NOTES

CONDITIONAL PREEMPTION, COMMANDEERING, AND THE VALUES OF COOPERATIVE FEDERALISM: AN ANALYSIS OF SECTION 216 OF EPACT

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This Note considers whether the U.S. Supreme Court should expand its commandeering doctrine to invalidate conditional preemption programs. It does so through the lens of section 216 of the Energy Policy Act of 2005, focusing on both formalist and functionalist accounts of the line between conditional preemption and commandeering. The Court's formal bar on commandeering permits conditional preemption even though some conditional preemption schemes, such as section 216, threaten the very values that the Court uses to justify the bar on commandeering. Seizing on this point, some judges and several scholars have called for a functionalist assessment of the line between conditional preemption and commandeering. This Note acknowledges that analysis of section 216 illustrates viable criticisms of a bright-line distinction between conditional preemption and commandeering. It ultimately, however, defends the distinction. By drawing on the literature on voice and administrative accountability, this Note develops a model of conditional preemption that responds to the Court's normative concerns and offers a rejoinder to functionalist criticisms of conditional preemption.

INTRODUCTION

"The Framers split the atom of sovereignty,"[1] and the U.S. Supreme Court has struggled with that split ever since.[2] The problem of whether the Constitution creates judicially enforceable protections of state sovereignty has been particularly vexing.[3] The text of the Tenth Amendment, for example, has remained the same: "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."[4] In their long life, these words have been merely a reminder of Congress's limited powers,[5]

1. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

2. See, e.g., H. Jefferson Powell, The Oldest Question of Constitutional Law, 79 Va. L. Rev. 633, 652–81 (1993) (discussing judiciary's engagement with federalism).

3. See Vicki C. Jackson, Narratives of Federalism: Of Continuities and Comparative Constitutional Experience, 51 Duke L.J. 223, 223–25 (2001) (tracing Court's fluctuating understanding of Constitution's protection of state sovereignty).

4. U.S. Const. amend. X.

5. See Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 86–87 (1824) (rejecting view that Tenth Amendment requires strict construction of Congress's enumerated powers); see also United States v. Darby, 312 U.S. 100, 124 (1941) (stating that Tenth Amendment "states but a truism").

a reservation of spheres of exclusive state authority,[6] and a protector of states' traditional governmental functions.[7] Today, the Tenth Amendment prohibits the federal government from "commandeering" state legislatures by directing them to enact specific legislation.[8] The Tenth Amendment also shields state executives by barring federal commands that they administer federal programs.[9]

As commentators have noted, the Court's commandeering concerns could—and perhaps should—extend to Congress's use of conditional preemption to "encourage" state participation in federal regulation.[10] Conditional preemption tells the states: Either regulate pursuant to federal demands or the federal government will preempt your ability to regulate.[11] Given the Court's commandeering ban, "[i]t would . . . not be surprising if the Court decided to cut back [on] or eliminate . . . conditional preemption."[12]

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6. See Hammer v. Dagenhart (Child Labor Case), 247 U.S. 251, 273–76 (1918) (holding that Tenth Amendment reserves regulation of local labor to states).

7. See Nat'l League of Cities v. Usery, 426 U.S. 833, 852 (1976) (holding that Tenth Amendment prohibits Congress from displacing traditional state functions), overruled by Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

8. New York v. United States, 505 U.S. 144, 149, 174–76 (1992) (holding that Tenth Amendment prohibits Congress from commandeering state legislatures).

9. Printz v. United States, 521 U.S. 898, 933 (1997) (holding that Tenth Amendment prohibits Congress from commandeering state executives).

10. See, e.g., Matthew D. Adler & Seth F. Kreimer, The New Etiquette of Federalism: *New York*, *Printz*, and *Yeskey*, 1998 Sup. Ct. Rev. 71, 104 (suggesting that some "action-inducing threats [could] count as commandeering"); Michael C. Dorf & Charles F. Sabel, A Constitution of Democratic Experimentalism, 98 Colum. L. Rev. 267, 426–27 (1998) (arguing that cooperative federalism may not always offer states "real" choice).

11. Through conditional preemption, "Congress either allows states to regulate in compliance with federal standards or preempts state law with federal regulation." Philip J. Weiser, Towards a Constitutional Architecture for Cooperative Federalism, 79 N.C. L. Rev. 663, 668 (2001). Conditional preemption is one form of what many call "cooperative federalism," a term used to refer to "those instances in which a federal statute provides for state regulation or implementation to achieve federally proscribed policy goals." Id.

12. Carlos Manuel Vázquez, *Breard*, *Printz*, and the Treaty Power, 70 U. Colo. L. Rev. 1317, 1336 (1999). Proposals for cutting back on conditional preemption include: eliminating coercive schemes, see Petersburg Cellular P'ship v. Bd. of Supervisors, 205 F.3d 688, 703–04 (4th Cir. 2000) (Niemeyer, J., separate opinion) (arguing Telecommunications Act's use of conditional preemption does not offer states meaningful choice); prohibiting conditional preemption when Congress does not commit federal resources in the instance of state default, see Roderick M. Hills, Jr., The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't, 96 Mich. L. Rev. 813, 926 (1998) (criticizing Court's acceptance of Public Utilities Regulatory Policies Act because Act did not offer regulatory alternative if states refused federal commands); and applying intermediate scrutiny to all cooperative federalism schemes, Huyen Pham, The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power, 74 U. Cin. L. Rev. 1373, 1409 (2006) (arguing for application of intermediate scrutiny to all cooperative federalism schemes).

This Note asks whether the electricity transmission siting provisions of section 216 of the Energy Policy Act of 2005 (EPAct)[13] challenge commandeering doctrine and suggest the Court should cut back on conditional preemption. Section 216 of EPAct creates a "backstop siting authority"[14] that allows the Federal Energy Regulatory Commission (FERC) to preempt state land use planning and to authorize construction of electricity transmission facilities.[15] Interested parties, including a group of counties, have raised commandeering issues in comments on the FERC rulemaking under EPAct,[16] suggesting courts may face such challenges.

This Note concludes that, for the most part, the Court should not cut back on conditional preemption. Part I discusses section 216 of EPAct and the Court's commandeering doctrine. It describes the split between federal judges who have understood commandeering to be a narrow formalist category and those who have used a functionalist analysis to question conditional preemption.[17] Part II examines section 216, concludes it

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13. See Energy Policy Act of 2005, Pub. L. No. 109-58, sec. 1221(a), § 216(b), 119 Stat. 594, 947 (to be codified at 16 U.S.C. § 824p) (providing FERC with authority to issue construction permits in "national interest electric transmission corridor[s]" if FERC considers enumerated factors and concludes preempting state authority is appropriate).

14. Steven J. Eagle, Securing a Reliable Electricity Grid: A New Era in Transmission Siting Regulation?, 73 Tenn. L. Rev. 1, 35 (2005).

15. See Energy Policy Act § 216(b) (describing FERC's authority to preempt state siting).

16. Request for Rehearing by the Communities Against Regional Interconnect at 15, Rulemaking on Regulations for Filing Applications for Permits to Site Interstate Elec. Transmission Facilities, No. RM06-12-000 (FERC Dec. 15, 2006), available at http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=11208500 (on file with the *Columbia Law Review*) (arguing that FERC's interpretation of "withheld approval" raises Tenth Amendment commandeering concerns). Other interested parties have argued the scheme will raise political accountability concerns, which *New York* purported to relieve by banning commandeering. Motions for Leave to Intervene out of Time and Rehearing Request of the Minnesota Public Utilities Commission and Minnesota Department of Commerce at 4, Rulemaking on Regulations for Filing Applications for Permits to Site Interstate Elec. Transmission Facilities, No. RM06-12-001 (FERC Dec. 18, 2006), available at http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=11210069 (on file with the *Columbia Law Review*) [hereinafter Motions for Leave to Intervene] (arguing that FERC's interpretation of "withheld approval" creates "unwarranted complication[ ]" of possibly confusing members of public about respective state and federal roles in siting process, thereby necessitating need for "understandable" explanations of FERC's preemptive authority). The Department of Energy quickly dismissed any Tenth Amendment concerns in its October 2, 2007 order designating national interest corridors. National Electric Transmission Congestion Report, 72 Fed. Reg. 56,992, 56,997 (Oct. 2, 2007) ("While the Tenth Amendment reserves to States those powers not delegated to the Federal government by the Constitution, the Interstate Commerce Clause of Article I explicitly authorizes the Federal government 'to regulate commerce with foreign nations, and among the several states, and with Indian tribes.'" (quoting U.S. Const. art. I, § 8, cl. 3)). The Department was responding to comments from public meetings that argued section 216 violates the Tenth Amendment. See id.

17. A "functionalist" approach to commandeering analysis focuses on whether a particular regulatory scheme unduly coerces the states and violates the values of federalism. A "formalist" approach involves a narrow inquiry into whether the relevant

is constitutional under a formalist analysis, and engages in a functionalist analysis to criticize this result. This criticism reveals that section 216 could be viewed as unduly coercing the states and violating federalism values, including the maintenance of clear lines of political accountability. In short, Part II concludes that the Court's formalist test may be underinclusive, in that it does not fully protect the federalism values that the ban on commandeering supposedly serves.

Part III explores, but ultimately rejects, the possibility of crafting a balancing test as an alternative to existing doctrine. Sensitive to Part III's argument that a balancing test will be judicially unadministerable, Part IV offers a solution to the critiques of conditional preemption. It draws on the legislative debates surrounding EPAct's siting provisions to defend section 216, arguing that administrative accountability[18] addresses some of the Court's commandeering concerns by providing states with a voice in the federal process.[19]

I. ELECTRICITY SITING FEDERALISM AND STATE SOVEREIGNTY PROTECTION

On August 14, 2003, the lights of New York City abruptly went out. So too did the power, and with it subway trains, the local airports, even elevators.[20] "N[orth] American chaos" emerged as much of eastern Canada and the northeastern United States lost power.[21] A joint U.S.-Canada Task Force studied the blackout and ultimately concluded that one Ohio company's violations of reliability standards triggered a "cascad[ing]" power failure.[22] The Task Force also called for study of the

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federal statute permits, on its face, the states to refuse to follow federal demands. See infra Part I.C. For examples of the two approaches, compare *Petersburg Cellular*, 205 F.3d at 703 (Niemeyer, J., separate opinion) (employing functionalist approach and analyzing whether particular conditional directive offered states viable exit option), with Verizon Md. Inc. v. RCN Telecom Servs., Inc., 232 F. Supp. 2d 539, 557–58 (D. Md. 2002) (employing formalist approach and arguing conditional directive is permissible when it threatens constitutionally valid preemption).

18. For a definition of administrative accountability, see Edward Rubin, The Myth of Accountability and the Anti-Administrative Impulse, 103 Mich. L. Rev. 2073, 2120–25 (2005).

19. See generally Albert O. Hirschmann, Exit, Voice, and Loyalty 3–5 (1970) (defining "exit" and "voice").

20. See Barton Gellman & Dana Milbank, Blackout Causes Mass Disruption, Wash. Post, Aug. 15, 2003, at A1 (describing blackout's effects). For an early suggestion that congestion in northeastern electricity transmission grids may have caused the blackout, see Justin Gillis, Power Grid More Vulnerable Daily, Wash. Post, Aug. 17, 2003, at A14.

21. Blackouts Cause N America Chaos, BBC News, Aug. 15, 2003, at http://news.bbc.co.uk/1/hi/world/americas/3152451.stm (on file with the *Columbia Law Review*).

22. See U.S.-Canada Power System Outage Task Force, Final Report on the August 14, 2003 Blackout in the United States and Canada: Causes and Recommendations 17, 73–75 (2004), available at https://reports.energy.gov/BlackoutFinal-Web.pdf (on file with the *Columbia Law Review*) (describing reliability standard violations that led to cascading blackout).

relationship between local governments' refusal to site facilities and electricity transmission congestion.[23]

Congress responded to the problems of local mismanagement and power grid congestion with EPAct's comprehensive energy policy reform.[24] Its titles revise law in areas ranging from coal production to development of renewable energies,[25] with the ambition of creating more efficient and secure energy production for the nation's future.[26] One way EPAct aspires to achieve this goal is by reducing grid congestion in interstate electricity transmission corridors.[27] In order to do this, EPAct shifts some authority over the siting of electricity transmission facilities from the states, which have long enjoyed exclusive authority,[28] to the federal government. EPAct section 216 grants FERC conditionally preemptive siting authority in the hopes of overcoming local holdup and expediting facility construction.[29]

Part I.A describes FERC's authority and the conditions EPAct places on states that wish to remain involved in siting decisions.[30] This description of EPAct's conditional preemption sets the stage for Part I.B's explo-

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23. Id. at 148 (labeling "relationship between competition in power markets and reliability . . . important and complex" and calling for study that would account for factors including local "constraints on siting of generation and transmission [facilities]").

24. See generally H.R. Rep. No. 109-190, at 1 (2005) (Conf. Rep.), reprinted in 2005 U.S.C.C.A.N. 448 (describing EPAct goal of ensuring "secure, affordable, and reliable energy"); Hoang Dang, Student Article, New Power, Few New Lines: A Need for a Federal Solution, 17 J. Land Use & Envtl. L. 327 (2002) (describing national crisis of need for electricity).

25. Energy Policy Act of 2005, Pub. L. No. 109-58, tit. II, tit. IV, 119 Stat. 594, 594–96 (2005) (to be codified in scattered sections of U.S.C.) (addressing renewable energy and coal production respectively).

26. See H.R. Rep. No. 109-190, at 1 (describing EPAct goal of ensuring "secure, affordable, and reliable energy").

27. Energy Policy Act § 216(a)(2) (directing Department of Energy to identify transmission corridors "experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers").

28. Federal Power Act, 16 U.S.C. § 824(a) (2000) (proclaiming exclusive state siting authority).

29. See Energy Policy Act § 216(b) (providing FERC with power to preempt state siting authority in "national interest electric transmission corridor[s]"). Concerns about the deleterious effects of local holdup, or a "Not-In-My-Backyard" (NIMBY) mentality, appear throughout the legislative history of EPAct. See, e.g., H.R. Rep. 108-65, at 170 (2003) (describing intent to "expedite[ ]" electricity transmission facility construction in early version of EPAct); 151 Cong. Rec. S7267 (daily ed. June 23, 2005) (statement of Sen. Thomas) (citing "barriers," such as "NIMBY-ism," to national ability to "transport energy where it's needed"); Richard J. Pierce, Jr., Completing the Process of Restructuring the Electricity Market, 40 Wake Forest L. Rev. 451, 453–55 (2005) (criticizing pre-EPAct landscape for allowing state holdup of necessary electricity facilities). But see David H. Meyer & Richard Sedano, Transmission Siting and Permitting, *in* National Transmission Grid Study Issue Papers E-1, E-26 (Dep't of Energy ed., 2002) (arguing that under pre-EPAct scheme "worthy projects are approved, and deficient projects are discouraged").

30. See Energy Policy Act § 216(b) (setting conditions for FERC involvement in siting decisions).

ration of the Court's Tenth Amendment jurisprudence.[31] Part I.C then discusses how lower courts have adopted either formalist or functionalist analyses of commandeering and conditional preemption.

A. *EPAct Section 216 and Siting of Electricity Transmission Facilities*

This section first explores section 216, focusing on why and how Congress delegated to FERC the ability to conditionally preempt the states and issue construction permits for electricity transmission facilities. It then discusses FERC's interpretation of its authority under section 216.

1. *Section 216: Congress's Delegation of Conditional Preemption Authority to FERC.* — Though the contours of the permitting process for electricity transmission facilities vary from state to state, companies that want to construct facilities must go through a period of state and local review of design, land use plan consistency, and environmental permit applications.[32] In extreme cases, this period of review has taken more than a decade.[33] Sometimes, projects wait years only to see the state refuse to issue the necessary land use and environmental permits.[34] EPAct section 216 enables companies that cannot obtain the necessary permits at the state level to ask FERC to issue a construction permit allowing them to build their proposed facilities.[35]

Implementation of section 216 first requires the Secretary of Energy to study national congestion problems[36] and to designate "national interest transmission corridor[s]."[37] Now that the Secretary has identified corridors,[38] FERC is authorized to issue construction permits in them for

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31. For a helpful introduction to the concept of conditional preemption, see Ronald D. Rotunda, The Doctrine of Conditional Preemption and Other Limitations on Tenth Amendment Restrictions, 132 U. Pa. L. Rev. 289 (1984) [hereinafter Rotunda, Conditional Preemption]; see also FERC v. Mississippi, 456 U.S. 742, 758–69 (1982) (discussing conditional preemption in context of utility regulation); Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 283–93 (1981) (discussing conditional preemption in context of surface mining regulation).

32. See Eagle, supra note 14, at 13 (describing common elements of various permitting processes).

33. Id.

34. Id. at 12–13 (noting NIMBYist governmental hurdles faced by large transmission projects).

35. See Energy Policy Act § 216(b) (allowing FERC to issue construction permit).

36. Id. § 216(a)(1). The Secretary has completed the study of transmission congestion. See U.S. Dep't of Energy, National Electric Transmission Congestion Study 39–49 (2006), available at http://www.oe.energy.gov/DocumentsandMedia/Congestion_Study_2006-10.3.pdf (on file with the *Columbia Law Review*) (summarizing results of study).

