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# The Vigor of Anti-Commandeering Doctrine in Times of Terror<sup>\*</sup>

Ann Althouse<sup>†</sup>

## I. INTRODUCTION

Although the Rehnquist Court has acquired a reputation for enforcing federalism,<sup>1</sup> in reality its efforts have not been very robust. So far, the Court has crafted its doctrine to show some deference to state and local government, but it has not threatened federal power where it is seriously needed. To a great extent, the Court's federalism decisions have *served* the interests of federal power, in that the cutbacks of recent years have removed unnecessary cases from the federal courts and placed off limits some areas in which Congress might otherwise posture for political effect. This constraint on federal power actually increases the likelihood that Congress will attend to matters that genuinely require national coordination.<sup>2</sup>

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<sup>†</sup> Robert W. & Irma M. Arthur-Bascom Professor, University of Wisconsin Law School. This Article is part of the David G. Trager Public Policy Symposium, *Our New Federalism? National Authority and Local Autonomy in the War on Terror*. I would like to thank Brooklyn Law School and all of the participants in the Trager Symposium, especially Susan Herman and Ernie Young, and, for editing assistance, John Althouse Cohen.

<sup>1</sup> To rely on the *New York Times*, one could easily get the impression that the Court has gone on a mindless rampage, enforcing federalism without regard for national interests, leaving Congress powerless to protect us from evils of all kinds. See, e.g., Linda Greenhouse, *For a Supreme Court Graybeard, States' Rights Can Do No Wrong*, N.Y. TIMES, Mar. 16, 2003, § 4, at 5 (referring to "a stunning series of federalism decisions that have curbed the power of Congress to bind the states to the full reach of federal law," and that represent a "federalism revolution," "ignited" by Chief Justice Rehnquist and "likely to define his place in Supreme Court history").

<sup>2</sup> Thus, it resisted the federalization of crimes and torts traditionally handled at the state level by placing a limit of the exercise of the commerce power. *United States v. Morrison*, 529 U.S. 598 (2000) (finding insufficient power to create a tort cause of action for gender-motivated acts of violence); *United States v. Lopez*, 514 U.S. 549 (1995) (finding insufficient power to make gun possession in a school zone a crime). For a more extended discussion of the opinion, expressed in the text, that the Court's federalism has been moderate, see Ann Althouse, *Inside the Federalism Cases*:

Surely, the war on terrorism demands federal attention: Local efforts tailored to local preferences are obviously not enough to deal with an international network of terrorists that threatens national security.<sup>3</sup> Yet, in carrying out the massive federal effort needed to deal with terrorism after September 11, 2001, the national government inevitably looks to the vast number of police, health workers, and other personnel employed at the state and local government levels.<sup>4</sup> Local officials are likely to contribute willingly to many of these efforts, especially in times of the greatest emergency or when federal money accompanies federal mandates. Nevertheless, at least some of the time, some local authorities will find reason to oppose the federal agenda.

Will the federalism doctrine developed by the Supreme Court in its pre-9/11 days protect the autonomy of state and local government officials who decide to resist the demands of federal authorities for assistance in the fight against terrorism? This Article will consider the doctrine that had developed prior to 9/11 and the motivations and aspirations behind it. It will focus on what appears to be the most important component of federalism doctrine in this context, the "anti-commandeering" doctrine announced in *Printz v. United States*,<sup>5</sup> which, based on inferences from the Constitution's federalist structure, barred Congress from imposing duties on state and local government officials. The majority of the Court took this position despite a warning by Justice Stevens that the Court ought to worry

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*Concern About the Federal Courts*, ANNALS AM. ACAD. POL. & SOC. SCI., March 2001, at 132, 142 (2001) (arguing that the Court "has not reverted to its pre-1937 activism but merely alerted Congress to think more carefully about whether federal solutions and federal court access are really needed or whether to rely on state and local laws and state court adjudication"); Ann Althouse, *On Dignity and Deference: The Supreme Court's New Federalism*, 68 U. CIN. L. REV. 245, 268 (2000) (characterizing current federalism doctrine as "a creditable and moderate" balance between dividing powers and benefiting individuals); Ann Althouse, *The Alden Trilogy: Still Searching for a Way to Enforce Federalism*, 31 RUTGERS L.J. 631, 689 (2000) (noting that the Court's recent federalism cases have only "sought to limit the way Congress can do things, not to place areas of regulation wholly off-limits to Congress," and ought to be considered "reasonably moderate and responsive to the needs of the competing institutions: the states, the Congress, and the courts").

<sup>3</sup> Local law enforcement might be reasonably well suited to deal with some isolated activities that are labeled terrorism, such as an individual bomber operating in one location. Cf. *Jones v. United States*, 529 U.S. 848 (2001) (narrowing the interpretation of 8 U.S.C. § 844(i), which authorizes federal prosecution of the use "of fire or an explosive" to destroy a building).

<sup>4</sup> See William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137 (2002) (describing the huge disproportion in personnel, with most police nationwide employed at the local level).

<sup>5</sup> 521 U.S. 898 (1997).

about the way its new doctrine would work “in times of national emergency”:<sup>6</sup>

Matters such as the enlistment of air raid wardens, the administration of a military draft, the mass inoculation of children to forestall an epidemic, or perhaps the threat of an international terrorist, may require a national response before federal personnel can be made available to respond. If the Constitution empowers Congress and the President to make an appropriate response, is there anything in the Tenth Amendment, “in historical understanding and practice, in the structure of the Constitution, [or] in the jurisprudence of this Court,” that forbids the enlistment of state officers to make that response effective?<sup>7</sup>

Justice Stevens was prescient. It is easy now to envision emergencies that would cry out for the full cooperation of the vast numbers of police, health workers, and other personnel of state and local government. Did the Court really mean to preserve the niceties of federalism in the face of events of this kind? Could local officials form their own views about the importance of, for example, smallpox inoculations after a bioterrorism attack and accordingly decline to help?

A growing number of municipalities, as well as a few states, have passed resolutions directing their officials to refuse to participate in the anti-terrorism efforts of the federal government.<sup>8</sup> These resolutions do not oppose the fight against terrorism in general, but they take issue with some aspects of enforcement, particularly the heightened powers of surveillance authorized by the USA PATRIOT Act.<sup>9</sup> These local laws acknowledge federal supremacy in the form of the Constitution, but express independence in articulating the content and extent of constitutional rights and assert that the current federal anti-terrorism efforts violate these rights so defined. Thus, these laws create the potential for multiple interpretations of the Constitution, a multiplicity that the autonomy recognized in *Printz* could possibly shield from review.

This Article considers the extent to which this phenomenon reflects ideas about the normative value of federalism, ideas that have been expressed from the time of the

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<sup>6</sup> *Id.* at 940.

<sup>7</sup> *Id.*

<sup>8</sup> See *infra* text accompanying notes 84-96.

<sup>9</sup> Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

founding to the present-day Rehnquist Court. For example, before the Bill of Rights was appended to the Constitution, James Madison attempted to convince people that the structure of federalism would protect them from the abuses of power. He wrote in Federalist 51:

In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.<sup>10</sup>

Americans have become accustomed over the years to thinking about constitutional rights as their protection from government abuse and about the states as potential *violators* of rights that require the supervision of federal courts enforcing federal rights against them. Assertions about federalism, particularly coming from the Rehnquist Court, which many perceive as lacking sufficient interest in the enforcement of rights,<sup>11</sup> have struck many commentators as working only to shield the abuses of state and local government.<sup>12</sup> But what happens when federal authorities begin to overreach? Those who disparage federalism doctrine may think that constitutional rights offer the best hope for controlling abuses of the federal government. Yet that hope has its limits, because it depends on the willingness of the federal courts to interpret and enforce constitutional rights vigorously.<sup>13</sup> Regarding matters of national security, the judicial conception of rights tends to defer to the expressed demands of the federal government.<sup>14</sup>

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<sup>10</sup> THE FEDERALIST NO. 51 (James Madison).

<sup>11</sup> See Simon Lazarus, *He'll Look Better When He's Gone*, WASH. POST, June 8, 2003, at B3 (reporting reputation of the Rehnquist Court as "hostile" to rights).

<sup>12</sup> See, e.g., Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001).

<sup>13</sup> The usual ability of state courts to enforce federal law, see U.S. CONST. art. VI (Supremacy Clause), disappears when it is asserted against federal officials. See 28 U.S.C. § 1442 (2000) (providing for removal to federal court when federal officials sued or prosecuted in state court). See also *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1871) (precluding state courts from issuing habeas relief for person's held in federal custody).

<sup>14</sup> See *Korematsu v. United States*, 323 U.S. 214, 244 (1944) (Jackson, J., dissenting); see also *infra* text accompanying notes 114-40.

But does the autonomy of state and local government recognized in *Printz* have any greater potential to protect Americans from the abuse of their rights by the federal government? At the least, the mechanisms of federalism work differently from the use of federal courts to enforce federal rights, and, as this Article will explain, in that difference there is some potential for state and local government to work as “a double security . . . to the rights of the people.” After describing the *Printz* case,<sup>15</sup> this Article focuses first on the relationship between the anti-commandeering doctrine and the protection of individual rights.<sup>16</sup> Next, the Article considers whether the war on terrorism ought to lead to the creation of an “emergency” exception to the anti-commandeering doctrine.<sup>17</sup> Finally, it concludes that the anti-commandeering doctrine should be preserved in its absolute form not only in spite of the war on terrorism, but precisely because it can protect individual rights that the exigencies of war may lead courts to narrowly construe.

## II. CONSTITUTIONAL PROTECTION FOR THE AUTONOMY OF STATE AND LOCAL GOVERNMENT OFFICIALS: THE *PRINTZ* ANTI-COMMANDEERING DOCTRINE

### A. *Introduction*

In *Printz v. United States*, the Court held that it is “fundamentally incompatible with our constitutional system of dual sovereignty” for the federal government to commandeer state or local government officials to “administer or enforce a federal regulatory program.”<sup>18</sup> At issue was the Brady Handgun Violence Prevention Act,<sup>19</sup> which required state and local law enforcement officials to perform background checks on persons who attempt to buy handguns. Rather than delaying until a federal system could be put into effect, Congress opted to rely

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<sup>15</sup> See *infra* Part II.

<sup>16</sup> See *infra* Part III.

<sup>17</sup> See *infra* Part IV.

<sup>18</sup> 521 U.S. 898, 935 (1997).

<sup>19</sup> Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (1968) (codified as amended in scattered sections of 18 U.S.C.) [hereinafter GCA], *amended by* Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified as amended in scattered sections of 18 U.S.C.) [hereinafter Brady Act]. This body of law regulated the purchase of handguns in various ways, such as imposing age and residency requirements and prohibiting sale to convicted felons, unlawful aliens, and others.

on the existing institutions of local government in order to begin its regulatory program immediately. The Act demanded that local "chief law enforcement officers" (CLEOs) receive paperwork from gun sellers and make a "reasonable effort," within five days, to determine whether their customers fell into any of the categories forbidden by federal law to purchase guns.<sup>20</sup>

Let us consider the Court's basis for decision in some detail.

### *B. Textual and Historical Analysis in Printz*

Justice Scalia, writing for a majority of the Court, did not begin his analysis with the text of the Constitution, which lacked a useful specific clause upon which to premise the anti-commandeering doctrine. Calling attention to this deficiency, Justice Stevens proclaimed in dissent:

There is not a clause, sentence, or paragraph in the entire text of the Constitution of the United States that supports the proposition that a local police officer can ignore a command contained in a statute enacted by Congress pursuant to an express delegation of power enumerated in Article I.<sup>21</sup>

In the dissenters' view, the Commerce Clause authorized Congress to regulate gun sales, and surely the Necessary and Proper Clause encompassed the means of forcing state and local government officials to administer the regulation.<sup>22</sup>

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<sup>20</sup> *Id.* § 922(s)(2).

<sup>21</sup> *Printz*, 521 U.S. at 944 (O'Connor, J., concurring).

