

# The Anti-Commandeering Doctrine in Civil Rights Litigation

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## ABSTRACT

*The anti-commandeering doctrine prevents the federal government from issuing commands directly to the states. Similar concepts appear in Supreme Court decisions as early as the 1800s, but the Court first formally named and applied the doctrine in the 1990s. For many years after that first decision, the doctrine lay dormant: few anti-commandeering challenges were brought against federal action, and even fewer violations were found. In 2018, however, for the first time in two decades, the Supreme Court once again held that a law violated the anti-commandeering doctrine.*

*This Note identifies three consequences of that 2018 decision, focusing specifically on the impact for civil rights and civil liberties. First, the decision revitalized the anti-commandeering doctrine, reminding advocates that it is available as a pathway to challenge federal laws that encroach on civil liberties. This consequence has already begun to materialize: In the year since the decision, anti-commandeering challenges suddenly have been brought against decades-old statutes. Second, the decision expanded the reach of the doctrine, enabling challenges to federal action that would have failed only a few years ago. This change is evident from the trajectory of the sanctuary city litigation. Before the Supreme Court's decision, anti-commandeering challenges to the federal government's efforts to punish sanctuary cities failed; in the year after the decision, they have seen success. And third, the decision reconceived of prior distinctions between constitutional and unconstitutional federal action, raising questions about the validity of previously safe statutes related to civil rights and civil liberties.*

*As this Note demonstrates, the anti-commandeering doctrine is at a moment of great potential: It is poised to emerge as a real player in civil rights litigation. But its positioning right now is delicate. A wrong move could once again condemn it to obscurity or even allow it to be weaponized against civil rights movements by constraining progress at the federal level. As a result, the anti-commandeering doctrine could be—for the first time in many years—the doctrine to watch.*

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## INTRODUCTION

The anti-commandeering doctrine stands for the proposition that the federal government may not force state governments to carry out its will.<sup>1</sup> The doctrine places a great deal of value on the form of a federal statute: Even if Congress can regulate an activity directly, it cannot instruct the states to regulate that activity in its place.<sup>2</sup> And even where Congress can encourage a state's voluntary cooperation in a regulatory program,<sup>3</sup> it can

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<sup>1</sup> See *New York v. United States*, 505 U.S. 144, 161 (1992) (“Congress may not simply . . . commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.”). In simple terms, “Congress can’t take over states’ governing apparatuses and force them to do its bidding.” Heather K. Gerken, *Slipping the Bonds of Federalism*, 128 HARV. L. REV. 85, 101 (2014).

<sup>2</sup> For example, while the federal government could directly regulate the sale of car tires, it could not instruct the states to regulate car tire sales on its behalf.

<sup>3</sup> Often, the federal government attempts to incentivize state participation through conditions on federal funding or cooperative federalism. Through the Spending Clause, then, Congress can work its way around the anti-commandeering doctrine’s constraints. See Roderick M. Hills, *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813, 866 (1998); Alison L. LaCroix, *The Interbellum Constitution: Federalism in the Long Founding Moment*, 67 STAN. L. REV. 397, 415 (2015); Gerken, *supra* note 1, at 90–91. There are limits to this path: At a certain point, monetary incentives can become unconstitutionally coercive. Cf. *South Dakota v. Dole*, 483 U.S. 203, 211 (1987). Alternatively, Congress could encourage states to participate through cooperative federalism schemes. Cooperative federalism refers to programs where the federal government offers states the choice of regulating that activity according to federal standards or having state law preempted by federal regulation. See, e.g., *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 287 (1981) (upholding a cooperative federalism scheme); see also Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 472–73 (2012). Notably, states can act “uncooperatively” in cooperative federalism regimes in order to challenge federal policy. See Jessica Bulman-Pozen, *Unbundling Federalism: Colorado’s Legalization of Marijuana and Federalism’s Many Forms*, 85 UNIV. COLO. L. REV., 1067, 1073–74 (2014) (naming and describing this phenomenon); Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L. J. 1256, 1271 (2009). There are other ways the federal government can structure policies to evade the constraints of the anti-commandeering doctrine. For example, the Supreme Court has held that Tenth Amendment constraints do not apply in the same way when Congress is acting via Section 5 of the Fourteenth Amendment. See, e.g., *EEOC v. Wyoming*, 460 U.S. 226, 243 n.18 (1983) (“[W]hen properly exercising its power under § 5, Congress is not limited by the same Tenth Amendment constraints that circumscribe the exercise of its Commerce Clause powers.”); *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966) (“As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.”). And the Supreme Court at one point also recognized that the Tenth Amendment does not constrain the federal government’s treaty power. See *Missouri v. Holland*, 252 U.S. 416, 435 (1920).

never force the states to regulate its citizens in accordance with federal instruction.<sup>4</sup> Despite its attention to line drawing, the doctrine is not an exercise in pure constitutional formalism. In practice, it can significantly constrain Congress's power to act and the states' ability to be free from federal command. This Note focuses on those real-world implications.

The Supreme Court formally announced the existence of an anti-commandeering doctrine only twenty-six years ago, when the Court first identified a federal law that impermissibly commandeered states.<sup>5</sup> Five years later, the Court struck down a second federal law for violating the doctrine's tenets.<sup>6</sup> Then, from 1997 to 2018, the Court remained largely silent. It found no law violating the anti-commandeering doctrine, considering and rejecting the single challenge that came before it in over two decades.<sup>7</sup> In 2018, however, the doctrine reemerged, and the Supreme Court struck down a federal law under the anti-commandeering doctrine for the third time in the Court's history.<sup>8</sup>

This Note will proceed in two parts. Part I will describe the doctrine's trajectory leading up to the Supreme Court's 2018 decision in *Murphy v. National Collegiate Athletic Association*.<sup>9</sup> Part II will demonstrate how *Murphy* both revived the doctrine and shifted its governing frameworks. After the Supreme Court handed down its decision, there was a rush of litigation, including sudden challenges to decades-old statutes.<sup>10</sup> *Murphy*, however, did more than just give life to a sleepy constitutional claim. It also changed our understanding of the power of the federal government by reconceiving prior distinctions between constitutional and unconstitutional federal action. As a result, *Murphy* has the potential to impact a range of federal laws affecting civil rights and civil liberties—from immigration law, to criminal law, to family law, and more. The Conclusion discusses how these changes could transform the anti-commandeering doctrine into a meaningful player in civil rights litigation going forward.

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<sup>4</sup> For example, while the federal government could (1) offer the states monetary incentives to regulate in a certain way, or (2) threaten to preempt state regulation if it did not regulate in that way, the federal government cannot force the states to regulate their citizens in accordance with federal instruction.

<sup>5</sup> See *New York*, 505 U.S. at 161.

<sup>6</sup> See *Printz v. United States*, 521 U.S. 898, 898 (1997). This decision prompted scholars to argue that the anti-commandeering doctrine was “unspecified and potentially explosive. If developed expansively, [it] threaten[s] to undermine the supremacy of federal law.” Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism*: New York, Printz, and Yeskey, 1998 SUP. CT. REV. 71, 72 (1998).

<sup>7</sup> See *Reno v. Condon*, 528 U.S. 141, 143 (2000). There were few challenges heard at the circuit court level, as well. In one such case, the Second Circuit heard and rejected an anti-commandeering challenge to Section 1373 of the Illegal Immigration Reform and Immigrant Responsibility Act. See *City of New York v. United States*, 179 F.3d 29, 31 (2d Cir. 1999).

<sup>8</sup> See *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1484–1485 (2018).

<sup>9</sup> *Id.*

<sup>10</sup> See *infra* Part II.A.

## I. THE EMERGENCE OF AN ANTI-COMMANDEERING DOCTRINE

A. *The Path to the Anti-Commandeering Doctrine*

The Supreme Court did not formally announce an anti-commandeering doctrine until the 1990s.<sup>11</sup> But the notions that underlie the doctrine—those of federalism and state autonomy—date back to the Founding.<sup>12</sup> At its highest level of generality, the doctrine is linked to the idea that the federal government should be limited in its power to act relative to the states, which possess a degree of enduring sovereignty—an idea that first appears in *The Federalist Papers*.<sup>13</sup> And judicial murmurings of the doctrine can be identified as early as the 1800s.<sup>14</sup> In 1842, for example, the Supreme Court heard a challenge to the Fugitive Slave Act of 1793, which empowered slave owners to assert ownership over enslaved people who had escaped to other states.<sup>15</sup> The Court held that the federal government could not force states to implement or enforce the Fugitive Slave Act.<sup>16</sup> By forbidding the federal government from enlisting state governments in pursuit of a federal regulatory

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<sup>11</sup> See *New York v. United States*, 505 U.S. 144, 161 (1992). Some scholars believe that the anti-commandeering doctrine is not well supported by historical considerations or by the text. See, e.g., Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2218–28 (1998) (discussing historical considerations); John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2029–32 (2009) (discussing the text). And some scholars believe the doctrine should not exist at all. See, e.g., Ann Althouse, *The Vigor of Anti-Commandeering Doctrine in Times of Terror*, 69 BROOK. L. REV. 1231, 1236 (2004) (arguing the doctrine has no basis in the Constitution). But this Note accepts the doctrine's existence in order to assess the role the Supreme Court has set it up to play in coming years.

