Court was explicitly asked to rule that a particular application of the VRA's preclearance requirements worked an unconstitutional command to state governments in violation of the principles articulated in *New York* and *Printz*.[236] It declined the invitation, ruling instead that the disputed reversion to the state's prior practice was not a "change" that required preclearance under the language of the statute.[237]

To be clear, I am not arguing that the Court in these cases considered and squarely decided that appropriate exercises of Reconstruction power are exempt from the anti-commandeering rule. I am, however, suggesting that we can infer something meaningful about the fact that the Court did not feel that it needed to engage with commandeering principles in deciding these cases.[238] In any event, it is descriptively accurate to observe that the Court, in its lengthy history examining the Voting Rights Act, has repeatedly upheld preclearance against

the federal government regarding its ability to mandate states to run their own governments in any particular way, this Court has authorized some incursions into state sovereignty by upholding the constitutionality of Section 5 of the Voting Rights Act." *Id.* at 13.

[235] Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1476 (2018).

[236] Brief for Appellant at 47, Riley v. Kennedy, 553 U.S. 406 (2008) (No. 07-77) (arguing that the district court's decision "allows the federal government to dictate the substance of state law and comes perilously close - if it does not go all the way - to authorizing precisely the sort of 'commandeering' of state governmental processes that the Constitution condemns"); *see also* Reply Brief for Appellant at 18, *Riley*, 533 U.S. 406 (No. 07-77) (arguing that *New York*'s anti-commandeering rule requires reversal of the district court's VRA decision).

[237] *Riley*, 553 U.S. at 411.

[238] Scholars have reflected a similar approach. *See, e.g.*, Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After* Tennessee v. Lane, 66 OHIO ST. L.J. 177, 179, 183-85 (2005) (considering the ongoing vitality of preclearance in light of the New Federalism, but assessing only the substantive *City of Boerne* requirements and not the commandeering doctrine); Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710, 1714-15 (2004) (discussing federalism concerns presented by the VRA without addressing commandeering principles).

constitutional challenge in spite of the commandeering qualities readily apparent in that regime.[239]

While this chronology is itself significant, there is arguably even more to learn from the cases in which the Court has *trimmed back* Congress's VRA enactments. Even where the Court has concluded that Congress went too far, the conclusions were not grounded in the commandeering nature of the VRA. The federalism concerns were instead accounted for through the substantive assessment of whether the challenged provision was an "appropriate" exercise of enforcement power. Consider the VRA Amendments of 1970,[240] which required states to lower the voting age to eighteen — not only for federal elections, which Congress could have achieved through its power under the Elections Clause, but also for state and local elections.[241] To support the latter exercise of power, Congress explicitly invoked its authority under Section 5 of the Fourteenth Amendment, positing that young adults excluded from the political process were being denied due process and equal protection rights.[242] The Court invalidated this provision in *Oregon v. Mitchell*, but not because of its commandeering nature.[243] As with the cases surveyed above in which the Court upheld various provisions of the VRA, here too the Court made no mention of the commandeering quality of the instruction to state legislatures. Instead, the defect lay in Congress's inability to show that the lowering of the voting age operated as a remedy for any unconstitutional conduct, given that age is not a protected category under the Court's equal protection jurisprudence.[244]

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[239] *See* Jackson, *supra* note 9, at 2208, 2208 n.129 ("'Commandeering' of state governments, in the sense of requiring affirmative state action to comply with federal requirements (for changing voting laws), has already been upheld under the post-Civil War Amendments.").

[240] Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314.

[241] Oregon v. Mitchell, 400 U.S. 112, 117, 122-23 (1970) (affirming Congress's power under the Elections Clause "to regulate congressional elections, including the age and other qualifications of the voters," as well as presidential elections).

[242] *See id.* at 126, 128; *see also* Voting Rights Act Amendments of 1970 § 301(a)(2) (finding that requiring a citizen to be twenty-one to vote "has the effect of denying to citizens eighteen years of age . . . the due process and equal protection of the laws").

[243] *Mitchell*, 400 U.S. at 118, 130.

[244] *See id.* at 126-28 ("Above all else, the framers of the Civil War Amendments intended to deny to the States the power to discriminate against persons on account of their race. While this Court has recognized that the Equal Protection Clause of the Fourteenth Amendment in some instances protects against discriminations other than those on account of race, . . . it cannot be successfully argued that the Fourteenth Amendment was intended to strip the States of their power, carefully preserved in the original Constitution, to govern themselves. The Fourteenth Amendment was surely not intended to make every discrimination between groups of people a constitutional

The voting age requirement was therefore not an "appropriate" exercise of enforcement power.[245]

More recently, and well after the decisions in *New York* and *Printz*, the Court struck down the coverage formula in Section 4 of the VRA, concluding that it was no longer a constitutional exercise of Congress's enforcement power "in light of current conditions."[246] No one reading *Shelby County v. Holder* could come away with the impression that the majority was insufficiently attentive to federalism concerns.[247] That is precisely what makes it notable that the Court invited Congress to produce a new coverage formula, one "based on current conditions," rather than making preclearance categorically off-limits as impermissible commandeering.[248]

Perhaps, one might say in response to this slender précis of VRA litigation, voting is in a category of its own, so that the lessons of this chronology don't necessarily apply to other instances of remedial commandeering.[249] Voting surely is a special case — it is "preservative of all rights"[250] — but when we focus specifically on the commandeering question, the unique qualities of this context militate in both directions. One could argue that the states are already in the business of holding elections, unlike regulating the disposal of radioactive waste or assisting with background checks for handgun purchases, and so the VRA apparatus does not conscript states into a regulatory realm from which they would otherwise be completely absent.[251] Thinking in this vein we might describe preclearance as merely requiring that covered states confer with federal officials to check their work, so to speak, rather than driving state officials into terrain they had intentionally chosen to avoid.

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denial of equal protection. Nor was the Enforcement Clause of the Fourteenth Amendment intended to permit Congress to prohibit every discrimination between groups of people. . . . Congress may only 'enforce' the provisions of the amendments and may do so only by 'appropriate legislation.'" (footnote omitted) (citations omitted)).

245 *Id.* at 128, 130.

246 Shelby Cty. v. Holder, 570 U.S. 529, 550-51 (2013).

247 *See id.* at 542-45 (discussing state sovereignty at length and observing that the VRA constitutes "extraordinary legislation otherwise unfamiliar to our federal system" (quoting Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 211 (2009))).

248 *Id.* at 557.

249 *See, e.g.*, Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 889 (1998) (suggesting "that Congress's need to commandeer nonfederal governments' *electoral* process is greater than its need to commandeer nonfederal governments' *regulatory* processes") (emphasis in original).

250 *Mitchell*, 400 U.S. at 241 (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

251 I thank Sam Kamin for this point.

The difficulty with treating the VRA as a lesser form of commandeering than those invalidated in *New York* and *Printz* is simply that it is exceptionally "tough medicine."[252] As one scholar asserts, the preclearance "measure stands alone in American history in its alteration of authority between the federal government and the states and the unique procedures it requires of states and localities that want to change their laws."[253] But regardless of whether one considers the VRA's preclearance regime or the take-title provision at issue in *New York* as a greater intrusion on state sovereignty, *Printz* explicitly refutes the idea that the magnitude of the intrusion into state sovereignty figures into the commandeering analysis.[254] We could stipulate that the VRA works a lesser intrusion into state sovereignty than the take-title provision invalidated in *New York*, but under the lesson of *Printz* that comparative advantage wouldn't salvage it. *Printz* makes clear that any conscription, no matter how minor or temporary, would qualify.[255]

In any event, we have examples of remedial commandeering accepted by the Court in other contexts. Consider the ADA, enacted "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[256] In the ADA, Congress expressly invoked "the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce."[257] Title I of the ADA, concerning "Employment," prohibits discrimination against qualified individuals with a disability "in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[258] It is immediately apparent that unlike the VRA, this provision imposes

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[252] Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 177 (2007) ("Because Congress acted at the apex of its power to enforce the guarantees of the post-Civil War Amendments in passing the VRA, the Court could stomach the tough medicine that is section 5 of the Act.").