<sup>22</sup> The CLEOs covered by the Brady Act were local officials. Justice Stevens questioned why local government should receive the protection of constitutional federalism. Notably, local government is not accorded the protection of sovereign immunity. *Id.* at 955 (Stevens, J., dissenting). This limitation gives rise to one of the strongest arguments against the Court's sovereign immunity doctrine: If there is good to be achieved by protecting the states from liability, why does the same principle not extend to local government? As was illustrated by *National League of Cities v. Usery*, the general protections of constitutional federalism do extend to local government. 426 U.S. 833, 855-56 n.20 (1976), *overruled on other grounds by* *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). Leaving local government out of sovereign immunity when the state can claim it creates real anomalies when federal law and state law impose conflicting requirements on local government. Justice Stevens offered this distinction as an alternate way to decide the case against *Printz* and *Mack*. *Printz*, 521 U.S. at 955 n.16 (Stevens, J., dissenting). The majority did not engage with this issue at all; it merely cited the case law that made the distinction. *Id.* at 931 n.15. The majority also rejected the dissenters' argument that it was not the state at all, but an individual acting for the state that was being compelled. *Id.* Though this distinction is in fact permitted to carry a good deal of weight in the law of sovereign immunity, see *Ex Parte Young*, 209 U.S. 123 (1907), the *Printz* majority

With no explicit text to support its doctrine and needing to rely on the entire text of the Constitution and the Tenth Amendment,<sup>23</sup> the majority set about looking through the historical materials for inferences about the meaning of constitutional federalism. Justice Scalia's opinion stressed the early history of the use of congressional power, on the theory that Congress's failure to use such a "highly attractive power" in its earliest years implied a belief that the Constitution forbade the assignment of compulsory tasks to state and local government.<sup>24</sup> Efforts to show that Congress had in fact used this power failed to impress the Court. It discounted the Extradition Act of 1793, which required the "executive

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viewed it as irrelevant, noting that whether one commands the state or the state actor, the point is to compel the state. *Id.* (citing *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989)).

<sup>23</sup> The majority opinion criticizes the dissenters for "falsely presum[ing] that the Tenth Amendment is the exclusive textual source of protection for principles of federalism." *Printz*, 521 U.S. at 923 n.13. As in *National League of Cities v. Usery*, the majority relied on the "system of dual sovereignty . . . reflected in numerous constitutional provisions," including the Tenth Amendment. *Id.* at 924 n.13. Most important is the idea of a limited set of legislative powers given to Congress in Article I, Section 8 of the Constitution, an idea which the Tenth Amendment restates in the negative. *Id.* at 918-19. In her concurrence, Justice O'Connor, does, however, explicitly state, "The Brady Act violates the Tenth Amendment." *Id.* at 935-36 (O'Connor, J., concurring). This gave Justice Stevens the opportunity to lecture the majority:

[T]he Tenth Amendment imposes no restriction on the exercise of delegated powers. . . . The Amendment confirms the principle that the powers of the Federal Government are limited to those affirmatively granted by the Constitution, but it does not purport to limit the scope or the effectiveness of the exercise of powers that are delegated to Congress.

*Id.* at 941-42 (Stevens, J., dissenting). The majority's opinion, taken as a whole, obviously recognizes these elementary concepts.

<sup>24</sup> *Id.* at 905. More recent history also lacks instances of using state officials. *Id.* at 916-18. To the extent that there seems to be any indication of such use, Justice Scalia, noting the lack of explicit compulsion, speculated that the compliance had been voluntary. Justice Stevens, writing in dissent, rejected the interpretive move that infers lack of power from unused power, because it would undermine the broad interpretation of the commerce power that supports the vast areas of regulation Congress has undertaken in the twentieth century, obviously far beyond anything it had attempted to use in its first century. *Id.* at 949 (Stevens, J., dissenting); *cf. id.* at 936-37 (Thomas, J., concurring) (favoring much narrower interpretation of the commerce power, which would not reach wholly intrastate sales, such as those regulated by the Brady Act). Justice Breyer made the point that the lack of instances of using this power may simply reflect the availability of other approaches for "assign[ing] . . . duties" to the states. *Id.* at 977 (Breyer, J., dissenting) (noting conditional federal spending, conditional preemption, and generally applicable regulation). Yet the availability of adequate alternative means can imply that the severe means of compulsion was not deemed necessary, as Justice O'Connor's concurring opinion indicates. Noting the alternatives available to Congress, she concurred with the majority because direct compulsion of state and local government "utterly fail[s] to adhere to the design and structure of our constitutional scheme." *Id.* at 936 (O'Connor, J., concurring).



authority" of a state to arrest fugitives at the request of other state executives,<sup>25</sup> because that Act rested directly on the Constitution's Extradition Clause.<sup>26</sup> Since there were no early statutes compelling the state executive in the absence of such a "particularized constitutional authorization,"<sup>27</sup> the Extradition Act, in the majority's view, contributed to the inference that Congress received no implied power authorizing compulsion. Accordingly, the majority noted, Congress *requested* state help with the imprisonment of federal convicts: It offered compensation and made alternate provisions when a state refused, thus revealing its understanding that compulsion would overreach its constitutional power.<sup>28</sup>

There were a few early instances of Congress requiring state *courts* to perform various tasks, but these did not count, in the majority's view, because courts differ from the other institutions of state and local government.<sup>29</sup> The Supremacy Clause explicitly requires state courts to apply federal law, and Article III implicitly requires the same by making the creation of the lower federal courts optional.<sup>30</sup> Moreover, quite aside from these constitutional provisions, it is the ordinary role of courts to enforce whatever law applies in the cases that fall within their jurisdiction.<sup>31</sup> Though established by a particular sovereign, courts do not simply operate as arms of that sovereign: They operate independently, ascertaining the law and applying it pursuant to the orthodoxies of the judicial method as they understand it. For them to apply the law of another sovereign is not to be "commandeered" by any outside

<sup>25</sup> *Printz*, 521 U.S. at 909 (citing Act of Feb. 12, 1793, ch. 7, § 1, 1 Stat. 302).

<sup>26</sup> *Id.* (citing U.S. CONST. art. IV, § 2).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 909-10 (citing Act of Sept. 23, 1789, 1 Stat. 96).

<sup>29</sup> *Id.* at 907.

<sup>30</sup> *Printz*, 521 U.S. at 905-07. The Court also noted that the "requirement" that state courts perform some tasks related to the naturalization process may only have applied where states had authorized their courts to perform these tasks. *Id.* (citing Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, *Holmgren v. United States*, 217 U.S. 509, 516-517 (1910), and *United States v. Jones*, 109 U.S. 513, 519-520 (1883)). It also refused to count "ancillary" administrative tasks assigned to courts along with judicial functions, although the dissenters sought to characterize these tasks as "executive." *Id.* at 908 n.2. Finally, it rejected the dissent's attempt to characterize some state judicial functions as similar to modern day adjudications that administrative agencies are permitted to carry out. *Id.* at 909-10. As Justice Scalia put it: "It is foolish . . . to mistake the copy for the original, and to believe that 18th-century courts were imitating agencies, rather than 20th-century agencies imitating courts." *Id.* at 908 n.2.

<sup>31</sup> *Id.* at 907. The Court also notes that the Full Faith and Credit Clause, U.S. CONST. art. IV, § 1, requires state courts to recognize obligations created by the law of other states. *Id.*

power, but to follow the requirements of the rule of law itself, and, in doing so, to exercise their own power. Federal courts as well as state courts maintain this conception of their own role, which betrays no element of subordination except to the rule of law and to other courts with jurisdiction to review them.<sup>32</sup> They recognize that they are compelled to follow interpretations of law announced by courts with final authority over a particular legal text, but that is merely an aspect of adhering to law according to the orthodoxies of the judicial method.<sup>33</sup>

The majority strained to respond to several statements made in *The Federalist Papers* that seemed to concede that the federal government would rely on state and local government officials, statements made to quell the outcry of ratification opponents who worried that the new Constitution would

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<sup>32</sup> The Stevens dissent did not see judges this way. It saw the requirement that state judges apply federal law as an obligation imposed on them "against their will." *Id.* at 969-70 (Stevens, J., dissenting). This view of judges provided leverage for arguing that if judges could be compelled, surely executive officials could be compelled. By the same token, it read the explicit reference to state judges in the Supremacy Clause as a sign of special respect toward state judges; failure to mention state executive branch officials, then, signified the lesser respect for their independence, rather than a belief that they could not be used to enforce federal law. *Id.* at 970 n.33 (Stevens, J., dissenting).

<sup>33</sup> The dissenters' key point here was that the tasks assigned to the judges were "substantially executive." *Id.* at 952 (Stevens, J., dissenting). Thus, an "executive" function had been assigned to the states. The majority responded by characterizing the task as adjudicatory, a categorization that is consistent with the presumption, relied on in separation of powers cases, that "[w]hen any Branch acts, it is presumptively exercising the [functionally identifiable] power the Constitution has delegated to it." *INS v. Chadha*, 462 U.S. 919, 951-52 (1983) (presuming Congress was exercising legislative power before finding a violation of the Bicameralism and Presentment Clauses). Interestingly, it was Justice Stevens who took this presumption the most seriously in *Bowsher v. Synar*, 478 U.S. 714, 749 (1986) (Stevens, J., concurring), applying the *Chadha* presumption to characterize the function of the Comptroller General as legislative before finding a violation of the Bicameralism and Presentment Clauses and disagreeing with the majority, which viewed him as unconstitutionally exercising the executive power. If the state judges were in fact required to perform an executive function, the imposition on state autonomy should be considered even more offensive than if the executive branch were required to perform an executive task, because not only would they be forced to perform tasks assigned by the federal government, they would be required to perform tasks inconsistent with the judicial function. The United States Supreme Court strongly protects the federal courts from being forced to perform nonjudicial work, see *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), and frequently expresses respect for the integrity of the state courts as courts, as opposed to agents of the political power of the states. See, e.g., *Alden v. Maine*, 527 U.S. 706 (1999) (equating state and federal courts with respect to congressional abrogation of sovereign immunity); *Younger v. Harris*, 401 U.S. 37 (1971) (presuming the adequacy of state courts to field questions of federal constitutional law that arise in criminal cases).

unleash an oppressive, overweening federal government.<sup>34</sup> While the dissenting Justices read these statements as assuming that Congress would have the power to compel local officials, the *Printz* majority saw them in a different light: Congress would ask for assistance from local officials, who would be inclined to participate willingly, because they would prefer to avoid the intrusion of federal officials.<sup>35</sup> Of particular importance was a passage from Alexander Hamilton's Federalist 27 that referred to the power of the federal government to "call to its assistance and support the resources of the whole Union" to execute its laws which will become the supreme law, which all state officials will have taken an oath to support: "Thus, the legislatures, courts, and magistrates, of the respective members will be incorporated into the operations of the national government *as far as its just and constitutional authority extends*; and will be rendered auxiliary to the enforcement of its laws."<sup>36</sup>

This passage did not, in the majority's view, suggest that the federal government could force state and local government officials to carry out the work of the federal government; it merely meant that the institutions of state government, as they carried out their own affairs, would be subject to the preemptive force of properly enacted federal law.<sup>37</sup> In context, the passage addressed the way the new

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<sup>34</sup> For a detailed comparison of the policies underlying the anti-commandeering doctrine and the problem of an abusive federal government, see *infra* text accompanying notes 42-57.

<sup>35</sup> See *Printz*, 521 U.S. at 910-11 (citing *FERC v. Mississippi*, 456 U.S. 742, 796 n.35 (1982) (O'Connor, J., concurring in part and dissenting in part)). In fact, as Justice Scalia's opinion indicates, the state and federal governments voluntarily aided each other in the early history of acting under the new Constitution. *Id.* at 910. One might well wonder why, if consent was seen as so easy to elicit, anyone would have cared whether Congress could compel state and local government to carry out its will, but one could find an answer in *The Federalist No. 51*: It was important for local institutions to have the vigor and autonomy to resist federal power when it crosses the line into abuse.

<sup>36</sup> THE FEDERALIST NO. 27 (Alexander Hamilton) (emphasis in original), quoted in *Printz*, 521 U.S. at 911.

<sup>37</sup> *Printz*, 521 U.S. at 913. The majority rejected the idea that this passage meant that Congress could make local officials the "auxiliary" of the federal government, the interpretation that formed "the very foundation" of Justice Souter's dissenting position. *Id.* at 911. As Justice Scalia explained, if this passage were interpreted that way, then the states would have to carry out federal policy even if Congress did not demand their assistance and, moreover, Congress would be able to impose duties on state legislatures, a position *New York v. United States* had already rejected. *Id.* at 912 (citing *New York v. United States*, 505 U.S. 144 (1992)). Justice Souter attempted to avoid the latter problem by adverting to "the essence of legislative power . . . a discretion not subject to command," but Justice Scalia called this a "novel

Constitution, unlike the Articles of Confederation, acted upon individuals rather than the states.<sup>38</sup> The point, according to the *Printz* majority, was that the states would now operate separately from the national government, which would no longer be put in a position of “using force” to compel them to carry out the federal will.<sup>39</sup> This interpretation, according to the majority, brought Federalist 27 into harmony with Federalist 36, which provided that the national government ought to “to employ the state officers as much as possible, and to attach them to the Union by an accumulation of their emoluments.”<sup>40</sup>

### C. *Normative Federalism in Printz*

*Printz* did not rely merely on historical interpretation; its federalism had normative appeal in its present-day applications. “This separation of the two spheres is one of the Constitution’s structural protections of liberty,” Justice Scalia wrote.<sup>41</sup> He repeated language from Justice O’Connor’s opinion

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principle of political science” that was quite simply “untrue.” *Id.* at 912 n.5. A command to legislate about a particular matter would not amount to a betrayal of their “essence,” as the majority would have it. *Id.* The betrayal is not to legislative essence but to sovereignty, according to Justice Scalia. *Id.*

<sup>38</sup> See *id.* at 919 (“The Framers’ experience under the Articles of Confederation had persuaded them that using the States as the instruments of federal governance was both ineffectual and provocative of federal-state conflict.”). The move away from the Articles of Confederation was quite specifically a division of sovereignty, with some powers given to the national government, which could then operate directly on individuals. *Id.* at 919-20 (citing 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 9 (M. Farrand ed., 1911)). Working through the states had failed, and the new plan was dual sovereignty. *Id.* at 920-21 (citations omitted) (quoting U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)), and THE FEDERALIST NO. 39 (James Madison)). The dissenters’ position was, as it had been in the earlier *New York v. United States*, that the power of the old plan was preserved, not rejected, and new power was simply an addition, in recognition of the inadequacy of the power under the Articles. *Id.* at 945 (Stevens, J., dissenting) (asserting that the Framers did not perceive the approach used under the Articles as “demean[ing]” to state sovereignty but as “cumbersome and inefficient”). The majority soundly rejects this position, citing Madison once again: “[A] sovereignty over sovereigns, a government over governments, a legislation for communities, as contradistinguished from individuals, as it is a solecism in theory, so in practice it is subversive of the order and ends of civil polity . . .” *Id.* at 921-22 (quoting THE FEDERALIST NO. 20 (James Madison & Alexander Hamilton)).

