

THE FOUNDATIONS OF FEDERALISM: AN EXCHANGE.

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I. INTRODUCTION

One hears the word “federalism” with some frequency these days. The debates over medical marijuana, capital punishment, abortion, assisted suicide, capital punishment, school financing, and even environmental policy, all have vital federalism dimensions. And as political conservatives have come increasingly to dominate the federal government, conservatives and liberals alike have reconsidered their commitments to federalism. On these and other issues, the word “federalism” has transformed from a tired shibboleth for political conservatism into a more interesting, if complex, focus for conversation and debate.

The debate continues, but lawyers, academics, and concerned citizens who seek guidance on federalism issues in the pages of the *United States Reports* will not find a consistent theory of federalism within. The United States Supreme Court’s fractured federalism opinions provide invariably Byzantine, frequently contradictory, and generally unhelpful advice. It is tempting to adapt Lord Macaulay’s dim view of the United States Constitution to the Supreme Court’s federalism opinions: “all sail and no anchor.”<sup>3</sup>

We share the frustrations of those who search for a new paradigm. In light of the enormous size and scope of the federalism question, we feel that the best way to move the conversation forward—the best way really to explore the secret workings of American federalism—is to break out of foreordained conceptual categories. What is called for is a free-wheeling, broad ranging, and altogether unreserved dialectic. Accordingly, we offer the reader the following exchange as a contribution to the ongoing scholarly dialogue on federalism.<sup>4</sup>

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<sup>3</sup> Ronald Dworkin *FREEDOM’S LAW* 11, n8 (Harvard University Press 1996) (citing Thomas Babington, Lord Macaulay. Letter to H.S. Randall, May 23, 1857) (the language, apparently, is Professor Dworkin’s).

<sup>4</sup> In reality, this exchange began to take shape in the summer of 2004, as an actual electronic dialogue between Professor Bezanson and Mr. Moeller. After much work, we have transformed these exchanges into the fictional dialogue that follows.

## II. PHANTOM FEDERALISM?: THE COMMERCE CLAUSE

Steve,

Many commentators consider the Supreme Court's recent cases construing the Commerce Clause, especially *United States v. Lopez* and *United States v. Morrison*,<sup>5</sup> to be the central axis of developing federalism jurisprudence.<sup>6</sup> I generally think this attitude is wrong. Not only are the origins of federalism deeply historic, running back to the very earliest decisions of the Supreme Court, but if there are any strong doctrines of federalism in the *United States Reports* they descend from the intergovernmental immunities<sup>7</sup> and comity/abstention<sup>8</sup> decisions of the 1970s.

I think that a more useful approach is to ask to what extent the Supreme Court's decisions reflect, or should reflect, various possible views regarding the relationship of the federal and State governments. The two views I want to examine are (1) the independent State model and (2) the enumerated -power model. Model (1), the independent State model, focuses on areas of regulation — that is, subjects of State and federal policy. It would protect the independence of the State governments by using judicial review to defeat assertions of federal power in certain policy areas, which would then be left entirely to the States. It works exactly like individual rights: every federal power is one stick in a bundle of sticks, and the independent State model uses the Supreme Court as a knife to cut through them. Model (2), the enumeration model, focuses on powers rather than policies. It would treat federalism interests as already reflected in the enumeration of federal powers in the Constitution. According to this model, the assertion of federalism interests in a Commerce Clause case (indeed in any case) is profoundly question-begging. Surely if “we, the people” delegated a power to

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<sup>5</sup> U.S. CONST. Art. I, § 8, cl. 3 (“The Congress shall have Power ... [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”); *Gonzales v. Raich*, 125 S.Ct. 2195 (2005); *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>6</sup> See, e.g., Jesse Choper and John Yoo, *The Scope of the Commerce Clause After Morrison*, 25 OKLA. CITY U. L. REV. 843 (Fall 2000); Vicki C. Jackson, *Federalism and the uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180 (1998); Bradford R. Clark, *Translating Federalism: A Structural Approach*, 66 GEO. WASH. L. REV. 1161 (1998); Ann Althouse, *Enforcing Federalism After United States v. Lopez*, 38 ARIZ. L. REV. 793 (1996); Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEXAS L. REV. 795 (1996).

<sup>7</sup> *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976), overruled by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

<sup>8</sup> See, e.g., *Younger v. Harris*, 401 U.S. 37 (1971).

the federal government through the act of ratification,<sup>9</sup> then it's irrelevant whether the Supreme Court, or anyone else, thinks the delegation was hasty or unwise.

Model (1) is pretty radical. While the Supreme Court briefly flirted with it *National League of Cities v. Usery*,<sup>10</sup> model (2) generally predominates, as it should. When asked whether Congress can do something, lawyers ought to the Constitution, oughtn't they?

Truly,  
R.B.

Professor Bezanson,

Obviously so, but nevertheless *Lopez* and *Morrison* stirred quite the controversy about federalism.<sup>11</sup> It's not clear to me, however, that the narrow holdings of *Lopez* and *Morrison* justified the tumult. In *Lopez*, the Supreme Court struck down a Gun Free School Zones Act provision that criminalized knowing possession of a firearm near a school building. Chief Justice Rehnquist's opinion for the Court argued that carrying a handgun in or near a school is neither commercial nor economic, "however broadly one might define those terms."<sup>12</sup> A debatable proposition, to be sure, but I'm inclined to agree. Whatever the words "Commerce ... among the several States" may mean, they do not *directly* refer to intraState weapons possession. Chief Justice Rehnquist allowed that the government might have prevailed if the statute were a necessary, "essential part of a larger regulation of economic activity," but the provision at issue in *Lopez* plainly was not.<sup>13</sup> The basic claim isn't too radical. Regardless whether *Lopez* is right, the Court speaks in the language of your model (2) above: "we, the people" did not delegate to Congress the power to punish simple weapons possession, unless the government proves that a specific act of possession, in a specific case, is connected to interState commerce—as when a statute enumerates interState travel or use of a weapon that has traveled in interState commerce as an element of a criminal offense.<sup>14</sup>

A few years later, in *Morrison*, the Supreme Court struck down a provision of the Violence Against Women Act. The provision created a federal civil damages action for victims of violent conduct that is motivated by the victim's gender. The holding necessarily sweeps somewhat more broadly than *Lopez* because Congress explicitly made explicitly found that when considered in

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<sup>9</sup> See U.S. CONST. Art. VII ("The Ratifications of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same").

<sup>10</sup> *Usery*, 426 U.S. at 833.

<sup>11</sup> See, e.g., the authorities cited in note 6, *supra*.

<sup>12</sup> *Lopez*, 514 U.S. at 560.

<sup>13</sup> *Id.*; see also *Raich*, 125 S.Ct. at 2215 (Scalia, J., concurring in the judgment).

<sup>14</sup> *Lopez*, 514 U.S. at 560 (discussing the absence of a jurisdictional element in the Gun Free School Zones Act provision at issue).

the aggregate, violence against women that is motivated by the victim's gender seriously affects interstate commerce,<sup>15</sup> findings that the Court criticized and rejected.<sup>16</sup>

Admittedly, the Chief Justice strays into your independent States model. He cited *Lopez* and discussed worries that Congress could decide for itself that aggregate effects were present and regulate "family law and other areas of traditional State regulation" based on "the aggregate effect of marriage, divorce, and childrearing on the national economy."<sup>17</sup> But the Chief Justice's opinion pulls itself back from the brink of model (1) by establishing a fairly clear rule: he explicitly "reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."<sup>18</sup> Why? The majority saw the core question as one of delegation. The people delegated limited powers to Congress. The ratifying population almost certainly did not mean to delegate "police power" to a distant federal legislature or to vitiate the "distinction between what is truly national and what is truly local."<sup>19</sup> Independent States reasoning, I suppose. But the rule itself isn't specifically tied to the States *as States*, and so it fits more nearly with your enumerated powers model. The federalism rhetoric isn't necessary for or relevant to the result.

So if this is a federalism revolution, it is a tame one indeed—though I worry that we've reached that conclusion by defining federalism so that almost no one is in favor of it. Loose talk of "police power" is disturbing, but very few federal statutes rest *solely* on aggregate economic effects analysis. Let me suggest something slightly different. Commerce Clause law before *Lopez* was hardly unambiguous. I think Eric Claeys's explanation of the New Deal cases is a good one. He argues that post-New Deal rational basis review was really a compromise between progressive reformers (who believed in unlimited congressional power) and the Supreme Court (which the public must perceive to be principled).<sup>20</sup> Professor Claeys describes the New Deal-era Supreme Court's "key innovation" as the modification of the substantial effects test in the *NLRB v. Jones & Laughlin Steel*<sup>21</sup> case: that case, he argues, "reversed the basic orientation of pre-1937 doctrine by reversing the direction of the 'effects' test.

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<sup>15</sup> *Morrison*, 529 U.S. at 614-15.

<sup>16</sup> *Id.*

<sup>17</sup> *Morrison*, 529 U.S. at 615-616 (2000) (citing *Lopez*, 514 U.S. at 575-79 (Kennedy, J., concurring)).

<sup>18</sup> *Morrison*, 529 U.S. at 617.

<sup>19</sup> *Id.*, 529 U.S. at 617-18 (citing *NLRB v. Jones & Laughlin Steel*, 301 U.S. 1, 30 (1937)).

<sup>20</sup> Eric R. Claeys, *The Living Commerce Clause: Federalism in Progressive Political Theory and the Commerce Clause after Lopez Morrison*, 11 WM. & MARY BILL OF RTS. J. 403, 429-42 (December 2002).

<sup>21</sup> *NLRB v. Jones & Laughlin Steel*, 301 U.S. 1 (1937).

Roughly speaking, from *Gibbons* to the New Deal, the ‘effects’ test tried to maintain a principled line between interstate commerce and local activities” by permitting Congress to invoke the Necessary and Proper Clause and the Supremacy Clause to regulate intrastate activity “only after it was [already] clear the law’s primary effect was to regulate interstate commerce.”<sup>22</sup> The new substantial effects test, by contrast, permitted Congress to regulate nearly any activity, but “[b]ecause the test continued to distinguish between interstate commerce and local activities” in principle, “it preserved the idea that the Commerce Clause was one of several limited and enumerated powers.”<sup>23</sup> I’m less cynical than Professor Claey’s, but plainly *Lopez* and *Morrison* disambiguate the New Deal settlement that he aptly describes.

The Supreme Court’s holdings in *Lopez* and *Morrison* may destabilize consensus in the legal community, but they do not, without more, inject radical extratextual federalism principles into constitutional law. I’m not conceding that the decisions are correct (far from it), but it’s clear to me that *Lopez* and *Morrison* don’t disturb the core Commerce Clause precedents. The respondents in *Gonzales v. Raich*<sup>24</sup> relied on *Lopez* and *Morrison* to ask the Supreme Court to hold that the Controlled Substance Act’s global criminal prohibition against marijuana was invalid as applied to intrastate medical use of marijuana by terminally ill cancer patients. In his opinion for the Court, Justice Stevens quipped that “[i]n their myopic focus, [respondents] overlook the larger context of modern-era Commerce Clause jurisprudence preserved by those cases.”<sup>25</sup> *Lopez* and *Morrison* involved challenges alleging “that a particular statute or provision fell outside Congress’[s] commerce power in its entirety” rather than a challenge “ask[ing the Supreme Court] to excise individual applications of a concededly valid statutory scheme.”<sup>26</sup>

As I’ve re-rolled it, surely Professor Claey’s story leaves out many of the details. But I think that it’s generally true. It seems to me that the New Deal Justices left us with what Cass Sunstein has called an “incompletely theorized agreement.”<sup>27</sup> Rational basis review left Congress with immense power, but avoided an official abdication of judicial review. *Lopez*, *Morrison*, and with time, *Raich*, disambiguate the agreement. The Supreme Court has said, in broad

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<sup>22</sup> Claey’s, 11 WM. & MARY BILL OF RTS. J. at 429-30 (discussing *The Shreveport Rate Cases*, 234 U.S. 342 (1914) (Hughes, J.); *Carter v. Carter Coal Co.*, 298 U.S. 238, 324 (Cardozo, J., dissenting); and *NLRB v. Jones & Laughlin*, 301 U.S. 1 (1937)).

<sup>23</sup> *Id.*, 11 WM. & MARY BILL OF RTS. J. at 430.

<sup>24</sup> *Raich*, 125 S.Ct. at 2209.

<sup>25</sup> *Raich*, 125 S.Ct. at 2209.

<sup>26</sup> *Id.*, at 2209.

<sup>27</sup> Cass Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (May 1995) (discussing the importance of agreement on conventions without agreement on underlying theory, ideology, or philosophy).

strokes, that we have to live with immense congressional power *and* that the Supreme Court will never abdicate its power of judicial review.

Sincerely,

S.M.

Steve,

I think we disagree in part. It sounds like you're pretty much willing to do away with talk of "federalism" and chalk it all up to enumeration. Hence your complaints about *Morrison*. I grant that you're surely right federalism talk need not, and perhaps should not, play any direct role in analyzing the Constitution's text, given that any interest in federalism is already reflected in the methodology of enumeration. Our own Iowa City's Nuclear Weapons Free Zone ordinance,<sup>28</sup> for example, should pose no legal obstacle to a federal military installation that stores and maintains nuclear weapons, provided that the facility is otherwise constitutionally established.<sup>29</sup> Federal power trumps State dignity when it exists.<sup>30</sup>

But from a broader perspective your position is too dismissive. Federalism is the background for sober enumerated powers analysis. The distributions of decision-making authority in the Constitution are a reflection of a government marked by "dual sovereignty," as the Justice Kennedy has aptly put it.<sup>31</sup> Think about Iraq today: a federal government with three separate "States" (Kurds, Shiite, and Sunni/Shiite mix in the middle). Won't the power of the central government there necessarily have to be limited so as to allow governing autonomy in the "States" so that religious, cultural, and economic differences can continue to be reflected? In this sense, Iraq is not much different than the original

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<sup>28</sup> Iowa City, IA City Code, Title 6, Ch. 5, §§ 6-5-3 ("Nuclear Weapons Work Prohibited. No person shall knowingly engage in work within the city, the purpose of which is the development, production, deployment, launching, maintenance or storage of nuclear weapons or components of nuclear weapons") and 6-5-5 (making violation a "simple misdemeanor or municipal infraction" and creating a private civil action in city residents to enforce the provision), available at <http://66.113.195.234/IA/Iowa%20City/index.htm> (last accessed 6 January 2006).

<sup>29</sup> U.S. CONST. Art I, § 8, cl. 1 ("The Congress shall have Power To ... provide for the common Defense ...."), cl. 11 ("... [t]o raise and support Armies, but no Appropriation of Money to that use shall be for a longer Term than two Years"), cl. 12 ("... [t]o provide and maintain a Navy"), and cl. 13 ("... [t]o make Rules for the Government and Regulation of the land and naval Forces").

<sup>30</sup> See *Raich*, 125 S.Ct. at 2213 ("Just as acquiescence to federal regulation cannot expand the bounds of the Commerce Clause, [citation omitted], so too State action cannot circumscribe Congress'[s] plenary commerce power [citation and footnote omitted]").

<sup>31</sup> *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 840 (Kennedy, J., concurring).

American union of disparate colonial interests, where decentralized diversity was the political price of military and economic unification.<sup>32</sup>

At bottom, the Supreme Court's holdings in *Lopez* and *Morrison* purport to give enumeration some teeth as a true limit. Why? *Because of the federalism roots of the enumeration methodology itself.* Chief Justice Rehnquist was eager, and correctly so, to note in *Morrison* that the framers “[d]epart[ed] from their parliamentary past,” and “adopted a written Constitution that further divided authority at the federal level so that the Constitution’s provisions would not be defined solely by the political branches nor the scope of legislative power limited only by public opinion and the Legislature’s self-restraint.”<sup>33</sup> Congress is not Parliament; it was not meant to have the powers of a unitary government; and any constitutional doctrine that gives Congress completely *plenary* powers (or, what is really the same, the power to define its powers) is at loggerheads with the primal principle of enumerated, and therefore limited, federal power. My guess is that the Justices are trying to enforce limits with a view to, but without explicitly incorporating, the States’ interests and extratextual federalism principles.

In short, I think that there really is a vague, weak kind of judicial federalism at work in these cases. I gather from what you’ve written that you take a dim view of it, but why should you? If the federalism at work is really as demure as I have cast it, why fret about the Supreme Court’s taking a moment to reflect on the framers’ emphatic rejection of unitary government and their quite deliberate choices to distribute decision-making powers in certain ways and to specific levels of government?

