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Federalism and the Rehnquist Court

by

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Little more than a year before William Rehnquist became Chief Justice, the Supreme Court decided Garcia v. San Antonio Metropolitan Transit Authority, in which the Court appeared to bury much of judicially enforceable federalism and to replace it with a politically enforceable brand of federalism. The "structure of the Federal Government itself" was the principal safeguard of state sovereignty, at least as manifested by immunity from congressional exercise of the commerce power. The fact that Congress is composed of state representatives was deemed sufficient to protect state autonomy. "Any substantive [judicial] restraint... must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a 'sacred province of state autonomy.'"

Three years later, in South Carolina v. Baker, the Court hinted that these procedural "failings" consisted only of such extreme things as depriving a state of "any right to participate in the national political process" or legislation that "single[s] out" a state in

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2. Id. at 550. The specific issue in Garcia was whether Congress had authority to extend the minimum wage and overtime provisions of the Fair Labor Standards Act to employees of a municipal bus transit authority. Garcia overturned the rule, originating in Nat'l League of Cities v. Usery, 426 U.S. 833 (1976), and clarified by Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981), that barred Congress from using its commerce power to regulate the "States as States" on matters of state sovereignty in a fashion that "would directly impair their ability 'to structure integral operations in areas of traditional governmental functions.'" Hodel, 452 U.S. at 287-88 (quoting Nat'l League of Cities, 426 U.S. at 852).
5. Id. at 513.
a way that leaves it "politically isolated and powerless." After fifty years of ever increasing judicial deference to congressional determination of the scope of the commerce power, this was hardly surprising. Ever since 1937 the grip of judicial review on issues of federalism had been relaxing; by 1988 it might well be thought to be the fragile grasp of a comatose patient.

But the patient has revived. Mark Twain thought that rumors of his death had been greatly exaggerated. The dissenters in Garcia said much the same thing about judicial review of federalism. Since then the Rehnquist Court has revived judicially enforceable federalism in four important ways: by limiting the source of congressional power to abrogate Eleventh Amendment immunity, by limiting the scope of Congress's power to enforce the Fourteenth Amendment and reducing judicial deference to congressional judgments about the scope of that power, by reducing substantially the degree of judicial deference to congressional determination of the scope of the commerce power, and by immunizing states from certain ways in which Congress might exercise its commerce power.

Commentary about these developments has been mostly critical. The principal claim of the critics is that the Court should not exercise meaningful judicial review of federalism issues. This is said to be true either because the original plan of the Constitution contemplated political enforcement of federalism rather than judicial enforcement, or because there are no practicable standards for judicial enforcement of federalism. The former claim is highly contestable and the latter is usually directed at the Court's recent energetic scrutiny of the

6. Id.
7. The post-1937 evolution of commerce clause doctrine is so well known it hardly needs documentation. Any good constitutional law casebook or treatise describes those developments. See, e.g., CALVIN MASSEY, AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES 194-207 (2001).
9. Justice Rehnquist, as he then was, noted laconically that he need not belabor "the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court." Garcia, 469 U.S. at 580 (1985) (Rehnquist, J., dissenting).
10. See infra Part II, § C.
11. See infra Part II, § D.
12. See infra Part II, § B.
13. See infra Part II, § A.
commerce power, especially in such cases as United States v. Lopez\textsuperscript{17} and United States v. Morrison.\textsuperscript{18} Moreover, because Americans have always employed federalism in an expedient fashion,\textsuperscript{19} it should not be surprising that these commentaries focus on the supposed instrumental quality of the Court’s revival of judicially enforceable federalism. To be sure, some commentators regard the entire issue of federalism, defined as preservation of “the right of states to act independently, in furtherance of goals the national government does not share,”\textsuperscript{20} as a “national myth, . . . a neurosis, a dysfunctional belief to which we cling despite its irrelevance to present circumstances.”\textsuperscript{21}

I have a different perspective. Federalism is not a dysfunctional anachronism, a nostalgic symbol of a pre-industrial America. Rather, when properly viewed and applied, it is crucial to preservation of individual liberty and a valuable device to preserve a healthy balance of power among governmental institutions. The institutional benefits

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\textsuperscript{17} 514 U.S. 549 (1995).
\textsuperscript{18} 529 U.S. 598 (2000).
\textsuperscript{19} This history of expediency begins in earnest within a quarter-century after constitutional ratification. The Hartford Convention of New England states contemplated secession; twenty years later South Carolinians concocted nullification; in another twenty-five years New Englanders resisted secession as treason; within another thirty years southern and western populists were demanding federal regulation of railroads and other industrial enterprises. For a fuller account, see Calvin R. Massey, The Locus of Sovereignty: Judicial Review, Legislative Supremacy, and Federalism in the Constitutional Traditions of Canada and the United States, 1990 DUKE L.J. 1229. In the twentieth century, political liberals championed the power of the federal government for wealth redistribution and ending the odious state practices of racial subordination but turned to the independence of state governance institutions as soon as political conservatives began to exert more influence on Congress, the Presidency, and the federal judiciary. Likewise, political conservatives of the late twentieth century, erstwhile champions of state autonomy, after gaining control of Congress have not hesitated to propose all manner of new federal initiatives that would curb state autonomy in the name of the conservative social vision. See, e.g., William Marshall, American Political Culture and the Failures of Process Federalism, 22 HARV. J.L. & PUB. POL’Y 139, 141-44 (1998).


\textsuperscript{21} Id. at 950. Rubin and Feeley distinguish federalism from decentralization. The latter is a policy adopted by a central authority that local autonomy is the most efficacious way of achieving some desired goal, “a purely managerial decision by a centralized authority.” Id. at 911. By contrast, federalism “is not a managerial decision by the central decision-maker . . . but a structuring principle for the system as a whole,” one that allows “normative disagreement amongst the subordinate units so that different units can subscribe to different value systems.” Id. at 911-12. Rubin and Feeley argue that some familiar arguments made in favor of federalism—public participation, citizen choice, state competition, and experimentation—are really arguments for decentralization and that the only genuine arguments for federalism—diffusion of power and preservation of community—are unpersuasive. They contend that there has been an inadequate showing that increased federal power has in fact decreased individual liberty and argue that the relevant political community in America is a national community.
of federalism are not simply preservation of state autonomy as a counter to federal power but also operate less directly to preserve the scheme of separated powers within the federal government. Whether federalism is properly enforceable primarily by the judiciary or the national political process presents a quite separate issue. To the extent that federalism is seen as merely a question of how much decentralization of power the national managers think is appropriate,\textsuperscript{22} federalism is an entirely political matter. But if federalism presents genuine issues of individual liberty and preservation of a balance of power between government institutions, the need for judicially enforceable federalism becomes much stronger.

Individual liberty is a slippery and multifaceted concept. Because the Constitution acts almost entirely as a brake upon government power it is easy to assume that liberty inheres in freedom from government power. But liberty also inheres in the freedom to decide through one's democratically elected representatives how government power is to be exercised. Of course, this liberty can be exercised on a national, state, or local level, and some people might say that it does not occasion any loss of liberty if such decisions are uniformly made at the national level. This conclusion, however, misses the point: Liberty is advanced by a dispersal of decision-making authority that creates variation of public policy within the nation. In other words, one aspect of liberty is variation in the policies that result from exercise of government power. This idea will be elaborated in Part I.

Liberty is more than freedom from government power and freedom to exercise government power. Governments are not the only source of human oppression in our complex interdependent world and the exercise of government power to curb private acts of intolerable oppression undoubtedly operates to advance human liberty. The use of government power to limit private racial prejudice in American public life is, of course, the obvious example. Whatever loss of liberty was suffered by racial bigots by the advent of federal civil rights legislation was surely outweighed by the gains in liberty accorded to long-suffering racial minorities. Of course, this calculation of "net liberty" involves a subjective assessment that the liberty of acting on racial prejudice in public life is of much less value than the liberty of equal participation in public life. While nobody of good will now disagrees with this assessment that is because we have

\textsuperscript{22} In essence this is the Rubin and Feeley position. Although they distinguish between federalism and decentralization, their rejection of federalism as irrelevant to modern American circumstances leaves them embracing an entirely politically enforceable neo-federalism that they call decentralization. \textit{See supra} note 20.
made a societal judgment about the nature of liberty in the context of race and public life. Thus, liberty has a socially contingent quality. A federalism that preserves and increases human liberty is one that secures for states power to act (or not to act, if that is the taste of the state residents) in areas that if left unregulated would not diminish human liberty. The difficulty, of course, lies in defining those areas. Were we to start afresh we might chart the contours of federal and state power differently than did our eighteenth and nineteenth century ancestors. However, we must begin with their allocation of power; that is the Constitution's design. Our contemporary problem is to interpret the constitutional allocation of federal and state power in a fashion that maximizes human liberty. If liberty is jeopardized by consigning federalism to the political process, federalism must be enforced by courts. But if the discretionary federalism produced by the political process poses no danger to liberty there is less reason for the judiciary to enforce federalism. Part I examines this issue further.

To understand the Rehnquist Court's federalism (indeed, to understand any federalism decisions) it is essential to understand why federalism matters. If federalism does not matter, or if the judiciary has no role to play in federalism, our view of the Court's work will be vastly different than if federalism does matter and the Court has a role to play in ensuring its existence. Accordingly, the purpose of Part I is to explain why federalism matters and why the Court has a role to play in maintaining federalism. American federalism was hatched to preserve liberty. While America and its brand of federalism has undergone considerable change since Madison's time, the liberty-enhancing theory undergirding federalism has not lost its vitality or relevance to our times. Part I seeks to demonstrate that fact. Moreover, the Court has a significant role to play in preserving liberty, a role that it must play with respect to federalism just as it discharges similar responsibilities with respect to free speech or equal protection. Part I also reinforces that claim.

It is against that background that the Rehnquist Court's federalism work should be considered. Part II seeks to examine that work in light of the benefits to liberty that are part of maintaining a division of power between the federal and state governments. The Rehnquist Court's federalism may also operate to preserve the institutional balance of power within the federal government. The Court's rejection of the idea, rooted in Katzenbach v. Morgan, that Congress has power independent of the judiciary to define the substance of Fourteenth Amendment rights, is not by itself an issue of federalism. Indeed, the most obvious result of City of Boerne v.

Flores\textsuperscript{24} and its progeny has been the reassertion of judicial primacy in the interpretation of the Constitution's individual liberties. But another important effect of confining congressional power to enforce Fourteenth Amendment rights to legislation that is remedial has been to expand the scope of state insulation from congressional authority, at least until and unless the Court should confer greater authority on Congress by judicial expansion of Fourteenth Amendment rights. These doctrinal developments, discussed at greater length in Part II, illustrate a fusion of federalism with separation of powers.

Assessment of the Rehnquist Court's federalism requires consideration of what it has \textit{not} done as well as what it has done. There have been no major doctrinal innovations regarding the conditional spending power, a lacuna that is surely curious if the Court is as hell-bent on limiting federal power as some of its critics claim.\textsuperscript{25} Moreover, the Court's preemption cases reflect a lack of sensitivity to federalism that is equally curious. To be sure, the ostensible issue in the preemption cases is ascertainment of the congressional intent in its legislation, but because the Court presumes that "Congress did not intend to displace state law"\textsuperscript{26} when it legislates in areas of traditional state authority one would think that this rebuttable presumption against preemption would lead the Court to interpret federal law to avoid preemption whenever possible. This, however, is not the case. Similarly, the Court has begun to flirt with examination of the substance of state law on the theory that a state's resolution of its own law can impede federal constitutional rights. This phenomenon will also be explored in Part II.

The conclusions that will be drawn in this Article are not easily characterized along any ideological spectrum. The case for federalism as a device to protect liberty is strong, but judicial enforcement of meaningful limits on the commerce power or the conditional spending power would place in doubt the validity of a great many federal laws that have long been accepted as within the ambit of federal power. The political cost to the Court of asserting a

\begin{quote}
\textsuperscript{24} 521 U.S. 507 (1997).
\textsuperscript{25} This is perhaps most true of lay critics, of which I offer The New York Times as the exemplar. For example, whenever the Court has delivered its opinion in any of the major decisions discussed in this Article—Lopez, Morrison, Flores, Kimel, Garrett, to name just a few—The New York Times has attacked the Court as a politically-motivated despoiler of the Constitution. A reader only of the Times would think that the Rehnquist Court's federalism lacks any connection to constitutional history or doctrine, is devoid of reason, and is prompted only by partisan politics. As should be evident, I think this is a risible caricature. There may well be grounds for disagreement with the Court (and I shall register my disagreement later on) but the Times's basis of disagreement is too shallow to merit further mention.
\end{quote}
reformist vision of federalism—one at odds with much of the nation's assumptions about the scope of federal power (to say nothing of national preferences)—is certain to be considerable. While a conscientious judge ought not render decisions solely on the basis of an institutional cost-benefit analysis, that factor may be relevant to determining the precise limits of judicial review of federal legislative powers. The Court's decisions limiting congressional power to enforce Fourteenth Amendment individual rights to remedial legislation represent primarily a judicial claim of primacy in interpreting the nature and scope of individual liberties. As such, these developments are just another move along the road from *Marbury v. Madison*\(^\text{27}\) that leads through *Cooper v. Aaron*.\(^{28}\) So far, the Rehnquist Court's decisions in this area have simply produced greater state insulation from accountability to private citizens, a result that says far more about the awkwardness of Eleventh Amendment doctrine than it does about the wisdom of denying to Congress the power to define for itself the meaning of equal protection or due process. Confining the congressional enforcement power to a remedial role is an indispensable element of preserving the Court's primary role as the interpreter of individual constitutional rights, but the manner of the confinement raises questions about the proper latitude that Congress should enjoy in selecting remedial devices.

Moreover, the Court has begun to signal a broader willingness to examine state courts' resolution of issues of state law, albeit on the claim that the state courts' resolution of such state issues raises non-trivial issues of federal law. While that principle is surely old-hat, the recent willingness of the Court or individual justices to examine issues of state law to determine whether their resolution by a state's highest court was pretextual is, if not new, at least a revival of a dormant strain of constitutional jurisprudence. This phenomenon, too new and too gossamer to be called a trend, does at least raise some doubts about the fidelity of the Rehnquist Court to its commitment to the autonomy of state governance institutions.

Finally, the work that the Rehnquist Court has not done—limiting the scope of the conditional spending power and taking its own preemption doctrine seriously—requires further qualification of any assessment of its federalism. Surely this is an unfinished work, and its present development is not entirely coherent. On one hand the Court has begun, however tentatively, to reassert meaningful judicial review of the commerce power, the principal source of federal legislative authority. But the Court has eschewed any heightened review of the conditional spending power, the principal alternative to the

\(\text{27. 5 U.S. (1 Cranch) 137 (1803).} \)

\(\text{28. 358 U.S. 1 (1958).} \)
commerce power and a powerful weapon with which to interfere with the autonomous governance of states. To compound the problem the Rehnquist Court has acted as if federalism has nothing to say about preemption, despite the fact that its own doctrine incorporates a federalism principle in the form of the presumption against preemption.

In short, the Rehnquist Court is not yet engaged in an ambitious attempt to remake federalism in the vision of a localist system of muscular states and a puny federal government. Its federalism is an oddly dissonant score written in different keys, entirely missing in some places, and unintelligible in others. It is more a guidebook than a rule book, and even then it is sufficiently confusing, inconsistent, and contradictory that it may not prove to be a very reliable guidebook. It is not easy to harmonize these dissonant chords and the Court shows no inclination to do so; perhaps it thinks it has no reason to do so.

I. The Value of Federalism

Federalism, our "oldest question of constitutional law" according to Justice O'Connor, has always posed two major threshold issues: What values does (and should) federalism foster? Are those values, whatever they are, best achieved by judicial enforcement or through the political process alone? Though these questions are surely capable of independent analysis and separate treatment, in practice they are often fused together, thus making it more difficult to answer either question.

Federalism is often claimed to serve many diverse values. It "increases opportunity for citizen involvement in democratic processes," will better satisfy citizen preferences by catering to tastes at a state level, provides citizens with the option of moving to a state with public policies perceived to be more congenial, enables states to

31. See Michael W. McConnell, Federalism: Evaluating the Founders' Design, 54 U. CHI. L. REV. 1484, 1493-94 (1987) [hereinafter McConnell, Federalism]. In the words of the Supreme Court, the decentralized policy making that results from federalism "will be more sensitive to the diverse needs of a heterogeneous society." Gregory, 501 U.S. at 458.
32. The exit option value of federalism is articulated best by economist Charles Tiebout, A Pure Theory of Local Expenditures, 64 J. POL. ECON. 416 (1956), who argued that individual jurisdictions (states in our federal system) will offer various packages of taxation and public expenditures that will induce citizens to locate in the state that most closely approximates their own utility function. One can broaden the concept to non-economic public policies as well (e.g., regulation of guns or smokers, motorcycle helmet laws, or laws protecting or punishing minority sexual behavior). The exit option value of federalism is popular among contemporary legal economists. See, e.g., RICHARD POSNER,
experiment with innovative public policies, preserves a government structure that inhibits a potentially tyrannical concentration of power in the central government, insures the continuance of discrete political and social communities, and ensures clear political accountability for government actors in each of the central and state governments. Federalism is not, of course, an unqualified boon. It can lead to the imposition of negative externalities and economic inefficiency. And, of course, federalism has no place with respect to


33. The classic expression of this value is by Justice Brandeis:
   It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment [so] we must ever be on our guard, lest we erect our prejudices into legal principles. New State Ice Co. v. Liebman, 285 U.S. 262 (1932) (Brandeis, J., dissenting). See also, Charles Fried, Federalism—Why Should We Care?, 6 HARV. J. L. & PUB. POL’Y 1 (1982); Lewis B. Kaden, Politics, Money and State Sovereignty: The Judicial Role, 79 COLUM. L. REV. 847, 854-55 (1979).

34. See, e.g., Andrzej Rapaczynski, From Sovereignty to Process: The Jurisprudence of Federalism after Garcia, 1985 SUP. CT. REV. 341, 389 ("[P]recisely because the states are governmental bodies that break the national authorities’ monopoly on coercion [they] constitute the most fundamental bastion against a successful conversion of the federal government into a vehicle of the worst kind of oppression.").


36. This claim is made mostly with respect to central government initiatives that have the effect of forcing state legislators or executives to act in a fashion prescribed by the central government, thus subjecting those state actors to political accountability for actions that were not voluntary and enabling the federal legislators who dictated those actions to avoid accountability for their policy choices. See Printz v. United States 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992).

37. The problem can occur in almost any area, but the easiest example is environmental pollution, where it is plainly not in the interest of an upwind state to proscribe dirty fuels when the pollution costs of the practice are borne far more heavily by downwind states. The result is the American experience of northeastern acid rain produced by mid-western coal-fired power generation facilities.

38. Consider the added costs of conforming to individual state rules concerning distribution of alcoholic beverages, a condition enshrined in the Constitution’s federalism design through the Twenty-first Amendment. Consider the additional costs of auto manufacturer compliance with special pollution rules imposed by California, or the increased costs to consumers of regional rules regarding reformulated gasoline that prevent amelioration of short supplies in those regions by importation of excess gasoline from other regions. Of course, these examples are not pure federalism examples because they derive from federally mandated decentralization written into federal environmental law. The principle, however, is the same. These problems can arise in almost any area of life. See, e.g., Lucian Arye Bebchuck, Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law, 105 HARV. L. REV. 1435 (1992) (arguing that state competition to provide pro-manager corporate laws decreases shareholder
individual rights secured by the Constitution. Even the most ardent advocate of federalism rejects the idea that states should be free to ignore or undercut constitutionally guaranteed individual liberties.

The positive values of federalism can be sorted into three general categories, each with a distinctive value: individual liberty, collective autonomy, and political accountability. Individual liberty, as used here, means the freedom of individuals to make choices about their lives without government interference. Of course, none of us have complete liberty, and only the most misanthropic anarchists among us would long for complete liberty. The relevant question is whether federalism increases individual liberty at the margin. Collective autonomy describes a different liberty, the freedom of the people of a state, acting collectively, to adopt public policies that suit them even though such policies are at odds with national preferences or the preferences of other states. Political accountability is simply the process by which a democratic representative government maintains its legitimacy—structures by which the governmental agents are held responsible to their principals, the people. Accountability maintains democratic legitimacy when political actors are responsible for their own voluntary actions but distorts legitimacy when political actors are held liable for actions over which they have no control and have had no hand in shaping.

Individual liberty is enhanced by federalism's preservation of an exit option and by its structural prophylactic role of preventing undue concentration of governmental power. Collective autonomy is fostered by federalism's ability to maximize aggregation of citizen preferences, encourage experimentation, and preserve community. Two of these federalism values—maximizing the satisfaction of citizen preferences and preserving community—also serve in a subsidiary way to augment individual liberty. Political accountability is preserved by federalism's role in promoting greater citizen participation and by preserving clear lines of accountability. Each of these three groups will be examined below.

A. Individual Liberty: Exit Options and Thwarting Tyranny

(1) Exit Options

As befits a nation created by people leaving old surroundings for new, American life has always been dominated by a intensely felt sense of new possibilities, new beginnings. Some of this may be the stuff of myth, but some of it has surely been reality. The ability to
move to a new locale is one part of that vision, and of course that individual liberty, in the form of the right of interstate migration, is constitutionally recognized. There are myriad reasons why a person might exercise this right, and selection of a different legal regime may not be the dominant motivating factor for most people.

Indeed, as critics have pointed out, the transaction costs of relocation are apt to overwhelm the utility gains, but this assumes that utility gains are largely measured by the economic benefits of lower taxation, the receipt of greater public expenditures, or some unlikely combination of the two, in the new locale. Utility is not exclusively economic, however. It is hard to measure the subjective utility to a chain smoker of a relocation from California, where it is virtually illegal to smoke in public, to North Carolina, where tobacco use is, if not celebrated, at least tolerated more readily than in California. The same might be said of a gun owner who chooses to relocate from Massachusetts, where hand guns are virtually illegal, to Texas or Florida, where a law abiding citizen can openly carry such weapons. Who is to say with confidence that the smoker, or the citizen worried about the ability to defend himself from crime (perhaps overly worried, but isn’t that for him to assess?) has paid too high a price in relocation costs for the utility gains that come from his newly acquired liberty to smoke or carry a firearm in public?