<sup>39</sup> *Id.* (quoting THE FEDERALIST NO. 27 (Alexander Hamilton)).

<sup>40</sup> *Id.* (quoting THE FEDERALIST NO. 36 (Alexander Hamilton)).

<sup>41</sup> *Id.* at 921. Justice Scalia’s *Printz* opinion also concerned itself with the separation of powers: Putting responsibility in the hands of “thousands of CLEOs” all over the country ran counter to the President’s duty, under Article II, Section 3 of the Constitution, to “take Care that the Laws be faithfully executed.” *Id.* at 922. Justice Stevens dismissed the notion that the President needed to be able to control the agents of federal power as “hyperbole.” *Id.* at 959-60. Although the anti-commandeering doctrine in some ways limits what the federal government can do, preserving state and

in *Gregory v. Ashcroft*: "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."<sup>42</sup> Justice Scalia also quoted the language from Federalist 51, characterizing federalism as "a double security . . . to the rights of the people."<sup>43</sup> He concluded with an important warning: "The power of the Federal Government would be augmented immeasurably if it were able to impress into its service – and at no cost to itself – the police officers of the 50 States."<sup>44</sup>

The *Printz* dissenters argued that the anti-commandeering doctrine perversely encourages the federal government to "aggrandize itself."<sup>45</sup> If Congress – and, presumably, the President – cannot employ state and local government to do their work, they will need to enlarge the

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local government autonomy also *enhances* federal power to the extent that it consolidates the President's control over the execution of federal law. This enhancement of federal power, it should be noted, operates as something of a safeguard against abuse, because it focuses responsibility on the President and because it disables local officials who might themselves engage in abuses. If this safeguard were genuinely important, however, it should be considered a problem to permit consensual participation by state officials. See *id.* at 922-23 (citing THE FEDERALIST NO. 70 (Alexander Hamilton)), 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 495 (M. Jensen ed., 1976), and Calabresi & Prakash, *The President's Power to Execute the Laws*, 104 YALE L. J. 541 (1994)).

<sup>42</sup> *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991), quoted in *Printz*, 521 U.S. at 921. Ironically, John Ashcroft, now the figurehead of federal power imposed on the state in his role as Attorney General, was at the time of *Gregory v. Ashcroft*, a state governor who sought to resist the impositions of federal law, as the state of Missouri procured from the United States Supreme Court a validation of its power to force its judges to retire at age 70. Notably, *Gregory v. Ashcroft* is not itself a strong affirmation of state constitutional power; it merely presumes against preemption in applying the Age Discrimination in Employment Act. But the theoretical underpinnings for the stronger federalism cases to come were found in that case, which is quoted by Justice O'Connor in her majority opinion in *New York v. United States*, 505 U.S. 144, 181 (1992), and in her concurring opinion in *United States v. Lopez*, 514 U.S. 549, 568 (1995) (O'Connor, J., concurring). Interestingly, the motivation to produce a normative version of federalism came from a dissenting opinion in a habeas case, *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting), which criticized the majority's empty federalism. This sequence of events is detailed in Ann Althouse, *Variations on a Theory of Normative Federalism: A Supreme Court Dialogue*, 42 DUKE L.J. 979 (1993).

<sup>43</sup> *Printz*, 521 U.S. at 922 (quoting THE FEDERALIST NO. 51 (Alexander Hamilton)).

<sup>44</sup> *Id.* Though it was Justice Stevens who wanted to rely on an argument for federal power in the case of an emergency, see *supra* text accompanying notes 5-8, he denounced Justice Scalia's scenario as an "alarmist hypothetical" that had no grounding in reality. *Id.* at 959 n.21 (Stevens, J., dissenting).

<sup>45</sup> *Id.* at 959 (Stevens, J., dissenting).

federal government, which would only diminish the importance of state and local government.<sup>46</sup> Under this argument, it is self-defeating to attempt to improve the lot of state and local government by enhancing their autonomy, because it will only lead the national government to compensate by increasing its own power. Traces of this modern-day dispute appeared in the historical ratification debate, which both the majority and dissenting opinions in *Printz* tapped. Justice Stevens's dissenting opinion drew attention to the worries raised by opponents of ratification that "overbearing" federal officials – particularly tax collectors – would descend on the people of the states.<sup>47</sup> When they fretted that a "swarm of revenue and excise officers [would] prey upon the honest and industrious part of the community, eat up their substance, and riot on the spoils of the country,"<sup>48</sup> proponents of the new Constitution responded with assurances that Congress would use state officials to perform its work.<sup>49</sup> If the proponents were capable of thinking that the use of local officials was reassuring, that the use of state authorities protected from abuse by the federal government, then, according to Justice Stevens, they must also have believed that the new Constitution was giving the federal government the power to force local officials to perform these tasks. If they had retained a power to resist commandeering, he assumed, the reassurance would not have worked so well; the opponents ought to have raised the possibility of refusal as a way to characterize the reassurance as inadequate. The majority's answer here was simply that participants in the debate were assuming that local officials would cooperate: They took it for granted that the fear of federal officials would provide the motivation to perform the work voluntarily.

Justice Br yer's dissenting discussion of the problem of aggrandizing the federal government departed from the original intent analysis about which Justices Scalia and Stevens disagreed. Analyzing federalism in terms of its normative value, he acknowledged that state autonomy can be a positive, because of its potential to provide a "double

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<sup>46</sup> See *infra* text accompanying notes 42-57.

<sup>47</sup> *Printz*, 521 U.S. at 946-47 (Stevens, J., dissenting). *The Federalist* No. 27 is entirely addressed to the criticism that the Constitution "cannot operate without the aid of a military force to execute its laws." THE FEDERALIST NO. 27 (Hamilton).

<sup>48</sup> *Printz*, 521 U.S. at 910 (quoting 1 DEBATE ON THE CONSTITUTION 502 (B. Bailyn ed., 1993)).

<sup>49</sup> See *id.* at 910 (citing THE FEDERALIST NO. 27 (Hamilton)).

security,” as Madison termed it, for the rights of the individual.<sup>50</sup> He then professed puzzlement over how “the creation of a new federal gun-law bureaucracy, or the expansion of an existing federal bureaucracy – [could] better promote either state sovereignty or individual liberty[.]”<sup>51</sup> He wrote in a similar vein in his dissenting opinion in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,<sup>52</sup> a case that dealt with the scope of a state’s sovereign immunity defense. In that case, Justice Breyer wrote that the ratification debate cannot be conclusive, because federalism has obviously adapted at key points in American history:

Thomas Jefferson’s purchase of Louisiana, for example, reshaped the great debate about the need for a broad, rather than a literal, interpretation of federal powers; the Civil War effectively ended the claim of a State’s right to “nullify” a federal law; the Second New Deal, and its ultimate judicial ratification, showed that federal and state legislative authority were not mutually exclusive; this Court’s “civil rights” decisions clarified the protection against state infringement that the Fourteenth Amendment offers to basic human liberty. In each instance the content of specific federalist doctrines had to change to reflect the Nation’s changing needs (territorial expansion, the end of slavery, the Great Depression, and desegregation).<sup>53</sup>

Justice Breyer found no similar justification for reshaping federalism in the period since desegregation, when federal power against the states was increased in order to protect the rights of individuals. Indeed, all of the reframing of federalism doctrine up to that point came about in service of the interest in liberty. Justice Breyer’s idea of connecting federalism to liberty echoes the position taken by Madison in Federalist 51, which the Rehnquist Court frequently cites in justifying its enforcement of constitutional federalism.<sup>54</sup> The liberty-federalism connection is repeatedly invoked by voices on both

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<sup>50</sup> *Id.* at 977 (Breyer, J., dissenting) (likening the American constitutional question to the federalism problems encountered in Europe, citing *The Federalist Papers* as rejecting some, but not all, aspects of European solutions to federalism problems).

<sup>51</sup> *Id.* (citations omitted) (arguing that the European experience with federalism is helpful in answering this question).

<sup>52</sup> 527 U.S. 666, 693 (1999) (Breyer, J., dissenting, joined by Stevens, J., Souter, J., and Ginsburg, J.).

<sup>53</sup> *Id.* at 702.

<sup>54</sup> See *New York v. United States*, 505 U.S. 144, 181 (1992); *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991).

sides of the federalism debate, which goes to show that, like the historical materials, it is a principle capable of varying applications.

In *Printz*, Justice Breyer asserted that there is simply no across-the-board liberty-enhancing effect in protecting state and local governmental autonomy when Congress has seen fit to use the states in service of ends that fall within its constitutional powers. He noted that “[m]odern commerce and the technology upon which it rests” necessitate regulation at the national level, thus diminishing what will be done at the local level and undermining, over time, the salutary participatory democracy that occurs within the smaller, decentralized institutions of local government.<sup>55</sup> He criticized federalism doctrines that constrained the ability of Congress to use state and local government, because there were so many matters about which it would be forced to regulate. The modern economy needs “government large enough to secure trading rules that permit industry to compete in the global market place, to prevent pollution that crosses borders, and to assure adequate protection of health and safety by discouraging a regulatory ‘race to the bottom.’”<sup>56</sup> Because it must regulate, if Congress cannot commandeer state and local government officials as it sees fit, it must create a huge, overweening federal government.

Justice Breyer justified the evolution of federalism doctrine in service of the interests of liberty while rejecting the Court’s post-Civil Rights Era development of federalism doctrine. He wrote prior to this country’s recognition, after 9/11, of the terrorist war declared against it. Surely, we have entered a new period that will exert pressure on constitutional doctrine. But, as we have seen, Justice Breyer cautioned against developments in federalism doctrine that do not serve the cause of individual liberty. The war on terrorism has created conditions in which courts are likely to acknowledge greater national power, permitting actions that would not only change the role of state and local government but that also threaten to reduce individual liberties. Thus, there is a new occasion to reconsider federalism in light of history, and it is an occasion that in fact does offer some potential, as discussed in

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<sup>55</sup> *College Savings*, 527 U.S. at 703-04 (quoting *Printz*, 521 U.S. at 977 (Breyer, J., dissenting)).

<sup>56</sup> *Id.*



the next section, for reinforcing the protection of individual liberties. But what of the problem of an oversized, pervasive federal government? If Justice Breyer could be so concerned by the way modern-day commerce might produce a dangerously aggrandized national government, should there not be even more concern about enlarging the national government to meet the needs of the war on terrorism? Enlarging the federal government for this purpose poses a new and more serious threat to the rights and liberties of individuals.

#### D. *Printz and Precedent*

Justice Scalia's *Printz* opinion discussed the path of recent precedent that led to *Printz*, beginning with an effort in the 1970s to deal with environmental protection, a matter of national urgency, by commandeering state government officials. The Environmental Protection Agency first conscripted state officials to "prescribe auto emissions testing, monitoring and retrofit programs, and to designate preferential bus and carpool lanes."<sup>57</sup> When a number of circuit courts questioned the constitutionality of this "novel" approach, and the United States Supreme Court granted certiorari in one of the cases, the EPA backed away from its regulations.<sup>58</sup> In the next few years, the Court decided *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*<sup>59</sup> and *FERC v. Mississippi*,<sup>60</sup> which dealt with federal environmental laws that skirted close to the commandeering problem. In those cases the Court drew attention to the constitutional problem, but nevertheless found ways to uphold the laws. In *Hodel*, it relied on the fact that the states were given a choice either voluntarily to adopt federal standards or to suffer preemption of their own laws if they did not. In *FERC*, the Court read the federal law only to require the states to *consider* federal standards (or again to suffer preemption). While there was a command to "consider," something some members of the Court thought already crossed the constitutional line, the majority thought asking the state to consider standards did not go too far: Indeed, in *Printz* Justice

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<sup>57</sup> *Printz v. United States*, 521 U.S. 898, 925 (1997).

