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**The Twentieth Annual Law Review Symposium
Fear and Federalism
Symposium**

FEAR AND FEDERALISM*
23 Oh.N.L.R. 1295 (1997)

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I. PRELIMINARILY.

Congress clearly is not going to dismantle the states. So I have been wondering why the Supreme Court of late has been investing so heavily in the federalism business, so energetically protecting the states from the nation.¹ Historically, when there have been sharp conflicts between

*. I am indebted for valuable insights to Symposium co-participants Martha Field, Stephen Gottlieb, Gene Nichol, John Nowak, Martin Redish, and Norman Redlich. Thanks also to moderators Evan Caminker and Susan Gilles. My thanks to the editors and members of the Law Review for the gracious hospitality of the Ohio Northern University Twentieth Annual Law Review Symposium.

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1. *E.g.*, *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996) (Congress has no Article I power to authorize suit against a state in federal court for a violation of federal law, notwithstanding its power to do so under Section 5 of the Fourteenth Amendment); *United States v. Lopez*, 115 S.Ct. 1624 (1995) (Congress has no commerce power to regulate the possession of a handgun within 1,000 feet of a school); *New York v. United States*, 505 U.S. 144 (1992) (under the Tenth Amendment, Congress may not “commandeer” state legislative processes in regulating hazardous waste disposal, although Congress may regulate that activity directly); *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (Congress may regulate the retirement age of state judges only by clear language). For good current discussions see Herbert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The*

“states’ rights” and national power, anyone could tell you what was at stake. But why should protection of the states against Congress be a matter of passion, a matter for special vigilance, these days?

Political scientists will tell you that you don’t need a lawyer to explain this. There is something cheering, no doubt, to the conservative in the street when a conservative Supreme Court holds that the nation cannot prosecute possessors of guns near schools,² submit a state to suit in federal court,³ or make a state take title to chemical waste it won’t clean up.⁴ But this sort of thinking does not do justice to the Justices’ constitutional concerns, nor, **(1997) 23 Oh.N.L.R. 1296** I think, does it satisfy ours. The question, then, is what “Our Federalism”⁵ ought to require? What is it that “we” are afraid of? If Congress finds it necessary to act in some way touching the interests of the states, why should it matter? The *question* must matter in some degree to the cogency of theories of American federalism, and to the Court’s rapidly developing new federalism jurisprudence.

In these remarks I will start by setting to one side the values American federalism serves; my main interest, rather, is in broaching the question of

Supreme Court’s Lopez And Seminole Tribe Decisions, 96 COLUM. L. REV. 2213 (1996); Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1 (1996).

[In accordance with the author’s request, these footnotes will not always conform to THE BLUEBOOK—A UNIFORM SYSTEM OF CITATION (16th ed. 1996) eds.]

2. *United States v. Lopez*, 115 S.Ct. 1624 (1995) (striking down an act of Congress as beyond its commerce power for the first time in 60 years without actually overruling any intervening case); Gun Free School Zones Act of 1990, 18 U.S.C. § 922

(q)(1)(A).

3. *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996) (holding that the Eleventh Amendment trumps Congress’s Article I powers). There is a good review of *Seminole* in Henry Paul Monaghan, *The Sovereign Immunity “Exception,”* 110 HARV. L. REV. 102 (1996) (arguing that, *Seminole* notwithstanding, sovereign liability is the rule, and sovereign immunity the exception).

4. *New York v. United States*, 505 U.S. 144 (1992) (Congress has no power to “commandeer” state legislative processes in regulating hazardous waste disposal, although Congress may regulate that activity directly).

5. Hugo Black simply invented “Our Federalism” in *Younger v. Harris*, 401 U.S. 37, 44-45 (1971):

the fears against which it safeguards. What are those concerns of federalism? If you frame the question in this way you assume, for the sake of the discussion, that we value state power not only in itself, but also because we fear national power.

Concededly, the question, *What do we fear about national power*, may be too subjective to yield useful answers. I am reminded of a conversation I had a few years ago with a colleague, an anguished opponent of *Roe v. Wade*.⁶ We were contemplating the power of Congress over abortion. In his mind, the question was whether, if *Roe* were overruled, Congress would have power to legalize abortions. In my mind, the question was whether, if *Roe* were overruled, Congress would have power to prohibit abortions.⁷ It was a good five minutes before my colleague and I realized we were *afraid of different things*.

In skirting the question, *What do we value about state power*, I certainly do not mean to denigrate it. Indeed, the answer to that question may well be, “Perhaps too little.” There is a well-known tendency to read the past in a way that devalues state power and glorifies the nation. It is always a temptation to read moments in the past as way-stations in our (1997) 23 *Oh.N.L.R.* 1297 progress toward a modern happy condition.⁸ It

“[O]ne familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of ‘Our Federalism.’ . . . What the concept does represent is a system in which. . . the National Government, anxious though it may be to vindicate. . . federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.”

Black went on to assert, improbably:

“It should never be forgotten that this slogan, ‘Our Federalism,’ born in the early struggling days of our Union of States, occupies a highly important place in our Nation’s history and its future.”

Id. This way of using the word “Federalism” was unknown in the 18th century, when “Federalism” meant the political leanings of the Federalist party. Indeed, the earliest use I can find of the Frankfurter-ish “our federalism” is, in fact, by Frankfurter. *Texas v. Florida*, 306 U.S. 398, 428 (1939).

6. 410 U.S. 113 (1973).

7. And doubtless if a visitor from contemporary China had been on the scene the question in her mind would have been the power of Congress to require abortions.

8. See generally HERBERT BUTTERFIELD, *THE WHIG INTERPRETATION OF HISTORY* (1951).

is hard not to read approvingly in this way of the nation-building spirit of John Marshall or of the national victory reflected in the Fourteenth Amendment. It is tempting, too, to see American pluralism as flourishing because under national protection. There is an appealing analogy in the relative safety that minorities abroad have historically been able to enjoy under the protections of empire or other larger forms of over-arching political organization, against the animosities of petty ethnic nation-states.⁹ One can easily slip into the habit of thinking about American constitutional history with a kind of national triumphalism. But in this country there has been no consistent link between national power and individual liberty. There are enough sad stories in American constitutional history to remind us that civil liberties have sometimes been at least as well secured by some states as by the nation.¹⁰ The example usually given of an early nationalist assault on civil liberties is that of the Sedition Act of 1798. But for a clearer clash between national and state powers you would probably point to the antebellum controversy over runaway slaves.

I have just finished an article drawing on that material,¹¹ and the story no doubt is familiar to the reader too. But the fact is that before the Civil War there were brutal federal laws that, in effect, authorized “slave-catchers,” as they were derisively called, to ride into a free state and on a rudimentary showing carry off a black person found there.¹² The racial

9. For interesting discussion of the Framers’ belief that without union the states would be perpetually warring, see Akhil Reed Amar, *Some New World Lessons for the Old World*, 58 U. CHI. L. REV. 483 (1991).

10. Cf. James Madison, *The Federalist* No. 51: “In the compound republic of America, the power surrendered by the people is . . . divided. . . . Hence a double security arises to the rights of the people.” Cf. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (O’Connor, J.); MARTIN REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* (1995) [Redish, “Political Structure”]. For current viewpoints on the question raised in the text, see *generally* FEDERALISM AND RIGHTS (Ellis Katz & G. Alan Tarr eds. 1996).

11. Louise Weinberg, *Methodological Interventions and the Slavery Cases, or, Night-Thoughts of a Legal Realist*, in Symposium, 56 U. MD. L. REV. 1319 (1997).

12. Fugitive Slave Act of Feb. 12, 1793, ch. 7, §§ 3,4, 1 Stat. 302, *repealed*, Act of June 28, 1864, ch. 166, 13 Stat. 200; Fugitive Slave Act of September 18, 1850, ch. 60, 9 Stat. 462, *repealed*, Act of June 28, 1864, ch. 166, 13 Stat. 200. In *In re Booth*, 3 Wis. 1, 18-48 (1854), *overruled*, *Ableman v. Booth*, 62 U.S. (21 How.)

presumption of slavery inherent in the fugitive slave law put black people living in freedom in the North at terrible risk. Some of the “free” states enacted so-called “liberty laws” in an effort to impose reasonable (1997) **23 Oh.N.L.R. 1298** procedures on slave renditions. But the Supreme Court struck down the first generation of “liberty laws” in 1842 in *Prigg v. Pennsylvania*, on a theory that today we would call a “preemption” theory.¹³ Building on John Marshall’s narrowing of state power over bankruptcy in *Sturges v. Crowninshield*,¹⁴ the Court held that matters concerning fugitive slaves also were within the exclusive governance of the nation. The author of *Prigg*, of course, was that strenuous nationalist, Joseph Story.¹⁵ The national power in that period, in the Supreme Court as well as in Congress, simply was not a liberal or reliably progressive power.

506 (1859), the Wisconsin court rightly declared both statutes unconstitutional, in part on due process grounds. *See generally* STANLEY W. CAMPBELL, *THE SLAVE CATCHERS: ENFORCEMENT OF THE FUGITIVE SLAVE LAW, 1850-60*, 207 (1970).

13. 41 U.S. (16 Pet.) 539, 618 (1842) (holding in part that such laws interfered with the slavemaster’s constitutional right of “recaption” of the slave, *id.* at 613, and in any event were exclusively within the power of Congress, *id.* at 621-26, this latter point over the dissent of Chief Justice Taney, *id.* at 627: “[A]ccording to the opinion just delivered, the state authorities are prohibited from interfering, for the purpose of protecting the right of the master, and aiding him in the recovery of his property. I think, the states are not prohibited; and that, on the contrary, it is enjoined upon them as a duty, to protect and support the owner, when he is endeavoring to obtain possession of his property found within their respective territories”).

