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NATIONAL LEAGUE OF CITIES RISING: HOW THE TELECOMMUNICATIONS ACT OF 1996 COULD EXPAND TENTH AMENDMENT JURISPRUDENCE

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Abstract: Whether and how the Tenth Amendment affects Congress's Commerce Clause power has been the subject of heated debate in the Supreme Court for over thirty years. In 1976, the Court held in National League of Cities v. Usery that the Tenth Amendment acts to immunize certain essential aspects of state sovereignty from federal regulation. This case was later overruled as stating an unworkable rule, but the 1992 case of New York v. United States revived the Tenth Amendment as instead standing for an anti-commandeering principle. In 2000, a lone Fourth Circuit judge argued that a provision of the Telecommunications Act of 1996 (TCA) violated this principle. This Note tracks the evolution of the Supreme Court's Tenth Amendment jurisprudence, analyzes how the challenge posed by the TCA falls within that evolution, and concludes that such challenge may provide the next step in the Court's surreptitious revival of National League of Cities.

[R]egulation of land use is perhaps the quintessential state activity.¹

INTRODUCTION

An unassuming peak in the small town of Warner, south of New Hampshire's White Mountains and a twenty-minute drive northwest of Concord, Mount Kearsarge might appear an unlikely place to ground a federalism controversy. Compared to the imposing 6288-foot summit of Mount Washington or other peaks in the Presidential Range, the tip of Kearsarge reaches a modest 2937 feet, though its distance from the White Mountains allows panoramic views that reach from Vermont's Green Mountains to Boston. The geographic isolation that

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provides hikers to Kearsarge's summit with such a view, however, also provides telecommunications equipment with ideal unobstructed radio wavelengths. In 1997, U.S. Cellular Corporation planted a 180-foot lattice cell tower atop Mount Kearsarge, prompting local outrage ranging from litigation brought by citizens of Warner, to press describing the tower as a "huge, glittering one-finger salute."

This local reaction is mirrored nationwide, as municipalities resist the siting of wireless towers for reasons including aesthetic, environmental, and financial. Vermont Senator Patrick Leahy echoed these sentiments when he asserted on the floor of the Senate, "I don't want Vermont turned into a giant pincushion with 200-foot towers indiscriminately sprouting up on every mountain and in every valley, ruining the view that most of us have spent a lifetime enjoying."

The controversy stemmed from the passage of the Telecommunications Act of 1996 (TCA). Specifically, in §332(c)(7) of the TCA, Congress purports to leave cell tower siting authority in the hands of state and local governments, but mandates guidelines for, and places limitations on, state and local zoning authorities' exercise of that power. The ambiguity of one provision of §332(c)(7) recently led a Fourth Circuit judge to conclude that the provision violates the Tenth Amendment of the Constitution in light of the anti-commandeering principle announced in the Supreme Court case New York v. United States. This

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2 See Nevins v. N.H. Dep’t of Res. & Econ. Dev., 792 A.2d 388 (N.H. 2002). The Kearsarge case is anomalous in that the New Hampshire Department of Resources and Economic Development gave express permission to U.S. Cellular to site the tower. Id. at 390-91. The local response to such cell tower siting, however, was anything but anomalous. Amanda Parry, Court to Hear Cell Tower Arguments, CONCORD MONITOR, Nov. 9, 2001, at A4.


7 Id. § 332(c)(7).

8 Id. § 332(c)(7)(A).

9 Id. § 332(c)(7)(B)(i)-(v).

10 Judge Niemeyer concluded that §332(c)(7)(B)(iii) of the TCA violates the Tenth Amendment. Petersburg Cellular P’ship v. Bd. of Supervisors, 205 F.3d 688, 705 (4th Cir. 2000) (Niemeyer, J.). His view did not command a majority of the three-judge panel; Judge Widener did not reach the constitutional issue, and Judge King expressly dissented from Judge Niemeyer’s constitutional argument. Id. at 691-92 (per curium).

11 U.S. CONST. amend. X. (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

Note evaluates the argument that select portions of § 332(c)(7) are open to attack on Tenth Amendment grounds. Part I provides an overview and background of the TCA. Part II outlines the TCA itself, and describes the constitutional challenge recently raised in the Fourth Circuit. Part III outlines the Supreme Court's Tenth Amendment jurisprudence, and Part IV applies these principles to § 332(c)(7), concluding that reconciling the Supreme Court's recent Tenth Amendment cases means reviving one aspect of a previously discredited doctrine.

I. OVERVIEW AND BACKGROUND OF THE TELECOMMUNICATIONS ACT OF 1996

Congress first turned its attention to the telecommunications industry with the Telecommunications Act of 1934, which created the Federal Communications Commission (FCC) to deal with interstate phone and radio communications. Regulatory authority to construct and maintain intrastate phone infrastructure, as well as the power to set rates for intrastate phone service, however, remained at the state and local level. The wireless communications industry required an entirely new infrastructure, and the industry's growth has been exponential. In 1985, just two years after the FCC issued its first license to operate a cellular tower, there were 203,600 individual cellular subscribers, with 599 cell towers in commercial use. There were 28 million individual subscribers and nearly 20,000 towers by 1995, when the TCA was first under congressional consideration.

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14 La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 375 (1985). In addressing the FCC’s power to preempt state authority, the Supreme Court noted:

The Communications Act [of 1934] not only establishes dual state and federal regulation of telephone service; it also recognizes that jurisdictional tensions may arise as a result of the fact that interstate and intrastate service are provided by a single integrated system.... [through a jurisdictional separations process], it facilitates the creation or recognition of distinct spheres of regulation.

Id.


16 CTIA Survey Results, supra note 15. As one might expect, the growth has only accelerated since the enactment of the TCA; as of June 2001, subscribers approached the 120 million mark, and cell sites topped the 114,000 mark. Id.
The exponential growth in cell towers is due to a combination of increased popularity of cell phone service and the nature of the technology itself. "Cellular" technology is so named because large geographic service areas are divided into hexagonal cells, tessellated in the manner of a honeycomb.\(^{17}\) Each tower is sited at or near the center of one cell, and transmits within a narrow radio wavelength.\(^{18}\) The signal is transmitted to the edge of its cell, where a tower in an adjacent cell picks up the signal and transmits it along as the individual user moves through the service area.\(^{19}\) Each tower has a limited carrying capacity, so as more individuals subscribe to the service area, the length of the radius within which each tower can transmit an acceptable signal is shortened.\(^{20}\) This results in gaps between the cells, thereby requiring more towers to fill these gaps.\(^{21}\)

In addition, recent years have seen a sharp rise in the use of broadband Personal Cellular Service (PCS).\(^{22}\) This all-digital service transmits across a higher frequency band than traditional cellular service.\(^{23}\) Higher frequency necessarily denotes a shorter wavelength; PCS offers greater quality, reliability, and flexibility of service, but at limited range.\(^{24}\) PCS towers, therefore, need not be as high as traditional cellular towers, but to equal the area covered by one traditional cell tower, as many as four PCS towers are required.\(^{25}\)

In part, the TCA is Congress's response to the conflict between industry's need to site ever-increasing numbers of towers to provide uniform service to a rapidly expanding customer base, and municipalities' desire to maintain control over where such towers will be sited.\(^{26}\) Congress recognized the problem: "State and local require-


\(^{18}\) Id. Cellular transmits in the 824-849 and 869-894 MHz range. Id.

\(^{19}\) Id.

\(^{20}\) Id. at 11.

\(^{21}\) Id.


\(^{23}\) FCC Fact Sheet #1, supra note 17, at 9. PCS systems transmit in the 1850-1990 MHz range. Id.

\(^{24}\) See FCC Fact Sheet #2, supra note 22, at 5-6.

\(^{25}\) See id. at 6.

ments, siting and zoning decisions [have] created an inconsistent and, at times, conflicting patchwork of requirements which will inhibit the deployment of [PCS].”

In enacting the TCA, Congress intended “to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector development of advanced telecommunications.” Such rapid acceleration would naturally be hindered by the patchwork of local regulations, the multiplicity of necessary towers, and local resistance to them. Thus, the TCA, as drafted in the House of Representatives, would have allowed the FCC total federal preemption of state authority to regulate tower siting. However, the Conference Committee rejected this approach, seeking to leave some zoning authority in the hands of state and local governments. The resulting compromise appeared as § 332(c)(7) of the TCA, about which the Conference Committee explained: “The conference agreement creates a new [§ 332(c)(7)] which prevents [FCC] preemption of local and State land use decisions and preserves the authority of State and local governments over zoning and land use matters except in the limited circumstances set forth in the conference agreement.”

II. Section 332(c)(7) of the Telecommunications Act of 1996

As codified, § 332(c)(7) is entitled “Preservation of local zoning authority.” The title is something of a misnomer. Subparagraph A of the Section expressly claims that “[e]xcept as provided in this paragraph, nothing in [the TCA] shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.” However, the bulk of § 332(c)(7) is subparagraph B, concerning the limitations on or the instructions to local zoning authority.