The fact that the exit option may rarely be exercised in its pure form—solely in order to live in a different legal system—does not drain it of significance. People move for a variety of reasons, and for multiple reasons. A more desirable legal regime may well be an element in many relocation decisions. The population boom experienced by southern New Hampshire, for example, is no doubt the product of many reasons, but one of them is surely the recognition that New Hampshire offers a legal regime of lower taxes, lesser public services, and less regulation than does neighboring Massachusetts. Moreover, even if the pure exit option is very rarely exercised, its possibility is an important aspect of individual liberty. This is seen most clearly by considering the “liberty value” of rights

39. The first clear recognition of the right was in Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867) (implied by constitutional structure), but the right has continued to be recognized under various parts of the Constitution, in Edwards v. California, 314 U.S. 160 (1941) (commerce clause); Shapiro v. Thompson, 394 U.S. 618 (1969) (equal protection); Zobel v. Williams, 457 U.S. 55 (1982) (equal protection, although Justice O’Connor, concurring, urged that the basis of decision be the privileges and immunities clause of Art. IV, §2); and Saenz v. Roe, 526 U.S. 489 (1999) (splitting the right of migration into three components, grounded in the privileges and immunities clauses of Art. IV and the Fourteenth Amendment, the commerce clause, and perhaps as an unenumerated implicit right).

40. See, e.g., James M. Buchanan and Charles J. Goetz, Efficiency Limits of Fiscal Mobility: An Assessment of the Tiebout Model, 1 J. PUB. ECON. 25 (1972).
that may rarely be exercised. A woman may go through life never desiring to terminate a pregnancy but that does not mean that the constitutional right to terminate her pregnancy is of no significance to her. Most people are never charged with a crime, but that does not mean that the right to counsel, or the privilege against self-incrimination, or the presumption of innocence, are of no consequence to those of us who are not criminal defendants.

We recognize, as a staple of our individual rights jurisprudence, that such rights are redeemable by individuals, one at a time. The constitutional rights of criminal defendants are the clearest example, but even with respect to equal protection, where the concept of a “group right” may be at its strongest, the Court declares these rights to be held by individuals. In United States v. Virginia,41 for example, Justice Ginsburg, writing for the Court, made it clear that so long as “some women” qualified for VMI the equal protection guarantee was enforceable by them.42 This is not radical doctrine; constitutional rights are individual possessions. The exit option preserved by federalism is as much an individual right as any other. To state it as the right to migrate is only to phrase it in the recognized vernacular of constitutional individual liberties. Transposed to the structural language of federalism the right is deeper: the right to be able to choose among differing visions of public policy, the right to choose a meaningfully different polity without abandoning one’s country of citizenship. To be sure, the exit option right is only made real by the collective action of differing state polities, and no individual can be sure that a state will enact his particular vision of legal paradise, but if the central government thoroughly eliminates the possibility of such collective action by vigorous and sweeping national legislation that imposes a policy uniformity on the nation, the exit option is reduced to little more than a change of license plates and driver’s licenses. As with any other individual right, it is unacceptable to entrust its enforcement to the very political body that has the power to decide whether or not to eviscerate the right. This right is not just a “state’s right;” it is an individual right and must be protected by courts pari passu with all other individual constitutional rights.

Of course, the exit option insight is not limited to migration between states. A more meaningful exit option would be one that makes a wide variety of legal regimes available at the level of municipalities. Variation in the package of taxes, public services, and regulations that compose legal regimes would reduce the undeniable

42. “State actors controlling gates to opportunity” may not “exclude qualified individuals based on ‘fixed notions concerning the roles and abilities of males and females.” Id. at 517 (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982)).
transaction costs of relocation and thus make the utility gains of the
exit option more widely accessible. Federalism, however, operates
only at the state level. It may be unfortunate that we lack a federal
constitutional mechanism for ensuring the power of municipalities to
produce variable legal regimes, but under our system that is the
responsibility of state citizens in constructing their state constitutions.
Although many states do provide some limited autonomy to
municipalities no state has seen fit to arrange the state as a federal
system, guaranteeing an exit option within the state. Perhaps it is
time for a state to do so, which would be an exercise in collective
autonomy that would also serve as a fine example of experimentation.

(2) Thwarting Tyranny

Federalism also advances individual liberty by thwarting the
 possibility of a tyrannical central authority. Though it is not likely
that the American central government is in any danger of capture by
authoritarian forces, there is no reason to be smugly complacent.
America is not immune to the catastrophes that have befallen other
democracies. Federalism was no barrier to Hitler’s usurpation of
democratic authority in Weimar Germany, and American federalism
might prove to be equally flimsy protection against an American
caudillo. In any event, the improbability of an American Stalin or
Franco is no reason to dismiss altogether the value of federalism as a
device to prevent lesser degrees of tyranny from being imposed by
the central government.

Concentration of political power—the power to make binding
public policy—can take several forms, but two possibilities are most
relevant to this discussion. The central government could either
dictate state policies or eliminate state power to set any policies at all.
The former occurs when the central government “commandeers” a
state’s legislative or executive functions by compelling them to
perform federally mandated actions. Such commandeering will be
discussed in more detail in the next subsection, as it raises issues of
collective autonomy. For now, note that commandeering enables the
central government to employ two separate governments to bear
upon the people. While the policies yoked to this dual enforcement
mechanism may be benign, the mechanism itself is dangerous, for it
permits an unscrupulous wielder of power at the center not only to
ensure that no state will in any way subvert the centrally mandated
edict but also employs the states as the federal police. The other
method of concentrating political power is to eliminate the states’
ability to set independent policies. The standard and entirely
legitimate method of doing so is for Congress to use its valid
constitutional powers to preempt state authority. Two issues are
raised by this method. One is the question of the scope of the
enumerated powers of Congress. If those powers are like the universe, ever-expanding to infinity, the entire concept of federalism is, to quote John Marshall in a different context, an "absurd attempt... to limit a power, in its own nature illimitable." The other issue is the manner in which courts determine whether Congress has intended to preempt state power. For concentration of power at the center to be checked effectively it is important that these issues be taken seriously. Individual liberty might still flourish if the federal government calls the tune to which state legislatures and executives must dance and legislatively preempts the entire field of human activity, but it would flourish by the grace of that central authority. It is that possibility that prompted Professor Rapaczynski to remark that the states "constitute the most fundamental bastion against a successful conversion of the federal government into a vehicle of the worst kind of oppression." The continued existence of states possessed of independent power to set policy is a structural aspect of individual liberty and, as with other guarantees of individual liberty, the courts have an important role in maintaining this structural framework of individual liberty. Even without a present showing of the imminent prospect of centralized tyranny the courts surely must act to preserve the structure that keeps the prospect of oppression distant and unthinkable. The Rehnquist Court's record on all of these issues will be examined in detail in Part II. For now, it is enough to note that the Court has hardly been a model of consistency.

B. Collective Autonomy: Maximizing Satisfaction of Citizen Preferences, Experimentation, and Community

(1) Citizen Preferences

It is trite but true to note that our individuality is inextricable from our social relationships. The federalism version of this truism is the aspect of human liberty that is served by permitting the people of each state the freedom to make diverse policy choices, so long as those choices do not impair constitutional rights uniformly guaranteed to all Americans. This entails the freedom to choose policy ends, not just the freedom to select the means to reach a common, nationally shared objective. The difference may readily be seen by considering the arguments of some federalism proponents that federalism promotes economic efficiency by enabling states to compete for desirable assets—educated, productive people or clean,

43. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
44. Rapaczynski, supra note 34, at 389.
profitable employers—by tailoring their public policies to induce those assets to locate within the state. If states set policies that conduce to such a universally shared and efficient outcome they are engaging in a means-based federalism. While that is one facet of federalism, it is quite different from an ends-based federalism. If California chooses to set policies that encourage leisure, hedonism, and strongly egalitarian redistribution of wealth through the political system, and Utah acts to encourage work, thrift, and self-reliance by eschewing political wealth redistribution, the two states are engaging in a distinctly ends-based federalism. But if California acts to induce smart computer entrepreneurs to locate there by fashioning a combination of tax breaks and state-subsidized housing for computer employees, and Utah seeks the same end by increasing its public expenditures on education and transportation, the two states are engaging in means-based federalism.

It is quite likely that much of American federalism is in fact conducted at the means-based level, but it is error to reason from that fact (if it is fact) to conclude that Congress should have virtually unreviewable authority to decide whether Congress may foreclose the states from employing their chosen means to a common end. Of course, Congress does have power to limit the means selected by states, via such sources as the commerce, conditional spending, and Fourteenth Amendment enforcement powers, and I make no argument to the contrary. My point is that the fact that the states may be selecting differing means to achieve a nationally shared goal is not, by itself, a convincing reason for allowing Congress carte blanche to define the scope of its own powers used to control states’ selection of means. The fallacy in the contrary line of reasoning is an unarticulated assumption that nationally shared goals should be prescribed by Congress and that, accordingly, Congress should determine the means available to states to attain that goal. But nationally shared goals are as apt to be the product of cultural


46. Rubin and Feeley argue that a means-based federalism is not really federalism at all. They note that a common goal (such as efficiency) can as readily be achieved by a delegation to the states from the central government of the authority to employ independent means to achieve this goal. While that is true, it does not detract from the fact that preservation of states’ independent authority to set ends necessarily preserves a lesser included power to use differing means to achieve a widely-shared (albeit not mandated) objective. What Rubin and Feeley call decentralization (as opposed to federalism) is, at least in this case, a second-order federalism, a federalism of varying means rather than varying ends. See Rubin & Feeley, supra note 20, at 920-923.
attitudes as congressional prescription, and preservation of the ability to reach national consensus on goals through cultural evolution rather than law is but another facet of collective autonomy and individual liberty.

However important a role federalism plays in preserving means-based policy autonomy, its role is equally great in preserving ends-based policy autonomy. This preserves not just the ability of California, if it desires, to permit nudity on public beaches and of Alabama to ban such behavior, but also the ability of Massachusetts, should it wish, to create cradle-to-grave social welfare benefits through very high taxation and of Texas to lower taxes and eliminate the social welfare state insofar as it may. It is true that in practice we do not observe such wildly variant choices, but this raises the question of whether that is due to the existence of a national political culture that eliminates the desire for such policy variance or whether policy variations are inhibited by other factors, such as the continued existence of exit options or the ever-increasing scope of policy mandates from Congress. But it is undeniable that federalism operates to preserve the possibility of such choices, and the very fact of their possibility increases the quantum of collective autonomy that is possessed by the citizens of a state polity. Whether they choose to exercise their autonomy is an entirely different matter, and the failure of exercise is hardly a reason to conclude that Congress should be free of judicial oversight when it acts to foreclose future exercises in collective autonomy.

As Michael McConnell has demonstrated, citizen preferences are aggregated in a manner that enhances overall utility when states are left free to pursue disparate policies. The point is seen most clearly with respect to ends-based policy autonomy. For simplicity’s sake, imagine a nation composed of two states, Scylla and Charybdis, each with ten million citizens. If 70% of the citizens of Scylla prefer legal marijuana and 80% of the citizens of Charybdis prefer to prohibit the drug, the different preferences of the citizens of these two states will be maximized by preserving their right to set policy independently. Seven million Scyllans and eight million Charybdians will be satisfied; only five million citizens of the two states will be disappointed. The preference satisfaction rate is 75%. But if the same issue were to be decided by a national plebiscite, marijuana

47. See, e.g., Bible Belt Couples “Put Asunder” More, Despite New Efforts, N.Y. TIMES, May 21, 2001, at A1 (detailing the efforts of states to cut the divorce rate through a combination of pre-marital education, subsidized marriage counseling, and alteration of laws governing marriage, and asserting that there exists “a strong national consensus that the social ills caused by divorce are costing the federal and state governments huge amounts of money.”).

would be banned nationally and only eleven million citizens would be satisfied, a preference satisfaction rate of 55%. Obviously, this simple example assumes perfect expression in law of citizen preferences and takes no account of the skewing effects of representative democracy, especially the American system of senatorial representation. Nor does it account for the possible increase in utility that might result from exercise of the exit option. What this example does reveal, however, is that collective autonomy is very likely to result in better aggregation of citizen preferences than would the manufacture of policy exclusively at the central level.

Collective autonomy is a close cousin to individual liberty. The citizens who compose each state have common geographic and cultural interests, mutual and interdependent economic interests, a distinct interest in controlling the processes of their governance within their state, and an interest in preserving some zone of regulatory control over their community. Even if the interests of Iowans in such matters is similar to those of Minnesotans or Nebraskans, they are not identical. To reason that the similarity of interests of these midwesterners justifies an unreviewable authority in Congress to set policy on every matter about which they may be similarly interested is not so different from contending that, because all Democrats possess similar though not identical interests in political speech a majority of Democrats should determine the extent of the political speech rights of all Democrats. Nobody would contend that limits on the political speech of all Democrats imposed by a majority of Democrats should escape judicial scrutiny, even though such limits might be acceptable, even desirable, to the overwhelming majority of Democrats. The fact that Congress might act in a fashion that generally suits Iowans, Minnesotans, and Nebraskans is no more forceful a justification for congressional action escaping judicial review.

(2) Experimentation

The usual assumption about this aspect of collective autonomy is that if the states experiment with different methods of, say, welfare reform, some good ideas will emerge that may be emulated by all and the bad ideas will be confined to a few unhappy states. When cast in those terms experimentation is entirely a matter of means-based policy autonomy and, if the real objective is to use the states as laboratory rats to determine which method will best conduce to accomplishment of a universally-shared goal, some sort of central administration is probably necessary.49 In this vision of

49. See, e.g., Rubin & Feeley, supra note 20, at 923-26.
experimentation the federal government is the white-coated laboratory scientist who designs and carries out the experiments.

Experimentation means much more than this, however. Experimentation may embody experimentation as to ends as well as means. Nebraska has been engaged for some time in the experiment of a unicameral legislature. Perhaps this is as much a means to some other end—frugality or better preference aggregation, to name only two possibilities—as it is an end in itself. California engaged in what proved to be a disastrous experiment in gas and electric utility deregulation. If this was a means to the end of lower energy costs to consumers it has now been demonstrated that it was a very poorly calculated means, and one not likely to be emulated by others. But perhaps the principle of deregulation is itself an end. A handful of states engaged in the experiment of legalizing marijuana for medical use, surely an end in itself, until the Supreme Court unanimously curtailed that experiment in United States v. Oakland Cannabis Buyers' Cooperative.50 It is this latter sort of experimentation, testing new policy ends rather than tinkering with the means, that is of most value in a federal system. Suppose that in some future day a majority of Arizonans were to be speakers of Spanish and Arizona should decide to deliver its public services, including education, almost exclusively in Spanish. Arizona's embarkation upon such an "experiment" would not be to see if Spanish is a good idea for the country as a whole, but to cater to the aggregate preferences of Arizonans. When viewed in this light experimentation is no different from the earlier argument concerning maximization of citizen preferences. The important point is that experimentation is not, as some critics of federalism contend, entirely about states testing different means to a common end. It is about the ability of states and their citizens to experiment with entirely new policy objectives.

(3) Community

We form communities of many differing kinds—alumni associations, baseball fans, veterans' groups, churches, recovering substance abusers, dog lovers—in our endless subdivision of our interests. But there are two forms of community that are especially important in any consideration of federalism—cultural communities and political communities.

Cultural communities are groups of people bound together by shared language, ethnicity or distinctive customary behavior. French speakers in Canada are a cultural community. Navajos and Hopis constitute separate cultural communities within the United States. Cuban emigres to the United States, at least to the extent that group

remains geographically concentrated in South Florida, are another example. It is reasonable to ask why we might wish to preserve such communities and, if it turns out that we do, we might wonder whether American federalism is the best mechanism for preservation.

The argument for preservation of cultural communities is rooted in the idea that these communities are constitutive of individual identity. A political system that purports to value individual liberty should wish to preserve communities that provide much of an individual's sense of personhood. This may be true, but it might also be said, at some risk of trivialization, that at least some people constitute their identity by their affiliation with athletic teams.\(^1\) The contemporary spectacle of riotous celebration of victory in the Super Bowl, or the NBA finals, or, even more recently, the venting of the frustration of defeat by fans of the collegiate basketball teams of the universities of Maryland and Arizona, surely inspire us to draw some lines about which communities constitutive of identity are deserving of protection. Nonetheless, the historical claims of such communities as French speakers in Quebec, or Navajos and Hopis in America, are of such antiquity and depth that they have a special resonance. There is no pat formula by which to separate the deserving cultural community from the bogus one, but the claims of language or ethnicity are surely superior to those of more transient and less indelible traits.

The harder question is whether American federalism is very well suited to the preservation of cultural communities. Because such communities are nowhere coterminous with a state polity it is not at all clear that historically accidental state boundaries work to preserve such communities. Indeed, inasmuch as the Amish in Pennsylvania, Ohio, Iowa, or Wisconsin, the Navajos in Arizona and New Mexico, or blacks or Hispanics everywhere remain in a minority position within state polities, it might well be unrealistic to think that federalism is utile to this end. However, to the extent that it is thought that states will act to oppress these minorities, federalism is not an issue. The federal constitutional guarantees of equal protection, due process, and religious liberty are likely to be adequate protection from blatant state misconduct. Even so, it cannot be said that federalism will do very much to preserve the existing distribution of cultural communities in the United States.\(^2\)

\(^1\) The clearest example of this was the sad account of a thirty-something fan of the Houston Oilers professional football team who reacted to his team's playoff defeat sometime in the 1980s or early 1990s by committing suicide. The incident was reported in the San Francisco Chronicle at the time but I was insufficiently morbid to preserve a clipping.

\(^2\) There are, of course, some exceptions to this appraisal. For example, the electoral system for presidential elections requires national candidates to pay attention to politically
Quite the opposite would be the case, of course, if revolutionary blandishments toward Quebec had succeeded and it were an American state. Perhaps the admittedly remote possibility of Puerto Rican statehood should caution us to be slow about dismissing completely the utility of federalism for preserving cultural communities.

Whatever role federalism plays with respect to cultural communities it is quite capable of preserving political communities, especially when those political communities overlap with distinct cultural communities. The cantons of Switzerland are one such example, so too, is the present semi-autonomous status of Quebec. But it is frequently claimed that no American state possesses a unique, distinctive political culture and that the American political community is not a mosaic but one undifferentiated whole. Political communities are not necessarily cultural communities; they are aggregations of people with a commonality resulting from sharing a social and economic interdependence that is produced by geographic proximity. This interdependence does not stop abruptly at state borders but, within reason, regions of the nation have different interests. New England has a concern for the price of home heating oil that is not shared by Californians, whose anxiety about electricity on demand is not necessarily shared by Kansans. The states of the midwest underlying the depleted Oglalla aquifer may share an interest in its fate that is not held by citizens of Kentucky and Tennessee. Wyoming has an interest in mineral extraction that is similar, but certainly not identical, to that of Montana and Colorado. Washington, Oregon and Idaho share an interest in the fate of the Columbia-Snake watershed but their individual interests diverge. Not all of these interests are driven by geography. Utah has an interest in public morality that is considerably different than that of neighboring Nevada, and I do not think the difference inheres in topography. It may be true that Nebraskans lack the sort of cultural identity that Quebeckers, Catalans, or Scots may possess, but that is not to say that Nebraska is so utterly lacking in a separate political identity that Nebraskans’ shared sense of political identity is insignificant. It is undoubtedly true that we regard ourselves as Americans, and only as an afterthought might we identify ourselves as Arizonans or Floridians. But we do have an interest in the political

significant concentrations of voters in key electoral jurisdictions. This probably works to magnify the importance of Cuban-Americans in Florida, or Jews in New York, but the effect is at best ephemeral and the product of other political forces. In the 2000 election, for example, Al Gore could safely rely on New York and thus neither he nor George Bush had any particular need to display any special attention to any voters in New York, whatever their religious affiliation.

53. See, e.g., Rubin & Feeley, supra note 20, at 944-47.
independence of our state that is a bit larger than the design of the state's license plate. To say that we have a national political community is not to deny that we also belong to state political communities. Montanans have an interest in maintaining the right to possess a firearm that is simply not the same as that of a New Jerseyan. The fact that New Jerseyans and Montanans belong to the same national political community says absolutely nothing about whether that political community, or the separate political communities of Montana and New Jersey, should make decisions about the extent of permissible firearms possession in Montana or New Jersey. But the fact that the demographic, social, and cultural conditions of Montana and New Jersey are considerably different from each other, and different in ways that are relevant to this issue, suggests that the separate state political communities are the appropriate political actors. Despite the fact that our national life is all too homogenous in certain ugly respects—the ubiquitous chain vendors of junk food, exotic coffee, and discount merchandise, the same panorama of broad boulevards hospitable only to autos, the dreary collection of uninspired residential architecture clustered together in subdivisions mandated by profit and brain-dead zoning bureaucrats—there is no reason to celebrate this insipid homogeneity by encouraging Congress to impose without restraint a similarly dreary legal uniformity. It is the function of federalism to preserve at least the possibility of difference among our political communities, however moribund we may permit those communities to become.

C. Political Accountability: Citizen Participation and Clear Responsibility

(1) Citizen Participation

A familiar claim for federalism is that it "increases opportunity for citizen involvement in democratic processes." This is usually interpreted to mean that federalism will encourage more citizen participation in state politics as more public policies are set at the state level. This may well be true. There are fewer barriers to such participation—state capitals are closer to home for most people than the District of Columbia, state legislators have fewer demands on their time than their federal counterparts, state legislators are often part-time politicians with some connection to real life—but there is no assurance that these conditions produce greater citizen participation in the democratic process. Some argue that fostering public participation in politics at the state level is hardly a good thing and ought not be uncritically encouraged. This argument usually centers on the contention that state polities are apt to be insensitive to minorities in their midst as, of

55. Some argue that fostering public participation in politics at the state level is hardly a good thing and ought not be uncritically encouraged. This argument usually centers on the contention that state polities are apt to be insensitive to minorities in their midst as, of
additional ways in which federalism promotes political accountability through citizen participation.

The organized citizens' lobby is a paradox of citizen participation. Whether the lobbyist be the National Rifle Association or Defenders of Wildlife, People for the American Way or the Center for Individual Rights, the AARP or Common Cause, they represent the focused energies of citizens. But in the course of focusing those energies and views such lobbies tend to acquire an independent voice and mind, posing some risk that they do not accurately reflect the sentiments of the citizens they purport to represent. In a centralized system it is far easier for these groups to exert pressure on 535 members of Congress, all conveniently located on Capitol Hill, than to organize fifty separate branch agencies, each charged with the task of lobbying a separate set of state legislators. A robust federalism makes lobbying harder, more uncertain, more expensive, and less effective. To the extent that lobbying, a "representative" form of citizen participation, is thought to be inferior to unmediated citizen involvement, federalism decreases the power of lobbying and at least creates opportunities for direct citizen participation in the creation of public policy. Whether those opportunities are seized is left to the citizenry; federalism's role is simply to create the opportunities.