14. 17 U.S. (4 Wheat.) 122 (1819) (Marshall, C. J.) (holding unconstitutional a state’s attempted retroactive discharge of debts).

15. After *Sturges* was decided, with Story’s concurrence, Story repeatedly proposed to Congress a uniform federal bankruptcy law, later promoting the proposal through Daniel Webster. *See* GERALD T. DUNNE, *JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT* 145-57 (1970). Similarly, after *Prigg* was decided, Story wrote a member of Congress proposing for better enforcement of the Fugitive Slave Law that federal officials be commissioned in each county, and enclosing a draft bill; this suggestion was adopted by Congress in the harsh new Fugitive Slave Act of 1850. Thus, notwithstanding *Prigg*’s elimination of state resources from the slave-catching enterprise, this wounding decision can hardly be called the “triumph of liberty” Justice Story always insisted it had been. KENT NEWMYER, *SUPREME COURT JUSTICE JOSEPH STORY, STATESMAN OF THE OLD REPUBLIC* 376-77 (1985); Paul Finkelman, *Story Telling on the Supreme Court: Prigg v. Pennsylvania and Justice Joseph Story’s Judicial Nationalism*, 1994 SUP. CT. REV. 247 (1994).

In the remarks that follow, I will begin by offering a few observations about the old fears of national power that still frame our rhetoric today. I will then have a brief look at what our theories tell us we are afraid of. Our current fears seem abstract, conjectural, or based on fallacy. I will then touch on the question whether national power can be limited by principles intrinsic to federalism theory, or needs to be scrutinized in a wholly different way. I will reach the question whether an enlightened federalist might not have more serious fears of national power today. If the answer is “yes,” it is not because such fears present any imminent threat, but rather because they seem weightier than those with which the Court and its observers seem preoccupied. Some of these latter concerns probably would best be served by a more limited jurisprudence of federal preemption. But I identify a class of more serious potential abuses of national power interestingly having to do with delivery of governmental services. This more serious concern (1997) 23 Oh.N.L.R. 1299 would seem to warrant retention of some judicial review, and indeed to call for a more developed jurisprudence of substantive limits on national power, limits extrinsic to theories of federalism.

II. WHAT WE WERE AFRAID OF ONCE.

“To be fearful of vesting Congress, constituted as that body is, with ample authorities for national purposes, appears to me the very climax of popular absurdity and madness.”

-George Washington¹⁶

“And thus the United States would furnish the singular spectacle of a political society without sovereignty, or of a people governed without government.”

- Alexander Hamilton¹⁷

16. Letter from George Washington to John Jay of August 15, 1786, III THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 207, 208 (Henry P. Johnson ed. 1970).

The great constitutional issue, even before this country was founded, was federalism; and through much of our history the greatest clash of political ideas has been the clash between the ideologies of states' rights and those of centralized power. What the colonies had wanted, in the face of Britain's disastrous policies of the 1760s and 1770s, was internal autonomy—home rule. But eventually, with some of their colonial assemblies prorogued, and Boston under occupation, the patriots in their brave rump assemblies came to see that their liberty depended on their independence. Although they also understood that they could not win or keep their independence without union, it was the irony of their situation that their essential demand for independence from *imperial* rule made them fearful of *national* power. This helps in part to explain their difficulties in fighting and paying for the Revolution, their false start with the Articles of Confederation,¹⁸ and the hysteria over George Washington's supposed monarchical tendencies that gave painful birth to a two-party system.

Although the word “federalism” in its modern sense was not used in the 18th century,¹⁹ federalism was at the heart of the debates in the **(1997) 23 Oh.N.L.R. 1300** Constitutional Convention at Philadelphia, and in the subsequent debates over ratification of the Constitution. The “Anti-Federalists,” opponents of the Constitution, had fears of central government, fears of damage to state autonomy, fears that good citizenship—civic virtue—and good government could not exist in a big

17. *Opinion on the Constitutionality of an Act to Establish a Bank*, (Philadelphia, February 23, 1791), VIII THE PAPERS OF ALEXANDER HAMILTON 98 (Harold C. Syrett ed. 1965).

18. As early as 1780, Alexander Hamilton in a celebrated letter offered a clause-by-clause critique of the Articles of Confederation, opening with, “The fundamental defect is a want of power in Congress.” Letter of September 3, 1780, from Alexander Hamilton to James Duane, II THE PAPERS OF ALEXANDER HAMILTON 400-418, 401 (Harold C. Syrett ed. 1961).

19. In the 18th century, “Federalism” refers to views of the Federalist party, and “federalism” to the nationalist spirit rather than to the deference the nation is expected to pay the states. *See, e.g.*, the usage in *Smith v. Turner* and *Norris v. The City of Boston*, 48 U.S. (7 How.) 283, 340 (1849). *See also* *United States v. Haswell*, 26 F. Cas. 218 (C.C. D. Vt. 1800), a prosecution for the following criminal libel of a Federalist:

country, fears that the states could not resist forced consolidation. These, at any rate, are some of the things that were usually said at the time.²⁰ Also there were things that were usually not said.

There comes to my mind a brilliant scene in a historical novel by John Updike.²¹ The rosy young political operative, James Buchanan, is seen at midday with Andrew Jackson, strolling along Pennsylvania Avenue. Buchanan is proposing a (now notorious) political deal.²² In response, Jackson will launch into one of the more magnificent monologues of modern literature. But in the characters' immediate foreground, weirdly unremarked by either of them, Updike paints in a detail of genius: the grotesque figure of a black field laborer lolling unsoberly on a bench.²³

“To the Enemies of Political Persecution in the Western District of Vermont: Your representative (Matthew Lyon) is holden by the oppressive hand of usurped power in a loathsome prison, deprived almost of the right of reason, and suffering all the indignities which can be heaped upon him by a hard-hearted savage, who has, to the disgrace of Federalism, been elevated to a station where he can satiate his barbarity on the misery of his victims. . . .”

Id. at 218. The earliest reference to “federalism” in its modern Frankfurter-ish sense in a Supreme Court opinion is indeed by Justice Frankfurter. See the justly obscure *Hale v. Bimco Trading Co.*, 306 U.S. 375, 378 (1939) (Frankfurter, J.) (describing a 1793 statute under which state proceedings could be stayed pending review in the Supreme Court as a “historical mechanism for achieving harmony in one phase of our complicated federalism”).

20. See generally THE FORMATION AND RATIFICATION OF THE CONSTITUTION (Kermit Hall ed., 1987); GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969).

21. JOHN UPDIKE, MEMORIES OF THE FORD ADMINISTRATION (1992).

22. In the elections of November, 1824, no one had a majority; under the 12th Amendment the election therefore was put to the House of Representatives. At that juncture Speaker Henry Clay sent a proposal to Andrew Jackson, through James Buchanan. He, Clay, would throw his political weight behind Jackson if Jackson would promise, if elected, to name Clay Secretary of State. Jackson rejected the “corrupt bargain.” ROBERT V. REMINI, THE LIFE OF ANDREW JACKSON 154-55 (1988). Clay thereupon gave John Quincy Adams even the vote of his, Clay's, own state, Kentucky, although the Kentucky vote had clearly gone for Jackson. Adams became President. And he named Clay Secretary of State.

23. JOHN UPDIKE, MEMORIES OF THE FORD ADMINISTRATION 183 (1992):

“Their stroll halted beneath a scabby-trunked sycamore, near a bench of weathered slats where a negro in threadbare blue field clothes had fallen,

(1997) 23 Oh.N.L.R. 1301 In just such a way, if you could rewind to the Philadelphia Convention, you might sense a weirdly unremarked presence in the foreground. It is, of course, slavery. Now, I have no doubt that even without slavery, jealousy of national power at the time of the founding would have been natural to the colonies.²⁴ But in fact slavery had already become a sectionally divisive issue. Delegates from southern states made repeated demands at Philadelphia.²⁵ The first priority for those southern delegates was to protect the institution of slavery. Their greatest fear was that the Constitution might shape a national power that could free the slaves. This fear was hardly fanciful: the Confederation Congress was then meeting in New York, and by July 13, 1787, had passed the Northwest Ordinance. The Northwest Ordinance remains very much an organic law of the United States. Among other things, the Northwest Ordinance abolished slavery in all the territory above the Ohio River west to the Mississippi.²⁶

As for the friends of the Constitution—the Federalists—their urgent priority was to achieve ratification. Whatever the Federalists’ views of the peculiar institution of slavery, it became their constant study to assuage

with the aid of rum, into an oblivious doze, cold as was this, the penultimate day of the year. ‘I have not the least objection, Mr. Buchanan, to answering your question. I think well of Mr. Adams.’”

24. Letter from George Washington to John Jay of March 10th, 1787, III THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 238, 239 (Henry P. Johnson ed. 1970):

“A thirst for power, and the bantling—I had like to have said MONSTER sovereignty, which have taken such fast hold of the States individually, will, when joined by the many whose personal consequence in the line of State politics will in a manner be annihilated, form a strong phalanx against it. . . .”

25. See the account in PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON* 1-33 (1996); and see FORREST MCDONALD, *WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION* 92 (1992).