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30 Id. at 207-08, reprinted in 1996 U.S.C.C.A.N. 124, 222.
33 Id. § 332(c)(7) (A).
34 Id. § 332(c)(7) (B) (i)-(v).
Subparagraph B provides that state or local governments "shall not unreasonably discriminate among providers of functionally equivalent services" and "shall not prohibit or have the effect of prohibiting the provision of personal wireless services." When a request for authorization to site or modify a wireless facility is made, state or local governments are required to act on such a request "within a reasonable period of time." For a state or local government to validly deny a request to "place, construct, or modify" a wireless facility, the statute requires that such a decision be "in writing and supported by substantial evidence." Beyond these standards and procedures, subparagraph B explicitly preempts state and local governments from regulating wireless facilities "on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with [FCC regulations]." The final provision of subparagraph B grants both state and federal judicial review of any siting decision made at the local government level, and provides that "the court shall hear and decide such action on an expedited basis."

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35 Id. § 332(c)(7)(B)(i)(I).
36 Id. § 332(c)(7)(B)(i)(II).
37 Id. § 332(c)(7)(B)(ii).
38 47 U.S.C. § 332(c)(7)(B)(iii). This provision reads in full: "Any decision by a State or local government or instrumentality thereof to deny a request to place, construct or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record." Id.
39 Id. § 332(c)(7)(B)(iv). This provision reads in full:

No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission’s regulations concerning such emissions.

40 Id. § 332(c)(7)(B)(v). This provision reads in full:

Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumental-
The amorphous language of these provisions invites litigation, as has been noted by reviewing courts.41 The Second Circuit remarked that "this statute fairly bristles with potential issues, from the proper allocation of the burden of proof through the available remedies for violation of the statute's requirements."42 This Note will address the requirement that a local zoning board's denial of a siting request be supported by "substantial evidence."43

In the Fourth Circuit case of Petersburg Cellular Partnership v. Board of Supervisors, Judge Niemeyer opined that imposition of the "substantial evidence" federal standard commandeered the state's legislative process and thereby violated the Tenth Amendment.44 This, however, was not the holding of the court, which reversed on more complex grounds.45

The district court had overturned the local zoning board's permit denial on the grounds that it failed to meet the "substantial evidence" burden imposed by § 332(c)(7)(B)(iii).46 On appeal to the Fourth Circuit's three-judge panel, Judge Niemeyer agreed with the district court that the "substantial evidence" test was not met, but voted to reverse because he also found that the standard itself violated the Tenth Amendment.47 Judge Widener also voted to reverse, but on the grounds that the "substantial evidence" test was met; he therefore did not reach the constitutional issue.48 Judge King believed that the "substantial evidence" test was not met, and separately dissented from Judge Niemeyer's constitutional argument, concluding that Congress's power to "conditionally preempt" state regulation did not violate the Tenth Amendment.49

The constitutionality of § 332(c)(7) was raised again in the Second Circuit, which summarily dismissed the Tenth Amendment ar-

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Id. 41 See, e.g., Cellular Tel. Co. v. Town of Oyster Bay, 166 F.3d 490, 494 (2d Cir. 1999).
42 Id.
43 Id. at 691–92 (per curium).
44 Id. at 691 (per curium).
45 Id. (per curium)
46 Id. at 691 (per curium).
47 Id. at 691–92 (per curium).
48 Id. at 691–92 (per curium).
49 Id. at 691–92 (per curium).
The Second Circuit expressed "no doubt that Congress may preempt state and local governments from regulating the operation and construction of a national telecommunications infrastructure, including construction and operation of personal wireless communications facilities." Though the language employed by the Second Circuit was broad, the only provision of § 332(c)(7) before the court dealt with the restriction on a local government’s ability to deny siting based on environmental effects of radio frequency emissions.

The Supreme Court denied certiorari of this case, despite the urging via amici curiae of members of Congress and a host of municipalities who supported the position taken by Judge Niemeyer in Petersburg Cellular. The Supreme Court was correct in denying certiorari on the narrow issue before the Second Circuit, but the Court should address the “substantial evidence” requirement in the future, as its recent Tenth Amendment jurisprudence raises serious questions about this provision’s constitutionality.

III. The Supreme Court’s Commerce Clause and Tenth Amendment Jurisprudence

A. Background

The Constitution grants Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” The idea that Congress has the power to regulate telecommunications under its Commerce Clause power
would appear to be unremarkable, given that Congress clearly has the power to regulate wholly intrastate commercial activities that, in the aggregate, affect interstate commerce.\textsuperscript{58} The Court has construed Congress's broad power to legislate under the Commerce Clause as limited, however, by principles of state autonomy identified in the Tenth Amendment.\textsuperscript{59} The Tenth Amendment states in its entirety: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."\textsuperscript{60} This barrier to congressional action has been held to exist independent of the power otherwise delegated by the Commerce Clause.\textsuperscript{61}

It is ironic that the Tenth Amendment has been read as an affirmative barrier to congressional action where, by its own text, it reserves to the states only those powers that have not been delegated by the Constitution to the federal government.\textsuperscript{62} Because the Commerce Clause is a clear delegation of constitutional power, the Tenth Amendment would not seem to factor into the analysis.\textsuperscript{63} This view was most clearly expressed in the 1941 case of \textit{United States v. Darby}, where the majority upheld Congress's ability under the Commerce Clause to require that private employers adhere to certain labor standards.\textsuperscript{64} Although the Darby Court recognized that the actual objects

\textsuperscript{58} Wickard \textit{v. Filburn}, 317 U.S. 111, 125 (1942) (upholding Congress's ability under the Commerce Clause power to regulate homegrown and consumed wheat because of the aggregate effect such activity would have on national wheat markets); \textit{cf. United States v. Lopez}, 514 U.S. 549, 567 (1995) (holding as unconstitutional Congress's attempt to regulate simple possession of firearms in wholly intrastate school zones).


\textsuperscript{60} U.S. CONST. amend. X.

\textsuperscript{61} \textit{New York}, 505 U.S. at 156–57; \textit{see also Printz}, 521 U.S. at 923–24, 923 n.13 (suggesting that the term "Proper" in the Necessary and Proper Clause provides an additional textual barrier to powers delegated to Congress). The Necessary and Proper Clause provides Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cl. 18.

\textsuperscript{62} \textit{See, e.g., New York}, 505 U.S. at 156–57.

\textsuperscript{63} Note, however, that the Court has read broad principles of state sovereign immunity into the Eleventh Amendment's bare textual prohibition of a state citizen's right to sue a different state, \textit{Hans v. Louisiana}, 134 U.S. 1, 10–13, 21 (1890), and held that Fourteenth Amendment equal protection principles apply against the federal government through the Fifth Amendment despite the absence of any "equal protection" clause in the latter, \textit{Bolling v. Sharpe}, 347 U.S. 497, 498–500 (1954).

of regulation were employees not alleged to be commodities in interstate commerce, it explained that the “power of Congress to regulate interstate commerce extends to ... activities intrastate which have a substantial effect on the commerce.”65 This decision was “unaffected by the Tenth Amendment which ... states but a truism that all is retained which has not been surrendered.”66

The importance and scope of the Tenth Amendment has been vigorously debated throughout the last quarter of the twentieth century, leaving a wake of conflicting precedents, overturned cases, and most recently, anti-commandeering arguments in favor of state immunity from certain forms of federal legislation.67

B. Early Signs of Limits on the Commerce Clause Based on State Autonomy

In 1971, the Court skirted an issue which it would later tackle nearly head-on: whether the Commerce Clause grants Congress the power to impose criminal penalties on convicted felons possessing guns.68 In United States v. Bass, the Court engaged in narrow statutory interpretation to avoid further defining the scope of the Commerce Clause vis-à-vis the states.69 Writing for the majority, Justice Marshall justified the narrow reading:

Because its sanctions are criminal and because, under the Government’s broader reading, the statute would mark a major inroad into a domain traditionally left to the States, we refuse to adopt the broad reading in the absence of a clearer direction from Congress.70

. . . .

65 Id. at 119–20.
66 Id. at 123–24.
69 404 U.S. at 351. As recently as 2001, the same analysis was used to avoid a head-on collision between the Commerce Clause and federalism principles. See Solid Waste Agency v. United States Army Corps of Eng’rs, 531 U.S. 159, 174 (2001) (“Permitting [the U.S. Army Corps to claim jurisdiction over wholly intrastate, non-navigable waters] would result in a significant impingement of the States’ traditional and primary power over land and water use . . . . We thus read the statute as written to avoid the significant constitutional and federalism questions.”).
70 Bass, 404 U.S. at 339.
Reviving National League of Cities Under the Telecommunications Act

... [U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. 71

Four years later, Justice Marshall wrote another narrow opinion for the Court, in which Darby's language regarding the Tenth Amendment was addressed. 72 In Fry v. United States, the Court was asked to determine whether the scope of the Commerce Clause allowed Congress to place restrictions on state and local government employee wage increases in an effort to stabilize the economy. 73 The Court noted the principle that "[s]tates are not immune from all federal regulation under the Commerce Clause merely because of their sovereign status," 74 and went on to uphold the statute, emphasizing that it was an emergency measure of quite limited scope. 75 The Court rejected the petitioner's Tenth Amendment argument, but retreated from the broad language of Darby:

While the Tenth Amendment has been characterized as a "truism," stating merely that "all is retained which has not been surrendered," it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system. 76

These hints that the Court was willing to entertain the possibility of state immunity from federal regulation became reality the following year. 77

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71 Id. at 349.
73 See id. at 545. The statute in question was the Economic Stabilization Act of 1970, a temporary grant of authority to the President to issue orders and regulations restricting wages throughout the economy. See id. at 543-45.
74 Id. at 548.
75 Id.
76 Id. at 547 n.7 (quoting United States v. Darby, 312 U.S. 100, 124 (1941)) (internal citation omitted).
C. "The Court's jurisprudence in this area has traveled an unsteady path."78