37. Energy Policy Act § 216(a)(2) (requiring Secretary of Energy to designate corridors that have congestion that harms consumers).

38. On May 7, 2007, the Department of Energy issued draft national interest electric transmission corridors. The Draft Mid-Atlantic Area National Corridor stretched through New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, West Virginia, Ohio, and Washington, D.C. The Draft Southwest Area National Corridor stretched across parts of California, Nevada, and Arizona. See Draft National Interest Electric Transmission Corridor Designations, 72 Fed. Reg. 25,838, 25,838, 25,909, 25,923 (May 7, 2007). On

electricity transmission facilities that are involved in "the transmission of electric energy in interstate commerce."[39] When FERC issues a permit, it essentially tells states that their permitting regulations and their takings laws no longer apply to the specific project.[40] The FERC permit holder can build its transmission line. If it cannot purchase easements from private landowners, it can take their property: Section 216 delegates the federal takings power to permit holders for use in either federal district court or state court.[41]

FERC's preemptive authority, however, is conditional. To trigger it, states have to behave (or fail to behave) in certain ways:[42]

- If the state refuses to grant permits for a particular type of facility or to "consider the interstate benefits" potentially accruing from the facility, then FERC can step in.[43]
- Relatedly, if the state refuses to consider permitting a facility because the facility does not transport electricity to anyone in the state,[44] then FERC can consider permitting the facility.[45]
- FERC can act if it determines that the state has authority to consider permitting the facility but has "withheld approval for more than 1 year after" a permit application.[46]
- FERC can also act if the state "conditions its approval" on acceptance of concessions that keep the facility from "significantly reduc[ing]" transmission congestion or make building the facility prohibitively expensive.[47]

October 2, 2007, the Department of Energy designated both the Mid-Atlantic corridor and the Southwest corridor as national interest corridors. National Electric Transmission Congestion Report, 72 Fed. Reg. 56,992, 56,992 (Oct. 5, 2007).

39. Energy Policy Act § 216(b)(2). The Court has found this level of regulation valid under the substantial effects test for the Commerce Power. See New York v. FERC, 535 U.S. 1, 7, 23–24 (2002) (describing interstate nature of electricity transmission, never discussing any possible constitutional infirmity, and upholding on statutory grounds FERC's claims of jurisdiction over "unbundling of wholesale transactions [and] . . . the unbundled transmissions of electricity retailiers" despite localized aspects).

40. But see infra notes 129–138 and accompanying text (discussing possible commandeering issue arising from FERC's interpretation of the EPAct).

41. Energy Policy Act § 216(e)(1).

42. Id. § 216(b)(1)(A)–(C) (directing FERC to look to state authority and behavior).

43. Id. § 216(b)(1)(A). Some states forbid their siting boards from considering interstate benefits in their decisionmaking. Jim Rossi, Moving Public Law out of the Deference Trap in Regulated Industries, 40 Wake Forest L. Rev. 617, 647 (2005).

44. In industry terms, such a facility would not serve end-users in the state. See Eagle, supra note 14, at 36.

45. Energy Policy Act § 216(b)(1)(B). For local laws that created federal concern, see, e.g., Point of Pines Beach Ass'n v. Energy Facilities Siting Bd., 644 N.E.2d 221, 223–24 (Mass. 1995) (interpreting Massachusetts law to limit approval of projects to those that serve at least some Massachusetts power needs). Massachusetts ultimately overruled this decision by statute. Mass. Ann. Laws ch. 164, § 69J 1/4 (LexisNexis 2002); see also Eagle, supra note 14, at 21–22 (discussing *Point Pines* and Massachusetts law).

46. Energy Policy Act § 216(b)(1)(C)(i).

47. Id. § 216(b)(1)(C)(ii).

Even when one of these conditions is met, "three or more contiguous States" can create an interstate compact whose decisions FERC cannot overturn unless the states are in disagreement.[48]

2. *FERC's Interpretation of Its Authority.* — FERC has interpreted permit application requirements in a final rule pursuant to section 216.[49] FERC's interpretation concludes that a state has "withheld approval,"[50] triggering FERC's jurisdiction under section 216(b), even when it lawfully rejects a siting application.[51] Thus, FERC can override state denials of permit applications. FERC Commissioner Suedeen G. Kelly dissented from this interpretation, arguing it gave the states "no choice."[52]

One aspect of FERC's rulemaking itself creates a possible commandeering concern. Under FERC's rule, permit applications must describe relevant local zoning requirements.[53] In issuing its permit, FERC may mandate compliance with these requirements.[54] Yet, under one interpretation of the rule, states and local governments cannot refuse to issue these permits. The rule concludes that states and localities cannot "unreasonably delay" construction of facilities that have FERC construction permits; instead, states and localities must issue permits "consistent with

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48. Id. § 216(i)(1). Noticing the incentive this provision creates, Professor Eagle concludes, "The threat of federal backstop siting authority will undoubtedly encourage states to form regional entities . . . [,] which may be the main purpose behind the federal permitting provisions." Eagle, supra note 14, at 38–39.

49. EPAct delegated authority to the Secretary of Energy to coordinate federal review and permitting of electricity transmission facility applications. See Energy Policy Act § 216(h)(2), (3), (4)(A)–(B), (5). The Secretary in turn delegated this authority to FERC. See Dep't of Energy Deleg. Order No. 00-004.00A (May 16, 2006), available at http://www.directives.doe.gov/pdfs/sdoa/00-004_00A.pdf (on file with the *Columbia Law Review*). FERC's 2006 rulemaking was authorized by this delegation order and section 216. See Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities, 71 Fed. Reg. 69,440, 69,441–42 (Nov. 16, 2006) (to be codified at 18 C.F.R. pts. 50, 380).

An open question this Note does not consider is whether FERC's interpretation of the scope of its preemptive authority would receive *Chevron* deference. The Court's presumption against preemption conflicts with *Chevron*. The Court has not been clear on how to deal with this conflict. See Medtronic, Inc. v. Lohr, 518 U.S. 470, 496 (1996) (claiming to give "substantial weight" to agency interpretation, but also arguably considering statutory meaning independently); Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 744 (1996) (appearing to apply both de novo review and *Chevron* deference to preemption question). The lower courts have also been divided. For a discussion of recent cases, see Nina A. Mendelson, *Chevron* and Preemption, 102 Mich. L. Rev. 737 (2004).

50. See Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities, 71 Fed. Reg. 69,440, 69,444 (Nov. 16, 2006) (to be codified at 18 C.F.R. pts. 50, 380).

51. Id.

52. Id. at 69,476.

53. See 18 C.F.R. § 50.5(c)(2)–(3) (2007) (setting requirements for permit applications).

54. See supra notes 32–35 and accompanying text. For discussion of the possible commandeering issue, see infra notes 129–138 and accompanying text.

the conditions" of the FERC permit.[55] In other words, as Part II will describe, FERC's rule on these local requirements arguably commands the states to issue the relevant permits.[56]

B. New York's *Anticommandeering Principle and the "Federalist Revival"*

Section 216 pressures states to behave in certain ways if they want to retain their siting authority. Some local governments have already protested that this pressure raises Tenth Amendment commandeering issues.[57] To understand whether these local governments have a colorable claim, it is necessary to examine the Court's commandeering jurisprudence and its commitment to federalism.

The term "federalism" has often been "equated with protecting states' rights."[58] Over the past thirty years, the Court has shifted from protecting state sovereignty in *National League of Cities v. Usery*,[59] to consigning protection of federalism to the political process in *Garcia v. San Antonio Metropolitan Transit Authority*,[60] and then back again in a "federalist revival."[61] Under current doctrine, the Tenth Amendment bars the federal government from "commandeering" state legislatures[62] or state executive officials,[63] though it permits, as it long has, both conditional preemption and conditional spending as means to encourage the states to regulate pursuant to federal demands.

1. *Conditional Preemption Upheld:* Hodel, FERC, *and the* National League of Cities *Framework.* — In 1976, in *National League of Cities*, Justice Rehnquist, writing for four Justices, concluded that application of the Fair Labor Standards Act to the states violated the Tenth Amendment because it "directly displace[d] the States' freedom to structure integral operations in areas of traditional government functions."[64] Justice Blackmun's concurrence crafted a balancing test: Congress may interfere with state sovereign activity only if the federal interest in doing so is "de-

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55. Regulations for Filing Applications, 71 Fed. Reg. at 69,462.

56. See id. (stating that FERC will consider state and local permits described in applications and may require compliance with them).

57. See supra note 16 and accompanying text.

58. Erwin Chemerinsky, Protecting the Spending Power, 4 Chap. L. Rev. 89, 89 (2001) (criticizing state-oriented modern federalism).

59. See 426 U.S. 833, 845 (1976) (seeking to protect states' core sovereignty).

60. See 469 U.S. 528, 551–52 (1985) (concluding political process, not courts, should protect state sovereignty).

61. Vicki C. Jackson, Federalism and the Uses and Limits of Law: *Printz* and Principle?, 111 Harv. L. Rev. 2180, 2213 (1998) [hereinafter Jackson, *Printz* and Principle?]. This revival began with Gregory v. Ashcroft, 501 U.S. 452, 458–61 (1991) (delineating federalism values and crafting clear statement rule based on them).

62. New York v. United States, 505 U.S. 144, 171–77 (1992).

63. Printz v. United States, 521 U.S. 898, 935 (1997).

64. *Nat'l League of Cities*, 426 U.S. at 852.

monstrably greater" than the state's interest in the activity.[65] Ultimately, the Court adopted Justice Blackmun's balancing test.[66]

The *National League of Cities* test gave rise to cases dealing with "conditional preemption." Conditional preemption tells the states: Regulate consistently with federal directions, or federal law will take away ("preempt") your ability to regulate the area in question.[67] In 1981, in *Hodel v. Virginia Surface Mining and Reclamation Association*, the Court used the balancing test, upholding a conditional preemption scheme in the Surface Mining Control and Reclamation Act (SMCRA) that directed the states to regulate certain aspects of surface mining consistently with federal standards or else suffer preemption.[68]

A year after *Hodel, FERC v. Mississippi* upheld an unusual use of conditional preemption in the Public Utilities Regulatory Policies Act (PURPA) that commanded states upon pain of preemption to adjudicate certain utilities disputes and consider adopting federal regulatory standards.[69] With SMCRA, Congress had told the states: Regulate pursuant to our demands, or we will step in and regulate surface mining ourselves.[70] PURPA, however, told the states: Regulate pursuant to our demands, or there will be no one regulating these utilities.[71] The Court upheld this unconventional use of conditional preemption.[72]

In her partial dissent in *FERC*, Justice O'Connor argued that conditional preemption sometimes does not offer states a viable exit option. Moreover, it undermines political accountability, depletes state resources, and threatens individual liberty.[73] She argued the states had no real "choice" to exit because PURPA "compel[led]" them to either accept federal demands or "abandon regulation of an entire field traditionally reserved to state authority."[74]

In *FERC*, of course, a state's choice to abandon the field would have meant nonregulation. The federal government was not going to step in with its own regulatory scheme. The federal threat of regulatory inaction,

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65. Id. at 856 (Blackmun, J., concurring) (offering interpretation of Justice Rehnquist's opinion as resting on balancing of federal and state interests).

66. See Rotunda, Conditional Preemption, supra note 31, at 303 (explaining that Court's opinion in Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981), clearly adopts Justice Blackmun's balancing test).

67. See supra note 11 (defining Court's conditional preemption doctrine).

68. 452 U.S. at 280 (upholding Surface Mining Control and Reclamation Act).

69. See 456 U.S. 742, 746 (1982) (describing PURPA's directives to states).

70. See *Hodel*, 452 U.S. at 268–70 (discussing SMCRA).

71. See *FERC*, 456 U.S. at 746 (discussing PURPA's conditional preemption).

72. Id. at 769–71.

73. Id. at 786–91 (O'Connor, J., dissenting) (criticizing PURPA based on concerns about its tendency to undermine political accountability and responsiveness of local government to local needs). In fact, Justice O'Connor used the term "commandeer" to refer to PURPA's effect: "Although the congressional goal is a noble one, appellants have not shown that Congress needed to commandeer state utility commissions to achieve its aim." Id. at 781 n.8.

74. Id. at 783 (internal quotations omitted).

rather than action, worked to coerce the states.[75] One might have wondered whether this distinction had constitutional weight.[76] Interestingly, however, Justice O'Connor did not focus on this aspect of PURPA as constitutionally significant when she distinguished it from SMCRA. She distinguished SMCRA because it did not threaten field preemption, i.e., it did not threaten to remove the states entirely from the regulation of surface mining.[77] In addition to these arguments, Justice O'Connor identified a state dignity concern, arguing PURPA coerced states to "function as bureaucratic puppets."[78]

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75. In other words, as the majority recognized, PURPA did not offer a regulatory alternative. If the states withdrew from the field of regulating utilities, no government would be regulating utilities. In this sense, federal "inaction" made the states' choice difficult. Id. at 745, 766 (majority opinion) (recognizing that PURPA offered states a difficult choice but nonetheless upholding it).

76. Usually, conditional preemption schemes threaten the states with federal action. See, e.g., Clean Water Act, 33 U.S.C. § 1342 (2000) (allowing states to submit national pollutant discharge elimination system (NPDES) regulatory plans for federal approval but preempting states with federal enforcement of NPDES regulations in event of state refusal to submit plan); Clean Air Act, 42 U.S.C. §§ 7407, 7409 (2000) (inviting states to enforce national ambient air quality standards through state implementation plans, but providing for federal implementation plans). Constitutional law draws a sharp distinction between governmental action and inaction in several areas. See, e.g., DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 195 (1989) (concluding that Due Process Clause is "limitation on the State's power to act," not a requirement that state act); Poelker v. Doe, 432 U.S. 519, 521 (1977) (concluding that state can refuse to fund non-medically necessary first trimester abortions). In *New York*, Congress had acted: It told the states to do something. There is a serious question whether federal inaction could be commandeering; for example, would federal refusal to regulate immigration be an act of commandeering because it forces border states to act? See Gregory Zhong Tian Chen, Elian or Alien? The Contradictions of Protecting Undocumented Children Under the Special Immigrant Juvenile Statute, 27 Hastings Const. L.Q. 597, 664 (2000) (discussing cases in which states claimed "government's inaction" in immigration field forced states to act). A conclusion that inaction in that setting could be commandeering would be equivalent to a determination that the federal government has an affirmative duty to regulate immigration. With PURPA, however, Congress had acted by telling the states to regulate and threatening them with preemption. Concluding that Congress crossed a constitutional line in this setting would not be tantamount to concluding that Congress has an independent constitutional duty to regulate utilities. Instead, it would be a conclusion that Congress cannot try to force states to regulate utilities using a particular type of threat. Cf. infra notes 294–300 and accompanying text (arguing PURPA was unconstitutional).

77. See *FERC*, 456 U.S. at 783 (O'Connor, J., dissenting) (stating that under SMCRA states could still "devote their . . . resources to . . . mining and land use problems [not preempted by the Act]"). Justice O'Connor's effort to distinguish SMCRA seems somewhat threadbare. She was not on the Court when *Hodel* upheld SMCRA, and may have voted to strike down SMCRA had she been: The logic of her *FERC* dissent points in the direction of invalidating conditional preemption in general. Ronald D. Rotunda, *Usery* in the Wake of *Federal Energy Regulatory Commission v. Mississippi*, 1 Const. Comment. 43, 51 (1984) ("The crux of [Justice O'Connor's *FERC*] dissent is her rejection of the concept of conditional preemption.").

78. *FERC*, 456 U.S. at 783 (O'Connor, J., dissenting). Some supporters of the commandeering principle have argued commandeering expresses disrespectful and destructive "social meaning" because it "treats the states as puppets," thereby undermining their stature as independent political communities. Adam B. Cox, Expressivism in

Justice O'Connor's views did not prevail in the short term. In 1985, the Court overruled *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority*, abandoning the "traditional government functions" balancing test as judicially unmanageable.[79] Dissenting from the Court's decision to leave protection of the states to the political process, Justices O'Connor and Rehnquist predicted that "this Court will . . . again assume its constitutional responsibility."[80]

2. *The Commandeering Ban Emerges:* New York *and* Printz. — In *New York v. United States*, Justice O'Connor was able to make true her prediction—at least partially. *New York* concerned the constitutionality of the Low Level Radioactive Waste Act (LLRWA), which attempted to deal with the growing problem of radioactive waste buildup by influencing states' behavior. The LLRWA put three incentives in place to encourage (or force) states to deal with radioactive waste within their borders. First, a conditional spending incentive told states that if they wanted certain federal funds, they would have to regulate radioactive waste in certain ways.[81] Second, a conditional preemption incentive told states that if they wanted other states' waste sites to remain open to them, they would have to meet federal benchmarks.[82] Finally, a "take title" incentive required states to either take title to, and liability for, radioactive waste produced in-state or regulate the disposal of this waste consistently with congressional instructions.[83]

In striking down the take title incentive, Justice O'Connor drew on *Hodel* and *FERC*, asserting that both recognized a ban on commandeering.[84] She argued that the "take title" incentive impermissibly "com-

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Federalism: A New Defense of the Anti-Commandeering Rule?, 33 Loy. L.A. L. Rev. 1309, 1316 (2000).