26. “There shall be neither slavery nor involuntary servitude in the said territory. . . .” Art. VI, Ordinance of 1787, Northwest Territorial Government, The [Confederation] Congress (July 13, 1787), Organic Laws of the United States of America, U.S.C.A. Today the area that was governed by the Northwest Ordinance is occupied by the States of Ohio, Indiana, Illinois, Wisconsin, Michigan, and part of the State of Minnesota.

the fears of those who feared national power over that issue. The consequence of this politically imperative need to achieve ratification was that at Philadelphia the Federalists met southern demands with the studied silences, ambiguities, circumlocutions, and inherently unstable compromises that disfigured the Constitution.²⁷

(1997) 23 Oh.N.L.R. 1302 In the debates on ratification, federalism remained the burning issue. Chief Justice Marshall would later point out that those great political essays, *The Federalist Papers*, were “written in answer to objections founded entirely on the extent of its [the nation’s] powers, and on its diminution of state sovereignty.”²⁸ At this point, the Federalists adopted a strategy of insisting on the *limitations* under which

27. MAX FARRAND, *THE FRAMING OF THE CONSTITUTION* 149-152 (1913) (discussing the debates of August, 1787, at Philadelphia, on accommodations of slavery in the Constitution). *See, e.g.*, the Constitution’s references to “other Persons” in the Three-Fifths Clause, providing the South with additional representation in Congress based on a proportion of its slave population, Art. I, § 2, cl. 3. *See also, e.g.*, Art. II, § 1, cl. 2, which projected this enhancement of southern power into the electoral college. Moreover, Art. I, § 9, cl. 4 guaranteed to the slave states that only three fifths of their black populations would be counted in apportioning any federal tax directly upon the states. As for the treatment of the slave trade in Art. I, § 9, cl. 1, that was not perceived by Southerners as a deferred prohibition of the trade, as we sometimes carelessly read it, but rather as a postponement of the issue at least to 1808. The southern states also gained the provision for the return of fugitive slaves, Art. IV, § 2, cl. 3. The Insurrections Clause of Art. I, § 8, cl. 15, and the Domestic Violence Clause of Art. IV, § 4, guaranteeing protection against and authorizing the calling up of armed forces to suppress “insurrections,” presumably had in view not only such phenomena as Shay’s Rebellion, but also slave rebellions; in the Declaration of Independence, King George is charged with stirring up “domestic insurrections” among us, apparently a reference to slave revolts; the charge is immediately followed by a charge that he stirred up the Indians too.

Professor Finkelman points out that the Three-Fourths Clause of Art. V further gave the slave states in effect “a permanent veto” over any constitutional amendment. PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON* 5 (1996). For the view that southern control over the amendment process was “apparently the only protection [regarding slavery] the Southerners deemed necessary,” *see* Alan N. Greenspan, *The Constitutional Exercise of the Federal Police Power: A Functional Approach to Federalism*, 41 *VAND. L. REV.* 1019, 1023 n. 31 (1988).

28. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 418-19 (1821) (Marshall, C. J.).

the national government visualized by the Constitution would function. That was the line taken in *The Federalist* by its chief authors, James Madison and Alexander Hamilton. Hamilton's real views of national power were as capacious as John Marshall's, and arguably James Madison's were too at that time.²⁹ Madison and Hamilton addressed their remarks in *The Federalist* narrowly "To the People of the State of New York," but they came to see their job as persuading the other laggard states to ratify as well.³⁰ This strategy of emphasizing that the national power was "limited" was to have fateful consequences for later interpretation of the Constitution.

The debate over federalism did not come to an end with ratification. The Kentucky and Virginia Resolutions,³¹ a response to such grievances as (1997) 23 Oh.N.L.R. 1303 the Sedition Act of 1798, were all about state autonomy and the fear of national power. The rural, agrarian, Jeffersonian ideals voiced in those Resolutions—the "spirit of '98," as people came to refer to those ideals—probably became permanent national ideals with the landslide Jeffersonian electoral victory of 1800. But it would be a mistake to say that the nationalist spirit survived only among the Federalist holdovers on the Marshall Court. Notwithstanding Thomas Jefferson's doubts about national power to buy the Louisiana Territory, it was he, Jefferson, the author of the Virginia Resolution, who effected the Louisiana Purchase, ridding that territory of French and Spanish influence and vastly expanding the national boundaries. And it was James Madison,

29. The apparent evolution of Madison's views is examined in LEONARD R. SORENSON, *MADISON ON THE "GENERAL WELFARE" OF AMERICA: HIS CONSISTENT AND CONSTITUTIONAL VISION* (1995).

30. On the effectiveness of *The Federalist Papers* or lack thereof see generally ALBERT FURTWANGLER, *THE AUTHORITY OF PUBLIUS: A READING OF THE FEDERALIST PAPERS* (1984); James W. Ducayet, Note, *Publius and Federalism: On the Use and Abuse of The Federalist in Constitutional Interpretation*, 68 N.Y.U. L. REV. 821 (1993).

31. Thomas Jefferson, Kentucky Resolution (Nov. 10, 1798); James Madison, Virginia Resolution (Dec. 21, 1798), reprinted in 5 *THE FOUNDERS' CONSTITUTION*, 131-136 (Philip B. Kurland & Ralph Lerner eds., 1987). The story of the Resolutions is well told in H. Jefferson Powell, *The Principles of '98: An Essay in Historical Retrieval*, 80 VA. L. REV. 689 (1994). For resolutions opposing the Virginia and Kentucky Resolutions, see *AMERICAN CONSTITUTIONAL INTERPRETATION* 264-65 (Walter F. Murphy et al. eds. 1986) (resolutions of Massachusetts, Rhode Island, and Vermont).

the author of the Kentucky Resolution and opponent of the first Bank of the United States, who requested and signed into existence the second Bank of the United States.

But in some minds the Kentucky and Virginia Resolutions of 1798 had become transmuted into constitutive positions of the slave states. Always there was that issue of race slavery. You can see the awful apparition behind the defacing knife—slash across the map of the Union that was the Missouri Compromise of 1820. Jefferson grieved that “a geographical line” had been drawn that, “held up to the angry passions of men, will never be obliterated;” and he foretold the coming catastrophe.³² It was race slavery that increasingly dominated the mounting threats of secession. It was race slavery that, at bottom, was the cause of the Civil War.³³ And neither the War nor Reconstruction effected closure; we know that race relations remained at the heart of the controversy over American federalism until very recently, within living memory.

It is time to acknowledge what we were afraid of. It is time to acknowledge that in our darker past some of the ambiguities of the Constitution on the subject of national power signified only the felt political necessity of avoiding any explicit threat to the slave interest. We hardly need to placate that interest today. The Constitution has been amended to expunge every vestige of slavery.³⁴ No one supposes there is any sectional interest that could lead the insufficiently accommodating nation to disunion (1997) 23 *Oh.N.L.R.* 1304 and civil war. It is our good fortune that this is not one of the things we are afraid of now.³⁵ Against this background of ancient history, a hard-breathing anxiety over limited powers should seem almost quaint today. Concededly, there are times the

32. “This momentous question, like a fire-bell in the night, awakened and filled me with terror. I considered it at once as the knell of the Union.” Letter by Thomas Jefferson to John Holmes, April 22, 1820, in 12 *THE WORKS OF THOMAS JEFFERSON* 158 (Paul L. Ford, ed. 1904).

33. See Abraham Lincoln, Second Inaugural Address, March 4, 1865: “All knew that this [slave] interest was, somehow, the cause of the war.” *ABRAHAM LINCOLN, SPEECHES AND WRITINGS* 792 (Roy P. Basler ed. 1946).

34. In this Symposium, see John E. Nowak, *Federalism and the Civil War Amendments*, 23 *OHIO N.U. L. REV.* 1210 (1997).

35. For the argument that we still do have regional differences of moment, see DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* 86-87 (1995).

old struggles come back to haunt us. The failure of the New Deal arguably had to do with a failure of political will to bring black and other rural agricultural workers up to level.³⁶ The states' rights struggle in the Warren Court period was a struggle, precisely, over black rights.

III. THEORIES OF FEDERALISM.

So the issue of federalism has until very recently indeed been the loaded one we tend to think it. At least until the Chase Court's 1869 decision in *Texas v. White*,³⁷ argument about this loaded issue tended to form around a few genteelly abstract theories of sovereignty; the nation engaged in a running debate on the nature and extent of the national power, not quite acknowledging that much of that debate was over slavery and race. Echoes of these theories still resonate with us today.

One of the more persistent has been the theory of *state sovereignty*. Under this theory, the Union is a loose confederation of autonomous sovereign states (this aspect of state sovereignty theory is sometimes designated as "compact theory"). The theory of state sovereignty implies that the states *preceded* the Union,³⁸ *delegated* only a portion of their

36. See WILLIAM FORBATH, RACE, CLASS AND CITIZENSHIP (forthcoming, manuscript on file with the author); David E. Bernstein, *Roots of the "Underclass:" The Decline of Laissez-Faire Jurisprudence and the Rise of Racist Labor Legislation*, 43 AM. U. L. REV. 85, 119 (1993).

37. 74 U.S. (7 Wall.) 700 (1868) (Texas could not unilaterally secede from the Union, and acts undertaken by Texas when in a state of rebellion were nullities; therefore Texas could invoke the original jurisdiction of the Court, and, further, was entitled to the proceeds of bonds negotiated for goods during the Civil War; and those creditors who traded with Texas during its period of rebellion would be without remedy); *and see* Hart v. White, 80 U.S. (13 Wall.) 646, 649-52 (1872) (Georgia never having left the Union, her attempted secession in no way excused her from her obligations under the Impairment of Contracts Clause; not referring to Texas v. White).

