

# REDEFINING FEDERALISM:

LISTENING TO THE STATES IN  
SHAPING “OUR FEDERALISM”

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ENVIRONMENTAL LAW INSTITUTE  
Washington, D.C.

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1616 P Street NW, Washington, DC 20036

Published November 2004.

Printed in the United States of America  
ISBN 1-58576-086-2

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## Editor's Note

**T**his book is the result of collaboration in the best sense of the word. I have been joined in this enterprise by five contributing authors with enormous talents, each of whom has made an unmistakable and irreplaceable contribution to the final product. While the contributing authors each added ideas to the entire volume, they drafted different portions and these drafting accomplishments warrant specific note. In Parts One and Two of the book, Jennifer Bradley drafted the chapter entitled *Federalism and Environmental Protection*; Jim Ryan drafted *Federalism as Libertarian Fantasy*; and Jason Rylander drafted *The Rise of Libertarian Federalism*. Part Three of the book, *Listening to the States*, was written by Tim Dowling and Jay Austin, with Tim drafting the chapters on the Commerce Clause, §5 of the Fourteenth Amendment, the Tenth Amendment, and preemption, and Jay writing the chapters on the Eleventh Amendment and the “dormant” Commerce Clause. In my role as contributing author, I wrote the *Introduction*, *Conclusion*, and the chapters entitled *Federalism as a Neutral Principle* and *The Voice of the States: An Overview*.

The book's approach is somewhat novel in that it attempts to meld the contributions of six contributing authors into a single, coherent, and persuasive argument in favor of the vision of federalism being advanced in U.S. Supreme Court cases by the states. The result differs from a collection of essays, in that the authors were not free to choose their own topics—thus it would not be accurate to assume that each author agrees with everything in the book. The book differs from a true coauthorship in that little effort was made to make the work read in a single narrative voice. As editor, I have tried to eliminate inconsistencies and redundancies, and provide necessary summaries and transitions, but I have not attempted to strip the individual sections of the distinct writing styles of their contributing authors. I believe this makes the book both more interesting and more persuasive, but that, ultimately, is for the reader to judge.

The book's approach is unusual also because we have, in Part Three, attempted to distill from the Court briefs filed by state attorneys general what we term the “voice of the states.” We explain our methodology in more detail in later parts of the book, but two points warrant

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highlighting here. First, the term “voice of the states” is shorthand, and in one sense a misnomer: the 50 states almost never speak together in one voice. More precisely, when we use the term we are referring to the consensus, or, in a few cases, the majority position of the states that weigh in on a particular issue.

Second, we are describing in Part Three the positions the states have taken in important recent federalism cases, not the positions we necessarily wish they had taken on particular issues. Collectively, we believe that the views advanced by the states provide the Court with a compelling alternative vision to its existing federalism jurisprudence. On certain individual issues, the authors do not necessarily agree with the position taken by the states, but we have not burdened this book with the weight of these personal beliefs. We have set out to describe the voice of the states, and we have done so even where we might wish the states’ message was different.

Finally, as with any book on a topic as large as constitutional federalism, we have necessarily been selective in the topics we are able to cover. We have taken as our focus what we believe are the key constitutional questions affecting the distribution of governmental authority between the federal government and the states. Thus, while interpretations of individual liberties guaranteed by the Bill of Rights and other parts of the U.S. Constitution can prevent state experimentation in large areas, these topics are not discussed here because these limitations apply to all levels of government. Similarly, books could be and have been written on federalism and 28 U.S.C. §1983, which provides a cause of action for individuals to sue state officials for violations of federal law. While the enforceability of federal law against the states is a very important issue of federalism, the law of §1983 is at bottom an issue of statutory, not constitutional, law, and thus outside this book’s focus. There are, finally, some important doctrines of constitutional federalism, including the choice of law rules of *Erie Railroad v. Thomkins*, which are not discussed here simply because they are well settled and not particularly controversial among the current Justices.

The authors would like to thank: Eldon Crowell, Richard Fallon, Simon Lazarus, Sean Maloney, and John Nolon for their very helpful comments on drafts of this book; Leah Doney Neel for her careful and tireless editing and proofreading; Joseph Kakesh for invaluable research assistance; and John Turner and the entire publishing staff at Environmental Law Institute for their belief in the book and their hard work in bringing it into print. Last but far from least, we would like to thank the foundations, including the Soros Foundation’s Open Society Institute,

#### **EDITOR'S NOTE**

the Surdna Foundation, the Public Welfare Foundation, the Charles Evans Hughes Memorial Trust, the Naomi and Nehemiah Cohen Foundation, the David and Lucile Packard Foundation, the William and Flora Hewlett Foundation and the Town Creek Foundation, which have provided direct or general support for CRC and ELI's work on this book. John Kowal of the Open Society Institute deserves special mention: this book would not have happened without his belief in the project and the work of both Community Rights Counsel and Environmental Law Institute.

—Doug Kendall, editor

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## Chapter 1:

# Redefining Federalism

**T**he U.S. Supreme Court is in the midst of federalism revival. Some have even called it a revolution. This revival or revolution, it is said, is necessary to protect state and local governments from overreaching by the federal government. But families that live by the freeways in Los Angeles, who saw the Court in April 2004 strike down a local clean air protection based on a reading of the reach of the federal Clean Air Act, disagree. So do family farmers and environmentalists in South Dakota, who passed a state constitutional amendment to address corporate cattle, hog, and chicken farming operations, only to see the amendment overturned by a federal court. Christy Brzonkala, who according to reports was brutally raped by two football players at Virginia Tech University, and was supported in her federal suit against these players by 36 of the nation's state attorneys general, likewise had the Court reject her case in the name of federalism.

If federalism is about protecting the States, why not listen to them? In the last decade, the Supreme Court has reworked significant areas of constitutional law with the professed purpose of protecting the dignity and authority of the States, while frequently disregarding the States' views as to what federalism is all about. The Court has ignored the views of the States in two directions: striking down federal laws despite the nearly unanimous opinions of the States that a federal role is appropriate, and invalidating State initiatives despite impassioned calls by the States about the ambiguity of the federal interest and the need for State innovation. The Court, according to the States, is protecting federalism both too much and too little.

The states have done more than simply disagree with particular holdings of the Court. They have redefined the question. Federalism, according to the states, is not primarily about protecting their parochial

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interests. Federalism is, instead, about assigning government authority to the correct level of government in our constitutional structure. Listening to the states, therefore, holds out the promise of a restoration of a good government form of federalism that has appeal across the political spectrum.

That is not the federalism we have today. Federalism, a bedrock of our government structure, has become a political weapon. Opponents of health, safety, and environmental laws, and other government interventions into the free market, have seized upon federalism as a potential vehicle for advancing their political agenda. These advocates—who include grass-roots organizers such as Grover Norquist, legal activists such as Michael Greve, and legal scholars such as Richard Epstein—have constructed a definition of federalism that is hostile to government at all levels. Correspondingly, supporters of these laws increasingly view federalism as a dirty word, synonymous almost with the calls for “states’ rights” in resisting federal antidiscrimination statutes.

At the center of the current federalism debate is Chief Justice William H. Rehnquist and Justices Sandra Day O’Connor, Antonin Scalia, Anthony M. Kennedy, and Clarence Thomas, whom some call the “five friends of federalism” on the Court. In a long series of 5-4 rulings over the last decade, they have invoked and attempted to define what the Court has historically called “Our Federalism” in rulings that typically limit federal power.

We come neither to praise this federalism jurisprudence nor to bury it. The Court deserves praise for launching a national discussion on federalism, and we believe the Court has an important role in policing the appropriate allocation of authority and responsibility among federal, state, and local governments. But the Court has been decidedly uneven in its pursuit of federalism and, through this inconsistency, it has provided ammunition for both proponents and critics, who view the entire pursuit to be simply a tool for advancing an antiregulatory political agenda.

The objective of this book is to reestablish federalism as a neutral principle, a lens for understanding the appropriate distribution of decisionmaking authority between the levels of government. We do so by reference to briefs filed by state attorneys general in federalism cases heard by the Court over the past decade. This source is or should be uniquely persuasive because the Court has been clear that its federalism cases are animated by a concern that the federal government has grown too powerful and too encompassing, threatening to swamp state and local governments in its wake. If the goal is to protect the role of regional

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governments in modern American society, what source could be more important to consider than the views expressed by the states?

Plainly, the states are not neutral in federalism cases in the sense of being disinterested in the outcome. But what makes the voice of the states compelling is how frequently the states have argued *against* what is presumed to be their self-interested position. Declarations against interest are given special credibility in the law, and these surprising positions by the states make it worth exploring in more depth what they are saying about federalism.

This exploration reveals that states view their interests in federalism cases differently from what conventional wisdom would suggest. Federalism, according to the states, is not a pitched battle between the federal government and the states over exclusive spheres of governmental authority. Federalism, rather, is about respect for the critical structural role states play in our federal system and about allocating government power in a way that improves how the government serves its citizens.

The states' vision of federalism is neutral in the sense that the rules emerging from their briefs do not guarantee victory for the Left or the Right on a range of issues. The rules advocated by the states will lead to a conservative outcome in some cases and a liberal outcome in others, but they are not systematically skewed to favor either conservatives or liberals.

By listening more carefully to the states in crafting its federalism jurisprudence, therefore, the Rehnquist Court could transform its most important jurisprudential legacy from a source of criticism and polarization to a doctrine that should win broad support from across the political spectrum. If the Court's pursuit of federalism leads it to adopt rules that achieve federalism's promise as a neutral principle, the Rehnquist Court will have done more than started a long-overdue national dialogue on the topic, it will have employed our Framers' wisdom to make our government serve its citizens better. This would be a legacy of which any Court, and any Chief Justice, could be proud.

The book proceeds in three parts.

Part One explains why attention to federalism—the appropriate allocation of authority between our federal government, on the one hand, and our state, regional, and local governments, on the other—can improve government's success in addressing problems facing our communities. To make this discussion concrete, we tell the stories of two very different places, southern California and South Dakota, and explain how government officials and citizens in those places tried to take responsibility for improving their environment and were blocked by federal

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courts. As these cases illustrate, federal courts are often responsible for stifling the emergence of federalist solutions.

Moving from actual examples to the literature on federalism, Part One explores the policy reasons for supporting federalist solutions. Again using the context of environmental protection, we demonstrate that federalism's promise as a neutral principle lies in its potential to make the government respond better to the needs of its citizens and to make more citizens satisfied with policy outcomes. We also discuss some of the other advantages of federalism and some of the common misperceptions about federalism, such as the assumed link between federalism and discredited notions of "states' rights."

Part Two examines the work of Michael Greve—who directs the American Enterprise Institute's Federalism Project—and other promoters of "libertarian federalism." Greve readily admits that promoting libertarian federalism, which advances the use of federalism as a vehicle for attacking government at all levels, "*must* be an ideological affair." He seeks an admittedly "crass" collaboration between what he calls the "Leave-Us-Alone" coalition—a loose affiliation including, among others, gun owners, homeschoolers, and property rights groups—and the Court in promoting libertarian federalism. Greve seeks, in other words, to divide Americans over federalism.

We explain why what Greve calls "real" federalism is in reality libertarian fantasy dressed up in constitutional clothes. Libertarian federalism fails as a matter of constitutional law because it is inconsistent with the text, structure, and history of the U.S. Constitution. Greve is promoting a return to the discredited *Lochner* era, where the Court inappropriately stifled the federal and state reforms of the Progressive Era, and calling this federalism to make it sound new. Libertarian federalism fails as a matter of policy because it is neither principled in its assault on federal and state authority (Greve likes government regulations near and dear to his Leave-Us-Aloners), nor coherent in its explanation of the appropriate allocation of government authority.

While libertarian federalism has garnered a considerable following in certain legal and political circles, the real question is what the Court thinks about federalism. Tracking an overall pattern of the Court's rulings in the last decade, a number of commentators have concluded that the Court's federalism looks an awful lot like the antigovernment federalism Greve is promoting. The Court has limited federal power under the Commerce Clause and the Fourteenth Amendment and, at the same time, been quite aggressive about striking down state laws under the Supremacy Clause and the "dormant" Commerce Clause.

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This pattern has contributed to the polarization around this issue both on the Court (most federalism cases have been the same five Justices in the majority and the same four Justices in dissent) and around the country. But we think it is too soon to conclude from this pattern of rulings that the Court is either insincere about its federalism or captivated by libertarian federalism. The words of the Court belie either conclusion and, in recent cases, several of the Court's most passionate federalists have taken positions supporting state innovation even where the Justice likely opposed the state's action as a matter of policy. There is evidence, in other words, that the Court is moving toward federalism as a neutral principle, and away from federalism as a political weapon.

In Part Three, we detail the position taken by the states across the spectrum of federalism cases. While the states rarely speak unanimously about anything, and sometimes even file competing briefs in the same case, consensus positions emerge from the state briefs on many of the central federalism questions. Part Three compares and contrasts the states' vision of federalism with that being articulated by the Court.

The divergence between the Court and the states is particularly stark in cases involving state and local initiatives challenged under the Supremacy Clause and dormant Commerce Clause. In these cases, the states' adamant call for respect for federalism has fallen to date on deaf ears at the Court. States have also taken a strong position against the Court in a number of important federal power cases, supporting laws such as the Violence Against Women Act and the Clean Water Act, which have been narrowed by the Court in an effort designed to preserve state autonomy. Finally, while states have recognized the need for state compliance with federal law mandates, they have generally been very supportive of the Court in its effort to protect states against federal commandeering and some suits for money damages.

The voice of the states distills to three basic rules that we believe the Court should follow if its objective is to rekindle in America an appreciation of our federal system. The first rule is to "do no harm." The Court's current preemption and dormant Commerce Clause doctrine results in the invalidation of state and local initiatives even when the interference with federal objectives is far from clear. The Court should modify these doctrines to ensure that state and local initiatives are invalidated only where Congress is explicit in displacing the states or the states are blatantly discriminating against other states.

The second lesson from the states' briefs is that the Court is right to focus on federal actions that commandeer state resources and force states to submit to claims for money damages in federal court. The states argue

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forcefully that such protections are necessary to ensure that states retain their independence and do not become mere subdivisions of the national government. The states are not rigid in their position on these issues—indeed they have supported efforts to hold states accountable to federal mandates in a number of cases—but they believe that the Court is right to carefully scrutinize the means used by the federal government to enlist the states in achieving a federal objective.

The final lesson is that federalism is not about creating formalistic distinctions that prevent the federal government from addressing national problems. The state briefs in pure federal power cases—cases that do not involve the application of federal mandates to the states—teach that these cases often involve competing federalism concerns, and the states are just as concerned about protecting the power of the federal government in areas where a federal role is necessary as they are about preserving particular large spheres where states only are permitted to act. The states have overwhelmingly supported federal government participation in solving nationwide problems such as violence against women and the pollution of lakes and streams.

There is no magic in the states' briefs on federalism—they are written more to win cases than to articulate an overall vision of federalism—and we shouldn't listen to the states simply because they are speaking. Rather, we think the states have earned our attention by doing a far better job than the Court to date in articulating a vision of federalism that is both normatively attractive and consistent with the text, structure, and history of our Constitution.

The vision of federalism articulated by the states will not satisfy partisans on either side of the current federalism debate. Supporters of the Court's effort to reduce federal power will surely take issue with any stabilization or retreat by the Court in limiting the power of the federal government. Those supporting maximum enforcement of federal mandates will object to the states' support for rules against commandeering and for state immunity from suit. Finally, overzealous defenders of "traditional state functions" or "purely local economies" will be disappointed to learn that the states themselves have largely abandoned such formalistic tests. But like federalism, the Court's federalism jurisprudence is not, or should not be, about satisfying any political constituency; it should be about making our federal system work. If this is the test, the voice of the states warrants the Court's full attention.

# PART ONE



## Chapter 2:

### Federalism and Environmental Protection

“**T**here’s a reason you don’t see freeways going through Beverly Hills.”<sup>1</sup> That statement is a shorthand explanation for why the South Coast Air Quality Management District (District) decided to crack down on diesel pollution. In 1999, after an extensive study of toxic risks, the District learned that diesel emissions accounted for most of the area’s cancer risk from air pollution, and that the risks from those diesel emissions were highest near freeways.<sup>2</sup> Low-income and minority communities tended to live in the high-risk areas near the freeways, and these communities were generally not represented in local policy decisions.<sup>3</sup> The District decided to protect the people at the most risk and with the fewest resources to combat that risk. It passed rules that required operators of trash trucks, buses, and other heavy-duty vehicles to choose cleaner models when buying new vehicles for their fleets.<sup>4</sup> The rules led to thousands of cleaner vehicles on the streets and highways of Los Angeles.<sup>5</sup> But in April 2004, the U.S. Supreme Court struck down many of the District’s fleet rules.<sup>6</sup> The District, the Court said, was attempting to take for itself power that only the federal government could exercise.<sup>7</sup>

There is enormous potential for state and local environmental law and scores of examples of regional governments taking action to protect natural resources in accordance with local values. However, as were the District’s fleet rules, many of these efforts are thwarted by federal courts, which have recently struck down a number of local environmental laws under the U.S. Constitution’s Supremacy Clause<sup>8</sup> and the “dormant” Commerce Clause.<sup>9</sup> When state and local environmental laws are invalidated because courts decide that these regional governments have overreached their authority, the federal government becomes the primary force in environmental law by default.<sup>10</sup>

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States and localities are taking the lead in many areas of domestic policy, not just environmental law. In health care, for example, numerous states, including Texas under then-Gov. George W. Bush, have enacted patients' bill of rights, providing recourse for patients harmed by the overaggressive cost-cutting strategies of health maintenance organizations. Other states have devised innovative programs for pooling state purchasers to bargain down the skyrocketing prices for prescription drugs—using market forces to take on the pharmaceutical giants protected by the bloated federal prescription drug benefit law.

Similarly, in the area of corporate reform, New York Attorney General Eliot Spitzer is using a New York State law to hold Wall Street firms accountable for letting their financial self-interests taint the stock picks they offered American consumers.

State and local legislation and experimentation are especially apt in environmental law. By its very nature, federal law cannot precisely protect all of the microclimates, watersheds, and airsheds in this vast nation.<sup>11</sup> As one scholar puts it: “[The environmental movement] has picked all the ‘low hanging’ fruit and must now deal with more diffuse problems that are increasingly less amenable to national solutions.”<sup>12</sup> Environmental protection may at one point have been a kind of regulatory monoculture, with the federal government stepping in because state and local governments would not or could not act. It has now become more like a complete ecosystem, in that it requires a proper balance of elements—local, state, and federal responsibility—to flourish.

This chapter will briefly examine why state and local governments should engage in environmental protection and how some local governments are doing just that. Then it will tell the stories of two very different places, southern California and South Dakota, and how government officials and citizens in those places tried to take responsibility for improving their environment, and were blocked by federal courts. These stories will show what motivates governments or citizens to act, why they find that they cannot rely entirely on federal laws to keep their water and air clean, what they hope to achieve by local action, and what happens when courts frustrate their goals. Additionally, these stories show why all Americans should be troubled when courts move aggressively to limit local power (and in doing so, tip the balance in favor of increased federal power).

## FEDERALISM AND ENVIRONMENTAL PROTECTION

### **Why State and Local Governments Need to Exercise Power in the Environmental Regulation Arena**

There are a number of reasons why, in the last few years, there has been a surge in state and local environmental law. First, inaction at the federal level has meant that anyone—whether a state official, local advocate, or national environmental group—seeking more or stricter environmental protection has been forced to turn to a different level of government. As Prof. Dan Tarlock writes: “Nature abhors a vacuum, and the current implosion of the national government (with respect to many nondefense-national security functions) creates greater opportunities for States and their local government agents.”<sup>13</sup> States and localities are stepping into the vacuum both by passing their own regulations and also by suing for rigorous enforcement of federal laws.<sup>14</sup>

Second, environmentalists and local officials are increasingly trying to achieve environmental goals through land use regulations, which have historically been matters of local concern. One reason for turning to land as the next frontier in environmental regulation is that, as Professor Tarlock points out, “[a]s environmental protection shifts from an almost exclusive emphasis on pollution abatement and prevention to include biodiversity conservation, it is no longer possible to ignore land use issues.”<sup>15</sup> Even sponsors of federal smart growth legislation have insisted that land use regulation is generally up to states and localities, with the federal government providing support and encouragement.<sup>16</sup>

Land use regulations can also be a means to promote clean air or clean water, and may be the only way to grapple with “nonpoint” sources of air and water pollution (like polluted runoff from fields and streams). In theory, the U.S. Environmental Protection Agency (EPA) has authority to regulate runoff pollution under the Clean Water Act’s (CWA’s) program governing the total maximum daily load (TMDL) of pollution in our rivers and streams. But for more than a decade in a variety of political climates, EPA has been debating regulations that limit runoff pollution under this authority, and federal limits appear farther off today than they did a decade ago.

This gridlock is partly a reflection of the federal political climate. Equally, however, it reflects the perception, shared by many environmentalists, that problems such as runoff pollution are land use issues that are best solved at the state or local level. This gridlock at the federal level can be viewed as an opportunity to foster a change in the worldview of state and local officials, who rarely view themselves as environmental leaders. Without state and local governments shouldering their responsi-

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bility for managing land uses to reduce water pollution, the United States will never achieve the goal of bringing our waters back to fishable and swimmable condition.

The nation's 30-year-old environmental regime has had significant successes, but its allocation of federal, state, and local responsibility (most, some, and very little, respectively) is now evidently insufficient to continue cleaning up the nation's air and water or to address land conservation at all. It is not the case that all pollution is local. But many of the next necessary steps in pollution control will be.

### **How State and Local Governments Are Taking on an Environmental Regulation Role**

States and localities are increasingly taking responsibility for environmental protection, rather than leaving it up to a higher level of government. Some of the nation's most important and aggressive environmental initiatives in recent years have come at the state level. For example, in June 2004, the state of California announced an aggressive plan to combat global warming by requiring a 30% reduction in carbon dioxide emissions from passenger vehicles and light duty trucks over the next 10 years.<sup>17</sup> Similarly, the state of New York implemented regulations in 2003 that would cut sulfur dioxide emissions from power plants to one-half of what is allowed under the federal Clean Air Act (CAA), and also reduce nitrogen oxide (NO<sub>x</sub>) emissions.<sup>18</sup> Massachusetts' new rules will require four power plants to cut their mercury emissions levels by 85% over the next four years and 95% over the next eight years.<sup>19</sup> The state previously established a gradual phasing down of sulfur dioxide and NO<sub>x</sub> emissions.<sup>20</sup>

At the local level, one observer speaks of "a remarkable and unnoticed trend among local governments to adopt laws that protect natural resources."<sup>21</sup> These local laws include traditional land use regulations enacted in the service of particular environmental goals and watershed and runoff regulations aimed at stemming nonpoint source pollution.

As discussed above, land use regulations make a practical case for environmental federalism because this kind of regulation is entrenched at the local level. Efforts at federal land use control in the 1970s failed,<sup>22</sup> and more recent attempts at involving the federal government in advising and supporting local planning processes have stalled.<sup>23</sup> Because of their control over land use, state and local officials have always been critical environmental decisionmakers; now that role is becoming plain. There are many examples of the explicit convergence of land use and en-

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vironmental laws. For example, Delaware, Florida, New York, and Washington require or allow localities' comprehensive plans to identify, conserve, and protect natural resources or important environmental areas.<sup>24</sup> Local zoning ordinances create specific overlay or conservation districts that protect wildlife habitats (as in Tucson, Arizona; Summit County, Colorado; and Holladay, Utah), and protect ecologically sensitive areas such as ridgelines and slopes (as in Putnam Valley, New York). Preservation of open space is a unifying theme in many local land use laws.

Local officials also deploy land use regulations to protect water quality. In Wallingford, Connecticut, and Bedford, New York, ordinances ban or restrict potentially polluting land uses such as dry cleaning and disposal of hazardous waste in order to lower the risk of contamination of the local aquifer. Falmouth, Massachusetts, and the Long Island Pine Barrens use transfer of development provisions to restrict development affecting their drinking water supply. Other localities limit development in floodplains, on ridgelines or steep slopes, or in stormwater channels.

The federal environmental laws of the early and mid-1970s were premised, at least in part, on the notion that state and local governments were unable or unwilling to take responsibility for safeguarding natural resources. But state and local activity over the last 30 years, and particularly over the last decade, undercuts this view of states and localities. State and local governments are not perfect guardians of the environment (neither is the federal government), but they can be competent partners in an allocation of authority that puts responsibility for different environmental problems at different governmental levels, or federalism.

### **Thwarted State and Local Efforts to Address Particular Environmental Challenges**

With more and more frequency, state or local governments that are willing to play an active role in environmental protection are blocked by court rulings that declare such action inconsistent with federal law. Or, citizens use the initiative process available in many states, only to be thwarted by a court ruling based on what is known as the dormant Commerce Clause. These rulings show that deference to national power, or national uniformity, can be the enemy of environmental protection. People who care about the environment should not be afraid to challenge judicial doctrines that block these "overachieving" state and local governments.

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### *The Los Angeles Basin: “The Risk Follows the Freeways”*

The Los Angeles metropolitan area has the worst air pollution in the nation.<sup>25</sup> The area is the only place in the entire country that EPA has designated an “extreme nonattainment” area for core air pollutants such as soot and smog.<sup>26</sup> The District has the unenviable mission of controlling air pollution in the bulk of this metropolitan area, specifically in Orange County and the urbanized portions of Los Angeles, Riverside, and San Bernardino counties.<sup>27</sup>

Diesel emissions in the Los Angeles area, mostly from trucks, buses, and other heavy-duty vehicles, account for about 70% of the toxic cancer risk in the region.<sup>28</sup> This cancer risk is not spread evenly throughout the Los Angeles Basin, but instead is highest in south-central and east-central Los Angeles County and along freeways.<sup>29</sup> As an attorney for the District explains: “Toxic risk in southern California follows the freeways.”<sup>30</sup>

The pattern of heightened risk was a particular concern because of the District’s environmental justice initiatives, which seek to provide clean air to every resident, regardless of income or place of residence.<sup>31</sup> Dr. Pom Pom Ganguli, the public advisor for the District, explains that

[t]he areas where you have higher risks are along the freeways, and that’s where poorer communities live because the land is cheap. These are the people who are not represented in policy decisions. . . . Traffic and increased pollution affects [low-income residents] most. Our board has taken a position that we should try to help them [and] reduce diesel emissions near their homes, schools, and hospitals.<sup>32</sup>

District officials believed that they could not rely on the federal government to address the health risks that heavy-duty diesel engines present to Los Angeles area residents. “[EPA] has not acted as expeditiously or to the level of stringency that is needed” to clean up the air in southern California, says Ganguli, particularly with respect to heavy-duty mobile engines.<sup>33</sup> While EPA has announced a rule that will reduce diesel emissions over the next 25 years, starting in 2007,<sup>34</sup> Ganguli says this rule is “too little and it comes too late. It’s not enough right now. We need reductions from existing sources now.”<sup>35</sup>

In order to reduce the cancer risks from heavy-duty diesel engines, the District took action under a provision of the California Health and Safety Code that gives the District the ability to require the purchase of “vehicles which are capable of operating on methanol or other equivalently clean[-]burning alternative fuel.”<sup>36</sup> The District passed a series of rules that required owners of fleets of transit buses, school buses, trash collection trucks, airport shuttles and taxis, and street sweepers and other

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heavy-duty vehicles to buy clean-fueled vehicles when they replaced vehicles in their fleets, or added to their fleets. Any operator who could show that he or she needed a model that was not commercially available in a clean-fuel version could get an exemption from the fleet rules.<sup>37</sup> Between June 2000, when the first fleet rules were adopted, and January 2004, public and private operators purchased more than 5,500 clean-fueled heavy-duty fleet vehicles, including 3,000 transit buses.<sup>38</sup>

The fleet rules were challenged in federal court by the Engine Manufacturers Association in August 2000.<sup>39</sup> The association complained that the District had overstepped its powers and intruded on the federal government's regulatory turf. Specifically, the association said that the fleet rules violated the provision of the CAA that forbids any state or local government from adopting or enforcing "any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines. . . ."<sup>40</sup>

The federal district court ruled for the District and upheld the rules.<sup>41</sup> The lower court explained that the state of California, through a special exemption in the CAA, already set emissions standards for the kinds of vehicles that could be sold in California. The District's rules directed fleet operators "to choose from among the least polluting of [state-]certified, available vehicles."<sup>42</sup> Therefore, "[t]he [r]ules impose no new emission requirements on manufacturers whatsoever, and therefore do not run afoul of Congress' purpose behind motor vehicle preemption: namely, the protection of manufacturers against having to build engines in compliance with a multiplicity of standards."<sup>43</sup> The U.S. Court of Appeals for the Ninth Circuit affirmed the lower court ruling, calling it a "well-reasoned" opinion.<sup>44</sup> But in April 2004, the Court struck down the District's fleet rules that applied to the purchase of new vehicles by private fleet operators, saying that the rules were prohibited by the CAA.<sup>45</sup>

Since the Court's ruling, the District is hanging on to as much of the fleet rules as it can. "We're not going to give up, but we're just going to have to figure out other ways" to reduce diesel pollution from mobile sources, says Kurt Wiese, the District's senior deputy district counsel.<sup>46</sup> However, the District does not have an enormous amount of room to maneuver. "Because for the last 50 years we've been doing aggressive stationary source controls, we've had to turn to mobile sources [to continue to reduce air pollution] and our hands are really limited in that," laments Henry Hogo, the District official in charge of the fleet rules.<sup>47</sup> "We've been actively pursuing greater federal controls, [greater] in our area than in other areas, and the position that the federal government has is that they want to develop rules that would [apply] across the board in all 50 states," he says.<sup>48</sup> But no other state, no other metropolitan area, has the

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intense air pollution problem of Los Angeles. “We are frustrated,” admits Ganguli, “[w]hile on the one hand the [CAA] is requiring us to meet standards, on the other hand the federal government is not helping us. It is a Catch-22 situation.”<sup>49</sup>

*South Dakota: “Once You Get a Contaminant Into the Aquifer, No Amount of Money Is Going to Clean It Up”*

“Within [one-]quarter mile of my farm, [there are] 17,000 corporate hogs and a 10,000[-]cattle feed yard, and they have destroyed my water supply,” says Ralph Duxbury, a retired farmer and livestock producer in Hurley, South Dakota.<sup>50</sup> “Basically, we felt as though there needed to be individual responsibility between production agriculture and the community and environment,” according to Charlie Johnson, a member of the group Dakota Rural Action.<sup>51</sup> These dual concerns, of environmental damage done by corporate livestock producers and the lack of community investment and attention, underpinned the support for the amendment in 1998 to the South Dakota Constitution known as Amendment E.

In the late 1990s, corporate livestock operations were on the rise in South Dakota.<sup>52</sup> The state had an anticorporate farming law on the books, the 1974 Family Farm Law, which limited corporate ownership of farms and farm lands, but left exceptions for livestock feeding operations.<sup>53</sup> Between March 1997 and March 1998, the number of large livestock operations on the state environmental agency’s weekly permit list almost tripled, jumping from 35 to 94.<sup>54</sup> One of the largest hog producers in the country, Murphy Farms, was preparing to increase its hog feeding facilities in South Dakota from 20 to 60.<sup>55</sup> Environmentalists and family farming advocates were alarmed by this trend, fearing that corporate farms would pollute South Dakota’s water supply and drive family farmers out of business.<sup>56</sup>

Environmentalists were particularly concerned because they felt that the state Department of the Environment and Natural Resources (DENR) was not a tough enforcer of existing environmental laws. As Luanne Napton, president of the statewide environmental group South Dakota Resources Coalition, says bluntly: “It’s almost impossible to get [federal environmental law, such as the CWA] enforced here.”<sup>57</sup> Johnson, a member of the family farm advocacy group Dakota Rural Action, echoes Napton’s lament. “It’s all fine and dandy to have some of the best laws in the books, but if there’s no incentive to follow them, or if disregarding the regulations is no more [to corporations] than you and I paying a speeding ticket, what effect will you have?”<sup>58</sup> The Natural Re-



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sources Defense Council has criticized the DENR for failure to respond promptly to manure spills and for generally having a weak regulatory climate when it comes to monitoring and preventing water pollution from livestock operations.<sup>59</sup>

Working with sympathetic state legislators, the advocates drafted some 20 bills designed to strengthen environmental protections and shore up family farm operations. But during the 1997 legislative session, says Napton, “all of these bills were either instantly killed or watered down so as to be meaningless [and] at that point, we knew we had to do something else.”<sup>60</sup> Johnson concurs, saying that the feeling was “[I]et’s go to a constitutional amendment and win it once and for all.”<sup>61</sup>

In South Dakota, one can see all the causes of frustration with current environmental law, at all levels. The federal government was providing insufficient oversight in the face of the state’s insufficient enforcement (and this is an enormous, common problem in the CWA).<sup>62</sup> The state legislature was caught up in the common public choice dilemma presented by any environmental legislation: the benefits seem to be diffuse and generally far in the future, while the costs seem to be immediate and severe.<sup>63</sup> The state’s initiative and referendum process appeared to be the only way to circumvent these problems and force environmental protection.

There is no way to eliminate the risk of underenforcement of environmental laws. It can occur even if the citizens of the state overwhelmingly favor the law in question. But the risk of underenforcement rises dramatically when federal standards are imposed on unsympathetic state officials. Environmental federalism posits that in many circumstances people gain more from allowing high and low variations between (and within) states, than from locking every state and locality into the same level of protection. The “floor” of protection established by federal law gives a lower bound to environmental protection, and, as was the case in South Dakota, citizens can force their governments to go above this floor through the legislative or the initiative process. Though there is risk in this flexibility, it can be preferable to the status quo, which denies any empowerment to state residents to improve the quality of environmental protection where they live.

After their frustrating experience in 1997, the South Dakota Resources Coalition and Dakota Rural Action began building support for a constitutional amendment that would relieve the environmental and economic threats corporate agriculture presented. The amendment, known as Amendment E, was designed to keep corporations, except family farm corporations, from owning farmlands or having interests in

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agricultural contracts, farmlands, or operations.<sup>64</sup> It stated, in part: “[N]o corporation or syndicate may acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise, in any real estate used for farming in this [s]tate, or engage in farming,”<sup>65</sup> but had an exception for family farm corporations. The amendment was one of a long line of anti-corporate farming laws passed by midwestern legislatures or citizen initiatives, dating as far back as 1936.<sup>66</sup> Fourteen states now have some kind of restriction on corporate agriculture, arising from “the belief that the Jeffersonian ideal of numerous, vibrant, independent, widely dispersed family farmers is healthy for the nation.”<sup>67</sup>

The fear of environmental harm was strong among Amendment E supporters.<sup>68</sup> “The reason people use artificial entities,” says Johnson, “[is that] they’re trying to put a corporate veil between their own assets and responsibility for what the business does in everyday transactions. From an environmental standpoint, it just isn’t good enough to have reasonably strong regulations, you need to have a very strong incentive to follow those rules also,” such as a risk of loss of personal assets, Johnson explains.<sup>69</sup> Because of the state’s particular geology, says Napton,

once you get some contaminant like manure into this aquifer, no amount of money is going to clean it up. Nature is going to have to do it, and it could take 1,000 years. . . . We had just seen horror footage of huge manure spills in North Carolina, and we knew we couldn’t allow that to happen here because there is no clean-up here.<sup>70</sup>

Some of Amendment E’s early, vigorous supporters were quite concerned about the effect that corporations, particularly out-of-state corporations, would have on South Dakota’s economy. Amendment E was necessary “to keep corporate takeovers from decimating agriculture. . . . It’s real important that we keep people in our communities that contribute to our communities and our infrastructure,” says Duxbury.<sup>71</sup> “The feed comes in from out of State, the hogs come in from out of State, [and get] exported out of State. The owners get off scot-free,” he adds.<sup>72</sup> Donald Hoogestraat, another retired hog farmer who backed Amendment E, says: “I could see where the corporations were taking the entire hog industry from the independent farmers. [Corporations] pulled all the profits out of here [and] all they left behind was the manure.”<sup>73</sup> But the concern about out-of-state corporations draining money from the South Dakota economy was not included in the language of Amendment E, which applied equally to local and out-of-state corporations. In fact, opponents of Amendment E complained that “[t]he language

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of Amendment E does not clearly distinguish between South Dakota farmers and out-of-state-based farmers and ranchers.”<sup>74</sup>

Despite the neutral language of Amendment E, in August 2003, the U.S. Court of Appeals for the Eighth Circuit overturned Amendment E, ruling that it violated the so-called dormant Commerce Clause, which gives courts the power to strike down state and local laws that discriminate against out-of-state commerce.<sup>75</sup> Citing statements similar to those by Johnson and Hoogestraat, the court found that “the evidence in this case leads to a single conclusion: Amendment E was motivated by a discriminatory purpose.”<sup>76</sup>

Since the court’s ruling, the backers of Amendment E are unsure how to proceed. Some supporters have considered a legislative solution, such as amending the 1974 Family Farm Act, but others doubt that the legislature will be more sympathetic now than they were in 1997, when a score of similar bills were quickly disposed of.<sup>77</sup> “We’ll discuss everything that might be remotely possible,” says Napton. “Everything is on the table.”<sup>78</sup>

### Conclusion

Other parts of this book will explain the flaws in judicial opinions that blocked the District’s fleet rules and South Dakota’s Amendment E. This chapter, on the other hand, has set forth a policy argument, consisting of two points. First, state and local governments should be recognized and supported as having critical responsibilities in many domestic policy areas including environmental protection. Many states and localities are asserting themselves as environmental champions, as demonstrated through the numerous examples above. Second, federal court rulings are having an important federalism-stifling effect that has serious costs. It means leaving tons of toxic diesel emissions in the already polluted air of southern California. It makes South Dakota’s aquifers and farmers vulnerable to companies that have previously polluted water supplies. Shouldn’t the people breathing that air or drinking that water, who have the most urgent interest in the community’s health, be allowed to protect their resources? Recall the plaintive statement of the District official: “Our need is immediate, and you do not have such immediate need in other parts of the country . . . and that is at the root of the problem.” The root of the solution is environmental federalism.

## Chapter 3:

### Federalism as a Neutral Principle

In *Gregory v. Ashcroft*,<sup>1</sup> Justice Sandra Day O'Connor reminds us that our “federalist structure . . . preserves to the people numerous advantages.”<sup>2</sup> The first advantage she mentions, federalism’s promise of “assur[ing] a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society,” captures nicely the promise of federalism as a neutral principle.<sup>3</sup>

The previous chapter discusses the benefits of a decentralized solution in the practical context of communities dealing with real-world environmental problems. In this chapter, we turn from the concrete to a series of hypothetical scenarios that help give a more robust description of federalism’s ability to improve political outcomes. We then turn to a discussion of some of the other advantages of federalism and some of the common misperceptions about federalism, such as the assumed link between federalism and discredited notions of “states’ rights.”

#### **Improving Political Outcomes**

Federalism can improve citizen satisfaction with political outcomes, and this represents the most important neutral value advanced by a federal system of government. Federalism’s promise of improving political outcomes is best illustrated by considering a highly simplified world with only two states, state Green and state Gray, each containing 100 voters.<sup>4</sup> The two are joined together by a national government that has the power to set standards that apply throughout both states.

Assume that smog caused by automobiles affects both states, but causes more health problems in state Green. Assume that, therefore, 70 voters of the citizens of state Green want a ban on high polluting vehicles, while only 40 voters in state Gray want such a ban. One option is

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for the national government to ban high polluting vehicles and because 110 voters support such a ban, national legislation would probably be enacted. The alternative would be for state Green to enact a ban and state Gray to forego any action. A state-by-state solution in this case will honor the preferences of 130 total citizens (70 from state Green, 60 from state Gray), 20 more than would be satisfied by a solution at the national level. If the population is mobile and citizens are sufficiently motivated by the policy choice in question to move because of it, the state-by-state solution could satisfy the policy preferences of an even greater total number of citizens as they move between states to effectuate their preferences.

Now add a wrinkle. Assume that the different levels of support for pollution control in the two states are attributable to the fact that smog from state Gray travels across the state's border and causes health problems in state Green. Under this scenario, it is unlikely that either state, acting alone, would ban high polluting vehicles. State Gray would bear disproportionate costs for enacting the ban and receive fewer corresponding benefits. Voters in state Green would likely conclude that it made little sense for them to bear the costs of banning emissions without an emissions ban in state Gray. Thus, a state-by-state solution would only make 90 citizens happy (those who don't want any ban on emissions). In such cases, a national solution would be the best policy outcome.

Now add one final wrinkle. What if state Green adopts a ban on high emission vehicles and automobile manufacturers respond by developing a new car that pollutes less but costs no more? When this occurs, opposition to the pollution ban will almost certainly evaporate in state Gray, which will then enact a similar ban. Conversely, if car owners in state Green end up paying inordinately high vehicle prices, support may in turn evaporate, and state Green might end up repealing its ban. This experimentation rationale for federalism has never been stated better than by Justice Louis Brandeis, who famously wrote: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country."<sup>5</sup>

In the first and third scenarios lay the promise of federalism as a neutral principle. Environmentalists frequently protest that a state-by-state solution will lead to laws that are less protective of the environment overall than national environmental safeguards. This is indeed the outcome of the first example above, where more people get their preferred outcome, but the environment in state Gray is less protected than it

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would be under a national solution. But absent any pervasive flaws in the political process, it is just as likely that a state-by-state solution will result in greater protection for the environment.\* Proponents and opponents of stronger environmental protections should each like federalism not because they always win, but because it improves the overall popularity of the measures.