Regards,  
R.B.

Professor Bezanson,

There’s nothing wrong with careful attention to history, but the Supreme Court doesn’t have license to restructure the government with substantive federalism principles. I concede that it has to draw lines based on enumeration in the text, but it cannot draw them just anywhere. Conservative talismans like “federalism” and “separation of powers” don’t actually appear anywhere within the four corners of the Constitution. A Supreme Court decision that redefines

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<sup>32</sup> See generally Akhil R. Amar AMERICA’S CONSTITUTION: A BIOGRAPHY 43-53 (Random House 2005) (arguing that the central motivations behind the establishment of the Constitution of 1789 were deeply geopolitical—the need for military and economic unity in the face of potential invasion or interference by, and economic competition from, European imperial powers).

<sup>33</sup> *Morrison*, 529 U.S. at 616, n7 (citing and quoting, in parenthetical, *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 176 (“The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written”)).

Congress's powers trifles with democracy, and so it should be grounded in an intellectually coherent account of the Constitution's text and the very real regime that it creates. That said, surely the *Morrison* majority was right to state that every commerce regulation the court had sustained up to up to *Lopez* regulated some activity that was either "economic" in some attenuated sense or that had substantial effects on interstate commerce.<sup>34</sup> I think you *can* articulate a distinction between raising crops like wheat and marijuana on the one hand (economic) and acts of violence on the other (noneconomic), but the ghost of Justice Holmes looms large: given that one *can* draw a distinction, the relevant question is *why* he or she should draw it.<sup>35</sup> I just don't see anything coherent here. It's all *ad hoc*. So even if judicial review isn't presumptively illegitimate in this area, *Lopez* and *Morrison* don't coherently reconstruct Article I, section 8. Or am I asking for too much?

Truly,  
S.M.

Steve,

I think you're beating something of a straw man. Of course I agree that interpreting constitutional language to get at substantive results is illegitimate, even when the result in question is some unquestionably relevant abstraction like "federalism" or "separation of powers." The specific purposes of the framers and the ratifying population matter. But the problem with this vague formulation is that exactly nine Justices on the Supreme Court are sure to agree with it. It verges on tautology; it's not a useful tool for gaining purchase on the Court's work.

Perhaps something like the following analysis is more helpful. The Justices, I think, paused to reflect on the original reasons for the enumeration of Congress's powers in the Constitution. The test we have after *Morrison* does not literally incorporate some formulation like "traditional State concern" as one of its elements.<sup>36</sup> In this minimal sense, they didn't *use* independent State (model (1)) concepts of federalism as part of their gloss on Article I. *Lopez* and *Morrison* are quite noticeably distinct from the now-repudiated Fair Labor Standards Act case, *National League of Cities v. Usery*, and the Eleventh Amendment cases, which *use* independent State concepts in this sense.<sup>37</sup> Rather, the majority opinions in both

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<sup>34</sup> *Morrison*, 529 U.S. at 610.

<sup>35</sup> See Oliver W. Holmes, Jr., "The Path of the Law," in COLLECTED LEGAL PAPERS (1897).

<sup>36</sup> *Morrison*, 529 U.S. at 610-13 (elaborating four factor test).

<sup>37</sup> *Usery*, 426 U.S. at 845 ("... there are attributes of sovereignty attaching to every State government which may not be impaired by Congress, *not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner*) (emphasis added); *Alden v. Maine*, 527 U.S. 706, 730 (1999) ("To rest on the words of the [Eleventh] Amendment alone would be to engage in the type of ahistorical literalism we have rejected in interpreting the scope of the State's



cases *refer to* or *mention* them as illustrative of the nature of the federalism interests supposedly codified in the original enumeration.<sup>38</sup> One can believe that *Lopez* and *Morrison* are technically wrong without embracing the fairly radical idea that mere *reference* to federalism concerns is illegitimate when those concerns are not explicit in the Constitution's text. Surely you are not claiming that every invocation of extratextual federalism is inappropriate on democracy grounds, either historically, as a matter textual principles and purposes, or practically. If you are, then wouldn't you have to give up any robust reading of the Bill of Rights, and any further extension of individual constitutional rights claims? The First Amendment and substantive due process cases are brimming, even more so than the federalism cases, with extratextual principles, and the Court invokes these principles to upset democratic political outcomes.<sup>39</sup>

Puzzled,  
R.B.

Professor Bezanson,

I'll answer your straw man with a dead horse. Courts aren't elected, but courts don't need to be elected legitimately to do some things. Invoking extratextual principles to police illegitimate violations of legal rules established to protect the natural and human rights of individuals is clearly different than invoking extratextual principles to restructure the powers of government. The Constitution is a document of the Eighteenth Century. Its electric current is the rhetoric of individual rights and policing the abuse of government power.<sup>40</sup> The Bill of Rights records and memorializes these rights as strong prohibitions on government conduct. It seems impossible for a legal document to capture the full meaning of the rights the Constitution is supposed to protect. Thus, the Supreme Court must invoke extratextual principles. Those invoked by Justice Chase in

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sovereign immunity since the discredited decision in *Chisholm [v. Georgia]*" (citing *Seminole Tribe v. Florida*, 517 U.S. 44, 68, 69 (1996). See also *Printz v. United States*, 521 U.S. 898 (1997) (holding that Congress may not by statute require State executive agencies to implement federal law); *New York v. United States*, 505 U.S.144 (1992) (holding that Congress may not by statute require State legislatures to implement federal law by enacting legislation).

<sup>38</sup> We mean to invoke something like the use/mention distinction that is popular in analytic philosophy. Simon Blackburn, *THE OXFORD DICTIONARY OF PHILOSOPHY* 387 (Oxford 1996) ("**use/mention distinction** The distinction between using a word, such as 'cat', to talk about cats, and mentioning the word, as one would if pointing out that 'cat' has three letters. The distinction becomes important when the possibility of mistaking use and mention arises, and philosophers often like to believe that those who do not share their views have made such a confusion").

<sup>39</sup> Indeed, this is a primary area of complaint from conservative Justices, see, e.g., *Lawrence v. Texas*, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting).

<sup>40</sup> See generally Bernard Bailyn, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (Enlarged Edition) (Belknap Press of Harvard University Press 1992); Bernard Bailyn, *TO BEGIN THE WORLD ANEW: THE GENIUS AND AMBIGUITIES OF THE AMERICA FOUNDERS* (Knopf 2003).

*Calder v. Bull*<sup>41</sup> or by the “established method” of the substantive due process cases<sup>42</sup> provide imperfect legal definition to these rights. Unless one is willing to throw out the centrality of individual rights to the constitutional experiment (I am not), then extratextual principles are unavoidable in the individual liberties context.

By contrast, the division of power between the federal and State governments serves to serve only instrumental ends. Whereas individual rights are ends in themselves, structural principles are not. We do not place limits on the regulatory powers of the federal government *because* the State governments are like individual rights holders.<sup>43</sup> State governments are creations of “we, the people” as well. If so, then enumeration shouldn’t amount to anything *more* than enumeration: the extratextual principles invoked to restrict Congress’s power to govern the States must themselves be only instrumental. That is, they must be procedural or structural, not substantive, as they are in *Usery* or in the Eleventh Amendment context. The Supreme Court should not invoke extratextual principles merely to freeze into place particular political settlements or institutional arrangements, unless those principles unambiguously indicate that the historic arrangement is instrumentally necessary for the perpetuation of the constitutional regime. In other words, I’m loudly objecting to your independent States model of federalism, because it treats federalism problems like individual rights problems.

We don’t do that in the separation of power context. Consider, for example, the Commander in Chief Clause.<sup>44</sup> Surely this clause, like the Commerce Clause, is governed by enumeration-based limits. Plainly, however, the clause does not exist *in order to preserve* the State of military science in 1789. Nuclear weapons, stealth bombers, and aircraft carriers give the President vast, imperial powers—powers that surely would alarm the framers. Yet it would be legally absurd to interpret the words “Army” and “Navy” not to authorize the

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<sup>41</sup> *Calder v. Bull*, 3 U.S. 386, 388 -389 (1798) (Chase, J., seriatim).

<sup>42</sup> At the very least this method entails “protect[ing] those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition,’ [citations omitted] and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed,’ [citation omitted]” and “the ... fundamental liberty interest” in which can be “‘careful[ly] descri[bed]” by reference to “[o]ur Nation’s history, legal traditions, and practices,” *Washington v. Glucksberg* 521 U.S. 702, 720-721 (1997) (citations omitted). It is not clear to what extent *Lawrence v. Texas* relaxes either the traditional characterization requirement or the strength of the required historical pedigree for new substantive due process rights, *see, e.g., Lawrence*, 539 U.S. at 571-72.

<sup>43</sup> *But see Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (explicitly discussing waiver of State sovereign immunity in federal court as “the surrender of constitutional rights”)

<sup>44</sup> U.S. CONST. Art. II, § 2, cl. 1 (The President shall be Commander in Chief of the Army and Navy of the United States, and the militia of the several States, when called into the actual Service of the United States ....”).

President to use these weapons on the theory that they are, for constitutional purposes, “nonarmy” and “nonnavy.” By and large, the Justices appear to have no such plans for the Commerce Clause. Gun regulation, for some purposes, is off limits, but medical marijuana is not. Unless we have a significantly more radical project of this kind, then we are adrift without guiding principle—we have essentially *ad hoc* limits on the commerce power. Except for Justice Thomas<sup>45</sup>, there is no new federalism.

Worried,  
S.M.

Steve,

You’re being somewhat unfair. The Commerce Clause cases aren’t really *ad hoc*. Or, at least, *Gonzales v. Raich*<sup>46</sup> shows that they don’t have to be. I grant you that except for Justice Scalia’s concurrence in the judgment, the opinions are pretty uninteresting. Justice Stevens is at his muddled best—it is impossible to pin down his holding. Can Congress legislate by categories or is there a required jurisdictional element in as applied cases? I have absolutely no idea from reading the opinion. And I have not seen *Perez*<sup>47</sup> cited so much or so singularly ever before. Justice O’Connor offers up much the same thing. Where does this fuzzy lingo about historic spheres of sovereignty, encroachment, State as laboratories, and federalism as structural liberty all fit into a clear and coherent idea, principle, doctrine, or rule? I would say that she hasn’t got the foggiest idea. I don’t, frankly, see the Court returning to *Usery* any time soon. Justice Thomas, as you note, is on his own.

It’s Justice Scalia’s concurrence in the judgment<sup>48</sup> that speaks to our disagreement. He sees the case as an enumerated powers case, not one about federalism or State sovereignty. The case presents a simple question about the extent of Congress’s legislative power under Article I; Congress has the power to enact the Controlled Substances Act provision prohibiting intraState medical use of marijuana because that regulation is necessary and proper to achieving a concededly permissible regulatory purpose under Congress’s core Commerce Clause powers—prohibiting the interState market in marijuana.<sup>49</sup> One could, of course, make the argument that the regulation was actually unnecessary because its contents could easily be extracted from the federal law without compromising

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<sup>45</sup> 125 S.Ct. at 2229 (Thomas, J., dissenting).

<sup>46</sup> 125 S.Ct. at 2195.

<sup>47</sup> *Perez v. United States*, 402 U.S. 146 (1971) (upholding federal statute criminalizing “loan sharking” on the theory that the activity has substantial effects on interState commerce).

<sup>48</sup> 125 S.Ct. at 2215 (Scalia, J., concurring in the judgment).

<sup>49</sup> See *United States v. Darby*, 312 U.S. 100 (1941); *United States v. Sullivan*, 332 U.S. 689 (1948).

the Controlled Substances Act's effectiveness, but for one reason or another this argument didn't wash.<sup>50</sup> In itself this is interesting for Justice Scalia—it is deferential, it rings of *McCullough v. Maryland*, and it balances interests.<sup>51</sup> But I take it his point is very simple: there was no federalism issue in the case.

This position, however, is not necessarily inconsistent with the weak form of extratextual federalism in *Lopez* and *Morrison*. Perhaps Justice Scalia simply believes that when Congress has established a larger framework for regulating interstate commerce under its undisputed power, deference under *McCulloch* and the Necessary and Proper Clause is appropriate. In other words, I think you're presenting a false dichotomy. The alternative to the dissenters' views in *Raich* is not necessarily your own brand of liberal federalism.

Regards,  
R.B.

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<sup>50</sup> See *Raich*, 125 S.Ct. at 2207-09; the converse of this proposition is also a live issue. The distinction between regulations that regulate interstate economic activity because that activity has a substantial effect on interstate commerce and those that regulate intrastate economic activity because it is a necessary part of a large federal regulatory framework, has never been so clearly expressed as in Justice Scalia's concurrence in *Raich*. Assuming the Supreme Court adopts his view, we think one might be able to challenge individual statutes on the theory that they bear no relationship to any legitimate larger scheme of regulation of the channels or instrumentalities of interstate commerce. In other words, the law in question might now have to be sufficiently "schematic," by some definition, to enable Congress to avoid the argument that it is simply interfering with State affairs. The interesting implication is for some federal criminal provisions. Congress has a habit of legislating away one problem at a time, leaving us, in some areas, with a patchwork quilt of statutory provisions that have no evident collective purpose, let alone anything like a "schematic" character. See Alex Kreit, *Why is Congress Still Regulating Noncommercial Activity?*, 28 HARV. J. L. & PUB. POL'Y 169, 198 (2004) (advocating such a standard: "first, the broader scheme must be targeted at a commercial enterprise; second, the regulated actors or entities must be performing the specific activity as part of the enterprise"; and stating this "broader scheme analysis would be employed in substantial effects cases for statutes that fail the four prong *Morrison* test"). Take, for example, the recent federal law that added killing a fetus to a broad range of federal criminal statutes resting on, e.g., the commerce power, see Unborn Victims of Violence Act, 18 U.S.C. 1841 (2004). Under *Raich* the government might well have difficulty arguing that the fetus section was in any way related to the larger schematic of the range of federal criminal laws, which generally serve to protect specific governmental regulatory or institutional interests, like the national banking system.

<sup>51</sup> Justice Scalia is famously interested in *rules of law*. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CHI. L. REV. 849 (1989); Antonin Scalia, *The Rule of Law as the Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); *Burnham v. Superior Ct. of California*, 495 U.S. 604, 626-27 (1990) (arguing that Justice Brennan's proposed test for personal jurisdiction, which relied a number of factors to determine whether to subject a transient defendant to process, was *conceptually* flawed: "Thus, despite the fact that he manages to work the word 'rule' into his formulation, Justice BRENNAN's approach does not establish a rule of law at all, but only a 'totality of the circumstances' test, guaranteeing what traditional territorial rules of jurisdiction were designed precisely to avoid: uncertainty and litigation over the preliminary issue of the forum's competence").

## II. THE MOVING TARGET: SOVEREIGNTY

Professor Bezanson,

I disagree. Justice Scalia endorsed a theory of sovereignty in *U.S. Term Limits, Inc. v. Thornton*<sup>52</sup> that is I think is inconsistent with the lukewarm federalism of his *Raich* concurrence. *Term Limits* involved a challenge to an Arkansas State constitutional provision that imposed term limits on candidates for Congress. The Supreme Court struck down the provision on the theory that the States shouldn't be permitted to interfere with the election of the federal legislature.<sup>53</sup> Justice Thomas dissented on the opposing theory that “[n]othing in the Constitution *deprives* the people of each State of the power to prescribe eligibility requirements for ... candidates .... it raises no bar to action by the States or the people.”<sup>54</sup> Justice Thomas's dissent is backed up by a theory of political power and sovereignty: “the people of the States,” he argues, “need not point to any affirmative grant of power in the Constitution in order to prescribe” laws that affect the federal government, because “[t]he ultimate source of the Constitution's authority is the consent of the people of each individual State not the consent of the undifferentiated people of the Nation as a whole.”<sup>55</sup> On one level this is an argument about governmental immunities. On another, it is an image of constitutional power. It's something that *flows from a source*—like water, sound, or electricity. What's important is tracing power back to the source.