Another avenue of citizen participation promoted by federalism is the ability of state citizens to create differing mechanisms for selection of their governmental agents. Of course, this power is limited by the federal Constitution, particularly the equal protection and guaranty clauses. For much of our history states were free to compose representative government on the basis of a wide variety of factors, but with Reynolds v. Sims and its progeny this power has been greatly constricted. It may be unfortunate that the Court ignored the value of federalism in creating its equal protection jurisprudence, but it has done so and there is no prospect for a revival of federalism in this area. But other possibilities remain. There is no
course, American states were during the oppressive Jim Crow century after the Civil War. See, e.g., Rubin & Feeley, supra note 20, at 915-17. But there is no reason to think that
course of federalist policies during the Great Depression is one contrary example, and contemporary
terminating initiatives legalizing physician-assisted suicide or medical marijuana use are additional

barrier to a state’s adoption of a parliamentary system of government, for example, and there are decided advantages to a parliamentary system. A state could create electoral districts with small numbers of electors, somewhat like New Hampshire’s large House of Representatives, and the nature of a parliamentary system would encourage civic participation in each such election because elections for members of parliament become the indispensable avenue for influencing the policy direction of the resulting government. A state could combine parliamentary government with proportional representation, thereby ensuring Italian-style revolving-door governments, but increasing the incentive for citizens to participate in parliamentary elections as voters, campaign workers, and public speakers. None of these things will ever happen at the federal level. Ensuring the possibility of their occurrence at the state level is one value of federalism.

(2) Clear Lines of Accountability

Political accountability is fostered not only by enhanced citizen participation in existing political processes and the creation of new processes but also by ensuring that government actors are clearly exposed to public reckoning for their own choices and shielding them from responsibility for policy choices that are not of their doing. The Court’s method of doing so has been the creation of the “anti-commandeering” principle, by which Congress is deprived of power to compel states to enact federally prescribed legislation or to administer federal regulatory programs. This principle is a procedural device, specifying a particular impermissible method of federal regulatory control. Because federal systems are composed of two separate units of government, each independently responsible to the people, it is essential that federalism principles promote accurate political accountability for legislation, provide adequate notice to citizens of pending policy choices, and foster opportunity to comment upon and to influence those choices.

It may be that voters, or at least some voters, are intelligent enough to recognize which government is the source of a particular policy that is irksome or delightful and that there is thus no need for the anti-commandeering principle. But there are other aspects of accountability at work here. Federal dictation of the content of state legislation would strip state legislators of autonomy; they would be literally “puppets of a ventriloquist Congress.” While puppet service might not take up too much legislative time (assuming that Congress

59. Brown v. EPA, 521 F. 2d 827, 839 (9th Cir. 1975).
were to pull the puppet strings sparingly) it would sap state legislators
of independent judgment, not simply because of the sheer puppetry
but also because legislative mandates would eliminate the state’s
ability to consider other options. As a result, even though citizens
may be fully aware that their state legislators were merely performing
federally mandated tasks, they would be unable to assess their
legislators on the basis of how they exercised independent judgment.

A different interference with accountability occurs with respect
to administrative mandates. There is only so much time, and to the
extent a state executive official is assigned federal administrative
tasks he is rendered less able to execute state law. Or, even if time is
effectively expanded by the addition of personnel, a state’s legislative
priorities are set by Congress, whether or not it explicitly demands
the increased state taxes and expenditures necessary to discharge the
federal mandate. Moreover, the interference with accountability is
not limited to state officials. As Justice Scalia noted in Printz, the
President’s constitutionally assigned power and responsibility to
execute federal law “would be shattered, and... subject to
reduction... by simply requiring state officers to execute its laws.”60
State officials are simply not accountable to the President; it is
beyond the power and duty of the President to supervise the
administration of federal laws executed by state officials.

D. The Value of Federalism and the Judicial Role

Whether these values can best be attained by principal (or
exclusive) reliance upon the courts or the political process is a mixed
question of political theory and constitutional interpretation, and the
dividing line between the two modes of thought is not easy to discern.
Is it constitutional interpretation or political theory to claim, as did
Justice Blackmun in Garcia, that “the principal means chosen by the
Framers to ensure the role of the States in the federal system lies in
the structure of the Federal Government itself?”61 Surely the
structure of the federal government is a matter of constitutional text,
but the question of whether the limits on federal power imposed by
that structure are to be determined by the Court or the Congress is
not squarely answered by text. While it might be a reasonable
inference that the answer is to be found in constitutional
interpretation, in fact political theorists and constitutional
interpreters have vied to provide the answer.62 Judicial review is, of

60. 521 U.S. at 923.
62. The most important defenses of politically enforceable federalism are arguments
based on political theory. See, e.g., JOHN ELY, DEMOCRACY AND DISTRUST (1980);
JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980);
course, an implied power but it is so deeply imbedded in our constitutional culture that it will not depart, and the limits of federal power are plainly expressed (albeit in general terms) in the paramount law that the Court claims is its "emphatic" duty to interpret. Equally true is the proposition that the Constitution must be interpreted not to defeat the venture in self-government it launched, and if judicial enforcement of federalism produces politically untenable outcomes that act on the polity like suppressed tectonic forces (as may have been the case prior to the 1937 constitutional revolution), deference to the political branches may be as much sound constitutional interpretation as it is political theory.

Nevertheless, there are sound reasons for insisting that the judiciary play a role in policing the Constitution's allocation of power between the federal and state governments. These reasons are historical, structural, and prudential. While none of them, considered individually, absolutely crush the arguments for politically enforceable federalism, taken together they make a convincing case for an active judicial role in enforcing federalism.

The historical case for judicially enforceable federalism is best presented by John Yoo in his cleverly titled article, The Judicial Safeguards of Federalism, and the best attack upon that historical reading is Larry Kramer's article, Putting the Politics Back into the Political Safeguards of Federalism. Professors Yoo and Kramer agree that American federalism is rooted deeply in the colonial experience, but each draws different conclusions. Yoo argues, predictably enough, that the Revolution was triggered by Parliament's attempt to withdraw autonomous governance from the colonies in the form of control over taxation of American colonists and that the colonial conception of equality between colonial assemblies and Parliament was a fundamental stage upon which the ratification debates were played. In the course of the ratification debates, Anti-Federalists attacked the proposed Constitution as a vehicle for annihilating the states and Federalists responded with an expressio unius argument—the enumeration of limited powers assigned to the central government was adequate protection for state autonomy—and with an early version of politically enforceable federalism, arguing that the very composition of the central


63. See Yoo, supra note 16.
64. See Kramer, supra note 14.
65. Yoo, supra note 16, at 1364.
66. Id. at 1375-77.
government would be entirely owing to the states. But these arguments were not effective. Anti-Federalists pointed to ancient Rome and political man’s natural hunger for power to contend that political safeguards were no safeguards at all. The wisest fox ever to exist might be given to understand that if he eats all the hens in the coop he may have no supper on the morrow, and that his faithful guarding of the hens from wolverines will be rewarded by a hen per day, but it is not in the nature of the fox to forebear his grisly pleasure. As with foxes, so with politicians, except that foxes may be more charming and trustworthy. At any rate, in Yoo’s account the Federalists realized the losing nature of their political safeguards argument and began to champion judicial review as the ultimate check upon the expansion of federal power with consequent diminution of state autonomy. Yoo summarizes these developments by declaring that the “historical evidence . . . shows an understanding among the leading ratifiers that while the national political process may have been the primary safeguard of federalism, it was not the exclusive safeguard of federalism.”

Professor Kramer agrees that the Revolution was spawned by Britain’s shrinking of the scope of colonial self-government, but argues that the lesson drawn from that experience by Americans was that republican politics—popular sentiment, either manifested directly or through democratically elected representatives—was sufficient to check an overly greedy central government. He relies upon the tenuous nature of judicial review in revolutionary America to support the inference that it was unlikely that the Founders would have relied on the judiciary as the principal check upon a pretentious central government. But Kramer fails to mention such pivotal colonial events as the Writs of Assistance Case, in which James Otis Jr. argued strongly for the judiciary—and a colonial judiciary—as the check upon the grasping pretensions of the imperial Parliament. To be sure, the Writs of Assistance Case is an isolated event, but its importance to American political thought of the era was vastly greater than its singularity might suggest. John Adams later declared that it was at that moment that the child Independence was born. Adams may have been indulging in hyperbole but his statement is no less important for that. The colonial generation was perfectly willing

67. Id. at 1377-80.
68. Id. at 1381-82.
69. Id. at 1383-89.
70. Id. at 1391.
72. Id. at 238-242.
74. Id. at 7.
to seek to enforce its localist vision of federalism by ordinary politics, revolutionary politics, and war. Is it any surprise that they were also willing to enlist the judiciary in the crusade?

More central to Kramer’s argument is the contention that “in all the flood of pamphlets and essays and editorials that poured from the presses . . . and in all the voluminous records of debate in the state ratifying conventions, there is only a smattering of references to courts and judicial review.” Kramer thinks the paucity of arguments in the ratification debates for judicial review as a mechanism of curbing federal power and preserving state autonomy is “completely understandable given the immature state of the law respecting judicial review and its limited role at the time . . ., [and] it utterly discredits any notion that federal courts were an important element of the design to protect state sovereignty.” But Kramer has missed much of the nuance of the ratification argument. The statements cited by Kramer—familiar comments of James Wilson, John Marshall, Alexander Hamilton in The Federalist No. 78, and less familiar ones by Oliver Ellsworth and John Stevens—were all uttered in the context of a debate that had grown increasingly more difficult for the Federalist defenders of the proposed Constitution. The Federalists had failed to persuade with either their expressio unius argument or their political safeguards argument. Calls for a Bill of Rights were ringing in the ratifying conventions, and because individual liberty and government power were perceived as two sides of the same coin, the demands for a Bill of Rights were demands for written, enforceable constitutional guarantees of limits upon federal power. It is only later generations of Americans that have bifurcated individual rights and government powers, treating the former as trump cards to be played upon the latter. The founding generation did not see it that way—individual liberty inhered in the absence of government power and the Bill of Rights was all about adding additional checks on power. It is thus no accident that the Bill of Rights included two structural checks on federal power, the Ninth and Tenth Amendments. Thus, when Federalists belatedly started to offer the courts as the defenders of state autonomy they were engaged in a rear-guard action of sorts, one designed to gain ratification by offering the courts as well as the political process as the agents of federalism.

In a sense, none of this should be surprising. As Kramer accurately notes, it is “old news” that “judicial review received scarcely any attention at the Federal Convention,” and it is equally

75. Kramer, supra note 14, at 252.
76. Id.
77. Id. at 242.
old news that the role of judicial review remained unsettled until the Marshall Court made the claim that stuck. It is thus not surprising that even though the ratification debates centered on the scope of federal power not very much was made of judicial review as a pivotal element in restraining that power. Nor should we be surprised by the lack of specific mention of the courts as a device to restrain congressional usurpations. Judicial review was simply not a topic of vigorous discussion, and no amount of dissection of the record left to us will produce anything definitive on this point. The historical record is "almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. [Two centuries] of partisan debate and scholarly speculation yield[] no net result but only suppl[y] more or less apt quotations from respected sources on each side of any question."78

This does not mean, however, that history tells us nothing. We know that the Revolution was a revolt against withdrawal of autonomy from the colonies; we know that judicial review played a role in the development of colonial and revolutionary thought as a means to check legislative abuses; we know that the Framers intended both to strengthen the central government and to ensure that its powers were sufficiently limited to maintain significant policy independence in the states; we know that judicial review became firmly established little more than a decade after constitutional union and that the very first exercise of that power was to strike down a federal statute, albeit not one with federalism implications. Even the most ardent advocates of politically enforceable federalism must admit that these accepted markers of our constitutional history do not add up to a clinching argument against any use of the courts to police the limits of federal power.

Of course, it is true that most of the antebellum exercises of judicial review were invocations of that power to check state encroachments upon federal power. Apart from Gibbons v. Ogden,79 the Court's role with respect to the commerce clause was to chart the implicit limits placed by that clause upon state regulations of interstate commerce. But this does not establish that it was the early understanding of the nation that judicial review was not to be used to check attempts by Congress to exceed its powers. To the contrary, the exceedingly nationalist John Marshall took pains to say, in McCulloch v. Maryland,80 that if Congress, "under the pretext of executing its powers, [should] pass laws for the accomplishment of

objects not entrusted to the government[,] it would become the painful duty of this tribunal ... to say that such an act was not the law of the land.”81 The failure to employ judicial review in this fashion says more about scrupulous observance by Congress of the limits placed by the Constitution upon its powers than it does about a supposed national consensus that judicial review was not to be used to check congressional ventures into unauthorized territory. It should come as no surprise to any student of American constitutional history that the Court’s use of judicial review power to control the scope of federal power coincides with the rise of the twentieth century’s phenomena of extreme nationalism—the consolidation of national power at the center of each megastate vying for world supremacy: Great Britain, Nazi Germany, the Soviet Union, Japan, China, and, of course, the United States. Nor should it be terribly surprising that the Court abandoned the effort at the apex of American power. In the struggle for world supremacy concentration of American power at the center was a positive good, but with the end of superpower competition and the general worldwide devolution of political authority to accommodate demands for regional autonomy stemming from many different sources, the Court returned its attention to the proper scope of federal power.

The sweep of history, as opposed to the arid accounting of quotes preserved to us, suggests that the Framers regarded the courts as one among several devices to control federal authority. The Court had few occasions to exercise this power until Congress began aggressively to grasp for substantial control of American life, but long before this event the Court asserted that it possessed such power, providing some confirmation of the Framers’ expectation that the Court would act to rein in Congress in the name of federalism. It is impossible to conclude from history alone that the courts have no role to play in preserving federalism, but it would be equally dangerous to rely on history alone to support the proposition that the courts have the primary responsibility for preserving state autonomy.

The structural arguments for judicially enforceable federalism inevitably overlap with the historical arguments. Can there be any doubt that the Framers had dual objectives in framing the Constitution—to increase federal authority but only within carefully defined limits calculated to preserve state autonomy? Can there be any less doubt that the Framers’ Constitution diffused federal power among three branches and endowed each branch with powers sufficient to check the ambitions of the other branches? Can it be possible that such a system was designed with conscious omission of the power of courts to arrest unauthorized exercises of federal power

81. *Id.* at 423.
by either the President or Congress? Such must be the conclusion urged by the advocates of politically enforceable federalism.

Professor Kramer, for example, makes much of the comments of Federalists during the ratification debates to the effect that popular politics—the sentiments of the people transmitted directly by elections and indirectly through their representatives—would be adequate to ensure the continued autonomy of the states.\textsuperscript{82} No doubt Kramer is correct to contend that the Framers expected the "structural innovations" of the Constitution to be "merely a tool to make possible the preservation of [liberty within] a constitutional order," with the people supplying the "energy [and] direction to protect liberty."\textsuperscript{83} But that expectation does not negate the quite real probability that the Framers expected judicial review to be one of the tools wielded by the people's representatives to preserve liberty.

Moreover, Kramer is surely wrong to conclude that political parties, institutions that straddle the federal-state boundary, are the viable, if unexpected, political guardians of federalism. Kramer's essential point is that American political parties, loosely organized and focused primarily on the practical end of winning elections, together with a cadre of elected and appointed federal office-holders with roots in the states, operate to make the states and the federal government interdependent and thus furnish a balance wheel that regulates the scope of federal power and adequately preserves state autonomy. In short, because neither the federal government nor the states can do without the other, and the agents of the people in both governments gain office through political parties, the mediating institution of those parties ensures that state interests remain adequately considered in policy formation. But this vision fails to account for the power of political action committees, single issue lobbies that are more than willing to expend money and effort to secure the election of pliable members of Congress wherever and whenever possible. Political parties are willing participants in this system, vying with increasing vigor for "soft-money" for themselves and funneling other contributions into their allied PACs.\textsuperscript{84} Without much exaggeration, the result is a Congress of members who represent, not Alabama and California and New York and Wyoming, but the AARP, People for the American Way, the NRA, the NEA, the environmental lobby, the health insurance industry, and on and

\textsuperscript{82} Kramer, \textit{supra} note 14, at 252-68.
\textsuperscript{83} \textit{Id.} at 268.
\textsuperscript{84} The proposed campaign-finance legislation currently pending in Congress is, of course, designed to dampen the fervor of this process. Perhaps it will do so, if it is constitutionally valid; but the post-Watergate Federal Election Campaign Act was supposed to do the same thing, and it is in the wake of that legislation that the present system developed.
on. Of course, those lobbies represent the concentrated energies of real people, but their interests are not identified or expressed in any manner relevant to federalism. It is wholly unrealistic to expect a Congress of people committed to issues that have no relevance to federalism to tarry and consider the limits of federal power as they hasten to do the bidding of their ideological allies that put and keep them in office. Any concern for federalism in this political process is pure happenstance.

A political structure that no longer harmonizes in any meaningful way with the constitutional structure is a dubious candidate for leadership in the preservation of that constitutional structure. Of course, if “the people . . . become more partial to the federal than to the State governments . . . the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due,” but Madison’s immortal observation carries with it the implication that if the people should think the federal government has too few powers they are free to amend the Constitution to endow it more amply. Nothing in this or any other statement of the Framers suggests that the people’s federal representatives are free to ignore the limits on their power in order to facilitate a transient popular fondness for the federal government as the translator of popular will. At most, Madison’s comment suggests that the scope of federal power ought be interpreted with sufficient flexibility to accommodate reasonable variations in taste about the wisdom of national or local action on any given issue of policy. There is, however, an enormous difference between flexibility and flaccidity, a difference acutely appreciated by one whose elasticized bathing suit waist band has suddenly lost its elasticity in mid-dive. The Court’s role is to make sure that the Constitution’s elasticity of federalism is not lost by reckless and untoward stretching of the fabric.

Moreover, because federalism’s values are not purely instrumental but are heavily laden with the burden of protecting individual liberty, judicial review has a definite role to play. Even the most outspoken defenders of politically enforceable federalism are quick to agree that the Court has a pivotal role to play in preserving individual liberty. It has no more warrant to abandon its duty when federalism is the constitutional agent of liberty than when equal protection is the agent of liberty.

From this may be seen the prudential role of the Court. Prudential reasoning about the Constitution is eminently pragmatic,

85. THE FEDERALIST NO. 46 (James Madison).
86. According to PHILIP BOBBITT, CONSTITUTIONAL FATE (1982), prudential arguments about the Constitution are those that advance “particular doctrines according to the practical wisdom of using the courts in a particular way.” Id. at 7.
and the Court’s role in federalism is, or at least should be, influenced significantly by pragmatic considerations. The best argument for politically enforceable federalism is a prudential one—that the Court’s notions of the limits of federal power, when arrayed in opposition to popular notions on that subject, are unstable, lacking in endurance, and costly expenditures of the Court’s institutional political capital. But these arguments are speculation at most. The pre-1937 Supreme Court engendered opposition, and strong opposition at that, but it did not founder even when opposed by perhaps the most popular American President since George Washington, a President backed by overwhelming congressional majorities. Nor is the Court a monolith—there is every reason to expect that a Court severely out of step with contemporary politics will be corrected through the appointments process. After all, by the time Franklin Roosevelt expired, he had appointed eleven justices and the Four Horsemen had drifted off into death and retirement.

Advocates of politically enforceable federalism argue that these conditions, certainly lamentable even if correctable, come about because the Court as an institution is poorly equipped to locate the limits of federal power. Congress, it is said, is better able to marshal the facts needed to assess whether any given issue is appropriately within the ambit of federal power. This argument has assumed a mantra-like quality, repeated so often that it has become a shorthand jargon among justices and scholars. Justice Brennan, for example, relied on the “institutional competence” of Congress as justification for his now repudiated holding that Congress could engage in “benign” racial discrimination so long as such racial discrimination was substantially related to an important state objective. But Brennan never provided any persuasive illumination of the nature of this competence, one so vast as to reduce the scrutiny to be given to presumptively invalid racial discrimination. Congress is indeed capable of collecting vast amounts of evidence inadmissible in ordinary lawsuits, evidence that may be highly probative in sorting out public problems and devising solutions to them, but that fact says absolutely nothing about the relative ability of Congress and Court to discern when those solutions, however admirable, transcend the constitutional boundaries upon federal power. If the argument of those advocating politically enforceable federalism is simply that federal power should be large enough to enable the federal government to act upon any perceived problem, they are not arguing that Congress is more “competent” than the Court in surveying the boundaries of federal power; they are arguing that the limits of

federal power are whatever Congress chooses them to be. And that, boiled down to the syrup, is precisely what constitutes the political "safeguards" of federalism. This is not a pragmatic argument for preserving the Constitution's structure of divided powers; it is an argument for amending the Constitution without resort to Article V. To be sure, many of those who make this argument have little patience with Article V, and think that the Constitution may be freely amended by "extraordinary" moments of ordinary politics, but their argument remains one of constitutional amendment rather than a prudential argument about constitutional interpretation.

Consider a hypothetical federal law invoking the commerce power to prohibit recreational hunting of deer. It is entirely possible that a majority of citizens in some unknown number of states would applaud such a law, and that there would be strong contrary sentiment within a (possibly minority) number of affected states. The ultimate question is which organ of government delineates the frontier between federal and state power to set policy. There are three plausible choices: the individual States, the Congress, and the Court. Nobody proposes that the States should decide the issue, for the obvious reason that they are not disinterested. Why, then, do we so readily assume that the Congress is sufficiently disinterested to decide the issue?

That said, judicially enforceable federalism does not mean that federalism should be exclusively enforced by judges, nor does it imply any precise standard of review to apply to judicial review of congressional enactments. The real debate ought to be over the standard of review. Since the New Deal, the effective level of review of the scope of federal power has been, in the main, an extremely deferential version of minimal scrutiny. If any legitimate objective may be hypothesized which Congress might rationally have thought fitted within an enumerated head of federal power, the legislation is valid so long as it is rationally related to accomplishment of that objective. This level of review is so gossamer that it is akin to the translucent newly shed skin of the snake: It has the form of the snake but none of its substance. Today's debate has come about because the Rehnquist Court has raised the level of review, but the nature of those changes and their utility in securing the values of federalism remains unclear. The next section, which examines the actual contours of the Rehnquist Court's federalism, probes this uncertain new terrain.