<sup>12</sup> The Federalist Papers provide an early articulation of the relationship between the federal government and the states. James Madison, in Federalist Number 45, wrote, "The powers delegated by the proposed Constitution to the Federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." THE FEDERALIST NO. 45, at 292 (James Madison). Similarly, Madison observed, the Constitution limited but did not abolish the sovereign powers of the states, who still retained "a residuary and inviolable sovereignty." THE FEDERALIST NO. 39, at 245 (James Madison) (Clinton Rossiter ed. 1961). Significantly, Madison tied this structure of government to the preservation of individual liberty, as Justice O'Connor later would in *New York v. United States*, when she articulated the anti-commandeering doctrine for the first time. 505 U.S. at 161. In Federalist Number 51, Madison wrote: "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other at the same time that each will be controlled by itself." THE FEDERALIST NO. 51, at 320 (James Madison) (Clinton Rossiter ed. 1961). In *New York v. United States*, Justice O'Connor, reminiscent of Madison's writings, wrote, "[T]he 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." 505 U.S. at 187.

<sup>13</sup> See FEDERALIST NO. 39, *supra* note 12, at 245.

<sup>14</sup> *Prigg v. Pennsylvania*, 41 U.S. 539, 539–40 (1842).

<sup>15</sup> See *id.*

<sup>16</sup> See *id.* at 541.

program, the Court's opinion gave an initial glimpse into what would later become the anti-commandeering doctrine.<sup>17</sup>

Despite these early indications of constitutional limits on Congress's ability to act relative to the states, the Supreme Court did not begin to meaningfully center federalism in public law jurisprudence until the 1970s and 1980s.<sup>18</sup> Through a collection of decisions made under the Tenth Amendment, the Supreme Court, led by Chief Justice William Rehnquist and Justice Sandra Day O'Connor, began to set the stage for the articulation of a new doctrine—one that constrained the federal government's power to issue commands directly to the states.

In 1976, the Supreme Court decided *National League of Cities v. Usery*,<sup>19</sup> explicitly recognizing a substantive component of the Tenth Amendment.<sup>20</sup> In *Usery*, the Court held that, insofar as Congressional action "operated directly to displace the states' ability to structure employer-employee relationships in areas of traditional governmental functions," it was unconstitutional.<sup>21</sup> Less than ten years later, the Supreme Court overruled the traditional government function test in *Garcia v. San Antonio Metropolitan Transit Authority*<sup>22</sup> after concluding that the test was unworkable.<sup>23</sup> In her

<sup>17</sup> Justice Joseph Story wrote for the Court, "The clause relating to fugitive slaves is found in the national constitution, and not in that of any state. It might well be deemed an unconstitutional exercise of the power of interpretation, to insist that the states are bound to provide means to carry into effect the duties of the national government, nowhere delegated or [e]ntrusted to them by the constitution; on the contrary, the natural, if not the necessary, conclusion is, that the national government, in the absence of all positive provisions to the contrary, is bound, through its own proper departments, legislative, executive or judiciary, as the case may require, to carry into effect all the rights and duties imposed upon it by the constitution." *Id.*

<sup>18</sup> See John J. Dinan, *The Rehnquist Court's Federalism Decisions in Perspective*, 15 J.L. & POL'Y 127, 130 (1999) ("[A] majority of the Justices on the current Court (including the Chief Justice and Justices O'Connor, Scalia, Kennedy, and Thomas) has for the first time engaged in an extended inquiry into the original understanding and contemporary value of the federal principle."). See also Richard H. Fallon, Jr., Foreword, *Implementing the Constitution*, 111 HARV. L. REV. 54, 151 (1997) (arguing that the Rehnquist decisions "may augur a coming doctrinal revolution"); Stephen G. Calabresi, *A Constitutional Revolution*, WALL ST. J., July 10, 1997, at 14 (suggesting that the decisions may mark the beginning of "a new post-New Deal jurisprudential era").

<sup>19</sup> 426 U.S. 833, 842 (1976), overruled by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985).

<sup>20</sup> *Id.* (citing *Fry v. United States*, 421 U.S. 542, 547 (1975)) ("[O]ur federal system of government imposes definite limits upon the authority of Congress to regulate the activities of the States as States by means of the commerce power. . . . In *Fry*, the Court recognized that an express declaration of this limitation is found in the Tenth Amendment."). Notably, the dissent disagrees with the majority's characterization. *Id.* at 861 n.4 (Brennan, J., dissenting) ("I cannot subscribe to reading *Fry* as departing, without analysis, from a principle that has remained unquestioned for over 150 years."). Most scholars understand *Usery* to be a substantial departure from prior Tenth Amendment jurisprudence, even though the test it announced was later overturned. See, e.g., Bernard Schwartz, *National League of Cities v. Usery Revisited—Is the Quondam Constitutional Mountain Turning Out To Be Only a Judicial Molehill?*, 52 FORDHAM L. REV. 329, 329 (1983).

<sup>21</sup> *Usery*, 426 U.S. at 833.

<sup>22</sup> 469 U.S. 528, 531 (1985).

<sup>23</sup> *Id.*

*Garcia* dissent, Justice O'Connor argued that the Court should consider state autonomy when reviewing a federal law that seeks to regulate the states as states.<sup>24</sup> Justice O'Connor's dissent hinted at the policy rationales that would come to underpin the anti-commandeering doctrine, setting the stage for the doctrine's formal emergence.

In 1981, in *Hodel v. Virginia Surface Mining*,<sup>25</sup> the Supreme Court unanimously held that the Tenth Amendment did not limit the federal government's power to conditionally preempt a state's regulation of private activities.<sup>26</sup> *Hodel* concerned the Surface Mining Control and Reclamation Act, which set performance standards to protect the environment during surface mining.<sup>27</sup> Like other cooperative federalism statutes, the Act mandated that a regulatory program be adopted for each state, either by the federal government approving a state's proposed program, or, if a state chose not to submit a proposal, by the federal government adopting and implementing its own program.<sup>28</sup> If a state chose not to submit a program, the full regulatory burden would be borne by the federal government.<sup>29</sup> Thus, under the Act, states were not "compelled to enforce [mining] standards, to expend any state funds, or to participate in the federal regulatory program . . . ."<sup>30</sup> According to the Court, Congress could constitutionally structure a statute to offer states a choice: either regulate in compliance with federal standards or be preempted by federal regulation.

Then, the following year, the Supreme Court heard another Tenth Amendment challenge to a federal law. *FERC v. Mississippi*<sup>31</sup> concerned the Public Utility Regulatory Policies Act ("PURPA"), which required states to consider, but not necessarily adopt, specific standards governing energy use.<sup>32</sup> When considering whether to adopt these standards, the states had to follow federally mandated notice-and-comment procedures and report to the federal government annually about their consideration of the standards.<sup>33</sup> PURPA empowered "any person" to bring an action in state court to enforce these procedural obligations.<sup>34</sup> Mississippi challenged PURPA as an impermissible invasion of state sovereignty in violation of the Tenth Amendment, but the Supreme Court disagreed.<sup>35</sup> According to the Court, "PURPA should not be invalid simply because, out of deference to state authority, Congress adopted a less intrusive scheme and allowed the States to continue regulating

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<sup>24</sup> *Id.* at 588 (O'Connor, J., dissenting).

<sup>25</sup> 452 U.S. 264 (1981).

<sup>26</sup> *Id.* at 265.

<sup>27</sup> *Id.* at 268-69.

<sup>28</sup> *Id.* at 269.

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

<sup>30</sup> *Id.* at 288.

<sup>31</sup> 456 U.S. 742 (1982).

<sup>32</sup> *Id.* at 742.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 748-49.

<sup>35</sup> *Id.* at 742.

in the area on the condition that they *consider* the suggested federal standards.”<sup>36</sup> The Court viewed PURPA as reminiscent of the Surface Mining Control and Reclamation Act it had upheld in *Hodel* the previous year.<sup>37</sup> Under PURPA, Congress required a state administrative body to consider federal regulations as a condition for continued state regulation; if the state would not consider the regulations, the federal government would preempt the state’s regulations.<sup>38</sup> The Court placed a great deal of emphasis on the fact that Congress had the power to regulate energy use if it chose to do so.<sup>39</sup> In contrast to *Hodel*, however, there was no alternative federal regulatory system in place under PURPA if the state declined to comply.<sup>40</sup> In *FERC*, the Supreme Court concluded that Congress could condition state regulation on compliance with federal regulations in a preemptable field, even without actually preempting states that chose not to comply.<sup>41</sup>

Six years after *FERC*, in 1988, the Supreme Court again shed light on the federal government’s power to regulate state activities. In *South Carolina v. Baker*,<sup>42</sup> the Court heard a challenge to the Tax Equity and Fiscal Responsibility Act (“TEFRA”).<sup>43</sup> By enacting TEFRA, Congress sought to incentivize registering bonds by removing a tax exemption for unregistered bonds, which left no paper trail and facilitated tax evasion.<sup>44</sup> TEFRA provisions thus preserved a federal tax exemption for interest earned on registered bonds issued by the federal or state government.<sup>45</sup> TEFRA also denied tax exemptions for interest earned on unregistered bonds issued by the United States and imposed a series of tax penalties on unregistered bonds issued by private corporations.<sup>46</sup> South Carolina brought suit challenging TEFRA, arguing that the Act effectively required states to issue only registered bonds.<sup>47</sup> To comply with TEFRA, many state legislatures amended statutes to allow for the issuance of registered bonds and state executive officers structured and implemented a registered bond system.<sup>48</sup> The Supreme Court found neither burden rose to the level of a Tenth Amendment violation.<sup>49</sup> In prescient phrasing, the Court asserted that “[s]uch ‘commandeering’ is . . . an inevitable consequence of regulating a state activity.”<sup>50</sup> It reflected that,

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<sup>36</sup> *Id.* at 765.