79. 469 U.S. 528, 531 (1985) (quoting and overruling *National League of Cities*). The *Garcia* court cited Professor Wechsler's argument in justification of its approach. Id. at 550–51 & n.11. Professor Wechsler argues that the Constitution commits protection of state sovereignty to the political process. Therefore, state sovereignty claims should be largely nonjusticiable. See Herbert Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543, 559 (1954); cf. Jesse H. Choper, Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court 171–259 (1980) (arguing for limited judicial review); Larry D. Kramer, Putting the Politics Back into the Political Safeguards of Federalism, 100 Colum. L. Rev. 215, 291 (2000) (arguing for rationality review on basis that political process largely protects state sovereignty).

This Note's definition of the term "judicially manageable (or unmanageable)" corresponds with that advanced by the Court in *Garcia*. A judicially manageable standard is one that is replicable by the lower courts in a consistent fashion, arrives at predictable results, and does not invite judges to reweigh the merits of federal policy.

80. *Garcia*, 469 U.S. at 589 (O'Connor, J., dissenting).

81. New York v. United States, 505 U.S. 144, 152–53 (1992) (discussing conditional encouragement incentives).

82. Id. at 153.

83. See id. at 153–54.

84. See id. at 161–62 (resting on precedents). But see Richard E. Levy, *New York v. United States*: An Essay on the Uses and Misuses of Precedent, History, and Policy in

mandeer[ed]" the states in violation of the Tenth Amendment.[85] Congress could not simply make the states take title to the waste.[86] Nor could it simply tell the states to regulate.[87] Since Congress lacked authority to impose either requirement standing on its own, it could not combine the two to create an incentive to regulate.[88] By contrast, Congress can both disperse funds and preempt the states. As a result, it can combine a command to regulate with an offer to fund or a threat to preempt.[89]

An anticommandeering rule, the Court asserted, protects political accountability and states' resources.[90] It also helps to diffuse power to multiple centers of authority (federal and state governments), which the Court concluded restrains tyranny and promotes liberty.[91] Conditional preemption does not undermine either of these federalism values in the Court's eyes because it allows states to decline participation.[92]

In 1997, *Printz v. United States* extended the commandeering ban to state officials by striking down the Brady Act, which directed state law enforcement officers to perform background checks on prospective gun purchasers under the threat of criminal penalties.[93] By commandeering state executives, the Court concluded, the Brady Act frustrated federalism's diffusion of authority. The Act undermined dual sovereignty and

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Determining the Scope of Federal Power, 41 U. Kan. L. Rev. 493, 502–03 (1993) (arguing *FERC* and *Hodel* did not "clearly establish[ ]" anticommandeering rule).

85. See *New York*, 505 U.S. at 175–77 (striking down take title incentive but upholding other two).

86. See id. at 175 (arguing take title provision effectively "'commandeer[ed]'" state governments into the service of federal regulatory processes).

87. Id. at 176 (concluding Congress cannot tell states to regulate).

88. See id. at 175–76 (concluding Congress cannot combine two independently unconstitutional directives).

89. See id. at 168 (upholding conditional spending and preemption incentives).

90. See id. at 168–69 (discussing federalism values of responsiveness and political accountability). This functionalist justification for the anticommandeering rule has not fared well under academic criticism. See, e.g., Mark Tushnet, Globalization and Federalism in a Post-*Printz* World, 36 Tulsa L.J. 11, 28–29 (2000) [hereinafter Tushnet, Globalization] (arguing Court's justification is "clearly vulnerable" and seeking to restate it more "carefully"). Nor did the argument fare well when first made; Justice White pointed out in dissent that the LLRWA resulted from an interstate compromise. *New York*, 505 U.S. at 189 (White, J., dissenting).

91. See *New York*, 505 U.S. at 181–82 (arguing federalism "'reduce[s] the risk of tyranny'" (quoting Gregory v. Ashcroft, 501 U.S. 452, 458 (1991))). This anti-tyranny effect appeared prominently in the Court's justifications of its extension of *New York* to prohibit "commandeering" of state executive officials. See Printz v. United States, 521 U.S. 898, 921–22 (1997).

92. See *New York*, 505 U.S. at 168 (upholding conditional spending and conditional preemption). In upholding conditional preemption, Justice O'Connor did not extend her reasoning as far as her *FERC* dissent. See supra notes 73–74 and accompanying text.

93. 521 U.S. at 935.

raised the risk of tyrannical overreaching on the federal government's part.[94]

3. Testa *and the Special Case of State Courts.* — The Court has traditionally refused to extend commandeering analysis when Congress mandates that the state courts hear federal law claims. The seminal decision in this regard, *Testa v. Katt*, holds that state courts cannot refuse to hear federal law claims that are analogous to state claims they already adjudicate.[95] Because the analogous claims rule involves a "high level of generic abstraction,"[96] state courthouses are generally open to federal claims. There is, however, a narrow "valid excuse" exception if a state's neutral procedural rules would bar the analogous state claim.[97] As *Printz* makes clear, *Testa*'s holding remains good law.[98]

C. *Lower Court Interpretations of the Anticommandeering Principle*

This section discusses two different approaches—formalist and functionalist—that lower courts have adopted when applying the anticom-

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94. See id. at 922–23 (arguing commandeering furthers tyranny); id. at 929–30 (arguing commandeering frustrates political accountability). *Reno v. Condon*, the Court's latest Tenth Amendment case, does not shed light on the conditional preemption issue. The *Reno* Court analyzed a different question, concluding that there is no commandeering when Congress does not compel the states to regulate private parties. Reno v. Condon, 528 U.S. 141, 150 (2000).

95. See 330 U.S. 386, 394 (1947). *Printz* affirmed *Testa*. *Printz*, 521 U.S. at 929.

96. Kevin M. Clermont, Jurisdictional Salvation and the Hague Treaty, 85 Cornell L. Rev. 89, 129 (1999).

97. See Howlett v. Rose, 496 U.S. 356, 369–72 (1990) (giving examples of valid excuses).

98. Despite *Printz*'s reaffirmation of *Testa*'s holding, there is some connection between congressional directives to state courts and commandeering. In *Alden v. Maine*, the Court connected commandeering analysis to its sovereign immunity jurisprudence, holding that constitutional structure, as embodied in the Tenth and Eleventh Amendments, does not permit Congress to abrogate state sovereignty immunity in state courts. The Court concluded that Congress's subjection of states to suit in state courts "turn[ed] the State against itself" and allowed Congress "to commandeer the entire political machinery of the State against its will." Alden v. Maine, 527 U.S. 706, 749 (1999). Using state courts in this manner undermined state dignity by "impos[ing] a governance upon the state antithetical to the state's own views." Louise Weinberg, Of Sovereignty and Union: The Legends of *Alden*, 76 Notre Dame L. Rev. 1113, 1165–66 (2001). The concept of "state dignity" refers to a diffuse expressive interest of the state in maintaining its identity and prestige as a sovereign with powers, responsibilities, and interests separate from the federal government. See Evan H. Caminker, Judicial Solicitude for State Dignity, 574 Annals Am. Acad. Pol. & Soc. Sci. 81, 85 (2001) (describing Court's notion of state dignity); Tracy O. Appleton, Note, The Line Between Liberty and Union: Exercising Personal Jurisdiction over Officials from Other States, 107 Colum. L. Rev. 1944, 1982–83 (2007) (noting dignity- and comity-based rationale for sovereign immunity, which protects states as separate sovereigns). For a careful discussion of the difference between state sovereignty, which refers to a sphere of independent state authority, and state sovereign immunity, which refers to protection of states from suit, see Richard H. Fallon, Jr., et al., Hart and Wechsler's The Federal Courts and the Federal System 1060–63 (5th ed. 2003).

mandeering principle.[99] "Formalist" opinions ask if states have a formal option to refuse to participate in a federal scheme. This inquiry proceeds in three steps.[100] First, the court identifies what command the statute contains.[101] Then the court asks what sanction Congress has mandated for refusal to concede to the command.[102] If the sanction is something Congress could constitutionally enact on its own, then no commandeering has occurred.[103] For example, if Congress could use its commerce power to preempt state regulation in the area, then Congress can use conditional preemption to encourage state regulation.[104]

A minority of judges, usually concurring or dissenting in commandeering decisions, have gone beyond the formalist approach and analyzed whether a particular regulatory scheme coerces the states.[105] These judges have considered in different ways the quality of choice offered by conditional preemption, especially in light of the federalism values served

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99. See Erwin Chemerinsky, Formalism and Functionalism in Federalism Analysis, 13 Ga. St. U. L. Rev. 959, 959–61 (1997) (discussing formalism in Supreme Court federalism decisions, and arguing for functionalism as better alternative); Mark Tushnet, Why the Supreme Court Overruled *National League of Cities*, 47 Vand. L. Rev. 1623, 1636–44 (1994) (referring to possible functionalist and formalist tests after *New York*).

100. See, e.g., Strahan v. Coxe, 127 F.3d 155, 170 (1st Cir. 1997) (finding no commandeering when state "has the choice of either regulating in this area according to federal . . . standards or having its regulations preempted"); Wyoming v. U.S. Dep't of Interior, 360 F. Supp. 2d 1214, 1241 (D. Wyo. 2005) (concluding no commandeering if state can decline participation in federal scheme with consequence that federal preemption will occur); USCOC of Virginia RSA # 3, Inc. v. Bd. of Supervisors, 245 F. Supp. 2d 817, 833 (W.D. Va. 2003) (concluding no commandeering exists if state can choose to act pursuant to federal guidelines or can choose not to do so, thereby triggering federal preemption); Verizon Md. Inc. v. RCN Telecom Servs., Inc., 232 F. Supp. 2d 539, 558 (D. Md. 2002) ("If Congress could constitutionally [preempt] . . . [,] then Congress can also condition its preemption on the states regulating the agreements in conformity with its wishes."); MCI Telecomm. Corp. v. N.Y. Tel. Co., 134 F. Supp. 2d 490, 500 (N.D.N.Y. 2001) (concluding there is no commandeering if law "offers . . . the State a voluntary choice to either participate in the scheme it establishes or reject any such participation" and have state regulation preempted as a result).

101. See Petersburg Cellular P'ship v. Bd. of Supervisors, 205 F.3d 688, 716 (4th Cir. 2000) (King, J., dissenting) (discussing one view of Telecommunications Act).

102. See id. (asserting that *New York* requires determination if alternatives are constitutionally "valid" congressional mandates).

103. See id. at 717 (noting that choice need not be "'meaningful'" or "'viable'").

104. New York v. United States, 505 U.S. 144, 167–69 (1992) (concluding that because preempting states' ability to ship radioactive waste out of state is within Congress's commerce power, Congress could use threat of this preemption to encourage states to regulate).

105. Cf. FERC v. Mississippi, 456 U.S. 742, 783–84 (1982) (O'Connor, J., dissenting) (arguing that states' formal option of exiting a field of regulation is not a true "'choice'"). The Court has at least nominally recognized the distinction between formal options and real choices in its conditional spending jurisprudence. See South Dakota v. Dole, 483 U.S. 203, 211 (1987) (suggesting that conditional spending, if too "coercive," would prove unconstitutional).

by the ban on commandeering.[106] Three analytical threads emerge from these opinions. The first is whether the scheme addresses an area that states have traditionally regulated.[107] The second is whether the scheme threatens field preemption, i.e., whether it threatens to preempt the states' ability to regulate an entire subject matter.[108] The third is whether Congress has provided a viable regulatory alternative; PURPA's refusal to implement federal regulation in the event of the states' refusal to meet federal demands is an example of a nonviable regulatory alternative.[109] Behind this last factor is the intuition that when states have traditionally regulated a field, they feel great pressure to see regulation of it con-

106. The functionalist approach is not dominant, but it has existed since shortly after the Court decided *New York* and reflects persistent critiques of the Court's line between commandeering and cooperative federalism. See, e.g., Envtl. Def. Ctr., Inc. v. EPA, 319 F.3d 398, 452 (9th Cir. 2003) (Tallman, J., concurring in part and dissenting in part) (concluding that federal stormwater discharge regulation through conditional preemption did not offer states "real choice"); Conant v. Walters, 309 F.3d 629, 645 (9th Cir. 2002) (Kozinski, J., concurring) (considering effects of federal medical marijuana policy as form of commandeering); *Petersburg Cellular*, 205 F.3d at 703 (Niemeyer, J., separate opinion) (seeking to pierce "thin veil of 'choice'" through functionalist analysis of coercive effect of Telecommunications Act); United States ex rel. Stevens v. Vt. Agency of Natural Res., 162 F.3d 195, 217–20 (2d Cir. 1998) (Weinstein, J., dissenting) (arguing qui tam suits violate commandeering ban and state sovereign immunity by interfering with political processes); Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank, 136 F.3d 1360, 1365 (9th Cir. 1998) (Kozinski, J., concurring) (arguing *Printz* bars Congress from "interfer[ing] with the functioning of state officials and instrumentalities by endowing them with powers and duties that conflict with their responsibilities under state law"); Bd. of Natural Res. v. Brown, 992 F.2d 937, 947 (9th Cir. 1993) (concluding provisions of Forest Resources Conservation and Shortage Relief Act created "Hobson's choice" for states). For an in-depth discussion of *Petersburg Cellular*, see Jared O'Connor, Note, *National League of Cities* Rising: How the Telecommunications Act of 1996 Could Expand Tenth Amendment Jurisprudence, 30 B.C. Envtl. Aff. L. Rev. 315 (2003).

107. See *Petersburg Cellular*, 205 F.3d at 703 (Niemeyer, J., separate opinion) ("To suggest that a local government body withdraw from land-use regulation . . . is nothing short of suggesting that it end its existence in one of its most vital aspects."); see also *Bd. of Natural Res.*, 992 F.2d at 947 (arguing that requiring state to withdraw from protecting public trust in natural lands presents unconstitutionally coercive choice).

108. *Petersburg Cellular*, 205 F.3d at 703 (Niemeyer, J., separate opinion); see also FERC v. Mississippi, 456 U.S. 742, 783 (1982) (O'Connor, J., dissenting) (arguing that PURPA is constitutionally suspect because of, inter alia, its threat of field preemption). Two traditional justifications for federalism are that it allows for regulatory diversity and regulatory experimentation. Field preemption undermines both; once the federal government has preempted a field, it is the only regulator around. Cf. Ernest A. Young, The Rehnquist Court's Two Federalisms, 83 Tex. L. Rev. 1, 130 (2004) [hereinafter Young, Federalisms] ("The first priority of federalism doctrine ought to be limiting the preemptive impact of federal law on state regulation . . . . [so as to protect] . . . state-by-state diversity and experimentation.").

109. See *Petersburg Cellular*, 205 F.3d at 702–04 (Niemeyer, J., separate opinion) (suggesting consigning regulation to market rather than congressional alternatives creates coercion); see also *Envtl. Def. Ctr.*, 319 F.3d at 451–52 (Tallman, J., concurring in part and dissenting in part) (arguing permissible conditional preemption should not include threat of preemption that is unaccompanied by federal regulatory alternative).

tinue.[110] A scheme that touches on all three factors does not present a "real choice" to states.[111]

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New York's formalistic acceptance of conditional preemption may be inconsistent with the functional concerns that led the Court to create the commandeering ban. Part II explores this possibility through analysis of section 216 of EPAct, examining first formalism and then different functionalist critiques of conditional preemption.

II. How Section 216 of EPAct Challenges the Line Between Commandeering and Conditional Preemption

Part I's discussion of section 216 and the Court's commandeering ban raises the question whether section 216 is permissible conditional preemption. Part II.A's formalist analysis concludes it is, suggesting section 216 raises one colorable but ultimately unavailing concern. Parts II.B and II.C criticize this conclusion. In general, judges that have approached conditional preemption from the functionalist perspective have identified three criteria to root out regulatory schemes that unduly coerce the states to adopt federal regulation.[112] Part II.B will analyze section 216 against each of these factors, arguing that each of them makes some sense in light of protecting the values of political accountability and the dignity of the states. Ultimately, this Part will conclude that this intuitive analysis illegitimately invites judges to reweigh the policies of regulatory schemes and rests on judicially unmanageable factors.

Then, moving beyond this focus on coercion, Part II.C will examine the functional impact of section 216 on the values of federalism that are in theory protected by the court's decision in *New York*. This Part will consider section 216's effect on political accountability, state dignity, the preservation of local resources, and federalism's capacity to reduce the risk of tyranny. Together, these Parts raise the problem this Note identi-

110. For example, functionalist opinions have concluded that regulating land use or fulfilling a state's obligation under the public trust trigger this unique pressure on states. *Petersburg Cellular*, 205 F.3d at 702–04 (Niemeyer, J., separate opinion) (considering land use); *Bd. of Natural Res.*, 992 F.2d at 947 (considering western states' public trust obligations regarding timber sales from public land).

111. Part II.B will examine functionalism in greater detail, arguing it is an intuitive, though judicially unmanageable, cipher for political accountability and dignity concerns. Suffice it to say here that both Supreme Court Justices and scholars have shared the intuition that conditional preemption may not provide a meaningful choice to states. See, e.g., *FERC*, 456 U.S. at 783 (O'Connor, J., dissenting) ("[T]here 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."); Dorf & Sabel, supra note 10, at 426 (arguing conditional preemption may not provide states with a "real" choice).