Justice Thomas finds the source in the Article VII ratification procedure: “The Constitution took effect once it had been ratified by the people gathered in convention in nine different States. But the Constitution went into effect only ‘between the States so ratifying the same,’ ... it did not bind the people of North Carolina until they had accepted it. In Madison's words, the popular consent upon which the Constitution's authority rests was ‘given by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong.’”<sup>56</sup> Justice Thomas has

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<sup>52</sup> 514 U.S. 779, 845 (1995) (Thomas, J., dissenting, joined by Rehnquist, C.J., O'Connor, J., and Scalia, J.).

<sup>53</sup> *Term Limits*, 514 U.S. at 783.

<sup>54</sup> *Term Limits*, 514 U.S. at 845 (Thomas, J., dissenting).

<sup>55</sup> *Term Limits*, 514 U.S. at 846 (Thomas, J., dissenting).

<sup>56</sup> *Term Limits*, 514 U.S. at 846 (citing THE FEDERALIST NO. 39, at 243 (James Madison) (Clinton Rossiter ed. 1961); J. Elliot, ed. 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 94 (2nd ed. 1876); Justice Thomas's footnote to this proposition may be even more important. He argues: “The ringing initial words of the Constitution – ‘We the People of the United States’ – convey something of the same idea. (In the Constitution, after all, the ‘United States’ is consistently a plural noun.) The Preamble that the Philadelphia Convention approved before sending the Constitution to the Committee of Style is

argued that “the people of the several States are the only true source of power.”<sup>57</sup> And so the Tenth Amendment, I gather, is an express articulation of this view rather than a tautologous confirmation of enumeration: “As far as the Federal Constitution is concerned, then, the States can exercise all powers that the Constitution does not withhold from them and they are constitutionally supreme. *All power may be traced to them.* The Federal Government and the States thus face different default rules: Where the Constitution is silent about the exercise of a particular power – that is, where the Constitution does not speak either expressly or by necessary implication – the Federal Government lacks that power and the States enjoy it.”<sup>58</sup> The unstated premise of Justice Thomas’s claim, I gather, is that our ability to trace, *ex post*, the lines of delegation is what really matters when deciding whether Congress has some power. That’s not what we’re saying Justice Scalia’s *Raich* concurrence says—he’s clearer than Justice Stevens, but Scalia still muddies the waters.

Bemused,  
S.M.

Steve,

I’m intrigued. Justice Scalia joined Justice Thomas in *Term Limits*, but I don’t know that he’s ever expressed anything quite this strong in his own voice. It’s best to remember that a Supreme Court Justice doesn’t necessarily agree with every logical implication of every opinion he or she joins. Perhaps a disagreement between Justices Scalia and Thomas (and Chief Justice Rehnquist, whose votes track Thomas’s in both cases) was submerged in *Term Limits*.<sup>59</sup> I have never thought that Justice Scalia is especially committed to returning the Constitution from exile. But what, exactly, is the character of the disagreement we’ve identified? What is, or what would be, the counterview that permits Scalia to concur in *Raich*?

At sea,  
R.B.

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even clearer. It began: ‘We the people of the States of New -Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia ....’ Scholars have suggested that the Committee of Style adopted the current language because it was not clear that all the States would actually ratify the Constitution. In this instance, I agree with the majority that the Committee’s edits did not work a substantive change in the Constitution.”

<sup>57</sup> *Term Limits*, 514 U.S. at 847 (citing and quoting *Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (Black, J., plurality opinion) (“The United States is entirely a creature of the Constitution. Its power and authority have no other source”)) (Thomas omits footnote).

<sup>58</sup> *Term Limits*, 514 U.S. at 847-48 (emphasis added).

<sup>59</sup> Another instance of an incompletely theorized agreement, perhaps? See Sunstein, *supra*, at note 22.

Professor Bezanson,

It's hard to say. Perhaps from Justice Thomas's perspective, the problem with Scalia's opinion in *Raich* is just that it muddies the ultimate sources of sovereignty. Justice Scalia's federal power to regulate intrastate economic activity as long as there is a larger regulatory framework is a creature without obvious genealogy. It's difficult to trace to its origin. It is as if Justice Thomas believes that one must have a Parliament or a delegatee legislature, but not both. In effect, Justice Scalia strives to avoid this momentous choice. He gives us neither Parliament nor elemental, foundational, original State. Some kind of legislative Chimera. Perhaps he simply cares a great deal less about tracing the strands of delegation and properly characterizing Congress than does Justice Thomas.

But I think that's somewhat inconsistent for Justice Scalia. His separation of powers jurisprudence devotes a great deal of care to abstract questions of authority and the characterization of government power. Let's call this constitutional "formalism." A formalist, in this sense, "generally assume[s] that the Constitution recognizes three kinds of functions—legislative, executive, and judicial—that must be assigned to the corresponding branch of government," so that "separation-of-powers issues turn largely on the classification of functions."<sup>60</sup> This bears a close relation to late Nineteenth and early Twentieth Century legal formalism.<sup>61</sup> Perhaps it's the same thing.

In any event, Justice Scalia's dissents in the independent counsel statute case, *Morrison v. Olson*,<sup>62</sup> and the first Sentencing Guidelines case, *Mistretta v.*

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<sup>60</sup> Jesse Choper, Richard Fallon, Jr., Yale Kamisar, and Steven Shiffrin, *CONSTITUTIONAL LAW: CASES—COMMENTS—QUESTIONS* (9<sup>th</sup> Edition) 155 (West 2003) (citing Peter Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984) and Rebecca Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1522-31 (1991)).

<sup>61</sup> Gerald Wetlaufer, *Systems of Belief in Modern American Law: A View from Century's End*, 49 AM. U. L. REV. 1, 12-13 (1999) ("The formalists clearly believed that the law was comprised of principles—including definitions, concepts, and doctrines—broad in their generality, few in their number, and clear enough to permit answers to the questions of law to be more or less directly deduced. The formalists also believed that the law generally is, and should be, unresponsive to particular factual contexts and circumstances. They wrote as if such principles had an existence of their own, quite apart from what judges or legislators might actually have said or done, and that these principles were valid on grounds that were indifferent to what we have come to see as either the needs of society or the purposes that law might serve. Although such principles might develop and evolve over time, they did not do so in accordance with society's changing needs. Neither were they influenced by custom and practice nor by what people might 'feel' to be 'just'") (footnotes omitted).

<sup>62</sup> *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting from decision to uphold as constitutional the Independent Counsel Statute's provision for termination for "good cause"); see *id.*, 699 (quoting the Article II Vesting Clause and stating: "That is what this suit is about. Power.

*United States*,<sup>63</sup> focus on the correct abstract characterization of the government powers at issue.<sup>64</sup> I'm associating Justice Scalia with the mode of argument that appears in the opinions for the Court in *Nixon v. United States*<sup>65</sup>, *INS v. Chada*<sup>66</sup>, *Clinton v. New York*<sup>67</sup>, *United States v. Curtiss-Wright Export Corp.*<sup>68</sup>, *Dames & Moore v. Regan*,<sup>69</sup> and *Youngstown Steel Sheet & Tube Co.*<sup>70</sup> The much-discussed "unitary executive" theory, too.<sup>71</sup> The common feature here is that formalism is not a context-sensitive approach. It relies on the courts to enforce clearly drawn, bright-line boundaries between governmental institutions and powers. And we can see *that* attitude heartily at work in Scalia's dissents in *Olsen* and *Mistretta*, and Thomas's dissent in *Term Limits*. All three opinions treat power as the plenary right to operate within a defined space—that's the metaphor here, room to act, and to do whatever one wants within bounded limits. I think it is fair to label Justice Scalia a formalist in this sense. It's an attitude that's hostile to the Necessary and Proper Clause, so why not then label his *Raich* concurrence, and its reliance on implied powers and federal interests, an inconsistency? Why should the same Constitution that provides a springboard for

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The allocation of power among Congress, the President, and the courts in such fashion as to preserve the equilibrium the Constitution sought to establish--so that 'a gradual concentration of the several powers in the same department,' Federalist No. 51, p. 321 (J. Madison), can effectively be resisted.

<sup>63</sup> *Mistretta v. United States*, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting from decision to uphold as constitutional the Sentencing Reform Act's establishment of the United States Sentencing Commission) ("I dissent from today's decision because I can find no place within our constitutional system for an agency created by Congress to exercise no governmental power other than the making of laws").

<sup>64</sup> See also *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 815 (1987) (Scalia, J., concurring in the judgment) (holding that an interested party in a lawsuit may not be appointed to prosecute indirect criminal contempt proceedings; Justice Scalia concurred on a strict separation of powers theory, and would have held that officials of the judicial branch cannot initiate such prosecutions, but may only refer potential prosecutions to the executive branch).

<sup>65</sup> *Nixon v. United States*, 506 U.S. 224 (1993).

<sup>66</sup> *INS v. Chada*, 462 U.S. 919 (1983).

<sup>67</sup> *Clinton v. City of New York (Line Item Veto Case)*, 524 U.S. 417 (1997).

<sup>68</sup> *United States v. Curtiss-Wright Export Corporation*, 299 U.S. 304 (1936).

<sup>69</sup> *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

<sup>70</sup> *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure Case)*, 343 U.S. 579 (1952).

<sup>71</sup> See generally Steven Calabresi and Christopher Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451 (Summer 1997); Steven G. Calabresi and Christopher Yoo, *The Unitary Executive During the Second Half-Century*, 26 HARV. J. L. & PUB. POL'Y 667 (Summer 2003); Steven G. Calabresi and Christopher Yoo, 80 NOTRE DAME L. REV. 1 (Nov. 2004); Christopher Yoo, Steven G. Calabresi, and Anthony Colangelo, *The Unitary Executive in the Modern Era*, 90 IOWA L. REV. 601 (Jan. 2005); see John Yoo, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (University of Chicago press 2005).



formalist analysis in the separation of powers context be read any differently in the federalism context?

Sincerely,  
S.M.

Steve,

I'd guess that you really mean to say that it shouldn't be. And that Justice Scalia should abandon his formalist ways for the alternative: "functionalism," which "takes as its foundational commitment the different but equally familiar ideal of 'checks and balances'" and argues that "there can be no rigid division of governmental functions into three sharp categories, each the distinctive province of a single branch of government" so that "actions and institutional arrangements should be measured by reference to ... characteristic *functions* of the separation of powers."<sup>72</sup> That is, what is separating the powers supposed to *do*?<sup>73</sup>

But I think that Justice Scalia's views are more subtle than you're letting on. Why must he err everywhere for erring once? Furthermore I think one can make the case that Justice Thomas has more or different formalistic commitments. For example, in *Term Limits* Justice Thomas coyly suggested that *Garcia v. San Antonio Metropolitan Transport Association*, which repudiated *Usery*, was wrongly decided and flatly stated that the *Term Limits* majority misinterpreted *McCulloch* when it argued that the Constitution implies a prohibition on State mandated electoral qualifications for congressional candidates because the Tenth Amendment delegates all powers that aren't at least mentioned in the text.<sup>74</sup> This is not quite Justice Scalia's structural formalism, which I take to be exemplified by his dissent in the independent counsel case, *Morrison v. Olsen*.

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<sup>72</sup> Jesse Choper, Richard Fallon, Jr., Yale Kamisar, and Steven Shiffrin, CONSTITUTIONAL LAW: CASES—COMMENTS—QUESTIONS (9<sup>th</sup> Edition) 155 (footnote omitted)..

<sup>73</sup> As we are using the term "functionalism," it would encompass the Supreme Court's deferential, interest-balancing approach in *McCulloch v. Maryland*, 17 U.S. at 316. Justice Jackson's famous concurrence in *Youngstown Steel Sheet & Tube Co. v. Sawyer Youngstown*, 343 U.S. at 634 (Jackson, J., "concurring in the judgment and the opinion of the court"), comes to mind.

<sup>74</sup> *Term Limits*, at 852-853 (Thomas, J.) (specifically referring to *Garcia* and arguing that "[w]hen [the Supreme Court is] asked to decide whether a congressional statute that appears to have been authorized by Article I is nonetheless unconstitutional because it invades a protected sphere of State sovereignty, it may well be appropriate for [the Court] to inquire into what [it] ha[s] called the 'traditional aspects of State sovereignty'" and arguing that the *Term Limits* majority's reliance on *McCulloch v. Maryland* "is misplaced" because while "*McCulloch* did make clear that a power need not be 'expressly' delegated to the United States or prohibited to the States in order to fall outside the Tenth Amendment's reservation" it is nevertheless the case that "*McCulloch* did not qualify this observation by indicating that the question also turned on whether the States had enjoyed the power before the framing. To the contrary, *McCulloch* seemed to assume that the people had 'conferred on the general government the power contained in the constitution, and on the States the whole residuum of power'").

Earnestly,  
R.B.

Professor Bezanson,

Maybe you have a point. In a 2004 Spending Clause case called *Sabri v. United States*, the Supreme Court upheld the federal statute criminalizing bribery of State, local, or tribal officials when the program receives at least \$10,000 in federal funds as an exercise of the Spending Clause.<sup>75</sup> In that case, Justice Thomas concurred in the judgment.<sup>76</sup> He would have upheld the statute as a valid exercise of the commerce power.<sup>77</sup> He disagreed, however, with the majority's conclusion that the statute was a valid exercise of the spending power. Specifically, he argued that the statute could not be justified as a necessary and proper extension of the Spending Clause power because it ran afoul of the Court's test for applying the Necessary and Proper Clause: the law must be "plainly adapted" to some permissible end enumerated in Article I.<sup>78</sup> Justice Thomas proposed his own test for determining whether a statute is "plainly adapted": "it would seem," he wrote, "necessary to show some obvious, simple and direct relation between the statute and the enumerated power."<sup>79</sup> That isn't rational basis. And it isn't nearly as deferential as Justice Scalia is in *Raich*. So perhaps there's a distinction to be drawn. Could it really just be about judicial review?

Cheers,  
S.M.

### III. SOVEREIGNTY DIVIDED: A FRACTURED FEDERALISM

Steve,

Quite possibly. But let's shift gears for a bit. With all this talk of the conservative view in *Term Limits*, I wonder if the majority opinion is any more coherent. I don't think so. Justice Stevens's opinion for the Court doesn't answer the most important question in the case. Nothing about either the existence of a national Constitution or the concept of enumerated powers compels him to strike down the Arkansas constitutional amendment at issue in *Term Limits*. Justice Stevens *states* that the "State imposed restriction is contrary to the 'fundamental principle of our representative democracy,' embodied in the Constitution, that 'the people should choose whom they please to govern

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<sup>75</sup> *Sabri v. United States*, 541 U.S. 600 (2004).

<sup>76</sup> *Sabri*, 541 U.S. at 610 (Thomas, J., concurring in the judgment).

<sup>77</sup> *Sabri*, 541 U.S. at 614 (Thomas, J., concurring in the judgment).

<sup>78</sup> *Sabri*, 541 U.S. at 612 (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 415).

<sup>79</sup> *Sabri*, 541 U.S. at 613 (quoting just previous to the quoted text to WEBSTER'S NINTH NEW DICTIONARY OF THE ENGLISH LANGUAGE 898 (1991)).

them,”<sup>80</sup> but stating and proving are different things. Furthermore, this particular formulation is deeply question-begging: the conclusion (that the Constitution is a unifying document of the whole people) is part of the premise (that the Constitution is an act of delegation by the whole people). And it almost has the ring of unitary government to it and I think we both agree that Chief Justice Rehnquist is right to say that that’s not what the Constitution establishes.

True, Justice Stevens invokes *Powell v. McCormack*<sup>81</sup> and the John Wilkes affair,<sup>82</sup> but these examples are less illuminating than one might think. In the *Powell* case, Congress voted to “exclude” a member accused of financial improprieties before he was seated by majority vote rather than to “expel” him after he was seated by the constitutionally mandated two-thirds vote.<sup>83</sup> The Supreme Court, in effect, ordered the House of Representatives to seat him.<sup>84</sup> Mr. Wilkes was a Member of Parliament in the Seventeenth Century, who printed his criticism of a Franco-British treaty; Wilkes’s scurrilous journalism “earned [him] a conviction for seditious libel,” nearly two years in prison, and expulsion from Parliament.<sup>85</sup> Wilkes’s district repeatedly re-elected him to his seat; Parliament repeatedly prevented him from taking it; and eventually, Wilkes’s political fortunes reversed and “the House of Commons voted to expunge the resolutions that had expelled [him] and had declared him ineligible, labeling those prior resolutions ‘subversive of the rights of the whole body of electors of this kingdom.’”<sup>86</sup>

Justice Stevens also reviewed American historical materials. He cites *The Federalist* for the proposition that the “plan of the Constitutional Convention did not contemplate ‘an entire consolidation of the States into one complete national sovereignty,’ but only a partial consolidation in which ‘the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States.’”<sup>87</sup> But that principle doesn’t really answer the Tenth Amendment argument. Justice Stevens gets to the heart of his argument when he invokes *McCulloch v. Maryland* to argue that “the text of the Tenth Amendment draws a basic distinction between the powers of the newly created Federal Government and the

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<sup>80</sup> *Term Limits*, 514 U.S. at 783 (citing and quoting *Powell v. McCormack*, 395 U.S. 486, 547 (1969)).