<sup>37</sup> *FERC v. Mississippi*, 456 U.S. 742, 782–83 (1982) (O’Connor, J., concurring in judgment in part and dissenting in part).

<sup>38</sup> *Id.* at 772–75 (Powell, J., concurring in part and dissenting in part).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 755–56.

<sup>41</sup> *See id.* at 771.

<sup>42</sup> 485 U.S. 505 (1988).

<sup>43</sup> *Id.* at 505.

<sup>44</sup> *Id.* at 507–09.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 510.

<sup>47</sup> *See id.* at 511.

<sup>48</sup> *South Carolina v. Baker*, 485 U.S. 505, 514 (1988).

<sup>49</sup> *Id.* at 527.

<sup>50</sup> *Id.* at 514.

when a state seeks to engage in an activity regulated by the federal government, that state may need to take legislative or administrative action to comply with the regulations.<sup>51</sup> Significantly, the Court concluded that TEFRA regulates state activities; it does not “seek to control or influence the manner in which States regulate private parties.”<sup>52</sup> This distinction would reappear in later cases.

During this era, the Rehnquist Court repeatedly constrained the federal government’s powers relative to the states. In *United States v. Lopez*,<sup>53</sup> the Court held for the first time in sixty years that Congress had exceeded its power to legislate under the Commerce Clause.<sup>54</sup> And in *Gregory v. Ashcroft*,<sup>55</sup> Justice O’Connor, writing for the majority, extolled the benefits of federalism.<sup>56</sup> In doing so, she adopted a clear-statement rule for congressional interference with a state’s decision to establish qualifications for judges because the alternative “would upset the usual constitutional balance of federal and state powers.”<sup>57</sup> The Court observed how this balance exists to protect individual citizens from government encroachment, declaring that “[i]n the tension between federal and state power lies the promise of liberty.”<sup>58</sup> And then, finally, in 1992, the Supreme Court formally announced the existence of an anti-commandeering doctrine.<sup>59</sup>

### B. *The Introduction of the Anti-Commandeering Doctrine*

The Supreme Court first labeled and defined the anti-commandeering doctrine in *New York v. United States*.<sup>60</sup> *New York* concerned a federal statute that required states to provide for the disposal of radioactive waste generated within their borders.<sup>61</sup> The statute at issue provided: (1) monetary incentives, which allowed states with disposal sites to impose a surcharge on waste received from other states; (2) access incentives, which allowed states to

<sup>51</sup> *Id.* at 514–15.

<sup>52</sup> *Id.* at 505–06.

<sup>53</sup> 514 U.S. 549 (1995).

<sup>54</sup> *See id.* at 551 (“We hold that the Act exceeds the authority of Congress ‘[t]o regulate Commerce . . . among the several States. . . .’” (quoting U.S. CONST., art. I, § 8, cl. 3)).

<sup>55</sup> 501 U.S. 452 (1991).

<sup>56</sup> *See id.* at 458 (“This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry. . . . Perhaps the principal benefit of the federalist system is a check on abuses of government power.”).

<sup>57</sup> *Id.* at 452.

<sup>58</sup> *Id.* at 459.

<sup>59</sup> *Cf.* Adam B. Cox, *Expressivism in Federalism: A New Defense of the Anti-Commandeering Rule?*, 33 LOY. L.A. L. REV. 1309, 1309 (2000).

<sup>60</sup> *See* 505 U.S. 144, 161 (1992). *New York* was the first time that the Supreme Court officially endorsed an anti-commandeering doctrine, but murmurings of similar constitutional principles date back to the 1840s.

<sup>61</sup> *Id.* at 151–52.



increase the cost of access to their sites and then deny access altogether to waste generated in states that did not meet federal deadlines; and (3) a take-title sanction, which provided that a state that failed to provide for the disposal of all internally generated waste by a particular date must take title to the waste and become liable for all damages suffered by the waste's generator or owner.<sup>62</sup> Justice Sandra Day O'Connor, writing for the majority, struck down the statute's third provision, concluding, "Congress may not simply commandeer the legislative processes of the states by directly compelling them to enact and enforce a federal regulatory program."<sup>63</sup> O'Connor then outlined four distinctions between permissible and impermissible federal action:

1. The federal government can strongly incentivize states to participate in a federal program and condition federal funds on participation, but it cannot force them to participate.<sup>64</sup>
2. The federal government can preempt state legislation and regulate a particular activity, but it cannot instruct state legislatures to regulate the activity for it.<sup>65</sup>
3. The federal government can pass a generally applicable law that incidentally requires the states to act just as it requires private actors to act, but the federal government cannot target the states themselves.<sup>66</sup>
4. The federal government can direct state judges, but it cannot direct other state officials in the same way.<sup>67</sup>

Where a law constitutes impermissible federal action under one of these four distinctions, the Court declared, that law violates the anti-commandeering doctrine. The take-title provision at issue in *New York*, unlike the monetary incentives and the access incentives, did not incentivize state action; it *required* state action.<sup>68</sup> In addition, the law was not preemptive,<sup>69</sup>

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<sup>62</sup> *Id.* at 152–54.

<sup>63</sup> *Id.* at 161 (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981)).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 161–69. Some view this distinction to be a counter-intuitive and overtly negative aspect of the doctrine. *Printz v. United States*, 521 U.S. 898, 959 (1997) (Stevens, J., dissenting); see also Althouse, *supra* note 11, at 1236 ("[T]he anti-commandeering doctrine pervasively encourages the federal government to aggrandize itself."). Nonetheless, it is a key pillar of the doctrine as understood in *New York*. 505 U.S. at 161–169.

<sup>66</sup> *New York v. United States*, 505 U.S. 144, 177–78 (1992). See Thomas H. Odom & Marc R. Baluda, *The Development of Process-Oriented Federalism: Harmonizing the Supreme Court's Tenth Amendment Jurisprudence from Garcia Through Printz*, 31 URB. LAW. 993, 1005 (1999) ("*New York* and *Printz* invalidated laws that 'commandeered' the states in the context of statutes that were not generally applicable and that did not only incidentally apply to states. Thus, the dividing line is between generally applicable laws and laws that single out or target states.>").

<sup>67</sup> *New York*, 505 U.S. at 178–79.

<sup>68</sup> *Id.* at 174–75

generally applicable,<sup>70</sup> or commandeering only of the state judiciary.<sup>71</sup> Thus, O'Connor concluded, it must be unconstitutional under the anti-commandeering doctrine.<sup>72</sup>

Justice O'Connor then explained the policy rationales underlying the Court's distinctions between constitutional and unconstitutional federal action. She traced the ways in which the central ideals of our system of government—specifically, democratic accountability and individual liberty—counsel in favor of an anti-commandeering doctrine.<sup>73</sup> According to the Court, when the federal government directs the states to act, it blurs lines of political accountability and causes voters to wrongly blame local officials for the adverse effects of a federal policy.<sup>74</sup> In contrast, she wrote, “Where [C]ongress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate’s preferences; state officials remain accountable to the people.”<sup>75</sup> In addition, O'Connor proposed, preventing the federal government from directing the states protects our system of federalism.<sup>76</sup> Harkening back to her opinion in *Gregory v. Ashcroft*,<sup>77</sup> O'Connor observed that federalism serves as a check against tyranny: Sovereign states can protect the interests of their citizens from the national government’s overreach. Because federalism is a means to protect individual liberty, and is not just an end in itself, the anti-commandeering doctrine should not be cast aside even if a state supports the federal law at issue. As a result, Justice O'Connor rejected the contention that the law in *New York* should be saved because the state of New York consented to its passage.<sup>78</sup> The Constitution divides power for the benefit of the people, not the states, O'Connor concluded, and the Court cannot permit the states to concede to impingements on individual liberty.<sup>79</sup>

Five years after *New York*, the Supreme Court revisited the anti-commandeering doctrine in *Printz v. United States*,<sup>80</sup> invalidating the Brady Handgun Violence Prevention Act.<sup>81</sup> The Act required state and local law enforcement officers to conduct background checks on prospective handgun

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<sup>69</sup> *Id.* at 168–70.

<sup>70</sup> *Id.* at 178–79.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 188.

<sup>73</sup> She also proposed that the anti-commandeering principle prevents Congress from shifting the costs of regulation to the states. *New York v. United States*, 505 U.S. 144, 183 (1992). This rationale is not treated as being as significant or determinative as the other two rationales.

<sup>74</sup> *Id.* at 168; see *FERC v. Mississippi*, 456 U.S. 742, 787 (1982).

<sup>75</sup> *New York*, 505 U.S. at 168.

<sup>76</sup> *Id.* at 168–69.