112. See supra notes 105–111 and accompanying text (extracting functionalist test from caselaw).

fies: Does section 216 unduly infringe on state sovereignty, and thus suggest that the Court should strengthen its anticommandeering doctrine to restrict conditional preemption?

A. *Formalist Analysis of Section 216*

Section 216 of EPAct is not a generally applicable law; it targets state behavior rather than directly regulating both state and private behavior.[113] Because section 216 makes FERC's involvement contingent on how states regulate the siting of electricity facilities,[114] it presents conditions that states have to meet if they want to stave off federal preemption. State permitting agencies are engaged in a quasi-legislative act,[115] making *Testa*'s exception to the commandeering rule inapplicable here.[116]

1. *Section 216's Permissible Acts of Conditional Preemption.* — Three of section 216's commands are clearly permissible under the formalist test's three-step inquiry.[117] The first step requires identifying the statute's commands. One of section 216's commands requires state planning agencies to consider the possible interstate benefits of electricity facilities.[118] The second tells states not to "withh[o]ld approval for more than 1 year after the filing of an application."[119] The third tells states not to undermine national goals by conditioning approvals in economically infeasible or inefficient ways.[120] Under the formalist test's second step, the sanction

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113. See Reno v. Condon, 528 U.S. 141, 150 (2000) (citing South Carolina v. Baker, 485 U.S. 505, 514–15 (1988)) (holding that commandeering analysis does not apply to statutes that do not direct states to regulate private parties); New York v. United States, 505 U.S. 144, 160 (1992) (distinguishing *Garcia* as involving generally applicable law); see also Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 554 (1985) (holding that Fair Labor Standards Act can apply to state employees). For example, the statute in *Garcia* regulated an activity that is essentially private, as opposed to public, in nature—employing individuals—and it applied equally to private employers and governmental employers. Id. at 554.

114. See, e.g., Energy Policy Act of 2005, Pub. L. No. 109-58, sec. 1221(a), § 216(b), 119 Stat. 594, 947 (to be codified at 16 U.S.C. § 824p) (directing FERC to override states that withhold approval of facilities for more than one year following application).

115. See, e.g., Eastlake v. Forest City Enters., 426 U.S. 668, 684–85 (1976) (Stevens, J., dissenting) (describing nature of land use planning).

116. See supra Part I.B.3.

117. This account of the formalist test draws on Adler & Kreimer, supra note 10, at 103–04 (describing one view of line between commandeering and conditional encouragement of states).

118. See Energy Policy Act § 216(b)(1)(A)–(B) (allowing FERC to preempt state siting processes in states that do not consider interstate benefits or do not permit facilities unless they "serve end-use customers in the State").

119. Id. § 216(b)(1)(C)(i). As discussed in supra notes 50–52 and accompanying text, FERC has determined that this phrase—"withhold approval"—allows it to permit a facility even if the state has lawfully rejected it. FERC deems a denial to be the "withhold[ing] of approval," which FERC can override. If the state wants to maintain its siting and takings power authorities, it must anticipate those projects that FERC itself would permit, and issue its own permits instead. For an argument that this case-by-case scheme creates federalism value concerns, see infra Part II.B and Part II.C.

120. Energy Policy Act § 216(b)(1)(C)(ii).

for noncompliance with these commands is preemption of the state's siting regulations.[121] The final formalist question is whether Congress could preempt the states and regulate the type of facility in question under its Article I powers.[122] Here, FERC can site facilities only if they serve interstate commerce.[123] A formalist analysis argues that this scheme protects political accountability because states can refuse to submit to federal siting demands, forcing a federal agency to act if it wants to site particular facilities.[124]

Under the formalist analysis, section 216's command that state courts hear federal eminent domain claims is permissible so long as those courts ordinarily hear state eminent domain claims.[125] *Testa*'s analogous claims rule involves "a high level of generic abstraction."[126] Perhaps if a state refused to delegate its takings power, thereby barring its courts from hearing takings claims by private companies, the state could object.[127] As for federal delegation of the takings power to private companies, well-settled law holds this is permissible.[128]

2. *Section 216 and Subsequent State and Local Permitting.* — FERC's ambiguous interpretation of section 216(h) raises a commandeering con-

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121. Id. § 216(b) (describing FERC's preemptive authority).

122. Section 216 only applies to facilities that transmit energy in interstate commerce. Id. § 216(b)(2). Thus, it is a valid enactment based on Congress's interstate commerce power.

123. Cf. New York v. FERC, 535 U.S. 1, 16 (2002) (finding that "transmissions on . . . national grids constitute transmissions in interstate commerce").

124. See New York v. United States, 505 U.S. 144, 168 (1992) (arguing that if states refuse to consent, "it is the Federal Government that makes the decision in full view of the public").

125. Testa v. Katt, 330 U.S. 386, 394 (1947) (requiring state courts to hear federal claims analogous to state law claims). See also supra Part I.B.3.

126. Clermont, supra note 96, at 129.

127. Even this possibility is doubtful. In *Howlett v. Rose*, the Court elaborated on the *Testa* rule: "The Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." 496 U.S. 356, 367–71 (1990). As *Mondou v. N.Y., New Haven & Hartford R.R.* made clear, state courts cannot refuse to hear a claim simply because it is "not in accord with the policy of the State." 223 U.S. 1, 55–56 (1912). *Howlett* cited this statement in support of its contention that state courts cannot "dissociate themselves from federal law because of disagreement with its content." 496 U.S. at 371–73.

Thus, if a state were to allow its courts to hear eminent domain claims but not allow for delegation of the state's eminent domain power to third parties, a state objection to hearing a federal delegated takings claim would likely be unsuccessful. Its objection would likely be construed as being a policy disagreement over how, and for what reasons, eminent domain is exercised. The state could not object that hearing an eminent domain claim would force it to ignore a rule of judicial administration or that the state courts lack the competency to hear that type of cause of action. See id. at 372.

128. The Court has long recognized the sovereign's prerogative to delegate the eminent domain power. See, e.g., Cherokee Nation v. S. Kan. Ry., 135 U.S. 641, 656–58 (1890) (approving delegation of eminent domain power to private railroad).

cern.[129] Section 216(h) directs FERC to "coordinate . . . Federal authorization . . . [with] State agencies that are responsible for conducting any separate permitting and environmental reviews . . . to ensure timely and efficient review and permit decisions."[130] FERC promulgated a rule under this section that requires applicants to identify subsequent state and local permits that are necessary for FERC-approved facilities.[131] Under one reading of FERC's rule interpreting its section 216(h) authority, if FERC has granted a construction permit, then state and local permitting agencies must issue subsequent permits "consistent with the conditions of the Commission's permit."[132] If a court were to defer to this interpretation,[133] there would be a commandeering issue.

Under this interpretation of FERC's ambiguous rule, states cannot avoid participating in the federal regulatory program;[134] they must either site the facilities originally pursuant to federal standards or issue additional permits once FERC has sited the facility. This reading of the rule suggests that FERC will *require* states to issue permits. States that issue subsequent permits that are consistent with FERC's permit may suffer unjustified condemnation from their constituents.[135] Though FERC's interpretation does not specify a means of enforcement of this duty, one circuit court has concluded that precatory instructions could commandeer

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129. See Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities, 71 Fed. Reg. 69,440, 69,462–63 (Nov. 16, 2006) (to be codified at 18 C.F.R. pts. 50, 380) (interpreting section 216(h) of EPAct).

130. See Energy Policy Act of 2005, Pub. L. No. 109-58, sec. 1221(h), § 216(h) (to be codified at 16 U.S.C. § 824p); supra note 49 (describing FERC's authority under the Department of Energy's delegation).

131. See Regulations for Filing Applications, 71 Fed. Reg. at 69,462–63 (discussing pre-filing rules).

132. Id. at 69,462.

133. FERC's interpretation was the result of a formal procedure—notice and comment rulemaking—that arose in the context of a congressional delegation of the power to make rules implementing section 216's application requirements. See Energy Policy Act § 216(b) (delegating power to make rules implementing application requirements); Regulations for Filing Applications, 71 Fed. Reg. at 69,441 (summarizing FERC's adoption of application rules through notice and comment rulemaking). The *Mead* test is met. See United States v. Mead Corp., 533 U.S. 218, 229 (2001) (holding that agency interpretations qualify for *Chevron* deference when Congress would expect agency to "speak with the force of law"). A federal court would thus face the question under *Chevron* of whether (a) section 216 is ambiguous and (b) whether an interpretation of an ambiguous statute that creates Tenth Amendment concerns would be permissible. The latter holding would be unlikely. See Chevron v. Natural Res. Def. Council, 467 U.S. 837, 843–44, 865–66 (1984).

134. See New York v. United States, 505 U.S. 144, 175–77 (1992) (invalidating take title provision because it did not offer states exit option).

135. See id. at 169 ("[W]here the Federal Government directs the States to regulate, 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.").

the states because a federal court could conceivably issue injunctions enforcing them.[136]

The solution to this issue lies in the following interpretation of section 216(h). Section 216(h)(3) tells FERC to coordinate federal authorization with state permitting processes "[t]o the maximum extent practicable under applicable Federal law,"[137] which would presumably include commandeering doctrine. Section 216(h)(4)(A) tells FERC to coordinate with "State agencies that are willing."[138] Reading these sections in light of section 216(b), it appears that FERC's siting permit preempts all state siting processes but invites states, even if they do not site the facilities initially, to work with FERC on subsequent permitting.[139] Essentially, two moments of conditional preemption occur: (1) when states consider siting a facility and (2) when they consider cooperating with FERC on subsequent permitting.[140]

B. *Functionalist Analysis of the Coercive Effect of Section 216*

Under the formalist analysis, then, section 216 is constitutional conditional encouragement of state regulation. Professors Michael Dorf and Charles Sabel have put the functionalist critique of conditional encouragement succinctly: "The [*New York*] Court does not even ask whether,

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136. Bd. of Natural Res. v. Brown, 992 F.2d 937, 947 (9th Cir. 1993) (concluding that federal statute created Tenth Amendment issue even though it did not specify means of enforcement).

137. Energy Policy Act § 216(h)(3) (requiring federal coordination with state permitting processes).

138. Id. § 216(h)(4).

139. One can read FERC's interpretation in this way when it suggests *all* state and local permitting processes are "preempted by Federal law in instances where our jurisdiction is triggered." Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities, 71 Fed. Reg. 64,440, 69,462–63 (Nov. 16, 2006) (to be codified at 18 C.F.R. pts. 50, 380) (interpreting section 216(h) of EPAct).

140. This interpretation avoids the constitutional issues discussed above, a result favored under the canon of constitutional avoidance. See, e.g., Spector Motor Serv. v. McLaughlin, 323 U.S. 101, 105 (1944) (stating that federal courts "ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable"). The canon calls for the federal courts to determine whether a construction of a statute "is fairly possible by which the [constitutional] question may be avoided." Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 345–48 (1936) (Brandeis, J., concurring) (internal quotation marks omitted) (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)). Here, the ambiguity in FERC's rule is itself enough to argue for fair application of the canon, which leads to the reading of the regulation outlined above. The statute's reference to "States that are willing" lends additional support; even if the statute is somewhat ambiguous on this point, it is fair to focus on this phrase to conclude Congress did not intend to commandeer the states. See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.").

much less argue that, the states' choice is a real one."[141] Drawing on their insight, one type of functionalist inquiry purports to answer when the states' choices are not real.

The answer is straightforward: If conditional preemption threatens to oust states completely from a field that they have long regulated, and offers nonregulation in return for states' recalcitrance, the states' choice is not a real one.[142] The counter argument is equally straightforward: Defining "coercion" involves arbitrary line-drawing.[143] It is too difficult to translate an intuition about coercion into predictable doctrine, calling into question the empirical basis of the intuition itself.[144]

It is possible, however, to recuperate the functionalist test not as a theory of when, empirically speaking, conditional preemption coerces states, but as a theory of what types of choices Congress should not force the states to make.[145] As previously explained, courts taking a functionalist approach have generally considered three factors when analyzing conditional preemption schemes: whether preemption occurs in an area states have traditionally regulated, whether field preemption is threatened, and whether the states are offered a viable regulatory alternative. This subsection argues that functionalism's three factors make some sense in light of the federalism values of political accountability and state dignity.[146] It concludes, however, that the arbitrariness of the functionalist analysis lies in its invitation for judges to reweigh the policies of regulatory schemes as well as in the judicial unmanageability of the factors themselves.[147] It is improvident and illegitimate for judges to reconsider

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141. Dorf & Sabel, supra note 10, at 426. It is important to note that while Professors Dorf and Sabel make a functionalist critique of *New York v. United States*, they do not offer the functionalist test discussed here.

142. See supra notes 105–111 and accompanying text (describing functionalist test).

143. Kathleen Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1413, 1420–21 (1989) (arguing that "coercion" concept is not definable, making any particular baseline arbitrary). Lower courts have consistently refused to apply *Dole*'s "coercion" test for spending conditions. See, e.g., West Virginia v. U.S. Dep't of Health and Human Servs., 289 F.3d 281, 290 (4th Cir. 2002) (stating that most courts have refused to apply coercion test); California v. United States, 104 F.3d 1086, 1092 (9th Cir. 1997) (concluding there may be little "viability left in the coercion theory"). The Court has been skeptical of the concept. See Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937) (arguing that policing coercion would "plunge the law in endless difficulties").

144. Another way to put this criticism is to ask what one means by "coercion." See Lynn A. Baker, Conditional Federal Spending After *Lopez*, 95 Colum. L. Rev. 1911, 1956 (1995) (questioning whether "coercion" has useful meaning).

145. Cf. Thomas R. McCoy & Barry Friedman, Conditional Spending: Federalism's Trojan Horse, 1988 Sup. Ct. Rev. 85, 120 (arguing that coercion test "is inherently useless" and instead concluding that conditional spending unjustifiably forces states to choose between vitally important funding and no funding at all).

146. See, e.g., Alden v. Maine, 527 U.S. 706, 714 (1999) (concluding dignity is element of federalism's protections of states); New York v. United States, 505 U.S. 144, 168 (1992) (arguing commandeering disrupts political accountability).

147. For a discussion of judicial manageability, see Richard H. Fallon, Jr., Judicially Manageable Standards and Constitutional Meaning, 119 Harv. L. Rev. 1274, 1285 (2006).

the policy of a conditional preemption scheme. Congress, not the courts, is better suited to design such schemes.[148]

1. *Section 216 and States' Regulation of Land Use and Eminent Domain.* — Despite *Garcia*'s criticisms of the federal courts' inconsistent conclusions as to what is and is not a traditional or core sovereign function of states,[149] the Court today occasionally employs the concept in federalism decisions.[150] In regard to section 216, states have historically regulated land use, utilities, and local eminent domain.[151] This historical role creates a special political accountability problem because even when federal preemption has occurred, voters may persist in the mistaken belief that state and local governments are responsible for local siting decisions. To see how this confusion might occur, one needs to understand *New York*'s vision of political accountability. *New York* argues that voters do not grasp chains of causation.[152] Voters focus on the last actor in a regulatory chain, such that if Congress issues a command, the state officials who implement it will suffer political disapproval.[153] This may be a dim view of voter sophistication,[154] but it appears to be the Court's own.

In a concurrence in *United States v. Lopez*, Justice Kennedy invoked the political accountability rationale behind *New York* to argue that Congress confuses political accountability when it encroaches on areas of

148. Cf. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 551–52 (1985) (concluding that Congress, by virtue of state "representation" within it, has greater institutional competency to balance national interests and federalism than does Court). Not even the advocates of judicial review of federalism have argued the Court should invalidate schemes based on policy concerns. See, e.g., Saikrishna B. Prakash & John C. Yoo, The Puzzling Persistence of Process-Based Federalism Theories, 79 Tex. L. Rev. 1459, 1522–23 (2001) (concluding Court should police structural "boundaries between federal and state power"); Young, Federalisms, supra note 108, at 130 ("The first priority of federalism doctrine ought to be limiting the preemptive impact of federal law on state regulation," so as to protect "state-by-state diversity and experimentation.").

149. See *Garcia*, 469 U.S. at 550 (rejecting *National League of Cities*' inquiry into states' core sovereignty).

150. See, e.g., Rapanos v. United States, 126 S. Ct. 2208, 2224 (2006) (arguing that because land use is traditional state function, Court should require clear statement from Congress before "authoriz[ing] an unprecedented intrusion into traditional state authority"); Gregory v. Ashcroft, 501 U.S. 452, 469–70 (1991) (presuming that Congress does not intend "to intrude on state governmental functions" unless it acts clearly).

151. See Federal Power Act, 16 U.S.C. § 824(a) (2000) (proclaiming exclusive state authority over electricity utilities prior to EPAct); *Rapanos*, 126 S. Ct. at 2224 (arguing land use regulation "is a quintessential state and local power"). This argument skirts the judicial manageability issue by recourse to historical understanding.

152. See New York v. United States, 505 U.S. 144, 169 (1992) ("[W]here the Federal Government directs the States to regulate, 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 . . . ." (emphases added)).