<sup>81</sup> *Powell v. McCormack*, 395 U.S. 486 (1969)

<sup>82</sup> *Term Limits*, 514 U.S. at 788-90.

<sup>83</sup> *Powell*, 395 U.S. at 489-93; U.S. CONST. Art. I, § 5, cl. 1, 2.

<sup>84</sup> *Powell*, 395 U.S. at 549-50 (ordering retroactive reinstatement—Mr. Powell had already been elected to the next Congress, which was already underway when the Supreme Court reviewed the case).

<sup>85</sup> *Term Limits*, 514 U.S. at 789-90.

<sup>86</sup> *Term Limits*, 514 U.S. at 790.

<sup>87</sup> *Term Limits*, 514 U.S. at 801 (quoting THE FEDERALIST NO. 32 (Alexander Hamilton)).

powers retained by the pre-existing sovereign States. As Chief Justice Marshall explained, ‘it was neither necessary nor proper to define the powers retained by the States. These powers proceed, not from the people of America, but from the people of the several States; and remain, after the adoption of the constitution, *what they were before*, except so far as they may be abridged by that instrument.’<sup>88</sup> Stevens surely has the winning argument here. The powers of the State governments are, constitutionally, what they are. They were created by the act of ratification no less than the federal government’s powers were. So someone claiming Statepower under the Tenth Amendment has to point to something more than simply the fact of omission from the four corners of the Constitution to make a really compelling Tenth Amendment argument. If this isn’t true, then *McCulloch* was wrongly decided,<sup>89</sup> and Justice Thomas’s arguments in *Sabri* and *Raich* were not too extreme but rather too moderate.

But this is all rather beside the point. Justice Stevens has got to point to something more than the text as well, because the Qualifications Clause doesn’t obviously forbid the States from establishing additional qualifications for congressional candidates. In some sense, he has got to be saying that the States shouldn’t have that power. He must look into the murky depths to divine what is properly among the original retained powers of the States. Inscrutable common law judging, that.

But in this respect, Justice Stevens is fairly straightforward about what the Court is doing. Justice Stevens argues that pointing to the missing prohibition on additional qualifications “overlooks the revolutionary character of the Government that the Framers conceived,” because “the Framers were presented with, and eventually adopted a variation of, ‘a plan not merely to amend the Articles of Confederation but to create an entirely new National Government with a National Executive, National Judiciary, and a National Legislature.’ In adopting that plan, the Framers envisioned a uniform national system, rejecting the notion that the Nation was a collection of States, and instead creating a direct link between the National Government and the people of the United States.”<sup>90</sup> That is,

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<sup>88</sup> *Term Limits*, 514 U.S. at 801 (quoting *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 193 (1819)) (emphasis added). Justice Thomas took issue with this argument in the context of *McCulloch*, see note 58, *supra*.

<sup>89</sup> *Term Limits*, 514 U.S. at 801 (quoting *Sturges*, 17 U.S. (4 Wheat. ) at 436) (In that case, “the Court rejected the argument that the Constitution’s silence on the subject of State power to tax corporations chartered by Congress implies that the States have ‘reserved’ power to tax such federal instrumentalities. ‘[An] ‘original right to tax’ such federal entities ‘never existed, and the question whether it has been surrendered, cannot arise.’” The very next sentence of the Court’s decision is even clearer. “In language that presaged Justice Story’s argument, Chief Justice Marshall concluded: ‘This opinion does not deprive the States of any resources which they originally possessed’”).

<sup>90</sup> *Term Limits*, 514 U.S. at 803.

the Constitution creates what the Articles didn't: a national legislature.<sup>91</sup> And the States can't interfere with the structural rules that create and constitute that legislature. That's a pragmatic, almost common-law, approach to this problem. It makes a great deal of sense to me, and, I suspect, to you. It's also a lot more satisfying than ghostly appeals to sovereignty.

Inquiring,  
R.B.

Professor Bezanson,

Well, surely the *Term Limits* majority is right to say that Representatives are federal officers—even though they are “chosen by separate constituencies” they become “servants of the people of the United States” when elected, as opposed to mere “delegates appointed by separate, sovereign States.”<sup>92</sup> Perhaps this rhetoric is the handmaiden to your eminently pragmatic point—if we didn't act as if the office of Representative were essentially federal in character, the States would effectively control the membership of the House. But I think there's something more complicated at work here.

The *Term Limits* Court rejected Justice Thomas's more specific argument that “because the States ratified the Constitution, the people can delegate power only through the States or by acting in their *capacities* as citizens of particular States”; rather, the Court maintained, the Constitution “was submitted to the whole people” of the country—who only *met* in separate places to complete the act of ratification.<sup>93</sup> I think it's fair to say that Justice Thomas believes the ratification effected a one-directional delegation. Power goes *from* the people as citizens of the States *to* the federal government. Indeed, Justice Thomas sees evidence for his bottom-up approach in the fact the Constitution provides for no election of any officer by the whole people of the nation—every election, even the presidential election, is mediated through the citizen's citizenship *of a State*.<sup>94</sup> But Justice Stevens sees something different in the fact that the States retain their salience in the Constitution's election scheme: complex layers of delegation and redelegation. The ratifying population delegated the power to hold federal elections to the federal level by ratifying the Constitution, and through the

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<sup>91</sup> See Amar, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 57-64 (arguing that the Congress created by the Constitution of 1789 was qualitatively different than that created by the Articles of Confederation, in that, among other things, it had “legislative” powers and could enact “law,” which the Article Congress did not have and could not do).

<sup>92</sup> *Term Limits*, 514 U.S. at 838.

<sup>93</sup> *Term Limits*, 514 U.S. at 840 (quoting *McCulloch*, 4 Wheat. at 403) (emphasis added).

<sup>94</sup> *Term Limits*, 514 U.S. at 859-60 (“The Georgia citizen who is unaware of this distinction will have it pointed out to him as soon as he tries to vote in a Massachusetts congressional election”).

Constitution they were re-delegated a second time to the States— that is, the conduct of elections was “delegated to, rather than reserved by, the States.”<sup>95</sup>

Is there anything but a choice between dueling one-directional constructs? In his concurrence, Justice Kennedy offers a multidirectional alternative:

In one sense it is true that ‘the people of each State retained their separate political identities,’ for the Constitution takes care both to preserve the States and to make use of their identities and structures at various points in organizing the federal union. It does not at all follow from this that the sole political identity of an American is with the State of his or her residence. It denies the dual character of the Federal Government which is its very foundation to assert that the people of the United States do not have a political identity as well, one independent of, though consistent with, their identity as citizens of the State of their residence. It must be recognized that ‘for all the great purposes for which the Federal government was formed, we are one people, with one common country.’<sup>96</sup>

That is to say that “we, the people” have multiple political identities. Our States have complex interacting sovereignties and our citizens have complex interacting political capacities. I am inclined to side with Justice Kennedy over Justice Stevens. The Constitution was ratified only once. In the moment of ratification, political power didn’t flow one way or the other. The political power of the people was singular, more or less mixed together—as in a stew. And “we, the people” ladled it out to different agents for different purposes.

There’s much to be admired here. Surely the people have a right to see their governments work independently within the proper bounds of their respective constitutional charters without troublesome meddling from their counterparts at the other level, yet equally surely, all power is not fractured, with the federal government and the States locked into a struggle for shares of the original delegation. I’m reminded of Professor Amar’s suggestion that the States are meant to fight against the federal government for the rights of the people.<sup>97</sup> And Professor Pettys’s article about “federalism’s forgotten marketplace”—competition for hearts and minds.<sup>98</sup> There’s something here that is intellectually more appealing than Justice Stevens’s unitary government and Justice Thomas’s

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<sup>95</sup> *Term Limits*, 514 U.S. at 804 (emphasis added).

<sup>96</sup> *Term Limits*, 514 U.S. at 840 (citing *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969) (which in turn quotes *The Passenger Cases*, 48 U.S. 283 (1849) (Taney, C.J., dissenting) and cites *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 43 (1868) (“The people of these United States constitute one nation” and “have a government in which all of them are deeply interested”)).

<sup>97</sup> Akhil Amar, *Of Sovereignty and Federalism*, 96 YALE L. J. 1425 (1987).

<sup>98</sup> Todd Pettys, *Competing for the People’s Affection: Federalism’s Forgotten Marketplace*, 56 VANDERBILT L. REV. 329 (2003).

fractured government. Law, like life, is complicated, and we shouldn't expect the arrows of power and delegation to point all in one direction.

Regards,  
S.M.

Steve,

Be that as it may, none of this provides any guidance to courts. I'll hold off on commenting about Justice Kennedy for a bit. Justice Stevens's view in *Term Limits* that the States have no power over qualifications rests ultimately on the conclusion that the Constitution did not "delegate to" the States the power to govern elections to federal office. There are two possible explanations for this conclusion: (1) that the specific history of the qualifications provisions of the Constitution supports an exclusive federal power (quite apart from the way other power-granting provisions of the Constitution might be read); or (2) that as a general rule all matters lying in the "shadow" of any federal power (implied powers?) should be read as part of the federal power itself, thus pre-empting State power, in the absence of delegation. Stevens, frankly, does not make the case for alternative (1). Yet alternative (2) seems, to me, to be untenable and flatly inconsistent with broad areas of doctrine, such as *McCulloch*, the Commerce Clause, and the negative Commerce Clause cases, which are the stuff of balancing and policy and necessity, and not of rules based strictly on philosophical definitions of power. Moreover, the idea of "implied powers" (except in *Curtis-Wright*<sup>99</sup> by some accounts) has never been accepted by the Court and was, as I recall, pretty clearly rejected by the framers.<sup>100</sup>

Justice Stevens's idea that "we, the people" as a whole granted, effectively, all powers to the federal government except for a (largely federally determined) residuum of uncertain impliedly delegated authority (not sovereignty) to the States seems historically and politically untenable, just as Justice Thomas's opposite view is untenable. Enumeration, instead, consists of a workable and instrumental form of limitation on power, not as a manifestation of sovereignty. Of course I've overstated Justice Stevens's view. But not unfairly, I think, and for what it's worth, doing so makes my point more graphically. More basically, I'm struck by how irrelevant both Stevens's and Thomas's two source-of-power constructs are to the result of the case. If Justice Stevens's view is right, that conclusion does *not* mean that unlimited congressional tenure is part of the implied exclusive federal power. If Justice Thomas is right, that does *not* mean that qualifications exclude length of service and thus lie within his pro-State default rule. The constructs, to be sure, lend a certain background air to the decisions, but nothing really specific to the resolution of the issue presented.

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<sup>99</sup> *United States v. Curtis-Wright Export Corp.*, 299 U.S. 304 (1936).

<sup>100</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

Add to this the fact that, practically if not politically and constitutionally, neither the federal government nor the States look anything like the constructs present them. In fact, in practice, and in historical pattern, our system of federal and State governments cannot be described as consisting of one sovereign and a bunch of delegees. Both are, or are not, sovereign in some ways. Both are repositories of direct will from their respective polities. And in the case of the federal government, where the representatives, while federal in duty, are elected locally, and where, until the Seventeenth Amendment,<sup>101</sup> Senators were distinctly State agents, the pattern of sovereignty is deeply ambiguous. Process-based, one might say, rather than power-based.

As for Justice Thomas, it seems to me that he has the better of the historical interpretations, but in the end his interpretation doesn't compel his default rule: literal and narrow reading of federal power with the federal government as the delegee. Instead, it reflects the fact that at the beginning both governments were to be "sovereign" in unforeseen ways, and to some extent each would have to muddle through with the other against that background. The job was to transcend differences of the narrow and regional sort in order to *make a nation*. To decide the case on abstract constructs that do not at all flow from the history, on default rules, and on the presence or absence of pre-existing power, seems, well, silly and unnecessarily ideological.

So I confess: I have a growing, healthy skepticism about pure principle and coherent philosophy when it comes to "federalism" and its meaning. So I have a dispute with both you and Justice Kennedy. It's all too far removed from practicality. We can *say* that there's dual sovereignty, but it doesn't change anything. That Statement doesn't explain much of the Constitution. Remember that the framers were practical men. Maybe when it comes to federalism and sovereignty there was no overarching conception, but instead a set of practical, yet untested, structures that were conducive to limitation of power and a search for accommodation and adjustment to change over time.

Sincerely,  
R.B.

Professor Bezanson,

I'm not quite willing as you are to dispense with sovereignty rhetoric completely. Surely the idea of sovereignty is relevant. Surely the liberal Justices now on the Supreme Court have done less than they might to offer a compelling countertheory of State sovereignty. But I think something more can be said for their general approach of balancing federal and State interests across the board. If we adopt Justice Kennedy's way of thinking, there's no need to say that the States

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<sup>101</sup> U.S. CONST. Amdt. XVII § 1 ("The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years ....").



get table scraps. Rather, “the people” are the ultimate source for *both* federal and State sovereign power.<sup>102</sup> They freely elect to entrust some of it to the federal government and some to State governments. The symbol of that delegation is the Constitution's text. Neither the federal nor State governments need be superior. Neither need possess ultimate sovereignty. What we have, rather, is sovereignty divided.

It's true that all limits on federal power are enumerative. But it does not follow that State and federal power see-saw with one another. If that were true, it would be as if the source of State constitutional power were federal enumeration.<sup>103</sup> The same people underlie both federal and State power, but the powers of each are conceptually independent of one another. The fact that time and technology have elevated this constitutional provision above the others is an argument for amending the Constitution, not bootstrapping abstract principles of federalism into constitutional law. Thus nowadays State sovereignty may not mean very much in practical terms, but it remains unchanged. Nothing about the *concept* of State sovereignty guarantees that it retains, or should retain, its once strong practical importance as time progresses. I think you agree. But if you do, I just don't see how you can avoid conceding that some complex Kennedy-style approach to sovereignty is valid.

Regards,  
S.M.

Steve,

Now we're getting somewhere! The subject is sovereignty and whether it has any real or consistent meaning—and perhaps whether it *should* have any meaning in the Twenty-first Century. Let me start us again from the foundations. We want to get a handle on the essential nature of the relationship between the federal and State “sovereigns.” What, precisely, *is* the union? And what are the

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<sup>102</sup> For a compelling explanation of this theory and the corporate law metaphor, see Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. at 1425.

<sup>103</sup> Enumeration itself is not a source of State power. As an empirical matter, most limitations on federal regulatory authority give the States freedom to experiment. But nothing about the *concept* of federal enumeration compels this. The State could have limited and enumerated powers as well. In some instances, they clearly do. If the Constitution permits the federal government, and only the federal government, to engage in some *class* of regulatory actions, then an enumeration-based prohibition on some group of actions within that class does not function as a grant of authority to the States. The treaty power is the clearest example. A limit on the treaty power based on a new interpretation of the word “treaty” is not a grant of power to the States. The Constitution expressly forbids States to make treaties with foreign powers, U.S. CONST., Art. I., § 10, cl. 3. The same ought to be true of the Commerce Clause, and indeed of all federal powers. The danger *Morrison*-type reasoning poses on this front is that this insight will be lost. We think that's how the dissenters in *Term Limits* got it wrong. They failed to analyze the questions of federal and State power as conceptually independent.

ground rules for dispute resolution? The concept of sovereignty matters here, but in the *United States Reports*, it is selective, perhaps inconsistent, and wears many faces. The Commerce Clause cases are cases about sovereignty only in the weak sense that the constitutional device of enumeration is a form or manifestation of sovereignty. Which, of course, on some level it is. The truism that federal sovereignty is confined to those powers assigned to the federal government (some of which are shared with others: State, other public actors, private parties, and individuals; some of which are concurrent with rival, but subordinate, powers in the States) is, after all, true. So *Lopez* and *Morrison* are about sovereignty, but in a largely indirect sense: the content of federal power, which is supreme when possessed, and the interests of the losing party if that power is exceeded.