1. State Sovereignty Trumps Congressional Power

_National League of Cities v. Usery_ marked the first time that the Court held a congressional act unconstitutional on state autonomy grounds despite a valid exercise of congressional power under the Commerce Clause.79 Then-Justice Rehnquist's majority opinion held that the Tenth Amendment barred Congress from using its Commerce Clause power to affect state employees with minimum wage and overtime amendments to the Fair Labor Standards Act, because Congress could not "exercise that power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made."80 The Court expressed concern that, absent an inviolable sphere of state autonomy free from federal regulation, the broad sweep of the Commerce Clause power could render the states as sovereign political entities all but irrelevant.81 Though agreeing that private corporations and individuals are proper objects of federal regulation, the _National League of Cities_ Court read the Tenth Amendment as conferring upon states as states a special identity in relation to the federal government.82 In doing so, the Court squarely overruled _Maryland v. Wirtz_, which had explained that although the scope of the federal taxing power was limited to areas not "traditionally" engaged in by the states, the Commerce Clause power had no such limitation.83 The _National League of Cities_ Court did not define precisely in which "traditional" or

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79 _Nat'l League of Cities_, 426 U.S. at 855.
80 Id. Then-Justice Rehnquist characterized this as consistent with _Fry_ because the provision under consideration there was a strictly temporary measure intended to address a serious national emergency, and neither burdened state coffers nor supplanted states' decisions about how their government should be structured. _Id._ at 853. Justice Rehnquist so concluded despite the fact that he had dissented from _Fry_ on the grounds that the Commerce Clause power did not reach as broadly as the majority suggested, and neither was the national economic situation so urgent as to allow Congress to intrude on state sovereignty through other Constitutional means. See _Fry v. United States_, 421 U.S. 545, 559 (1975) (Rehnquist, J., dissenting).
81 _Nat'l League of Cities_, 426 U.S. at 855.
82 _Id._ at 854.
83 _Id._ at 855; see _Maryland v. Wirtz_, 392 U.S. 183, 198 (1968), _overruled by Nat'l League of Cities v. Usery_, 426 U.S. 833 (1976), _overruled by Garcia v. San Antonio Metro. Transit Auth._, 469 U.S. 528 (1985) ("The state can no more deny the power if its exercise has been authorized by Congress than can an individual.") (quoting United States v. California, 297 U.S. 175, 185 (1936)).
"integral" state functions this new immunity would inhere, but was asked to do so in a string of cases to follow.

2. Narrowing the National League of Cities Test

In three cases following National League of Cities, the Court applied the "traditional/integral state function" test to challenges of Congress's exercise of its Commerce Clause power, and upheld the congressional acts at issue in each one.84 Two are particularly relevant here: Hodel v. Virginia Surface Mining & Reclamation Ass'n and FERC v. Mississippi.85

First was the Hodel case, which saw, inter alia, a facial Tenth Amendment challenge to the Surface Mining Control and Reclamation Act (Surface Mining Act).86 The Surface Mining Act was primarily an environmental protection statute intended to protect against the adverse effects of surface coal mining.87 Two so-called "steep slope" provisions of the Surface Mining Act were alleged to run afoul of the Tenth Amendment.88 The first required that, on slopes steeper than twenty degrees, private individuals and businesses return mined areas to their approximate original contours and prohibited them from employing certain dumping and mining techniques.89 The second allowed private "steep slope" operators to obtain a variance from the requirement that they return the land to its approximate original contour if those operators could demonstrate that "equal or better economic or public use" could be achieved by a different postmining restoration technique.90

Appellants urged that these provisions violated National League of Cities's ban on congressional trammeling of traditional state functions, arguing that regulation of land use has long been recognized as an

85 FERC, 456 U.S. 742; Hodel, 452 U.S. 264. The third case upheld the Age Discrimination in Employment Act, finding that federal minimum standards governing mandatory retirement of state employees did not directly impair the state's ability to structure integral operations in areas of traditional governmental functions, nor did it impose serious financial burdens on the state. Wyoming, 460 U.S. at 238, 240–41.
86 452 U.S. at 268.
87 Id.
88 Id. at 283–84.
89 Id. at 284.
90 Id.
inherent state police power. The Court found this argument misplaced. The Court first reiterated the distinction made by *National League of Cities* between federal regulation of private persons and businesses—proper objects of both federal and state governmental regulation—and federal regulation of the states as states, thought by virtue of their sovereign power to have special standing to challenge congressional authority. The Court then outlined the three requirements that any successful challenge under *National League of Cities* must meet:

First, there must be a showing that the challenged statute regulates the "States as States." Second, the federal regulation must address matters that are indisputably attributes of state sovereignty. And third, it must be apparent that the States’ compliance with the federal law would directly impair their ability to structure integral operations in areas of traditional governmental functions.

The Court therefore did not address whether land use regulation is an indisputable or integral attribute of state sovereignty under the second prong of the test. Instead, it found that appellants had not shown that the Surface Mining Act regulates the states as states under the first prong. The steep slope provisions directly regulated only the conduct of private individuals and businesses, and did not compel any action by the states at all. The Court stressed this point:

[T]he States are not compelled to enforce the steep-slope standards, to expend state funds, or to participate in the federal regulatory program in any manner whatsoever. If a State does not wish to submit a proposed permanent program that complies with the Act and implementing regulations, the full regulatory burden will be borne by the Federal Government.

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92 *Hodel*, 452 U.S. at 286.

93 Id. at 287–88 (citation and quotations omitted).

94 Id. at 288.

95 Id.

96 Id.
The *Hodel* Court noted that by virtue of the Supremacy Clause, Congress may prescribe federal minimum standards that states may implement or else be preempted by a federally administered regulatory program.97 The Court stated that "nothing in *National League of Cities* suggests that the Tenth Amendment shields the States from preemptive federal regulation of private activities affecting interstate commerce."98 Ultimately, the Surface Mining Act was considered akin to the Clean Air and Clean Water Acts: acceptable forms of "cooperative federalism" wherein Congress imposes no affirmative burdens on the state to regulate but simply allows states to regulate private parties as they see fit, subject to limits imposed by federal preemption.99

In *FERC*, the Court upheld the Public Utility Regulatory Policies Act of 1978 (PURPA) against Tenth Amendment challenge.100 Congress passed PURPA in response to the energy crisis faced by the United States in the late 1970s; put simply, its intention was to promote energy conservation by encouraging the states to adopt certain regulatory practices affecting private utilities.101 This was the first time the Court had directly addressed a federal statute that used "state regulatory machinery to advance federal goals."102 Because the operation of PURPA is roughly analogous to the provisions of the Telecommunications Act of 1996, considered herein, it is instructive to look closely at how the Court construed the statute.

Distilled to its essence, PURPA contained three basic requirements. First, section 210 authorized the Federal Energy Regulatory Commission (the Commission) to exempt power facilities that rely on renewable energy resources from state regulation, and required state regulatory authorities and nonregulated utilities to implement FERC's rules encouraging the growth of such facilities.103 Second, titles I and III of PURPA directed the states to "consider" adopting de-

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97 *Id.* at 290. The Supremacy Clause provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

98 *Hodel*, 452 U.S. at 290–91.

99 *Id.* at 289 n.30.


101 *Id.* at 745–46.

102 *Id.* at 759.

103 *Id.* at 751.
tailed federal retail regulatory practices. Third, these titles also imposed certain procedures on state commissions regarding the means by which such “consideration” of the federal standards should be implemented, including deadlines by which states must report and a requirement that states must furnish a written explanation to the public if the federal standards are rejected. Notably, the mandate to “consider” federal standards was just that and no more: “Despite the extent and detail of the federal proposals, however, no state authority or nonregulated utility is required to adopt or implement the specified rate design or regulatory standards.”

Regarding section 210, the Court held that the power it granted FERC to exempt certain power facilities from state regulation was an unexceptional exercise of federal preemption. The Court recognized potential problems with the second provision’s requirement that “each State regulatory authority shall . . . implement such rule . . . for each electric utility for which it has ratemaking authority.” Compelling state agencies to implement a federal regulation is closely analogous to the National League of Cities problem, but the FERC Court nevertheless upheld this provision because in practice, state agencies could “implement” the federal regulations simply by adjudicating disputes between private utilities and private production facilities arising under PURPA. It is clear that the Supremacy Clause compels state courts—as distinguished from state legislatures or executives—to recognize rights granted to private parties by federal law. The Court therefore held that because the Mississippi Public Service Commission customarily heard similar claims to those granted by PURPA, “it can satisfy § 210’s requirements simply by opening its door to claimants. That the Commission has administrative as well as judicial duties is of no significance.”