38. *See* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 163-68 (1996) (showing that among the Founders, Luther Martin and James Wilson were interested in the question whether the states preceded the Union and disagreed on the point; arguing that the states did precede the Union, but that the question is pointless because only the loyalty of the people and

(1997) 23 Oh.N.L.R. 1305 preexisting powers to the Union, and *reserved* the rest exclusively. The critical feature of state sovereignty theory as a states' rights theory is that it has been thought also to imply a reservation to the states of power to withdraw from the compact, to *secede*. The Articles of Confederation clearly reflected this sort of thinking,³⁹ as did the Virginia and Kentucky Resolutions of 1798. The Virginia and Kentucky Resolutions made the additional case that the states had power to interpret the Constitution for themselves, a not unreasonable position—unless it would deny the Supreme Court's ultimate authority, the position the Supreme Court emphatically rejected in *Martin v. Hunter's Lessee*.⁴⁰ You see state sovereignty theory in strong form in the *South Carolina Exposition and Protest*, a legislative report adopted by South Carolina in reaction to the so-called Tariff of Abominations of 1828. Claiming the Virginia and Kentucky Resolutions of 1798 as its intellectual provenance, the *Exposition and Protest* pushed compact theory to an extreme, arguing that each state had power to “nullify” federal law within its boundaries, and even proposing a specific procedure for nullification, frustration of which would give the state a right to “secede.” The covert author was that erstwhile nationalist, Vice President John C. Calhoun.⁴¹ Calhoun early

their political ties count; and those ties gave the states the advantage at the beginning). As Professor Rakove points out, a nationalist also could conceive of the states and nation as coming into being together, say on July 4, 1776. *And see* James Madison, *The Federalist* No. 39 (arguing that the states are organic constituents of the constitutional plan: “The act, therefore, establishing the Constitution, will not be a NATIONAL, but a FEDERAL act.”).

39. Alexander Hamilton describes the defective organization of the nation under the Articles of Confederation as a “compact” in *The Federalist* No. 21.

40. 14 U.S. (1 Wheat.) 304 (1816); *cf.* *Cooper v. Aaron*, 358 U.S. 1 (1958).

41. Under Calhoun's proposal, the people of a state in convention could vote to “nullify” an act of Congress within the state's borders. If the federal government persisted in enforcing its law within the nullifying state, the state had the right to secede. If three-fourths of states “nullified,” this would be tantamount to constitutional amendment, and the law would be nullified everywhere. John C. Calhoun, *The South Carolina Exposition and Protest* (1828), 10 THE PAPERS OF JOHN C. CALHOUN 442 (1977). President Andrew Jackson responded with his *Nullification Proclamation*, 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1902, at 640 (J. Richardson ed. 1903). South Carolina soon proposed to issue another resolution. This was to protest new sales of public lands, but the controversy widened to include the Tariff Act and slavery as well. This proposed new resolution precipitated the historic two-day Hayne-Webster debate of

injected the burning (1997) 23 *Oh.N.L.R.* 1306 issue of slavery into the controversy, and slavery quickly became its subtext.⁴²

Buttressing state sovereignty and compact theories was the ideology of “limited powers,”⁴³ taken over whole from the strategic arguments of the Federalists at the time of the founding. The Constitution does not explicitly say that ours is a nation of “limited powers.” But there is the reservation, in the Tenth Amendment, of powers not delegated. And, more directly, there is the *enumeratedness* of Article I, implicitly

January 26-27, 1830. Senator Robert Y. Hayne of South Carolina, building on the ideas of Calhoun, argued for an extreme theory of state sovereignty. It was in reply to this that Daniel Webster of Massachusetts invoked the sovereignty of “We, the people.” The occasion is now remembered for Webster’s grand peroration, “Liberty and Union, now and for ever, one and inseparable.” *THE GREAT SPEECHES AND ORATIONS OF DANIEL WEBSTER* 227, 269 (Edwin P. Whipple ed. 1894). A few months later, on April 13, 1830, Webster’s words found an echo when, at a Democratic party dinner, Andrew Jackson, turning to face his Vice President, rose with a toast: “Our Federal Union. It must be preserved.” See JOHN NIVEN, *JOHN C. CALHOUN AND THE PRICE OF UNION* 173 (1988). As abolitionism spread in the North, Calhoun began to argue that slavery was “a positive good.” When Congress enacted the Tariff Act of 1832, a special convention in South Carolina responded with an “Ordinance of Nullification” on November 24. 1 S.C. Stat. 329 (1832). It was widely understood that slavery was the underlying issue, and also that if South Carolina seceded the rest of the South would follow. Jackson alerted the army and the navy. Calhoun resigned the Vice Presidency on December 28, 1832, and was quickly installed as Senator from South Carolina to lead the fight against the Tariff and the antislavery forces in Congress. Then a political compromise was arranged. Under the Tariff Act of 1833, rates were to be gradually reduced; the *quid pro quo* for this was the Force Act (“the Bloody Bill”), giving the President discretion to call out troops to enforce the tariff. South Carolina repealed the Ordinance of Nullification, but purported to “nullify” the Force Act, and the controversy receded for the time being. See Generally Richard E. Ellis, *the Union at Risk: Jacksonian Democracy, States’ Rights, and The Nullification Crisis* (1987); Robert V. Remini, *the Revolutionary Age of Andrew Jackson* 84-104 (1976). Another Famous Response to the Nullification Crisis, by the Way, Was Joseph Story, *Commentaries on the Constitution of the United States* (1833).

42. See, for a good discussion, Richard H. Brown, *The Missouri Crisis, Slavery, and the Politics of Jacksonianism*, 65 *SO. ATLANTIC Q.* 55 (1966).

43. The only explicit use of the term “limited powers” I can find in *The Federalist Papers* appears in No. 55, in which “Publius” considers how many members the House of Representatives should have. But Publius is emphatic that ours is a nation of limited powers:

suggesting power withheld.⁴⁴ Thus, James Madison wrote in *The Federalist* No. 14:

“[The] general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects. . . .”⁴⁵

The most frequently heard language from *The Federalist* about this arrangement is also James Madison’s, in No. 45:

“The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.”⁴⁶

(1997) 23 Oh.N.L.R. 1307 The Supreme Court’s earliest references to limited national powers are in John Marshall’s magisterial opinion in *McCulloch v. Maryland*.⁴⁷ The Chief Justice refers to the nation as a “government. . . limited in its powers.”⁴⁸ But then, significantly, he adds,

“But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. Even the 10th amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word ‘expressly’. . . . The men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of this word in the articles of confederation. . . .”⁴⁹

“For the same reason that the limited powers of the Congress, and the control of the State legislatures, justify less frequent elections than . . . might otherwise [be required], the members of the Congress need be less numerous than if they possessed the whole power of legislation. . . .”
Here, whatever “the whole power of legislation” is, Congress hasn’t got it.

44. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194-95 (1824) (Marshall, C. J.) (“The enumeration presupposes something not enumerated”).

45. James Madison, *The Federalist* No. 14.

46. James Madison, *The Federalist* No. 45.

47. 17 U.S. (4 Wheat.) 316, 400 (1819).

48. *Id.* at 405.

49. *Id.* at 406-407.

As Marshall saw, the limits on national powers did not include a requirement that they be *express*. Earlier, Alexander Hamilton, while focusing on the same practical question involved in *McCulloch*—whether the nation has power to charter a bank—was even more dismissive of textual limits on national power. In his great state paper on the subject, he put this very crisply: “It is not denied that there are implied as well as express powers and that the former are as effectually delegated as the latter.”⁵⁰ So it was understood 200 years ago that the limits of constitutional text could not circumscribe national power. Whatever John Marshall *said* about limited, enumerated powers in *McCulloch*, then, amounts only to pious utterance, given the world of implied powers the case bequeathed to us. Of course we still worry about this; surely the text of the Constitution must mean *something*. But it seems much too late to make an issue of unenumerated powers. We now live in a federal union in which there are national powers that are atextual, inherent, implied, necessary and proper, attributes of sovereignty, pre-constitutional, and extra-constitutional.

Yet there remains the *fact* of enumeration and the *fact* of the Tenth Amendment. Why do these facts exist? Whatever their other purposes, these features of the Constitution must have functioned to reassure the slave states. Charles Pinckney, who had been one of South Carolina’s delegates at the Philadelphia convention, triumphantly pointed out afterwards that, **(1997) 23 Oh.N.L.R. 1308** since the Constitution gave the nation only the powers enumerated in Article I, Congress had no power to abolish slavery.⁵¹

50. Alexander Hamilton, Secretary of the Treasury, *Opinion on the Constitutionality of an Act to Establish a Bank*, (Philadelphia, February 23, 1791), VIII THE PAPERS OF ALEXANDER HAMILTON 97, 100 (Harold C. Syrett ed. 1965).

51. Footnote should read: “We have a security that the general government can never emancipate them, for no such authority is granted and it is admitted, on all hands, that the general government has no powers but what are expressly granted by the Constitution, and that all rights not expressed were reserved by the several states.” THE DEBATES, RESOLUTIONS, AND OTHER PROCEEDINGS, IN CONVENTION, ON THE ADOPTION OF THE FEDERAL CONSTITUTION (Jonathan Elliot ed. 1827-30) [“ELLIOT’S DEBATES”], vol. IV at 286-88; *cf.* 3 ELLIOT’S DEBATES 589 (remarks of Patrick Henry, expressing fears of implied war powers under which the nation could “liberate every one of your slaves”).