The sovereignty question gets considerably more interesting when one shifts focus to intergovernmental immunities, and specifically to regulatory immunities. It was here that the Court tried to define the meaning or content of sovereignty in a long line of cases culminating in *National League of Cities v. Usery*.<sup>104</sup> There the Court effectively defined the minimum of sovereignty as a State possessed of some measure of policy-making discretion at the legislative level, responsible to its polity and acting in the polity's interests; a modicum of executive power and discretion independent of control by the federal sovereign; and judicial authority over a range of subjects not subject to federal oversight, by judges not subject to federal employment mandates.<sup>105</sup> And finally, and perhaps more importantly, a measure of power of self definition—or in an anthropomorphic mode, some free will. The terminology employed by the Supreme Court in service of this vision of sovereignty is too convoluted to warrant extended recitation here—consisting as it does of “traditional functions” and such inescapably vague terms.

In *Garcia*, of course, the Court pitched this stuff out and elected instead to adopt a process-based or “structural” definition of Statesovereignty. It did so to everyone's, but especially liberals', relief. States are entitled to participate in the decisions of the federal sovereign, both by acting as a federal agent—a Senator from a State, a signator to a compact, etc.—and as a lobbyist or advocate able to persuade, or threaten, other federal actors. The States, in a word, are *part* of the federal sovereign. The idea we're grasping at is somewhat like the idea of one's forming a partnership with a corporation owned entirely by oneself. This is a bit strange, or at least a bit at odds with a view of States and the federal government as *separate* sovereigns, since one sovereign (federal) consists in part of the other. It is hard to think of superior and subordinate relationships when the States are

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<sup>104</sup> 426 U.S. at 833.

<sup>105</sup> See *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (absent “plain Statement” in law, federal age discrimination act can't be applied to Statejudges ).

both subordinate and superior. But that is an argument against the rhetoric of dominance and antagonism more than it is a principled critique of the complex conception of sovereignty at work in *Garcia*.

*Garcia* is strange from a purely ideological perspective, because it assigns decision-making power to federal and State governments by setting up “rules of the game” for a competition. At the same time it muddles the true identity of the prevailing sovereign because the subordinate or “other” sovereign (the State) is itself a part of the federal sovereign. Can it be that in this sense the “true” or pure independent sovereign is the State? Perhaps. But *Garcia*, it seems, is more than a decision that lays the procedural ground rules for conflict or cooperation. It recognizes the federal sovereign as unique, truly *dual in itself*, and therefore not limited by substantive areas of authority. Its acts are the acts of the State sovereigns—the acts of the *united States*.

There are other aspects of the intergovernmental immunity question, however, and it is not altogether clear that they follow the same patterns. First, there is immunity from suit: the Eleventh Amendment and all the variations of the theme. When can one sovereign bring another to heel under its law, privately enforced; or in the second sovereign’s own courts; or even by the first sovereign in its courts?<sup>106</sup> In relation to the States, the answers to these questions, if we take them to lie in the nature of sovereignty, seem all and ultimately to rest on dignitary interests: the indignity of a State being held liable to individuals in the courts of the other sovereign; the indignity of a State being subjected to paying damages assessed under the law of the other, federal sovereign, even (or especially) in the State’s own courts. Forced self-flagellation, that! If one runs these ideas out to their logical extremes, one can claim that the States sovereign should not be subject to suit enforcing federal law against it even if the plaintiff is the federal government itself.<sup>107</sup> Being subject to regulation by the federal government is one thing; being forced to comply in court is another. The indignity of it all!

The immunity works the other way, too, both at the judicial/jurisdictional and the regulatory (and taxing) level. But my sense is that the basic reason for this lies elsewhere than dignity. It lies instead in power and supremacy. There is no doubt that when the federal government acts within its power, it acts as a whole that excludes anything else, particularly regulation at the hands of the States. The Supremacy Clause doesn’t provide much explanation. After a brief foray or two into language of reciprocity (States can’t tax the federal government

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<sup>106</sup> U.S. CONST., Amdt. XI. See, e.g., *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *Alden v. Maine*, 527 U.S. 706 (1999); *Kimel v. Florida Board of Regents*, 120 S.Ct. 631 (2000).

<sup>107</sup> An extreme that the Supreme Court has quite explicitly rejected, *Alden*, 527 U.S. at 755 (citing *Monaco v. Mississippi*, 292 U.S. at 328-29) (act of ratification waived immunity to suit by federal government).

and likewise the federal government can't tax the States – even State employees at one point<sup>108</sup>), all pretense of reciprocity fell away, and the immunities rule became the Supremacy Clause writ large.<sup>109</sup> As with preemption,<sup>110</sup> States have no power to tax the federal government or its instrumentalities, but the federal government can, if it chooses, tax the States and their instrumentalities.

So in this area of immunities, sovereignty talk whirls around the States. But it must be a strange kind of sovereignty: very limited in reach in view of the Supremacy Clause and very specific its definition of sovereignty. Is this the explanation for all of the “dignity” and “respect” talk? I think States deserve respect as governments—and fear, too—as do all governments.<sup>111</sup> Other governments should deal with the States carefully. I dislike self-flagellation, compelled or not. But even with all of that, I fail to see where the idea that dignity is the theme tying all of these things together came from, and what dignity has to do, really, with a government that should be obeyed because it has power, and feared for that reason too. Dignity may be part of the myth of royalty, but States are there to serve *us*, to respect *us*, not the other way around. There may be really good reasons for limiting suits against States, but I don't see them as related to dignity or even to sovereignty, as opposed to practical governance and public policy. Under this view, the Eleventh Amendment emanates no penumbras, but just plain words that must be obeyed, and no more.

Let me add a final word, or perhaps a final nail in the coffin, for “dignity” under the Eleventh Amendment. Think of *Ex Parte Young*.<sup>112</sup> When the States violate federal law, don't sue them directly for money damages. Instead sue the State officers, in their official capacity for equitable relief, and in their private capacity for money damages.<sup>113</sup> This hardly comports with the States' “dignity,”

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<sup>108</sup> *Dobbins v. Comm'rs*, 41 U.S. (16 Pet.) 435 (1842) (State tax on a federal officer's salary); *Collector v. Day*, 78 U.S. (11 Wall.) 113 (1871) (federal tax on salary of State judge).

<sup>109</sup> E.g., *South Carolina v. Baker*, 485 U.S. 505 (1988) (sustaining federal income tax on selected State and local municipal bonds).

<sup>110</sup> See note 30, *supra*.

<sup>111</sup> Leaving open the question whether fear should be thought of as the very basis of American government. See John Adams, *Thoughts on Government* (Boston, 1776), rpt. In Charles Hyneman and Donald Lutz, eds., *AMERICAN POLITICAL WRITING OF THE FOUNDING ERA* 401, 402 (Liberty Fund 1983) (“Fear is the foundation of most governments; but it is so sordid and brutal a passion, and renders men in whose breasts it predominates so stupid and miserable, that Americans will not be likely to approve of any political institution which is founded on it”); available online at: [http://www.pbs.org/wgbh/amex/adams/filmmore/ps\\_thoughts.html](http://www.pbs.org/wgbh/amex/adams/filmmore/ps_thoughts.html) (last accessed 20 February 2006).

<sup>112</sup> 209 U.S. 123 (1908) (holding that State sovereign immunity does not relieve Attorney General of Minnesota from duty to comply with prospective equitable orders to comply with federal law).

<sup>113</sup> *Alden*, 527 U.S. at 757 (1999) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 237-238 (1974); *Ford Motor Co. v. Department of Treasury of Ind.*, 323 U.S. 459 (1945)) (“Even a suit for money damages may be prosecuted against a State officer in his individual capacity for unconstitutional

and indeed it is arguably a greater indignity to bring a State's governor or legislators, for example, to answer personally for choices made (and, it should be noted, protected by eloquently waxed language in *Usery*<sup>114</sup>) on behalf of the State. The State, after all, is but the collection of people and their choices in governance at any point in time.

Another more recent version of intergovernmental immunities is the "commandeering" rule: the federal government cannot employ the State coercively as its agent to formulate, enforce, or adjudicate federal policy (except, with adjudication, for the Supremacy Clause<sup>115</sup>). Commandeering is *Garcia*-like: non-substantive and wholly procedural or structural, "Cross the line and you're out." But it *is not* a rules of negotiation or participation doctrine, as *Garcia* seems to be. It is instead a line in the sand. There is no balancing of State and federal or public interests here.<sup>116</sup> It is, rather, a formal rule with a winner declared if the rules are violated. Indeed (and evocatively), it is not even clear that a State can agree to be commandeered, for the vice is the federal government's misbehavior in making policy without the stomach actually to confess to it and carry it out. What's going on here? Is it indignity visited on the State or is it punishment visited on the federal government for overreaching? Is it the presence of State sovereignty or the absence of federal sovereignty? If it's the former we're back in the land of kings and dignity as the meaning of sovereignty. If the latter we are in the rules-laid down territory: sovereignty means simply what one can and cannot do, and has no larger meaning.

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or wrongful conduct fairly attributable to the officer himself, so long as the relief is sought not from the State treasury but from the officer personally")

<sup>114</sup> *Usery*, 426 U.S. at 854-55 ("... we have reaffirmed today that the States as States stand on a quite different footing from an individual or a corporation when challenging the exercise of Congress' power to regulate commerce," a power which "Congress may not exercise that power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made. We agree that such assertions of power if unchecked, would indeed, as Mr. Justice Douglas cautioned in his dissent in [*Maryland v.*] *Wirtz*, allow 'the National Government (to) devour the essentials of Statesovereignty,' 392 U.S., at 205, 88 S.Ct., at 2028, and would therefore transgress the bounds of the authority granted Congress under the Commerce Clause. While there are obvious differences between the schools and hospitals involved in *Wirtz*, and the fire and police departments affected here, each provides an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens. We are therefore persuaded that *Wirtz* must be overruled").

<sup>115</sup> U.S. CONST. Art VI, cl.2; *Testa v. Katt*, 330 U.S. 386 (1947). See also *Gregory*, 501 U.S. at 452 (which avoided the question whether to extend commandeering to State judges by finding that absent "plain Statement" in law, federal age discrimination act cannot be applied to State judges, and refusing to find such a Statement in the ADEA).

<sup>116</sup> *Printz v. United States*, 521 U.S. 898 (1997) ("where ... it is the whole object of the law to direct the functioning of the State executive, and hence to compromise the structural framework of dual sovereignty, ... a 'balancing' analysis is inappropriate").

Regards,  
R.B.

Professor Bezanson,

I agree that defining sovereignty by referring to dignity isn't of much help. It is, as you suggest, at some level about rules. What else would a legal concept of sovereignty be? Actually, Daniel Farber's book, *Lincoln's Constitution*, helpfully explores the question of federal/Statesovereignty in its connection to secession and the Civil War. His contends that there are at least three persistent variations on the theme of State sovereignty: (1) President Abraham Lincoln's and Senator Daniel Webster's strongly nationalistic view that the union was created the very instant "we, the people" of the united colonies declared ourselves to be independent of the King of Great Britain, and that an undivided American people collectively ratified the present Constitution and created a fully sovereign national government; (2) a moderated, transformative view, under which the whole people created a government sovereign for some purposes but not for others—the States were connected for certain purposes prior to 1789, but retained their separate identities, which persisted in some form after ratification, and which persist weakly to this day; and (3) Senator John C. Calhoun's strongly decentralized view that the States retained their full sovereignty after ratification because the Constitution was ratified by the people in their capacities as citizens of particular States, there is no undifferentiated American people and the States retain enormous constitutional significance *as States*.<sup>117</sup>

Fair enough. Farber argues that "each of the three positions regarding sovereignty can find some support in the historical record."<sup>118</sup> "[T]he ambiguity of the historical record is more of a problem for staunch States' rights advocates like Jefferson and Calhoun than for nationalists like Hamilton and Lincoln."<sup>119</sup> Why? The "sweeping powers" of the government under the Constitution of 1789.<sup>120</sup> States' rights advocates have to argue uphill. Be that as it may, Jacksonian Democrats still "succeeded in paring federal activities to a bare minimum."<sup>121</sup> Thus, there is a political dimension to sovereignty talk. Or, in our parlance, a substantive dimension. "In practical terms," Farber claims, "the key issue was not sovereignty but power."<sup>122</sup>

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<sup>117</sup> Daniel Farber, *LINCOLN'S CONSTITUTION* 30-33 (University of Chicago Press 2003).

<sup>118</sup> Farber, *LINCOLN'S CONSTITUTION* 43.

<sup>119</sup> Farber, *LINCOLN'S CONSTITUTION* 44.

<sup>120</sup> *Id.* ("Nationalists had to do little more than take the document at its word, with some added support from the *Federalist Papers* and from the early decisions of the Supreme Court").

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

And that's it, isn't it? It's not that sovereignty is metaphysical. So is God's existence, but surely that's an important question. It's that sovereignty and its *locus* have political importance. The federalist view was expressed strongly in *Marbury* and *McCulloch*. Lots of pretty phrases about "we, the people" and the majesty of the Constitution.<sup>123</sup> But I also have the sense that Statesovereignty can be discussed with alternative political tropes, as an expression of a certain kind of democracy. In many ways, the federal government is not especially democratic<sup>124</sup>—indeed, in *Garcia* the Supreme Court cites theundemocratic features of the federal Constitution, the Senate, the Electoral College, and the like, to proclaim that the federal political process adequately protects the States. The federal Constitution structures the legislative process so that federal politicians must cater to geographic and economic interests.

The States, by contrast, have a kind of democratic flavor. "Dignity" talk casts the State legislatures as democratic in roughly the same way that parliamentary systems are supposed to be democratic—purely majoritarian. The concept of representation at work is quite literal—it is what Hannah Pitkin called "descriptive representation."<sup>125</sup> The State government literally resembles the people, as the image in a mirror resembles a person.<sup>126</sup> Thus, the dignity is the dignity of the very people. No sophisticated layers of federalism, no Byzantine separation of powers, just majoritarianism. Thus the literal *indignity* that, for conservatives, is heaped upon the people by the Supreme Court's decision to strike down a law in the name of individual rights. Controversial individual rights cases like *Locke v. Davey*<sup>127</sup> and *Lawrence v. Texas*<sup>128</sup> are federalism decisions every bit as much as *Printz* and *Garcia*, in the sense that in those cases the Supreme Court decides whether to impose federal constraints on State-level

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<sup>123</sup> See generally Edmund S. Morgan, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* (W.W. Norton 1988) (an incredibly insightful exploration of the history of the concept of popular sovereignty in the Anglo-American tradition).

<sup>124</sup> See, e.g., Robert Dahl, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* (Yale University Press 2003) (answer: not very).

<sup>125</sup> See generally Hanah Pitkin, *The Concept of Representation* 60-91 (University of California 1967) (discussing the concept of "descriptive representation" in which the government represents the people because it literally represents, or describes the people—obviously, this is not the concept of representation at work in the federal Constitution).

<sup>126</sup> Pitkin, *The Concept of Representation* 72.

<sup>127</sup> *Locke v. Davey*, 540 U.S. 712 (2004) (upholding limitation for minister training in Washington scholarship program in order to afford States give in "the joints" of Establishment Clause jurisprudence).

<sup>128</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down Texas's criminal prohibition of homosexual sodomy on substantive due process grounds, without explicitly classifying a fundamental right).

majoritarian decision-making. Thus my fascination with Justice Chase's ruminations in *Calder v. Bull* on the nature of republican government.<sup>129</sup>

Justice Chase rejected what the partisans of State dignity embrace: the idea that State government simply is majority rule in areas without federal preemption. That is emphatically what the federal government is not. One can State the matter in reverse: are State governments bounded by enumeration, cabined by constitutional restrictions, and subject to federal imposition?<sup>130</sup> Should they be?<sup>131</sup> Or are they like imperfect Parliaments, with defeasibly complete legal supremacy? My own thinking is that Justice Chase shouldn't be cast aside. His opinion in *Calder* is written in the language of the great constitutional cases: *Brown v. Board*, *Griswold v. Connecticut*, *Eisenstadt v. Baird*, *Cohen v. California*, *Roe v. Wade*, *Texas v. Johnson*, *Planned Parenthood v. Casey*, and *Lawrence v. Texas*.<sup>132</sup> I think we should take Professor Randy Barnett's libertarian critique<sup>133</sup> of the very concept of unlimited police powers seriously, regardless of whether we accept it.