[253] *Id.*; *see also* Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 96 (2013) (discussing *Shelby County* and noting that "despite the Court's care to avoid ruling on section 5, it was the indignity that '[s]tates must beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own' that provided the unacceptable constitutional insult'" (footnote omitted)).

[254] Printz v. United States, 521 U.S. 898, 932 (1997).

[255] *See id.*

[256] Americans with Disabilities Act of 1990, 42 U.S.C. § 12101(b)(1) (2018). For a fuller discussion of the legislative history leading up to the Act, see Tennessee v. Lane, 541 U.S. 509, 516 (2004).

[257] 42 U.S.C. § 12101(b)(4).

[258] *Id.* § 12112(a) (2018).

duties on both state and private employers, as the Fair Labor Standards Act ("FLSA") had done before it.[259] It is therefore not an instance of commandeering as the Court has defined it.[260]

Title II, however, is different, concerning only "Public Services."[261] It defines "public entity" to include "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government." It then provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[262] Although this provision is not generally applicable, limited in scope as it is to public entities, we still must pause before concluding that it constitutes commandeering. The provision is most naturally read as one that confers rights on private individuals — those with a disability who are otherwise eligible for the "services, programs, or activities of a public entity."[263] Read in this way, there is reason to wonder whether this would qualify as commandeering, given the Court's explanation in *Murphy* that a provision might be read as a valid preemption provision if it confers rights or responsibilities on private individuals.[264] The problem is that Title II, as the Court has observed, does more than just preempt contrary state law — it imposes upon states an "affirmative obligation to accommodate persons with disabilities in the administration of justice."[265] By requiring states to take "reasonable measures to remove architectural and other barriers to accessibility," Title II and its implementing regulations function as a set of instructions to state officials, and imposes monetary damages for failure to

[259] *See generally* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (upholding the application of FLSA to the states).

[260] *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1478 (2018) ("The anticommandeering doctrine does not apply when Congress evenhandedly regulates an activity in which both State and private actors engage."). In *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 368 (2001), the Court ruled that the imposition of money damages against states under Title I of the ADA exceeded Congress' authority to enforce the Fourteenth Amendment's prohibition on "irrational state discrimination in employment against the disabled."

[261] 42 U.S.C. § 12132 (2018).

[262] *Id.*

[263] *See id.*

[264] *Murphy*, 138 S. Ct. at 1480 (noting that all preemption provisions "work in the same way: Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with the federal law; and therefore the federal law takes precedence and the state law is preempted.").

[265] Tennessee v. Lane, 541 U.S. 509, 533 (2004).

comply.[266] It nonetheless has been upheld as an appropriate exercise of Congress's power under Section 5 of the Fourteenth Amendment.[267] In so ruling, the Court applied the congruence and proportionality test from *City of Boerne* and concluded that Title II was a "reasonable prophylactic measure" to remedy a widespread pattern of people being excluded from courthouses and court proceedings by reason of their disabilities.[268]

In sum, the Court has repeatedly evaluated whether enforcement legislation is "appropriate" without applying commandeering principles to statutes that conscript unwilling state officials or "issue direct orders to state legislatures."[269] The anti-commandeering rule has never been layered on top of the first-order assessment of whether the challenged legislation is an "appropriate" exercise of enforcement power. Whether it be the deferential test applied in the era of *Katzenbach v. Morgan*[270] or *City of Boerne*'s more stringent congruence and proportionality test, if

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[266] *See id.* at 531.

[267] *Id.* at 533-34.

[268] The record included "numerous examples of the exclusion of persons with disabilities from state judicial services and programs, including exclusion of persons with visual impairments and hearing impairments from jury service, failure of state and local governments to provide interpretive services for the hearing impaired, failure to permit the testimony of adults with developmental disabilities in abuse cases, and failure to make courtrooms accessible to witnesses with physical disabilities." *Id.* at 527, 533.

[269] The Court itself has suggested in passing that anti-commandeering principles do not apply to Section 5 legislation. In *Pennsylvania Dept. of Corr. v. Yeskey*, 524 U.S. 206 (1998), the Court interpreted Title II of the ADA to include state prisons and state prisoners. The Court refused to consider the state's belatedly raised constitutional objections to the ADA:

> We do not address another issue presented by petitioners: whether application of the ADA to state prisons is a constitutional exercise of Congress's power under either the Commerce Clause, *compare* Printz v. United States, 521 U.S. 898, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997), *with* Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985), or § 5 of the Fourteenth Amendment, see City of Boerne v. Flores, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997).

Id. at 212. As Professors Adler and Kreimer argue, a "fair implication of the comment is that *Printz* limits legislation adopted pursuant to the Commerce Clause, while legislation adopted pursuant to the Fourteenth Amendment is exempt from that limit if appropriate under the standards of *Boerne*." Adler & Kreimer, *supra* note 10, at 123 n.154. They go on to observe that the "Court in *Yeskey* virtually invited a properly raised challenge to the provisions of the Americans with Disabilities Act that require state accommodation of the needs of handicapped individuals." *Id.* at 126. When the time came, the Court upheld these provisions in *Tennessee v. Lane*, 541 U.S. at 533-34.

[270] 384 U.S. 641, 652 (1966).

Congress has satisfied it, the inquiry is at an end.[271] Remedial legislation should not also be subjected to the commandeering constraint.

III. REMEDIAL COMMANDEERING'S FUTURE

As explained above, the application of commandeering doctrine to remedial legislation would be unprecedented. It would also be grievously damaging to the vitality of landmark statutory regimes like the VRA and the ADA — each in their own way immensely important to the vindication of equal protection and due process principles in American life. And yet understanding that Congress is free from the constraints of the anti-commandeering rule when it exercises Reconstruction power is about more than just holding the line in defense of existing legislation — it is about creating space for a variety of ambitious new proposals currently circulating in the political arena and in scholarly discourse. As it turns out, remedial commandeering appears as a common element of various initiatives being offered to tackle problems that range from election integrity to reproductive choice to police misconduct. This Part offers a brief look at some of these proposals and then explains why it is no accident that each of them contains direct orders to state officials.

A. Remedial Commandeering in Proposed Legislation

1. HR 1: For the People Act of 2021

American democracy, as one scholar observes, "is more fragile today than in recent memory."[272] Others put the matter more bluntly, urging us to recognize that "American democracy is in crisis."[273] Political campaigns have become so obscenely expensive to run that members of Congress are utterly beholden to wealthy donors, offering them an influence over the lawmaking process that is nothing short of corrupt.[274]

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[271] As well as the equal sovereignty principle and the "current conditions" rule applied in *Shelby Cty. v. Holder*, 570 U.S. 529, 550 (2013).

[272] Tabatha Abu El-Haj, *Making and Unmaking Citizens: Law and the Shaping of Civic Capacity*, 53 U. MICH. J.L. REFORM 63, 65 (2019).

[273] *E.g.*, LAWRENCE LESSIG, THEY DON'T REPRESENT US: RECLAIMING OUR DEMOCRACY, at ix (2019).

[274] *See, e.g.*, Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1706 (1999) ("[T]he conventional view is that American politics is more vacuous, more money driven, more locked up than ever."); Lawrence Lessig, *Corrupt and Unequal, Both*, 84 FORDHAM L. REV. 445, 448 (2015) (explaining the institutional corruption created by Congress's "dependence on a tiny

Incumbent officials redraw electoral districts in a way that favors their own party,[275] creating a stranglehold on power that the Supreme Court has said is unreviewable by federal courts.[276] Voter suppression efforts have taken on renewed vigor in the wake of *Shelby County*,[277] with dozens of states passing restrictive voter ID laws, cutting back on early voting, and imposing onerous registration requirements.[278] Researchers have shown that these laws "have a differentially negative impact on the turnout of racial and ethnic minorities,"[279] and there is evidence that this is exactly what they were intended to do.[280] While these dynamics have been accelerating for some time, the armed siege of the nation's capital on January 6, 2021, seeking to violently overturn the results of the 2020 presidential election, served as an explosive reminder that ours is not currently "a democratic republic in vibrant good health."[281]

number of campaign funders"). The Center for Responsive Politics estimates that $14 billion was spent on the 2020 election, more than double the amount spent in 2016. *2020 Election to Cost $14 Billion, Blowing Away Spending Records*, OPENSECRETS.ORG (Oct. 28, 2020, 1:51 PM), https://www.opensecrets.org/news/2020/10/cost-of-2020-election-14billion-update/ [https://perma.cc/7QGA-NAFW].

