CONSTITUTIONAL FEDERALISM, INDIVIDUAL LIBERTY, AND THE SECURITIES LITIGATION UNIFORM STANDARDS ACT OF 1998

A.C. PRITCHARD*

Constitutional federalism has been called back from its deathbed by the United States Supreme Court. After half a century of deference to the growth of federal power at the expense of the states, the last decade has seen a reversal. In a series of cases beginning in 1991, the Supreme Court has consistently rebuffed Congress's attempts to interfere with state sovereignty.[1] Federalism once again matters to the Supreme Court.[2]

For a time, it appeared that the Court's efforts to protect federalism reflected a broader political current favoring government decentralization. When the Republican Party took control of Congress in 1994, there was talk of returning authority to the states and relieving the burdens that the federal government had imposed on them.[3] Congress even passed the Unfunded Mandates Act, erecting certain procedural obstacles to federal legislation

* Assistant Professor, University of Michigan Law School; Council of Scholars, Foundation for Economic Education. J.D., University of Virginia; M.P.P., University of Chicago. Email: acplaw@umich.edu. I would like to thank Evan Caminker, Ellen Katz, Joan Larsen, and Ronald Mann for helpful comments and discussion on the ideas presented here. Lacey Calhoun provided helpful research assistance. The Cook Fund of the University of Michigan Law School provided financial support for this project. Full disclosure: the author was previously Senior Counsel in the Securities and Exchange Commission's Office of General Counsel, and in that capacity assisted in preparing the SEC's response to the bills that eventually became the Securities Litigation Uniform Standards Act. The SEC, as a matter of policy, disclaims responsibility for any private publication or statement by any of its employees. The views expressed herein are those of the author and do not necessarily reflect the views of the Commission or of the author's former colleagues on the staff of the Commission. *See* 17 C.F.R. § 200.735-4(e)(2) (1998).

1. *See* Alden v. Maine, 527 U.S. 706 (1999); College Sav. Bank v. Florida Prepaid Postsecondary Educ. Exp. Bd., 527 U.S. 666 (1999); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999); Printz v. United States, 521 U.S. 898 (1997); United States v. Lopez, 514 U.S. 549 (1995); New York v. United States, 505 U.S. 144 (1992); Gregory v. Ashcroft, 501 U.S. 452 (1991). These cases are discussed below, at *infra* notes 78-173 and accompanying text.

2. *See* Steven G. Calabresi, *Textualism and the Countermajoritarian Difficulty*, 66 GEO. WASH. L. REV. 1373, 1379 (1998) ("Today, judicial protection of constitutional federalism is more secure than it has been at any time since the New Deal, although the Court majority committed to constitutional federalism remains a very narrow one.").

3. *See* Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2238 (1998) ("[T]he 1994 elections appeared to give a mandate to the Republican Contract with America and its promises to return power to the states"); Richard W. Painter, *Responding to a False Alarm: Federal Preemption of State Securities Fraud Causes of Action*, 84 CORNELL L. REV. 1, 3 (1998) ("Ironically, the Congress that now preempts these state [securities fraud] remedies has been committed to federalism in almost every other area of legislation.").

This Article proceeds in four parts. Part I provides background on the historical development of constitutional federalism, the Supreme Court's decisions in this area, and the apparent demise of constitutional limits on federal power. Part II then reviews the Court's revival of constitutional federalism over the last decade. Based on this review, I argue that the Supreme Court's current federalism doctrine can be understood as a "constrained libertarianism" that attempts to use constitutional structure as a check on government interference with individual liberty. In this model, states are respected in our constitutional system because of the counter-balance that they provide to federal power. State autonomy is valuable because it discourages excessive federal regulation.[15] The Court's constitutional federalism is constrained, however, by its earlier concession of a general police power to the Congress. The Court essentially abdicated its responsibility to restrain Congress's power at the time of the New Deal. That abdication severely constrains the Court's constitutional federalism today.

Part III focuses on the Court's decisions applying the principles of constitutional federalism to state courts. It compares Congress's greater authority over state courts with the limited power that Congress wields over state legislatures and executives, and explores the limits of that authority over state courts. Part IV provides background to Congress's enactment of the Uniform Act and explains why it adopted the form of preemption that it did. It then applies the constrained libertarianism theory of constitutional federalism developed in Parts II and III of this Article to the Uniform Act.

I conclude that the Uniform Act is consistent with principles of constitutional federalism because its preemption results in less, rather than more, government interference with private conduct. That this unusual form of conditional preemption eliminates a state procedure, rather than a substantive law, should make no difference in the constitutional analysis. This preemption enhances liberty because it eliminates a secondary, and potentially inconsistent, level of government regulation. Individuals are more free if they have to deal with one level of government, rather than two, in managing their affairs. Having ceded to Congress the complete authority to regulate interstate securities markets, and thereby affording Congress the additional authority to restrict state courts in this area, the Uniform Act

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15. I do not attempt to provide a normative justification for the judicial protection of liberty here. While some readers may disagree with this normative proposition, discussion of the point would make an excessively long article still longer. Those interested should see RANDY E. BARNETT, THE STRUCTURE OF LIBERTY (1998); RICHARD A. EPSTEIN, PRINCIPLES FOR A FREE SOCIETY (1998). For those who disagree with protection of liberty as a normative matter, my "constrained libertarian" interpretation may help make sense of the Court's occasionally confusing constitutional federalism jurisprudence.

enhances individual liberty because eliminating state regulation enhances individuals' choices. State regulation cannot reduce, but can only supplement, the baseline of federal regulation. Eliminating state regulation reduces the overall amount of government. Therefore, the constrained libertarianism theory supports a broad preemption power. Finally, the Conclusion offers some thoughts on Congress's preemptive power over state courts in a world where markets are increasingly operating globally, rather than nationally.

I. CONSTITUTIONAL FEDERALISM

A. Origins

Federalism owes its constitutional status in our political system more to practical politics than to political theory. When the Framers convened in Philadelphia in 1787, the states were established entities, with roots going deep into the colonial era. The national government, by contrast, could trace its roots back no further than a decade, to the convening of the first Continental Congress. Worse yet, the national government had quickly established a reputation for being ineffective under the Articles of Confederation, unable to accomplish those governmental functions that were more effectively done at the national level.[16] Given this background, preservation of the states' autonomy was not merely a useful political innovation, but necessary for the viability of any constitutional proposal.[17] Any plan that subordinated the states to mere administrative units of the federal government would have met a quick death when sent out to the states for ratification. Thus, the states retained "a residuary and inviolable sovereignty" under the new Constitution, "no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere."[18]

James Madison and the other authors of The Federalist Papers, all skilled rhetoricians, transformed this necessity into a virtue:

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the

16. *See* Jack N. Rakove, *The First Phases of American Federalism*, *in* COMPARATIVE CONSTITUTIONAL FEDERALISM: EUROPE AND AMERICA 1, 5-6 (Mark Tushnet, ed., 1990).

17. The Constitutional Convention explicitly rejected proposals by Hamilton and others to eliminate the states quasi-sovereign status. *See* John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1367-1368 (1997).

18. The Federalist No. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961)

> portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.[19]

This concept of "dual sovereignty"—separate and distinct spheres of national and state authority—meant that states would be vigilant monitors of attempts by the national government to expand its authority beyond those powers enumerated in the Constitution. Any addition to federal authority would imply a subtraction from state authority.[20] Thus, the constitutional federalism of dual sovereignty enlisted the states as guardians of individual liberty against federal encroachment. At the same time, competition among the states and constitutional limits on state power would restrict state encroachments on individual liberty.[21]

Hamilton argued that the states would protect liberty in another fashion. He saw the states as focal points for organizing the people's opposition to overreaching by the national government.

> Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as an instrument of redress.[22]

While Madison and Hamilton agreed that the states would help protect liberty, they foresaw different mechanisms by which the states could act. Madison's argument assumes legal limits on the federal government's power, perhaps enforceable in court, while Hamilton's argument seems to rely on

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19. The Federalist No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961).

20. *See* H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 654 (1993) ("Both sides to the debate were hampered by their shared assumption that 'sovereignty' was a unitary and exclusive quality, capable neither of division nor of joint tenancy. Sovereignty meant control, and the 'logic of the doctrine of sovereignty required either the state legislatures or the national Congress to predominate.'").

21. *See* John McGinnis, *The Boundaries of Legislative Power*, 13 J.L. & POL. 588, 589 (1997) ("[T]he federal government was restrained by the Constitution, and the states were restrained by competition that the federal government maintained through keeping open the avenues of trade and investment.").

22. The Federalist No. 28, at 181 (Alexander Hamilton) (Clinton Rossiter ed., 1961). *See also* Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle*, 111 HARV. L. REV. 2180, 2219 (1998) ("Particularly given judicially enforceable traditions of regular and free voting and of a free press, states need not threaten the use of military force in order to provide structures for development and organized expression of countervailing positions to those of the national government.").

the political process, fueled by popular pressure. This difference was not resolved at the time,[23] but has played a crucial role in disputes over the role of constitutional federalism in the late Twentieth Century.