<sup>58</sup> *Id.* (citing *Maryland v. EPA*, 530 F.2d 215, 226 (4th Cir. 1975); *Brown v. EPA*, 521 F.2d 827, 838-42 (9th Cir. 1975); *District of Columbia v. Train*, 521 F.2d 971, 994 (D.C. Cir. 1975)).

<sup>59</sup> *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264 (1981).

<sup>60</sup> *FERC v. Mississippi*, 456 U.S. 742 (1982).

Scalia put the word “command” in scare quotes as he described the requirement at issue in *FERC*.<sup>61</sup> Finally, in *New York v. United States*, the Court faced the situation in which Congress had directly imposed a task on the state legislatures: the “take title” provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985, which required state legislatures to provide for the disposal of low-level radioactive waste or forced the state to take title to the waste – either way, a demand on the states to act.<sup>62</sup>

*New York* had made it plain that Congress could not commandeer the state legislatures, yet it was also plain that the state courts were compelled to apply federal law.<sup>63</sup> The discussion of precedent in *Printz* thus centered on whether executive officials were more like courts or more like legislatures. Counsel for the United States characterized the CLEOs as following orders and not making policy and therefore more like judges who – as the orthodox view of judging would have it – do what the law requires. By contrast, a legislature must make policy: Indeed, the statute in *New York v. United States* commanded the state legislature to make the politically difficult decision about where to locate a facility for the disposal of radioactive waste. The dysfunction inherent in this form of federalism was obvious. Congress sought political credit for solving the problem of disposing of radioactive waste without taking responsibility for making the very decision likely to outrage voters. Thus, *New York v. United States* demonstrated that political accountability lay at the heart of the majority’s federalism.

The majority persevered with its accountability analysis in *Printz*. It was not simply a matter of whether doing background checks technically constituted policymaking as opposed to the mere application of the law. Either characterization made sense: The Brady Act provided for a specific task to be performed by the CLEOs, but there was

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<sup>61</sup> *Id.* at 765. See also *Printz*, 521 U.S. at 926. Justice O’Connor, sounding themes that would later find their way into the majority’s federalism opinions, characterized the law as “conscript[ing] state utility commissions into the national bureaucratic army,” *FERC*, 456 U.S. at 775 (O’Connor, J., concurring in part and dissenting in part), “unavoidably undermin[ing] state sovereignty,” *id.* at 785, “blur[ring] the lines of political accountability and leav[ing] citizens feeling that their representatives are no longer responsive to local needs,” *id.* at 787, and denying “[c]itizens . . . the lessons of self-government,” *id.* at 790.

<sup>62</sup> *New York v. United States*, 505 U.S. 144 (1992).

<sup>63</sup> See *Testa v. Katt*, 330 U.S. 386 (1947).

some discretion involved in deciding what "efforts" were "reasonable."<sup>64</sup> The crucial question, however, was how the Brady Act changed the dynamics of federalism. As Justice Scalia analyzed this question, the key was "[p]reservation of the States as independent and autonomous political entities."<sup>65</sup> Counsel for the United States attempted to deflect the accountability problem by contending that the mere "discrete, ministerial tasks" called for by the Brady Act would not lead anyone to assign responsibility to local government rather than to Congress.<sup>66</sup> The majority found two problems with this argument: First, by using the resources of local government, Congress avoided paying for the work; and second, the local government official was stuck in the role of being the face of enforcement, the one to blame for any denial or mistake in the course of performing individual background checks.<sup>67</sup>

#### E. *Printz and Pragmatism*

In the end of his opinion, Justice Scalia made short work of what he dismissed as "a cluster of arguments that can be grouped under the heading: 'The Brady Act serves very important purposes, is most efficiently administered by CLEOs during the interim period, and places a minimal and only temporary burden upon state officers.'"<sup>68</sup> Of course, this is just the sort of argument that will likely be offered in support of relying on state and local government to help in an emergency with the fight against terrorism, so it is helpful to pause and note just how little regard the *Printz* Court had for arguments of this kind.

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<sup>64</sup> *Printz*, 521 U.S. at 927-28. Justice Scalia mused that this approach to the question was "interesting" and "reminiscent" of attempts to distinguish between the executive power and the legislative power in old nondelegation cases like *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 530 (1935), and *Panama Refining Co. v. Ryan*, 293 U.S. 388, 428-429 (1935). *Id.* at 927. He rejected this formal style of line drawing as imprecise and ineffective. *Id.* at 928.

<sup>65</sup> *Id.* (citing *Texas v. White*, 7 Wall. at 725). Justice Scalia noted that depriving the states of policymaking authority by writing statutes that constrained discretion only exacerbates this problem. *Id.*

<sup>66</sup> *Id.* at 929.

<sup>67</sup> *Id.* at 929-30. The idea of preserving accountability did not impress the dissenters, who noted the tendency of local officials to make a public show of blaming the federal government. *Id.* at 957 n.18 (Stevens, J., dissenting) (noting that Sheriffs Printz and Mack publicized their opposition to the Brady Act).

<sup>68</sup> *Id.* at 931-32.

The formal, structural principle mattered, according to the *Printz* Court, and would be enforced despite compelling, counterbalancing exigencies.<sup>69</sup> Justice Scalia wrote:

[W]here . . . it is the whole *object* of the law to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty, such a “balancing” analysis is inappropriate. It is the very *principle* of separate state sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that fundamental defect.<sup>70</sup>

As the Court had recognized in *New York v. United States*, constitutional federalism is worth enforcing even though it seems “‘formalistic’ . . . to partisans of the measure at issue,” who tend to see the value of a law recently adopted to serve a “perceived necessity” of the time.<sup>71</sup> By “resist[ing] the temptation” to approve of “an expedient solution to the crisis of the day,” the Court claimed to be serving the long-term interest

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<sup>69</sup> Importantly, he set to one side “laws of general applicability.” *Printz*, 521 U.S. at 932. See also *Reno v. Condon*, 528 U.S. 141 (2000) (upholding The Driver’s Privacy Protection Act of 1994 (DPPA or Act), 18 U.S.C. § 2721-2725, which regulated the disclosure and sale of information acquired by states in the process of licensing drivers). *Reno* distinguished *Printz* and *New York v. United States*:

[T]he DPPA does not require the States in their sovereign capacity to regulate their own citizens. The DPPA regulates the States as the owners of data bases. It does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals. . . .

[South Carolina argues] that the DPPA is unconstitutional because it regulates the States exclusively. The essence of South Carolina’s argument is that Congress may only regulate the States by means of “generally applicable” laws, or laws that apply to individuals as well as States. But we need not address the question whether general applicability is a constitutional requirement for federal regulation of the States, because the DPPA is generally applicable. The DPPA regulates the universe of entities that participate as suppliers to the market for motor vehicle information – the States as initial suppliers of the information in interstate commerce and private resellers or redisclosers of that information in commerce.

*Id.* at 151.

<sup>70</sup> *Printz*, 521 U.S. at 932-33. Here, Justice Scalia invoked the strict separation of powers cases: *Bowsher v. Synar*, 478 U.S. 714, 736 (1986) (declining to subject principle of separation of powers to a balancing test); *INS v. Chadha*, 462 U.S. 919, 944-46 (1983) (same); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239-240 (1995) (holding legislated invalidation of final judgments to be categorically unconstitutional). *Id.* It seems a bit odd that formalism is appealing to the majority at this point when elsewhere in the opinion it railed against formalism, for example, in refusing to import the city/state distinction and the government/individual distinction from sovereign immunity doctrine.

<sup>71</sup> 521 U.S. at 933 (quoting *New York v. United States*, 505 U.S. 144, 187 (1992)). By contrast, Justice Breyer, in dissent, criticized the “inflexibility” of the majority’s “absolute principle, . . . which poses a surprising and technical obstacle to the enactment of a law that Congress believed necessary to solve an important national problem.” *Id.* at 978 (Breyer, J., dissenting).

in avoiding the concentration of power,<sup>72</sup> so that decentralized government would still be in place to provide a “double security” for the rights of the people.

In the post-9/11 period, clearly the federal government has offered and is likely to continue to offer “expedient solution[s] to the crisis of the day.” The question now is whether courts will continue to “resist the temptation” and see the value of deterring the concentration of power in the federal government. Similarly, one might wonder whether some of those who criticized *Printz* for its hardnosed inflexibility in the face of a gun-control policy they favored will see good use for it in resisting what they may now perceive as overreaching federal authority in the fight against terrorism. The tables have now been turned with respect to policy preferences, which will test the principles of both sides of the Court and the commentators who aligned with them after *Printz*.

### III. THE RELATIONSHIP BETWEEN ANTI-COMMANDEERING DOCTRINE AND PROTECTING INDIVIDUAL LIBERTY

#### A. *Introduction*

Let us consider the relationship between the anti-commandeering doctrine announced in *Printz* and the protection of individual rights. Madison, writing in Federalist 51, associated the structures of federalism with the protection of individual liberty.<sup>73</sup> Similarly, ideas about constitutional rights lay in the background of the *Printz* litigation, as section B of this Part discusses. To a large extent, ideas about constitutional rights will provide the motivation for invoking the anti-commandeering doctrine in the context of the war on terrorism. Indeed, local resistance to participating in federal anti-terrorism efforts has already resulted from beliefs that these efforts infringe on constitutional rights, as section C of this Part discusses. Section D discusses the limitations inherent in relying on structural constitutional doctrine rather than constitutional rights, but also finds important potential in the anti-commandeering doctrine for preserving a robust understanding of individual rights, perhaps beyond any version of rights that any of the branches of the federal government,

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<sup>72</sup> *Id.* at 933 (quoting *New York*, 505 U.S. at 187).

<sup>73</sup> See *supra* text accompanying note 11.

including the federal courts, would be willing to endorse directly.

*B. The Constitutional Rights Behind the Federalism Argument in Printz*

*Printz* analyzed constitutional federalism, the scope of Congress's affirmative powers, and the force of the Tenth Amendment, but the controversy also entailed concerns about the right to bear arms.<sup>74</sup> Only Justice Thomas's concurring opinion offered a glimpse at this aspect of the case. Noting the long lapse of time since the Court had addressed the scope of the Second Amendment<sup>75</sup> and vivid recent scholarly attention to the question of whether it describes a personal right,<sup>76</sup> he saw a "colorable argument" that the Brady Act violated not only constitutional federalism but also the right to bear arms. Looking more deeply into the litigation reveals its connection to the defense of perceived Second Amendment rights. The National Rifle Association (NRA) financed four of the cases attacking the Brady Act, including the two consolidated in *Printz*.<sup>77</sup> The lawyer who handled the cases, Stephen P. Halbrook, specialized in Second Amendment cases.<sup>78</sup> The

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<sup>74</sup> The *Printz* majority did observe that statutes in the petitioners' states directed them not to interfere with gun rights. See *Printz*, 521 U.S. at 934 n.18 (citing MONT. CODE § 45-8-351(1) (1995), ARIZ. REV. STAT. § 13-3108(B) (1989), and declining to decide whether the statutes prohibited the actions required by the Brady Act).

<sup>75</sup> *Id.* at 937-38 & n.1 (Thomas, J., concurring) (citing *United States v. Miller*, 307 U.S. 174, 178 (1939) (limiting second amendment right to "ordinary military equipment" that is capable of serving the purpose of "common defense")). Justice Thomas would constrain commerce clause doctrine to the point where it would not reach "wholly intrastate, point-of-sale transactions." *Id.* at 937 (Thomas, J., concurring) (citing *United States v. Lopez*, 514 U.S. 549, 584 (1995) (concurring opinion)).

<sup>76</sup> *Id.* at 938 n.2 (citing many scholarly articles including the following, which was written by counsel for the petitioners: S. HALBROOK, *THAT EVERY MAN BE ARMED, THE EVOLUTION OF A CONSTITUTIONAL RIGHT* (1984)).

<sup>77</sup> Sam Howe Verhovek, *5 Rural Sheriffs Are Taking the Brady Law to Court*, N.Y. TIMES, Apr. 25, 1994, at A10 (noting that four of five lawsuits were "financed by the National Rifle Association").