[mucked up by editors].

In opposition to these states' rights theories—state sovereignty, compact theory, and the theory of “limited powers”—there have been various nationalist theories, among which were the so-called “dual sovereignty” or “dual federalism” theories. Chief Justice Marshall's nation-building opinion in *Gibbons v. Ogden*⁵² is a prime representative of this thinking, as are Joseph Story's *Commentaries*.⁵³ Under a “dual federalism” theory, national legislative power is exclusively in the nation, and a state's legislative power exclusively in that state, subject of course to the supremacy of conflicting national law. This understanding is quite accurate;⁵⁴ but “dual federalism” theory has been persistently miscast as failing to reflect the concurrency of federal and state powers. To this day the much anthologized Taney Court case of *Cooley v. Board of Wardens*⁵⁵ is consistently over-read⁵⁶ as a wise modification of *Gibbons v. Ogden*'s supposedly extreme dual federalism.⁵⁷

“We have a security that the general government can never emancipate them, for no such authority is granted and it is admitted, on all hands, that the general government has no powers but what are expressly granted by the Constitution, and that all rights not expressed were reserved by the several states.” 4 Elliot's Debates 589 (remarks of Patrick Henry, expressing fears of implied war powers under which the nation could “liberate every one of your slaves”).

52. 22 U.S. (9 Wheat.) 1 (1824).

53. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833).

54. Cf. *Term Limits, Inc. v. Thornton*, 115 U.S. 1842, 1872 (1995) (Kennedy, J., concurring): “Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.”

55. 53 U.S. (12 How.) 299 (1851) (Curtis, J.). *But see id.* at 318 (explaining that Congress had incorporated the states' pilotage laws into federal law; resolving the difficulty presented by Pennsylvania's enactment of its pilotage laws after the federal incorporation of state pilotage laws).

56. *See, e.g.*, ARCHIBALD COX, THE COURT AND THE CONSTITUTION 105 (1987).

57. Actually, state laws were permitted to govern pilotage in *Cooley* because, although the act of Congress did not bind the Court in the particular case, Congress

But the most persistent nationalist theory is probably that of “popular sovereignty.”⁵⁸ The theory of popular sovereignty, first given prominence (1997) 23 Oh.N.L.R. 1309 by Daniel Webster in his great debate with Robert Y. Hayne,⁵⁹ and discernible in *McCulloch v. Maryland*,⁶⁰ as it is in Story’s *Commentaries*,⁶¹ holds that the sovereign is “We, the people of the United States,” not the states.⁶² So the states neither could have delegated nor retained sovereign powers. Under this theory, “We, the people” delegated to the nation its powers, and reserved to the states the powers suitable to them. Popular sovereignty theory is compatible with an intelligible theory of dual federalism, if not of dual sovereignty; John Marshall subscribed to both, as did Joseph Story.

It is an important further understanding of this people-as-sovereign thinking that, when “We, the people” assembled within our state ratifying conventions, “We” confirmed not only the Constitution but the older tie of Union, as perpetual and indissoluble. After the Constitution went into

had already decided that the national interest was best served in that way. *Cooley*, 53 U.S. (12 How.) at 318.

58. For current debate among the Justices over popular sovereignty theory see *Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842, 1863 (1995) (Stevens, J., for the Court); *id.* at 1872 (Kennedy, J., concurring); *id.* at 1875 (Thomas, J., dissenting, joined by Rehnquist, C.J., O’Connor, J., and Scalia, J.). For current extended consideration of this class of theories see WAYNE D. MOORE, *CONSTITUTIONAL RIGHTS AND POWERS OF THE PEOPLE* (1996).

59. On the Hayne-Webster debate, see *supra* note 41. In Pennsylvania’s debate over ratification of the Constitution, James Wilson relied on the Preamble’s invocation of “We, the people” for his argument that the nation was not a loose compact of states. 4 “Elliot’s Debates” 286. See also James Madison, 1 *DEBATES ON THE FEDERAL CONSTITUTION OF 1787*, 70 (Gaillard Hunt & James B. Scott eds. 1987).

60. 17 U.S. (4 Wheat.) 316, 403 (1819); and see *id.* at 404-405: “The government of the union, then, . . . is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.”

61. JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 134 (1833).

62. Professor Farber argues that under nationalist theories the true sovereign is the nation or federal government. Daniel A. Farber, *The Constitution’s Forgotten Cover Letter: An Essay on the New Federalism and the Original Understanding*, 94 *MICH. L. REV.* 615, 636 (1995).

effect, giving us a “more perfect Union,” a state could no more unilaterally leave the Union than it could unilaterally amend the Constitution for any other purpose. This was Abraham Lincoln’s theory,⁶³ and it should have **(1997) 23 Oh.N.L.R. 1310** been secured by the Civil War. It was this latter view of a perpetual Union of indissoluble states that the Supreme Court substantially adopted in 1869 with Chief Justice Chase’s opinion in *Texas v. White*,⁶⁴ an opinion that seems almost to echo the “mystic chords of memory” language in Abraham Lincoln’s First Inaugural Address.⁶⁵

63. See Abraham Lincoln, First Inaugural Address (March 4, 1861), which I set out somewhat fully on the point, for its general interest:

“The Union is much older than the Constitution. It was formed, in fact, by the Articles of Association in 1774. It was matured and continued by the Declaration of Independence in 1776. It was further matured and the faith of all the then thirteen States expressly plighted and engaged that it should be perpetual, by the Articles of Confederation in 1778. And, finally, in 1787 one of the declared objects for ordaining and establishing the Constitution was ‘to form a more perfect union.’ But if [the] destruction of the Union by one or by a part only, of the States be lawfully possible, the Union is less perfect than before the Constitution, having lost the vital element of perpetuity. “It follows from these views that no State, upon its own mere motion, can lawfully get out of the Union,-that resolves and ordinances to that effect are legally void, and that acts of violence, within any State or States, against the authority of the United States, are insurrectionary or revolutionary, according to circumstances. I therefore consider that in view of the Constitution and the laws, the Union is unbroken; and to the extent of my ability I shall take care, as the Constitution itself expressly enjoins upon me, that the laws of the Union be faithfully executed in all the States.”

ABRAHAM LINCOLN, SPEECHES AND WRITINGS 582-83 (Roy P. Basler ed. 1946).

64. 74 U.S. (7 Wall.) 700 (1869) (Texas could not unilaterally secede from the Union, and acts undertaken by Texas when purporting to have seceded were nullities; therefore Texas is entitled to the proceeds of bonds negotiated for goods during the Civil War, and those creditors who traded with Texas during that period are without remedy).

65. “The Union of the States never was a purely artificial and arbitrary relation. It began among the Colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war. . . .” 74 U.S. (7 Wall.) at 724-725. For an interesting variant view of *Texas v. White*, see Herman Belz, *Deep-Conviction Jurisprudence and Texas v. White: A Comment on G. Edward White’s Historicist Interpretation of Chief Justice Chase*, 21 N. KY. L. REV. 117, 128 (1993).

In hindsight the ideologies of states' rights, among the theories of federalism, seem to fare particularly badly. It was concern for states' rights and fear of national encroachment on states' rights that crippled the Articles of Confederation; it was deployment of this rhetoric in aid of pro-slavery interests that produced the calculated silences and contrived ambiguities in the Constitution and the Bill of Rights; and it was this rhetoric that finally seemed to justify to the South the destruction of the Union and even today to glorify to some in the South its own spilled blood and treasure.

Yet today we are still quarreling about the respective powers of the nation, the states, and "We, the people." Consider the colloquy among the Justices in the 1995 case of *Term Limits, Inc. v. Thornton*.⁶⁶ Five of the Justices in *Term Limits* evidently are comfortable with the implied powers doctrine of *McCulloch v. Maryland*.⁶⁷ Four of them somehow have managed to get this far in life still believing without embarrassment that in the silence of the constitutional text, the states or the people have the "default" powers, and the nation is helpless.⁶⁸

66. 115 S.Ct. 1842 (1995).

67. *Term Limits*, 115 S.Ct. at 1863 (Stevens, J., for the Court); *id.* at 1872 (Kennedy, J., concurring).

68. *Id.* at 1875 (Thomas, J., dissenting, joined by Rehnquist, C.J., O'Connor, J., and Scalia, J.). While conceding that "Our system of government rests on one overriding principle: all power stems from the consent of the people," Justice Thomas argued that "The 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." *Term Limits*, 115 S.Ct. at 1875 (Thomas, J., dissenting, joined by Rehnquist, C.J., O'Connor, J., and Scalia, J.). *But see* Marshall, C.J., in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403 (1819): "[T]he instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively and wisely, on such a subject, by assembling in convention. It is true, they assembled in their several states-and where else should they have assembled?" For current commentary supportive of the *Term Limits* dissent, see, in Symposium, 38 ARIZ. L. REV. (1996), Lynn A. Baker, "They the People:" A Comment on *U.S. Term Limits, Inc. v. Thornton*, *id.* at 859; Robert F. Nagel, *The Term Limits Dissent: What Nerve*, *id.* at 843. Taking the other side in the debate is Mark Tushnet, *What Then Is the American?*, *id.* at 873. I note that however close the theoretical question in the Court, the result in *Term Limits* does not seem to turn on the answer. For the Court, *Term Limits* simply follows from *Powell v. McCormack*, 395 U.S. 486 (1969). *See Term Limits*, 115 S.Ct. at 1845.