104 Id. at 747.
105 Id. at 748–49.
106 FERC, 456 U.S. at 749–50 (emphasis added). Similarly, despite the imposition of reporting deadlines, PURPA provided no penalties to be levied against states that failed to meet these deadlines, and expressly stated that states were free to determine that “it is not appropriate to implement any such standard.” Id. at 750.
107 Id. at 759.
108 Id. (alteration in original).
109 Id. Recall, however, that National League of Cities dealt with a federal statute that directly affected both private employers and state employers equally, whereas this provision of PURPA addressed how states regulate private parties. Id.
110 Id. at 760.
111 U.S. CONST. art. VI, cl. 2; see Testa v. Katt, 330 U.S. 386, 393 (1947).
112 FERC, 456 U.S. at 760.
Moving to PURPA's mandatory consideration of federal standards, the Court did not find a Tenth Amendment bar because PURPA did not compel the states to promulgate a legislative program.\textsuperscript{113} Not only did the Act merely instruct the states to "consider" adopting the federal standards, but a state need not have even gone that far if it instead elected to simply abandon the field of utilities regulation altogether.\textsuperscript{114} The Court found that such "conditional pre-emption" was permissible—because the Commerce Clause power could allow Congress to entirely preempt the field, the Court found no problem with a federal regulatory scheme that "simply [established] requirements for continued state activity in an otherwise pre-emptible field."\textsuperscript{115} The Court was not troubled by the fact that PURPA did not furnish federal oversight of the field even if a state did choose to opt out:

We recognize, of course, that the choice put to the States—that of either abandoning regulation of the field altogether or considering the federal standards—may be a difficult one. And that is particularly true when Congress, as is the case here, has failed to provide an alternative regulatory mechanism to police the area in the event of state default.\textsuperscript{116}

Despite this, the fact that the "mandatory consideration" provisions did not \textit{unavoidably} apply to the states was enough for the Court to uphold them.\textsuperscript{117}

Given this analysis of the consideration requirements, it followed that PURPA's procedural requirements easily passed constitutional muster. Although titles I and III prescribed detailed notice and comment procedures for a state to follow when acting on the federal standards, the state could also avoid these by simply opting out of the regulated field altogether.\textsuperscript{118} Because Congress could "require a state administrative body to consider proposed regulations as a condition to its continued involvement in a pre-emptible field ... [Congress

\textsuperscript{113} Id. at 769.
\textsuperscript{114} Id. at 764.
\textsuperscript{115} Id. at 769.
\textsuperscript{116} Id. at 766.
\textsuperscript{117} See id.
\textsuperscript{118} See \textit{FERC}, 466 U.S. at 771.
may require] certain procedural minima as that body goes about undertaking its tasks."\textsuperscript{119}

Notably, \textit{FERC} was the first in this line of cases in which Justice O'Connor took part, and her partial dissent telegraphed the anti-commandeering principles that would later appear in her majority opinion in \textit{New York v. United States.}\textsuperscript{120} Justice O'Connor agreed that the exemption authority granted to FERC by section 210 was an unexceptional exercise of federal preemption as seen in \textit{Hodel}.\textsuperscript{121} However, she would have invalidated both the "mandatory consideration" and procedural requirements of titles I and III as violating all three prongs of the \textit{National League of Cities} test.\textsuperscript{122} She vigorously dissented from the Court's conditional preemption analysis, calling it an "absurdity" that recognized no limit on "federal regulation of state governments."\textsuperscript{123} Instead, Justice O'Connor would have distinguished between the acceptable "cooperative federalism" exhibited in \textit{Hodel} and the conditional preemption doctrine:

The Surface Mining Act does not force States to choose between performing tasks set by Congress and abandoning all mining or land use regulation. . . . [I]t allows the States to choose either to work with Congress in pursuit of federal surface mining goals or to devote their legislative resources to other mining and land use problems. By contrast, there is nothing "cooperative" about a federal program that compels state agencies either to function as bureaucratic puppets of the Federal Government or to abandon regulation of an entire field traditionally reserved to state authority. Yet this is the "choice" the Court today forces upon the States.\textsuperscript{124}

3. The Court Relinquishes Oversight of Federalism Concerns

With the 1985 case of \textit{Garcia v. San Antonio Metropolitan Transit Authority}, the Court reconsidered the minimum wage and overtime

\textsuperscript{119} Id.
\textsuperscript{120} Id. at 775 (O'Connor, J., dissenting).
\textsuperscript{121} See id. at 775 n.1 (O'Connor, J., dissenting).
\textsuperscript{122} Id. at 778–80 (O'Connor, J., dissenting).
\textsuperscript{123} Id. at 781 (O'Connor, J., dissenting). As an example of such "absurdity," she noted that under the conditional preemption analysis, \textit{National League of Cities} was wrongly decided because the state could have opted out of paying its employees by simply closing various branches of state government. \textit{Id.} at 781–82 (O'Connor, J., dissenting).
\textsuperscript{124} \textit{FERC}, 466 U.S. at 783–84 (O'Connor, J., dissenting).
provisions of the Fair Labor Standards Act that applied generally against both the states and private employers, the same issue addressed in *National League of Cities*.\textsuperscript{125} Although *National League of Cities* had announced the principle that Congress may not regulate states as states in ways that interfere with traditional state functions, lower courts had struggled to determine precisely which functions were to be considered traditional versus nontraditional.\textsuperscript{126} The Court itself had avoided this question in *Hodel* and *FERC*, but when squarely confronted with it in *Garcia*, it surveyed the myriad of conflicting and apparently arbitrary distinctions made by lower courts and decided to overrule *National League of Cities*.\textsuperscript{127} The Court also largely removed from judicial oversight the determination of the scope of state immunity from congressional power under the Commerce Clause:

Any rule of state immunity that looks to the "traditional," "integral," or "necessary" nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes. . . . We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is "integral" or "traditional."\textsuperscript{128}

The Court affirmed that limitations exist on Congress's power to interfere with state functions, and that states retain a "significant measure of sovereign authority,"\textsuperscript{129} but felt that protection of that sovereignty was better served by the political process.\textsuperscript{130} The "built-in" political safeguards of federalism were held to be adequate in guaranteeing that Congress's exercise of the Commerce Clause power would not unduly burden the states; presumably, although members of Congress are by definition part of the federal government, that they represent their respective states is enough to ensure that they will protect


\textsuperscript{126} Id.

\textsuperscript{127} Id. at 538–39 ("We find it difficult, if not impossible, to identify an organizing principle. . . . The constitutional distinction between licensing drivers and regulating traffic, for example, or between operating a highway authority and operating a mental health facility, is elusive at best.").

\textsuperscript{128} Id. at 546–47.

\textsuperscript{129} Id. at 549 (citing *Equal Employment Opportunity Comm'n v. Wyoming*, 460 U.S. 226, 269 (1983) (Powell, J., dissenting)).

\textsuperscript{130} Id. at 556.
state sovereignty as a matter of self-interest. The majority stated: "[W]e are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the ‘States as States’ is one of process rather than one of result." Dissenting from this result, then-Justice Rehnquist noted his continued belief that states enjoyed a certain fundamental sovereignty that Congress could not intrude upon regardless of the scope of its Commerce Clause power, a view that he predicted "will . . . in time again command the support of a majority of this Court."

Because Garcia focused on the political safeguards of federalism, it left open the possibility for judicial review where that process fails. This loophole was recognized three years later in South Carolina v. Baker, in which the Court agreed to hear a Tenth Amendment challenge to a federal tax requirement prohibiting states from issuing bearer bonds. The Court ultimately found no process failing on the facts because the State did not prove or even allege that it was deprived of the right to participate in the political process. Notably, the Baker Court also upheld the federal statute on the ground that it regulated state activities and did not "seek to control or influence the manner in which States regulate private parties."

D. State Autonomy Revived

1. New York v. United States

Seven years after Garcia, and without explicitly overruling it, the Court jumped back into the debate by holding that the federal judiciary rather than the political process should be the guardian of federalism. The modern line of Tenth Amendment cases began with the seminal New York v. United States, holding once again that the Tenth Amendment presents an independent bar to Congress’s otherwise valid exercise of its Commerce Clause power. Writing for the Court, Justice O’Connor conceded that as a matter of simple logic, the “tautology” that is the Tenth Amendment necessarily cannot limit Con-

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131 See Garcia, 469 U.S. at 556.
132 Id. at 554 (emphasis added).
133 Id. at 580 (Rehnquist, J., dissenting).
134 See id. at 554.
136 See id. at 514.
138 Id. at 177.
gress’s power. Nor does the text of the Commerce Clause clarify the issue; instead, the Court assumed the duty of policing the federalist political structure:

In the end, just as a cup may be half empty or half full, it makes no difference whether one views the question [as] ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution [or] discerning the core of sovereignty retained by the States under the Tenth Amendment. Either way, we must determine whether [a congressional act] oversteps the boundary between federal and state authority.

The statutory provisions at issue in New York were enacted by Congress in response to a nationwide shortage of low-level radioactive waste disposal sites. Through a series of three incentive programs, the Low-Level Radioactive Waste Policy Act (Waste Policy Act) sought to hold individual states responsible for disposal of radioactive waste generated within their borders, though disposal could occur outside of those borders through a system of regional interstate compacts. All three provisions were challenged on Tenth Amendment grounds, but only the “take-title” provision was held unconstitutional.

As a preliminary matter, the Court distinguished between Congress’s authority to subject state governments to generally applicable laws—that regulate both private parties and states—and Congress’s

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139 Id. at 156–57 (“The Tenth Amendment [like the Commerce Clause] restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology.”).