<sup>77</sup> 501 U.S. 452, 459 (1991) (“If this ‘double security’ is to be effective, there must be a proper balance between the States and the Federal Government. These twin powers will act as mutual restraints only if both are credible. In the tension between federal and state power lies the promise of liberty.”).

<sup>78</sup> 505 U.S. at 181–82.

<sup>79</sup> *Id.*

<sup>80</sup> 521 U.S. 898, 933 (1997).

<sup>81</sup> *Id.*

purchasers for a period of sixty months after enactment, while the federal government built a national background check database.<sup>82</sup> Although *New York* never explicitly applied the anti-commandeering doctrine to low-level state executive officers,<sup>83</sup> the *Printz* Court clarified that the doctrine's protections extended to those officers.<sup>84</sup> Even this temporary direction to state officers was sufficient, in the Court's view, to violate the anti-commandeering doctrine.<sup>85</sup>

In reaching this conclusion, the *Printz* Court sidelined the policy rationales that Justice O'Connor had declared in *New York* to underpin the doctrine. Instead of explaining how democratic accountability and liberty considerations counsel in favor of striking down the law, the Court relied on theories of a unitary executive<sup>86</sup> and of dual sovereignty to support its holding.<sup>87</sup> The Court in *New York* had never mentioned Article II or the executive power. And Justice O'Connor had explicitly rejected state sovereignty as a stand-alone rationale for the anti-commandeering doctrine; rather, state sovereignty was a means to ensure individual liberty.<sup>88</sup> Five years after *New*

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<sup>82</sup> See 18 U.S.C. § 922(s)(1)(D) (1988) (“[T]he law of the State requires that, before any licensed importer, licensed manufacturer, or licensed dealer completes the transfer of a handgun to an individual who is not licensed under section 923 [18 USC § 923], an authorized government official verify that the information available to such official does not indicate that possession of a handgun by the transferee would be in violation of law.”).

<sup>83</sup> *New York* prohibited federal instructions to state legislators. *New York v. United States*, 505 U.S. 144, 188 (1992).

<sup>84</sup> 521 U.S. 898 at 966.

<sup>85</sup> *Id.* at 931–33. Some scholars argued that the facts in *Printz* violated the anti-commandeering doctrine as described in *New York* because states *did* have a choice—the statute only required the state to conduct background checks, not to act on any flags they uncovered. *Printz v. United States*, 521 U.S. 898, 917 (1997). The Court concluded, however, that: (1) The state had no choice with regard to whether its officers conducted a background check; and (2) With regard to responding to flags, the state did not have a practical choice between action and inaction because of potential backlash that was sure to come from informed inaction. *Id.* at 917–18, 930. Regardless, *Printz* highlights unresolved doctrinal complexities. For example, should the preemption distinction apply if the federal government cannot constitutionally regulate the field? In *New York*, there was no question that the federal government could have regulated the radioactive waste directly. But it is not so clear in *Printz* that the federal government can supersede state handgun regulation. Which way should this difference cut? Some scholars argue that where the federal government needs the states in order to regulate, the anti-commandeering doctrine should not apply. John D. Tortorella, *Reining in the Tenth Amendment: Finding A Principled Limit to the Non-Commandeering Doctrine of United States v. Printz*, 28 SETON HALL L. REV. 1365, 1388–90 (1998). The Court's opinion in *Murphy* suggests that the doctrine should apply with particular force where the federal government is trying to circumvent substantive constitutional constraints on its powers by commandeering state actors. See *infra* Part II.B.

<sup>86</sup> Justice Scalia, writing for the majority, explained how, by using state officers to implement federal laws, the president did not have adequate control over enforcement as required under the Constitution. *Printz v. United States*, 521 U.S. 898, 922–23 (1997). Some scholars have picked up on this line of thought. See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 639–42 (1994) (suggesting state implementation of federal law must be subject to President's supervision).

<sup>87</sup> *Printz*, 521 U.S. at 923–24, 935.

<sup>88</sup> *New York v. United States*, 505 U.S. 144, 181 (1992), (“State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from diffusion of sovereign power.”).

*York* and the Supreme Court's first word on the anti-commandeering doctrine, the doctrine was cut loose from the policy rationales that had previously grounded it.

If the Supreme Court had relied on its prior rationales of democratic accountability and individual liberty, it might have upheld the Brady Act.<sup>89</sup> There was no indication that the background checks would cause citizens to improperly hold a state government accountable for the federal government's decisions. Justice Scalia, writing for the majority, mentions democratic accountability only after prompting from Justice Stevens's dissent. He writes,

[I]t will be the CLEO [Chief Law Enforcement Officer] and not some federal official who stands between the gun purchaser and immediate possession of his gun. And it will likely be the CLEO, not some federal official, who will be blamed for any error (even one in the designated federal database) that causes a purchaser to be mistakenly rejected.<sup>90</sup>

But Justice Scalia's brief discussion of democratic accountability, however, was not grounded in the structure of the Brady Act. In practice, the Act would function as such: a potential purchaser would approach a firearm seller to purchase a firearm; the seller would then contact the CLEO, a behind-the-scenes state agent, who would run a background check on a purchaser. The CLEO generally would not interact directly with the purchaser at any point.<sup>91</sup> If a purchaser failed the background check, the CLEO would notify the seller, who would then inform the purchaser that she failed the *federal* background check—information which would cause her to properly hold the federal government politically accountable.<sup>92</sup> The Act thus could preserve clear lines of democratic accountability between citizens and their federal and state representatives.

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<sup>89</sup> The Brady Act did not provide federal funds to local law enforcement agencies to conduct the background checks, but millions of dollars in federal grants have been awarded to states to improve their criminal history records systems, so the cost-sharing rationale would not necessarily counsel in favor of striking down the law. See *Department of Justice Announces More Than \$70 Million to Support School Safety and \$64 Million to Improve State Criminal Record Systems*, U.S. DEP'T JUSTICE (Oct. 12, 2018), <https://www.justice.gov/opa/pr/department-justice-announces-more-70-million-support-school-safety-and-64-million-improve>, archived at <https://perma.cc/32XC-FQRE>.

<sup>90</sup> *Printz*, 521 U.S. at 930.

<sup>91</sup> See 18 U.S.C. § 922(c)(2) (1988) (describing the duties of the transferor to send to the CLEO a copy of the transferee's sworn statement). However, if an individual is determined to be ineligible to receive a handgun, he can request that the CLEO provide the reasons for her determination, and the CLEO must provide her reasoning to the individual within twenty days of the request. See *id.* § 922(s)(6)(C).

<sup>92</sup> See *Printz v. United States*, 521 U.S. 898, 958 n.18 (1997) (Stevens, J., dissenting) ("Moreover, we can be sure that CLEO's will inform disgruntled constituents who have been denied permission to purchase a handgun about the origins of the Brady Act requirements. The Court's suggestion that voters will be confused over who is to 'blame' for the statute reflects a gross lack of confidence in the electorate that is at war with the basic assumptions underlying any democratic government.").

With regard to state sovereignty and individual liberty, scholars have noted the difference between the facts of *New York* and *Printz*: “Commandeering state legislatures and forcing them to enact laws may constitute more of an intrusion and infringement on state sovereign ‘dignity’ than asking state law enforcement personnel merely to enforce a federal law on an interim basis.”<sup>93</sup> The dissenting justices also understood *Printz* to present a less significant infringement on state sovereign acts. Weighing that more minor infringement against the alternative—an expansion of the federal government<sup>94</sup>—Justice Breyer expresses puzzlement over how “the creation of a new federal gun-law bureaucracy, or the expansion of an existing federal bureaucracy [could] better promote either state sovereignty or individual liberty.”<sup>95</sup> Justice Stevens in his dissent similarly writes, “[I]t is difficult to see how state sovereignty and individual liberty are more seriously threatened by federal reliance on state police officers to fulfill this minimal request than by the aggrandizement of a national police force.”<sup>96</sup> In the end, the *Printz* Court fails to adequately wrestle with the reasons why the anti-commandeering doctrine exists in the first place; rather, it references them in name alone and then proceeds to highlight novel policy considerations, such as the unitary executive theory, to explain its holding. Thus, *Printz* marks a departure from the policy rationales guiding the doctrine in *New York*.

*New York* and *Printz* were the only two times that the Supreme Court struck down a federal law under the anti-commandeering doctrine before its decision in *Murphy*. They thus provide the clearest instruction on the original contours of the doctrine. However, the Supreme Court has, in another way, informed our understanding of the anti-commandeering doctrine: On a single occasion after *New York*, it rejected an anti-commandeering challenge to a federal law, finding that Congress’s actions were permissible.<sup>97</sup> In this way, just as *New York* and *Printz* inform our understanding of where the line falls between constitutional and unconstitutional federal action, so does *Reno v. Condon*.<sup>98</sup>

The Supreme Court decided *Reno* in 2000, three years after it decided *Printz*, and clarified the distinction between commandeering and generally applicable laws. The case concerned a Tenth Amendment challenge to the Driver’s Privacy Protection Act, which regulated the disclosure of personal

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<sup>93</sup> Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1665 (2006) (stating also that “*New York* is arguably a stronger kind of Tenth Amendment case than *Printz* from the standpoint of symbolic federalism and political accountability values, at least if one abstracts away from the particular facts of *New York*”).