This is not an argument for a weak national government. As scenario two demonstrates, there are very good reasons for national environmental laws. One of these reasons is interstate externalities or spillover effects. Another is the economies of scale that come in some instances with federal regulation. The U.S. Environmental Protection Agency (EPA) spends a significant amount of money testing and setting standards for products like pesticides: it would be enormously inefficient for 50 states to try to duplicate this work. Similarly, there are good reasons in favor of preemption of state laws in some areas. Again, there is no reason to subject pesticide manufacturers to 50 different state label requirements.

Where these or other persuasive reasons justify a national solution, or a national minimum standard, Congress should act. Where such justifications are lacking, Congress should refrain from acting and state and local governments should be free to craft their own solutions. As James Madison put it in *Federalist 10*: “The federal Constitution forms a happy combination in this respect; the great and aggregate interests being referred to the national, the local and particular to the State legislatures.”<sup>6</sup> In Justice Stephen Breyer’s more recent interpretation, he explains:

Modern commerce and the technology upon which it rests need large markets and seek government large enough to secure trading rules that permit industry to compete in the global marketplace, to prevent pollution that crosses borders, and to ensure adequate protection of health and safety by discouraging a regulatory “race to the bottom.” Yet local control over local decisions remains necessary. . . . Local control can take account of such concerns and help to maintain a sense of community despite the global forces that threaten it. Federalism matters to ordinary citizens seeking to maintain a degree of control, a sense of community, in an increasingly interrelated and complex world.<sup>7</sup>

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\* To illustrate, consider a variation of the first scenario in which only 60 people in state Green want to ban high polluting vehicles and only 30 people in state Gray want such a ban. In this scenario, a national ban would not be enacted (because it is favored by only 90 of the 200 total citizens). A state-by-state solution would result in a ban in state Green, no ban in state Gray, and again the satisfaction of the preferences of 130 citizens. A state-by-state solution in such a case would maximize both citizen satisfaction and environmental protection (given the political dynamic).

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### Improving the Political Process

Federalism also can improve the political process itself by allowing many government functions to be handled by a branch of government that is closest to the people and most responsive to the citizens' specific needs and desires. Unfortunately, this important, politically neutral value of federalism is being underprotected by recent U.S. Supreme Court case law.

Americans like having our police officers come out of our local communities and like having our zoning boards make decisions about land use. We'd rather go to our state to get a driver's license and register our cars than have to approach a federal bureaucracy. A federal system can promote political participation by allocating power to smaller units of government where it is easier for citizens to exchange ideas, understand the issues at hand, and debate each other in a meaningful way.<sup>8</sup> The promise of decentralization seems to animate Chief Justice William H. Rehnquist's vision of federalism as reflected in his testimony at his confirmation hearing for elevation to Chief Justice: "My personal preference has always been for the feeling that if it can be done at the local level, do it there. If it cannot be done at the local level, try it at the [s]tate level, and if it cannot be done at the [s]tate level, then you go to the national level."<sup>9</sup>

Bringing the government closer to the people is plainly one of federalism's great advantages. It is also, however, the advantage least promoted currently by the Court. The reason lies in a distinction drawn by Prof. Richard Briffault between federalism and what he calls "localism." As Professor Briffault explains, local governments are smaller, far more numerous than states, and thus far better positioned to provide their citizens with meaningful opportunities for political participation.<sup>10</sup> The U.S. Constitution, on the other hand, protects the states' existence, boundaries, and their democratic processes but never mentions the need for local governments. According to the Court, local governments are subordinate government instrumentalities created by the state to assist in carrying out state government functions.<sup>11</sup>

So does federalism protect local governments? The Court has never satisfactorily answered this question and its rulings reflect this indecision. To give just one example, while the Tenth and Eleventh Amendments both mention only "States," the Court protects local government officials against commandeering by the federal government under the Tenth Amendment, but provides no sovereign immunity to local officials under the Eleventh Amendment.

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A more telling question, perhaps, is what the Court does where the interest of states and local governments come into conflict. This was precisely the case in *Nixon v. Missouri Municipal League*,<sup>12</sup> decided in March 2004, in which the Missouri Municipal League argued that a state law preventing local public utilities from providing telecommunication services was preempted by the federal Telecommunications Act.<sup>13</sup> The Court ruled for the state of Missouri, finding the plain statement rule applied in *Gregory* to federal laws interfering with a “decision of the most fundamental sort for a sovereign entity” protected Missouri’s decision to control its subdivisions.<sup>14</sup> Where states and local government interests come into conflict, according to *Nixon*, states usually prevail.

Finally, as detailed in other parts of this book, the Court’s doctrines under the dormant Commerce and the Supremacy Clauses too frequently strike down local government initiatives. By making these doctrines more federalism-protective, the Court would go a long way toward protecting the process advantages of localism.

In sum, while improving the political process is one of the great advantages of federalism, it is an advantage that is being promoted insufficiently by existing Court case law.

### Protection Against Tyranny

A final advantage of federalism—the ability of states to defend their citizens against federal tyranny—is being overprotected by the current Court. As *Nixon* illustrates, constitutional federalism, at least as defined by the current Court, is more about protecting the states as states than it is about protecting the advantages of having a government that is closest to the people. Indeed, the Court has called preserving the strength of states to act as a meaningful check against federal government abuse “[p]erhaps the principal benefit of the federalist system”<sup>15</sup> and in cases such as *Nixon*, the need to preserve strong states has trumped the values of participatory democracy at the local level. As Professor Briffault notes, states are “too large to provide real participatory democracy,” but they are “more capable than local governments of being viable power centers.”<sup>16</sup>

The advantage of federalism in protecting against federal abuse is the hardest argument for modern Americans to understand. As Justice Anthony M. Kennedy notes in *United States v. Lopez*,<sup>17</sup> it seems counterintuitive to think that two levels of governments would enhance individual liberty more than one.<sup>18</sup> But like the division of power among the Congress, the president, and the judiciary, the Framers believed that



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by dividing government authority between the national government and the states, the “different governments will control each other, at the same time that each will be controlled by itself.”<sup>19</sup> In particular, Madison believed that a strong national government was necessary to control the factions that can dominate politics, particularly at the state and local level.<sup>20</sup> Correspondingly, the states needed sufficient authority to allow them to rise up and revolt if the federal government ever became tyrannical. As the Court said in *Gregory*: “A healthy balance of power between the [s]tates and the [f]ederal [g]overnment will reduce the risk of tyranny and abuse from either front.”<sup>21</sup>

States enthusiastically support the Court’s decisions preserving their power as a check on federal overreaching. But, as we explain in Part Three, the states have recognized important limits, limits that reflect our constitutional history. It was the Framers’ perspective, expressed by Madison in *Federalist 46*, that any “ambitious encroachments of the federal government on the authority of the State governments” would result in armed insurrection by state militias against the federal authority.<sup>22</sup> Madison believed that this ability of the states to resist federal authority, coupled with the other checks and balances built into our constitutional system, made even the Bill of Rights unnecessary.<sup>23</sup>

Madison lost this fight and the Bill of Rights was passed as the first Ten Amendments to the Constitution just a few years after ratification. As a result, few today would argue that the states are the first line of defense in protection, for example, against federal restrictions on the freedom of speech: it is the First Amendment that bears this load.

Moreover, such an armed insurrection by the states happened once in our nation’s history, when the national government tried to limit slavery’s expansion to new government territory. Since the Union victory in the Civil War, thankfully, no state has seriously attempted armed resistance to federal authority. The end of the Civil War and the Progressive Era also brought the Thirteenth through the Seventeenth Amendments to the Constitution, all of which expanded federal power and reduced the power of the states.<sup>24</sup>

When we speak of the ability of states to check federal tyranny, then, we do so in a different language than did the Framers and by reference to a Constitution that has changed in important ways. Some argue that the simple fact that the federal government has grown beyond the bounds envisioned by the Framers proves, ipso facto, that the state checks on federal government abuse have broken down and need restoration by the Court. This argument is wrong because the country and the Constitution have changed in subsequent years, and the relevant question is whether

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the federal government's expansion is incompatible with the words of the Constitution, as amended by subsequent generations.

The states' position in federalism cases fully embraces the nuances demanded by a modern argument for state power. The state briefs explored later in this book strongly embrace the Court's effort to limit federal laws that commandeer state resources and personnel for the accomplishment of federal objectives. The states do not view formalistic limits on federal power as essential to state liberty, however, and thus have overwhelmingly supported federal laws necessary to combat national problems such as violence against women and pollution of our air and water.

### **Federalism Versus Libertarianism**

The next part of this book addresses and refutes the arguments of libertarian activists such as Michael Greve of the American Enterprise Institute, who are seeking to use federalism as a vehicle for attacking government at all levels.

We pause here only to make the point that federalism and libertarianism are very different concepts that can and should be considered independently of one another. As explained above, individual liberties are constitutionally protected by the Court primarily through its interpretation of the rights guaranteed by the Bill of Rights and subsequent constitutional amendments. Since the incorporation of the protections of the Bill of Rights against the states, these liberties are protected from encroachment by any government: federal, state, or local.

One can be passionately libertarian, and advocate for an expansive view of rights protected by the Constitution against incursion by any level of government, without viewing federalism as a vehicle to advance a libertarian agenda. Federalism is primarily about allocating the powers the government does have, not about determining what government can do in the first place.

### **Federalism Versus States' Rights**

This leads naturally to a discussion of a common misperception about federalism. Many Americans are almost instinctually repelled by arguments in favor of a federalist solution because of a common association between federalism and the cries of "states' rights" that were used to resist abolition of slavery in the 19th century and national civil rights laws in the mid-20th century.

But federalism, neutrally defined, is not about states' rights at all. It is about allocating authority to the level of government best suited to ad-

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dress the problem at hand. There are two sides of federalism: one is protecting state authority where it is appropriate; and the other is ensuring that the federal government has power where national rules are necessary. Few Americans now think that we should allocate authority to protect against racial discrimination exclusively to the states, and the Reconstruction Era Amendments guarantee an important federal role.

Serious consideration of constitutional and political federalism would lead to a devolution of some power to the states, but not because federalism is about states' rights. Rather, federalism trends toward more state authority because in recent years so much has been federalized, some of it without much apparent forethought. A good example is the federalization of criminal law, which is in many respects the classic example of an area traditionally handled by state and local governments. As the American Bar Association concluded in 1998: "The expanding coverage of federal criminal law, much of it enacted in the absence of a demonstrated and distinctive federal justification . . . has little to commend it and much to condemn it."<sup>25</sup>

It is within this context that the Court's 1995 ruling in *Lopez* draws its strongest support. Prof. Larry Kramer has noted that despite the nearly complete absence of judicial checks on federal power between 1937 and 1995, the vast majority of the law that most affects our lives is state law on topics such as trusts and estates, contracts, torts, family relations, property, and land use.<sup>26</sup> Professor Kramer uses this evidence to argue that the political process adequately protects states from federal intrusion. Professor Kramer's point is a good one, but the federalization of crime over the last two decades is an important counterexample. Congress passed the "Gun-Free School Zones Act" at issue in *Lopez* without even bothering to articulate how precisely the act of possessing a gun near a school affected interstate commerce. All Americans should celebrate *Lopez* for the insistence by the Court that Congress needs to think more seriously about the need for a national law than it did in passing the Gun-Free School Zones Act.

### Conclusion

Federalism, as we have defined it here, deserves support from Americans for an amalgam of practical and historic reasons that have almost nothing to do with our preferences regarding the outcome of policy debates. Rather, support for federalism as a neutral principle distills to one basic, patriotic idea: we support federalism because the ingenious system devised by our Framers still has much to commend itself to us today.

## PART TWO

## Chapter 4:

### Federalism as Libertarian Fantasy

As the previous chapters explain, there is much to be gained from careful attention to the proper allocation of authority between local, state, and federal governments. The Framers' allocation of power among the national and regional governments is one of the key structural elements of our government system, which is a model for democracies worldwide and the source of enormous civic pride for all Americans.

Although a commitment to federalism should transcend political disputes, a vocal and increasingly influential group of libertarian scholars and activists is attempting to hijack the term to promote a vision that has nothing to do with federalism at all. According to Michael Greve, who runs the Federalism Project at the American Enterprise Institute, and his colleagues, federalism “must be an ideological affair” because federalism is about limiting the authority of both state and federal governments. The most comprehensive explanation of these views comes in a book by Greve called *Real Federalism*.<sup>1</sup> This chapter chronicles the errors and contradictions in Greve's argument as part of this book's broader effort to promote a vision of federalism that does not rely on ideological division. In the next chapter, we will chronicle the disturbing amount of influence libertarian federalism is having in legal circles and then consider, before rejecting, the proposition that the U.S. Supreme Court is advancing a libertarian agenda in the guise of protecting federalism.

#### **Real Federalism in a Nutshell**

Federalism is at once both a question of constitutional law and a question of policy. In assessing an approach to federalism as a matter of policy, the key question ought to be whether the approach is principled and persuasive. In assessing an approach to federalism as a matter of con-

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stitutional law, the key question ought to be whether the approach is consistent with the text, structure, and history of the U.S. Constitution. Greve's "real" federalism fails on both fronts.

Greve's argument, to begin, is plagued by internal contradiction. Greve starts *Real Federalism* by arguing that the federal government's powers should be limited. The basic reason, he argues, is that states are better at satisfying the preferences of their constituents. In addition, he contends, people have an easier time moving from one state to another, and therefore they can find the state that offers the package of goods and services they desire. Greve thus suggests, in this part of the book, that we can trust states to act in the best interests of their constituents.<sup>2</sup>

In a later part of the book, however, Greve changes his mind about state governments. It turns out that states cannot be trusted either.<sup>3</sup> Greve expands on this idea in an article written after the publication of *Real Federalism*, entitled *Federalism's Frontier*.<sup>4</sup> In that article, we learn from Greve that what states really want to do is to form "intergovernmental conspiracies against citizens."<sup>5</sup> They want to exploit, not serve, their citizens. The notion that the federal government should be limited because you can trust the states turns out to be a sham argument. In reality, in Greve's world, you cannot trust anyone. Or at least any government.

Thus, Greve argues, "real" federalism requires protection against both the federal and state governments. In fact, what Greve means by "real" federalism is protection from regulation of (almost) any sort. But saying that this is what federalism means does not make it so. A scrambled egg is not a swing set, no matter how much anyone might argue to the contrary.

There is one final twist to Greve's argument worth highlighting. We said above that Greve opposes regulation of almost any sort. It turns out, upon close inspection, that Greve does not oppose *all* laws and regulations that interfere with the private market. He is happy with certain kinds of laws and regulations that are compatible with his political and ideological agenda. Thus, while he criticizes laws that seek to protect the environment,<sup>6</sup> make products safer,<sup>7</sup> and protect women from domestic violence,<sup>8</sup> he embraces laws that would prohibit private companies or public universities from engaging in affirmative action.<sup>9</sup> Similarly, he supports laws that would restrict access to abortion and limit the rights of gays and lesbians.<sup>10</sup>

Here, finally, we understand what Greve's federalism stands for: a radical, largely anti-government agenda, with certain exceptions for pet political causes. Lest readers think this is an exaggeration, Greve

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himself is not shy about identifying the constituency that he believes will most support his call for a return to “real federalism.” He labels this group the “Leave-Us-Alone” constituency. This group, he suggests, consists of gun owners, conservative religious groups, property rights groups, and tax limitation groups.<sup>11</sup> It is their agenda that Greve is pushing under the banner of federalism, and this agenda lacks any neutral, consistent, or even coherent principle.

This might be bad enough were Greve simply arguing at the level of policy. But he goes a step further. He wants us to believe that his agenda is commanded by the Constitution. In particular, he wants us to believe that the Constitution establishes clearly defined rules that hamstring both the federal and state governments from legislating in the public interest. Thankfully, it does nothing of the kind.

The Constitution establishes some basic rules about the distribution of power between the states and the federal government. Those rules are neither as restrictive nor, indeed, as determinate as Greve suggests. They say nothing about the relationship between a state and its citizens, much less establish that states are prevented from legislating in the interests of the health and welfare of their citizens.

Perhaps recognizing that his substantive agenda would never stand a chance in the political arena, Greve has targeted the Court to do his bidding.<sup>12</sup> He hopes to encourage the Court, with the help of his “Leave-Us-Alone” constituency, to wrap a chain around the houses of Congress and the halls of state legislatures.

There was a time, to be sure, when the Court enforced strict limits on the power of both the federal and state governments to legislate on behalf of the common welfare. The Court did so during the infamous *Lochner* era of the early 20th century, prior to the New Deal. The Court did not rely just on principles of federalism, because those principles do not restrict all government power. Instead, the Court invented a fundamental right to economic liberty, which it used to block state laws that interfered with the free market.<sup>13</sup>

The problem for Greve is that the *Lochner* era has been thoroughly discredited by judges and commentators across the political spectrum. Almost no one takes seriously a call to return to that era, when the Court imposed its own economic views upon Congress and state governments without any warrant in the Constitution for doing so. Greve’s answer is to dress up *Lochnerism* in the guise of federalism and to call this vision, ironically enough, “real federalism.”

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His plan is a dangerous one, which should be recognized and denounced for what it is: a call for judicial activism in the service of a radical, anti-government agenda. He is calling, in short, for a judicial coup d'état.

### **The Policy of Real Federalism: Now You Trust 'Em, Now You Don't**

#### *Let's Free the States*

In *Real Federalism*, Greve begins his case by presenting a familiar argument in favor of a smaller role for the federal government. Greve contends that “*real federalism* . . . aims to provide citizens with *choices* among different sovereigns, regulatory regimes, and packages of government services.”<sup>14</sup> The basic idea is that when the federal government enacts legislation, it sets uniform rules for the entire country. Those rules are difficult to avoid unless one leaves the country, which is not a realistic or desirable option for most people. State legislation, by contrast, is easier to avoid for the simple reason that it's easier to move to another state than it is to move to another country. At least in theory, someone who dislikes a particular state's policies can move to another state that provides a package of goods and services more consistent with that person's preferences. What is true for individuals is equally, if not more, true for businesses, which may be more mobile than many individual citizens.

To the extent people are mobile and pay attention to policy, allowing states more room to legislate will lead to greater satisfaction among citizens and “consumers” of government services. Citizens and businesses will gravitate to those states that offer a package of goods and services consistent with their preferences. States, in turn, will have an incentive to compete for taxpaying citizens and businesses, which will encourage innovation and instill a certain competitive discipline.<sup>15</sup>

This is a plausible argument in favor of leaving more authority to state and local governments. Indeed, it is essentially the “improving political outcomes” argument in favor of federalism laid out in the previous part of this book, stripped of the recognition that national standards are the best option in many cases.

One objection often voiced to this vision of federalism, however, is that unchecked competition among the states may not be productive but destructive. Rather than innovating and providing the package of goods and services desired by a majority of its citizens, states instead may engage in a race to the bottom. The basic idea is that, in an effort to attract businesses, states will adopt policies and programs that are actually in-



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consistent with what their citizens prefer. They will do this in response to policies and programs enacted by other states in an effort to remain competitive. One response will beget another, even further away from citizens' ideal preferences, and so on in a spiral toward the bottom.

One obvious response to destructive competition is federal regulation. If all states must abide by the same environmental rules, there is no need—indeed, no ability—to weaken those rules in order to attract business. Absent that downward pressure, the rules can be set with an eye toward satisfying citizen preferences for environmental health and safety. National rules can also limit the extent to which one state can export the costs of its programs to another; that is, it can address the problem of externalities, such as pollution, that flow from one state's policies or activities.<sup>16</sup>

Greve dismisses the idea that states will engage in destructive races to the bottom. He contends that competition will not lead to the elimination or reduction of environmental, health, and civil rights protections. As he points out, some states already have stronger environmental protections than those required by the federal government, whereas others have stronger protection against employment discrimination than federal law provides. The reason, he recognizes, is because “many citizens *like* government,” and welcome government practices that would strike others as intrusive.<sup>17</sup>

According to Greve, then, one of the reasons to favor a smaller role for the federal government is because states can be trusted to follow the preferences of their citizens. Where citizens “like government,” we can expect states to be active participants in regulating the market. The opposite will prevail in those states whose citizens generally dislike government.

There is certainly some truth to Greve's argument here. Giving states more freedom to act will not necessarily lead to lowering regulatory standards or shrinking the role of the government in protecting the health, safety, and welfare of its citizens. Many of the numerous preemption cases prove as much, as they involve state laws that go further than federal law requires. But notice that, to the extent this argument *is* correct, federalism is necessarily an imperfect vehicle for those who want to limit the power of *all* governments.

Most proponents of devolution recognize and accept this.<sup>18</sup> After all, one cannot logically argue against federal power by asserting that states are more trustworthy and then complain when they legislate rather than refrain from doing so. But this is precisely what Greve does. Once he has finished arguing in favor of limiting the federal govern-

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ment, he sets his sights on state governments. It turns out that, despite what he argues in the first few chapters of *Real Federalism*, Greve doesn't really trust the states.

And it is here that his argument unravels.

### *Let's Rein In the States*

In fact, Greve does not trust state governments any more than he trusts the federal government. After extolling the virtues of state government in order to bolster his argument that federal power should be curtailed, Greve abruptly changes his tune. “[F]or all their alleged flexibility and ‘closeness to the people,’” he now tells us, “the states may be the least responsible, most interest-group-infested, most meddlesome of all government institutions.”<sup>19</sup> Gone is the notion that states, left undisturbed by the federal government, will act in the best interests of their citizens.

In its place, Greve paints a portrait of states as greedy and rapacious, hoping to exploit citizens in neighboring states and willing to allow other states to exploit their own citizens in return. This new vision of states is expanded upon in *Federalism's Frontier*. In this article, Greve turns his attention to what he calls “horizontal federalism,” by which he means measures designed to protect states from “aggression and exploitation by other states.”<sup>20</sup> He contends in this piece that the actions of one state can have extraterritorial effects and can “create an exploitative dynamic that no individual state can escape.”<sup>21</sup> The example he uses is products liability litigation. If one state determines that a product is defective, the argument goes, that state will effectively set safety rules for the entire nation because the producer will work to make the product meet the safety regulations of a particular state.<sup>22</sup>

If it sounds like Greve is making a race-to-the-bottom argument, that is because he is, but with a twist. Greve acknowledges here that the actions of one state can have an effect on other states, which is the rationale used by those who favor federal regulation in numerous fields, including environmental protection. Yet under Greve's vision, instead of engaging in races to shed regulations in order to attract business, states will actually engage in a race to overregulate if left unchecked. As he says of products liability law, which he contends has extraterritorial effects: “The end result is a race toward excessive liability levels—‘excessive’ in the sense that the rules are stricter than the rules that the citizens of autarkic[, i.e., autonomous,] states would choose.”<sup>23</sup> This is a race-to-the-bottom argument, pure and simple, except that Greve's bottom is too much, rather than too little, regulation.

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To make the flip-flop complete, guess what Greve proposes in order to curb this race among states to regulate? Federal interference! Specifically, Greve promotes aggressive federal preemption of state law. The basic idea behind preemption is that the Supremacy Clause of the Constitution makes federal law supreme over any conflicting state law. As a corollary to this basic principle, Congress can occupy a field of regulation by stating that its regulations are meant to exclude any state regulations on the same topic. A court's basic task, then, is to determine whether Congress meant to exclude state regulation.<sup>24</sup>

One might think that anyone seriously interested in granting more authority to the states would be wary of federal preemption. (Indeed, a number of commentators who generally support devolution of authority to states oppose federal preemption, to Greve's consternation.)<sup>25</sup> After all, federal preemption means that the federal government has exclusive authority to regulate in a particular field, which enhances federal power and diminishes state power. At the very least, anyone serious about state autonomy *and* judicial restraint would want courts to find preemption only when Congress has expressed its intentions clearly. Otherwise, judges might substitute their own views about the propriety of state regulation for those of Congress, and do so without any basis in the Constitution.

But Greve tells us, in *Federalism's Frontier*, that this view is mistaken—that it is “false” federalism. “Real” federalism, Greve asserts, requires a strong preemption doctrine and an activist judiciary.<sup>26</sup> This means that “real” federalism, oddly enough, requires a powerful central government. Otherwise there would be no federal authority to act, much less preempt state law. “Real” federalism, in Greve's hands, also requires a judiciary willing to make preemption calls itself rather than forcing Congress to do so. Thus, instead of supporting a clear statement rule, which would allow preemption only when Congress clearly expresses intent to preempt, Greve suggests that courts should strike down state laws on preemption grounds whenever they get a chance.<sup>27</sup>

At least they should strike down *some* state laws. Greve is not opposed to all state regulation, and thus he would not advocate federal preemption on all topics. Instead, he desires an end to state regulation that interferes with the free market. He is perfectly happy for states to prohibit affirmative action by universities and, if they do not, for the Court to prohibit it.<sup>28</sup> He is perfectly happy for states to prevent localities from enacting antidiscrimination laws that protect gays and lesbians.<sup>29</sup> And he would be delighted if states had greater authority to regulate abortions.<sup>30</sup> On these issues, near and dear to the hearts of so-called Leave-Us-

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Aloners, he is perfectly happy for states to regulate, despite his frequent protestations that “real” federalism is ultimately designed to protect individual liberty, and despite his apparent concern that regulation in one state will pressure other states to follow suit.

Confused? If you are, relax. You *ought* to be confused.

### *Putting the Pieces Together*

When one puts Greve’s various arguments together, a curious inconsistency emerges. On the one hand, Greve extols the virtues of state autonomy from federal control, because states will compete with one another for business and the affection of citizens. The federal government, by contrast, is to be feared because it has an insatiable quest for power and acts capriciously. In Greve’s colorful, if tasteless, words, the federal government enacts statutes (such as those protecting school children from gun violence and women from domestic violence) “for the same reason that prompts a dog to lick its testicles: it does it because it can.”<sup>31</sup> Greve dismisses the idea of a race to the bottom and instead suggests that states will go their own way, with some eliminating regulations and others enhancing them. On these bases, he advocates limiting the power of the federal government.

Yet Greve then argues, schizophrenically, that state regulations, on issues from products liability to Medicaid, will force other states to respond in kind, creating a race to overregulate. And on that basis, he advocates enhancing the power of the federal government by strengthening federal preemption. The federal government obviously cannot preempt state regulations if it is prohibited from regulating in that area at all. Thus, in order to have the sort of preemptive power he wishes it to have, the federal government’s power cannot be as limited as Greve suggests it ought to be at the beginning of his *Real Federalism* book. To preempt the states across a range of legislative issues, the federal government will necessarily have to have a good deal of regulatory authority.

If one were to summarize Greve’s principle of federalism in a single sentence, it might read something like this: the federal government’s authority should be limited in order to give states more authority because the federal government can’t be trusted and the states can, except when they can’t, which turns out to be fairly often, which means that the federal government’s authority should be expanded in order to allow the federal government to preempt the states. To lean on Greve’s dog analogy, reading this work is a bit like watching a dog chase its tail.

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It is tempting simply to dismiss Greve's argument as hopelessly incoherent. But to be fair, it turns out that there is a lurking principle that links together these seemingly contradictory positions. The principle is this: states should be free to act *only* if they are shedding regulations that, for example, protect the health and safety of workers or the environment. When states act to repeal such regulations, in Greve's view, state competition is working just fine. Where others might see a race to the bottom, Greve sees a virtuous cycle of competition, leading to less and less interference with the operation of the free market. But when states act to provide even greater protection to workers or to the environment than the federal government might be willing to provide, they need to be stopped in their tracks by the federal government. Only when states are regulating in the service of a socially and religiously conservative agenda—to restrict abortion, require school prayer, prohibit affirmative action, or discriminate against gays and lesbians—should they be left alone.

As a matter of policy, this vision of federalism has little to commend it. Greve does not offer us any principled explanation as to why some state regulations should be tolerated and others disfavored. Similarly, he does not explain why safety regulations (which he disfavors) will have external effects but prohibitions on affirmative action (which he favors) will not. Nor does he explain how one can or should determine the proper scope of federal power, especially if he wants both to limit that power to prevent federal regulation and to preserve that power in order to preempt state regulation. Without any principled theory as to when and why the federal government should be allowed to act, and when and why it should be allowed to interfere with state legislation, we are left with little more than the substantive agenda of Greve and his band of "Leave-Us-Aloners," who, it turns out, do not really want to leave us alone when it comes to certain aspects of race, religion, and sex.

One can agree or disagree with all or part of that agenda on the merits. We find it telling, however, that Greve himself is not prepared to do so. Rather than argue about the substance of his agenda, Greve wants to convince readers that his agenda just happens to flow from principles of "real federalism," which themselves derive from the Constitution. Perhaps he recognizes that his particular agenda is not especially appealing, and for this reason shies away from arguing directly for his blend of *laissez-faire* economic policies and strict, religiously conservative social policies. But his attempt to link this convoluted vision to the Constitution simply does not work.

There is a very simple reason why: the infamous *Lochner* era is over. What is more, it is nearly universally agreed, by both conservatives and

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liberals alike, that the Court's aggressive limitations on federal and state power during this era were without constitutional basis.<sup>32</sup> This presents a huge problem for Greve, who wants to return to the *Lochner* era but cannot come out and say so directly. What Greve is attempting to do instead is to resurrect the judicial activism of this era under the banner of federalism. To see this, and to understand how far Greve's argument strays from the actual text and structure of the Constitution, it is necessary to examine that document and then to examine how it was misinterpreted during the *Lochner* era.

### **Real Federalism or Constitutional Fantasy?**

#### *Playing by the Rules Laid Down: The Actual Constitution*

The Constitution divides power between the states and federal government first and foremost by making it clear that the federal government is one of few and defined powers. Article I lists those powers, which include the power to raise and support the army and navy, declare war, coin money, and regulate immigration. Most importantly, the Constitution grants the federal government the authority to regulate interstate commerce. It also grants Congress the authority to enact any and all laws that are necessary and proper to carry out its enumerated powers.

At the same time that the Constitution grants the federal government certain powers, it prohibits the states from engaging in certain activities. States, for example, are prohibited from entering into treaties, taxing imports or exports, passing bills of attainder, or passing ex post facto laws. The Constitution also requires cooperation among the states and prohibits discrimination against out-of-state citizens. Thus, the Constitution requires each state to give "full faith and credit . . . to the public Acts, Records, and judicial proceedings of every other state." And it also provides that the "citizens of each state shall be entitled to all privileges and immunities" granted to citizens in other states.

The obvious import from the Constitution's text and structure is that the federal government is permitted to do only that which is explicitly authorized by the Constitution or that which is necessary and proper to carry out enumerated powers. By contrast, the Constitution permits states to do anything that the Constitution does not explicitly prohibit them from doing. Put differently, the Constitution envisions the federal government as one of few and defined powers, while it envisions state governments as possessing authority to govern for the general welfare of its citizens. To be sure, neither level of government can violate individual rights that are

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contained in the Bill of Rights and later constitutional amendments. But these rights, while incredibly important, do not really change the balance of power between the state and federal governments, except insofar as the Civil War Amendments—the Thirteenth through the Fifteenth—give Congress the authority to enforce them against the states.

The Constitution certainly leaves a good deal of power to the states, and it seems plain that the Framers could not have predicted that the federal government would expand in the ways that it has. But it is important to recognize that the actual text and structure of the Constitution do not create a weak federal government. On the contrary, as conservative law professor, and now federal appellate judge, Michael McConnell recognized, the federalism rules that the Framers wrote “are skewed in favor of national power.”<sup>33</sup> To cite the most obvious and important example, when there are conflicts between state and federal laws, the Supremacy Clause of the Constitution makes clear that federal law prevails.

In addition, the enumerated powers that the Framers granted to the federal government were drafted in a way that would allow them to expand or contract in the face of technological and social change. The power to regulate interstate commerce is a perfect (and the most relevant) example. At the time of the founding, national markets were nascent and interstate commerce was relatively sparse. As a result, federal power was correspondingly limited. Now there is a national market for almost any and every product, and that market is so interconnected that activities in one state can affect the market in another. Congress’ regulatory power is accordingly broader for the simple and logical reason that as interstate commerce expands, Congress’ power must expand as well because it has the power to regulate such commerce. As explained by Judge McConnell, upon whose work Greve purports to rely, this should not cause concern: “The Framers and ratifiers of the Constitution established rules and standards for determining the proper scope of national authority; that those rules and standards produce different outcomes in later circumstances is neither surprising nor troubling.”<sup>34</sup>

A more basic point to recognize is that the Constitution’s sparse text does not provide concrete answers to the myriad questions that arise concerning the appropriate balance of state and federal power. This is why the issue of federalism gets complicated once one gets beyond the fact that federalism is generally about the distribution of power and starts to ask how that power *ought* to be distributed. The lack of certainty may make some uncomfortable, but is unavoidable in a document that simply lays out a basic framework of government and is designed to last for centuries.

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Given that the Constitution is less than precise about the boundaries of state and federal power, it follows that a key issue—perhaps *the* key issue—for federalism concerns the proper scope of judicial review. What should courts do in light of the fact that the Constitution provides only limited guidance?

There are essentially two options: enforce only those limits on federal and state power that are clearly derived from the text and structure of the Constitution, or enforce those limits that individual Justices think are proper. The former approach recognizes that the Constitution establishes certain limits on state and federal governments, but within those limits democracy and majority rule ought to prevail. This approach acknowledges that we may not like the results produced by the political process, but that it is more important to preserve democratic decision-making than to ensure victory on each and every issue. The latter approach, by contrast, rests on a view that the unelected judiciary should go beyond the text and structure of the Constitution in an effort to block democratic decisions in the name of some normative, ideological, and ultimately personal vision.

### *The Rise and Fall of the Lochner Era*

Prior to the New Deal, the Court favored the latter approach. The Court established strict limits on the federal government, and equally strict limits on the ability of state governments to regulate in the interests of the safety and welfare of its citizens.

The limits on the federal government were created by a cramped reading of Congress' power to regulate interstate commerce. Through a series of rulings, the Court sought to limit Congress' authority to regulate the market by drawing a number of seemingly arbitrary lines between permissible and impermissible regulation. Congress could regulate the channels or instrumentalities of commerce, but it could not regulate manufacturing, even of goods destined for interstate commerce, because manufacturing was not commerce. Thus, Congress could not prohibit the shipment of interstate goods produced with child labor. Congress also could not regulate goods at the point of sale, because this was commerce, but it was not interstate. In general, Congress could not regulate local economic activities, even if these had an effect on commerce.<sup>35</sup>

At the same time, the Court also limited the ability of state governments to protect the health and safety of workers and consumers. Without any basis in the text of the Constitution, the Court determined that the Constitution created a fundamental right to economic liberty and prop-



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erty. Restrictions on business practices, the Court often concluded, interfered with this fundamental right and therefore were unconstitutional. Thus, in the infamous case that gave this era its name, *Lochner v. New York*,<sup>36</sup> the Court struck down a New York law that sought to regulate the hours of bakers in the interest of protecting the health and safety of both bakers and their customers. Such legislation, the majority concluded, interfered with the fundamental right of bakers and their employers to property and economic liberty. In so ruling, as Justice Oliver Wendell Holmes pointed out in his famous dissent, the majority acted without regard for the actual text of the Constitution.<sup>37</sup> They simply made up this right and used it to strike down duly enacted state laws.

The New Deal Court abandoned both lines of attack. On the federal front, the Court faced mounting pressure both from outside and from within the Court. The president and members of Congress criticized the Court for creating obstacles to economic recovery by inhibiting the ability of the federal government to respond to the Great Depression.<sup>38</sup> Internally, some Justices began to recognize that the lines the Court had drawn in its Commerce Clause jurisprudence were arbitrary. The essential truth was that interstate commerce had mushroomed, and markets were increasingly interconnected and national in scope. As a result, even local activities could have an impact on interstate commerce. Given that the Commerce Clause directly grants Congress the power to regulate interstate commerce, and given that Congress also has explicit power to adopt all laws “necessary and proper” to regulate such commerce, these Justices realized that the Constitution afforded them little basis for imposing severe restrictions on Congress’ ability to regulate labor and capital markets.<sup>39</sup>

Ultimately, the Court changed course and dismantled the categories it had once used to limit federal authority under the Commerce Clause. The Court concluded that the Commerce Clause, properly read, gave Congress the power to regulate activities having a substantial effect on interstate commerce.<sup>40</sup> This was a broad power, indeed, and some thought that the Court had all but abandoned efforts to limit federal power. Where once the Court might have drawn arbitrary lines to limit federal power, now it seemed that the Court had gone to the opposite extreme and handed Congress a blank check. But as we will see in a moment, the current Court has made clear that the Commerce Clause is not a blank check, and it has reminded Congress that there are lines beyond which it may not go in the name of regulating interstate commerce.

As for limitations on state authority, the Court ultimately abandoned its *Lochner* jurisprudence. The Court finally recognized that Justice

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Holmes was right in his dissent in *Lochner*, a dissent that conservative Judge Richard Posner has hailed as the greatest judicial opinion of the 20th century.<sup>41</sup> Holmes argued that the Constitution did not enshrine a particular economic policy, namely laissez-faire economics, into the Constitution. As individuals, Justices might support laissez-faire economics. But as members of the Court, bound to enforce the Constitution, the Justices had no business reading this preference into the Constitution. This is precisely, Holmes suggested, what the Court was doing in *Lochner* and similar cases.<sup>42</sup> The Roosevelt Court ultimately agreed, and the era of striking down economic legislation to protect some fictitious fundamental right to economic liberty came to an end.<sup>43</sup>

### *Longing for Lochner's Return*

Fast forward to the late 20th century. By this point, the notion that the Court can discern and enforce serious limitations on federal authority through a cramped reading of the Commerce Clause is a political and judicial non-starter. To be sure, the Court, in *United States v. Lopez*,<sup>44</sup> struck down federal legislation on the ground that Congress exceeded its power under the Commerce Clause. It did so again in *United States v. Morrison*,<sup>45</sup> a few years later, and it established a rule that Congress is essentially free to regulate economic affairs but limited in its ability to regulate noneconomic issues. This creates another seemingly arbitrary category, both because it is not obvious how to distinguish economic from noneconomic issues (e.g., what is crime?) and because ostensibly noneconomic issues can affect markets (e.g., education). Putting that to one side, the more important point about these decisions is that the Court left untouched the bulk of its Commerce Clause jurisprudence.

The Court is thus prepared to remind Congress that there are some limits on federal authority to regulate interstate commerce, but it is not at all prepared to turn the clock back to before the New Deal Court. And with good reason: it is as obvious today as it was then that the power granted to the federal government to regulate interstate commerce is broad because of the economic realities of today's markets. To impose the same constraints that existed before the New Deal would be to impose artificial and judge-created limitations.

More specifically, it would mean the repeal of such laws as the Civil Rights Act of 1964, granting protection to minorities and women from discrimination in the workplace and in places of public accommodation. This law, and many others, rest on Congress' authority to regulate interstate commerce.<sup>46</sup> If that authority were sharply curtailed, these laws

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would all be called into question. Thus, even a conservative Court, interested in reviving “federalism,” has thus far recognized that there is no constitutional basis for turning back the clock and repeating the mistakes of an earlier generation.

As for *Lochner*, by the late 20th century the case name had become an epithet.<sup>47</sup> For liberals and conservatives alike, *Lochner* came to stand for unbridled judicial activism and a dangerous disregard for the text and structure of the Constitution.<sup>48</sup> Indeed, conservatives accused the Court of “*Lochnerizing*” when it recognized rights of privacy and sexual autonomy.<sup>49</sup> Almost no one, at least publicly, is prepared to defend the *Lochner* era as a model of principled judicial decisionmaking.

Now imagine that you have the same substantive agenda as Greve. You do not want either the federal or state governments interfering with the free market, which means that you oppose strong environmental, health, and safety laws. You long for the *Lochner* era, when the Court was serious about restricting the activities of both levels of government. But the *Lochner* era has been so discredited, by liberals and conservatives alike, that you risk ridicule if you simply advocate for a return to that era.

So what do you do?

You pretend that this is all about federalism, and that the federalism you envision is enshrined in the Constitution. And this is precisely what Greve tries to do. In advocating limits on both state and federal authority, he claims that these limits flow from a proper understanding of federalism. Consider, first, his argument about federal authority.

### The Mysterious Doctrine of Enumerated Powers

In *Real Federalism*, Greve frequently laments what he calls the demise of the “doctrine of enumerated powers” at the hands of the Roosevelt Court. He claims that this doctrine imposes severe constraints on the power of the federal government. If only the Court would return and resurrect this doctrine of enumerated powers, Greve suggests, the proper constitutional order would be restored.<sup>50</sup>

But this is silly. It is of course true that the federal government is one of enumerated powers. That, however, is not the issue. The issue is the *scope* of those powers and, more precisely, the scope of Congress’ power to regulate interstate commerce. Identifying the precise scope of that power is difficult, as the New Deal Court ultimately acknowledged. The current Court, though interested in reminding Congress that the Commerce Clause is not a blank check, also recognizes that

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there is no constitutional basis for resurrecting the artificial limitations used before the New Deal to hamstring Congress.

In order to be persuasive at the level of constitutional analysis, Greve must explain why the current Court ought to return to this earlier era of restrictions *as a matter of constitutional law*. But Greve offers no explanation. He simply suggests, over and over again, that the doctrine of “enumerated powers” answers any and all questions about the proper scope of those powers. This is argument by fiat. It does not respond at all to the argument, accepted by liberals and conservatives alike, that the text of the Constitution grants Congress authority that is commensurate with the scope of the subject it is regulating—in this case, interstate commerce.

