

# FEDERALISM AT THE *CATHEDRAL*: PROPERTY RULES, LIABILITY RULES, AND INALIENABILITY RULES IN TENTH AMENDMENT INFRASTRUCTURE

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*This Article explores the consequences for good governance of poorly constructed legal infrastructure in the Tenth Amendment context, and recommends a simple jurisprudential fix: exchanging a property rule for the inalienability remedy rule that the Supreme Court used to protect the anti-commandeering entitlement in *New York v. United States*. Grounded in a values-based theory of American federalism, it shows how the New York inalienability rule unnecessarily removes tools for resolving interjurisdictional quagmires—exemplified by the radioactive waste capacity problem at the heart of the New York litigation—by prohibiting novel forms of state-federal bargaining.*

*In New York, the Court held that Congress lacked the authority to bind a state's participation in a regulatory scheme even if state officials had effectively waived Tenth Amendment-based objections during consensual negotiations with the federal government. In so doing, the Court articulated a reasonable entitlement to federal noninterference protected by an unreasonable inalienability rule. It is an inalienability rule because any number of collective-action problems would prevent the negotiated transfer of the entitlement except through representation by elected officials. It is unreasonable because the intergovernmental partnerships thus thwarted would help resolve pressing interjurisdictional problems without offending the Constitution. Indeed, the underlying values of federalism that give meaning to the Tenth Amendment would be better served by allowing a state to decide for itself whether to hold or trade its entitlement.*

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*Focusing on the facts and legacy of the New York decision, this Article concludes that, although its inalienability rule is defensible in exclusively state or federal jurisdictional contexts, it is dubious in contexts that require regulatory attention at both the local and national level. A property rule that would enable states to bargain with their anti-commandeering entitlement would not offend the touchstone of Tenth Amendment jurisprudence, which has always been the prevention of federal coercion of the states. A pro-bargaining property rule would be more consistent with the rest of the Court's federalism jurisprudence, more faithful to the full panoply of values that undergird American federalism, and better for state and federal governance in difficult interjurisdictional contexts.*

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## INTRODUCTION: THE INFRASTRUCTURE OF LEGAL RULES

As climate change, war in the Middle East, and the price of oil focus American determination to move beyond fossil fuels, nuclear power has resurfaced as a possible alternative. But energy reform efforts may be stalled by an unlikely policy deadlock stemming from a structural technicality in an aging Supreme Court decision: *New York v. United States*,<sup>1</sup> which set forth the Tenth Amendment anti-commandeering rule and ushered in the New Federalism era in 1992.<sup>2</sup> This dry technicality also poses ongoing regulatory obstacles in such critical interjurisdictional contexts as stormwater management, climate regulation, disaster response, and national security.<sup>3</sup> Such is the enormous power hidden in the infrastructure of legal rules, including the property, liability, and inalienability remedy rules that protect normative legal entitlements.

This Article explores the consequences for good governance of poorly constructed infrastructure in the Tenth Amendment context, and recommends a relatively simple jurisprudential fix: exchanging a property rule for the inalienability remedy rule that the Court used to protect the anti-commandeering entitlement in *New York*. Grounded in a values-based theory of American federalism, the Article shows how the *New York* inalienability rule unnecessarily removes tools for resolving interjurisdictional quagmires by prohibiting useful forms of

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1. 505 U.S. 144, 161 (1992).

2. Broadly, the New Federalism refers to a political movement that gathered force over the 1980s by advocating renewed respect for distinct spheres of state and federal power. See, e.g., *United States v. Morrison*, 529 U.S. 598, 617–18 (2000) (“The Constitution requires a distinction between what is truly national and what is truly local.” (citing *United States v. Lopez*, 514 U.S. 549, 568 (1995))). In the landmark New Federalism cases that followed, the Supreme Court rejected a series of federal laws held to transgress this reinvigorated boundary, beginning with its holding in *New York* that the federal government may not “commandeer” the states by compelling them to regulate. 505 U.S. at 161. For a detailed review of the Court’s New Federalism Tenth Amendment jurisprudence, see Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503, 539–67 (2007). The present Article draws some of its conceptual vocabulary from the broader treatment of federalism theory in this earlier piece.

3. Ryan, *supra* note 2, at 567–96 (describing how the New Federalism Tenth Amendment jurisprudence has created problems for interjurisdictional governance in these contexts); see Christopher Dickey, *The Spymaster of New York*, NEWSWEEK, Feb. 9, 2009, at 40–41 (reporting on conflicts between the CIA and the NYPD over counter-terrorism intelligence gathering).

state-federal bargaining.<sup>4</sup> The collective-action problem at the heart of the *New York* litigation—equitable radioactive waste management—is exactly this sort of quagmire, as demonstrated by a new round of lawsuits and proposed legislation that prove it unresolved all these decades later.

The facts of the *New York* saga are compelling, but the story really begins with the under-sung significance of legal infrastructure. Any given legal rule really implies two—the normative element of the rule (“no parking”), and the legal consequences that follow when the rule is violated (if you park there anyway, will the government: fine you? tow your car? revoke your registration?). The normative element is easily recognized and amply debated during the rulemaking, whether the rule is of legislative, administrative, or judicial origins. Meanwhile, the remedial element may languish in relative anonymity—at least until second-order conflicts arise following general acceptance of the normative rule. (For example, the common law principle of *sic utere tuo ut alienum non lædas*<sup>5</sup> had been long established before jurists began to debate whether a losing private nuisance defendant should cease the harmful use or merely compensate the suffering plaintiff.<sup>6</sup>) Yet it is the combination of both elements that orders critical aspects of our lives—ranging from private law transactions over the sale of a house, to public law transactions over government condemnation of the house, all the way to state and federal bargaining over how best to regulate radioactive waste near that house.

This dimension of legal architecture was first explored by Guido Calabresi and Douglas Melamed in their iconic *Harvard*

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4. In previous work, I have argued that the best way to understand federalism is in terms of the good governance values it seeks to foster, primarily in terms of the checks and balances between local and national levels of government that safeguard individual rights, the benefits of variation and innovation that accrue to localism, the need for governmental accountability that enables meaningful democratic participation, and the synergistic problem-solving capacity that accords a federal system. See Ryan, *supra* note 2, at 596–658. In adjudicating difficult jurisdictional issues that raise questions of federalism, faithfulness to these values should be the touchstone. See *id.*

5. “Use your property so as not to damage another’s.” BLACK’S LAW DICTIONARY 1757 app. B (8th ed. 2004).

6. See *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870, 872 (N.Y. 1970) (departing from the traditional approach of prohibiting nuisance harms outright to allow a defendant cement company to continue its harmful operations, as long as it compensated neighboring plaintiffs for the harm); see also RESTATEMENT (SECOND) OF TORTS § 822 cmt. d (1979) (adopting the *Boomer* approach for evaluating nuisance remedies).

*Law Review* article, *Property Rules, Liability Rules, and Inalienability: One View of The Cathedral*, which describes legal rules as pairings of an entitlement (designating which of the conflicting parties will prevail in a given scenario of legal conflict) with a second-order rule indicating how that entitlement will be vindicated if challenged.<sup>7</sup> *One View of the Cathedral* (“*Cathedral*”) identifies three approaches taken by legal rules to protect the entitlements they establish: the “property rule,” by which the entitlement is treated as an item of property that the holder may choose to trade or sell to a competitor; the “liability rule,” by which the competitor may usurp the entitlement over the holder’s protest so long as the loss is compensated; and the more sparingly used “inalienability rule,” which forbids shifting an entitlement from its assigned holder regardless of the parties’ wishes.<sup>8</sup> It details different circumstances in which each approach will most faithfully serve the intended purposes of the rule,<sup>9</sup> and suggests that entitlements and remedies are not always well matched in this regard.<sup>10</sup>

Thus, although the substance of the entitlement may preoccupy rulemakers at the outset, it is often this secondary aspect of the rule that becomes the more persisting subject of legal controversy. Many authors have employed the *Cathedral* framework of analysis to critique underperforming legal rules in the common law contexts that Calabresi and Melamed addressed directly,<sup>11</sup> but others have shown that the framework proves robust even at the constitutional level, where the normative elements of legal rules are often more clear from the

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7. See generally Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

8. *Id.* at 1092–93.

9. These circumstances often relate to confidence levels in the rulemakers’ assumptions about the initial allocation of entitlements. For example, property rules enable efficient bargaining between competitors when the initial allocation of entitlements is uncertain, liability rules ensure socially desirable transfer against holdouts when the least cost avoider is uncertain, and inalienability rules protect what the authors call a “moralism,” or a policymaking consensus that a preordained outcome is worth the resulting sacrifice in autonomy and efficiency values. *Id.* at 1112.

10. *Id.* at 1118–24 (discussing how different remedy rules may advance different goals associated with the substantive entitlement).

11. A recent sampling includes: Ian Ayres & J.M. Balkin, *Legal Entitlements as Auctions: Property Rules, Liability Rules, and Beyond*, 106 YALE L.J. 703 (1997); Henry Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719 (2004); Stewart E. Sterk, *Property Rules, Liability Rules, and Uncertainty about Property Rights*, 106 MICH. L. REV. 1285 (2008).

text than remedial elements that courts must sometimes infer jurisprudentially.<sup>12</sup> From ongoing friction over the explicit liability rule in the Fifth Amendment Takings Clause (enabling the state to condemn private property for public use so long as market value is paid)<sup>13</sup> to debate over the coercive overuse of property rule-enabled plea bargains (alleged to distort the criminal law bargaining process to the point of vitiating the Sixth Amendment right to jury trial),<sup>14</sup> many of today's most compelling constitutional controversies involve the second-order, remedial aspect of the operative legal rule. Constitutional federalism now joins these ranks, as the casual insertion into *New York* of an ill-considered inalienability rule—one that obstructs intergovernmental bargaining around uncertain Tenth Amendment entitlements<sup>15</sup>—threatens to further exacerbate regulatory dilemmas that require the negotiation of unique state-federal partnerships.

A most alarming example is the crisis that first led to the *New York* controversy twenty-five years ago: our seriously dwindling capacity for handling radioactive waste that nobody wants in the backyard. The entrenched problem of safe and equitable radioactive waste management is again making headlines, thanks to the 2008 closure to national waste traffic of the Barnwell disposal site in South Carolina that had indi-

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12. *E.g.*, Eugene Kontorovich, *The Constitution in Two Dimensions: A Transaction Cost Analysis of Constitutional Remedies*, 91 VA. L. REV. 1135, 1138 (2005); Thomas W. Merrill, *The Constitution and the Cathedral: Prohibiting, Purchasing, and Possibly Condemning Tobacco Advertising*, 93 NW. U. L. REV. 1143, 1144 (1999).

13. *See, e.g.*, Michael Heller & Roderick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465, 1474 (2008) (critiquing the eminent domain liability rule that under-compensates owners with market price for property they did not wish to part with in the first place, even at market rates).

14. *See, e.g.*, Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 864 (1995) (observing that prosecutors sometimes overcharge a defendant in the absence of sufficient evidence to extract a plea bargain for a lesser offense); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1909–10 (1992) (noting that most legal scholars find plea bargaining “both inefficient and unjust”); Joseph P. Fried, *New York Judge Rejects Death Penalty Plea Deal*, N.Y. TIMES, Aug. 7, 1997, at A1 (reporting on judicial concerns that plea provisions of the death penalty law allow prosecutors to coerce guilty pleas from capital defendants).

15. *See infra* Part II.C (explicating the inalienability rule effected by the Court's conclusion that New York State could not have consented to the Act's requirement (that it either site a disposal facility or take title to the radioactive waste generated within its borders) on grounds that states can never consent to be bound by this kind of federal law).

rectly inspired the *New York* dispute in the first place.<sup>16</sup> Barnwell had been processing the majority of the nation's low-level radioactive waste for the better part of the last half-century, as one of only three sites nationwide accepting this most common form of radioactive waste (produced by the use of nuclear material in commercial applications ranging from power plants to consumer products).<sup>17</sup> South Carolina resented becoming a dumping ground for other states' toxic waste and first threatened to close the Barnwell doors in 1979, prompting a national panic and Congress's first attempts to resolve the problem.<sup>18</sup> Respectful of the federalism implications of creating a new national regulatory regime, Congress adopted a state-led approach proposed by the National Governors Association when it passed the Low-Level Radioactive Waste Policy Act ("the Act")<sup>19</sup> and subsequent amendments, which required each state to take responsibility for disposing of the waste produced within its borders by a set deadline (or "take title" to that waste).<sup>20</sup>

But in an effort to make its own rhetorical point about federalism, the Supreme Court eviscerated the Act's "take-title" enforcement provision in *New York*, holding that Congress lacked the authority to bind a state's participation in the plan even if state officials had effectively waived Tenth Amendment-based objections during consensual negotiations with the federal government.<sup>21</sup> Writing for the Court, Justice O'Connor explained that a state may not waive its anti-commandeering entitlement (prohibiting the federal government from compelling the state to regulate) because the Tenth Amendment protects rights held not by the state qua state but by its citizens as individuals.<sup>22</sup> In so doing, the Court articulated a reasonable

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16. See *New York v. United States*, 505 U.S. 144, 150 (1992) (describing how South Carolina's earlier threats to close Barnwell to national traffic led to the passage of the Low-Level Radioactive Waste Policy Act); Judy Fahys, *Industry Recipe: Diluted N-Waste*, SALT LAKE TRIB., June 28, 2008 (reporting on the closure of Barnwell to all but three other states as of July 2008).

17. See, e.g., Stevenson Swanson, *Clock Is Ticking on Available Sites for Disposing Nuclear Waste: States Seek New Places to Bury Radioactive Debris*, CHI. TRIB., Mar. 14, 1993, at 13.

18. See *infra* notes 110–21 and accompanying text.

19. Low-Level Radioactive Waste Policy Act, Pub. L. No. 96-573, 94 Stat. 3347 (1980) (current version at 42 U.S.C. §§ 2021b–2021d (2006)).

20. Low-Level Radioactive Waste Policy Amendments Act of 1985 § 5(d)(2)(C), Pub. L. No. 99-240, 99 Stat. 1842, 1850, *declared unconstitutional by New York v. United States*, 505 U.S. 144 (1992).

21. *New York*, 505 U.S. at 182.

22. *Id.*

entitlement to federal noninterference protected by an unreasonable inalienability rule. Prohibiting state government from bargaining with the entitlement creates an inalienability rule because any number of collective-action problems would prevent the negotiated transfer of the entitlement *except* through representation by elected officials.<sup>23</sup> It is unreasonable because the intergovernmental partnerships thus thwarted would help resolve pressing interjurisdictional problems without offending the Tenth Amendment. Indeed, underlying values of American federalism that give meaning to the Tenth Amendment would be better served by allowing a state to decide for itself whether to hold or trade its entitlement.

*New York's* subtle inalienability rule attracted much less attention than the substantive anti-commandeering rule that it protected, but the consequences of inalienability are currently front-page news, now that Barnwell is finally closed to national waste shipments, three additional decades of waste have accumulated, and no new disposal capacity to absorb it has been created since *New York* extracted what teeth in the Act might have compelled it. The capacity crisis has taken on added urgency as policymakers revisit nuclear power as an alternative source of energy, especially now that the only disposal site accepting nationwide waste has contracted to also accept shipments from Europe.<sup>24</sup> Fears that this would further strain domestic capacity prompted protest from the other states in its regional compact, bills in both houses of Congress to prevent the importation of internationally produced waste, and a proposal under consideration by the Nuclear Regulatory Commission to reduce the capacity crisis simply by shifting more toxic forms of waste into less stringently regulated categories.<sup>25</sup> No thanks to the *New York* inalienability rule, the low-level radioactive waste crisis languishes with no solution in sight.

This Article explores how Calabresi and Melamed's *Cathedral* framework can help us understand the interjurisdictional gridlock that has arisen under the New Federalism Tenth Amendment jurisprudence in infrastructural terms—and more importantly, how to resolve it at the infrastructural level. It

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23. See *infra* Part II.C. For an analogous argument in the property law context, see Richard A. Epstein, Comment, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353, 1367 (1982) (arguing that a property owner's ability to hold out is one of our legal system's "essential strengths").

24. See *infra* text accompanying note 180.

25. See *infra* Part II.D.

proceeds from a theoretical account of the Tenth Amendment as the guardian of American federalism by vindicating the dual sovereignty directive, charged with protecting the principles of good government that underlie our system of dual sovereignty.<sup>26</sup> These include the maintenance of checks and balances between state and federal power to safeguard individual rights, the protection of local autonomy to promote interjurisdictional variation and innovation, the enhancement of public accountability to enable meaningful democratic participation by voters, and the facilitation of synergistic approaches to regulatory problem solving that accord the federalist structure.<sup>27</sup> By this account (which I have outlined in previous work), the Tenth Amendment polices regulatory activity at the margins of state and federal authority for impermissible compromises of these fundamental federalism values.<sup>28</sup> This account departs from the New Federalism's idealization of a bright-line boundary between mutually exclusive spheres of state and federal authority, out of recognition for the thorny regulatory problems—like radioactive waste management—that do not fit precisely within one sphere or the other.<sup>29</sup>

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26. Ryan, *supra* note 2, at 518–22 (reviewing the Constitution's dual sovereignty directive and identifying ambiguities that require interpretation according to an extrinsic theoretical model of federalism).

27. *Id.* at 596–628 (outlining the fundamental federalism values and discussing the tensions among them). The good governance values that undergird American federalism are well understood in previous federalism scholarship with the exception of the underappreciated problem-solving value, which arises from the subsidiarity ethic—that governance take place at the most local level possible, or that level with sufficient capacity to successfully address the problem at hand. *Id.* at 620–28. The problem-solving value is also indicated in the constitutional choice of a federal system after the failure of the decentralizing Articles of Confederation to realize efficient interstate commerce, to provide for the common defense, and to resolve interstate disputes. *Id.* at 619. James Madison invoked the problem-solving value in defending the Constitution in the Federalist Papers, urging that the distribution of power it contemplated was needed to accomplish the goals of the new government:

Was, then, the American Revolution effected, . . . not that the people of America should enjoy peace, liberty, and safety, but that the governments of the individual States, that particular municipal establishments, might enjoy a certain extent of power and be arrayed with certain dignities and attributes of sovereignty?

*Id.* at 621–22 (quoting THE FEDERALIST NO. 45, at 288–89 (James Madison) (Clinton Rossiter ed., 1961)).

28. *Id.* at 644–62 (outlining the role of the Tenth Amendment within the Balanced Federalism theoretical model).

29. *Id.* at 567–95 (describing how an interjurisdictional gray area betrays the New Federalism's preferred model of strict-separationist dual sovereignty); see also Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why*

Focusing on the facts and legacy of the *New York* decision, this Article concludes that although the inalienability rule is defensible in exclusively state or federal jurisdictional contexts, it is dubious in contexts that require regulatory attention at both the local and national level.<sup>30</sup> The failing interstate market for radioactive waste disposal demonstrates the interjurisdictional dilemma: Congress could regulate the market under its commerce authority, but the siting of specific waste processing facilities must ultimately conform to state and local land-use laws that mediate impacts on local communities, making it better resolved with the benefit of both federal and state expertise. In this “gray area” of overlapping local and national concern, state and federal regulators must find ways to work together—occasionally by negotiating partnerships that blur the bright-line boundary the New Federalism imagines between idealized spheres of exclusively state or federal jurisdiction.<sup>31</sup>

In these negotiations, the media of exchange are the reciprocal entitlements to sovereign authority and regulatory non-interference delineated by the Tenth Amendment, which affirms that the Constitution delegates some forms of sovereign authority to the federal government while leaving others with the states.<sup>32</sup> Entitlements to authority at the margin of this division were the bargaining chips at hand when the states negotiated with Congress to create the Low-Level Radioactive Waste Policy Act. However, the *New York* inalienability rule

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*State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813, 831–32, 938–39 (1998) (deeming the New Federalism’s view of mutually exclusive state and federal regulatory spheres “palpably untrue”); Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2196 (1998) (discussing the “outmoded” basis for the New Federalism dual sovereignty approach); Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563, 1564–66 (1994) (critiquing the New Federalism model’s reliance on the territorial view of federalism).

30. Ryan, *supra* note 2, at 572–84 (describing interjurisdictional regulatory problems); *see also id.* at 514, 570 (limiting the discussion of “regulatory problems” to the classic targets of administrative law, including “market failures, negative externalities, and other collective-action problems that individuals are ill-equipped to resolve on their own”).

31. *See id.* at 539–67 (reviewing how the Rehnquist Court’s Tenth Amendment and preemption jurisprudence reify a “strict separationist” ideal of New Federalism dual sovereignty).

32. U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”); *see also* Ryan, *supra* note 2, at 519–20 (reviewing what is made certain and what is left unclear under the Tenth Amendment dual sovereignty directive).

makes such intergovernmental negotiation so much more difficult that none has occurred in the sixteen years since the rule toppled the last attempt, setting the stage for the renewed crisis that is again demanding lawmakers' attention.

Other efforts at interjurisdictional problem solving have also been stunted under the bright-line approach to segregating state and federal jurisdiction, leading to unnecessary regulatory uncertainty,<sup>33</sup> gridlock,<sup>34</sup> litigation,<sup>35</sup> and even outright abdication.<sup>36</sup> Because the New Federalism ideal does not reflect the jurisdictional realities of American governance, many scholars (myself included) have suggested that the Court turn to other models of federalism for inspiration.<sup>37</sup> However, this Article demonstrates that progress is attainable even within the existing New Federalism paradigm, simply by matching its normative Tenth Amendment rule with a more appropriate remedial rule.

Specifically, the inalienability remedy should be replaced with a property rule, at least in the gray area. Enabling additional opportunities to bargain around New Federalism's bright line of jurisdictional separation could alleviate some of the obstacles that have plagued interjurisdictional problem solving since *New York* was decided. Indeed, in prohibiting bargained-for state waiver of the anti-commandeering entitlement, *New*

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33. For example, much regulatory uncertainty currently attends wetlands regulation. See *infra* note 235 (discussing *Rapanos v. United States*, 547 U.S. 715, 731–32 (2006)).

34. A prime example is that regarding the disposal of low-level radioactive waste. See *infra* Part II.D.

35. One example of such litigation was the Tenth Amendment challenge to the state-federal partnership at the heart of the Clean Water Act's Phase II Stormwater Rule. See *infra* notes 213–18 and accompanying text.

36. The failed response to Hurricane Katrina has been so characterized. E.g., Peggy Noonan, *The Scofflaw Swimmer: Government Takes Too Much Authority and Not Enough Responsibility*, WALL ST. J., Sept. 29, 2005, <http://www.opinionjournal.com/columnists/pnoonan/?id=110007328> ("No one took charge. Thus the postgame commentary in which everyone blamed someone else: *The mayor fumbled the ball, the governor didn't call the play, the president didn't have a ground game.*").

37. E.g., Hills, *supra* note 29, at 816–17, 938–44 (arguing for local autonomy on a functional basis); John R. Nolon, *Champions of Change: Reinventing Democracy Through Land Law Reform*, 30 HARV. ENVTL. L. REV. 1, 18–22 (2006) (advancing a model of integrated federalism); Ryan, *supra* note 2, at 644–65 (advocating a model of Balanced Federalism that better mediates between competing federalism values in the interjurisdictional gray area); Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CAL. L. REV. 1409, 1466–68 (1999) (proposing that federal and state courts participate together in developing constitutional law).

*York's* inalienability rule ironically extinguishes what would otherwise be the New Federalism's most promising means of advancing interjurisdictional collaboration in a way that would honor all federalism values. As with all bright-line rules, one potential advantage of the New Federalism's jurisdictional line is the clarity it creates about *who has what* for the purposes of state-federal bargaining. Applying Coasian insight, bargaining protects us against errors in assigning the initial legal entitlement under conditions of uncertainty,<sup>38</sup> and uncertainty is a serious concern when drawing a line of jurisdictional separation through the haze of overlapping state and federal interests at the margin between them. The jurisdictional clarity New Federalism seeks to protect could thus be harnessed to facilitate negotiations that may be needed when state and federal regulators must collaborate at the margins of their jurisdictional allocation. But the inalienability rule chills bargaining around that line, unnecessarily abrogating the possibility of consensual state-federal partnerships in the tricky interjurisdictional contexts that need it most.

Worse, it does so without a satisfying rationale from the Court. The majority suggested that state sovereign authority is an inherently unwaivable entitlement,<sup>39</sup> but this stands in stark contrast to other federalism entitlements to the same authority that are protected by property rules, such as the waivable Eleventh Amendment entitlement to state sovereign immunity and trades negotiated under the federal spending power.<sup>40</sup> The majority also worried that elected representatives' interests could stray dangerously from those of their constituents, but this generic problem of representational democracy is actually least pressing in the Tenth Amendment context, where citizen and representative interests substantially overlap.<sup>41</sup> The bargaining medium is the very state sovereignty that empowers even the most self-interested state representatives, who are unlikely to bargain away their own base

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38. See R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 15 (1960) (arguing that efficient results can be achieved when parties can bargain, so long as transaction costs are low). As with all bright-line rules, one potential advantage of the New Federalism's jurisdictional line is the clarity it creates about *who has what* for the purposes of state-federal bargaining. Whether or not the line is correctly drawn, at least the parties are on clear notice about which level of government has been designated which jurisdictional entitlements.

39. See *infra* Part III.B.

40. See *infra* Part III.B.1.

41. See *infra* Part III.B.2.

of authority unless it is the only way to meet important interests of their constituents.<sup>42</sup>

In contrast, a property rule that would enable states to bargain with their entitlement would not offend the touchstone of Tenth Amendment jurisprudence, which has always been the prevention of federal “coercion” of the states.<sup>43</sup> The consensual nature of state-federal negotiation means that each state would decide for itself whether to alienate the entitlement in each instance. In this respect, a property rule approach would better serve the federalism values of local autonomy (locating decisional authority at the local level), interjurisdictional innovation (allowing for the diversity of response that engenders the federalism “laboratory of ideas”), and problem-solving synergy (fostering intergovernmental partnerships to cope with interjurisdictional problems). It would offer sufficient protection for check-and-balance federalism values, because a state will not bargain against its powerful interest in maintaining the balance of state and federal power unless offsetting, problem-solving values justify the trade-off—as all of the states believed when they negotiated the terms of the Low-Level Radioactive Waste Policy Act. Indeed, bargaining is a time-honored means—and perhaps the only means—of enabling parties who lack consensus on the perfect to move forward toward the good, relying on the contract law presumption that the parties themselves are best situated to evaluate whether the deal serves their true interests.<sup>44</sup>

By prohibiting state-federal bargaining around a very uncertain line, the inalienability rule ossifies errors in the initial allocation of jurisdictional entitlements and subverts the role of the Tenth Amendment by undermining the very federalism values it exists to protect. When a remedy rule proves so sweeping that it threatens to reconfigure the substantive meaning of the normative rule it protects, that is a strong signal that normative and remedial elements have been mismatched at the level of legal infrastructure—and that interven-

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42. See *infra* Part III.B.2.