<sup>94</sup> There is an open question regarding whether the Court in *New York* was concerned with the degree to which a particular statute infringed on individual liberty or with chipping away at the overall structure of dual sovereignty at the eventual expense of individual liberty. See generally *New York v. United States*, 505 U.S. 144, 144 (1992).

<sup>95</sup> *Printz*, 521 U.S. at 977 (Breyer, J., dissenting).

<sup>96</sup> *Id.* at 959 n.21 (Stevens, J., dissenting).

<sup>97</sup> See *Reno v. Condon*, 528 U.S. 141, 148 (2000).

<sup>98</sup> *Id.* at 151.

information contained in state motor vehicle departments records.<sup>99</sup> The Act prohibits states from knowingly disclosing personal information when selling these records to private entities.<sup>100</sup> Even though states are always the initial suppliers of the driver's license information, the Act also contains separate provisions governing resale by private parties who have obtained the information from a DMV.<sup>101</sup> To determine whether the federal law was constitutional, the Court asked two questions. First, the Court asked whether Congress had the power to regulate the information under the Constitution; then, the Court asked whether, in attempting to regulate the information, Congress impermissibly commandeered the states.<sup>102</sup> Determining that the Act did not commandeer the states, the *Reno* Court distinguished between a permissible federal law that regulates state activities and an impermissible federal law that regulates the states' regulation of their citizens. The first, as a generally applicable law, merely regulated the state as it might regulate private parties. The second unconstitutionally regulated states in their sovereign capacity.<sup>103</sup> According to the Court, the Driver's Privacy Protection Act fell into the first category: It regulated the states as the owners of databases;<sup>104</sup> it did not seek to control or influence the manner in which States regulated private parties. The Court noted that it left for another day the question of whether the federal government could constitutionally regulate state activities only where it also regulates private activities.<sup>105</sup> According to the Court, the question was unnecessary to reach in *Reno* because the Driver's Privacy Protection Act regulated "the universe of entities that participate as suppliers to the market for motor vehicle information."<sup>106</sup> However, the nuances of what qualifies as a generally applicable law would turn out to be significant in the Court's decision in *Murphy v. National Collegiate Athletic Association*.

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<sup>99</sup> See 18 U.S.C. §§ 2721–2725 (1994).

<sup>100</sup> 18 U.S.C. § 2721(a) (1994).

<sup>101</sup> *Reno*, 528 U.S. at 143–44.

<sup>102</sup> *Id.* at 148–49.

<sup>103</sup> *Id.* at 149–50.

<sup>104</sup> *Id.* at 151.

<sup>105</sup> *Id.* The Court's comment implies that it was reading *South Carolina v. Baker*, 485 U.S. 505 (1988), as involving both the regulation of states and private entities. That the law at issue in *Baker*, TEFRA, did not regulate state and private bonds in the same way does not appear to have been significant to the *Reno* Court. Indeed, even the Driver's Privacy Protection Act did not regulate states and private actors identically. That it regulated both public and private activities in some manner when selling personal driver's license information was sufficient. The *Murphy* Court had to recharacterize the *Baker* and *Reno* line of cases in order to strike down the Professional and Amateur Sports Protection Act ("PASPA"), because PASPA had provisions regulating both private and publicly run sports gambling regimes. See *infra* Part II.C

<sup>106</sup> *Reno v. Condon*, 528 U.S. 141, 151 (2000).

## II. THE REVIVAL AND RECONCEPTUALIZATION OF THE ANTI-COMMANDEERING DOCTRINE

Two decades after the Supreme Court's last word on the anti-commandeering doctrine, the Court granted certiorari in *Murphy v. National Collegiate Athletic Association*.<sup>107</sup> *Murphy* concerned a challenge to a federal statute that made it unlawful for: "(1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact; or (2) a person to sponsor, operate, advertise, or promote pursuant to the law or compact of a governmental entity a lottery, sweepstakes, or other betting, gambling, or wagering scheme" in relation to sports games.<sup>108</sup> The New Jersey legislature repealed its laws prohibiting sports gambling schemes, and a lawsuit was filed seeking to enjoin the law's enforcement because it conflicted with PASPA.<sup>109</sup> The state of New Jersey argued that PASPA violated the anti-commandeering doctrine.<sup>110</sup> The Court concluded that prohibiting a state legislature from legislating as it wished was the equivalent of issuing a command to that legislature.<sup>111</sup> And because the anti-commandeering doctrine prohibits the federal government from issuing commands to state governments, the law was unconstitutional.

The Supreme Court's decision in *Murphy* had three distinct effects on the doctrine. First, just by virtue of striking down a law for commandeering state actors, the Court revived the doctrine and reminded advocates that it remains available as a defense against federal encroachment. Second, *Murphy* changed how we understand the distinction between impermissible commandeering and permissible federal preemption.<sup>112</sup> The Court had never before recognized that a negative command to state officials—an instruction *not* to legislate—could violate the doctrine. By expanding the doctrine to include these types of instructions, the Court blurred the lines between a statute that unconstitutionally commandeers by instructing the states not to legislate and a statute that constitutionally pre-empts by effectively preventing the states from legislating. And third, because PASPA also included a

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<sup>107</sup> *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1473 (2018).

<sup>108</sup> Professional and Amateur Sports Protection Act, Pub. L. No. 102-559 (1992).

<sup>109</sup> See *Murphy*, 138 S. Ct. at 1465–66.

<sup>110</sup> See *id.*

<sup>111</sup> See *id.* at 1478 (concluding that the distinction between commanding and prohibiting is "empty").

<sup>112</sup> The Supreme Court's holding is consistent with the first and fourth distinctions created in *New York*: The statute did not allow for a choice, and it did not target only the state judiciary. Notably, the individual liberty rationale does not weigh in favor of striking down the law. PASPA enacted a federal scheme in accordance with the democratic preferences of each state: It froze into place state sports gambling laws as they stood at the time of PASPA's passage. Recall, in *New York*, the Supreme Court concluded that the state could not concede power in the federalist scheme because the scheme exists to protect individual liberty. *New York v. United States*, 505 U.S. 144, 181–82 (1992). In contrast, PASPA acts almost like a cooperative federalist regime, taking into account the voters' desires for the schemes to operate according to their own state's needs.

provision preventing private actors from establishing sports betting regimes just as it prevented states from doing so, the Court had to reconstrue prior opinions where it upheld statutes that are generally applicable to private and public actors. In the year since *Murphy* was handed down, these changes to the doctrine have already affected certain civil rights cases, such as the sanctuary city litigation. Looking forward, *Murphy* could bring the anti-commandeering doctrine into more frequent use across a variety of policy areas affecting civil rights and civil liberties.

### A. Reviving the Doctrine

By striking down a federal law under the anti-commandeering doctrine—regardless of the specifics of the case—the Supreme Court signaled to litigators that the doctrine could be a viable path for challenges to other federal laws. In the year since *Murphy* was decided, long-standing statutes have been challenged as violations of the anti-commandeering doctrine. One such example is the Federal Death Penalty Act (“FDPA”).

The FDPA was passed in 1994 and provides for the use of state facilities to implement federal executions. After *Printz* clarified that the anti-commandeering doctrine applied to state executive officers in 1997, the FDPA risked being challenged under the anti-commandeering doctrine. But no claims came for over twenty years. It was not until *Murphy* reminded the legal world that the Court was open to hearing and deciding cases under the anti-commandeering doctrine that the Act was challenged. Since *Murphy*, courts have already confronted two anti-commandeering challenges to the Act.<sup>113</sup> Though the suits were dismissed because the claims were not yet ripe,<sup>114</sup> the fact that they were both brought in the year after *Murphy* against a decades-old statute demonstrates the revival of anti-commandeering challenges. After *Murphy*, federal policymakers should be more conscious of the anti-commandeering doctrine because their proposals might be more vulnerable to challenge.<sup>115</sup>

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<sup>113</sup> *United States v. Mills*, 393 F. Supp. 3d 650, 657 (E.D. Mich. 2019); *United States v. Madison*, 337 F. Supp. 3d 1186, 1197 (M.D. Fla. 2018).

<sup>114</sup> See *Mills*, 393 F. Supp. 3d at 668–69; *Madison*, 337 F. Supp. 3d at 1195.

<sup>115</sup> Since *Murphy*, the anti-commandeering doctrine has appeared in thought pieces about proposed federal action. For example, in response to President Trump’s threats to force states to re-open their economies in the midst of the COVID-19 pandemic, some lawyers argued that such an order would violate the anti-commandeering doctrine. See Ben Berwick et. al., *Trump Can’t Reopen the Country Over State Objections*, LAWFARE (Mar. 27, 2020), <https://www.lawfareblog.com/trump-cant-reopen-country-over-state-objections>, archived at <https://perma.cc/RMB9-TDGU> (citing *Murphy* and concluding that “neither the president nor Congress can directly require states and cities to call off their ‘shelter-in-place’ orders, or to reopen schools and businesses”).