B. The Decline of Dual Sovereignty

This notion of dual sovereignty prevailed for many years after the Constitution was adopted, restraining both the federal and state governments.[24] But the premise of the dual sovereignty argument, that state and federal authority were separate, rather than overlapping, was eventually exposed as its weakest link. Dual sovereignty began to fray as the national government sought to expand its authority in the post-Civil War era. The 13th, 14th and 15th Amendments explicitly shifted the line between state and federal authority giving Congress a variety of tools with which to protect the civil liberties of the newly-freed slaves from state encroachment.[25]

The more fundamental expansion of national authority was not reflected in any constitutional amendment, but was instead adversely possessed as a result of the federal government continually pushing the boundaries of its authority. Technological advances of the Nineteenth Century made it possible to organize business on a national level in many industries.[26] Consequently, national politicians began to see opportunities to extract rents from those industries. Beginning with the Interstate Commerce Act's cartelization of the railroad industry,[27] followed soon thereafter by the Sherman Act's rent extraction from technologically innovative national producers such as Standard Oil,[28] Congress began to look for ways to redistribute wealth generated by the increasingly national economy.

At the same time, states looked to create or protect rents by protecting local producers from out-of-state competitors. The field of securities laws

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23. *See* Yoo, *supra* note 17, at 1381-91 (providing history of debate over protections of state sovereignty).

24. *See* Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1491 (1994) ("There was, in fact, a time when the Supreme Court flirted with the idea of establishing absolute, mutually exclusive domains for the state and federal governments.").

25. *See* Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447, 1464 (1995) ("Whatever viability the Framers' libertarian theory had for federalism originally, it has been overtaken by the rights-based libertarian approach followed since the Civil War.").

26. *See* Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 369 (1997) ("Rapid advances in communications, transportation, and industrialization brought us together as a nation and forced reconsideration of the rules by which we governed ourselves.").

27. *See* George W. Hilton, *The Consistency of the Interstate Commerce Act*, 9 J.L. & ECON. 87, 87-99 (1966).

28. Standard Oil Co. v. United States, 221 U.S. 1 (1911).

provides an apt example. Beginning in the early part of the Twentieth Century, states adopted "blue sky" laws imposing disclosure and other regulatory hurdles on businesses seeking capital from investors in those states.[29] These barriers to entry protected well-organized local consumers of capital, primarily local banks and farmers, from competition, thus keeping their price of capital low.[30]

Both rent creation and rent extraction require the power to regulate. Rent creation requires regulation to exclude competitors, while rent extraction requires a credible threat of regulation.[31] These conflicting demands for regulatory authority soon led to conflict between state and federal power.[32] The line between state and national authority was being pushed from both directions, and the Supreme Court struggled with the effort to draw it. Even in the face of the national economic crisis of the Great Depression, the Court endeavored to maintain a strict separation between the spheres of state and national power.[33] Franklin Roosevelt's threat to the Court's independence, however, forced the Court to fold, eventually abandoning its efforts to limit Congress's power to regulate interstate commerce.[34] Indeed, the Court construed the Commerce Clause, in conjunction with the Necessary and Proper Clause, so broadly that Congress was allowed to regulate conduct that

29. Kansas adopted the first blue sky law in 1911. *See* THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION 367 (2d ed. 1990).

30. Jonathan R. Macey & Geoffrey P. Miller, *Origin of the Blue Sky Laws*, 70 TEX. L. REV. 347, 351 (1991) ("State banking regulators, interested in protecting and expanding their regulatory turf and in advancing the financial interests of banks under their supervision . . . [as well as] farmers and small business owners who saw the suppression of securities sales as a useful means for increasing their own access to bank credit.").

31. *See* Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101 *passim* (1987).

32. *See* Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1488 (1987) ("Constitutional limits expressed in terms of interstate consequences lead to different results when applied to railroads than when applied to a horse and buggy. As the size of the market has expanded, so has federal power.").

33. *See* United States v. Constantine, 296 U.S. 287, 296 (1935) (rejecting attempt by "the United States [to] impose cumulative penalties above and beyond those specified by State law for infractions of State's criminal code by its own citizens. . . . The concession of such a power would open the door to unlimited regulation of matters of state concern by federal authority."); Hopkins Fed. Sav. & Loan Ass'n v. Cleary, 296 U.S. 315, 338 (1935) (setting aside, as an "illegitimate encroachment by the government of the nation upon a domain of activity set apart by the Constitution as the province of the states," federal law allowing state-chartered S&L's to switch to a federal charter).

34. *See* McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631, 1670-71 (1995) (arguing that the Court initially resisted the New Deal in hopes of generating a political backlash, only to back down when it became clear that the New Deal had strong support within Congress and the electorate); *but see* Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201 *passim* (1994) (arguing that the judicial loosening of restrictions on Congress's power was more gradual than is typically thought).

was neither commerce *nor* interstate.[35] By cumulating individual instances of regulated activity, Congress was effectively given the equivalent of a general police power.[36] State sovereignty placed no limit on that power.[37] Distinct spheres of allocated power could no longer serve as the basis for the conclusion that the federal government could not interfere with state authority.

C. The Era of Congressional Dominance

Despite the predictions of Madison and Hamilton, the states did not rise up to protest the New Deal power grab by the federal government. Two factors contributed to silence the states. First, the states' voice in federal government largely had been eliminated by the Seventeenth Amendment, which transferred the power to choose Senators from state legislatures to state voters.[38] The result was to make Senators answer primarily to national, rather than local, interest groups.[39] The second factor was the Court's concession to state level rent seeking. At the same time that the Court was sanctioning Congress's assumption of a general police power, it was freeing the states' hands to extract rents from business and industry.[40] Only a generation before, the Court had rejected state attempts to cartelize industry as inconsistent with the freedom of contract guaranteed by the Due Process

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35. *See* Wickard v. Filburn, 317 U.S. 111, 127-29 (1942) (upholding federal regulation of wheat grown for home consumption). *See also* Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 807-11 (1996) (discussing the role of the Necessary and Proper Clause in the expansion of federal power).

36. *See* Perez v. United States, 402 U.S. 146, 154 (1971) ("Where the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class.").

37. *See, e.g.*, United States v. Darby, 312 U.S. 100, 124 (1941) (the Tenth Amendment's reservation of power to the states reflects "but a truism that all is retained which has not been surrendered.").

38. U.S. CONST. amend. XVII.

39. *See* Todd J. Zywicki, *Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment*, 73 OR. L. REV. 1007, 1039-41 (1994). *See also* Garcia v. San Antonio Metro Transit. Auth., 469 U.S. 528, 565 n.9 (1985) (Powell, J., dissenting) (arguing that members of Congress answer to national, rather than state, constituencies); Calabresi, *supra* note 2, at 1389

> Senators no longer represent the states as institutions; they represent popular majorities in each State *and* national factions that give senators money to advertise on television in their respective states. Many small state senators from both political parties raise most of their campaign funds from out of state. These senators thus are often more beholden to national corporate and labor political action committees than they are to the voters who nominally elect them.

Id.

40. *See* Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 506-32 (1997).

Clause.[41] The New Deal Court, however, abandoned the effort to protect individuals from wealth redistribution by the states.[42] That Court also tolerated states' efforts to regulate what earlier Courts had held to be interstate commerce, and thus, the province of the federal government.[43] Finally, the New Deal Court overruled *Swift v. Tyson*,[44] thereby making state supreme courts the final arbiters of state common law.[45] This freed state supreme courts to use the common law as a tool of social policy. Thus, the states were given a far greater domain in which to seek rents, at both the legislative and judicial level, to compensate for occasional federal incursions into what had previously been the states' exclusive territory.

The expansion of national power inevitably led to a narrowing of residual state subject matter authority, and the Court consistently sided with the national government over the states.[46] The Court soon abandoned any real pretense of constraining Congress's spending power,[47] and left Congress free to attach conditions to funds that states receive when administering a federal program.[48] The Court also gave Congress broad authority to preempt state law, stating that "any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause."[49] These twin

41. *See* Lochner v. New York, 198 U.S. 45 (1905).

42. *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

43. *See* Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125, 167-68 (discussing the narrowed scope of preemption brought on by the New Deal Court).

44. 41 U.S. (16 Pet.) 1 (1842).

45. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). "Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts." *Id*. at 78.

46. In the few cases that arose before this time the states received a more sympathetic hearing. *See* Coyle v. Smith, 221 U.S. 559, 579 (1911) (holding that Congress could not dictate the location of Oklahoma's state capital after it had been admitted as a state).

47. *See* South Dakota v. Dole, 483 U.S. 203, 207 (1987) ("[O]bjectives not thought to be within Article I's 'enumerated legislative fields', may nevertheless be attained through the use of the spending power and the conditional grant of federal funds."); Lessig, *supra* note 43, at 188-190 (arguing that the Court's rules on Congressional spending impose no constraint at all).

48. *See* Bell v. New Jersey, 461 U.S. 773, 790 (1983) ("Requiring States to honor the obligations voluntarily assumed as a condition of federal funding before recognizing their ownership of funds simply does not intrude on their sovereignty."). While Congress is free to impose conditions on federal spending, the states are free to refuse the money if the conditions are too onerous. The result is bargaining between state and federal officials over the terms of the grant. *See* Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 861-65 (1998) (discussing the constitutionality of conditions on federal grants). On the subject of congressionally placed conditions on the receipt of federal funds, see generally Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911 (1995); Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 SUP. CT. REV. 85.