Majoritarian dignity doesn't compel the holdings of many (if any) of the federalism cases,<sup>134</sup> but it is an animating value. Perhaps it provides a motivation to read federal power narrowly because, given the extreme importance of *vox populi*, the framers and the ratifying population would never have wanted enumerated powers to extend to *this* or *that* area. The dignitary concept of federalism is defined vaguely, that's almost the point. The vague rhetoric doesn't control the growth of legal doctrine. Rather, it informs pedestrian forms of legal analysis. In a certain light, the logic of the Eleventh Amendment cases works exactly like the logic of the Commerce Clause cases: enumeration controls in one

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<sup>129</sup> 3 U.S. 386 (1798) (stating a view of unarticulated, natural law, limits on government action.); see note \_\_, *supra*.

<sup>130</sup> Ironically, *interposition* might be the better term.

<sup>131</sup> We pause to note for those who embrace the Eleventh Amendment cases but reject the individual rights cases we have cited here that The Ninth Amendment can function as a hook for extratextual principles of individual liberty in the same manner as the Eleventh Amendment; it reads ("Nothing in this Constitution shall be construed ....") exactly as the Eleventh Amendment does ("The judicial Power of the United States shall not be construed ....").

<sup>132</sup> *Brown v. Bd. of Education (Brown I)*, 347 U.S. 483 (1954); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Cohen v. California*, 403 U.S. 15 (1971); *Roe v. Wade*, 410 U.S. 113 (1973); *Texas v. Johnson*, 491 U.S. 397 (1981); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Lawrence*, 539 U.S. at 558.

<sup>133</sup> See Randy Barnett, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (Princeton 2004).

<sup>134</sup> *Alden v. Maine* is the most likely candidate. The language of the Supremacy Clause seems clear ("... and the Judges in every State shall be bound [by the "Constitution and the Laws of the United States"], any Thing in the Constitution or Laws of any State to the Contrary notwithstanding"). Presumably, State common law sovereign immunity against suit in State court is a "Thing in the ... Laws of any State."



area, and the Eleventh Amendment's gloss on Article III controls in the other. The Supreme Court's federalism is one of form, not substance.

That said, I don't know what to make of *Printz*. I suspect, however, that you're right. To me, the case seems to be more about congressional overreaching than it is about abstract State sovereignty. For that reason, *Printz* seems to me to be an aberration—judicial regulation of congressional hubris at the outer edges of generally plenary federal commerce power. The core problem seems to me to be much larger—what is it around which *Printz* orbits? The rationale behind *Garcia* and Justice Blackmun's rules-of-the-game approach is almost as much of a moving target as sovereignty. It seems to me that the teaching of *Garcia* is that the presence of the State in the federal decision-making process insulates federal decisions from charges of tyranny, or heavy-handedness, in the administration of (assumedly legitimate) federal powers. This plays on themes of procedural justice.<sup>135</sup> It's almost consideration or unconscionability. Congress can't get more than it bargains for.

I think we're approaching a kind of general theory of federalism. Perhaps we can even explain the votes of a moderately conservative Justice, such as Justice Kennedy. We can reimagine *Lopez*, *Morrison*, *New York v. United States*, and *Printz*, as cases in which Congress got more than it bargained for. We can reimagine *Garcia*, *Term Limits*, and (perhaps) *Raich* as cases in which it did not. And to the extent I am troubled by *Raich*, it's because I doubt that if Congress had to reenact the Controlled Substances Act today, it could do so without granting an exemption for intrastate medical marijuana use. If the prohibition survives solely by inertia, without any input from the people in democratic *fora*—State or federal—then something has gone wrong.

Sincerely,  
S.M.

#### IV. PLAIN TALK: CONGRESS'S DUTY TO SPEAK FOR THE PEOPLE

Steve,

Intriguing. But I assume that you're not proposing a doctrine to rival the Court's holding in *Raich*. It's hard to see what that would be. Rather, I take it you're expressing discomfort with Congress's exercise of its power rather than its existence—it's almost like you're saying something about the values implicit in

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<sup>135</sup> See John Rawls, A THEORY OF JUSTICE 83-90 (Belknap Press of Harvard University Press 1971), for an enlightening discussion of concepts of procedural justice in the context of Rawls's earlier thinking on equality of opportunity.

the Presentment Clause.<sup>136</sup> I gather from what you're saying that you approve of sunset provisions. When something's in doubt, put it up for a vote.

I think there are cases that support what you're saying in the federalism context. There's the clear statement rule of *Gregory v. Ashcroft*.<sup>137</sup> The same is true of the similar rules of *Edelman v. Jordan* and *Atascadero State Hospital v. Scanlon*.<sup>138</sup> Also think about the recent decision in *Gonzales v. Oregon*.<sup>139</sup> Technically, it's about administrative law. In 2001, Attorney General John Ashcroft promulgated a regulation stating that prescribing certain Schedule II controlled substances for the purpose of assisting a terminally ill patient to end his or her life is not a "legitimate medical purpose" within the meaning of the detailed federal statutes and regulations that permit licensed physicians to prescribe controlled substances.<sup>140</sup> Oregon's Death With Dignity Act was enacted by a voter initiative in 1994.<sup>141</sup> It proscribes certain procedures under which Oregon physicians may lawfully distribute or prescribe, but not administer, the same drugs.<sup>142</sup> Justice Kennedy's opinion for the Court refused to show deference to the Attorney General's interpretation of the Controlled Substances Act or pre-existing federal regulations,<sup>143</sup> but also addressed the substance of the Attorney General's interpretation of the statute.<sup>144</sup>

Justice Kennedy stated unequivocally that Congress could preempt Oregon's law,<sup>145</sup> but argued that the Controlled Substances Act "manifests no intent to regulate the practice of medicine generally."<sup>146</sup> Better still, Justice Kennedy stated:

Just as the conventions of expression indicate that Congress is unlikely to alter a statute's obvious scope and division of authority through muffled hints, the background principles of our federal system also belie the notion

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<sup>136</sup> U.S. CONST. Art. I, § 7, cl. 2 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; he approve he shall sign it, but if not he shall return it ..."); see *Clinton*, 524 U.S. at 417.

<sup>137</sup> See *Gregory*, 501 U.S. at 452 (absent "plain Statement" in federal law, federal age discrimination act can't be applied to State judges).

<sup>138</sup> *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985); *Edelman*, 415 U.S. at 651.

<sup>139</sup> *Oregon*, 126 S.Ct. 904 (2006).

<sup>140</sup> *Oregon*, 126 S.Ct. at 913, 915, 918.

<sup>141</sup> *Oregon*, 126 S.Ct. at 912.

<sup>142</sup> *Oregon*, 126 S.Ct. at 912-13.

<sup>143</sup> *Oregon*, 126 S.Ct. at 914-922 (discussing whether to provide deference under *Auer v. Robbins*, 519 U.S. 452 (1997) and *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) and deciding to extend no deference).

<sup>144</sup> *Oregon*, 126 S.Ct. at 922.

<sup>145</sup> *Oregon*, 126 S.Ct. at 923.

<sup>146</sup> *Id.*; *Oregon*, 126 S.Ct. at 939 (Thomas, J., dissenting).

that Congress would use such an obscure grant of authority to regulate areas traditionally supervised by the State's police power. It is unnecessary even to consider the application of clear statement requirements, [citations omitted] or presumptions against preemption, [citations omitted] to reach this commonsense conclusion.<sup>147</sup>

It's hard to pin down that this means. The Ninth Circuit cited *Gregory* to impose a clear statement requirement on the Attorney General.<sup>148</sup> And it's also worth noting that at one point "[l]egislation was ... introduced to grant the explicit authority" that Attorneys General Ashcroft and Gonzales asserted against Oregon, "but it failed to pass."<sup>149</sup>

What does *Oregon* mean? It's impossible to say with any precision. But it seems that something like your discomfort with politicians' free riding off of pre-existing preemption is alive and well on the Court.

Enthused,  
R.B.

Professor Bezanson,

You raise an excellent point. But the result wasn't the same in the Supreme Court's recent decision in the internet winery case, *Granholm v. Heald*, where the Supreme Court struck down State winery regulations under the dormant Commerce Clause.<sup>150</sup> Federal law preempted State law without Congress having to make *any* statement, much less a plain one. Justice Kennedy wrote the opinion in that case, too.<sup>151</sup> I'll grant that the Commerce Clause plainly puts *some* limits on the States' police powers. And these core limits should be enforced whether Congress speaks to the issue or not. But this is really a very narrow category of cases—State action inconsistent with the existence of the Commerce Clause. Perhaps even the union more generally. Indeed, something like this principle has been affirmed in other areas of the law—most dramatically when the Supreme Court struck down California's "anti-Okie" law in *Edwards v. California*.<sup>152</sup>

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<sup>147</sup> *Oregon*, 126 S.Ct. at 925.

<sup>148</sup> *Oregon*, 126 S.Ct. 914 (quoting *Oregon v. Ashcroft*, 368 F.3d 1118 (9th Cir. 2004) (in turn quoting *Gregory*, 501 U.S. at 460)).

<sup>149</sup> *Oregon*, 126 S.Ct. at 913.

<sup>150</sup> *Granholm v. Heald* 125 S.Ct. 1885 (2005).

<sup>151</sup> *Granholm*, 125 S.Ct. at 1895 (he argued that "[t]he rule prohibiting State discrimination against interstate commerce follows ... from the principle that States should not be compelled to negotiate with each other regarding favored or disfavored status for their own citizens," and that "[s]tates do not need, and may not attempt, to negotiate with other States regarding their mutual economic interests").

<sup>152</sup> See *Edwards v. California*, 314 U.S. 160, 174 (1941) (quoting *Baldwin v. G.A.F. Seeling, Inc.*, 249 U.S. 511, 523); see also *Saenz v. Roe*, 526 U.S. 489 (1999).

A discriminatory rule against interstate migration presents an easy case. The harder questions are of degree and extent—where to draw the line in the average Commerce Clause case. I suspect that here, too, the answer lies in *Garcia*. In most cases, *Garcia* should put the burden on Congress legislate if it wants to preempt unwise State regulation. Indeed, Justice Blackmun’s opinion in *Maine v. Taylor*<sup>153</sup> is very much in this vein. In *Taylor*, the Supreme Court upheld an outright ban on the importation of live, out-of-State baitfish in Maine ; Justice Blackmun’s opinion for the Court rested largely on the theory that Maine had legitimate concerns about the potential for foreign fish to introduce previously unknown diseases and parasites into Maine’s domestic stock.<sup>154</sup> “Not all intentional barriers to interstate trade”, he argued, “are protectionist . . . and the Commerce Clause ‘is not a guaranty of the right to import into a State whatever one may please, *absent a prohibition by Congress*, regardless of the effects of the importation upon the local community.’”<sup>155</sup> That’s the key, isn’t it? Surely the State’s interest matters, but there’s a structural point to be made. Congress unquestionably could defeat Maine’s ban, but until Congress legislates Maine “retains its broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources.”<sup>156</sup> And if Congress wants to displace Maine’s environmental policy, it should put it up for a vote.<sup>157</sup>

Justice Stevens, very much in the mode of muddying sovereignty, dissented in *Maine v. Taylor*; though he disclaimed any motive “to derogate the State’s interest in ecological purity,” he argued that “the State . . . should be put to its proof,” and “the invocation of environmental protection or public health has never been thought to confer some kind of special dispensation from the general principle of nondiscrimination in interstate commerce.”<sup>158</sup> That is consistent with our reading of *Raich*.

So while I must confess that personally my sympathies lie with the winery owners in *Granholm*, it’s clear to me that the Supreme Court’s holding in that case takes the pressure off Congress to hold a vote on winery regulation. In fact, the decision exercises federal power in a fairly opaque way. Congress actually has to *authorize* a State to enact laws that intentionally discriminate against out-

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<sup>153</sup> *Maine v. Taylor*, 477 U.S. 131 (1986); see also *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) for an earlier discussion of similar issues.

<sup>154</sup> *Taylor*, 477 U.S. at 137-38.

<sup>155</sup> *Taylor*, 477 U.S. at 149, n19 (quoting *Robertson v. California*, 328 U.S. 440, 458 (1946)).

<sup>156</sup> *Taylor*, 477 U.S. at 151.

<sup>157</sup> This is hardly a new concept. See *Mobile Co. v. Kimball*, 102 U.S. 691, 699 (1880); and *id.* at 701 (discussing *Cooley v. Bd. of Wardens of Philadelphia*, 53 U.S. 299 (1851)).

<sup>158</sup> *Maine v. Taylor* 477 U.S. 131, 152-153 (1986) (Stevens, J., dissenting) (emphasis added; paragraph break omitted).

of-State commerce, unless the State asserts a powerful interest.<sup>159</sup> And when Congress actually *wants* to preempt such laws, it gets to do so for free.<sup>160</sup>

Regards,  
S.M.

Steve,

Clever debating strategy. You know my sympathies for Harry Blackmun opinions.<sup>161</sup> I can't for the life of me understand why *Garcia* has fallen out of favor. *Garcia* was one of his best opinions, and has much significance here, for it reinforces the fact that Congress has the exclusive Commerce Power and the States can participate in its exercise. But Justice Blackmun was but one Justice, and he is, sadly, no longer on the Court. So, my question to you is: does the *Gonzales v. Oregon* and *Maine v. Taylor* theory of federalism have any life left in it on the modern Supreme Court? Granted, Chief Justice Roberts and Justice Alito are blank slates in this regard. But aside from undisciplined tealeaf reading about

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<sup>159</sup> See *Taylor*, 477 U.S. at 140 (“Maine’s ban on the importation of live baitfish thus is constitutional only if it satisfies the requirements ordinarily applied under *Hughes v. Oklahoma*[, 441 U.S. 322 (1979),] to local regulation that discriminates against interstate trade: the statute must serve a legitimate local purpose, and the purpose must be one that cannot be served as well by available nondiscriminatory means”); *Philadelphia*, 437 U.S. at 624 (“The crucial inquiry ... must be directed to determining whether [the statute] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental”); cf. *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970) (“Where the statute regulates even-handedly 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. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443, 80 S.Ct. 813, 816, 4 L.Ed.2d 852. If a legitimate local purpose is found, then the question becomes one of degree”).

<sup>160</sup> And what Congress gets can be valuable indeed. Consider Justice Souter’s similar arguments about local rights in another environmental case, *C&A Carbone v. Town of Clarkstown*, 511 U.S. 383, 421 (1994) (Souter, J., dissenting) (quoting *Garcia*, 469 U.S. at 556), where he dissented from the Supreme Court’s decision in that case to strike down a law establishing municipally owned waste collection and providing it with special rights. Chief Justice Rehnquist’s arguments in his dissent in the *Healy* case have much the same ring, *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 216-217 (1994) (Rehnquist, C.J., dissenting, joined by Blackmun, J.) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). Chief Justice Rehnquist focused on the notion of comity, in *Oregon Waste Systems, Inc. v. Dept. of Environmental Quality of State of Or.* 511 U.S. 93, 111-12 (1994) (Rehnquist, C.J., dissenting, joined by Blackmun, J.), where the Supreme Court invalidated yet another solid waste regulation. Chief Justice Rehnquist’s point is well taken: if comity means anything, it means not treating your neighbor as a garbage heap.

<sup>161</sup> Professor Bezanson worked as a law clerk for Justice Harry A. Blackmun in October Term 1972 (1972-73). He and Justice Blackmun maintained strong ties long after Professor Bezanson left his position as a clerk.

the larger story of *Gonzales v. Oregon*, can we learn anything from the other Justices?

Curious,  
R.B.

Professor Bezanson,

Well, there's Justice Thomas. He concurred in the judgment in the recent *American Trucking Associations* case, where the Supreme Court upheld a \$100 fee Michigan levies on intrastate commercial trucking under the Commerce Clause.<sup>162</sup> He argued that "[t]he negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application,' ... and, consequently, cannot serve as a basis for striking down a State statute."<sup>163</sup> Justice Scalia is somewhat more restrained. He concurred in *West Lynn Creamery v. Healy*, where the Supreme Court struck down a Massachusetts program under which the State collected mandatory fees from all sellers of milk in Massachusetts (some of whom were not from Massachusetts) for a fund to be distributed to all producers of milk in Massachusetts (all of whom were from Massachusetts).<sup>164</sup> Justice Scalia conceded that the Commerce Clause was written "to create a national market," but he argued that "[i]t does not follow from that ... that every State law which obstructs a national market violates the Commerce Clause. Yet that is what the Court says [in *Healy*]," and " ... this expansive view of the Commerce Clause calls into question a wide variety of State laws that have hitherto been thought permissible," including purely monetary subsidies.<sup>165</sup> Justice Scalia therefore announced that he "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>166</sup> And thus Scalia strives to

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<sup>162</sup> *Am. Trucking Ass'ns v. Mich. Pub. Serv. Comm'n*, 125 S.Ct. 2419 (2005); *id.* at 2426 (Thomas, J., concurring in the judgment).