<sup>78</sup> See STEPHEN P. HALBROOK, *FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876* (1998); STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* (1984); STEPHEN P. HALBROOK, *RIGHT TO BEAR ARMS: STATE AND FEDERAL BILLS OF RIGHTS AND CONSTITUTIONAL GUARANTEES* (1989); STEPHEN P. HALBROOK, *FIREARMS LAW DESKBOOK: FEDERAL AND STATE CRIMINAL PRACTICE* (1995); Testimony of Stephen P. Halbrook, Senate Committee on the Judiciary, Subcommittee on Constitution, Federalism and Property, Hearings on the Enforcement of the Second Amendment by Congress – the Intent of the Fourteenth Amendment, FED. NEWS SERVICE, Sept. 23, 1998 (arguing in favor of federal legislation extending the right to bear arms to actions by the states, using Section 5 of the Fourteenth Amendment).

petitioners, Richard Mack<sup>79</sup> and Jay Printz,<sup>80</sup> in fact were concerned about gun rights as well as the burdens on their workload. The decision to rely on the federalism ground did not reflect a lack of interest in Second Amendment rights. As the plaintiffs' lawyer Halbrook told the press: "From the point of view of litigation strategy, the court understands Tenth Amendment issues[.] They don't understand the Second Amendment so much."<sup>81</sup>

Thus, to some extent, the *Printz* case did involve resistance to federal power based on a conception of individual constitutional rights. Protecting federalism in *Printz* allowed a broad conception of Second Amendment rights to survive without contradiction.<sup>82</sup> Local government officials could continue to nurture their belief in an interpretation of gun rights far more vigorous than anything the Court has ever shown a willingness to embrace. Quite apart from the fact that the Court has never said that the Fourteenth Amendment incorporates the Second Amendment,<sup>83</sup> and even if the Court were willing to read the amendment as guaranteeing a personal right to bear arms, it would still require an expansive

<sup>79</sup> See Tom Diemer, *Gun Law Records Check Worries Local Officials; High Court to Determine Whether Measure Complies with 10th Amendment*, PLAIN DEALER, April 21, 1996, at 25A.

Sheriff Mack's argument is simple: He is not an employee of the federal government and should not have to work for it. He is not a member of the National Rifle Association, but he did not hesitate to seek its help when he found out from the ATF what he would be asked to do under the Brady law. "This was never part of my job description," Mack said. "I disagree with gun control. I disagree with federal intrusion. And this was both."

*Id.*

<sup>80</sup> *Morning Edition: Howard Berkes, Sheriffs Sue Government Over Brady Bill* (NPR radio broadcast, May 25, 1994) (describing Printz as "a card-carrying member of the National Rifle Association," who "called the NRA when he heard how much work he'd have to do to enforce the Brady law").

<sup>81</sup> Diemer, *supra* note 79.

<sup>82</sup> For the classic article arguing that the judiciary will "underenforce" some aspects of the Constitution and that therefore other institutions should participate in the articulation of "constitutional norms," see Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1224-26 (1978). For a recent article analyzing the Second Amendment in light of Sager's thesis and arguing that the amendment has been made "a constitutional pariah, barred from associating with other 'high caste' civil liberties our judges have labored to protect," see Brannon P. Denning, *Gun Shy: The Second Amendment as an "Underenforced Constitutional Norm"*, 21 HARV. J.L. & PUB. POLY 719 (1998).

<sup>83</sup> See *Presser v. Illinois*, 116 U.S. 252 (1886); *United States v. Cruikshank*, 92 U.S. 542 (1875). Printz and Mack would have had standing to challenge the Brady Act on Second Amendment grounds, based on its limit on Congress: if Congress's authority to require background checks violated the Second Amendment, the burden on them to conduct the checks would be lifted.

reading of that right to see it as barring the fairly reasonable limitations imposed by the Brady Act. By litigating about federalism, Printz, Mack, Halbrook, and the NRA did not have to expose their robust vision of gun rights to judicial scrutiny. Gun rights may very well have been the motivating force behind their litigation effort, but they won precisely because they relied on a constitutional theory that did not require the Court to engage them in the debate about the meaning of constitutional rights. If they had, it is likely that they would have lost; and if so, they would have not only lost the case but provoked an authoritative judicial opinion puncturing the vision of expansive rights that they so treasured.

C. *Local Resolutions Asserting Constitutional Rights and Refusing to Participate in Anti-Terrorism Efforts*

The fight against terrorism has raised concerns that the federal government has overreached its legitimate power. Concerns about racial profiling, invasions of privacy, unreasonable searches, and infringement on free speech have fueled a political movement, led by groups such as the American Civil Liberties Union and the Bill of Rights Defense Committee, urging state and local government to adopt resolutions directing their officials not to participate in at least some aspects of the anti-terrorism effort.<sup>84</sup>

My own city of Madison, Wisconsin, is one of the many cities that have adopted resolutions purporting to resist the impositions of the federal government. The relevant portion of its resolution, illustrative of the sort of resolutions adopted in many places,<sup>85</sup> announces the city's policy to forbid the following activities "in the absence of probable cause of criminal activity":

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<sup>84</sup> See Carol Rose, *Ashcroft Bars the Doors to Democracy*, BOSTON GLOBE, Sept. 16, 2003, at A19 (op-ed by executive director of the ACLU in Massachusetts, criticizing USA PATRIOT Act for authorizing excessive surveillance of citizens and political organizations and praising the resolutions passed in "more than 160 towns and cities . . . in support of the Bill of Rights and against the unconstitutional provisions of the USA PATRIOT Act"); John W. Dean, *Grassroots Opposition to Rights-Infringing Antiterrorism Tactics*, CNN.COM, Sept. 15, 2003, available at <http://www.cnn.com/2003/LAW/09/15/findlaw.analysis.dean.patriot/index.html>.

<sup>85</sup> See Susan Schmidt, *PATRIOT Act Misunderstood, Senators Say; Complaints About Civil Liberties Go Beyond Legislation's Reach, Some Insist*, WASH. POST, Oct. 22, 2003, at A4 (noting "nearly 200 cities and three states have passed resolutions contending that the PATRIOT Act . . . tramples on civil liberties"). See also Bill of Rights Defense Committee, *Local Efforts*, at <http://www.bordc.org/OtherLocalEfforts.htm> (last visited July 7, 2004).



1. any initiation of, participation in, assistance or cooperation with any inquiry, investigation, surveillance or detention; and
2. the recording, filing and sharing of any intelligence information concerning any person or organization, even if authorized by federal law enforcement, acting under new powers granted by the USA PATRIOT Act or Executive Orders. This includes collection and review of library lending and research records, as well as book and video store sales and/or rental records; and
3. the retention of intelligence information. Information that is currently held shall be thoroughly and carefully reviewed by the City Attorney or other appropriate City official to be designated by the Mayor, for its legality and appropriateness, using the United States and Wisconsin Constitutions. Any information that was collected is permanently disposed of if there is no probable cause of criminal activity; and
4. enforcement of immigration matters, which are entirely the responsibility of the Immigration and Naturalization Service. No city service will be denied on the basis of citizenship; and
5. profiling based on race, ethnicity, citizenship, religion, or political values.<sup>86</sup>

The Madison resolution, like others adopted around the country, begins with an acknowledgment of the authority of the United States Constitution and its superiority to all other law, including subconstitutional federal law.<sup>87</sup> It proclaims the city's "long and proud tradition" of respecting constitutional rights, its regard for its own "highly diverse population," and its concern that the fight against terrorism "not be waged at the expense of essential civil rights and liberties."<sup>88</sup> The Madison resolution refrains from declaring that the Act is unconstitutional, but it does express concern that the USA

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<sup>86</sup> Madison Area Peace Coalition, *Resolution to Defend the Bill of Rights and Civil Liberties*, at <http://madpeace.org/usapatriot1.html> (last visited July 7, 2004). The resolution also calls upon

any state or federal law enforcement agencies working within the City of Madison [to] comply with the policies and procedures of the Madison Police Department, and regularly report to the Mayor the extent and manner in which they have acted under the USA PATRIOT Act or new Executive Orders. This includes the names of any detainees held in the Madison area, or any Madison residents detained elsewhere. The Mayor will then publicly report to the Common Council.

*Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

PATRIOT Act “threatens civil rights and liberties guaranteed under the United States Constitution.”<sup>89</sup>

A former assistant attorney general for the Office of Legal Policy at the Justice Department, Viet Dinh, who drafted much of the Act,<sup>90</sup> has minimized these local resolutions as “merely statements of principle of saying that the Constitution . . . is sacred and that the states and locals will not do anything in abridgement of the Constitution.”<sup>91</sup> According to Dinh’s characterization, no one should violate the Constitution, but since no courts have found that any provisions of the PATRIOT Act violate constitutional rights, the resolutions mean little.<sup>92</sup> Yet the resolutions implicitly take the position that some of the activities authorized by the PATRIOT Act are unconstitutional. Attorney General John Ashcroft summarizes the purpose of the PATRIOT Act as “[t]aking down the wall between intelligence and enforcement.”<sup>93</sup> In distinct contrast, the state and local government resolutions specifically limit their participation to law enforcement, responding only to “probable cause of criminal activity” instead of any lower standard, and withhold participation in intelligence efforts altogether. The limitation asserted in the resolution is scarcely a boilerplate acknowledgment of constitutional rights: It is a robust interpretation of the meaning of constitutional rights that implicitly denounces the central purpose of the PATRIOT Act. Confining participation in federal anti-terrorism efforts to this extent is therefore true resistance to the federal program, not merely a bland statement of a truism about the superiority of the Constitution over other federal law. The resolutions embody a policy of resisting the version of federal rights propounded by the Bush administration, a policy that has the potential to survive a United States Supreme Court

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<sup>89</sup> *Id.*

<sup>90</sup> See Amy Goldstein, *Fierce Fight Over Secrecy, Scope of Law; Amid Rights Debate, Law Cloaks Data on Its Impact*, WASH. POST, Sept. 8, 2003, at A1.

<sup>91</sup> See *NewsHour with Jim Lehrer: Deadly Attack; Too Tough* (PBS television broadcast, Aug. 19, 2003) (statement of Viet Dinh, noting that “not a single provision of the USA PATRIOT Act has been overturned by a court” and that “the ACLU’s challenge . . . two weeks ago was the first time that any provision was actually challenged”).

<sup>92</sup> *Id.* See also Goldstein, *supra* note 90 (quoting Viet D. Dinh as saying, “Somewhere in this marketplace of ideas, of truths and half-truths, of fact and spin, we get a . . . picture of what the [Justice] Department should be doing. . . . The debate is healthy to establish the rules of this continuing path toward safety.”).

<sup>93</sup> Mark Hollis, *Ashcroft Defends Patriot Act; “Our Strategy Is Succeeding,” He Tells Floridians*, SUN-SENTINEL (Fort Lauderdale, FL), Sept. 25, 2003, at 3A.

interpretation of the meaning of those rights that agrees with the administration.<sup>94</sup> Moreover, the resolutions may also invoke state constitutions, which, although they do not bind federal officials, do limit state officials.<sup>95</sup> As long as no federal law preempts the provisions of a state's constitution, state constitutional law may offer far more expansive rights than those found in the federal Constitution, rights interpreted by state courts without supervision by the United States Supreme Court.<sup>96</sup> By relying on the anti-commandeering doctrine, local officials can, if they choose, find the power to uphold a far more expansive view of individual rights than they could defend in court directly.

As written, the resolutions depict state and local government stepping up to the job of providing "a double security . . . to the rights of the people," the vision of Federalist 51. Surely, state and local government officials may lack the nerve to persist in following the announced policy. It is one

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<sup>94</sup> The state might seek to "cut a broader swath" around rights, erring on the side of protecting rights. *Cf. City of Boerne v. Flores*, 521 U.S. 507, 518-19 (1997) (describing power of Congress to legislate under Section 5 of the Fourteenth Amendment, to make prophylactic laws to protect the constitutional right to the free exercise of religion by "cutting a broader swath" than the rights themselves protect). Section 5 doctrine recognizes the role of Congress in protecting individuals from states that have demonstrated a tendency to violate constitutional rights. Similarly, the state and local governments that are passing the resolutions described in the text represent a belief that the federal government has demonstrated a tendency to violate individual rights. Ordinarily, state and local government is in no position to control the unconstitutional actions of the federal government. *See, e.g., Tarble's Case*, 80 U.S. (13 Wall.) 397 (1871) (denying power of state court to give habeas corpus relief to a person held in federal custody in violation of constitutional rights). The anti-commandeering doctrine, however, quite interestingly gives state and local government some ability to push back against assertions of federal power, as discussed in the text.

<sup>95</sup> *See, e.g., supra* text accompanying notes 84-89 (discussing Madison resolution). Consider footnote 18 of the majority's opinion in *Printz*, which dealt with the argument that state law barred the CLEOs from taking the very action that federal law attempted to impose. *Printz v. United States*, 521 U.S. 898, 934 n.18 (1997) (citing MONT. CODE § 45-8-351(1) (1995) (barring any "county . . . or other local government unit" from "prohibiting . . . or regulating the purchase, sale or other transfer (including delay in purchase, sale, or other transfer), ownership, [or] possession . . . of any . . . handgun"), and ARIZ. REV. STAT. § 13-3108(B) (1989) ("[a] political subdivision of this state shall not . . . prohibit the ownership, purchase, sale or transfer of firearms")). The *Printz* Court did not reach this question because the CLEOs who brought the case themselves sought to resist the requirements of federal law.