49. Perez v. Campbell, 402 U.S. 637, 652 (1971). The development of the Court's preemption doctrine is discussed in Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767,

powers of preemption and conditional spending give Congress tremendous leverage over state regulatory authority.[50]

Other aspects of state sovereignty were brought under Congress's discretion in the post-New Deal era. When New York State went into the business of selling bottled water, the Court found no impediment to Congress's imposing an excise tax on the water, as long as it imposed the same tax on water sold by private parties.[51] Thus, while New York was protected from being singled out by the federal government, it could not assert immunity from taxation based solely on its status as an independent sovereign.[52]

D. The Death of Constitutional Federalism?

A series of cases from the 1980s appeared to signal the ultimate demise of federalism limits on Congress's power. The first is *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*[53] The Surface Mining Control and Reclamation Act of 1977 ("Reclamation Act") established national policy for the control of the environmental effects of strip mining.[54] Under the Reclamation Act, "any State wishing to assume permanent regulatory authority over the surface coal mining operations . . . within its borders must submit a proposed permanent program to the Secretary [of the Interior]."[55] The Secretary was to approve the program only if the state legislature had enacted laws reflecting congressionally adopted environmental standards. If the state failed to submit a program, the Secretary was directed to develop a

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785-807 (1994).

50. The federal courts also have substantial power over the states, as it is a "settled principle that federal courts may enjoin unconstitutional action by state officials." Puerto Rico v. Branstad, 483 U.S. 219, 228 (1987). As states can only act through their agents, this is a substantial constraint on state regulation.

51. *See* New York v. United States, 326 U.S. 572, 582 (1946) ("[S]o long as Congress generally taps a source of revenue by whomsoever earned and not uniquely capable of being earned only by a State, the Constitution of the United States does not forbid it merely because its incidence falls also on a State.").

52. *See* South Carolina v. Baker, 485 U.S. 505, 525 (1988) (upholding non-discriminatory tax imposed on income from bonds issued by state, concluding that: "States have no constitutional entitlement to issue bonds paying lower interest rates than other issuers."). This rule applies even if the tax applies to "traditional" governmental functions. *See also* Massachusetts v. United States, 435 U.S. 444 (1978) (upholding application of a general tax on a civil aircraft to helicopters used by state police).

53. 452 U.S. 264 (1981).

54. *See* Surface Mining Control and Reclaimation Act of 1977, 30 U.S.C. §§ 1201-1328 (1994 & Supp. III 1997).

55. *Hodel*, 452 U.S. at 271.

permanent federal regulatory program for that state.[56] Thus, states were allowed to regulate in the area only if the state legislature enacted federal policy as state law.

Virginia challenged this aspect of the Reclamation Act as violating the Tenth Amendment. The Court rejected the claim, stating that:

> [T]he states are not compelled to enforce the . . . standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever. If a State does not wish to submit a proposed permanent program that complies with the Act and implementing regulations, the full regulatory burden will be borne by the Federal Government. Thus, there can be no suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.[57]

As long as Congress did not *require* the states to regulate, the Court saw no difficulty with Congress dictating how the states regulated, if the states chose to do so. Given that Congress had the greater power to preempt state regulation altogether, no constitutional problem arose when it exercised the lesser power to specify the mode of state regulation.[58] States would regulate according to the federal standards only if they had an independent policy interest in doing so. Otherwise, regulation would be a federal responsibility.

Congress's power to control state regulation of private parties was confirmed emphatically the following term in *FERC v. Mississippi*.[59] The Public Utility Regulatory Policies Act of 1978 ("PURPA")[60] required state regulators to "'consider' the adoption and implementation of specific 'rate design' and regulatory standards;" follow certain notice and comment procedures in considering the proposed federal standards; and resolve disputes among regulated parties arising out of the implementation of those standards.[61] Mississippi challenged the law as exceeding Congress's Commerce Clause power and violating the Tenth Amendment.[62] The Court quickly dismissed Mississippi's argument that the state's "governance of commerce"[63] was beyond the reach of the Commerce Clause. The state's

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56. *See id.* at 272.
57. *Id.* at 288.
58. *See id.* at 290.
59. 456 U.S. 742 (1982).
60. Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (codified as amended in scattered sections of 16 U.S.C.).
61. 456 U.S. at 746-48.
62. *See id.* at 752.
63. *Id.* at 755.

claim was undercut by Congress's finding that the use of electric power affected interstate commerce, and the Court found that this finding was not irrational.[64] The Court's long-standing deference to federal power determined this outcome.

The Tenth Amendment challenge required more substantial discussion. The Court described Congress's "attempts to use state regulatory machinery to advance federal goals" as raising "an issue of first impression."[65] The enlistment of state utility commissioners to resolve disputes among private parties was unobjectionable because "[d]ispute resolution of this kind is the very type of activity customarily engaged in by the Mississippi Public Service Commission."[66] The principle that state courts could not discriminate against federal claims was held to apply to state agencies as well, as long they were given adjudicative responsibilities under state law.[67] The requirement that states consider rate making standards and follow certain procedures in doing so was supported by the conditional preemption rationale that resolved *Hodel*:

> [I]f a State has no utilities commission, or simply stops regulating in the field, it need not even entertain the federal proposals.
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> . . . Congress could have pre-empted the field, at least insofar as private rather than state activity is concerned; PURPA should not be invalid simply because, out of deference to state authority, Congress adopted a less intrusive scheme and allowed the states to continue regulating in the area on the condition that they *consider* the suggested federal standards.[68]

Once again, Congress was not compelling the state to regulate, only imposing certain conditions on states that chose to regulate. The Court attached no constitutional significance to the fact that Congress had made no provision for regulating the utilities if the states failed to adopt the federal standards, deeming any coercion reflected in the choice between abandoning

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64. *See id.* at 755-58.
65. *Id.* at 759.
66. *Id.* at 760.
67. *See id.* at 760-61.

> That the Commission has administrative as well as judicial duties is of no significance. Any other conclusion would allow the States to disregard both the preeminent position held by federal law throughout the Nation, and the congressional determination that the federal rights granted by PURPA can appropriately be enforced through state adjudicatory machinery.

Id. On the principle of non-discrimination by state courts, see *infra* at notes 190-195 and accompanying text.

68. *Id.* at 764-65.

regulation altogether or following federal standards constitutionally irrelevant.[69] The weight of the state interest in regulating a particular area apparently did not enter into the constitutional calculus.

The culmination of a half-century of congressional dominance over the states came in *Garcia v. San Antonio Metropolitan Transit Authority*.[70] Overturning a decision only a decade old that had appeared to give new life to the Tenth Amendment,[71] the Court held that Congress was free to impose the same rules on state governments that it imposed on private actors. Given that the Court had long since abandoned any federalism limits on what Congress could constitutionally impose on private actors, this concession of power opened the door to dramatic incursions into state sovereignty. States were left to protect themselves, like individuals, through the political process.[72] The Court took comfort in the demonstrated ability of the states to garner their share of federal revenues and to gain exemptions from a variety of otherwise generally applicable laws.[73] Although the states had not obtained an exemption from the statute at issue, the burden was not onerous. The Court observed that the state agency "faces nothing more than the same minimum-wage and overtime obligations that hundreds of thousands of other employers, public as well as private, have to meet."[74] Lobbying, not lawsuits, was to be the bulwark of federalism.[75] The dissenters fretted that the decision signaled the death of constitutional federalism and the independent sovereignty of the states.[76]

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69. *See id.* at 766.

70. 469 U.S. 528 (1985).

71. *See* National League of Cities v. Usery, 426 U.S. 833 (1976).

72. *See Garcia*, 469 U.S. at 552. "State sovereign interests . . . are more properly protected by the procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Id.*

73. *See id.* at 552-54.

74. *Id.* at 554.

75. *See id.* at 556 ("[T]he principal and basic limit on the federal commerce power is that inherent in all congressional action–the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated.").

76. *See id.* at 579 (Powell, J., dissenting) ("Although the Court's opinion purports to recognize that the States retain some sovereign power, it does not identify even a single aspect of state authority that would remain when the Commerce Clause is invoked to justify federal regulation."); *Id.* at 588 (O'Connor, J., dissenting) ("If state autonomy is ignored in assessing the means by which Congress regulates matters affecting commerce, then federalism becomes irrelevant simply because the set of activities remaining beyond the reach of such a commerce power 'may well be negligible.'"). Commentators have agreed. *See, e.g.*, William W. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709 (1985).

II. FEDERALISM REVIVED

Despite the seeming death knell sounded in *Garcia*, the 1990s have seen a revival of the judiciary's role in policing congressional incursions into the sovereignty of the states. Two features of the Court's decisions reviving constitutional federalism—one normative, the second doctrinal—are noteworthy. First, the decisions repeatedly invoke liberty as the goal of constitutional federalism. The Court's explanations, however, tend to revolve around accountability, which has only a tenuous connection to liberty. The second feature of the Court's constitutional federalism decisions is that they go to great lengths to establish their consistency with earlier doctrine. This respect for *stare decisis* creates a tension in the Court's doctrine, as it continues to insist that dual sovereignty puts limits on the power of the federal government, but nonetheless defers to Congress's power over individuals.

Notwithstanding the Court's deference to Congress, the Court's constitutional federalism decisions do help to enlist the states in preserving liberty against overreaching by the federal government. Those decisions fall into four categories: (1) limits on Congress's power; (2) the clear statement rule; (3) commandeering; and (4) sovereign immunity. The last three categories do not limit the federal government's power directly, but instead limit indirectly by giving the states clear incentives and the means to resist attempts to expand federal power. Thus they combine Madison and Hamilton's vision of the role of the states in preserving liberty.[77]

A. Normative and Doctrinal Justification

1. Constitutional Federalism and Individual Liberty

The Court's efforts to explain the relationship between constitutional federalism and individual liberty have been somewhat vague.[78] For example, Justice Kennedy, in his concurring opinion in *United States v. Lopez*, argued the following:

> Though on the surface the idea may seem counterintuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one. . . .