275 *See Article III — Justiciability — Political Question Doctrine* — Rucho v. Common Cause, 133 HARV. L. REV. 252, 252 (2019) ("If electoral districting is left to incumbent legislatures, it becomes a tool to stack the political process against disempowered opponents.").

276 *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2506-07 (2019).

277 570 U.S. 529 (2013).

278 *See New Voting Restrictions in America* 1, BRENNAN CTR. FOR JUST. (2019), https://www.brennancenter.org/our-work/research-reports/new-voting-restrictions-america [https://perma.cc/U2SL-LZ2D] [hereinafter *New Voting Restrictions*].

279 Zoltan Hajnal, Nazita Lajevardi & Lindsay Nielson, *Voter Identification Laws and the Suppression of Minority Votes*, 79 J. POL. 363, 363 (2017).

280 *See, e.g.*, N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204, 214 (4th Cir. 2016) (striking down voter ID law that "target[ed] African American voters with almost surgical precision," and noting that Republican leaders drafted the restrictions only after receiving data indicating that African Americans would be the voters most significantly affected). Thomas Hofeller, the Republican strategist described as the "Michelangelo of gerrymandering," specifically advised Republicans on how to draw districts that would be "advantageous to Republicans and Non-Hispanic Whites." *The Hofeller Files*, COMMON CAUSE (June 17, 2019), https://www.commoncause.org/resource/the-hofeller-files/ [https://perma.cc/5J3U-ZFUU].

281 Jack Holmes, *If We Don't Pass H.R. 1, 'We Are F*cked as a Nation,'* ESQUIRE (Jan. 25, 2021), https://www.esquire.com/news-politics/a35296946/hr1-for-the-people-bill-reform-money-in-politics/ [https://perma.cc/ZL4L-KUAL]. Writing in December 2020, *before* the attack on the Capitol, former National Security Adviser Susan Rice described the 2020 election as "our democracy's near-death experience." *See* Susan Rice, Opinion, *Our Democracy's Near-Death Experience*, N.Y. TIMES (Dec. 1, 2020), https://www.nytimes.com/2020/12/01/opinion/trump-biden-democracy.html [https://perma.cc/5RAP-APJM].

Democratic lawmakers understood the urgency of repairing our electoral system even before they faced insurrectionists in the halls of the Capitol. When Democrats regained control of the House in 2019, their first order of business was HR 1,[282] a massive democracy reform bill addressing campaign finance, voting rights, redistricting, and government ethics.[283] Professor Lawrence Lessig described it as "the most important civil rights bill in half a century,"[284] explaining both the symbolic and practical importance of the commitment to "fix democracy first."[285] At the time, with Republicans controlling both the Senate and the White House, there was no realistic prospect that the bill would be enacted. But H.R. 1 was reintroduced on January 4, 2021, and with President Biden in the White House and Democrats holding the slimmest majority in the Senate, it now stands a chance of becoming law.[286]

H.R.1 hasn't lacked for criticism, including the assertion that various provisions relating to campaign finance and electioneering communication would unduly burden speech and associational rights in violation of the First Amendment.[287] Putting these objections aside,

[282] *See* For the People Act of 2019, H.R. 1, 116th Cong. (2019).

[283] *See* Peter Overby, *House Democrats Introduce Anti-Corruption Bill as Symbolic 1st Act*, NPR (Jan. 5, 2019, 7:01 AM EDT), https://www.npr.org/2019/01/05/682286587/house-democrats-introduce-anti-corruption-bill-as-symbolic-first-act [https://perma.cc/95QB-GEY7].

[284] Lawrence Lessig, Opinion, *Democratic House Will Address Most Important Civil Rights Issue in Half Century*, USA TODAY (Dec. 18, 2018, 4:00 AM EDT), https://www.usatoday.com/story/opinion/2018/12/18/reform-congress-candidates-president-preserve-democracy-campaign-finance-bill-column/2336790002/ [https://perma.cc/9H4V-M5TR].

[285] Lawrence Lessig, *American Democracy Is Broken. We Must Demand 2020 Candidates Commit to a Fix*, GUARDIAN (May 5, 2019, 6:00 AM EDT), https://www.theguardian.com/commentisfree/2019/may/05/american-democracy-is-broken-we-must-demand-2020-candidates-commit-to-a-fix [https://perma.cc/24TA-DBRX].

[286] G. Michael Parsons, *The Peril and Promise of Redistricting Reform in H.R.1*, HARV. L. REV. BLOG (Feb. 2, 2021), https://blog.harvardlawreview.org/the-peril-and-promise-of-redistricting-reform-in-h-r-1/ [https://perma.cc/6V94-GSMD]; *see also* Nicholas Stephanopoulos, *H.R. 1 and Redistricting Commissions*, ELECTION LAW BLOG (Jan. 9, 2019, 7:30PM), https://electionlawblog.org/?p=103123 [https://perma.cc/WX2C-Z6K2] ("If Democrats win unified control of Washington in 2020, it's also likely that some or all of H.R. 1 will become law. If that happens, it would be a development of earthshaking significance, at least as important as the enactment of the Voting Rights Act in 1965 or the Federal Election Campaign Act in 1974.").

[287] *See, e.g.*, Letter from ACLU Opposing H.R. 1 (Mar. 6, 2019), https://www.aclu.org/sites/default/files/field_document/aclu_h.r._1_vote_recommendation_letter.pdf [https://perma.cc/85C3-LZA9] (arguing H.R. 1 would unconstitutionally burden free speech and associational rights).

for our purposes one of the bill's most noteworthy features is that it is absolutely filled with direct instructions to state governments.[288] A partial sampling of the requirements that it imposes on state officials includes: providing for automatic voter registration, internet registration, and same-day registration; [289] ensuring the availability of early voting;[290] prohibiting voter caging and the removal of individuals from voting rolls for failure to vote in a previous election;[291] and prohibiting felon disenfranchisement.[292]

For the most part the bill imposes requirements that are limited to federal elections, and thus adequately grounded upon Congress's authority under Article I's Elections clause.[293] But the bill's drafters are also clearly intending to draw upon Congress's Reconstruction powers as authority for the sweeping reforms. In Section 3, "Findings of General Constitutional Authority," the bill offers an extended discussion of congressional authority "to legislate to enforce the provisions of the Fourteenth Amendment, including its protections of the right to vote and the democratic process."[294] The text explains that both Section 1 and Section 2 of the 14th Amendment protect the fundamental right to vote, and therefore "Congress finds that it has the authority pursuant to section 5 of the Fourteenth Amendment to protect the right to vote."[295] Specifically addressing racial

[288] *See* For the People Act of 2021, H.R. 1, 117th Cong. § 2(b) (2021).

[289] *See* H.R. 1 § 1001, 1012, 1031.

[290] *See* H.R. 1 § 1611.

[291] *See* H.R. 1 §§ 1201, 2502.

[292] *See* H.R. 1 § 1402, 1403.

[293] As explored above, the possibility that Congress may be empowered to commandeer state officials pursuant to the Elections Clause offers some lessons for the Reconstruction powers. *See supra* Part II.C.

[294] H.R. 1 § 3 (3)(A).

[295] H.R. 1 §§ 3 (3)(B), (3)(C). Section Two of the Fourteenth Amendment provides that "Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state." U.S. CONST. amend XIV, § 2. As Professor Franita Tolson has argued, the extraordinary punitive measure authorized by Section 2 presupposes Congress's power to impose lesser obligations on states regarding the right to vote. *See* Franita Tolson, *What Is Abridgement: A Critique of Two Section Twos*, 67 ALA. L. REV. 433, 457 (2015).

discrimination in voting and access to the political process, the bill invokes congressional authority "pursuant to both section 5 of the Fourteenth Amendment, which grants equal protection of the laws, and section 2 of the Fifteenth Amendment, which explicitly bars denial or abridgment of the right to vote on account of race, color, or previous condition of servitude."