<sup>163</sup> *Id.* (citations omitted).

<sup>164</sup> *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994).

<sup>165</sup> *Healy*, 512 U.S. at 207-208 (Scalia, J., concurring); *see also id.*, at 211-12 (footnote omitted) ("I would therefore allow a State to subsidize its domestic industry so long as it does so from nondiscriminatory taxes that go into the State's general revenue fund. Perhaps, as some commentators contend, that line comports with an important economic reality: A State's less likely to maintain a subsidy when its citizens perceive that the money (in the general fund) is available for any number of competing, nonprotectionist, purposes"). We assume that we may ignore the subsidy effects of the market participant doctrine, *see Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), for the purposes of Justice Scalia's concurrence. *See also Am. Trucking Ass'ns*, 125 S.Ct. at 2426 (Scalia, J., concurring in the judgment, citing to his *Healy* opinion).

<sup>166</sup> *Healy*, 512 U.S. at 210 (Scalia, J., concurring) (citations omitted).

“produce a clear rule that honors the holdings of our past decisions but declines to extend the rationale that produced those decisions any further.”<sup>167</sup>

Granted, Justices Scalia and Thomas haven’t embraced our broad, vague, and mushy preference for clear statements. But there’s something attractive about the transparency involved in their arguments, isn’t there? When you think about this position alongside his *Raich* concurrence, Justice Scalia is consistent—he rejects a broad dormant Commerce Clause and embraces a theoretically robust (and doctrinally sound) view of Commerce Clause power. I also think that Justice Kennedy wins a prize for consistency—he’s has somewhat consistently elaborated his views on divided sovereignty.<sup>168</sup>

One could argue that Congress’s power *affirmatively* to regulate national life through Article I, section 8 may be distinguished from, and should receive different treatment than, Congress’s power under the same Clause *negatively* to displace obnoxious State regulations. This seems to me, however, to be a distinction without a difference. To justify such an assumption, one must assume that Congress is simply not to be trusted with economic stewardship of the nation,<sup>169</sup> or that somehow Article I, section 8 is a grant of power to the Supreme Court rather than to Congress.

Regards,  
S.M.

Steve,

Maybe. I’m troubled, though. It’s almost like we have dueling default rules in the opinions. Perhaps we can State the problem as follows: unless the self-executing Commerce Clause is a default rule to which Congress has to give special exceptions (Justices Scalia and Thomas reject the principle outright, and surely Justice Stevens doesn’t mean to embrace it), there has to be a mechanism for resolving conflicts. But it doesn’t appear that Stevens has one, aside from the somewhat unhelpful proposition that the presumption must be toward the invalidity of discriminatory regulation. But transparency aside, I think the same goes for the conservatives. They adopt the opposite default rule. This isn’t very helpful because when there is *no* discrimination on the face a State statute (where

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<sup>167</sup> *Id.* (citations omitted).

<sup>168</sup> With respect to Justice Kennedy, *see, e.g., Term Limits*, 514 U.S. at 838 (Kennedy, J., concurring) (“The Framers split the atom of sovereignty”); *Granholm v. Heald* 125 S.Ct. at 1885; *Lopez*, 514 U.S. at 565 (Kennedy, J., concurring).

<sup>169</sup> Or, perhaps more precisely, not to be trusted not to resist the temptation to save political capital and garner political points in the States by refusing to displace State political settlements already won. Admittedly, Congress is the birthplace of collective action problems. Structural collective action problems, if proved to exist for a particular issue or range of issues, might change the analysis and justify Supreme Court intervention. An argument would need to be offered up, however, to show why *this* issue is different from *that* or *most* issues.

the *Pike v. Bruce Church* balancing test applies<sup>170</sup>), the question of the police power is not squarely presented. The *Pike* test is deferential to the States. But where the law is discriminatory, the States asserting one of its sovereign powers. There's a conflict here that has to be resolved somehow. And I hope there's more to ask than whether the State interest is important and whether it can be served by nondiscriminatory means.<sup>171</sup>

Before we move on, let me try to get to the bottom of these issues. First, let me try to restate briefly your analysis and interpretation, with some extrapolation of my own, perhaps. Negative Commerce Clause doctrine is both incoherent in many settings, especially beyond discrimination against interstate commerce. And, more importantly, it lacks textual or theoretical justification in the Constitution. It doesn't explain *why* State regulations that discriminate against or interfere with the national market should be (presumptively?) unconstitutional, either in terms of the States' governing authority (I prefer that to "sovereignty", which I deem a pretty useless term) or in terms of *Congress's* exclusive and enumerated power. The effect of broad judicial intervention is to cut Congress, the power-holder, out of the circle. And this is justified partly on the ground that Congress (these days) is not in a position to act. But Courts can.

In the abstract, at least, this is a remarkable and structurally destructive tautology. An alternative view, voiced in our exchange by Justice Blackmun, shifts the presumption of unconstitutionality in cases involving (here I generalize the view, which rests heavily on the environmental interests of States) a State's political actions designed to protect the health and welfare interests of its citizens even if the effect of such actions interferes with the national market and/or disproportionately burdens interstate commerce. In such cases the States exercising its police power—governing in the health and welfare interests of its population—which it is entitled to, and indeed must, do under the federal system established by the Constitution—*de facto*, not *de jure*.

Judicial preemption of such State regulations is unjustified for many possible reasons: (a) because the Judicial Branch does not have such broad Commerce Power; (b) because in doing so it invades the States' sovereignty, dignity, or, as I prefer, its practically essential governing power; (c) because judges don't have the knowledge or capacity to decide such "interference" questions and weigh the State's policies (or even ascertain them); or (d) because it cuts the federal legislative process out, making political compromises and settlements unlikely because the Court has already settled the matter.

It is the last point that's most interesting. *Garcia* suggests that negative Commerce Clause doctrine is not only cutting Congress out, but preempting a structural and valuable element of the Constitutional system that safeguards State

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<sup>170</sup> *Pike*, 397 U.S. at 137; see note 159, *supra*.

<sup>171</sup> See authorities cited in note 159, *supra*.



interests. To state our point briefly: the States' structural protections — opportunities for individual or collective defense of their interests in the Constitutional scheme—require *legislative* action at the federal level, accompanied by the procedural and substantive protections of States in that process (bicameralism,<sup>172</sup> nondelegation,<sup>173</sup> limits on federal administrative action,<sup>174</sup> presentment,<sup>175</sup> representation in the Senate for States,<sup>176</sup> and the like). If the judicial branch would stay out of most negative implications conflicts, the issues presented by State regulation could, *if deemed important to federal interests*, be taken up and negotiated with the States' participation in the House and Senate and the White House, the Constitutional *loci* of the power to regulate commerce among the States.

I find this view much more satisfying than appeals to “federalism” or “sovereignty.” It seems that every Justice has his or her own definition or intuition about federalism, from very little (Stevens, Ginsburg) to some (Kennedy, O'Connor) to everything (Thomas), with others lurking in the cracks. And I like your view's location in *Garcia* and the structural and procedural, rather than the substantive, language of Constitutional doctrine.

But questions abound. What is the counterpoint, if any, in Commerce Clause doctrine, to such a structural understanding from negative Commerce Clause doctrine? Here are some thoughts. In Commerce Clause doctrine, enumeration is the limit. But substantive justifications have always found their way into the analysis (federalism, Statesovereign interests, etc.) because enumeration-based formulaic limits, by themselves, can't stand without a background—presently vaguely substantive<sup>177</sup>—explanation. One answer is that *Garcia* is the limit here, too: process alone is the key, and as long as Congress follows the prescribed process (with its implications for cutting back on delegation, restricting executive lawmaking power, etc.), it can do what it wants. Indeed, Justice Souter made this very argument in *Morrison*, rooting his analysis in *Garcia* and the Seventeenth Amendment.<sup>178</sup> Yet that seems a bit unsatisfying

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<sup>172</sup> *Chada*, 462 U.S. at 919; see also *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Airport Noise, Inc.*, 501 U.S. 252 (1991).

<sup>173</sup> *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); see Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 Mich. L.Rev. 303, 336 (1999).

<sup>174</sup> *E.g.*, *Gonzales v. Oregon*, 126 S.Ct. 904 (2006); see notes 139-49, *supra*.

<sup>175</sup> *Clinton (The Line Item Veto Case)*, 524 U.S. at 417.

<sup>176</sup> U.S. CONST., Art. V (“... no State, without its Consent, shall be deprived of its [*sic*] equal Suffrage in the Senate”).

<sup>177</sup> *Morrison*, 529 U.S. at 615-616 (2000) (citing *Lopez*, 514 U.S. at 575-79 (Kennedy, J., concurring)); see note 17, *supra*.

<sup>178</sup> See *Morrison*, 529 U.S. at 649-52 (Souter, J., dissenting), arguing, among other things, that the Seventeenth Amendment, U.S. CONST. Amdt. XVII (“The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years ....”) and *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. at 528, altered the constitutional calculus,

and incomplete. As Chief Justice Rehnquist noted, the Congress is not a Parliament.<sup>179</sup> But without resort to “federalism” and “sovereignty,” there are alternative and narrower substantive limits: the words “commerce” and “among the States.” As to these things, the Judicial Branch can perhaps justify its judicial review power—a substantive terms-defining power, but not broader “federalism-” and “sovereignty-” based creative power. *Raich* seems very much to respect such a distinction, even if its holding isn’t clear on the face of the Court’s opinions.

Is the presence of such limited judicial power in the Commerce Clause setting the counterpart to the discrimination-line power exercised by the Court, and accepted by Scalia, in the negative commerce cases? Perhaps so. Such a view clearly makes some sense. But if so, what does the permissible reach of judicially-enforced negative Commerce Clause limits consist of? It surely can’t consist of “federalism,” or all is lost in the symmetrical analysis. And I doubt that it can consist of a definition of the “police power,” which really defies definition and in any event is not stated or conferred in the Constitution.

Here’s a thought. Instead of police power (or perhaps in recognition, but not constitutionalization, of it) the limit of State power is that a State may not *exercise* the commerce power in Article I, section 8, because the commerce power is exclusive. That’s the flip side of what Chief Justice Marshall said in the passage you’ve quoted from *Gibbons*. When *can* it be said that the State is exercising the commerce power? Certainly not in the instance you draw from *Taylor*. There, commerce is affected, even changed, but the aim of the law or regulation is purely local and undoubtedly a *bona fide* exercise of the State’s governing (police) power. This is so even if the regulation overtly discriminates against out of State commerce. But some regulations discriminate against out of State commerce with no other possible interest than giving State interests a commercial advantage over out of State interests —economic protectionism, in itself, is the means employed to achieve other putative interests which themselves are commercial—the milk cases versus quarantines to protect livestock from disease.<sup>180</sup> Such laws are unconstitutional unless Congress expressly adopts them as its own.

I’m not certain that this works as an explanation of the cases, but if it or some variant of the idea does work, it can set the boundary between valid and invalid State laws at the (judicially manageable) definitional level of whether the State is exercising the exclusive commerce power, rather than make it turn on whether federalism or sovereignty interests have been violated or insensitively

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and, in effect, remanded federalism disputes to the court of politics. Indeed, Chief Justice Rehnquist’s argument that Congress should be understood emphatically not to be like Parliament, *Morrison*, 529 U.S. at 616, n7; *see* note 33, *supra*, was made in response to this point.

<sup>179</sup> *Morrison*, 529 U.S. at 616, n7.

<sup>180</sup> *See, e.g. Taylor*, 477 U.S. at 131.

balanced. The federalism and sovereignty interests, instead, have been reflected in the balance struck in the Commerce Clause, as we have similarly suggested for the commerce power itself. More broadly we might posit that the sovereignty or federalism interests in much (all?) of the Constitution have been already balanced in the structural protections surrounding the exercise of federal power, *a'la Garcia*.

So much for federalism at large; there is no “brooding omnipresence in the sky.”<sup>181</sup> Federal supremacy means *federal* supremacy, not some larger theory of dual sovereignty that might, in a better world, prohibit commandeering and unfunded mandates. What are the implications of our emerging, largely practical and non-ideological, approach to “federalism” and “sovereignty” concepts in the Constitution? It seems to me that (1) the methodologies employed by both camps in the *Term Limits* opinion were erroneous, as no overarching principles about the source of power can or should be divined, must less applied, in the Constitution or its history (and, it may be added, neither overarching principle really resolved the issue in the case, which would be better addressed by text and history at the retail level); and (2) the operable conception of the Constitutional system was a melange of varying ideas and practical realities and known uncertainties that lay ahead, borne by, I suspect, a deep suspicion of “pure” theory, as acted out in the French Revolution.<sup>182</sup>

Federalism is an interpretive device, but not a freestanding one. Of the two models with which we began this exchange, we’re closer to model (2), the enumerated powers independent Statemodel, but we’re not entirely divorced from the spirit of model (1). We’ve seen that substantive theories of federalism and sovereignty have little explanatory force when we approach the document at any significant level of specificity. You keep reiterating your adherence to a complex, multilayered theory of sovereignty, but in law a theory of sovereignty that refers to everything governs nothing. Vague sovereignty has no specific meaning, except in one sense. It pushes us to see the Constitution is a rules-of-the-game document, a practical guide to representative government in a layered, federal, system produced by a political consensus that had pre-digested the varying strands of intellectual thought at the time. It is not a script intended to evoke and enliven judicial resort to larger political or philosophical ideas such as “federalism” or “sovereignty.”

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<sup>181</sup> *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) (“The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified; although some decisions with which I have disagreed seem to me to have forgotten the fact”).

<sup>182</sup> Alexander Bickel, *The Morality of Consent* 12-25 (1975). Discussion Edmund Burke’s *Reflections on the Revolution in France* (1790).

We need to think about the implications of generalizing this approach. Its value (as well as risk) would be experimentation (part of O'Connor's tetherless federalism in *Raich*); its justification, as with the Commerce Clause, would be enumeration and what it implies—the necessary resort to the structured political process to work out solutions if they are deemed necessary at the federal level.

Regards,  
R.B.

## V. UNION REVISITED

Professor Bezanson,

Well, let's not be too hasty. Maybe we can take another look at the idea of the union. It seems to matter to the Justices. In *Granholm*, Justice Kennedy put forward the odd assertion that the prohibition on outright interstate discrimination “is essential to the foundations of the Union. The mere fact of nonresidence should not foreclose a producer in one State from access to markets in other States.”<sup>183</sup> Rhetoric about the union is a commonplace in the dormant Commerce Clause cases.<sup>184</sup> But the rhetoric of union must be the beginning rather than the end of the inquiry. Obviously, some federally-imposed limitations on State regulatory powers are logically essential to the existence of the union. The Supreme Court can surely enforce sweeping preemption of State action without Congress's approval if alternative is political collapse and economic and military ruin—the very reasons for the Constitution's existence.<sup>185</sup> But except for State-

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<sup>183</sup> *Granholm* 125 S.Ct. at 1895.

<sup>184</sup> *E.g.*, *Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525 (1949); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935).