88. Bruce Ackerman is probably the foremost exponent of this doctrine. See BRUCE ACKERMAN, WE THE PEOPLE (1995).
II. The Rehnquist Court's Federalism

The federalism jurisprudence of the Rehnquist Court has six main facets, four of which operate, ostensibly or actually, to protect state autonomy, and two of which detract from state autonomy. The four autonomy enhancing features are: (1) endowing the states with a "procedural immunity" from federal regulation under the commerce power, (2) reducing the deference that courts pay to Congress's determination that a given regulated activity substantially affects interstate commerce, (3) confining the source of Congress's power to abrogate the states' Eleventh Amendment immunity to section 5 of the Fourteenth Amendment, and (4) limiting Congress's power to enforce the substance of the Fourteenth Amendment to remedial legislation. The two aspects that detract from state autonomy are: (1) a refusal to apply, in practice, the presumption against preemption of state law, and (2) an implicit undermining of the adequate and independent state grounds doctrine by an increased willingness of the Court to examine the resolution of state law by a state's highest court when such resolution is thought to be relevant to determination of a federal issue. Each of these phenomena will be discussed below.

A. The States' "Procedural Immunity" from Commerce-Based Regulation

The unintended legacy of Garcia v. San Antonio Metropolitan Transit Authority\(^89\) was the shift of focus from the scope of the substantive immunity promised by National League of Cities v. Usery\(^90\) to the process of congressional regulation of the states. National League of Cities sought to define an area of traditional sovereign functions that could not be invaded by Congress by use of its commerce power. When Garcia scrapped that approach it purported to establish that the limits upon the use of the commerce power to regulate states are only politically enforceable. Judicial review was to be "tailored to compensate for possible failings in the national political process\(^91\) and such failures were conceived as limited to instances where states were "deprived of any right to participate in the national political process or... singled out in a way that left [them] politically isolated and powerless.\(^92\) Very quickly this was qualified by an interpretive rule, created in Gregory v. Ashcroft:\(^93\) Because "Garcia has left... to the political process the protection of the States against intrusive exercises of Congress's Commerce Clause powers, we must be absolutely certain that Congress intended such an

89. 469 U.S. 528 (1985).
91. Garcia, 469 U.S. at 554.
exercise."³⁹⁴ This "absolute certainty" could only be supplied by a clear and unequivocal statement of Congress's intent to regulate core state functions. This "super-strong clear statement rule," as Professors Eskridge and Frickey have characterized it,³⁹⁵ reflected not only the Court's view that regulation of core state functions is so unusual that congressional intent to do so must be beyond cavil, but also the principle, well-embedded in the implied preemption doctrines, that federal preemption, at least in areas "traditionally regulated by the States," is so "extraordinary" that a presumption against such preemption applies.³⁹⁶

Gregory's substantive canon of interpretation, which was itself a process-based limit on the exertion of federal power upon the states, spawned the current "procedural immunity" enjoyed by the states.³⁹⁷ In New York v. United States,³⁹⁸ the Court concluded that, while Congress surely could use its commerce power to regulate the creation and disposal of low-level radioactive waste, it could not simply tell the states that they must either take title to all such waste generated within their borders (and assume the associated liabilities of ownership) or construct a disposal facility in the manner prescribed by the federal government. That, said the Court, was an impermissible "commandeering" of the state power to govern itself.³⁹⁹ Federal commands to which state legislators must respond posed too great a risk of loss of political accountability.¹⁰⁰ In Printz v. United States,¹⁰¹ the Court concluded that Congress had no commerce-based power to require state executive officials to enforce a federal regulatory scheme. Congress could not command local sheriffs to conduct Brady Act background checks because that posed much the same problem of lost or blurred political accountability, undermined the President's exclusive power and obligation to enforce federal law, and lacked warrant in either history or precedent. The result of Printz and New York is that Congress "may not compel the States to enact or administer a federal regulatory program,"¹⁰² or in the more colorful words of the Ninth Circuit's Judge Sneed, the states may not

³⁹⁴. Id. at 464.
³⁹⁶. Gregory, 501 U.S. at 460. See also infra text accompanying notes 257-310.
³⁹⁹. Id. at 207 n.3.
¹⁰⁰. Id. at 169.
¹⁰². Id. at 926.
be reduced "to puppets of a ventriloquist Congress." Note that this is merely a constitutional etiquette manual—Congress remains free to preempt state law by regulating state activity in common with other activity, so long as that regulation is otherwise within the commerce power. Thus, in *Reno v. Condon*, the Court sustained the validity of a federal law forbidding most releases of drivers' license information to the public. The law, said the Court, did not require states to enact new law nor to administer a federal regulatory program; it merely forbade the state, as an owner of a data base of drivers' license information, from divulging that information to the public. The Court refrained from declaring whether the fact that the law applied equally to private owners of such databases was critical to its conclusion, but hinted that it was not. As a result, the procedural immunity of states from federal regulation under the commerce clause appears limited to legislation that requires the states either to enact or administer a federal program and, possibly, regulation of a core attribute of state sovereignty that lacks a clear statement of Congress's intent so to invade state sovereignty.

One of the more interesting aspects of this procedural immunity is its seemingly anomalous relationship with long established doctrine rooted in *Testa v. Katt*, which held that state courts must entertain federal claims when Congress directs them to do so, at least when the doors of the state courts are open to analogous claims based on state law. In *New York* the Court distinguished *Testa* on the ground that, although *Testa*'s requirement that state courts must enforce federal law "in a sense[] direct[s] state judges to enforce [federal law], this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause, [and no] comparable constitutional provision authorizes Congress to command state legislatures to legislate." The same claim was made in *Printz*. Justice Stevens, dissenting in *Printz*, argued that the Supremacy Clause's specific reference to state judges should not detract from the general command of the clause that federal law trumps contrary state law. But once Occam's razor is applied to these opposing arguments a single dispute is revealed. All the justices would agree that federal law is supreme; the question is whether the federal law that commands state legislative or

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103. Brown v. EPA, 521 F. 2d 827, 839 (9th Cir. 1975).
107. *Printz*, 521 U.S. at 929 (the Supremacy Clause's specific reference to state judges "says nothing about whether state executive officers must administer federal law").
108. Id. at 968 (Stevens, J. dissenting).
administrative action is "made in pursuance" of the Constitution. The Supremacy Clause's specific reference to the binding nature of federal law upon state judges is no help in answering that question because the answer must depend on the judicial sense of the structural postulates that define the boundary between the Constitution's grant of limited, enumerated powers to the federal government and the residual authority left in the states.

Some sense of the majority's structural postulate can be derived from its decision in Alden v. Maine. After Seminole Tribe of Florida v. Florida held that Congress lacked authority under its Article I powers to abrogate a state's Eleventh Amendment immunity from damages suits in federal court, employees of the state of Maine filed suit in a Maine court seeking damages for Maine's alleged violation of the federal Fair Labor Standards Act. The claim was dismissed due to Maine's sovereign immunity. In the Supreme Court the employee plaintiffs contended that because Congress had in the FLSA specifically authorized private suits against states in their own courts without regard to a state's consent to such suit, the Supremacy Clause required that Maine entertain their claim. The Court replied that because "the Supremacy Clause enshrines as 'the supreme Law of the Land' only those federal Acts that accord with the constitutional design[, this] merely raises the question of whether a law is a valid exercise of the national power." The law was invalid because the principle of state immunity from suit without its consent was a pre-constitutional attribute of sovereignty that was not waived by the states in the Constitution, either explicitly or by any implication from the grant to the federal government of its enumerated powers. This conclusion was reinforced by several
important structural principles of federalism. The foremost principle was the interference with a state's autonomy—its "decisionmaking ability"—presented by a congressional edict that states must entertain unconsented suits for damages:

A power to press a State's own courts into federal service to coerce the other branches of the State... is the power first to turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will and at the behest of individuals....

....

.... Private suits against nonconsenting States—especially suits for money damages—may threaten the financial integrity of the States....

....

.... A general federal power to authorize private suits for money damages would place unwarranted strain on the States' ability to govern in accordance with the will of their citizens....

[T]he allocation of scarce resources among competing needs and interests lies at the heart of the political process.... If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen.117

Such a mandate would also "strike[] at the heart of the political accountability so essential to our liberty and republican form of government" because it would blur not only the distinct responsibilities of the State and National Governments but also the separate duties of the judicial and political branches of the state governments.... A State is entitled to order the processes of its own governance, assigning to the political branches, rather than the courts, the responsibility for directing the payment of debts. If Congress could displace a State's allocation of governmental power and responsibility, the judicial branch of the State, whose legitimacy derives from fidelity to the law, would be compelled to assume a role... beyond its competence as defined by the very Constitution from which its existence derives.118

such immunity, id. at 745-48. The Court in Alden was careful to note, however, that the states' "immunity from private suit in their own courts" was "beyond the congressional power to abrogate by Article I legislation." Id. at 754. Presumably, as with Eleventh Amendment immunity, Congress may use its power to enforce the Fourteenth Amendment to abrogate state sovereign immunity in its own courts. See Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

116. Alden, 527 U.S. at 750.
117. Id. at 749-51.
118. Id. at 751-52 (citations omitted).
Moreover, said the Court, "[t]here can be no serious contention ... that the Supremacy Clause imposes greater obligations on state-court judges than on the [federal] Judiciary." 119 Nothing in the Supremacy Clause suggests "that state courts may be required to assume jurisdiction that could not be vested in the federal courts and forms no part of the judicial power of the United States." 120 To harken back to *Testa v. Katt*, the Court in essence did one of two things: Either it read *Testa* as standing for the principle that the states may not close their courts to federal claims while entertaining analogous state claims, or the Court read *Testa* more broadly (as establishing a principle that state courts must entertain federal claims when directed by Congress to do so) and simply engrafted onto *Testa v. Katt* a pre-existing latent principle that states must entertain federal damage suits *against themselves* only to the extent that the state has waived its inherent sovereign immunity.

The structural postulate at work in *Alden* was the procedural immunity principle. Congress remained free to impose liability on the states for violations of the FLSA and to enforce the states' resulting duty by suit brought by the United States; 121 what Congress could not do was to impose an enforcement mechanism that interfered with the internal governance processes of the states. Though in *Alden*, as in *New York* and *Printz*, the Court couched the interests it protected as the autonomous governance structure of states, in fact the Court was protecting additional interests, rooted in collective autonomy and political accountability. 122

The procedural immunity principle is well-suited to realize the important collective autonomy goals of maximizing the satisfaction of citizen preferences, preservation of the states' ability to experiment with different policy objectives, and protection of political community. Sovereign immunity may be a Faustian bargain, in that

119. *Id.* at 752.
120. *Id.* at 753.
121. *Id.* at 759. See 29 U.S.C. § 216(e), a portion of the FLSA that authorizes the United States to do just that.
122. The constitutional locus of the procedural immunity principle is less important than the fact that it exists. It might be attributed to the Constitution's structure—limited and enumerated federal powers, residual state authority—or it might be located in the structural truism of the Tenth Amendment, or it could be located in the guarantee clause, as Professor Deborah Jones Merritt has argued, or the necessary and proper clause, as Donald Regan has urged. All of these textual roots nurture a principle that is indispensable to retention of federalism. *See* Deborah Jones Merritt, Republican Governments and Autonomous States: A New Role for the Guarantee Clause, 65 U. COLO. L. REV. 815 (1994); Donald Regan, How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez, 94 MICH. L. REV. 554, 593 (1995). Cf. Gary Lawson and Patricia Granger, The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, 43 DUKE L.J. 267 (1993).
the citizens of a state trade off the ability to hold their governmental agents liable to them for damages in return for lower taxes and a greater ability to control disposition of public funds for public objectives, but it is a bargain that citizens should be free to make. More importantly, keeping a state's legislature free of a federal diktat is essential to the realization of these collective autonomy goals. Almost as important is the Printz principle that frees state administrators from the burden of running federal programs, a burden that leads either to a slighting of state responsibilities or the distortion of state taxing and spending policies to satisfy federal demands that the states, rather than the federal government, administer federal programs.

Procedural immunity is also key to the preservation of clear lines of political accountability. The vice of federal dictation of state policy is not the possibility that state voters are dolts and cannot understand that the federal government has forced their state legislators or administrators to enact or administer federal programs, but that state legislators and administrators are held accountable for what they did not do. Federal control constricts the scope of independent judgment, and such judgment inheres equally in acts of commission and omission.

The costs of procedural immunity are negligible. Congress is deprived only of the power to delegate to states the responsibility and fiscal cost of enacting and administering federal dictates. Congress remains free to enact federal regulatory schemes and to create a federal bureaucracy to administer those programs. Moreover, the force of procedural immunity is easily avoided by straightforward preemption of state law, conditional preemption, or the conditional spending power. Given the ready availability of such

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123. This can be done most effectively by express preemption, although given the laxness with which the Court has applied the substantive interpretive canon against implied preemption one cannot safely say that express preemption is necessary to this objective. See infra text accompanying notes 257-310.

124. This is simply legislation that expressly (or, perhaps, impliedly) preempts state law but is suspended in the event that a state adopts the legislation as its own. An example is a federal law forbidding possession of a firearm that has moved in interstate commerce in or near a school, but is suspended in any state that has made possession of a gun in or near a school a crime. To the extent this gambit should become popular with Congress it raises some of the same difficulties as conditional spending, and may well receive a doctrinal disposition similar to that accorded conditional spending in South Dakota v. Dole, 483 U.S. 203 (1987).

125. See South Dakota v. Dole, 483 U.S. 203 (1987). Given the size of the federal budget and the awesome scope of federal taxation, this remains perhaps the single most potent device by which the federal government can shape state behavior. If the Rehnquist Court were as implacably determined to exalt state power relative to the federal government as some of its critics seem to claim, one would think that the Court would by now have found a handy vehicle to alter conditional spending doctrine to put teeth into
devices, procedural immunity is simply an etiquette tip to Congress. As a practical matter the states may (or may not) be better off with intact governance autonomy and proliferating federal bureaucracy, but the point of federalism has never been to protect states just because they exist, but rather to accomplish ends that enhance individual liberty, collective autonomy, and political accountability. If a proliferation of federal regulation, by itself, is thought to be menacing to liberty, the people hold the agent of correction in their hands when they congregate at the polls. But collective autonomy and political accountability cannot be so readily protected by popular action. The case for the Court’s creation of procedural immunity is strongest with respect to these values of federalism.

B. Renewed Judicial Oversight of the Scope of the Commerce Power

For more than half a century—from 1937 to 1995—the Supreme Court allowed Congress nearly unfettered discretion to determine the limits of its regulatory power under the commerce clause. Since United States v. Lopez, however, the comfortable assumption that Congress could treat the commerce power as a plenary police power has been exploded.

The Court has reduced the deference it will pay to Congress’s judgment that a given intrastate activity is sufficiently related to interstate commerce that Congress may regulate that activity. In Lopez the Court invalidated the federal Gun-Free School Zones Act, which prohibited possession of a gun in or near schools. In doing so, it made clear that a regulated activity must have a substantial effect on interstate commerce to enable Congress to invoke as a source of regulatory authority the branch of the commerce power that enables it to regulate activities solely because

the coercion element of Dole, or sharpen the required connection between the spending and the federal interest in the program, or adopt Justice O'Connor's suggestion that the condition be directly tied to the manner in which the funds are spent, or develop a formula for meaningful judicial oversight of what constitutes the general welfare, or some combination of these notions.

126. For much of this period the Court deferred to the congressional judgment about the scope of the commerce power so long as it was rational to conclude that an activity Congress chose to regulate was either in commerce or substantially affected such commerce. The beginning of this era of deference was NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). The apparent beginning of the end was United States v. Lopez, 514 U.S. 549 (1995). This statement must be qualified by noting that National League of Cities v. Usery, 426 U.S. 833 (1976), overruled by Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985), and its progeny represented an abortive attempt to assert judicial review over one narrow aspect of the commerce power—its use to regulate core attributes of state sovereignty.

of their effect on interstate commerce.\textsuperscript{129} The Court also suggested that the lack of congressional findings of fact on the effect on interstate commerce of gun possession in or near schools was a factor that contributed to the Court's \textit{de novo} review of the substantiality of the effect. In \textit{United States v. Morrison},\textsuperscript{130} in which the Court struck down the civil remedy provision of the federal Violence Against Women Act,\textsuperscript{131} the Court, however, showed no deference to an explicit congressional finding that violence motivated by the sex of the victim had a substantial effect on interstate commerce. Instead, the Court effectively declared that when the regulated activity is an intrastate non-economic activity it will decide for itself whether the aggregate effects of the regulated activity on interstate commerce are sufficiently substantial to support congressional regulation. In doing so, it revived aspects of the "dual sovereignty" approach of \textit{Hammer v. Dagenhart},\textsuperscript{132} albeit limited to the "substantial effects" aspect of commerce doctrine: Congress, said the Court, may not "use the Commerce Clause to completely obliterate the distinction between national and local authority.... \[The\] Constitution requires a distinction between what is truly national and truly local."\textsuperscript{133}

Be that as it may, there is doubt about the practicality of the means by which this distinction can be served in the context of the commerce power. There are several possibilities, each of which is considered in turn.

(1) \textit{Procedural Deference}

The Court could insist on a clear statement of congressional findings of fact that the activities it seeks to regulate are either in commerce or have a substantial effect on commerce. If the Court were to defer to such findings (if rational), judicial review would amount to another procedural requirement, a reminder to Congress that it does not have unlimited power and that it must link factually its use of regulatory authority to an identified constitutional source of regulatory authority. But the Court appears content to confine its procedural federalism to matters of more direct federal interference with state governance mechanisms. In \textit{Morrison} the Court exhibited

\begin{thebibliography}{9}
\bibitem{129}This branch of the commerce power began its modern development in \textit{Houston, East & West Texas Ry. Co. v. United States (The Shreveport Rate Case)}, 234 U.S. 342 (1914), in which the Court upheld federal authority to regulate \textit{intrastate} railroad freight rates where the effect of those rates was felt on interstate commerce. Sometimes known as the "protective principle," this aspect of the commerce power was the sole basis available to justify the validity of the Gun-Free School Zones Act.
\bibitem{130}529 U.S. 598 (2000).
\bibitem{131}42 U.S.C. \textsection 13981 (1995).
\bibitem{132}247 U.S. 251 (1918), \textit{overruled by} United States v. Darby, 312 U.S. 100 (1941).
\bibitem{133}\textit{Morrison}, 529 U.S. at 615, 617-18.
\end{thebibliography}
no deference to congressional fact-finding that supported at least a rational judgment that sex-based violence, particularly that directed at women by reason of their sex, had a substantial inhibitory effect on interstate commerce. The Court’s reluctance to apply a purely procedural limit seems consistent with its expressed desire to separate substantively the national from the local. A procedural limit is unlikely to do so. The famous Dutch dikes form a substantive barrier to flooding of the polders of Holland. If instead of the dikes the Dutch were to rely on an elaborate procedure of mobilization of Netherlanders to stack sandbags whenever there is a clear threat of flooding, this procedural barrier would be ridiculously inadequate. At some point, it is apparent, the Court wants a federalism of dikes, not one of alarm bells.

(2) Procedural Non-Deference

The Court could apply, as it did in Jones v. United States, the canon of statutory interpretation that “where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.” In Jones the Court overturned a conviction under the federal arson statute as applied to the arson of an owner-occupied private residence. The statute made criminal arson of “any building . . . used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce.” Because the Court was of the view that a reading of the arson statute that included within its coverage any arson that “affected interstate commerce,” no matter how slight, would raise a significant question of the validity of the statute, the Court interpreted the statutory language to include only arson of buildings actually used in a commercial manner. A related version of “procedural non-deference” is the requirement, associated with United States v. Bass, that “unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the

134. 529 U.S. 848 (2000).
135. Id. at 857 (quoting United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909)). This principle was also cited in Edward J. De Bartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council, 485 U.S. 568, 575 (1988). Perhaps the most famous statement of this principle is in Justice Brandeis’ summation of the various canons the Court is supposed to use to avoid a decision on constitutional grounds. See Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 348 (1936) (Brandeis, J., concurring).
137. Id. (emphasis added).
138. Jones, 529 U.S. at 858.
139. Id. at 850.
federal-state balance in the prosecution of crimes." Through each of these procedural devices—narrow statutory interpretation to avoid decisions on the outer boundaries of the commerce power and a clear statement rule with respect to the federalization of crime—the Court can and apparently will supplement its newly invigorated substantive review of the commerce power. To continue the dike metaphor, while the Court insists on a federalism of dikes it is not averse to a procedure that might relieve some pressure on those dikes.

(3) Commerce and Non-Commerce

The Court could distinguish between commercial and non-commercial activities, deferring to rational congressional judgments about the effect on interstate commerce of commercial activities and displaying no deference to such judgments about non-commercial activities. The Court has not yet explicitly done so, preferring instead to hint that it will not defer to such congressional determinations when Congress regulates an intrastate and non-commercial activity. But this still requires a rule to distinguish the commercial from the non-commercial. Until the 1930s revolution, the Court was fairly consistent in defining "commerce" in its eighteenth century meaning of trade or exchange as opposed to manufacture or agriculture, activities that brought articles of commercial exchange into existence. The classic examples remain Chief Justice Fuller's declamation in United States v. E.C. Knight Co. that "commerce succeeds to manufacture, and is not a part of it," and Justice George Sutherland's statement in Carter v. Carter Coal Co.: "Mining brings the subject matter of commerce into existence. Commerce disposes of it." Professor Randy Barnett has ably demonstrated that the public understanding of the term "commerce" at the time of constitutional ratification was limited to trade, exchange, and navigation, as distinguished from business activity dependent on

141. Jones, 529 U.S. at 858.
142. Morrison, 529 U.S. at 613: "While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity . . ., thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."
143. See, e.g., SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (J.F. Rivington et al. eds., 6th ed. 1785) (Commerce: "1. Intercourse; exchange of one thing for another; interchange of any thing; trade; trafficking"; Agriculture: "The art of cultivating the ground; tillage; husbandry, as distinct from pasturage"; Manufacture: "1. The practice of making any piece of workmanship. 2. Any thing made by art.").
144. 156 U.S. 1 (1895).
145. Id. at 12.
146. 298 U.S. 238 (1936).
147. Id. at 304.
commerce, primarily agriculture and manufacturing. None of this, however, explains why we should interpret the Constitution today in accord with the original meaning of the terms employed in the Constitution. To address that separate issue would require an additional article. For present purposes, it is enough to note that serious commitment to a distinction between commercial and non-commercial activity may necessitate a judicial return to commerce-as-exchange (as opposed to production of the articles of such exchange), an approach that poses problems. Into which category does the service economy fit? Is the physician’s examination and diagnosis commerce—a service supplied in exchange for money—or is it prior to or following the commerce of the physician’s negotiation of the rate of reimbursement she will receive from the patient’s health maintenance organization? But Lopez and Morrison do not suggest that the distinction between commercial and non-commercial activities, however chimerical, is always the critical inquiry. Neither Lopez nor Morrison suggest that the Court will reject deference to Congress when it seeks to regulate an interstate non-commercial activity. Indeed, the Court’s continued acceptance of congressional power to regulate the instrumentalities of interstate commerce suggests that there would be no post-Lopez, post-Morrison commerce clause obstacle to regulation of avowedly non-commercial telephone use. There is simply no indication that the Court is poised to undermine Champion v. Ames or any other chestnuts of this genre.