43. *New York v. United States*, 505 U.S. 144, 166–69 (1992).

44. Even federalism scholars concerned about the potential for state-federal collusion around federalism constraints concede that the commandeering context is the least vulnerable to this problem. See John O. McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89, 119 (2004) (warning that states may collude with the federal government in undermining federalism constraints, but acknowledging that this is least likely in the context of commandeering).

tion is warranted. A pro-bargaining property rule would be more consistent with the rest of the Court's federalism jurisprudence, more faithful to the full panoply of values that undergird American federalism, and better for state and federal governance in the gray area. Part I reviews the *Cathedral* framework's exegesis of legal infrastructure, and addresses its application in the context of constitutional federalism. Part II explores how the *New York* case establishes the inalienability of the anti-commandeering entitlement, and the consequences of inalienability in gray areas of interjurisdictional concern. Part III proposes the change to a property rule approach and refutes the Court's rationale for the *New York* inalienability rule as both theoretically and pragmatically weak.

## I. THE *CATHEDRAL* FRAMEWORK

Legal rules structure civil society, but their own architecture is easily overlooked, sometimes at great societal cost. This Part introduces the *Cathedral* framework as a way of understanding legal infrastructure, and the various benefits that architects of legal rules may secure in choosing among the different remedial alternatives for vindicating the normative entitlement at the heart of a given legal rule. After reviewing how scholars have applied the framework in other public law contexts, it explores how the Supreme Court has applied the framework inconsistently across distinct doctrinal realms within its federalism jurisprudence. It also responds to potential skepticism about the applicability of the framework to federalism bargaining, noting the ways that state-federal bargaining approximates private market bargaining even more closely than other forms of governmental bargaining.

### A. *The Cathedral in Private Law Contexts*

The *Cathedral* framework draws from tort, property, and criminal law in unifying a set of conceptual tools for choosing among different approaches to protecting the assignment of legal entitlements.<sup>45</sup> As described above, legal rules mediate between parties with conflicting interests in some legal sphere, and a legal rule's first job is to decide which of the parties' interests will be privileged as a substantive matter. In so doing,

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45. Calabresi & Melamed, *supra* note 7, at 1089–90.

the rule confers on the privileged party a legal entitlement—a right to do (or not do) something, or to have (or not have) something happen to her—be it the entitlement to exclude a competitor from a given parcel of land, the entitlement to practice one’s religion despite the neighbors’ opposition, or the entitlement to use a crosswalk without being run over by lawful automobile traffic. The second, less-celebrated job of the legal rule is to structure the scope of permissible transactions involving this assigned entitlement. To this end, as between the privileged holder and those with competing interests, the law will vindicate the entitlement in one of three ways: by a property rule, a liability rule, or an inalienability rule.

If the entitlement is protected under a *property rule*, its holder has absolute power to convey the entitlement away for a satisfactory price. This approach treats the entitlement like an item of personal property, enabling the holder to protect it against all challengers or trade it on the open market at will. It represents the most common remedy rule in property law—for example, governing most private real estate transactions, where an owner sells her house in the marketplace only if she so desires, and then on her own terms.<sup>46</sup>

If the entitlement is protected under a *liability rule*, it may be purchased at an objectively determined price by the competitor even without the holder’s consent.<sup>47</sup> This is the most common remedy rule in tort law—where accident victims are not usually given the ex ante opportunity to bargain away their entitlement not to be victims of negligently inflicted harm, but in which the law compensates them for the loss of that entitlement by requiring the competitor (here, the tortfeasor) to compensate them in the form of objectively determined damages. However, the liability rule has also gained traction in property and other areas of law under the influence of the Law and Economics school, which suggests that legal rules promote general societal utility over individual autonomy in cases where holdouts or other collective-action problems could derail socially desirable outcomes. For example, in the landmark *Boomer v. Atlantic Cement Co.*<sup>48</sup> private nuisance decision, the court departed from the traditional approach requiring abatement of the nuisance to protect the plaintiff’s entitlement to be free of harm, and instead allowed a socially valuable factory use to

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46. *Id.* at 1092.

47. *Id.*

48. 257 N.E.2d 870 (N.Y. 1970).

continue (because it paid taxes and employed many local residents) so long as it compensated neighboring homeowners for their losses. The Restatement of Torts now adopts the liability rule remedy for private nuisance.<sup>49</sup>

The final approach is one of *inalienability*, by which the entitlement is held to rest where it is initially laid by the law, and any attempted transfer by either party is legally unenforceable.<sup>50</sup> This is a common remedy rule in criminal law (where consent is not a defense to murder or statutory rape),<sup>51</sup> but it is also found in other areas of law. For example, in the common law of property, the implied warranty of habitability establishes an entitlement to renters for a minimum standard of safety and sanitation in rental housing that cannot be negotiated away, even between a willing landlord and tenant happy to bargain for less safety at less rent.<sup>52</sup>

Calabresi and Melamed propose various reasons for using property, liability, and inalienability rules to accomplish the goals of well-ordered legal rules. For example, they suggest that property rules be used whenever the cheapest cost avoider can be identified, because it enables interparty bargaining that ensures the entitlement ultimately reaches the most efficient destination even if an error is made in the initial assignment.<sup>53</sup> The choice of to whom to assign the entitlement as an initial matter is still an important decision, of course, since it may create significant distributional consequences for the parties. However, even the procedural clarity yielded by property rules is subject to the usual caveats of the Coase Theorem's limiting assumptions,<sup>54</sup> and so Calabresi and Melamed also note that

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49. RESTATEMENT (SECOND) OF TORTS § 822 cmt. d (1979) (noting that “[i]t may be reasonable to continue an important activity if payment is made for the harm it is causing”).

50. Calabresi & Melamed, *supra* note 7, at 1092–93.

51. For example, Florida prohibits murder even when the victim consents. FLA. STAT. § 782.08 (2007). Oregon does not allow persons under the age of eighteen to consent to a sexual act. OR. REV. STAT. § 163.315(1)(a) (2007).

52. Some jurisdictions describe the implied warranty of habitability as a covenant for basic rental housing services. *E.g.*, Acad. Spires, Inc. v. Brown, 268 A.2d 556, 559 (Essex County Ct. 1970) (“In a modern society one cannot be expected to live in a multi-storied apartment building without heat, hot water, garbage disposal or elevator service. Failure to supply such things is a breach of the implied covenant of habitability.”).

53. Calabresi & Melamed, *supra* note 7, at 1118. The “cheapest cost avoider” refers to that party to a given conflict who is able to forestall the harm at issue at the lowest expense or with the least investment of resources.

54. *See, e.g.*, Coase, *supra* note 38, at 15–16 (assuming the absence of transaction costs).

property rules can lead to inefficient results when transaction costs are high (especially when multiple parties are associated with classic collective-action problems, such as holdouts or free-loaders).<sup>55</sup>

By contrast, liability rules are useful when there is uncertainty at the outset about the identity of the cheapest cost avoider, and where transaction costs or collective-action problems would impede efficient bargaining over the entitlement.<sup>56</sup> In either case, the liability rule ensures that a socially desirable transaction may proceed even if the entitlement holder protests<sup>57</sup>—as does the law of eminent domain, which enables the government to condemn land for highways and airports by paying fair market value even if one or more of the owners of targeted properties would rather not sell. However, liability rules can lead to troubling distributional effects (where the efficient result is partly determined by the parties' relative ability to pay), and can also create problems from an efficiency standpoint. Specifically, the objectively determined price of the entitlement will only approximate its value to the unwilling entitlement holder, which can complicate the realization of an efficient result through market-approximating mechanisms.<sup>58</sup> For example, the payment of fair market value for eminent domain condemnations is frequently criticized as under-compensating unwilling property owners by definition, because if they really only valued the land at the prevailing market price, they presumably would have already sold it on the open market.<sup>59</sup>

Inalienability rules ensure specific outcomes to protect what Calabresi and Melamed call a “moralism,” by which they

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55. Calabresi & Melamed, *supra* note 7, at 1119.

56. *Id.*

57. The liability rule ensures the efficient result regardless of initial allocation because if a competitor values the entitlement more than the initial holder, she may purchase it even over the holder's dissent. Where uncertainty hampers the initial allocation, the authors suggest that the law could assign the entitlement based on the ex ante costs of each side in determining its implied harms or benefits. *Id.* at 1107–10.

58. *Id.* at 1120.

59. See *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979) (acknowledging that market price “does not necessarily compensate for all values an owner may derive from his property”); see also RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 183 (1985) (“The central difficulty of the market value formula for explicit compensation . . . is that it denies any compensation for real but subjective values.”); *Heller & Hills*, *supra* note 13, at 1474 (critiquing the eminent domain liability rule for necessarily under-compensating reluctant private owners).

mean a strong policymaking consensus preferring some desired outcome despite the resulting efficiency and autonomy losses that the assignment of an inalienability rule inevitably implies.<sup>60</sup> In this way, inalienability may be used to serve a policy of paternalism (to protect legal actors under some kind of disability, such as minors with regard to statutory rape), or to achieve a preferred distributional preference in light of some compelling public policy (such as affirmative action).<sup>61</sup> For example, the implied warranty of habitability reflects a societal consensus about minimum levels of residential safety, despite its frustration of bargains that some landlords and tenants might otherwise reach for less expensive, less safe housing.

From the standpoint of Law and Economics, the problem with inalienability rules is that they prioritize other policy concerns over economic efficiency (if, as is often the case, these subjective concerns cannot be assigned a reliably measurable economic value).<sup>62</sup> That said, inalienability rules are not always used in opposition to efficiency; Calabresi and Melamed note that they are occasionally appropriate to avoid the wasteful costs of setting up a market to shift an entitlement for which there is no actual demand.<sup>63</sup> Still, they are most often deployed where the pursuit of efficiency takes a backseat to a countervailing policy concern. From the libertarian standpoint, the problem with inalienability rules is that they prioritize other policy concerns over individual autonomy. If there is not perfect consensus about the public policy privileged by the inalienability rule, then those who disagree with the policy may acutely object to this loss of all transactional control over the entitlement.

### B. *The Cathedral in the Public Law Context*

The *Cathedral* framework originates in the private law context, but it is also meaningful in describing constitutional entitlements—as well as the infrastructural problems that can

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60. Calabresi & Melamed, *supra* note 7, at 1111–12, 1123–24.

61. *Id.* at 1113–14.

62. Some authors describe them as “public goods” that are hard to value economically. See, e.g., David S. Brookshire & Don L. Coursey, *Measuring the Value of a Public Good: An Empirical Comparison of Elicitation Procedures*, 77 AM. ECON. REV. 554, 554 (1987) (considering the “practical problems” associated with measuring the value of public goods); Sameer H. Doshi, *Making the Sale on Contingent Valuation*, 21 TUL. ENVTL. L.J. 295, 296 (2008).

63. Calabresi & Melamed, *supra* note 7, at 1123–24.

arise when courts must jurisprudentially infer what remedy rule should attach to an otherwise clearly stated normative rule. Some constitutional entitlements, such as individual rights, are easily analogized to the standard private law entitlements to do or have something. Other constitutional entitlements allocate jurisdictional authority to different governmental actors, and assign limits to that authority. Although these more structural entitlements stray farther from the original *Cathedral* inquiry, the framework remains surprisingly powerful in clarifying what happens when they are challenged, and offers useful analytical tools for courts that must determine remedies jurisprudentially.

The scholarly consensus is that most constitutional entitlements are protected under a property rule,<sup>64</sup> although Professor Eugene Kontorovich has recently demonstrated many instances of hidden liability rules.<sup>65</sup> Still, all three varieties can be found in constitutional law, some specified in the text and others jurisprudentially. For example, a defendant's Sixth Amendment right to jury trial is treated as protected by a property rule, since she can bargain it away in exchange for a

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64. See, e.g., AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 115, 239 n.112 (1997) (arguing that constitutional rights should not be transformed into "takings-clause-like 'liability' rights" because it would allow the government to "cynically treat violations of sacred constitutional rights merely as the cost of doing business"); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 *YALE L.J.* 1, 93-94 (1988) (arguing that constitutional rights are properly protected with property rules rather than liability rules because "dignitary relationships between citizen and government" cannot be monetized and attempts to do so would, from the expressive perspective, devalue important political rights); Kontorovich, *supra* note 12, at 1138 (applying the framework to constitutional entitlements and remedies in general and suggesting that the dominant trend is to view constitutional entitlements as requiring property rule protection); David Luban, *The Warren Court and the Concept of a Right*, 34 *HARV. C.R.-C.L. L. REV.* 7, 19 n.36, 19-20 (1999) (suggesting that the "only conceivable notion of constitutional rights" entails "prophylactic protection from potential infringements" and that the Warren Court subscribed to such a property rule view of constitutional rights); Richard H. Seamon, *The Asymmetry of State Sovereign Immunity*, 76 *WASH. L. REV.* 1067, 1135 n.325 (2001) (observing that constitutional rights are presumptively protected by property rules); cf. Erik G. Luna, *The Models of Criminal Procedure*, 2 *BUFF. CRIM. L. REV.* 389, 436 (1999) (arguing that Fourth Amendment doctrine should seek to prevent unconstitutional conduct rather than compensate it, and that the government should not be able to "purchase" supposedly inalienable constitutional rights through the expediency of a liability rule").

65. Kontorovich, *supra* note 12, at 1138 (suggesting that although the dominant trend is to view constitutional entitlements as requiring property rule protection, the use of liability rules is widespread); Eugene Kontorovich, *Liability Rules for Constitutional Rights: The Case of Mass Detentions*, 56 *STAN. L. REV.* 755, 758 (2004).

plea agreement that she would rather have. Although land is generally protected under a property rule in the private market, an owner's Fifth Amendment right against government appropriation for public use is protected under an explicit liability rule, since the state may take it over her dissent so long as just compensation is paid.<sup>66</sup> Meanwhile, the Thirteenth Amendment prohibition of slavery confers an entitlement to freedom zealously guarded by an inalienability rule, since even a consensual agreement to sell oneself into slavery will be legally unenforceable.<sup>67</sup> Voting rights guaranteed by the Fourteenth Amendment are also protected under an inalienability rule (and even more explicitly so by state law), since an enfranchised citizen cannot legally trade her right to vote to someone else.<sup>68</sup>

Applying the *Cathedral* framework to constitutional entitlements generates some controversy: some suggest that it is heretical to speak of remedies for constitutional violations at all, because it implies that unconstitutional acts are permissi-

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66. Professor Eugene Kontorovich has also coined the “liability rule” combination of property and liability rules in certain areas of constitutional law, including takings, since the liability rule for public-use takings is paired with a property rule for non-public-use takings. See Kontorovich, *supra* note 12, at 1161. An even more explicit liability rule can be found in the Third Amendment proscription on quartering troops on private property during peace time without the owner's permission—an explicit constitutional property rule that is less conspicuously paired with an implied liability rule protecting the entitlement during wartime. *Id.* at 1140.

67. Professor Thomas Merrill has proposed a variation on the *Cathedral* framework to better describe entitlements in the public law context, in which he suggests an alternate basis for inalienability rules. Merrill, *supra* note 12, at 1143–44 (applying the framework to constitutional rights within the context of the government's efforts to reduce smoking). In his view, an inalienability rule is useful whenever the value of keeping the entitlement where it is initially allocated is worth more to the public than it is to the holder of the initial allocation, thus preventing socially undesirable transfers of publicly valuable allocations. See *id.* at 1154. Merrill's suggestion is a useful way of understanding the *Cathedral* “moralism” in the public law context, but it ultimately breaks down to the same way of understanding Calabresi and Melamed's “moralism” this Article uses: a policy-making consensus about a desired outcome that outweighs the resulting efficiency and autonomy losses implied by the inalienability rule.

68. See Pamela S. Karlan, *Politics by Other Means*, 85 VA. L. REV. 1697, 1709 (1999) (“The law treats voting as a ‘market-inalienable’ activity: Votes can be given away (indeed, they get most of their meaning from being ‘cast’), but they cannot be sold, at least not directly.”); Saul Levmore, *Voting with Intensity*, 53 STAN. L. REV. 111, 116 (2000) (“It is possible to think of voting as unique but it is also defensible to think of voting rights as contained in a class of things generally held inalienable.”).

ble so long as they are remedied appropriately.<sup>69</sup> However, using the framework to better understand our most foundational legal rules does not undermine constitutional limits, it merely characterizes more accurately the inherent limits built into the underlying constitutional entitlements. In other words, speaking of the liability rule protecting private property against condemnation for public use does not cheapen the Fifth Amendment right to private property, it just accurately characterizes the remedy rule effectively built in to the constitutional grant. Either way, as Professor Kontorovich has argued, the distinction is ultimately about whether the essential negotiation over shifting an entitlement happens *ex ante* (as it does under a property rule) or *ex post* (as it does under a liability rule)—or not at all (as it does *not* under an inalienability rule).<sup>70</sup>

### C. *Federalism at the Cathedral*

The Supreme Court's recent federalism jurisprudence shows the same array of choices among remedy rules for protecting assigned entitlements. Like other constitutional entitlements, most created by the rules of constitutional federalism are protected under a property rule. For example, a state's Eleventh Amendment entitlement to sovereign immunity from citizen suit<sup>71</sup> is protected by a property rule, because the state can choose to waive the entitlement by consenting to an otherwise barred suit.<sup>72</sup> In the New Federalism era, the Supreme Court has defended its strong protection of a state's rights under the Eleventh Amendment by characterizing the entitlement to sovereign immunity as a core attribute of statehood—one that cannot be casually abrogated without posing dire consequences for the success of the state as an enterprise of government.<sup>73</sup> However, in keeping with its general approach

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69. *E.g.*, Kontorovich, *supra* note 12, at 1138 (“Limiting remedies to *ex post* money damages (thereby adopting a liability rule) is widely thought of as incompatible with constitutional values.”).

70. *See id.* at 1137.

71. U.S. CONST. amend. XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”).

72. Jackson, *supra* note 64, at 89; *see also* Seamon, *supra* note 64, at 1135.

73. *E.g.*, *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996). The Court noted: “[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition[s] . . . which it confirms.” . . . [F]irst, that each State is a sovereign entity in our federal system; and

of protecting entitlements under a property rule, the Court has also consistently held that the Constitution does not prohibit a state from trading away this entitlement of its own accord.<sup>74</sup>

Similarly, the scope of federal regulatory jurisdiction under the Commerce Clause and other federally enumerated powers is also protected by a property rule, as demonstrated by the Court's concomitant Spending Clause jurisprudence. Although the Commerce Clause grants a zone of positive jurisdictional authority to the federal government,<sup>75</sup> the entitlement can also be understood as a reciprocal entitlement to the states for federal regulatory noninterference beyond the designated limits (and it is this aspect of the Commerce Clause rule that has most interested the Court since the New Federalism revival).<sup>76</sup> However, the federal government frequently uses its spending power to negotiate with the states for expanded regulatory jurisdiction beyond the limits of the commerce power or its other enumerated powers.<sup>77</sup> When this happens, a state is essentially bargaining away its constitutional entitlement to federal noninterference in the relevant regulatory zone,<sup>78</sup> much as an

second, that “[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.”

*Id.* (third alteration in original) (emphasis added) (quoting *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991); *Hans v. Louisiana*, 134 U.S. 1, 13 (1890) (quoting THE FEDERALIST NO. 5, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961))).

74. *E.g.*, *In re New York*, 256 U.S. 490, 497 (1921) (repeating the constitutional proscription of citizen suits against a state unless “consent [is] given”). A state may waive its Eleventh Amendment immunity if it does so explicitly. *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (“[W]e will find waiver only where stated ‘by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.’” (second alteration in original) (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909))).

75. U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .”).

76. In several of its most famous New Federalism decisions, the Court emphasized the limits of Congress's power under the Commerce Clause. *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001) (invalidating federal Clean Water Act jurisdiction over isolated intrastate wetlands); *United States v. Morrison*, 529 U.S. 598, 602 (2000) (invalidating federal civil remedies under the Violence Against Women Act); *United States v. Lopez*, 514 U.S. 549, 551 (1995) (invalidating the Gun-Free School Zones Act).

77. *E.g.*, *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (upholding Congress's use of the spending power to persuade states to enact a minimum drinking age).

78. For example, even as the Court held that Congress lacked constitutional authority to require the states to take the challenged actions, it noted that Congress remained free to persuade the states to do so using its power under the Spending Clause. *New York v. United States*, 505 U.S. 144, 166–67 (1992).

individual defendant might trade away her property-rule-protected Sixth Amendment entitlement to a jury trial in a plea agreement with the prosecution. For example, the federal government was able to persuade most states to reduce their speed limits during the gas crisis of the 1970s by conditioning their receipt of federal highway funds on the adoption of a fifty-five mile per hour maximum on interstate highways.<sup>79</sup>

In the background of these reciprocal federal and state entitlements lurks the Tenth Amendment, promising a system of dual sovereignty in which the state and federal governments play distinct roles.<sup>80</sup> It is the penumbral effect of the Tenth Amendment that creates the reciprocal state entitlement whenever the Constitution grants a limited power to the federal government, such as the federal power to regulate interstate commerce. The state receives a reciprocal entitlement for federal noninterference beyond the limits thereby implied, such as the Court has found with regard to the regulation of domestic violence<sup>81</sup> or hydrologically isolated wetlands.<sup>82</sup> Indeed, although the New Federalism revival promotes a casual understanding of the Tenth Amendment entitlement as one against federal commandeering of state power,<sup>83</sup> the better characteri-

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79. See, e.g., Zachary Coile, *Rep. Speier Proposes National Speed Limit to Aid Fuel Efficiency*, S.F. CHRON., July 11, 2008, at A1 (discussing the 1974 law that conditioned federal highway funds on states' adoption of a fifty-five mph limit). A contentious modern example is President Bush's "No Child Left Behind" initiative, by which the U.S. Department of Education has effectively mandated national elementary school performance standards, for example, David Nash, Note, *Improving No Child Left Behind: Achieving Excellence and Equity in Partnership with the States*, 55 RUTGERS L. REV. 239, 253 (2002), even though public education is beyond Congress's enumerated powers. *Lopez*, 514 U.S. at 565 (noting that the commerce power does not authorize Congress to mandate a national school curriculum).

80. Ryan, *supra* note 2, at 519, 564 (discussing the Tenth Amendment's dual sovereignty directive); see *supra* notes 31–32.

81. *Morrison*, 529 U.S. at 602 (invalidating federal civil remedies under the Violence Against Women Act because the provision exceeded federal authority under the Commerce Clause and Section 5 of the Fourteenth Amendment).

82. *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 162 (2001) (implying that the Army Corps of Engineers had exceeded federal authority under the Commerce Clause in asserting Clean Water Act jurisdiction over isolated wetlands, but holding on statutory grounds to avoid reaching the constitutional issue). See also *infra* note 235 (detailing how the progenies of this decision have spun the law of wetlands regulation into unworkable chaos).

83. See *Printz v. United States*, 521 U.S. 898, 935 (1997) (observing that the Tenth Amendment forbids the federal government to "issue directives requiring the States to address particular problems [or] command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program").

zation—acknowledged even by the Court’s own New Federalism proponents—is that the Tenth Amendment creates these very state and federal entitlements to reciprocal jurisdictional zones. To this point, writing for the majority in *New York v. United States*,<sup>84</sup> Justice O’Connor explained:

In a case like these, involving the division of authority between federal and state governments, the two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.<sup>85</sup>

As noted above, in its commerce and spending-power jurisprudence, the Court has interpreted these reciprocal state entitlements as protected under a property rule enabling their waiver in spending-power deals. In its Eleventh Amendment jurisprudence, the Court has allowed the states to trade on an entitlement to sovereign immunity that it has described as an essential attribute of state sovereignty.<sup>86</sup> But in the seminal case of its New Federalism Tenth Amendment jurisprudence, the Court chose a very different alternative from among those described in the *Cathedral* framework. In *New York v. United States*, as detailed in Part II, the Court protected its vision of mutually exclusive state and federal regulatory spheres under an inalienability rule that prevents any kind of waiver, even as it allows a parallel sort of waiver in spending-power cases.<sup>87</sup>

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84. 505 U.S. 144, 156 (1992).

85. *Id.* See also Ryan, *supra* note 2, at 554–55.

86. See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) (“A sovereign’s immunity may be waived, and the Court consistently has held that a State may consent to suit against it in federal court.”); *supra* note 73.

87. For the argument that the Supreme Court’s spending-power cases wrongly undermine the rest of its New Federalism jurisprudence, see Lynn A. Baker, *Federalism and the Spending Power from Dole to Birmingham Board of Education*, in *THE REHNQUIST LEGACY* 205, 205–06 (Craig M. Bradley ed., 2006) (discussing how *South Dakota v. Dole* provides a loophole through which Congress may continue to regulate the states beyond what is condoned in other areas of the New Federalism jurisprudence); Lynn A. Baker & Mitchell N. Berman, *Getting Off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 *IND. L.J.* 459, 499–500 (2003); Ilya Somin, *Closing the Pandora’s Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Government*, 90 *GEO. L.J.* 461, 461 (2002).