The drafters again invoke Congress's 14th Amendment powers, along with the Elections Clause, as authority for the redistricting reform elements of the statute.[296] This part of the bill requires that redistricting be done by an independent bipartisan commission, and sets detailed criteria for eligibility for service as a commissioner, including prohibitions on individuals who are holding or have held public office for a specified period of time.[297] The bill goes on to impose substantive requirements for the drawing of congressional districts, including "minimizing the division of communities of interest and a ban on drawing maps to favor a political party."[298] Remarkably, the bill would also require that every state redistricting commission "hold each of its meetings in public, shall solicit and take into consideration comments from the public, including proposed maps, throughout the process of developing the redistricting plan for the State, and shall carry out its duties in an open and transparent manner which provides for the widest public dissemination reasonably possible of its proposed and final redistricting plans."[299]

As scholars have noted, this extensive list of "federal orders to the states" makes the bill susceptible to allegations of commandeering.[300] But critics of H.R. 1 who invoke the anti-commandeering doctrine to decry the bill as unconstitutional have failed to consider the limits on the reach of that doctrine.[301] H.R. 1 does indeed rely pervasively on

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[296] *See* H.R. 1 § 2400.

[297] *See* H.R. 1 §§ 2401-2415.

[298] H.R. 1 § 2401(c)(5).

[299] H.R. 1 § 2413(b)(1).

[300] *See, e.g.*, Nicholas O. Stephanopoulos, *The Anti-Carolene Court*, 2019 SUP. CT. REV. 111, 155 (noting that conservative critics of H.R. 1 have opined that it "would surely invite legal challenge as a violation of the anti-commandeering doctrine"); *Anticommandeering — Gerrymandering*, *supra* note 204, at 1806 ("While opponents of H.R. 1 allege the redistricting provision is unconstitutional on anticommandeering grounds, text, precedent, history, and purpose demonstrate otherwise.").

[301] Richard Kisielowski, *Democrats' HR1: An Attempt to Commandeer America's Elections – An Overview*, REPUBLIC NAT'L LAW. ASS'N (Feb. 1, 2019), https://www.rnla.org/democrats_proposed_hr1 [https://perma.cc/7DLA-W3SE] (purporting to identify "over 30 significant new mandates placed on the states from the federal government, not including the dozens of other smaller requirements, policies, and centralized standards placed on the

direct instructions to state officials. But as explained in detail throughout this Article, Congress is welcome to do so when legislating pursuant to its powers under the Reconstruction Amendments. H.R. 1 illustrates how essential it is to recognize this principle in order to achieve structural democracy reform. If Congress endeavors to ensure that state elections are carried out in a manner that is fully consistent with Fourteenth and Fifteenth Amendment obligations, it will very likely need to issue direct instructions to state officials in a form that would qualify as commandeering.[302] Whatever its other merits or shortcomings, any aspects of the For the People Act that can be grounded upon Congress's authority under the Fourteenth and Fifteenth Amendments are exempt from the commandeering prohibition.

2. Voting Rights Advancement Act of 2019

Because the obstacles to HR 1's enactment were so formidable in 2019, Democrats in Congress introduced a separate bill addressing a much more discrete and manageable concern related to voting rights: providing a new coverage formula in the wake of *Shelby County*.[303] As many had feared, the Court's invalidation of the coverage formula had an immediate and destructive effect, with dozens of states enacting laws making it harder to vote, and a thirty-three percent increase in the number of people being purged from voter rolls across the country.[304]

50 states and over 8,000 local jurisdictions that administer elections in the nation"); *see also* Ilya Shapiro & Nathan Harvey, *What Left-Wing Populism Looks Like*, NAT'L REV. (Mar. 7, 2019), https://www.nationalreview.com/2019/03/democrats-for-the-people-act-unconstitutional-left-wing-populism/ [https://perma.cc/S2YT-9QU6] (asserting that the bill "would surely invite legal challenge as a violation of the anti-commandeering doctrine established by the Supreme Court in New York v. United States (1992) and reiterated just last year in Murphy v. NCAA (2018), which prohibits the federal government from conscripting state officials into carrying out preferred policies"); Walter Olson, *House Passes Political-Ombibus Bill H.R.1*, CATO INST. (Mar. 11, 2019, 9:53AM), https://www.cato.org/blog/house-passes-political-omnibus-bill-hr-1 [https://perma.cc/URP2-9HMF] (opining that the bill "would likely run into the Supreme Court's doctrine against federal 'commandeering' of state government resources").

302 Stephanopoulos, assessing whether HR 1 could qualify as an appropriate exercise of Section 5 power, considers only whether the measure can satisfy *City of Boerne*'s congruence and proportionality test — the implicit assumption is that as an exercise of Fourteenth Amendment regulatory authority, it would not also be subjected to anti-commandeering principles. *See* Stephanopoulos, *supra* note 300, at 153-56.

303 570 U.S. 529 (2013).

304 *See New Voting Restrictions*, *supra* note 278, at 1; *Voter Purges*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/issues/ensure-every-american-can-vote/vote-suppression/voter-purges (last visited Dec. 23, 2020) [https://perma.cc/RLM8-H9R2].

Perhaps unsurprisingly, the rate of increase in voter purges was highest in jurisdictions with a history of voting discrimination.[305]

The Voting Rights Advancement Act of 2019 ("VRAA") passed in the House in December 2019 but never made it out of the Senate.[306] Like the original VRA, it would apply to state elections as well as federal elections, necessitating its constitutional grounding on the Fourteenth and Fifteenth Amendments.[307] In addition to updating the VRA's coverage formula, the VRAA adds a "practice-based preclearance" regime that would subject certain types of election laws to the preclearance requirement, no matter the jurisdiction.[308] As discussed extensively above, preclearance is a form of commandeering — it very clearly communicates to the states what they may and may not do — but one that has always been considered exempt from the prohibition. Although the VRAA has not yet been reintroduced at the time of this writing, it remains a priority for Democratic lawmakers and voting rights advocates, and a spokesperson for President Biden indicated that he will work for its enactment.[309] If anything, its urgency has become only more pronounced as a backlash emerges to the historic voter turnout of the 2020 election: by the end of January 2021, legislators in twenty-eight states had introduced 106 bills that would restrict the right to vote in various ways.[310] Restoring a preclearance regime to subject such measures to appropriate scrutiny is an essential element of revitalizing our democracy. And that, in turn, depends on our firm recommitment to the principle that Congress may issue direct orders to

[305] *Voter Purges*, *supra* note 304.

[306] Voting Rights Advancement Act of 2019, H.R. 4, 116th Cong. (2019). In July 2020, it was renamed the John Lewis Voting Rights Advancement Act as a tribute to the late congressman's lifelong dedication to civil rights.

[307] As discussed extensively above, the original Voting Rights Act was enacted pursuant to Congress's authority under the Fifteenth Amendment. *See* The Voting Rights Act, Pub. L. No., PL 89-110, 79 Stat. 437 (describing the bill as "An Act To enforce the fifteenth amendment to the Constitution of the United States").

[308] *See* H.R. 4 § 4(a) and (b). Examples include: any changes to the documentation or requirements to vote; any change that "reduces, consolidates, or relocates voting locations"; and any "change to the maintenance of voter registration lists that adds a new basis for removal from the list of active registered voters or that puts in place a new process for removing a name from the list of active registered voters."

[309] Marty Johnson, *Urgency Mounts for New Voting Rights Bill*, HILL (Jan. 16, 2021), https://thehill.com/homenews/administration/534427-urgency-mounts-for-new-voting-rights-bill [https://perma.cc/YQ7M-YV3Y].

[310] Gabby Birenbaum, *State GOPs Have Already Introduced Dozens of Bills Restricting Voting Access in 2021*, VOX (Jan. 29, 2021), https://www.vox.com/22254482/republicans-voter-suppression-state-legislatures [https://perma.cc/ZL8R-68BF].

the states when legislating pursuant to the Reconstruction Amendments.