(4) “Among the Several States”

The Court could read the scope of Congress’s power “to regulate commerce among the several States” as limited to activities that are within the category of commerce among the several states. According to Professor Barnett the original meaning of the phrase was that “Congress can only regulate gainful activity that takes place between people of different states.” This is not to say that Congress lacks (or should lack) any power to regulate activities that do not involve commercial intercourse between citizens of different states,


149. 188 U.S. 321 (1903) (upholding the federal Lottery Act, which prohibited interstate shipment of lottery tickets, as applied to such a shipment). While the Court concluded that the lottery tickets were an “article of commerce” it is hardly deniable that Congress was motivated by a desire to stamp out what it regarded as the moral evil of gambling. The conclusion that lottery tickets were articles of commerce was perhaps necessary to the decision in 1903 but would seemingly be unnecessary today, even after Lopez and Morrison.

150. Barnett, supra note 148, at 136. See id. at 132-39 for Barnett’s discussion of the evidence leading to this conclusion.
but it is to suggest that the Court might well deny the usual presumption of validity to congressional regulation of activities that are wholly intrastate. To do so, of course, the Court would be forced to repudiate the entire "protective principle," a staple of commerce clause doctrine since at least the Shreveport Rate Case.\textsuperscript{151} Nothing in Lopez or Morrison suggests that the Court is willing to circumscribe the commerce power in so radical a fashion.

(5) Regulation or Prohibition

Ever since Champion v. Ames\textsuperscript{152} it has been settled that the power to regulate interstate commerce includes the power to prohibit such commerce. It is not self-evident that the Court is correct in this conclusion. Examination of the context in which the Constitution uses the terms "regulate" and "prohibit" and their variants suggests that, apart from the commerce clause, the terms are distinctly different and the verb "to regulate" was not used by the Constitution's authors to include the power "to prohibit"\textsuperscript{153} except with respect to foreign commerce.\textsuperscript{154} The Court could embark on the venture of limiting the commerce power to regulation short of prohibition, or it could limit the prohibitory power to those activities that are "inherently injurious," though how such activities would be identified is a mystery in itself.\textsuperscript{155} However, there is absolutely no indication in Lopez or Morrison that the Court is willing, much less ready, to make any doctrine out of this contextual evidence.

(6) Elimination of the Aggregation Principle

Justice Thomas, concurring in Lopez, questioned the validity of the aggregation principle, the idea that the relevant impact on interstate commerce of a regulated activity is the impact on commerce of the regulated activity considered as a whole, not the effect on such commerce produced by any specific action within the

\textsuperscript{151} 234 U.S. 342 (1914).
\textsuperscript{152} 188 U.S. 321 (1903).
\textsuperscript{153} Barnett, supra note 148, at 139-46.
\textsuperscript{154} Id. at 143-46.
\textsuperscript{155} The Court embraced such a doctrine in the era of Hammer v. Dagenhart, 247 U.S. 251 (1918), where the majority sought to confine the use of the commerce power in such cases as Champion v. Ames, 188 U.S. 321 (1903) (prohibition of interstate shipment of lottery tickets), Hipolite Egg Co. v. United States, 220 U.S. 45 (1911) (seizure of impure eggs that had moved in interstate commerce), Hoke v. United States, 227 U.S. 308 (1913) (prohibition of interstate transport of women for immoral purposes, as applied to commercial prostitution), and Caminetti v. United States, 242 U.S. 470 (1917) (same, as applied to non-commercial adultery) to instances where "the character of the particular subjects" was such that "the use of interstate transportation was necessary to the accomplishment of harmful results." Hammer, 247 U.S. at 270-71.
regulated class of activities. The problem with aggregation, as Justice Thomas saw it, was that the principle “has no stopping point. [One] always can draw the circle broadly enough to cover an activity that, when taken in isolation, would not have substantial effects on commerce.” Elimination of the aggregation principle would enable individuals engaging in regulated activities to escape regulation by demonstrating that the effect on interstate commerce of their actions, considered in isolation, is insignificant. This result is precisely what the Court in Maryland v. Wirtz disavowed, and for good reason. It is the nature of general regulations that they cover all instances to which they apply, and exceptions carved out piecemeal on the basis of the individualized character of the regulated activity is an invitation to litigation and public resentment of the seemingly random nature of the regulation.

But Justice Thomas was correct to attack the aggregation principle as unbounded and thus an invitation to Congress to regulate even more than it might desire in order to establish the requisite effect of the regulated activity upon interstate commerce. Some limiting principle is necessary and the majority in Lopez did not suggest one. The Court’s refusal to defer to Congress on the question of what constitutes a substantial effect on interstate commerce may limit congressional power, but not in the same way that a limit on the aggregation principle would accomplish. The Court’s refusal to defer to Congress merely substitutes the Court’s judgment for that of Congress on the question of whether the aggregate impact on commerce of the regulated activity is sufficiently substantial to validate the legislation. While this is a significant change, because it represents a move from deferential minimal scrutiny to what might be called non-deferential minimal scrutiny (a level of review that might be considerably more stringent than the facial doctrine would suggest because it is the Court’s judgment that matters now), it continues to allow Congress to define the activities whose aggregate effects count for commerce clause analysis. However non-deferential this new level of review turns out to be, it contains no substantive check on the aggregation principle itself, a check that would limit the judgment of anyone, judge or legislator, who might be assessing the impact of a regulated activity on interstate commerce. For Justice Thomas’s criticism to flourish, something more is needed.

156. The principle originated in Wickard v. Filburn, 317 U.S. 111 (1942), and has been adhered to ever since. See also Perez v. United States, 402 U.S. 146 (1971); Maryland v. Wirtz, 392 U.S. 183 (1968).


158. 392 U.S. at 197 n.27 (1968) (“[W]here a general regulatory statute bears a substantial relation to [interstate] commerce, the de minimis character of individual instances arising under that statute is of no consequence.”).
One possibility is to breathe new life into the "proper" aspect of the necessary and proper clause. As Gary Lawson and Patricia Granger have argued, the means available to Congress to implement its enumerated powers ought themselves be limited to avenues that comport with the outer limits on the ends they purportedly serve.\(^{159}\) In essence, this is a call to the Court to invoke John Marshall's "pretext qualifier" from *McCulloch v. Maryland.*\(^{160}\) Despite regular declarations by the Court that it does not examine Congress's motive, a principle enshrined in commerce clause jurisprudence by *United States v. Darby,*\(^{161}\) the Court does in fact do so. Even when applying minimal scrutiny to presumptively valid legislative classifications the Court has divided over whether it should accept post hoc hypothetical objectives or scrutinize the record to divine the actual purposes of Congress.\(^{162}\) And, of course, determination of the actual purpose of any given classification by sex is a staple of the intermediate scrutiny applied to such classifications.\(^{163}\) There is room for the Court to examine the actual purpose of Congress in enacting legislation that regulates intrastate non-commercial activities, and to void those laws that have as their actual purpose the accomplishment of an end that is not substantially related to interstate commercial activity. Even *Darby* does not stand in the way of this move, for there the Court declared that Congress's "motive and purpose" was beyond judicial scrutiny only when the law constitutes "a regulation of interstate commerce,"\(^ {164}\) and that, of course, is precisely the question the Court would seek to answer by examining the actual purpose of a regulation that on its face does not touch upon interstate commerce.

Another possibility is some version of the substantial overbreadth principle used in free speech jurisprudence. A statute regulating speech that on its face has a disproportionate number of possible unconstitutional applications is regarded as substantially overbroad and thus invalid in all its applications.\(^ {165}\) Transposed to the commerce clause, the overbreadth principle might require that the

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159. See Lawson & Granger, *supra* note 121.
161. 312 U.S. 100, 115 (1941). "The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control.... Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause." *Id.*
164. 312 U.S. at 115.
class of activities regulated bear some proportional relation to the
actual problem identified by Congress and supported by its findings
of fact. This vision of overbreadth has recent analogues in the other
areas of constitutional law. Such a requirement would impose on
Congress the burden of demonstrating on the legislative record a
legitimate problem that its resulting legislation is tailored to fit. This
does not mean that Congress must meet the burden of strict
scrutiny—narrow tailoring or necessity—but it does mean that
Congress could not simply expand the size of the regulated class until
it had regulated enough to constitute a substantial effect on interstate
commerce. Under this test, for example, if Congress desired to limit
air pollution emissions from backyard barbecues, wood stoves, and
fireplaces in order to address the problem of global warming it would
be required to demonstrate that pollution from the regulated sources
form a substantial part of the pollution problem that Congress sought
to regulate. Congress might simply declare its purpose to be to
improve local air quality but then it might be required to demonstrate
that the regulated activities have a substantial effect on interstate
commerce. That burden is not impossible to meet; asking Congress
to meet it would keep Congress focused on the limits of its delegated
powers rather than indulging in the fantasy that its powers are always
broad enough to accommodate the latest fashions in regulation.

There may be other ideas that could prove attractive to the
Court. I make no claim of having exhausted this field. Rather, it is
my objective merely to point out that this remains a fertile source of
doctrinal development for an emerging doctrine of judicially
enforceable federalism.

(7) Further Thoughts

Although the Court in Lopez and Morrison took a much more
skeptical and non-deferential look at exercises of the commerce
power that combine regulation of a non-commercial activity with
regulation of an intrastate activity, it eschewed any of the more
radical possibilities discussed above. The Court tinkered with existing
doctrine rather than challenging its foundations.

A deeper rethinking is in order. The problem with the
commerce clause is that we have not constructed doctrine to deal with
the fundamental issues presented by the modern affirmative use of

166. In City of Boerne v. Flores, 521 U.S. 507 (1997), the Court imposed a requirement
of proportionality between the remedy and the problem when Congress invokes its power
to enforce the substantive guarantees of the Fourteenth Amendment. In Dolan v. City of
Tigard, 512 U.S. 374 (1994), the Court fashioned a requirement of “rough proportionality”
between the burden imposed on a property owner as a condition to development of his
property and the impact of that development on matters of legitimate concern to the
government.
the power. Dormant commerce clause doctrine, whatever its defects, at least addresses one central concern of the commerce power—the creation and maintenance of a national market free of state-imposed trade barriers. But the doctrine that controls Congress’s active exercise of its commerce-based regulatory power never deals with the core question presented by our modern penchant to use the commerce power as a catch-all source of federal regulatory authority: Under what circumstances is national action justified?167

The Constitution’s structure suggests a presumption against the exercise of national power; only the federal government is required to justify its exercise of power by pointing to a textual grant of authority for the power exercised. This state of affairs—the anomalous and mildly disfavored nature of federal power—sufficiently permeated our thinking about the allocation of governmental power that as late as 1954 Herbert Wechsler could say (with tongue apparently not planted in cheek) that “[n]ational action has ... always been regarded as exceptional in our polity, an intrusion to be justified by some necessity, the special rather than the ordinary case.”168 But now it is vogue among academicians (and perhaps some federal politicians) to claim that there are no longer any limits on federal legislative power,169 or at least any limits that courts can or should enforce.170 Transposed to the commerce clause key, the tune sung by these brides of federal power is that the commerce power is as vast as Congress wants it to be. Such claims ignore or fail to appreciate the role played by federalism in preserving liberty, collective autonomy, and political accountability.

The reason that the commerce power has been inflated into a grotesque parody of itself is that we have insisted, sometimes correctly, upon national action to address problems created by states inflicting negative external costs on the nation as a whole, and many

167. Donald Regan puts the question as follows: “Is there some reason the federal government must be able to do this, some reason why we cannot leave the matter to the states?” Donald Regan, How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez, 94 MICH. L. REV. 554, 555 (1995). Regan notes that the sixth resolution offered by Virginia in the 1787 convention urged that Congress should have power “to legislate in all cases for the general interests of the union, and also in those to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation.” Id. at 555-56 (quoting NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON 380 (1966)).


170. See, e.g., JESSE CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980); Kramer, supra note 14; Moulton, supra note 15.
of the most egregious external costs are not commercial in nature. The paradigmatic illustrative example is the problem of racial apartheid that permeated the Jim Crow era. National action was indispensable to correction of the mammoth external costs imposed by the racist practitioners of apartheid, but the commerce clause was not the most adroit vehicle for the action.

Consider the contortionist rationale of *Katzenbach v. McClung.* Congress could forbid Ollie’s Barbecue from racial discrimination with respect to its customers because 46% of its food had moved in interstate commerce. But what was the connection between the movement of food in interstate commerce and the racial discrimination practiced by Ollie’s Barbecue? The Court argued that Ollie’s discriminatory conduct depressed demand for food moving in interstate commerce. As Donald Regan has put it, so what? If the Court meant by this observation that the commerce clause empowers Congress to do anything it thinks will promote the interstate movement of goods there is no limit to this power. May Congress require homeowners to wash their windows weekly in order to promote the interstate movement of window cleaning supplies? May Congress mandate consumption of a daily glass of wine in order to promote the interstate movement of wine? Or prohibit wine consumption in order to promote the interstate movement of hard liquor and beer? If that is not fanciful enough, consider the Court’s contention that Congress could regulate all aspects of Ollie’s Barbecue because a substantial amount of the food it served had moved in interstate commerce. By this reasoning could Congress enact a national dress code applicable to all people who either regularly use an instrumentality of interstate commerce or regularly travel across state lines? Surely the regulation imposed must bear some logical relationship to the interstate movement. The ability of Congress to seize adulterated food that has moved in interstate commerce is an example of such a relationship, but the link between admittedly odious racial discrimination and interstate food movement is so ludicrously attenuated that it is hard to believe the Court was

171. I do not mean to imply that racial apartheid was objectionable solely on the ground that it inflicted costs on the portions of the nation that did not practice apartheid. It was objectionable primarily on moral grounds, and that fact is what should have led us into using the Fourteenth Amendment, rather than the commerce power, as the source of congressional power to dismantle the apartheid structure practiced by American states. *See infra* text accompanying notes 182-83.

173. *Id.* at 299-300.
175. McClung, 379 U.S. at 304.
willing to put it on paper. Nor can it be said that congressional use of 
the commerce power was valid because Ollie's discrimination was 
part of a larger cultural pattern of racial discrimination in Alabama 
that discouraged the interstate movement of people into Alabama. 177 
States, of course, may not close off their borders to outsiders, 
impose penalties on those who exercise their constitutional right to 
migrate, 179 or treat newcomers differently from old-timers, 180 but there 
is nothing that compels states to act to make themselves attractive 
candidates for interstate migration. If Massachusetts wants to impose 
ruinous but non-discriminatory taxation rates that have the effect of 
discouraging immigration it is free to do so. Nor was the Court's 
contention that Ollie's racial discrimination depressed access by 
blacks to goods that had moved in interstate commerce 181 of any 
relevance to the commerce power. Neither the commerce clause nor 
any other part of the Constitution secures a general right of access to 
interstate commerce. So long as states act in a manner that does not 
discriminate against interstate commerce they are free to forbid the 
use or possession of, say, tobacco products.

What was at issue in McClung was something very different—the 
right of black Americans to be treated the same way as all other 
Americans, with no special disadvantage visited upon them by reason 
of their ancestral heritage. This is the province of the Thirteenth and 
Fourteenth Amendments, not the commerce power. Congress chose 
the commerce power to implement the promise of equal citizenship 
because it was afraid of the Civil Rights Cases. 182 The Court contorted 
the commerce power because it was morally just and politically and 
socially imperative that the 1964 Civil Rights Act be upheld. But the 
cost that we have paid in erosion of federalism was unnecessarily 
incurred. With the benefit of hindsight, the 1964 Civil Rights Act 
should have been grounded in section 2 of the Thirteenth 
Amendment, which as interpreted by Jones v. Alfred H. Mayer Co., 183 
gives Congress the power "rationally to determine what are the 
badges and the incidents of slavery" 184 and to act to eliminate those 
badges and incidents of our lamentable past. Or Congress and the 
Court could have concluded that the public accommodations 
provisions of the 1964 Civil Rights Act were a valid exercise of 
Congress's power to enforce the citizenship clause of the Fourteenth

177. McClung, 379 U.S. at 301.
182. 109 U.S. 3 (1883).
184. Id. at 440.
Amendment, thus adopting the view expressed by the elder Justice Harlan in the Civil Rights Cases.\textsuperscript{185} Or Congress and the Court could have concluded that the public accommodations title of the 1964 Civil Rights Act was a valid exercise of Congress's power to remedy state denials of equal protection that inhered in the states' refusal to deliver to blacks the same access to public accommodations that the common law of those states delivered to whites.

The tale of Ollie's Barbecue demonstrates the importance of clear thinking about the relationship between commerce clause doctrine and other sources of national power. We should rejoice that the Court in \textit{McClung} upheld the public accommodations provisions of the Civil Rights Act, but we should lament the constitutional perversion that was employed to that end. When thinking about federalism we must not lose sight of the occasions for exercise of federal power and the appropriate sources of authority for that exercise. When we engage in expedient reasoning to accomplish an appropriate national objective we produce an immediate benefit at the cost of a long-term distortion of our federal structure, a distortion that imperils the value of federalism. The hand-wringing about \textit{Lopez} and \textit{Morrison} is utterly misplaced; the possession of guns in schools was already illegal under Texas law and the addition of a federal civil remedy to victims of sex-based violence added relatively little to the tort remedies already available in the state courts. In neither case was the occasion for exercise of federal power of much moment, but the marginal degradation of constitutional structure and the values preserved by federalism that would have occurred had these statutes been upheld under the commerce clause was indeed significant.\textsuperscript{186}

\section*{C. Abrogation of Eleventh Amendment Immunity}

In \textit{Seminole Tribe of Florida v. Florida},\textsuperscript{187} the Court overruled its prior decision in \textit{Pennsylvania v. Union Gas Co.}\textsuperscript{188} that Congress could exercise its Article I, section 8 powers to abrogate the states' sovereign immunity recognized in the Eleventh Amendment.\textsuperscript{189}

\begin{itemize}
  \item \textsuperscript{185} 109 U.S. at 46-47, 53-55 (Harlan, J., dissenting).
  \item \textsuperscript{186} Of course, \textit{Morrison} also presented the question of whether the federal civil remedy for victims of sex-motivated violence was a valid exercise of Congress's enforcement authority under the Fourteenth Amendment. That separate issue is considered in Part II, D, infra.
  \item \textsuperscript{187} 517 U.S. 44 (1996).
  \item \textsuperscript{188} 491 U.S. 1 (1989), overruled by \textit{Seminole Tribe}, 517 U.S. 44 (1996).
  \item \textsuperscript{189} A four-justice plurality of the Court, in an opinion by Justice Brennan, held that Congress could abrogate the states' Eleventh Amendment immunity under any of its sources of authority. \textit{Id}. In an opinion concurring in the judgment, Justice White agreed
\end{itemize}
Seminole Tribe held that congressional power to abrogate state sovereign immunity was limited to its Fourteenth Amendment enforcement power.\textsuperscript{190} Not only did Seminole Tribe make it significantly more difficult for Congress to abrogate the states' sovereign immunity, the decision raised the stakes with respect to the scope of Congress's power under section 5 of the Fourteenth Amendment to enforce the substantive guarantees of that amendment, because the enforcement power was left as the only avenue for Congress to subject the states to liability to private litigants for damages attributable to their violation of federal law.

The entire notion of state sovereign immunity from suit for damages in federal court is problematic. The federalism value of political accountability is fostered by ensuring that states remain fully liable for the damages they cause to private actors. But the imposition of such liability exacts a price in terms of a diminution of collective autonomy, because the damages paid are not paid from some abstract source but come from the collective coffers of the state, thus reducing the state's ability to undertake other expensive policy initiatives that might be desired by the state polity. Ever since Hans v. Louisiana\textsuperscript{191} the Court has been persuaded that the Eleventh Amendment embodies a pre-constitutional attribute of state sovereignty, one not surrendered in the original plan of the Constitution. Though that conclusion may be driven more by its reading of history than an assessment of the competing federalism values at stake, the Court did acknowledge the value of collective autonomy in its decision in Alden v. Maine:\textsuperscript{192}

A general federal power to authorize private suits for money damages would place unwarranted strain on the States' ability to govern in accordance with the will of their citizens. . . . [The] allocation of scarce resources among competing needs and interests lies at the heart of the political process. While the judgment creditor of a State may have a legitimate claim for compensation, other important needs and worthwhile ends compete for access to the public fisc. Since all cannot be satisfied in full, it is inevitable that difficult decisions involving the most sensitive and political of judgments must be made. If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the

\begin{footnotesize}
\begin{itemize}
  \item[\textsuperscript{190}] See Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). The conclusion was reinforced in Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S.627, 636 (1999) (Congress may not use its Article I power to regulate copyrights and trademarks to abrogate the states' Eleventh Amendment immunity).
  \item[\textsuperscript{191}] 134 U.S. 1 (1890).
  \item[\textsuperscript{192}] 527 U.S. 706 (1999).
\end{itemize}
\end{footnotesize}
Whether or not this is an appropriate balance in terms of the competing federalism values at stake, the Eleventh Amendment cases do leave private litigants with the ability to use federal courts to enjoin unconstitutional behavior by state officials, and the federal government can still sue states directly in federal court to enforce federal law. Thus, even though current Eleventh Amendment doctrine impedes citizen accountability, it does not destroy it, and it advances the value of collective autonomy."194

Moreover, the Eleventh Amendment cases make clear (if it was not beforehand) that the Court regards the principle of sovereign immunity as rooted in a pre-constitutional attribute of the states’ existence. The Eleventh Amendment, in this view, did not create state sovereign immunity but simply recognized and confirmed a state of affairs that had existed before the Constitution and which was intended to be maintained after constitutional ratification. It is interesting to compare this Eleventh Amendment doctrine with U.S. Term Limits, Inc. v. Thornton,195 in which the Court held that states lacked authority to establish term limits on their members of Congress. The Constitution is silent on the precise issue and the Court divided, 5-4, on the structural “default rules” that should apply when confronted by such textual lacuna. The majority concluded that the power to set qualifications for members of Congress was a power that states lacked prior to the Constitution because Congress, and state representation in Congress, is a creature of the Constitution. As Justice Stevens observed in his majority opinion, “the power to add qualifications is not part of the original powers of sovereignty that the Tenth Amendment reserved to the States. . . . ‘[T]he states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them. [N]o state can say[] that it has reserved[] what it never possessed.’”196 The dissenters, led by Justice Thomas, argued that because the

193. Id. at 750-51.
194. A general discussion of the merits (or demerits) of state sovereign immunity and the appropriate interpretation of the Eleventh Amendment is outside the scope of this paper. Academic discussion on these points is vast. My contribution to the literature is Calvin Massey, State Sovereignty and the Tenth and Eleventh Amendments, 56 U. Chi. L. Rev. 61 (1989).
196. Id. at 802 (quoting 2 Justice Joseph Story, Commentaries on the Constitution of the United States § 627 (1833)).
Constitution derives its authority... from the consent of the people of the States... it would simply be incoherent to assert that the people of the States could not reserve any powers they had not previously controlled.