#### D. *Skepticism and the Cathedral*

Before advancing to the case, however, it is worth confronting potential skepticism about whether Calabresi and Melamed's private law bargaining analysis is truly applicable in the remote context of constitutional federalism. This Article proceeds in the firm belief that there is much to be gained from intradisciplinary exchange between one area of legal thought and another—even when there are rough edges to the enterprise—because it can illuminate old problems with the clarity of a new vantage point, and unpack seemingly daunting new problems with the benefit of proven conceptual tools. Even so, are the differences between private and state-federal bargaining so raw that the *Cathedral* framework simply cannot be made to fit? Analysis suggests otherwise. In fact, the dynamics of state-federal bargaining approximate marketplace bargaining even more closely than other forms of negotiation in which government is a party. Moreover, the uncertainties that pervade intergovernmental bargaining indicate that it suffers even more acutely from the very private law bargaining problems that Calabresi and Melamed urge are best resolved by the use of property and liability rules.<sup>88</sup>

Political bargaining, involving the authoritative allocation of scarce resources, is often distinguished from economic bargaining, which involves the price-regulated allocation of scarce resources.<sup>89</sup> Political bargaining becomes necessary where high transaction costs prevent market efficient bargaining, leading to the use of sovereign authority. Similar problems relating to collective action and “signaling” (by which parties communicate leverage, proposals, and concessions) occur in

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88. For good primers on bargaining theory in general and as applied to governments, see generally GIDEON DORON & ITAI SENED, *POLITICAL BARGAINING: THEORY, PRACTICE, & PROCESS* (2001); Robert H. Mnookin & Lewis Kornhausert, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *YALE L.J.* 950 (1979); David B. Spence & Lekha Gopalakrishnan, *Bargaining Theory and Regulatory Reform: The Political Logic of Inefficient Regulation*, 53 *VAND. L. REV.* 599 (2000). See also Benjamin L. Snowden, Note, *Bargaining in the Shadow of Uncertainty: Understanding the Failure of the ACF and ACT Compacts*, 13 *N.Y.U. ENVTL. L.J.* 134 (2005) (detailing the rise and fall of the Apalachicola-Chattahoochee-Flint River Basin Compact between Alabama, Georgia, and Florida, and the Alabama-Coosa-Tallapoosa River Basin Compact between Alabama and Georgia). Snowden traces the seven-year history of the compacts from signing to breakdown, using the lens of bargaining theory to explore the legal and political issues that complicate negotiations engaging multiple sovereigns. *Id.*

89. DORON & SENED, *supra* note 88, at 7.

both private and political bargaining, except that they are exacerbated in political bargaining, which generally involves a greater variety of interests and players.<sup>90</sup> Signaling becomes more complex—even baroque—in the context of political bargaining.<sup>91</sup> Compared with private parties, government actors encounter more difficulty identifying the full scope of their own interests at stake in the bargaining, because their constituents' interests often conflict.<sup>92</sup> They may even encounter greater difficulty understanding the interests of the other parties to the negotiation, due to the public participation and open meeting requirements that often accompany governmental negotiating.<sup>93</sup> The stress added to political bargaining by these factors only exacerbates the usual collective-action bargaining hurdles that motivated the original *Cathedral* analysis.

State-federal political bargaining may be even more like private economic bargaining than the more conventional political bargaining between participants in the same pool of sovereign authority. Where sovereign authority is truly divided (as between federal and state government), rather than nested (as between state and municipal governments), intergovernmental negotiation will be more like price-regulated private bargaining, because neither side can compel the other to perform against its will.<sup>94</sup> The likeness becomes less clear in contexts where one side commands most of the negotiating leverage (if, for example, the regulatory target implicates clearly enumerated federal power and state authority has been all but field preempted), but the analogy is strongest in the gray area of interjurisdictional concern that is the subject of this inquiry, where sovereign authority is divided and yet both kinds are necessary to effectively regulate. Even where power disparities

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90. See Snowden, *supra* note 88, at 179–80.

91. *Id.*

92. See, e.g., *id.* at 176–77.

93. For example, in Snowden's account, initial meetings to discuss the proposed compacts included "as many as 50 to 150 stakeholder groups or representatives," reducing negotiation to "statement[s] of positions" rather than the more nuanced information exchange preferred by bargaining theory. *Id.* at 179–80 (alteration in original) (internal quotation marks omitted) (quoting Interview by Joshua Azriel with Bob Kerr, Dir., Pollution Prevention Assistance Div., Ga. Dep't of Natural Res. (June 1999), available at <http://www.wuftfm.org/rivers/ikerr.html>).

94. This is true, at the very least, in a properly functioning market for bargaining. Where one side holds constitutional authority to regulate the other, as Congress may require state compliance with legislation enacted under the post-Civil War amendments, then the relationship is not one of bargaining but of legitimate constitutional compulsion.

exist between the parties (and, to be sure, the federal government is not always the more powerful party),<sup>95</sup> this reflects the inherent inequalities of bargaining power that pervade private bargaining. For example, Professor Roderick Hill has argued that states behave “exactly like private firms” in negotiating federal-state partnerships under the spending power.<sup>96</sup>

As do all negotiations, state-federal bargaining takes place “in the shadow of the law,”<sup>97</sup> but uncertainty regarding that special legal context poses the biggest obstacle to efficient bargaining. The primary source of uncertainty, especially in the interjurisdictional gray area, is the substantive question of who actually holds which jurisdictional entitlement.<sup>98</sup> But infrastructural uncertainties also pervade the law of intergovernmental bargaining—for instance, and especially in the federalism context, whether or not a given entitlement is even a legitimate medium of exchange (as the anti-commandeering entitlement currently is not). Similarly, parties negotiate with an eye toward their best alternative to the negotiated agreement,<sup>99</sup> but uncertainty about the reach of judicial or congressional intervention after the negotiation concludes can undermine the parties’ efforts to understand their true alternatives, further compromising bargaining efficiency.<sup>100</sup>

To facilitate more efficient intergovernmental bargaining, then, the single most important *ex ante* adjustment would be to reduce the legal uncertainties that attend it through the articulation of clearer bargaining rules. Some uncertainty will always pervade political bargaining, due to the practical difficul-

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95. As in all negotiations, leverage accrues to the party who loses the least from reaching no deal. The federal government would likely be the bigger loser were the states to withdraw from many cooperative federalism enterprises, as it would then have to find ways to provide the needed regulatory services entirely on its own, without the substantial assets of local government infrastructure. *Cf.* Hills, *supra* note 29, at 817 (asserting that the “federal government should purchase [state and local] services through a voluntary intergovernmental agreement”).

96. *Id.* at 870 (but also arguing that the anti-commandeering rule provides an important constraint on spending-power bargaining).

97. *Cf.* Mnookin & Kornhausert, *supra* note 88, at 950.

98. For example, in Snowden’s River Basin Compact example, uncertainty regarding the extent of federal claims on the basin ultimately undermined the success of the entire negotiation. Snowden, *supra* note 88, at 184.

99. ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 100* (1991).

100. For example, Snowden shows how uncertainties regarding the potential for congressional apportionment and the unlikely prospect of judicial intervention helped undermine the River Basin Compact negotiations. Snowden, *supra* note 88, at 188.

ties associated with public accountability and open meetings, multiple stakeholders and conflicting constituent interests, and some level of interjurisdictional competition. Yet even if the substantive aspect of political bargaining remains confusing, this Article contends that the Court could improve the overall state-federal bargaining enterprise by clarifying the infrastructure—the procedural rules that help parties understand the available media of exchange and their best alternatives to agreement. *New York v. United States* arguably does this by articulating an inalienability rule that forbids one form of bargaining altogether. However, Calabresi and Melamed argue that bargaining-related uncertainties—especially uncertainty about whether the initial allocation of entitlements was correct—counsels against inalienability rules.<sup>101</sup> As proposed in Part III, and in contrast to the *New York* rule, enabling freely consensual bargaining over the anti-commandeering entitlement would facilitate interjurisdictional progress in exactly the troubling case of uncertainty about the initial jurisdictional allocation. But first, we explore the history, architecture, and consequences of the *New York* rule itself.

## II. INALIENABILITY AND THE TENTH AMENDMENT: THE *NEW YORK* RULE

In 1992, *New York v. United States* inaugurated the Supreme Court's New Federalism era, setting forth the Tenth Amendment anti-commandeering doctrine in a decision that invalidated parts of the Low-Level Radioactive Waste Policy Act Amendments of 1985.<sup>102</sup> The most forceful component of the Act's penalty structure was held unconstitutional for commandeering state legislative authority, even though the states had collaboratively crafted the law and lobbied Congress for its passage over a competing proposal that would have preempted them entirely by shifting oversight to federal regulators.<sup>103</sup> The history of the *New York* saga foreshadows the difficulties

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101. Calabresi & Melamed, *supra* note 7, at 1120.

102. Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. No. 99-240, 99 Stat. 1842 (1986) (codified as amended at 42 U.S.C. §§ 2021b–2021j (2006)).

103. *E.g.*, Neil Siegel, *Commandeering and its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1660–64 (2006) (arguing that in thwarting the state-based solution, the Court's decision in *New York* was ultimately more destructive to state sovereignty interests than would have been a decision to uphold the take-title provision).

that the inalienability of the *New York* rule has since perpetuated. This Part reviews that history, analyzes the inalienability rule created by the Court's decision, and describes the chaotic aftermath that has again prompted congressional attention to the problem of safe and equitable disposal of radioactive waste. Finally, it explores the special challenges that Tenth Amendment inalienability creates for intergovernmental responses to problems that implicate both state and federal jurisdiction.

A. *The Low-Level Radioactive Waste Policy Act*

The Low-Level Radioactive Waste Policy Act and the *New York* decision involved a constitutional crisis over the disposal of radioactive waste.<sup>104</sup> As the Supreme Court explained, commercially and scientifically produced radioactive waste is both dangerous and ubiquitous:

Radioactive material is present in luminous watch dials, smoke alarms, measurement devices, medical fluids, research materials, and the protective gear and construction materials used by workers at nuclear power plants. Low level radioactive waste is generated by the Government, by hospitals, by research institutions, and by various industries. The waste must be isolated from humans for long periods of time, often for hundreds of years. Millions of cubic feet of low level radioactive waste must be disposed of each year.<sup>105</sup>

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104. Generated from medical, scientific, and commercial applications, these low-level radioactive waste products include debris, rubble, soils, paper, liquid, metals, and clothing that have been exposed to radioactivity, and sealed radiological sources that are no longer useful. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-221, *LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT: APPROACHES USED BY FOREIGN COUNTRIES MAY PROVIDE USEFUL LESSONS FOR MANAGING U.S. RADIOACTIVE WASTE 1* (2007), available at <http://www.gao.gov/new.items/d07221.pdf>. High-level radioactive waste, such as spent nuclear reactor fuel or weapons-grade material, is dealt with separately, though just as controversially, as it is slated for burial beneath Yucca Mountain in Nevada. See Chris Rizo, *NRC Rejects Nevada AG's Yucca Mountain Complaint*, LEGAL NEWSLINE, Aug. 22, 2008, <http://www.legalnewsline.com/news/215102-nrc-rejects-nevada-ags-yucca-mountain-complaint> (noting that 70 percent of Nevadans oppose the Yucca Mountain project, and describing efforts to fight it).

105. *New York v. United States*, 505 U.S. 144, 149–50 (1992).

Most Americans, it appears, prefer not to live near radioactive waste disposal facilities,<sup>106</sup> and so the increasing use of commercial technologies involving radioactive materials over the 1970s and 1980s was not matched by an increase in disposal facilities to deal with their waste products. By 1979, after half the nation's disposal sites had either filled up or closed for water management problems, only three low-level radioactive waste facilities remained in the United States to handle the entire nation's waste: the Beatty site in Nevada, the Hanford site in Washington, and the Barnwell site in South Carolina.<sup>107</sup> Nationwide, all waste that could not be stored safely at its site of generation was trucked to one of these three facilities, frustrating the citizens of Nevada, Washington, and South Carolina, who resented bearing the burden of risk for the entire nation's low-level radioactive waste stream.<sup>108</sup>

The states with disposal facilities (the "sited states") faced a dilemma. They could not simply close their borders to interstate shipments of waste and continue to site in-state produced waste without running afoul of the dormant Commerce Clause, which forbids the states from discriminating against interstate commerce.<sup>109</sup> For constitutional purposes, shipments by paying customers for the disposal of low-level radioactive waste created in other states represent a stream of interstate commerce otherwise indistinguishable from the preferred in-state shipments. Accordingly, the sited states had two options: they

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106. *Id.* at 182 ("Most citizens recognize the need for radioactive waste disposal sites, but few want sites near their homes.").

107. *Id.* at 150.

108. Audeen W. Fentiman, Tamara L. Leyerle & Ronald J. Veley, Factsheet: Legislation Governing Disposal of Low-Level Radioactive Waste, Ohio State University RER-60, [http://ohioline.osu.edu/rer-fact/rer\\_60.html](http://ohioline.osu.edu/rer-fact/rer_60.html) (last visited Aug. 29, 2009) ("In 1979 the governors of Nevada and Washington believed that they should not have to bear forever the burden of low-level radioactive waste disposal for the entire country . . .").

109. For example, the state of Washington tried to close its borders to out-of-state shipments of nuclear waste in 1981, but failed when a federal court determined that to do so would violate the dormant commerce clause and the Supremacy Clause. Associated Press, *State's Nuclear Waste Ban Is Ruled Unconstitutional*, N.Y. TIMES, June 27, 1981, at 6, available at <http://query.nytimes.com/gst/fullpage.html?res=9503E6D91138F934A15755C0A967948260> (quoting Judge McNichols's statement that the proposed ban was "unenforceable because it violates both the supremacy and the commerce clause"); see also *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 767–68 (1945) (explaining the rationale behind the dormant commerce clause); *Eby-Brown Co. v. Wis. Dep't of Agric.*, 295 F.3d 749, 756 (7th Cir. 2002) ("The so-called 'dormant commerce clause' prohibits the various states from discriminating against or burdening items in the interstate stream of commerce.").

could trigger a constitutional standoff to make their point (but likely lose in court), or they could simply close their facilities down completely, forcing the rest of the nation out of its collective stupor and into action regarding the radioactive waste capacity crisis.

One by one, they chose the latter option. In 1979, the Governor of Nevada closed the Beatty site after a leak was found in a shipment of radioactive sludge delivered by truck; he pledged not to allow it to reopen until he could be assured that the packaging and transportation systems were “foolproof.”<sup>110</sup> Shortly thereafter, Washington temporarily closed the Hanford facility, leaving South Carolina’s Barnwell site as the only available disposal facility in the country.<sup>111</sup> This prompted South Carolina’s own threat of closure, and the prospect of no disposal capacity finally jump-started a national political conversation to resolve the inequities faced by the sited states while protecting the public from unsafe exposure to harmful radioactive waste products.<sup>112</sup>

To accomplish these objectives, Congress considered mandating a national regulatory program that would preempt state decision making.<sup>113</sup> However, the states negotiated an alternative proposal through the National Governors Association and lobbied hard for Congress to adopt what came to be known as the “state-based” solution.<sup>114</sup> Underscored by the general policy that each state should be responsible for its own waste,<sup>115</sup>

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110. See *Nevada A-Dump Closed*, FACTS ON FILE WORLD NEWS DIG., July 13, 1979, at 519. After reopening and closing several times, Nevada closed the site permanently in 1992. See Richard R. Zuercher, *Nevada Accord Closes Beatty LLW Facility Permanently*, NUCLEONICS WK., Nov. 11, 1993, at 6; see also *Squeeze on Wastes*, CHEMICAL WK., Apr. 12, 1978, at 21 (demonstrating the tense relations between Nevada, Washington, and South Carolina over site closures).

111. *New York*, 505 U.S. at 150.

112. See *id.* at 151; see also Thomas O’Toole, *President Seeking Permanent Sites to Store Atomic Waste, Spent Fuel*, WASH. POST, Feb. 12, 1980, at A1 (discussing the various sites that the federal government considered purchasing for waste disposal as the South Carolina facility became harder to use).

113. *New York*, 505 U.S. at 192 (White, J., concurring and dissenting).

114. *Id.*; see also *id.* at 189–90 (“To read the Court’s version of events, one would think that Congress was the sole proponent of a solution to the Nation’s low-level radioactive waste problem. Not so. The Low-Level Radioactive Waste Policy Act of 1980 (“1980 Act”), and its amendatory 1985 Act, resulted from the efforts of state leaders to achieve a state-based set of remedies to the waste problem. They sought not federal pre-emption or intervention, but rather congressional sanction of interstate compromises they had reached.” (citations omitted)).

115. See *id.* at 190–91 (“In May 1980, the State Planning Council on Radioactive Waste Management submitted the following unanimous recommendation to President Carter: ‘The national policy of the United States on low-level radioac-

the states' regional approach embodied a compromise between the sited states (frustrated at bearing more than their fair share of the nation's toxic waste) and the unsited states (desperate for more time to prepare for the point at which they would no longer be able to use the sited states' facilities).<sup>116</sup> Under this approach, states would be responsible for disposing of their own waste, either alone or within regional interstate compacts formed for the purpose of low-level radioactive waste disposal.<sup>117</sup> Each compact would choose a state to host the compact's disposal facility for a designated period, or otherwise provide for waste disposal, as by contractual arrangement with another compact for use of their facility.<sup>118</sup> After a reasonable period in which unsited states could build new disposal facilities, the sited states would be authorized in 1986 to close their borders to interstate shipments of waste if they chose, or to admit waste generated only from within their own regional compacts.<sup>119</sup>

The plan would alleviate the unfair burden on the sited states while protecting all Americans from the hazards associated with the cross-country transportation of low-level radioactive waste on public highways. However, the states could not implement the plan completely on their own; they needed Congress's formal blessing to head off the dormant Commerce Clause problem otherwise created by the controls on interstate waste shipments after the 1986 deadline.<sup>120</sup> In acknowledgment of the states' hard-fought consensus, Congress unanimously adopted the state-based approach in the Low-Level Radioactive Waste Policy Act of 1980 ("the Act").<sup>121</sup>

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tive waste shall be that every State is responsible for the disposal of the low-level radioactive waste generated by nondefense related activities within its boundaries and that States are authorized to enter into interstate compacts, as necessary, for the purpose of carrying out this responsibility.' This recommendation was adopted by the National Governors' Association a few months later." (citations omitted)).

116. *Id.* at 181 (majority opinion) ("[T]he Act embodies a bargain among the sited and unsited States . . .").

117. *Id.* at 150–51.

118. *Id.* at 151–52; Fentiman, Leyerle & Veley, *supra* note 108.

119. *New York*, 505 U.S. at 151.

120. *Id.* ("The 1980 Act authorized States to enter into regional compacts that, once ratified by Congress, would have the authority beginning in 1986 to restrict the use of their disposal facilities to waste generated within member States.")

121. Low-Level Radioactive Waste Policy Act, Pub. L. No. 96-573, 94 Stat. 3347 (1980) (current version at 42 U.S.C. §§ 2021b–2021d (2006)).

Despite such national consensus before its passage into law, the plan was plagued by widespread noncompliance.<sup>122</sup> The initial Act was toothless;<sup>123</sup> Congress had honored the states' request that it include no federal penalties for violations in the first few years, giving the states time to evaluate how best to perfect their plans without federal interference.<sup>124</sup> However, this deference did not serve the Act's goal of rapid progress toward the creation of additional disposal capacity, as no new facilities had been built even by 1985.<sup>125</sup> As the sited and unsited states had negotiated, the Act permitted the sited states to refuse out-of-state shipments beginning in 1986, a fast-approaching deadline that was now certain to leave many states without any means of disposing of this hazardous waste.<sup>126</sup> The looming crisis was reminiscent of that which had prompted Congress to act in the first place: things seemed as they had in 1979 when the sited states first threatened to close their facilities, except that now they could do so without violating the dormant Commerce Clause.

Anxious to forestall a top-down federal solution, the states returned to the negotiating table to hammer out a new proposal, which the National Governors Association persuaded Congress to pass as the Low Level Radioactive Waste Policy Act Amendments of 1985.<sup>127</sup> The new compromise extended the

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122. See *New York*, 505 U.S. at 151.

123. *Id.* ("The 1980 Act included no penalties for States that failed to participate in this plan.").

124. *Id.* at 191–92 (White, J., concurring and dissenting). Justice White quoted from the Governors' Task Force's recommendation to Congress that it:

defer consideration of sanctions to compel the establishment of new disposal sites until at least two years after the enactment of compact consent legislation. States are already confronting the diminishing capacity of present sites and an unequivocal political warning from those states' Governors. If at the end of the two-year period states have not responded effectively, or if problems still exist, stronger federal action may be necessary. But until that time, Congress should confine its role to removing obstacles and allow the states a reasonable chance to solve the problem themselves.

*Id.* (internal quotation marks omitted); see also *id.* at 195 ("Congress could have pre-empted the field by directly regulating the disposal of this waste pursuant to its powers under the Commerce and Spending Clauses, but instead it *unanimously* assented to the States' request for congressional ratification of agreements to which they had acceded.").

125. *Id.* at 151 (majority opinion).

126. See *supra* notes 119–20.

127. Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. No. 99-240, 99 Stat. 1842 (1986) (codified as amended at 42 U.S.C. §§ 2021b–2021j (2006)); see also *New York*, 505 U.S. at 151 (acknowledging the role of the Nation-

deadline by which unsited states could continue to ship waste to sited states until 1992, but included harsher penalties for non-compliance with a timetable of regulatory milestones requiring states to take specific steps toward the ultimate goal of disposal self-sufficiency.<sup>128</sup>

Noncompliant states would still lose access to the sited states' disposal facilities after the six-year extension, but states that failed to meet milestones over the intervening years could also be forced to pay steep surcharges for access to existing disposal facilities in increasing increments over time, and denied certain access even before the 1992 final deadline.<sup>129</sup> One quarter of the surcharges levied by the sited state facilities would be collected and redistributed by the Secretary of Energy to states that did meet the required milestones.<sup>130</sup>

Finally, the most severe penalty under the new plan, and that most expected to motivate compliance, was the "take-title" penalty, by which a state that had not met the terms of the Act by 1996 would be held to "take title" to any low-level radioactive waste produced within its borders at the request of the waste's producers.<sup>131</sup> The take-title provision essentially meant that a state would assume legal liability for any damage associated with low-level radioactive waste produced within its borders for which it had not made disposal arrangements, either by building its own facility or by gaining access to a site with sufficient capacity through membership in a willing regional compact. As a quid pro quo for the six-year reprieve that the sited states were granting, the unsited states were thus promising to make genuine progress toward self-sufficiency or face real and dire consequences.

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al Governors Association in preparing the terms of the law). Hereafter, references to "the Act" refer to the Low-Level Radioactive Waste Policy Act as amended in 1985.

128. *New York*, 505 U.S. at 151-53. Among these milestones: by 1986, each state was to have ratified legislation in which it either joined a regional compact or indicated an intent to develop a disposal facility within the state; by 1988, each unsited compact was to have identified the state in which its facility would be located, and each compact or stand-alone state was to have developed a siting plan for the new facility; by 1990, each state or compact was to have filed a complete application for a license to operate the disposal facility (or certified that the state would be able to dispose of all in-state generated waste after 1992). *Id.* at 152-53.

129. *Id.*

130. *Id.* at 152.

131. *Id.* at 153-54.

### B. *New York State's Challenge*

These Amendments might have achieved the needed ratio of carrot to stick, but the Tenth Amendment challenge that would follow obviated any such accomplishment.

Over the following seven years, Congress approved nine regional compacts encompassing forty-two states, three of which included the sited states of South Carolina, Washington, and Nevada.<sup>132</sup> The six unsited compacts and four of the unaffiliated states met the first few milestones required under the Amended Act, among them New York State—one of the largest state producers of low-level radioactive waste in the nation.<sup>133</sup> Anxious for prolonged access to existing facilities until it could make other arrangements, New York had supported both the state-based plan that the National Governors Association initially brought to Congress and the secondary compromise in the penalty-bearing Amendments, actively lobbying for their passage into federal law.<sup>134</sup> With so much in-state waste production, New York especially benefited from the additional twelve years of access under the law, and it made good faith efforts to build its own facility during that time.<sup>135</sup> Although it enacted legislation providing for the siting and financing of a facility and identified five potential locations in Allegany and Cortland counties, the surrounding communities each strenuously objected to the construction of a radioactive waste disposal site in their vicinity.<sup>136</sup>

With the 1992 deadline fast approaching and no contingency for disposing of the waste that could soon be refused by the sited states, New York and its two counties sued to overturn the Act on various grounds, including violation of their rights under the due process clause, the Tenth Amendment, the Eleventh Amendment, and the Guarantee Clause.<sup>137</sup> After losing at the district and appellate court levels, the Supreme Court granted certiorari to hear New York on its Tenth Amendment and Guarantee Clause issues.<sup>138</sup> The Court was interested in New York's claim that the Act's penalty structure commandeered its retained reservoir of state sovereign author-

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132. *Id.* at 154.

133. *Id.*

134. *Id.* at 180–81.

135. *Id.* at 154.

136. *Id.*

137. *Id.*

138. *Id.*

ity, most dramatically through the take-title provision.<sup>139</sup> New York argued that under the Tenth Amendment, Congress could neither force a state to build a radioactive waste disposal facility, nor compel it to assume liability for the waste of in-state producers, and so the false choice required under the Act rendered it an unenforceable act of federal coercion.<sup>140</sup>

The cited states intervened as defendants in New York's suit.<sup>141</sup> They agreed with the position of the United States that the Act did not violate the Tenth Amendment, but added that whether or not some other state could successfully object to the Act on these grounds, New York—of all states—could hardly state a Tenth Amendment claim of coercion when it had so clearly consented to the very terms it now challenged.<sup>142</sup> Even if, *arguendo*, the Act really interfered with a state's Tenth Amendment rights in the abstract, they argued, New York had waived the relevant entitlement, not only through its participation in the National Governors Association process but by its independent efforts to get the Act and Amendment passed into federal law.<sup>143</sup> As Justice White wrote in dissent:

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139. *Id.* at 174–77.

140. *See id.* at 175–76.

141. *Id.* at 154.

142. *Id.* at 180–81. As Justice O'Connor wrote:

The cited state respondents focus their attention on the process by which the Act was formulated. They correctly observe that public officials representing the State of New York lent their support to the Act's enactment. A Deputy Commissioner of the State's Energy Office testified in favor of the Act. Senator Moynihan of New York spoke in support of the Act on the floor of the Senate. Respondents note that the Act embodies a bargain among the cited and uncited States, a compromise to which New York was a willing participant and from which New York has reaped much benefit. Respondents then pose what appears at first to be a troubling question: How can a federal statute be found an unconstitutional infringement of state sovereignty when state officials consented to the statute's enactment?

*Id.* (citations omitted).

143. *Id.* Justice White wrote separately to convey his understanding of New York's waiver:

In my view, New York's actions subsequent to enactment of the 1980 and 1985 Acts fairly indicate its approval of the interstate agreement process embodied in those laws within the meaning of Art. 1, §10, cl. 3, of the Constitution, which provides that "[n]o State shall, without the Consent of Congress, . . . enter into any Agreement of Compact with another State." First, the States—including New York—worked through their Governors to petition Congress for the 1980 and 1985 Acts. . . . Second, New York acted in compliance with the requisites of both statutes in key respects, thus signifying its assent to the agreement achieved among the States as codified in these laws. After enactment of the 1980 Act and

As I have attempted to demonstrate, these statutes are best understood as the products of collective state action, rather than as impositions placed on States by the Federal Government. . . . Indeed, in 1985, as the January 1, 1986, deadline crisis approached and Congress considered the 1985 legislation that is the subject of this lawsuit, the Deputy Commissioner for Policy and Planning of the New York State Energy Office testified before Congress that “New York State supports the efforts of Mr. Udall and the members of this Subcommittee to resolve the current impasse over Congressional consent to the proposed LLRW compacts and provide interim access for states and regions without sites. New York State has been participating with the National Governors’ Association and the other large states and compact commissions in an effort to further refine the recommended approach in HR 1083 and reach a consensus between all groups.”