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77. For a discussion of Madison and Hamilton's vision, see *supra* notes 19-23 and accompanying text.

78. *See* Friedman, *supra* note 26, at 319 ("The values of federalism are invoked regularly in much the same way as 'Mom' and 'apple pie': warm images with little content.").

> The theory that two governments accord more liberty than one requires for its realization two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States. If, as Madison expected, the [f]ederal and [s]tate [g]overnments are to control each other, and hold each other in check by competing for the affections of the people, those citizens must have some means of knowing which of the two governments to hold accountable for the failure to perform a given function. . . . Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory. The resultant inability to hold either branch of the government answerable to the citizens is more dangerous even than devolving too much authority to the remote central power.[79]

So, while Justice Kennedy claims liberty as his ultimate normative justification for constitutional federalism, his argument is couched much more in terms of accountability. Justice Kennedy leaves it unclear how accountability, absent meaningful limits on federal power, will preserve freedom. In particular, he does not explain how accountability to the *electorate* can be translated into freedom for *individuals*. Kennedy suggests that clear lines of authority will encourage the electorate to sanction the federal government for overreaching. But the point is hardly self-evident; perhaps greater accountability to the voters will lead to more government regulation, rather than less, as politicians redouble their efforts to pander to interest groups. Democracy may be compatible with individual liberty, but the concepts are far from equivalent.[80] If the protection of liberty is the goal, the political process seems a poor substitute for the right of an individual or a State to seek a federal court order enjoining a power grab by the federal government.[81]

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79. *See Lopez*, 514 U.S. at 576-77 (citations omitted).

80. For a thoughtful discussion of the relationship between the two, see Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 571-78 (1998).

81. Kennedy again invoked accountability in a later case protecting state sovereign immunity: "[I]f 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." *See* Alden v. Maine, 527 U.S. 706 (1999). Political accountability was in turn justified by the court as "essential to our liberty and republican form of government." *Id.* As in his prior effort, however, Kennedy did not further elaborate on the supposed connection.

Justice O'Connor, perhaps the Court's staunchest defender of federalism, has also invoked liberty as the goal of constitutional federalism, but like Justice Kennedy, her account relies much more heavily on accountability. In *Gregory v. Ashcroft*,[82] Justice O'Connor was realistic about the limits that the Court could place on congressional aggrandizement:

> One fairly can dispute whether our federalist system has been quite as successful in checking government abuse as Hamilton promised, but there is no doubt about the design. . . . [T]o be effective, there must be a proper balance between the States and the Federal Government. These twin powers will act as mutual restraints only if both are credible. In the tension between federal and state power lies the promise of liberty.
>
> The Federal Government holds a decided advantage in this delicate balance: the Supremacy Clause. As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States. Congress may legislate in areas traditionally regulated by the States. This is an extraordinary power in a federalist system.[83]

Despite the difficulties in placing limits on federal power, O'Connor argued that dual sovereignty offered a number of advantages: (1) "a decentralized government that will be more sensitive to the diverse needs of a heterogenous society;" (2) "opportunity for citizen involvement in democratic processes;" (3) "more innovation and experimentation in government;" and (4) "it makes government more responsive by putting the States in competition for a mobile citizenry."[84] The first three purposes, while perhaps normatively justifiable in their own right, turn on accountability, not liberty, as they go to government's accuracy in registering citizen preferences and efficiency in translating those preferences into policy. Only the last of these purposes potentially serves the cause of individual liberty. Citizens of states with overreaching governments (e.g., Massachusetts) will flee to more laissez-faire regimes (e.g., New Hampshire). But this purpose protects

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82. 501 U.S. 452 (1991).

83. *Gregory*, 501 U.S. at 459-60 (citation omitted). The Court's realism about its ability to restrain Congress is reflected in an earlier concurrence by Justice Rehnquist:

> It is illuminating for purposes of reflection, if not for argument, to note that one of the greatest 'fictions' of our federal system is that the Congress exercises only those powers delegated to it, while the remainder are reserved to the States or to the people. . .. [O]ne could easily get the sense from this Court's opinions that the federal system exists only at the sufferance of Congress.

Hodel, 452 U.S. at 307 (Rehnquist, J., concurring).

84. *Gregory*, 501 U.S. at 458.

individuals only from state interference, not federal.[85]

Encouraging competition among the states stands in considerable tension with the Court's previous identification of the prevention of "destructive interstate competition" as "a traditional role for congressional action under the Commerce Clause."[86] When Congress regulates, it eliminates (or at least reduces) state competition, whether that competition advanced or diminished individual liberty. The Court makes no effort to distinguish which of the two effects dominates, but instead defers to congressional power.[87] And that power has been invoked more frequently to reduce the range of individual choice.[88] Given the acceptance by both Kennedy and O'Connor of this broad

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85. *See* Jonathan Rodden & Susan Rose-Ackerman, *Does Federalism Preserve Markets?* 83 VA. L. REV. 1521, 1558 (1997) ("Competitive subnational governments without a strong central government have little incentive to engage in redistribution to the poor."). Thus, efforts at redistribution will be channeled toward the federal level. *See* Kramer, *supra* note 24, at 1549-50.

> [T]he ability to limit immigration, coupled with the power to regulate the economy, makes it easier for Congress to take equity into account alongside efficiency. As a result, political pressures for redistribution tend to get channeled to the national level–a movement seen today in areas like taxation, welfare benefits, health, and even education.

Id. There is room for doubt, however, whether these redistributions will be from the rich to the poor. *See* DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 79 (1995). [T]he ability to achieve "redistribution of the nation's wealth"—one widely heralded advantage of national over state authority—is more likely than not to take the form of redistribution from the less organized to the more concentrated, better financed, more cohesive groups. The history of national subsidies in a wide range of situations supports the validity of this view. *Id.* The effect of that competition among the states is disputed. *Compare* Lucian Arye Bebchuk & Allen Ferrell, *Federalism and Corporate Law: The Race To Protect Managers from Takeovers*, 99 COLUM. L. REV. 1168, 1173-74 (1999) (arguing that competition among states for corporate charters encourages laxity in regulation); Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435, 1435 (1992) (arguing that "state competition is likely to fail with respect to certain important issues that state corporate law has traditionally governed") *with* Robert Daines, *Does Delaware Law Improve Firm Value?* (1999) (unpublished manuscript) (finding empirical evidence that Delaware law adds value); Mary E. Kostel, Note, *A Public Choice: Perspective on the Debate over Federal Versus State Corporate Law*, 79 VA. L. REV. 2129, 2130 (1993) (arguing that "interest groups are as likely to skew legislation toward management interests—and away from shareholder's interests—at the federal level as at the state level").

86. *Hodel*, 452 U.S. at 282.

87. *See e.g.*, South Carolina v. Baker, 485 U.S. 505, 513 (1988) ("[N]othing in *Garcia* or the Tenth Amendment authorizes courts to second-guess the substantive basis for congressional legislation.").

88. *See* Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 410-11 (discussing federal government's advantage in facilitating wealth transfers). For this reason, states may in fact prefer to have their discretion eliminated by uniform federal policies. *See* Evan H. Caminker, *State Sovereignty and Subordinancy: May Congress Commandeer State Officers To Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1012 (1995).

> [D]ecentralized decisionmaking may even lead a state to eschew policies that it truly desires for fear that they will influence a mobile citizenry and commercial-industrial base to react in ways that undermine local welfare. A state might decide not to adopt regulatory standards that entail substantial costs for industry and obstacles to economic development out of concern that the

federal power, we can question whether their invocation of liberty as the goal of constitutional federalism is genuine, or simply a rhetorical flourish meant to make accountability seem more attractive.

Justice O'Connor's focus seems to be limiting *abuse* of power, rather than limiting power per se. She identified "the principal benefit of the federalist system" as "a check on abuses of government power."[89] She analogized to the separation of powers at the federal level, relying upon The Federalist as her authority for the proposition that the division of power preserves freedom, without specifying just how that mechanism might work.[90] Justice O'Connor urged this point again in *New York v. United States*[91] with no greater specificity.[92] Indeed, her vagueness on this point led the dissent to dismiss the invocation of liberty as resort "to generalities and platitudes about the purpose of federalism being to protect individual rights."[93]

Justice Scalia also relied on liberty as a normative justification in *Printz v. United States*.[94] He argued that the "separation of the two spheres is one of the Constitution's structural protections of liberty. . . . The power of the Federal Government would be augmented immeasurably if it were able to impress into its service–and at no cost to itself–the police officers of the 50 States."[95] Prohibiting the federal government from conscripting the states limits government because it precludes Congress from going off budget to fund its agenda. Scalia's reference to the states' police powers suggests that commandeering might also be an end-run around the Constitution's limitation of Congress to enumerated powers. Both of these concerns are consistent with a liberty-enhancing vision of constitutional federalism.

In the Court's recent sovereign immunity cases, Justice Scalia once again

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> welfare gains to state residents from the regulation will be more than offset by the exit of capital to other states imposing less rigorous standards.

Id.

89. *Gregory*, 501 U.S. at 458.

90. *See id.* at 458-59 (citing both The Federalist No. 28 (Hamilton) & No. 51 (Madison). For a discussion of The Federalist No. 28 and No. 51, see *supra* notes 19-22 and accompanying text.

91. 505 U.S. 144 (1992).

92. *See New* York, 505 U.S. at 181.