140 Id. at 159 (emphasis added). This theory of judicial oversight of the federalist structure is based not only on Marbury v. Madison’s general proposition that “[i]t is emphatically the province and duty of the judicial department to say what the law is,” but also from the majority’s distrust of Congress’s ability to draw the line appropriately—a position clearly articulated by the dissent of Justice O’Connor in Garcia: “With the abandonment of National League of Cities, all that stands between the remaining essentials of state sovereignty and Congress is the latter’s underdeveloped capacity for self-restraint.” Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 588 (1985) (O’Connor, J., dissenting); see Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

141 New York, 505 U.S. at 150.

142 Id. at 150–52.

143 Id. at 171–77.

144 Id. at 160. The Fair Labor Standards Act of 1938 (FLSA), which, among other things, imposed a minimum wage requirement on private industry as well as state schools and hospitals, is one such example. 29 U.S.C. §§ 201–219 (2000). As noted in Part III.B supra, Congress’s ability to regulate states with such “generally applicable” laws has been the subject of much debate among members of the Court. See Maryland v. Wirtz, 392 U.S.
authority to order states to regulate private parties in a particular way.\textsuperscript{145} The Court did not explain the relevance of such a distinction; it simply stated that the provisions at issue were not subject to the reasoning of the "laws of general applicability" cases because here, Congress attempted to use the states to implement its regulations.\textsuperscript{146}

Based on this analysis, \textit{FERC} and \textit{Hodel} were held to be binding precedent\textsuperscript{147} while the problem of \textit{Garcia} was avoided.\textsuperscript{148} Recall that \textit{Garcia} overturned \textit{National League of Cities} on the basis that the political process, rather than judicial whim, should be the arbiter of federalism.\textsuperscript{149} It would therefore be difficult to argue straight-faced that the statute at issue in \textit{New York} failed on political process grounds, because the legislative compromise at issue was promulgated by the several states which came to Congress only for approval, and the State of New York itself voluntarily complied with the Act's requirements.\textsuperscript{150}

In announcing its anti-commandeering principle, the Court explained that although the federal statutes in both \textit{Hodel} and \textit{FERC} sought to motivate the states to regulate private parties in a manner that Congress deemed appropriate, the statutes were upheld in each case "precisely because [they] did not 'commandeer' the States into regulating."\textsuperscript{151} In \textit{Hodel}, states were not compelled to enforce the federal standards, spend state funds, or participate in the federal regulatory program at all; if the state opted out of the program, "the full

\textsuperscript{145} \textit{New York}, 505 U.S. at 160.
\textsuperscript{146} \textit{Id.} at 160–61. The majority's failure to explain the basis for this distinction did not go unnoticed by Justice White, who noted in a vigorous dissent that the Court had never decided any Tenth Amendment case on this ground. \textit{Id.} at 201 (White, J., dissenting) ("[T]he Court makes no effort to explain why this purported distinction should affect the analysis of Congress' power under general principles of federalism and the Tenth Amendment. The distinction, facilely thrown out, is not based on any defensible theory."). Implicit throughout the majority opinion, however, is the theory that unlike direct regulation of states or private parties, accountability concerns are not raised unless Congress acts on private parties through the states. \textit{See id.} at 166–69; see also infra text accompanying notes 256–260.
\textsuperscript{147} \textit{New York}, 505 U.S. at 161.
\textsuperscript{148} \textit{See id.} at 154, 160.
\textsuperscript{149} \textit{Garcia}, 469 U.S. at 546–47.
\textsuperscript{150} \textit{See New York}, 505 U.S. at 151, 154.
\textsuperscript{151} \textit{Id.} at 161.
regulatory burden [would] be borne by the Federal Government.”\textsuperscript{152} Similarly, the program at issue in \textit{FERC} was construed as requiring “only consideration of federal standards,” and because the states could avoid even this burden by ceasing all regulation in the field, the Court had upheld the statute because “there was nothing in PURPA ‘directly’ compelling the States to enact a legislative program.”\textsuperscript{153}

The Court analyzed the history of the Constitutional Convention and the Federalist Papers for proof of this anti-commandeering conception of federalism.\textsuperscript{154} The Court explained that as finally adopted in the Constitution, the Commerce Clause power “authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments’ regulation of interstate commerce.”\textsuperscript{155} The federal system established separate state and federal sovereigns, each governing individuals and competing between themselves for the affection of citizens; this separation of governmental power is thought to ensure greater protection of individual liberty.\textsuperscript{156}

Beyond the historical justification, the practical basis for the Court’s anti-commandeering principle is political accountability.\textsuperscript{157} Accountability provides the unifying rationale behind Congress’s Spending Clause authority to encourage or entice states into regulating by conditioning the receipt of federal-to-state funding grants on state acceptance of federal standards.\textsuperscript{158} In addition, accountability also justifies Congress’s authority under the Commerce and Suprem-

\textsuperscript{152} \textit{Id.} (quoting \textit{Hodel v. Va. Surface Mining & Reclamation Ass’n, Inc.}, 452 U.S. 264, 288 (1981)).

\textsuperscript{153} \textit{New York}, 505 U.S. at 161–62 (quoting \textit{FERC v. Mississippi}, 456 U.S. 742, 764–65 (1982)). This implicit recognition of \textit{FERC}’s conditional preemption analysis was undercut, however, by the later reasoning of the Court when addressing the Waste Policy Act itself. \textit{See infra} text accompanying notes 233–241.

\textsuperscript{154} \textit{New York}, 505 U.S. at 163–66. The breadth of the historical analysis is beyond the scope of this Note, which deals narrowly with the principles announced and their application to the TCA.

\textsuperscript{155} \textit{Id.} at 162–66.

\textsuperscript{156} \textit{See id.} at 163–64; \textit{see also} \textit{Gregory v. Ashcroft}, 501 U.S. 452, 457–59 (1991) (explaining that the chief purpose of the federalist system’s establishment of twin sovereigns exercising separate authority directly on the citizenry was to create a mutual restraint on tyranny).

\textsuperscript{157} \textit{New York}, 505 U.S. at 168–69.

acy Clauses to offer states the choice of either regulating private parties according to federal standards, or being preempted by federal regulation. The crucial point in both instances is that "the residents of the State retain the ultimate decision as to whether or not the State will comply." This ability to choose freely not to comply is thought to permit state governments and officials to represent the state citizens' interests more directly. If those interests are contrary to national interests, then Congress may preempt state authority and regulate private parties directly, with federal representatives bearing responsibility for the programs. However, if Congress could simply compel the states to regulate according to its direction, the Court fears that "it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." Given these principles and concerns, the Court addressed the three provisions of the Waste Policy Act (WPA).

The first provision gave complying states a "monetary" incentive to pass legislation binding them to regional compacts, to develop siting plans, and to file applications for disposal site operation; such states received funds gathered from surcharges collected in the interim by states accepting waste into pre-existing facilities. This "monetary" incentive was held to be a constitutional exercise of Congress's commerce and spending powers, as it simply conditioned receipt of federal funds upon state compliance with deadlines for enacting regulatory legislation.

The second provision, an "access" incentive, increased surcharges and denied access to pre-existing disposal sites for states that had not met the deadlines outlined in the first provision. The Court interpreted this provision as providing the states with the choice of either regulating according to federal standards, or holding private parties responsible for the creation of radioactive waste. These parties would be subject to federal regulation denying them access to disposal sites.

159 New York, 505 U.S. at 167–68. This, of course, assumes that the field is preemptible—the crucial question that is yet to be openly decided. See infra text accompanying notes 242–251.

160 New York, 505 U.S. at 168.

161 Id.

162 Id.

163 Id. at 169.

164 Id. at 152–53.

165 Id. at 173.

166 New York, 505 U.S. at 153.
in other states that had complied with those federal standards.\textsuperscript{167} This incentive did not violate the anti-commandeering principle because it did not compel state regulation or expenditure of state funds; if the state refused to comply, the burden would fall on the waste generators themselves.\textsuperscript{168} Notably, the Court emphasized that "the State [need not] abandon the field if it does not accede to federal direction; the State may continue to regulate the generation and disposal of radioactive waste in any manner its citizens see fit."\textsuperscript{169}

The third provision, a "take-title" incentive, came into effect as a penalty: if a state had not made arrangements to dispose of all internally-generated waste by a certain date, that state would be forced to take title and possession of its waste, and the WPA imposed liability upon that state for all damages resulting from failure to do so.\textsuperscript{170} The Court construed this provision as giving states a choice between regulating according to federal standards or being forced to accept control of the waste.\textsuperscript{171} Either option alone was held to be beyond Congress's power: one option commands states to regulate under congressional instruction and the other is effectively a congressionally-mandated subsidy to waste producers.\textsuperscript{172} As both options were considered "unconstitutionally coercive regulatory techniques," allowing states to choose one or the other was "no choice at all."\textsuperscript{173}

The Court was careful to distinguish the "take-title" provision from the two provisions found to be constitutional. While the two constitutionally valid provisions used conditional exercises of congressional power as a coercive technique, the "take-title" provision lacked a "critical alternative . . . [a] State may not decline to administer the federal program. No matter which path the State chooses, it must follow the direction of Congress."\textsuperscript{174} The emphasis on anti-commandeering was strong enough for the Court to announce that the rule is categorical, allowing no balancing of interests.\textsuperscript{175} It is the structure of dual sovereignty, rather than the give-and-take of political forces that is thought to provide the best protection of individual liberty, so the Court felt justified in drawing a bright line:

\textsuperscript{167} Id. at 174.
\textsuperscript{168} Id.
\textsuperscript{169} Id.
\textsuperscript{170} Id. at 153.
\textsuperscript{171} Id. at 175.
\textsuperscript{172} New York, 505 U.S. at 175–76.
\textsuperscript{173} Id. at 176.
\textsuperscript{174} Id. at 176–77.
\textsuperscript{175} See id. at 187.
The result may appear "formalistic" in a given case to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity. But the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.  