Based on the assumption that “other states will [not] continue indefinitely to provide access to facilities adequate for the permanent disposal of low-level radioactive waste generated in New York,” the state legislature enacted a law providing for a waste disposal facility to be sited in the State. . . . [Justice White described New York’s compliance with various provisions of the Act]. As it was undertaking these initial steps to honor the interstate compromise embodied in the 1985 Act, New York continued to take full advantage of the import concession made by the sited States, by exporting its low-level radioactive waste for the full 7-year extension period provided in the 1985 Act. By gaining these benefits and complying with certain of the Act’s 1985 deadlines, therefore, New York fairly evidenced its acceptance of the federal-state arrangement—including the take title provision.<sup>144</sup>

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pursuant to its provision in § 4(a)(2), 94 Stat. 3348, New York entered into compact negotiations with several other northeastern States before withdrawing from them to “go it alone.”

*Id.* at 196 (White, J., concurring and dissenting).

144. *Id.* at 196–98 (citations omitted). Justice White further cited the rule in *Dyer v. Sims*, 341 U.S. 22 (1951), in which the Court denied a claim by West Virginia that it did not have the constitutional authority to enter into the compact it had already joined:

Estoppel is not often to be invoked against a government. But West Virginia assumed a contractual obligation with equals by permission of another government that is sovereign in the field. After Congress and sister States had been induced to alter their positions and bind themselves to terms of a covenant, West Virginia should be estopped from repudiating her act.

The sited states claimed that New York could not make out a commandeering challenge after specifically asking to be bound by the terms of a legislative bargain, one in which it had participated just long enough to reap the intended benefits of twelve additional years of access to the sited states' facilities. Surely, they urged, New York's actions seeking federal ratification of the interstate deal it had helped negotiate should vitiate a later claim that Congress had violated its state sovereignty.

To be sure, there were compelling arguments on both sides of the debate as to whether New York's actions leading up to the passage of the challenged provisions should have estopped its subsequent Tenth Amendment challenge. Its enthusiastic support for federal passage of the Act and its Amendments certainly made New York seem less like the victim of federal coercion and more like an opportunistic litigant, one seeking any possible legal foothold before a Court itching to hold forth on matters of federalism. Similarly, waiver might be discernable from its manifested intent to abide by the terms of the Act until the time of its challenge—at least insofar as to take full advantage of the period of extended access.<sup>145</sup>

On the other hand, Tenth Amendment waiver had never previously been addressed by the Court, so whether New York's action did or did not constitute waiver would have been a question of first impression. If Tenth Amendment waiver is comparable to a state's waiver of its Eleventh Amendment immunity from suit, then New York's actions—though suggestive and even self-serving—were still probably too indirect to have qualified as waiver. Eleventh Amendment waiver must be made explicitly; there is no such thing as “implied” or “constructive” Eleventh Amendment waiver.<sup>146</sup> By these standards, even if the National Governors Association could be held to have spoken for New York, its recommendation to Congress did not have the force of a binding agreement by the states, it was not formally consented to by the state legislatures, and it certainly fell short of an explicit waiver of protected constitutional

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*Id.* at 199 (emphasis omitted) (citing *Dyer*, 341 U.S. at 34).

145. *Id.* at 196–98.

146. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675–76 (1999) (explaining that its “stringent” test finds waiver of a state's Eleventh Amendment sovereign immunity “if the State voluntarily invokes our jurisdiction, or else if the State makes a clear declaration that it intends to submit itself to our jurisdiction,” but not if a state is merely consenting to suits in state courts or stating its intention to “sue and be sued” (citations omitted) (internal quotation marks omitted)).

rights. Neither could statements of support for the legislation by higher-level New York officials be construed as express consent to waive a constitutional right. That New York took advantage of open disposal facilities also may not manifest a clear intent to surrender its Tenth Amendment rights, at least if the appropriate metric were the Eleventh Amendment model.<sup>147</sup>

In the end, the well-known outcome of the case is that New York prevailed on its Tenth Amendment claim with regard to the take-title penalty, the penalty was stricken, and legal history was made as the New Federalism's Tenth Amendment anti-commandeering doctrine was born.<sup>148</sup> The Court was clear that although Congress could preempt state authority to directly regulate the interstate market for low-level radioactive waste disposal, and though it can wield the spending power to persuade states to voluntarily accede to a federal regulatory program, "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program."<sup>149</sup> In other words, the Tenth Amendment creates an entitlement to the states for a zone of federal noninterference, which, *inter alia*, forbids the federal government from using (or "commandeering") state government as an apparatus within a national regulatory program.

### C. *The New York v. United States Inalienability Rule*

For the purposes of our inquiry here, however, the significant part of the decision is not the anti-commandeering rule itself, but how the Court dealt with the question of waiver. Inadvertently or otherwise, it did so by protecting the new anti-commandeering rule with a *Cathedral* inalienability rule. This section describes how the decision made the anti-commandeering entitlement both explicitly inalienable by elected officials and implicitly inalienable by any other means, and differentiates the property rule that would apply to spending-power bargaining over related jurisdictional trades.

#### 1. Anti-commandeering Inalienability

Rather than deciding, as well it might have, that New York's actions simply did not rise to the needed level for waiv-

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147. *See New York*, 505 U.S. at 183.

148. *Id.* at 187–88.

149. *Id.* at 188.

ing the Tenth Amendment entitlement against federal commandeering, the Court decided that the entire waiver question was moot. There was no need to decide whether New York's actions met the criteria for waiver because, simply put, there *is* no such waiver in the Tenth Amendment context. Writing for the majority, Justice O'Connor explained that a state may not waive its Tenth Amendment entitlement because the Tenth Amendment protects not the state itself but the interest its individual citizens hold in state sovereignty:

The sited state respondents focus their attention on the process by which the Act was formulated. They correctly observe that public officials representing the State of New York lent their support to the Act's enactment. . . . Respondents note that the Act embodies a bargain among the sited and unsited States, a compromise to which New York was a willing participant and from which New York has reaped much benefit. Respondents then pose what appears at first to be a troubling question: How can a federal statute be found an unconstitutional infringement of state sovereignty when state officials consented to the statute's enactment?

The answer follows from an understanding of the fundamental purpose served by our Government's federal structure. The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: "Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." . . .

Where Congress exceeds its authority relative to the States, therefore, the departure from the constitutional plan cannot be ratified by the "consent" of state officials.<sup>150</sup>

By this reasoning, state actors can *never* waive the Tenth Amendment entitlement against federal commandeering. Even if the New York state legislature had explicitly signaled its intent to waive any Tenth Amendment objections to the requirements of this or any other federal law, said the Court, it would

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150. *Id.* at 180–82 (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)).

have no legal consequence, because elected officials may not waive a constitutional entitlement intended to protect individual citizens. For the purposes of legislative and executive action, then, the Tenth Amendment entitlement is inalienable as a matter of constitutional law.

Moreover, decision (or game) theory indicates that it would be inalienable even by the citizens supposedly empowered by the Court's rationale *except* by legislative or executive action (or its functional equivalent). Whether a state's citizens could directly waive the entitlement was not addressed by the decision, but even if the majority had intended this odd contingency, any number of collective-action problems make the needed universal consensus both theoretically and pragmatically impossible.<sup>151</sup> In reasoning that the entitlement cannot be waived by state officials because it exists to protect individual citizens, the Court essentially analogizes to others in the Bill of Rights that protect individuals and cannot be waived by elected representatives or majority vote, such as the right to jury trial or the right against unreasonable searches (which are, after all, countermajoritarian by design). But these other constitutional rights protect a waivable autonomy that can only inhere in separate individuals, while the Tenth Amendment protects something singular and external in which all citizens hold equal interests collectively.<sup>152</sup>

For citizens to waive their collectively held Tenth Amendment entitlement would thus require universal assent by each individually consenting citizen, but scholars of collective action agree that universal consensus in so large a group is all but impossible—not only due to inevitable policy dissensus among statewide electorates,<sup>153</sup> but also to the classic collective-action problem of holdout, where a minority wields its veto power to

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151. See generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (rev. ed. 1971).

152. Indeed, in *District of Columbia v. Heller*, 128 S. Ct. 2783, 2790–91 (2008) (invalidating a gun control ordinance banning handguns in the home), the Court clarified its understanding that the Tenth Amendment's reservation of sovereign authority to "the people" refers to them only in their corporate capacity, as the collective body that forms the citizenry of a government: "the term unambiguously refers to all members of the political community, not an unspecified subset."

153. Even setting aside the holdout problem, members of a large group with common interest (such as a state) will almost never unanimously agree on the best way to further the group's interest. See, e.g., OLSON, *supra* note 151, at 8 (explaining this collective-action problem and noting the example of a labor union, where "the members . . . have a common interest in higher wages, but at the same time each worker has a unique interest in his personal income").

“hold out” for special treatment by a majority anxious for their agreement.<sup>154</sup> A single naysayer could cancel the will of all other voters, creating overwhelming incentives for the obstacles that game theory predicts in such environments (and for which liability rules are often used to defuse),<sup>155</sup> foreclosing the possibility that citizens could ever reach the universal agreement needed to alienate.<sup>156</sup> Similarly, the collective-

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154. See Epstein, *supra* note 23, at 1366–67 (discussing holdout in the real estate context and observing that “[i]f a holdout is adamant, no private party can force him to sell the land in question at any price”).

155. For example, the law of eminent domain employs a liability rule for exactly this purpose. See, e.g., W.A. FISCHER, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* 68 (1995) (“Holdouts are endemic in public projects . . . . Preventing time-consuming strategic bargaining is an important justification for eminent domain.”).

Holdouts can also stall negotiations involving property sales, business mergers, and telecommunications. See, e.g., SIMON M. LORNE & JOY MARLENE BRYAN, *ACQUISITIONS AND MERGERS: NEGOTIATED AND CONTESTED TRANSACTIONS* § 9:39 (2005) (“In *NoDak Bancorporation v. Clarke*, [998 F.2d 1416 (8th Cir. 1993)], a divided panel of the Eighth Circuit reversed a district court decision and held that the National Bank Act did not prohibit a ‘freeze out’ merger in which minority shareholders were forced to accept cash for their stock in a national bank.”); see also *NoDak*, 998 F.2d at 1422–23 (“Disallowing freeze out mergers would mean that minority shareholders could hold up an efficient consolidation or merger transaction by refusing to give their consent . . . .”); Dale Hatfield & Philip J. Weiser, *Spectrum Policy Reform and the Next Frontier of Property Rights*, 15 *GEO. MASON L. REV.* 549, 605 (2008) (“If all entrants in the telecommunications service or equipment manufacturing markets could be ‘held up’ from deploying a new service or product until the incumbent voluntarily agreed to afford it access and interconnection to its network, those entrants would be placed at a formidable and likely insurmountable disadvantage.”).

Of note, the buyout of the tiny, polluted town of Cheshire, Ohio provides at least one documented example of a multiparty transaction that overcame the holdout obstacle. See Gideon Parchomovsky & Peter Siegelman, *Selling Mayberry: Communities and Individuals in Law and Economics*, 92 *CAL. L. REV.* 75, 91 (2004). Still, with a population of only 221 people, the Cheshire example promises little for universal consensus at the state level, where populations range from Wyoming’s 522,000 to California’s 36,000,000. See U.S. Census Bureau, *Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2000 to July 1, 2008*, <http://www.census.gov/popest/states/NST-ann-est.html> (select “Excel” under “Formats Available”) (last visited Aug. 30, 2009).

156. The history of statewide referendums further demonstrate that they are unlikely to yield unanimity because voters are predictably unpredictable and often vote for reasons seemingly unrelated to the objectives of the proposition. Cf. JOHN G. MATSUSAKA, *FOR THE MANY OR THE FEW: THE INITIATIVE, PUBLIC POLICY, AND AMERICAN DEMOCRACY* 143 (2004) (discussing how even seemingly “crazy” proposals can attract surprising levels of support among statewide electorates); Buck Wolf, *Donald Duck’s a Big Bird in Politics*, ABC NEWS, <http://abcnews.go.com/Entertainment/WolfFiles/story?id=91051&page=1> (last visited Aug. 30, 2009) (noting that the Donald Duck Party has received enough write-in votes to be Sweden’s ninth-most-popular political organization). There have been some unanimous or nearly unanimous group decisions in American history, but none on

action problem by which some individuals “free ride” on the contributions of others accounts, at least in part, for the chronic problem of low voter turnout at elections: most Americans appreciate living in a democracy, but the large numbers who don’t bother to vote on election day are effectively free-riding on the efforts of those who do.

Even beyond the theoretical problems with achieving statewide consensus are the very real pragmatic problems implied by the statewide referendum needed to accomplish it: would it really be possible to hold an election or census that would actually count the vote of each entitlement holder? The history of modern elections and census-taking suggests (strongly) that the answer is no. Many presidential elections boast participation rates of barely half the electorate, and even among those who do show up, volumes of votes are cast but not counted for various reasons.<sup>157</sup> If an individual’s entitlement is so precious that it cannot be waived by her elected representatives, should we allow it to be waived by butterfly ballot?<sup>158</sup> Meanwhile, the federal government’s acknowledgment that the

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the scale of a statewide referendum. *See, e.g.*, InfoUSA, Bureau of Int’l Info. Programs, U.S. Dep’t of State, The Electoral Process, <http://usinfo.org/enus/government/elections/electoralProcess.html> (last visited Aug. 30, 2009) (noting that the Electoral College “voted unanimously on only two occasions, both for George Washington, for the terms beginning in 1789 and 1793”).

157. *See* *Bush v. Gore*, 531 U.S. 98, 103 (2000) (citing statistics showing that 2 percent of cast ballots fail to register a vote, either because the ballot remains blank, is insufficiently marked, or marks two different candidates); U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2000: POPULATION CHARACTERISTICS 2 (2002), <http://www.census.gov/prod/2002pubs/p20-542.pdf> (reporting that only 55 percent of the total voting-age population voted in the unusually well-attended 2000 presidential election between candidates George W. Bush and Albert Gore). Indeed, not all citizens are registered or even entitled to vote (for example, children, felons in some states, and others that have not met various state requirements for voting), but the *New York* decision clearly associates the entitlement with *citizenship*, not voting status.

158. *Cf.* Don Van Natta Jr., *Gore Set to Fight Palm Beach Vote*, N.Y. TIMES, Nov. 25, 2000, at A1, *available at* <http://www.nytimes.com/2000/11/25/politics/25PALM.html> (noting that a basis for Gore’s challenge was “10,000 sworn affidavits signed by residents ranging in age from 18 to 98, [many of whom] said they were confused by the butterfly ballot’s design or were denied assistance or given wrong instructions”). Electronic malfunction represents another threat. *See* John Schwartz, *Mostly Good Reviews for Electronic Voting*, N.Y. TIMES, Nov. 12, 2004, at A20, *available at* <http://www.nytimes.com/2004/11/12/politics/12evote.html> (reviewing the performance of electronic voting machines during the 2004 elections and noting that “[i]n a few states, including Florida, some voters reported that their selection of Senator John Kerry on touchscreens turned into a vote for President Bush, forcing them to restart the process so that their true votes could be properly recorded”).

census regularly misses millions of Americans (and disproportionately among them, the poor and politically disenfranchised) led to a national debate about whether to supplement the 2000 Census's raw enumeration with figures derived from statistical sampling techniques.<sup>159</sup> Referenda and census-taking are thus flawed means by which to ensure the participation of each of a state's citizens, but how else would citizens collectively waive their Tenth Amendment entitlement except by a vote or census of some kind? If the entitlement is substantial enough to warrant inalienability by elected officials, wouldn't the inevitable underinclusiveness of a statewide plebiscite also pose a constitutional problem?

Moreover, if we were to settle for something other than a perfect accounting of a universal consensus—for example, supermajority vote at a standard statewide referendum—then that would raise questions about why majority-elected state officials could not just alienate the entitlement as a proxy for the people's will in the first place. Indeed, the *New York* majority purported to protect citizens' Tenth Amendment interests by requiring state-federal cooperation to take place through conditional federal spending or full federal preemption because these methods enable “the residents of the State [to] retain the ultimate decision as to whether or not the State will comply,”<sup>160</sup>—presumably by electing representatives who will enact their policy preferences.

Yet this proposition is difficult to reconcile with its stated rationale for anti-commandeering inalienability. If electing representatives who reflect their policy preferences suffices to express citizens' will regarding their Tenth Amendment entitlement in spending-power contexts, why can't the same state-wide representatives act as rightful agents of their constituent entitlement-holders in bargaining with the federal gov-

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159. See, e.g., Joan Biskupic & Barbara Vobejda, *High Court Rejects Sampling In Census*, WASH. POST, Jan. 26, 1999, at A1 (“In hopes of getting more accurate population figures, the Census Bureau had wanted to combine the results of a traditional head count with a statistical ‘sample’ . . . . [This was done] to get a more accurate fix on the nation's population at a time when increasingly larger numbers of people do not speak English, are not part of stable families or move frequently.”).

160. *New York v. United States*, 505 U.S. 144, 168 (1992). Justice O'Connor explained: “If a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant. . . . Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people.” *Id.*

ernment over the entitlement itself? How is one form of representation meaningfully different from the other? Both seem to reflect the theory of representative democracy on which the republic is founded; it is not clear why the first way constitutionally protects citizens' Tenth Amendment interests and the second does not.

Sliced theoretically or pragmatically, then, the Tenth Amendment entitlement described in *New York* was also rendered inalienable. The Court did not employ the vocabulary of the *Cathedral* framework directly, so we cannot know what the majority truly intended regarding direct alienability by citizens (or more to the point, whether they thought it through at all). However, forensic analysis of the decision suggests that the majority intended a standard inalienability rule, binding elected officials and citizens alike. Importantly, the Court supported its conclusion by likening constitutional federalism to other structural constraints unavailable for renegotiation, like the horizontal separation of powers between the three branches of government.<sup>161</sup> This suggests the majority's view that Tenth Amendment state sovereign authority is an intrinsically inalienable constitutional medium—as fixed an entitlement as those protected by the non-delegation doctrine—regardless of whether by state or by citizen.

## 2. Spending-Power Alienability

But is this really so? Given the extent to which states regularly do waive such sovereign authority in spending-power negotiations with Congress and interstate compacts with other states, it is hard to understand how it could be without rejecting nearly a century of settled constitutional law.<sup>162</sup> The Tenth Amendment is the core expression of constitutional federalism—encapsulating the dual sovereignty directive that is its defining feature—but federalism constraints have a less immutable quality than the horizontal separation of powers en-

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161. *Id.* at 182 (“Where Congress exceeds its authority relative to the States, therefore, the departure from the constitutional plan cannot be ratified by the ‘consent’ of state officials. An analogy to the separation of powers among the branches of the Federal Government clarifies this point. The Constitution’s division of power among the three branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment.”).

162. See *infra* Part III.B.3 (discussing state authority yielded to other states in interstate compacts).

titlements,<sup>163</sup> which have remained inalienable (at least in theory<sup>164</sup>) even as the Court has allowed federalism entitlements to be traded on the open market in other contexts. States routinely waive their Eleventh Amendment entitlement to sovereign authority to private litigants,<sup>165</sup> their Tenth Amendment sovereign authority to other states in interstate compacts,<sup>166</sup> and their constitutionally protected jurisdictional territory to the federal government in the commonplace state-federal bargaining via the spending power,<sup>167</sup> which even *New York* heralded as an available alternative to trading on the Tenth Amendment entitlement.<sup>168</sup> How can all these other instances of negotiated federalism constraints be permissible if they are supposed to be as fiercely protected as the separation of powers among the three branches?<sup>169</sup>

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163. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–60 (1992) (discussing the separation of powers doctrine and noting that it “depends largely upon common understanding of what activities are appropriate” to each branch).

164. The Court has not enforced the non-delegation doctrine protecting the horizontal separation of powers for more than sixty years, instead upholding all recent delegations to administrative agencies. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* § 3.10.1 (3d ed. 2006); see, e.g., *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 472 (2001) (holding that the EPA’s promulgation of ambient air quality standards under the Clean Air Act was not a usurpation of legislative power).

165. See, e.g., *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 613 (2002) (“This Court has established the general principle that a State’s voluntary appearance in federal court amounts to a waiver of its Eleventh Amendment immunity, and has often cited with approval the cases embodying that principle.” (citations omitted)); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 681 n.3 (1999).

166. See, e.g., Michael L. Buenger & Richard L. Masters, *The Interstate Compact on Adult Offender Supervision: Using Old Tools to Solve New Problems*, 9 *ROGER WILLIAMS U. L. REV.* 71 (2003) (discussing how states use interstate compacts to work together on national issues while preserving autonomy); see also *infra* Part III.B.3 (refuting the distinction between the state sovereign authority yielded to other states in state compacts and to the federal government in state-federal bargaining).

167. See, e.g., *Baker*, *supra* note 87, at 205–06 (discussing how *South Dakota v. Dole* provides a loophole through which Congress may continue to regulate the states beyond what is condoned in other areas of the New Federalism jurisprudence); *Baker & Berman*, *supra* note 87, at 499–500 (arguing that the Court’s decision in *Dole* allows Congress to pursue goals under the Spending Clause that it otherwise could not); *Siegel*, *supra* note 103, at 1655–57 (arguing that the anti-commandeering doctrine may not actually advance federalism values, since the Court’s proposed alternative is that Congress engage states in spending-power deals that compromise the same federalism values claimed in support of the anti-commandeering doctrine).

168. See *New York v. United States*, 505 U.S. 144, 158–59 (1992).

169. One might counter that the Tenth Amendment anti-commandeering rule protects federalism values of a different order than the Eleventh Amendment and

Enabling alienation of the same state sovereign authority in spending-power deals undermines the rationale for Tenth Amendment inalienability, and at least one federalism scholar suggests that the availability of state-federal bargaining under the Spending Clause converts the entire anti-commandeering infrastructure into a property-rule protected regime.<sup>170</sup> Professor Roderick Hills has identified the *New York* entitlement as protected under a property rule, correctly observing that it gets stronger protection than it would under a liability rule because the states may withhold their services from the federal government even if the federal government were to fully compensate them.<sup>171</sup> However, his analysis considers only the two choices—property or liability rule—missing the third potential leg of the *Cathedral* stool. By contrast, Professor Ilya Somin invokes Calabresi and Melamed to more precisely specify that the anti-commandeering doctrine protects state autonomy “by an ‘inalienability rule’ that prevents it from being violated even through the voluntary agreement of the states themselves.”<sup>172</sup>

Regardless of semantics, the Court’s proposition that needed interjurisdictional collaboration can always take place through spending-power negotiations raises the fair question whether the entitlement is really alienable after all. If the same kind of state sovereign authority can be alienated by other means, then isn’t it at least waivable in some form, and isn’t that enough? The answers, respectively, are *yes* and *no*. The spending power enables one way in which states may waive sovereign authority, but the *Cathedral* framework appropriately directs our attention not just to the undifferentiated pool of sovereign authority, but to the relevant entitlement—the particular slice of that state sovereign bologna—that becomes the subject of bargaining. The argument that the spending power converts the *New York* inalienability rule into a property rule

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spending power do, but the underlying values of federalism do not change depending on which constitutional design feature is protecting them. See Ryan, *supra* note 2, at 602–06; Siegel, *supra* note 103, at 1660–68.

170. Hills, *supra* note 29, at 822–23 (arguing that the *New York* entitlement to states to “withhold their own services and the services of state and local personnel subject to their constitutional authority from the federal government” is “protected by a property rule”).

171. *Id.*

172. Somin, *supra* note 87, at 482; see also McGinnis & Somin, *supra* note 44, at 94 n.14 (“[W]e do not believe that state and federal officials should be able to bargain away or surrender their respective powers. . . . [T]he rules defining the structure of federalism are inalienability rules rather than property or liability rules.”).

conflates the relevant entitlements, misses the important ways in which commandeering bargaining can resolve collective-action problems that spending-power bargaining cannot, and presumes that the dance of state-federal negotiation should always be within the control of the federal government.

The entitlement to a particular slice of sovereign authority waived in spending-power deals is infrastructurally distinct from the more specific anti-commandeering entitlement. First, the state's waived authority in spending-power deals may only be purchased for cash, not traded for in-kind regulatory benefits as a waivable anti-commandeering entitlement might be. This precludes an infinite variety of intergovernmental bargains that would trade waiver of a state's anti-commandeering entitlement to enable compensatory regulatory benefits—benefits that could be justified in federalism terms and would be otherwise unrealizable.<sup>173</sup>

In the *New York* example, the states collaborated to resolve an interjurisdictional regulatory problem in a way that preserved state autonomy against preemption but required federal ratification, which would have been a very difficult negotiation to effect under the spending power. Assuming *arguendo* that the *New York* defendants could prove waiver on their facts, the states would have had to replace the straightforward anti-commandeering waiver they offered Congress (effectively, “We have come to an interstate agreement and need your help to make it enforceable by binding us to our promises”) with an invitation to a conditional spending bargain that might look more like: “We have come to an interstate agreement that needs your help to become enforceable, so please do that for us and also give us some money.” Would those bargains really look the same to Congress? Perhaps Congress would prefer to just preempt the field, which might not benefit the state sovereign authority purportedly protected in this decision.

In addition, spending-power deals do not afford the tools for negotiating around collective-action problems made available through the negotiated waiver of states' anti-commandeering entitlements. Again taking the *New York* facts to illustrate, the state-based solution was designed to resolve a demonstrated collective-action problem shown to require meaningful enforcement measures to bind states to the bargain

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173. See Siegel, *supra* note 103 (describing how the anti-commandeering rule limits state autonomy in derogation of federalism values).

early on, when nobody yet knew who would benefit most or least. By forging a federally enforceable agreement behind the contract veil of ignorance, the states could create a meaningful regulatory system free of fair-weather bargaining partners, who might (as New York State ultimately did) free-ride on the continued sacrifice of the sited states and then renege when it becomes their turn to pay.<sup>174</sup> In a spending-power deal, states are free to join and leave the program as they see fit, simply by accepting and then refusing funds. Although this freedom may appear to advance the federalism value of local autonomy, that value is ultimately undermined by the wisdom of the contract law premise that we are most free when we can choose to be bound by our own promises.<sup>175</sup> State compacts uncoupled from federal penalties suffer from the same defect because they are so easy to disavow.<sup>176</sup> After *New York*, no state can truly bind itself to its promises, and all the other states know it.