Greve also endorses Justice Clarence Thomas’ concurring opinion in *Lopez*, in which Thomas argues that the Framers intended Congress’ commerce power to be quite limited.<sup>51</sup> Not a single other Justice joined Thomas’ controversial opinion, suggesting that his particular view of the Framers’ intent is not shared by a single other member of the Court. Justice Thomas’ failure to persuade his colleagues might also be due to the fact that his main point leads nowhere. Justice Thomas emphasizes, again and again, that “commerce” is different from both manufacturing and agriculture. He argues that it follows that Congress cannot regulate the making of goods, for example, but only the trade of those goods.<sup>52</sup>

It takes but a moment to realize that this is not a very helpful distinction. Even if we grant that “commerce” means “trade” and nothing else—which is not at all clear—the ability to regulate interstate commerce also necessarily carries with it the ability to regulate how those items are manufactured. To see this, imagine Congress enacting a law that prohibits any items made by children under 10 years of age from being traded across state lines. Formally, this is a regulation of interstate trade. Just as clearly, however, such a law would affect how goods are manufactured. One could multiply the example thousands of times—no goods can be transported across state lines that are made in unsafe conditions, in conditions that pollute the air or the water or the ground, in conditions of unfair labor practices, etc. Are these restrictions within Congress’ Commerce Clause powers? They certainly seem to be, as they are regulations of interstate commerce, even if we adhere to Justice Thomas’ distinction between trade and other activities. Even accepting Justice Thomas’ premises, therefore, does not lead to the conclusion that Congress’ power to regulate interstate commerce, properly construed, is a very circumscribed grant of authority.

Even Justice Thomas, moreover, does not advocate overruling all of the Court’s Commerce Clause cases after 1937. He instead suggests that

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the Court should “temper” and “modify” its Commerce Clause jurisprudence. But he stops short of “totally rejecting [the Court’s] more recent Commerce Clause jurisprudence.”<sup>53</sup> Greve, by contrast, is not at all hesitant about overturning decades of settled law and understandings about the scope of federal and state power.<sup>54</sup> But he fails to offer any real constitutional argument in favor of doing so.

Compounding his error, Greve also uses this hollow concept of the doctrine of enumerated powers to justify the Court’s decisions that aggressively apply the Tenth and Eleventh Amendments. The Tenth Amendment provides that “powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” The Amendment simply confirms that the federal government is one of enumerated powers; it states a truism that neither adds to nor subtracts from the powers granted to the federal and state governments elsewhere in the Constitution. The Court, however, has read the Tenth Amendment—along with emanations from the structure of the Constitution—to protect against federal commandeering of state legislative and executive resources.<sup>55</sup>

Greve acknowledges that these Tenth Amendment and structural penumbra decisions have “no textual basis.”<sup>56</sup> Given Greve’s insistence that the Court return to (his version) of the Constitution’s text when interpreting the Commerce Clause, one might expect him to be critical of these cases. Instead, Greve suggests that the Court’s failure to enforce the doctrine of enumerated powers—again, a doctrine that he neither defines nor justifies—excuses what he believes are otherwise illegitimate Tenth Amendment decisions.<sup>57</sup> This sort of “two wrongs make a right” method of interpretation is, to say the least, unusual. Greve provides no explanation as to why a supposedly incorrect interpretation of one part of the Constitution justifies an incorrect interpretation of another part. Even were one inclined to agree with this bizarre manner of constitutional interpretation, it remains the case that Greve has not demonstrated why the Court has erred in its Commerce Clause jurisprudence, which takes away any justification—even accepting Greve’s methodology—for misinterpreting the Tenth Amendment.

Greve makes the same interpretive move with regard to the Eleventh Amendment. That Amendment provides that citizens of one state may not sue another state in federal court. The Court, however, has read the Amendment to bar suits brought by citizens against their home state, and it has also limited the ability of Congress to abrogate a state’s immunity under this Amendment.<sup>58</sup> Greve concludes that the Court’s construction of the Eleventh Amendment is “fanciful,” but he nonetheless justifies

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the results “as a means of salvaging one aspect of federalism, [s]tate sovereignty, from the wreckage wrought by the demise of direct, enumerated powers constraints on Congress.”<sup>59</sup> If one were not already convinced that constitutional interpretation, in Greve’s view, is just a game, a means to support the various policies he prefers, his blithe acceptance of decisions that he himself believes have no basis in the Constitution should remove all doubt. In Greve’s vision, any decision, no matter how it is reached, that restricts federal or state power is a good one, justified by a vague reference to the failure of the Court to resurrect the discarded and discredited jurisprudence of the *Lochner* era.

### *Lochner as Horizontal Federalism*

Greve is no more persuasive when attempting to justify restrictions on state power. It seems clear that what Greve would prefer is a resurrection of *Lochner*, pure and simple. But he refrains from calling for this explicitly, recognizing in a moment of candor that “[t]he revival of substantive economic due process is a libertarian pipedream.”<sup>60</sup> Instead, in *Federalism’s Frontier*, he suggests that the Court in *Lochner* and similar cases created a doctrine of “horizontal federalism,” which prevented states from exploiting one another.<sup>61</sup> Greve recognizes that the Court is not about to recreate the *Lochner* era and resurrect a fundamental right to contract, as a means of protecting “horizontal federalism.” So he turns to a second-best approach: federal preemption. Federal preemption, in Greve’s view, is “a possible response to the abandonment of constitutional and judicial injunctions [such as *Lochner*] against [s]tate aggression.”<sup>62</sup> Thus, he advocates “a more robust judicial presumption to the effect that congressional action in some field of interstate commerce was intended to preempt [s]tate action.”<sup>63</sup>

Federal preemption is only a second-best approach for Greve because it requires an exercise of federal power. In Greve’s ideal world, the world of *Lochner*, the states would be directly precluded by courts from legislating in a way that interfered with laissez-faire economic policies. Absent a return to that ideal world, Greve is willing to push for an aggressive role for federal preemption. In doing so, he creates problems for his entire argument, as explained above, because he has to accept a broad regulatory power for the federal government in order to justify a broad power of federal preemption.

The inconsistency and incoherence are somewhat amusing aspects of Greve’s argument. The dangerous and disturbing part is his disdain for democratic decisionmaking and his embrace of judicial overreaching.

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Preemption, at the end of the day, is all about statutory interpretation and legislative intent. The basic rule is that *if* Congress wants to preempt a field of regulation, it can, but if it does not want to do so, it need not. The Constitution neither compels nor forbids preemption. It gives Congress an option. The only role of any court, including the Supreme Court, is to discern whether Congress meant to preempt a field or not. Given this reality, the Court has on occasion expressed support for a clear statement rule: it will find preemption only when Congress expresses preemptive intent clearly in the statute.<sup>64</sup>

This rule creates an easy, workable approach that both the Court and Congress can understand. It sends a clear message to Congress about what is needed for preemption, which will ensure that Congress, not the Court, will decide whether preemption is justified. It also creates a default rule against preemption, which limits federal authority and allows room for state autonomy and action. For anyone interested in preserving state authority and enhancing democratic decisionmaking, the clear statement rule has much to commend it. Indeed, this helps explain why conservatives such as Kenneth Starr favor a clear statement rule.<sup>65</sup>

The problem, of course, is that a clear statement rule might not lead to as much preemption as Greve would like. And for this reason, he rejects the clear statement rule. In so doing, he embraces an aggressive role for courts and condones courts that create rather than discover a legislative intent to preempt.<sup>66</sup> The ends, to Greve, apparently justify the means. As with the Tenth and Eleventh Amendment cases, as long as courts reach the right political result, Greve is not going to fret over the details of how they arrived there.

This is emblematic of Greve's entire approach to constitutional interpretation. While he chastises the Court for ignoring the commands of the Constitution, he makes a mockery of constitutional interpretation with his endorsement of jerry-rigged and results-oriented interpretations. He has little patience for the idea of judicial restraint, the notion that Courts ought to give the benefit of the doubt to legislatures in the absence of a clear constitutional command to the contrary. In so doing, he conveys disdain for the democratic process. Yet that process is at the heart of the Constitution itself, which provides a blueprint not for rule by judges, but for a democracy. Greve obviously does not think that the agenda that he and the "Leave-Us-Aloners" push would win on the merits. If he did, he would not be so intent on twisting and contorting the Constitution in an effort to encourage courts to impose his libertarian fantasy upon the rest of us.

## Chapter 5

### The Rise of Libertarian Federalism

**A**fter cataloguing the inconsistencies and logical flaws in *Real Federalism*, it is tempting simply to dismiss it. A scrambled egg is not a swing set, as noted earlier, and constitutional federalism does not produce a libertarian utopia, no matter how many times Michael Greve says it does.

We take Greve's work seriously not because we believe his ideas warrant such serious consideration, but rather because the vision he lays out in *Real Federalism* is being taken very seriously in legal circles. As described below, his work has been lauded by a long list of prominent scholars and policymakers including Attorney General John Ashcroft, appellate judges Michael McConnell and William Pryor, and former Gov. John Engler (R-Mich.). His vision of federalism has been promoted by leading think tanks including the Cato Institute, the Heritage Foundation, the Federalist Society, and the American Enterprise Institute (AEI), where Greve was hired after *Real Federalism* to create and direct a new "Federalism Project." Legal foundations such as Washington Legal Foundation and Pacific Legal Foundation have advanced Greve's vision through litigation simultaneously attacking federal and state governmental authority. In sum, the libertarian vision of federalism and the U.S. Constitution promoted by Greve in *Real Federalism* is having considerable influence, and this vision is helping divide Americans over the topic of federalism.

#### **Playing Partisan Politics With Federalism**

Dividing Americans over federalism is exactly what Greve intended in writing *Real Federalism*. The rapid growth of the federal government over the last half of the 20th century provided fertile ground for the



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emergence of federalism as a potent political issue. President Ronald Reagan declared famously that big government is “the problem not the solution.”<sup>1</sup> President William J. Clinton just as famously declared that “the era of big government is over.”<sup>2</sup> President Reagan issued a federalism Executive Order in 1986 emphasizing the importance of the division of responsibilities between the national government and the states.<sup>3</sup> President Clinton issued his own in 1999 that in many respects mirrors his predecessor’s language.<sup>4</sup> While Presidents Reagan and Clinton disagreed about many details of federalism, they, and until recently, just about everyone, agreed on two things: federalism is about ensuring that the states play an important role in our governmental structure and federalism is, in theory at least, a neutral principle: states were free to reach liberal or conservative outcomes with any power devolved to them.

Greve’s book was written specifically to convince political conservatives to abandon these two accepted premises. Federalism, Greve says in his book, “*must* be an ideological affair.” It “is not about means, but about ends; not about reinventing government, but about relimiting it.”<sup>5</sup> He thus implores his “conservative friends” to “get over” their “terribly sentimental” attitudes “about the virtues of state government.”<sup>6</sup> He criticizes the Republican party’s “shift to a foolish ‘devolution’ agenda that, far from re-empowering citizens, merely shifts the terms of the intergovernmental conspiracy in the states’ favor.”<sup>7</sup> He writes: “[T]he state-sovereignty perspective is not a partial view of federalism but an upside down view. It does not simply slight federalism’s competitive dimension but replaces competition with a cartel.”<sup>8</sup> He even goes so far recently as to “denounce the states as real federalism’s real enemies.”<sup>9</sup>

### The Libertarian Constitution

*Real Federalism* did not arise in a vacuum. It is an outgrowth of radical libertarian scholarship that began emerging two decades ago, most prominently in the work of University of Chicago law professor Richard Epstein. Epstein laid much of the intellectual groundwork for Greve’s book in a 1987 article in the *Virginia Law Review* where he argued that the “affirmative scope of the commerce power should be limited to those matters that today are governed by the dormant [C]ommerce [C]lause: interstate transportation, navigation and sales.”<sup>10</sup> In 1996, Epstein called for the U.S. Supreme Court to overrule “with a single blow” every Commerce Clause case decided by it since 1787.<sup>11</sup>

Like Greve, Epstein argues for the Court to give a “one-two punch” to “reduce the effective size of government at both levels.”<sup>12</sup> Explicitly

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seeking a return to the *Lochner* era, Epstein has also argued for the Court to enforce “restrictions on state regulation through the Contracts Clause and the Fourteenth Amendment, which have received narrow interpretations for so many years.”<sup>13</sup> Even more famously, Epstein argued in his 1985 book *Takings, Private Property, and the Power of Eminent Domain*, that “many of the heralded reforms and institutions of the [20th] century” including zoning, rent control, workers’ compensation law, environmental protections, and even progressive taxation are “constitutionally infirm or suspect.”<sup>14</sup>

Epstein’s work has helped spawn an entire narrative of a “Constitution in exile.” This narrative puts as its foil not the Earl Warren Court and its activism, but rather the Franklin D. Roosevelt Court and its overturning of the *Lochner* era.<sup>15</sup> Prof. Cass Sunstein describes this narrative as follows:

The American constitutional system functioned well, and just as it was supposed to, between the founding and about 1936. In that period, Congress had sharply limited powers. The “nondelegation doctrine” banned Congress from giving broad discretion to the executive branch. The “takings” clause protected property rights against governments. Freedom of contract was safeguarded by both the contracts clause and the due process clause, which banned maximum-hour and minimum-wage legislation. But in the late 1930s, the [F]ramers’ careful handiwork collapsed. It did so when the [Court] capitulated to the mob, in the form of Franklin Delano Roosevelt and the New Deal. As a result, the real Constitution was sent into exile. The Warren Court extended the damage to the Constitution by substituting a set of principles of its own choosing. America’s Constitution—the pre-New Deal Constitution—remains to be restored by jurists, legal thinkers, and others who care about it.<sup>16</sup>

Libertarians like Epstein are open in their support of judicial activism in order to advance their legal agenda. As Epstein readily admitted in *Takings*, implementing a return to the pre-New Deal powers of the federal and state governments would require “a level of judicial intervention . . . far greater than we have ever had.” In the words of James Huffman, the Dean of Lewis and Clark Law School: “[L]iberty is too important to be sacrificed to an abstract commitment to judicial restraint.” Huffman warned the Heritage Foundation in 1993 that “the Reagan revolution will come to nothing” if “judges sit on their hands in the name of a simplistic theory of judicial restraint.”<sup>17</sup>

While this narrative of a “Constitution in exile,” and the judicial activism necessary to fuel it, has been dismissed in whole or in part by leading conservatives including Justice Antonin Scalia, Robert Bork,

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and Charles Fried,<sup>18</sup> it has developed a cult-like status in certain circles. As early as 1984, the Heritage Foundation touted Epstein for a seat on the Court. In 1985, an official in the Reagan Administration noted that “Epstein’s ideas have begun to gain currency . . . a movement is forming around . . . a lot of the thoughts he’s been in the forefront of promoting.”<sup>19</sup> This fervor for judicial activism and radical libertarian ideas has only increased in recent years. For example, 20 years ago, Epstein was virtually alone in openly calling for *Lochner*’s return; he is now joined by a justice on the California Supreme Court<sup>20</sup> and a growing list of academic disciples.<sup>21</sup>

Nor was Greve the first to argue that federalism could be used as a vehicle for advancing a libertarian agenda. Clint Bolick of the Institute for Justice did this in 1993 in his book *Grassroots Tyranny*.<sup>22</sup> By 1997, *U.S. News and World Report* noted that an increasing number of proponents of devolving power to the state were coming to believe “that devolution’s ultimate goal is not to transfer power to state government but to strip power from government entirely.”<sup>23</sup>

Shortly before Greve’s book was published, the Heritage Foundation’s Adam Thierer wrote *The Delicate Balance: Federalism, Interstate Commerce, and Economic Freedom in the Technological Age*, which compared the views of “libertarian federalists” such as Epstein and Bolick with “state sovereignty textualists” such as Prof. Lino Graglia and Justice Scalia.<sup>24</sup> As the Cato Institute’s Robert Levy noted in a review of Thierer’s book, Thierer suggests that “conservative federalism may be moving in a libertarian direction.”<sup>25</sup> Levy found it “revealing and welcome” that the “proudly conservative” Heritage Foundation would publish such a book.<sup>26</sup>

### The Reception for Real Federalism

The reception generated by *Real Federalism* indicates that enthusiasm for Greve’s libertarian federalism goes far beyond Heritage and Cato. The back cover of *Real Federalism* contains glowing acclaim from U.S. Attorney General John Ashcroft, who called *Real Federalism* an “important book” that “shows how legislators who truly respect federalism can help to restore constitutional limits to federal power.” Three-term governor of Michigan Engler “highly recommend[ed]” Greve’s book to “fellow governors and other state policymakers.” And now-Judge McConnell praised Greve’s “excellent book” which “explores the real promise of federalism and why current constitutional doctrine falls short.”

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As noted earlier, AEI not only published *Real Federalism*, they hired Greve to direct their Federalism Project. AEI is one of the largest think tanks in the nation with an annual budget of more than \$18 million. More than 20 AEI fellows hold prominent positions in the second Bush Administration, and President George W. Bush himself has addressed AEI functions.<sup>27</sup> Greve's position as head of AEI's Federalism Project gives him a large microphone with which he can disseminate his ideas on federalism and constitutional law. He produces a bi-monthly newsletter on federalism topics and publishes regularly in law journals and popular publications like the *Wall Street Journal*, the *Los Angeles Times*, the *National Review*, and the *Weekly Standard*.<sup>28</sup>

Perhaps most importantly, Greve's antigovernment vision of federalism is now being litigated in courts around the country by a well-funded collection of legal foundations including Pacific Legal Foundation and Washington Legal Foundation, both of whom join Greve in advocating against both federal and state power to address problems such as environmental protection.<sup>29</sup> The Cato Institute, of which Greve is a board member, launched an amicus curiae project after *Real Federalism* was published as part of an effort "to remind the [Court] that government has delegated, enumerated, and limited powers."<sup>30</sup> Since that time, Cato has filed briefs arguing that the federal government lacks constitutional authority to prevent violence against women, to regulate interstate wetlands, and to protect endangered species.<sup>31</sup> Like Greve, Cato is equally opposed to most government initiatives at the state level and it has in recent years filed briefs opposing state action to prevent tobacco deaths, to ban handguns, and to promote racial diversity.<sup>32</sup>

Finally, it bears noting that individuals with a vision of the Constitution that matches Greve's in its radicalism are winning lifetime appointments to the federal appellate bench in disproportionate numbers. As noted in the next part of this book, exactly one state Attorney General, former Alabama Attorney General Pryor, has argued for a radical reduction in federal power along the lines advocated by Greve, and for an interpretation of federalism "with a bias against government activism at all levels."<sup>33</sup> Pryor was nominated and then recess appointed to the U.S. Court of Appeals for the Eleventh Circuit by President Bush. The outside counsel making these arguments on Pryor's behalf was typically Jeffrey Sutton, a private-firm lawyer from Ohio who now sits on the U.S. Court of Appeals for the Sixth Circuit. D. Brooks Smith, who told the Federalist Society as a sitting judge that the Commerce Clause was intended by the Founders only "to permit the national government to eliminate trade barriers," sits on the U.S. Court of Appeals for the Third Cir-

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cuit.<sup>34</sup> President Bush's nominee to the U.S. Court of Appeals for the Ninth Circuit, William G. Myers III, filed a Court brief arguing that the federal government lacked Commerce Clause authority to protect the waters and wetlands that serve as habitat for migratory birds.<sup>35</sup>

Perhaps most disturbingly, President Bush has nominated California Supreme Court Justice Janice Rogers Brown to the U.S. Court of Appeals for the District of Columbia Circuit, and Brown's name has been featured prominently on "short lists" for potential Bush Court nominees.<sup>36</sup> Brown is to our knowledge the only sitting judge in America to openly yearn for judicial activism and a return to *Lochner*-era review of economic regulations.<sup>37</sup> Two decades ago, when Epstein began openly advocating for judicial activism and a return to *Lochner*, it was widely viewed as ending Epstein's hopes at being nominated to the Court.<sup>38</sup> That Brown, who cites Epstein regularly and openly espouses nearly identical views, could now be on any short lists for the Court is a disturbing indicia of the ascendancy of the ideas that animate *Real Federalism*.

### Greve and the Court

The real question, of course, is not whether think tanks and legal foundations agree with Greve, it's what the Court thinks of his work, or more precisely, of the legal arguments being advanced by others in the courts that track his theories. Greve recognizes this in his declaration that federalism's future "hangs on a pattern of cooperation between the Court and political constituencies."<sup>39</sup> If the Court does not act, Greve says, his vision of "federalism is dead and will remain dead."<sup>40</sup>

Greve advocates that the "Leave-Us-Alone" coalition provide the Court with a constituency for actively limiting government power through a radically changed version of federalism jurisprudence. "The restoration of more robust, enumerated constraints requires a more hospitable political climate. The time must be right, and that means that some political force must find the constraints sufficiently useful to support their restoration. The Court needs help. Federalism needs a constituency."<sup>41</sup> Greve admits that his proposed collaboration between the Court and "Leave-Us-Aloners" may seem "crass" and "unlikely, even odd" because "when the [Court] looks to the prevailing winds, it looks to elite culture, not the demands of the unwashed."<sup>42</sup> Likewise, many of the antigovernment organizations that make up the "Leave-Us-Alone" coalition are suspicious of the elite Court. Nonetheless, Greve urges each side to "overcome its deep distrust of the other."<sup>43</sup> As Greve puts

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it: “Both sides have more room for cooperation than they think they do, and that room defines the realm of future federalist possibilities.”<sup>44</sup>

On the surface, the Court’s federalism jurisprudence gives credence to the possibility that such a “crass” collaboration is actually possible. Several prominent commentators have noted that the Court’s federalism cases during the last decade or so are simultaneously aggressive in striking down exercises of federal power under the Commerce Clause and §5 of the Fourteenth Amendment and in striking down exercises of state power under the Supremacy Clause and other constitutional provisions.<sup>45</sup> As Greve desires, the combined effect of these doctrinal developments makes it more difficult for any level of government to address problems such as environmental degradation.

This curious pattern of rulings has led many to question the genuineness of the Court’s commitment to federalism. An alternative explanation, of course, is that the Court is committed to the libertarian vision of federalism being promoted by Greve and his colleagues. For several reasons, however, it seems both hasty and overly simplistic to conclude from this pattern that the Court is advancing Greve’s agenda. As an initial matter, the Court has taken only baby steps on the way to Greve’s proposed constitutional revolution. To conclude from these baby steps that the Court has any interest in following Greve anywhere close to the bottom of his rabbit hole is too presumptuous for our liking.

The Court’s written opinions, moreover, provide scant support for Greve’s thesis. The Court’s rulings on federal power have all been replete with praise for the states and sonnets about the need for decentralization and local control. Greve calls this “faux federalism,” and says the Court needs a “change in perspective” but none seems likely, at least in the 80-year-old Chief Justice William H. Rehnquist, who has been the Court’s driving force in promoting federalism since his lone dissent in 1975 in *Fry v. United States*.<sup>46</sup> It seems implausible to think that the Justices would assert the need for state dignity and power as a launching pad for an effort to undermine state power. The Court’s rulings striking down state initiatives are similarly free of any of Greve’s rhetoric about the need to discipline the states.<sup>47</sup> While the Court has not yet fully appreciated the federalism-stifling effect of their preemption and dormant Commerce Clause rulings, there is no evidence that they share Greve’s view of the states as the enemy of federalism.

Finally, as detailed below, some of the Court’s more recent federalism decisions indicate movement on the Court away from Greve’s libertarian federalism. In recent preemption and the dormant Commerce Clause cases, for example, Justice Clarence Thomas and Justice Scalia have in-

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dedicated a willingness to recognize the need for state regulatory innovation, in contradiction to Greve's desire to discipline the States.<sup>48</sup> Justice Sandra Day O'Connor also appears to now be listening to the states in their call for moderation in stripping the federal government of needed authority, at least under §5 of the Fourteenth Amendment.<sup>49</sup>

In short, it seems more reasonable to think that the Court will continue to move in the direction of listening to the states in defining federalism than it is to worry that the Court will make dramatic moves in Greve's direction. It is with that hope in mind that we turn to the law of federalism.

# PART THREE



## Chapter 6:

### The Voice of the States: An Overview

**H**aving described what federalism is, and is not, in the first two parts of this book, we turn now to the most important question: what should federalism *jurisprudence* look like? To answer this question, we examine briefs prepared by state attorneys general and filed by the states in recent constitutional cases. These briefs, known as amicus briefs or friend-of-the-court briefs because the states were not parties in the cases, provide the U.S. Supreme Court with the states' unique and vital perspective on federalism issues.

As noted in the introduction, there is no magic to be found in these briefs. State briefs often are filed under a time crunch and are designed to help win particular cases with idiosyncratic facts; at times they reflect these limits on their form. States also rarely speak unanimously on any topic, and at times states file competing briefs in the same case. In such cases, distilling the voice of the states can be a challenge.

There nonetheless emerges from a review of the states' briefs broad consensus over what the Court is getting right and getting wrong about federalism. In a nutshell, the states view the Court's federalism like Goldilocks viewed the Three Bears' porridge: the Court is too hot in some areas, too cold in others, and getting it just about right in a final few places.

The Court is too hot, according to the states, in limiting federal power under the Commerce Clause. Most dramatically in a brief filed by 36 state attorneys general in support of the federal Violence Against Women Act (VAWA), the states have passionately argued about the need for a federal role in helping solve national problems such as gender-motivated violence. Federalism, the states have argued, is not well protected by formalistic rules that prevent a federal role where one is plainly needed, and where the federal role is supported by an appropriately def-

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erential reading of the Congress' Commerce Clause authority. The Court disregarded the states' views and struck down an important part of the VAWA as beyond federal Commerce Clause power, prompting Justice David H. Souter to note in dissent the irony that "the [s]tates will be forced to enjoy the new federalism whether they want it or not."<sup>1</sup> The states' view on the appropriate scope of the Commerce Clause is the topic of Chapter 7.

The too cold areas of federalism, according to the states, are the Court's doctrines under the so-called dormant Commerce Clause and the Supremacy Clause. As discussed in Chapters 8 and 9 below, the Court frequently employs these doctrines to strike down social and economic experimentation by the states, based on its conclusion that the states' initiative conflicts with a federal statute or interferes with interstate trade. These doctrines—long expanded beyond their textual justifications—have become even more federalism-stifling over the past 15 years. It is here where the voice of the states is most unified, strong, and powerless to date in moving the Court.

The strength of the states' position in favor of state experimentation is surprising in at least one respect. Dormant Commerce Clause cases are supposed to pit states against states. The Court created the negative or "dormant" Commerce Clause to protect against the economic balkanization that could occur if states were allowed to discriminate against the commerce of other states. But when they have participated in recent cases, the states purportedly discriminated against have *supported* the state that is alleged to have engaged in discrimination. In most dormant Commerce Clause cases over the last 15 years, not a single state supported striking down the law of the allegedly discriminatory state. The Court is plainly creating problems for the states under the dormant Commerce Clause, not solving them.

The Court has gotten it just about right, according to the states, in its jurisprudence under §5 of the Fourteenth Amendment, the Eleventh Amendment, and the Tenth Amendment. Questions regarding §5 of the Fourteenth Amendment and the Eleventh Amendment often form different sides of the same coin: Congress uses its §5 authority in modern times mainly as a vehicle for trumping the Eleventh Amendment immunity enjoyed by the states against certain suits for money damages. As chronicled in Chapter 10, the states' position in both §5 and Eleventh Amendment cases appears to act as a good bellwether for results before the Court. States have, in general, supported a broad interpretation of Eleventh Amendment immunity with considerable success before the Court. More recently, a majority of states supported Congress' power

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under §5 to trump state immunity and again had success before the Court in *Tennessee v. Lane*.<sup>2</sup>

The states' success in commandeering cases under the Tenth Amendment has been more spotty—they have sometimes gotten more protection than they wanted, sometimes less—but, as detailed in Chapter 11, the states generally have supported the Court's creation and application of the anti-commandeering principle first established by the Court in 1992 in *New York v. United States*.<sup>3</sup>

The states' briefs on particular federalism issues represent an important measure of the Court's success in these doctrinal areas. But more important than the individual parts of the states' voice is the collective whole, which we believe captures the best of what federalism has to offer modern Americans. The states care deeply about federalism and they view the Court as an essential bulwark that can protect the states against threats to their critical role in our federal republic. This explains their support for the Court's immunity and commandeering jurisprudence. The Court errs, according to the states, when it inappropriately concludes that to protect the states it must limit the ability of the federal government to play a role in addressing national problems. The Court errs even more seriously in ignoring the states' pleas for reform of judicial doctrines under the Supremacy Clause and the dormant Commerce Clause that inappropriately limit state experimentation.

In short, the states are asking the Court to redefine federalism. They seek a federalism jurisprudence that is more about protecting the critical structural role states play in our federal system and about the Court's "grave responsibility"<sup>4</sup> to protect state experimentation and less about limiting government power at all levels. We believe that the states offer the Court a view of federalism and the protection of state sovereignty and prerogatives that is both workable and true to our constitutional text, structure, and history. The Court has much to learn from the states about federalism, if it would only listen.

## Chapter 7

# Overprotecting Federalism Under the Commerce Clause

It is, then, not the least irony of these cases that the [s]tates will be forced to enjoy the new federalism whether they want it or not.

—Justice David H. Souter<sup>1</sup>

**I**t might surprise some people to learn that the U.S. Constitution does not confer upon Congress a general police power to protect the public interest. Instead, Congress has enacted our national environmental safeguards and most other health, safety, and public welfare laws by invoking its authority to address interstate commerce under Article I, §8, Clause 3, which empowers Congress to “regulate Commerce with foreign Nations, and among the several States.”

Even some of our basic civil rights statutes, which you might expect to be rooted in the Equal Protection Clause of the Fourteenth Amendment, are actually based on the Commerce Clause. For example, the Civil Rights Act of 1964 prohibits racial and religious discrimination by privately owned motels, restaurants, and other businesses that serve the public. In *Heart of Atlanta Motel, Inc. v. United States*,<sup>2</sup> the U.S. Supreme Court upheld this statute as an appropriate exercise of Commerce Clause power, expressly sidestepping the issue of whether the law could be justified under the Equal Protection Clause, which applies only to state action, not private conduct.

How solid is this Commerce Clause foundation? Racially segregated motels and lunch counters, commonplace in many areas during the first half of this century, now seem unthinkable. But consider this twist. Suppose a motel charged African-American patrons \$81 per night for a room, but everyone else \$80. Or suppose it imposed nominally higher charges on the basis of religion, gender, or disability. In *Heart of Atlanta*

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*Motel*, the Court upheld the application of our civil rights laws to a motel that refused altogether to serve African Americans. Accordingly, it could rely on evidence showing that such blanket discrimination substantially impeded interstate travel and uphold the federal ban as a valid effort to promote interstate commerce. Could a motel owner avoid the Court's ruling by arguing that these federal laws are unconstitutional as applied to a nominal but discriminatory difference in price, citing the lack of evidence that a slightly higher charge would substantially curtail interstate commerce?

Ten years ago, this concern would have been dismissed as fanciful. The Court had given broad latitude to Congress under the Commerce Clause, going decades without striking down a federal law as outside its scope. It also ruled that Congress may regulate an entire class of activity that significantly affects interstate commerce without carving out de minimis exceptions of the kind described in our hypothetical.<sup>3</sup> Most observers would have expected the Court to find Commerce Clause authority to impose a ban on racially motivated, nominal price differences as part of an overall prohibition on discrimination by private businesses.

But in a 1995 case called *United States v. Lopez*,<sup>4</sup> the Court surprised just about everyone by striking down a federal law banning gun possession near schools as outside the scope of the Commerce Clause. Five years later, in *United States v. Morrison*,<sup>5</sup> the Court invalidated portions of the federal Violence Against Women Act (VAWA), again concluding that the regulated activity did not have an adequate impact on interstate commerce to justify the law under Congress' commerce authority.

Drawing on these precedents, in May 2004 a federal appeals court held that the federal Americans With Disabilities Act (ADA) could not be applied to prohibit a \$2.00 fee charged by the state of Missouri for placards that allow the disabled to use parking places designated for the handicapped. In *Klingler v. Director, Department of Revenue*,<sup>6</sup> the court assumed, arguendo, that the fee violated the ADA, but struck down the ADA's application to the fee as unconstitutional because the record failed to show that the fee would appreciably deter the disabled from going to stores or otherwise engaging in commerce. The court expressly distinguished *Heart of Atlanta Motel* because the refusal to serve African Americans in that case "block[ed] a great number of potential economic transactions," whereas the placard fee was unlikely to deter people from shopping or otherwise engaging in commerce.<sup>7</sup>

Returning to our hypothetical, could *Klingler* be extended to other forms of discrimination and prevent Congress from using its Commerce Clause authority to ban discriminatory nominal price disparities unless

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it showed that the price difference would actually influence purchasing decisions? If Congress is prevented from regulating an entire class of activities due to the effect of the class on commerce, and is instead required to show a significant effect on commerce by every action within the class (for example, the imposition of a nominal placard fee), many applications of our civil rights laws and other federal protections could be called into question.<sup>8</sup>

Commerce Clause challenges under *Lopez* and *Morrison* implicate many other important protections. Four recent decisions by the largest federal appeals court in the country, the U.S. Court of Appeals for the Ninth Circuit, prove the point, with the court invalidating federal authority to impose restrictions on the medical use of marijuana,<sup>9</sup> the prescription of lethal drugs for terminally ill patients,<sup>10</sup> the possession of child pornography,<sup>11</sup> and the possession of machine guns.<sup>12</sup> Most federal health, safety, and public welfare laws also are rooted in Congress' Commerce Clause authority.

The issue transcends political boundaries and sometimes results in seemingly ironic role reversals. In three of the four recent Ninth Circuit cases, judges appointed by Democratic presidents applied *Lopez* and *Morrison* aggressively to strike down assertions of federal authority, while judges appointed by Republican presidents argued for more expansive federal authority.<sup>13</sup>

To understand how we have arrived at this state of affairs, we need to examine Commerce Clause jurisprudence more carefully, in particular *Lopez* and *Morrison*. As we shall see, the voice of the states in these cases provides insightful guidance on how to avoid the slippery slope of improperly disabling Congress from enacting needed legislation under the Commerce Clause.

### **The Pre-*Lopez* Evolution**

Congress exercised its power under the Commerce Clause relatively rarely in the formative years of our Republic, but two early rulings, both written by Chief Justice John Marshall, established broad regulatory power for Congress. In an 1824 case called *Gibbons v. Ogden*,<sup>14</sup> the Court upheld a federal statute regulating ferry service between New York and New Jersey, insisting that the Commerce Clause power is “complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than those that are prescribed in the Constitution.” The Court subsequently referred to *Gibbons* as “the opinion that first staked out the vast expanse of federal authority over the economic

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life of the new [n]ation.”<sup>15</sup> Marshall’s opinion five years earlier in *McCulloch v. Maryland*<sup>16</sup> provided a sweeping interpretation of the Constitution’s Necessary and Proper Clause, famously declaring: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution are constitutional.”<sup>17</sup>

During the *Lochner* era, known primarily for the Court’s illegitimate invocation of the Due Process Clause to invalidate state regulations, the Court also changed course under the Commerce Clause and aggressively struck down assertions of federal authority. Applying formalistic distinctions, the Court ruled that Congress could not use the Commerce Clause to regulate production, manufacturing, and mining because these activities were technically distinguishable from commerce, even though they plainly are necessary to commerce.<sup>18</sup> The Court also held that Congress could not regulate activities that had only an indirect effect on interstate commerce.<sup>19</sup>

The *Lochner* era ended in 1937 when the Court rejected a due process challenge to state minimum wage laws.<sup>20</sup> The Court contemporaneously began to abandon rigid notions of Congress’ Commerce Clause authority, and it rejected the distinction between direct and indirect effects on commerce.<sup>21</sup> These doctrinal changes accompanied great societal changes, including a shift to a single national economy that prompted calls for federal controls, as well as tremendous technological advances that launched us into the space age.

The doctrinal transformation was dramatic. Prior to 1937, for example, the Court held that Congress could not regulate a manufacturing alliance that controlled roughly 98% of U.S. sugar refining capacity, or restrict wide-ranging business conspiracies, or control membership in labor organizations.<sup>22</sup> After the *Lochner* era, the Court abandoned these rigid limitations and permitted far greater Commerce Clause regulation, allowing Congress to keep pace with the rapid industrial development and other monumental changes during the 20th century.

In its post-*Lochner* era cases, the Court made clear that in determining whether federal regulation of local activity falls within the Commerce Clause authority, a court must consider not just the effect of the specific local activity at issue, but the entire collective effect of all similar local activity on interstate commerce.<sup>23</sup> Under this “aggregation” principle, a court asks whether the regulated class of activities as a whole substantially affects interstate commerce.<sup>24</sup> Moreover, the Court repeatedly has ruled that the inquiry must afford Congress considerable deference be-

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cause the Constitution delegates the commerce authority to Congress, and because legislatures have a greater institutional competence than the courts to make this kind of empirical judgment.

The collective result of the post-*Lochner* era developments is that the Commerce Clause, complemented by the Necessary and Proper Clause, authorizes a federal law as substantially affecting interstate commerce “if there is any rational basis for such a finding.”<sup>25</sup> And for some 50 years after the end of the *Lochner* era, the Court did not strike down a single federal law as outside the Commerce Clause authority.

Some might complain that Commerce Clause case law since the New Deal authorizes many congressional enactments that were not specifically contemplated by the Founders. The critical interpretive inquiry, however, is not the subjective intent of any particular Founder, but the objective meaning of the words used in our basic charter. Although the Founders could not have anticipated the revolutionary changes in technology, communications, and our national economy that occurred, they ratified a Commerce Clause capacious enough to allow for many new applications to unforeseen circumstances. As noted by Alexander Hamilton: “[N]othing is more common than for laws to *express* and *effect*, more or less than was intended.”<sup>26</sup> Justice Antonin Scalia has recognized as much with respect to statutes, stating “the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.”<sup>27</sup> If true for statutes, this insight is even more true for our Constitution, which, in the oft-quoted words of Chief Justice Marshall, does not “partake of the prolixity of a legal code,” but instead by its nature requires only that “its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves.”<sup>28</sup>

### A School Gun Case Cracks the Door

In addition to our nation’s environmental and civil rights laws, most federal criminal laws rest on Congress’ Commerce Clause authority. And it was a case involving a federal criminal conviction for gun possession, *Lopez*, that ushered in a new era in Commerce Clause analysis.

Alphonso Lopez Jr., was a student at Edison High School in San Antonio, Texas. He was convicted of violating the federal Gun-Free School Zones Act by possessing a concealed .38 caliber handgun within 1,000 feet of a school. According to Lopez, another person had given him the gun so that Lopez could deliver it to a third person who planned to use it



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in a “gang war.” A federal district court sentenced Lopez to six months in prison and two years of supervised release.

Applicable state law was not silent on the subject. State officials charged Lopez with violating the Texas Penal Code, which makes it a felony for a person to carry a firearm at an educational institution. The state charges were dismissed, however, after a federal grand jury indicted Lopez for violating federal gun law.

The *Lopez* case eventually reached the Supreme Court, which invalidated the Act as outside the scope of Congress’ Commerce Clause authority. Its analysis was predicated on two key rulings. First, the Court held that the aggregation principle—which, as noted above, allows a court to consider the cumulative effect of all similar activities in evaluating whether the regulated activity substantially affects interstate commerce—applies only to activities that are commercial or economic in nature. Because mere gun possession is not a commercial activity, the Court ruled, the Act could not be upheld by considering the aggregated economic effects of all similar activities regulated by the Act.<sup>29</sup>

Second, the *Lopez* Court rejected the government’s argument that gun possession near schools substantially affects interstate commerce because the cost of violent crime is substantial and because guns threaten the educational process and thus ultimately impair national productivity. The Court concluded that these rationales had no limiting principle and could authorize federal regulation of virtually any activity. Accepting this attenuated chain of causation, in the Court’s view, could “obliterate the distinction between what is national and what is local.”<sup>30</sup> The Court was unwilling “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 [s]tates.”<sup>31</sup>

Importantly, the *Lopez* Court did not overrule any prior Commerce Clause precedent, citing with approval the entire post-*Lochner* era line of cases.<sup>32</sup> And in analyzing the constitutionality of the federal gun ban, it applied the deferential test of whether Congress had any rational basis for concluding that gun possession at schools substantially affected interstate commerce.<sup>33</sup> It declined to accept the government’s justifications for the Act, however, in part because neither the government nor the dissent could identify any activity that Congress could not regulate under those justifications.<sup>34</sup>

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### *The (Small) Voice of the States*

A very small coalition—comprising the states of Ohio and New York and the District of Columbia—filed an amicus brief defending the federal school gun ban.<sup>35</sup> Unlike the *Lopez* majority and the Justices Anthony M. Kennedy-Sandra Day O’Connor concurrence, this coalition does not view the gun ban and similar federal laws as an unfortunate intrusion into areas of state concern. Instead, they made clear that due to the increasing frequency and severity of violence in schools, this problem was stretching to the breaking point the combined resources of state and local law enforcement authorities, and they welcomed federal efforts in this area to supplement state efforts.<sup>36</sup>

These amici states acknowledged that it might seem paradoxical for states to support the federal authority asserted in *Lopez*, but they argued there is a close nexus between the protection of public safety from gun violence and interstate commerce, and that Congress need not make express findings of the connection so long as the Court can posit a rational basis that would support the requisite connection to interstate commerce.<sup>37</sup> The state amicus brief concluded with soaring rhetoric emphasizing that joint federal and state efforts to protect public safety through law enforcement represent “the [n]ation’s classic traditions of cooperative federalism.”<sup>38</sup>

The small coalition of states supporting federal authority in *Lopez* would not stay small for long. Just a few years later, in *Morrison*,<sup>39</sup> a large majority of states would be unified in supporting federal authority under the Commerce Clause to regulate domestic violence through the VAWA. Unfortunately, the Court would turn a deaf ear to their plea.

### **A School Rape Case Cracks the Door Further**

Pundit George Will’s crystal ball must have been cloudy the day he wrote his July 14, 1994, column for the *Washington Post* pooh-pooing the VAWA. He directed special ridicule at a provision designed to promote respectful treatment of women college students, labeling it “a monument to the feminist fiction that . . . women students risk life and limb” on college campuses.<sup>40</sup> Just months later, an 18-year-old freshman phoned her mother to say she was brutally raped by two fellow students in a dorm room. She would become the first person to sue under the Act, filing the case that would decide its constitutionality.