<sup>96</sup> *See PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980) (recognizing independent power to articulate the meaning of rights in state constitutional law). The United States Supreme Court recognizes state court authority over the interpretation of state constitutional law, but it is unlikely to remain passive when strong federal interests are at stake, as the litigation over the 2000 presidential election made eminently clear. *See Ann Althouse, The Authoritative Lawsaying Power of the State Supreme Court and the United States Supreme Court: Conflicts of Judicial Orthodoxy in the Bush-Gore Litigation*, 61 MD. L. REV. 508 (2002).

thing to pass these resolutions in the atmosphere of a city council meeting, amid idealistic expressions about rights – but it is quite another to follow through when federal officials make real requests and where resistance to these requests may allow a terrorist attack to occur.<sup>97</sup> Yet, this structural safeguard for rights can work independently of federal interpretation of federal constitutional rights if the anti-commandeering doctrine survives in its absolute form and if state and local government officials have the courage to invoke it.

*D. The Value of Anti-Commandeering Doctrine as a Method of Protecting Rights in Times of Terror*

Litigation strategy prompted Printz and Mack to rely on federalism doctrine instead of directly asserting constitutional rights. Resistance to federal anti-terrorism efforts is also taking a form that could be vindicated through reliance on federalism. As discussed in the next Part, the war on terrorism might move the courts to erode or abolish the anti-commandeering doctrine, but for now let us assume the courts will be willing to adhere to the anti-commandeering doctrine, in its absolute form, so that state and local government officials, if they have the nerve, will be able to decline to carry out the anti-terrorism tasks Congress or the President attempts to assign to them. What is lost and what is gained by using federalism doctrine to resolve the controversy rather than analyzing whether constitutional rights are violated?

First, it should be noted that constitutional rights do not drop out of the picture simply because federalism doctrine is used for litigation purposes. Constitutional rights continue to motivate and justify decisions to invoke state and local autonomy. Without the ability to frame their resistance in the language of rights, state and local government officials might not be able to win public support for their resistance, which would otherwise resemble the federalism-based resistance to the civil rights movement that still merges federalism and hostility to rights in the public mind. Moreover, public demand for resistance to the federal commandeering of state and local government officials arises out of deep beliefs about the

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<sup>97</sup> One can predict that degree of emergency would affect the willingness to resist. For a discussion contrasting dire emergency and chronic, low-level emergency, see *infra* text accompanying notes 106-140.

meaning and importance of rights and the special need for vigilance in the face of strong claims about national security.

Ideas about constitutional rights are not the only basis for state and local government officials to resist federal demands. They also have political disagreements with the federal government. They may question the need for those efforts, care about maintaining good relations with an immigrant community,<sup>98</sup> or believe they have superior techniques for dealing with security matters. They may want to satisfy preferences of their own constituents, who may be suspicious of or hostile to federal policy. Of course, political and policy interests also underlie decisions to bring lawsuits even when the claims asserted are claims of constitutional right. There is never a necessary link between the claim one chooses to rely on in court and the motivation for seeking a particular outcome from that court. What is important here is that when one chooses to base one's claim on a constitutional right, the court deciding the case will need to say what the scope of the claimed right is. Rights claimants expose their expansive, idealistic visions to courts that might very well deflate them.

If Printz and Mack had presented a Second Amendment right to the courts in attacking the Brady Act, their case would have produced an interpretation of that right that might very well have disappointed them. Indeed, that is exactly what their lawyer expected and why he relied on the federalism ground. If they had relied on the Second Amendment and succeeded, they would have procured a decision about rights that not only would have endorsed a vision of liberty that they treasured but also would have obligated every government actor to respect that right, including the many officials who were voluntarily following the requirements of the Brady Act and who would not invoke their power to refuse commandeering.<sup>99</sup> It would have prevented the federal government as well from using its own personnel to perform the background checks on gun buyers. Printz and Mack won their case by relying on the federalism

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<sup>98</sup> See, e.g., Jodi Wilgoren, *University of Michigan Won't Cooperate in Federal Canvass*, N.Y. TIMES, Dec. 1, 2001, at B6 (reporting complaints by "Arab-American leaders, immigration lawyers and others . . . about the Justice Department's plan to question around 5,000 men ages 18 to 33 who have arrived here since Jan. 1, 2000, from countries suspected of links to terrorism," objections by "police departments in Detroit; Oregon; Austin and Richardson, Tex.; San Francisco and San Jose, Calif.," and refusal by the University of Michigan to help with the interviews).

<sup>99</sup> The binding power of this interpretation of constitutional law would, of course, depend on whether the United States Supreme Court chose to review the case.

ground: the Court recognized their autonomy to opt out of the gun control enforcement. If they had relied on the Second Amendment they probably would have lost, however, and if that had happened, there would be a decision in U.S. Reports denying the existence of a right they believed they had. The anti-commandeering doctrine thus deprived us of *information* about the meaning of a right.

Would it be better to force litigants like Printz and Mack to rely on claims of constitutional rights in order to increase the likelihood that courts will produce opinions telling us what our rights are? If there are rights, one may feel tempted to argue, they should be proclaimed so that government actors would know what they need to do and could be sanctioned if they fail.<sup>100</sup> The main problem with this attitude is that frequently the answer courts will give is that the claimed right does not exist, thereby putting the judicial stamp of approval on power that government was already inclined to exercise. Leaving a pall of doubt over the claimed right might have caused government actors to act with extra precaution, cutting a broad swath around known rights,<sup>101</sup> unless exigent circumstances push them to take actions challenging the constitutional limit. Since a decision based on rights will constrain Congress and all other state and local government actors who may favor the measure in question, courts feel pressure not to over-expand interpretations of constitutional rights. Because of this restraint that limits the judicial interpretation of rights, protecting the autonomy of state and local government offers an important alternative, preserving an expansive conception of rights in localities that place a high value on the particular liberty in question.

This alternative highlights the way structures of federalism can account for variation in conditions and preferences from place to place.<sup>102</sup> There are varying local preferences about the balance between individual liberties and actions government might take to increase the physical

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<sup>100</sup> Announcing clear rules of constitutional law also creates a foundation for overcoming the qualified immunity defense to a suit against a government actor for the violation of constitutional rights. See *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

<sup>101</sup> See *supra* text accompanying notes 94-97.

<sup>102</sup> For an extended discussion of the values of federalism, see, for example, Steven G. Calabresi, "A Government of Limited and Enumerated Powers": In Defense of *United States v. Lopez*, 94 MICH. L. REV. 752 (1995); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484 (1987) (reviewing Raoul Berger's *Federalism: The Founders' Design*).

security of its citizens. There is also variation in how much local citizens desire to exercise a particular liberty and how serious the threat to physical safety in their area is. The *Printz* case clearly illustrated this kind of difference. It is well known that persons in rural localities in the West tend to value their own access to guns and are relatively less concerned with the danger created when felons acquire guns than are citizens living in urban areas in the Northeast. By avoiding a decision based on the Second Amendment in *Printz*, the Court was able to satisfy the widest array of preferences, as local CLEOs were able to respond to what their own citizens wanted. *Printz* and *Mack* could opt out, but the regulations and enforcement structure of the Brady Act could survive in places where people had different values.

Yet, if rights are important, should they not trump these local preferences? A powerful lesson learned in the civil rights era was that the local majoritarian preference might be quite reprehensible. The law speaks in terms of rights precisely to deny the preference of the majority, and there has long been a particular worry about the parochial preferences of small, localized majorities.<sup>103</sup> But what if the local majoritarian preference is to *increase* individual liberty, if it is to take a very expansive view of rights, beyond what courts would be willing to carve in stone as constitutional law? The autonomy of local governments can preserve a vigorous culture of rights, as the resolutions described above indicate. It was at the local level, in particular cities, with a specific set of citizens, where the resistance to the PATRIOT Act gained a foothold. Is this not the “double security . . . to the rights of the people” to which Madison referred in *Federalist* 51?<sup>104</sup>

Should we regret that the anti-commandeering doctrine relieves pressure that might otherwise push state and local government officials to challenge the constitutionality of actions taken by the federal government?<sup>105</sup> By giving the state

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<sup>103</sup> THE FEDERALIST NO. 10 (Madison) (noting that smaller democratic constituencies find it easier to “concert and execute their plans of oppression”).

<sup>104</sup> See *supra* text accompanying note 11.

<sup>105</sup> Consider how the Supreme Court has gone out of its way to disable the state courts from having a role judging the constitutionality of the actions of federal officials. See, e.g., *Tarble's Case*, 80 U.S. 397 (1871) (precluding state courts from issuing habeas relief for person's held in federal custody). Similarly, Congress has empowered federal officials sued in state court to remove such cases to federal court. 28 U.S.C. § 1442 (2000). The institutions of the federal government have made it their business to supervise the constitutionality of the actions of those who do the work of

and local government officials a less judgmental way to disengage from a federal program, the *Printz* doctrine discourages some vigorous debate about the meaning of constitutional rights: Instead of fighting over the meaning of constitutional rights, the different governmental institutions can go about their own business, performing their separate functions in their separate ways. Yet nothing prevents state and local government from deciding when to invoke their *Printz*-given right to be left alone based on their own ideas about what rights are and when to assert rights directly. The anti-commandeering doctrine thus functions to preserve an idealistic view of rights, at a time when courts, motivated by the strongly urged needs of the federal government to protect security, would tend not to take the idealistic view of rights. Moreover, the ability of state and local government to resist being commandeered creates pressure on the federal government not to go too far, not to put too low a value on individual liberty, so that they can inspire voluntary participation even in the places that have a strong tradition of valuing individual rights.

#### IV. FEDERAL POWER IN THE EVENT OF EMERGENCY

##### A. *The Printz Court and Emergency*

Will the anti-commandeering doctrine retain vigor in the context of the war on terrorism? The *Printz* Court stated its doctrine in absolute terms,<sup>106</sup> warning of the importance of “resist[ing] the temptation” to accept “an expedient solution to the crisis of the day.”<sup>107</sup> But the war against terrorism may give rise to irresistible temptation, pushing judges to reframe or explain away the doctrine. To what extent should emergency affect the *Printz* anti-commandeering doctrine?<sup>108</sup> The *Printz* majority, professing strict adherence to the concept of dual sovereignty, brushed off an entire “cluster” of arguments for

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state and local government. See, e.g., *Ex Parte Young*, 209 U.S. 123 (1908) (rejecting sovereign immunity defense for agents of the state); 28 U.S.C. § 1343 (2000) (creating federal jurisdiction over claims for violations by state actors for violations of federal constitutional rights). However, they have used their powers to prevent the states from pushing back, supervising the federal government.

<sup>106</sup> But see *Reno v. Condon*, 528 U.S. 141 (2000), discussed *supra* note 69.

<sup>107</sup> *Printz v. United States*, 521 U.S. 898, 933 (1997) (quoting *New York v. United States*, 505 U.S. 144, 187 (1992)).

<sup>108</sup> See *supra* text accompanying notes 3-9.



weighing the importance of the power against the burden on state and local government.

Taking the opposite tack, Justice Stevens was not only willing to balance federal and state interests; he was ready to assign a heavy weight to federal interests and to minimize the burdens imposed on the state. After warning of the important needs that might arise in the case of an emergency such as a terrorist attack, Justice Stevens proceeded to accept the problem of gun violence as an emergency, citing 12,489 murders around the country over the course of one year.<sup>109</sup>

Although the number of deaths per year from gun violence is considerable, exceeding the number of deaths from the 9/11 attacks by more than a factor of four, the deaths result from disconnected incidents of localized violence. Unlike the international network of terrorism, disconnected criminal acts, even if frequent and widespread, do not require a nationally coordinated response. State and local government has traditionally handled problems of violent crime, which are susceptible to decentralized treatment. In fact, decentralized treatment of crime problems can be superior, as it is tailored to local conditions and preferences. Moreover, it can be more protective of individual rights. For example, if Congress were to attempt to federalize the crime of murder, in all likelihood, it would make the death penalty available. That law would then supersede the choices of many states that have embraced a more robust vision of the right against cruel and unusual punishment in their own law than the United States Supreme Court has adopted as a matter of federal constitutional law.<sup>110</sup>

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<sup>109</sup> *Printz*, 521 U.S. at 940 (Stevens, J., dissenting).