Moreover, limiting state-federal bargaining to deals based on conditional spending confers a leadership role on the federal government at all times, again precluding the kind of novel bargaining the states sought to effect in *New York*. It assumes that Congress is the only party that would initiate intergovernmental bargaining, empowers federal actors in the negotiation by assigning them first-offer rights, and reduces the role of the states to accepting or rejecting the terms of a financial trade-off. Indeed, we should consider it significant that the spending power has *not* been the chosen medium for bargaining in the intergovernmental negotiations that have encountered anti-commandeering challenges. What does that tell us about the limits of conditional spending negotiations? The very fact that the states and Congress all unanimously approved the approach undone in *New York* and did not simply turn to a spending-power arrangement thereafter suggests that there are differences in the spending-power approach that differentiate the entitlements at issue, both substantively and for the practical purposes in which they have arisen in government.

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174. See *infra* Part III.B.3 (explaining why interstate compacts are hard to enforce absent external penalties, because states can simply withdraw when they no longer wish to participate).

175. E.g., CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 9–11, 14–16 (1981).

176. See *infra* Part III.B.3.

*D. The Aftermath: Radioactive Waste Disposal in Interjurisdictional Limbo*

Before exploring the legal implications of the Tenth Amendment inalienability rule, it is worth reviewing the practical consequences for low-level radioactive waste disposal that have followed. The ongoing gridlock is paradigmatic of that which paralyzes regulatory response to other problems similarly stuck in New Federalism limbo, stranded in an unacknowledged gray area between clearer realms of pure state and federal responsibility.

Since the *New York* decision, complete regulatory stagnation has exacerbated the problem of safe and equitable low-level radioactive waste disposal. The states have made no net progress in creating additional disposal sites; there are still only three facilities for processing the entire nation's low-level radioactive waste.<sup>177</sup> Not a single new facility has been built as part of the regional compacts created by the Act. Only one new facility has come on line since the permanent closure of the Beatty, Nevada site—a private facility in Clive, Utah.<sup>178</sup> Because the Clive facility is licensed only to accept the least hazardous class of radioactive waste, its addition does not alleviate the deficit in capacity exacerbated by the loss of the Beatty site.<sup>179</sup> Furthermore, the Clive facility has generated additional controversy by contracting to accept low-level radioactive waste from Italy, which is projected to hasten the date by which it will fill to capacity (currently anticipated in about twenty years).<sup>180</sup> Utah and the other member states of the Northwest Compact have protested,<sup>181</sup> but the private site

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177. U.S. Nuclear Regulatory Comm'n, Locations of Low-Level Waste Disposal Facilities, <http://www.nrc.gov/waste/llw-disposal/locations.html> (last visited July 14, 2008).

178. *See id.*

179. Clive's disposal facility is only licensed to accept "Class A" waste. U.S. NUCLEAR REGULATORY COMM'N, FACT SHEET: ENERGYSOLUTIONS' PROPOSAL TO IMPORT LOW-LEVEL RADIOACTIVE WASTE FROM ITALY 3 (2008), available at <http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/energysolutions.pdf>.

180. Bart Gordon & Jim Matheson, Op-Ed., *Importing Nuclear Waste Is in EnergySolutions' Best Interests, but Not America's*, SALT LAKE TRIB., Apr. 5, 2008 (noting that EnergySolutions' claim that it can handle all U.S. waste for the next 19 years was based on unusually low estimates and did not include foreign shipments). The Government Accountability Office reports that we do not even know how much waste we currently have, and that the "equation will also change" if more nuclear plants are licensed. *Id.*

181. On May 8, 2008, the Northwest Compact states passed a resolution attempting to block EnergySolutions' plans to accept imports of radioactive waste.

operator is fighting to preserve a likely lucrative contract, given that Europe faces an even greater shortage of disposal options.<sup>182</sup> Alarmed at the prospect of further eroding capacity for domestic waste, both houses of Congress have proposed bills to forbid domestic sites from accepting international shipments of radioactive waste.<sup>183</sup>

South Carolina's Barnwell site continued to accept the bulk of waste generated in the eastern United States until July 1, 2008, when it finally acted on the authority conferred in the Act to close its doors to shipments of waste from outside its regional compact.<sup>184</sup> Although the take-title penalty was overturned in *New York*, the Act's remaining penalty structure permitted the sited states to exclude after the deadline. South Carolina continued to provide access to the many members of the Southeast Compact (including, for a time, New York—which had negotiated its way into the compact after its judicial victory because it still lacked disposal options for its in-state producers), but South Carolina eventually withdrew from the Southeast Compact when it became clear that its partner states were not progressing on their compact obligations to

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Charlotte E. Tucker, *Dwindling Capacity in U.S. to Handle Low-Level Waste Prompts Import Questions*, 31 INT'L ENVTL. REP. 495, 495 (2008).

182. See, e.g., *Warning on Nuclear Waste Disposal*, BBC NEWS, Apr. 4, 2005, <http://news.bbc.co.uk/2/hi/science/nature/4407421.stm> (discussing the severe shortage of radioactive waste disposal sites in England). To protect the contract, Clive's operator has filed suit in federal court to establish that the Northwest Compact lacks authority to interfere with the Italian contract because its facility is not contractually bound by the Northwest Compact. The suit sought a declaratory judgment that the Clive site is a private commercial facility not established under the authority of the Northwest Compact, and therefore operates outside the Northwest Compact's power to approve or deny importation of waste. Tucker, *supra* note 181, at 495. In February 2009, the judge ruled that the Clive site "is not now and has never has been a regional disposal facility" and will soon decide whether "Congress intended to grant compacts the authority to regulate other facilities." Amy Joi O'Donoghue, *EnergySolutions Wins Small Victory in Bid to Store Italy's N-waste*, DESERET NEWS, Feb. 27, 2009, <http://www.deseretnews.com/article/1,5143,705287580,00.html> (quoting Judge Ted Stewart).

183. In response to the Clive site's proposal, House Representatives Bart Gordon (D-TN), Jim Matheson (D-UT), and Ed Whitfield (R-KY) introduced a bill (H.R. 5642) that would "ban imports of low-level radioactive waste into the United States." Mike Ferullo, *Radioactive Waste: Congressmen Offer Bill to Ban Import of Foreign-Generated Low-Level Waste*, 39 ENVTL. REP. 562, 562 (2008). Senators Benjamin Cardin (D-MD) and Lamar Alexander (R-TN) introduced a similar bill in the Senate. See S. 3225, 110th Cong. (2008).

184. *South Carolina's Barnwell Closes; Many Without Rad Waste Disposal*, NUCLEAR WASTE NEWS, July 7, 2008, at 1.

share disposal responsibilities.<sup>185</sup> At one point, South Carolina became so incensed over unfair exploitation within the compact that it initiated a high-stakes constitutional standoff with North Carolina, from whom it formally ceased accepting waste shipments in 1995 after North Carolina repeatedly failed to fulfill its compact responsibility to site a new facility.<sup>186</sup> The Governor of North Carolina threatened to sue South Carolina under the dormant Commerce Clause,<sup>187</sup> though he never delivered on the threat (perhaps reluctant to litigate with such patently unclean hands, or perhaps because the Clive site began accepting nationwide shipments around the same time).<sup>188</sup> South Carolina eventually joined the much smaller Atlantic Compact with New Jersey and Connecticut, and as of July 2008 Barnwell will now accept interstate shipments only from these two states.<sup>189</sup>

Barnwell's closure to the rest of the nation has finally triggered the crisis that commanded the attention of Congress and the National Governors Association during the 1980s. As a nation, we are arguably in an even worse situation than before the Act and Amendments were passed.<sup>190</sup> There are still only

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185. See Andrew Meadows, *Governor-Elect Wants South Carolina to Rejoin Nuclear-Waste Group*, STATE, Dec. 15, 1998 (reporting on South Carolina's departure from the Southeast Compact).

186. MARK HOLT, CONG. RESEARCH SERV., CIVILIAN NUCLEAR WASTE DISPOSAL 17 (2006), available at <http://ncseonline.org/NLE/CRSreports/06Sep/RL33461.pdf>.

187. See Jim Clarke, *N.C., S.C. at Odds Over Who Can Use Barnwell Landfill*, CHARLOTTE OBSERVER, June 26, 1995, available at 1995 WLNR 1767874 (Westlaw NewsRoom).

188. See Richard R. Zuercher, *Envirocare Sets Sights on Market for Class A Commercial LLW*, NUCLEONICS WEEK, July 20, 1995, at 1, 1. Nevertheless, four other states in the Southeast Compact sued North Carolina for some \$90 million in light of its various failures to comply with the terms of the Compact. See *Alabama v. North Carolina*, 539 U.S. 925 (2003) (granting leave to file complaint); 540 U.S. 1014 (2003) (appointing a special master to handle the litigation). The case is presently ongoing. E-mail from John F. Maddrey, Assistant Solicitor General, N.C. Dep't of Justice, to author (Dec. 13, 2006) (on file with author).

189. See *Barnwell Closure Results in Revised Storage Guidance*, NUCLEAR NEWS, July 2008, at 19 (noting that its declining disposal capacity has forced Barnwell to discontinue its open-door policy and accept only from within the Atlantic Compact).

190. The one silver lining to this continued failure is that the increasing costs of low-level radioactive waste disposal has somewhat dampened supply, slowing the pace of the looming crisis, but also the pace of potentially life-saving medical research. See Gregory B. Jaczko, Comm'r, U.S. Nuclear Regulatory Comm'n, Remarks at the Electric Power Research Institute's 2007 International Low Level Waste Conference and Exhibit Show: The Need for Alternatives in Low Level Radioactive Waste Disposal (June 26, 2007), available at <http://www.nrc.gov/read-ing-rm/doc-collections/commission/speeches/2007/S-07-033.html> (acknowledging

three low-level radioactive waste facilities nationwide. Hanford accepts waste only from the Northwest and Rocky Mountain Compacts, and Barnwell accepts only from the two other states in the Atlantic Compact. Only Clive will accept shipments from any producer in the entire nation, but Clive accepts only the least hazardous “Class A” forms of waste, which degrade over a period of one hundred years.<sup>191</sup>

Hoping to resolve that particular aspect of the capacity crisis with the stroke of a pen, nuclear industry lobbyists have asked the Nuclear Regulatory Commission to reconsider its waste classification system.<sup>192</sup> The Commission is presently considering their proposal, which would allow holders of low-level radioactive waste to blend the more hazardous Class B and C wastes (which can take up to five hundred years to degrade) with Class A waste, and classify the resulting product simply as Class A.<sup>193</sup> If adopted, the new system would enable the Clive site, approved only for Class A waste, to begin accepting the more hazardous forms without taking additional safety precautions, prompting resounding protest from nearby Utah residents.<sup>194</sup> In addition, Clive is poised to devote a portion of

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that the system is broken and noting the stress on medical research). In 2001, the National Academies commissioned a study finding that the cost of disposal was a major driver in the directions of medical research. See COMM. ON THE IMPACT OF LOW-LEVEL RADIOACTIVE WASTE MGMT. POLICY ON BIOMEDICAL RESEARCH IN THE U. S., BD. ON RADIATION EFFECTS RESEARCH, NAT'L RESEARCH COUNCIL, THE IMPACT OF LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT POLICY ON BIOMEDICAL RESEARCH IN THE UNITED STATES (2001), available at [http://www.nap.edu/catalog.php?record\\_id=10064](http://www.nap.edu/catalog.php?record_id=10064) (follow “Download Free PDF” hyperlink). The report found that if disposal access were further restricted by additional site closures, medical facilities already stressed to capacity might not be able to meet the need for additional long term on-site storage. *Id.* at 37–40.

191. Patty Henetz, *Huntsman Signs Waste-Ban Measure*, SALT LAKE TRIB., Feb. 26, 2005, at A6 (reporting that Utah permits only Class A waste, the “least radioactive but most abundant” form, having banned Class B and C wastes).

192. Fahys, *supra* note 16 (“[I]n the industry’s latest effort to reduce the amount of B&C waste that would require expensive storage until new disposal is found, it has asked the U.S. Nuclear Regulatory Commission to reconsider its low-level waste categories. If successful, nuclear plants and other waste generators will be able to mix B&C waste with untainted or mildly contaminated waste to meet Utah’s Class A radioactivity limits—which means it can be buried in EnergySolutions’ Utah landfill.”).

193. *Id.*

194. See, e.g., Editorial, *Radioactive Cocktail: Blending Waste Won’t Lessen the Danger*, SALT LAKE TRIB., July 1, 2008 (“Officials from our nation’s nuclear power industry have devised a magical mathematical formula that miraculously transforms dangerous Class B and Class C nuclear waste into less-ominous Class A waste.”). As the *Tribune* observed, “[t]he trouble is, the formula defies the associative property of mathematics, the laws of science and the canons of common sense. The only way to make  $A + B + C = A$  is to remove B and C from the equa-

its available capacity to importing waste from nations like Italy, further hastening its projected fill date.

Accordingly, the Nuclear Regulatory Commissioner publicly acknowledged in 2007 that “the low-level waste compact process has not been quite as successful as we would have hoped.”<sup>195</sup>

While the NRC has developed national standards for low-level radioactive waste disposal in its regulations the agency does not currently regulate any of the disposal sites in the United States. The current disposal facilities are all regulated by states. . . .

The Low [L]evel Radioactive Waste Policy Acts of 1980 and 1985 were supposed to ensure a reliable and predictable means of disposing of low level radioactive waste. The acts made each state responsible for providing for waste disposal, but I do not believe that the overarching objectives of the acts will ever be realized.<sup>196</sup>

Indeed, the citizens of South Carolina, Washington, and Utah remain unhappily burdened with an unfair share of the entire nation’s hazardous waste; all citizens remain at risk for waste transportation accidents over long stretches of public highways; and the nation is that much closer to running out of available disposal capacity without further options. Rising oil prices have renewed national interest in nuclear power, but erecting more nuclear power plants—which produce significant quantities of both high-level and low-level radioactive waste—would significantly exacerbate the problem.<sup>197</sup>

The 1980s collaboration between the states and Congress used a variety of carrots and sticks to incentivize unsited states

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tion.” *Id.* Even before the new blending proposal, Utahns were already concerned about attracting more radioactive waste to the state. Judy Fahys, *Guv Says ‘N-O’ to N-Dump Times Two*, SALT LAKE TRIB., Nov. 11, 2005, at A1 (“Gov. Jon Huntsman Jr., bent on protecting Utah from becoming a national dumping ground for radioactive waste, announced Thursday he will reject plans to double the size of Envirocare of Utah, a landfill for government and reactor cleanup waste in Tooele County.”). The Governor was reacting to reports that the facility had accepted 93 percent of government radioactive waste that went to all domestic commercial facilities between 1998 and 2003. *Id.*

195. Jaczko, *supra* note 190.

196. *Id.*

197. Although some waste can temporarily be stored on site, all must be processed at a proper disposal facility when the plant is eventually decommissioned. *See id.*

to take responsibility for their fair share of risk, but *New York* dissolved the most persuasive stick, and carrots have proved insufficient. The states have lost any incentive to resolve the collective-action problem without a means of enforcing the needed interstate bargain. Congress, having been judicially disciplined on federalism grounds for an attempt made with due respect for state autonomy, has lost all incentive to impose a top-down solution that (even if legal) will engender serious federalism friction. Neither Congress nor the states have meaningfully wrestled with the resulting regulatory “hot potato” since then, each side seeming to conclude from their loss in court that the status quo is really the other’s problem.<sup>198</sup> Yet solving the problem of equitable radioactive waste disposal has proved the exclusive province of neither one nor the other side alone; it is an *interjurisdictional* problem best tackled with the unique regulatory capacities that both Congress and the States bring to bear.

*E. Tenth Amendment Inalienability and the Gray Area*

Problems like this occupy an interjurisdictional gray area at the margins of clear state and federal prerogative, demanding regulatory attention at both the local and national level. Sometimes, this is because neither side has all the legal jurisdiction needed to address the problem (for example, in dealing with water pollution, which passes from land uses regulated at the state level into water bodies regulated at the federal level).<sup>199</sup> Sometimes, the federal government could but declines to preempt state involvement under its enumerated powers because the state needs regulatory capacity that the federal government can only acquire by replicating the state apparatus

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198. Ryan, *supra* note 2, at 588–90. Of note, Utah, Maine, and Vermont have each attempted to assert some authority over the production of low-level radioactive waste within their borders, requiring new and relicensing nuclear facilities to obtain approval from governors, legislatures, and/or voters, though one commentator has suggested that this legislation violates the Supremacy Clause. Melissa B. Orien, *Battle over Control of Low-Level Radioactive Waste: Some States Are Overstepping Their Bounds*, 2005 BYU L. REV. 155, 156 (2005) (“If a state enacts a statute that conflicts with federal goals for LLRW, then the statute is preempted by federal law.”).

199. Ryan, *supra* note 2, at 572–80 (describing such “*de jure*” interjurisdictional regulatory problems); *see also id.* at 514, 570 (limiting the discussion of “regulatory problems” to the classic targets of administrative law, including “market failures, negative externalities, and other collective-action problems that individuals are ill-equipped to resolve on their own”).

that generates it (for example, the local expertise that facilitates counter-terrorism and disaster response efforts).<sup>200</sup> Federal duplication of state government would not only be foolishly inefficient, it would threaten the very federalism values that motivate the Tenth Amendment in the first place.

The three intervening decades since the Act was passed have demonstrated that coordinating safe and equitable radioactive waste disposal is among the more stubborn regulatory problems that have become stranded in the interjurisdictional gray area. The *New York* saga reveals it as a matter that concerns both the states and the federal government, and one whose resolution requires the unique capacity that each can offer. It is a textbook national collective-action problem requiring a federal umpire, in that none of the states wants to site the hazardous facility that all of them nevertheless need, with each state hoping to “free-ride” on another’s sacrifice.<sup>201</sup> After all, Congress became involved only after the states, acting separately, were fast approaching one of two unacceptable outcomes (either South Carolina would remain the unwilling bearer of all other free-riding states’ costs, or it would close its site altogether and leave the entire nation without safe disposal options). At the same time, it is a textbook example of a local land-use problem in which surrounding communities have profoundly unique interests. Siting a hazardous waste facility implicates the very governmental decision making about land-use planning that is the hallmark province of state and local government—and for good reason, bearing as it does on issues of property law, public health and safety, community stability, and other equitable matters of uniquely local concern.<sup>202</sup> Even

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200. *Id.* at 580–84 (describing such “*de facto*” interjurisdictional regulatory problems).

201. That is, unless the states were to outlaw production of this kind of waste altogether, a proposal that no state has yet adopted. *See generally* U.S. NUCLEAR REGULATORY COMM’N, RADIOACTIVE WASTE: PRODUCTION, STORAGE, DISPOSAL (2002), available at <http://www.nrc.gov/reading-rm/doc-collections/nuregs/brochures/br0216/r2/br0216r2.pdf>.

202. For example, several states require municipal or local voter approval of new or renewed licenses for low level radioactive waste facilities, consistent with the traditional role of local government in approving land uses that would affect neighboring homes and businesses. *E.g.*, ME. REV. STAT. ANN. tit. 38, § 1493 (2001) (requiring state-wide voter approval of LLRW sites); UTAH CODE ANN. § 19-3-105(3) (2007) (requiring municipal approval of LLRW processing facilities); VT. STAT. ANN. tit. 10, § 7012(f) (2006) (requiring local voter approval of LLRW sites). The hurdles created by these statutes indicate the tension between the parochialism that can accompany local land-use authority and the need for a nationally-mediated program to create disposal capacity for unavoidable radioactive

the Court conceded that the problem occupies an interjurisdictional zone, in its recognition that both the states and federal government are empowered to regulate there.<sup>203</sup> As with many such interjurisdictional regulatory problems, a partnership approach is appropriate, desirable, and possibly the only effective means of proceeding. Why, then, is such collaboration so difficult to realize?

At least part of the problem is that through such banner New Federalism decisions as *New York*, the Supreme Court has endorsed an idealized model of dual sovereignty that fails to account for the messy reality of interjurisdictional regulatory problems, and inadvertently frustrates the negotiation of certain state-federal partnerships needed to resolve them. Although the New Federalism's model posits mutually exclusive spheres of clearly identified state and federal jurisdiction, persistent problems like equitable low-level radioactive waste disposal call attention to an interjurisdictional gray area between them, where the spheres partly overlap.<sup>204</sup> For regulatory problems in the gray area, efficient resolution requires participation by both the state and federal governments—either for the unique jurisdictional authority each holds (for example, in regulating water pollution, which triggers federal authority under the Commerce Clause but also local authority in regulating the land uses that cause most water pollution)<sup>205</sup> or for the unique regulatory capacity that each side brings to the table (for example, in counterterrorism and disaster relief, in which the federal government does not preempt state involvement because localized capacity is critical to effective on-the-ground reconnaissance and response).<sup>206</sup> Effective coordination is often stunted by the New Federalism's bright line of strict jurisdic-

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waste. Such statutes acknowledge the traditional role of local government in approving local land uses that affect neighboring homes and businesses, but they may exacerbate the not-in-my-backyard ("NIMBY") phenomenon that has obstructed the development of new capacity needed to handle the nation's waste load. For this reason, a regulatory approach is needed that can both appropriately honor local interests while also refereeing the nationwide collective-action problem in which all communities would prefer to free-ride on another neighborhood's risk-taking.

203. *New York v. United States*, 505 U.S. 144, 188 (1992) ("The Constitution permits both the Federal Government and the States to enact legislation regarding the disposal of low level radioactive waste.").

204. Ryan, *supra* note 2, at 567–72 (defining the interjurisdictional gray area).

205. *Id.* at 574–80 (describing the "*de jure*" interjurisdictional regulatory problem of water pollution).

206. *Id.* at 580–84 (describing the "*de facto*" interjurisdictional regulatory problems of air pollution and counterterrorism efforts).

tional separation,<sup>207</sup> as Congress's adoption of the state-based solution was later eviscerated by the inalienability rule articulated in *New York*.

The state-federal partnership approach taken in the Low-Level Radioactive Waste Policy Act was not the only way to tackle this interjurisdictional regulatory problem,<sup>208</sup> but it was a solid plan that drew unanimous support from Congress and each of the states.<sup>209</sup> Although the most serious environmental justice questions were preserved for the ultimate siting decisions,<sup>210</sup> the state-based approach promised at least a rough environmental justice between the states, guaranteeing that the burden of environmental risk would be shared throughout the nation. By forcing all the states to internalize costs they had previously been happy to externalize to South Carolina, Nevada, and Washington, the Act would have realigned the interests of voters and lawmakers nationwide toward better regulatory decision making about the production and use of materials that none wished to host later as waste. Local communities would have more voice under the state-based solution than they would have under a fully federalized approach. The states were thus willing to accept the contained prescription of federal interference implied by the take-title penalty because they preferred it to the alternative, by which Congress might rely on its commerce authority to craft a federal solution that preempted state input from top to bottom.<sup>211</sup>

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207. *Id.* at 584–96 (critiquing the impacts of the dual federalism model on interjurisdictional regulatory response).

208. John Dinan, *Congressional Responses to the Rehnquist Court's Federalism Decisions*, 32 PUBLIUS 1, 12 (2002) (arguing that Congress had viable options for coping with the problem even after *New York* because it could persuade state action via its spending power or directly regulate waste producers under its commerce authority).

209. Low-Level Radioactive Waste Forum, Inc., Supporting a State and Regional Approach to a Complex Environmental Issue, <http://www.llwforum.org> (last visited Aug. 27, 2009) [hereinafter LLRW Forum] (noting that both the original 1980 legislation and the 1985 amendments “were endorsed by the Governors of the 50 states”).

210. Low-income and minority neighborhoods bear a disproportionate percentage of the national burden of hosting hazardous waste facilities, which contribute to high rates of asthma and other health problems in host communities. *E.g.*, Anna Kuchment, *Into the Wilds of Oakland, Calif.: Young Pollution Sleuths and Community Activists Fight for Healthier Air*, NEWSWEEK, Aug. 11, 2008, at 49, 50.

211. No state voted against the state-based solution that was proposed at the 1980 meeting of the National Governors' Association, and which the Association then took to Congress. *See* LLRW Forum, *supra* note 209. Had one of the states opposed the terms of the state-based solution during this process and later sued to

The ultimate question is whether the states should have been able to make this choice. In other words, even if the Tenth Amendment gives states the means to protest federal interference when it would thwart the good governance values advanced by constitutional federalism, should they also be able to waive their entitlement when doing so would promote those values? After all, American federalism erects not only the checks and balances that curb both state and federal power, but also enables the potential for harnessing local and national expertise into regulatory partnerships to enable what neither the states nor the federal government could accomplish alone.<sup>212</sup>

Coordinating an effective resolution to the national collective-action/local land-use problem of radioactive waste disposal is a single example of many in this variety, each stuck in the limbo of the interjurisdictional gray area so obscured by the New Federalism ideal. Many other interjurisdictional regulatory problems have also become the subject of negotiated state-federal partnerships, and many others would benefit from the alternative. Indeed, although *New York* is the only case that explicitly states the inalienability rule, it is hardly the only one affected.

For example, a decade of deliberations preceded the Phase II Stormwater Rule of the Clean Water Act, during which the states and federal government collaborated in the design of a national-local regulatory partnership ideally suited to the interjurisdictional task of protecting the nation's waters from local stormwater pollution.<sup>213</sup> Protecting navigable waters is a matter of federal jurisdiction, but most land uses that are the source of stormwater pollution are under the jurisdiction of

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invalidate the Act, it would have presented an interesting twist on the waiver question that was not raised by the facts accompanying New York's suit.

212. See Ryan, *supra* note 2, at 619 (noting that "it was the early States' recognition that centralized coordination was necessary to realize efficient interstate commerce, provide for the common defense, and resolve interstate disputes that led to the rejection of the Articles of Confederation in favor of constitutional federalism"); see also *id.* at 655–58 (discussing how American federalism is designed to facilitate problem solving at the most local level with capacity, which may require partnership approaches in the interjurisdictional gray area).