153. See id. (discussing political accountability problems of commandeering).

154. See Printz v. United States, 521 U.S. 898, 957–58 n.18 (1997) (Stevens, J., dissenting) (arguing Court's political accountability justification "reflects a gross lack of confidence in the electorate").

traditional state authority.[155] A functionalist judge could argue Justice Kennedy's argument applies in a special way to FERC's case-by-case preemptive authority under section 216. States that consider interstate benefits cannot know ex ante which sites FERC will determine fall within its jurisdiction.[156] Thus, it is likely that both states and FERC will be siting facilities within the same jurisdiction. A unique risk of confusion arises because the traditional role of state and local governments in land use leads voters to expect states and local governments to make land use decisions.[157] Total preemption could gradually revise those expectations, but conditional preemption creates a particular risk because of them.[158]

The political accountability problem deepens in light of the fact that when FERC exercises its conditional preemption authority, it opens the doors of state courthouses to permit holders.[159] Federal use of state courts would always raise political accountability problems under the Court's reasoning,[160] but use of the state courts raises a special problem here. A state contemplating whether to deny a permit application confronts the possibility that its constituents will look to a subsequent state court decision in holding the state accountable for the siting of a particular facility. Ex ante, then, the threatened use of state courts may be particularly pressing.[161]

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155. United States v. Lopez, 514 U.S. 549, 576–77 (1995) (Kennedy, J., concurring) (concluding federal encroachment on "areas of traditional state concern" blurs political accountability).

156. See Energy Policy Act of 2005, Pub. L. No. 109-58, sec. 1221(a), § 216(b), 119 Stat. 594, 947 (to be codified at 16 U.S.C. § 824p) (providing FERC with ability to preempt states on case-by-case basis). Minnesota made a related argument during the FERC rulemaking. Motions for Leave to Intervene, supra note 16, at 4–6 (arguing that FERC's override authority puts states in difficult position of having to consider section 216's enumerated factors yet at same time facing possible preemption despite good faith consideration ex ante).

157. This is an empirical claim subject to refutation. But so too, of course, was Justice O'Connor's claim about the effects of commandeering. Hills, supra note 12, at 826. This Note does not ultimately endorse the functionalist analysis, but rather makes a case for it and draws on the lessons of that case.

158. Cf. FERC v. Mississippi, 456 U.S. 742, 787 (1982) (O'Connor, J., dissenting) (arguing total preemption may actually preserve political accountability). Justice Blackmun responded, "it is a curious type of federalism that encourages Congress to preempt a field entirely, when its preference is to let the States retain the primary regulatory role." Id. at 765 n.29 (majority opinion).

159. Energy Policy Act § 216(e) (delegating eminent domain power to FERC permit holders by way of federal district courts or state courts).

160. See Evan H. Caminker, State Sovereignty and Subordinancy: May Congress Commandeer State Officers to Implement Federal Law?, 95 Colum. L. Rev. 1001, 1060–63 (1995) [hereinafter Caminker, State Sovereignty] (questioning whether political accountability problems are endemic to cooperative federalism and commandeering of state courts).

161. An unpersuasive extension of the functionalist argument here would hold that section 216's use of state courts as leverage to encourage states to site facilities violates the spirit, if not the letter, of *Alden*. See Alden v. Maine, 527 U.S. 706, 749 (1999) (opening state courts to suit against states "turn[ed] the State against itself" and allowed Congress "to

This analysis identifies an important political accountability problem and shows that coercion and political accountability can be linked. At the same time, the coercion analytical model has an inherent tension. As the next subsection will show, the coercion approach brings into conflict concerns over political accountability and concerns about state dignity.

2. *Section 216 and Field Preemption.* — The second factor that functionalist opinions identify, and which *New York* itself lends credence to, is whether Congress has threatened field preemption, leaving the state with no ability to "regulate [the field] . . . in any manner its citizens see fit."[162] It is hard to explain this factor on any basis other than a theory of coercion.[163] One could certainly argue that field preemption undercuts local responsiveness, experimentation, and diversity, but these arguments ultimately suggest that preemption, and the scope of the commerce power, is the problem,[164] not conditional preemption per se.

Justice O'Connor's dissent in *FERC* offers the best, though ultimately unconvincing, way to justify the use of this factor.[165] There, she distinguished PURPA from SMCRA. Sections 1254 and 1255 of SMCRA, which *Hodel* upheld, preserved a role for states in "mining and land use regula-

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commandeer the entire political machinery of the State against its will"). Section 216 uses the threat of commandeering the state courts to "encourage" state political bodies to follow federal directions. The use of state courts "to coerce the other branches of the State," according to *Alden*, involves "plenary federal control of state governmental processes [that] denigrates the separate sovereignty of the States." Id.

The federal statute in *Testa v. Katt* is distinguishable. *Testa* concerned section 205(e) of the Emergency Price Control Act, which enabled a buyer to sue a seller of goods in either federal or state court for alleged violations of the Act's price ceilings. The Court upheld this requirement. Testa v. Katt, 330 U.S. 386, 394 (1947). In contrast to *Alden*, the statutory section at issue in *Testa* simply required state courts to hear federal claims analogous to state law claims. It did not attempt to change state regulatory behavior by using the states' judiciaries to coerce the states' political branches.

Ultimately, it is difficult to agree with the functionalist argument on this point, based as it is on a diffuse concept of dignity. If the states are concerned about the indignity of seeing FERC permit holders use their courts, they can grant state permits and avoid courtroom disputes. *Testa* represents settled doctrine grounded in the Supremacy Clause and the Constitutional Convention's compromise over federal authority. See, e.g., Anthony J. Bellia, Jr., Congressional Power and State Court Jurisdiction, 94 Geo. L.J. 949, 950–51, 992–1000 (2006) (discussing *Testa* and original understanding). The possibility of undermining this doctrine should lead the Court to reject applying *Alden* here.

162. New York v. United States, 505 U.S. 144, 174 (1992). In other words, Justice O'Connor reasoned that the LLRWA was not preempting states entirely from regulating the field of radioactive waste management; she used this argument to bolster her conclusion, as the quoted material shows. For a similar argument, see Petersburg Cellular P'ship v. Bd. of Supervisors, 205 F.3d 688, 703–04 (4th Cir. 2000) (Niemeyer, J., separate opinion) (questioning whether requiring state to "withdraw" from field is unduly coercive).

163. Cf. *FERC*, 456 U.S. at 783 (O'Connor, J., dissenting) (implying that no state will refuse federal instruction when compliance is only way to maintain states' presence in "an entire field").

164. Cf. Young, Federalisms, supra note 108, at 130 (arguing that federalism requires limits on preemption in order to preserve regulatory diversity among states).

165. See 456 U.S. at 783–84 (O'Connor, J., dissenting).

tion"[166] even if they refused federal demands. They could still pass laws more stringent than federal standards and laws "governing operations 'for which no provision is contained in [SMCRA].'"[167] PURPA, by contrast, excluded states from regulating the utilities in question if they did not accept federal demands.[168] Justice O'Connor concluded PURPA was telling the states to act as "bureaucratic puppets" or not be involved at all.[169]

Under Justice O'Connor's approach, FERC's broad section 216 override of state denials forces states to act as "puppets"[170] because it tells them "[e]ither issue a permit, or we'll do it for [you]."[171] Moreover, when FERC preempts, states are excluded from the "field" of regulating facilities that serve interstate commerce.[172] They cannot supplement FERC's siting decision with independent permitting.[173] In short, Congress and FERC have refused to cooperate. Instead, they have chosen to dictate.[174]

However, these dignity-based concerns about field preemption conflict with the argument that section 216 creates political accountability problems. Preserving a role for both the states and the federal government in regulating electricity facilities necessarily blurs lines of accountability for voters.[175] This tension between different federalism values exists in Justice O'Connor's *FERC* dissent, which argues against field preemption and then, in a later argument, suggests that field preemption "might well [have been] prefer[able]" to the states.[176] Rather than fault Justice O'Connor too vociferously, one could recognize this tension as reflective of the fact that different federalism values can pull in different

166. Id. at 783.

167. See id. at 783–84 & n.11 (quoting 30 U.S.C. § 1255(b) (Supp. IV, 1976)) (distinguishing SMCRA and PURPA); see also Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 289–90 (1981) (discussing SMCRA).

168. *FERC*, 456 U.S. at 783 (O'Connor, J., dissenting) (arguing PURPA requires states "to abandon regulation of an entire field traditionally reserved to state authority").

169. Id.

170. Id.

171. Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities, 71 Fed. Reg. 69,440, 69,476 (Nov. 16, 2006) (to be codified at 18 C.F.R. pts. 50, 380).

172. Energy Policy Act of 2005, Pub. L. No. 109-58, sec. 1221(a), § 216(b), 119 Stat. 594, 947 (2005) (to be codified at 16 U.S.C. § 824p) (providing FERC with ability to preempt states from siting facilities that serve interstate energy needs). In this regard, the functionalist analysis would point out that the states' option to enter into interstate compacts and thereby avoid FERC reversal and delegation of the eminent domain power, id. § 216(i), "coerces" states because the alternative is so much more distasteful.

173. See Regulations for Filing Applications, 71 Fed. Reg. at 69,462–63 (suggesting all state permitting processes suffer preemption).

174. See *FERC*, 456 U.S. at 782 (O'Connor, J., dissenting) ("Similarly, Congress could dictate the agendas and meeting places of state legislatures, because unwilling States would remain free to abolish their legislative bodies.").

175. See supra notes 152–158 and accompanying text.

176. *FERC*, 456 U.S. at 786–87 (O'Connor, J., dissenting).

directions.[177] Part III.A will take up this point in greater detail, but even with Justice O'Connor's argument in mind, it is difficult to defend the functionalist criticism of section 216 on this point.

For one, field preemption usually has a broader connotation than something to the effect of "preemption of electricity facilities that serve interstate commerce."[178] Using "field preemption" as one factor invites judges to manipulate the definition of the "field" to fit an intuitive sense of how coercive a particular scheme is. The functionalist claim about "field preemption" is used in no small measure as a rhetorical gesture: PURPA *must* be coercive because it forces states to consider "abandon[ing] regulation of an *entire* field traditionally reserved to state authority."[179] A judge who questions section 216 might argue it forces states to abandon land use and environmental regulation, while a judge who defends it can argue it only preempts zoning of certain facilities.[180]

Moreover, Justice O'Connor's dignity argument in *FERC* sounds like a criticism of Congress's policy, i.e., its balance of local input and national direction in regulating a field.[181] While the Justices disagree as to whether the Tenth Amendment mandates a particular structure,[182] none seem to believe that it mandates a particular policy when Congress tries to resolve regulatory problems. For example, the Court has not suggested that if it determines a problem is within the commerce power's

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177. See infra Part III.A (discussing problems raised by attempt to fashion balancing test based on Part II's criticisms).

178. Examples of field preemption include foreign policy, immigration, and air traffic noise. See, e.g., Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 371–72 (2000) (considering foreign policy preemption); City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 633 (1973) (considering field preemption in context of regulation of air traffic noise); Hines v. Davidowitz, 312 U.S. 52, 68–69 (1941) (considering field preemption in immigration context).

179. *FERC*, 456 U.S. at 783 (O'Connor, J., dissenting) (emphasis added).

180. In *Petersburg Cellular*, Judge King and Judge Niemeyer had this argument about the Telecommunications Act. Judge Niemeyer contended that the Telecommunications Act preempted a field of land use regulation. Petersburg Cellular P'ship v. Bd. of Supervisors, 205 F.3d 688, 703 (2000) (Niemeyer, J., separate opinion). Judge King argued that it only preempted certain zoning activities. Id. at 716 n.5 (King, J., dissenting) (asserting Telecommunications Act does not preempt field of zoning, but only preempts zoning of cell towers).

181. This policy-based argument shines through when Justice O'Connor argues PURPA unwisely threatens "valuable state invention." *FERC*, 456 U.S. at 789 (O'Connor, J., dissenting).

182. For example, Justice Scalia and Justice Stevens disagreed in *Printz* as to whether the Constitution prohibits or permits commandeering of state executive officials. Compare Printz v. United States, 521 U.S. 898, 921–22 (1997) (majority opinion) (suggesting commandeering violates constitutional "separation" of state and federal authority into "two spheres"), with id. at 939 (Stevens, J., dissenting) (arguing that "correct understanding" of constitutional structure demonstrates that commandeering of state executive officials does not create Tenth Amendment problem).

scope, it will then ask whether Congress must solve it through conditional preemption versus complete preemption.[183]

3. *Section 216 and Viable Alternatives to Regulation.* — To resolve a possible constitutional infirmity with section 216(h) and FERC's interpretation of it, the formalist analysis above concluded that states can likely refuse to issue permits even after FERC has issued its construction permits.[184] This interpretation of 216(h) and FERC's rule still arguably creates an "untethered regulatory command"[185] that directs states to act but does not provide a regulatory alternative.[186] If states want certain aspects of FERC-permitted facilities regulated,[187] they will have to do so themselves (consistent with FERC conditions) or section 216 will simply preempt, and leave unregulated, those aspects.[188] *FERC v. Mississippi* would render this permissible,[189] but this raises political accountability concerns.

New York's vision of political accountability suggests that voters look to the last actor in the regulatory chain who has the ability to act.[190] As a result, voters may blame the states for lack of regulation as much as for the federal policies accomplished through commandeering. Both, however, result from Congress's narrowing of the state's regulatory choices.[191]

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183. In *New York*, Justice O'Connor made clear that the Constitution does not "mandate a particular form of accounting" and protects, within broad limits, "Congress['s] . . . power to structure federal spending." 505 U.S. 144, 172–73 (1992). Similarly, Justice White concurred in the majority's judgment that Congress's choices of conditional preemption and conditional spending were constitutional; he would have gone further and concluded the take title incentive was also within Congress's power to approve as part of an interstate compact. Id. at 208 (White, J., concurring in part and dissenting in part).

184. See supra Part II.A.2 (resolving possible constitutional problem by concluding that two moments of conditional preemption occur under regulatory scheme).

185. See Candice Hoke, Constitutional Impediments to National Health Reform: Tenth Amendment and Spending Clause Hurdles, 21 Hastings Const. L.Q. 489, 552 (1994) (defining concept of "untethered regulatory command").

186. See id. at 554 (arguing untethered regulatory command unconstitutionally creates "regulatory vacuum").

187. For example, states might want certain environmental or height regulations to be in effect. See supra note 32 and accompanying text (describing state and local government regulation of electricity transmission facilities).

188. See supra Part II.A (presenting view of section 216(h) and FERC's interpretation as including two "moments" of conditional preemption).

189. See 456 U.S. 742, 766 (1982) (recognizing that Congress had not "provide[d] an alternative regulatory mechanism" but nonetheless concluding that PURPA was constitutional).

190. See 505 U.S. 144, 169 (1992) ("[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval . . . .").

191. Cf. Adler & Kreimer, supra note 10, at 99–100 (arguing that *New York*'s vision of political accountability suggests voters blame representatives for failure to act as result of federal preemption). Professor Hills has argued the outcome in *FERC* was suspect because there was no nexus between Congress's threatened vacuum and the goal of *regulating* utilities. Hills, supra note 12, at 926. Professor Rotunda made a similar point in his article

At the same time, however, it is difficult to say section 216 leaves a *vacuum* if states do not issue subsequent permits—FERC will still be conducting federal environmental reviews along with other federal agencies.[192] The application of the "untethered regulatory commands" concept to this setting threatens to undermine a federal determination that some regulatory conditions are not necessary to effectuate the twin goals of expanding the electricity grid and protecting the human environment. In other words, it threatens to substitute a judge's sense of viable regulatory alternatives for Congress's own.[193] In short, while the coercion analysis has some intuitive appeal, and helps to identify colorable concerns about the constitutionality of section 216, it ultimately forces reliance on judicially unmanageable factors.

C. *Functionalist Analysis of Section 216's Effect on Federalism Values*

The functionalist analysis of section 216 in Part II.B explores one common objection to conditional preemption: It can be "unduly coercive." This section considers other common objections to conditional preemption: Section 216's conditional preemption raises concerns regarding the federalism values the ban on commandeering supposedly serves. Because Part II.B has already raised political accountability and state dignity concerns, this section will touch on these arguments briefly.

1. *Section 216 Raises Political Accountability and State Dignity Concerns.* — The *New York* Court's concern that voters cannot glimpse chains of causation raises the question of whether the regulatory framework is ambiguous as to whether the states or the federal government are exercising ultimate control, as Justice Kennedy noted in *Lopez*.[194] FERC has interpreted section 216(h) to require or at least allow states and local governments to issue subsequent necessary permits consistently with the terms of a FERC siting permit.[195] Voters "may" be confused as to the proximate causes of decisions in such a scheme.[196] As for state dignity, in addition to Part II.B's arguments, FERC's broad override transforms state siting

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on conditional preemption but also inexplicably defended *FERC*. See Rotunda, Conditional Preemption, supra note 31, at 324 n.250 ("As long as the federal government is committed to take over a preemptible area of governance under the terms it sets for the states, the decision made at the federal level . . . [is] consistent with the federalism of the United States Constitution.").

192. Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities, 71 Fed. Reg. 69,440, 69,455–59 (Nov. 16, 2006) (to be codified at 18 C.F.R. pts. 50, 380) (discussing FERC environmental reviews).