<sup>110</sup> See Dean A. Strang, *The Rhetoric of Death*, 1998 WIS. L. REV. 841, 841 (noting that Wisconsin abolished the death penalty in 1853). States can recognize rights that go beyond that provided by federal law if they are enforcing their own state law crimes, and these state law rights have made a powerful contribution to the development of federal law. See Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141 (1985); William Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). State law rights, however, do not protect a person accused of a federal crime. It should also be noted that the recent case law restricting the scope of the Commerce Clause doctrine, because it limits the growth of federal crimes in areas of traditional state regulation, has the capacity to preserve a more robust version of constitutional rights that exists in some states. See *United States v. Lopez*, 514 U.S. 549 (1995). Moreover, recent federal statutes have expanded the availability of the death penalty at the federal level. "[T]he 145 unbroken years since [Wisconsin abolished the death penalty] mark the longest time in American history, anywhere, that justice has been administered without threat of death," Strang, *supra*, at 841, but if a person commits a federal capital crime in Wisconsin, that long record will be broken.

In *Printz*, what was more important to Justice Stevens than his own view that gun violence constituted an emergency was that Congress had made a “policy judgment” that it amounted to an emergency, and that it would therefore supposedly usurp the legislative function for the Court to substitute its own assessment.<sup>111</sup> Justice Stevens not only wanted to use a balancing test to analyze whether state and local government could claim autonomy as a matter of constitutional law; he wanted to preclude the Court from deciding the weight of the interests in the balance. At the opposite extreme, the majority thought it was especially important to resist the temptation to balance at all and seemed to scoff at assertions of emergency. Justice Scalia observed that every generation thinks whatever it cares about is a “crisis” justifying an exception to constitutional structures, which it is only too ready to characterize as empty formality. It is hard to criticize the formality or inflexibility of the majority’s dual sovereignty analysis, however, if the alternative is a balance of interests that the judge is forbidden to weigh. The supposed balancing process becomes in essence complete judicial restraint, leaving Congress as the judge of the scope of its own power.

This resort to judicial restraint has characterized the discussion of the broad range of federalism issues in the opinions of Justice Stevens, along with those of Justices Souter, Ginsburg, and Breyer.<sup>112</sup> These Justices consistently defer to congressional decision making about the proper balance between federal power on the one hand and state and local power on the other. For them, judicial restraint completely subsumes federalism, so that whatever efforts Congress thinks ought to be undertaken as a matter of national policy become ipso facto constitutional (as long as individual rights are not violated). One ought to realize, then, that for these Justices, it is not really the case that emergency justifies national power, but that the congressional decision to act itself creates the power.

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<sup>111</sup> *Printz*, 521 U.S. at 940 (Stevens, J., dissenting).

<sup>112</sup> Justice Stevens’s dissent in *Printz* reaffirms the belief expressed in *Garcia* that Congress is well situated to protect the interests of the states. *Id.* at 956-57 (Stevens, J., dissenting). He holds out the Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48. (1995), as evidence of Congress fulfilling this role, even though all that act does is permit members of Congress to point out that they are imposing an unfunded mandate. *See id.* at 957-58.

Arguably, this restraint should not extend to unilateral actions taken by the President, the sort of actions likely to be taken in the most extreme emergencies. If the reason for deference is genuinely the belief, frequently endorsed by the *Printz* dissenters,<sup>113</sup> that Congress is structured to take account of the interests of state and local government, then decisions by the President alone do not deserve the same deference. If the real reason these Justices do not favor the enforcement of federalism is, however, the low valuation of state interests compared with federal interests, one might expect them to favor deference to decisions of the President as well (at least unless they see those decisions as detrimental to individual liberty).

One doubts whether emergency mattered at all to the dissenters, other than to critique the majority's absolute position. Would they have argued for the narrow construction of individual rights to ensure that government would be in a position to deal with hypothetical emergencies? If not, it would seem that the rejection of judicially enforceable federalism is the motivating force behind their position. Congress is trusted not because of anxiety about emergencies, but because state and local government autonomy is not a significant enough value to matter in the equation. What is missing from the *Printz* case, then, is a serious confrontation with the problem of emergency from the perspective of someone who thinks that constitutional federalism is important and deserving of judicial preservation.

### B. *Judicial Passivity in the Case of Dire Emergency*

In looking for a way to supply the analysis about emergency that is missing in *Printz*, I found myself drawn to Justice Jackson's dissenting opinion in *Korematsu*,<sup>114</sup> perhaps the most thoughtful meditation on the role of the judiciary in times of emergency to be found in the Supreme Court's cases.<sup>115</sup>

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<sup>113</sup> See, e.g., *United States v. Morrison*, 529 U.S. 598, 649-50 (2000) (Souter, J., dissenting) (citing the thesis detailed in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985)); *Alden v. Maine*, 527 U.S. 706, 805-06 (1999) (Souter, J., dissenting) (same); *Printz*, 521 U.S. at 956-57 (Stevens, J., dissenting) (same).

<sup>114</sup> *Korematsu v. United States*, 323 U.S. 214, 244 (1944) (Jackson, J., dissenting).

<sup>115</sup> Justice Jackson also discussed the effect of emergency in his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, which considered the implied emergency powers of the President. *Youngstown* dealt with the struggle for power

The *Korematsu* majority upheld a conviction for the violation of a military order excluding persons of Japanese descent from the west coast during World War II. Despite the recognition that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect,"<sup>116</sup> the majority took the position that "under circumstances of direst emergency and peril . . . the power to protect must be commensurate with the threatened danger."<sup>117</sup> Extrapolating to the anti-commandeering doctrine, one might speculate that it will collapse in a truly dire situation that demands the assistance of local authorities.

Consider, then, Justice Jackson's response. He admitted that "[i]t would be impracticable and dangerous idealism to expect or insist that each specific military command in an area of probable operations will conform to conventional tests of constitutionality" and that "[t]he very essence of the military job is to marshal physical force, to remove every obstacle to its effectiveness, [and] to give it every strategic advantage." However, he also thought that courts should stand apart from such operations rather than to distort the meaning of constitutional law to uphold them.<sup>118</sup> He assumed that the

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between the President and Congress, neither of whom necessarily needs to use courts to fend off the other. In *Youngstown*, the Court imposed limits on the President despite assertions of emergency. Jackson, in his concurring opinion, acknowledged that there was a limit to how much the Court could preserve legal limits before the pressures of the need for emergency power would overcome its will:

I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. A crisis that challenges the President equally, or perhaps primarily, challenges Congress. If not good law, there was worldly wisdom in the maxim attributed to Napoleon that "The tools belong to the man who can use them." We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.

*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring). Jackson's acknowledgment is ominous for individuals and state and local government in times of terror, because they lack coequal powers and must depend on the Court's willingness to champion their cause.

<sup>116</sup> *Korematsu*, 323 U.S. at 216.

<sup>117</sup> *Id.* at 220.

<sup>118</sup> *Id.* at 244 (Jackson, J., dissenting).

Defense measures will not, and often should not, be held within the limits that bind civil authority in peace. No court can require such a commander in such circumstances to act as a reasonable man; he may be unreasonably cautious and exacting. Perhaps he should be. But a commander in temporarily focusing the life of a community on defense is carrying out a military program; he is not making law in the sense the courts know the term. He issues orders, and they may have a certain authority as military commands, although they may be very bad as constitutional law.

period of emergency would end soon enough, and that it would be better to preserve the law in a form untainted by considerations of military exigency. The executive could achieve its goals, but could not call upon the courts to aid it in its extra-constitutional efforts.

Justice Jackson also wrote that courts were not capable of framing doctrine that would account for the emergency, because “[i]n the very nature of things, military decisions are not susceptible of intelligent judicial appraisal.”<sup>119</sup> Here, Justice Jackson expressed an idea about judicial incompetence somewhat similar to Justice Stevens’s, yet surely the two positions differ. Jackson was writing about what the majority had called “circumstances of direst emergency and peril.” Stevens simply accepted Congress’s characterization of unconnected murders widely dispersed over time and space as an emergency.<sup>120</sup> The scope of judicial incapacity recognized by Justice Stevens was thus far greater.<sup>121</sup>

The present-day conditions of the war on terrorism are quite different from the emergency Justice Jackson needed to reconcile with judicial power. This war could continue indefinitely, with perhaps many years passing before there is another visible attack<sup>122</sup> or with no further attack ever occurring.<sup>123</sup> Jackson could justify judicial inaction because he could trust that the military emergency would end:

A military order, however unconstitutional, is not apt to last longer than the military emergency . . . . But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle.<sup>124</sup>

But let us assume for the sake of argument that at least some aspects of the war on terrorism do constitute an

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<sup>119</sup> *Id.* at 245 (Jackson, J., dissenting).

<sup>120</sup> *See supra* text accompanying note 109.

<sup>121</sup> Of course, we would not expect Justice Stevens to defer to similar assertions about emergency if individual rights, such as those asserted in *Korematsu*, were at stake. But to observe this is only to restate the point made above that Justice Stevens rejects the judicial enforcement of constitutional federalism. *See supra* text accompanying notes 111-12.

<sup>122</sup> The eight year period between the first World Trade Center bombing in 1993 and the September 11th attack in 2001 illustrates the long time frame used by al Qaeda. Moreover, the “area of probable operations” might be the entire country.

<sup>123</sup> *See Hollis, supra* note 93 (noting the claim by Attorney General that the PATRIOT Act is working to prevent terrorist attacks).

<sup>124</sup> *Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting).

emergency comparable to the one Justice Jackson considered. And again, let us accept that the anti-commandeering doctrine is in place and deserves to be respected as a matter of constitutional law.<sup>125</sup> Courts might attempt to follow the advice of Justice Jackson and leave the absolute doctrine untouched while still looking for a way to defer to the choices of the national government out of deference to the exigencies of war. Adopting this stance, courts would not opine about whether the anti-commandeering doctrine absolved state and local government officials from the obligation to perform assigned tasks, nor would they provide a forum for adjudicating any sort of penalty that federal law might attempt to impose on them.<sup>126</sup> The benefit of this approach, under Jackson's theory, is that it avoids creating a new emergency principle of constitutional law that would "then lie[] about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."<sup>127</sup> We do better to tolerate a mere "incident" of unremedied constitutional violation than to find a way to incorporate it into constitutional doctrine, in Jackson's view, where it will have "a generative power of its own," affecting everything that follows.<sup>128</sup> To respond to the current emergency by abolishing the anti-commandeering doctrine or reframing it to include an exception for the "direst emergency and peril" to make national power "commensurate with the threatened danger"<sup>129</sup> would be to take a position corresponding to that of

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<sup>125</sup> Four members of the Supreme Court rejected the doctrine in its entirety, and many commentators agree. It may be that the uses of the anti-commandeering doctrine discussed in this Article will convince some *Printz* opponents to rethink their position. But, obviously, one solution to the obstacles discussed in the text would be simply to overrule *Printz* and abolish the doctrine altogether. My view is that *Printz* raised a close question as a matter of original intent, but was justified on pragmatic and normative grounds. The purpose of this Article is to examine those grounds in light of the new circumstances of the war on terror.

<sup>126</sup> See Dean, *supra* note 84, (speculating that local officials refusing to perform tasks imposed by federal law could be charged with obstruction of justice).

<sup>127</sup> *Korematsu*, 323 U.S. at 245-46 (Jackson, J., dissenting).

<sup>128</sup> *Id.*

<sup>129</sup> One might recommend a more flexible doctrine, balancing federal security needs against the degree of intrusion on the autonomy of state and local government, but the problems of judicial competence are most intense when confronted with questions of military exigency. Justice Jackson recognized these problems:

I would not lead people to rely on this Court for a review that seems to me wholly delusive. The military reasonableness of these orders can only be determined by military superiors. If the people ever let command of the war power fall into irresponsible and unscrupulous hands, the courts wield no power equal to its restraint. The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their

the *Korematsu* majority. The *Korematsu* majority constrained individual rights; the proposal to build an emergency exception into the *Printz* doctrine constrains the autonomy of state and local government.

Strikingly, Justice Jackson's solution in *Korematsu* seems quite a bit like the refusal of state and local government officials to contribute to the efforts of the federal government:

I should hold that a civil court cannot be made to enforce an order which violates constitutional limitations even if it is a reasonable exercise of military authority. The courts can exercise only the judicial power, can apply only law, and must abide by the Constitution, or they cease to be civil courts and become instruments of military policy.<sup>130</sup>

As we saw above, state courts were treated differently from state legislatures and state executive officials in the anti-commandeering cases, because courts are bound by the rule of law, and state courts must enforce federal as well as state law, because it is part of the applicable law that binds them.<sup>131</sup> By the same token, federal courts, including the Supreme Court, are bound to the rule of law, including constitutional law, with its principle of supremacy over other federal law. Normally, we would understand that to mean that judges must strike down the unconstitutional acts of government in cases in which they have jurisdiction. Under Jackson's *Korematsu* approach, constitutional law, in the case of dire, military emergency, simply becomes a justification for judicial passivity. The courts themselves resist being commandeered into the enforcement of military commands, on the theory that these commands fall outside of the regime of law that binds courts.