213. See Brief of Respondent-Intervenor Natural Resources Defense Council, Inc. at 50, *Env'tl. Def. Ctr., Inc. v. U.S. Env'tl. Prot. Agency*, 344 F.3d 832 (9th Cir. 2003) (Nos. 00-70014, 00-70734, 00-70822), 2001 WL 34092891 (listing participants of the Phase II Subcommittee); OFFICE OF WATER, U.S. ENVTL. PROT. AGENCY, STORM WATER DISCHARGES POTENTIALLY ADDRESSED BY PHASE II OF THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM STORM WATER PROGRAM 1-21 to -22 (1995).

state and local government.<sup>214</sup> Recognizing this intersection, the United States Environmental Protection Agency (“EPA”) invited the states and their localities to participate in the creation of a regulatory program, which—like the state-based solution in *New York*—departed from the conditional spending and preemption models to empower municipalities directly in designing localized pollution controls that satisfied EPA’s baseline requirements.<sup>215</sup>

Nevertheless, EPA’s oversight of local stormwater permitting required under the Plan was challenged as a commandeering of state sovereign authority.<sup>216</sup> The Ninth Circuit narrowly upheld the permitting program, but only by painstakingly establishing that municipalities could avoid the challenged oversight by invoking an alternative available under a separate section of the Clean Water Act.<sup>217</sup> It took the panel two opinions over three years to establish this, which it did over a vigorous dissent.<sup>218</sup> Without the inalienability rule, the court might have more simply concluded that the states had waived their Tenth Amendment entitlement in consenting to the collaboration they helped create (and better still, the states could have simply specified it as so). Although the Phase II Rule ultimately survived the Tenth Amendment challenge, the fact that this negotiated partnership was nearly undone by complex anti-commandeering litigation further chills other attempts at non-spending-power bargaining to cope with other interjurisdictional crises.

Similar issues arise as legislators struggle to reconcile new federal climate initiatives with the various state laws passed while federal attention to the issue was unforthcoming. Over most of the past decade, states have led the charge to reduce

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214. Land-based activities that contribute to stormwater pollution, such as real estate development, impervious surfacing, and the use of fertilizers and pesticides in lawn care, are matters of state concern. *E.g.*, *City of Abilene v. U.S. Env’tl. Prot. Agency*, 325 F.3d 657, 659–60 (5th Cir. 2003) (discussing the permit process by which municipalities collaborate with the EPA to prevent stormwater pollution from reaching municipal sewer systems). *See generally* ENVTL. LAW INST., ALMANAC OF ENFORCEABLE STATE LAWS TO CONTROL NONPOINT SOURCE WATER POLLUTION (1998) (listing relevant state laws).

215. U.S. Env’tl. Prot. Agency, Stormwater Program, [http://cfpub.epa.gov/npdes/home.cfm?program\\_id=6](http://cfpub.epa.gov/npdes/home.cfm?program_id=6) (last visited Aug. 27, 2009).

216. *See City of Abilene*, 325 F.3d at 659–60.

217. *Env’tl. Def. Ctr., Inc. v. U.S. Env’tl. Prot. Agency (EDC I)*, 319 F.3d 398, 415 (9th Cir. 2003), *vacated*, 344 F.3d 832 (9th Cir. 2003).

218. *See Env’tl. Def. Ctr., Inc. v. U.S. Env’tl. Prot. Agency (EDC II)*, 344 F.3d 832, 845 (9th Cir. 2003) (confirming its original holding in *EDC I* upholding the regulatory partnership against the Tenth Amendment challenge).

Americans' greenhouse gas emissions,<sup>219</sup> but even the architects of these programs urge that national leadership is needed for success.<sup>220</sup> Many acknowledge the need for federally uniform standards and obligations for regulated parties that operate in more than one state, but others observe that the states are uniquely situated to regulate many causes of greenhouse gas production within their traditional police powers over health, safety, and land uses, and to tailor policies to regional differences.<sup>221</sup> States that followed California's lead in regulating greenhouse gas emissions by automobiles (under a Clean Air Act provision that authorizes both the EPA and California to set standards and allows other states to choose between them) were confronted with unsettling (though ultimately unsuccessful) lawsuits by the automobile industry arguing that California's standards are federally preempted.<sup>222</sup> Congress

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219. See, e.g., Robert B. McKinstry, Jr., John C. Dernbach & Thomas D. Peterson, *Federal Climate Change Legislation as if the States Matter*, NAT. RESOURCES & ENV'T, Winter 2008, at 3, 4 (describing eight northeastern states' Regional Greenhouse Gas Initiative, six western states' and two Canadian provinces' Western Climate Initiative, and the Climate Registry, which includes thirty-nine states and two Canadian provinces). See generally The Climate Registry, <http://www.theclimateregistry.org> (last visited Aug. 28, 2009); RGGI, Inc., Regional Greenhouse Gas Initiative, <http://www.rggi.org> (last visited Aug. 28, 2009); Western Climate Initiative, <http://www.westernclimateinitiative.org> (last visited Aug. 28, 2009).

220. See, e.g., McKinstry, Dernbach & Peterson, *supra* note 219, at 3 ("Most observers, even at the state level, see state and regional efforts as a next-best strategy in the absence of serious national leadership.")

221. *Id.* at 4–5, 7–8. The scholarly literature is also brimming with discussion about the challenges posed by the uncertain impact of federalism doctrines for effective climate change regulation. See generally Holly Doremus & W. Michael Hanemann, *Of Babies and Bathwater: Why the Clean Air Act's Cooperative Federalism Framework is Useful for Addressing Global Warming*, 50 ARIZ. L. REV. 799 (2008); Kirsten Engel, *State and Local Climate Change Initiatives: What is Motivating State and Local Governments to Address a Global Problem and What Does This Say About Federalism and Environmental Law?*, 38 URB. LAW. 1015 (2006); Daniel A. Farber, *Climate Change, Federalism, and the Constitution*, 50 ARIZ. L. REV. 879 (2008); Alice Kaswan, *A Cooperative Federalism Proposal for Climate Change Legislation: The Value of State Autonomy in a Federal System*, 85 DENV. U. L. REV. 791 (2008); David Adelman & Kirsten H. Engel, *Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority* (Ariz. Legal Studies, Discussion Paper No. 07-23, 2007), available at <http://ssrn.com/abstract=1016767>; Ann E. Carlson, *Iterative Federalism and Climate Change* (UCLA Sch. of Law Pub. Law & Legal Theory Research Paper Series, Research Paper No. 08-09, 2009), available at <http://ssrn.com/abstract=1115556>.

222. See, e.g., *Lincoln-Dodge, Inc. v. Sullivan*, 588 F. Supp. 2d 224, 227–28 (D.R.I. 2008) (affirming decisions in Vermont and California that neither the Clean Air Act nor the Energy Policy and Conservation Act, which set miles-per-gallon standards for motor vehicles, preempted state greenhouse gas emission standards); Marc Lifsher & John O'Dell, *Automakers Challenge States' Emissions*

has considered at least seven different comprehensive climate change bills that would have applied to all sectors of the economy,<sup>223</sup> but each was criticized for failing to better collaborate with existing state programs and leverage state expertise and regulatory capacity, and none made it to the President's desk.<sup>224</sup> There may be many reasons why Congress has not better engaged the states, but among them is the fear, stoked by the *New York* inalienability rule, that enlisting state agents as partners in a federal regulatory program may invite legal challenges—as the Low-Level Radioactive Waste Policy Act and Phase II Stormwater Rule did—even when the states are willing partners.

Because *New York* rendered bargaining over commandeering illegal, Congress and the states have never again replicated the precise form of partnership there invalidated, and it is thus hard to know how frequently instances of such bargaining would arise otherwise. The Phase II Stormwater Rule comes closest, although that plan was carefully crafted with a (baroque) “opt-out” provision—inspired by *New York*, and made possible by the fact that its regulatory target did not hinge on the prevention of a collective-action problem requiring uniform participation (like radioactive waste disposal). Although we cannot now know precisely how often anti-commandeering bargaining will prove useful, we do know how many problems languishing in the interjurisdictional gray area need new regulatory approaches, and we can surmise that many could benefit

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*Laws*, L.A. TIMES, Mar. 23, 2007, at C2 (describing the later-dismissed suit against Vermont's tailpipe standards for greenhouse gases, which were based on a California standard that had been adopted by ten other states). The new administration is taking a more aggressive approach to tailpipe emissions, and showing greater willingness to allow states to lead. Janet Raloff, *California May Yet Get the First Greenhouse Gas Limits for Cars*, SCIENCE NEWS, Feb. 6, 2009, <http://www.sciencenews.org/view/generic/id/40664> (reporting that President Obama directed the EPA to review the previous administration's refusal to let California set tough tailpipe-emissions standards for new cars and trucks).

223. McKinstry, Dernbach & Peterson, *supra* note 219, at 3–4; America's Climate Security Act of 2007, S. 2191, 110th Cong. (2007); Low Carbon Economy Act of 2007, S. 1766, 110th Cong. (2007); Safe Climate Act of 2007, H.R. 1590, 110th Cong. (2007); Climate Stewardship Act of 2007, H.R. 620, 110th Cong. (2007); Global Warming Reduction Act of 2007, S. 485, 110th Cong. (2007); Global Warming Pollution Reduction Act, S. 309, 110th Cong. (2007); Climate Stewardship and Innovation Act of 2007, S. 280, 110th Cong. (2007).

224. McKinstry, Dernbach & Peterson, *supra* note 219, at 3–4; *cf.* Darren Samuelsohn, *Senate Leader Says Energy, Climate Bills Will Be Combined*, N.Y. TIMES, Mar. 5, 2009, <http://www.nytimes.com/cwire/2009/03/05/05climatewire-senate-dems-to-put-energy-emissions-bills-in-10009.html> (reporting on ongoing efforts to regulate climate impacts).

from greater flexibility in how intergovernmental partnerships might be formed, especially those confronting collective-action hurdles.<sup>225</sup> The *New York* inalienability rule removes a potentially fruitful tool from a toolbox with few others, a toolbox to which state and federal regulators must increasingly turn to combat our most difficult regulatory problems.

Scholars have increasingly recognized the challenge of managing interjurisdictional regulatory problems within the New Federalism paradigm, and many have questioned the usefulness of a theoretical model that so poorly tracks the real world it seeks to order.<sup>226</sup> Some critics suggest that American federalism has outlived its relevance in general,<sup>227</sup> while others advocate alternative federalism models that better reflect the complex reality of the regulatory landscape.<sup>228</sup> For example, in

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225. Cf. Jessica Bulman-Pozen & Heather Gerken, *Uncooperative Federalism*, 118 YALE L.J. (forthcoming 2009) (suggesting that even outright commandeering can confer benefits for the role of states in a federal system).

226. See William W. Buzbee, *Contextual Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 108, 108–09 (2005) (noting the “benefits of regulatory overlap [and] cooperative federalism structures”); William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 IOWA L. REV. 1, 8–14 (2003) (examining how the “regulatory commons problem” can generate regulatory gaps for interjurisdictional problems like urban sprawl and global warming); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 4–8 (1997) (proposing a normative model of collaborative governance that involves cooperation between agencies and government in the administrative process); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 248–49 (2005) (proposing the concept of polyphonic federalism, where the focus is placed upon the interaction between state and federal authority, rather than upon where the two spheres diverge); see generally Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159 (2006) (arguing that the static allocation of regulatory authority to either state or federal government obstructs good environmental management, and that broadly overlapping state and federal jurisdiction is needed).

227. See Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 908–14 (1994) (arguing that the original colonial benefits of federalism no longer apply in the modern United States).

228. See, e.g., Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 653 (1996) (arguing for “multiple tiers of governmental activity in the environmental domain”); Hills, *supra* note 29, at 816–17, 938–44 (arguing for local autonomy on a functional basis, as opposed to the New Federalism’s focus on principles of dual sovereignty and political accountability); Nolon, *supra* note 37, at 18–20 (advancing a model of integrated federalism that relies on greater cooperation based on each governmental actor’s capacity for problem solving in a given context); Schapiro, *supra* note 37, at 1466–68 (proposing a framework whereby federal and state courts participate together in developing constitutional law); Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 719–20 (2001) (concluding that a “reverse-*Erie*” doctrine is needed to balance federal supremacy and state autonomy in the administrative context); Kimberly C. Galligan, Note, *ACORN v. Edwards: Did the*

previous work, I have advocated for a model of “Balanced Federalism” that better accounts for the interjurisdictional gray area and mediates the inevitable tension between each of the various values that undergird American federalism, including not only the checks and balances privileged by the separationist ideal of the New Federalism model but also the values of localism, accountability, and subsidiarity-tempered problem solving.<sup>229</sup> Proposals like these keep us honest and thoughtful about the American experiment, but the adaptation required before any would yield fruit is unlikely to materialize quickly enough to provide meaningful gray-area solutions in the short run.

Still, there is fruit hanging lower on the tree, even now, in easy reach of the Supreme Court even from within its chosen paradigm. The Court could easily enable progress in the gray area from within the New Federalism model, facilitating the negotiation of needed state-federal partnerships with minimal change to existing precedents. A slight adjustment could preserve most of what the New Federalism revival has accomplished while encouraging the resolution of problems that have languished in the gray area since *New York* was decided. Without upsetting the substance of the Tenth Amendment anti-commandeering rule or any other important New Federalism precedents, the Court could simply replace the jurisprudential inalienability rule with a property-rule remedy.

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*Fifth Circuit Squirrel Away States' Tenth Amendment Rights at the Cost of National Environmental Welfare?*, 9 VILL. ENVTL. L.J. 479, 508–09 (1998) (arguing for a middle-of-the-road approach to federal-state cooperation).

229. See Ryan, *supra* note 2, at 644–665. To remedy the theoretical problems left unresolved by cooperative federalism and the pragmatic ones caused by New Federalism, I argue that the Court should adopt a model of Balanced Federalism that better mediates between competing federalism values and provides greater guidance for regulatory decision making in the interjurisdictional gray area. Where the New Federalism asks the Tenth Amendment to police a stylized boundary between state and federal authority from crossover by either side, Balanced Federalism asks the Tenth Amendment to patrol regulatory activity within the gray area for impermissible compromises of fundamental federalism values. The article concludes by introducing the outlines of a jurisprudential standard for interpreting Tenth Amendment claims within a model of Balanced Federalism dual sovereignty that affords both checks and balances. *Id.*

### III. TOWARD BARGAINING IN THE INTERJURISDICTIONAL GRAY AREA: A PROPERTY RULE APPROACH

When the anti-commandeering rule made *New York* the most celebrated case of the New Federalism revival, the inalienability rule tucked in to protect it garnered far less attention. The Supreme Court has never revisited this aspect of the rule, and the relevant language in *New York* has never been cited in a subsequent case, favorably or otherwise. Nor has it attracted previous scholarly inquiry. But what the inalienability rule lacks in charisma, it makes up for in potency: the states and Congress have never again attempted to replicate the partnership lawmaking model that produced the ill-fated Low Level Radioactive Waste Policy Act. In the name of federalism, state-federal bargaining has been confined to the conditional spending model, despite its foreclosure of state-leadership opportunities and collective-action resolution.

Of course, it could be that this model was so flawed that its short-lived influence is well deserved. On the other hand, the states and Congress have not since produced a meaningful alternative for the safe and equitable disposal of radioactive waste in interstate commerce.<sup>230</sup> The fact that—but for New York’s self-serving challenge—the Act seemed poised to succeed where nothing else has raises the fair question whether preventing the states from bargaining with their entitlement is truly a good idea. Neither the normative nor the remedial element of the anti-commandeering rule is specified in the text of the Tenth Amendment itself, but even if we stipulate that the substance of the rule is constitutionally required, the remedial aspect is as open to interpretation as those attaching to the Sixth or Eleventh Amendments. In the absence of a clear textual directive or entrenched precedent on the matter (and the Court’s Tenth Amendment jurisprudence over the last century can be called anything but entrenched<sup>231</sup>), the jurisprudential nature of the determination invites interpretive and policy con-

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230. Of note, this Article deals only with the problem of low-level radioactive waste disposal, but the problem of how to safely and equitably dispose of high-level radioactive waste (the most toxic byproducts of nuclear reactors and weapons programs) is just as pressing. The current federal plan is to store such waste in a national deposit under Yucca Mountain in Nevada, which remains the subject of vociferous protest among Nevadans unhappy about bearing the entire nation’s share of risk. *E.g.*, Rizo, *supra* note 104.

231. *E.g.*, Ryan, *supra* note 2, at 539–49 (reviewing vacillations in the Court’s twentieth century federalism jurisprudence).

siderations about whether the inalienability approach actually makes sense.

If the purpose of the Tenth Amendment is to protect the fundamental federalism values, which remedial rule best accomplishes that? Even if protecting the anti-commandeering entitlement with an inalienability rule makes sense some of the time, does it make sense *all* of the time, as would justify the universal quash on this form of state-federal bargaining? Why not enable the kind of consensual bargaining that the state of New York apparently favored when it lobbied for federal passage of the state-based approach? And if not in all cases, then at least those in the uncertain territory of the interjurisdictional gray area, where novel intergovernmental bargaining may be the key to resolving otherwise intractable problems? This Part proposes that the Court protect the anti-commandeering entitlement with a property rule instead, rejecting the weak rationales that the Court offered in support of the inalienability approach.

#### A. *The Property Rule Approach*

Some barriers to interjurisdictional problem solving created by the New Federalism's line of strict jurisdictional separation could be surgically alleviated, simply by enabling bargaining around that line under a property rule.

##### 1. The Case for a Property Rule

The property rule approach distinguishes itself from the others in the *Cathedral* framework by enabling the parties to shift entitlements through consensual bargaining. Liability rules allow competitors to shift the entitlement over the holder's protest, and inalienability rules force the parties to live with the initial distribution even if both would prefer otherwise. In the interjurisdictional gray area, the inalienability approach frustrates the problem-solving value of federalism, while a liability rule that would enable the usurpation of state sovereign authority would threaten the value of checks and balances. However, a property rule that enables the state to decide for itself would satisfy all federalism values. It would advance the problem-solving value by facilitating the negotiation of regulatory partnerships needed to solve interjurisdictional problems. It would advance the values associated with

local autonomy by preserving decision-making authority to the states. And it would respect the check-and-balance value, protecting the fundamental order of American dual sovereignty, by reserving veto rights over waiver to the states.

A property rule would also take advantage of a primary architectural feature of the existing New Federalism Tenth Amendment jurisprudence. The New Federalism's otherwise controversial bright-line approach to jurisdictional separation heralds one potential advantage for state-federal bargaining: bright lines can help facilitate efficient bargaining where bargaining is desirable, as it would be in the gray area. Ideally, bright lines delineate the relevant parameters of a bargaining environment<sup>232</sup>—who holds which entitlement, the available media of exchange, and each party's best alternative to reaching agreement. The pro-bargaining potential in the New Federalism model reveals the great inefficient irony of the *New York* rule: The substantive anti-commandeering element of the rule enhances state autonomy by preventing federal coercion, drawing a line in the sand between state and federal entitlements that could facilitate consensually negotiated partnerships around that line. Then the remedial element undermines state autonomy by preventing the very bargains facilitated by the bright-line substantive element. (Bad infrastructure indeed.)

Moreover, the property rule would facilitate the efficient resolution of interjurisdictional uncertainty in important ways that the inalienability rule cannot. The inalienability approach exacerbates inherent problems with the line-drawing enterprise to begin with, as demonstrated by none other than Professor Coase. The Coase Theorem teaches that bargaining protects against errors made in the initial assignment of legal entitlements under conditions of uncertainty,<sup>233</sup> and—at least in the interjurisdictional gray area—uncertainty pervades the initial allocation of regulatory jurisdiction at the margins of the New Federalism's paradigm of mutual exclusivity. Indeed, when the regulatory target implicates both state and federal obligations, the assignment of the jurisdictional entitlement exclusively to *either* the state *or* the federal government proves

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232. See Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 577 (1988).

233. Coase, *supra* note 38, at 15 ("It is always possible to modify by transactions on the market the initial legal delimitation of rights. And, of course, if such market transactions are costless, such a rearrangement of rights will always take place if it would lead to an increase in the value of production.").

essentially arbitrary. As described above, the New Federalism's strict protection of these arbitrary assignments has variously led to regulatory uncertainty, gridlock, litigation, and abdication, such as that which has plagued not only the regulation of low-level radioactive waste, stormwater pollution,<sup>234</sup> and wetlands,<sup>235</sup> but even governmental response to threats of terrorism and natural disaster, such as Hurricane Katrina.<sup>236</sup>

By contrast, property-rule protection for Tenth Amendment entitlements would enable states to engage in the very bargaining that Coase, Calabresi, and Melamed all predict will facilitate efficiency when uncertainty muddles the initial allocation.<sup>237</sup> Calabresi and Melamed explain that the law can help maximize efficiency by assigning entitlements to reflect Pareto optimality ("that allocation of resources which could not be improved in the sense that a further change would not so improve the condition of those who gained by it that they could compensate those who lost from it and still be better off than before"),<sup>238</sup> or that which yields the most overall societal value and fewest overall societal costs.<sup>239</sup> However, when there is

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234. See *supra* notes 213–18 and accompanying text (describing challenges to the Phase II Stormwater Rule).

235. In *Rapanos v. United States*, 547 U.S. 715, 731–32 (2006), a fractured Supreme Court rejected portions of the Army Corps of Engineers' jurisdictional guidelines regarding wetlands regulation without achieving consensus on how the Corps might establish permissible guidelines, throwing the field into further disarray. See also Jeff Kinney, *Internal EPA Memo Finds Enforcement Decreased Following Rapanos Decision*, 39 ENV'T REP. 1392 (2008) (reporting on a House oversight committee investigation of post-*Rapanos* Clean Water Act enforcement and an internal EPA memorandum stating that the *Rapanos* decision may be undermining "EPA's ability to maintain an effective enforcement program").

236. See Ryan, *supra* note 2, at 567–95 (critiquing the impacts of the dual federalism model on regulatory response in each of these interjurisdictional scenarios); Dickey, *supra* note 3 (reporting on national security conflicts).

237. See Coase, *supra* note 38, at 15; Calabresi & Melamed, *supra* note 7, at 1093–95 (noting Coase's argument that "economic efficiency will occur regardless of the initial entitlement" in the absence of transaction costs, which "must be understood extremely broadly as involving . . . the absence of any impediments or costs of negotiating").

238. Calabresi & Melamed, *supra* note 7, at 1093–94 ("[E]conomic efficiency asks for that combination of entitlements to engage in risky activities and to be free from harm from risky activities which will most likely lead to the lowest sum of accident costs and of costs of avoiding accidents. It asks for that form of property, private or communal, which leads to the highest product for the effort of producing.").

239. Although Calabresi and Melamed take economic efficiency as a primary consideration in the allocation of legal entitlements, they are clear that it is not the only basis on which the law should choose; additional considerations include the unique "other justice reasons" and distributional preferences of any given society. *Id.* at 1098–1105.

uncertainty about which initial distribution would best maximize benefits and minimize costs, efficiency can only be realized by allowing entitlements to shift until a Pareto optimal allocation is reached.<sup>240</sup>

Assigning regulatory jurisdiction to either the state or federal government in the interjurisdictional gray area is a project of uncertainty by definition, refereed by well-intended but fallible human beings. To then defend these entitlements with an inalienability rule fixes errors in the arbitrary initial assignment forever. The property rule would protect the division of state and federal power while empowering both to take the needed steps in negotiating the kinds of partnerships that can effectively cope with interjurisdictional quagmires.

Key is the property rule's element of choice. In empowering the entitlement holder to decide for itself whether or not to bargain, the property rule approach enhances state sovereignty by supporting local autonomy—a federalism value on par with checks and balances.<sup>241</sup> A classic statement of Tenth Amendment jurisprudence is that states should not be “compelled” to participate in a federal regulatory program,<sup>242</sup> and even more recent decisions emphasize the centrality of preventing federal “coercion” of the states.<sup>243</sup> But where the states invite federal regulation—if only to make it possible to enforce their own agreements against corrosive collective-action problems—there is no coercion. The consensual element inherent in property rule protection means that states will not waive their Tenth Amendment state sovereignty unless they elect to do so—just

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240. *Id.* at 1093–97. When there is uncertainty about the initial distribution of entitlements, the authors suggest that it allocate costs to the party that can best perform the needed cost-benefit analysis (or most cheaply avoid costs), and if it is too difficult to determine the least cost avoider, then to the party that can most cheaply act in the market to correct disparities in the entitlement distribution (since they expect that our imperfect markets in fact will create transaction costs). *Id.* at 1096–97.

241. *See* Ryan, *supra* note 2, at 610–20 (discussing the federalism values in protecting the benefits of localism).

242. *See, e.g.*, *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981); *see also* *New York v. United States*, 505 U.S. 144, 161 (1992).

243. *See* *Env'tl. Def. Ctr., Inc. v. U.S. Env'tl. Prot. Agency (EDC II)* 344 F.3d 832, 847 (9th Cir. 2003) (noting that under the Tenth Amendment, “the Federal Government may not compel States to implement, by legislation or executive action, federal regulatory programs,” (internal quotation marks omitted) (quoting *Printz v. United States*, 521 U.S. 898, 925 (1997)) and that “[t]he crucial proscribed element is coercion; the residents of the State or municipality must retain ‘the ultimate decision’ as to whether or not the State or municipality will comply with the federal regulatory program” (quoting *New York*, 505 U.S. at 168)).

as they elect to waive sovereign authority when they enter into spending-power deals that expand federal authority beyond its initial jurisdictional entitlement.<sup>244</sup> Even federalism theorists who worry that state officials will elect to collude with the federal government in undermining federalism constraints have conceded that the anti-commandeering context is least vulnerable to their concern. As Professors John McGinnis and Ilya Somin have explained:

In practice, commandeering is not nearly as great a danger to federalism as the Spending power and the Commerce power. State governments often have strong incentives to resist uncompensated commandeering because, by definition, it deprives them of resources without any offsetting benefits. For this reason, state governments routinely use their political power to resist commandeering and other “unfunded mandates.”<sup>245</sup>

By extension, they are unlikely to choose *not* to resist commandeering unless it promises substantial offsetting benefits.

Although a detailed account of the mechanics is beyond the scope of this Article, we can imagine at least the rough sketch in which a state’s legislature, representing the people in their corporate capacity,<sup>246</sup> could directly waive the state’s anti-commandeering entitlement or statutorily authorize the governor to negotiate on behalf of the people as needed. If there was no waiver, the anti-commandeering entitlement would remain with the state and could be judicially enforced against federal overreaching.<sup>247</sup> If a given instance of commandeering bargaining were challenged, the court would evaluate the permissibility of the trade based on the litigants’ showing that bargaining is appropriately within the gray area, or that the regulatory

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244. A different case arises if all the states but one agree on a policy, and the majority persuades Congress to pass a commandeering rule that the dissenting state could challenge under a property rule approach.