193. Cf. supra notes 181–183 and accompanying text (referring to critique of functionalist intuition as policy-laden).

194. United States v. Lopez, 514 U.S. 549, 576–77 (1995) (Kennedy, J., concurring) (drawing on *New York* to argue that if federal government were to regulate "areas of traditional state concern . . . the boundaries between the spheres of federal and state authority would blur").

195. See supra notes 129–133 and accompanying text.

196. *New York* speaks about possibilities, not certainties, of confusion. New York v. United States, 505 U.S. 144, 169 (1992).

decisions into the functional equivalent of an initial agency decision, reviewable de novo by the "agency head," FERC.[197]

2. *Section 216 Raises Concerns About Preservation of Local Resources.* — A variant on the accountability argument criticizes commandeering for sapping state resources without state consent.[198] Under section 216, unless states choose to stop considering permits for any site that could plausibly affect interstate commerce, they risk expending resources on denials FERC overrides or approvals FERC considers infeasible.[199] To be sure, one can respond that states have consented by remaining in the siting business.[200] The concern here, however, is one of notice.[201] Case-by-case conditional preemption makes it difficult for states to devote their resources elsewhere once and for all.[202]

The open, ambiguous nature of the limitations on FERC's jurisdiction challenges the counterargument that states will learn to predict FERC's desires. FERC can exercise its authority if the proposed facility is "consistent with the public interest . . . [,] will significantly reduce transmission congestion . . . [,] protects or benefits consumers . . . [,] [and] is consistent with sound national energy policy and will enhance energy independence."[203] The vagueness of this delegation to FERC allows for wide enough discretion that states may have difficulty predicting when

197. Cf. Administrative Procedure Act, 5 U.S.C. § 557(b) (2000) (providing rules for agency review of initial decisions); Adler & Kreimer, supra note 10, at 141–42 (arguing that both commandeering and conditional preemption equally undermine state dignity). The analogy, admittedly, is imperfect. States can participate as stakeholders in the FERC permitting process. Energy Policy Act of 2005, Pub. L. No. 109-58, sec. 1221(a), § 216(d), 119 Stat. 594, 948 (to be codified at 16 U.S.C. § 824p).

198. See *New York*, 505 U.S. at 168 (arguing that commandeering undermines state citizens' abilities to instruct representatives to "devote [their] attention and resources" elsewhere).

199. See Energy Policy Act § 216(b)(1)(C) (authorizing FERC to override states that have "withheld approval" or conditioned approvals in ways that interfere with section 216's goals).

200. Cf. FERC v. Mississippi, 456 U.S. 742, 765–67 (1982) (concluding states' refusal to exit field involves meaningful consent to federal direction).

201. Cf. South Dakota v. Dole, 483 U.S. 203, 207 (1987) (requiring Congress to attach clear conditions to receipt of federal funds); Celestine Richards McConville, Federal Funding Conditions: Bursting Through the *Dole* Loopholes, 4 Chap. L. Rev. 163, 183 (2001) ("A state cannot make a full and informed choice regarding whether to participate in the federal program without understanding how the federal program will impact the state's own policy choices.").

202. Complete preemption harms state control of resources in a different way. As Professor Tushnet has argued, preemption may disrupt local resources more than commandeering, since commandeering merely "shifts" issues down the state's "priority list," while preemption removes issues from the state's purview entirely. See Tushnet, Globalization, supra note 90, at 30.

203. Energy Policy Act § 216(b)(3)–(5) (describing requirements for FERC to site facilities).

FERC will or will not act.[204] As a result, the preservation of local resources argument raises concern.

3. *Conditional Preemption Raises Concerns About Reducing the Risk of Tyranny.* — *Printz* argues that the diffusion of authority between states and the federal government protects against tyranny.[205] Commandeering centralizes authority, pressing state resources into federal service without cost, thereby "augment[ing]" the federal government's power.[206] This argument makes sense for any situation where the federal government will not preempt because it is not feasible for it to set up a federally run regulatory alternative.[207] In such a situation, where the regulatory issue is within the bounds of Congress's powers but not within the bounds of the federal government's resources, commandeering could "augment" the federal government's power.

Preemption, however, threatens to diffuse authority more than commandeering does when it leads to an expanded federal bureaucracy instead of states' exercise of bounded discretion.[208] When every state consents to a conditional preemption threat, power is centralized (i.e., not diffused) to the same degree as it is under commandeering: States are implementing federal directives.[209] To the extent that some states consent and the federal government can act to implement the program directly when other states do not, conditional preemption also threatens federalism's diffusion of power.[210]

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Part II raised two functionalist problems with a formalist analysis of section 216 of EPAct. First, section 216 may unacceptably coerce the

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204. Cf. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474 (2001) (reaffirming that particular statutory delegation to act in "public interest" was constitutional, but recognizing that delegation created broad range for agency discretion).

205. Printz v. United States, 521 U.S. 898, 921 (1997) (arguing "separation of the two spheres [state and federal] is one of the Constitution's structural protections of liberty").

206. Id. at 922.

207. Cf. Neil S. Siegel, Commandeering and Its Alternatives: A Federalism Perspective, 59 Vand. L. Rev. 1629, 1634 (2006) (arguing "anticommandeering doctrine undermines federalism values when the (clearly constitutional) alternative of preemption is reasonably available").

208. See *Printz*, 521 U.S. at 977 (Breyer, J., dissenting) (arguing that "creation of a new federal gun-law bureaucracy" threatens individual liberty more than commandeering); Stephen Breyer, Active Liberty: Interpreting Our Democratic Constitution 56–62 (2005) (criticizing *New York* for forcing federal government to expand federal bureaucracy).

209. This point is true from the perspective of implementation of the scheme. As for the question of whether commandeering and conditional preemption are differentially situated as to the political process, see infra Part III.B and Part IV.

210. This argument takes as given *Printz*'s underlying account of federalism's protection of political liberty. Some argue that protection of state sovereignty has threatened political liberty. Slavery is a common example. See Ernest A. Young, The Conservative Case for Federalism, 74 Geo. Wash. L. Rev. 874, 883 n.53 (2006) (discussing slavery-based criticisms of federalism).

states, not offering them a real "choice" in the sense that it unjustifiably undermines their dignity and accountability to their citizens. Second, section 216 threatens to undermine the federalism values on which the Court rested its commandeering ban. While the coercion approach may be judicially unmanageable, many of the concerns that this Part raised cannot easily be dismissed. In particular, section 216 appears to disrupt political accountability and threatens to waste state resources. Given these problems, should the Court expand its commandeering jurisprudence to cover section 216's act of conditional preemption?

III. Does Commandeering Doctrine Require Radical Surgery?

Part II's critiques suggest that commandeering doctrine requires radical change because its formalism is underinclusive. Part III considers a common scholarly suggestion: Create a balancing test to apply to Tenth Amendment claims.[211] Ultimately rejecting this proposal as judicially unmanageable, Part III raises the need for Part IV's defense of the apparently underinclusive commandeering ban.

A. *Considering a Balancing Test*

Scholars have questioned the categorical nature of the commandeering ban, arguing for a more sensitive doctrine that balances the various state and federal interests involved in any federal scheme.[212] Indeed,

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211. Another possibility this Part does not discuss is eliminating conditional preemption entirely. See, e.g., Michael S. Greve, Against Cooperative Federalism, 70 Miss. L.J. 557, 615–22 (2000) (arguing cooperative federalism will lead to "entangled, paralyzed, [and] demoralized" America); Vázquez, supra note 12, at 1336 (suggesting one way to resolve tension between commandeering ban and conditional preemption is to eliminate availability of conditional preemption). This proposal requires a wholesale rejection of *Printz*'s and *New York*'s references to permissible conditional preemption programs. *Printz*, 521 U.S. at 925 (reaffirming both *Hodel v. Virginia Surface Mining & Reclamation Ass'n* and *FERC v. Mississippi*); New York v. United States, 505 U.S. 144, 173–74 (1992) (same). Most scholarly criticism of *New York* has taken a moderate stance, asking if a functionalist balancing test of some sort would be preferable to the Court's formalist rule. See infra note 212. For discussion of whether Part II's criticisms suggest that the Court should *lift* the commandeering ban, see infra Part III.B.

212. Professor Erwin Chemerinsky has raised variants of this argument in a series of articles criticizing the Rehnquist Court's formalist approach to federalism. See Erwin Chemerinsky, Federalism Not as Limits, But as Empowerment, 45 U. Kan. L. Rev. 1219, 1220 (1997) ("[F]ederalism should be viewed as not being about limits on any level of government, but empowering each to act to solve difficult social issues."); Erwin Chemerinsky, The Values of Federalism, 47 Fla. L. Rev. 499, 538 (1995) (offering similar argument). Whether Professor Chemerinsky's vision could generate predictable, manageable doctrine is an open question. While Chemerinsky employs his vision of federalism as empowerment to criticize the Court's Tenth Amendment jurisprudence, Professor Deborah Merritt argues "that Professor Chemerinsky's vision of empowerment supports the Supreme Court's recent decision in *New York v. United States*." Deborah J. Merritt, Federalism as Empowerment, 47 Fla. L. Rev. 541, 541 (1995). These contrary results, based nominally on the same functionalist vision of federalism, suggest that a broad-based functionalist approach might not be judicially manageable.

Part II's critique of section 216 counsels against categorical conclusions about the effect of federal regulation on the federalism values *New York* seeks to protect. The constitutionality of federal intervention into state regulatory decisions may be, so to speak, in the details.[213]

This argument raises the question of whether the Court should adopt a more sensitive Tenth Amendment jurisprudence that could differentiate between types of commandeering and could account for conditionally preemptive regulations that raise the same concerns the Court expressed in *New York* and *Printz*. A balancing standard that accounts for both the federal interests and the degree of interference with states' federalism interests theoretically provides a better fit between values and doctrine.[214]

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213. Compare, for example, the background check and receipt of forms provisions of the Brady Act with the take title provision of the LLRWA, both of which the Court concluded were impermissible commandeering. See *Printz*, 521 U.S. at 935 (invalidating provisions of Brady Act); *New York*, 505 U.S. at 177 (invalidating provision of LLRWA). Part II's critiques of section 216, for example, suggested that conditional preemption sometimes creates political accountability concerns that resonate with the Court's commandeering concerns. Comparing the Brady Act and the LLRWA in light of a functionalist assessment belies the Court's formalist equation of the two.

With respect to political accountability, the conventional wisdom seems to be that the LLRWA raised a greater concern than the Brady Act. See, e.g., Caminker, State Sovereignty, supra note 160, at 1010–11 (distinguishing Brady Act from LLRWA based on former's "ministerial" nature); Jackson, *Printz* and Principle?, supra note 61, at 2203–04 (arguing LLRWA presented greater accountability problem than Brady Act). By requiring the states to exercise considerable discretion in siting radioactive waste facilities, an act likely to draw local communities' ire, the LLRWA presented more of a political accountability problem than the Brady Act, whose ministerial command local law enforcement officers could easily explain as the result of federal legislation. Tushnet, Globalization, supra note 90, at 28–29 (arguing that "*New York v. United States* provides a better example than *Printz*" of political accountability problems because states can easily explain that Congress is accountable for ministerial duties). One could argue, however, that the Brady Act presented more of a political accountability problem. It did not tell local law enforcement officers what to do with the information they garnered when performing the background check. The officers could tell the seller not to sell based on the ineligibility of the prospective buyer if they wanted. *Printz*, 521 U.S. at 903. Given "widespread" gun ownership in America, Staples v. United States, 511 U.S. 600, 610 (1994) ("[T]he fact remains that there is a long tradition of widespread lawful gun ownership by private individuals in this country."), and the higher level of access citizens have to local government, Gregory v. Ashcroft, 501 U.S. 452, 458 (1991), one could argue the Brady Act mandated a duty more likely to create frequent accountability problems than the LLRWA. Here, it is important to remember that the Brady Act did not prohibit sale solely to felons, but to a wide category of persons, including nonresidents under 21, citizens dishonorably discharged from the military, and persons who had committed misdemeanors involving domestic violence. *Printz*, 521 U.S. at 902 (describing ineligible prospective buyers under Brady Act). To be sure, one could still argue that both the LLRWA and the Brady Act, despite their differences, exceeded constitutionally permissible levels of federalism disruption. Yet by exposing possible differences, a functionalist approach challenges the Court's formalist equation of the two.

214. The Court's pre-*Garcia* jurisprudence developed in precisely that direction. See generally Robert F. Nagel, Federalism as a Fundamental Value: *National League of Cities* in Perspective, 1981 Sup. Ct. Rev. 81, 86 (criticizing objections to *National League of Cities*

Unfortunately, crafting such a test is not easy.[215] Professor Alexander Aleinikoff has identified the challenges a balancing test must overcome, several of which are relevant here: (1) utilizing a scale that is external to judges' personal preferences; (2) determining which interests deserve a place on the scale; (3) determining the effect of balancing interests in the case at bar on nonparties; and (4) convincingly conceptualizing the relationship between individual and governmental interests.[216]

The functional justifications for federalism[217] could serve as an external scale.[218] Problems arise, however, in trying to meet the last three challenges. For example, courts will struggle with weighing one federalism value against another. One of Part II's critiques of section 216 suggested that its case-by-case preemption of a regulatory role states have traditionally played confuses lines of political accountability. The federalism interest in preserving clear lines of political accountability counsels for complete preemption.[219] Complete preemption, however, could undermine the federalism interest in preserving a regulatory role for the states, which have the opportunity under section 216 to experiment with siting decisions in the first instance.[220] Even if FERC preempts states'

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balancing as based on "[s]cholarly preoccupation with rights" rather than structural constitutional constraints).

215. Professor Leff, in characteristic style, put the problem thus: "[*A*]*ctual* weighing is only possible because all matter is equally affected by the force of gravity. . . . [N]ot all legal questions are thoroughly amenable to the same process by which lumps of matter are compared for gravitational attraction." Arthur Allen Leff, The Leff Dictionary of Law: A Fragment, 94 Yale L.J. 1855, 2124 (1985). Of course, Supreme Court Justices have suggested federalism is amenable to balancing. See, e.g., Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 562–63 (1985) (Powell, J., dissenting) (discussing balancing approach of *National League of Cities* and other cases).

216. T. Alexander Aleinikoff, Constitutional Law in the Age of Balancing, 96 Yale L.J. 943, 973–74, 977–78, 981–82 (1987). Professor Merritt drew on Professor Aleinikoff's criticisms in arguing that the adoption of Justice Blackmun's balancing test in subsequent cases increased the ambiguity of the Court's Tenth Amendment jurisprudence. Deborah Jones Merritt, The Guarantee Clause and State Autonomy: Federalism for a Third Century, 88 Colum. L. Rev. 1, 13–14 & n.74 (1988) [hereinafter Merritt, Guarantee Clause].

217. Traditional justifications include the claims that (1) federalism diffuses power to multiple authorities, mitigating against tyranny; (2) federalism provides for greater political responsiveness; (3) federalism increases regulatory diversity and thereby maximizes opportunities for the satisfaction of the diverse preferences of the American citizenry; and (4) federalism creates opportunities for governmental experimentation that may, over the long run, increase social welfare by improving governance. See, e.g., Merritt, Guarantee Clause, supra note 216, at 3–10.

218. Professor Siegel has crafted a balancing test with this point in mind, but explicitly condones conditional preemption under the test, making his test inapplicable given the goals here. See Siegel, supra note 207, at 1677.

219. Cf. Hills, supra note 12, at 826 (arguing that *New York*'s political accountability argument "condemn[s] . . . even *voluntary* intergovernmental cooperation").

220. See Siegel, supra note 207, at 1634 (arguing that preserving regulatory role for states even if political accountability is sacrificed may be preferable in certain circumstances). For further discussion of this problem, see supra notes 170–177 and accompanying text.

decisions, these decisions may signal to FERC important local issues involved in siting.[221] Should both of these interests be on the scale? If so, on which sides should the Court place them?

Determining the effects of balancing on nonparties also creates problems because the states are not a monolithic entity with regard to any particular program. Take, for example, section 216's goal of reducing transmission congestion. West Virginia may not face a pressing power problem, while the decisions it makes regarding facility siting have direct effects on power congestion in Virginia or Washington, D.C.[222] In other words, West Virginia has different interests from other states in regard to section 216. Yet, West Virginia may one day want federal intervention on some other issue. More deeply, it may share an interest with other states in federalism's protection of state sovereignty.[223] At the same time, federal resolution of a state-based NIMBY problem is arguably appropriate from a structural perspective.[224] Thus, determining the effect of a Tenth Amendment ruling on nonparty states presents the difficult problem of how the Court should consider the relationship between a particular regulation's policy and long-term vertical federalism concerns. Similar problems arise with regard to the relationship between individual citizens' interests and governmental interests.[225]

These complex problems are not necessarily intractable, but they ask courts "to replicate the job that a democratic society demands of its legislature."[226] It is not surprising, then, that various post-*New York* proposals for Tenth Amendment balancing design a core state functions test to

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221. As Part IV discusses in greater detail, states have an opportunity to provide input even when FERC exercises its jurisdiction and considers preempting state siting decisions.