### C. *The Value of Anti-Commandeering Doctrine in an Emergency*

Should courts today respond with Jacksonian passivity to emergency measures taken in the war on terrorism? Jackson's idea was palatable precisely because the peril of World War II would end soon enough. Should a modern day court, however, stand back and allow the federal government to

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responsibility to the political judgments of their contemporaries and to the moral judgments of history.

*Id.* at 248 (Jackson, J., dissenting).

<sup>130</sup> *Id.*; see also *supra* text accompanying notes 84-97.

<sup>131</sup> See *supra* text accompanying note 64.

transgress rules of constitutional law because of the war on terrorism, which is potentially endless? Those who already disapprove of the anti-commandeering doctrine, like the *Printz* dissenters, might favor placing the doctrine on indefinite hold. Yet, surely, they would not treat individual rights similarly, the way Justice Jackson was willing to condone what he thought was unconstitutional race discrimination.

Even if much of the war on terrorism does not rise to the level of the “direst emergency and peril” faced by Justice Jackson, some incidents in the future could. Consider, for example, a serious bioterrorism attack, unleashing anthrax simultaneously in numerous cities around the United States.<sup>132</sup> The national government would surely need to rely on the work of the large numbers of local police and other government personnel in place around the country; we can expect that it would act immediately, commandeering local personnel to carry out severe procedures to contain and eradicate the disease. One response to this scenario is that the anti-commandeering doctrine simply would not matter: Everyone would comply. The situation itself would motivate public officials to join together and accept direction from the authority that is in a position to coordinate efforts. If we can predict this response, we should not worry about what courts ought to do about the anti-commandeering doctrine in the case of the “direst emergency and peril.” Indeed, the test of whether such a condition exists is whether it inspires this unquestioning compliance.

Yet it is not beyond comprehension that some local officials would think that the threat of the disease in their locality does not justify some extreme measures they are commanded to enforce.<sup>133</sup> Some local government workers might

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<sup>132</sup> See Judith Miller, *U.S. Has New Concerns About Anthrax Readiness*, N.Y. TIMES, Dec. 28, 2003, § 1, at 20 (noting “concerns about the nation’s vulnerability to terrorist attacks with” anthrax spores after fresh intelligence that an attack of this kind is “a top Al Qaeda objective”). Miller describes “a secret cabinet-level ‘tabletop’ exercise conducted last month that simulated the simultaneous release of anthrax in different types of aerosols in several American cities.” *Id.* This drill, called Scarlet Cloud, “showed that antibiotics in some cities could not be distributed and administered quickly enough and that a widespread attack could kill thousands.” *Id.* An earlier exercise, conducted by the Department of Homeland Security and “involv[ing] 8,000 local, state, and federal officials,” which “simulated a radiological attack on Seattle and a pneumonic plague attack on Chicago,” had “showed that the government had enormous difficulties stopping the spread of contamination through the country and into Canada.” *Id.*

<sup>133</sup> If they were taking steps of their own that interfered or conflicted with the work of the federal government, they could be subjected to regulation and preemption,



think they know better about the risks of the disease weighed against the dangers of the vaccine or might feel sympathetic to local individuals with exaggerated fears about vaccinations. Still, would anyone seek the courts' opinion about the validity of commandeering? The federal government might simply substitute military personnel wherever there were pockets of noncompliance.<sup>134</sup> The real prospect of the use of military personnel would prompt many would-be resisters to go along. Funding can also help secure voluntary compliance. The entire problem of resistance could be averted in advance with plans for emergency that include consent, for example, as a condition on spending money to put various anti-terrorism safeguards in place.<sup>135</sup>

The circumstances would be very different from the *Korematsu* problem that Justice Jackson confronted, where the federal government imposed harsh restrictions on private individuals who had every reason to feel deeply wronged, entitled to disobey in secret, and convinced that their disobedience would harm no one. Here, the federal government would be trying to *use* local officials to perform services in an emergency. These officials themselves would not be regarded as the problem, but as a means for dealing with the problem. Most of these officials as public servants would want to comply. Those who did not, presumably only a few if the emergency is *genuinely dire*, would be conspicuous dissidents from national policy. They would be in a position to give voice to the arguments against government policy, unlike, say, *Korematsu*, who tried to avoid detection. In fact, they would need to explain

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since they are still subject to generally framed laws that do not actually try to commandeer them. See *Reno v. Condon*, 528 U.S. 141 (2000). At some point, actions of this kind would be criminal. See Dean, *supra* note 84.

<sup>134</sup> This is one test of whether there truly is an emergency, since this would be a very dramatic step, likely to produce harsh criticism, especially considering that the military would be sent into a locality where local officials felt emboldened to resist the emergency command. Surely, there will be a huge gap between the sort of emergency where the President, with or without the backing of Congress, would be willing to attempt to commandeer local officials and the more extreme situation where he would actually utilize the military.

<sup>135</sup> Efforts are being made to create advance plans for dealing with many of the potential emergencies, including bioterrorism attacks. See *National Press Club Luncheon Address by Homeland Security Department Secretary Tom Ridge*, Apr. 29, 2003, FED. NEWS SERVICE (noting commitment of federal government to fund state and local government because of their crucial role in protecting against terrorism, with \$1.6 billion provided as of March 2003 and plans for an additional \$1.5 billion). One reason for supporting the continuation of the anti-commandeering doctrine in its absolute form is precisely because it creates an incentive for adequate funding and for advance planning.

themselves because they would be exposed to public criticism for their failure to help. The pressure to comply with federal orders would increase in proportion to the severity of the emergency, but it would also decrease in proportion to the strength of their argument that the federal government was abusing its power and infringing on individual rights. At the same time, however, the prospect of noncompliance would exert pressure on federal policymakers to inspire compliance by providing adequate funding and by proposing measures that are not perceived as abusive.

Would the resisting local officials be charged with crimes or subjected to sanctions?<sup>136</sup> Perhaps only then would the matter arrive in court,<sup>137</sup> at which point there would be no need to adopt the Jacksonian device to avoid penalizing them: Adhering to the absolute anti-commandeering doctrine would produce the same result. Clearly, respecting the anti-commandeering doctrine is different from enforcing constitutional rights. Jackson sought a way to avoid interfering with the efforts of the national government and still allow *Korematsu* to go free. But that dichotomy already exists in the anti-commandeering doctrine: The national government is free to take the steps it wants to take with its own personnel and state and local government is able to refuse to contribute to those efforts.

This resolution of the problem has an advantage to those who are concerned with individual rights, which the courts would probably slight if they were asked to enforce them at the expense of strong national security considerations. Imagine individuals attempting to procure injunctions from courts so that they could avoid inoculations or quarantines after a severe bioterrorist attack. They would surely fail. Yet the sensitivity of some local officials to their concerns could lead those officials to resist taking orders from the federal government, and that potential for resistance might generate

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<sup>136</sup> Cf. Dean, *supra* note 84 (warning of the potential for charges of the obstruction of justice if local officials fail to comply with the requirement that they aid in federal investigation of crimes).

<sup>137</sup> Conceivably, the state and local government officials would themselves initiate litigation, as Printz and Mack did. They might seek a declaratory judgment that they are entitled to refuse to participate. Like Printz and Mack, they would only have standing to litigate in federal court if they faced sanctions for refusing to be commandeered. If the federal government chose simply to bypass them, then, they should not be entitled to extract an advisory opinion about the anti-commandeering doctrine. The more dire the emergency, the less likely this kind of anticipatory litigation is.

more careful decision making at the federal level, taking account of individual liberties to some extent. Officials resisting commandeering would raise the objection that the federal effort violated the constitutional rights of individuals, the very rights that courts would avoid enforcing in "circumstances of the direst emergency and peril." Indeed, if a court ever did face the anti-commandeering question in these circumstances, it would undoubtedly respond to the actual context: The more intrusive on individual rights particular measures are, the more appealing noncompliance would look. By denying the means of commandeering to the federal government, the courts have created an incentive to adopt policies that inspire compliance, thus preserving a beneficial structural safeguard for individual rights.

Preserving the *Printz* doctrine in its absolute form, instead of trying to design an exception based on emergency, also eliminates the problem of asking a court to identify what constitutes a genuinely dire emergency. The willingness of Justice Stevens in *Printz* to view murder as a national emergency should serve as a warning against creating a doctrinal exception. Even if courts endeavored to keep the emergency exception under control, claims about the war on terrorism will tend to look strong. Reexamine the list of matters that the current local resolutions resist:<sup>138</sup> Which ones could not be justified as part of the emergency of the war on terrorism? More importantly, putting an absolute power to resist in the hands of state and local government creates pressure that works in favor of protecting individual rights. There is good reason to think that opposition at the local political level has moderated the behavior of the federal government<sup>139</sup> and that this method of controlling the national government is more effective than lawsuits based on individual

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<sup>138</sup> See *supra* text accompanying note 86.

<sup>139</sup> See Philip Shenon, *Panel on Terror Calls for Board On Protecting Civil Liberties*, N.Y. TIMES, Dec. 16, 2003, at A32 (reporting recommendation by federal commission on terrorism "that the White House establish an independent bipartisan panel to review whether new laws and regulations proposed by the government might infringe on civil liberties"); Schmidt, *supra* note 85 (quoting speech by Attorney General John Ashcroft asserting that the provision that would permit government access to library and other records had never been used and characterizing criticism of the PATRIOT Act as "castles in the air built on misrepresentation; supported by unfounded fear; held aloft by hysteria").

rights.<sup>140</sup> This is precisely the vision of federalism found in Federalist 51.

## V. CONCLUSION

Over the course of United States history, conditions have changed, causing people to look more and more to the national government for solutions to modern-day problems. It would seem that the war on terrorism can only increase the demand for the national government to extend its reach into more and more aspects of American life. One might well predict, then, that the war on terrorism will finish off the Rehnquist Court's federalism revival: Federalism neurotics<sup>141</sup> will need to snap out of their nostalgia and face the hard realities of a brutally changed world. What can survive of the Madisonian "double security . . . to the rights of the people"? How can the states play an important role in controlling abuse by the federal government when we are forced to look to the federal government to deal with such monumental threats?

It is well recognized, however, that the federal government might go too far in prosecuting its war on terrorism. It has not been my purpose here to express an opinion on whether or not it has, but the local resolutions discussed in this Article are part of the evidence that many people *believe* or *fear* that the federal government has gone very far wrong and has committed many serious violations of constitutional rights. Not surprisingly, those who worry about the violation of constitutional rights tend to assume that the rights themselves offer the best hope for a cure. Remembering how state and local government has in the past attempted to use federalism arguments to deflect claims of constitutional rights, they tend not to look to federalism for the protection of rights.

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<sup>140</sup> See *NewsHour with Jim Lehrer*, *supra* note 91 (statement of Laura Murphy, director of the Washington National Office of the American Civil Liberties Union).

[W]e just brought the first challenge to the PATRIOT Act two-and-a-half weeks ago. The case has not been adjudicated . . . [I]t takes a while for a challenge to work its way through the judicial process. [One] cannot state factually that the courts have reviewed all of the provisions of the PATRIOT Act and upheld them. That has yet to be seen.

*Id.*

<sup>141</sup> See Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on A National Neurosis*, 41 UCLA L. REV. 903 (1994).

This Article has sketched out reasons for thinking that federalism, in particular the autonomy protected by the anti-commandeering doctrine, can protect constitutional rights better than the direct assertion of claims based on those rights. State and local government officials exert pressure on the federal government that works differently from constitutional rights. Claims of autonomy, justified by the Supreme Court's decision in *Printz*, can arise out of strong interpretations of constitutional rights. These interpretations may be drastically overstated or naively idealistic and, consequently, quite unlikely to move courts to rein in the federal government as it pursues national security. But state and local government autonomy can exert pressure on the federal government to moderate its efforts and take care not to offend constitutional rights, even rights that the courts would not now be willing to enforce. To carry out its programs, the national government will need to inspire the confidence of the vast numbers of police and other personnel employed at the state and, especially, local government level.

Because state and local government autonomy can work as a safeguard for the rights of the people, the anti-commandeering doctrine should remain in place, in full force, unmodified by any sort of emergency exception. Courts, if they are given the opportunity to rethink the anti-commandeering doctrine should continue to "resist the temptation" to adopt "an expedient solution to the crisis of the day."<sup>142</sup> It is true that this autonomy deprives the national government of a means to carry out programs that may be vitally important. But in cases of the "direst emergency and peril," the great majority of persons employed at the state and local level of government can be expected to respond without objection. Where there are pockets of noncompliance, the federal government can send in its own personnel, including the military. The different levels of government will exert pressure on each other. State and local government will tend to resist only when the emergency is not dire and when the actions of the federal government offend local beliefs, often idealistic beliefs about constitutional rights. The federal government will want to win compliance and will take steps to inspire cooperation, such as offering ample funding and framing demands that take account of ideas about

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<sup>142</sup> See *supra* text accompanying notes 69-72.

individual rights. Remove the anti-commandeering doctrine, or temper it with an emergency exception, and this beneficial interaction is lost.