3. Federal Protection for Reproductive Rights

As important as remedial commandeering has been to the robust and effective protection of voting rights, its presence is not limited to that context: commandeering mechanisms have also appeared in legislation designed to safeguard other constitutional rights, such as reproductive decision-making. Beginning with the landmark decision in *Roe v. Wade*,[311] and since reiterated in other cases, the Court has explained that "the Constitution protects a woman's right to terminate her pregnancy in its early stages."[312] Nonetheless, over the last decade a growing number of states have sought to limit access to abortion, without explicitly banning it outright, by imposing burdensome regulations on abortion providers that make it nearly impossible for such facilities to function.[313] Because these laws tend to target abortion providers while leaving unregulated other medical procedures with much higher health risks, they are sometimes described as "targeted restrictions on abortion providers," or "TRAP" laws.[314] Striking down two such laws in *Whole Woman's Health v. Hellerstedt*, the Supreme Court explained that the laws were unconstitutional because they placed a substantial obstacle in the path of women seeking a pre-viability abortion without corresponding medical benefit.[315] Federal litigation challenging state TRAP laws has been successful in many instances, but the process is slow, costly, and wrought with

311 410 U.S. 113 (1973).

312 Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 844 (1992).

313 According to the Center for Reproductive Rights, "[i]n 2016 alone, eighteen states enacted fifty new abortion restrictions, bringing the total number of new abortion restrictions enacted since 2010 to a staggering 338." RESTORING OUR RIGHTS: THE WOMEN'S HEALTH PROTECTION ACT 6, CTR. FOR REPROD. RTS. (2017), https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/USPA-AWF-WHPA-Report-Web.pdf [https://perma.cc/66YC-U2UY].

314 *See, e.g.*, *Targeted Regulation of Abortion Providers (TRAP)*, CTR. FOR REPROD. RTS. (Aug. 28, 2015), https://reproductiverights.org/document/targeted-regulation-abortion-providers-trap [https://perma.cc/2P4M-MJTE] (using the TRAP acronym and explaining that such "laws single out the medical practices of doctors who provide abortions and impose on them requirements that are different and more burdensome than those imposed on other medical practices.").

315 *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2310-11 (2016); *see also* June Med. Servs. LLC v. Russo, 140 S. Ct. 2103, 2112-13 (2020).

uncertainty.[316] Even a ruling from the Supreme Court invalidating a specific type of abortion restriction as an undue burden does not ensure that states will adjust their conduct accordingly. After the decision in *Whole Women's Health v. Hellerstedt*, for example, Louisiana continued to defend an admitting privileges statute that was "almost word-for-word identical" to the one that had been struck down in Texas — although the evidence demonstrating that the Louisiana law imposed a substantial obstacle was "even stronger and more detailed" than what had been available in Texas.[317] When the Supreme Court was eventually called upon to examine the Louisiana law, it observed that "[t]his case is similar to, nearly identical with, Whole Woman's Health. And the law must consequently reach a similar conclusion."[318]

To short-circuit this costly and wasteful cycle, advocates for reproductive rights have called for federal legislation protecting the right to obtain an abortion against undue burdens,[319] and lawmakers have responded accordingly in each of the last four legislative sessions. A comparison between the two most recent bills reveals the shadow that

316 *Hellerstedt* itself exemplifies this phenomenon: the district court enjoined the challenged provisions because it found that the number of facilities providing abortions dropped in half, from about forty to about twenty, as the admitting-privileges requirement began to be enforced. Upon taking effect, the surgical center requirements would reduce the number of clinics down to seven or eight. *See Whole Woman's Health*, 140 S. Ct. at 2301. The Fifth Circuit stayed the injunction, but then the Supreme Court vacated the stay. The Fifth Circuit eventually reversed the district court on the merits, allowing the provisions to go into effect. The provisions were in effect for more than a year before the Supreme Court reversed the Fifth Circuit. *Id.* at 2303.

317 *June Med. Servs.*, 140 S. Ct. at 2112, 2122.

318 *Id.* at 2133.

319 The Center for Reproductive Rights, for example, has announced that it "fully supports new legislation to protect abortion access." Press Release, *Center for Reproductive Rights Fully Supports New Federal Legislation to Protect Abortion Access*, CTR. FOR REPROD. RTS. (May 23, 2019), https://reproductiverights.org/press-room/new-federal-legislation-to-protect-abortion-access [https://perma.cc/QN52-SEVY]. The Guttmacher Institute has similarly urged that "Congress must take action to put an end to medically unnecessary restrictions and bans on abortion," Megan K. Donovan, *After the Latest Supreme Court Ruling on Abortion, the Women's Health Protection Act Is More Important than Ever*, GUTTMACHER INST. (July 30, 2020), https://www.guttmacher.org/article/2020/07/after-latest-supreme-court-ruling-abortion-womens-health-protection-act-more [https://perma.cc/W7LH-9K7Z], as has the Center for American Progress. Press Release, Nora Ellmann, *State Actions Undermining Abortion Rights in 2020*, CTR. FOR AM. PROGRESS (Aug. 27, 2020), https://www.americanprogress.org/issues/women/reports/2020/08/27/489786/state-actions-undermining-abortion-rights-2020/ [https://perma.cc/54Q4-6QVD] ("Congress should pass the Women's Health Protection Act, which would prohibit laws that ban abortion before viability and that impose medically unnecessary restrictions on abortion care.").

Murphy is casting over federal legislation, and the uncertainty that prevails over its reach.

The Women's Health Protection Act of 2017 ("WHPA"), introduced before *Murphy* was decided, identified a variety of targeted restrictions on abortion providers, and would have made it "unlawful" for those to be "imposed or applied by any government."[320] For example, the WHPA would have made it unlawful for a state to impose

> a requirement or limitation concerning the physical plant, equipment, staffing, or hospital transfer arrangements of facilities where abortions are performed, or the credentials or hospital privileges or status of personnel at such facilities, that is not imposed on facilities or the personnel of facilities where medically comparable procedures are performed.[321]

This prohibition on certain types of state laws would almost certainly constitute commandeering under *Murphy*'s formulation: the direct instruction to state lawmakers is clear, and the language closely parallels the invalidated provision of the PASPA that had purported to make it "unlawful" for states to authorize gambling.[322] Unlike PASPA, however, the WHPA was grounded both on Congress's power under Section 5 of the Fourteenth Amendment as well as its Commerce Clause authority;[323] while commandeering is a fatal defect for exercises of Commerce Clause power, a different result is required for legislation enacted pursuant to Section 5 of the Fourteenth Amendment.[324] As explored in detail above, *Murphy*'s mandate was limited to legislation enacted pursuant to the Commerce Clause, and was not intended to disrupt Congress's longstanding power to commandeer state officials in service of Fourteenth Amendment enforcement.[325]

Nonetheless, when lawmakers reintroduced the WHPA in 2019, they had clearly been chastened by *Murphy*. The new bill is functionally quite similar to the old one — it itemizes in detail which types of restrictions

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320 Women's Health Protection Act of 2017, H.R. 1322, 115th Cong. § 4(a) (2017).

321 H.R. 1322 § 4(a)(5).

322 *See supra* Part I.

323 Women's Health Protection Act of 2019, H.R. 2975, 116th Cong. § 2(18) (2019).

324 As controversial as abortion continues to be, it seems that the most restrictive state abortion regulations are in fact quite unpopular. *See* Neil S. Siegel, *Why the Nineteenth Amendment Matters Today: A Guide for the Centennial*, 27 DUKE J. GENDER L. & POL. 235, 240 (2020).