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

Id. (quoting Coleman v. Thompson, 501 U.S. 722, 759 (Blackmun, J., dissenting)).

93. *Id.* at 206 (White, J., concurring in part and dissenting in part).

94. 521 U.S. 898 (1997).

95. *Printz*, 521 U.S. at 921.

invoked individual liberty. He did not spare his sarcasm in taking the dissenters to task for espousing a concept of liberty—participation in democratic decision-making—unknown to the framers of the Constitution:

> The proposition that "the protection of liberty" is most directly achieved by "promoting the sharing among citizens of governmental decision-making authority" might well have dropped from the lips of Robespierre, but surely not from those of Madison, Jefferson, or Hamilton, whose north star was that governmental power, even—indeed, especially—governmental power wielded by the people, *had to be dispersed and countered*. And to say that the degree of dispersal to the States, and hence the degree of check by the States, is to be governed by Congress's need for "legislative flexibility" is to deny federalism utterly. . . . Legislative flexibility on the part of Congress will be the touchstone of federalism when the capacity to support combustion becomes the acid test of a fire extinguisher. Congressional flexibility is desirable, of course—but only within the *bounds of federal power* established by the Constitution. Beyond those bounds (the theory of our Constitution goes), it is a menace.[96]

Liberty, in Scalia's view, required keeping government power within its constitutional bounds, not democratic participation in the direction of federal power.[97] Thus, Justice Scalia's formulation of federalism's liberty preserving virtues is in tension with Kennedy and O'Connor's attempt to conflate liberty with democratic accountability. But Kennedy and O'Connor would certainly agree with Justice Scalia that it is essential for states to retain their own power if they are to serve as a "counter" to the power of the federal government. Leaving state authority to the discretion of Congress effectively means no counterweight to federal authority. And federal authority, left unchecked, is a "menace" to freedom.

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96. *College Sav. Bank*, 119 S. Ct. at 2233.

97. *But see* id. at 2239 (Breyer, J., dissenting).

> The ancient world understood the need to divide sovereign power among a nation's citizens, thereby creating government in which all would exercise that power; and they called "free" the citizens who exercised that power so divided. Our Nation's founders understood the same, for they wrote a Constitution that divided governmental authority, retained great power at state and local levels, and which foresaw, indeed assumed, democratic citizen participation in government at all levels, including levels that facilitated citizen participation closer to a citizen's home.

Id.

2. Dual Sovereignty and Federal Power

A second consistent theme of the Court's recent constitutional federalism decisions has been its insistence that the federal government is one of enumerated powers, a core premise of dual sovereignty. For example, Justice O'Connor asserts that: "every schoolchild learns [that] our Constitution establishes a system of dual sovereignty between the States and the Federal Government. . . . [U]nder our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause."[98] For dual sovereignty to protect liberty, it is also necessary both that "[t]he Constitution created a Federal Government of limited powers"[99] and that the Court continue to limit those powers. But the jurisprudence of the post-New Deal Court is founded on deference to Congress's assertion of power over virtually all activity that takes place within the United States, no matter how remote its connection to any national interest.[100] And with one minor exception,[101] the Court has not departed from this deference in its constitutional federalism cases.

This continued reliance on dual sovereignty has muddled the Court's efforts to breathe life into the Tenth Amendment. Justice O'Connor, writing for the Court in *New York*, treated the Tenth Amendment question as one of dual sovereignty: "whether particular sovereign powers have been granted by the Constitution to the Federal Government or have been retained by the States."[102] The result is a rather strained insistence that the question of where Congress's power under the Commerce Clause ends, and where the powers exclusively reserved to the states by the Tenth Amendment begin, are "mirror images of each other."[103] Despite the transparency of the fiction, it is probably a necessary one in order to evade the force of the Court's New Deal interpretation of the Tenth Amendment as stating "but a truism that all is

98. *Gregory*, 501 U.S. at 457.

99. *Id.*

100. *See* Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950) (chronicling the New Deal's destruction of dual sovereignty).

101. *See infra* text accompanying notes 107-113 (describing *Lopez* as a minor exception to the courts trend toward deference).

102. *New York*, 505 U.S. at 155. *See also* H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 650 (1993) ("O'Connor's federalism thus disavows the *National League of Cities* approach, which identified the federalism limit on congressional power as an analogue to Bill of Rights limitations, a trump that invalidates legislation that is within the scope of a power delegated to Congress.").

103. *New York*, 505 U.S. at 156 ("If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.") (citations omitted).

retained which has not been surrendered."[104] This line-drawing between state and federal power sits rather awkwardly with the Court's repeated acquiescence in Congress's appropriation of a general police power under the Commerce Clause. And the Court has not questioned the scope of that interpretation of the Commerce Clause in any of its Tenth Amendment cases.[105] Nonetheless, the Court has found that state sovereignty limits congressional action in a number of other cases. For those who believe that constitutional limits should be grounded in the Constitution's text, Justice Rehnquist was closer to the mark when he asserted that the Tenth Amendment, like other provisions of the Bill of Rights, is an independent limit on Congress's enumerated powers.[106] The Court is more likely to develop a coherent constitutional federalism doctrine if it acknowledges that state sovereignty may trump otherwise valid exercises of federal power.

B. The Court's Decisions and Their Implications for Individual Liberty

1. Limits on the Commerce Clause Power

The Court's long-standing deference to federal power made *United States v. Lopez*[107] the most startling of the Court's recent constitutional federalism cases. *Lopez* recognized limits, for the first time in half a century, on Congress's ability "[t]o regulate Commerce . . . among the several States."[108] The Court found that Congress had exceeded its authority by prohibiting

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104. *Darby*, 312 U.S. at 124.

105. *See, e.g., New York*, 505 U.S. at 157.

> The Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses; first, because the Framers would not have conceived that any government would conduct such activities; and second, because the Framers would not have believed that the *Federal* Government, rather than the States, would assume such responsibilities. Yet the powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government's role.

Id.

106. *See* Fry v. United States, 421 U.S. 542, 553 (1975) (Rehnquist, J., dissenting).

> In this case . . . the State is not simply asserting an absence of congressional legislative authority, but rather is asserting an affirmative constitutional right, inherent in its capacity as a State, to be free from such congressionally asserted authority. Whether such a claim on the part of a State should prevail against congressional authority is quite a different question, but it is surely no answer to the claim to say that "a state can no more deny the power if its exercise has been authorized by Congress than can an individual."

Id. (quoting United States v. California, 297 U.S. 175, 185 (1936)).

107. 514 U.S. 549 (1995).

108. U.S. CONST. art. I, § 8 cl. 3. *See* Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 517 (1995) ("From 1936 until April 26, 1995, the Supreme Court did not declare unconstitutional even one federal law as exceeding the scope of Congress' powers under the Commerce Clause.").

possession of a gun within 1000 feet of a school. The Court's concern for state sovereignty is clear: "[t]o uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[109]

Congress's authority had to be limited in order to preserve an area, however small, of exclusive state authority, an essential premise of dual sovereignty. *Lopez* ensures that the Court can still plausibly claim that the national government is one of enumerated powers. And the decision may serve the salutary purpose of reminding Congress that it does not have unlimited power.[110] *Lopez* does not, however, challenge the New Deal Court's broad reading of the Commerce Clause.[111] Indeed, it is not clear that *Lopez* puts any substantive limit on Congress's power; it may simply require that Congress use a different form.[112]

Lopez also does little to encourage the state regulatory competition that might promote freedom. The authority reserved exclusively to the states by *Lopez* is so narrow that virtually every state will exercise it to its full extent. Moreover, there will be little variation in that state regulation, as the holding in *Lopez* is unlikely to encourage states to allow students to bring guns to schools.[113] *Lopez* is hardly a stimulus that will generate competition among the states on the appropriate regulation of guns. Thus, while *Lopez* was a surprising decision, it does little to enhances individual liberty.

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109. *Lopez*, 514 U.S. at 567.

110. *See* Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447, 1483 (1995) ("There is probably some relationship between the perception that there are no effective limits on Congress' power, and Congress behaving as though its power is unlimited.").

111. *See Lopez*, 514 U.S. at 556. New Deal cases

> ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause. In part, this was a recognition of the great changes that had occurred in the way business was carried on in this country. Enterprises that had once been local or at most regional in nature had become national in scope. But the doctrinal change also reflected a view that earlier Commerce Clause cases artificially had constrained the authority of Congress to regulate interstate commerce.

Id. Of the Justices in the majority, only Justice Thomas was willing to say that the New Deal cases went too far in deferring to Congress's assumption of a general police power. *See id.* at 599 (Thomas, J., concurring) ("If anything, the 'wrong turn' was the Court's dramatic departure in the 1930's from a century and a half of precedent.").

112. The Court did not call into question its prior rulings upholding federal statutes regulating gun possession when the gun had traveled in interstate commerce. *See Lopez*, 514 U.S. at 561-62 (discussing *United States v. Bass*, 404 U.S. 336 (1971), which did not hold as unconstitutional a statute prohibiting felons from possessing guns that had traveled in interstate commerce).

113. *See* Lessig, *supra* note 43, at 209 ("Was there really a state that wanted to permit gun possession within 1,000 feet of a school, but which was disallowed by Congress's statute?").