(1997) 23 Oh.N.L.R. 1311 But today most of us tend to see the essential problem of American federalism not so much as one of sovereignty, but rather of reconciling the settled understanding that ours is a nation of “limited, enumerated powers” with the home truth that the United States must have every power necessary to its own governance. The irony is that nothing in the “settled understandings” about “limited, enumerated powers,” even if those understandings could have any modern meaning, can help us with today’s hard questions. Unenumeratedness is beside the point when we are talking about the national commerce power, because the commerce power is enumerated.⁶⁹ And it is the commerce power into which today we tend to pack so much of the power of Congress. It is a further irony that the issue of unenumerated powers furnishes the rhetoric of Chief Justice Rehnquist’s odd 1995 opinion in *United States v. Lopez*,⁷⁰ denying Congress the (enumerated) commerce power to criminalize possession of guns near schools.⁷¹ Chief Justice Rehnquist purported to meet this objection with the language from the great case of *Gibbons v. Ogden*⁷² with which Chief Justice Marshall explained that enumeration of the interstate commerce power “presupposes” an unenumerated intrastate commerce power. But of course, *Gibbons* arose in a very different context. *Gibbons* was a test of state power, under what we would think of today as the “dormant” Commerce Clause; and the state failed the test.

What is unwritten is not the commerce power, obviously, but the limits the Supreme Court places upon it. Courts must fashion limits on the commerce power if they want them, as they fashion any other item of federal common law. Chief Justice Rehnquist in the *Lopez* case “fashioned” a requirement that an activity regulated under the commerce

69. *United States v. Lopez*, 115 S.Ct. 1624, 1626 (1995) (acknowledging that the commerce power is an enumerated power).

70. Chief Justice Rehnquist met this difficulty: “. . . Congress’ authority is limited to those powers enumerated in the Constitution, and. . . those enumerated powers are interpreted as having judicially enforceable outer limits. . . .” *Lopez*, 115 S.Ct. at 1633.

71. *Lopez*, 115 S.Ct. at 1627; Gun Free School Zones Act of 1990, 18 U.S.C. § 922(q)(1)(A).

72. 22 U.S. (9 Wheat.) 1, 194-95 (1824) (Marshall, C. J.) (“The enumeration [*i.e.*, of a power over commerce that is interstate] presupposes something not enumerated [*i.e.*, power over commerce that is wholly internal to the state]”).

power must (1997) 23 Oh.N.L.R. 1312 itself be “commercial” or “economic.”⁷³ I will come back to this; here let me just reiterate: Judges make these things up. Of course, in doing so, judges are constrained by history and reason.

But, certainly since 1937,⁷⁴ it has been hard to find substantial limits on national power *intrinsic to federalism theory*. Of course Congress acts within such *extrinsic* limits as the Bill of Rights; but there is no effective federalism limit on national power other than the rational limits of the structural position. So the only principle we can confidently say limits the nation in the exercise of national power is this: the exercise must be rationally related to a legitimate national governmental interest.⁷⁵ The impatient reader may see in this only some vague notion; but others will recognize the basic rationality requirement of law that is due process, and understand that that requirement binds each state as well. In this sense the states are governments of limited powers, too.⁷⁶ Alexander Hamilton described the position over two hundred years ago in his report on the Bank:

73. *Lopez*, 115 S.Ct. at 1630-31.

74. *See* NLRB v. Jones & Laughlin, 301 U.S. 1, 37 (1937) (Hughes, C. J.) (the commerce power “may be exerted to protect interstate commerce no matter what the source of the dangers which threaten it”). *See also, e.g.*, *United States v. Darby*, 312 U.S. 100, 115 (1941) (Congress can exclude from interstate commerce goods made by workers with substandard wages, overruling *Hammer v. Dagenhart* which had held that Congress has no power to regulate child labor in interstate commerce). *See, e.g.*, David P. Currie, *The Constitution in the Supreme Court: The New Deal, 1931-1940*, 54 U. CHI. L. REV. 504, 532 (1987) (discussing the Court’s “switch in time” in the shadow of Roosevelt’s court-packing plan, after which the Court regularly sustained New Deal legislation).

75. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) (“[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators”).

76. *See* Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 810- 11 (1989) (arguing that a sovereign’s lawmaking powers flow from its governmental interests; explaining that American law in any event must have a basis in reason because the Due Process Clauses constitutionalize the protections of the common law against law that is arbitrary or unreasonable).

“It is not only agreed, on all hands, that the exercise of constructive powers is indispens[able], but every act which has been passed is more or less an exemplification of it. . . . It leaves therefore a criterion of what is constitutional, and of what is not so. This criterion is the end to which the measure relates as a mean.”⁷⁷

(1997) 23 *Oh.N.L.R.* 1313 Clearly, two hundred years ago it was understood that the legitimacy of exercises of national power turns on their rational relation to legitimate governmental purposes. And equally clearly, two hundred years ago it was understood that national power cannot be confined to Article I’s formal enumerations. Yet Chief Justice Rehnquist in *Lopez* actually says of the enumeration of powers that it is our “constitutionally mandated division of authority.”⁷⁸ We do not have to believe this. But if we fear national power at the expense of the states—I think rightly—and if we have a sense of the importance of that fear, part of the problem, surely, must be that we do not see limits on national power intrinsic to any realistic theory of federalism.

IV. WHAT WE SUPPOSE WE ARE AFRAID OF.

“The Constitution [withholds] from Congress a plenary police power that would authorize enactment of every type of legislation. . . . To uphold the Government’s contentions here, we would have to pile inference upon inference⁷⁹ in a manner that

77. Alexander Hamilton, Secretary of the Treasury, *Opinion on the Constitutionality of an Act to Establish a Bank*, (Philadelphia, February 23, 1791), VIII THE PAPERS OF ALEXANDER HAMILTON 106, 107 (Harold C. Syrett ed. 1965). This thinking is reflected in Chief Justice Marshall’s familiar means/ends language in *McCulloch*: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” 17 U.S. (4 Wheat.) at 421.

78. *Lopez*, 115 S.Ct. 1624, 1626 (Rehnquist, C. J.).

79. Cf. James Madison, *Speech on the Bank Bill* (1791), 13 THE PAPERS OF JAMES MADISON 372 (Charles F. Hobson & Robert A. Rutland eds. 1981):

would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.”

- Chief Justice William H. Rehnquist⁸⁰

“It can therefore never be good reasoning to say this or that act is unconstitutional, because it alters this or that law of a State. It must be shown that the act which makes the alteration is unconstitutional on other accounts, not because it makes the alteration.”

- Alexander Hamilton⁸¹

It would help a little in trying to pin down what it is that we are afraid of today about national power vis-a-vis the states if we could disabuse ourselves of some received wisdom about the threat that national power is supposed to present to the states’ continued existence. It is probably time to retire the fixed but spurious idea that if Congress had all the power it (1997) **23 Oh.N.L.R. 1314** needed to govern the nation for the nation’s general welfare, the states would cease to exist as states, and we would have a single consolidated country.⁸² I think of this bugbear as the *consolidation catastrophe*.

“If implications, thus remote and thus multiplied, can be linked together, a chain may be formed that will reach every object of legislation, every object within the whole compass of political economy.”

80. *Lopez*, 115 S.Ct. at 1633, 1634.

81. Alexander Hamilton, Secretary of the Treasury, *Opinion on the Constitutionality of an Act to Establish a Bank*, (Philadelphia, February 23, 1791), VIII THE PAPERS OF ALEXANDER HAMILTON 109-111 (Harold C. Syrett ed. 1965).

82. Cf. James Madison, *The Federalist* No. 39: “‘But it was not sufficient,’ say the adversaries of the proposed Constitution, ‘for the convention to adhere to the republican form. They ought, with equal care, to have preserved the FEDERAL form, which regards the Union as a CONFEDERACY of sovereign states; instead of which, they have framed a NATIONAL government, which regards the Union as a CONSOLIDATION of the States.’” In No. 39, Madison conceded that the government would be national in its operation directly upon the people. But he

Supporting the scenario of the “consolidation catastrophe” is our thinking about the nature of the common law. We conceive that the states generally “received” the common law of England in a way that the nation did not and could not. Just as the Constitution does not give the whole power of legislation⁸³ to Congress, it does not give the Supreme Court the whole power of the general common law. *Erie v. Tompkins*⁸⁴ holds that general questions of common law are for the states. Unlike the House of Lords, which is a court of last resort over every will or divorce, the United States Supreme Court is a court of last resort only over cases raising broad issues of national public policy.

These ways of looking at national power are related to the concomitant concept of “the police power” of a state. By the “police power” an American lawyer means a polity’s general power of governance over the general welfare of the people within that polity. A state of the Union has police power, we say, to provide for the health, education, safety, and general welfare of its people. The national powers are seen as outside the states’ police powers. But in the partisan dispute over the first Bank of the United States, James Madison took the further position that there was no national power to make law in “the general welfare.”⁸⁵ And since matters within a state’s “police powers,” matters touching its people’s health, (1997) 23 *Oh.N.L.R.* 1315 education, and safety, are traditionally viewed as “for the state,” it is still sometimes said—in the

pointed out, “Among communities united for particular purposes,. . . the local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority, than the general authority is subject to them, within its own sphere.”

In *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 550 (1935), the Court struck down the wages and hours provisions of the National Industrial Recovery Act on the ground that the activity of the Schechter brothers was only “indirectly” related to interstate commerce. This supposed distinction between “direct” and “indirect” effects, according to the Court, was “a fundamental one, essential to the maintenance of our constitutional system,” because otherwise “there would be virtually no limit to the federal power and for all practical purposes we should have a completely centralized government.” *Id.* at 548.