325 *See supra* Parts I.B.1, II.C.

on abortion providers are impermissible.[326] Included on this list, once again, is any

> requirement or limitation concerning the physical plant, equipment, staffing, or hospital transfer arrangements of facilities where abortion services are provided, or the credentials or hospital privileges or status of personnel at such facilities, that is not imposed on facilities or the personnel of facilities where medically comparable procedures are performed.[327]

But instead of speaking in terms that are directed to the states, making it "unlawful" for a state to impose such restrictions, the new bill would confer a statutory right on abortion providers and their patients to provide or obtain an abortion without being subject to the impermissible restrictions.[328] The bill's drafters took heed of *Murphy*'s mandate, bringing the new bill within the confines of a permissible preemption provision by conferring an entitlement on individuals rather than explicitly issuing an order to state officials.[329]

It was eminently sensible for the drafters of the updated WHPA to employ this workaround — in its new, *Murphy*-proof form, the legislation can be grounded upon either the Commerce Clause power or Congress's power under Section 5 of the Fourteenth Amendment.[330] As an exercise of Commerce Clause power, the bill would not have to withstand scrutiny under *City of Boerne*'s congruence and proportionality test.[331] But not every obligation that Congress might wish to impose on the states can be framed as a statutory entitlement conferred on individuals. As with the voting rights example above and the crisis of racialized police brutality considered in the next section, there are constitutional rights that cannot be enforced without direct instructions to state officials.

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[326] *See* Women's Health Protection Act of 2019, H.R. 2975, 116th Cong. § 4 (2019).

[327] *Id.*

[328] *See id.*

[329] *See* Murphy v. NCAA, 138 S. Ct. 1461, 1478 (2018).

[330] *See also* Freedom of Access to Clinic Entrances Act of 1994, Pub. L. No. 103-259, 108 Stat. 694, 694 (1994) (invoking both Commerce Clause authority and Section 5 of the Fourteenth Amendment for federal law criminalizing the violent or intimidating obstruction of access to reproductive health services).

[331] Since the bill would not authorize damages against state violators, but only injunctive relief, the abrogation of state sovereign immunity would not serve as a motive to ground the statute on Congress's Section 5 power.

4. Police Misconduct

Racialized police brutality is hardly a new phenomenon,[332] but new technologies have made it easier than ever to witness the excessive and often lethal force inflicted on unarmed people of color engaged in the dangerous business of interacting with police officers.[333] As the tragedies continue to accumulate, exemplified by the high profile deaths of George Floyd, Breonna Taylor, and Elijah McClain, public outrage has intensified.[334] But our growing awareness of the problem has done little to alleviate it: five years after the Ferguson protests, as one scholar explains, "the number and demographic profile of officer-involved shooting deaths have remained roughly constant. This occurred despite vigorous advocacy for more stringent rules constraining police violence and harsher repercussions when the rules are violated."[335]

An extensive scholarly literature reveals that existing legal regimes have proven inadequate to the task of providing accountability for these deaths, or for the much wider swath of abusive police practices including racial profiling; unlawful stops, arrests, and searches; the planting of evidence; and dishonesty under oath.[336] Explaining this persistent and systemic failure, some observers emphasize the "organizational culture of policing," especially "lax supervision and inadequate investigation of internal wrongdoing," that continues to bedevil structural reform efforts.[337] Others point out that doctrinal fixes, such as the exclusionary rule, are completely irrelevant to police wrongdoing that does not result in the collection of incriminating evidence.[338] Synthesizing these various critiques, Professors Jason Mazzone and Stephen Rushin explain that currently available mechanisms

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[332] *See* Eleanor Lumsden, *How Much Is Police Brutality Costing America?*, 40 U. HAW. L. REV. 141, 147 (2017) (providing a brief history of racialized policing, including slave patrols, the Black Codes, and the approval of state officials in lynchings).

[333] *See* Howard M. Wasserman, *Police Misconduct, Video Recording, and Procedural Barriers to Rights Enforcement*, 96 N.C. L. REV. 1313, 1319-20 (2018) (describing the significance of recording technology in "policing the police").

[334] *See* Oliver Holmes & Daniel Boffey, *"Abuse of Power": Global Outrage Grows After Death of George Floyd*, GUARDIAN (June 2, 2020), https://www.theguardian.com/us-news/2020/jun/02/abuse-of-power-global-outrage-grows-after-death-of-george-floyd [https://perma.cc/6AQQ-SXGK].

[335] Nirej Sekhon, *Police and the Limit of Law*, 119 COLUM. L. REV. 1711, 1712 (2019).

[336] *See, e.g.*, Michael S. Scott, *Progress in American Policing? Reviewing the National Reviews*, 34 LAW & SOC. INQUIRY 171, 172 (2009) (discussing the cyclical renewed interested in police reform every thirty to forty years).

[337] Mazzone & Rushin, *supra* note 146, at 271.

[338] *See id.* at 274.

> all suffer from similar defects. These mechanisms rely on piecemeal, reactive litigation — a strategy that is woefully inadequate to securing widespread and enduring reform. Police officers who violate individual rights face little risk of being held liable for their actions or of being otherwise sanctioned. Although the federal government has powers to investigate and pursue police misconduct, current constraints — resource limits, a lack of data, evidentiary requirements, and evasive tactics by police departments — limit the punch those powers can deliver.[339]

Mazzone and Rushin call upon Congress to enact federal legislation, modeled on the VRA, that would remedy police misconduct in a large-scale and systematic way.[340] Drawing upon the lessons of the VRA, they propose a new federal statute establishing "a coverage formula to identify the jurisdictions reached by the law and the reforms to be imposed upon those jurisdictions."[341] Noting some of the qualities that differentiate policing from voter suppression, they offer various metrics that Congress could use to identify jurisdictions that ought to be covered by a preventive police misconduct regime: the frequency of civilian deaths at the hands of law enforcement, for example, or the success rate of civil rights suits filed against officers.[342] Covered jurisdictions would then be subject to a variety of reforms designed to remedy and prevent constitutional violations, such as implementing early intervention systems and improving mechanisms for responding to citizen complaints.[343]

Other scholars have similarly invoked the idea that Congress has an essential role to play in the elimination of racialized police brutality. Writing in the aftermath of the murder of George Floyd, Professors Rebecca Brown and Omar Noureldin also call for Congress to use its Section 5 power "to ensure that the promise of 'due process of law' and the 'equal protection of the laws' without regard to race — so elusive throughout our history — finally materializes in the conduct of local law enforcement."[344] Brown and Noureldin propose a regime that would

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[339] *Id.* at 282.

[340] *Id.* at 282-83.

[341] *Id.* at 295.

[342] *See id.* at 296-310.

[343] *Id.* at 310.

[344] Rebecca L. Brown & Omar H. Noureldin, *INSIGHT: Congress Has Constitutional Power to Set National Police Conduct Standards*, BLOOMBERG L. (June 8, 2020, 1:01 AM), https://news.bloomberglaw.com/us-law-week/insight-congress-has-constitutional-power-

> create federal oversight of local police action, such as by requiring the establishment of citizen-staffed police commissions, appointing inspectors general in every city, imposing uniform standards of conduct like de-escalation norms, providing for mandated recording and public release of camera footage, and easing the often disabling evidentiary burdens and liability hurdles involved in victims' actions for monetary compensation.[345]

Even these brief descriptions should serve to illuminate the commandeering nature of proposals for national legislation to remedy police misconduct. As Mazzone and Rushin readily acknowledge, their proposed statute would commandeer state officials in precisely the way the VRA has done for more than fifty years.[346] Like the remediation of voter suppression, the elimination of police misconduct cannot be achieved by reframing the desired result as a statutory entitlement conferred on private individuals rather than a direct instruction to state officials. The workaround that lawmakers applied to the WHPA after *Murphy* was decided won't suffice here. As with the aspiration toward free and fair elections, equitable and responsible policing requires state actors to undertake an intricate set of actions and inactions, to make fine-grained and iterative adjustments in official decision-making, and to subject themselves to monitoring and engagement with federal officials, none of which can be fully captured simply by articulating a right that inheres in private individuals. It would thus be mistaken to conclude that the redrafting we saw at work in the WHPA can assuage the threat that *Murphy* may pose to Congress's enforcement power if the commandeering prohibition is erroneously applied to remedial legislation.

In sum, what can serve as a bulwark against state TRAP laws will not necessarily suffice to protect against other incursions. Indeed, even in the context of reproductive choice, we could imagine a future in which the right to choose was thought of as something more robust than the barest negative liberty to terminate a pregnancy without interference or assistance from the state. Following reproductive justice theorists, Congress might decide that the effective enforcement of a woman's constitutional right to choose requires states to provide sex education, to eliminate exemptions for contraception coverage in state insurance

to-set-national-police-conduct-standards?context=search&index=1 [https://perma.cc/6REY-NVB6].