245. McGinnis & Somin, *supra* note 44, at 119.

246. *See supra* note 152 (discussing the Court’s explication of the Tenth Amendment reference to “the people”).

247. Note that by this account of a valid waiver, the *New York* defendants may not have been able to satisfy the test for waiver even if one had been made available (since neither the legislature nor the governor acted formally). Similarly, the federal government would not have been able to defend against the *Printz* commandeering challenge, because states had not been given an opportunity *ex ante* to opt in or out. 521 U.S. at 935. However, were the waiver rule available and clear, then the parties could structure their behavior to secure clear and legally adequate waiver beforehand where intended.

partnership addresses an interjurisdictional problem on which both sides claim obligation or expertise (and perhaps for which alternative avenues of resolution are unavailing).<sup>248</sup> Allowing bargaining while placing the burden of persuasion on the bargainers shows proper deference to the check-and-balance value while preventing it from overshadowing all other considerations of good federalist governance.

Making the change to a property rule would be a relatively simple jurisprudential fix, as the inalienability rule has not been visited by the Court since its articulation in *New York*. Although the rule remains in force, the Court's reasoning on this aspect of the decision has not been invoked in any subsequent decision, such that it has not become an inextricable part of the fabric of the rest of our jurisprudence. Reversing the inalienability rule would leave other precedents protecting state sovereignty fully intact, while affording flexibility for intergovernmental bargaining that should not offend them.

In the end, the *New York* rule simply went farther than necessary. Enabling commandeering bargaining resonates with Justice Blackmun's argument in *Garcia v. San Antonio Metropolitan Transit Authority*<sup>249</sup> that states' rights are protected by the political process in which state actors play an important role, but the continued enforceability of the anti-commandeering entitlement when it is *not* waived preserves the role of judicially enforceable federalism constraints. Meanwhile, affording judicial review to contain bargaining within the gray area should satisfy concerns that Tenth Amendment bargaining will not encroach on the uncontroversial realms of purely state or federal authority. In this respect, the property rule approach would forge a middle path through the extremes of the Court's erstwhile vacillating Tenth Amendment jurisprudence.

Of note, the property rule approach would also free the federal government to waive its reciprocal Tenth Amendment entitlement—but that already happens with so much frequency

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248. Like *Federalism and the Tug of War Within*, Ryan, *supra* note 2, at 570, this Article does not resolve the absolute boundaries of the interjurisdictional gray area. That we can identify clear examples within it should suffice to reject a categorical rule premised on its absence. This discussion preserves for later the inevitable arguments over whether a given instance of bargaining takes place in the gray area where it should be permitted or the poles where it should not be. Nevertheless, the current conversation at least steers the debate into more useful theoretical territory. *Id.* at 570–72.

249. 469 U.S. 528 (1985).

and so little ado that affirming it is of almost no consequence except to bring the system back into symmetry.<sup>250</sup> The “marble cake” model of cooperative federalism,<sup>251</sup> representing the innumerable places across the regulatory landscape where federal and state jurisdiction really do overlap, is mostly composed of areas where the federal government *could* but *does not* choose to fully preempt state involvement.<sup>252</sup> This is visible not only in such purposeful collaborative initiatives as the Clean Air and Clean Water Acts, where the federal and state governments take responsibility for separate but interlocking parts of a unified regulatory program,<sup>253</sup> but also in the concurrent jurisdictional fabric of American law more generally.<sup>254</sup> (For example, bankruptcy law is constitutionally enumerated

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250. See, e.g., MORTON GRODZINS, *THE AMERICAN SYSTEM* 8, 60–153 (Daniel J. Elazar ed., 1966).

251. *Id.*

252. For example, Congress has created a regime of shared federal and state authority over the coastal waterways three miles seaward from a state’s coastal boundary. The Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451–1466 (2006), offers federal funding and legal regard for state management of these waterways when states submit coastal management plans for approval by the Department of Commerce, National Oceanic and Atmospheric Administration (NOAA). When a coastal management plan is in effect, the federal government endeavors to comply with the state plan. 16 U.S.C. § 1456(c) (“Each Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs.”). The Act requires that federal activity affecting the coastal zone be consistent with that state’s coastal management policies, in what the Department of Commerce has described as a “limited waiver of federal supremacy and authority.” Coastal Zone Management Act Federal Consistency Regulations, 71 Fed. Reg. 788, 789 (Jan. 5, 2006) (codified at 15 C.F.R. pt. 930).

253. See Clean Water Act, 33 U.S.C. §§ 1251–1387 (2006) (allocating roles between the EPA and the states); Clean Air Act, 42 U.S.C. §§ 7401–7671 (2006) (delegating standard setting authority to the federal government and program design and implementation to the states); see also Ryan, *supra* note 2, at 567–83 (discussing regulatory crossover).

254. E.g., Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1382–85 (2006) (describing overlapping state and federal jurisdiction in products liability law); Susan R. Klein, *Independent-Norm Federalism in Criminal Law*, 90 CAL. L. REV. 1541, 1553–55 (2002) (describing overlapping state and federal jurisdiction in the context of criminal law); A. Brooke Overby, *Our New Commercial Law Federalism*, 76 TEMP. L. REV. 297, 299–300 (2003) (discussing the advent of cooperative federal commercial laws, with particular emphasis on the Electronic Signatures in Global and National Commerce Act); Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 145 (2001) (noting “broad concurrent regulatory authority over the economy” by the state and federal governments); see also Ryan, *supra* note 2, at 554–67 (discussing federalism, preemption, and the related reallocation of authority).

to the federal government,<sup>255</sup> but its administration depends on property law definitions and conclusions that differ from state to state.)<sup>256</sup> Despite the challenge it poses to the separationist premise of the New Federalism's conception of dual sovereignty, the federal government's frequent waiver of its Tenth Amendment entitlement has attracted little attention from the Court—presumably because the Court has not been concerned about a threat to the overall federal project posed by retained state power.

Needless to say, the reverse is true: the Court clearly considers unchecked federal power a threat to the overall project of retained state sovereign authority. It is for this reason that it protected the states' Tenth Amendment entitlement so purposefully (and for this reason that the rest of this Article addresses only the states' entitlement, though the argument applies equally well to its federal counterpart). The inalienability rule the Court chose to protect Tenth Amendment state sovereign authority misses the mark, but the concerns that drove the choice suggest what the majority was really afraid of: the third leg in the *Cathedral* stool, the liability rule.

## 2. Fear of "Liability"

What the majority truly sought to prevent—and with generally good reason—was the adoption of a *Cathedral* liability rule. Under a liability rule, the jurisdictional competitor is empowered not only to bargain for the entitlement, but to swap compensation for it even over the holder's protest. It appears that the Court was so concerned about the threat of liability—specifically, the threat of federal override of state prerogative—that it remedially overcompensated.

A liability approach would render a state's Tenth Amendment entitlement vulnerable to the very kind of federal aggrandizement that the Court most fears. Protecting the Tenth Amendment entitlement under a liability rule would shift decision-making power about the entitlement to the jurisdictional competitor—empowering the federal government to condemn

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255. U.S. CONST. art. I, § 8.

256. See, e.g., Felicia Anne Nadborny, Note, 'Leap of Faith' into Bankruptcy: An Examination of the Issues Surrounding the Valuation of a Catholic Diocese's Bankruptcy Estate, 13 AM. BANKR. INST. L. REV. 839, 889 (2005) (noting that although certain property interests are determined by federal bankruptcy standards, bankruptcy courts frequently "look to state law for guidance in determining what constitutes property of the bankruptcy estate").

the entitlement even over a state's protest (and vice versa), so long as the loser was somehow "made whole" by the appropriator. The *Cathedral* authors recommend liability rules when there is both uncertainty about the initial allocation and high transaction costs that could prevent otherwise desirable entitlement shifting—a description that applies to state-federal bargaining in the gray area, which is complicated by uncertainties and practicalities that exceed most private bargaining scenarios.<sup>257</sup> But allowing the nonconsensual shifting of entitlements to sovereign authority advances problem solving at too great a cost to other important federalism values, such as local autonomy and checks and balances. It would be better simply to remove some of the obstacles to bargaining that create high transaction costs in the gray area, which would bring the scenario more in line with those that the *Cathedral* authors recommend for property rule protection.

One could imagine rare circumstances in which a liability approach might be appropriate—perhaps where a serious inter-jurisdictional emergency renders the bargaining process impossible (or intolerably harmful), as may have happened in the wake of Hurricane Katrina.<sup>258</sup> At the time, many argued that the federal government should have been able to federalize the Louisiana National Guard and assume command of local first responders even without gubernatorial permission because the emergency had so incapacitated the state apparatus that the relevant state actors might not have been able to take the needed steps to evaluate and instigate a waiver.<sup>259</sup> Professor Neil Siegel has posed a similar thought-problem about a future terrorist attack on the scale of 9/11, where the substantive anti-commandeering rule would prevent the President from assuming command of local first responders to coordinate a centralized response without gubernatorial consent.<sup>260</sup> (Reflecting

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257. See *supra* Part I.D.

258. Siegel, *supra* note 103, at 1687–88; see also Bulman-Pozen & Gerken, *supra* note 225 (suggesting that liability-rule commandeering may be a useful regulatory device even in cases other than emergencies).

259. See John Yoo, Editorial, *Trigger Power*, L.A. TIMES, Oct. 2, 2005, at M5; Michael Greenberger, *Yes, Virginia: The President Can Deploy Federal Troops to Prevent the Loss of a Major American City from a Devastating Natural Catastrophe* 14–19 (Univ. of Md. Legal Studies, Research Paper No. 2006–37, 2006), available at <http://ssrn.com/abstract=946207> (arguing that the President had clear authority to intervene even before passage of the Warner Act).

260. Siegel, *supra* note 103, at 1684–86. Another provocative case that some argue could warrant a liability approach has already materialized in the slower-motion emergency context of catastrophic injury to children in automobiles. The

these concerns, the post-Katrina amendments to the Stafford Act may authorize exactly this kind of federal move.)<sup>261</sup> But even in such compelling circumstances, naked federal commandeering would be highly contentious. For all who argued that the federal government should have acted more forcefully during the Katrina response, others argued passionately that the federal government must not violate state sovereignty.<sup>262</sup>

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National Transportation Safety Board (NTSB) has urged states to require children aged four to eight to use booster seats because most are too large for the infant restraints already required by law, but too small for conventional seatbelts to work effectively. Adam Hochberg, *NTSB Puts Heat On States Without Booster Seat Laws* (NPR radio broadcast Sept. 30, 2009), available at <http://www.npr.org/templates/story/story.php?storyId=112884532&ft=1&f=1003>. NTSB estimates that these children are nearly 60 percent more likely to suffer catastrophic injury in a car accident when they are not using a booster seat. *Id.* In light of these statistics, all states have passed laws requiring booster seats except Florida, Arizona, and South Dakota. State representatives in Florida and Arizona are attempting to pass booster seat legislation in the coming year, but the Governor of South Dakota recently vetoed his own legislature's successful booster seat bill on grounds that such decisions should be left to the family—despite “heart-rending testimony” from parents of injured children who had not used booster seats because they were following the requirements of child restraint laws that they had assumed were designed for maximum protection. *Id.* When a governor vetoes a demonstrated means of halting preventable child deaths in legislation that has been duly approved by the state legislature, which expression of Tenth Amendment sovereignty should prevail? At one level, the answer is easy: state legislation must yield to the governor's veto, and a displeased electorate maintains the alternative of voting that governor out at the next election cycle. Still, the families of children injured in the intervening years may later consider it the sort of emergency that should have warranted NTSB override under an anti-commandeering liability rule.

261. The failed response to Hurricane Katrina—partly the result of poor coordination between the federal government and the incapacitated state and local governments in New Orleans—motivated the enactment of a federal law that enables the President to deploy the military in response to major domestic emergencies without consent of the states involved. John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083 (2006); see also Greenberger, *supra* note 259, at 1–2 (arguing that the new law neither adds to nor subtracts from the President's existing powers but merely clarifies them after uncertainty suggested during the Katrina emergency).

262. Cf. Ed McClure, Letter to the Editor, *In Times of Catastrophe, Responsibility Starts at Local Level*, ST. PETERSBURG TIMES, Sept. 6, 2005, at 16A, available at [http://www.sptimes.com/2005/09/06/Opinion/In\\_times\\_of\\_catastroph.shtml](http://www.sptimes.com/2005/09/06/Opinion/In_times_of_catastroph.shtml) (arguing that the state and local government should have been able to handle the emergency without more federal involvement); Robert J. Spratlin, Editorial, *Bash Mayor, Governor for Katrina Response, not Bush*, BURLINGTON COUNTY TIMES, Sept. 19, 2005, at 6A (arguing that primary responsibility for the disaster response lay with state and local officials, and that the federal government properly abstained from interfering absent invitation); Posting of Douglas L. Marriott to USA Today Opinion, <http://blogs.usatoday.com/oped/2007/09/keep-out-federa.html> (Sept. 5, 2007, 12:07 EST) (arguing against further federal involvement in the recovery effort because large bureaucracies are not effective in dealing with emergencies).

Neither is it clear how a liability-rule entitlement shift should be compensated in this context.

A liability rule could stress the check-and-balance value of federalism beyond its breaking point, and we can safely presume that in almost all imaginable circumstances, a state that really needed federal assistance to protect public safety would simply ask for it—waiving its entitlement to federal noninterference just as the property rule would encourage. Indeed, the specter of federal override of Tenth Amendment–protected state sovereign authority is what galvanized the New Federalism revival in the first place.<sup>263</sup> Although a liability rule enabling a jurisdictional competitor to claim an entitlement over the holder’s protest might unduly threaten federalism checks and balances, a property rule that enabled the holder to choose for itself would not. The property rule approach honors state autonomy and protects against federal coercion by keeping veto power in the hands of the entitlement holder—the states.

Thus, even if the uncontroversial poles of purely state and federal authority were properly protected by an inalienability rule, the uncertain entitlements in the gray area are exactly those best protected by a pro-bargaining property rule. New Federalism proponents may rightly fear the use of a liability rule to protect the Tenth Amendment entitlement, which might enable the federal government to condemn areas of state jurisdiction as it can private property for an interstate—but a property rule protects state autonomy by empowering the state as the ultimate decision maker. Because a state is unlikely to bargain away its entitlement against its own interests, the bargaining paradigm would protect the states against the threat of federal overreaching intended by American federalism. And it would enable the kind of state-federal bargaining that could make the needed difference in the interjurisdictional gray area.

*B. The Court’s Defense: Inalienable by Nature and Necessity*

The inalienability approach thus fails the recommendations of the *Cathedral* framework, but it also fails under the

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263. See Ryan, *supra* note 2, at 642 (discussing how New Federalism “arose out of concern that the predominant *cooperative federalism* model fails to adequately circumscribe federal authority” (emphasis added)); *id.* at 539–42 (discussing how the New Federalism seeks to better corral federal authority).

Court's own rationale in *New York*. With all the intellectual rigor of an afterthought, the Court essentially defended the new inalienability rule on two grounds—by nature and by necessity—neither of them satisfying. First, it proclaimed the entitlement inalienable by its very nature, analogizing unsuccessfully to other rights that the state may not waive on behalf of individuals and to the inalienable horizontal separation of powers between Congress, the President, and the federal judiciary. It also justified the inalienability rule on grounds of necessity, because the interests of a state's citizens and their elected representatives might differ too much to allow the latter to waive on behalf of the former in state-federal negotiations—even though the interests of citizens and their elected officials in state sovereign authority are remarkably well-aligned. Finally, the Court undermined its reasoning on both nature and necessity grounds by suggesting that the same elected officials who should not be able to waive their citizens' entitlement in negotiations with the federal government might nevertheless be able to do so in the negotiation with another state of an interstate compact.

1. By Nature: An Inherently Inalienable Entitlement?

The Court first grounded its inalienability approach in the very nature of the entitlement, grouping the anti-commandeering rule with other rights that the state may not waive on behalf of citizens and to more structural constitutional features, such as the horizontal separation of powers.<sup>264</sup> Ultimately, its comparison with other rights that states cannot waive is unhelpful, since those are rights that citizens hold *against* the state, an analogy that simply does not hold in the context of the Tenth Amendment entitlement to state sovereign authority. And though the comparison between horizontal and vertical separation of powers seems more compelling, the Court fails to distinguish why property-rule protection is somehow acceptable in other federalism contexts, such as its Eleventh Amendment and spending-power doctrines.

As an initial matter, the decision forces us to consider whether the nature of the Tenth Amendment entitlement itself

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264. *New York v. United States*, 505 U.S. 144, 182 (1992). See *supra* note 161, for the full quotation.

requires that it be inalienable. Indeed, some constitutional entitlements are protected by an inalienability rule,<sup>265</sup> and probably rightly so. For example, in defending Tenth Amendment inalienability, the Court analogized to the separation of powers between Congress, the President, and the Supreme Court,<sup>266</sup> which is (weakly) vindicated by the non-delegation doctrine (preventing Congress from abdicating its role to the executive)<sup>267</sup> and the *Chevron* doctrine of administrative law (preventing the judiciary from encroaching on executive and legislative decision making).<sup>268</sup> But even assuming strong protection for the inalienability of the horizontal separation of powers, the Court's analogy fails.

Comparing the horizontal separation of legislative, executive, and judicial power with federalism's vertical separation of state and federal power is appealing at first blush, but ultimately unsatisfying when considered in the full context of federalism entitlements that are treated as tradable. The same state sovereign authority considered sacrosanct under the *New York* rule is the subject of bargaining elsewhere, especially amidst the waivable reciprocal entitlements to regulatory non-interference that are created in the interplay between the grants and limits on federal power.<sup>269</sup> When the states yielded to a nationally mandated drinking age in exchange for federal highway funds, they bargained away an entitlement to a particular zone of sovereign authority free from federal interference.<sup>270</sup> When they accepted federal education funding in exchange for instituting a battery of standardized tests, they bargained away another such entitlement.<sup>271</sup> If constitutional

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265. In addition to the Thirteenth Amendment prohibition of slavery discussed earlier, *see supra* Part I.B., another example is the Guarantee Clause, U.S. CONST. art. IV, § 4, which guarantees each state a republican form of government—though this alleged inalienability may be all bark and no bite, given the Court's long tradition of treating claims raised under the Clause as nonjusticiable. *See, e.g., New York*, 505 U.S. at 184 (“[I]t rests with Congress, not the judiciary, ‘to decide what government is the established one in a State.’” (quoting *Luther v. Borden*, 48 U.S. (7. How.) 1, 42 (1849))).

266. *See supra* note 161.

267. *But see supra* note 164 (discussing the Court's reluctance to enforce the non-delegation doctrine for the last 60 years, upholding all delegations to administrative agencies challenged on these grounds).

268. *Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (holding that a federal agency's interpretation of its organic statute is entitled to “deference” from the court).

269. *See supra* notes 75–79 and accompanying text.

270. *South Dakota v. Dole*, 483 U.S. 203, 210–11 (1987).

271. *See No Child Left Behind Act of 2001*, 20 U.S.C. §§ 6301–8962 (2006).

law permits state-federal bargaining around Tenth Amendment defined zones under the spending power, why should the states' Tenth Amendment anti-commandeering entitlement be different?<sup>272</sup> Indeed, the majority's accompanying suggestion that Congress could work around the take-title commandeering problem by conditioning state waiver on federal funds implodes this line of reasoning.<sup>273</sup>

Perhaps conscious of this weakness in its characterization of the Tenth Amendment entitlement as an immutable structural feature of the Constitution, the Court also characterized it as an individual right—reasoning that the entitlement is inalienable in state-federal bargaining because it belongs not to the state as a state, but to the individuals within the state. After acknowledging that the challenged terms of the Low-Level Radioactive Waste Policy Act constituted a regulatory bargain in which New York was a willing beneficiary, the Court asked and then answered its own rhetorical question in terms of the individual interests in state sovereign authority. Returning to Justice O'Connor's reasoning:

How can a federal statute be found an unconstitutional infringement of state sovereignty when state officials consented to the statute's enactment?

The answer follows from an understanding of the fundamental purpose served by our Government's federal structure. The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: "Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power."<sup>274</sup>

Indeed, no one would argue that the Tenth Amendment does not protect individuals in this way, but the argument proves too much—because *all* constitutional directives exist to protect

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272. Noting this inconsistency, some scholars have argued that the *New York* entitlement is appropriately inalienable and the others under-protected. See *supra* note 87.

273. See *supra* Part II.C.2.

274. *New York v. United States*, 505 U.S. 144, 181 (1992) (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)).

individuals. Indeed, this is the very purpose of the Constitution; it is what each of its elements is ultimately designed, directly or indirectly, to accomplish.

That it benefits individuals, then, is an unremarkable feature of the Tenth Amendment entitlement. But by invoking its relationship to individuals, the Court implicitly compared the entitlement to others in the Bill of Rights that establish clear individual rights, such as the Sixth Amendment right to jury trial,<sup>275</sup> the Fourth Amendment right against unreasonable search and seizure,<sup>276</sup> or even the First Amendment right to free speech.<sup>277</sup> But even the fact that a constitutional entitlement protects individuals does not necessitate an inalienability rule, since most constitutional rights—including each of those mentioned above—are protected under a property rule.<sup>278</sup> As described earlier, citizens frequently bargain away their right to jury trial for a plea agreement that better meets their interests,<sup>279</sup> their right against unreasonable searches when they choose to cooperate with warrantless police,<sup>280</sup> and their right to free speech when they accept government employment.<sup>281</sup> Is there something else about the nature of Tenth Amendment state sovereign authority that justifies this inalienability?

To be sure, most constitutional rights that are waivable under a property rule are not usually waived by the *state*, which makes sense, because they are mostly rights held by individual citizens *against* the state. The First Amendment entitles individuals to speak free from state interference, the Fourth Amendment entitles them to be free of unreasonable

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275. U.S. CONST. amend VI.

276. *Id.* amend. IV.

277. *Id.* amend. I.

278. See Merrill, *supra* note 12, at 1144 (asserting that a property rule governs the Sixth Amendment); *id.* at 1164 (“[T]he current regime of protection afforded to Fourth Amendment rights can be described as a foundational property rule subject to numerous exceptions where we follow what amounts to a police power rule.”); Seamon, *supra* note 64, at 1135 n.325 (observing that constitutional rights are presumptively protected by property rules).

279. In 2003, out of 83,530 defendants in United States District Courts, 74,850 were convicted, 72,110 of whom entered pleas of guilty or *nolo contendere*. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2003 423 tbl.5.22 (Ann L. Pastore & Kathleen Maguire eds., 2003), available at <http://www.albany.edu/sourcebook/pdf/t522.pdf>.

280. See *Miranda v. Arizona*, 384 U.S. 436, 475 (1966) (observing that a citizen may willingly waive his rights and provide information that may aid a law enforcement effort).

281. See, e.g., *Snepp v. United States*, 444 U.S. 507, 515–16 (1980) (holding that a contract between the CIA and one of its employees was valid, even though it restricted his ability to publish a book about his work for the agency).

search and seizure by the state, and the Sixth Amendment guarantees them a fair trial before facing state punishment. But the Court's facile invocation of this principle in *New York* is dubious, because the Tenth Amendment entitlement—though it may exist to protect individuals—is not like these other individual rights. The entitlement at issue in *New York* was not held by citizens against New York, or the state officials who might have waived it; if it was held against anything, that would have been the federal government. The states' Tenth Amendment entitlement, the mirror image of its reciprocal federal counterpart, benefits individuals by delineating a zone of sovereign authority protected against federal incursion. In this respect, it seems far less like the First or Fourth Amendment entitlement than it does its neighboring entitlement, the Eleventh Amendment entitlement to state sovereign immunity—a medium of state sovereign authority that the Court acknowledges a state *can* waive.<sup>282</sup>

The inalienability of the Tenth Amendment entitlement to state sovereign authority is difficult to reconcile with the freely alienable Eleventh Amendment entitlement to the same constitutional medium. The Tenth Amendment protects a zone of local regulatory authority, and the Eleventh Amendment protects the fiscal integrity of that level (and perhaps more in some philosophically significant way, in vindicating the state as a sovereign not subject to private suit<sup>283</sup>). While each benefits individuals by empowering them locally within a federal system, neither is cognizable except as it attaches to the state as an institution of government. An individual citizen has no divisible interest in state regulatory authority, or in a state's treasury, except as stakeholders within that state. The Tenth and Eleventh Amendments are thus better understood (as, indeed, they usually are) as conferring collective rights, meaningfully administered by the states *qua* states, and not to individuals.<sup>284</sup> It is for this reason that they have been conventionally

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282. See, e.g., *Edelman v. Jordan*, 415 U.S. 651, 673 (1974).

283. See *Alden v. Maine*, 527 U.S. 706, 713 (1999) (“[A]s the Constitution’s structure, its history, and the authoritative interpretations by this Court make clear, the States’ immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments.”).

284. For the most common statement of the Tenth and Eleventh Amendments as distinct, see *Fry v. United States*, 421 U.S. 542, 557 (1975) (Rehnquist, J., dissenting) (stating that they are “examples” of the Framers’ understanding “that

grouped together under the banner of “States’ Rights,” even though their underlying purposes may be to protect citizens from losing locally based legislative authority and from being forced as taxpayers to satisfy federal court judgments against their states. If state sovereign authority is alienable by state officials in the Eleventh Amendment context, it is hard to understand why it should not also be so in the Tenth Amendment context.<sup>285</sup>

Were the relationship to individual interests really the proper yardstick of inalienability that the Court proposes in *New York*, then the most logical arrangement would be the reverse: the Eleventh Amendment should be the inalienable of the pair, since that one can be much more closely connected with the protection of discrete individuals’ interests than the Tenth Amendment entitlement. Discrete individual taxpayers bear the brunt of legal liability for judgments against their states, and all else equal, citizens prefer lower to higher taxes—so at least all taxpayers would have a substantially parallel interest in how the Eleventh Amendment entitlement is used or waived. It is much harder to trace a direct relationship between use or waiver of the sovereign authority protected by Tenth Amendment and the interests of discrete individuals, due to the inevitable policy dissensus among them about how that authority is used.<sup>286</sup> (Demonstrating the breadth of con-

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the States were sovereign in many respects, and that although their legislative authority could be superseded by Congress in many areas where Congress was competent to act, Congress was nonetheless not free to deal with a State as if it were just another individual or business enterprise subject to regulation”).