... [If] someone says that the power to use a particular facility is reserved to some group, he is not saying anything about whether that group has previously used the facility. He is merely saying that the people who control the facility have designated that group as the entity with authority to use it. The Tenth Amendment is similar: The people of the States, from whom all governmental powers stem, have specified that all powers not prohibited to the States by the Federal Constitution are reserved “to the States respectively, or to the people.”

The tortured evolution of state sovereign immunity is similar. *Chisholm v. Georgia* read the text of Article III to grant the federal courts power to hear suits for damages brought against states although there was no explicit waiver by the states of any sovereign immunity they may previously have enjoyed under the law of nations. The Eleventh Amendment, according to *Hans v. Louisiana* and the conventional understanding, was simply a recognition that the Court in *Chisholm* was wrong to ignore the reservation of state sovereign immunity implicit in the Constitution. On one hand, current Eleventh Amendment doctrine is consistent with *U.S. Term Limits* because the states possessed some sovereign immunity under the law of nations, although even that might be debatable given the nature of the American Revolution. For example, in *United States v. Curtiss-Wright Export Corp.*, Justice George Sutherland, writing for the Court, argued that by the Declaration of Independence (and subsequent victory in arms) “the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America.”

On the other hand, current Eleventh Amendment doctrine is inconsistent with *U.S. Term Limits* because the scope of state sovereign immunity far exceeds the express contours of that immunity in the Eleventh Amendment. Whichever reading is better, the point remains that the Court is willing to read a

197. Id. at 851-52 (Thomas, J., dissenting).
198. 2 U.S. (2 Dall.) 419 (1793).
199. 134 U.S. 1 (1890).
background principle into the Constitution to preserve some measure of state autonomy through sovereign immunity but is quite unwilling to do the same with respect to state autonomy to add qualifications for membership in Congress. Perhaps the most charitable explanation is that sovereign immunity does protect the value of collective autonomy, however imperfectly and at some cost in terms of citizen accountability, but permitting states to add to congressional qualifications produces little in terms of collective autonomy (apart from the qualifications themselves) while imposing potentially significant external costs on the remainder of the nation.

D. Limiting the Scope of the Section 5 Enforcement Power

The Court has confined congressional power to enforce the Fourteenth Amendment\textsuperscript{202} to “remedial” action, thus overruling the alternative holding of \textit{Katzenbach v. Morgan},\textsuperscript{203} which had suggested that Congress could alter the substance of Fourteenth Amendment rights so long as it did not “restrict, abrogate, or dilute” them.\textsuperscript{204} In \textit{City of Boerne v. Flores},\textsuperscript{205} the Court struck down as applied to the states the Religious Freedom Restoration Act,\textsuperscript{206} an act that was frankly designed to reverse the Court’s decision in \textit{Employment Division v. Smith},\textsuperscript{207} which held that generally applicable criminal laws that impinge upon religious conduct do not offend the free exercise guarantee. The test, said the Court, to divine the difference between remedial and substantive enforcement of Fourteenth Amendment rights, was whether the congressional action was “congruent” with the constitutional violation sought to be remedied and whether that congressional action was a “proportional” response to the violation. Thus, in \textit{Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank},\textsuperscript{208} the Court concluded that there was insufficient evidence that states were violating the Constitution’s takings clause by their unauthorized use of other people’s intellectual property to support the claim that congressional abrogation of Eleventh Amendment immunity with respect to such matters was a proportional response to the violation. In the absence of such proportionality, Congress’s invocation of its power to enforce the constitutional rights incorporated into the Fourteenth Amendment was not remedial and was thus invalid. In \textit{Kimel v. Florida Board of

\begin{itemize}
  \item \textsuperscript{202} See U.S. CONST. amend. XIV, §5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).
  \item \textsuperscript{203} 384 U.S. 641 (1966).
  \item \textsuperscript{204} Id. at 651 n.10.
  \item \textsuperscript{205} 521 U.S. 507 (1997).
  \item \textsuperscript{206} 42 U.S.C. § 2000bb \textit{et seq.} (2001).
  \item \textsuperscript{207} 494 U.S. 872 (1990).
  \item \textsuperscript{208} 527 U.S. 627 (1999).
\end{itemize}
Regents, the Court concluded that the federal Age Discrimination in Employment Act, which prohibits all age discrimination in public employment was neither congruent with the constitutional violation nor proportional to it because, constitutionally speaking, government age discrimination is valid unless it is not rationally related to a legitimate objective. The statutory provision at issue applied to so much more activity than was constitutionally prohibited that it was neither congruent nor proportional.

In United States v. Morrison, in the course of striking down the civil remedy provisions of the Violence Against Women Act, the Court concluded that the provision of a federal tort remedy to victims of sex-motivated violence was beyond the Court's enforcement power for one old reason and a newly manufactured one. The old reason, rooted in the Civil Rights Cases, was that the remedy was not directed at any state actor or action: The civil remedy provision "is not aimed at proscribing discrimination by officials which the Fourteenth Amendment might not itself proscribe; it is directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias." The Court thus reaffirmed its commitment to the principle created by the Civil Rights Cases that, because the substantive guarantees of the Fourteenth Amendment are applicable only to state action, the power of Congress to enforce those substantive provisions is similarly limited, a conclusion that flows logically enough from the premise that Congress's enforcement power is exclusively remedial.

The new reason was a remarkable extension of the old reason. Because there was no proof in the legislative record that state discrimination against victims of sex-based violence in providing remedies for that violence was geographically widespread (even though Congress had identified twenty-one states in which it believed such discrimination occurred) the Court concluded that the creation of a civil remedy for such violence was neither congruent with nor proportional to the constitutional violation. The Court said that the civil remedy provision is also different from [the] previously upheld remedies [in Katzenbach v. Morgan and South Carolina v. Katzenbach] in that it applies uniformly throughout the Nation. Congress' findings indicate that the problem of discrimination against the victims of

211. 529 U.S. 598 (2000).
213. 109 U.S. 3 (1883).
214. Morrison, 529 U.S. at 626.
gender-motivated crimes does not exist in all States, or even most States. By contrast, the § 5 remedy upheld in *Katzenbach v. Morgan* was directed only to the State where the evil found by Congress existed, and in *South Carolina v. Katzenbach*, [in which Congress imposed voting rights requirements on States that, Congress found, had a history of discriminating against blacks in voting,] the remedy was directed only to those States in which Congress found that there had been discrimination.\(^{216}\)

In *Board of Trustees of the University of Alabama v. Garrett*,\(^{217}\) the Court elaborated upon the analytical process necessary to determine whether congressional exercise of its enforcement power is sufficiently congruent and proportional to be remedial. In the Americans with Disabilities Act, Congress had invoked its power to enforce the substantive guarantees of the Fourteenth Amendment to abrogate the states' sovereign immunity and subject them to liability to private citizens for money damages for violation of the ADA.\(^{218}\) The Court found that this abrogation of state sovereign immunity was *ultra vires*. First, the Court reiterated that Congress's "power 'to enforce' the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text,"\(^{219}\) but also confirmed "that it is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees.... Accordingly, § 5 legislation reaching beyond the scope of § 1's actual guarantees must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'"\(^{220}\) Second, the Court said that to apply these principles one must first "identify with some precision the scope of the constitutional right at issue, [an] inquiry [that] requires us to examine the limitations § 1 of the Fourteenth Amendment places upon States' treatment of the disabled."\(^{221}\) Those limits are determined by the relevant substantive precedents. Because *Cleburne v. Cleburne Living Center, Inc.*\(^{222}\) held that minimal scrutiny applied to classifications on the basis of mental retardation and, by implication, other related disabilities, the Court concluded "that States are not required by the Fourteenth Amendment to make

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216. *Morrison*, 529 U.S. at 626-27.
220. *Id.* (quoting *Flores*, 521 U.S. at 520).
221. *Id.*
special accommodations for the disabled, so long as their actions towards such individuals are rational."\(^\text{223}\) Having defined the metes and bounds of the constitutional right in question, we examine whether Congress identified a history and pattern of unconstitutional employment discrimination by the States against the disabled.... The legislative record of the ADA, however, simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled.\(^\text{224}\)

Congress made only general findings about historical societal discrimination against the disabled, but failed to identify specific instances of irrational discrimination by states against the disabled. Instead, Congress assembled a long list of "unexamined, anecdotal accounts of 'adverse, disparate treatment by state officials[,] action that] often does not amount to a constitutional violation where rational-basis scrutiny applies[, and which fails to establish] a pattern of unconstitutional behavior by the States."\(^\text{225}\)

But "[e]ven were it possible to squeeze out of these examples a pattern of unconstitutional discrimination by the States, the rights and remedies created by the ADA against the States\(^\text{226}\) were found to be neither congruent with the violation or proportional to its extent. The ADA's requirement that the disabled be reasonably accommodated\(^\text{227}\) except when such accommodation would pose an "undue hardship\(^\text{228}\) was neither congruent nor proportional because "the accommodation duty far exceeds what is constitutionally required in that it makes unlawful a range of alternate responses that would be reasonable but would fall short of imposing an 'undue burden' upon the employer."\(^\text{229}\) The ADA's prohibition of any action that has a disparate impact upon the disabled\(^\text{230}\) "without regard to whether such conduct has a rational basis,"\(^\text{231}\) was also neither congruent nor proportional because "disparate impact... evidence

\(^{223}\) Garrett, 531 U.S. 367.

\(^{224}\) Id. at 368.

\(^{225}\) Id. at 370.

\(^{226}\) Id. at 372.

\(^{227}\) See 42 U.S.C. §§ 12112(b)(5)(B), 12111(9) (1994), which require employers to "make existing facilities used by employees readily accessible to and usable by individuals with disabilities."

\(^{228}\) See 42 U.S.C. § 12112(b)(5)(A) (1994), which exempts employers from the "reasonable accommodation" requirement where the employer "can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity."

\(^{229}\) Garrett, 531 U.S. at 372.

\(^{230}\) See 42 U.S.C. § 12112(b)(3)(A) (1994) (forbidding "utilizing standards, criteria, or methods of administration" that have a disparate impact on the disabled).

\(^{231}\) 531 U.S. at 372.
alone is insufficient even where the Fourteenth Amendment subjects state action to strict scrutiny.\textsuperscript{232}

The Court in Garrett drew a sharp contrast between the ADA and the Voting Rights Act of 1965, upheld in South Carolina v. Katzenbach.\textsuperscript{233} When Congress enacted the Voting Rights Act it did what it did not do in the case of the ADA: it "documented a marked pattern of unconstitutional action by the States,"\textsuperscript{234} including racially biased application of voting tests in order to exclude black Americans from registering to vote that contributed to a persistent and "otherwise inexplicable 50-percentage-point gap in the registration of white and African-American voters in some States."\textsuperscript{235} The Voting Rights Act, in contrast to the ADA, was "a detailed but limited remedial scheme designed to guarantee meaningful enforcement of the Fifteenth Amendment in those areas of the Nation where abundant evidence of States' systematic denial of those rights was identified."\textsuperscript{236} In short

there must be a pattern of discrimination by the States which violates the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation.... [To] uphold the [ADA's] application to the States would allow Congress to rewrite the Fourteenth Amendment law laid down by this Court in Cleburne. Section 5 does not so broadly enlarge congressional authority.\textsuperscript{237}

This string of cases limits Congress to enforcing what the Court decides is the content of the Fourteenth Amendment, albeit with latitude to deter violations before they occur. Congress is no longer free to use section 5 to "remedy" constitutional violations by outlawing behavior that is constitutionally valid. When Congress seeks to address discrimination that is presumptively valid (e.g., age discrimination) it must establish sound reasons why it thinks the practice it seeks to address is constitutionally dubious. This means that Congress must tailor its remedies carefully to the invidious discrimination it identifies. Blunderbuss approaches, such as the ADEA, VAWA, or the ADA, are not permissible, but a more precisely tailored statute would be permissible.

The Court's approach to the section 5 power has been criticized from a variety of perspectives. Some contend that limiting Congress

\textsuperscript{232} Id. (citing Washington v. Davis, 426 U.S. 229, 239 (1976)).
\textsuperscript{233} 383 U.S. 301 (1966) (holding that the Voting Rights Act was a valid exercise of Congress's power under §2 of the Fifteenth Amendment, virtually identical to §5 of the Fourteenth Amendment, to enforce the Fifteenth Amendment's protection against racial discrimination in voting).
\textsuperscript{234} Garrett, 531 U.S. at 373.
\textsuperscript{235} Id.
\textsuperscript{236} Id.
\textsuperscript{237} Id. at 374 (footnote omitted).
to a remedial power wrongly shrinks the scope of the section 5 enforcement power; section 5, they say, contemplates an active role for Congress in establishing the substance of the constitutional rights secured by the Fourteenth Amendment.238 Others argue that, whatever the merits of that limitation upon scope, the Court erred by limiting Congress's choice of means to enforce judicially determined constitutional rights to those measures that are congruent with and proportional to the identified constitutional violation sought to be remedied. Some of these latter critics assert that there is no warrant for subjecting federal legislation adopted pursuant to the section 5 enforcement power to virtually strict scrutiny;239 others argue that while the "congruence and proportionality" means test is more akin to intermediate than strict scrutiny, it is still unjustified.240 None of these criticisms are ultimately persuasive.

The view that Congress is entitled to define the substance of the rights protected by the Fourteenth Amendment is grounded in various arguments. It is said that Congress, as an institution, is better suited to identify state practices that, while literally valid in terms of judicial interpretation of the Fourteenth Amendment, raise the possibility of hidden wrongful motives. This was the essence of Justice Brennan's "ratchet" theory of congressional power under section 5. But, as we shall see in a moment, this argument is merely a restatement of what will turn out to be the fundamental question here: Who should decide the content of constitutional norms—Court or Congress? A more sophisticated argument for vesting Congress with a power to define the substance of the Fourteenth Amendment


is Akhil Amar's interpretive device of "intratextualism." Professor Amar argues that similar (or identical) pieces of constitutional text should be given a consistent meaning. Building on that insight he observes that the Flores remedial reading of section 5 of the Fourteenth Amendment is inconsistent with the Court's reading of the scope of congressional power under section 2 of the Thirteenth Amendment, although the two enforcement provisions are virtually identical. In Jones v. Alfred H. Mayer Co. the Court held that under section 2 of the Thirteenth Amendment Congress had power to identify and outlaw those practices that it might reasonably think constitute the badges or incidents of slavery, and that that congressional power was broad enough to enable Congress to prohibit the refusal by one private person to engage in commercial dealings with another private person because of the latter person's race. As Professor Amar notes, "No court ever said, or ever would say, that when private person A refuses to deal commercially with private person B because B is black, this refusal is 'slavery' or 'involuntary servitude' within the meaning of section 1 of the Thirteenth Amendment." To Professor Amar there is no plausible justification for reading Congress's enforcement power under section 2 of the Thirteenth Amendment to extend beyond the judicially defined substance of section 1 of that amendment while reading Congress's enforcement power under section 5 of the Fourteenth Amendment as limited to remedial effectuation of the judicially defined substance of section 1 of the Fourteenth Amendment.

Amar's argument overlooks a crucial difference between the two amendments. The Thirteenth Amendment is one of the very few provisions of the Constitution that prohibits private behavior as well as state action. Certainly the Thirteenth Amendment bars states from establishing or enforcing laws instituting slavery, but it also bars private persons from practicing slavery regardless of the state laws (or lack of such laws) pertinent to that odious practice. The Fourteenth Amendment, of course, is directed to governments, by establishing citizenship and prohibiting certain practices of state governments. Congress's enforcement power under section 2 of the Thirteenth Amendment is more akin to its Article I powers, which enable Congress to act directly upon private persons, than to its enforcement power under section 5 of the Fourteenth Amendment, which, however interpreted, enables Congress only to prohibit certain

241. Compare U.S. CONST. amend. XIII, § 2 ("Congress shall have power to enforce this article by appropriate legislation") with U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article").
243. Amar, Intratextualism, supra note 238, at 823.
actions of the states. The difference is relevant to the proper latitude to be given Congress in defining that which the Constitution prohibits. The Thirteenth Amendment was all about eliminating the ghastly institution of slavery and all its trappings of racial subordination. It was essential to that end to prohibit private conduct steeped in slavery as well as the official state recognition of the practice, and the Thirteenth Amendment did so. To reach the private conduct that produced a verisimilitude of slavery by elaborate rituals of private racial oppression it was essential that Congress identify and outlaw those latter-day badges and incidents of the repudiated system of slavery. As with any other grant of power to regulate private behavior (e.g., the commerce power) Congress was given great latitude to set policy, to determine reasonable and appropriate measures executing its grant of power. But the Fourteenth Amendment is an entirely different proposition. By that amendment the states are barred from certain practices—most importantly, denial of due process and equal protection—and there is no power given Congress to set a different policy. Congress has no power to regulate private behavior within a specified domain, as it has with respect to slavery elimination or commerce regulation. Congress may only act to ensure that the states do not violate due process or equal protection. While it is true that the precise meaning of "equal protection" or "due process" is not self-evident from text, it is also true that there is nothing in the Fourteenth Amendment that indicates a special preference for Congress as the definer of these terms.

Nor is there much persuasive force in the argument that because the Reconstruction Congresses that framed the Thirteenth, Fourteenth, and Fifteenth Amendments were suspicious of the courts, regarding them (with some justification) as hostile to the Reconstruction project, we should read the enforcement provisions of those amendments as vesting in Congress a power to define the substance of the rights guaranteed by those amendments. Such a power is said to be necessary to effectuate the intentions of the framers of the Reconstruction amendments. First, it is odd that the same people who make this claim are often in the vanguard of those who belittle such people as Edwin Meese when he urges a jurisprudence of original intention. For myself, I am deeply skeptical that original intention can be located and, moreover, I do not think that, even if located, it is necessarily binding upon us. The Constitution that binds us is a written text, and the original meaning of that text—the sense of the words used as generally understood at the time of their adoption—is of central significance to any principled

explication of it,245 whatever the intentions of the authors and ratifiers of that text. Second, the methodology of original intentions is deeply flawed. For example, the very same Congress that drafted and proposed the Fourteenth Amendment countenanced official racial segregation in the public schools of the District of Columbia. Presumably those framers saw no dissonance between the guarantee of equal protection and officially mandated racial separation. Perhaps they partook of the sinister wine of separate but equal; perhaps not, but they surely thought that equal protection and racial apartheid could coexist. Are we thus to assume that the original intention of the Fourteenth Amendment was to permit Congress to mandate racial segregation in the name of enforcement of equal protection? The logical (though obnoxious) end of this line of reasoning is to conclude that Congress must have had power to enforce equal protection after *Brown v. Board of Education*246 by legislation that mandated a return to *Plessy v. Ferguson*.247 What nonsense! But is it any more nonsensical to argue that Congress had power to enforce free exercise of religion after *Employment Division v. Smith*248 by mandating a return to *Sherbert v. Verner*?249 The usual retort is to assert that the latter gambit expanded the scope of judicially recognized rights while the hypothesized former one would have constricted such rights. This is true only because we (justifiably) assign no consequence to the loss of liberty experienced by racist bigots and (less justifiably) think the loss of local political autonomy resulting from RFRA is of less consequence than the increased freedom of religious adherents to thumb their nose at secular laws that happen to impinge upon their practices. The reality is that it is often not easy to know whether any given legislative restructuring of a judicially defined right expands or contracts that shadowy, amorphous thing known as “liberty.”

Claims of expanded liberty rest ultimately upon the concept of “underenforced” norms, the idea that courts are institutionally ill-suited to define constitutional rights as broadly as the constitutional right might support.250 Supporters of this approach readily

245. For a complete explication of the differences between original intention and original meaning, see Randy Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999).
250. The origin of this concept is Lawrence Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978). See also Richard Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 75-106 (1997) (describing doctrine that invalidates only a portion of behavior that might be thought unconstitutional under the right invoked); Evan
acknowledge that this concept depends upon a gap between rights as
applied by courts and rights in the abstract.251 But how are we to
know the precise delineation of "rights in the abstract"? Of what,
abstractly defined, does equal protection consist? The concept of
equal protection acquires useful life only once we start to ask some of
the doctrinal questions: What purpose is served by differential
treatment? Is the purpose legitimate? Is the classification adequately
suited to accomplishment of the purpose? The idea that there is an
abstract ideal of any given right is puzzling, especially in this highly
relativist post-modern age in which we doubt all verities, or even the
concept of truth. Why are constitutional rights an exception to this
cultural skepticism? What epistemological process enables
commentators (or Congress) to discern with clarity the pure and
abstract form of any right in question? Congress views equal
protection one way, the Court views it differently. If you doubt that
there is some pure, "true" version of a right the question then
becomes simply: Which version will prevail and who will decide? For
over two hundred years—from Marbury through Cooper v. Aaron to
today—we have accepted the Court as the institution that defines
constitutional rights. This tradition is rooted not in blind obeisance to
the past but in the Constitution's purpose of restraining popular
majorities. Even though the Fourteenth Amendment is directed to
states, not the federal government, the content of Fourteenth
Amendment guarantees (particularly due process and equal
protection) is identical as applied to states and the federal
government. Given that, is it really appropriate to allow Congress a
free hand in defining the guarantees that restrain Congress?