2. The Clear Statement Rule

The Court's other constitutional federalism cases are likely to have a more significant impact on individual liberty, albeit indirectly. The first glimmer of constitutional federalism's revival came before *Lopez*, in *Gregory v. Ashcroft.*[114] At issue in *Gregory* was whether a provision of the Missouri constitution requiring judges to retire at age seventy was preempted by the Age Discrimination in Employment Act ("ADEA").[115] Justice O'Connor could not muster a majority to rethink whether the Court had achieved a "proper balance" between state and federal power; the absolute supremacy of the federal government went unquestioned.[116]

Rather than limiting federal power by constitutional rule, *Gregory* announced a mode of statutory interpretation informed by federalism concerns. The Court would look for a "plain statement" of Congress's intention to apply a law of general applicability to the states before it construes a statute as having that effect.[117] While Justice O'Connor claimed that her mode of interpretation avoided a "potential constitutional problem,"[118] it is difficult to see what that problem might be after *Garcia*, as the ADEA applies generally to both private and state employers.[119] Congress retained the power to interfere with state sovereignty, as long as it made its intention plain. Further, the rule of interpretation did nothing to directly enhance individual liberty. It merely erected an obstacle to Congress's interference with the states.

Gregory's plain statement rule works only indirectly to preserve liberty. It ensures that states will be put on notice to oppose draconian laws of general applicability that affect their operations so that Congress cannot sneak in regulation of the states through the back door. States will be alerted to the need to join private parties in lobbying against federal legislation, thus creating a more effective lobbying coalition of the sort anticipated by Hamilton.[120] Similar plain statement rules apply to Congress's imposition of conditions on federal grants to the states[121] and to Congress's abrogation of

114. 501 U.S. 452 (1991).
115. Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1994 & Supp. III 1997).
116. *See Gregory*, 501 U.S. 452.
117. *See id.* at 460-64.
118. *Id.* at 464.
119. *See* 29 U.S.C. § 633(a) ("The term 'employer' . . . also means a State. . .").
120. *See supra* note 22 and accompanying text. *See also* Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 5-7 (1988) (discussing the role of state and local governments in organizing opposition to federal policies).
121. *See* South Dakota v. Dole, 483 U.S. 203, 207 (1987) ("[I]f Congress desires to condition the States' receipt of federal funds, it 'must do so unambiguously . . . enabl[ing] the States to exercise their

states' sovereign immunity.[122] By eliminating ambiguity concerning the imposition of federal rules on state governments, these rules ensure that states will serve their liberty-enhancing role as focal points for lobbying against excessive federal regulation.[123] At the same time, the clear statement rule allows the Court to maintain its deferential attitude toward Congress's exercise of a general police power.[124]

3. Commandeering

Justice O'Connor found a majority for constitutional limits preserving state sovereignty the following term. In *New York v. United States*, the Court rejected Congress's attempt to "commandeer" state legislatures by requiring them to adopt regulations to deal with nuclear waste produced within their boundaries.[125] The Court looked to the early Republic's transition from the Articles of Confederation to the Constitution to justify the anti-commandeering principle.[126] The Court concluded that the primary reason for the Articles' failure was that they had the national government operating through the states, rather than directly governing individuals. The Framers repudiated that practice in favor of "a Constitution in which Congress would exercise its legislative authority directly over individuals rather than over

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choice knowingly, cognizant of the consequences of their participation.'") (alterations in original) (quoting Pennhurst Sch. and Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

122. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 243 (1985) (stating that when "Congress unequivocally expresses this intention in the statutory language," the court may determine that "Congress has abrogated the States' [sovereign] immunity. . .."

123. *See* Ann Althouse, *Variations on a Theory of Normative Federalism: A Supreme Court Dialogue*, 42 DUKE L.J. 979, 1006 (1993) ("If extra consideration leads to a rejection of the application of a statute to the states, or if legislators shrink from approving of the statute simply because its application to the states becomes conspicuous, that rejection exemplifies the political protection of federalism values touted by *Garcia*."); Rapaczynski, *supra* note 88, at 390.

> [T]he independence of the very process of state government, without seriously hampering the national authorities in regulating most private activities, assures the existence of an organizational framework, more efficient than any private institution could provide, that may always be used as an effective tool for bringing together otherwise defenseless individuals with some stake in resisting the overreaching of the national government.

Id. See also Grey, *supra* note 7 at 617-20 (discussing advantages and criticisms of clear statement rule).

124. *See* Bednar & Eskridge, Jr., *supra* note 110 at 1487 ("A clear statement approach rather than a constitutional approach to state burdens is also one with fewer political risks for the Court, because Congress can assert its preferences by overriding the Court with requisite clear statement (as it did in response to *Agtascodezo*)").

125. *See* 505 U.S. 144 (1992). Justice O'Connor stated that "Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *Id*. at 161 (alterations in original) (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 288 (1981).

126. *See id*. at 163-66.

States."[127]

The Court also offered two normative justifications for the anti-commandeering rule. First, it justified its decision as enhancing accountability to the electorate. The Court contrasted a state's decision to voluntarily participate in a federal program, for which state officials would remain accountable to their constituents, with state regulation compelled by the federal government. The Court worried that in the compelled case, "it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision."[128] The Court offered a second normative justification in the course of rejecting the notion that New York had acquiesced in the infringement on its sovereignty; the liberty-enhancement rationale offered in *Gregory*. The Court suggested that allowing state officials to consent to federal infringement of their sovereignty could raise accountability problems at both the state and federal levels.[129] These arguments, however, would also apply to federal programs in which state governments were voluntary participants and such voluntary programs are clearly constitutional.[130] Presumably, state politicians have brought the wrath of the electorate on themselves when they voluntarily participate in federal programs.

The Court distinguished voluntary acceptance of federal standards by states. *FERC*, as well as *Hodel*, involved conditional preemptions under which Congress dictated to the states how they would regulate, but only *if* the states chose to regulate.[131] In *New York*, by contrast, Congress was compelling New York to regulate private parties. This regulatory innovation went too far, as "the Constitution has never been understood to confer upon

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127. *Id*. at 165.

128. *Id.* at 169. This accountability rationale has met with some criticism. *See* Caminker, *supra* note 88, at 1060-74.

129. *New York*, 505 U.S. at 182-83.

> [P]owerful incentives might lead both federal and state officials to view departures from the federal structure to be in their personal interests. . . . If a federal official is faced with the alternatives of choosing a location or directing the States to do it, the official may well prefer the latter, as a means of shifting responsibility for the eventual decision. If a state official is faced with the same set of alternatives—choosing a location or having Congress direct the choice of a location—the state official may also prefer the latter, as it may permit the avoidance of personal responsibility. The interests of public official thus may not coincide with the Constitution's intergovernmental allocation of authority. Where state officials purport to submit to the direction of Congress in this manner, federalism is hardly being advanced.

Id.

130. *See* Hills, *supra* note 48, at 826 ("Such an argument seems to condemn not merely federal laws that commandeer state or local services but also even *voluntary* intergovernmental cooperation.").

131. *See New York*, 505 U.S. at 161-62.

Congress the ability to require the States to govern according to Congress' instructions."[132] Congress had the power to preempt state regulation, or to regulate directly private parties producing nuclear waste, but it could not compel the states to regulate on behalf of the federal government.

Conditions on federal grants were similarly distinguished as being voluntarily accepted by the states. The spending power conferred upon Congress the authority to direct state regulation by imposing conditions on its grants; the states were uncoerced because they were free to accept or reject the grants.[133] Both conditional preemption and grants to the states were acceptable means of inducing state regulation; only direct coercion of the states' exercise of sovereign authority was off limits. While Congress can *prohibit* states from taking certain actions, or *bribe* them to take actions they otherwise might not take, constitutional federalism prevents Congress from *directing* those actions.[134]

The Court's acceptance of conditional preemption reflects its general deference to the expansion of federal power. Preemption can be distinguished from commandeering by the amount of government regulation created. Congress's power to regulate under the Commerce Clause is practically unlimited, so limiting its preemption power would leave two sets of laws on the books when Congress chooses to regulate.[135] Rather than limiting Congress in this fashion, the Court has permitted Congress to preempt, in the interest of uniformity, even state laws whose purpose is consistent with federal regulation.[136] Congress can establish a federal ceiling, as well as a federal baseline; it can free commerce, as well as obstruct it. Thus, preemption reduces the governmental burden imposed on citizens because they need only comply with one set of laws. Commandeering, by contrast, allows the federal government to regulate more because it does not bear the full cost of regulation. Commandeering may induce states to regulate less because of resource constraints, but that outcome is uncertain; states may

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132. *Id*. at 162 (citing Coyle v. Smith, 221 U.S. 559, 565 (1911)).

133. *See id*. at 167. To be sure, this ignores the "race to the bottom" created by conditional spending as states compete for federal money by surrendering their sovereignty. *See* Yoo, *supra* note 17, at 1401 ("If the fifty states are in competition for these funds, then the states that are most willing to surrender some of their autonomy will be the ones that acquire federal funds with the greatest. ease.").

134. *See* Caminker, *supra* note 88, at 1009 ("None of these accepted strategies involves compulsion of affirmative state action, which seems more viscerally to treat states as subordinate agents of the federal government.").

135. Two sets of laws will mean a greater burden. *See* Bednar & Eskridge, supra note 110, at 1463 ("In our modern regulatory state, two layers of government seem as likely to impose double as to impose half the burdens that a single layer of government would impose.").

136. *See* Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88 (1992) (holding that two Illinois acts were preempted by OSHA).

simply levy a heavier tax burden on their citizens to fund their added responsibilities. Competition is unlikely to constrain this added tax burden because the federal government has imposed responsibilities on the states equally.