222. Cf. Eagle, supra note 14, at 13–22, 25–31 (describing NIMBYism problem that arises from uneven distribution of benefits from electricity transmission facility siting); New York v. United States, 505 U.S. 144, 199 (1992) (White, J., concurring in part and dissenting in part) ("The Court's refusal to force New York to accept responsibility for its own problem inevitably means that some other State's sovereignty will be impinged by it being forced, for public health reasons, to accept New York's low-level radioactive waste.").

223. Cf. *New York*, 505 U.S. at 181–82 (majority opinion) (emphasizing Constitution's structural provisions, and arguing that states have constitutional interest in federalism, regardless of particular interests of state officials facing specific policy problem). To put the point another way, some states may support commandeering of other states when it comes to one regulatory problem, while wanting to be free of it when it comes to a different problem.

224. See id. at 199 (White, J., concurring in part and dissenting in part) ("I do not understand the principle of federalism to impede the National Government from acting as referee among the States to prohibit one from bullying another.").

225. In their critique of federalism-based protections of states' rights, Professors Rubin and Feeley point out that, historically, some individuals' interests and their states' interests do not align. One clear example involved southern segregation. Edward L. Rubin & Malcolm Feeley, Federalism: Some Notes on a National Neurosis, 41 UCLA L. Rev. 903, 946–48 (1994). The point here is simply that the complicated relationship between individual and state interests makes comprehensive balancing difficult.

226. Aleinikoff, supra note 216, at 984.

check judicial inquiry.[227] *Garcia*'s criticisms of a core state functions approach, as well as the record of inconsistent lower decisions that *Garcia* identified,[228] suggest that this test would not be judicially manageable. Both precedent and prudence support the *New York* Court's decision to create a bright-line prohibition on commandeering[229] that is more judicially manageable than the pre-*Garcia* balancing test. Thus, institutional competency concerns justify the apparently underinclusive commandeering ban.

B. *Should the Court Abandon Commandeering Analysis?*

Perhaps, however, the commandeering ban is worse than underinclusive: Perhaps it is ill-advised and unnecessary.[230] Professor Evan H. Caminker, for example, has argued that (1) conditional preemption raises the same political accountability problems as commandeering, yet (2) conditional preemption is constitutional, leading to the conclusion that (3) political accountability is not a constitutionally significant value, which undermines the Court's ban on commandeering.[231] The Court's ban is a "balancing" test of sorts. It holds that no federal interest can outweigh the states' interests in avoiding commandeering.[232] If one doubts the Court's ability to balance in the conditional preemption context, then perhaps one should doubt the implicit balance its commandeering ban strikes.

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227. See, e.g., Jackson, *Printz* and Principle?, supra note 61, at 2254 ("[A] focus on whether a federal statute interferes with constitutionally contemplated functions of state governments may require developing a theory of core state government functions . . . ."); Pham, supra note 12, at 1408–12 (arguing for application of intermediate scrutiny to cooperative federalism schemes and for requirement that states show "core power" at issue in order to maintain successful claim).

228. *Garcia* offered an impressive list of inconsistent lower court cases under the *National League of Cities* framework. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 538–39 (1985). One quotation suffices to make the point. The Court canvassed a set of cases and stated, "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." Id. at 539.

229. *New York*, 505 U.S. at 176–78 (concluding commandeering is per se unconstitutional).

230. *Garcia*, of course, argued that *National League of Cities* was not only unwise, but unnecessary. *Garcia*, 469 U.S. at 551 & n.11 (arguing political process protects states). Justice White's and Justice Stevens's dissents in *New York* argued that the Court should respect the political process's balancing of federalism interests. *New York*, 505 U.S. at 210 (White, J., dissenting) ("By invalidating the measure designed to ensure compliance for recalcitrant States, such as New York, the Court upsets the delicate compromise achieved among the States and forces Congress to erect several additional formalistic hurdles to clear before achieving exactly the same objective."); id. at 211 (Stevens, J., dissenting) ("I see no reason why Congress may not also command the States to enforce federal water and air quality standards or federal standards for the disposition of low-level radioactive wastes.").

231. See Caminker, State Sovereignty, supra note 160, at 1069–72.

232. See *New York*, 505 U.S. at 177–78 (rejecting notion that any federal regulatory interest could justify violation of Constitution's structural protection for state sovereignty).

Part IV responds to this argument by suggesting there is a constitutionally significant difference between commandeering and conditional preemption when it comes to nonjudicial safeguards of federalism. Drawing on Professor Hills's argument that the commandeering ban helps states protect themselves in the political process,[233] Part IV illustrates how the line between commandeering and conditional preemption enables the states to have a voice during the administrative process as well. Commandeering remains a constitutionally suspect federal tool because, as Part IV argues, it does not offer the same opportunity for voice that conditional preemption offers.

IV. SECTION 216 AND THE VALUES OF COOPERATIVE FEDERALISM: A DEFENSE OF CONDITIONAL PREEMPTION

Part I described EPAct section 216 and the Court's line between conditional preemption and commandeering. Part II questioned whether section 216's conditional preemption is consistent with the Court's doctrine, since it threatens the values of the commandeering ban and intuitively raises coercion concerns. Part III deepened the problem, arguing it is prohibitively difficult to craft a more delicately attuned balancing test in response to Part II's criticisms. Is the Court left, then, with a normatively unsatisfying, underinclusive ban on commandeering?

Part IV responds to critiques of the current test with a defense that addresses the values of cooperative federalism and attempts to justify the judicially manageable, but seemingly underinclusive, commandeering ban. Part IV argues the crucial states' rights question for cooperative federalism programs is whether states retain "voice,"[234] or an opportunity to offer input at the policy implementation level (often the administrative level),[235] even if they refuse to consent to federal demands. Part IV.A describes a "voice" model of states' rights. It argues this model responds to the insights of Part II's critiques and provides a defense of section 216 that addresses some of the Court's normative concerns in its commandeering doctrine. Part IV.B considers counterarguments and argues for

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233. Hills, supra note 12, at 866–69 (arguing commandeering undermines states' ability to protect their interests during political process of devising legislation).

234. See Hirschmann, supra note 19, at 21, 30 (creating concepts of voice and exit); see also Hanoch Dagan & Michael A. Heller, The Liberal Commons, 110 Yale L.J. 549, 590–91 (2001) (discussing concepts of voice and exit). One scholar has linked the issues conditional preemption poses to the concepts of exit and voice. See Weiser, supra note 11, at 704–07. Professor Weiser argues that the Court should develop a doctrine by focusing on state opportunities for exit. See id. at 706 (arguing "an exit right is important to the success of cooperative federalism"). It is no critique of his argument to point out that it does not discuss the problems that this Note identifies in Parts II and III.

235. See, e.g., Energy Policy Act of 2005, Pub. L. No. 109-58, sec. 1221(a), § 216(b), 119 Stat. 594, 947 (to be codified at 16 U.S.C. § 824p) (delegating authority to FERC to issue preemptive construction permits); Clean Water Act, 33 U.S.C. § 1342 (2000) (delegating authority to Environmental Protection Agency to oversee implementation, at either federal or state level, of point source discharge permitting program).

judicial enforcement of voice and a prohibition on conditional preemption untethered from any viable federal regulatory alternative.

A. *Accountability, Coercion, and the Administration of Cooperative Federalism.*

The *New York* Court was unwilling to resign states' rights to political and administrative processes when it came to commandeering.[236] Part II suggested that the Court should not have left states to political and administrative safeguards in the context of conditional preemption. Part III offered a normatively unsatisfying reason why the Court shied away from policing conditional preemption: It is too hard to craft a doctrine to do so.[237] This section argues there was an additional reason why the Court was justified in not policing conditional preemption. Conditional preemption affords the states an opportunity for voice[238] that mitigates Part II's criticisms. Voice enables states to protect themselves during the administrative process, allaying the Court's functionalist concerns about commandeering.[239]

1. *Voice and Processual Safeguards of Federalism.* — In this context, voice means a meaningful opportunity to influence FERC as it considers exercising its conditional preemption authority and as it considers the terms of a federal permit.[240] Admittedly, at first glance this invocation of voice in defense of conditional preemption is inconsistent with Part II's analogy between conditional preemption and commandeering. States can of course complain about federal commandeering and the resulting federal policies, but nevertheless the Court has prohibited commandeering. If conditional preemption is like commandeering with respect to the functionalist justifications for federalism, then no amount of voice can make conditional preemption constitutional.

As this Part shows, however, conditional preemption, while sharing some similarities with commandeering, is constitutionally distinct. The opportunity for voice in section 216's conditional preemption challenges

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236. *New York*, 505 U.S. at 168–71 (concluding commandeering violates Tenth Amendment). The Court reached this conclusion even though the LLRWA was the result of state negotiation. Id. at 181.

237. In this sense, one can argue that *New York* integrated some of the sensibility of *Garcia*. See Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546–47 (1985) (arguing Court's balancing test was judicially unmanageable). By fashioning a bright line rule that lower courts could easily break down into three formalist steps, *New York* avoided miring the federal judiciary in a functionalist quagmire. For further discussion of the difficulties of policing conditional preemption, see supra Part III.A.

238. For a discussion of "voice," see Hirschmann, supra note 19, at 30–32.

239. For a list of these concerns, see supra Parts II.B–C.

240. This opportunity is important because, as this section will argue, voice in the conditional preemption context mitigates concerns about a state's inability to exit; it is not, as in the property context, an alternative to exit. Cf. Hirschmann, supra note 19, at 30 (describing voice as "any attempt at all to change, rather than to escape from, an objectionable state of affairs . . . through appeal to a higher authority with the intention of forcing a change in management, or through various types of actions and protests, including those that are meant to mobilize public opinion").

Part II's analogy, and ameliorates its concerns regarding federalism values. Section 216's scheme creates a real probability that states can have an effect on policy setting and implementation. Commandeering does not allow for the same effect.

In the property law setting, "voice," the ability to be heard, is an alternative to "exit," or the decision to leave a property regime.[241] In the case of cooperative federalism, voice is not an alternative to exit. It is, rather, the ability to have input at the level of policy design and implementation.[242] Under traditional commandeering analysis, voice is irrelevant: Congress can command a state to choose between regulating and preemption regardless of what the state thinks about the choice.[243]

The claim here, however, is that voice affects the *nature* of the choice itself. In response to Part II, this section argues that meaningful voice leads to meaningful choice: States have the opportunity to help shape a more palatable federal regulatory alternative.[244] There is, of course, a difference between mere chatter and protest that affects policy.[245] In this context, meaningful voice would mean more than complaining. It would mean the opportunity to influence and check FERC.[246]

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241. See Vicki Been, "Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 Colum. L. Rev. 473, 476–77 (1991) (discussing exit option as moving from jurisdiction); see also Dagan & Heller, supra note 234, at 590–91 (discussing voice as alternative to exit from common property regime).

242. Cf. Hirschmann, supra note 19, at 30 (describing voice as attempt "to change, rather than to escape from, an objectionable state of affairs" by complaining, protesting, etc.).

243. *FERC v. Mississippi* illustrates this dynamic in dramatic fashion. The Court recognized that the states faced a difficult choice given that the federal government had not offered to regulate utilities if the states refused to consent to federal demands. Nevertheless, it upheld the scheme. See FERC v. Mississippi, 456 U.S. 742, 765–66 (1982). Moreover, in *New York*, the United States pointed out, "[t]he Act enables the States to regulate pursuant to Congress' instructions in . . . different ways. States may avoid taking title by contracting with sited regional compacts, by building a disposal site alone or as part of a compact, or by permitting private parties to build a disposal site." New York v. United States, 505 U.S. 144, 176 (1992). Justice O'Connor dismissed this point, concluding, "No matter which path the State chooses, it must follow the direction of Congress." Id. at 177. In a sense, however, conditional preemption also forces states to follow Congress's direction either way: States must "not act" with respect to the facility (preemption) or act with respect to it pursuant to Congress's conditions. Similarly, one could consider preemption to be a form of commandeering. Mark Tushnet, The New Constitutional Order 83–90 (2003). Part II, however, does not rest its analogy between conditional preemption and commandeering on that point, but rather on criticisms suggesting that section 216 coerces states by not giving them a real choice to decline participation and disrupts other federalism values.

244. For discussion of arguments that section 216 denies states a real choice, see supra Part II.B.

245. See Nicole Stelle Garnett, The Neglected Political Economy of Eminent Domain, 105 Mich. L. Rev. 101, 128–29 (2006) (describing how speed of eminent domain proceeding may undermine voice and effective protest).

246. Cf. Dean Aflange, Jr., Congressional Regulation of the "States Qua States": From *National League of Cities* to *EEOC v. Wyoming*, 1983 Sup. Ct. Rev. 215, 242 (supporting political safeguards argument and stating, "the critical point [of the argument] is not

Professors Hanoch Dagan and Michael Heller have described the conditions required for effective voice in the liberal commons setting.[247] While some of the conditions, such as clear definition of the commons boundaries,[248] find no analogue here, the discussion of the importance of procedural norms is instructive.[249] Four procedural norms are crucial for successful voice: "disclosure, consultation, . . . fair hearing . . . [,] [and] [the possibility of] judicial intervention."[250] These procedural norms foster dialogue, deliberation, and "amplify each commoner's ability to change commons management from within."[251]

Each of these norms is present in the implementation process that section 216 creates. As a result, even if states refuse to site facilities pursuant to federal demands, they have the opportunity for effective voice in policy implementation. Section 216(d) requires FERC to offer states an opportunity for comment on "the need for and impact of a facility covered by the permit."[252] FERC's rules require it to release draft National Environmental Policy Act review documents to all stakeholders, including states, for their comment.[253] FERC will also use information "developed in State proceedings" as part of the record of decision.[254] This will include consideration of state findings as to the proposed project.[255] Moreover, states as parties to the FERC proceedings can file requests for rehearing following a permitting decision.[256] Finally, aggrieved parties, including states, may file appeals in federal court.[257] Thus, states have not only an opportunity to place their views before FERC, but also an

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whether [state's interests] are dominant but whether they can be assured a respectful and sympathetic hearing"). Dean Larry Kramer has modified the political safeguards theory by arguing in part that the relationships that develop between repeat players in the administration of federalism—i.e, state agency officials and federal legislators and officials—help to insure sympathy at the federal level of policy development. See Kramer, supra note 79, at 283.

247. Dagan & Heller, supra note 234, at 582–602 (discussing conditions for effective liberal commons). Of particular concern here is their discussion of procedural norms, which draws on Margaret A. McKean, Success on the Commons: A Comparative Examination of Institutions for Common Property Resource Management, 4 J. Theoretical Pol. 247 (1992). See Dagan & Heller, supra note 234, at 594–95.

248. See Dagan & Heller, supra note 234, at 591 (discussing "how best to determine the boundaries of group jurisdiction").

249. See id. at 594–95 (discussing how procedural "mechanisms significantly facilitate successful liberal commons property").

250. Id. at 595.

251. Id. at 590–91.

252. Energy Policy Act of 2005, Pub. L. No. 109-58, sec. 1221(a), § 216(d), 119 Stat. 594, 948 (to be codified at 16 U.S.C. § 824p).

253. Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities, 71 Fed. Reg. 69,440, 69,451 (Nov. 16, 2006) (to be codified at 18 C.F.R. pts. 50, 380).

254. Id. at 69,454.

255. Id. (stating FERC will consider state findings from state proceedings along with its own findings when conducting an environmental impact review).

256. Id. at 69,451 (describing FERC rehearing process).

257. Id. (discussing availability of appeal under Federal Power Act).

opportunity to rely on those views in challenging FERC decisions in federal court.

This opportunity for voice means that section 216 does not threaten to push the states entirely out of the decisionmaking process if they choose not to follow federal direction. Unless states believe there is no value to participating in the federal administrative process, this opportunity undercuts the severity of section 216's preemption penalty. Indeed, there is every indication that states participate vigorously in federal proceedings when permitted to and often initiate complex negotiations with the federal agency.[258]

This participation is significant because it raises the possibility that states can protect federalism values through processual mechanisms. Professor Roderick M. Hills has argued that the line between commandeering and conditional preemption helps the political process to hold Congress more accountable to the states, thereby reducing the risk of tyrannical overreaching.[259] As long as states can make credible threats of refusing to participate in a conditional preemption scheme, they can force Congress to negotiate for more favorable conditional preemption terms.[260] *New York* thus creates an entitlement rule that gives states leverage as Congress is contemplating creating a conditional preemption scheme; if Congress needs the states' participation, it will have to "buy" that entitlement.[261]

After legislative negotiation over the terms of a conditional preemption scheme, agency implementation of cooperative federalism creates a second process within which states can bargain with federal decisionmakers[262] and hold them administratively accountable in the approval of a state's proposed enforcement plan.[263] Opportunity for partic-

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258. Examples include participation in federal land use planning, federal hydropower licensing decisions, Clean Water Act implementation, and Coastal Zone Management Act implementation. See George Cameron Coggins, The Developing Law of Land Use Planning on the Federal Lands, 61 U. Colo. L. Rev. 307, 322 & n.142 (1990) (referring to complex negotiations that arise over federal land use planning); Avinash Kar, Ensuring Durable Environmental Benefits Through a Collaborative Approach to Hydropower Re-Licensing: Case Studies, 11 Hastings W.-Nw. J. Envtl. L. & Pol'y 27, 34–35 (2004) (describing case studies of licensing that involved federal and state negotiation); Thomas W. Merrill, Golden Rules for Transboundary Pollution, 46 Duke L.J. 931, 956–57 (1997) (referring to state participation in section 401 federal permitting under Clean Water Act through setting of local water quality standards).