Justice O'Connor had originally laid out this categorical conception of federalism in her partial dissent in FERC, and Justice Blackmun, writing for the Court, had derided this conception: "[I]t is a curious type of federalism that encourages Congress to pre-empt a field entirely, when its preference is to let the States retain the primary regulatory role. . . . Justice O'Connor articulates a view of state sovereignty that is almost mystical . . . ." However, the New York Court's conception of federalism—at least facially—has little to do with the strictly inviolable sphere of "traditional" state sovereignty envisioned by National League of Cities. The Court in New York recognized that in matters affecting interstate commerce, Congress has the power to entirely preempt the field. Rather than setting up an impenetrable barrier regarding the object of congressional regulation, the Court reads the Tenth Amendment as embodying an anti-commandeering principle dictating the manner in which Congress may regulate. The Court stated, "Whatever the outer limits of [state] sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program."

2. Anti-Commandeering Extended and Clarified: Printz & Condon

In 1997, Printz v. United States extended the anti-commandeering principle announced in New York from state legislatures to also apply to state executives. At issue in Printz was a 1993 amendment to the Gun Control Act of 1968, ordering local law enforcement officers to

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176 Id.
178 Id. at 767 n.30.
179 See New York, 505 U.S. at 159–60.
180 Id.
181 Id. at 188.
182 Id.
conduct criminal background checks on gun purchasers.\textsuperscript{184} This amendment (the Brady Act) was an interim provision; at the time the case was argued before the Court, the amendment would have lasted roughly a year until a nationwide instant background check system was put into place.\textsuperscript{185}

This was not a law of general applicability: because the Brady Act directed state officials to follow certain procedures in their dealings with private parties, the case was decided under the anti-commandeering principle announced in \textit{New York}.\textsuperscript{186} Though the specific arguments in this case addressing congressional commandeering of state executives are largely irrelevant to the issue under consideration here, \textit{Printz} emphasized the categorical nature of the anti-commandeering rule. The government's argument in \textit{Printz} in support of the Brady Act was essentially that it served "very important purposes [and imposed] a minimal and only temporary burden upon state officers," but the Court was unswayed.\textsuperscript{187} It reasoned that where the purpose of a federal law is to commandeer state executives, a balancing test is inappropriate because the federal structure itself is affected:

It is the very \textit{principle} of separate state sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that fundamental defect . . . . We adhere to that principle today, and conclude categorically, as we concluded categorically in \textit{New York}: The Federal Government may not compel the States to enact or administer a federal regulatory program.\textsuperscript{188}

The most recent Tenth Amendment case further clarified the landscape, indicating the situations to which the anti-commandeering principles announced in \textit{New York} and \textit{Printz} would apply. \textit{Reno v. Condon} addressed the Driver's Privacy Protection Act of 1994 (DPPA), a regulatory program that controls the manner in which personal information held by state Departments of Motor Vehicles is disclosed

\textsuperscript{184} Id. at 902–04.
\textsuperscript{185} See id. at 902. The statutorily-imposed deadline for this nationwide system was November 30, 1998; \textit{Printz} was argued in December of 1996 and decided on June 27, 1997. Id. Therefore, it would not have been long before the issue became moot, but the Court apparently saw—and seized—the opportunity to extend \textit{New York}'s reasoning. See \textit{New York}, 505 U.S. at 159.
\textsuperscript{186} \textit{Printz}, 521 U.S. at 925–26.
\textsuperscript{187} Id. at 931–32.
\textsuperscript{188} Id. at 932–33 (citation and quotations omitted).
and sold.\textsuperscript{189} The DPPA also applies to private persons in possession of drivers' personal information, regulating their use of such information and imposing penalties for noncompliance.\textsuperscript{190} A unanimous Court opinion authored by Chief Justice Rehnquist held that the DPPA was therefore a law of general applicability, and was analyzed not under \textit{New York} and \textit{Printz}, but rather \textit{Baker}:

In \textit{Baker}, we upheld a statute that prohibited States from issuing unregistered bonds \textit{because} the law "regulated state activities," rather than "seeking to control or influence the manner in which States regulate private parties"... \textit{Like the statute at issue in Baker}, the DPPA does not require the States in their sovereign capacity to regulate their own citizens. The DPPA regulates the States as owners of databases. It does not require the [State] 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.

We accordingly conclude that the DPPA is consistent with the constitutional principles enunciated in \textit{New York} and \textit{Printz}.\textsuperscript{191}

\textbf{IV. Analysis}

As a matter of simple logic, Justice Stevens is correct that the plain text of the Tenth Amendment alone cannot impose an independent barrier to the Commerce Clause power delegated to Congress, whether that power is exercised directly on states, private parties, or on private parties through the states.\textsuperscript{192} In determining whether the glass is "half empty or half full," the Tenth Amendment is simply the meniscus, and tells us nothing about the proper division of sovereignty.\textsuperscript{193} The \textit{New York} Court conceded as much, but is nevertheless imposing a particular vision of federalism on the states, despite Justice O'Connor's self-deprecating assertion that "our task ... consists not of devising our preferred system of government, but of understanding and applying the framework set forth in the Constitution."\textsuperscript{194} Political accountability is surely a worthy goal, but the Court

\begin{itemize}
\item \textsuperscript{189} Reno v. Condon, 528 U.S. 141, 143 (2000).
\item \textsuperscript{190} Id. at 146.
\item \textsuperscript{191} Id. at 150--51.
\item \textsuperscript{192} See \textit{New York v. United States}, 505 U.S. 144, 211 (1992) (Stevens, J., dissenting).
\item \textsuperscript{193} See \textit{id}. at 159.
\item \textsuperscript{194} See \textit{id}. at 157.
\end{itemize}
would be wiser not to rest its conception of federalism on ground so obviously non-textual and open to attack.\textsuperscript{195} If an unelected judiciary is to read its vision of federalism into the Constitution, a more supportable ground may be the Necessary and Proper Clause.\textsuperscript{196} Although the Commerce Clause power is clearly delegated to Congress by Article I, it could be argued that it is not "proper" for Congress to exercise it in a manner that intrudes on state sovereignty.\textsuperscript{197} This interpretation remains open to attack on the political process grounds outlined in \textit{Garcia v. San Antonio Metropolitan Transit Authority}, but it at least avoids the tautological problem of sole reliance on the Tenth Amendment.\textsuperscript{198}

Nevertheless, if the anti-commandeering principles of \textit{New York} and \textit{Printz v. United States} are to be followed—and given the Court's unchanged composition as of November 2002, they surely are—then aspects of § 332(c)(7) of the Telecommunications Act of 1996 are of questionable constitutionality.

As an initial matter, Congress's power under the Commerce Clause to regulate these tower sitings does not appear to be open to serious attack, despite the fact that the sitings are entirely local; this sort of commercial network affecting interstate commerce is ideally suited to federal regulation under the Commerce Clause.\textsuperscript{199} The problem with § 332(c)(7), as with all provisions open to Tenth Amendment attack, is not the ultimate object of regulation but the manner in which Congress chose to regulate.\textsuperscript{200} As noted \textit{infra}, the legislative history of § 332(c)(7) demonstrates that in its original form, as drafted in the House of Representatives, § 332(c)(7) would have simply allowed the Federal Communications Commission (FCC) broad federal preemption authority to issue permits for cell tower sitings.\textsuperscript{201} Had the final version of § 332(c)(7) done so, this may have

\textsuperscript{195} See id. at 211 (Stevens, J., dissenting).


\textsuperscript{197} Id. (Scalia, J.) (noting that the Court could move in this direction, or simply read the Necessary and Proper Clause together with the Tenth Amendment for extra support).

\textsuperscript{198} Id. at 956–58 (1997) (Stevens, J., dissenting) (arguing that members of Congress are unlikely to ignore the sovereignty concerns of their constituents).

\textsuperscript{199} See \textit{Petersburg Cellular P'ship v. Bd. of Supervisors}, 205 F.3d 688, 705, 711–12 (4th Cir. 2000) (wherein Judges Niemeyer and King, while disagreeing on the Tenth Amendment issue, agreed that this field is a proper object of congressional regulation under the Commerce Clause).


been a valid preemption of state law.\textsuperscript{202} However, since such intrusive federal regulation was politically unpopular in the Senate, Congress effected a compromise, explicitly instructing the FCC not to enact preemptive federal wireless facilities siting standards.\textsuperscript{203} Instead, Congress attempted to have it both ways, purporting to leave siting decisions largely in the hands of state and local governments, but seeking to retain a measure of control by instructing them to apply federal standards and follow federal procedures.\textsuperscript{204}

Section 332(c)(7) is not a permissible federal law of general applicability that applies to both states and private parties, as seen in Garcia and Reno v. Condon.\textsuperscript{205} Neither is § 332(c)(7) strictly limited to regulating internal state activities, which was upheld as constitutional in South Carolina v. Baker.\textsuperscript{206} Section 332(c)(7) claims both to preserve and limit state and local zoning authority over telecommunications corporations’ cell tower siting requests.\textsuperscript{207} Thus, by its own terms, § 332(c)(7) is an attempt by Congress to direct the way in which states regulate private parties, bringing the law within the ambit of the New York analysis.\textsuperscript{208}

The requirement that state and local governments compile a “written record” based on “substantial evidence” in order to deny a private party’s request to “place, construct, or modify” a cell tower, plainly instructs state and local governments to adopt a federally imposed procedure and standard of review.\textsuperscript{209} This is precisely the kind of “commandeering” that was warned against in New York: Congress is prohibited from indirectly regulating private parties by “requir[ing] the States to govern according to Congress’s instructions.”\textsuperscript{210} The full extent of the federal government’s commandeering of local authority

\textsuperscript{202} In fact, one provision of § 332(c)(7) is a valid example of such preemption. The blanket prohibition on state or local regulation of cell towers on the basis of environmental effects of radio frequency emissions is an unexceptional exercise of Congress’s preemption power, as it requires no action on the part of state or local governments; it simply prevents regulation in that area. See Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7)(B)(iv) (2001); see also New York, 505 U.S. at 168; Cellular Phone Taskforce v. FCC, 205 F.3d 82, 96 (2d Cir. 2000), cert. denied, 531 U.S. 1070 (2001); Southwestern Bell Wireless v. Johnson County Bd. of Comm’rs, 199 F.3d 1185, 1193–94 (10th Cir. 1999).