Christy Brzonkala’s story is nothing short of nightmarish.<sup>41</sup> In the fall of 1994, she enrolled at Virginia Polytechnic Institute, commonly

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known as Virginia Tech, in Blacksburg, Virginia. Early on in her first year, Brzonkala and another female student met Antonio Morrison and James Crawford, both members of the school's acclaimed football team. According to Brzonkala, within 30 minutes of that first meeting, the two men raped her. She claims that after the four students talked for a few minutes in one of the dorm rooms, Brzonkala's friend and Crawford left. Morrison immediately asked Brzonkala if she would have sex with him. She twice told him "no," but Morrison persisted. As Brzonkala got up to leave, Morrison grabbed her, threw her on a bed, pushed her down by the shoulders, and raped her. Crawford then returned to the room, exchanged places with Morrison, and raped her. When Crawford finished, Morrison raped her a third time. Following the assault, Brzonkala became severely depressed and eventually attempted suicide. She later withdrew from Virginia Tech for that academic year.

In early 1995, Brzonkala filed a complaint against Morrison and Crawford under the university's Sexual Assault Policy. At an administrative hearing, Morrison admitted that Brzonkala had twice told him "no," and that he had sex with her anyway. The committee found insufficient evidence to take action against Crawford, but found Morrison guilty of sexual assault and suspended him for two semesters. Morrison appealed the suspension, but the dean rejected the appeal. The school subsequently held a second hearing on the matter, a proceeding Brzonkala viewed as riddled with procedural irregularities.<sup>42</sup> Morrison was again suspended, but he appealed and, without notice to Brzonkala, the school ultimately set aside the suspension, requiring instead that he attend a one-hour sensitivity training session. When Brzonkala learned that Morrison would return to campus for the fall 1995 semester, she feared for her safety and dropped out. Brzonkala believes the ultimate outcome resulted from a coordinated university effort to allow Morrison to play football in 1995.

In December 1995, Brzonkala filed suit alleging, among other things, that Morrison and Crawford violated the VAWA, because their attack was motivated by gender animus. The VAWA, enacted in 1994 by overwhelming bipartisan majorities, creates a federal civil cause of action against anyone "who commits a crime of violence motivated by gender."<sup>43</sup> The federal government intervened in the case to defend the constitutionality of the Act, and the matter ultimately reached the Court styled as *United States v. Morrison*.

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### *The Growing Voice of the States*

Although the Commerce Clause analysis in *Lopez* was expressly grounded in a concern for preserving the appropriate role of the states in our federal system, fully 36 states filed a friend-of-the-court brief in *Morrison* arguing that Congress has authority to enact the VAWA.<sup>44</sup> Only a single state, Alabama, asked the Court to strike down the law.<sup>45</sup> The 36-state coalition began its brief by observing that the National Association of Attorneys General supported the reauthorization of the VAWA. They argued that Congress' extensive findings showed that violence against women substantially affects interstate commerce, a conclusion supported by many other reports and the states' own experience. They stressed that this violence lowers productivity, increases health care costs, and imposes \$3 billion to \$5 billion in costs on businesses due to absenteeism and other direct consequences. They also stressed that large numbers of rape victims are fired or forced to quit their jobs after the crime, and that homicide is the leading cause of death for women in the workplace.

The state coalition also agreed with congressional findings that existing state-law remedies, while substantial and improving, are still inadequate. These findings were based on studies conducted by 21 state task forces concluding that state reform efforts do not sufficiently address gender-based violence. They argued that the VAWA's civil remedy complements state efforts and thus reinforces, rather than undermines, cooperative federalism, in the same way as parallel state-federal remedies for racial and other discrimination.<sup>46</sup>

### *The Ruling*

On May 15, 2000, the same five-Justice majority that struck down the federal gun possession law in *Lopez* ruled that the VAWA's civil remedy provision goes beyond Congress' Commerce Clause authority. The Court began its analysis by noting that gender-motivated crimes "are not, in any sense of the phrase, economic activity."<sup>47</sup> Although the Court expressly declined to embrace an absolute rule against aggregating the affects of any noneconomic activity, it observed that it has upheld federal regulation of intrastate activity only where the activity is economic. While the VAWA was well supported by numerous congressional findings regarding the effect of gender-based violence on interstate commerce, the Court concluded that these findings did not justify the VAWA because they relied on the same method of reasoning rejected in *Lopez*. In other words, Congress found that gender-based violence affects inter-

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state commerce because it reduces national productivity, increases medical costs, and deters potential victims from traveling and engaging in employment interstate. But the Court ruled this causal chain of events was too attenuated, threatening to obliterate the distinction between what is national and what is local by authorizing federal regulatory authority over virtually every activity.<sup>48</sup>

A four-Justice dissent penned by Justice David H. Souter detailed the “mountain of data” Congress assembled regarding the effect violence against women has on commerce, including much of the evidence compiled by the state coalition showing that it costs this country’s economy billions of dollars each year.<sup>49</sup> The dissent meticulously describes historical evidence of the Founders’ belief, embedded in the Constitution, that the political process should sort out the respective allocation of state and national regulation as federal authority expands through the growth of national commerce. Citing the amicus brief from the 36-state coalition in support of the VAWA, the dissent observed that it is “not the least irony of these cases that the [s]tates will be forced to enjoy the new federalism whether they want it or not.”<sup>50</sup> It concludes by predicting that the abstract federalism animating *Lopez* and *Morrison* will be no more enduring than the extraconstitutional laissez-faire economics that drove the *Lochner* era.

### Lessons From the States

One key issue yet to be resolved by the Court is how to determine, under the approach articulated in *Lopez* and *Morrison*, whether the regulated activity at issue is economic, thereby permitting an aggregation of effects in determining the impact on interstate commerce. Should a court look only to the activity as described by the regulatory regime? Or, alternatively, should the court look to the purpose of the actor being regulated?

Consider, for example, federal protections for endangered or threatened species. Injuring or killing an endangered species, viewed as an isolated act, might well seem like noneconomic activity. But most harm to endangered species occurs as a result of commercial development and other economic activity. Should a court focus on the specific target of the regulatory regime and decide against aggregation because the harming of the species is noneconomic, or on the underlying objective of the regulated entity and aggregate where the objective is commercial?

*Lopez* does not answer this question because both the regulated activity (mere gun possession) and *Lopez*’s overall object (the facilitation of gang violence) were noncommercial. Although the lower court

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opinions noted that Lopez was to receive a small fee for carrying the gun to school, this fact is nowhere mentioned by the Court and did not inform its analysis. Likewise, in *Morrison*, neither the regulated activity (gender violence) nor Morrison's objective were commercial in nature. Thus, the question of how to evaluate the nature of the regulated activity remains.

A coalition of eight states provided an insightful answer in a case involving federal regulation of isolated wetlands. Wetlands adjacent to navigable waterways are indisputably subject to federal authority over the channels of interstate commerce,<sup>51</sup> but wetlands isolated from navigable waters present a more complex issue. Congress' authority to regulate the filling of isolated wetlands was before the Court in *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*,<sup>52</sup> a challenge filed by a consortium of municipalities that wanted to fill an isolated wetland to develop a waste disposal site. The *SWANCC* Court avoided the constitutional issue by construing the federal Clean Water Act narrowly to preclude its application to the site.

The eight-state coalition filed an amicus brief enthusiastically supporting federal wetland controls.<sup>53</sup> These states began by noting the highly technical and uncertain nature of environmental protection, particularly the cumulative impact of seemingly unconnected behavior. They observed that just a short time ago, no one could have guessed that spraying an aerosol can could harm the earth's ozone layer, or that eating a hamburger could contribute to the loss of the rainforest, and they contended that our evolving understanding of nature argues strongly for great deference to congressional determinations that federal environmental protections are needed. The coalition also stressed that individual states greatly benefit from national wetlands protections because they protect water quality and groundwater supplies, provide flood and erosion control, and promote wildlife, particularly in the many states that would be harmed by failure to protect wetlands in other states.

Turning to the question posed above regarding economic activity, the states argued that the relevant class of activity to be considered is not simply isolated wetlands, but the discharge of dredged material into U.S. waters and wetlands. They took this position because Congress rationally chose to regulate this class as a single, interrelated subject. Because such fill is typically associated with commercial activity, the states argued it is appropriate to aggregate the cumulative impact of such filling in considering the effect on interstate commerce. Indeed, the states expressed grave concern that an adverse ruling could undermine scores of federal environmental protections because many federal environmen-

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tal laws regulate economic activity that is often seemingly intrastate but has a huge cumulative impact on interstate commerce.

The states' position in Commerce Clause cases also speaks directly to the question that opened this chapter: may Congress regulate nominal charges and fees that discriminate on the basis of race, religion, sexual orientation, disability, or gender? As noted above, in *Klingler* a federal appeals court ruled that the Commerce Clause does not authorize a congressional effort to ban nominal fees for handicap parking space placards. Critical to the court's analysis was the determination of whether the state's sale of the placard to disabled persons constituted economic activity, which would allow the impact of the fee to be aggregated under *Lopez* and *Morrison*. While recognizing that such a sale can "perhaps be classified as 'economic' in a sense,"<sup>54</sup> the court held that "the relevant question seems to be whether the regulated activity is commercial in the sense of being closely connected to some national commercial market."<sup>55</sup> Applying this unprecedented test to the placard fee, the court held that the "non-profit revenue collection for [s]tate government" cannot be deemed economic activity.<sup>56</sup>

An appropriately deferential application of the Commerce Clause would recognize the obvious fact that the sale of a placard is itself an economic activity, a circumstance that justifies aggregation of the interstate impacts. It would render irrelevant the extent to which a nominal placard fee actually deters anyone from engaging in commerce, and recognize that a proper analysis would consider the interstate impact of disability discrimination as a whole.

The eight-state amicus brief in *SWANCC* confirms that the *Klingler* view of economic activity is far too cramped. That brief argued that where Congress addresses a set of activities as a single, integrated subject such as wetland destruction, the Commerce Clause authorizes the enactment so long as the class as a whole has a substantial impact on the entire class. Thus, Congress may regulate wetlands because filling them, as a class of activity, is largely a commercial activity that has substantial effects on interstate commerce. In the same way, Congress reasonably chose to regulate discrimination against the disabled as a single class of activity. Because this class unquestionably has a significant effect on interstate commerce, it should not matter whether a specific instance of discrimination (a nominal placard fee) by itself is shown to have a substantial effect.

This "class of activity" analysis also supports federal efforts to protect endangered species as a legitimate exercise of Commerce Clause authority. The class of activity that harms species is largely commercial.

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Habitat loss most often poses the greatest threat to endangered species,<sup>57</sup> and that loss is due mainly to development and other commercial activity.<sup>58</sup> Alternatively, the loss of species as a class often has significant effects on tourism and other economic enterprises, even where the loss of an individual member of that species would have no discernable effect. The U.S. Court of Appeals for the Fourth Circuit put it well in a case challenging protections for red wolves:

Once a species has been designated as endangered, there are by definition only a few remaining animals. Therefore, the effects on interstate commerce should not be viewed from the arguably small commercial effect of one local taking, but rather from the effect that single takings multiplied would have on advancing the extinction of a species. Each taking impacts the overall red wolf population, which has an effect on many dimensions of commerce between the states. As the [Court] has stated[:] “[If] it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.” *Heart of Atlanta Motel*, 379 U.S. at 258.<sup>59</sup>

The Fourth Circuit concluded by stressing that “it would be perverse indeed if a species nearing extinction were found to be beyond Congress’ power to protect while abundant species were subject to full federal regulatory power.”<sup>60</sup>

This “class of activity” analysis will likely play a central role in upcoming Commerce Clause cases. For example, in early 2004, the Court agreed to review a case called *Ashcroft v. Raich*,<sup>61</sup> in which a federal appeals court held that Congress lacks constitutional authority to apply the federal Controlled Substances Act to the medical use of marijuana. The claimants in *Raich* argue that just as the federal government lacked authority to restrict the mere possession of guns near schools in *Lopez*, it may not regulate the mere possession of marijuana. But this can’t be right. As the federal government argued in seeking Court review, the Controlled Substances Act creates a comprehensive program governing the commercial market for regulated drugs. The regulation of possession is an essential and integral part of this overall scheme. Indeed, Congress expressly found that the controlled substances produced and consumed within a single state cannot be differentiated from those in the interstate commercial market, and it is thus necessary to enforce federal restrictions against both categories to control the commercial market effectively.

The difference between *Raich* and *Lopez* is that in *Lopez*, Congress was not attempting to regulate the commercial market for guns. The limiting of the law to gun possession within 1,000 feet of a school be-



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lies any such intention. Congress was regulating gun possession to make public schools safer, and the Court struck down the Act because it found the connection between this objective and the regulation of interstate commerce was too attenuated. In *Raich*, Congress is regulating drug possession as part of a comprehensive program to eliminate illicit drug traffic.

The *Lopez* Court reaffirmed that “where a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence.”<sup>62</sup> And the Court repeatedly has held that “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.”<sup>63</sup> These precedents plainly support federal power under the facts of *Raich*, and they will most assuredly prove critical to future Commerce Clause cases.<sup>64</sup>

### Summing Up the Commerce Clause

The states reject the position, advanced by the dissent in *Morrison*, that the only limits upon Congress’ Commerce Clause authority are those provided by the political process.<sup>65</sup> But the states’ overwhelming support for the VAWA in *Morrison*, and the state support for wetlands protections in *SWANCC*, make equally clear that the states care as much about ensuring the federal government has the power to address national problems such as violence against women and environmental degradation as they do about protecting large spheres in which only the states can act. If we are to effectively combat problems like unfair discrimination, child pornography, possession of machine guns, and drug use, we need to listen to the voice of the states. They’re telling us that courts should not unduly constrain federal power in the name of federalism and state sovereignty, especially where the states themselves welcome a federal presence.

## Chapter 8

### Limiting State Experimentation Under the “Dormant” Commerce Clause

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the [n]ation. It is one of the happy incidents of the federal system that a single courageous [s]tate may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

—Justice Louis D. Brandeis<sup>1</sup>

Uttered in a lone dissent, Justice Louis D. Brandeis’ words about the U.S. Supreme Court’s responsibility to preserve the role of states as democracy’s laboratories have become the Court’s most recognizable words on the topic of federalism. While famous, these words remain controversial, at least with respect to the effect that the Court’s “grave responsibility” has on the outcome of cases before the Court. While adopted by the full Court in several majority opinions, Brandeis’ words are still more frequently employed by dissents that lament the Court’s failure to take his teaching to heart. Cases challenging the states’ ability to try novel social and economic experiments are most frequently brought under the so-called dormant Commerce Clause.

The dormant Commerce Clause is an unusual constitutional doctrine. Also known as the “negative” Commerce Clause, it is not a clause at all, but a purely judicial creation, found nowhere in the Constitution’s text. It is a creation with a venerable history, which arguably dates back to the Marshall Court’s landmark decision in *Gibbons v. Ogden*,<sup>2</sup> and was clearly established by Court decisions of the late 19th century.<sup>3</sup> Despite criticism and dissent from Justices across the Court’s political spectrum, the doctrine has grown inexorably, with challengers frequently cobbling

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together a coalition of five or more Justices to strike down state and local initiatives.

Simply put, dormant Commerce Clause jurisprudence holds that Congress' enumerated Article I, §8 power to "regulate Commerce . . . among the several States" necessarily implies the Court's power to strike down state laws and policies that interfere with interstate commerce, even where Congress has not legislated in the relevant field. The classic example of these laws is a duty or tariff placed by one state on the goods of another, and the justification for invalidating these is often traced back to the Founders' concern to prevent the economic gridlock that had prevailed under the Articles of Confederation.<sup>4</sup> This "national unity" rationale was eloquently restated in modern times by Justice Robert H. Jackson:

This principle that our economic unit is the [n]ation, which alone has the gamut of powers necessary to control the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units. As the Court [has] said . . . "[w]hat is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation."<sup>5</sup>

Under this rubric, the Court has taken it upon itself to evaluate, and quite frequently to invalidate, a wide array of state taxes, surcharges, regulations, and standards that it deems to violate the prohibition of the dormant Commerce Clause: no "discrimination" against interstate commerce.

This need to prevent economic balkanization of course must be balanced against the Court's "grave responsibility" to protect state innovation and experimentation. The tension between these conflicting aspects of the Court's responsibility underlies the tangled results it has reached on dormant Commerce Clause issues. It also underlies a strident split between different factions of Justices on how the doctrine is applied, what is its rationale, and whether it should even exist.

The failure of the Court to strike this balance correctly is evidenced by the state voice in dormant Commerce Clause cases. To be sure, states do not like efforts of their sister states that actually discriminate against them and their citizens or industries. Indeed, states and local governments themselves occasionally bring dormant Commerce Clause challenges. But recently this is the rare exception, rather than the rule: over the past three decades, 56 of 61 dormant Commerce Clause cases in the Court have been filed by private companies seeking to limit state regulation.<sup>6</sup> In most cases, not a single state supported

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these industry suits.<sup>7</sup> Rather, states more typically support their sister states, even in the face of allegations that the states supporting the law are being discriminated against by the very statute under review. The Court, paradoxically, appears to view this state solidarity as a strike against the challenged statute, invalidating two-thirds of the statutes that come before it with such a pedigree.<sup>8</sup>

The states are telling the Court that its recent dormant Commerce Clause case law overprotects against the possibility of state-against-state discrimination. Federalism, according to the states, demands a shift back toward a dormant Commerce Clause doctrine that doesn't unduly limit state experimentation.

### The Modern Dormant Commerce Clause and Its Discontents

Over the last 30 years, the Court has developed a two-tiered analysis to state laws challenged under the dormant Commerce Clause. The first tier asks whether the law in question “discriminates against interstate commerce”<sup>9</sup> in the sense of favoring or burdening some states more than others. If the law is held to be discriminatory, it is unconstitutional unless the state can “demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest.”<sup>10</sup> In practice, this strict scrutiny almost invariably results in the law being struck down; the Court itself has described it as “a virtually per se rule of invalidity.”<sup>11</sup>

In contrast, nondiscriminatory state legislation is subjected to a more lenient standard: “Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”<sup>12</sup> This so-called *Pike* (*Pike v. Bruce Church, Inc.*)<sup>13</sup> balancing test typically results in the law being declared constitutional; once it is held to be nondiscriminatory and a legitimate local purpose has been established, courts are less likely to second-guess the state legislature's weighing of costs and benefits unless a compelling factual showing of interstate “burden” can be made.<sup>14</sup>

This two-tier analysis has been subject to scathing criticism from Justices, commentators, and litigants for a wide variety of reasons.

Perhaps the biggest problems with the Court's doctrine stem from the efforts to distinguish “discriminatory” state laws from those that are “evenhanded.” Given the drastic difference between these two standards of review and their likely outcomes, one would expect this line to be rel-

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atively clear; but as the Court itself admits, “there is, however, no clear line between these two strands of analysis.”<sup>15</sup>

The lines of analysis under the dormant Commerce Clause blur because so many forms of state and local law are considered discriminatory. Strict scrutiny most clearly applies to enactments that exhibit “patent” discrimination: facial language that differentiates between products, services, customers, or other commercial actors solely on the basis of their state of origin.<sup>16</sup> But the Court also has “eschewed formalism for a sensitive, case-by-case analysis of purposes and effects,” claiming such an open-ended test is necessary because “the commerce clause forbids discrimination, whether forthright or ingenious.”<sup>17</sup> Thus, claimants can seek strict scrutiny for any of three reasons: patent or facial discrimination, a discriminatory purpose, or discriminatory effects. Most plaintiffs simply allege all three forms of discrimination, in hopes of improving their chances that strict scrutiny will be applied.<sup>18</sup> In many cases they are successful. The Court’s expansive definition of “discrimination” has rendered the *Pike* balancing test something of an afterthought to most dormant Commerce Clause plaintiffs.

While expansive, the Court’s definition of discrimination is far from clear. For example, while the Court has indicated that a discriminatory purpose, as evinced in legislative history or other materials, can lead to strict scrutiny of an otherwise neutral law,<sup>19</sup> it “has not laid out a specific test for determining discriminatory purpose,” so far leaving this determination to the lower courts, which have, in turn, been confounded by the issue.<sup>20</sup> The results of the Court’s analysis also appear arbitrary because, although the same standards ostensibly apply to all state enactments regardless of subject matter, the Court’s cases tend to fall into groupings that reveal distinctly different approaches depending on the object of regulation or the means chosen to effect it.<sup>21</sup>

The Court’s dormant Commerce Clause decisions have also taken the Court far from its core function of preventing economic balkanization. For example, the Court’s routine invalidation of facial geographic distinctions has led it to strike down as “discriminatory” even laws that were not proven to actually burden interstate commerce or out-of-state interests.<sup>22</sup> The Court has also created important exceptions to the doctrine, such as those for state regulations that merely subsidize local industry or position the state as a “market participant,” which are shielded from scrutiny even if they overtly favor in-state interests.<sup>23</sup>

Finally, the fact-specific nature of both tiers of review has also led to criticism of the entire framework as unduly susceptible to judicial legislation. The strict scrutiny test requires courts to consider—and most

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often to override—states’ assertions that they lack actual alternative, less discriminatory means of achieving the same purpose. The *Pike* balancing test, with its inherently factual weighing of burdens and benefits, is frequently derided; Justice Antonin Scalia has likened it to “judging whether a particular line is longer than a particular rock is heavy,”<sup>24</sup> and the states dislike its unpredictability. Such wide leeway for judicial discretion, the argument runs, is particularly inappropriate for implementation of a mandate that has no basis in constitutional text, and that in essence amounts to federal common law.<sup>25</sup>

In light of this collection of problems, many commentators and some Justices, from across the political spectrum, have labeled the Court’s dormant Commerce Clause jurisprudence a “quagmire” and argued for its modification or outright abandonment. Justice Scalia has argued that “our applications of the doctrine have . . . made no sense,” and joined Justice Clarence Thomas in calling for the abandonment of the entire doctrine.<sup>26</sup> Prof. Lisa Heinzerling has examined the rationales most frequently offered for the “nondiscrimination” principle—economic efficiency, protection of the states in the political process, and national unity—and skillfully demonstrated that the Court’s actual results are not consistent either with these principles or with its approach to injury and standing in other areas of constitutional law.<sup>27</sup> Absent those rationales, she argues, the only steady theme driving the doctrine is an apparent distaste for government interference with free markets, which is “a return to *Lochner*-style assumptions about the proper role of government” that must be rejected, even if it means rejecting the dormant Commerce Clause.<sup>28</sup>

The states have not yet reached the conclusion that the dormant Commerce Clause should be abandoned, at least not collectively.<sup>29</sup> But many of the critiques of the doctrine chronicled above feature prominently in their briefs in dormant Commerce Clause cases. Most loudly and importantly, the states have been arguing that the Court errs when it strikes down important state initiatives that are justified by compelling nondiscriminatory purposes. We will review the Court’s recent dormant Commerce Clause cases, and the states’ role in them, before returning to the current state of the doctrine generally.

### **Dormant Commerce Clause Applied: The Waste Cases**

In 1978, the Court decided *City of Philadelphia v. New Jersey*,<sup>30</sup> and set the benchmark for its most important line of recent dormant Commerce Clause cases, cases involving the disposal of hazardous and solid waste.

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By the mid-1970s, landfills across the country were in crisis, facing ever-increasing volumes of garbage and a shortage of suitable sites to dispose of it. In response, New Jersey enacted its Waste Control Act, which among other measures prohibited the importation of most “solid or liquid waste which originated or was collected outside the territorial limits of the state.”<sup>31</sup> The city of Philadelphia and private landfill operators in New Jersey challenged the law under the dormant Commerce Clause, alleging that it was nothing more than a protectionist measure “outwardly cloaked in the currently fashionable garb of environmental protection.”<sup>32</sup>

By a 7-2 majority, the Court struck down the New Jersey statute. At the outset, it rejected any suggestion that waste is not a legitimate article of “commerce”: “All objects of interstate trade merit Commerce Clause protection.”<sup>33</sup> It then declined to resolve the dispute about the law’s purpose, finding that its facial language and plain effect of stopping waste at the state border violated the nondiscrimination principle: “[T]he evil of protectionism can reside in legislative means as well as legislative ends.”<sup>34</sup> Accordingly, it applied strict scrutiny to invalidate the law, noting that New Jersey could enact a nondiscriminatory alternative. In dissent, then-Associate Justice William H. Rehnquist lamented the “Hobson’s choice” this posed for the state:

New Jersey must either prohibit *all* landfill operations, leaving itself to cast about for a presently nonexistent solution to the serious problem of disposing of the waste generated within its own borders, or it must accept waste from every portion of the United States, thereby multiplying the health and safety problems which would result if it dealt only with such wastes generated within the state.<sup>35</sup>

Fourteen years later, states were still trying to solve this dilemma, and still urging the Court to reconsider its reasoning. In *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*,<sup>36</sup> 21 states joined amicus briefs in support of a Michigan law that allowed counties to prohibit landfill operators from accepting waste from outside the county.<sup>37</sup> The states maintained that this and similar measures were a central part of comprehensive waste management schemes designed to stem the tide of garbage, which had only increased since *Philadelphia* was decided. They argued that waste disposal is a classic example of state and local police powers; that economic protectionism was not the motive for the law, which if anything had the effect of *raising* costs for local citizens; and that neither strict scrutiny nor *Pike* balancing was appropriate to this subject matter. They asked the Court to overrule the *Philadelphia* decision, in effect

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suggesting that it should almost wholly exempt waste management from its dormant Commerce Clause jurisprudence.

In another 7-2 decision, the Court declined the states’ invitation. It once again emphasized “facial” discrimination, rejecting the argument that the county-level ban was neutral because it burdened other Michigan counties’ waste equally with out-of-state waste, or because some counties had opted to take out-of-state waste.<sup>38</sup> Nor did it accept the states’ attempt to justify the law as part of a comprehensive environmental regulation: “Because those provisions unambiguously discriminate against interstate commerce, the [s]tate bears the burden of proving that they further health and safety concerns that cannot be adequately served by nondiscriminatory alternatives.”<sup>39</sup> It again held that the state had the option to limit the amount of *all* waste accepted, an option Chief Justice Rehnquist, siding with the states, again belittled in dissent: “The Court today penalizes the [s]tate of Michigan for what to all appearances are its good-faith efforts, in turn encouraging each [s]tate to ignore the waste problem in the hope that another will pick up the slack.”<sup>40</sup>

Decided the same day was *Chemical Waste Management, Inc. v. Hunt*,<sup>41</sup> which similarly rejected an Alabama law, supported by a large coalition of state and local governments,<sup>42</sup> that imposed a \$72-per-ton disposal fee on out-of-state hazardous waste—a “disincentive” intended to modulate the ever-increasing amount of “ignitable, corrosive, toxic[,] and reactive wastes” and “poisonous and cancer-causing chemicals” being brought into the state.<sup>43</sup> The Court gave short shrift to the states’ argument that such fees are less discriminatory than outright bans, and applied strict scrutiny. Turning to the alternatives analysis, it held that even hazardous waste must be dealt with by other means, such as across-the-board fees on all waste accepted or on all vehicles transporting waste.<sup>44</sup> But as Rehnquist retorted, these means would require the state to discriminate against itself: “Alabama’s general tax revenues presumably already support the [s]tate’s various inspection and regulatory efforts. . . . Thus, Alabamians will be made to pay twice, once through general taxation, and a second time through a specific disposal fee.”<sup>45</sup> Two years later, the Court also foreclosed this argument, striking down an Oregon surcharge on out-of-state solid waste of \$2.25 per ton, which the state argued was based on its actual costs, and more than matched by income taxes paid by in-state residents.<sup>46</sup> What mattered was the law’s facial discrimination, rather than any claim that its impact was *de minimis*.<sup>47</sup>

The waste cases culminated in *C&A Carbone, Inc. v. Town of Clarkstown*,<sup>48</sup> a 1994 challenge to a Clarkstown, New York, ordinance



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that required all solid waste to be sorted at the municipally-owned transfer station en route to its final disposal. The plaintiff was a local private recycling center that failed to send its nonrecyclable residue to the transfer station, as required by the ordinance. Instead, it was shipping the waste to landfills in Florida, Illinois, Indiana, and West Virginia, something that was discovered only after the police investigated an accident involving one of Carbone's trucks.

Fully half the states (including three of the four states to which Carbone had been shipping its waste), numerous local governments, and their professional and trade associations all weighed in on Clarkstown's behalf, arguing that such local government control is the last bastion of the police power, has no effect on out-of-state interests, and simply guarantees the town a steady flow of waste that is crucial for planning purposes.<sup>49</sup> Absent this guarantee, they argued, it becomes difficult for local government to offer publicly financed alternatives to private landfills, such as recycling, composting, or energy recovery, which are necessary, innovative steps for dealing with the waste crisis.<sup>50</sup>

The *Carbone* Court fractured. Writing for a bare majority of five Justices, Justice Anthony M. Kennedy applied strict scrutiny to strike down the law, holding that the ordinance discriminated against out-of-state providers of waste processing services, and that Clarkstown did in fact retain the option of subsidizing its facility through general taxes or municipal bonds.<sup>51</sup> Justice Sandra Day O'Connor concurred in the judgment, but found that the ordinance discriminated neither facially nor in its effect; instead, applying the *Pike* balancing test, she also concluded that the town's financial goals could be achieved by less burdensome means than a monopoly.<sup>52</sup> Justice David H. Souter, joined by perennial dissenters Rehnquist and Harry A. Blackmun, chastised the majority for striking "an ordinance unlike anything this Court has ever invalidated."<sup>53</sup> Adopting large portions of the states' argument, Justice Souter found no facial discrimination, no evidence of any harm to out-of-state interests (plaintiff Carbone being a *local* competitor), and no Commerce Clause justification for second-guessing the town's financing decision.<sup>54</sup>

This 5-1-3 split among the Justices stands in contrast to the states' united front in *Carbone* and other recent cases. It is remarkable that the Court is shielding states from "discriminatory" regulations and fees to which they do not object, and the interstate impacts of which often, as in *Oregon Waste Systems v. Environmental Quality Commission*<sup>55</sup> and *Carbone*, cannot be discerned. If the Court is going to create a constitutional doctrine out of whole cloth, shouldn't it at least hew to the

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justification for the doctrine in the first place? The voice of the states, echoed in the dissents of an odd-couple minority of Chief Justice Rehnquist and Justice Blackmun (with Justice Souter added in *Carbone*), says that the Court has lost its way in the waste cases by giving states no room to demonstrate that they are engaged in a good-faith effort to solve important problems. This is particularly apparent where there is little, if any, evidence that the state solution creates any tangible out-of-state burdens at all.

### After *Carbone*—A Clause in Crisis

As the Court reached the end of the line of waste cases, it also began to lose its consensus on the dormant Commerce Clause generally. The same term *Carbone* was decided, the Court handed down *West Lynn Creamery, Inc. v. Healy*,<sup>56</sup> which involved Massachusetts’ system of price supports for its dairy farmers. The state’s pricing order required every wholesale milk dealer to make a monthly “premium payment,” based on the volume of milk sold, into a special fund. The fund was then distributed only to the in-state producers of raw milk, in proportion to their production. Since at least two-thirds of the milk sold in Massachusetts came from out of state, the scheme was alleged to violate the dormant Commerce Clause.<sup>57</sup> The state countered that it was essential, both “to save an industry from collapse,”<sup>58</sup> and to preserve the “economic, social, environmental[,] and educational benefits” of local dairy farms.<sup>59</sup> It argued that because the pricing premium did not discriminate between in-state and out-of-state dealers, and because the subsequent division of the fund among in-state producers was a lawful subsidy, the combination of the two could not be unconstitutional.

By a 5-2-2 vote, the Court disagreed. Justices John Paul Stevens, O’Connor, Kennedy, Souter, and Ruth Bader Ginsburg held that the “avowed purpose and . . . undisputed effect” of the Massachusetts order was to raise the price of out-of-state milk, and thus discriminatory.<sup>60</sup> While the premium payment did apply equally to all milk sold in the state, and while subsidizing local farmers in itself was unlikely to raise Commerce Clause concerns, the combination of the two was fatal: “It is the entire program—not just the contributions to the fund or the distributions from that fund—that simultaneously burdens interstate commerce and discriminates in favor of local producers.”<sup>61</sup> The state’s argument that both in-state and out-of-state interests were burdened by the premium told only half the story:

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[W]hen a nondiscriminatory tax is coupled with a subsidy to one of the groups hurt by the tax, a [s]tate's political processes can no longer be relied upon to prevent legislative abuse, because one of the in-state interests which would otherwise lobby against the tax has been mollified by the subsidy.<sup>62</sup>

Justice Scalia, joined by Justice Thomas, concurred in judgment only, writing that the majority's "expansive view of the Commerce Clause calls into question a wide variety of state laws that have hitherto been thought permissible."<sup>63</sup> On his view, the Court had now made it difficult to save *any* form of state-funded subsidy, including direct payments from the general fund, from the charge of "discrimination" against out-of-state competitors. Decrying, not for the first time, the "quagmire" of dormant Commerce Clause jurisprudence, Scalia outlined his new test for resolving such cases: "I will, on *stare decisis* grounds, enforce a self-executing 'negative' Commerce Clause in two situations: (1) against a state law that facially discriminates against interstate commerce; and (2) against a state law that is indistinguishable from a type of law previously held unconstitutional by this Court."<sup>64</sup> Applying this test, he found the Massachusetts scheme to be similar to other taxes struck down earlier by the Court.<sup>65</sup> In dissent, Rehnquist, joined by Blackmun, again invoked the state's right to use its police power to protect both local industry and natural resources—in this case, "open lands that are used as wildlife refuges, for recreation, hunting, fishing, tourism, and education."<sup>66</sup>

By 1997, the Court reached a near-impasse on the dormant Commerce Clause, one that remains unresolved. In *Camps Newfoundland/Owatonna v. Town of Harrison*,<sup>67</sup> a 5-4 majority invalidated a Maine statute that denied a property tax exemption to charitable institutions that are "in fact conducted or operated principally for the benefit of persons who are not residents of Maine."<sup>68</sup> The statute had been challenged by a Christian Science summer camp, whose clients were 95% nonresidents. Justice Stevens held that the Maine statute facially discriminated against interstate commerce, and he stated in dictum that its goals could be met by other means, such as direct subsidies to Maine residents or to camps that serve them.<sup>69</sup> He also refused to create a different rule for nonprofit entities, or to accept Maine's characterization of its tax structure as a subsidy or a "purchase" that might qualify for the "market participant" exception to Commerce Clause scrutiny.<sup>70</sup>

Dissenting on behalf of himself, Chief Justice Rehnquist, and Justices Thomas and Ginsburg, Justice Scalia launched another scathing attack. "Our cases," he wrote, "have struggled (to put it nicely) to develop a set

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of rules by which we may preserve a national market without needlessly intruding upon the [s]tates’ police powers, each exercise of which no doubt has some effect on the commerce of the [n]ation.”<sup>71</sup> The four dissenters found no facial discrimination in the Maine tax law, and at most an indirect discriminatory effect; but would have upheld it even under strict scrutiny because of its overarching public purpose.<sup>72</sup> Alternatively, they proposed a new categorical exception to the nondiscrimination doctrine: “[T]he provision by a [s]tate of free public schooling, public assistance, and other forms of social welfare to only (or principally) its own residents—whether it be accomplished directly or [indirectly, through incentives]—implicates none of the concerns underlying our negative Commerce Clause jurisprudence.”<sup>73</sup>

More forcefully still, Justice Thomas’ separate dissent, joined by Scalia, proclaimed the death of the dormant Commerce Clause. After reciting a long history of the Court’s contradictory holdings and rationales for the doctrine, he urged its outright abandonment.<sup>74</sup> In its place, he argued, the Import-Export Clause, which prohibits states from “lay[ing] any Imposts or Duties on Imports or Exports,” provides the original, best, and most practical authority for implementing the Founders’ intent to protect interstate commerce.<sup>75</sup> While such a midstream switch would be radical, according to Justice Thomas it is justified by the state of current case law: “Precedent as unworkable as our negative Commerce Clause jurisprudence has become is simply not entitled to the weight of *stare decisis*.”<sup>76</sup>

### Returning Dormant Commerce Clause Doctrine to Its Roots in Economic Protectionism

Like the waste cases, *West Lynn Creamery* and *Camps Newfound/Owatonna* demonstrate just how far the Court has stretched the concept of impermissible “discrimination” against interstate commerce. In addition to outright trade barriers like the one struck down in *City of Philadelphia*, the Court will now infer such discrimination from geographic distinctions at the county and local level, even if they also are enforced within a state (*Fort Gratiot*, *Carbone*); from combinations of facially neutral provisions and policies (*West Lynn Creamery*); and from distinctions based on whether a regulated entity is assisting the state in serving its own residents (*Camps Newfound/Owatonna*). In Justice Thomas’ words, “the majority has essentially created a ‘dormant’ Necessary and Proper Clause to supplement the ‘dormant’ Commerce Clause,”<sup>77</sup> invalidating both laws aimed at interstate commerce and

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those it deems to affect it. This implied expansion of an implied doctrine both frustrates the states' attempts to solve existing environmental and land use problems, and stifles precisely the kind of long-term planning that such problems often demand.<sup>78</sup>

Certainly, the Court must be able to look beyond mere legislative artifice; the test of a statute's neutrality cannot simply be, as Justice Scalia stated in another context, "whether the state legislature has a stupid staff."<sup>79</sup> But, as the growing dissents in these cases show, neither can it be the rote recitation of "discrimination," followed by idle speculation as to what alternatives the state might have passed instead. The majority's attempts to bolster its findings of facial discrimination with discussion of "discriminatory effect" also have been unconvincing, especially in cases like *Carbone*, where "[a]n examination of the record . . . show[ed] that the burden falls entirely on Clarkstown residents."<sup>80</sup> As Professor Heinzerling has concluded, the Court often has invoked "discriminatory effect" without any real regard as to whether out-of-state interests, or even the parties themselves, were actually harmed by the law in question.<sup>81</sup>

Underlying the dissents—and the state briefs from which they borrow—is a call for returning to a dormant Commerce Clause doctrine that explicitly links purported discrimination with classic economic protectionism. At least two Justices, Scalia and Thomas, signed on to Scalia's 1994 pledge to draw the line at facially discriminatory laws and laws "indistinguishable from a type of law previously held unconstitutional by this Court."<sup>82</sup> While these same Justices' discovery of the Import-Export Clause (and their threatened rejection of *stare decisis*) is more recent, they concede that such a radical shift would be unnecessary if the dormant Commerce Clause were restored to a narrower understanding.<sup>83</sup> A third, Rehnquist, shares their criticism of the dormant Commerce Clause, though he grounds it in his approval of "resource protectionism" and other state police powers, and sometimes seems to prefer no constitutional rule shielding interstate commerce at all.<sup>84</sup> And Justices Souter, Ginsburg, and O'Connor, while usually voting in the majority, all have expressed reservations about the discrimination test as expanded in the Court's recent cases. While no precise rule unites these factions, most would seem to welcome a form of review that hews much closer to the doctrine's roots.

More specifically, at least four Justices appear willing to reconsider the question of whether a finding of discrimination should always (or virtually always) be fatal to a state or local law. The Court's current doctrine mandates invalidation of a discriminatory law if there is *any* non-

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discriminatory alternative, real or hypothetical. This doctrine precludes the states from proving that the law has a *benign* purpose, even if that purpose is readily apparent; that it is the *best* way of solving the problem; and that it has a discriminatory impact that is small or nonexistent. This has been true at least since the waste cases, where the majority was unmoved by voluminous evidence of the states’ “good-faith efforts.” But the four *Camps Newfound/Owatonna* dissenters have indicated that this is an assumption they might be willing to revisit. “The most remarkable thing about today’s judgment,” they wrote, “is that it is rendered without inquiry into whether the purposes of the tax exemption *justify* its favoritism. . . . Facially discriminatory or not, the exemption is [not] an artifice of economic protectionism.”<sup>85</sup>

This portion of the *Camps Newfound/Owatonna* dissent captures in a nutshell the voice of the states. States support the basic prohibition against economic protectionism that forms the core rationale for the dormant Commerce Clause; but the Court’s doctrine has taken it far beyond that narrow justification, and the Court majority is now unduly and actively interfering with state efforts to solve important problems. The states are asking for a form of judicial review that is not an automatic death sentence for state and local laws that impose justifiable geographic distinctions. The *Carbone* and *Camps Newfound/Owatonna* dissents, which together include five current Justices, give hope to the states that the Court might yet be receptive to such an argument.

### Family Farming, Zoning, and the Future of the Dormant Commerce Clause

We end this chapter close to where we began the book, with a discussion of the recent appeals court decision in *South Dakota Farm Bureau v. Hazeltine*,<sup>86</sup> which struck down a South Dakota constitutional amendment that prohibited most “corporations or syndicates” from acquiring farms in the state. The *Hazeltine* Court concluded that this Family Farm Amendment neither facially discriminated against interstate commerce nor had a discriminatory effect, but nonetheless applied strict scrutiny and struck it down based on statements of Amendment supporters that, according to the Court, showed the Amendment’s discriminatory purpose.<sup>87</sup> The *Hazeltine* case illustrates many of the problems with existing dormant Commerce Clause doctrine.

As an initial matter, *Hazeltine* shows just how expansive the Court’s definition of discrimination is, particularly as interpreted by some lower courts. In the heat of political debate, someone will almost inevitably

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make a statement that arguably serves as evidence of an intent to discriminate against interstate commerce.<sup>88</sup> In cases like *Hazeltine*, some courts have viewed such statements to be, on their own, sufficient to warrant strict scrutiny. But just as dormant Commerce Clause cases shouldn't turn on whether state legislators have a "stupid staff," neither should they turn on whether a measure attracts ill-informed or rhetorically excessive supporters.