285. One could argue that the difference in property—and inalienability—rule protection can be justified by the fact that the Eleventh Amendment is framed as a limit on federal power (which the states can waive) and the Tenth as affirming some reserve of state or people power (which the state cannot waive). However, it is not clear the Tenth Amendment is really framed differently from the Eleventh in this regard, since it also represents a limit on federal power, even if it does so by affirming that reservoir of authority not delegated to the federal government. More importantly, each amendment creates by its phrasing what amounts to a reciprocal set of “Hohfeldian” rights and duties. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 28–58 (1913). The Eleventh Amendment limitation on federal judicial power is what creates the meaningful state entitlement to sovereign immunity, just as the Tenth Amendment’s reciprocal affirmation of state and federal jurisdictional zones is what suggests the importance of some distinction between them. The Court could hardly justify so important a difference on the basis of so weak a distinction in phrasing.

286. There may also be policy dissensus among individual citizens about whether a given suit against their state is worth paying for despite the possibility of Eleventh Amendment sovereign immunity. However, this dissensus proceeds

flicting interests among statewide electorates is the aforementioned nonexistence of unanimous elections and referenda at the state level.)<sup>287</sup>

Moreover, though all citizens may have a parallel interest in protecting local authority, it is disputable that preventing the waiver of the entitlement at issue in *New York* even protected local authority: where the rubber of that entitlement really hits the road in each case depends on the specific authority and how it would be used or traded, which will always be different. Citizens' interests are much more uniform under the Eleventh Amendment, where they are unified around issues of finances and judicial process.<sup>288</sup> Numerous federal courts have invoked the centrality of the treasury-protective role by which the Eleventh Amendment benefits individual citizens' pocket-books,<sup>289</sup> while *New York* remains the only Tenth Amendment decision to characterize the entitlement as a protection for individuals that states may not waive.<sup>290</sup>

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from a baseline shared interest among citizens in the fiscal security of their state, several steps removed in comparison to such baseline indeterminacy about how Tenth Amendment regulatory authority is wielded.

287. See *supra* Part II.C (discussing the impossibility of uniform waiver of the Tenth Amendment entitlement).

288. See, e.g., William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1129 (1983) (noting that "the traditional core of eleventh amendment protection" is to avoid "the award of money judgments against the states").

289. See *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 39, 48 (1994) (noting that "the impetus for the Eleventh Amendment" was "the prevention of federal-court judgments that must be paid out of a State's treasury," and offering a litany of preceding appeals court opinions that "have recognized the vulnerability of the State's purse as the most salient factor in Eleventh Amendment determinations"). Cf. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 58 (1996) ("The Eleventh Amendment does not exist solely in order to 'preven[t] federal-court judgments that must be paid out of a State's treasury'; it also serves to avoid 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'" (citation omitted) (quoting *Hess*, 513 U.S. at 48; P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993))).

290. In *New York*, Justice O'Connor cites to *Coleman v. Thompson*, 501 U.S. 722, 759 (1991), as precedent for this proposition, but the case provides dubious support: *Coleman* was a habeas case that dealt with the ability of the federal court to grant habeas relief that had been denied by the state court, and the statement cited is not part of the majority opinion she authored but instead part of Justice Blackmun's dissenting opinion. See *New York v. United States*, 505 U.S. 144, 181 (1992) (citing *Coleman*, 501 U.S. at 759 (Blackmun, J., dissenting)).

## 2. By Necessity: The Agent-Accountability Problem

The Court's other main rationale for the *New York* inalienability rule centers on the problems of trust and accountability that arise between citizens and their agents in government. The majority justified the inalienability rule as one of necessity, fearing that constituents might be confused by the intergovernmental bargaining it prohibits and that the interests of elected officials may depart too significantly from that of their electorates to warrant power to waive their constituents' entitlement.<sup>291</sup> However, both the empirical and theoretical bases of the Court's accountability concerns are flawed.

First, the majority worried that enabling state legislators to bargain with Congress this way would undermine the accountability value of federalism, highlighting citizens' need to monitor the effectiveness of their representation in state and federal government (and take corrective action as needed).<sup>292</sup> When state legislators bind themselves under federal law in negotiations with Congress, the Court explained, they make it harder for constituents to know whom to blame if they do not like the resulting laws.<sup>293</sup> However, this argument has been roundly criticized for resting on the unsupported empirical premises that (1) voters cannot tell what level of government is to blame for a given policy, and (2) state and local officials are unable to tell them when the fault truly lies in Washington.<sup>294</sup> The Court's reasoning assumes that voters are either unable to understand interaction between the federal and state governments and/or that they cannot voice corrective preferences through their federal representation, though significant evidence suggests otherwise.<sup>295</sup> (For example, warned by their state representatives that the federal government was increasingly requiring their states to implement "unfunded mandates," voters persuaded their federal representatives to reign in the practice by passing the Unfunded Mandates Reform Act of 1995.)<sup>296</sup>

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291. See *New York*, 505 U.S. at 182–83.

292. *Id.* at 168–69 (noting that “where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished” by making it harder for voters to keep track of who is responsible for which policies).

293. *Id.*

294. H. Geoffrey Moulton, Jr., *The Quixotic Search for a Judicially Enforceable Federalism*, 83 MINN. L. REV. 849, 877 (1999).

295. See Ryan, *supra* note 2, at 606–10.

296. Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1501–1571 (2006).

More significant was the majority's deep concern that state officials cannot be trusted with the power to waive an entitlement that truly belongs to the citizens, who might have distinct interests from their elected representatives.<sup>297</sup> This is a more formidable concern, as the personal interests of elected officials and those of the constituents they represent can never be completely aligned. Nevertheless, while this gap between the interests of principals and agents is endemic in all fields where primary interest holders are represented by others, the gap is actually *less* problematic in the anti-commandeering context than in others that the Court seems to accept as a consequence of our representational democracy.

The problem that the *New York* decision identifies—that state representatives may not faithfully execute the best Tenth Amendment interests of their citizens<sup>298</sup>—is a species of the well-researched genera of what negotiation theorists call the principal-agent tension.<sup>299</sup> The principal-agent tension is created by the subtle disconnects between the personal interests of the principal and her bargaining agent that pervade all negotiations carried on by representatives.<sup>300</sup> For example, an agent paid by the hour may proceed more deliberately than if paid a flat fee, even if the principal is more interested in speed in the first case or care in the second. Voters' interests may best be served by tackling a thorny dilemma as soon as possible, but their elected official might ignore opportunities until after the election to mitigate the personal costs of any political fallout. Thus, although this aspect of the agent-accountability problem is a valid concern, it is also one that applies to *all* legislative products of elected representation (including the sorts of state legislative decision making that the Court approves in

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297. *New York*, 505 U.S. at 182–83 (noting the “possibility that powerful incentives might lead both federal and state officials to view departures from the federal structure to be in their personal interests”).

298. *See id.*

299. *See* ROBERT MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 69–91 (2000) (describing the principal-agent tension); JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 287 (Taylor & Francis e-Library 2003) (1942) (describing how a “government’s dependence” upon voting “forces upon the men at or near the helm a short-run view”); McGinnis & Somin, *supra* note 44, at 90 (arguing that judicially enforceable federalism constraints are needed because elected state officials will consent to federalism violations against the interests of their constituents, though conceding that this problem is least severe in the anti-commandeering context).

300. *See, e.g.*, MNOOKIN ET AL., *supra* note 299, at 75–76.

opposition to Tenth Amendment bargaining).<sup>301</sup> Should this particular context of state-federal bargaining be different?

The Court clearly thought so, heralding the vertical separation of powers as a cornerstone of American federalism, but closer analysis belies the proposition. If anything, this context is the one in which we can *least* fear the distorting effects of the principal-agent tension because the nature of Tenth Amendment state sovereign authority affords the greatest overlap between the private interests of individual citizens and their elected representatives, whose only claim to power lies in that very authority. Both citizens and state officials benefit by retaining as much local authority as possible, except when the problem they wish to resolve requires as constrained a sacrifice of this authority as possible.<sup>302</sup> But state representatives will be particularly jealous of Tenth Amendment-protected state authority; if they were too free in bargaining away these entitlements, they would soon find themselves out of work.<sup>303</sup> (If anything, we might fear the reverse problem—in which the citizens would benefit from waiver of an entitlement that the representative refuses to alienate—but this was clearly not the Court's concern.)

Meanwhile, we trust elected state representatives to make legislative trade-offs against all sorts of other constitutionally protected interests that are valued much differently at the individual and state level, where the principal-agent tension is much more pronounced. State legislatures can pass laws that constitutionally burden individual citizens' free speech (as narrowly tailored time, place, and manner restrictions), even though those are speech rights specifically held against the government.<sup>304</sup> Similarly, state legislatures pass laws that burden their citizens' equal protection interests all the time, and they can do so on any rational basis so long as no protected class is implicated.<sup>305</sup> It is much more likely that there could

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301. See *New York*, 505 U.S. at 168 (arguing that Congress may negotiate with state governments to achieve federal goals rather than compel state performance).

302. See *supra* note 175 (analogizing to the contract law principle that we bind ourselves to promises that compromise our autonomy when the autonomy-enhancing benefits of being bound outweigh the initial outlay).

303. See *supra* notes 244–45 and accompanying text (discussing that state-federal collusion is unlikely in an anti-commandeering context).

304. See *Grayned v. City of Rockford*, 408 U.S. 104, 115–17 (1972) (holding that reasonable time, place, and manner regulations of free speech may be necessary to further significant governmental interests).

305. *E.g.*, *McGowan v. Maryland*, 366 U.S. 420, 425–26 (1961).

be a gap between the interests of individual citizens and their state representatives in vindicating these more classic individual rights because—as previously discussed—these are rights that individual citizens hold *against* the state. Yet in these contexts, where the principal-agent tension is that much more palpable, we do not hesitate to allow the state to burden them by the legislative decision making of elected representatives.

By contrast, when legislators bargain with their state's sovereign authority—the precious commodity that is the basis for their own authority to legislate about anything—we can feel comparatively secure that they will share their constituents' interests in conservatism. The principal-agent tension will always be most pressing when the right in question is one exercised by individuals one at a time against the state, and less so as the right is more cognizable as a collective one, like those described by the Tenth and Eleventh Amendments. An entitlement to legislative decision making seems far from the prerogative of any one individual citizen, even though individual citizens benefit from it collectively. Even those who defend the need for judicially enforceable federalism constraints on principal-agent grounds (worrying that state officials will sell out their constituents' interest in state sovereignty for careerist gains) acknowledge that the lack of potential for officials' personal gain in negotiating around commandeering constraints fortifies this bargaining realm against a threat more pressing in other federalism contexts.<sup>306</sup>

Whether the Tenth Amendment entitlement protects an individual or a collective right, the close overlap between citizens' and representatives' interests in their states' sovereign authority means that Tenth Amendment bargaining will be more resistant to the distorting effects of the principal-agent tension than most other legislative arenas in which elected officials make trade-offs against constitutionally protected rights. Moreover, the Court's solutions to the problem it identifies—state legislative decision making about federal proposals for spending-power deals or cooperate-or-be-preempted choices<sup>307</sup>—invite the same kinds of principal-agent conflicts in negotiations that further strain accountability. These problems

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306. McGinnis & Somin, *supra* note 44, at 119. However, these authors nevertheless support the inalienability of the anti-commandeering entitlement. *Id.* at 118–20.

307. *See* *New York v. United States*, 505 U.S. 144, 158–59 (1992).

make it hard to understand what the inalienability rule provides that is preferable to a property rule approach.

### 3. The State Compact Problem

Finally, the majority's defense of the Tenth Amendment inalienability rule on both nature and necessity grounds was substantially undermined by dicta implying that even though New York State could not waive its citizens' entitlement to the federal government in negotiating a resolution to the crisis, it might have succeeded in doing so had it joined an interstate compact and waived the same sovereign authority directly to other states.<sup>308</sup> The decision suggests (without deciding) that the disputed take-title provision—which the majority considered part of the Act requiring the formation of interstate waste disposal compacts but not part of the interstate compacts themselves<sup>309</sup>—might have been binding had New York promised to abide by the provision within the actual terms of an interstate compact it joined pursuant to the Act:

Nor does the State's prior support for the Act estop it from asserting the Act's unconstitutionality. While New York has received the benefit of the Act in the form of a few more years of access to disposal sites in other States, New York has never joined a regional radioactive waste compact. Any estoppel implications that might flow from membership in a compact thus do not concern us here. The fact that the Act, like much federal legislation, embodies a compromise among the States does not elevate the Act (or the antecedent discussions among representatives of the States) to the status of an interstate agreement requiring Congress' approval under the Compact Clause. That a party collaborated with others in seeking legislation has never been understood to estop the party from challenging that legislation in subsequent litigation.<sup>310</sup>

The Court's conclusion that the states' earlier negotiations did not rise to the level of a compact is unremarkable, but the implications of the passage are striking. The suggestion that New York's lawsuit might have been estopped had the state bar-

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308. *Id.* at 183.

309. Even this is a disputed point; in his dissent, Justice White interpreted the relevant interstate compacts as incorporating the Act's take-title provision by reference. *Id.* at 194–96 (White, J., dissenting).

310. *Id.* at 183 (majority opinion) (citations omitted).

gained away its sovereign authority with other states rather than the federal government betrays the heart of the Court's rationale that state officials may not waive an entitlement that does not belong to them. If the entitlement is inalienable by state officials to Congress because it really belongs to individual citizens, how could it nevertheless be alienable by state officials to the officials of another state?<sup>311</sup> If the entitlement belongs to the citizens, what difference does it make whether the sovereign to whom their elected officials waive it is the federal or a separate state government?<sup>312</sup>

The discrepancy casts doubt on the Court's assertion that the Tenth Amendment entitlement is inalienable because it protects individuals. It is unclear why a state could waive an individual entitlement by joining a compact that requires congressional approval, but not after negotiating for the same waiver in direct congressional legislation independent of the compact. The same rights are at stake in both contexts, and the interstate-compact medium certainly does not enable states to waive other constitutional rights held by individuals. For example, the New England states could not form an interstate compact to deny residency status to minorities, even with congressional consent,<sup>313</sup> nor could the southeastern states form a compact to deny members of the Republican Party the right to speak in a public forum.<sup>314</sup> But that is the absurd implication of the Court's suggestion that the result of the case might have

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311. We might also consider the perverse implications were the Court to choose consistency by holding that a state could not waive its sovereign authority in *either* context: a compact like the ones embedded within the Act would be impermissible, no matter the need. However, the proposition is undermined by the existence of hundreds of interstate compacts in which states *do* waive some degree of Tenth Amendment sovereignty to other states or to an interstate commission. *See, e.g.*, Klamath River Basin Compact of 1957, Pub. L. No. 85-222, 71 Stat. 497, 502-05 (1957); Interstate Compact for Adult Offender Supervision, MINN. STAT. § 243.1605 (2008); Interstate Compact for Juveniles, ARIZ. REV. STAT. ANN. §§ 8-368 to -368.01 (2003).

312. Note that *New York* did not definitively decide that a state *could* waive its Tenth Amendment protected sovereign authority by joining a compact, only that it *might* be able to do so. 505 U.S. at 183. The decision suggests that had New York joined a compact in which the take-title penalty was made an explicit part, then its bid to be released from the bargain might have been vitiated by an estoppel claim unavailable in the context of challenging federal legislation. But would entering into a compact under one part of the Act imply consent to another part that is otherwise unconstitutional?

313. *Cf.* U.S. CONST. amend. XIV (prohibiting state action that discriminates on the basis of race).

314. *Cf. id.* amend. I (prohibiting state action that interferes with citizens' political speech).

been different had New York followed the other of the two permissible paths outlined by the Act—had it joined a compact that required it to site a facility, rather than attempting to site an in-state facility on its own.

The best counterargument is probably that the relevant Tenth Amendment entitlement is not really a positive one for a zone of state sovereign authority but a negative one against federal interference with that authority. If this were so, the state could waive the same sovereign authority to interference by another state without triggering the citizens' separate entitlement to federal noninterference in that zone of state authority. Under this analysis, the question really becomes one about the content of the Tenth Amendment entitlement: regardless of who has the power to waive it, is the entitlement really about a zone of state sovereign authority that cannot be interfered with by any outside sovereign, including another state (we can call this the "positive entitlement"), or about a prohibition on federal interference in state affairs ("the negative entitlement")? But in fact, and as suggested in the earlier references to the Hohfeldian framing of the Tenth and Eleventh Amendments,<sup>315</sup> neither depiction of the entitlement truly stands without the other. Indeed, this is exactly what the Court tells us in *New York*:

In a case like these, involving the division of authority between federal and state governments, the two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.<sup>316</sup>

The existence of the positive entitlement's zone of state jurisdiction implies at least a presumption of federal noninterference, while the negative entitlement's restriction is meaning-

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315. See *supra* note 285.

316. 505 U.S. at 156; see also *id.* at 159 ("In the end, just as a cup may be half empty or half full, it makes no difference whether one views the question at issue in these cases as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment. Either way, we must determine whether any of the three challenged provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 oversteps the boundary between federal and state authority."); *id.* at 177.

less unless it refers to noninterference within a specific zone of state sovereign authority. So any answer to this question must include both a positive and negative component, and the only question is whether the negative component protects state sovereign authority from interference by any outside sovereign, or only the federal government.

In *Federalism and the Tug of War Within*, I argue that the best understanding of the entitlement is as a (positive) jurisdictional zone of sovereign authority coupled with a (negative) presumption against interference by the jurisdictional competitor that may be overcome in the interjurisdictional gray area where state and federal zones may occasionally overlap.<sup>317</sup> Overcoming the presumption requires demanding scrutiny under a standard that weighs the overall harms and benefits to all federalism values. By this view, any entitlement to noninterference is strong at the two uncontroversial ends of the state-federal jurisdictional spectrum (constituting the vast majority of the total), but weak in the gray area. *Federalism and the Tug of War Within* did not consider jurisdictional competition that might come from beyond the state-federal continuum (i.e., another state), but the relevant inquiry seems the same: whether the waiver of sovereign authority in any case would advance or detract from the fundamental federalism values that give meaning to the Tenth Amendment.

Regardless, the Court's reasoning in *New York* fails to resolve the problem. If a state may not waive its citizens' entitlement to the federal government but may to another state, the Court must assume that the only relevant entitlement is the negative entitlement to federal noninterference. But as established above, this elides the positive entitlement to a zone of state sovereign authority that must accompany the negative entitlement. If the state can still trade on the positive entitlement with the right bargaining partner, then this contradicts the Court's stated characterization of the entitlement not as a state prerogative but as a right belonging to individual citizens, which would seem to deserve protection from trade to either the federal government or any another sovereign state.

On a pragmatic level, it is also worth noting that limiting a state's ability to bargain with its sovereign authority to the sole arena of interstate compacts would make it harder for interstate compacts to be effective because interstate compacts (like

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317. Ryan, *supra* note 2, at 658–67.

international laws) are easy to get out of and thus hard to enforce.<sup>318</sup> No matter what states may promise upon entering a compact, they can generally withdraw from compacts simply by repealing their own enacting state legislation, leaving compacting states vulnerable to strategic bargaining moves that may ultimately undermine the accomplishment of interstate bargaining goals. Indeed, this is exactly what New York State sought to do in the case of the Low-Level Radioactive Waste Policy Act: it took advantage of the Act's initial benefits (extended deadlines enabling it to use South Carolina as a low-cost radioactive-waste dumping ground for an additional twelve years) until the bargain no longer seemed appealing, then left its partner states holding the proverbial bag. The unfairness of New York's behavior offends common law contract sensibilities, which may be why the Court held open the possibility that New York might be held to account for its strategic behavior by a state within the breached compact, even if not by the federal government suing for violation of the underlying federal law.<sup>319</sup> And, indeed, when the Act's compacts were uncoupled from the independently enforceable take-title threat, it failed to deliver on its goal of creating a national network of disposal sites.<sup>320</sup>

Could the scheme have worked if the take-title penalty had simply been included in each individual compact? Probably not. Interstate compacts are adopted as state law, so including the take-title provision directly in each compact would have given the penalty independent legal effect in each participating state by that state's own law. However, most states were already failing to comply with their own laws that adopted the other terms of the compacts—most conspicuously, in failing to create the mandated disposal sites<sup>321</sup>—which is why the penalties were needed to begin with. Including penalties in the compacts but not the independently enforceable federal law suggests two problems. First, there remains the probability of ongoing nonadherence to state law and the difficulty of inter-

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318. Cf. John Samples, *A Critique of the National Popular Vote Plan for Electing the President*, CATO POL'Y ANALYSIS SERIES No. 622 (Cato Inst., Wash., D.C.), Oct. 13, 2008, at 12–13, available at <http://ssrn.com/abstract=1462303> (criticizing a state compact-based proposal to elect the President by popular vote (and thus without amending the Constitution) because states could always withdraw from the compact before the election if polling data jarred state representatives).

319. *New York*, 505 U.S. at 183.

320. See *supra* Part II.A (reviewing the goals and history of the Act).

321. See, e.g., *Nebraska v. Cent. Low-Level Radioactive Waste Compact Comm'n*, 187 F.3d 982, 984–85 (8th Cir. 1999).

state enforcement. Worse is the possibility that this approach could encourage even less compliance with the overall scheme, by motivating states to refrain from compacts altogether to avoid vulnerability to the penalty.

Providing an incentive for states to pull out of the compacts they had joined would lead them right back to the collective-action problem that inspired the state-based low-level radioactive waste solution in the first place. Removing the externally enforceable penalty thus defeated the intentions of the states that designed the system adopted by the Act. If penalties are limited to the language of interstate compacts because Congress cannot enact them even with states' consent, then enforcement problems could undermine interstate compacting goals altogether. A separately enforceable provision with teeth may be necessary to contain the collective-action problems that inhibit full participation and enforcement. Indeed, these kinds of freeloader and holdout problems are exactly the sort of collective-action problems that Calabresi and Melamed cite in support of remedy rules that enable bargaining regimes to realize efficient results.<sup>322</sup>

In the end, perhaps the best way to understand the *New York* inalienability rule is in the very terms that the *Cathedral* framework identifies in support of inalienability: it exists to protect a "moralism" that the Court considered worthy of the resulting efficiency and autonomy losses.<sup>323</sup> But identifying what is really driving the rule opens the decision up to proper public scrutiny about that choice, scrutiny it fails to withstand.

#### CONCLUSION: THE WRONG MORALISM

Weak on its own theoretical terms, the Court's defense of the *New York* inalienability rule is ultimately best explained in *Cathedral* terms. Calabresi and Melamed suggest that an inalienability rule is often only justifiable to vindicate a strong "moralism"—a policymaking consensus about some value so important that it is worth protecting in spite of the resulting efficiency and autonomy losses.<sup>324</sup> The Tenth Amendment inalienability rule has proven costly in efficiency and autonomy terms, but it faithfully protects the moralism that underlies the

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322. Calabresi & Melamed, *supra* note 7, at 1106–10.

323. *See id.* at 1093–98.

324. *Id.* at 1112; *see also* Merrill, *supra* note 12, at 1150, 1156 (discussing a public law version of this principle).

New Federalism paradigm. The Court's reasoning in *New York* suggests that it considers the protection of mutual exclusivity in state and federal jurisdiction so important that the bright-line boundary New Federalism draws between them—policed by the Tenth Amendment and the Supremacy Clause—must be protected even when the parties wish to bridge it, at whatever practical cost.<sup>325</sup> Consistent with the rest of the New Federalism jurisprudence, it exalts the check-and-balance value above all other federalism considerations, including local autonomy, interjurisdictional innovation, and interjurisdictional problem solving.

Federalism values represent a legitimate moralism in the Tenth Amendment context. But is the check-and-balance value behind the inalienability rule the *right* moralism—that is, the only federalism value that should count in the analysis? Perhaps at the purely state and federal ends of the spectrum (where intergovernmental bargaining is not necessary), but not in the interjurisdictional gray area—where problem-solving values are in heightened tension with checks and balances, because the assignment of a regulatory problem to one or the other jurisdictional realm is unproductive toward its resolution. The New Federalism's mutually exclusive jurisdictional spheres are essentially arbitrary at their margins, presenting exactly the case the *Cathedral* authors make for when an entitlement-shifting rule is necessary: when there is significant uncertainty about where to assign the initial entitlement. In the end, bargaining might be the best way to honor all relevant federalism values simultaneously—from checks to localism to problem solving—because a state would not pragmatically shift its entitlement to sovereign authority against its own interests. Allowing states to bargain with their entitlements—and, significantly, to lead in the intergovernmental negotiating process—strengthens the role of the states in the federal system while opening up regulatory possibilities for dealing with issues on which neither side can be the proverbial “least cost avoider” on its own.

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325. The majority effectively acknowledged that its opinion was driven by this concern in its discussion of the purposes of dividing state and federal authority. *New York v. United States*, 505 U.S. 144, 181–82 (1992) (“‘Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and Federal Government will reduce the risk of tyranny and abuse from either front.’” (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991))).

In previous work, I have argued that the New Federalism has undermined the balance between competing federalism values that have long served our system of government, and suggested that federalism theory evolve toward a model that better mediates between them.<sup>326</sup> But even if that route is never taken, this Article shows how a modest modification of a jurisprudentially created remedy rule could help relieve the tension building in the gray area. Even taking the rest of the New Federalism jurisprudence as it stands, the Court should retreat from the *New York* inalienability approach and protect the substantive anti-commandeering rule with a property rule that would enable consensual state-federal bargaining, facilitating the negotiation of novel regulatory partnerships in the gray area while respecting state autonomy. State sovereignty should include the ability to bargain.

If the anti-commandeering entitlement is the proper subject of bargaining, does that mean that states should be able to bargain away any fundamental aspect of sovereignty? Of course not. Ultimately, we evaluate whether a federalism entitlement should be waivable in the same terms as any other constitutional entitlement: if allowing remedial waiver would undercut the purpose of the normative element of the rule, then the entitlement should be treated as inalienable. For example, allowing a state to waive its equal suffrage in the Senate would undercut the representational ethic of Article I. Allowing Congress to redraw state boundaries would undermine the federalism values that give the Tenth Amendment its meaning to begin with. But allowing remedial waiver of the anti-commandeering entitlement—at least in the interjurisdictional gray area—advances those values more faithfully than any of the alternatives.

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326. See Ryan, *supra* note 2.