\textsuperscript{204} See 47 U.S.C. § 332(c) (7).


\textsuperscript{207} 47 U.S.C. § 332(c) (7).


\textsuperscript{210} New York, 505 U.S. at 162.
is illustrated when a local government's denial of a cell tower siting permit would otherwise enjoy a presumption of validity, capable of being overcome only by a showing that the decision was arbitrary and capricious.\textsuperscript{211} Depending on the interpretation of "substantial evidence", state and local governments may be required under § 332(c)(7) to compile testimony and studies to support their denial of a cell tower siting permit.\textsuperscript{212} Even absent such interpretive possibilities, state and local governments are at the very least facially compelled to expend funds in the creation of a written record.\textsuperscript{213}

That such congressional commands appear \textit{de minimus} is irrelevant to the anti-commandeering analysis; \textit{New York} and \textit{Printz} made it clear that federal regulation of private parties through the legislative and executive offices of states offends the very principle of federalism.\textsuperscript{214} The anti-commandeering rule is categorical, and its application here demonstrates why.\textsuperscript{215} Section 332(c)(7) has eased market entry for locally-opposed cell towers which may have been denied a siting permit but for the TCA.\textsuperscript{216} As a result, the political consequences of public disapproval may fall on the local officials who approve cell tower permits, rather than on the congressional representatives responsible for promulgating the TCA.\textsuperscript{217} As stated in \textit{New York}: "Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in matters not pre-empted by federal regulation."\textsuperscript{218}

State and local governments are not bureaucratic extensions of Congress, and may not be employed as administrative agencies to carry out federal policy.\textsuperscript{219} If Congress wants to grant the wireless telecommunications industry special standing in relation to local zoning decisions, it should either condition the states' compliance with such policy on the receipt of federal funds under its Spending Clause authority, or openly preempt cell tower siting regulation altogether.

\textsuperscript{211} See, e.g., Petersburg Cellular P'ship v. Bd. of Supervisors, 205 F.3d 688, 699 (4th Cir. 2000).
\textsuperscript{213} See \textit{id}.
\textsuperscript{215} Printz, 521 U.S. at 932–33; \textit{New York}, 505 U.S. at 187.
\textsuperscript{216} Note the explosion in growth of tower sitings since the TCA's enactment: in the twelve years prior to the TCA, 25,000 cell towers had been sited. An additional 89,000 towers were sited in just five years following its enactment. CTIA Survey Results, \textit{supra} note 15.
\textsuperscript{217} See \textit{New York}, 505 U.S. at 168–69.
\textsuperscript{218} \textit{Id}. at 169.
\textsuperscript{219} \textit{Id}. at 188.
under its Supremacy Clause authority.\textsuperscript{220} The former course of action would provide states with a meaningful opportunity to opt out of the federal program if desired, while the latter would have the benefit of transparency in political decisionmaking.\textsuperscript{221} That the cram-down effect of full federal preemption would likely be controversial is precisely \textit{why} such a decision should be made in full public view, with federal officials assuming clear responsibility for the program.\textsuperscript{222} Though \textit{New York} dealt with nuclear waste sites rather than cell tower sites, its warning is precisely on point: "If a federal official is faced with the alternatives of choosing a location or directing the States to do it, the official may well prefer the latter, as a means of shifting responsibility for the eventual decision."\textsuperscript{223}

The obvious counter-argument to this view of § 332(c)(7) is to raise the doctrine of conditional preemption.\textsuperscript{224} Citing both \textit{Hodel v. Virginia Surface Mining \\& Reclamation Ass'n, Inc.} and \textit{FERC v. Mississippi} with approval, the \textit{New York} court explained that Congress may "offer States the choice of regulating . . . according to federal standards or having state law pre-empted by federal regulation."\textsuperscript{225} In the "mandatory consideration" provisions addressed in \textit{FERC} itself, the Court held that Congress may properly impose requirements on states that choose to continue to regulate "in an otherwise pre-emptible field."\textsuperscript{226} The Court upheld Congress's concededly difficult choice—"either abandoning regulation of the field altogether or considering the federal standards"—even in the absence of any federal regulation that would fill the void in the case of such state abandonment.\textsuperscript{227} Such is precisely the case here. Section 332(c)(7)'s provisions can be simply construed as presenting states with the following choice: regulate according to federal instructions or abandon zoning.\textsuperscript{228} \textit{FERC} made clear that it is irrelevant that the FCC has been instructed not to promulgate rules preemption state or local zoning authority.\textsuperscript{229} The

\begin{itemize}
\item \textsuperscript{220} See id. at 167–68.
\item \textsuperscript{221} See id. at 167–69.
\item \textsuperscript{222} See id. at 169.
\item \textsuperscript{223} \textit{New York}, 505 U.S. at 182–83.
\item \textsuperscript{224} See id. at 173–74.
\item \textsuperscript{225} Id. at 167.
\item \textsuperscript{226} \textit{FERC v. Mississippi}, 456 U.S. 742, 769 (1982).
\item \textsuperscript{227} Id. at 766.
\item \textsuperscript{229} \textit{FERC}, 456 U.S. at 766; see 47 U.S.C. § 332(c)(7)(A) ("Except as provided in this paragraph, nothing in this Act shall limit or affect the authority of a State or local govern-
\end{itemize}
take-title provision in *New York* was unconstitutional precisely because states could not avoid the federal regulation by any means; either "choice" commandeered the state into the service of the federal regulatory program.\textsuperscript{230} But here, § 332(c)(7) does not *unavoidably* apply to states, who may instead freely choose to avoid regulating according to the federal standards by abdicating zoning and allowing telecommunications corporations to site cell towers where they choose.\textsuperscript{231}

If the Supreme Court were to fully adopt *FERC*'s reasoning, then § 332(c)(7) could stand as constitutional, but the Court's Tenth Amendment jurisprudence calls into question the validity of the conditional preemption analysis as applied in the context of land use regulation. As indicated by the holding in *FERC*—that "Congress may establish requirements for continued State activity in an otherwise pre-emptible field"—there still may be fields which Congress simply may not preempt.\textsuperscript{232}

In *New York*, the Court recast the conditional preemption analysis as applied to the "access" provisions of the federal statute.\textsuperscript{233} Though the choice presented was still seen as one in which "States [could] either regulate . . . according to federal standards . . . or [private parties] [would] be subject to federal regulation authorizing sited States and regions to deny access to their disposal sites," the access provisions were upheld as constitutional specifically because states could opt out of the program without compromising their sovereignty.\textsuperscript{234} If a state refused to adopt the federal program, the burden of this refusal

\textsuperscript{230} *New York*, 505 U.S. at 175. One commentator has suggested that *FERC* is simply "no longer good law . . . [because] [t]he Court viewed *FERC* as a case of first impression, and it rejected Justice O'Connor's Tenth Amendment commandeering analysis, which she offered for the first time in her dissent in that case, and which a majority later accepted in *New York v. United States*." Beermann & Jacques, supra note 56, at 782–84. This argument, however, ignores the fact that the *New York* Court approvingly cited *FERC*; this Note posits that *FERC* and the concept of conditional preemption remain viable, but only in certain fields of regulation to be determined by the Court.

\textsuperscript{231} See *FERC*, 456 U.S. at 766.

\textsuperscript{232} *Id.* at 770 n.32. ("[Today's holding] does not suggest that the Federal Government may impose conditions on state activities in fields that are not pre-emptible.") To the extent that *Hodel* contained the same broad dicta regarding conditional preemption, it appears similarly open to attack; recall, however, that *Hodel* addressed not congressional control of states' regulation of private parties, but rather direct congressional regulation of private parties which displaced existing state regulation—an acceptable exercise of federal preemption. 452 U.S. 264, 288–89 (1981).

\textsuperscript{233} *New York*, 505 U.S. at 173–74.