The case also demonstrates how blurry the line between discriminatory and nondiscriminatory measures looks in practice to lower federal court judges. The U.S. Court of Appeals for the Eighth Circuit decided that the evidence of a discriminatory purpose was "substantial" enough to warrant application of strict scrutiny to the Family Farm Amendment. Looking at the same evidence, the district court had "decline[d] to find sufficient discriminatory purpose," and applied the *Pike* balancing test.<sup>89</sup>

Finally, *Hazeltine* reinforces the need for giving some weight to the benign justifications for particular state laws. The South Dakota Legislature has promoted family farming since 1974; eight other midwestern states have pro-family-farm statutes and constitutional provisions, some of them dating back to the 1930s.<sup>90</sup> The primary concern of this time-honored body of legislation is protection of family farming, land stewardship, and the environment. Protectionist rhetoric voiced by a handful of supporters shouldn't be enough for unelected judges to push all these important objectives aside.

Even if courts continue to embrace the purpose inquiry as a free-standing basis for finding discrimination, as the Eighth Circuit has done, they should at a minimum allow the state to show that the same legislation would have been enacted even absent the discriminatory purpose. Drawn from the Court's civil rights jurisprudence, this so-called *Mt. Healthy* (*Mt. Healthy City Sch. Dist. v. Doyle*)<sup>91</sup> defense in effect requires that the discriminatory motive not only was present, but also was the "but-for" cause of the final decision.<sup>92</sup> The approach has begun to cross over to the dormant Commerce Clause in the context of zoning, where denying permission for controversial land uses frequently leads to charges of discriminatory intent.

In *Randy's Sanitation v. County of Wright*,<sup>93</sup> a Minnesota waste management company was denied a rezoning permit for a waste transfer station, and alleged that the denial was discriminatory. The district judge ruled the company needed to prove not only "that the [c]ounty's decision makers were motivated by a desire to stifle interstate commerce," but also "that the same decision would not have been made absent this wrongful motivation."<sup>94</sup> While that case settled and has yet to be adopted

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elsewhere, its approach to the dormant Commerce Clause has been heralded as a solution to mixed-motive cases such as *Hazeltine*.<sup>95</sup> By ratifying such a defense to allegations of discriminatory purpose, courts would restore the voice of the states where it is most needed: ahead of the strict scrutiny inquiry, with a legitimate chance to justify their laws, rather than as mere lip service after strict scrutiny is applied.<sup>96</sup>

### **Dormant Commerce Clause Summary**

Nowhere in the law is the voice of the states stronger or more persuasive than in its call for reform of the dormant Commerce Clause. The very premise of the doctrine suggests that states should be divided over the Court’s application of it, depending on whose ox is gored by a particular enactment. Instead, the states’ united voice in opposition to the Court’s recent decisions indicates just how badly those decisions have skewed the law toward stamping out any whiff of economic protectionism, at the expense of much-needed state experimentation. If federalism has anything to do with protecting such experimentation, as Justice Brandeis first insisted, and if the Court really cares about federalism, it must listen to the states’ call for reform of the dormant Commerce Clause.



## Chapter 9

### Stifling Federalism Under the Supremacy Clause

**T**he Supremacy Clause of the U.S. Constitution provides that the Constitution and the laws of the United States “shall be the supreme Law of the Land,” binding on judges in every state, notwithstanding anything to the contrary in any state constitution or law.<sup>1</sup> While it is indisputable that federal law trumps conflicting state law, the U.S. Supreme Court has not always had an easy time determining when conflicts exist. The Court’s difficulty arises in large measure because Congress often is unclear as to whether it wants a particular federal law to preempt state law.

Complicating the analysis is the Court’s rather schizophrenic commitment to federalism in preemption cases. On the one hand, the Court has insisted time and again that it must preserve the police power of the states to regulate in the public interest unless Congress clearly states that federal law trumps those state protections: “We start with the assumption that the historic police powers of the [s]tates were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”<sup>2</sup> In other words, the Court says it protects traditional state police power by adhering to a presumption against preemption and requiring a “clear and manifest” statement by Congress to overcome that presumption.

On the other hand, preemption jurisprudence often appears to pay mere lip service to the Court’s professed commitment to federalism. In recent years, the Court has held that federal law preempts a wide range of state and local protections, including: remedies against health maintenance organizations that unreasonably deny insurance coverage for physician-recommended treatment<sup>3</sup>; environmental safeguards in the Los Angeles Basin that required the use of cleaner trucks and cars<sup>4</sup>; a Califor-

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nia law designed to facilitate insurance claims by Holocaust survivors<sup>5</sup>; Washington State regulations of oil tankers designed to protect the Puget Sound<sup>6</sup>; and Illinois licensing requirements for hazardous waste workers.<sup>7</sup> Indeed, the success rate of state governments before the Court in preemption cases appears to have fallen even as the Court has moved aggressively to protect federalism in other areas.<sup>8</sup>

In these cases, the Court has found “express” preemption without a clear statement from Congress that the state or local law in question was subject to preemption. The Court has also developed two different forms of “implied” preemption that seem to allow the Court to sidestep any finding of a clear congressional statement of intent to preempt.

As the number of cases finding preemption has increased over the years,<sup>9</sup> the Court’s doctrine has resulted in increased scrutiny by many court-watchers. In 1987 President Ronald Reagan signed an Executive Order to promote federalism by directing executive branch agencies to read federal laws in ways that protect state law from preemption.<sup>10</sup> The U.S. Department of Justice under President Reagan likewise issued guidance to federal litigators generally encouraging them to argue for preemption only where justified by the express terms or policies of the federal law in question, and discouraging the invocation of field preemption arguments.<sup>11</sup>

In 1991, a distinguished task force of the U.S. Appellate Judges Conference, headed by then-Judge Kenneth Starr of the U.S. Court of Appeals for the District of Columbia Circuit, and including a diverse collection of appellate judges and academic advisors, issued an extensive analysis of preemption doctrine.<sup>12</sup> The report, published by the American Bar Association, was critical of preemption law generally and particularly critical of implied preemption. It concluded that the case law governing field and obstacle preemption provided inadequate guidance regarding how to define the scope of preemption, invoked flawed proxies for determining congressional intent, and ultimately resulted in judicial policymaking. It recommended that courts adopt a genuine clear statement rule and find preemption only when Congress makes clear in the text of federal law that state laws are preempted.

This approach, the task force concluded, would advance federalism, promote clarity and predictability in the law, and move the responsibility for preemption back to Congress and away from the courts. On this last point, the judicial task force stressed:

When judges preempt[s] state laws in the absence of explicit congressional guidance, they in effect assume a legislative role without accepting legislative responsibility. Judges’ legislative function in this case is mani-

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fest: though a preemption judgment is not necessarily final, judges determine the law of the land and displace the considered judgment of state legislators. Yet, federal judges need not have their assumptions and conclusions tested in the rough-and-tumble of the political process; they need not consider the views of any constituents; and, most importantly, they need not defend their views before the citizens affected by their actions.<sup>13</sup>

The voice of the states in preemption cases echoes these conclusions. They advocate that the Court adopt a real clear statement rule, one with teeth, and one that requires preemption only for direct conflicts or where Congress has made crystal clear its desire to trump state law.

### The Three Types of Preemption

Express preemption is the most straightforward type of preemption: it occurs where and to the extent Congress says so. Because Congress frequently speaks in ambiguous terms, however, even express preemption is a battleground. In the view of the states, the Court too frequently finds express preemption based on congressional mandates that are far from clear.

A good example is the *Engine Manufacturers* case, discussed in Chapter 2, in which the Court struck down the South Coast Air Quality Management District's (District's) rules dictating the types of cars and trucks that could be purchased for vehicle fleets. A coalition of 17 states supported the District and argued vigorously that the Clean Air Act preempted only "numerical standards" applicable to vehicle manufacturers and had no application to rules directed at the potential purchasers of new vehicles.<sup>14</sup> The Court rejected this argument, with only Justice David H. Souter dissenting based on federalism concerns.

Implied preemption is, inherently, even more controversial. The first kind of implied preemption is field preemption. The Court has ruled that in the absence of an express, clear statement of preemption, federal law preempts state law where the scope of the federal law indicates that Congress intended it to occupy an entire field exclusively, even at the expense of state regulation that does not conflict with federal policies.<sup>15</sup>

For example, in a 1947 landmark ruling called *Rice v. Santa Fe Elevator Corp.*,<sup>16</sup> the Court ruled that Illinois could not regulate grain warehouses licensed under federal law, regardless of whether the state law actually conflicted with federal law. Daniel Rice and others had filed a complaint with the Illinois Commerce Commission charging warehouse owners with excessive and discriminatory rates, unsafe facilities, and other violations of state law. The *Rice* Court concluded that federal regu-

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lation was “so pervasive as to make reasonable the inference that Congress left no room for the [s]tates to supplement it.”<sup>17</sup>

A dissent authored by Justice Felix Frankfurter, however, argued that the *Rice* decision needlessly “uproots a vast body of [s]tate enactments,”<sup>18</sup> and that “due regard for our federalism, in its practical operation, favors survival of the reserved authority of a [s]tate over matters that are the intimate concern of the [s]tate unless Congress has clearly swept the boards of all [s]tate authority, or the [s]tate’s claim is in unmistakable conflict with what Congress has ordered.”<sup>19</sup>

More recently, the Court found preemption of a local noise control ordinance that prohibited nighttime jet aircraft traffic at a California airport, even though applicable federal law contained no express preemption provision.<sup>20</sup> While acknowledging that noise abatement is “deep seated” in the states’ police power, the Court concluded that pervasive federal control over navigable airspace evidenced a congressional intent to preempt this field. A four-Justice dissent penned by then-Associate Justice William H. Rehnquist complained that while either Congress or the Federal Aviation Administration could preempt local noise ordinances, neither had chosen to do so.<sup>21</sup>

The second kind of implied preemption is “obstacle preemption,” under which the Court infers a congressional intent to preempt where state law is an obstacle to accomplishing the full objectives of the Congress. For instance, in 1987 the Court ruled that the federal Clean Water Act (CWA) preempted state common-law nuisance actions filed by Vermont landowners against a New York paper mill because the mill was polluting Lake Champlain, which is situated between the two states.<sup>22</sup> The Court so ruled even though the Act expressly protects “any right or jurisdiction of the [s]tates with respect to the waters (including boundary waters) of such [s]tates,” and even though the provision of the Act that establishes citizen suits provides that it does not restrict rights under “any statute or common law.”<sup>23</sup> The majority held that the nuisance suit would stand as an obstacle to the goals of federal law by allowing Vermont to regulate pollution sources in other states. The dissent emphasized that the overarching goal of the CWA is cleaner water, a purpose that would be advanced by allowing the suit to go forward.

### Airbags and Federalism

The disconnect between the states and the Court in preemption cases played out dramatically recently in *Geier v. American Honda Motor Co.*<sup>24</sup>

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In 1992, teenager Alexis Geier crashed into a tree while driving a 1987 Honda Accord in Washington, D.C. She suffered severe head and facial injuries that required 14 reconstructive surgeries. The car did not have an airbag or other passive restraint devices, but was equipped with a manual seat belt, which Geier had buckled at the time of the accident. Her parents sued American Honda Motor Company for damages, contending the car had a negligent and defective design due to its failure to have passive restraints. After lower courts ruled that the Geiers' common-law claims were preempted by the National Traffic and Motor Vehicle Safety Act of 1966, the Geiers took the case to the Court.

The Act preempts “any safety standard” that is not identical to a federal standard issued under the Act. In 1984, the U.S. Department of Transportation (DOT) issued a rule requiring some, but not all, new cars to have passive restraints. On the other hand, the Act also provides that compliance with federal standards “does not exempt any person from any liability under common law.”<sup>25</sup>

A coalition of 17 states—led by Missouri and including Arizona, California, Colorado, Connecticut, Delaware, Iowa, Kansas, Montana, New Hampshire, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington—pressed hard for a strong clear statement rule to preserve the role of the states in our federal system. “Ambiguity is not tolerated” on preemption issues, they insisted.<sup>26</sup> Quoting Justice Frankfurter, the states contended that “[a]ny indulgence in construction should be in favor of the [s]tates, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority, completely displacing the [s]tates.”<sup>27</sup> They urged the Court to clarify that express preemption analysis should be limited to the text of the statute, which must be interpreted in light of the strong presumption against preemption.

They also argued for a limitation on the doctrine of implied preemption, especially where the federal law in question contains a provision that is designed to preserve state laws. They stressed that the states reasonably relied on the Act's savings provision in deciding whether to support or oppose the federal law, and that the savings clause should not be given an unnaturally narrow reading that would retroactively deprive the states of any meaningful role in the legislative process. The *Federalist No. 46*, they argued, contemplated this essential role for the states as a check on the inclination of the national government to undermine state sovereignty. Citing the Starr task force report, the states argued that Congress, not the courts, must accept responsibility for strik-

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ing the preferred federal-state balance on public safety issues and other important policy matters.

Finally, the states contended that the Act's preemption of conflicting state "standards" is not best interpreted as embracing common law. A negligence lawsuit like the Geiers' does not establish standards, but merely redresses injuries, they argued. It would make perfect sense, they continued, for Congress to provide uniform federal safety regulations for newly manufactured cars, while preserving state common-law liability for injuries caused by past negligence.

Notwithstanding the persuasive arguments marshaled by the states, the Court ruled by a 5-4 vote that the Act prevented the Geiers from seeking redress through their lawsuit. Writing for the majority, Justice Stephen Breyer agreed with the states that the Act does not expressly preempt common-law suits, especially in view of the savings clause, which assumes that some significant number of common-law suits remain intact. Indeed, the majority opinion states flat out that there is "no convincing indication that Congress wanted to preempt, not only [s]tate statutes and regulations, but also common-law tort actions."

Nevertheless, the Court went on to conclude that lawsuits like the Geiers' would conflict with the objectives of the Act and the 1984 implementing airbag regulation, and thus are impliedly preempted. According to the Court, the airbag rule was designed to provide carmakers a range of options among passive restraints to be achieved through a gradual phase-in, a mix that would lower costs, encourage new technologies, and win consumer acceptance. A successful negligence lawsuit premised on a state common-law duty to install airbags in 1987 Honda Accords and similar cars, in the Court's view, would thwart this objective. In so ruling, the majority gave some (though not dispositive) weight to the DOT's view, expressed in an amicus brief, that the suit would be an obstacle to the goals of the airbag rule, even though the preamble to the rule in the *Federal Register* contained no mention of preemption.

A four-member dissent, consisting of Justices John Paul Stevens, Souter, Clarence Thomas, and Ruth Bader Ginsburg, accused the majority of "an unprecedented extension" of preemption doctrine.<sup>28</sup> The dissenting opinion, authored by Justice Stevens, begins by lambasting the Court for imposing a judge-made rule found in neither the Act nor the airbag rule, a rule that implicitly rejects the long-standing presumption against preemption and improperly invokes regulatory commentary rather than regulatory text in divining the scope of preemption.<sup>29</sup> Noting that the overall purpose of the Act is to reduce traffic injuries and

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deaths, the dissent excoriates the majority for concluding that the Geiers' negligence suit would undermine congressional objectives.<sup>30</sup>

Following the lead of the states' amicus brief, the dissent emphasizes the critical connection between state sovereignty and a properly restrained application of preemption doctrine. Justice Stevens sets the stage early on, intoning: "This is a case about federalism, that is, about respect for the 'constitutional role of the [s]tates as sovereign entities.'" <sup>31</sup> The dissent insists "the Supremacy Clause does not give unelected federal judges *carte blanche* to use federal law as a means of imposing their own ideas of tort reform on the [s]tates."<sup>32</sup>

After explaining the critical importance of the presumption against preemption to federalism and the role of states as separate sovereigns in our federal system, the dissent observes that it is "perfectly clear" that the phrase "safety standard" in the Act's preemption provision, especially when read in light of the savings clause for tort suits, embraces only state statutes and regulations, not common-law actions.<sup>33</sup> The dissent then emphasizes that the presumption against preemption, and the concomitant requirement that Congress provide a clear and manifest statement of its intent to preempt, ensure that preemption power remains in the hands of Congress, not the unelected judiciary.

Then comes a frontal assault on the whole doctrine of obstacle preemption. Characterizing the doctrine as "perhaps inadequately considered,"<sup>34</sup> the dissent cites prominent scholars who have criticized the doctrine.<sup>35</sup> It tweaks the nose of Justice Anthony M. Kennedy, who joined the *Geier* majority, by quoting his previously expressed concern that "a freewheeling judicial inquiry into whether state law is in tension with federal objectives would undercut the principle that it is Congress and federal agencies, rather than the courts, that preempt state law."<sup>36</sup>

As the dissent also observes, absent any obligation by Congress or the executive branch to state clearly an intent to preempt, the states are deprived of notice in the legislative or regulatory process that their sovereignty might someday be impaired by an inchoate obstacle preemption analysis, and thus deprived of any opportunity to urge the federal political branches to protect state interests.<sup>37</sup> The dissent concludes by articulating a rule requiring administrative agencies to provide clear notice to the states and the public of an intent to preempt, and to solicit comment on this intent, in order to respect the federalism that underlies the presumption against preemption.<sup>38</sup>

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### A Genuine Clear Statement Rule

The notion of implied obstacle preemption, i.e., an implied clear statement, is an unworkable oxymoron. Fortunately, the antidote of a clear statement rule of the kind recommended by the states, the *Geier* dissent, and the Starr task force report finds ample precedent in the law. For instance, when Congress imposes conditions on the states' receipt of federal funding, it "must do so unambiguously" so that states can exercise an informed choice as to whether to accept the funding notwithstanding whatever concomitant impairment of their sovereignty the funding conditions entail.<sup>39</sup> Federal laws that intrude on the states' ability to conduct their own affairs, such as laws that affect state-law qualifications for state judges or state restrictions on municipalities, require a "plain statement" in the text of the law.<sup>40</sup> And Congress may override the states' Eleventh Amendment immunity from suit in federal court only if it makes its intention "unmistakably clear in the language of the statute."<sup>41</sup>

These plain statement rules are not toothless tigers. In one recent case, federal law authorized "any entity" to provide telecommunications services. Despite the breadth of the phrase "any entity," it was not clear enough to trump a Missouri law prohibiting cities, counties, and public utilities from doing so because the Court viewed control over municipalities as an essential part of state sovereignty.<sup>42</sup> The Court also has held that state judges are not covered under federal age discrimination laws due to an exclusion for "policymakers," even though it was not entirely certain whether the exclusion applied, stating that it would not read the law to cover state judges unless Congress clearly did so.<sup>43</sup> Similarly, because the Court's Tenth Amendment case law leaves many state sovereignty issues in the hands of the political branches (see Chapter 11), it has been especially insistent on a clear congressional statement where federal law would impair state sovereignty.<sup>44</sup>

The message of the states on preemption makes good sense. If Congress wants to preempt state law, it is perfectly capable of doing so with clarity. Rulings that find "express" preemption in the face of ambiguous federal mandates, and wide-ranging judicial inquiries into "obstacles" and "frustration of purposes" are far too loose for a federal system that purports to respect the sovereign role of the states and their ability to enact laws that protect their citizens.

The coalitions on the Court are shifting, and there is reason to hope the Court may some day adopt a genuine clear statement rule. Just last year, Justices Stevens, Antonin Scalia, and Thomas joined an opinion by Justice Ginsburg arguing against implied preemption based on an alleged



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frustration of federal objectives even in the area of foreign affairs, a domain in which federal authority is viewed as paramount.<sup>45</sup> In voting to uphold a California law designed to help Holocaust victims and their descendants collect unpaid insurance proceeds, these four Justices displayed appropriate judicial humility and restraint by insisting that “judges should not be the expositors of the [n]ation’s foreign policy, which is a role they play by acting when the [p]resident himself has not taken a clear stand” by speaking definitively to a foreign policy issue.<sup>46</sup>

It is hypocritical for the Court to assert that it finds preemption only where congressional intent to preempt is clear and manifest, but then to discern the requisite clarity in vague manipulations of perceived purposes. Elimination of obstacle preemption, and sincere adherence to a clear statement rule with bite under the Supremacy Clause, would fit hand in glove with the Court’s parallel efforts to promote federalism and state sovereignty under other constitutional provisions. Indeed, as stated by Justice Breyer in a 2001 preemption case, adherence to such rules might well be the best test of real federalism:

[T]he true test of federalist principle may lie, not in the occasional constitutional effort to trim Congress’ commerce power at its edges, or to protect a [s]tate’s treasury from a private damages action, but rather in those many statutory cases where courts interpret the mass of technical detail that is the ordinary diet of the law.<sup>47</sup>

Justice Breyer has eloquently laid down the federalist challenge facing the Court in preemption cases. He and his colleagues in the *Geier* majority must now recognize that opinions like *Engine Manufacturers* that find express preemption in ambiguous federal mandates, and like *Geier* that improperly imply preemption of critical state laws, fail this federalist test.

## Chapter 10

### Sovereign Immunity and the Fourteenth Amendment

**T**he special relationship between the Eleventh Amendment and §5 of the Fourteenth Amendment is a circumstance of historical timing. The Eleventh Amendment limits the power of federal courts to hear cases brought against states. Although the express terms of the Eleventh Amendment prohibit only suits against a state by citizens of another state, early case law construing the amendment extends it to bar suits by citizens against their own states.<sup>1</sup> The amendment, which applies principally to suits against states for money damages,<sup>2</sup> “avoid[s] the indignity of subjecting a [s]tate to the coercive process of judicial tribunals at the instance of private parties.”<sup>3</sup>

On the other hand, Congress often uses its authority under §5 to enforce equal protection and due process guarantees by providing remedies in federal court for conduct that could lead to violations. Because the nation ratified the Fourteenth Amendment after the Eleventh Amendment, the U.S. Supreme Court has held that Congress can override Eleventh Amendment immunity through a valid exercise of its §5 authority.<sup>4</sup> This ability to vitiate state immunity under §5 is especially important because the Court ruled in 1996 that Congress cannot abrogate state immunity under its Commerce Clause authority or other powers listed in Article I of the U.S. Constitution.<sup>5</sup>

While inextricably linked in modern cases, §5 and the Eleventh Amendment have very different origins and purposes. This chapter acknowledges the link between these topics by addressing them together; it recognizes the distinctions among them by addressing them seriatim, discussing first the immunity afforded states under the Eleventh Amendment and then Congress’ power to enforce the Fourteenth Amendment (and trump state immunity).

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### Eleventh Amendment Immunity

In the 1996 landmark case *Seminole Tribe of Florida v. Florida*,<sup>6</sup> 31 states joined Florida in opposing federal jurisdiction over states under the Indian Gaming Regulatory Act (IGRA). As the states candidly admitted in their amicus brief: “This case is more about federalism than about Indian tribes.”<sup>7</sup> It also was about more than the IGRA, a specialized statute that simply required states to enter into good-faith negotiations with Indian tribes who desired to engage in gaming, and made that negotiation requirement enforceable in federal court. Many of the amici states might never find themselves in the same position as Florida did under the Act.

At stake, however, was the much larger issue of state sovereign immunity—the principle that state governments and state entities are exempt from most lawsuits brought by private parties in federal court. While this principle is long-standing, articulated in Court cases since at least 1890, it has been on a collision course with the last several decades of expanding federal rights and remedies. In the same way that passage of federal environmental, civil rights, and labor laws has led the Justices to reexamine the relationship between the states and Congress under the Commerce Clause, Tenth Amendment, and Fourteenth Amendment, it also has led them to revisit the relationship between the states and the federal judiciary. Even regulation of Indian affairs—an area the Constitution unquestionably assigns to the federal government—could raise federalism concerns if it allows citizens to haul sovereign states into federal court without their consent.

The textual basis for these concerns has been the Eleventh Amendment. On its face, the amendment merely appears to rein in the Article III jurisdiction of the federal courts, reading: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”<sup>8</sup> Ratified in 1798—the first amendment adopted after the original Bill of Rights—the Eleventh Amendment was a response to the Court’s early decision in *Chisholm v. Georgia*,<sup>9</sup> which had allowed a creditor to sue the state of Georgia to collect on a debt. According to lore, that decision caused “such a shock of surprise” to the founding generation that it prompted the swift drafting and ratification of the amendment.<sup>10</sup> At the very least, then, the amendment repudiated the *Chisholm* notion that federal courts should be available to adjudicate private parties’ common-law claims against a state.

## SOVEREIGN IMMUNITY AND THE FOURTEENTH AMENDMENT

Most of the subsequent debate hinges on whether the Eleventh Amendment is confined to its immediate circumstances and literal terms, or whether it exemplifies a larger vision of state sovereign immunity, including immunity from claims brought under federal law, that predated the Constitution and was incorporated into it. *Seminole Tribe* and other recent Court decisions have featured lengthy, dueling versions of constitutional and legal history on either side of this question, and an ongoing campaign of dissent by four Justices who reject the expansive view.<sup>11</sup> Scholars have judged these historical essays as more or less a draw, shedding much heat but little light on the original understanding of state sovereign immunity.<sup>12</sup>

What is clear, however, is that the Court's controlling opinions have moved steadily and rapidly away from the more literal reading of the Eleventh Amendment. In the late 19th century case of *Hans v. Louisiana*,<sup>13</sup> the majority looked beyond the amendment's language to hold that its prohibition on suits "by citizens of another [s]tate" applies equally to suits brought by a state's *own* citizens. Taking *Hans* as its touchstone, the *Seminole Tribe* majority agreed that the amendment "stand[s] not so much for what it says, but for the presupposition . . . which it confirms,"<sup>14</sup> and thus sided with the states in that case. Though the Eleventh Amendment is silent about affirmative acts of Congress, the Court held that the IGRA, and other statutes enacted under the Article I commerce power, could not abrogate the states' immunity from private suit. As discussed later in this chapter, this holding focused considerable new attention on the reach of §5 of the Fourteenth Amendment, which trumps Eleventh Amendment immunity when properly invoked.

Since *Seminole Tribe* sent its own "shock of surprise" into modern jurisprudence, the same 5-4 majority has further embraced the idea of a sovereign immunity that is only loosely tethered to the Eleventh Amendment's text. It has barred federal-law suits against states in *state* court, despite the fact that the amendment speaks only of "[t]he Judicial power of the United States."<sup>15</sup> Similarly, it has ruled that states are immune from proceedings brought by citizens before federal *administrative* tribunals, while making a great deal of those tribunals' "quasi-judicial" nature.<sup>16</sup> At times, the majority's textual, historical, and structural arguments all seem subordinate to a single abstract ideal: "The preeminent purpose of state sovereign immunity is to accord [s]tates the dignity that is consistent with their status as sovereign entities."<sup>17</sup>

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### The States' Perspective

For their part, the states have overwhelmingly agreed with this strong view of sovereign immunity. After *Seminole Tribe*, 38 states argued in favor of and none against the result in *Alden v. Maine*,<sup>18</sup> the case that extended immunity to state courts<sup>19</sup>; 39, plus one U.S. territory, backed its extension to administrative proceedings.<sup>20</sup> Clearly, the Court's deference to "sovereign dignity" strikes a chord that transcends the states' various economic interests or the political leanings of their leaders and citizens.

Of course, all states do share a common self-interest in limiting their exposure to legal liability, and avoiding the expensive, time-consuming demands of being subjected to legal process. For this reason, "conservation of the public fisc" is one of the rationales frequently cited for the Eleventh Amendment and for sovereign immunity generally.<sup>21</sup> But this rationale by itself cannot explain the fact that states frequently consent to be sued, both in their own courts and in federal court, both by waiving immunity in individual cases and by enacting statutory waivers for entire categories of cases.<sup>22</sup> More important to them than fiscal matters *per se* is the autonomy to decide which legal obligations and debts will take priority in a time of limited resources. In the states' view as well as the Court's, it is this autonomy that raises profound questions of federalism: "A general federal power to authorize private suits for money damages would place unwarranted strain on the [s]tates' ability to govern in accordance with the will of their citizens."<sup>23</sup>

Both the states' actions and their arguments demonstrate that their primary goal is to reinforce the dual sovereignty that is at the core of our federal system. They note, uncontroversially, that immunity from lawsuits is an inherent attribute of sovereignty, enjoyed by both the federal and state governments, with each preeminent in its own sphere. They do not question the Supremacy Clause, which mandates that the federal sovereign's laws trump state sovereigns' laws where the two are in substantive conflict. But faced with the question of whether and when federal law also defeats the procedural bar against an unconsenting state having to answer private parties' claims, they insist on a modicum of dignity—the minimum they believe are necessary to ensure that they, in Justice Anthony M. Kennedy's words, "are not relegated to the role of mere provinces or political corporations."<sup>24</sup>

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### **Balancing Immunity With Uniform Compliance With Federal Law**

Although the states have demanded and received a baseline rule that immunizes them from many suits for money damages under federal laws, they have also recognized the need to comply with federal mandates. States retain, and have demonstrated their willingness to exercise, an array of legal and policy choices that allow them to rein in the implications of Eleventh Amendment case law, to allow alternatives to private suits, or to waive their immunity altogether. In addition, they are well aware of important limits on the practical reach of state sovereign immunity—some of them as old as the Eleventh Amendment and some emerging from, or given new importance by, the Court's recent decisions.

Most importantly, as detailed below, some states have followed a critical and nuanced approach in cases involving enforcement of constitutional rights under §5 of the Fourteenth Amendment. These states have supported federal power to protect the rights of their state employees and their disabled citizens, even if this means that states are subjected to money damages suits in federal court. Notably, the Court itself was persuaded by their arguments, recognizing a limit to its own recent forays into Eleventh Amendment jurisprudence.<sup>25</sup>

Second, as mentioned above, neither the Eleventh Amendment nor state sovereign immunity alter the constitutional supremacy of federal law over state law; they only affect the ability of private citizens to enforce federal law against the states. According to the *Alden* Court, the states' own duty to uphold the Constitution and federal law provides the initial check: "We are unwilling to assume the [s]tates will refuse to honor the Constitution or obey the binding laws of the United States."<sup>26</sup> And where a state is in violation of a valid federal law, the federal government itself may take appropriate enforcement action against the state, including action that vindicates the rights of an individual or individuals who themselves would have been powerless to initiate a lawsuit. As a practical matter, this negates some of the impact of state sovereign immunity, assuming that the federal government has sufficient resources and the political will to heed citizen complaints and address state violations.<sup>27</sup>

This federal enforcement power is especially important for the many environmental statutes that share federal regulatory and enforcement authority with the states under "cooperative federalism." Where states carry out these programs, the federal government retains oversight of key decisions, often including the ability to initiate administrative or ju-

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dicial proceedings. In *Alaska Department of Environmental Conservation v. U.S. Environmental Protection Agency*,<sup>28</sup> the Court upheld the U.S. Environmental Protection Agency's voiding of a Clean Air Act permit issued by the state of Alaska. While the case was decided on statutory, not constitutional grounds, it had clear federalism overtones.<sup>29</sup> Significantly, more states weighed in on the federal government's side than Alaska's, again demonstrating the willingness of the states to carefully balance their need for sovereignty against the need for uniform enforcement of federal safeguards.<sup>30</sup>

Third, the oldest and perhaps simplest exception to sovereign immunity is waiver by the sovereign government, or its consent to be sued. Simply put, a state's "dignity" cannot be offended by answering to citizens in federal court if the state has freely chosen to appear there. Now that the core principle of state sovereign immunity against federal suits is firmly established, states can afford to decide as a matter of policy—as they do routinely under state law—in which cases they will raise the defense, and in which cases it may not serve the public interest to do so. For example, California recently argued for state immunity in an Americans With Disabilities Act (ADA) suit that it appealed all the way to the Supreme Court; but upon consideration, then withdrew its fully briefed appeal for fear of setting an unfavorable national precedent.<sup>31</sup>

In addition to the states' ability to choose whether and when to exercise sovereign immunity, several legal doctrines that place important limits on immunity have remained undisturbed by the Court's decisions and gone largely unchallenged by the states. For example, in certain cases the precedent of *Ex parte Young*<sup>32</sup> allows citizens to file federal suits against state officials to enjoin ongoing violations of federal law. These suits rely on the legal fiction that the suit is not against the state but its official, who is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."<sup>33</sup> While the suits may not seek damages, they provide an important jurisdictional hook that has allowed some private enforcement against the states of federal laws, especially civil rights statutes, for nearly 100 years.<sup>34</sup>

Congress also has considerable authority under the Spending Clause to place conditions on the states' receipt of federal funds.<sup>35</sup> Among other things, it can expressly require that states that accept federal grant money for implementing a statute must consent to be subject to suit in federal court under the remedial provisions of that statute, to the same extent as any other party. The Spending Clause is also an important backup source of federal authority because the Court, through Chief Jus-

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tice William H. Rehnquist, has held that “objectives 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.”<sup>36</sup>

The states do not support the aggressive use of the Spending Clause by the federal government or an expansive application of the doctrine of *Ex parte Young*. Indeed in several recent cases, some states have advocated for a narrow interpretation of these doctrines.<sup>37</sup> But nor have the states urged the Court to revisit the doctrines’ basic parameters,<sup>38</sup> which provide important avenues for Congress and citizens to secure the objectives of federal law.

The combination of the careful litigation strategy adopted by many states, their judicious use of their sovereign discretion, and various legal doctrines and exceptions all strike an important balance in the Court’s Eleventh Amendment revival—as is already being seen in practice. It also explains why the states have been so adamant about preserving what remains of the basic principle of sovereign dignity, and why they should be given the benefit of the doubt as to how they will exercise that dignity. In short, to say that the states must be treated as sovereign is not yet to revert to the English common-law maxim that “the king can do no wrong”; and precisely because the states are sovereign, they will continue to have countless opportunities for doing right.

### Section 5 of the 14th Amendment

The law affords special credibility to declarations against one’s own interest. As explained by an eminent scholar: “[A]sserting a fact distinctly against one’s interest is unlikely to be deliberately false or heedlessly incorrect.”<sup>39</sup> That’s why the position of the states is so intriguing when it comes to §5 of the Fourteenth Amendment, which authorizes Congress to enforce our constitutional guarantees of equal protection and due process. While the states have traditionally supported a narrow interpretation of §5 for the same reasons they have supported an expansive interpretation of Eleventh Amendment immunity, a growing number of states have taken the opposite position, arguing for a robust interpretation of §5. These states promote federal authority under §5 even when it will almost certainly be financially disadvantageous to them. In the most recent case decided by the Court, *Tennessee v. Lane*,<sup>40</sup> this became the majority position of the states.

Part of the explanation for this rather surprising position by the states is that §5 is important for more than simply trumping Eleventh Amend-



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ment immunity. Section 5 also is an important source of power generally for Congress to ensure that state and local governments provide their citizens equal protection and due process under law. Indeed, to the extent the Court narrows Congress' authority under the Commerce Clause, it may become the *only* way Congress can enforce these mandates. As a result, congressional efforts to enact laws under §5 have given rise to a host of cases that shape the respective roles of the states and the national legislature in our federal system.

Through its jurisprudence interpreting §5, as well as a similar provision in the Fifteenth Amendment, the Court has made clear that these enforcement provisions empower Congress to do more than simply proscribe conduct that violates the Constitution. Rather, Congress may adopt prophylactic measures that prohibit constitutional conduct where appropriate to prevent or deter unconstitutional conduct. For example, the Constitution itself does not prohibit a state from imposing a literacy test as a voting requirement, but Congress may use its §5 power to prohibit literacy tests to combat racial discrimination in voting.<sup>41</sup> Just 11 years after the Fourteenth Amendment's ratification, the Court described Congress' broad §5 power to promote equality by observing:

Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against [s]tate denial or invasion, if not prohibited, is brought within the domain of congressional power.<sup>42</sup>

The Court has frequently endorsed this flexible view of Congress' §5 authority as embracing any law that advances the goals of the Fourteenth Amendment.<sup>43</sup>

### “Congruence and Proportionality”

While broad, this prophylactic authority under §5 is not unlimited. As is true for any constitutional provision, the Court, not Congress, has the last word on defining the substance and meaning of the Fourteenth Amendment.<sup>44</sup> If Congress alone could redefine substantive constitutional protections, it could easily circumvent the constitutional amendment process set out in Article V, and the Constitution would lose its status as our paramount law.

In 1997, in a case called *City of Boerne v. Flores*,<sup>45</sup> the Court established a two-part test for determining whether §5 legislation is a proper prophylactic against unconstitutional conduct or instead an effort by

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Congress to redefine substantive constitutional protections. First, the Court looks to the evidence of actual constitutional violations by the states, and then it considers whether the response proposed by Congress reflects “congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”<sup>46</sup>

*City of Boerne* involved a challenge to the Religious Freedom Restoration Act (RFRA) of 1993, which prohibited government action that substantially burdened the free exercise of religion unless the action was the least restrictive means to advance a compelling government interest. The Act was a direct response to a 1990 ruling by the Court upholding the denial of unemployment benefits to Native Americans who were fired for using peyote for sacramental purposes.<sup>47</sup> In the peyote case, the Court ruled that neutral laws of general applicability, like the laws against peyote, could be applied to religious practices even where they do not advance a compelling interest.

Applying its newly minted two-part test in *Boerne*, the Court first found that Congress did not assemble much evidence that states were actually violating the Free Exercise Clause, as interpreted by *Employment Division, Department of Human Resources of Oregon v. Smith*.<sup>48</sup> “Congress’ concern,” the Court ruled, “was with the incidental burdens imposed [by facially neutral laws], not the object or purpose of the legislation.”<sup>49</sup> Under *Smith*, such burdens were not constitutional violations. The Court concluded that the legislative record underlying the RFRA lacked evidence of “modern instances of generally applicable laws passed because of religious bigotry.”<sup>50</sup> In fact, according to the Court, congressional hearings on the RFRA lack any evidence of religious persecution in the United States in the past 40 years.<sup>51</sup> As a result, the Court found that Congress had very little, if any, evidence of unconstitutional conduct by the states.

Even if the RFRA defenders could show it was designed to root out unconstitutional conduct by the states, the Court identified a second flaw, concluding that the RFRA was “out of proportion” to any such conduct.<sup>52</sup> The RFRA applied to official actions of “almost every description” at every level of government, it lacked a termination date and geographic limits, and it imposed the most demanding test known to constitutional law.<sup>53</sup> The Court stressed that while congressional judgments under §5 are entitled to “much deference,” its discretion “is not unlimited.”<sup>54</sup>

The Court’s imposition of congruence and proportionality limits on Congress’ §5 authority was unexpected by many. One reason for the surprise is that Congress’ enforcement authority under §2 of the Thirteenth

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Amendment, conferred by a provision virtually identical to §5, embraces the power to enact legislation not only to prohibit slavery and involuntary servitude (the conduct prohibited by the amendment), but also to identify and remedy “badges and incidents” of slavery, including racial discrimination in private housing sales.<sup>55</sup> If Congress could impose remedies under §2 of the Thirteenth Amendment only where congruent and proportional to persistent and widespread violations of that amendment, its authority would be hollow because slavery no longer exists. Conversely, if Congress were authorized to define and remedy the “badges and incidents” of Equal Protection Clause violations, *City of Boerne* would have been an easy victory for the defenders of the RFRA. And yet the Court provides no explanation as to why almost identical enforcement provisions of the Constitution, ratified within three years of each other, are given wildly disparate readings.

Over the next five years, the Court continued to apply and refine its newly minted congruence and proportionality test. In 2000, in *Kimel v. Florida Board of Regents*,<sup>56</sup> the Court held that the federal Age Discrimination in Employment Act (ADEA) was not a valid exercise of §5 because its broad restriction on the use of age in employment decisions prohibits substantially more conduct than would be deemed unconstitutional under the rational basis test that applies in age discrimination challenges under the Equal Protection Clause.<sup>57</sup> Because it found that Congress “had virtually no reason to believe” that states were engaging in unconstitutional age discrimination, the Court ruled that the ADEA’s broad prophylactic provisions could not be justified as congruent and proportional as required by *City of Boerne*.<sup>58</sup>

The next year, in *Board of Trustees of the University of Alabama v. Garrett*,<sup>59</sup> the Court ruled that Title I of the federal ADA, which prohibits employment discrimination against the disabled, was not a valid exercise of §5. Like in *Kimel*, the Court decided that Congress had failed to identify a pattern of unconstitutional employment discrimination by the states against the disabled, and imposed obligations on the states far beyond those required by the Fourteenth Amendment.<sup>60</sup>

The *United States v. Morrison*<sup>61</sup> case, discussed in Chapter 7, shows the high stakes involved in the §5 debate, as well as its intersection with the Commerce Clause issue. In *Morrison*, the Court held that the civil remedy established by the federal Violence Against Women Act (VAWA) is not authorized by §5 because it is directed at private individuals who commit criminal acts motivated by gender bias, whereas the Fourteenth Amendment itself prohibits only state (and not private) action.<sup>62</sup> Because the Court also concluded—over the argument of 36 states—that the Com-

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merce Clause could not be used to justify the VAWA's civil remedy provision, the ruling precluded Congress from not only overriding state immunity, but providing that civil remedy at all, even though, as the Court recognized, "there is pervasive bias in various state justice systems against victims of gender[-]motivated violence."<sup>63</sup>

Underlying all these rulings is the Court's express concern that limitations on Congress' §5 authority "are necessary to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the [s]tates and the [n]ational [g]overnment."<sup>64</sup> There is some irony in this statement, because the Fourteenth Amendment was enacted after the Civil War specifically to alter the Framers' balance of authority. This irony is not lost on the states, which have supported limits on §5 powers, but have advocated for a nuanced analysis that ensures the federal government has the authority necessary to fully enforce the constitutional guarantees of due process and equal protection.