### B. *Expanding the Doctrine*

*New York* distinguished between permissible preemption<sup>116</sup> and impermissible commandeering.<sup>117</sup> Under the Supremacy Clause, when Congress regulates an activity based on a power granted to the federal government in the Constitution, it permissibly preempts state law and prevents state legislatures from enacting statutes to the contrary.<sup>118</sup> In contrast, when Congress instructs a state to regulate on its behalf, it violates the anti-commandeering doctrine. But *Murphy* announced for the first time that Congress can also violate the doctrine when it instructs states *not* to regulate. Thus, when a state is inhibited from regulating as it wishes, it could be due to either constitutional preemption or unconstitutional commandeering. Though some have heralded *Murphy* as a win for state's rights,<sup>119</sup> this doctrinal expansion opened the door to trickier questions regarding the line between permissible and impermissible federal action.<sup>120</sup> Recognizing the gray area that its decision created, the Supreme Court announced a new test to identify when a statute constitutionally preempts state legislative action: First, the statute must "represent the exercise of a power conferred on Congress by the Constitution"; second, it must be "best read as [a law] that regulates private actors."<sup>121</sup>

Extending the doctrine to include instructions not to act complicates some of the original policy rationales behind the doctrine's existence. Even though the difference between commandeering and preemption might alter the text of a statute, from the point of view of a state resident, its effects are the same: The state is not acting. But the Court has never understood preemption to impermissibly blur lines of political accountability. One might

<sup>116</sup> *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290 (1981) (holding that preemption permissibly prohibits state regulation).

<sup>117</sup> *New York*, 505 U.S. at 161.

<sup>118</sup> See Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 767 (1994).

<sup>119</sup> See Kasia Parecki, *Murphy v. NCAA: Anticommandeering – A Win for State Autonomy and Federalism*, Forum, 97 DENV. L. REV. 61, 62 (2019).

<sup>120</sup> Other scholars have noted *Murphy's* difficulty in reconciling commandeering and conditional preemption. Vikram David Amar, "*Clarifying*" *Murphy's Law: Did Something Go Wrong in Reconciling Commandeering and Conditional Preemption Doctrines?*, 2018 SUP. CT. REV. 299, 300 (2018). More generally, scholars have discussed the gray area between preemption and commandeering. See Jessica Bulman-Pozen, *Preemption and Commandeering Without Congress*, 70 STAN. L. REV. 2029, 2045 (2018) (arguing that the distinction between preemption and commandeering is blurry). Notably, including prohibitions on legislating within the anti-commandeering doctrine does not align with the way that scholars understood and described the doctrine before *Murphy*. See, e.g., Matthew D. Adler, *State Sovereignty and the Anti-Commandeering Cases*, 574 ANNALS OF THE AM. ACAD. POL. & SOC. SCI. 158, 158 (2001) ("The anti-commandeering doctrine . . . prohibits the federal government from . . . imposing targeted, affirmative, coercive duties upon state legislators or executive officials.") (emphasis added).

<sup>121</sup> *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1479 (2018).

wonder, then, why commandeering does. In fact, Justice Ginsburg in her dissent in *Murphy* argues,

If States themselves and private parties may not operate sports-gambling schemes, responsibility for the proscriptions is hardly blurred. It cannot be maintained credibly that state officials have anything to do with the restraints. Unmistakably, the foreclosure of sports-gambling schemes, whether state run or privately operated, is chargeable to congressional, not state, legislative action.<sup>122</sup>

The decision to include negative instructions within the ambit of the anti-commandeering doctrine has repercussions beyond logical inconsistency. In the year since *Murphy* was decided, the Court's expansion already has had an impact on constitutional challenges to federal action. Indeed, the Court's opinion in *Murphy* effectively resurrected a constitutional defense of sanctuary cities.

### *i. Sanctuary Cities*

In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act. Section 1373 of the Act prohibits state and local governments from restricting the transfer of information to Immigration and Naturalization Service regarding an individual's citizenship or immigration status.<sup>123</sup> In 1999, sanctuary cities<sup>124</sup> filed suit against the federal government, challenging the law under the anti-commandeering doctrine.<sup>125</sup> Lower courts rejected their claims, and the case never made it to the Supreme Court.<sup>126</sup> But last year, a collection of sanctuary cities once again argued that Section 1373 violated the anti-commandeering doctrine. This time, lower

<sup>122</sup> *Id.* at 1489 (Ginsburg, J., dissenting).

<sup>123</sup> 8 U.S.C. § 1373 (1996).

<sup>124</sup> Sanctuary cities are jurisdictions that refuse to assist the federal government's efforts to deport undocumented immigrants. Tal Kopan, *What are sanctuary cities, and can they be defunded?*, CNN: POLITICS (Mar. 26, 2018, 3:40 PM), <https://www.cnn.com/2017/01/25/politics/sanctuary-cities-explained/index.html>, archived at <https://perma.cc/X3N5-89MG>. But note that the precise definition of sanctuary city is not clear. Some cities use the label to describe more expansive protective activities. *Id.*

The [Executive Order conditioning federal funding on compliance with the law] provided a definition of a sanctuary city, tying it to the provision of federal law forbidding a federal, state, or local entity from having a policy that restricts sending or receiving information regarding an individual's citizenship or immigration status.

Andrew F. Moore, *Introduction to the Symposium on Sanctuary Cities: A Brief Review of the Legal Landscape*, 96 U. DEF. MERCY L. REV. 1, 5 (2018). Notably, even though there have been some conflicts between states and sanctuary cities, see Pratheepan Gulasekaram et. al., *Anti-Sanctuary and Immigration Localism*, 119 COLUM. L. REV. 837, 842 (2019), the anti-commandeering doctrine only constrains federal action.

<sup>125</sup> See *City of New York v. United States*, 179 F.3d 29, 33 (2d Cir. 1999), cert. denied, 528 U.S. 1115 (2000).

<sup>126</sup> *Id.*

courts ruled in their favor.<sup>127</sup> In doing so, the judges pointed to *Murphy*.<sup>128</sup> Contrasting the outcomes of these two rounds of litigation clarifies the significance of the *Murphy* Court's decision to shift the bounds of the anti-commandeering doctrine.<sup>129</sup>

In 1999, the Second Circuit decided *City of New York v. United States*.<sup>130</sup> In the case, New York City raised two challenges to Section 1373 under the anti-commandeering doctrine. First, it asserted that Section 1373 impermissibly commandeered its law enforcement officers by forcing them to share information concerning individuals' immigration status.<sup>131</sup> Second, it asserted that Section 1373 impermissibly commandeered its legislature by preventing it from regulating the transfer of that information.<sup>132</sup> The first allegation is most analogous to the allegations in *Printz*; the second resembles *Murphy*. For the law to fall, the city needed to prevail on only one of its claims. It failed on both, but the reasons why are revealing.

The Second Circuit did not reject the city's claim that Section 1373 commandeers law enforcement officers because it determined the claim was outside of the bounds of the anti-commandeering doctrine. In fact, the Second Circuit explicitly recognized that the city's concerns had merit. It acknowledged: "[I]t is undeniable that [the statute does] interfere with the City's control over . . . its employees' use of such [confidential information obtained in the course of municipal business]." <sup>133</sup> Nevertheless, the claim failed because the city did not include sufficient evidence in the record of the federal government's incursion.<sup>134</sup> The court concluded, "[T]he City has

<sup>127</sup> See *City & Cty. of San Francisco v. Sessions*, 349 F. Supp. 3d 924, 952 (N.D. Cal. 2018) (citing *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1477 (2018)).

<sup>128</sup> See *id.* at 953 ("There is no distinction for anti-commandeering purposes, post-*Murphy*, between a federal law that affirmatively commands States to enact new laws and one that prohibits States from doing the same."). As Ilya Somin notes, "[t]he sanctuary cities cases suggest that the traditional ideological division over judicial review of federalism may be outdated." Ilya Somin, *Making Federalism Great Again: How the Trump Administration's Attack on Sanctuary Cities Unintentionally Strengthened Judicial Protection for State Autonomy*, 97 TEX. L. REV. 1247, 1250 (2019).

<sup>129</sup> At least one scholar proposes that courts should read Section 1373 narrowly to avoid a commandeering challenge. Specifically, the article argues courts should read Section 1373 so that it does not unduly interfere with sub-federal officials' control over their employees, and instead, merely permits communication between different levels of government. See Peter Margulies, *Deconstructing "Sanctuary Cities": The Legality of Federal Grant Conditions That Require State and Local Cooperation on Immigration Enforcement*, 75 WASH. & LEE L. REV. 1507, 1514 (2018). At least so far, courts have not adopted this route after *Murphy*.

<sup>130</sup> 179 F.3d 29, 31 (2d Cir. 1999).

<sup>131</sup> See *City of New York v. United States*, 179 F.3d 29, 36 (2d Cir. 1999). Some scholars have argued that federal demands for information alone qualify as unconstitutional commandeering. See Robert A. Mikos, *Can the States Keep Secrets from the Federal Government?*, 161 U. PENN. L. REV. 103, 107 (2012) (suggesting that the commandeering of state information-gathering services is indistinguishable in all relevant respects from the commandeering of other state executive services).

<sup>132</sup> See *City of New York*, 179 F.3d at 34.

<sup>133</sup> *Id.* at 36.