Conditional preemption, on its face, is more difficult to justify than ordinary preemption. It allows the federal government to extend its reach by controlling state regulation. But the expanded federal power conditional preemption creates necessarily reduces the reach of state government. States are left to enforce federal standards rather than their own, but private parties need only comply with one set of standards. The state has demonstrated that it would regulate absent the federal regulation. Otherwise, the state would not bother to enforce the federal standards. Thus, conditional preemption merely exchanges a federal burden for a state one, thereby adding minimal governmental burden.[137] Commandeering, on the other hand, may require the states to regulate in an area previously unregulated. This would create an additional governmental burden directed by the federal government at the states' expense. This rationale may provide a more persuasive explanation for cases like *FERC* than the notion of state consent.[138] If the states' "choice" of whether to regulate seems illusory, it is because they believe that regulation is essential, and they would have regulated with or without the federal intervention.

The *New York* Court also distinguished prior decisions upholding the application of laws of general applicability to the states.[139] The law at issue in *New York* ran afoul of constitutional federalism principles because it was directed at the states in their sovereign capacities. The Court stated this conclusion in terms remarkably similar to the argument that it had rejected in *FERC*: "The allocation of power contained in the Commerce Clause . . . authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce."[140] The dissenters in *New York* found the distinction between laws of general applicability and those directed specifically at the states unpersuasive. "An incursion on state sovereignty hardly seems more

137. To be sure, substituting a state regulation for a federal one eliminates the competition between states, but this is an inevitable by-product of federalization and the Court's deference to federal power.

138. *See Printz*, 521 U.S. at 965-66 (Stevens, J., dissenting) ("The state commissions could avoid [the obligation to consider federal standards] only by ceasing regulation in the field, a 'choice' that we recognized was realistically foreclosed, since Congress had put forward no alternative regulatory scheme to govern this very important area.").

139. *See New York*, 505 U.S. at 160.

140. *Id.* at 166.

constitutionally acceptable if the federal statute that 'commands' specific action also applies to private parties. The alleged diminution in state authority over its own affairs is not any less because the federal mandate restricts the activities of private parties."[141]

But allowing Congress to regulate state operations cannot easily be carved out of federal power to regulate the economy generally. One of the rationales justifying the regulation of *intra*state commerce is that it is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless intrastate activity were regulated."[142] An analogous rationale justifies imposing rules of general applicability on the states. As the court pointed out in *Fry v. United States*[143] in upholding a federal law freezing wages as applied to state employees,

> [i]n 1971, when the freeze was activated, state and local governmental employees composed 14% of the Nation's work force. It seems inescapable that the effectiveness of federal action would have been drastically impaired if wage increases to this sizeable group of employees were left outside the reach of these emergency federal wage controls.[144]

Regulation of state economic activity may be essential to ensure the effectiveness of regulation generally when the states are major participants in the regulated area.

The distinction between laws of general applicability and those directed specifically at the states nonetheless can be justified as preserving individual liberty. As Judge Easterbrook has recognized,

> [s]o long as public market participants are treated the same as private ones, they enjoy the protection the latter have been able to secure from the legislature; and as Congress is not about to destroy private industry (think what that would do to the tax base!) it can not hobble the states either.[145]

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141. *Id.* at 201-02 (White, J., concurring in part and dissenting in part). *See also Printz*, 521 U.S. at 961 (Stevens, J., dissenting) ("A structural problem that vanishes when the statute affects private individuals as well as public officials is not much of a structural problem."); Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism: New York, Printz, and Yeskey*, 1998 SUP. CT. REV. 71, 110-15 (criticizing distinction between laws of general applicability and laws directed toward the states).

142. *Lopez*, 514 U.S. at 561.

143. 421 U.S. 542 (1975).

144. *Fry* 421 U.S. at 548 (1975) (citation omitted).

145. Travis v. Reno, 163 F.3d 1000, 1003 (7th Cir. 1998). *See also* Jackson, *supra* note 3, at 2207. [W]hen a state is subject to a statute that applies to many private entities, states are protected in at

The converse is also true. States' opposition to laws of general applicability will help protect private industry from overreaching by the national government. By contrast, "[a] state-specific law does not provide states with the protection that private groups have arranged for themselves; it could in principle be a vehicle of destruction."[146]

Judge Easterbrook took a wrong step, however, when he allowed the existence of similar restrictions in other laws to qualify a law directed solely at the states as being one of general applicability. Private parties who are already subject to federal restrictions are unlikely to resist when Congress proposes analogous restrictions on the states.[147] Timing matters; by legislating in a piecemeal fashion, Congress can adopt a strategy of divide and conquer.[148]

Despite this risk, the Court held that the requirements imposed by Congress on state motor vehicle departments in the Driver's Privacy Protection Act[149] were constitutional.[150] Chief Justice Rehnquist brushed aside South Carolina's argument that the law was not one of general applicability, observing that it "regulates the universe of entities that participate as suppliers to the market for motor vehicle information—the States as initial suppliers of the information in interstate commerce and private resellers or redisclosers of that information in commerce."[151] If such derivative application suffices to make a law one of general applicability, we can expect Congress to exploit this loophole to draft legislation targeting the states under a pretense of general applicability.

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least two ways. First, such a statute—to the extent that it is directed at some significant amount of private activity—is unlikely to be aimed at uniquely governmental functions of states; states would not be "singled out" for the purpose of federal use of their governmental capacities. Second, statutes that fall on private and public interests may be more likely to be closely politically monitored and contested; the legislative process is 'safeguarded' from imprudent decisions not only by the states' representation but also by the general public's representation.

Id.

146. *Travis*, 163 F.3d at 1005.

147. *See* Zelinsky, *supra* note 4, at 1410.

Proposals targeted only at [states and localities] leave them isolated in the legislative process, bereft of allies to help reduce the legislative zone of discretion. In contrast, when the legislature considers proposals affecting [states and localities] in the same fashion as other persons . . . , the localities have partners in the lawmaking process, obviating the need for special care of [local] interests.

Id.

148. To be sure, the Court approved a separate law imposing a tax on state-issued bearer bonds in *South Carolina v. Baker*, but a separate regime was necessary because of the tax free status of state bonds, not enjoyed by corporate issuers. 485 U.S. at 527.

149. Driver's Privacy Protection Act of 1994, 18 U.S.C. §§ 2721-2725.

150. Reno v. Condon, 120 S. Ct. 666 (2000).

151. *Id.* at 672.

While Congress should ordinarily be required to regulate states in the same manner as private entities, some states functions may have no private analogue. A law that regulates the states separately from private employers could still pass constitutional muster, but only if Congress imposes the same rule on the federal government. By requiring Congress to restrict itself we can be confident that Congress is not using the law to undermine the sovereignty of the states. If the law applies to both federal and state government, the states have not been singled out.[152]

Printz v. United States brought a second application of the anti-commandeering principle.[153] The *Printz* Court struck down a federal statute that required state law enforcement officers to check the background of prospective handgun purchasers. The anti-commandeering rule of *New York* was extended to prohibit the federal government from enlisting state *executive* branch officials for federal regulatory purposes. The Court insisted that "[i]t is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority."[154] Congress could not implement its policy choices by enlisting state officials as federal bureaucrats. Notably, the Court did not rest its conclusion solely on the Tenth Amendment, but also invoked "reasonable implications" from other constitutional provisions, suggesting a broader scope for the protection of state sovereignty.[155]

Justice Stevens, in dissent, challenged the majority's contention that the anti-commandeering rule protects liberty:

> Perversely, the majority's rule seems more likely to damage than to preserve the safeguards against tyranny provided by the existence of vital state governments. By limiting the ability of the Federal Government to enlist state officials in the implementation of its

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152. *Cf.* Evan H. Caminker, *Printz, State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 246.

> Although Justice Scalia surely recognizes that generally applicable laws can impose the same type of burden on state executives as state-targeted commandeering statutes, his focus . . . on the "whole object of the law" suggests that only laws that *particularly* target state executives violate the "very principle of separate state sovereignty" he has constructed. On this view, the states' sovereign status provides them with a right not to be singled out by Congress on the basis of their statehood, and nothing more.

Id.

153. 521 U.S. 898.

154. *Id.* at 928.

155. *Id.* at 924 n.13 ("Our system of dual sovereignty is reflected in numerous constitutional provisions and not only those, like the Tenth Amendment, that speak to the point explicitly. It is not at all unusual for our resolution of a significant constitutional question to rest upon reasonable implications.").

> programs, the Court creates incentives for the National Government to aggrandize itself. In the name of States' rights, the majority would have the Federal Government create vast national bureaucracies to implement its policies.[156]

Justice Stevens confuses size with aggrandizement, and thus, his fear of a gigantic federal bureaucracy arising from the anti-commandeering principle seems overblown. The federal government's interference with private choice does not vary with reliance on federal or state bureaucrats; the only difference is which level of government pays. The budget constraint is the only limit that Congress seems to take seriously. Massive deficits and the discipline imposed by the international market for debt are the only structural tools that have been shown to limit Congress's thirst to expand the size and scope of the federal government.

Apart from liberty concerns, it is difficult to see how the anti-commandeering rule could impair government effectiveness. Making Congress pay for state services does not seem like a huge burden to place on the federal government.[157] If Congress doesn't like the price charged by the states for regulating private conduct, it can hire its own administrators.[158] And if Congress is unwilling to pay this price, it suggests that the policy's benefits may not exceed its costs.[159]

Justice Souter suggests that Congress should be allowed to commandeer, but be required to pay compensation *ex post*.[160] This suggestion makes little sense given that Congress can bargain with the states. The barriers to a transaction that would suggest the need for a taking power, such as potential holdout problems, can be overcome by the usual logrolling that facilitates

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156. *Id*. at 959 (Stevens, J., dissenting).