Moreover, the contention that Congress should possess either an
ontological power to define (and make stick) what constitutes
constitutional rights protected by the Fourteenth Amendment 252 or an
epistemological power to raise a judicial presumption in favor of
congressional definitions of such rights, 253 fails to account adequately
for the dual function played by the Court's doctrine in this area.
First, judicial oversight is limited to the means employed by
Congress—congruence with and proportionality to a demonstrated
factual pattern of constitutional wrongdoing by state actors. 254 The

Caminker, Note, A Norm-Based Remedial Model for Underinclusive Statutes, 95 Yale L.J. 1185, 1192 (1986) (claiming that judicial doctrine often treats as "unconstitutional only a subset of legislative actions which contravene the norm motivating the doctrine").

251. See, e.g., Caminker, Means-Ends Constraints, supra note 240, at 1169-78.
252. See Amar, Intratextualism, supra note 238, at 824.
253. Id.
254. In Garrett, for example, the Court did not question the legitimacy of a congressional objective to prohibit what Congress considered irrational discrimination against the disabled. Bd. of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).
Court has not indicated any willingness to scrutinize the congressional objective, save for the requirement derived from the Fourteenth Amendment itself that Congress act only to remedy constitutional violations. Moreover, with respect to state action that bears a heavy presumption of constitutional invalidity (e.g., racial discrimination or establishment of an official state religion) the burden that Congress needs to surmount is reduced, as is exemplified by the 1965 Voting Rights Act. But when Congress seeks to regulate state action that is presumptively lawful (e.g., rational discrimination on the basis of age or disability) its burden is appropriately and correspondingly increased, because the actions Congress seeks to outlaw through use of a power limited to redress of certain unconstitutional behavior are themselves presumptively outside the scope of the regulatory authority invoked. State action that is clothed with a mild presumption of invalidity (e.g., sex discrimination) occupies the nether world in between and will predictably generate litigation that will be decided on the nuance of the individual controversy. There is surely far more latitude for Congress to forbid states to engage in sex discrimination in employment than for Congress to provide a federal civil remedy for the victims of sex-motivated violence because the former forbidden conduct is far less likely to be substantially related to an important state interest than is the absence of a federal civil cause of action for actions already subject to civil and criminal liability under state laws.

Judicial review of the enforcement power serves two important functions: preservation of the institutional role of the judiciary as the primary interpreter of the Constitution, and preservation of the individual liberty and collective autonomy values of federalism. In our rush to use the Constitution as the vehicle to address all manner of perceived unfairness we tend to forget that the Fourteenth

Rather, the Court focused on the means chosen by Congress to reach this goal and to assess those means it examined the evidence before Congress that states were in fact engaging in such irrational discrimination. While the Court refused to consider evidence that political subdivisions of a state had engaged in irrational discrimination against the disabled because those actors enjoyed no Eleventh Amendment immunity, see id. at 369-70, the implication of that selective review is that evidence of constitutional violations by any state actor is relevant to the scope of Congress's enforcement power when Congress is invoking that power for some purpose other than abrogation of state sovereign immunity. Such evidence, for example, would be relevant to determine whether Congress could invoke its enforcement power to bar irrational discrimination by states against the disabled, so long as the remedy for state violations does not consist of private suits for damages. Citizens could enforce such state obligations by injunctive relief and the United States could independently enforce such obligations. Garrett suggests that a broader array of evidence will be germane to assessing the legitimacy of exercise of the enforcement power in a context other than abrogation of state sovereign immunity, a point that is vastly underappreciated in the commentary upon the Flores progeny.
Amendment bars only certain state actions. And the scope of the Fourteenth Amendment’s constitutional liberties preserved from government invasion is not a matter of legislative grace; it is a matter of constitutional law, the domain of the courts ever since Marbury. To recognize a congressional power to define for itself what constitutes constitutional wrongdoing would be to surrender a basic premise of our constitutional democracy—that the legislatures cannot be entrusted to determine the scope of the liberties that constitutional law preserves from their invasion.

You may well be inclined to join Justice Brennan in replying that the “sponsors and supporters of the [Fourteenth] Amendment were primarily interested in augmenting the power of Congress,” and thus it is inconsistent with their intentions to limit congressional power to enforce the Fourteenth Amendment. But surely nobody contends that there are no limits at all to Congress’s enforcement power. Justice Brennan offered his “ratchet footnote” in Katzenbach...

255. Of course, the question of whether the courts are the exclusive arbiters of the Constitution continues to produce debate. In the area of individual liberties the Court has made its most emphatic claims of exclusive authority. See, e.g., Cooper v. Aaron, 358 U.S. 1 (1958), in which the Court stated that Marbury “declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.” Id. at 18. Lest there be any doubt what the Court meant by “the law of the Constitution” the Court claimed that “[i]t follows that the interpretation of the Fourteenth Amendment enunciated by this Court... is the supreme law of the land.” Id. Edwin Meese III, while he was Attorney General, responded as follows:

[T]he Constitution and constitutional law... are not synonymous....

... The Constitution [is], in its own words, “the supreme Law of the Land.”... Constitutional law is what the Supreme Court says about the Constitution in its decisions resolving the cases and controversies that come before it....

... [A] constitutional decision by the Supreme Court... binds the parties in a case and also the executive branch for whatever enforcement is necessary. But such a decision does not establish a supreme law of the land that is binding on all persons and parts of government henceforth and forevermore.... The Supreme Court would face quite a dilemma if its own constitutional decisions really were the supreme law of the land,... for then the Court would not be able to change its mind. It could not overrule itself in a constitutional case. Yet... the Court has done so on numerous occasions....

... Constitutional interpretation is not the business of the Court only, but also properly the business of all branches of government. The Supreme Court... is not the only interpreter of the Constitution. Each of the three coordinate branches of government... has a duty to interpret the Constitution in the performance of its official functions.

v. Morgan as an adequate judicial limit, but there are several problems with this resolution. First, when are constitutional liberties such as equal protection diluted rather than expanded? This is not unlike the now-rejected idea that "benign" racial classifications warrant reduced judicial scrutiny. Second, if Congress can expand constitutional liberties beyond their judicially recognized dimensions what generally applicable principle prevents Congress from contracting those liberties? And even if we dispense with generally applicable principles and rely simply on the "ratchet footnote," is Congress thereby foreclosed from repealing legislative expansions of equal protection or due process, or does the ratchet principle only apply when Congress seeks to shrink such liberties below the floor established by the Court? Third, and perhaps most important, Justice Brennan's resolution concedes to Congress the power to amend the Constitution by ordinary legislation.

The other major criticism of the Flores test is that the Court has imposed a more stringent means-ends test upon congressional exercise of its section 5 enforcement power than it has upon other implementing powers of Congress, particularly the "necessary and proper" clause and section 2 of the Thirteenth Amendment. These criticisms rest upon two observations: (1) that the intention of the framers of the Fourteenth Amendment was to vest Congress with an implementing power identical to its "necessary and proper" power, and (2) that the linguistic similarities between these implementing powers argues for a parallel interpretation. Neither observation is sufficient to persuade.

While there is little doubt that influential members of the Thirty-ninth Congress thought that section 5 would endow Congress with an implementing power identical to its "necessary and proper" power, it is also true that the same Congress specifically rejected the following implementing power, phrased explicitly in terms of the necessary and proper clause, that would have given Congress a plenary power:

257. Id. at 651 n.10.
258. This criticism was made by the younger Justice Harlan in Oregon v. Mitchell, 400 U.S. 112, 205 (1970):
Congress is subject to none of the institutional restraints imposed on judicial decisionmaking; it is controlled only by the political process. In Article V, the Framers expressed the view that the political restraints alone were an insufficient control over the process of constitution making. . . . To allow a simple majority of Congress to have final say on matters of constitutional interpretation is therefore fundamentally out of keeping with the constitutional structure.
259. The most extended version of this criticism is Caminker, Means-Ends Constraints, supra note 240.
260. See, e.g., Caminker, Means-Ends Constraints, supra note 240, at 1159 n.164.
The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.261

This version of an enforcement power would have eliminated the state action requirement and given Congress authority to do whatever it might think reasonable to secure equal protection. It may well be that this was rejected because it eliminated the state action requirement, or because it gave Congress a substantive power to decide the meaning of equal protection and privileges and immunities, or because it gave Congress broader authority to implement the Fourteenth Amendment than Congress thought wise. But given its explicit use of the "necessary and proper" phrase and Congress's rejection of that locution, it is reasonable to doubt that the case has been persuasively made that Congress intended section 5 to incorporate a "necessary and proper" power.

As discussed earlier, the linguistic similarities between section 5 and section 2 of the Thirteenth Amendment mask the real substantive differences of the two amendments, differences that support significantly different enforcement authority. The same observation is true with respect to the necessary and proper implementation power. Broad authority by Congress to select means necessary and proper to implement its delegated powers expands the power of Congress to displace contrary exercises of state legislative power, but exercise of this federal authority does not invariably require states to conform to federally specified norms. Congressional authority exercised under the necessary and proper clause is authority exercised generally upon private persons, not upon the states as governmental units. Even when such power does validly extend to the states, the states are required to conform to a federal policy that is not constitutionally required. Under a section 5 power coterminous with the necessary and proper clause, however, the states would be required to conform with Congress's sense of a constitutional norm. Given the flaccid level of judicial review that applies to the scope of the delegated powers that Congress may implement through the necessary and proper clause, it is appropriate to give equally deferential review to the implementation power. But the level of judicial review that applies to the substantive guarantees of the Fourteenth Amendment is substantially greater, and it thus makes sense to tie the level of judicial review of the Fourteenth Amendment's implementation power to the level of review of the substantive guarantees. Of course, to the extent that the Court

261. CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866).
reinvigorates its level of review of the scope of the delegated powers of Congress, it may be necessary to reexamine this issue.

Moreover, the Court’s congruence and proportionality limits on the enforcement power serve to preserve individual liberty and collective autonomy. It is axiomatic that neither the citizens of the nation as a whole, acting through Congress, nor the citizens of a state, acting through their state agents of government, are free to deny their fellow citizens any of our familiar constitutional liberties. But when constitutionally guaranteed rights are not at issue there is no *a priori* reason to privilege federal action ostensibly undertaken to redress constitutional violations. On such issues as providing legal protection against discrimination based on age, disability, or sexual orientation, a conflict is apt to develop between those who see such legislation as protective of individual liberty and those who see it as invasive of individual liberty. As long as constitutional rights are not at stake, and it is up to the judiciary to declare that they are at stake, this conflict between liberty as freedom from government and liberty as freedom through government often resolves into a conflict between a state polity that sees liberty as the former and a national polity that sees it as the latter. (But, of course, these views could be, and sometimes are, reversed.) Because there is no constitutionally guaranteed individual liberty to be free of, say, rational age discrimination, the question is whether the federal government has the authority to use its power to remedy constitutional wrongdoing in order to outlaw constitutionally valid practices that may be desired by the citizens of some unknown number of states. By allowing the citizens of the states to exercise their individual choice about domicile and their collective autonomy to decide policies that do not implicate constitutional liberties, the Court has advanced these values of federalism as well as preserving the judicial role to say what the Constitution means.

Nor is *Morrison*’s reiteration of the state action requirement as a limitation on the section 5 enforcement power a blow to the ability of Congress to enforce constitutional liberties. When Congress uses its section 5 power to enforce the Fourteenth Amendment it must act with respect to identified state action, but this does not necessarily mean that the remedy must be limited exclusively to state actors. Suppose that Congress provided that any state actor proven to have engaged in sex discrimination in investigating or prosecuting crimes of sex-based violence would be subject to civil and criminal sanctions, and that the victim of sex-based violence in such a case would also have a federal tort remedy against the perpetrator. Would *Morrison* render such legislation unenforceable? I do not believe so. Or suppose that Congress identified six states in which crimes of sexual violence were habitually neither investigated nor prosecuted. Would
E. Ignoring the Presumption Against Preemption

Whenever Congress legislates in areas in which states also have power to act the question of preemption arises. Congress may expressly preempt state law, but then there can be debate about the scope of the preemption, or even whether Congress’s "express" intention to preempt state law is clear enough to constitute express preemption. When Congress does not act expressly to preempt state law, the question becomes one of implied preemption. Congress’s intention to preempt is implied from what it actually did. The usual questions are to ask whether the federal law operates to occupy an entire field of regulation, or whether it conflicts with state law. It is familiar doctrine that in each preemption case the question "is what the purpose of Congress was. [When Congress legislates] in a field which the States have traditionally occupied ... we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." When a federal statute contains an express preemption provision the courts turn first to "the plain wording of [the statute], which necessarily contains the best evidence of Congress’s preemptive intent." When the issue is whether Congress impliedly preempted state law the burden is on the party urging preemption to show either that Congress intended federal law to occupy a field exclusively or that state law is in actual conflict with federal law. Conflict preemption exists when either it is impossible to comply with both state and federal law or state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

The presumption against preemption is not a mere canon of statutory construction; it is a substantive canon of constitutional interpretation. As Justice Stevens is prone to observe, preemption cases are cases about federalism. More particularly, they are about

the process of federalism, and a sampling of recent preemption cases suggests that while the Court may be creating one brand of process federalism when the scope of the commerce clause is at issue it is engaged in a distinctly different brand when preemption is afoot.

*Geier v. American Honda Motor Co.* involved a tort claim against American Honda by a driver of a 1987 Honda Accord injured in an auto accident. The Accord was not equipped with a driver's side airbag and Geier claimed that Honda was negligent in failing so to equip the car. Honda claimed that its compliance with an interim Department of Transportation regulation that required it to equip some of its models (but not the 1987 Accord) with airbags insulated it from liability by reason of the regulation's preemption of state tort law. The Court ruled that the statute under which DOT had promulgated the airbag regulation at issue did not expressly preempt state tort law, but concluded that the possibility of state tort liability for the lack of an airbag posed such an obstacle to the accomplishment of Congress's objectives that such state tort law was in actual conflict with DOT's airbag regulation. Congress's objective in the underlying statute was "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." The statute authorizes the Secretary of Transportation to promulgate minimum safety standards. Over time, the Secretary did so, and DOT's Safety Standard 208, which dealt with "occupant crash protection" went through a series of changes, each with the aim of forcing auto manufacturers to produce vehicles with some form of passive restraint system that would force unwilling occupants to use seatbelts or obtain roughly equivalent protection. Because auto users detested automatic seatbelts, ignition interlock devices, continuous buzzer warnings of unsecured seatbelts, and other intrusive systems, the Secretary began to encourage auto manufacturers to install relatively expensive airbags on some models as a prelude to a requirement that all autos include airbags. Interim Safety Standard 208, at issue in *Geier*, provided auto manufacturers with a variety of methods to overcome public reluctance to wear seatbelts and thus improve passenger safety through "passive restraint" devices that

271. *Geier*, 529 U.S. at 875-77.
272. An ignition interlock is a device that prevents engine ignition until the driver's seatbelt is fastened.
would not encounter public resistance, mostly but not entirely airbags. Even though the presumption against preemption imposes on the party seeking to establish preemption the burden of proving a clear and manifest intent of Congress to preempt contrary state law, the majority of the Court concluded that the checkered history of Safety Standard 208 indicated that the Department of Transportation had as its objective a gradual phasing in of airbags, an objective that would be frustrated by a state’s imposition of tort liability on an auto manufacturer who complied with Safety Standard 208 by manufacturing a vehicle without an airbag. This is more than a little remarkable. First, conflict preemption is not normally to be found where the conflict is between state law and a general, broad, or abstract federal objective. Thus, in Commonwealth Edison Co. v. Montana, the Court found no conflict between Montana’s substantial severance tax on coal, which admittedly made coal more expensive to the electrical generation utilities that use it, and a variety of federal laws that specifically have as their objective the production and consumption of coal. The federal objectives in Safety Standard 208 are hardly any more specific; indeed, the tortured history of the standard suggests agency vacillation as to what sort of polices ought to be adopted to protect auto users who stubbornly refuse to do the sensible thing and buckle their seat belts. Nothing whatsoever in that history indicates any concern about the possibility of state tort law interfering with these efforts. Second, the federal objective identified by the Court in Geier was an agency objective, not a congressional objective. A string of prior cases suggests that the presumption against preemption has special force when the federal norm that allegedly preempts state law is an agency rule. This is true whether one subscribes to the politically enforceable or judicially enforceable brand of federalism. From the political perspective, “[u]nlike Congress, administrative agencies are clearly not designed to represent the interests of States, yet with relative ease they can promulgate comprehensive and detailed regulations that have broad

273. 529 U.S. at 878-79.
274. Id. at 881-83.
From the judicial perspective, the values of federalism are more endangered by politically unaccountable agency administrators that are concerned entirely about their narrow bailiwick than by politically accountable members of Congress. One would think that a Court concerned with federalism would be especially sensitive to these matters and find the presumption against preemption particularly applicable when agency regulations are at issue. Finally, there is some reason to wonder whether the entire species of obstacle preemption is really warranted. It has been persuasively argued that the Supremacy Clause supports preemption "if and only if state law contradicts a valid rule established by federal law, and the mere fact that the federal law serves certain purposes does not automatically mean that it contradicts everything that might get in the way of those purposes." Yet, one need not eliminate the "obstacle" branch of conflict preemption to heed this admonition. It was precisely for these reasons that Commonwealth Edison v. Montana limited obstacle conflict preemption to cases where state law poses a sharp, unavoidable conflict with a specific federal purpose. The Court's virtual abandonment of these principles in Geier cannot fail to cause one to wonder about the nature of the Court's commitment to a judicially enforceable federalism.

In United States v. Locke, the Court held that Washington State's regulations of oil tankers plying its waters were impliedly preempted by a series of federal laws regulating similar but not identical aspects of tanker traffic in American waters. Washington had adopted rules governing tanker navigation procedures, crew training and procedures, and reporting of casualty incidents. The Court held that federal law had impliedly preempted the entire field of design, construction, equipping, and operation of oil tankers, and that conflict preemption applied to the narrow area of state regulation of matters peculiar to local waters, such as depth or narrowness of marine passages. The Court catalogued a series of federal statutes, treaties, and international agreements that, taken together, indicated a congressional intent to occupy the entire field of tanker design, construction, and operation. The important aspect of Locke was that the Court firmly rejected any suggestion that the presumption against preemption should apply at all when "the State

277. Geier, 529 U.S. at 949 (Stevens, J., dissenting).
281. Id. at 99-103.
regulates in an area where there has been a history of significant federal presence.\textsuperscript{282} This rejection of the presumption against preemption has a certain bootstrap quality to it. In a field preemption case the entire inquiry is to decide whether what Congress has done is sufficiently pervasive to constitute an implicit declaration that no other regulation of the area is to be allowed. But a large part of this inquiry is to chart the boundaries of the field. The presumption against preemption works to hem in the field boundaries and prevent judges from deciding that the field is so vast as to be virtually limitless. If the presumption drops away as soon as Congress embarks upon significant regulation there is no effective judicial check upon the perimeters of the regulated field. That the result in \textit{Locke} was sensible and one that should have been reached even if the presumption against preemption applied does not alter the potentially disturbing effect of the Court's method.\textsuperscript{283} No doubt Congress has power to occupy an entire field within its enumerated powers and thoroughly oust the states from any regulatory role in that field, but the presumption against preemption has a useful role to play in addition to causing judges to consider carefully the scope of the implied field. Field preemption can produce a regulatory vacuum when the federal scheme fails to address some particular point that may be of concern to a state. Of course, Congress can correct that oversight but it may be disinclined to do so if the vacuum is of consequence only to one or two states. The federalism value of collective autonomy is enhanced by a cautious application of field preemption. Continued use of the presumption against preemption in field preemption cases would promote that end.

In \textit{Egelhoff v. Egelhoff ex rel. Breiner},\textsuperscript{284} the Court held that the federal ERISA statute\textsuperscript{285} expressly preempted a Washington law providing that the designation of a spouse as the beneficiary of a non-probate asset is automatically revoked upon divorce. David Egelhoff had made Donna Egelhoff, his wife, the beneficiary of a life insurance

\textsuperscript{282} \textit{Id.} at 108.

\textsuperscript{283} Id. at 113. Washington had imposed a crew training requirement that did "not address matters unique to the waters of Puget Sound [but that imposed] requirements that control the staffing, operation, and manning of a tanker outside of Washington's waters." \textit{Id.} at 113. Washington also imposed an "English language proficiency requirement[... on a tanker's crew, [a requirement that dictated] how a tanker operator staffs the vessel even from the outset of the voyage, when the vessel may be thousands of miles from Puget Sound." \textit{Id.} Finally, Washington imposed a navigation watch requirement "not tied to the peculiarities of Puget Sound; it applies throughout Washington's waters and at all times." \textit{Id.} at 114.

\textsuperscript{284} 532 U.S. 141, 121 S.Ct.1322 (2001).

policy provided him by Boeing, his employer, and which was governed by ERISA. David and Donna divorced and two months later David died intestate after he was injured in an auto accident. Although Donna was still the named beneficiary of the Boeing life insurance policy, David’s statutory heirs (his children by a prior marriage) argued that they were the beneficiaries by reason of the Washington statute revoking the designation of Donna as the insurance beneficiary upon David and Donna’s divorce. The Court ruled that the provision of ERISA that states that ERISA “shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan” covered by ERISA was a sufficiently clear expression of congressional intent to overcome the presumption against preemption. Four justices thought that the “relate to” language of ERISA should be construed only as a “reference to our established jurisprudence concerning conflict and field pre-emption,” and two of them thought that even under those doctrines of implied preemption the Washington law was not preempted. The majority acknowledged the applicability of the “presumption against pre-emption in areas of traditional state regulation such as family law” but summarily dismissed it because “Congress had made clear its desire for pre-emption.” That clarity was not discernible to Justices Breyer and Stevens, who asserted that “[n]o one could claim that ERISA pre-empted the entire field of state law governing inheritance—though such matters ‘relate to’ ERISA, broadly speaking. Neither is there any direct conflict between the Washington statute and ERISA, for the one nowhere directly contradicts the other.” Indeed, the Washington law “is a rule of interpretation, and it is designed to carry out, not to conflict with, the employee’s likely intention as revealed in the plan documents.” This was because the Washington rule treats the divorced beneficiary spouse “as if” he or she had predeceased the decedent unless the “instrument governing disposition of the nonprobate asset expressly provides otherwise.” Egelhoff’s Boeing insurance plan was “silent about what occurs when a beneficiary designation is invalid” and so

287. Egelhoff, 121 S.Ct. at 1330 (Scalia, J., concurring). See also id. at 1331 (Breyer, J., dissenting) (“Like Justice Scalia, I believe that we should apply normal conflict pre-emption and field pre-emption principles where, as here, a state statute covers ERISA and non-ERISA documents alike”).
288. Id. at 1330.
289. Id.
290. Id. at 1331 (Breyer, J., dissenting).
291. Id.
the Washington statute merely filled that gap. The dissent pointed out the many instances in which resort to the background state law of property or inheritance is essential to determine whether "a given name makes a designation that is, or has become, invalid" and noted that such reference to state law "cannot possibly create any direct conflict with the plan documents." The more serious preemption claim was that the state law might pose a case of obstacle conflict preemption, but the dissenters applied the presumption against preemption and concluded that because "the only damage to federal interests [was] the added administrative burden the state statute imposes upon ERISA plan administrators," there was insufficient evidence to overcome the presumption. Moreover, the Washington law, and other state laws like it, reinforce ERISA's ultimate objective of fair protection of employee benefits. By finding preemption the Court ignored the fact that the divorced ex-spouse had already received half the community property of the marriage and would receive, by virtue of preemption's displacement of the Washington revocation statute, property already awarded to the decedent spouse in the marital dissolution.