### The States Weigh In

The states are deeply conflicted in their views on the proper reach of §5. As early as *Boerne*, four states—New York, Maryland, Connecticut, and Massachusetts—broke ranks with a larger group of 13 states, and argued in support of federal authority under §5 to enact the RFRA.<sup>65</sup> While supporting a "limited and narrow" interpretation of §5 powers, these four states argued that the RFRA was constitutional under "any of the narrow theories" advanced by opponents of the law. Responding to the argument in opposition to the RFRA made by 13 states, these states concluded that the "Act protects religious freedom, which the amici [s]tates joining this brief recognize as fundamentally important, and does so without interfering significantly with the [s]tates' prerogatives in furthering their important missions."<sup>66</sup> The participating states were unanimous in opposition to §5 authority in *Kimel* and *Garrett*, but the number of participating states dropped from 23 in *Kimel*,<sup>67</sup> to just seven one year later in *Garrett*.<sup>68</sup>

In both *Nevada Department of Human Resources v. Hibbs*<sup>69</sup> and *Lane*, a significant number of states argued in favor of §5 authority to override the states' Eleventh Amendment immunity, and in *Lane*, this was the view of the majority of states that weighed in. The Court sided with this collection of states in both cases. In *Hibbs*, by a vote of 6-3, the Court agreed with the arguments made by six states and upheld the federal Family Medical Leave Act (FMLA) as a valid abrogation of state immunity. Notwithstanding his staunch adherence to the vision of federalism

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that informed the §5 rulings discussed above, Chief Justice Rehnquist authored the majority opinion. In *Lane*, a bare five-Justice majority upheld the application of the ADA to wheelchair users who were denied reasonable access to state courthouses.

These pro-federal power briefs in *Hibbs* and *Lane* plainly do not represent the majority view of the 50 states regarding the proper reach of §5: the *Hibbs* brief did not even command a majority of the states that participated in the case. But it is surprising, given the financial stakes to the states, that the states are conflicted at all. And because this view became the majority view of the states in *Lane*, this emerging voice of the states in securing these expansive §5 rulings warrants closer examination.

### *Hibbs and the FMLA*

In 1996, William and Diane Hibbs were on their way to a restaurant for breakfast when another driver ran a red light and crashed into their car. The accident seriously injured Mrs. Hibbs' neck and caused major nerve damage, requiring a series of extensive surgeries. The accident also caused a preexisting metal plate in her neck to press against her esophagus, requiring her to be extremely careful in moving her body to avoid a fatal puncture. In addition to her injuries, she battled depression caused by her pain medication, which caused her to become clinically depressed and suicidal, necessitating temporary admission to a hospital psychiatric unit. In the ensuing months and years, she needed near-constant care from her husband and others.

The FMLA required the state of Nevada to provide Mr. Hibbs with 12 weeks of unpaid medical leave to care for his wife. Under state law, Mr. Hibbs also qualified for 200 hours of "catastrophic leave," which consisted of paid leave donated by fellow employees. Mr. Hibbs and the state disagreed over whether the catastrophic leave ran concurrently with, and counted as part of, the 12 weeks of unpaid leave under the FMLA. According to Mr. Hibbs, Nevada improperly ordered him to return to work before he used all 12 weeks of the authorized leave. When Mr. Hibbs failed to return, the state fired him.

Mr. Hibbs took the state to court. He sued the state in federal court for money damages to recover lost pay and injunctive relief ordering the state to rehire him. But Nevada argued that Congress has no constitutional authority to authorize Mr. Hibbs and others like him to seek money damages against a state in federal court under the FMLA.<sup>70</sup>

Mr. Hibbs believes he is the victim of precisely the kind of reverse discrimination the leave law was designed to address. Congress passed the

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FMLA to address a stereotype held by many employers that when a family emergency requires leave from work, women rather than men should take the leave. The law provides that all workers—male and female—are entitled to 12 weeks of unpaid leave to meet home-based emergencies. And it authorizes an estimated five million state workers to sue their employers for money damages in federal court if the state fails to comply. The federal leave law applies to about 60% of the national workforce, including the roughly five million people who work for state governments. Tens of millions of men and women have relied on the law to care for ailing family members, without having to choose between their job and their family.

Mr. Hibbs believes that Nevada discriminated against him and denied him additional time off because of his sex. Seven years after the accident, Mrs. Hibbs reportedly was a heavily sedated “shell of her former self.”<sup>71</sup> The Hibbises had lost their \$140,000 home, their horses, and much else. Mr. Hibbs, then 46 years old, was understandably embittered: “I lost everything, but they don’t care. This isn’t about me anymore.”<sup>72</sup>

When the *Hibbs* case reached the Court, the key issues were (1) whether there was sufficient evidence of unconstitutional gender discrimination by the states in awarding sick leave, and (2) whether the FMLA remedy was a congruent and proportional response to the evidence of these violations.

### *The Voice of the States*

Six states—New York, Connecticut, Illinois, Minnesota, New Mexico, and Washington—filed a friend-of-the-court brief supporting Mr. Hibbs and opposing the position of their sister state, Nevada.<sup>73</sup> While acknowledging that they “more typically advocate the application of Eleventh Amendment immunity,” they argued that “allowing our citizens to enforce their FMLA rights without restriction is consistent with [their obligation to ensure] that workplace gender discrimination against our citizens, with all its vestiges, is eliminated.”<sup>74</sup>

The six-state coalition emphasized that Congress had before it extensive evidence of the states’ widespread involvement in the nation’s long history of gender discrimination in employment, which flowed directly from stereotypes regarding the appropriate roles of men and women in our society. The states argued that discrimination in medical leave reflects the same outmoded notion that women are too timid and delicate to function in the workplace, and that families would be undermined if women pursued independent careers. They further contended that evi-

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dence of discrimination in parental leave policies is relevant to defining the scope of the problem to be addressed because it was based on the same improper stereotype regarding the appropriate role of women in our society.

Importantly, the six-state coalition responded to arguments made by 13 amicus states, led by Alabama, which asserted that the FMLA was not appropriate §5 legislation as applied to the states because the states had led the way in eliminating gender discrimination in leave policies.<sup>75</sup> The six-state coalition argued that the state sick and medical leave policies cited by Alabama were seriously deficient, and that Alabama's assertion of state leadership on the leave issue was "illusory."<sup>76</sup>

Finally, the states argued that the FMLA was a congruent and proportionate response to evidence of unconstitutional conduct by the states because it was narrowly tailored and highly sensitive to the needs of employers. Although the act requires a minimum level of leave on a gender-neutral basis, the states explained that this mandate is necessary to eliminate the possibility that women would become less desirable applicants for employment, and to reduce the chance of discrimination inherent in discretionary leave policies.

In a 6-3 ruling, the Court upheld the FMLA, agreeing with many of the arguments proposed by the six-state coalition. Writing for the majority, Chief Justice Rehnquist took into account the history of pervasive gender discrimination that underlies the Court's use of heightened scrutiny to review gender-based equal protection claims. The Court expressed concern over the invidious gender stereotypes that have led to disparate medical leave policies. It rejected the argument that the states have taken the lead in equalizing leave policies, citing many of the points advanced by the six-state coalition. And it concluded that the FMLA is a proportionate response because it narrowly targets the discrimination to be eradicated and is limited in other important ways.

In short, in *Hibbs* the six-state coalition brought an important and unique voice to the debate over how best to analyze congressional authority under §5 to address equal protection violations. While emphasizing the importance of state immunity, they advocated a restrained and accommodating approach to judicial review of congressional determinations regarding the need and scope of legislation enacted under §5 to enforce equal protection and due process guarantees. The *Hibbs* Court upheld the FMLA using an analysis remarkably similar to that advanced by these states.

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### *Lane and the ADA*

George Lane is no angel. He reportedly has been arrested more than 30 times for drunk driving, drug possession, various traffic offenses, and other violations of the law. Several years ago, an automobile accident rendered him a paraplegic wheelchair user. He was required to appear in a rural Tennessee county courthouse to answer criminal charges for reckless driving for that accident.

But no one should be forced to endure what he claims came next. Lane alleges he had to crawl up two flights of stairs because the courthouse had no elevator or ramps. Lane also claimed that when he subsequently refused to crawl or be carried to the courtroom for a hearing, he was arrested and jailed for failure to appear.

Beverly Jones, a certified court reporter and paraplegic wheelchair user, also says she is the victim of disability discrimination. She claims she has been unable to gain access to several county courthouses in Tennessee and thus has been denied work opportunities and the ability to participate in the judicial process.

In 1998, Lane and Jones filed suit under the federal ADA, alleging that the state of Tennessee violated Title II of the Act, which prohibits discrimination against the disabled in the provision of public services and programs. They sought both monetary damages and injunctive relief, alleging past and ongoing violations. Tennessee argued that Title II of the ADA was not a proper exercise of Congress' §5 authority.

The *Lane* case raised several key issues regarding Congress' power to abrogate Eleventh Amendment immunity through laws under §5 of the Fourteenth Amendment. For example, in evaluating the evidence of unconstitutional conduct, is Congress limited to evidence of discrimination involving the specific conduct being challenged (in the case of Lane and Jones, denial of access to courts), or is evidence of discrimination against the disabled in the provision of all public services and programs generally also relevant? Is evidence of unconstitutional discrimination by municipalities relevant, or must §5 laws be supported exclusively by evidence of discrimination by the states? Must the evidence considered by Congress support the entire statute or relevant provision, or may courts evaluate congruence and proportionality with respect to the specific act of discrimination alleged in the case at hand? Must §5 laws be tailored to apply only to those states with a history of the violation sought to be remedied, or may the law be applied to all 50 states when the evidence shows widespread violations?



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Unlike in *Hibbs*, where a majority of participating amicus states argued that the federal leave act did not abrogate state immunity, in *Lane* state supporters of the federal disability law outnumbered opponents. A coalition of 10 states—Minnesota, Connecticut, Illinois, Massachusetts, Missouri, New Mexico, New York, Vermont, Washington, and Wisconsin—filed an amicus brief in support of Lane and Jones, arguing in favor of the ability of state citizens to use Title II of the ADA “without limitation.”<sup>77</sup> As in *Hibbs*, the states acknowledged that they more typically advocate for Eleventh Amendment immunity. But they stressed that *Lane* is different due to the “vital public policy” underlying the ADA, as well as “the central role of the [s]tates in providing public services, programs, and activities subject to Title II.”<sup>78</sup>

The 10-state coalition began by distinguishing the Court’s earlier ruling in *Garrett*, which held that the provisions prohibiting employment discrimination against the disabled in Title I of the ADA did not override state immunity.<sup>79</sup> The states argued that unlike *Garrett*, which involved state action that is accorded deferential review and deemed unconstitutional only if it is deemed irrational, the conduct at issue in *Lane* under Title II is subject to heightened scrutiny because it implicates fundamental rights of voting and access to the court. They contended that as a result, the record of unconstitutional behavior relevant to *Lane* is more extensive than that before the Court in *Garrett* and supports Congress’ decision to override state immunity. Indeed, the states noted that in *Garrett* the Court observed that the “overwhelming majority” of the evidence of prejudice against the disabled involved discrimination in the provision of public services and public accommodations, areas governed by Titles II and III of the Act.<sup>80</sup>

The states urged the Court to consider evidence that states had a long history of improper and irrational discrimination against the disabled, denying them the right to marry, procreate, vote, enter contracts, and obtain drivers’ licenses, and subjecting the disabled to abusive and inhumane treatment. The states reviewed extensive evidence of discrimination against the disabled that impaired access to courtrooms and undermined their fundamental right to participate in the judicial process. Citing the analysis used by the Court in *Hibbs*, they also argued that Congress was justified in enacting Title II in part because prior legislative efforts failed to curb discrimination against the disabled. The states further observed that the National Association of Attorneys General endorsed the ADA, and the congressional testimony contained no state opposition to the abrogation of Eleventh Amendment immunity.

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Urging judicial restraint, the states argued that “it is not permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker.”<sup>81</sup> In view of this deference owed to legislative determinations, the states asserted that the Court should not “lightly second-guess” Congress’ determination that the record justified abrogation of Eleventh Amendment immunity.<sup>82</sup>

Turning to the issue of whether Title II is a congruent and proportional response to the prejudice suffered by the disabled, the states emphasized that Title II directly targets irrational and unconstitutional state conduct. Moreover, given the pervasiveness of past discrimination, it was appropriate for Congress to include in Title II a requirement that states provide reasonable accommodations for the disabled. Just as the mandatory leave provisions in *Hibbs* are necessary to avoid having employers avoid genuine equality by eliminating medical leave altogether (a result that would not achieve Congress’ remedial goals), the states argued that Title II’s reasonable modification requirement is necessary because a simple mandate of equal treatment would not achieve the remedial goals that underlie the ADA. Finally, the states also stressed Title II’s significant limitations, including its application only to those whose impairments limit their major life activities, and only to those who are otherwise eligible for the public service or program at issue.

On May 17, 2004, the Court ruled in *Lane* that the action could proceed because Title II, as applied to cases involving access to the courts, is a valid exercise of Congress’ authority under §5 and thus overrides the state’s Eleventh Amendment immunity.<sup>83</sup> The ruling is narrow on its face because it applies only to those alleging denial of access to the courts. But it resolves many of the open questions regarding Congress’ §5 authority in a manner consistent with the position advanced by the amici states supporting *Lane* and *Jones*.

For instance, in evaluating the scope of the harm addressed by Title II, the Court considered not only evidence of disability discrimination in access to courthouses, but (as argued by the states) the full panoply of state discrimination in public programs and services, including bans on marriage, unjustified commitment, abuse and neglect, irrational zoning decisions, and discrimination in public education and voting. The Court concluded that Congress reasonably determined that prior legislative efforts had not adequately addressed disability discrimination, parroting the states’ observation that most of the evidence reviewed by the *Garrett* Court involved discrimination in public services and programs. The *Lane* Court also ruled that discrimination by municipalities is relevant to the §5 inquiry, citing the early racial discrimination cases that upheld §5

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remedies in part due to evidence of prejudice by city and county officials.<sup>84</sup> The Court also held that it need not evaluate all applications of the relevant statute or provision during the §5 inquiry, ruling instead that it may conduct the §5 inquiry on a case-by-case basis, an approach that makes it easier for at least some applications of a challenged provision to survive. In the words of the Court: “It is unclear what, if anything, examining Title II’s application to hockey rinks or voting booths can tell us about whether Title II substantively redefines the right of access to the courts.”<sup>85</sup> Moreover, the Court did not require a specific showing of disability discrimination in all 50 states, or even in Tennessee, evidently concluding that a nationwide response to widespread harm is appropriate under §5 in the absence of state-by-state proof.

### Lessons From the States

The majority view of the states in favor of federal power in *Lane* provides an important and useful voice in the debate over the scope of Congress’ §5 enforcement powers. Several Justices have written or joined opinions taking an exceedingly narrow and incoherent view of the congruence and proportionality test. Chief Justice Rehnquist and Justice Kennedy argue, for example, that in applying the congruence and proportionality test, Congress and courts should not consider evidence of unconstitutional conduct by municipalities because they do not share in the states’ Eleventh Amendment immunity. Justice Antonin Scalia contends that courts may not apply a provision enacted under §5 against a state unless Congress had before it evidence of unconstitutional conduct by that specific state. In other words, extensive evidence of widespread and persistent constitutional violations by 49 states would not entitle Congress to conclude that a nationwide remedy is appropriate.

These approaches, however, conflate the §5 and Eleventh Amendment inquiries. The congruence and proportionality test does not define the scope of immunity, but rather ensures that Congress is using its §5 authority to enforce, and not redefine, substantive constitutional rights. The *Boerne* and *Morrison* cases make this clear, for in both cases the Court applied the congruence and proportionality test to strike down purported applications of §5 authority wholly apart from any application of state Eleventh Amendment immunity.

Thus, in evaluating whether any particular exercise of §5 authority is congruent and proportional to harm caused by unconstitutional conduct, it is entirely appropriate for Congress and the courts to take into account the full panoply of unconstitutional conduct by all relevant actors. In ex-

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exercising its §5 authority, Congress should be able to draw reasonable inferences regarding the scope of the harm to be addressed, just as it does when exercising other authority. Congress may reasonably conclude that evidence of persistent and widespread unconstitutional conduct suggests a serious risk of constitutional violations nationwide and thus warrants a nationwide response, even in the absence of a record indicting each of the 50 states. It may also reasonably conclude that evidence of persistent and widespread unconstitutional action by municipalities and other state subdivisions suggests a serious risk of unconstitutional conduct by the states themselves.

If the record shows widespread unconstitutional conduct by the majority of states, and if Congress responds by applying a §5 remedy to all 50 states, it has not “redefined” substantive constitutional rights. If municipalities engage in widespread unconstitutional conduct, and if Congress responds by applying a §5 remedy to both municipalities and states, it likewise has not “redefined” substantive constitutional rights. In other words, if a remedy is appropriate vis-à-vis municipalities or most states, it makes little sense to conclude that the same remedy is an improper redefinition of rights if applied more broadly where reasonable inferences support a broader application. As Justice John Paul Stevens’ majority opinion in *Lane* correctly observes, Congress and the Court considered evidence of municipal constitutional violations in upholding laws addressing racial discrimination as applied to the states.<sup>86</sup> There is no reason for courts to second-guess Congress’ reasonable inferences under §5 in other contexts.

The amicus briefs submitted by the state coalitions in favor of federal power in *Hibbs* and *Lane* contend that Congress should be able to draw reasonable inferences from the record in fashioning §5 remedies, and to rely on its prior experience in addressing similar unconstitutional conduct, thereby making the legislative records of prior attempted enactments relevant to the inquiry. They also argued that judicial decisions involving the conduct being addressed are relevant to the inquiry, a position that reasonably assumes congressional familiarity with pertinent case law. They rooted their position in long-standing principles of judicial restraint and in the recognition that Congress is better suited than the judiciary in assessing appropriate responses to violations of the Fourteenth Amendment. In so doing, they helped steer the Court away from a doctrinally incoherent and unreasonably narrow view of §5 authority to an approach that pays proper deference to congressional prerogatives, even when it comes at the expense of state immunity.

## Chapter 11

### Preventing Commandeering Under the Tenth Amendment

**I**t is no exaggeration to say that the U.S. Supreme Court's jurisprudence over the past 30 years under the Tenth Amendment has been a roller coaster ride.

In a 1976 case called *National League of Cities v. Usery*,<sup>1</sup> a deeply divided Court held that the amendment blocks Congress from applying federal minimum wage and maximum hour provisions to state employees working in areas of traditional state functions such as fire and police departments, sanitation, and public health. By a 5-4 vote, the Court revived the Tenth Amendment, a provision that had been left unused for several decades, and overruled long-standing precedent in order to provide affirmative protection to various attributes it viewed as vital to state sovereignty. One such attribute, it held, is the ability to set wages and hours for employees who carry out traditional government functions. Even though the federal wage and hour laws fall within the general scope of Congress' Commerce Clause authority, the Tenth Amendment worked as a check against assertion of this authority against the states in their capacity as states.

In dissent, Justice William Brennan excoriated the majority for overturning long-standing precedent, saying that he could "not recall another instance in the Court's history when the reasoning of so many decisions covering so long a span of time has been discarded in such a roughshod manner."<sup>2</sup> He denounced the result as "a catastrophic judicial body blow at Congress' power under the Commerce Clause"<sup>3</sup> and the Court's analysis as "a thinly veiled rationalization for judicial supervision of a policy judgment that our system of government reserves to Congress."<sup>4</sup>

Nine years later, in *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>5</sup> a bare majority of the Court voted to reverse *National League of*

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*Cities*, concluding that the primary protection afforded to state sovereignty against federal law resides not in the Tenth Amendment, but in the states' ability to participate in the political process and shape federal legislation in a way that protects their autonomy. The Court concluded that lower courts had struggled with the "troublesome" task of identifying traditional functions as required under *National League of Cities*.<sup>6</sup> In dissent, Justice Sandra Day O'Connor accused the majority of "sound[ing] a retreat" on "the battle scene of federalism."<sup>7</sup> Both Justices William H. Rehnquist and O'Connor predicted that the Court eventually would overrule *Garcia*.<sup>8</sup>

Notwithstanding the Rehnquist-O'Connor prediction, in a 1988 case called *South Carolina v. Baker*,<sup>9</sup> the Court reaffirmed that the Tenth Amendment's constraints "are structural, not substantive—i.e., that states must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable activity."<sup>10</sup>

In the following decade, however, the Court turned once more, this time only 90 degrees, and again imposed affirmative limits on congressional power, construing the Tenth Amendment to prohibit federal "commandeering" of state legislatures by invalidating a federal law that coerced state legislators to enact laws implementing federal policy.<sup>11</sup> It subsequently extended the anti-commandeering mandate to state executive branch officials.<sup>12</sup>

When one considers the amorphous text of the Tenth Amendment—which provides that "powers not delegated to the United States by the Constitution, nor prohibited by it to the [s]tates, are reserved to the states respectively, or to the people"<sup>13</sup>—this jurisprudential flip-flopping becomes easier to understand. The Court once asserted that the Tenth Amendment is a mere truism, providing simply that "all is retained which has not been surrendered."<sup>14</sup> The challenge for the Court has been to determine the extent to which the Tenth Amendment imposes substantive limits on congressional authority or reserves specific categories of power exclusively to the states. Such limits cannot flow directly from the tautological constitutional text, but instead derive from incidents of state sovereignty.<sup>15</sup>

As with the Commerce Clause and §5 of the Fourteenth Amendment, the Court routinely invokes federalist principles in analyzing the extent to which the Tenth Amendment prohibits Congress from using its enumerated powers to invade state sovereignty. Indeed, the Court has noted that, in its view, the two questions are "mirror images of each other."<sup>16</sup> In other words, if the U.S. Constitution delegates power to Congress, the

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Tenth Amendment makes clear that power is not reserved to the states; at the same time, the Constitution does not confer upon Congress the power to impair any necessary element of state sovereignty.<sup>17</sup>

The two cases discussed below demonstrate how the Court vindicates post-*Garcia* what it views as essential sovereign powers reserved by the Tenth Amendment by prohibiting Congress from “commandeering” state legislative and executive authority. The first case, *New York v. United States*,<sup>18</sup> shows how the states argue for Tenth Amendment protection against federal laws viewed as threatening to state independence. In the second case, *Printz v. United States*,<sup>19</sup> we see that a majority of participating states argued in favor of federal authority, notwithstanding the Tenth Amendment, in areas of traditional federal-state cooperation such as law enforcement. The voice of these states in *Printz* demonstrates that protection of state sovereignty does not necessarily require a reflexive denial of national authority.

### Waste in the Nuclear Age

“We live in a world full of low-level radioactive waste.”<sup>20</sup> Radioactive material is all around us, in watch dials, smoke alarms, and other commonplace items. Low-level radioactive waste is produced in countless nuclear power plants, industrial labs, hospitals, research institutions, and government facilities. It typically consists of contaminated protective clothing, wiping rags, mops, equipment and tools, luminous dials, medical tubes, swabs, injection needles, syringes, and laboratory animal carcasses and tissues. We produce millions of cubic feet of this waste each year. To protect the public it must be kept isolated, often for hundreds of years.

In 1979, only three states—Nevada, South Carolina, and Washington—had low-level waste disposal sites, and two of those announced plans to close. In the 1980s, to ensure adequate disposal capacity and to alleviate the unfairness in having just three states carry the entire nation’s disposal burden, Congress established a national policy that each state is responsible for providing disposal capacity for the low-level radioactive waste generated within its borders. Since that time, Congress has taken several steps to encourage the development of new sites and interstate compacts for the operation of regional facilities.

In the Low-Level Radioactive Waste Policy Act Amendments of 1985, Congress established three conditions to encourage state participation. The first consisted of monetary incentives to be paid out to states that met a series of statutory deadlines on developing disposal facilities and re-

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gional compacts. The second comprised access incentives, consisting of graduated surcharges and access denials imposed on states that missed the deadlines. The third condition was a “take-title” provision, which required any state unable to provide for the disposal of its waste by 1996 to take title to the waste or assume liability for damages suffered by the generator due to the state’s failure to take title and possession.

### *The States Assert Their Sovereignty*

In 1990, the state of New York and two of its counties sued the United States, arguing that all three conditions in the 1985 Act violate various provisions of the Constitution, including the Tenth Amendment. Not surprisingly, the three states that already had disposal capacity intervened as defendants to argue in favor of the 1985 law. But a coalition of 16 states and territories filed a friend-of-the-court brief in support of New York, challenging the take-title provision under the Tenth Amendment.<sup>21</sup>

The 16-state coalition argued that the take-title provision profoundly altered federal-state relations by shifting significant liability from the federal government and waste producers onto the states. The coalition did not mince words, contending that the take-title provision “tramples on state sovereignty by putting state legislative and executive branches squarely under the thumb of Congress.”<sup>22</sup> It asserted that commandeering states in this fashion threatens their separate and independent existence. By coercing the states to participate in a federal regulatory program, according to the coalition, the Act impaired a quintessential attribute of sovereignty and undermined the states’ ability to function effectively in our federal system. These states viewed the Act as more intrusive on state sovereignty than any other federal law because it commandeered state proprietary functions in the marketplace in order to advance federal interests.

The amici states acknowledged that the Court had previously upheld against Tenth Amendment challenge federal requirements that states enforce federal standards, and that state utility commissions consider specified ratemaking standards and adhere to federal procedural requirements.<sup>23</sup> The Court also had rejected a Tenth Amendment challenge to the imposition of federal minimum wage and overtime rules on the states,<sup>24</sup> and to a federal income tax provision denying tax exemption for interest earned on unregistered long-term state and local government bonds.<sup>25</sup> But in none of these cases, the states argued, had the Court upheld a federal requirement that a state enact laws to promote federal interests.



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In previous federal programs reviewed by the Court, the states retained the ultimate choice to refrain from regulatory responsibilities in an area involving federal regulation or from participation in federal programs. In contrast, the 1985 Act commandeered state machinery in a way that left little choice or flexibility. The states were required by congressional fiat to provide for disposal of low-level waste produced by private generators and some federal entities or take title to and possession of that waste. Congress did little more than opt out of a difficult political and economic problem and impose it on the states.

### *The Court Agrees*

In *New York*, the Court rejected many of the claims made by the state of New York, but agreed with the state amici that the take-title provision of the 1985 Act violated the Tenth Amendment.<sup>26</sup> Acknowledging that its Tenth Amendment jurisprudence “has traveled an unsteady path,”<sup>27</sup> the six-Justice majority nevertheless insisted that its case law made clear that Congress may not commandeer the state legislative process by requiring states to enact a specified regulatory program. Drawing heavily from the debates at the constitutional convention, the Court explained that in choosing the Virginia plan over the competing New Jersey plan of government, the Founders made clear their intention that Congress would exercise its authority directly over individuals rather than over states, and that the Court has consistently respected that choice.

*New York* reaffirmed prior rulings that Congress may encourage desirable state action through incentives under its Spending Clause authority, and pursue cooperative federalism by offering states the choice of either regulating activity according to federal standards or having state law preempted by those standards. But both of these approaches ensure political accountability because the ultimate decisionmaker is clear: either the state chooses to accept the federal program or the federal government imposes it directly through preemption. In contrast, the Founders declined to authorize direct federal commandeering of the state legislatures because it diminishes political accountability by shielding from full public view the federal compulsion behind a controversial law.

The Court concluded that the monetary and access incentives at issue were unexceptional exercises of Congress’ Commerce Clause and Spending Clause authorities that did not intrude on state sovereignty protected by the Tenth Amendment. But it invalidated the take-title provision because it foisted upon the states a choice between two unconsti-

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tutional alternatives: either take title to the waste and assume associated liabilities pursuant to federal law, or enact the federal waste site program. Characterizing the law as unique insofar as it compels the adoption of a federal program, the Court concluded that this commandeering is “inconsistent with the Constitution’s division of authority between federal and state governments.”<sup>28</sup>

The Court deemed irrelevant the strength of the federal interest involved. Nor did it matter to the Court that various state officials consented to the law and benefitted from its other provisions. Responding to arguments made in support of the law by the three states with disposal sites, the Court insisted: “Where Congress exceeds its authority relative to the [s]tates, the departure from the constitutional plan cannot be ratified by the ‘consent’ of state officials.”<sup>29</sup>

Echoing the state coalition’s concern that the law threatened their independent existence, the Court concluded by emphasizing that “[s]tates are not mere political subdivisions of the United States,” and “[s]tate governments are neither regional offices nor administrative agencies of the [f]ederal [g]overnment.”<sup>30</sup> Emphasizing the importance of the structure and form of our federalist system, the Court asserted that the anti-commandeering mandate is necessary to protect the “residuary and inviolable sovereignty” of the states.<sup>31</sup>

### Enlisting the States to Curb Handgun Violence

In *New York*, Congress overstepped its authority by forcing the states to adopt a federal regulatory program and by treating states as mere tools to implement federal policy. Although three states with waste disposal sites defended the law to protect their parochial interests, the state amici coalition complained vociferously, and the Court heard their message.

In the next Tenth Amendment case before the Court, however, the amici coalition fractured, with more states (13) supporting than opposing (8) a federal handgun control bill against a Tenth Amendment challenge. As was the case in several Commerce Clause and §5 cases discussed in Chapter 10, the Court invalidated key portions of the law to promote state sovereignty, notwithstanding the views of most of the states.

The *Printz* case involved the 1993 Brady Handgun Violence Prevention Act (Brady Act). James Brady, then-White House Press Secretary to President Ronald Reagan, was among those shot during John Hinckley’s 1981 assassination attempt on Reagan. Hinckley used a .22-caliber pistol, colloquially known as a “Saturday Night Special,” purchased at a Dallas pawnshop. Hinckley was deranged, thinking the assassination

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would cause a movie actress, Jodie Foster, to fall in love with him. Under Texas law, there was no waiting period, no background check, and no questions asked. Brady suffered a serious head wound that nearly killed him and left him paralyzed and wheelchair-bound. The president, too, almost died.

Brady and his wife, Sarah, have since spent many years spearheading efforts for stricter handgun control, and the 1993 Brady Act was named in his honor. But the Brady Act was not the result of a single tragedy. By 1993, gun violence in the United States had reached epidemic proportions, and handgun violence was especially troubling. Each day saw another 65 deaths caused by handguns, or 24,000 every year.<sup>32</sup> Handguns were involved in more than 900,000 violent crimes the previous year,<sup>33</sup> and there were about 200 million guns in private hands.<sup>34</sup> Smaller handguns sold for as little as \$35, making them especially attractive to criminals and teenage gang members.

The idea behind the Brady Act was a simple one. An earlier law had made it illegal to sell a gun to convicted felons, anyone adjudicated as mentally unstable, and others who posed a threat to the community. The Brady Act required the U.S. Attorney General to establish a national instant background check by 1998 to determine whether a prospective handgun sale is legal. As an interim measure, the Act compelled the chief law enforcement officer of every local jurisdiction to conduct background checks prior to sale on a temporary basis. Once the national system became operative in 1998, sellers would use that system to perform checks at the point of sale.

The Act required local officials to make “a reasonable effort” to ascertain the legality of the handgun sale, and each local enforcement agency could tailor the scope of the check to its individual circumstances based on resources, access to records, and enforcement priorities.<sup>35</sup> The Act also authorized \$200 million in state grants, which supplemented \$850 million in funding under a 1988 federal law for the improvement of state criminal history records and other law enforcement initiatives. Sheriffs, police chiefs, and other state officers who failed to comply were subject to criminal penalties. The law was supported by the Fraternal Order of Police, the International Brotherhood of Police Officers, the National Association of Police Organizations, the National Sheriffs Association, the International Association of Chiefs of Police, and the Federal Law Enforcement Officer’s Association.<sup>36</sup> Between 1994 and 1996, the Brady Act prevented about 6,600 firearms sales each month to dangerous persons.<sup>37</sup>

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In *Printz*, county officials from Arizona and Montana challenged the Act as a violation of the anti-commandeering mandate articulated in *New York*. Eight states filed a supporting amicus brief, arguing that Congress cannot conscript state officials to implement and enforce federal regulatory schemes.<sup>38</sup> They argued the Brady Act's administrative burden on the states was substantial, but even if it was viewed as minor, there is no de minimis exception to the Tenth Amendment. They even urged the Court to expressly overrule its 1985 ruling in *Garcia*, which placed primary reliance on the political process to protect state sovereignty.<sup>39</sup>

An even larger state coalition, however, filed a friend-of-the-court brief in favor of the Brady Act.<sup>40</sup> These 13 states—Maryland, Connecticut, Florida, Hawaii, Iowa, Michigan, Minnesota, Mississippi, Nevada, North Carolina, Oregon, Rhode Island, and Wisconsin—emphasized that while they too have a strong interest in a vigorous reading of the Tenth Amendment, they also want to preserve “the tradition of cooperation” between the states and the federal government in critical law enforcement missions.<sup>41</sup>

Noting that information compilation and sharing is a long-standing, core area of federal-state cooperation, the coalition argued that the Brady Act imposed obligations on state officials no different in kind from those routinely imposed in a variety of contexts and that benefit all 50 states. The state amici observed that even the authors of the Tenth Amendment, the First Congress, passed federal laws requiring state assistance in their execution. They expressed concern that devising too stringent a limit on federal power under the Tenth Amendment would “balkanize[ ] law enforcement efforts by erecting an inflexible barrier to approaches that require some cooperation between the [s]tate and federal governments.”<sup>42</sup>

The 13-state coalition stressed that, unlike the law at issue in *New York*, which required states actually to adopt specified federal policies and programs, the Brady Act required only minor, temporary involvement of state executive branch employees in purely ministerial matters and thus did not impair state autonomy.

The Court sided with the minority state view in a 5-4 ruling.<sup>43</sup> Recognizing that the constitutional text does not speak to the issue before it, the *Printz* Court stated that the “most conclusive” element of the analysis was not historical understanding or the structure of the Constitution, but its own jurisprudence, particularly *New York*, which it read as flatly prohibiting Congress from compelling the states to administer a federal program. Responding to contentions that unlike the law at issue in *New*

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*York*, the Brady Act does not require the states to adopt a legislative or policy agenda, the Court stressed that an essential attribute of state sovereignty is “that they remain independent and autonomous within their proper sphere of authority,” which is impaired when federal law compels state legislatures to enact specified policy or state officers to administer federal policies.<sup>44</sup>

The Court also concluded that the structure of the Constitution suggested that states retain “a residuary and inviolable sovereignty,”<sup>45</sup> citing as examples the prohibition against involuntary reduction of a state’s territory, the requirement for votes of three-fourths of the states to amend the Constitution, and other provisions referring to the states.<sup>46</sup> Moreover, after surveying relevant historical practice, the Court concluded that there was an absence of federal laws commandeering state executive branch officials until recently.

The *Printz* Court also feared that commandeering of the kind required by the Brady Act would fundamentally shift the balance of power among the three branches of the federal government in favor of Congress. It would also enable Congress to bypass executive branch execution of federal laws, and allow Congress to enlist tens of thousands of state officials and state resources to carry out its policies. In short, the Court held that Congress could not bypass the anti-commandeering mandate for state legislatures articulated in *New York* “by conscripting the [s]tate’s officers directly” into service to implement federal law.<sup>47</sup>

Justices John Paul Stevens, David H. Souter, Ruth Bader Ginsburg, and Stephen Breyer dissented. In an opinion by Justice Stevens, the dissenters insisted that the text, structure, and history of the Constitution, as well as the Court’s case law, allowed Congress to impose affirmative obligations on state executive officers. They began by considering the implications of the issue during national emergencies, when for example the federal government might call upon state officials to help with the enlistment of air raid wardens or mass inoculations to address an epidemic. The dissent then noted that the Brady Act was passed in response to a perceived epidemic in gun violence, a policy judgment best made by Congress, not the courts.

The dissent viewed the appropriate analysis as uncomplicated: because Congress could regulate the sale of handguns under the Commerce Clause and Necessary and Proper Clause, and because no other constitutional provision prohibited the challenged provisions in the Brady Act, it was constitutional, notwithstanding the majority’s view as to the appropriate allocation of federal and state powers. Unlike other provisions in the Bill of Rights, the Tenth Amendment imposes no sub-

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stantive restrictions on Congress' delegated powers. In fact, the text makes clear that the only powers it reserves to the states are those not delegated to Congress. In the dissent's view:

There is not a clause, sentence, or paragraph in the entire text of the Constitution of the United States that supports the proposition that a local police officer can ignore a command contained in a statute enacted by Congress pursuant to an express delegation of power enumerated in Article I.<sup>48</sup>

The dissent viewed the historical record not as revealing a decision to prohibit commandeering as violative of state sovereignty, but rather as reflecting the Founders' conclusion that commandeering under the Articles of Confederation often was inefficient and cumbersome. If anything, according to the dissent, the historical materials showed a desire to enhance the power of the federal government, including its powers to act through local officials, and early enactments reflected this authority.

Turning to the majority's structural arguments, the dissent invoked the ruling in *Garcia* that the principal protection of the role of the states in our federal system is the political process. The perverse result of the majority's position, in the dissent's view, is an untoward aggrandizement of federal power: "In the name of [s]tate's rights, the majority would have the [f]ederal [g]overnment create vast national bureaucracies to implement its policies. This is exactly the sort of thing that the early [f]ederalists promised would not occur."<sup>49</sup>

Flush from their successive Tenth Amendment victories in *New York* and *Printz*, some states pushed the edge of the envelope on the commandeering theory in *Reno v. Condon*.<sup>50</sup> *Reno* involved a challenge to the federal Driver's Privacy Protection Act, which restricts the disclosure and resale of personal information contained in records kept by state motor vehicle departments. The sales generated significant revenues for the states. But a unanimous Court had little difficulty in concluding that the Act does not commandeer the states in a manner prohibited by the Tenth Amendment. The high Court concluded that unlike the laws at issue in *New York* and *Printz*, the Act does not require the state officials to enact any law, enforce any federal program, or regulate their citizens in any way. Rather, the law does nothing more than regulate the states as owners of the information databases. Although the Court agreed with South Carolina that the Act requires state officials to expend time and effort to become familiar with and comply with the law, it concluded this burden is no different from myriad commonplace responsibilities to conform to federal standards.

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### Tenth Amendment Summary

In the *Federalist Papers*, James Madison emphasized that after the formation of the Republic the states retained “a residuary and inviolable sovereignty.”<sup>51</sup> The Constitution’s enumeration of powers for the federal government implies the existence of this residual state sovereignty, and the Tenth Amendment makes the implication express.<sup>52</sup> It should come as no surprise that the states jealously guard this sovereignty against unconstitutional impairment.

At the same time, 13 states, a comfortable majority of the states weighing in as amicus, argued in *Printz* that judicial protection of state sovereignty should be tempered with a reluctance to undermine traditional federal-state partnerships or impose inflexible barriers needed for cooperation between federal and state officials. Too rigid an approach, they tell us, would unduly balkanize the government’s authority to promote the public interest through cooperative federalism. And the imposition of artificial controls, divorced from the constitutional text and historical practice, prevents federal and state officials from striking the right balance in our federalism. As noted by the dissent in *Printz*, such contrived rules could perversely force the federal government, in the name of states’ rights, to establish vast bureaucracies to implement federal policies.

Although courts must protect state autonomy, they should distinguish between genuine threats such as the commandeering of legislatures and federal laws that require states simply to provide minimal assistance in a way that does not undermine state independence. Only then will Tenth Amendment jurisprudence allow the appropriate allocation of federal and state authority.

## Chapter 12

### Conclusion

**J**udicial review of federalism cases is both inevitable, and inevitably controversial. The U.S. Supreme Court has declared its commitment to constitutional federalism in dozens of cases over the last decade, but the results of the Court's work are both chaotic and extremely controversial. Chaotic because the Court has been aggressive in protecting federalism in some areas, but not others. Controversial because this pattern of opinions seems to track closer to the political ideology of the Justices than to the text of the Constitution.

The Court will have to sort out this tangled doctrine in cases that will be decided in the coming decade. It really only has two options. One is to listen to Michael Greve, who believes that federalism's future "hangs on a pattern of cooperation between the [Court] and political constituencies" and "must be an ideological affair." Greve notes that "this picture will strike some as an unsuitably crass and political account of an institution that ought to be beyond politics." We think so, and believe the Court will too.

The other option is to listen to the states. In the last decade, the states have filed briefs with the Court that provide an outline of a federalism jurisprudence that is neither controversial nor chaotic, a vision of federalism as a neutral principle. States and local governments have also proven the benefits of the good government form of federalism they are promoting through their leadership in addressing problems such as health care, corporate reform, and environmental protection.

Listening to the states yields three important rules for the Court in policing federalism. The states' powerful and consistent opposition to overreaching preemption and dormant Commerce Clause rulings indicates that the Court should follow the teachings of Hippocrates and "first, do no harm." The Court's current dormant Commerce Clause and



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preemption cases undercut federalism considerably by invalidating state initiatives with little evidence of conflict with federal objectives. If the Court wants to promote federalism as a neutral principle, reform of its existing doctrine in these areas is the first place to start.

The second lesson, stemming from the briefs of the states in Tenth and Eleventh Amendment cases, is that, consistent with its recent cases, the Court should carefully review efforts by the federal government to commandeer the resources and personnel of the states to advance a federal objective. These efforts have the potential to subsume the states into “political subdivisions of the United States,” and it should come as little surprise that states jealously protect what Madison called their “residuary and inviolable sovereignty.” On the other hand, the state briefs in cases such as *Printz v. United States*<sup>1</sup> and *Alaska Department of Environmental Conservation v. U.S. Environmental Protection Agency*<sup>2</sup> illustrate that, even in this core area, the state position is not inflexible. States recognize the need for uniformity in the enforcement of federal law and the benefits of federal-state partnerships in programs of cooperative federalism. When listening to the states, therefore, the Court should exercise care to avoid inflexible barriers to needed cooperation between federal and state officials.