259. Hills, supra note 12, at 875 (arguing that ban on commandeering improves political process by allowing "'free-trade federalism' to flourish").

260. See id. at 855–58, 866 (arguing that ban on commandeering allows states to lobby Congress for more favorable legislative conditions).

261. Id. at 872 ("If Congress is willing to pay the price . . . demanded by each state, then Congress can use each state's regulatory machinery to implement federal law.").

262. Professor Hills suggests as much briefly when he states that the administrative process provides "a second stage of intergovernmental lobbying." Id. at 866.

263. Administrative accountability "refers to the ability of one actor to demand an explanation or justification of another actor for its actions and to reward or punish that

ipation even in the event of preemption lessens the force of the functionalist argument's intuition that preemption can be coercive by cutting state input out of regulatory implementation entirely.[264] In order to show, however, that section 216 creates this opportunity, it is necessary to demonstrate that FERC needs the states' participation to fulfill its mandate.[265] Since this demonstration helps show that voice ameliorates Part II's consideration of federalism values, this section now turns to that issue.

2. *Section 216 and the Values of the Commandeering Ban Revisited.* — Under section 216, FERC has a mandate to expedite the siting of critically important electricity transmission facilities.[266] As FERC itself has put it, "time is of the essence in the siting of these facilities."[267] As a result, FERC believes "it is incumbent on a project sponsor and States to work together in an attempt to site the facilities at the State level."[268] This statement is either mere rhetoric or an implicit acknowledgment that FERC does not have the resources to process every necessary permit expeditiously,[269] as energy experts have argued in criticizing section 216 for not going far enough.[270] FERC thus does not have an incentive to override state permitting decisions in such a manner as to chill state involvement. Nor does it have an incentive to make decisions without any concern for state objections, which could lead to lengthy state challenges at both the administrative level and in the federal courts.[271] Commandeering, by contrast, does not exert pressure on a federal entity charged with a congressional mandate, because its directions fall solely on the states.[272]

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second actor on the basis of its performance or its explanation." Rubin, supra note 18, at 2119.

264. See supra Part II.B (arguing that conditional preemption may seem intuitively coercive).

265. Cf. Hills, supra note 12, at 872 (arguing that it may be more cost-effective for Congress to grant implementation discretion to states to gain their participation instead of relying on complete preemption and federal regulation). Hills's argument suggests Congress responds to states' voices during the legislative process when Congress needs the states' participation.

266. See Part I.A (describing section 216).

267. Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities, 71 Fed. Reg. 69,440, 69,453 (Nov. 16, 2006) (to be codified at 18 C.F.R. pts. 50, 380).

268. Id.

269. In other words, FERC may not be able to fully accomplish its mandate by completely "displacing" the states. Cf. Tushnet, Globalization, supra note 90, at 36 (discussing scenario in which threat of preemption is empty "because Congress lacks the will or resources").

270. See Eagle, supra note 14, at 43 (arguing states' participation in regional siting is necessary if FERC is to accomplish its mandate, and suggesting, with no reference to Tenth Amendment, that Congress should "simply mandate regional siting").

271. See supra notes 252–257 and accompanying text.

272. See New York v. United States, 505 U.S. 144, 168–69 (1992) ("[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the

One could respond that FERC may not care if it fulfills its mandate, both because it is an independent agency sheltered from public opinion and because conditional preemption so deeply confuses political accountability that the federal government suffers no consequences if a conditional preemption scheme does not move forward.[273] This, however, ignores the pressure that FERC may feel to fulfill its mandate both from energy interests as well as Congress itself.[274] In other words, conditional preemption is differentially situated from commandeering in terms of the interinstitutional pressures that inhere in the modern administrative state.[275]

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brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated . . . .").

273. FERC, after all, is an independent agency within the Department of Energy, which may reduce its accountability to the public. See Nicholas Bagley & Richard L. Revesz, Centralized Oversight of the Regulatory State, 106 Colum. L. Rev. 1260, 1290 n.188 (2006).

274. For a description of congressional oversight of agencies through mandates in delegation, authorizations, committee oversight, and appropriations, as well as a description of private interest lobbying of agencies, see Peter L. Strauss, Administrative Justice in the United States 77–85, 294–96 (2002). As an independent agency, however, FERC is not subject to the full range of presidential oversight contained in the Office of Management and Budget (OMB) process. The direct oversight elements of the OMB process applies only to executive branch departments. See id. at 111–12 (describing OMB).

275. The underlying assumptions of this Part's argument are that there is value in administrative process and procedure, and that meaningful deliberation goes on when federal agencies go through the required procedural steps to implement policy. See, e.g., Lisa Schultz Bressman, Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State, 78 N.Y.U. L. Rev. 461, 528–37 (2003) (describing view that procedural constraints can check agency arbitrariness and improve decisionmaking and political accountability). Scholars have challenged this view. See, e.g., Merrick B. Garland, Deregulation and Judicial Review, 98 Harv. L. Rev. 505, 583 (1985) (expressing "[d]oubts" over whether procedural requirements can ever force agencies to meaningfully deliberate). Admittedly, a view that administrative processes do not permit interested parties meaningful opportunity to influence policy would undermine Part IV's argument. Yet one need not adopt a naïve "proceduralism," Sidney A. Shapiro & Richard E. Levy, Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions, 1987 Duke L.J. 387, 405–06, to conclude that procedure and process, while not perfect checks on agency discretion, provide meaningful opportunities for voice and deliberation, especially given the existence of judicial review. At the very least, the existence of procedural constraints and participation requirements "marks not the end of judicial review but its beginning, serving as a necessary precondition for substantive review." Garland, supra, at 589; see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (requiring agencies to engage in hard look at data and articulate how agency's decision connected facts to its outcome). States, as relatively well-organized players in political processes, can avail themselves of this intertwined system of administrative procedure and judicial review that creates voice.

In a related context, Professor Carol Rose has argued for a mediation model of local government land use decisionmaking. Because local land use planning's analogue is neither adjudication nor legislation, but rather mediation, courts should police local governments' land use decisions to ensure that affected parties receive fairness and due consideration. She writes, "in inquiring whether a piecemeal land change was duly

These pressures find concrete expression in administrative processes. Section 216, for example, grants states a right of participation in FERC hearings on permit applications.[276] While FERC intends for most section 216 decisions to be based on paper hearings,[277] it has created a system for interested parties, including states, to participate during the prefiling process. This process, which allows FERC to gather information to determine if it will allow an application to proceed, will include notice, "public meetings[,] and/or technical conferences" with stakeholders.[278] These formal and informal opportunities for participation, along with the right to request rehearing and judicial review, allow states as repeat players to air their concerns about FERC's particular decisions as well as its decisionmaking patterns.

This point about administrative accountability is important to analyzing whether section 216 raises, like commandeering, the risk of federal tyranny. Conditional preemption seems to increase the risk of tyranny so long as some states consent to federal demands or the federal government preempts them and acts on its own.[279] Unlike commandeering, however, conditional preemption allows states to exert pressure against the federal government not only during the legislative process, but also throughout administrative implementation.

Under section 216, states have the opportunity first to approve or deny facilities pursuant to their own policy preferences. They then have the opportunity to defend those preferences as consistent with federal directions by participating at the FERC level should a utility company

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considered, a court should focus on voice in mediation and ask whether the local body went through the steps of identifying disputants, exploring issues, and explaining results." Carol M. Rose, Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy, 71 Cal. L. Rev. 837, 900 (1983).

Of course, the multiplicity of interest groups and scale at the federal level, as well as the lack of opportunity for exit from a national regulatory program, belie any straightforward analogy between local land use planning and FERC's section 216 permitting processes. See Carol M. Rose, The Ancient Constitution vs. the Federalist Empire: Anti-Federalism from the Attack on "Monarchism" to Modern Localism, 84 Nw. U. L. Rev. 74, 96 (1989) (arguing that local government has "far fewer . . . checks and balances, and far less multiple-interest representation" than federal government). If Professor Rose's account of voice as an indicator of due consideration is correct in the local government context, however, then the additional opportunities for voice that inhere in the "structural restraints" on federal government, id., further support this Note's account of section 216.

276. Energy Policy Act of 2005, Pub. L. No. 109-58, sec. 1221(a), § 216(d), 119 Stat. 594, 948 (to be codified at 16 U.S.C. § 824p).

277. Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities, 71 Fed. Reg. 69,440, 69,461–63 (Nov. 16, 2006) (to be codified at 18 C.F.R. pts. 50, 380) (discussing hearing process). FERC's regulations allow for evidentiary trial-like hearings if interested stakeholders request them and FERC concedes or if FERC decides on its own motion to conduct them. Id.

278. Id. at 69,461.

279. See supra Part II.C.3 (discussing commandeering doctrine's concern over federal tyranny).

enter a federal application.[280] Finally, they have the opportunity to challenge the FERC decision in court.[281] These three levels of opportunity for asserting voice in the implementation of the federal scheme allow states to pick and choose particular sites over which to fight federal direction. Moreover, if FERC actually requires state participation to accomplish the long-term goals of section 216, then states have a lever at the level of interagency contact to oppose federal preferences. Commandeering, by contrast, impresses duties upon states without offering them the same range of opportunities for vocalizing their dissent.

Finally, there is the question of state dignity.[282] On the one hand, offering states the opportunity to participate in the FERC process even if they decline to follow federal instructions appears to acknowledge the importance of local input for achieving federal goals.[283] On the other hand, "reducing" the states to either "puppets" of Congress or mere stakeholders in a federal process seems to disrespect them as sovereign entities capable of making independent regulatory decisions.[284] If the state dignity argument has any purchase, however, this act of conditional preemption is preferable to commandeering or preemption with no state input.[285] Section 216 permits states to select at what level they will choose to participate in implementation of the federal scheme. It does not threaten them with the pain of complete exclusion from a field.

B. *Counterarguments and the Possibility of Judicial Enforcement of Voice*

Is voice enough to challenge Part II's equation of commandeering with conditional preemption? The LLRWA's take title provision, after all, emerged from state negotiations and gave states "latitude" in implementing Congress's regulatory commands, yet the Court still invalidated it in *New York*.[286] By severing the tie between governmental action and voters' awareness, commandeering undermines the accountability that makes possible the *people*'s federalism.[287] If conditional preemption raises the

280. See supra note 14 and Part I.A (describing FERC's "backstop authority").

281. See supra notes 250–257 and accompanying text (describing opportunities for voice in section 216).

282. See supra notes 78 & 98 (describing state dignity concerns) and Parts II.B.1 & II.C.1 (discussing state dignity and section 216's effect on it).

283. Compare the discussion of the natural gas siting provisions in EPAct. See 151 Cong. Rec. S6986 (daily ed. June 22, 2005) (statement of Sen. Alexander) (arguing that LNG siting process recognizes need to partner with states by allowing state governors to input local perspectives during LNG siting process).

284. See Cox, supra note 78, at 1316 (arguing commandeering does not treat states as separate sovereigns but rather as puppets).

285. See Adler & Kreimer, supra note 10, at 142 (arguing commandeering and preemption equally confound an expressive theory of federalism that focuses on whether federal regulation expresses disrespect for states).

286. See New York v. United States, 505 U.S. 144, 176–183 (1992) (rejecting United States's arguments that focused on state consent).

287. Id. at 181 ("[T]he Constitution divides authority between federal and state governments for the protection of individuals."). In other words, the Court in *New York*

same concerns, no amount of meaningful state input into policy implementation can render it constitutional. The Court's commandeering decisions did not consider the possibility that states could exert pressure against the federal government while following the LLRWA and the Brady Act's commands.[288] Though the Court did not focus on this difference between commandeering and conditional preemption, it helps to justify the line it drew between the two.

Accepting Part IV's response to this critique requires challenging the conclusion that any measure of political accountability confusion merits invalidation.[289] Though the Court rejected the importance of states' voice in fashioning the LLRWA, it did not do so out of concern for political accountability for its own sake, but rather because of concern for aggrandizing federal power.[290] While the Court's commandeering line appears underinclusive in light of the way in which the Court used functionalist reasoning to justify the commandeering ban,[291] it does not follow that the line it drew is indefensible on *any* reasoning. Part IV has considered the same federalism values the Court considered, but has reasoned about them in light of how political and administrative processes can contribute to their protection. Admittedly, the Court was unwilling to think about federalism's function in this way. Part IV has argued, however, that voice can help cooperative federalism function to maintain "a healthy balance of power between the States and the Federal Government."[292]

In drawing a distinction between commandeering and conditional preemption in terms of voice, Part IV has responded to claims that functionalist reasoning exposes the Court's commandeering ban as a needless—and unjustifiably costly—doctrine.[293] Its argument suggests the Court should continue to police commandeering. Moreover, its discussion of the need for voice in federal administrative processes leads to a slight modification of the existing formalist test.

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emphasized that even if state representatives are happy with a particular federal command, there is a risk that their individual constituents will be unable to hold them (and the federal government) accountable for the resulting policies. In short, the Court was not concerned with federalism for the state's sake, but for the people's sake.

288. See supra Part I.B.2 (describing Court's ban on commandeering).

289. Taken to its logical conclusion, an argument that political accountability confusion of any degree generates a Tenth Amendment violation would justify rejecting cooperative federalism. See Rubin, supra note 18, at 2094 (arguing that elimination of political accountability concerns would require Court "to reverse an entire century of political developments").

290. See *New York*, 505 U.S. at 181–82 (arguing that federalism protects individuals by checking tyranny).

291. Part II's arguments illustrate this tension between the Court's formalist test and its functionalist justifications based on federalism values.

292. *New York*, 505 U.S. at 181 (quoting Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)).

293. See supra Part III.B (raising argument that commandeering ban is unwise and unnecessary).

The Court should require Congress, when it threatens conditional preemption, to allow states to still have input into, though not control over, the resulting federal preemptive regulation.[294] The proposal that the Court should do so dovetails with the argument that it is unduly coercive for Congress not to offer a federal regulatory alternative in the event that states refuse to consent to federal demands (the "untethered regulatory command" problem).[295] In other words, states cannot have any voice at the level of administrative implementation of a scheme if the federal administration is not going to be implementing any scheme at all. If Congress has not provided for federal implementation of a program in the event of state refusal to regulate, there is not a "nexus" between the federal threat and the regulatory goal.[296] Federal refusal to regulate in the state's stead suggests the conditional preemption threat is merely a means to force state regulation.[297]

This analysis calls the Court's ruling in *FERC v. Mississippi* into question,[298] but is also a basis for concluding the Court can legitimately ask whether the federal government has offered a regulatory alternative the states can participate in should they refuse to consent to federal demands. Judicial policing of this formal option need not involve a searching inquiry into the viability of state choice.[299] The reality of most conditional preemption schemes is that they involve federal agency implementation in the course of state refusal to consent to federal demands.[300] If this Part's analysis is correct, the formal opportunity for state participation in federal implementation lessens the apparent dangers of conditional preemption.

CONCLUSION

As the Court continues to grapple with the multiple meanings and values of federalism,[301] its Tenth Amendment jurisprudence provides an attractive area for extension of states' rights protections. Indeed, as this Note shows through the lens of section 216 of EPAct, one can criticize

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294. Cf. Weiser, supra note 11, at 705 (suggesting cooperative federalism has value of "encourag[ing] the federal government to listen to the voice of the states").

295. See Hills, supra note 12, at 925–26 (questioning untethered commands); see also supra Part II.B.3.

296. See Hills, supra note 12, at 925–26 (applying unconstitutional conditions analysis to *FERC v. Mississippi*).

297. Federal preemption of the states with nonregulation may be a valid policy goal. However, if the states are forced to choose between federal nonregulation and a different state-administered scheme with some regulatory content, then it is clear that nonregulation is not the federal goal, but rather bare coercion. See id. (suggesting federal failure to ante up signifies bald attempt to force states to act).

298. See supra notes 69–75 and accompanying text (discussing *FERC v. Mississippi*).

299. Cf. Part II.B (detailing difficulties of policing coercion).

300. Hills, supra note 12, at 926 (stating most conditional preemption schemes are unlike that considered in *FERC v. Mississippi*).

301. See Rubin & Feeley, supra note 225, at 909 (discussing multiple values of federalism).

conditional preemption on the basis of its arguably coercive effect and its disruption of other federalism values. As this Note has also argued, however, such critiques are difficult to translate into manageable doctrine.

Instead, this Note has defended the distinction between commandeering and conditional preemption. It has examined how section 216 provides states with an opportunity for voice even if they do not consent to federal demands, lessening coercion concerns, and has argued that administrative accountability addresses some of the Court's functionalist concerns. The multiple opportunities for state and local input in section 216 seize on the virtue of cooperative federalism—its ability to combine local inputs with national coordination[302]—while also mitigating against federal aggrandizement. To paraphrase Justice O'Connor, section 216 promises a successful combination of the "Nation's newest problems of public policy" and fidelity to the Nation's "oldest question of constitutional law."[303]

302. See Breyer, supra note 208, at 56–57 (discussing virtues of cooperative federalism).

303. New York v. United States, 505 U.S. 144, 149 (1992).