83. See James Madison, *The Federalist* No. 14.

84. 304 U.S. 64 (1938).

85. For a recent study of the consistency of Madison’s understandings of the power of Congress see LEONARD R. SORENSON, *MADISON ON THE “GENERAL WELFARE” OF AMERICA: HIS CONSISTENT AND CONSTITUTIONAL VISION* (1995).

face of innumerable acts of Congress—that the United States has no power to regulate for the health, education, or safety of *its* people. Such a conclusion, of course, is an absurdity. One cannot conclude from the hypothesis that Congress cannot make California law that Congress cannot make federal law that is applicable in California.

There is a difference between the feared consolidation of a general federal “power of police” and the actual federal police power,⁸⁶ and it is very like the difference between the pre-*Erie* “general federal common law” and the true federal common law we have today.⁸⁷ Yet the view persists that because the nation has no “general police power,” there can be no national power to make law for the general welfare.⁸⁸ Why not? Because to imagine that is, circularly, to invite the “consolidation

86. For a mixing of these two ideas in *Lopez*, see 115 S.Ct. at 1632 (Rehnquist, C. J.) (complaining that Justice Breyer’s proposals would yield a “federal police power” because they would not reserve any activity exclusively for state governance); *id.* at 1642 (Kennedy, J., joined by O’Connor, J., concurring); *id.* at 1649 (Thomas, J., concurring): “[T]he substantial effects test suffers from the further flaw that it appears to grant Congress a police power over the Nation”). For references in the Supreme Court to federal police power, see, e.g., *United States v. Winstar Corp.*, 116 S.Ct. 2431, 2478 (1996) (concurring op.); *North American Co. v. SEC*, 327 U.S. 686, 705 (1946); *United States v. Darby*, 312 U.S. 100, 116 (1941) (“The authority of the federal government over interstate commerce does not differ in extent or character from that retained by the states over intrastate commerce” (quoting *United States v. Rock Royal Co-operative*, 307 U.S. 533, 569 (1939)); *Lynch v. United States*, 292 U.S. 571, 579 (1934); *Board of Trade of Chicago v. Olsen*, 262 U.S. 1, 40 (1923); *Felsenheld v. United States*, 186 U.S. 126, 131 (1902). See 2 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 729-730 (rev. ed. 1935) (explaining that the Interstate Commerce Act of 1887 launched a new age of congressional reliance on the Commerce Clause for the exercise of general police powers at the national level).

87. See Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 827 (1989):

“The ghost of *Swift v. Tyson* need not trouble us. Unlike the pre-*Erie* general federal common law, the post-*Erie* federal common law is federal law, not some independent view of state law, and is entitled to supremacy under article VI. This supremacy means that the same law is applied in all courts on the same sorts of questions. Identified federal common law cannot raise the old pre-*Erie* problems of forum shopping and discrimination.”

88. But for an exposition of this view, see Alan N. Greenspan, *The Constitutional Exercise of the Federal Police Power: A Functional Approach to Federalism*, 41 VAND. L. REV. 1019, 1021 (1988).

catastrophe,” a kind of implosion, in which state lines will disappear, and the nation assume one consolidated general “power of police.”

There is scant objective correlative in real life for this familiar fear of the “consolidation catastrophe.” Dual federalism doesn’t work that way. Consider the constitutional revolution of 1937, in which, among other things, the Hughes Court construed the commerce power broadly enough to enable Congress to regulate any activity affecting interstate commerce, (1997) 23 Oh.N.L.R. 1316 however internal to the state.⁸⁹ In the wake of that constitutional revolution, writers mourned the death of our federalism;⁹⁰ but somehow the consolidation catastrophe did not take place. The states survived. Indeed, with the passing of the *Lochner*⁹¹ era and the reign of *Swift v. Tyson*,⁹² the states obviously had *more* power than they had before the constitutional revolution of 1937.⁹³

Nor did state law amalgamate with or dissolve into federal law. The increasing perception of the legitimacy of true federal common law, for which *Erie* laid the necessary positivistic and legal-realist intellectual

89. N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 25-28 (1937).

90. See, e.g., as late as 1987, David P. Currie, *The Constitution in the Supreme Court: The New Deal, 1931-1940*, 54 U. CHI. L. REV. 504, 532 (1987) (lamenting “The End of Federalism:” “Unhappily, the price of judicial independence was the death of our federal system”).

91. *Lochner v. New York*, 198 U.S. 45 (1905) (holding that the state cannot legislate a maximum 60-hour work week because to do so would interfere with the liberty of contract protected by the Fourteenth Amendment); *departed from*, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (holding that a state can legislate a minimum wage for women).

92. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18-19 (1842) (stating that except in matters governed by statute or fixed local usage, it has never been supposed that the Rules of Decision Act forbids federal courts to apply the general common law without regard to the otherwise applicable common-law rules of the state), *overruled*, *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) (declaring unconstitutional the course of conduct pursued by federal courts under *Swift*).

93. See, e.g., Herbert Hovenkamp, Book Review, *Federalism Revised*, 34 HAST. L. J. 201, 215 (1982) (“The end of the *Lochner* era in 1937, and the development of the *Erie* doctrine in 1938, helped to restore eroded state power and prepare for a realignment of state and federal areas of concern”).

foundations,⁹⁴ made the nation's case law more, not less, distinct from that of the states. Even after *Brown v. Board of Education*, when the nation forced its view of equal opportunity upon the states in a field traditionally "for" the states—education⁹⁵—the "consolidation catastrophe," like so many other doomsdays, failed to materialize.

When a state makes law, it does so for reasons having to do with a perceived interest of the state. When Congress makes law, obviously it does so for reasons having to do with a perceived interest of the nation. Recently, in a comment on *Lopez*, Professor Regan underscored this "obvious"⁹⁶ proposition, pointing out that there must be some "justification" for federal (1997) 23 Oh.N.L.R. 1317 law: "The kernel of my positive suggestion is so obvious that I would be embarrassed to offer it, if it did not seem necessary that someone should. . . . Federal power exists where and only where there is special justification for it. . . ."⁹⁷

Professor Regan's requirement of justification might have more "bite" than another's, since he would have courts explicitly inquire, among other things, whether there was some reason we could not "leave the problem to the states."⁹⁸ So would I. But for him as for everyone else, the first question is whether there is a rational basis for national governance.⁹⁹

94. Although I should have thought this position well understood, the only developed argument for it I can find is in Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 819-826, 835-836, 842 (1989), and in Louise Weinberg, *The Curious Notion that the Rules of Decision Act Blocks Supreme Federal Common Law*, 83 NW. U. L. REV. 860, 866-67, 875 (1989).

95. *Brown v. Board of Education of Topeka, Kansas*, 349 U.S. 294 (1955) (under the Equal Protection Clause, a state may not require racial segregation in public schooling).

96. Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554, 555 (1995). See also Thomas E. Baker, *A View to the Future of Judicial Federalism: "Neither Out Too Far Nor In Too Deep"*, 45 CASE W. RES. L. REV. 705, 791 (1995) (describing a related model, not discussed here, of "cooperative" federalism).

97. Regan, *supra* note 97 at 555; see also Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 810-11 (1989) (arguing that national law making power arises from an identified national interest).

98. Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554, 555 (1995).

This rational basis, the national interest, may be some substantive interest of nationwide concern, or a demonstrable need for uniformity, or a need to facilitate enforcement of state policies that would otherwise become ineffective at the interstate level. To leave a matter to state governance can sometimes be to defeat the states' collective interests; problems of rational choice can arise which produce races among the states to the regulatory bottom,¹⁰⁰ or can deplete collective resources,¹⁰¹ or discourage the states from furnishing a reasonable social safety net and providing reasonable social services, or encourage them to furnish havens for individuals evading another state's laws.¹⁰² When federal law responds to those sorts of (1997) 23 Oh.N.L.R. 1318 problems, obviously it benefits the states in their collective interests. When the nation establishes national substantive standards, typically it does so by

(arguing that federal law would be justifiable if there was some reason we could not "leave the problem to the states").

99. Weinberg, *supra* n.97 at 810-11.

100. For recent commentary *see, e.g.*, Thomas O. McGarity, *The Expanded Debate over the Future of the Regulatory State*, 63 U. CHIC. L. REV. 1463 (1996); Cass Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996); and *see* Symposium, 14 YALE L. & POL'Y REV. (1996), including Henry N. Butler & Jonathan R. Macey, *Externalities and the Matching Principle: The Case for Reallocating Environmental Regulatory Authority*, *id.* at 23; Peter P. Swire, *The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition among Jurisdictions in Environmental Law*, *id.* at 67. On the related question of "dormant" Commerce Clause control of interstate self-destructiveness, *see, e.g.*, Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L. REV. 789 (1996); Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377 (1996). *See* Letter from James Madison to J. C. Cabell (February 13, 1829), 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 478 (Max Farrand ed. 1911) (describing the Commerce Clause as "a negative and preventive provision against injustice among the States themselves"); *West Lynn Creamery, Inc. v. Healy*, 114 S. Ct. 2205, 2211 n. 9 (1994) (quoting Madison's remark). *But see* THOMAS R. DYE, AMERICAN FEDERALISM: COMPETITION AMONG GOVERNMENTS (1990) (making the case for interstate competition).

101. *Cf.* Garrett Hardin, *Tragedy of the Commons*, 162 SCIENCE 1243, 1244-45 (1968).