157. *See id*. at 936 (O'Connor, J., concurring) ("Congress is . . . free to amend the interim program to provide for its continuance on a contractual basis with the States if it wishes, as it does with a number of other federal programs.").

158. *See* Hills, *supra* note 48, at 893-900 (arguing that federal commandeering of state resources is inefficient).

159. *But see* Caminker, *supra* note 88, at 1084.

> Requiring Congress to establish local federal machinery would, at a minimum, drive up the cost of the federal program and make Congress divert federal resources from other projects or raise federal taxes, yet it would bring no compensating social gain. In more extreme cases, the requirement might make the program prohibitively expensive or administratively infeasible, in which case the federal goal remains unrealized. . . . [A]t least when the total implementation cost is relatively low . . . unfunded mandates are reasonable, since federal reimbursement would itself entail potentially substantial transaction costs which represent deadweight social losses.

Id.

160. *See Printz*, 521 U.S. at 975-76 (Souter, J., dissenting) ("I do not read any of The Federalist material as requiring the conclusion that Congress could require administrative support without an obligation to pay fair value for it.")

most legislation.[161] The more substantial objection is that withholding money under federal programs, which the Court allows, can be just as coercive as commandeering or subjecting states to suit.[162] But that objection fails in the absence of any limits on the federal spending power.[163]

4. Sovereign Immunity

The final piece of the Court's revived constitutional federalism has been a resuscitation of sovereign immunity. The Court has repeatedly rebuffed congressional attempts to use its Article I powers to abrogate the states' Eleventh Amendment immunity from damages.[164] The Court also rejected the proposition that a state's involvement in a commercial activity regulated by Congress could be construed as a waiver of its sovereign immunity.[165] Finally, in *Alden v. Maine* the Court held that Congress could not abrogate the states' sovereign immunity in the states' own courts.[166]

The Court's strong defense of sovereign immunity can be reconciled with a freedom-enhancing vision of constitutional federalism. Freeing the states from paying damages reduces Congress's ability to enlist private individuals to help impose its policies on the states. This is another application of the budget constraint as a means of preventing federal aggrandizement.[167] If

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161. *See* Hills, *supra* note 48, at 934-38 (criticizing Souter's theory). The ability of the federal government to solicit voluntary state cooperation also seems sufficient answer to the criticism that the anti-commandeering rule precludes federal use of state officials in an emergency. *See, e.g.*, Jackson, *supra* note 3, at 2212.

> Although reasonable minds may disagree whether the Brady Act was responding to an emergency, as the dissent points out, emergencies on occasion do arise—in the event of sudden war, for example, [*Printz*] would preclude the mandatory use of state officials to administer a draft law, or in the event of a hazardous waste emergency, to compel the involvement of state officers in response.

Id. In the case of a genuine emergency, it is hard to imagine that state officials would refuse their cooperation. And the concept of "emergency" is sufficiently flexible that we should be hesitant before giving Congress the power to commandeer state officials upon invoking an emergency.

162. *See College Sav. Bank*, 527 U.S. 666; 119 S. Ct. at 2236 (Breyer, J., dissenting) ("Given the amount of money at stake, it may be harder, not easier, for a State to refuse highway funds than to refrain from entering the investment services business.").

163. *See supra* notes 107-113 and accompanying text.

164. *See Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 627; *College Sav. Bank*, 527 U.S. 666; 119 S. Ct. at 2223.

165. *See College Sav. Bank*, 527 U.S. 666; 119 S. Ct. at 2224-31. This case suggests that Congress's power of conditional preemption has at least one limit: Congress cannot force the states to waive their sovereign immunity from damages. Sovereign immunity may be a special case, or it may suggest that the current Court is open to rethinking the broad conditional preemption power that it recognized in *Hodel* and *FERC*. Thanks to Evan Caminker for this point.

166. *Alden*, 527 U.S. 706; 119 S. Ct. 2240. *Alden* is discussed below at *infra* notes 212-220 and accompanying text.

167. The Court also seemed skeptical that Congress was imposing a rule on state government that

Congress wants to control the states, it has to pay the price for attorneys at the Department of Justice to bring suit.[168] Allowing a plethora of "private attorneys general" to enforce rules against the states would permit off-budget expansion of federal government power over the states in the same manner as commandeering.[169] Making Congress pay the full price of enforcement requires cost internalization; Congress will impose fewer policies on the states if it has to pay the full cost of administering those policies via the court system.[170] To be sure, freeing states from paying damages may undermine the purposes of regulation by putting private competitors of the states at a competitive disadvantage,[171] but this result enhances individual liberty as the disadvantaged businesses will lobby Congress for relief. And any undermining of deterrence is likely to be minimal, given that suits against localities and individual government officers remain available.[172] Thus, "Congress has ample means to ensure compliance with valid federal laws, but it must respect the sovereignty of the States."[173] State sovereign immunity encourages the states to serve as a counterweight to federal power.

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it had declined to impose on the federal government. *See Alden*, at 2264 ("It is unquestioned that the Federal Government retains its own immunity from suit not only in state tribunals but also in its own courts."). Would *Alden* have come out differently if the United States had waived its immunity from suit? A less expansive protection of sovereign immunity would allow Congress to impose rules on state governments only if it had imposed them on the federal government as well. This would greatly discourage rules being imposed on the states. However, this would come at a cost of removing the states as focal points for lobbying on behalf of the private sector.

168. *See College Sav. Bank*, 527 U.S. 666; 119 S. Ct. at 2240 (Breyer, J., dissenting) ("Congress . . . might create a federal damages-collecting 'enforcement' bureaucracy charged with responsibilities that Congress would prefer to place in the hands of States or private citizens."). *Cf. Alden*, 527 U.S. 706, 119 S. Ct. at 2269 ("despite specific statutory authorization [under 29 U.S.C. § 216(c)], the United States apparently found the same interests insufficient to justify sending even a single attorney to Maine to prosecute this litigation.").

169. *See* Frank B. Cross, *Realism about Federalism*, 74 N.Y.U. L. REV. 1304, 1323 (1999) (arguing that the Court's recent sovereign immunity decisions "could be seen as mere stalking horses for an antiregulatory ideological conservative agenda" or "as part of a conservative antitort plaintiff agenda").

170. *See Alden*, 527 U.S. 706, 119 S. Ct. at 2267 ("Suits brought by the United States itself require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue nonconsenting States.").

171. *See College Sav. Bank*, 527 U.S. 666, 119 S. Ct. at 2235 (Breyer, J., dissenting).

> [A] Congress that includes the State not only within its substantive regulatory rules but also (expressly) within a related system of private remedies likely believes that a remedial exemption would similarly threaten that program. It thereby avoids an enforcement gap which, when allied with the pressure of a competitive marketplace, could place the State's regulated private competitors at a significant disadvantage.

Id. (citation omitted).

172. *See Alden*, 527 U.S. 706, 119 S. Ct. at 2267 ("sovereign immunity . . . bars suits against States but not lesser entities"). And those suits will still attract plaintiffs' attorneys because sovereign immunity will not bar the payment of attorneys' fees by those entities and individuals.

173. *Alden*, 527 U.S. 706, 119 S. Ct. at 2268.

In sum, the Court has used its revived constitutional federalism sparingly. The Court by and large has not challenged directly the scope of federal power. It instead has protected the role of the states as bulwarks against federal overreaching by placing narrow constraints on the federal government's power over the states. Those constraints, taken together, encourage the states to act as focal points against the expansion of federal power and prevent the federal government from using the state governments as an off-budget resource. Rather than abandoning the protection of state sovereignty to the political process, the Court has used constitutional federalism to ensure that the states will have the incentives and resources to play an active role in the political process. This result harnesses the states in the effort to preserve individual liberty.

III. CONSTITUTIONAL FEDERALISM AND STATE COURTS

This Part is divided into two sections. The first section analyzes the Court's decisions discussing Congress's power to control state courts. The second section looks at the "judicial exception" to the anti-commandeering principle announced in *New York* and *Printz*, and the limits to that exception announced in *Alden*.

A. Congress's Power over State Courts

State courts have not been immune from Congress's expansion of power. Congress has the same authority to preempt substantive law imposed by state courts as it does state legislation.[174] And Congress has the power to preempt state tort claims,[175] even if it leaves an injured party without a remedy.[176] But Congress's control over state court procedures is less clear. The early doctrine of dual sovereignty led to strong statements, albeit in dicta, that Congress lacked the power to control state court adjudication:

> There are within the territorial limits of each State two governments, restricted in their spheres of action, but independent of

174. *See* Sperry v. Florida, 373 U.S. 379, 403 (1963) ("The authority of Congress is no less when the state power which it displaces would otherwise have been exercised by the state judiciary rather than by the state legislature.").

175. *See* Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 318-19 (1981) (finding that state common law may be preempted by federal law); Grey, *supra* note 7, at 607 ("There is no question that the federal government has the power under the Commerce Clause to preempt state tort claims.").

176. *See* Duke Power v. Carolina Envtl. Study Group, 438 U.S. 59, 88 (1978) (finding no constitutional requirement that federal laws preempting state causes of action "either duplicate the recovery at common law or provide a reasonable substitute remedy").