<sup>134</sup> *Id.* ("On the present record, the only state and local policy proffered by the City as disrupted by Sections 434 and 642 is the Executive Order described above. The City's facial

chosen to litigate this issue in a way that fails to demonstrate an impermissible intrusion on state and local power to control information obtained in the course of official business or to regulate the duties and responsibilities of state and local governmental employees.”<sup>135</sup> With adequate evidence of the intrusion into the operation of city government,<sup>136</sup> then, Section 1373 might have fallen under the anti-commandeering doctrine as originally conceived in *New York* and as applied to state executive officers under *Printz*.

In contrast, the city’s second claim necessarily implicates the *Murphy* Court’s future reconfiguration of the doctrine.<sup>137</sup> As the outcome in *City of New York* demonstrates, the original anti-commandeering doctrine is not sufficiently broad to sustain the claim. In response to the allegation that Section 1373 commandeered the legislature by prohibiting it from passing certain legislation, the Second Circuit wrote:

Congress has not compelled state and local governments to enact or administer any federal regulatory program. Nor has it affirmatively conscripted states, localities, or their employees into the federal government’s service. These Sections do not directly compel states or localities to require or prohibit anything. Rather, they prohibit state and local governmental entities or officials only from directly restricting the voluntary exchange of immigration information with the INS.<sup>138</sup>

But after *Murphy* was decided, San Francisco successfully made this exact argument. In the case, decided in 2018, the Northern District of California concluded that prohibiting local government officials from restricting the voluntary exchange of information with U.S. Immigration and Customs Enforcement violated the anti-commandeering doctrine.<sup>139</sup> In doing so, the court cited *Murphy*.<sup>140</sup> Comparing *City of New York* in 1999 to *City & County of San Francisco v. Sessions* in 2018 demonstrates that *Murphy*’s blurring of the preemption distinction was meaningful.

Just like the litigation brought by the city of New York, *Murphy* also changed the outcome of the litigation challenging Section 1373 brought by the city of Chicago. *City of Chicago v. Sessions*<sup>141</sup> is particularly noteworthy because the change in outcome took place over the course of only one year.

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challenge thus rests entirely on the interference of Sections 434 and 642 with that Executive Order and that Order alone.”).

<sup>135</sup> *Id.*

<sup>136</sup> See *id.* at 37 (calling for such evidence).

<sup>137</sup> In fact, scholars writing about sanctuary cities pre-*Murphy* considered the anti-commandeering doctrine to be inapplicable. See Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1377 (2006).

<sup>138</sup> *City of New York v. United States*, 179 F.3d 29, 35 (2nd Cir. 1999)

<sup>139</sup> *City & Cty. of San Francisco v. Sessions*, 349 F. Supp. 3d 924, 952 (N.D. Cal. 2018) (citing *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1477 (2018)).

<sup>140</sup> *Id.*

<sup>141</sup> 264 F. Supp. 3d 933 (N.D. Ill. 2017).

Chicago first filed suit in 2017, before *Murphy*.<sup>142</sup> The district court held that the City was not likely to succeed on its Tenth Amendment challenge because, just like in *City of New York*, the outcome “relies on the distinction between an affirmative obligation and a proscription.”<sup>143</sup> In stark terms, the district court wrote:

Without a doubt, Section 1373 restricts the ability of localities to prohibit state or local officials from assisting a federal program, but it does not *require* officials to assist in the enforcement of a federal program. This distinction is meaningful. In this distinction, Section 1373 is consistent with the constitutional principles enunciated in *New York* and *Printz*.<sup>144</sup>

In rejecting the City’s Tenth Amendment challenge, the court concluded that to rule otherwise would “require an expansion of the law that only a higher court could establish.”<sup>145</sup>

Through *Murphy*, the Supreme Court provided that expansion. And as a result, just two months after *Murphy* was decided, the city of Chicago prevailed in its anti-commandeering claim.<sup>146</sup> Citing *Murphy* throughout its opinion, the district court explicitly recognized the Supreme Court’s decision to expand the reach of the doctrine. It wrote, “[T]his Court hesitated to expand the anticcommandeering doctrine to a terrain that no higher court had yet seen fit to cover. But then, eight months after this Court’s preliminary injunction ruling, the Supreme Court navigated that ground in *Murphy v. National Collegiate Athletic Association*.”<sup>147</sup> Under the expanded definition of commandeering in *Murphy*, the district court concluded that Section 1373 violates the anti-commandeering doctrine.<sup>148</sup> Indeed, “Section 1373 does just what *Murphy* proscribes: it tells States they may not prohibit (i.e., through legislation) the sharing of information regarding immigration status with the [Immigration and Naturalization Service] or other government entities.”<sup>149</sup>

Section 1373, notably, includes an explicit command to state legislatures not to act. The test established in *Murphy*, however, is not clear on

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<sup>142</sup> See *id.* at 940, *reconsideration denied*, No. 17 C 5720, 2017 WL 5499167 (N.D. Ill. Nov. 16, 2017), and *aff’d*, 888 F.3d 272 (7th Cir. 2018), *reh’g en banc granted in part, opinion vacated in part*, No. 17-2991, 2018 WL 4268817 (7th Cir. June 4, 2018), *vacated*, No. 17-2991, 2018 WL 4268814 (7th Cir. Aug. 10, 2018).

<sup>143</sup> *Id.* at 947.

<sup>144</sup> *Id.* at 948–49.

<sup>145</sup> *Id.* at 949. *Cf. id.* (“Here, we follow binding Supreme Court precedent and the persuasive authority of the Second Circuit, neither of which elevates federalism to the degree urged by the City here.”). In its decision, the district court also raises the question of, whether, under *Printz*, Section 1373 unconstitutionally limits the ability of state governments to decline to administer a federal regulatory program because a state government cannot discipline a state officer for spending time assisting with federal law enforcement. See *id.*

<sup>146</sup> *City of Chicago v. Sessions*, 321 F. Supp. 3d 855, 866–73 (N.D. Ill. 2018).

<sup>147</sup> *Id.* at 866 (citing *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1461 (2018)).

<sup>148</sup> *Id.* at 873.

<sup>149</sup> *Id.*

whether a statute must include an explicit textual hook; the test merely requires a statute to not be “best read” as one that regulates private actors. *Murphy* thus leads us to an unanswered question that could arise in civil rights litigation going forward—namely, does a statute need to *explicitly* command state legislatures not to legislate in order to be commandeering, rather than preemption? If a statute does not include a textual hook, how can we be sure whether it preempts or commandeers?<sup>150</sup>

By extending the anti-commandeering doctrine to include negative instructions to state governments, *Murphy v. National Collegiate Athletic Association* raised new questions regarding the constitutionality of a breadth of laws related to civil rights and civil liberties.<sup>151</sup> The effects of this expansion are just beginning to be seen.

### C. Reconceiving the Doctrine

The Supreme Court’s decision in *Murphy v. National Collegiate Athletic Association* also shifted the bounds of a second distinction between

<sup>150</sup> The recent litigation challenging the Indian Child Welfare Act might run into this question. Passed in the 1970s, the Indian Child Welfare Act (“ICWA”) sought to protect Indigenous families and remedy a long history of the government-sanctioned forced removal and assimilation of Indigenous children. See 25 U.S.C. § 1901 (2012). If a child has to be removed from their home, ICWA dictates a preference order for placing that child in a new home. 25 U.S.C. § 1915(a) (2012). In 2018, ICWA was challenged as violating the anti-commandeering doctrine. *Brackeen v. Zinke*, 338 F. Supp. 3d 514 (N.D. Tex. 2018), *rev’d sub nom.* *Brackeen v. Bernhardt*, 937 F.3d 406 (5th Cir. 2019), *reh’g en banc granted*, 942 F.3d 287 (5th Cir. 2019). Nowhere in ICWA’s text is there an express prohibition on states legislating in a certain way, as there was in PASPA and as there is in Section 1373. Because *Murphy* does not technically address whether a statute must include an explicit textual prohibition to commandeer a state legislature, the challengers might argue that, by setting standards in an area of law where the state could legislate in the absence of federal action, ICWA impermissibly prevents that state from legislating. But ICWA only prevents states from legislating as would any federal preemption of state law. Extending *Murphy*’s holding to apply to implicit and indirect prohibitions on state legislation would expand the anti-commandeering doctrine deep into traditional preemption doctrine.