Finally, the state briefs in support of federal laws such as the Violence Against Women Act and the Clean Water Act demonstrate the need for the Court to exercise extreme caution in returning to the historically treacherous endeavor of placing formalistic restrictions on Congress’ power under the Commerce Clause. The state briefs teach that these cases often involve competing federalism concerns, and the states are just as concerned about protecting the power of the federal government in areas where a federal role is necessary as they are about preserving particular large spheres where states only are permitted to act.

Federalism, as explained by the states, is not a zero-sum game where every expansion of the national government’s power is viewed as an intrusion into the power of the states. Federalism, instead, is about respect for the critical structural role states play in our federal system. This understanding of federalism restores it to its proper place as a neutral principle, not a partisan political tool. The federal system bequeathed to us by our Framers is not a means to a conservative or liberal end. The ends that it serves are a better political process, more robust political participation, and the allocation of power in a way that improves how government serves its citizens. These ends are the essence of democracy, and ones that all Americans, whatever their political views, should hope to attain.

# Endnotes

## Chapter 2:

1. Telephone Interview with Dr. Pom Pom Ganguli, Public Advisor, South Coast Air Quality Management District (SCAQMD) (May 28, 2004) [hereinafter Ganguli Interview].
2. SCAQMD, MULTIPLE AIR TOXICS EXPOSURE STUDY (MATES II) ES-3, ES-5 (1999), available at <http://www.aqmd.gov/matesiidf/es.pdf> (last visited July 26, 2004) [hereinafter MATES II EXPOSURE STUDY].
3. Ganguli Interview, *supra* note 1.
4. Press Release, SCAQMD, AQMD Will Seek to Continue Implementing Fleet Rules (Apr. 28, 2004), available at [http://www.aqmd.gov/news1/2004/scotus\\_opinionpr.html](http://www.aqmd.gov/news1/2004/scotus_opinionpr.html). See also SCAQMD, *Fleet Rules Fact Sheet* (Jan. 2004), at <http://www.aqmd.gov/news1/2004/fleetrulesfactsheet.html>.
5. Press Release, *supra* note 4.
6. Engine Mfrs. Ass'n v. South Coast Air Quality Management Dist., 124 S. Ct. 1756, 34 ELR 20028 (2004).
7. *Id.* at 1761.
8. See, e.g., C&A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 24 ELR 20815 (1994); Oregon Waste Sys., Inc. v. Department of Env'tl. Quality, 511 U.S. 93, 24 ELR 20674 (1994); South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 33 ELR 20260 (8th Cir. 2003); Huish Detergents, Inc. v. Warren County, 214 F.3d 707 (6th Cir. 2000); Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County, 115 F.3d 1372, 28 ELR 20048 (8th Cir. 1997).
9. See, e.g., *Engine Mfrs. Ass'n*, 124 S. Ct. at 1756; *Fireman's Fund Ins. Co. v. City of Lodi, Cal.*, 302 F.3d 928, 33 ELR 20013 (9th Cir. 2002).
10. See Paul S. Weiland, *Federal and State Preemption of Environmental Law: A Critical Analysis*, 24 HARV. ENVTL. L. REV. 237, 238 (2000). As Paul Weiland says:

Both express preemption and implied preemption may operate to invalidate local environmental protection efforts even though it is the case that neither the legislature nor the judiciary has considered the policy implications of such action. Thus, preemption doctrine as it is currently applied on the national level and in many states may be good law but not good policy.

*Id.*
11. John R. Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, in *NEW GROUND: THE ADVENT OF LOCAL ENVIRONMENTAL LAW* 3, 38 (John R. Nolon ed., Env'tl. L. Inst. 2003) ("The diversity of local conditions such as climate, terrain, hydrology, and biodiversity, suggests that centralized

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approaches to environmental protection are not necessarily desirable when dealing with environmental problems.”).

12. A. Dan Tarlock, *The Potential Role of Local Governments in Watershed Management*, in *NEW GROUND*, *supra* note 11, at 213, 219.
13. *Id.* at 215. *See also* Nolon, *supra* note 11, at 4, referring to “environmental exigencies, precipitated in part by the inertia experienced at the federal level.”
14. *See, e.g.*, Juliet Eilperin, *Four States to Sue Power Plants*, *WASH. POST*, May 21, 2004, at A7; *see also* Peter H. Lehner, *Act Locally: Municipal Enforcement of Environmental Law*, 12 *STAN. ENVTL. L.J.* 50 (1993) (arguing that the fact that local governments are literally closest to the pollution problem makes them excellent plaintiffs in federal environmental lawsuits).
15. Tarlock, *supra* note 12, at 221.
16. *See* The Community Character Act of 2001, H.R. 1433/S. 975, 107th Cong. §2 (2001) (original source collected at Patricia E. Salkin, *State Enabling Statutes That Move Beyond Traditional Zoning*, in *NEW GROUND*, *supra* note 11, at 169, 189-90.
17. News Release, California Environmental Protection Agency Air Resources Board (ARB), ARB Releases Draft Proposal to Limit Greenhouse Gas Emissions From Cars (June 14, 2004), *available at* <http://www.arb.ca.gov/cc/newsreel/nr061404.htm>.
18. Press Release, Gov. George Pataki, Governor Pataki: Nation’s Toughest Acid Rain Controls Approved: Strict New Rules to Reduce Emissions to Be Phased In Beginning in 2004 (Mar. 26, 2003), *available at* [http://www.gorr.State.ny.us/gorr/03\\_26\\_03\\_acid\\_rain.htm](http://www.gorr.State.ny.us/gorr/03_26_03_acid_rain.htm). New York’s regulations have been blocked by the state superior court because of a technicality: the state did not hold the requisite public meetings for the laws. *See* Anthony DePalma, *State Judge Rejects Rules on Acid Rain*, *N.Y. TIMES*, June 5, 2004, at B1.
19. Stephanie Ebbert, *Mass. Sets New Limits on Mercury Emissions*, *BOSTON GLOBE*, May 26, 2004, at A1.
20. *Id.*
21. Nolon, *supra* note 11, at 3.
22. The National Land Use Planning Act, S. 3354, 91st Cong. (1970), proposed in 1970, was defeated in 1974. Nolon, *supra* note 11, at 5.
23. For example, the Community Character Act of 2001, *supra* note 16, stalled after being passed by the U.S. Senate Committee on Environment and Public Works on April 25, 2002. Salkin, *supra* note 16, at 192-93.
24. The examples of recent state and local environmental activity are drawn from Nolon, *supra* note 11, at 18-30.
25. AMERICAN LUNG ASS’N, *STATE OF THE AIR: 2004* (2004), *available at* <http://www.lungusa.org/site/pp.asp?c=dvLUK9O0E&b=50752> (last visited July 28, 2004).
26. *Engine Mfrs. Ass’n v. South Coast Air Quality Management Dist.*, 158 F. Supp. 2d 1107, 1109 (C.D. Cal. 2001).
27. SCAQMD, *Introducing AQMD*, *at* <http://www.aqmd.gov/aqmd/intraqmd.html#mission> (last updated Apr. 28, 2004).

## ENDNOTES

28. MATES II EXPOSURE STUDY, *supra* note 2, at ES-3.
29. *Id.* at ES-5.
30. Telephone Interview with Kurt Wiese, Senior Deputy District Counsel, SCAQMD (May 19, 2004) [hereinafter Wiese Interview].
31. SCAQMD, *Guiding Principles of Environmental Justice*, at [http://www.aqmd.gov/ej/EJ\\_guiding\\_principles.htm](http://www.aqmd.gov/ej/EJ_guiding_principles.htm) (last updated May 13, 2004).
32. Ganguli Interview, *supra* note 1.
33. *Id.*
34. Office of Transportation and Air Quality, U.S. EPA, *Regulatory Announcement: Heavy-Duty Engine and Vehicle Standards and Highway Diesel Fuel Sulfur Control Requirements*, at <http://www.epa.gov/otaq/regs/hd2007/frm/f00057.pdf> (Dec. 2000).
35. Ganguli Interview, *supra* note 1.
36. CAL. HEALTH & SAFETY CODE §40447.5 (West, WESTLAW through 2004 Legis. Sess.)
37. Press Release, *supra* note 4.
38. SCAQMD, *Fleet Rules Fact Sheet*, *supra* note 4.
39. Engine Mfrs. Ass'n v. South Coast Air Quality Management Dist., 158 F. Supp. 2d 1107 (C.D. Cal. 2001).
40. 42 U.S.C. §7543(a). California is the only state that received a waiver from EPA to establish its own emissions standards. *Id.* §7543(b).
41. *Engine Mfrs. Ass'n*, 158 F. Supp. 2d at 1119.
42. *Id.* at 1117.
43. *Id.*
44. *Engine Mfrs. Ass'n v. South Coast Air Quality Management Dist.*, 309 F.3d 550, 551 (9th Cir. 2002).
45. *Engine Mfrs. Ass'n v. South Coast Air Quality Management Dist.*, 124 S. Ct. 1756, 34 ELR 20028 (2004).
46. Wiese Interview, *supra* note 30.
47. Telephone Interview with Henry Hogo, Assistant Deputy Executive Officer for Science and Technology Advancement, SCAQMD (May 20, 2004).
48. *Id.*
49. Ganguli Interview, *supra* note 1.
50. Telephone Interview with Ralph Duxbury (May 17, 2004) [hereinafter Duxbury Interview].
51. Telephone Interview with Charlie Johnson, Member, Dakota Rural Action, and citizen sponsor of Amendment E (May 14, 2004) [hereinafter Johnson Interview].
52. Roger A. McEowen & Neil E. Harl, *South Dakota Amendment E Ruled Unconstitutional—Is There a Future for Legislative Involvement in the Structure of Agriculture?* 37 CREIGHTON L. REV. 285, 288 (2004).
53. S.D. CODIFIED LAWS §47-9A-1 (Michie 2000). An amendment in 1998, placed on the ballot by citizen initiative and approved by a majority of voters, attempted

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to narrow the livestock feeding exception and block corporate hog feeding operations. However, the state Attorney General interpreted the provision narrowly, which had the effect of allowing a fair number of contract hog feeding operations in the state. McEowen & Harl, *supra* note 52.

54. ROBBIN MARKS & REBECCA KNUFFKE, NATURAL RESOURCES DEFENSE COUNCIL, AMERICA'S ANIMAL FACTORIES: HOW STATES FAIL TO PREVENT POLLUTION FROM LIVESTOCK WASTE ch. 22 (1998), available at <http://www.nrdc.org/water/pollution/factor/stsda.asp>.
55. McEowen & Harl, *supra* note 52, at 288.
56. Telephone Interview with Luanne Napton, President, South Dakota Resources Coalition (May 14, 2004) [hereinafter Napton Interview]; Telephone Interview with Donald Hoogestraat (May 17, 2004) [hereinafter Hoogestraat Interview]. For a litany of the harms done by corporate agricultural concerns, particularly hog producers, in other states, see Petition for Writ of Certiorari at 4-5 n.8, Dakota Rural Action v. South Dakota Farm Bureau, Inc., 124 S. Ct. 2095 (2004) (Nos. 02-2366 et al.); MARKS & KNUFFKE, *supra* note 54, at Introduction and Executive Summary.
57. Napton Interview, *supra* note 56.
58. Johnson Interview, *supra* note 51.
59. MARKS & KNUFFKE, *supra* note 54.
60. Napton Interview, *supra* note 56.
61. Johnson Interview, *supra* note 51.
62. See generally Linda A. Malone, *When Federal Initiatives Fail*, in NEW GROUND, *supra* note 11, at 123; Nolon, *supra* note 11, at 8-9.
63. See, e.g., Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570 (1996); Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196 (1977); Peter P. Swire, *The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law*, 14 YALE L. & POL'Y REV. & YALE J. ON REG. 67 (1996). But see Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553 (2001) (arguing that public choice accounts are not empirically grounded and do not explain why any environmental regulation, at any level of government, occurs).
64. 1998 Ballot Question Pamphlet Compiled by the Office of Secretary of State Joyce Hazeltine, at <http://www.sdsos.gov/1998/98bqprocone.htm> (last visited July 28, 2004).
65. McEowen & Harl, *supra* note 52, at 288-89.
66. Petition for Writ of Certiorari at 2, Dakota Rural Action v. South Dakota Farm Bureau, Inc., 124 S. Ct. 2095 (2004) (Nos. 02-2366 et al.).
67. McEowen & Harl, *supra* note 52, at 286.
68. See, e.g., Johnson Interview, *supra* note 51; Napton Interview *supra* note 56.
69. *Id.*
70. Napton Interview, *supra* note 56.

## ENDNOTES

71. Duxbury Interview, *supra* note 50.
72. *Id.*
73. Hoogestraat Interview, *supra* note 56.
74. 1998 Ballot Question Pamphlet, *supra* note 64.
75. South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 587, 33 ELR 20260 (8th Cir. 2003).
76. *Id.* at 596.
77. Duxbury Interview, *supra* note 50; Johnson Interview, *supra* note 51; Napton Interview, *supra* note 56.
78. Napton Interview, *supra* note 56.

### Chapter 3:

1. 501 U.S. 452 (1991).
2. *Id.* at 457.
3. *Id.* at 458.
4. This initial scenario is a modified version of a hypothetical used in Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1454, 1494 (1987).
5. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).
6. THE FEDERALIST No. 10, at 83 (James Madison) (Clinton Rossiter ed., 1961).
7. College Sav. Bank. v. Florida Prepaid Postsecondary Educ. Bd., 527 U.S. 666, 703 (1999) (Breyer, J., dissenting).
8. As one commentator has put it: "Small size of the political unit, the sense of community, and political participation are mutually reinforcing. Smaller units are said to have a greater sense of community, which facilitates participatory decision making. Participation strengthens the sense of community, which, in turn, promotes greater participation." Richard Briffault, *What About the "Ism"?* *Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1313 (1994).
9. *On the Nomination of Justice William Hubbs Rehnquist to Be Chief Justice of the United States: Hearings Before the Senate Comm. on the Judiciary*, 99th Cong. 209 (1986) (statement of Justice William H. Rehnquist).
10. Briffault, *supra* note 8, at 1348 ("Grassroots democracy is possible, if at all, only at the local level. Local governments are, for the most part, much smaller than the states, and there are many more of them. They are much better positioned to provide citizens with opportunities for political participation . . .").
11. See *Nixon v. Missouri Mun. League*, 124 S. Ct. 1555, 1565 (2004) (municipal subdivisions "'are created as convenient agencies for exercising such of the governmental powers of the [s]tate as may be entrusted to them in its absolute discretion'" (quoting *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 607-608, 21 ELR 21127 (1991))).
12. 124 S. Ct. 1555 (2004).

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13. *Id.* at 1565.
14. *Id.* at 1565-66.
15. *Gregory*, 501 U.S. at 458.
16. Briffault, *supra* note 8, at 1349.
17. 514 U.S. 549 (1995).
18. *Id.* at 576 (Kennedy, J., concurring).
19. THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961).
20. *Id.* See also THE FEDERALIST NO. 10, *supra* note 6, at 77.
21. *Gregory*, 501 U.S. at 458.
22. THE FEDERALIST NO. 46, at 298 (James Madison) (Clinton Rossiter ed., 1961).
23. THE FEDERALIST NO. 84, at 511 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *Wallace v. Jaffree*, 472 U.S. 38, 97 (1985) (“Madison had actually opposed the idea of any Bill of Rights”). See also *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (“[s]o convinced were the Framers that liberty of the person inheres in structure that at first they did not consider a Bill of Rights necessary”).
24. The Thirteenth, Fourteenth, and Fifteenth Amendments, passed in the Reconstruction Era, outlawed slavery, gave the Congress important new legislative powers and, through incorporation, imposed restrictions on government power contained in the Bill of Rights on the actions of the states. During the Progressive Era, the Constitution was amended twice, both in 1913. The Sixteenth Amendment gave the federal government broad new authority to collect income taxes and correspondingly sweeping powers to spend funds in promotion of the “general welfare.” The Seventeenth Amendment stripped from the Constitution one of the Founders’ remaining power bases for states—the power of state legislatures to appoint U.S. senators.
25. AMERICAN BAR ASS’N, TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIMINAL LAW 55 (1998). See, e.g., Edwin Meese III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 TEX. REV. L. & POL. 1, 4, 6 (1997) (describing federal criminal laws as “ineffective and partisan,” and arguing that such laws increase “the potential . . . for an oppressive and burdensome federal police state”); William H. Rehnquist, *The 1998 Year-End Report of the Federal Judiciary*, reprinted in 11 FED. SENTENCING REP. 134, 135-36 (1998) (“The trend to federalize crimes that traditionally have been handled in [s]tate courts not only is taxing the [j]udiciary’s resources and affecting its budget needs, but it also threatens to change entirely the nature of our federal system.”).
26. Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1504 (1994).

### Chapter 4:

1. MICHAEL S. GREVE, REAL FEDERALISM 117 (1999).
2. *Id.* at 1-9.
3. *Id.* at 81-82.
4. Michael S. Greve, *Federalism’s Frontier*, 7 TEX. REV. L. & POL. 93 (2002).

## ENDNOTES

5. *Id.* at 125.
6. GREVE, *supra* note 1, at 105-06.
7. Greve, *Federalism's Frontier*, *supra* note 4, at 100-04.
8. GREVE, *supra* note 1, at 43 (calling the Violence Against Women Act “[a] particularly demagogic piece of legislation”); *id.* at 127 (calling the same legislation “an entitlement program for feminist advocacy groups”).
9. *Id.* at 96-97.
10. *Id.* at 99-103.
11. *Id.* at 87-113.
12. A subtitle in a chapter explaining his strategy says it all: “It’s the Courts, Stupid!” *Id.* at 21.
13. See generally LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1332-52 (3d ed. 2000) (detailing the rise of the Court’s economic substantive due process jurisprudence in the early 20th century).
14. GREVE, *supra* note 1, at 2.
15. *Id.* at 2-9.
16. For a debate about the existence of a race to the bottom in the environmental field, as well as a good overview of the general concept, see Richard L. Revesz, *The Race to the Bottom: A Response to Critics*, 82 MINN. L. REV. 535 (1997).
17. GREVE, *supra* note 1, at 5-7.
18. This includes the Court, and specifically the five Justices that have propelled the so-called federalism revival. Greve chastises this group of five as promoting a false federalism based on the dignity of states, rather than using federalism to curtail both federal and state power. Greve, *Federalism's Frontier*, *supra* note 4, at 96-100.
19. GREVE, *supra* note 1, at 82.
20. Greve, *Federalism's Frontier*, *supra* note 4, at 95.
21. *Id.* at 101.
22. *Id.* at 100-04.
23. *Id.* at 101.
24. See Richard H. Fallon, *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429, 462 (2002) (“The recurring question [in preemption cases] is whether Congress, although possessed of power to displace state rules, has manifested its intent to do so.”).
25. See Greve, *Federalism's Frontier*, *supra* note 4, at 111-12 (calling these commentators “well meaning but misguided conservative defenders of states’ rights”).
26. *Id.* at 110-16.
27. *Id.* at 110-21.
28. GREVE, *supra* note 1, at 96-97.
29. *Id.* at 100-03.
30. *Id.*



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31. *Id.* at 118.
32. All of the current Justices on the Court, for example, have disparaged the *Lochner* era. Indeed, the case name has become an epithet and accusation. As David Bernstein observed in a recent article: “Even today, Court Justices across the political spectrum use *Lochner* as a negative touchstone with which they verbally bludgeon their colleagues.” David Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1 n.2 (2003) (quoting numerous Court opinions, dissents, and concurrences).
33. Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1488 (1987).
34. *Id.* at 1491.
35. See TRIBE, *supra* note 13, at 810 (arguing that the Court denied “Congress the power to regulate . . . activities even if the *products* of those activities would subsequently enter what *all* agreed was ‘interstate commerce.’” (emphasis original)).
36. 198 U.S. 45 (1905).
37. *Id.* at 75 (arguing that the Constitution “is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the [s]tate or of laissez[-]faire”).
38. See, e.g., Bernstein, *supra* note 32, at 50-51.
39. Justice Robert H. Jackson, for example, wrote in a memorandum about the famous case of *Wickard v. Filburn*, 317 U.S. 111 (1942), that “the determination of the limit [on Congress’ power to regulate commerce] is not a matter of legal principle, but of personal opinion; not one of constitutional law, but one of economic policy.” Cited in Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089, 1142 (2000).
40. See, e.g., *Filburn*, 317 U.S. at 111.
41. RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* 285 (1988).
42. *Lochner*, 198 U.S. at 74-75.
43. See TRIBE, *supra* note 13, at 1352-62 (tracing the swift decline of the *Lochner* era).
44. 514 U.S. 549 (1995).
45. 529 U.S. 598, 610-11 (2000).
46. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).
47. See Bernstein, *supra* note 32, at 1 n.2.
48. Cass Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 874 (1987) (acknowledging and then questioning the common wisdom that *Lochner* was wrong because it involved judicial activism).
49. See, for example, then-Justice William H. Rehnquist’s dissent in *Roe v. Wade*, 410 U.S. 113, 174 (1973) (Rehnquist, J., dissenting), which accuses the majority of *Lochnerizing*. (“While the Court’s opinion quotes from the dissent of Mr. Justice Holmes in *Lochner* . . . the result it reaches is more closely attuned to the majority opinion of Mr. Justice Peckham in that case.”).
50. GREVE, *supra* note 1, at 13-14, 17-18, 20-22, 25-26, 80.

## ENDNOTES

51. *Lopez*, 514 U.S. at 584 (Thomas, J., concurring).
52. *Id.* at 585-93.
53. *Id.* at 585.
54. GREVE, *supra* note 1, at 30 (criticizing Justice Thomas' refusal to endorse rejecting the Court's modern Commerce Clause decisions as "yield[ing] to politics" and "an unpersuasive plea").
55. The Court has established what has become known as the anti-commandeering principle, which essentially means that Congress cannot order state legislatures to legislate pursuant to federal direction or command state executives to execute federal policy. The two cases establishing these respective rules are *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997).
56. GREVE, *supra* note 1, at 47.
57. *Id.* at 47, 60.
58. *See, e.g., Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (discussing Court's Eleventh Amendment jurisprudence).
59. GREVE, *supra* note 1, at 69.
60. Greve, *Federalism's Frontier*, *supra* note 4, at 110.
61. *Id.* at 95-96, 104-10.
62. *Id.* at 107.
63. *Id.*
64. *See, e.g., United States v. Locke*, 529 U.S. 89, 106-07, 30 ELR 20438 (2000) (confirming that the clear statement rule should apply when Congress regulates in an area traditionally reserved to the states); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (preemption requires that the Court "assum[e] that the historic police powers of the [s]tates [are] not to be superseded by . . . [federal laws] unless that [is] the clear and manifest purpose of Congress").
65. *See* KENNETH STARR ET AL., *THE LAW OF PREEMPTION* 40-56 (1991).
66. Greve, *Federalism's Frontier*, *supra* note 4, at 110-26.

### Chapter 5:

1. President Ronald W. Reagan, First Inaugural Address (Jan. 20, 1981), *available at* <http://www.yale.edu/lawweb/Avalon/presiden/inaug/reagan1.htm>.
2. President William J. Clinton, State of the Union Address Before the 104th Congress (Jan. 23, 1996), *available at* <http://clinton2.nara.gov/WH/New/other/sotu.html>.
3. Exec. Order No. 12612, 52 Fed. Reg. 41685 (Oct. 26, 1987), *repealed by* Exec. Order No. 13132, 64 Fed. Reg. 43255 (Aug. 4, 1999).
4. Note that President Clinton originally rescinded President Reagan's Executive Order in 1998 but restored it the same year following strong criticism. *See* Exec. Order No. 13083, 63 Fed. Reg. 27651 (May 14, 1998), *suspended by* Exec. Order No. 13095, 63 Fed. Reg. 42565 (Aug. 7, 1998).

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5. MICHAEL S. GREVE, *REAL FEDERALISM* 92 (1999) (emphasis in original).
6. Michael S. Greve, Remarks at the Federalist Society's Federalism and Separation-of-Powers Practice Group Roundtable, *Federalism: A Tenth Amendment and Enumerated Powers Revival?* at <http://www.federalismproject.org/masterpages/publications/fedsoc.html> (last visited July 23, 2004).
7. Michael S. Greve, *Madisonianism With a Minus Sign: Our Federalism and the Constitution*, at <http://www.federalismproject.org/masterpages/publications/Madison%20lecture.pdf>.
8. GREVE, *supra* note 5, at 81.
9. Greve, *supra* note 6.
10. Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1454 (1987).
11. Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167, 190 (1996).
12. *Id.* at 191.
13. *Id.* at 190-91.
14. RICHARD A. EPSTEIN, *TAKINGS, PRIVATE PROPERTY, AND THE POWER OF EMINENT DOMAIN* x (1985).
15. *See, e.g.*, Roger Pilon, *Restoring Constitutional Government*, in CATO SUP. CT. REV. xiv (2002):

The constitutional revolution the New Deal Court wrought was a textbook example of politics trumping law—not on a small scale, as when a judge ignores the law in a narrow case to reach a popular result but on a massive, structural scale. The very theory and purpose of the Constitution were upended. The American people had delegated limited powers to the national government. The Court rendered those powers effectively unlimited. The people restrained the exercise of that power and, later, the power of the [s]tates through a Bill of Rights, intended to protect both enumerated and unenumerated rights. The Court rendered that design unintelligible. In a word, heeding the politics of the day, the Court turned a document authorizing limited government into one authorizing effectively unlimited government, making a mockery of the rule of law.

*See also* RANDY BARNETT, *RESTORING THE LOST CONSTITUTION* 354 (2004):

The way the Constitution has been interpreted over the past [70] years has meant that, with some exceptions, the Necessary and Proper Clause has no justiciable meaning, the Tenth Amendment has no justiciable meaning, the Commerce Clause has no justiciable meaning, and the unenumerated police power of the states has no limit. To this list could be added the Second Amendment and the Takings Clause of the Fifth Amendment as well. Can you see a pattern here? Do you not see a systematic skewing of the Constitution? Can we abandon what the Constitution says and still claim credibly to follow it?
16. Cass R. Sunstein, *A Hand in the Matter*, LEGAL AFF., Mar./Apr. 2003, at 27.

## ENDNOTES

17. James L. Huffman, *The Heritage Foundation Lectures and Education Programs: A Case for Principled Judicial Activism*, at <http://www.heritage.org/research/legalissues/hl456.cfm> (last visited July 23, 2004).
18. Robert Bork has called *Lochner* an “abomination,” Robert H. Bork, *The Judge’s Role in Law and Culture*, 1 AVE MARIA L. REV. 19, 21 (2003), that “lives in the law as the symbol, indeed the quintessence of judicial usurpation of power.” ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 44 (1990). Bork has also harshly criticized Epstein’s views on takings as “not plausibly related to the original understanding of the takings clause,” *id.* at 230, and libertarian judicial activism more generally in a chapter of *The Tempting of America* called “Judicial Activism in the Service of Property and Free Enterprise.” *Id.* Charles Fried has famously condemned the “quite radical project” of “devotees of the extreme libertarian views of Chicago law professor [Epstein]” in the U.S. Department of Justice under Attorney General Edwin Meese who sought “to use the Takings Clause of the Fifth Amendment as a severe brake upon federal and state regulation of business and property.” CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT 183 (1991).
19. Deborah Graham, *Conservative Academics: Rising Stars*, LEGAL TIMES, Mar. 18, 1985, at 1.
20. Janice Rogers Brown, “A Whiter Shade of Pale”: Sense and Nonsense—The Pursuit of Perfection in Law and Politics, Speech to the Federalist Society, University of Chicago Law School (Apr. 20, 2000), at 7-8 [hereinafter A Whiter Shade of Pale], available at <http://www.communityrights.org/PDFs/4-20-00FedSoc.pdf>. See also Douglas T. Kendall & Timothy J. Dowling, Editorial, *Judicial Throwback*, WASH. POST, Sept. 19, 2003, at A25.
21. David E. Bernstein, *Lochner-Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1 (2003) (supporting *Lochner*’s substantive due process protections for property rights); Michael J. Phillips, *The Progressiveness of the Lochner Court*, 75 DENV. U. L. REV. 453 (1998) (challenging the view that *Lochner*-era decisions were illegitimately pro-business); Timothy Sandefur, *The Right to Earn a Living*, 6 CHAP. L. REV. 207 (2003) (denying that *Lochner* was an example of illegitimate “judicial activism”).
22. CLINT BOLICK, GRASSROOTS TYRANNY: THE LIMITS OF FEDERALISM 177-82 (1993).
23. Joshua Wolf Shenk, *Washington’s Counter-Devolutionaries*, U.S. NEWS & WORLD REP., Nov. 24, 1997, at 34.
24. ADAM D. THIERER, THE DELICATE BALANCE: FEDERALISM, INTERSTATE COMMERCE, AND ECONOMIC FREEDOM IN THE TECHNOLOGICAL AGE 57-58, 65-67 (1998).
25. Robert A. Levy, *Searching for the True Constitution*, REG., Summer 2004, at 47, 49 (reviewing and quoting THIERER, *supra* note 24), available at <http://www.cato.org/pubs/regulation/regv22n2/bookreviews.pdf>.
26. *Id.* at 49.
27. President Bush addressed AEI’s annual dinner on Feb. 26, 2003:

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At [AEI], some of the finest minds in our nation are at work on some of the greatest challenges to our nation. You do such good work that my administration has borrowed 20 such minds. I want to thank them for their service, but I also want to remind people that for 60 years, AEI scholars have made vital contributions to our country and to our government, and we are grateful for those contributions.

Remarks of President George W. Bush, *available at* <http://www.nationalreview.com/document/document022703.asp>.

28. See Greve's writings in AEI FEDERALIST OUTLOOK (American Enterprise Institute/Federalism Project, Washington, D.C.), *at* <http://www.federalismproject.org/masterpages/publications/index.html#Outlook>. According to searches in Westlaw's law review database, Greve has been cited some 330 times in legal articles as of June 2004. A search of Westlaw's news database brings up more than 200 articles quoting Greve.
29. Pacific Legal Foundation has filed briefs against federal authority in innumerable cases including *United States v. Lopez*, 514 U.S. 549 (1995), *United States v. Morrison*, 529 U.S. 598 (2000), and *Solid Waste Agency of Northern Cook County (SWANCC) v. Corps of Eng'rs*, 531 U.S. 159, 31 ELR 20382 (2001), and against state power in cases including *Pharmaceutical Research & Mfrs. of Am. v. Walsh (Walsh)*, 538 U.S. 644 (2002) (arguing in favor of invalidating a state law under the dormant Commerce Clause). Similarly, Washington Legal Foundation argued against federal Commerce Clause authority in *SWANCC* and for preemption in *United States v. Locke*, 529 U.S. 89 (2000), *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2000), and *Walsh*.
30. *Cato Launches Amicus Curiae Project*, CATO POLICY REP. (Cato Institute, Washington, D.C.), May/June 1999, *available at* [www.cato.org/pubs/policy\\_report/v21n3/amicus.html](http://www.cato.org/pubs/policy_report/v21n3/amicus.html).
31. See <http://www.cato.org/pubs/legalbriefs/lbriefs.html> (last visited July 29, 2004).
32. *Id.*
33. William H. Pryor, *Should Business Support Federalism?*, Remarks Before the Federalist Society (Nov. 12, 1999), *available at* <http://www.ago.state.al.us/speeches.cfm?Item=single&case=10>. See also William H. Pryor, *The Future of Federalism*, Remarks Before the Federalist Society (Nov. 18, 2000), *available at* <http://www.ago.state.al.us/speeches.cfm?Item=single&case=57>; William H. Pryor, *Fighting for Federalism*, Remarks Before the Federalist Society (Mar. 28, 2001), *available at* <http://www.ago.state.al.us/speeches.cfm?Item=single&case=63>; William H. Pryor, *Madison's Double Security: In Defense of Federalism, the Separation of Powers, and the Rehnquist Court*, 53 ALA. L. REV. 1167 (2002).
34. D. Brooks Smith, Speech to the Pittsburgh Chapter of the Federalist Society (June 29, 1993).
35. Brief of the American Farm Bureau Fed'n, the National Cattlemen's Beef Ass'n, and the North Dakota Farm Bureau, *SWANCC*, 531 U.S. 159, 31 ELR 20382 (2001), *available at* 2000 WL 1059641.
36. See, e.g., Editorial, *A Bad Fit for a Key Court*, L.A. TIMES, Nov. 5, 2003, at B14; Editorial, *Brown Gets Borked*, WALL ST. J., Oct. 30, 2003, at A16; Bob Egelko,

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*California Contender: A Federal Appeals Court Nominee Could One Day Become the First Black Woman Justice on the U.S. Supreme Court*, S.F. CHRON., Oct. 26, 2003, at D1.

37. A Whiter Shade of Pale, *supra* note 20, at 8:

In his famous, all too famous dissent in *Lochner*, Justice Holmes wrote that the “constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the [s]tate or of laissez faire.” Yes, one of the greatest (certainly one of the most quotable) jurists this nation has ever produced; but in this case, he was simply wrong.

38. At the Senate confirmation hearings for Justice Clarence Thomas, Judiciary Chairman Joseph Biden (D-Del.) famously waived a copy of Epstein’s book *Takings* in the air to leave the unmistakable impression that adherence to Epstein’s views would be deemed disqualifying. See Evan Gahr, *A Man Who Speaks His Own Mind*, INSIGHT, Aug. 17, 1992, at 14 (noting that Epstein’s *Takings* “is best known outside the legal community as the book that Sen. Joe Biden waved during Judiciary Committee hearings on the nomination of Clarence Thomas to the Court. The implication was that Thomas would be unfit for the job if he subscribed to Epstein’s views”). See also Thomas Sowell, *Forbidden Grounds: The Case Against Discrimination Laws*, FORBES, Apr. 13, 1992, at 92 (reviewing RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST DISCRIMINATION LAWS* (1992)) (“University of Chicago law professor [Epstein] has been mentioned from time to time as a possible nominee to the [Court]. Not yet 50 years old, he may conceivably be able to outlive the current political climate in Washington, and someday reach the high bench. But there will have to be a radical change in political thinking for him to have any chance at all.”).
39. GREVE, *supra* note 5, at 135.
40. *Id.* at 21.
41. *Id.* at 21-22.
42. *Id.* at 23.
43. *Id.* at 23.
44. *Id.* at 24.
45. See Richard H. Fallon, *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429 (2002). See also Frank B. Cross & Emerson H. Tiller, *The Three Faces of Federalism: An Empirical Assessment of Supreme Court Federalism Jurisprudence*, 73 S. CAL. L. REV. 741 (2000); Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141 (2002).
46. 421 U.S. 542 (1975).
47. Indeed, the Court’s preemption cases speak of the need for a presumption against preemption to protect the states. See, e.g., *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 426 (2002) (“We start with the assumption that the historic police powers of the [s]tates were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))). The problem is that the Court seems to honor this presumption in the breach.

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48. *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 610 (1997) (Thomas, J., joined by Rehnquist, C.J., as to part one, and Scalia, J., dissenting) (calling the majority's dormant Commerce Clause decision against the states "overbroad" and "unnecessary"); *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 886 (2000) (Stevens, J., joined by Souter, Thomas & Ginsburg, JJ., dissenting) (supporting Justice John P. Stevens' call for revisiting doctrine of obstacle preemption); *American Ins. Ass'n v. Garamendi*, 123 S. Ct. 2374, 2394 (2003) (Ginsburg, J., joined by Stevens, Scalia & Thomas, JJ., dissenting) (calling for changes in foreign policy preemption law).
49. *See Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003); *Tennessee v. Lane*, 124 S. Ct. 1978 (2004).

### Chapter 6:

1. *United States v. Morrison*, 529 U.S. 598, 654 (2000).
2. 315 F.3d 680 (6th Cir. 2003), *aff'd*, 541 U.S. \_\_\_ (May 17, 2004), 124 S. Ct. 1978 (No. 02-1667).
3. 505 U.S. 144 (1992).
4. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("[t]o stay experimentation in things social and economic is a grave responsibility").

### Chapter 7:

1. *United States v. Morrison*, 529 U.S. 598, 664 (2000) (Souter, J., with Stevens, Ginsburg, and Breyer, JJ., dissenting).
2. 379 U.S. 241 (1964).
3. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 277, 11 ELR 20569 (1981); *Perez v. United States*, 402 U.S. 146 (1971).
4. 514 U.S. 549 (1995).
5. 529 U.S. 598 (2000).
6. 366 F.3d 614 (8th Cir. 2004).
7. *Id.* at 619-20.
8. Apart from its Commerce Clause power, Congress may ban race discrimination by private parties under the Thirteenth Amendment. *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). But this authority would not extend to other forms of discrimination based on religion, gender, or disability.
9. *Raich v. Ashcroft*, 352 F.3d 1222 (9th Cir. 2003).
10. *Oregon v. Ashcroft*, 368 F.3d 1118 (9th Cir. 2004).
11. *United States v. McCoy*, 323 F.3d 1114 (9th Cir. 2003).
12. *United States v. Stewart*, 348 F.3d 1132 (9th Cir. 2003).
13. In the *Raich* case invalidating federal control over the medical use of marijuana, Carter-appointed Harry Pregerson was joined by Clinton-appointed Richard Paez, with Reagan-appointed C. Arlen Beam in dissent. In the *Oregon* ruling striking

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down federal regulation of physician-assisted suicide, Clinton-appointee Richard C. Tallman was joined by Johnson-appointee Donald P. Lay, with Nixon-appointee J. Clifford Wallace in dissent. In the *McCoy* case striking down an application of federal child pornography laws, Carter-appointee Stephen Reinhardt was joined by Clinton-appointee A. Wallace Tashima, with Reagan-appointee Stephen Trott in dissent.

14. 22 U.S. (9 Wheat.) 1, 194-95 (1824).
15. *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968).
16. 17 U.S. (4 Wheat.) 316 (1819).
17. *Id.* at 421.
18. *See Lopez*, 514 U.S. at 554 (reviewing cases).
19. *See id.* at 554-55 (citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)).
20. *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).
21. *See Lopez*, 514 U.S. at 555 (citing *National Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)); *see also Lopez*, 514 U.S. at 605-07 (Souter, J., dissenting).
22. *Lopez*, 514 U.S. at 570 (Kennedy, J., concurring) (citing cases).
23. *See Wickard v. Filburn*, 317 U.S. 111, 127-28.
24. *Maryland v. Wirtz*, 392 U.S. 183, 192-93 (1968).
25. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276, 11 ELR 20569 (1981).
26. Alexander Hamilton, *Opinion on the Constitutionality of an Act to Establish a Bank* (1791), reprinted in 8 PAPERS OF ALEXANDER HAMILTON 97, 111 (H. Syrett ed., 1965) (emphasis added).
27. *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998) (internal quotation marks omitted).
28. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).
29. *Lopez*, 514 U.S. at 561.
30. *Id.* at 567 (quoting *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 554 (1935) (Cardozo, J., concurring)).
31. *Id.* at 567.
32. *Id.* at 555-61.
33. *Id.* at 557.
34. *Id.* at 564-65.
35. No state weighed in against the law at issue in *Lopez*, but a coalition of state and local government groups opposed the assertion of Commerce Clause authority. *See* Brief of the National Conference of State Legislatures, National Governors' Association, National League of Cities, National Association of Counties, International City/County Management Association, and National Institute of Municipal Law Officers, Joined by the National School Boards Association, as Amici Curiae in Support of Respondent, *United States v. Lopez*, 514 U.S. 596 (1995) (No. 93-1260).



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36. Brief for the States of Ohio and New York and the District of Columbia as Amici Curiae in Support of Petitioner at 1-2, *United States v. Lopez*, 514 U.S. 596 (1995) (No. 93-1260).
37. *Id.* at 3.
38. *Id.* at 16-19.
39. 529 U.S. at 598.
40. 140 CONG. REC. S12584 (daily ed. Aug. 25, 1994).
41. This account of the events is adapted from the various judicial opinions. *See Brzonkala v. Virginia Polytechnic & State Univ.*, 935 F. Supp. 779 (W.D. Va. 1996), *aff'd*, 169 F.3d 820 (4th Cir. 1999) (en banc), *aff'd*, 529 U.S. 628 (2000). *See also* 132 F.3d 949 (4th Cir. 1997), (vacated by order granting rehearing en banc, Feb. 5, 1998). Additional details were added from various news stories. *See* Joan Biskupic, *Court to Hear Case on Violence Law*, WASH. POST, Sept. 29, 1999, at A21; Charles Bierbauer, *Supreme Court Strikes Down Violence Against Women Act*, CNN, May 15, 2000, available at <http://edition.cnn.com/2000/LAW/05/15/scotus.violence/>; Joedy McCreary, *The Changed Life of Christy Brzonkala*, available at <http://journalism.medill.northwestern.edu/docket/99-0005herstory.html>; Press Release, Security on Campus, Inc., Campus Safety Advocates to Support Brzonkala at Supreme Court (Jan. 11, 2000), available at <http://www.securityoncampus.org/reporters/releases/01112000.html>.
42. In July 1995, the dean and another school official visited Brzonkala at her home in Fairfax, Virginia, a four-hour drive from Virginia Tech. They advised her that Morrison's attorney threatened to sue the school because Morrison was charged under a Sexual Assault Policy that was not yet included in the *Student Handbook*. The school officials told Brzonkala they were unwilling to defend the suspension in court and would hold a rehearing under the Abusive Conduct Policy that pre-dated the Sexual Assault Policy. They assured her that they believed her story, and that the second hearing was a technicality. But the rehearing lasted seven hours, more than twice as long as the first hearing. The university belatedly informed Brzonkala that student testimony given at the first hearing would not be admissible at the second hearing and that she would need to submit affidavits or produce the witnesses. Due to inadequate notice, Brzonkala could not obtain affidavits or live testimony from her student witnesses. In contrast, Morrison had time to obtain affidavits or live testimony. The school refused to provide Brzonkala access to the tape recordings of the first hearing, while granting Morrison and his attorney complete access. School officials also prohibited Brzonkala from mentioning Crawford, which resulted in an unnatural version of the facts. Nevertheless, the second judicial committee found that Morrison had violated the Abusive Conduct Policy, and reimposed the same sanction. Morrison appealed, and the Provost overturned Morrison's sanction, concluding that it was excessive. In a rather Orwellian disposition, the Provost "deferred suspension until [Morrison's] graduation." 169 F.3d at 906-08.
43. *Id.* at 827.
44. Brief of Arizona, Alaska et al., as Amici Curiae in Support of Petitioner, *United States v. Morrison*, 529 U.S. 598, 606 (2000) (Nos. 99-5, -29).
45. Brief for the State of Alabama as Amicus Curiae in Support of Respondents at 1, *United States v. Morrison*, 529 U.S. 598, 606 (2000) (Nos. 99-5, -29).