345 *Id.*

346 *See* Mazzone & Rushin, *supra* note 146, at 331-32.

laws, to protect job security for pregnant workers, or provide state-level support for maternal and infant health.[347] Regardless of whether this seems politically unlikely at the present moment, the point is that there are numerous ways that Congress might seek to use its Section 5 enforcement power in a manner that would qualify as commandeering under *Murphy*'s formulation.

B. Short-circuiting the Iterative Evasion of Constitutional Duty

It is not an accident that across such a wide array of different substantive areas we can find proposals for remedial legislation that would include commandeering as a central aspect of the regulatory design. Commandeering is most important precisely in those areas where state disregard of constitutional rights has been most pronounced, intentional, and persistent — redistricting and voter ID laws that are not only politically motivated but racially discriminatory,[348] state laws that openly defy constitutional limits on abortion regulation,[349] pervasive police misconduct for which supervising departments provide impunity rather than accountability.[350] Plaintiffs may succeed in convincing a federal court

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[347] *See generally* Reva B. Siegel, *ProChoiceLife: Asking Who Protects Life and How — and Why It Matters in Law and Politics*, 93 IND. L.J. 207 (2018) (discussing a framework that "connects policies on sexual education, contraception, abortion, health care, income assistance, and the accommodation of pregnancy and parenting in the workplace.").

[348] *See, e.g.*, Michael Wines, *Deceased G.O.P. Strategist's Hard Drives Reveal New Details on the Census Citizenship Question*, N.Y. TIMES (May 30, 2019), https://www.nytimes.com/2019/05/30/us/census-citizenship-question-hofeller.html [https://perma.cc/VC8Q-VKS9] (discussing how the addition of the citizenship question on the census would facilitate the drawing of districts in Texas that "would dilute the political power of the state's Hispanics.").

[349] *See, e.g.*, Safia Samee Ali, *Federal Judge Blocks Missouri's Restrictive Abortion Law*, NBC NEWS (Aug. 27, 2019, 1:57 PM PDT), https://www.nbcnews.com/news/us-news/federal-judge-blocks-missouri-abortion-law-n1046846 [https://perma.cc/W77J-JRXG] (discussing Missouri's restrictive abortion law that was halted from taking effect by a federal judge).

[350] *See* Stephen Rushin, *Using Data to Reduce Police Violence*, 57 B.C. L. REV. 117, 149 (2016) ("[B]ecause decentralized law enforcement agencies take their cues from local political leaders, these systemic abuses are sometimes not just tolerated, but are even encouraged."); *see also* U.S. DEP'T OF JUST. CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 9-15, 62-78 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/T6UB-9EHF] (concluding that the Ferguson Police Department is more concerned with generating money than the fair administration of justice and that the Department's practices disproportionately harm the city's Black residents).

to strike down laws or enjoin policies that burden constitutional rights, but these victories are likely to provide only temporary respite as state lawmakers go back to the drawing board.[351]

We can see this phenomenon across a wide range of contexts. A restrictive voter identification law enacted in North Carolina was struck down by a federal appeals court because the challenged "provisions target African-Americans with almost surgical precision."[352] Within two years, a new version of the law was enacted and again struck down, the district court noting that the new law was still infected by the same discriminatory intent.[353] Not to be deterred by such setbacks, the North Carolina legislature enacted a third version in June 2020, this time bundling it with COVID-inspired provisions such as expanded voting by mail.[354] Texas is now defending against *Whole Woman's Health II*,[355] having enacted a fetal remains law soon after its previous attempt at targeted restriction of abortion providers was struck down in *Whole Woman's Health v. Hellerstedt*.[356] Unconstitutional policing practices in Pittsburgh prompted the Department of Justice to file suit against the Pittsburgh Bureau of Police, using a federal law that gives the Attorney General authority to initiate litigation against departments engaged in systemic misconduct; the substantial reforms achieved under the settlement completely unraveled once federal monitoring ended, with the mayor admitting that the city was likely "on the verge of another consent decree."[357] States and localities determined to burden constitutional rights view unfavorable federal court decisions as simply

[351] For reasons that have been explored in depth elsewhere, these victories are particularly hard to come by for plaintiffs challenging police misconduct. *See* Mazzone & Rushin, *supra* note 146, at 272-83.

[352] N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 214 (4th Cir. 2016) (noting that Republican leaders drafted the restrictions only after learning that African-Americans would be the voters most significantly affected).

[353] *See* N.C. State Conference of the NAACP v. Cooper, 430 F. Supp. 3d 15, 26, 35, 43 (M.D.N.C. Dec. 31, 2019) (noting that the subsequent voter ID law was also "imbued with discriminatory intent"). The Fourth Circuit reversed the preliminary injunction, concluding that the district court had improperly shifted the burden of proof to the state. N.C. State Conference of the NAACP v. Raymond, 981 F.3d 295, 311 (4th Cir. 2020).

[354] David Hawkings, *N.C. Legislators Clear Bill Combining Easier Mail Balloting with Voter ID*, FULCRUM (June 12, 2020), https://thefulcrum.us/north-carolina-voter-id-law [https://perma.cc/LQY7-HXEC].

[355] *See* Whole Woman's Health v. Hellerstedt (*Whole Woman's Health II*), 231 F. Supp. 3d 218, 222 (W.D. Tex. 2017).

[356] *See* Siegel, *supra* note 347, at 225.

[357] Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343, 1411 (2015).

providing the instruction manual for the next round of battle.[358] As long as state officials engage in the adaptive and iterative evasion of constitutional responsibilities, case-by-case litigation is destined to fall short of providing large-scale, systemic, and enduring reform.

We know this pattern well because it was the backdrop for the enactment of the VRA.[359] As the Court explained in one of its many rulings upholding the VRA, "[c]ase-by-case adjudication had proved too ponderous a method to remedy voting discrimination, and, when it had produced favorable results, affected jurisdictions often merely switched to discriminatory devices not covered by the federal decrees."[360] While this history is familiar, what we may not fully appreciate is the extent to which the pattern is a trans-substantive one, repeating itself across a wide variety of different matters.

To see how widely this phenomenon reaches, consider the newly emergent example of state statutes that criminalize whistle-blowing and undercover investigations in agricultural facilities.[361] Advocates are attacking these "ag-gag" measures one by one, and are succeeding in having them enjoined as violative of the First Amendment.[362] Federal

[358] Just hours after the Supreme Court refused to review the appellate court decision striking down North Carolina's 2013 voter ID law, legislative leaders began "calling for a new law that would incorporate some of the same ideas in a manner that they thought could withstand judicial review." *Cooper*, 430 F. Supp. 3d at 26. An even more aggressive dynamic permeates the abortion context. *See Whole Woman's Health II*, 231 F. Supp. 3d at 222 ("Facing the threat of an unfavorable decision from the Supreme Court in Whole Woman's Health, the Texas Department of State Health Services (DSHS) began plans for the next battle. Before the ink on the Supreme Court's opinion in Whole Woman's Health was dry, DSHS had already drafted amendments to Title 25 of the Texas Administrative Code §§ 1.132–1.136 (the Amendments), modifying the methods for disposal of fetal tissue. Four days after the Supreme Court issued its decision in Whole Woman's Health, the first draft of the proposed Amendments was published.").

[359] *See* Persily, *supra* note 252, at 177 (explaining that the coverage and preclearance remedy "was necessary because case-by-case adjudication of voting rights lawsuits proved incapable of reining in crafty Dixiecrat legislatures determined to deprive African Americans of their right to vote, regardless of what a federal court might order.").

[360] City of Rome v. United States, 446 U.S. 156, 174 (1980) (quoting South Carolina v. Katzenbach, 383 U.S. 301, 314 (1966)).

[361] *See, e.g.*, IDAHO CODE § 18-7042 (2020) (criminalizing "interference with agricultural production"); Animal Legal Def. Fund v. Wasden, 878 F.3d 1184, 1192 (9th Cir. 2018) (noting that the Idaho ag-gag law was passed after legislative hearings made clear the intent of the law was to protect dairy industry from being "persecuted in the court of public opinion.").