The majority's approach to preemption in *Egelhoff* was apallingly wooden: its analysis was so simplistic that one risks hyperbole in labeling it analysis. Most puzzling, though, was the Court's evident insensitivity to the federalism-based presumption against preemption. It is hard to understand why Justices who are so aware of the values of federalism in *Lopez, Morrison*, or *Garrett* exhibit such blindness to those values when presented with a preemption case. Given the broad range of issues over which Congress has undoubted power to regulate, the failure of the Court to apply preemption doctrine sparingly, and with real attention both to Congress's intent and the values of federalism, will in the long run prove disastrous to perpetuation of the very real values underlying the diffusion of power inherent in federalism. To those of us who care about federalism as an end in itself, rather than as an expedient means to accomplishment of other policy objectives, this failing of the Court is distressing.

To compound the preemption mess, the Court uses preemption to avoid issues that might better be resolved on other constitutional grounds. In *Crosby v. National Foreign Trade Council*, the Court ducked clarification of the scope of a state's power to regulate matters

293. *Egelhoff*, 121 S. Ct. at 1331 (Breyer, J., dissenting).
294. *Id.* at 1332 (Breyer, J., dissenting).
295. *Id.*
296. *Id.* at 1333 (Breyer, J., dissenting).
that have an impact on foreign affairs by reliance on preemption instead. After Massachusetts enacted a law generally barring state agencies from purchasing goods or services from companies doing business with Burma, Congress enacted a statute that authorized the President to impose similar economic sanctions against Burma and to lift those sanctions if Burma should substantially improve its human rights practices and commitment to democratic governance, or if American national security should so dictate. In *Crosby* the Court ruled that the Massachusetts law was impliedly preempted because the state law was an obstacle to the accomplishment of the intended purpose and natural effect of the federal law in three ways: (1) the state law undermined presidential discretion to lift sanctions, (2) interfered with the congressional decision to limit economic pressure against Burma to a specific range, and (3) was at odds with the President’s authority to speak for the nation in formulating an international strategy to deal with Burma.

In *Lorillard Tobacco v. Reilly*, the Court ruled that Massachusetts regulations banning cigarette advertising within 1000 feet of a school or playground were preempted by the federal Cigarette Labeling and Advertising Act, which provides that “no requirement or prohibition based on smoking and health shall be imposed under state law with respect to the advertising or promotion of any cigarettes” that bear the warning labels prescribed by federal law. In concluding that Congress had expressly preempted state ability to regulate cigarette advertising, the Court denied any distinction between regulations addressing the content of such advertising and those directed to the location of cigarette advertisements.

*Crosby* and *Lorillard Tobacco* illustrate a dysfunctional quality to the Court’s current federalism jurisprudence. Rather than confronting directly the scope of the states’ power to touch upon matters of foreign affairs, the Court in *Crosby* employed a rationale for preemption that could as easily have been used to elaborate upon the substantive line drawn by *Zschernig v. Miller* and *Barclay’s Bank v. Franchise Tax Board*. As a result, the decision enhanced the scope of federal power twice—once by expanding the scope of obstacle conflict preemption and again by using a rationale that effectively draws a firmer line against state regulation of issues touching upon an articulated federal foreign policy. While there may
be nothing objectionable to the result in Crosby, one is left wondering whether in the absence of federal legislation dealing with Burma a state could bar the use of state funds to purchase goods made in Burma. If the answer is that a state could not so act, one must wonder why it was necessary to use preemption as the vehicle to chart the boundary between federal and state power. In *Lorillard Tobacco*, the issue was really the extent of free speech protection for commercial advertising of a dangerous but legal product. The use of preemption to avoid deciding the issue with respect to cigarette advertising enhanced federal power at the expense of collective autonomy. Invalidation of the Massachusetts limits on such advertising may well be the correct judgment, but only if the First Amendment compels the result and that is precisely what the Court refused to tell us with respect to cigarette advertising.  

The Court's cavalier treatment of the presumption against preemption does not arise from a view that such a presumption is misplaced. Professor Caleb Nelson has argued that such a presumption is insupportable, given the deliberate inclusion within the Supremacy Clause of a *non obstante* clause that directs courts to refrain from efforts to harmonize federal law with pre-existing state law, but neither the Court as a whole or any single justice has ever indicated any agreement with that position. However, because the Court's actions could suggest *sub silentio* agreement with Professor Nelson's argument, some examination of his thesis may be appropriate. 

Nelson argues that the final phrase of the Supremacy Clause—“any Thing in the Constitution or Laws of any State to the Contrary notwithstanding” was intended to operate in like fashion as a statutory *non obstante* clause. Just as a statutory *non obstante* clause would instruct judges not to apply the presumption against implied repeal of earlier statutes that might be in partial conflict with the new legislation, the Supremacy Clause's *non obstante* provision was intended to instruct judges that they need not interpret federal law (which operates to repeal contrary state law) to harmonize with prior state law. The Supremacy Clause, according to Nelson, established

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303. Of course, the Court did decide the free speech issue in the context of smokeless tobacco and cigars, items not covered by the federal Cigarette Labeling and Advertising Act. Applying the conventional four-part *Central Hudson* test the Court found that the prohibitions were not sufficiently closely tailored to the objective of the regulations—discouraging tobacco use by minors—to survive constitutional scrutiny. *See Lorillard Tobacco*, 121 S. Ct. at 2407-08.


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

306. *See Nelson, supra* note 278, at 232 ("The *non obstante* provision tells courts that even if a particular interpretation of a federal statute would [preempt] some state laws,
a rule of applicability, "making clear that federal law applies even in state courts,"\textsuperscript{307} a rule of priority—making clear that federal law trumped state law even if the state law was enacted later;\textsuperscript{308} and a rule of construction—making clear that courts should not "apply the traditional presumption against implied repeals in determining whether federal law contradicts state law."\textsuperscript{309} Nelson concludes that the Supremacy Clause establishes a "logical contradiction" test: "Courts are required to disregard state law if, but only if, it contradicts a rule validly established by federal law."\textsuperscript{310} This is not the same as the physically impossible branch of conflict preemption; rather, it encompasses any substantive or jurisdictional conflict between state and federal law.\textsuperscript{311} From this, Nelson reasons that obstacle conflict preemption is wholly unwarranted, either as a matter of constitutional law\textsuperscript{312} or statutory interpretation,\textsuperscript{313} and that the presumption against preemption is equally unwarranted, due to its conflict with the Supremacy Clause's non obstante instruction.\textsuperscript{314}

Professor Nelson's argument is elegant, well-reasoned, and persuasive within its limits, but it is the limits of the argument that matter most. It may be the case that a presumption against preemption is not warranted by reference to the Supremacy Clause, but that does not eliminate the possibility that such a presumption is fairly grounded in other equally strong constitutional principles. The Supremacy Clause is an indispensable feature of our federal system, but so is the concept of enumerated, limited sources of federal power with residual power lying in the states. A presumption against a finding of implied preemption (which Professor Nelson finds unobjectionable\textsuperscript{315}) simply operates to ensure that there are sound, persuasive reasons to conclude that Congress intended to preempt state law. A presumption against a broad reading of federal law that purports to preempt state law expressly (which Professor Nelson finds objectionable\textsuperscript{316}) serves a different function. Like other "clear statement" rules it operates to ensure that the federal political process has focused upon the displacement of state authority before it

\textsuperscript{307} Id. at 246.
\textsuperscript{308} Id. at 250.
\textsuperscript{309} Id. at 255.
\textsuperscript{310} Id. at 260.
\textsuperscript{311} Id. at 260-64.
\textsuperscript{312} Id. at 265-76.
\textsuperscript{313} Id. at 276-90.
\textsuperscript{314} Id. at 290-303.
\textsuperscript{315} Id. at 293.
\textsuperscript{316} Id. at 293-98.
acts to do so. Without such a rule there is no assurance that in fact Congress has attended to the consequences of displacing state authority. This holds true whether one subscribes to the Garcia brand of process federalism or the Gregory/New York/Printz brand. Adherents to Garcia argue that "to give the state-displacing weight of federal law to mere constitutional ambiguity would evade the very procedure for lawmaking on which Garcia relied to protect states' interests." Adherents to the Gregory/New York/Printz version of process federalism combine that desire for a clear statement of congressional intent with inspection of the substance of federal law to determine whether it operates improperly to invade the states' autonomous governance process.

The presumption against preemption, properly and consistently applied, would not deprive Congress of any power it has to formulate law and make it supreme by displacing state law. But in order to do so Congress should be required to make unequivocally clear its intent to displace the state law in question. Without such an unequivocal statement the courts should interpret the federal law to effectuate its purpose while leaving intact as much state law as can be retained without vitiating the federal purpose. Egelhoff provides a useful example. In ERISA Congress expressly preempted state laws "insofar as they now or hereafter relate to any employee benefit plan" covered by ERISA. But the "relate to" language is hardly a model of precision. It could be taken to refer to any law, however tangential, that bears upon any aspect of a transaction included within a covered plan; or it could refer to the Court's established implied preemption doctrine (as four justices thought it did); or it could refer to those state laws that bear upon matters of central significance to covered employee benefit plans. The problem, of course, is that Congress expressed itself badly, even while purporting to engage in express preemption. This is the paradigmatic case for applying the presumption against preemption: Not only did Congress fail to make it unequivocally clear what state law it meant to preempt, the purpose of the federal law would be enhanced, not undercut, by a construction of federal law that would leave intact the state revocation statute that, in most instances, would have no impact at all upon employee benefit plans covered by ERISA. But the Court would have none of this; rather, a majority composed of those justices who say they are most sensitive to federalism values preferred instead to read Congress's opaque expression as if it were a clear direction.

318. Even Professor Nelson agrees in part with this contention. See Nelson, supra note 278, at 295-98.
F. Erosion of the Independence of State Law

The adequate and independent state grounds doctrine is the clearest demarcation of the independence of state law. As the Court said in *Herb v. Pitcairn*,\(^{319}\) "[t]his Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. . . . Our only power over state judgments is to correct them to the extent they incorrectly adjudge federal rights."\(^{320}\) But federal and state rights are not separate spheres. Of course, states may not diminish federal rights (as, for example, by a constitutional provision prohibiting abortions) but they may provide rights that are more generous than under federal law (as, for example, by a constitutional provision guaranteeing the right to a post-viability abortion). More curious is the Court's increasing tendency to entwine state law with federal constitutional law, a phenomenon that facially has nothing to do with the adequate and independent state grounds doctrine but which, in the application, tends to sap some of the independence of state law.

Let us begin with the modern view of the question of when a state government has sufficiently deprived someone of property to trigger the protection of procedural due process. Such cases as *Board of Regents v. Roth*,\(^{321}\) *Perry v. Sindermann*,\(^{322}\) and *Cleveland Board of Education v. Loudermill*\(^{323}\) establish that "[p]roperty interests are not created by the Constitution [but] are created and . . . defined by existing rules and understandings that stem from an independent source such as state law."\(^{324}\) As a result, the availability of a federal constitutional right is consigned to state discretion. In *Lucas v. South Carolina Coastal Council*,\(^{325}\) the Court created a per se rule by which government regulation of property could be identified as not a taking.

[R]egulations that prohibit all economically beneficial use of land . . . cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must . . . do no more than duplicate the result that could have been achieved . . . by adjacent landowners . . . under the State's law of private nuisance, or by the State under its

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319. 324 U.S. 117 (1945).
320. Id. at 125-26.
322. 408 U.S. 593 (1972).
324. Roth, 408 U.S. at 577.
complementary power to abate nuisances that affect the public generally... 326

As a result, the Court implicitly asserted the power to review a decision by a state’s highest court that some state regulation barring all economically beneficial use of a parcel of land is simply an application of the state’s “background principles” of nuisance law. For example, if on remand the South Carolina Supreme Court had ruled that the Beachfront Management Act, which barred Lucas from building on his barrier island lots, was nothing more than a prosaic application of South Carolina nuisance law, the United States Supreme Court could have reviewed that judgment to determine whether in fact South Carolina’s Supreme Court had interpreted South Carolina law correctly. The Court would claim the power to do so because it would insist that the scope of South Carolina’s nuisance law is inseparable from the federal constitutional issue of whether a taking has occurred. Lest that seem unduly breathtaking, that is precisely the reading given Lucas by the plurality of Chief Justice Rehnquist and Justices Scalia and Thomas in Bush v. Gore. 327 And, of course, in Bush v. Gore that plurality engaged in an extensive review of Florida election law in order to determine whether the Florida Supreme Court’s interpretation of Florida law was fairly consistent with the law that existed on election day 2000 or whether it represented such a marked departure as to constitute new law. The inquiry was necessitated, said the plurality, because Article II, section 1, clause 2 requires each state to appoint presidential electors “in such Manner as the Legislature thereof may direct.” Thus, the meaning of Florida law was transformed from a state issue into a federal constitutional issue, for if the Florida Supreme Court had remade Florida’s election law so as to constitute the appointment of electors by the Florida Supreme Court it would have violated Article II of the federal Constitution. Cynics may sneer and claim that Bush v. Gore was all raw politics and no law 328 but the fact is that three justices engaged in a full-scale review of state law to determine a point of federal constitutional law. This phenomenon is not confined to the extraordinary circumstances of Bush v. Gore but occurs in more prosaic cases as well.

In Rogers v. Tennessee, 329 the Court examined the Tennessee Supreme Court’s retroactive application of its decision abolishing the common law “year and a day rule,” under which a criminal defendant may not be convicted of murder unless the victim had died within a

326. Id. at 1029.
328. See, e.g., ALAN DERSHOWITZ, SUPREME INJUSTICE (2001).
year and a day of the act. The Court concluded that the Tennessee court had not violated due process by its retroactive application of its decision, but to reach that decision the Court examined Tennessee law to conclude that "the Tennessee court's abolition of the year and a day rule was not unexpected and indefensible." That conclusion, in turn, was driven by the Court's determination that "at the time of petitioner's crime the year and a day rule had only the most tenuous foothold as part of the criminal law of the State of Tennessee." The four dissenters also dissected Tennessee law, but for the purpose of demonstrating that the Tennessee Supreme Court had changed the law and that such change constituted a denial of due process because it amounted to a "retroactive creation of crimes" and did not give "'fair warning' of the impending retroactive change."

Whatever the merits of the result in Rogers, the method was not the best. Far better for the values of federalism that the Court accept the Tennessee Supreme Court's reading of Tennessee law and evaluate that reading in terms of its consistency with due process, the ex post facto clause, or both. If Tennessee's independent governance system went awry and the Tennessee Supreme Court violated the federal Constitution it is for the Court to say so, but the antecedent question of the meaning of Tennessee law was for Tennessee to determine.

In Bush v. Gore, the Court avoided this pitfall by relying on a tailor-made theory of equal protection evidently designed to fit this case only. The plurality's theory of the case raised the inefable question of when judicial interpretation of law becomes judicial manufacture of law. Three of the four dissenters in Rogers—Justices Stevens, Scalia, and Thomas—saw the same issue presented there: At what point does common law judging turn into judicial legislating? It is one of the ironies of the term that Justice Stevens would both dissent in Bush v. Gore and join a dissent in Rogers that employed the same method he abhorred in Bush v. Gore. In any case, the question is better left unanswered for there is no answer, or at least no satisfactory, plausible and persuasive answer, and thus no usable answer.

All that the Court has done by tying federal rights to interpretation of state law is to interfere unnecessarily in state governance procedures. How ironic that a Court that has assiduously crafted commerce power doctrine to create a zone of procedural

330. 121 S. Ct. at 1700-01.
331. Id. at 1701. The Court relied in part on earlier cases applying a similar analysis. See, e.g., Bouie v. City of Columbia, 378 U.S. 347 (1964); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958).
332. Rogers, 121 S.Ct. at 1709 (Scalia, J., dissenting).
333. Id.
immunity for states, a zone frankly designed to preserve state governance autonomy, should be so tone deaf to the same theme in other areas of constitutional law. Federalism is not confined to judicial decision about the scope of the enumerated powers of Congress; it is a consideration that is always present at the intersection of state and federal authority, no matter in what quarter of the Constitution that intersection may occur.

**III. Conclusion: The Consequences of Doctrine Changed and Doctrine Left Untouched**

There are good reasons to maintain federalism and sound reasons to think that the judiciary should be involved in the effort. Federalism promotes individual liberty, collective autonomy, and political responsibility through citizen involvement and accountability to citizens. The maintenance of federalism is the responsibility of everyone: the people, through direct action (such as voting) and indirect action (such as informed monitoring of power allocation issues and consideration of the consequences of those issues); the Congress, through real deliberation of the scope of its powers and sensitive consideration of the benefits of decentralization or centralization with respect to any given issue; the states, through education and lobbying of federal actors and responsible use of their own powers; and the courts, through judicial review of federal legislative or executive acts that may transcend the boundaries of the powers delegated to those federal agents of the people.

For a time, federalism seemed to be heading into a realm where it would be almost entirely politically enforceable, but the Court has energetically undertaken the task of supplying judicial enforcement to federalism. The effect of the Court’s recent foray into judicially enforceable federalism may be trifling, or it may be the leading edge of a counter-revolution. It is too soon to be sure.

The commerce clause cases, *Lopez* and *Morrison*, are easily evaded by use of the conditional spending power, or simply by limiting the scope of legislation to activities involving an instrumentality of interstate commerce, although the latter gambit does indeed shrink somewhat the scope of the statutory coverage. The commercial/non-commercial distinction serves only to divide regulatory capacity along a new dimension, but does not wholly deprive the federal government of regulatory capacity. While the commerce cases are significant, they do not strike me as of monumental consequence.

The process immunity cases are as easily avoided by express preemption of state law over a field that is of concern to Congress and within its regulatory authority. Congress might also engage in
conditional preemption, giving states a choice of surrendering regulatory authority altogether or regulating in a fashion that Congress prescribes. To the extent that Congress uses these devices, the process immunity cases will have had the ironic effect of encouraging further elimination of state autonomy, precisely what in his *New York v. United States* dissent Justice White predicted would occur.

By limiting Congress's power to enforce the Fourteenth Amendment to remedial action, the Court has significantly asserted its power. First, in conjunction with *Seminole Tribe* it has significantly trimmed congressional ability to abrogate the states' sovereign immunity, although the states remain exposed to injunctions and to enforcement actions by the United States itself. Second, by tying the scope of the remedial power to the effective level of judicial review of Fourteenth Amendment claims, the Court has made it considerably more difficult for Congress to bar conduct that is presumptively valid under the Fourteenth Amendment and thus subject only to minimal judicial scrutiny. Congress may still do so but its burden of proof of a constitutional violation is now heightened, and the onus is on Congress to demonstrate that the scope of its remedy is well-tailored to fit the violation. No excess remedial statutory cloth should be flapping when the judicial inspection of the legislative tailor occurs. The Court has definitely assumed command, and it will now be difficult to fabricate broad legislative remedies of behavior that the Court sees as constitutionally tolerable. Thus, for example, any attempt by Congress to use its enforcement powers broadly to curb discrimination against gays and lesbians will now be difficult to defend successfully. Rather than tilt at windmills, Congress would do better to fashion pointed legislation that addresses particularly egregious practices that are of dubious validity even under minimal scrutiny. Such advice is practical if not very palatable to those who are impatient to alter mores, and that illustrates the fact that the Court has made its most significant doctrinal change in this area.

Yet, some of the Court's emerging doctrine is very much at odds with a renewed sense of a judicially enforceable federalism. The Court has greatly expanded the scope of implied preemption, both field and conflict preemption, and has done so without much regard for the substantive presumption against preemption. It is more than a little ironic that the Court has created clear statement rules to ensure that Congress speaks with unmistakable clarity when it seeks to invade state sovereignty by using its commerce power but fails to maintain the functional equivalent of a clear statement rule with respect to preemption. The consequences of this heedless abandonment of the presumption against preemption is a vast
increase of federal authority, perhaps on balance much greater (and quite likely of more importance) than the federal authority that was checked in the process autonomy cases or even by the revised commerce doctrine of *Lopez* and *Morrison*.

Moreover, the Court has set about to fuse together state and federal law in some areas in such a manner that the Court can justify its independent review of state law in order to determine whether federal rights have been infringed. At times this will be necessary, but the necessity of this approach in the areas in which the Court has chosen to employ it is dubious at best. Perhaps this is a transitory phenomenon of no great consequence, but it ought to be an occasion for at least some passing reflection.

Finally, it is important to note what the Court has *not* done. The Court has not shrunk the conditional spending power and it has used preemption to avoid clarifying the extent to which states may regulate matters that have an effect on foreign affairs and to avoid a square decision on the free expression rights of advertisers of toxic but legal cigarettes. Until and unless the Court addresses these issues in a localist fashion (especially the conditional spending power) it is far too early to herald a new era of judicially enforceable federalism that is designed to restore vastly greater authority to states.

The Rehnquist Court lacks a coherent federalism philosophy. About the best that can be said for its efforts is that it has revived interest in and attention to the importance of a healthy federalism. But because of its scattershot approach—adding to state autonomy here, taking it away there, restricting federal authority in one moment and adding to it in another—the Court has exposed itself to the charge that judicially enforceable federalism is as hopelessly expedient as the politically enforceable alternative. As Justice Grier said of the Court when it decided *Ex Parte McCardle*:334 “I am ashamed that such opprobrium should be cast upon the Court, and that it cannot be refuted.”335

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334. 74 U.S. 506 (1869).

335. Justice Grier’s charge was not part of an official dissent but was widely reported in the newspapers of the time. *See*, e.g., CHARLES FAIRMAN, 6 OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, PART ONE: 1864-88 at 473-74 (1971); 3 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 204 (1922).