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46. Brief of Arizona, Alaska et al., at 2-23, *Morrison* (Nos. 99-5, -29).
47. *Morrison*, 529 U.S. at 613.
48. *Id.* at 614-19.
49. *Id.* at 628-34 (Souter J., with Stevens, Ginsburg, and Breyer, JJ., dissenting).
50. *Id.* at 654.
51. See *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 16 ELR 20086 (1985).
52. 531 U.S. 159, 31 ELR 20382 (2001).
53. Brief of the States of California, Iowa, Maine, New Jersey, Oklahoma, Oregon, Vermont, and Washington as Amici Curiae in Support of Respondents, Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 31 ELR 20382 (2001) (No. 99-1178). Of the states, Alabama alone filed a brief opposing the law. Brief of the State of Alabama as Amicus Curiae in Support of Petitioners, Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 31 ELR 20382 (2001).
54. *Klingler*, 366 F.3d at 617.
55. *Id.* at 618.
56. *Id.*
57. See *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 706 n.19, 25 ELR 21194 (1995) (citing 119 CONG. REC. 25669 (1973) (statement of Senator Tunney)); *Id.* at 30162 (statement of Representative Sullivan); *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 179, 8 ELR 20513 (1978); EDWARD O. WILSON, *THE DIVERSITY OF LIFE* 253, 346 (1992).
58. See Bradley C. Karkkainen, *Biodiversity and Land*, 83 CORNELL L. REV. 1, 7 (1997) (“[T]he principal cause of biodiversity loss is the fragmentation, degradation, and destruction of ecosystems and habitats through conversion of land to economically productive uses, especially agriculture, forestry, mineral and fossil fuel extraction, and urban development.”); Karin P. Sheldon, *Habitat Conservation Planning: Assessing the Achilles’ Heel of the Endangered Species Act*, 6 N.Y.U. ENVTL. L.J. 279, 284-85 (1998) (“The loss of habitat from human development activities is far and away the greatest cause of the decline and disappearance of wildlife and plant species.”).
59. *Gibbs v. Babbitt*, 214 F.3d 483, 497-98, 30 ELR 20602 (4th Cir. 2000).
60. *Id.*
61. 352 F.3d 1222 (9th Cir. 2003), cert. granted sub nom., *Ashcroft v. Raich*, 2004 WL 875062 (U.S.), 72 USLW 3674 (June 28, 2004).
62. *Lopez*, 514 U.S. at 558 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 197 n.27 (1968)).
63. *Perez v. United States*, 402 U.S. 146, 154 (1971) (quoting *Wirtz*, 392 U.S. at 193).
64. It might be more difficult to distinguish *Morrison* from *Lopez* on this basis, given that the VAWA cannot be viewed as primarily regulating economic activity. For the reasons discussed above, however, the direct and immediate economic impact that such violence often has on the commercial marketplace would provide

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grounds for distinguishing *Lopez*, given that mere gun possession near a school often might not have any economic effect at all.

65. For example, the states adamantly support the imposition of Tenth Amendment limits on Congress' Commerce Clause authority. Moreover, it is worth noting that only two states, New York and Ohio, joined the brief in favor of Commerce Clause authority in *Lopez*. In contrast, a large coalition of state and local government groups opposed the assertion of Commerce Clause authority in *Lopez*. See Brief of the National Conference of State Legislatures, National Governors' Association, National League of Cities, National Association of Counties, International City/County Management Association, and National Institute of Municipal Law Officers, Joined by the National School Boards Association, as Amici Curiae in Support of Respondent, *United States v. Lopez*, 514 U.S. 596 (1995) (No. 93-1260).

### Chapter 8:

1. *New State Ice v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).
2. 22 U.S. (9 Wheat.) 1 (1824).
3. *Case of the State Freight Tax*, 82 U.S. (15 Wall.) 232 (1872); *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851).
4. *E.g.*, *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 n.9 (1994) ("The 'negative' aspect of the Commerce Clause was considered the more important by the 'father of the Constitution,' James Madison.").
5. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537-38 (1949) (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935)).
6. Christopher R. Drahozal, *Preserving the American Common Market: State and Local Governments in the United States Supreme Court*, 7 SUP. CT. ECON. REV. 233, 257 (1999) (states challenged another state's law under the dormant Commerce Clause in only 5 of the 61 cases heard by the Court between 1970 and 1999).
7. *Id.* at 258 (a state or local government claimant or amicus supported a dormant Commerce Clause challenge in only 13 of the 61 cases).
8. *Id.* at 268 (states have lost 18 of 27 cases where a state or local government amicus supported a state statute challenged under the dormant Commerce Clause).
9. *Hughes v. Oklahoma*, 441 U.S. 322, 336, 9 ELR 20360 (1979).
10. *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392, 24 ELR 20815 (1994).
11. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624, 8 ELR 20540 (1978). Indeed, there is only one Court case in which a state law survived this test. In *Maine v. Taylor*, 477 U.S. 131 (1986), the Court upheld Maine's outright ban on the importation of out-of-state baitfish, finding that the state had no alternative means of preventing the spread of parasites to native fish species.
12. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).
13. 397 U.S. 137 (1970).
14. *E.g.*, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 11 ELR 20070 (1981) (Minnesota law banning sale of milk in plastic containers held to be non-

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- discriminatory, to serve a legitimate local purpose, and to place only a “relatively minor” burden on interstate commerce).
15. *General Motors Corp. v. Tracy*, 519 U.S. 278, 299 n.12 (1997).
  16. *E.g.*, *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 342, 22 ELR 20909 (1992) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 337, 9 ELR 20360 (1979): “At a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives.”).
  17. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994) (quoting *Best & Co. v. Maxwell*, 311 U.S. 454, 455-56 (1940)).
  18. Julian Cyril Zebot, *Awakening a Sleeping Dog: An Examination of the Confusion in Ascertaining Purposeful Discrimination Against Interstate Commerce*, 86 MINN. L. REV. 1063, 1065 & n.15 (2002). *See also* Michael A. Lawrence, *Toward a More Coherent Dormant Commerce Clause: A Proposed Unitary Framework*, 21 HARV. J.L. & PUB. POL’Y 395, 419 (1998) (“The Court has not clearly stated which of these three types of discrimination . . . should be given the most weight in determining the validity of a state statute or, for that matter, how these three types should interrelate.”).
  19. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984); *see also* *Hunt v. Washington Apple Adver. Comm’n*, 432 U.S. 333, 352-53 (1977) (dictum).
  20. *South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 596, 33 ELR 20260 (8th Cir. 2003), *cert. denied sub nom. Nelson v. South Dakota Farm Bureau, Inc.*, 124 S. Ct. 2095 (2004); *see Zebot, supra* note 18.
  21. At a minimum, most commentators and the Court itself acknowledge a distinction between cases involving state taxation and those involving other kinds of state regulation. *E.g.*, Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1101 (1986). Prof. Laurence Tribe breaks the regulation cases down further, as follows: restrictions on access to local markets; restrictions on access to local transportation facilities; restrictions on access to local resources; restrictions that put pressure on out-of-state businesses to relocate within the state; state ownership of natural resources; or regulations discouraging multi-state business structures. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 440 (2d ed. 1988). For a full survey of various classifications, *see* Lawrence, *supra* note 18, at 414.
  22. *E.g.*, *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 24 ELR 20815 (1994); *Oregon Waste Sys., Inc. v. Department of Env’tl. Quality*, 511 U.S. 93, 24 ELR 20674 (1994).
  23. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 199 n.15 (1994) (“‘[d]irect subsidization of domestic industry does not ordinarily run afoul’ of the negative Commerce Clause”); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976) (“market participant” exception). Justice Scalia has criticized the ad hoc nature of the results the Court reaches by invoking various exceptions. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 607 (1997) (Scalia, J., dissenting).
  24. *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring).

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25. *See, e.g., Camps Newfound/Owatonna*, 520 U.S. at 612-20 (Thomas, J., dissenting).
26. *Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232, 260 (1987) (Scalia, J., concurring in part and dissenting in part); *Camps Newfound/Owatonna*, 520 U.S. at 621-37 (Thomas, J., dissenting, joined by Justice Scalia, calling for replacement of the dormant Commerce Clause with the Import-Export Clause); *see generally* Lawrence, *supra* note 18, at 397-407 (cataloguing various arguments for and against the doctrine).
27. Lisa Heinzerling, *The Commercial Constitution*, 1995 SUP. CT. REV. 217.
28. *Id.* at 268-69. At least in the subset of dormant Commerce Clause cases dealing with environment and natural resources, it seems difficult to ascribe pure *Lochner*-ism to the shifting bloc of six to eight Justices that have voted to invalidate most state regulations to come before the Court. Here, Justice John Paul Stevens is the staunchest advocate of the dormant Commerce Clause, while Chief Justice William H. Rehnquist is virtually alone in his lavish praise of states that enact "comprehensive regulatory schemes." *E.g., Oregon Waste Sys., Inc. v. Department of Env'tl. Quality*, 511 U.S. 93, 108, 24 ELR 20674 (1994) (Rehnquist, C.J., dissenting). *See also* Christine A. Klein, *The Environmental Commerce Clause*, 27 HARV. ENVTL. L. REV. 1 (2003).
29. *But see* *South Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160 (1999), in which former Alabama Attorney General William Pryor urged the Court to overturn the dormant Commerce Clause and replace it with the Import-Export Clause. Brief for Respondents at 28-50, *South Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160 (1999) (No. 97-2045).
30. 437 U.S. 617, 8 ELR 20540 (1978).
31. *Id.* at 618.
32. *Id.* at 625.
33. *Id.* at 622.
34. *Id.* at 626.
35. *Id.* at 631 (Rehnquist, J., dissenting).
36. 504 U.S. 353, 22 ELR 20904 (1992).
37. Amicus Brief of the States of Pennsylvania, Georgia, Idaho, Illinois, Montana, Nebraska, Nevada, North Dakota, Ohio, South Carolina, South Dakota, Tennessee, West Virginia, and Wyoming in Support of Respondents, *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 504 U.S. 353, 22 ELR 20904 (1992) (No. 91-636); Brief for the States of Alabama, Arizona, Delaware, Indiana, Kentucky, Oregon, and Virginia as Amicus Curiae in Support of Respondents, *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 504 U.S. 353, 22 ELR 20904 (1992) (No. 91-636).
38. *Fort Gratiot*, 504 U.S. at 361-63.
39. *Id.* at 366.
40. *Id.* at 373 (Rehnquist, C.J., dissenting).
41. 504 U.S. 334, 22 ELR 20909 (1992).
42. Amicus Curiae Brief Submitted by the States of Ohio and Kentucky on Behalf of the States of Indiana, Utah, New Mexico, South Dakota, Kansas, Louisiana, Wyo-

## ENDNOTES

- ming, Michigan, and Tennessee; Brief of the States of South Carolina, Kansas, Louisiana, and Utah as Amici Curiae in Support of Respondents, *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 22 ELR 20909 (1992) (No. 91-471); Brief of the State of New York as Amicus Curiae in Support of Respondents, *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 22 ELR 20909 (1992) (No. 91-471); Brief of the National Governors' Association, Council of State Governments, National Conference of State Legislatures, National Association of Counties, International City/County Management Association, National League of Cities, and U.S. Conference of Mayors as Amici Curiae in Support of Respondents, *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 22 ELR 20909 (1992) (No. 91-471).
43. *Chemical Waste Management*, 504 U.S. at 337.
44. *Id.* at 345.
45. *Id.* at 351 (Rehnquist, C.J., dissenting).
46. *Oregon Waste Sys., Inc. v. Department of Env'tl. Quality*, 511 U.S. 93, 24 ELR 20674 (1994).
47. *Id.* at 100 n.4 (“[T]he degree of a differential burden or charge on interstate commerce ‘measures only the *extent* of the discrimination’ and ‘is of no relevance to the determination whether a [s]tate has discriminated against interstate commerce.’”) (quoting *Wyoming v. Oklahoma*, 502 U.S. 437, 455 (1992)).
48. 511 U.S. 383, 24 ELR 20815 (1994).
49. *E.g.*, Amicus Brief in Support of Respondent Submitted by the State of Ohio on Behalf of the States of Alaska, Arizona, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Maine, Massachusetts, Michigan, Minnesota, Montana, North Carolina, Oregon, Pennsylvania, South Carolina, Virginia, Wisconsin, and the Commonwealth of Puerto Rico, *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 24 ELR 20815 (1994) (No. 92-1402).
50. *Id.* at 9-10.
51. *C&A Carbone*, 511 U.S. at 390-94.
52. *Id.* at 401-06 (O'Connor, J., concurring in the judgment).
53. *Id.* at 410 (Souter, J., dissenting).
54. *Id.* at 411-30. Souter's opinion explicitly paints the majority as *Lochner*-ites for favoring private-market solutions over municipal financing: “No more than the Fourteenth Amendment, the Commerce Clause ‘does not enact Mr. Herbert Spencer's Social Statics . . . [or] embody a particular economic theory, whether of paternalism . . . or of laissez-faire.’” *Id.* at 424-25. Here again, Justices Scalia and Thomas voted to strike down the waste ordinance, despite their vocal criticism of the dormant Commerce Clause in other contexts.
55. 511 U.S. 93 (1994).
56. 512 U.S. 186 (1994).
57. *Id.* at 188-92.
58. *Id.* at 205.
59. Respondent's Brief on the Merits at 1, *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994) (No. 93-141).

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60. *West Lynn Creamery*, 512 U.S. at 194.
61. *Id.* at 201.
62. *Id.* at 200.
63. *Id.* at 208 (Scalia, J., concurring in the judgment).
64. *Id.* at 210. Scalia's skepticism dates back to at least 1987. *See* *Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232, 259-65 (1987).
65. *West Lynn Creamery*, 512 U.S. at 211 ("Although the question is close, I conclude it would not be a principled point at which to disembark from the negative-Commerce-Clause train.").
66. *Id.* at 212-13 (Rehnquist, C.J., dissenting). The Chief Justice also proved capable of playing the *Lochner* card: "The wisdom of a messianic insistence on a grim sink-or-swim policy of laissez-faire economics would be debatable had Congress chosen to enact it; but Congress has done nothing of the kind." *Id.* at 217.
67. 520 U.S. 564 (1997).
68. *Id.* at 568.
69. *Id.* at 575-82 & n.16.
70. *Id.* at 583-94; *see* Brief for the Respondents at 30-40, *Camps New-found/Owatonna v. Town of Harrison*, 520 U.S. 564 (1997) (No. 94-1988).
71. 520 U.S. at 596 (Scalia, J., dissenting).
72. *Id.* at 601-06. The dissenters criticized as incoherent the majority's view of acceptable alternative means: "Where regulatory discrimination against out-of-state interests is appropriate, the negative Commerce Clause is not designed to push a [s]tate into nonregulatory discrimination instead." *Id.* at 603 n.3.
73. *Id.* at 607-08.
74. *Id.* at 610-20 (Thomas, J., dissenting).
75. *Id.* at 621-40; *see* U.S. CONST. art. 1, §10, cl. 2.
76. *Id.* at 636. Chief Justice Rehnquist also joined Justice Thomas' critique of the dormant Commerce Clause, but not his discussion of the Import-Export Clause. At least one state has followed Justice Thomas' hint: former Alabama Attorney General Pryor explicitly urged the Court to replace the dormant Commerce Clause with the Import-Export Clause. Brief for Respondents at 28-50, *South Cent. Bell Tel. v. Alabama*, 526 U.S. 160 (1999) (No. 97-2045). A unanimous Court declined to address Pryor's argument because it was not raised at the certiorari stage; but Justice Thomas filed a separate concurrence emphasizing that consideration would be inappropriate only "in this case." *South Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 171 (1999).
77. 520 U.S. at 609.
78. Zebot, *supra* note 18, at 1089 ("Not only does the uncertainty surrounding the courts' standard for finding discriminatory purpose allow for case-by-case invalidation of legitimately enacted local environmental policies, but it also chills legislation in such areas.").
79. Michael S. Greve, *Commerce and the Constitution*, *Federalist Outlook*, AEI Online (Dec. 1, 2002), at note 6 and accompanying text, *available at* <http://www>.

## ENDNOTES

- aei.org/publications/pubID.57/pub\_detail.asp (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1025 n.12, 22 ELR 21104 (1992)).
80. *C&A Carbone*, 511 U.S. at 427 (Souter, J., dissenting); *see id.* at 430 (“The Commerce Clause was not passed to save the citizens of Clarkstown from themselves.”).
  81. *See* Heinzerling, *supra* note 27, at 235-51.
  82. *West Lynn Creamery*, 512 U.S. at 210 (Scalia, J., concurring).
  83. *See Camps Newfound/Owatonna*, 520 U.S. at 636 (Thomas, J., dissenting) (“[O]ur rule that state taxes that discriminate against interstate commerce are virtually *per se* invalid under the negative Commerce Clause may well approximate the apparent prohibition of the Import-Export Clause itself.”).
  84. Greve, *supra* note 79.
  85. *Camps Newfound/Owatonna*, 520 U.S. at 602-03 (emphasis added).
  86. 340 F.3d 583, 33 ELR 20260 (8th Cir. 2003), *cert. denied sub nom.* *Nelson v. South Dakota Farm Bureau, Inc.*, 124 S. Ct. 2095 (2004).
  87. The appellate panel concluded that the Amendment’s voters’ pamphlet reference to “distant corporations” and meeting notes that specifically named large, out-of-state conglomerates were enough to prove the drafters’ intent, and outweighed evidence of legitimate economic and environmental goals. *Id.* at 594-95.
  88. Zebot, *supra* note 18, at 1065-66.
  89. *South Dakota Farm Bureau, Inc. v. Hazeltine*, 202 F. Supp. 2d 1020, 1047-48 (D.S.D. 2002). The district court went on to invalidate the statute under the balancing test. *Id.* at 1049-50.
  90. The states are Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, Oklahoma, South Dakota, and Wisconsin. Brief Amici Curiae of the National Farmers Union et al., at 7-8, *Nelson v. South Dakota Farm Bureau, Inc.*, 124 S. Ct. 2095 (2004) (Nos. 03-1108, -1111).
  91. 429 U.S. 274 (1977).
  92. Zebot, *supra* note 18, at 1065-66; *see Mt. Healthy*, 429 U.S. at 274; John M. Baker, *The Most Dangerous Claim? Dormant Commerce Clause Attacks on Local Planning Decisions*, paper presented to the International Municipal Lawyers Association (Apr. 2004), at 12-15.
  93. 65 F. Supp. 2d 1017 (D. Minn. 1999).
  94. *Id.* at 1029. *But see* *Superior FCR Landfill, Inc. v. Wright County*, 2002 WL 511460 (D. Minn.) (refusing to allow the defense in challenge to rezoning denial of landfill expansion).
  95. Zebot, *supra* note 18.
  96. *See id.* at 1093 (“[I]t would diminish the federalism argument that the doctrine undervalues state sovereignty. No such argument is possible where the state is allowed to affirmatively prove that its policy was in fact motivated by legitimate policy concerns.”). Indeed, there arguably is a stronger basis for allowing such a defense under the dormant Commerce Clause, which is not textual, than under the Equal Protection Clause or other provisions expressly drawn to limit state actions.



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### Chapter 9:

1. U.S. CONST. art. VI, cl. 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

2. *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 426 (2002) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).
3. *Aetna Health Inc. v. Davila*, 124 S. Ct. 2488 (2004).
4. *Engine Mfrs. Ass'n v. South Coast Air Quality Management Dist.*, 124 S. Ct. 1756, 34 ELR 20028 (2004).
5. *American Ins. Ass'n v. Garamendi*, 123 S. Ct. 2374 (2003).
6. *United States v. Locke*, 529 U.S. 89, 30 ELR 20438 (2000).
7. *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 22 ELR 21073 (1992).
8. Richard H. Fallon, *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 49 U. CHI. L. REV. 429, 462-63 (2002). According to Richard Fallon, the Court decided 35 preemption cases between 1990 and 2001 and ruled that the state statute or cause of action was preempted in whole or part in 22 of these cases. Between 2000 and 2001, the two most recent years he examined, the Court decided seven cases and found preemption in all seven.
9. KENNETH STARR ET AL., *THE LAW OF PREEMPTION: A REPORT OF THE APPELLATE JUDGES CONFERENCE I* (American Bar Ass'n 1991) (noting a fourfold increase from the mid-1960s to the mid-1980s).
10. Exec. Order No. 12612 (1987).
11. OFFICE OF LEGAL POLICY, U.S. DOJ, *GUIDELINES ON CONSTITUTIONAL LITIGATION* 108-11 (1988).
12. STARR ET AL., *supra* note 9.
13. *Id.* at 48.
14. Brief Amici Curiae of the States of California, Arizona, Georgia, Illinois, Maine, Massachusetts, Nevada, New Hampshire, New Jersey, New York, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Texas, Vermont, and Washington in Support of Respondent, *Engine Mfrs. Ass'n v. South Coast Air Quality Management Dist.*, 124 S. Ct. 1756, 34 ELR 20028 (2004) (No. 02-1343).
15. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 64 (2002); *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995).
16. 331 U.S. 218 (1947).
17. *Id.* at 230.
18. *Id.* at 238 (Frankfurter, J., with Rutledge, J., dissenting).
19. *Id.* at 241.

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20. *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 3 ELR 20393 (1973).
21. *Id.* at 653 (Rehnquist, J., joined by Stewart, White & Marshall, JJ., dissenting).
22. *International Paper Co. v. Ouellette*, 479 U.S. 481, 17 ELR 20327 (1987).
23. *Id.* at 485.
24. 529 U.S. 861 (2000).
25. *Id.* at 868.
26. Brief Amici Curiae of the States of Missouri, Arizona, California, Colorado, Connecticut, Delaware, Iowa, Kansas, Montana, New Hampshire, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington in Support of Petitioners at 3, *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000) (No. 98-1811).
27. *Id.* at 3 (quoting *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 780 (1947) (Frankfurter, J., dissenting); *cf.* *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 616, 21 ELR 21127 (1991) (rejecting an implied preemption argument based on concerns about large-scale crop damage by insects by noting that “Congress is free to find that local regulation does wreak such havoc and enact legislation with the purpose of preventing it”).
28. *Geier*, 529 U.S. at 886.
29. *Id.* at 888.
30. *Id.* at 888-89.
31. *Id.* at 886 (citations omitted).
32. *Id.* at 894.
33. *Id.* at 896-98.
34. *Id.* at 907.
35. *Id.* at 908 n.22 (quoting Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 231-32 (2000) (“Under the Supremacy Clause, preemption occurs if and only if state law contradicts a valid rule established by federal law, and the mere fact that the federal law serves certain purposes does not automatically mean that it contradicts everything that might get in the way of those purposes.”)); *id.* at 911 (quoting 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §6-28, at 1177 (3d ed. 2000) (“[P]reemption analysis is, or at least should be, a matter of precise statutory [or regulatory] construction rather than an exercise in free-form judicial policymaking.”)).
36. *Id.* at 906 (quoting *Gade v. National Solid Wastes Management Ass’n*, 505 U.S. 88, 110, 22 ELR 21073 (1992) (Kennedy, J., concurring in part and concurring in judgment) (brackets omitted)).
37. *Id.* at 910-11.
38. *Id.* at 912.
39. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).
40. *Nixon v. Missouri Mun. League*, 124 S. Ct. 1555, 1565-66 (2004); *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991).

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41. Board of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 363 (2001); Kimel v. Florida Bd. of Regents, 528 U.S. 62, 73-78 (2000).
42. *Nixon*, 124 S. Ct. at 1565-66.
43. *Gregory*, 501 U.S. at 467.
44. *Id.* at 464.
45. American Ins. Ass'n v. Garamendi, 123 S. Ct. 2374, 2394 (2003) (Ginsburg, J., joined by Stevens, Scalia & Thomas, JJ., dissenting).
46. *Id.* at 2401.
47. Egelhoff v. Egelhoff, 532 U.S. 141, 160-61 (2001) (citations omitted) (Breyer, J., with Stevens, J., dissenting).

### Chapter 10:

1. *Hans v. Louisiana*, 134 U.S. 1 (1890).
2. A federal court may entertain a suit against an individual state official where the suit seeks prospective injunctive relief to end a continuing violation of federal law. *See Ex parte Young*, 209 U.S. 123 (1908).
3. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). The U.S. Supreme Court also has invoked the structure and history of the U.S. Constitution generally to conclude that Congress may not subject states to suit in state court in order to “accord [s]tates the esteem due them as joint participants in a federal system, one beginning with the premise of sovereignty in both the central [g]overnment and the separate [s]tates.” *Alden v. Maine*, 527 U.S. 706, 758 (1999). It is unclear whether Congress may use its §5 authority to trump this “structural” sovereign immunity.
4. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452-56 (1976).
5. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996). In so ruling, the Court overruled the 1989 plurality decision in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 19 ELR 20974 (1989), which held that Congress may use Article I powers to abrogate states’ Eleventh Amendment immunity because the states ceded their sovereignty when they gave Congress plenary authority to regulate commerce and execute the other powers set forth in Article I. *Seminole Tribe*, 517 U.S. at 59-72. Four Justices vigorously dissented. *Id.* at 76-185.  
The Court subsequently held that Congress may not use its Article I authority to subject states to private suits for damages in state courts. *See Alden*, 527 U.S. at 706. Like *Seminole Tribe*, *Alden* prompted a passionate four-Justice dissent that accused the majority of adopting a “conception of state sovereign immunity that is true neither to history nor to the structure of the Constitution.” *Id.* at 760-814.
6. 517 U.S. 44 (1996).
7. Brief of Amicus Curiae States of California, Washington, Alabama, Arizona, Arkansas, Colorado, Connecticut, Hawaii, Idaho, Kansas, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Texas, Vermont, Virginia, and West Virginia Supporting the State of Florida et al. at 1, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (No. 94-12).

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8. U.S. CONST. amend. 11.
9. 2 U.S. (2 Dall.) 419 (1793).
10. *Seminole Tribe*, 517 U.S. at 69 (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 325 (1934)).
11. *Compare, e.g., id.* at 100-85 (Souter, J., dissenting) *with id.* at 68 (Rehnquist, J.) (“The dissent . . . disregards our case law in favor of a theory cobbled together from law review articles and its own version of historical events.”); *Alden*, 527 U.S. at 706 (Kennedy, J.) *with id.* at 760-814 (Souter, J., dissenting). The dissenting bloc includes Justices David H. Souter, John Paul Stevens, Ruth Bader Ginsburg, and Stephen Breyer.
12. *E.g.*, Richard H. Fallon, *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429, 481 (2002) (“The history is complex and controverted.”).
13. 134 U.S. 1 (1890).
14. *Seminole Tribe*, 517 U.S. at 54 (quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991)).
15. *Alden*, 527 U.S. at 706.
16. *South Carolina State Ports Auth. v. Federal Maritime Comm’n*, 535 U.S. 743 (2002).
17. *Id.* at 760.
18. 527 U.S. 706 (1999).
19. *See* Brief of the States of Maryland, Alabama, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Massachusetts, Michigan, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming as Amici Curiae in Support of Respondent, *Alden v. Maine*, 527 U.S. 706 (1999) (No. 98-436).
20. *See* Brief of the States of Maryland, Alabama, Alaska, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Mississippi, Missouri, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wyoming, and the Territory of Guam as Amici Curiae in Support of Respondent *South Carolina, South Carolina State Ports Auth. v. Federal Maritime Comm’n*, 535 U.S. 743 (2002) (No. 01-46).
21. *E.g., Alden*, 527 U.S. at 750-52.
22. *Id.* at 755 (“Many [s]tates, on their own initiative, have enacted statutes consenting to a wide variety of suits.”).
23. *Id.* at 750-51.
24. *Id.* at 715.
25. *Nevada Dep’t of Human Resources v. Hibbs*, 538 U.S. 721 (2003) (Family and Medical Leave Act); *Tennessee v. Lane*, 124 S. Ct. 1978 (2004) (Americans With Disabilities Act).

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26. 527 U.S. at 755.
27. *See* South Carolina State Ports Auth. v. Federal Maritime Comm'n, 535 U.S. 743, 783-84 (2002) (Breyer, J., dissenting) ("A private citizen may ask an agency formally to declare that a [s]tate is not in compliance with a statute or federal rule, even though from that formal declaration may flow a host of legal consequences adverse to a [s]tate's interests.").
28. 124 S. Ct. 983, 34 ELR 20012 (2004).
29. Indeed, Justices Kennedy, Antonin Scalia, Clarence Thomas, and Chief Justice William H. Rehnquist dissented, complaining that the majority had ignored *Alden's* warning against "relegating [s]tates to the role of mere provinces or political corporations, instead of coequal sovereigns entitled to the same dignity and respect." *Id.* at 1018 (Kennedy, J., dissenting).
30. *See* Brief of Amici Curiae Vermont, California, Connecticut, Maine, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Oregon, Rhode Island, Wisconsin, and the Pennsylvania Department of Environmental Protection in Support of Respondents (July 16, 2003). Ten states supported Alaska's position against federal oversight: Alabama, Delaware, Iowa, Montana, Nebraska, Nevada, North Dakota, South Dakota, Utah, and Wyoming, Alaska Dep't of Envtl. Conservation v. EPA, 124 S. Ct. 983, 34 ELR 20012 (2004) (No. 02-658).
31. Medical Bd. of Cal. v. Hason, 279 F.3d 1167 (9th Cir. 2002), *cert. dismissed*, No. 02-479 (2002). Lobbying by disability-rights activists and pressure from the attorney general and governor played a large role in the about-face. *See* Bob Egelko, *State Drops Disability Case*, S.F. CHRON., Mar. 1, 2003, at A22.
32. 209 U.S. 123 (1908).
33. *Id.* at 159-60.
34. *Ex parte Young* also supplies a basis for the citizen suit provisions found in many federal environmental statutes. Since those provisions typically do not authorize damages, private citizens may use them against states by seeking to enjoin the responsible officials as individuals. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 75 n.17 (1996) (Clean Water Act citizen suits remain valid under *Ex parte Young*). *But see* Bragg v. West Virginia Coal Ass'n, 248 F.3d 275 (4th Cir. 2001), *cert. denied*, 534 U.S. 1113 (2002) (holding state immune from citizen suit under the Surface Mining Control and Reclamation Act); Pennsylvania Fed'n of Sportsmen's Clubs, Inc. v. Hess, 297 F.3d 310 (3d Cir. 2002) (same); Hope Babcock, *The Effect of the Supreme Court's Eleventh Amendment Jurisprudence on Environmental Citizen Suits: Gotcha!*, 10 WIDENER L. REV. 205 (2003).
35. *E.g.*, South Dakota v. Dole, 483 U.S. 203 (1987); Barbour v. Washington Metro. Area Transit Auth., 2004 WL 1531945 (D.C. Cir. 2004).
36. South Dakota v. Dole, 483 U.S. 203, 207 (1987).
37. *See* Brief Amici Curiae of the States of Utah, Colorado, Delaware, Hawaii, Idaho, Louisiana, Maryland, Michigan, Mississippi, Nevada, New Hampshire, North Dakota, Oklahoma, Pennsylvania, South Dakota, Virginia, Vermont, Wisconsin, and Wyoming, in Support of Respondent, Frew v. Hawkins, 124 S. Ct. 899 (2004) (No. 02-1196) (arguing against enforcement of a consent decree entered pursuant to an *Ex parte Young* suit absent a continuing violation of the underlying federal mandate); Brief Amici Curiae of the States of Illinois, Alabama, Delaware, Florida, Hawaii, Maryland, Mississippi, Nebraska, Nevada, New Jersey, Ohio,

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- Oregon, Utah, Washington, and Wyoming in support of Petitioners, *Gonzaga v. Doe*, 536 U.S. 273 (2002) (No. 01-679) (arguing that Spending Clause mandates cannot be enforced pursuant to 28 U.S.C. §1983).
38. Too much should not be read into this silence. It is entirely possible that states would, if presented the opportunity, advocate for dramatic changes in the Spending Clause and *Ex parte Young* doctrine. The most that can safely be said is that these are relatively well-settled areas of the law and the states have decided not to make changes in these areas of the law a top litigation objective.
  39. 5 J. WIGMORE, EVIDENCE §1457, at 329 (J. Chadbourn rev. 1974).
  40. 124 S. Ct. 1978 (2004).
  41. See *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).
  42. *Ex parte Virginia*, 100 U.S. 339, 345-46 (1879).
  43. *E.g.*, *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 727-28 (2003); *Katzenbach v. Morgan*, 384 U.S. 641, 650 (1966).
  44. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).
  45. 521 U.S. 507, 529 (1997).
  46. *Id.* at 520.
  47. *Employment Div., Dep't of Human Resources of Or. v. Smith*, 494 U.S. 872 (1990).
  48. 494 U.S. 872 (1990).
  49. *City of Boerne*, 521 U.S. at 531.
  50. *Id.* at 530.
  51. *Id.*
  52. *Id.* at 532.
  53. *Id.* at 532-36.
  54. *Id.* at 536.
  55. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). For an interesting discussion of this issue by Yale Law School Prof. Akhil Amar, see American Constitution Society, *Supreme Court Roundup*, at 30-32, at <http://www.acslaw.org/pdf/roundup.pdf>.
  56. 528 U.S. 62 (2000).
  57. *Id.* at 80-88.
  58. *Id.* at 91.
  59. 531 U.S. 356 (2000).
  60. *Id.*
  61. 529 U.S. 598 (2000).
  62. *Id.* at 619-27.
  63. *Id.* at 619.
  64. *Id.* at 620.

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65. Brief Amici Curiae of the States of Maryland, Connecticut, Massachusetts, and New York as in Support of Respondent at 5, *City of Boerne v. Flores*, 521 U.S. 507 (1997) (No. 95-2074).
66. *Id.* at 27.
67. Brief Amici Curiae of the States of Ohio, Tennessee, Connecticut, Delaware, Georgia, Hawaii, Idaho, Kansas, Louisiana, Maine, Michigan, Mississippi, Montana, Nebraska, Nevada, New Jersey, Oklahoma, Oregon, Pennsylvania, Rhode Island, Utah, Vermont, and Virginia in Support of Respondent in *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (No. 98-791)
68. Brief Amici Curiae of the States of Hawaii, Arkansas, Idaho, Nebraska, Nevada, Ohio, and Tennessee in Support of Petitioner in *Board of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (No. 99-1240).
69. 538 U.S. 721 (2003).
70. Associated Press, *Supreme Court to Hear Family Leave Bias Case* (Jan. 13, 2003), available at [http://www.amarillonet.com/stories/011303/usn\\_leavebias.shtml](http://www.amarillonet.com/stories/011303/usn_leavebias.shtml).
71. *Id.*
72. *Id.*
73. Brief Amici Curiae of the States of New York, Connecticut, Illinois, Minnesota, New Mexico, and Washington as in Support of Respondents, *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003) (No. 01-1368) [hereinafter Brief of the States of New York et al.].
74. *Id.* at 1.
75. Brief Amici Curiae of the States of Alabama, Alaska, Delaware, Hawaii, Indiana, Nebraska, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, and Virginia et al., in Support of Petitioners, *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003) (01-1368).
76. Brief of the States of New York et al., *supra* note 73, at 25.
77. Brief of the States of Minnesota, Connecticut, Illinois, Massachusetts, Missouri, New Mexico, New York, Vermont, Washington, and Wisconsin Amici Curiae in Support of Respondents at 1, *Tennessee v. Lane*, 124 S. Ct. 1978 (2004) (No. 02-1667) [hereinafter *Lane* State Amicus Brief]. Two other states, Kansas and Delaware, submitted a separate brief arguing that Title II validly overrides Eleventh Amendment immunity with respect to alleged violation of fundamental due process rights such as access to the courts, but not with respect to equal protection-based claims. Brief of the States of Kansas and Delaware Amici Curiae in Support of Respondents, *Tennessee v. Lane*, 124 S. Ct. 1978 (2004) (No. 02-1667). *But see* Brief of the States of Alabama, Nebraska, Nevada, North Dakota, Oklahoma, Utah, and Wyoming in Support of Petitioner in *Tennessee v. Lane*, 124 S. Ct. 1978 (2004) (No. 02-1667).
78. *Lane* State Amicus Brief, *supra* note 77, at 1.
79. 531 U.S. at 356.
80. *Lane* State Amicus Brief, *supra* note 77, at 4 (citing *Garrett*, 531 U.S. at 371 n.7).
81. *Id.* at 13 (quoting *Radice v. New York*, 264 U.S. 292, 294 (1924)).
82. *Id.*

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83. 124 S. Ct. at 1978.
84. *Id.* at 1991 n.16 (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 312-15 (1966)).
85. *Id.* at 1993 n.18.
86. *Id.* at 1991 n.16 (citing *South Carolina*, 383 U.S. at 312-15).

### Chapter 11:

1. 426 U.S. 833 (1976).
2. *Id.* at 871-72 (Brennan, J., with whom White and Marshall, JJ., join, dissenting).
3. *Id.* at 880.
4. *Id.* at 876.
5. 469 U.S. 528 (1985).
6. *Id.* at 530, 538.
7. *Id.* at 580 (O'Connor, J., joined by Powell and Rehnquist, JJ., dissenting).
8. *Id.* (Rehnquist, J., dissenting); *id.* at 589 (O'Connor, J., joined by Powell and Rehnquist, JJ., dissenting).
9. 484 U.S. 505 (1988).
10. *Id.* at 512.
11. *New York v. United States*, 505 U.S. 144, 156, 22 ELR 21082 (1992).
12. *Printz v. United States*, 521 U.S. 898 (1997).
13. U.S. CONST. amend. X.
14. *United States v. Darby*, 312 U.S. 100, 124 (1941), *cited in New York*, 505 U.S. at 156.
15. *New York*, 505 U.S. at 156-57.
16. *Id.* at 156.
17. *Id.*
18. 505 U.S. 144, 22 ELR 21082 (1992).
19. 521 U.S. 898 (1997).
20. *New York*, 505 U.S. at 149-50.
21. *See* Amicus Brief of the States of Ohio, Arkansas, Guam, Illinois, Indiana, Kentucky, Maine, Massachusetts, Nebraska, New Jersey, Pennsylvania, Rhode Island, South Dakota, Texas, West Virginia, and Wisconsin, *New York v. United States*, 505 U.S. 144, 22 ELR 21082 (1992) (Nos. 91-543 et al.). Michigan and Connecticut also filed similar amicus briefs in support of *New York*. And, of course, *New York* filed merits briefs as a party raising similar arguments.
22. *Id.*
23. *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 12 ELR 20896 (1982).
24. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).



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25. *South Carolina v. Baker*, 484 U.S. 505 (1988).
26. *New York*, 505 U.S. at 144.
27. *Id.* at 160.
28. *Id.* at 175.
29. *Id.* at 182.
30. *Id.* at 188.
31. *Id.* at 189 (quoting THE FEDERALIST NO. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961)).
32. 138 CONG. REC. S16551, S16554 (Oct. 5, 1992) (statement of Senator Metzenbaum).
33. 140 CONG. REC. S12496, S12539 (Aug. 25, 1994).
34. 139 CONG. REC. H9098, H9128 (Nov. 10, 1993) (statement of Representative Baker).
35. *Printz v. United States*, 521 U.S. 898, 904 (1997).
36. 137 CONG. REC. H2831, H2850 (May 8, 1991) (statement of Representative Annunzio).
37. *Printz*, 521 U.S. at 941 (Stevens, J., with whom Souter, Breyer & Ginsburg, JJ., joined, dissenting).
38. Brief of Amici Curiae States Colorado, Idaho, Kansas, Montana, Nebraska, South Dakota, Virginia, and Wyoming, *Printz v. United States*, 521 U.S. 898 (1997).
39. *Id.* at 16-17.
40. Brief of the States of Maryland, Connecticut, Florida, Hawaii, Iowa, Michigan, Minnesota, Mississippi, Nevada, North Carolina, Oregon, Rhode Island, and Wisconsin as Amici Curiae in Support of Respondent, *Printz v. United States*, 521 U.S. 898 (1997).
41. *Id.* at 2.
42. *Id.*
43. *Printz*, 521 U.S. at 898.
44. *Id.* at 928.
45. *Id.* at 919 (quoting THE FEDERALIST NO. 39, *supra* note 31, at 245).
46. *Id.*
47. *Id.* at 935.
48. *Id.* at 944.
49. *Id.* at 959.
50. 528 U.S. 141 (2000).
51. THE FEDERALIST NO. 39, *supra* note 31.
52. *Printz*, 521 U.S. at 919.

## ENDNOTES

### Chapter 12:

1. 521 U.S. 898 (1997).
2. 124 S. Ct. 983, 34 ELR 20012 (2004).

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