[362] As of this writing, ag-gag laws have been struck down in Utah, Idaho, Kansas, and Iowa. *See Wasden*, 878 F.3d at 1205; Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d 1193, 1195-96 (D. Utah 2017). The author discloses that the Animal Legal Defense Fund was represented in these cases by her spouse as well as another colleague

courts have repeatedly concluded that ag-gag laws are content-based restrictions on protected speech that cannot withstand the requisite strict scrutiny.[363] Achieving these victories, however, is costly and time-consuming, and has already resulted in state legislatures running back to the drawing board, enacting similar laws that improve upon the speech infringement defect in only minimal ways.[364] Iowa, for example, enacted its second ag-gag law merely two months after a federal judge struck down the first one; the second one has also been enjoined, with the federal court observing in December 2019 that the state defendants had still "not made any persuasive record regarding the interests the statute is said to serve."[365] On February 12, 2020, yet another bill was introduced into the Iowa state senate that would criminalize "false allegations regarding the mistreatment of animals."[366] The bill provides that an allegation is "conclusively presumed to be false" if it is based on evidence obtained by a person who accessed a commercial facility using deception — precisely the method employed by the undercover investigators that Iowa has been targeting in multiple rounds of ag-gag legislation.[367] The latest version, enacted into law in June 2020, is substantially improved in the sense that it does not specifically reference

at the University of Denver. See also People for the Ethical Treatment of Animals, Inc. v. Stein, 466 F. Supp. 3d 547, 566 (M.D.N.C. 2020) (enjoining North Carolina's Property Protection Act, which would impose severe civil liability on whistleblowers and undercover investigators, as an unconstitutional burden on protected speech).

363 *See, e.g.*, Animal Legal Def. Fund v. Reynolds, 353 F. Supp. 3d 812, 824 (S.D. Iowa 2019) (holding that Iowa's ag-gag law fails the strict scrutiny test).

364 Sometimes, perversely, the new efforts capture more speech than the previous ones. North Carolina, for example, attempted to insulate its anti-whistleblower statute from constitutional scrutiny by including all investigations regardless of industry. *See* Will Doran, *In Targeting Animal Rights Activists, NC Violated the First Amendment, Court Rules*, RALEIGH NEWS & OBSERVER (June 15, 2020, 5:10 PM), https://www.newsobserver.com/news/politics-government/article243547507.html [https://perma.cc/Q5GL-VZRQ] (explaining that North Carolina "did not single out agriculture" in an effort to distinguish its statute from ag-gag laws that had been ruled unconstitutional). *See generally* People for the Ethical Treatment of Animals, Inc. v. Stein, 466 F. Supp. 3d 547, 568 (M.D.N.C. 2020) (discussing the North Carolina Property Protection Act.).

365 Order at 41, Animal Legal Def. Fund v. Reynolds, No. 4:19-cv-00124 (S.D. Iowa 2019) (order granting preliminary injunction); Donnelle Eller, *Judge Issues Order Preventing Enforcement of Iowa's New 'Ag-gag' Law*, DES MOINES REG. (Dec. 3, 2019, 4:55 PM CT), https://www.desmoinesregister.com/story/money/agriculture/2019/12/02/federal-judge-stops-enforcement-iowas-new-ag-gag-law/2591453001/ [https://perma.cc/ZX73-G9ER].

366 S.B. 2239, 88th Gen. Assemb., 1st Sess. (Iowa 2019).

367 Undercover investigators will typically need to misrepresent or omit aspects of their identity, investigatory motives, and journalistic or organizational affiliations. *See* Rebecca Aviel & Alan K. Chen, *Lawyer Speech, Investigative Deception, and the First Amendment*, 2021 U. Ill. L. Rev. 1, 6 (forthcoming 2021).

speech or expression, but the legislative history continues to reveal a clear motive to suppress the circulation of disturbing and politically charged images that "don't always look good" by "organizations out there that simply don't want people to eat meat."[368]

In this context as in the others that we have explored, there is a limit to what piecemeal litigation can achieve in the face of official intransigence. And as with the various proposals summarized above, it is possible to envision federal legislation that would break this fruitless cycle. Because First Amendment rights are incorporated against the states through the Fourteenth Amendment, Congress may legislate to protect freedom of speech under its Section 5 power.[369] Political obstacles aside, Congress could enact a law prohibiting states from enacting ag-gag laws that infringe upon free speech rights. Any such measure would of course have to be congruent and proportional to a demonstrated pattern of violations — maybe limited to the jurisdictions that have already passed such laws, or perhaps focused very narrowly on the types of laws that have already been stuck down.[370] Assuming that Congress could satisfy these requirements, the commandeering quality of the statute should pose no additional obstacle. To paraphrase Professor Balkin on Congress's enforcement powers, the commandeering would indeed be "the whole point."[371]

By offering this example, I do not mean to suggest that constitutional violations in this realm are equivalent in scale or scope to those that inspired the VRA. On the contrary, I intentionally choose a context that some will find obscure to forestall the suggestion that remedial commandeering is limited to a closed universe, the boundaries of which we have already fully ascertained. Nor does remedial commandeering necessarily have a liberal or progressive political character. It is possible to imagine a future in which Congress acts to enforce 2nd Amendment rights by foreclosing certain types of handgun prohibitions, or passes legislation seeking to ensure that takings of private property are justly compensated.[372] Again, assuming that the measures were congruent and proportional to the scope and severity of constitutional violations

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368 Laura Belin, *Iowa's Ag Gag 3.0 May Get Past Courts*, BLEEDING HEARTLAND (June 28, 2020), https://www.bleedingheartland.com/2020/06/28/iowas-ag-gag-3-0-may-get-past-courts/ [https://perma.cc/F99N-UHWD].

369 *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).

370 *See supra* note 316.

371 Balkin, *supra* note 121, at 1830.

372 *See* U.S. CONST. amend. V (providing that private property shall not "be taken for public use, without just compensation"). The Takings Clause was made applicable to the states in Chicago, B. & Q.R. Co. v. City of Chicago, 166 U.S. 226, 236 (1897).

defined by reference to the Court's own view, the enactments would be valid notwithstanding the commandeering of state officials.

In sum, the idea that effective enforcement of constitutional rights might need more than case-by-case litigation has a profoundly wide reach, and has a firm foundation in our constitutional culture. But it is also potentially at risk of running headlong into the newly expanded commandeering constraint. This Article attempts to prevent the collision.

CONCLUSION

To enforce the substantive provisions of the Reconstruction Amendments, Congress must be able to issue direct orders to state and local governments. Congress has long understood this, and so has the Court, but in the face of a rapidly changing political and doctrinal landscape, the premise is worth as strong a defense as the scholarly literature can muster. This Article serves that purpose. It has explained why recent developments in commandeering and conditional spending doctrine threaten Congress's remedial power. For the first time in the history of the commandeering doctrine, both affirmative and negative commands are now clearly included in the scope of the prohibition. While many of the obligations that Congress has imposed on state officials pursuant to its Reconstruction power may be characterized as negative duties, this will no longer save such statutory regimes from the commandeering constraint. Instead, what is needed and offered here is a detailed and systematic examination of the logic that undergirds commandeering doctrine — and why it does not translate to Reconstruction power.

As this Article has shown, the commandeering prohibition rests on two underlying assumptions about congressional power: (1) that the program at issue is one where the federal government has the power to regulate private parties; and (2) that the program at issue is one in which state governments would be free to regulate however they see fit were it not for relevant federal legislation. Both are categorically untrue for legislation enacted pursuant to the power conferred on Congress by the Fourteenth and Fifteenth Amendments. And indeed, the Court has repeatedly upheld remedial legislation that conscripts state officials without ever applying the anti-commandeering restraint. Subjecting remedial legislation to commandeering analysis would be a profound departure from this longstanding practice. It would imperil existing regimes like the VRA and the ADA, and it would foreclose a wide range of new proposals designed to protect various constitutional rights from persistent patterns of violation. The good news is that the path forward

is clear: we must decisively recognize that under the Reconstruction Amendments, Congress enjoys the power of remedial commandeering.