<sup>185</sup> *See Gibbons*, 22 U.S. at 223-224 (1824) (Johnson, J.) (“The strong sympathies ... which bound the States together during a common war, dissolved on the return of peace; and the very principles which gave rise to the war of the revolution, began to threaten the confederacy with anarchy and ruin. The States had resisted a tax imposed by the parent State, and now reluctantly submitted to, or altogether rejected, the moderate demands of the confederation. Every one recollects the painful and threatening discussions, which arose on the subject of the five per cent. duty. Some States rejected it altogether; others insisted on collecting it themselves; scarcely any acquiesced without reservations, which deprived it altogether of the character of a national measure; and at length, some repealed the laws by which they had signified their acquiescence. For a century the States had submitted, with murmurs, to the commercial restrictions imposed by the parent State and now, finding themselves in the unlimited possession of those powers over their own commerce, which they had so long been deprived of, and so earnestly coveted, that selfish principle which, well controlled, is so salutary, and which, unrestricted, is so unjust and tyrannical, guided by inexperience and jealousy, began to show itself in iniquitous laws and impolitic measures, from which grew up a conflict of commercial regulations, destructive to the harmony of the States, and fatal to their commercial interests abroad. This was the immediate cause, that led to the forming of a convention” (paragraph breaks removed; this appears as three paragraphs in original)); *see also Id.*, at 224-225.

imposed barriers to interstate travel and migration,<sup>186</sup> State negotiation of treaties and trade agreements with other States or with foreign nations,<sup>187</sup> nullification and interposition,<sup>188</sup> secession,<sup>189</sup> and the like, that principle doesn't compel many specific limitations on the State power.

Let me recast the question—we're defining State regulatory authority in the shadow of federal power. We're looking for a *definition* of the police power, which can be thought of the sum total of State regulatory powers left over after their abrogation by self-executing constitutional provisions and constitutionally enacted federal statutes. Chief Justice Taney defined this constellation of powers in the language of territorial sovereignty in *Thurlow v. Massachusetts*<sup>190</sup>:

But what are the police powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. [It is] ... the power to govern men and things within the limits of its dominion. It is by virtue of this power that it legislates; and its authority to make regulations of commerce is as absolute as its power to pass health laws, except in so far as it has been restricted by the constitution of the United States.<sup>191</sup>

But this is deeply question-begging. The real question is how tightly the Constitution “restrict[s]” the powers of the States. According to Chief Justice Taney “it necessarily follows that the grant of power to the federal government is not an absolute and entire prohibition to the States, but merely confers upon Congress the superior and controlling power.”<sup>192</sup> But this is to State the same problem in different words. The scope of the “superior and controlling power”

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<sup>186</sup> See *Edwards*, 314 U.S. at 174; see also *Saenz*, 526 U.S. at 489; cited in note 152, *supra*.

<sup>187</sup> *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 61-71 (1st Cir. 1999) (holding that Massachusetts law directing State agencies not to conduct business with companies that trade with Burma was preempted by the dormant Foreign Commerce Clause), *aff'd on other grounds Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (holding that Massachusetts law directing State agencies not to conduct business with companies that trade with Burma was preempted by federal trade sanctions regime).

<sup>188</sup> U.S. CONST. Art. VI, cl. 2.

<sup>189</sup> Michael Stokes Paulsen, *The Civil War as Constitutional Interpretation* 71 U. CHI. L. REV. 691 (Spring 2004) (referring to the Civil War as “*Grant v. Lee*”); *id.* at 693, 727, n4 (“When once before I made oblique reference, with irony, to the ‘case’ of *Grant v Lee* (Appomattox Court House 1865) in a footnote to an academic article, the law review editors asked me to provide a case reporter citation, as they had not been able to find it on Westlaw or Lexis”).

<sup>190</sup> 46 U.S. 504 (1847).

<sup>191</sup> *Thurlow*, 46 U.S. at 583.

<sup>192</sup> *Thurlow*, 46 U.S. at 583; see also *Parker v. Brown*, 317 U.S. 341, 359-360, (1943); *id.*, 317 U.S. at 589; *Baltimore & O.R. Co. v. Maryland*, 88 U.S. 456, 471 (1874).

and the question whether it should be politically or judicially enforced are the heart of the matter.

We've really got to think about what it means to have concurrent powers and dual sovereignty. The idea of concurrent powers is certainly familiar. The Supreme Court has seen regulatory powers over commerce as inherently concurrent since the 1820s; *Gibbons v. Ogden* made the point in reference to concurrent State and federal powers of taxation, concluding that no logical or legal paradox emerges by the concession that both the State and the union can tax (and tax heavily) the same activity.<sup>193</sup> Chief Justice Marshall suggested that this issue emerges from the very form of our government:

In our complex system, presenting the rare and difficult scheme of one general government, whose action extends over the whole, but which possesses only certain enumerated powers; and of numerous State governments, which retain and exercise all powers not delegated to the Union, contests respecting power must arise. Were it even otherwise, the measures taken by the respective governments to execute their acknowledged powers, would often be of the same description, and might, sometimes, interfere. This, however, does not prove that the one is exercising, or has a right to exercise, the powers of the other.<sup>194</sup>

It's the last sentence that's key. I think the implicit suggestion is that State and federal power should be analyzed as distinct phenomena. As we have said several times, the separate governments' powers are, and should remain, conceptually separate. State and federal powers do not flow from the same source. The zenith of one is not the nadir of the other.

But if that's true then many things follow. First, something more than a definition is needed to show that the police power necessarily unlimited outside the area of federal preemption. Second, the Blackmun-esque view of complex and layered sovereignty, as in *Garcia*, with many actors speaking in different voices at different times, and/or the Kennedy-esque view of dual sovereignty, with State and federal actors each taking different and overlapping parts of the original powers delegated by "we, the people" become much more attractive.

Regards,  
S.M.

Steve,

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<sup>193</sup> *Gibbons v. Ogden* 22 U.S. 1, 198-200 (1824).

<sup>194</sup> *Gibbons v. Ogden*, 22 U.S. at 204-205 (1824); see also *Thurlow v. Com. Of Mass.*, 46 U.S. 504, 578-79 (Taney, C.J.).

I find your idea of accommodation even in the preemption setting to be very interesting, and certainly of a piece with the larger idea. In the *Oregon* case, however, we needn't go so far. The federal Controlled Substances Act exempts use of the otherwise prohibited or regulated drugs if they are sold or administered pursuant to a physician's prescription for treatment that meets reasonable medical standards.<sup>195</sup> The Oregon law does not violate the act, Oregon argued, because Oregon has passed a law that alters the licensing and medical practice standards set, traditionally and today, by the states.<sup>196</sup> The federal government's argument was that the new medical standards set by Oregon do not satisfy the Controlled Substances Act, not because the act specifically outlaws assisted suicide by doctor and patient at the very end of life, but because the federal government has some general authority via the Attorney General to decide whether medical standards in states are acceptable in light of the law enforcement purposes of the Act.<sup>197</sup> This is a general, and largely administrative and law enforcement authority.<sup>198</sup> It is not an express federal power going to the specific drug(s) used in specific ways authorized under the Oregon law. This makes the case different from *Raich* because there were no exceptions of this kind for the sale of marijuana and the California law in any event didn't limit itself (or perhaps even deal with) the practice of medicine issues.

Thus *Gonzales* is much closer to the pure negative implications cases, and so Oregon can make the more straightforward negative implications-type argument on behalf of state legislative power *in the absence of congressional action under Art. I, section 8*. This is an argument that would be greatly strengthened by a recognized claim that when a state acts within its traditional police powers and in the absence of economically protectionist discrimination against interstate commerce, the national market interests and solutions rest not with courts, but with Congress and the President exercising legislative powers under Articles I and II.

Sincerely,  
R.B.

Professor Bezanson,

I think you give us too little credit. While decided on grounds of deference (lack of it, actually) to the Attorney General's rulemaking power under federal law, the *Gonzales* decision rests on an expressed background of traditional state lawmaking, and by disallowing the Attorney Generals's power under the

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<sup>195</sup> See note 140, and accompanying text, *supra*.

<sup>196</sup> See note 142, and accompanying text, *supra*.

<sup>197</sup> See note 140, and accompanying text, *supra*.

<sup>198</sup> *Id.*

federal law it puts the matter back into Congress's lap where the States can launch a full and fair fight under the *Garcia* principles.

Genially,  
S.M.

Steve,

If that is true, then it seems, as a general matter, that we have settled on something very practical. We see “federalism” not as a theory and legal doctrine, but instead as a set of obstacles in the field of government power. To stretch the sports metaphor, these posts and barriers prevent any of the contestants from running the field, and serve as brakes or required resting points at which the contestants must count to ten and think carefully about what they are doing. The hope is to slow the brutality and engender, to the extent possible, cooperation and compromise and constructive competition.

So there is no grand Constitutional federalism that stands as an unbreachable chasm between state and federal power. There is, really, no schematic of “sovereignty” that can be usefully drawn upon. In a very American way, I think, sovereignty was quite decisively dispensed with as a term used, much less enforced, in the internal governance and affairs of the nation. The nation was sovereign among nations, but not within itself. This would mean, of course (if we are right), that the Supreme Court has profoundly miscalculated the nature of the Constitution's structural design. There is no “brooding omnipresence.”<sup>199</sup> There is no architect and no controlling philosophy. There is instead an imperfect and therefore malleable, immensely practical, and basically non-theoretical set of rules with which to govern a republic committed to democratic participation and the powerful idea of freedom and personal liberty. No absolutes. No precincts of unreviewable power. No corners free of healthy competition. Nothing too tidy.

In terms of the instances of “federalism” upon which the Supreme Court has lately focused its attention, what have we? We have a clear governing rule of enumeration at the federal level, which many say has served as a means of aggrandizement of federal power through the commerce and spending powers.<sup>200</sup> But we find no mention of “federalism” in Article I, section 8. No high theory. Instead we find an untidy and imperfect set of enumerated powers which necessarily change over time—in degree but not in kind.

*McCulloch v. Maryland*, with its reading of enumeration and the Necessary and Proper Clause, is not easily confined. There is nothing wrong with the Supreme Court trying to tweak it and shore it up, as in *Lopez* and *Morrison*. But the bludgeon of federalism, of separate and sealed “fields” of authority for the

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<sup>199</sup> *Jensen*, 244 U.S. at 222 (Holmes, J., dissenting).

<sup>200</sup> *See, e.g., South Dakota v. Dole*, 483 U.S. 203 (1987).



federal government and for the states, simply won't do. It can't work, for the bread of enumeration isn't sliced along substantive lines. More importantly, it isn't what was put in the Constitution. Enumeration is a practical and very important obstacle, a place to count to ten and give second thought. And a place to make certain that the other structural brakes—the *Garcia* rules of state participation, bicameralism, presentment, constrained delegation, and the like—are fully and fairly in place.

The Court should see other constitutional provisions and rules in a similar way. The Eleventh Amendment, for example, shouldn't be seen as a spare text engorged by federalism and sovereignty. Sovereignty and its conceit, dignity, have no place in the operative doctrines of the Constitution. Instead Article III's jurisdictional rules and the Eleventh Amendment's limits should be seen as practical instruments for protecting against the bankruptcy of government itself and from the subjugation of one government by the threat of economic ruin by the other. These are practical ideas that allow textual and practical legal rules, and that allow a healthy measure of flexibility for future adjustment (*Ex Parte Young*, for example) if wielded by a reasoned hand in obedience to other structural rules of limited judicial power or legislative process.

Two other constitutional provisions deserve mention here. The first is the qualifications provision of Article I. That provision needn't, and in our view shouldn't, be seen as a font of sovereignty, a term not used in the Constitution, borne at the creation. The remarkable conceptual and historical exercises played out by, among others, Justices Stevens and Thomas, are neither provable or usefully operable in law. It seems clear to us that the people of the states voted in their states to express their agreement on the creation of a government of the people of the nation.

Finally, a surprisingly broad array of the federalism rules are non-textual, which is to say that they are of the Court's own creation. This is most obviously true of the intergovernmental immunities doctrines, which have ebbed and flowed for over a century. It is true also of the most recent arrival in the immunities family, the commandeering rule prohibiting the federal government from using states as lawmaking, enforcing, and judicial agents of federal will. These sets of doctrines can be seen in two ways. The first, the Supreme Court's, looks at them as protections for the states' dignity and sovereign separateness. The second way of looking at the doctrines is that the Court, extra-textually but perhaps for good reason, has created them as practically necessary obstacles to aggrandizement. The latter is obviously our view. Under that view there is nothing wrong with the Court's creativity *if the rules allow for flexibility*. If they were absolute they would then become barriers in the name of state authority and not obstacles requiring occasions for sober political reflection. The bright-line absolutism of the commandeering doctrine, then, is misplaced.

The need for judicially crafted practical obstacles flexibly enforced to accommodate the occasional conflicts between the federal government and the States is, in its best sense, reflected in the judiciary's own rules of abstention and comity.<sup>201</sup> Abstention is, at base, a practical and functional set of rules by which a state court's greater ability to adjudicate certain local or complex regulatory issues is taken advantage of, but not at the expense (as opposed to delay) of opportunity for federal court jurisdiction over the federal issues. Comity likewise respects states' law enforcement powers as well as the Supremacy Clause obligation imposed on state courts by the Constitution, by deferring federal court review of federal claims until completion of the state criminal prosecution, absent specific reasons to distrust the state court's willingness to obey federal law. But the comity doctrine is not textually compelled, as opposed to textually informed. It is not fixed. It has expanded beyond criminal prosecutions.<sup>202</sup> And it has exceptions built into it—occasions for calm reflection. It is thus of a piece with the adjustments of federal and state claims of power occasioned by a judicially-created obstacle, but not a barrier.

A last lesson, this one a message to the judicial branch when exercising federal power, comes from the negative implications cases. There we see that encroachment by judicial supervision of state laws has effectively sheltered Congress from its constitutional responsibility to enact legislation preserving a national economy when it judges that local state laws serving local purposes have excessively disrupted its own view of the desired national market. The Court has (inadvertently it seems) sapped the marketplace of state experimentation and has preempted Congress' exclusive power to define what the market should be. The Supreme Court is acting like the nation's economist-in-chief, and nothing in the text of the Constitution gives it the power to do so. Congress has that power and responsibility, except in the rarest of cases that compel judicial action. The power to "regulate commerce among the States" belongs, after all, to Congress.

So that's where I see us ending up. The Court has taken us on a misconceived and constitutionally erroneous mission in the name of federalism and sovereignty. It should stop spinning high theories of "federalism" and "sovereignty" that the Constitution does not create. It should return to enforcing the obstacles set out in the Constitution; to assuring the integrity of the structural processes for exercise of federal power; and making the competing interests—the States and Congress—count to ten and give sober second thought when an obstacle is approached. Doing so will be more than enough to keep the Court plenty busy.

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<sup>201</sup> See, e.g., *Younger*, 401 U.S. at 37; *Samuels v. Mackell*, 401 U.S. 66 (1971); *Steffel v. Thompson*, 415 U.S. 452 (1974); *Hicks v. Miranda*, 422 U.S. 332 (1975).

<sup>202</sup> See, e.g., *Middlesex Co. Ethics Committee v. Garden St. Bar Assn.*, 457 U.S. 423 (1982); *Penzoil v. Texaco*, 481 U.S. 1 (1987).

Regards,  
R.B.

Professor Bezanson,

Is the liberal view any more coherent than the conservative view? No. One-directional constructs don't tell us very much about how to interpret specific language in the Constitution. And the moderate construct we've discussed, Justice Kennedy's insistence on speaking in terms of divided sovereignty, is so vague that despite its essential accuracy, sometimes I think it provides less practical advice than the alternatives. It's not the Justices' fault. Federalism, sovereignty—it's a slippery subject. And in this area of the law, there is a temptation to lose oneself in the sort of philosophical reflection that leads to long, opaque essays. Opaque essay-writing is a weakness from which I suffer as well.

I'm troubled by your praise for the abstention doctrines. I've never been the most enthusiastic fan of abstention—I never like to shut the federal courthouse doors, even temporarily. Your point, however, is well-taken. The courts aren't fora for philosophical reflection. They're places to resolve disputes. And if we're going to have two court systems with two bodies of law and separate spheres of jurisdiction and supremacy, then we've got to have some mechanism for commodiously moving cases from one system to the next, where each claim can be presented and adjudicated in its proper way.

Perhaps this is the final lesson of our engaging exchange. Divided sovereignty comes with its price. The Constitution seems to ask us to accept that the federal legislature partakes of a bewildering duality; that this is part of the framers' design; and that Congress will, in the long run, tend to get it right on most federalism issues. The Bill of Rights charms us with its gripping political principles. No great creative mind is needed to see the First Amendment at work. The structural clauses of the Constitution, however, are works of artifice. They are dry. They are technical. They do not speak in poetry to the moral imagination. The clauses of the Constitution ask us for faith in its designs. I like to think I carry the faith, but it is hard for me, as I know it is sometimes hard for all of us, to accept the short run. And sometimes, and the Supreme Court is no exception to this rule, we strain to anticipate framers. I think that patience, in the end, is the constitutional virtue.

Cheers,  
S.M.