<sup>151</sup> This decision might have other unintended consequences in areas related to civil rights and civil liberties. For example, M. Dyan McGuire argues that *Murphy* will effectively result in the legalization of marijuana. See generally M. Dyan McGuire, *What Murphy v. NCAA Might Mean for the Debate over Legal Marijuana: Power Distribution between the State and Federal Governments*, 55 CRIM. LAW BULLETIN 547 (2019). See also Gregory R. Bordelon, *The De-Federalization Gamble: A Workable Anti-Commandeering Framework for States Seeking To Legalize Certain Vice Areas*, 20 ATLANTIC L.J. 103, 108–09 (2018). After *Murphy*, the federal government could not constitutionally prohibit the states from legalizing marijuana. If every state chose to legalize marijuana under state law, McGuire suggests, it is unlikely that the federal government would step up to handle street-level enforcement. Thus, even if marijuana remains illegal under federal law, *Murphy* might have the effect of legalizing it in practice because the federal government’s enforcement mechanism would disappear. See McGuire, *supra* note 151. See also Robert A. Mikos, *On the Limits of Federal Supremacy: When States Relax (or Abandon) Marijuana Bans* (Cato Inst., Policy Analysis No. 714, 2012), <http://www.cato.org/sites/cato.org/files/pubs/pdf/PA714.pdf>, archived at <https://perma.cc/W6R6-DKD3>. Other scholars have suggested that the Court’s decision in *Murphy* will have repercussions for Indigenous gaming laws and regulations. See generally Francisco Olea, *The Professional and Amateur Sports Protection Act: How Its Invalidation Will Impact Indian Gaming’s Legal and Regulatory Framework*, 9 UNLV GAMING L.J. 35 (2019).

permissible and impermissible federal action initially established in *New York*: The distinction between generally applicable laws and those that regulate states in their sovereign capacity.<sup>152</sup> As described *supra*, this distinction was later clarified in *Reno v. Condon*, which upheld the Driver's Privacy Protection Act after finding that it was generally applicable. In *Reno*, the Court's "generally applicable" inquiry was concerned with determining how the federal government was regulating the state—specifically, whether the federal government was regulating the state in its sovereign capacity or not. To determine *how* the federal government was regulating, the Court looked to *what* it was regulating. It asked whether the activity that was being regulated was one in which private actors could also engage, or whether it was one exclusive to sovereigns.<sup>153</sup> The Court was not necessarily concerned with whether the law actually regulated private parties in practice<sup>154</sup>; instead, it used the capacity of private parties to engage in the regulated activity to shed light on the nature of the activity itself. If the activity was one in which private actors could also engage, then the state was acting like a private party when it engaged in the activity, not like a sovereign. Thus, the federal government could constitutionally regulate it.<sup>155</sup> But *Murphy* fundamentally changes the nature of this inquiry. By requiring that a federal law "evenhandedly regulate[ ] an activity in which both States and private actors engage,"<sup>156</sup> the *Murphy* Court for the first time focused the inquiry on how the law regulated states and private parties relative to one another.<sup>157</sup> Shifting away from *Reno*, the Court made determinative *who* the law regulates, not what or how.<sup>158</sup>

This reconceptualization is meaningful. Statutes that might have been upheld under *Reno* might now be struck down under *Murphy*. Indeed, it is unclear whether even *Reno* would come out the same way after *Murphy*. Even though PASPA had provisions regulating both private and public ac-

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<sup>152</sup> *New York*, 505 U.S. at 177–78; cf. Andrew B. Ayers, *Federalism and the Right to Decide Who Decides*, 63 VILL. L. REV. 567, 589 (2018) (“*Reno v. Condon* upheld a statute that required states to adopt procedures to protect the confidentiality of drivers’-license information. That statute, which applied to private parties and state governments, ‘does not require the States in their sovereign capacity to regulate their own citizens,’ but rather ‘regulates the States as the owners of databases.’”).

<sup>153</sup> See *Reno v. Condon*, 528 U.S. 141, 149–50 (2000).

<sup>154</sup> Indeed, the Court even left open the possibility that a law could be constitutionally generally applicable without regulating any private parties at all. *Id.* at 151.

<sup>155</sup> Similarly, when *Reno* recounted the Court’s decision in *Baker*, it identified as determinative the fact that the statute regulated activities in which the state engaged beyond its sovereign capacity. 528 U.S. at 142 (concluding that the law regulated “state activities, rather than seeking to control or influence the manner in which States regulated private parties”). The degree to which TEFRA regulated private parties was not decisive.

<sup>156</sup> *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S.Ct. 1461, 1478 (2018).

<sup>157</sup> Notably, the word “evenhanded” does not appear in the *Reno* opinion.

<sup>158</sup> This reframing could make new types of information relevant to the inquiry—namely, information concerning the relative percentage of state and private actors who actually engage in the regulated activity. Under *Reno*, that type of information likely would have been irrelevant.

tors,<sup>159</sup> it was still found unconstitutional. The Driver's Privacy Protection Act regulated both states and private actors, but it did not do so impartially, nor to equal extent. States were regulated as both sellers and collectors of driver's license information; private parties were regulated merely as sellers.<sup>160</sup> Similarly, in *South Carolina v. Baker*, TEFRA regulated both bonds issued by states and bonds issued by private companies, but it did not do so in the same way: It denied tax exemption for interest earned on unregistered bonds issued by states but imposed a series of tax penalties on unregistered bonds issued by private corporations.<sup>161</sup> After *Murphy*, it is no longer clear that courts could distinguish between permissible federal laws that regulate the states as they might regulate a private actor, even without equally regulating those private actors, and impermissible federal laws that regulate the states' sovereign regulation of their own citizens. Under *Murphy*'s "generally applicable" inquiry, DPPA and TEFRA might have been struck down.

The Supreme Court in *Murphy* accomplishes this reframing through a sleight of hand. It claims to apply *Reno* and *Baker* faithfully, even while inserting a new "evenhandedness" requirement into the mix. As a result, the question of whether the full impact of this change will be realized is left to lower courts to decide. Going forward, lower courts could either buy into *Murphy*'s reframing and apply a substantive evenhandedness test or pretend *Murphy* changed nothing at all and continue to apply the test as articulated in *Reno*.

In fact, there is already a split among the lower courts on this question. In October 2019, the Trump Administration petitioned the Supreme Court for certiorari to resolve the dispute.<sup>162</sup> In *City of Chicago v. Sessions*, the Northern District of Illinois followed the text of *Murphy*, analyzing whether Section 1373 "appl[ie]d with equal force to State and private actors."<sup>163</sup> In contrast, in *City & County of San Francisco*, a California district court cites

<sup>159</sup> Professional and Amateur Sports Protection Act, Pub. L. 102-559 (1992). In fact, based on the presence of these provisions regulating both private and public actors, Justice Ginsburg in dissent concludes that PASPA is a generally applicable law. She writes, "First, PASPA bans States themselves (or their agencies) from 'sponsor[ing], operat[ing], advertis[ing], [or] promot[ing]' sports-gambling schemes. Second, PASPA stops private parties from 'sponsor[ing], operat[ing], advertis[ing], or promot[ing]' sports-gambling schemes if state law authorizes them to do so." *Murphy*, 138 S.Ct. at 1489 (Ginsburg, J., dissenting). In a footnote, she then writes, "PASPA was not designed to eliminate any and all sports gambling. The statute targets sports-gambling schemes, i.e., organized markets for sports gambling, whether operated by a State or by a third party under state authorization." *Id.* at 1489 n.1 (Ginsburg, J., dissenting) (internal formatting omitted) (emphasis added).

<sup>160</sup> *Reno v. Condon*, 528 U.S. 141, 146 (2000).

<sup>161</sup> 485 U.S. 505, 510 (1988).

<sup>162</sup> See *United States v. California*, 921 F.3d 865 (9th Cir. 2019), *petition for cert. filed* (No. 19-532). In the petition for certiorari, the Justice Department argued that the laws at issue qualify as preemption, not commandeering, because they confer rights and restrictions on immigrants in detention. See Br. of Pet'r, *United States v. California*, at 25-28. On June 15, 2020, the Supreme Court denied certiorari. See *United States v. California*, 921 F.3d 865 (9th Cir. 2019), *cert. denied* (June 15, 2020).

<sup>163</sup> 321 F. Supp. 3d 855, 868 (N.D. Ill. 2018).



*Murphy* as continuing to uphold the general applicability distinction as originally understood. For purposes of the sanctuary city litigation, the space between *Murphy*'s test and *Reno*'s test may not be outcome-determinative, but the confusion *Murphy* creates could be meaningful in other cases affecting civil rights and civil liberties.<sup>164</sup>

#### CONCLUSION

*Murphy* both revived and reconceived of the anti-commandeering doctrine. In the short time since it was decided, *Murphy* has raised questions concerning the constitutionality of laws of all stripes. Though the decision might eventually affect other areas of law, its impact so far has been particularly felt in the context of civil rights and civil liberties—a notable consequence, given the doctrine's original goal of protecting individual liberty.

Situating *Murphy* within the trajectory of the anti-commandeering doctrine will help civil rights advocates structure their challenges to federal action that infringes on individual liberty and ensure the constitutionality of federal action that supports civil rights. As this Note demonstrates, in the span of just a few years, *Murphy* already has revived the doctrine, setting it forward as a potentially noteworthy player in civil rights litigation and federal policy-making. The decision also has transformed *New York*'s preemption distinction, generating significant uncertainty. And finally, *Murphy* has recharacterized *New York*'s general-applicability distinction in a way that could be outcome-determinative in certain cases.

These changes could have a meaningful impact going forward, particularly with regard to sanctuary cities. With *Murphy* on their side, cities can argue that Section 1373 fits squarely within the anti-commandeering doctrine. But even beyond sanctuary cities—and even beyond immigration law—*Murphy* could make viable new constitutional challenges to federal power. With at least four cases making their way through the lower courts since *Murphy* was decided, the reach of the anti-commandeering doctrine might just be beginning to be seen.

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<sup>164</sup> For example, a strong defense to a commandeering challenge to the Indian Child Welfare Act is that it is a generally applicable law: It places requirements on parties who ensure that children are placed in appropriate homes, and those requirements could apply to both state welfare agents and to private adoption agencies. If private adoption agencies do not perform all the same activities regulated by ICWA as state welfare agencies do, the defense that ICWA is a generally applicable law may be weaker under *Murphy* than under *Reno*.