\textsuperscript{234} *Id.*
would fall on the regulated private parties themselves, who would then be generating waste with no opportunity for disposal.\textsuperscript{235} The Court reasoned:

The State need not expend any funds, or participate in any federal program, if local residents do not view such expenditures or participation as worthwhile. \textit{Nor must the State abandon the field if it does not accede to federal direction}; the State may continue to regulate the generation and disposal of radioactive waste in any manner its citizens see fit.\textsuperscript{236}

Such is not the case with § 332(c)(7); the language of the statute contains simple commands to state and local governments with no preemptive choice at all.\textsuperscript{237} Even if the absence of an accompanying federal regulatory program to fill the void is not dispositive, § 332(c)(7) requires states to abandon zoning if they chose to avoid federal direction.\textsuperscript{238} No provision is made to allow states the opportunity to continue to regulate cell tower sittings "in any manner [their] citizens see fit."\textsuperscript{239} The \textit{New York} Court, echoing the language of Justice O'Connor's \textit{FERC} dissent, appears to recognize that offering states such a coercive choice is not a choice at all.\textsuperscript{240} The implication that state abandonment of the field would not be an acceptable alternative—indeed, that it would even be a relevant consideration in the conditional preemption analysis—flies in the face of \textit{FERC}'s reasoning.\textsuperscript{241}

\textit{Printz} further undermines the validity of the conditional preemption doctrine as applied to state legislative or executive regulation of private parties in the context of law enforcement. Congress's authority to regulate firearms sales under the Commerce Clause was undisputed in that case, and implicitly recognized in the majority opin-

\textsuperscript{235} Id. at 174.
\textsuperscript{236} Id. (emphasis added).
\textsuperscript{238} See generally \textit{id.}.
\textsuperscript{241} See \textit{FERC}, 456 U.S. at 766 (recognizing as difficult, but upholding as constitutional, the choice presented to states by Congress of "either abandoning regulation of the field altogether or considering the federal standards.").
This is consistent with precedent: as noted previously, the Court’s Tenth Amendment analysis ordinarily begins with a concession that the act proposed is valid under the Commerce Clause, then moves on to determine if the Tenth Amendment raises an independent barrier to congressional action. Presumably, the Court could have construed the Brady Act as providing the states with the same “choice” offered in FERC or implied by § 332(c)(7): either regulate according to congressional instruction or abandon the field to federal regulation. However, Printz did not suggest that states could opt out of the Brady Act’s provisions by eliminating their police force, thereby avoiding any congressional commandeering. Instead, the Court saw that the Brady Act simply imposed requirements that state law enforcement officers had to administer to private parties, and therefore used the anti-commandeering reasoning of New York to strike down the statute. Though § 332(c)(7) addresses state and local legislative bodies rather than state executives, the scope of the anti-commandeering rule appears coterminous.

The strong implication is that a majority of the Court feels that there are certain core powers of state sovereignty that the federal government may not usurp. Printz implies that law enforcement is one of those powers. Whether land use regulation is as well is an open question, one that § 332(c)(7) of the TCA squarely poses. The choice offered between regulating according to congressional instruction and abandoning such a traditional aspect of state sovereignty as land use regulation may be so highly coercive as to violate the anti-commandeering rule. New York made clear that “[a] choice between two unconstitutionally coercive regulatory techniques is no choice at all.” If Congress cannot turn the states into bureaucratic puppets to

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242 See id. at 923. But see id. at 936–37 (Thomas, J., concurring) (agreeing that the Tenth Amendment barred the congressional action at issue but suggesting in addition that the Commerce Clause power does not extend to the wholly intrastate transfer of firearms).

243 See, e.g., New York, 505 U.S. at 173–74 (conceding that private activity may be regulated under the Commerce Clause as long as it does not intrude on the Tenth Amendment’s protection of state sovereignty); see also supra text accompanying notes 135–138.

244 See FERC, 456 U.S. at 766.

245 Beermann & Jacques, supra note 56, at 784. See generally Printz, 521 U.S. 898 (declining, sub silentio, to apply New York’s “choice” framework to the Court’s analysis of the Brady Act).

246 Printz, 521 U.S. at 932–33.

247 See id. at 935.


249 See generally Printz, 521 U.S. 898.

250 New York, 505 U.S. at 176.
regulate third parties on its behalf, and the choice posed is construed as "become a bureaucratic puppet or abdicate a traditional sovereign power," then the Court must address whether Congress could constitutionally require the second option.

Whether the Court would actually frame the question this way is of course open to debate. It is possible that the Court would attempt to read § 332(c)(7) narrowly to avoid the federalism question.\footnote{251 See Solid Waste Agency of v. United States Army Corps of Eng'rs, 531 U.S. 159, 173–74 (2001). It is hard to view the plain language of the "substantial evidence" requirement as anything other than simple commandeering—though some circuit courts have read this requirement as requiring "substantial evidence" under the local zoning authority's own ordinances. See Petersburg Cellular P'ship v. Bd. of Supervisors, 205 F.3d 688, 708 (2d Cir. 2000). But reading § 332(c)(7)'s substantive provisions as requiring no more than what local ordinances already provide would render the Section entirely redundant at best and self-contradictory at worst, given that subparagraph B lists specific "limitations" on state and local zoning authority. Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7)(B) (2001).} The argument as framed above invites the Court to openly revive one aspect of National League of Cities v. Usery: reliance on judicial determination of which state functions are immune from congressional regulation.\footnote{252 Nat'l League of Cities v. Usery, 426 U.S. 833, 855 (1976), overruled by Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).} Although Garcia squarely overturned National League of Cities on political process grounds, New York—while distinguishing Garcia away on its facts—seriously undermined Garcia's reasoning.\footnote{253 New York, 505 U.S. at 159; Garcia, 469 U.S. at 557.} The Court has reassumed what it sees as its constitutional duty to police the boundaries of federal and state sovereignty.\footnote{254 New York, 505 U.S. at 159.} Similarly, New York and Printz's implicit rejection of the conditional preemption rule—when the only means for a state to avoid implementing the federal program is to abandon a traditional aspect of its sovereign police power—indicates that the Court may be ready to formally recognize Chief Justice Rehnquist's prediction in his Garcia dissent.\footnote{255 See id. at 174; see also Garcia, 469 U.S. at 580 (Rehnquist, J., dissenting). See generally Printz v. United States, 521 U.S. 898 (1997). Though New York's treatment of the "access" provisions casts doubt on the validity of the conditional preemption analysis, conditional preemption may not be considered commandeering if states are given the choice of abandoning a field that does not fall within their traditional police power. This approach reconciles New York and FERC if one assumes that the utilities regulation addressed in FERC is not a traditional state function. See New York, 505 U.S. at 174; FERC v. Mississippi, 456 U.S. 742, 764–66 (1982).}

\textit{Garcia} need not be formally overruled, nor National League of Cities fully reinstated, to hold that states still enjoy an inviolable sphere of sovereignty; the Court could leave to the political process acts of Con-
gress which do not commandeer states into regulating private parties, but instead subject both private parties and states to federal law, as upheld in Garcia and Condon. Though National League of Cities was concerned with direct congressional regulation of states as states, Condon makes clear that such regulation does not raise the accountability concerns underlying the anti-commandeering principle.

Where Congress regulates states directly, regulates citizens directly, or regulates any blend of the two in what are termed "generally applicable" laws, the regulation may still be traced in a direct line from Congress to the regulated state or private party. Furthermore, accountability does not suffer where Congress, through its Supremacy Clause authority, preempts states from regulating in a particular field. Where, however, Congress seeks to regulate private parties through the offices of the states—that is, to coerce states into regulating private parties according to federal standards—the Court has expressed a strong preference for publicly open, politically accountable federal preemption over even minimal congressional commandeering of states.

CONCLUSION

It is clear from New York v. United States that Congress cannot use its sovereignty to govern private conduct through another sovereign. The only way to view the "substantial evidence" requirement as not commandeering states to regulate private parties according to federal standards in blatant violation of New York is to say that states could avoid the program by abdicating zoning. Ultimately, the question is this: is offering states a choice between regulating private parties according to federal standards or abdication of zoning really a choice at all? Because New York forecloses the former, the answer to that question depends on whether Congress could constitutionally require states to do the latter. Printz v. United States demonstrates that Congress could not do so in terms of law enforcement. It hardly taxes the imagination to say that land use regulation occupies the same traditional state sovereign ground as law enforcement, but the Court has not yet said so explicitly. And thus, the debate circles back to National

257 Condon, 528 U.S. at 151.
258 See id.; New York, 505 U.S. at 168–69.
259 New York, 505 U.S. at 168.
260 Printz, 521 U.S. at 932–33; New York, 505 U.S. at 187.
League of Cities v. Usery, with the Court announcing in which areas Congress may not intrude on state sovereignty. The Court has already done so implicitly, but it should be explicit. Given that the force of the Court's anti-commandeering principle is rooted in concerns about clear political accountability, an unelected judiciary, when drawing lines to enforce this principle, should require of itself the same clarity as it requires of Congress.

This Note does not urge a full revival of National League of Cities, which limited Congress's Commerce Clause power to regulate states as states; clearly this line of reasoning was overruled and continues to be disfavored as evidenced by Reno v. Condon. What is suggested is that National League of Cities' assertion that the judiciary is charged to protect some as yet undefined and inviolable sphere of state sovereignty is ripe for reexamination. This judicial duty will only come into play when Congress acts (as it did in New York, Printz and, as suggested, in the TCA) to direct states to regulate private parties. This is the only time that accountability is a true concern. Accountability is not a concern, as federal preemption doctrine makes clear, when Congress is either regulating private parties directly or regulating the states as states, as in South Carolina v. Baker. But the TCA does not present a case where states simply must obey the federal law, but one where states are ordered to implement it against private parties. By categorically enforcing the anti-commandeering rule, the Court wants to make clear to the citizen which sovereign is regulating: is it the federal government or is it the states? Section 332(c) blurs the line, and this is exactly what it may not do.