102. *See* Louise Weinberg, *Against Comity*, 80 GEO. L. J. 53-94 (1991) (discussing these and similar problems).

furnishing only a “floor” above which a state is left free to impose its own more stringent standards.

Well, then, if the “consolidation catastrophe” is not a real threat, how about the more plausible threat of national encroachment on state autonomy? It is indeed commonly supposed that new federal law takes something from the states. And so it may; but not very much. Rather, dual sets of rights and duties are characteristic of this country. This dual governance is something with which Americans have an easy familiarity. The outcry on behalf of states’ rights that sometimes accompanies new federal regulations or new federal remedies rings a bit hollow. Of course, dual sets of obligations impose upon individuals the costs of conforming with the higher standard, or with both. But in such cases complainants, for example, retain their rights to plead a violation of state law, or to join a state-created claim with the federal as alternative theories, or even to waive the federal violation. There is little substantial threat to state remedies when new federal remedies are created. And dual sets of defenses are equally reinforcing.

We do sometimes say, loosely, that federal “rights” limit state “rights,” as, for example, that the First Amendment limits state libel law. But actual conflicts between federal and state laws of a kind that can bring the Supremacy Clause into play¹⁰³ generally are limited to situations like the conflict between libel law and the First Amendment, in which there is some federal *defense*.¹⁰⁴ Obviously a federal defense can destroy an individual’s rights under state law, and in this sense frustrate state remedial policies. State policies, generally, are adversely affected by new federal regulation only when a state’s policies are not manifested in state-created rights as such, but in state-created substantive defenses, or perhaps in lax standards or lax enforcement of existing standards-less generous protections that fall beneath the federal “floor.” This is not to say that the state may not have important policy objectives in protecting a class of

103. For fuller exposition of supremacy and also constitutional preemption in federalism theory, see Louise Weinberg, *The Federal-State Conflict of Laws: “Actual” Conflicts*, 70 TEX. L. REV. 1743 (1992).

104. See, e.g., *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988) (fashioning a federal common-law defense on behalf of military contractors in state-law actions for personal injuries and deaths); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (fashioning a federal common-law defense of nonjusticiability of the validity of the act of a foreign state).

putative defendants. But, again, it is worth bearing in mind that new federal obligations or standards, notwithstanding the costs they impose on enterprises within the state, can often be in the states' collective interest. There can arise (1997) 23 *Oh.N.L.R.* 1319 externalities of multistate governance of the sort I have already mentioned, which are predicted by public choice theories, and which can be controlled by federal regulation.¹⁰⁵

There is one problem of federal encroachment on state governance that does need to be taken seriously: the problem of federal preemption. By preemption I mean the construction of federal decisional or statutory law, in its terms or impliedly, to negate the power of the states to govern, even in the absence of any immediate substantive conflict between state and federal law. This is what the Court today calls "preemption of a field," or sometimes "field preemption"¹⁰⁶ (as opposed to "conflict preemption," which, more properly, is simply the operation of the Supremacy Clause).¹⁰⁷

Since neither state-created defenses nor rights can diminish their federally-created *analogs*, it is almost always unnecessary for Congress or the Court to "preempt" state law. And since in creating new federal law

105. *See supra* notes 100, 101 for current and classic literature.

106. For discussion of these categories, *see* *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190 (1983).

107. *See* Louise Weinberg, *The Federal-State Conflict of Laws: "Actual" Conflicts*, 70 *TEX. L. REV.* 1743, 1753-55, 1796-97 (1992). I pause to deal with a current misconception. Although supreme federal law does not preempt state law without some affirmative effort in that direction by courts or Congress, it is unhelpful to conceptualize preemption as disjunct from federal supremacy, as do Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 *SUP. CT. REV.* 125, 165 (1995) and Stephen A. Gardbaum, *The Nature of Preemption*, 79 *CORNELL L. REV.* 767, 787 (1994). The mistake may arise from a failure to take nonstatutory preemption sufficiently into account. *See, e.g.*, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (foreign relations); *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964) (public domain); *Clearfield Trust v. United States*, 318 U.S. 363 (1943) (United States commercial paper); *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917) (admiralty). As Justice Scalia has explained, a *field* of law can be preempted because (in the view of courts or Congress), state governance conflicts with the supremacy of federal policy. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 508 (1988) (Scalia, J.):

Congress presumably means to confer its benefits upon particular protected classes, it follows that preemption of parallel, supplementary, or analogous state law by federal is almost always a *mistake*. It can rarely make sense to interpret legislation as stripping its beneficiaries of whatever reinforcing defenses or rights they may have under preexisting law.

(1997) 23 Oh.N.L.R. 1320 From these preliminary analyses we can reasonably conclude that in general only federal defenses that under the Supremacy Clause would trump state-law rights, or federal rights that under the Supremacy Clause would trump conflicting state-law defenses, are likely to be a subject of concern to those anxious about encroachments upon existing state policies; and that, of these situations, a trumping of state defenses may actually serve the states' collective interest; but that federal *preemptions* of state laws not in actual conflict with federal law do need to be scrutinized with great care.

There are similarly unfocused or misplaced fears of federalization of criminal law. When Congress enacts new federal criminal legislation,¹⁰⁸ even when the legislation closely tracks state laws, the states generally are left with all the powers they previously had to prosecute crimes under their own laws. It is true that costs are imposed upon individuals, and inroads made on state policy, when federalization criminalizes conduct that previously was legal in a state. Earlier this year a state attempted to legalize conduct previously criminalized by the nation. California purported to legalize the use of marijuana in California for medicinal

“[T]he fact that the area in question is one of unique federal concern changes what would otherwise be a conflict that cannot produce pre-emption into one that can. But conflict there must be. In some cases, for example where the federal interest requires a uniform rule, the entire body of state law applicable to the area conflicts and is replaced by federal rules. *See, e.g., Clearfield Trust*, 318 U.S., at 366-367 (rights and obligations of United States with respect to commercial paper must be governed by uniform federal rule). In others, the conflict is more narrow, and only particular elements of state law are superseded.”

108. *See*, for useful discussion, William P. Marshall, *Federalization: A Critical Overview*, 44 DEPAUL L. REV. 719 (1995). On the politics of federalization, *see generally* Gerald G. Ashdown, *Federalism and the Criminal Justice System—Federalism, Federalization, and the Politics of Crime*, 98 W. VA. L. REV. 789 (1996).

purposes. But California doctors and their patients are well advised to obtain federal waivers from prosecution if they can.

It is also true that in states in which an act already is criminal, federalization opens the individual to the possibility of two prosecutions; and the crime that was a state misdemeanor may become a federal felony. But encroachment on the autonomy of the state does not seem a significant feature. Sometimes state prosecutors will happily defer to federal prosecutors to put defendants away for conveniently longer periods of time. It is true that a federal conviction may have a disparaging effect on a prior state judgment of acquittal for the analogous crime. But by and large the greatest ill effect of federalization seems to be to crowd federal dockets.¹⁰⁹

How, then, do you explain *United States v. Lopez*?¹¹⁰ In striking down a federal statute outlawing the possession of a gun within 1,000 feet of a school,¹¹¹ Chief Justice Rehnquist, writing for the Court, sounded a rather plaintive note. There must be *some limits* on the commerce power, (1997) 23 Oh.N.L.R. 1321 he seemed to be saying.¹¹² In the end, that is the test in *Lopez* that the federal gun law flunked: any rationale supporting the exercise of national power in *Lopez*, the Chief Justice reasoned, would support it in all cases, and therefore could have no meaning.¹¹³ What, then, did the Chief Justice propose?

Interestingly, Chief Justice Rehnquist did not *propose* a requirement of “substantial effects” upon interstate commerce to test intrastate activities.¹¹⁴ He *assumed* a “substantial effects” test to be already in

109. See generally Charles B. Schweitzer, *Street Crime, Interstate Commerce, and the Federal Docket: The Impact of United States v. Lopez*, 34 DUQ. L. REV. 71 (1995)

110. 115 S.Ct. 1624 (1995).

111. Gun-Free School Zones Act of 1990, part of Tit. XVII, Crime Control Act of 1990, Pub. L. 101-647, § 1702, 104 Stat. 4844-45.

112. See also Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 685, 712 (1995) (identifying the *Lopez* Court’s concern “that the Commerce Clause know some limits”).

113. *Lopez*, 115 S.Ct. at 1632 (Rehnquist, C. J.):

“Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been

place.¹¹⁵ You and I may have thought that Congress need only have a “rational basis” for an exercise of its commerce power, but Rehnquist was probably right. The cases that once seemed so hard to justify were, if you think about them, cases in which the regulated activity, like the consumption of home-grown wheat in *Wickard v. Filburn*,¹¹⁶ or the denial of accommodations to black travellers in *Heart of Atlanta Motel*,¹¹⁷ or even the denial of seats to black customers at places like Ollie’s Barbecue,¹¹⁸ *would*, in the aggregate, have “a substantial effect” on interstate commerce.

(1997) 23 Oh.N.L.R. 1322 But the tests the Chief Justice did have to offer seemed anti-climactic.¹¹⁹ Preliminarily, the Chief Justice purported

sovereign. Thus, if we were to accept the Government’s arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate.”

Professor Powell usefully calls this “the test of consequences,” and points out that James Madison used the test of consequences in his 1791 speech on the Bank. H. Jefferson Powell, *Enumerated Means and Unlimited Ends*, 94 MICH. L. REV. 651, 659 (1995). But Professor Powell rejects the test of consequences as an interpretive strategy, in part on the thinking that it contradicts “our rejection of the Madisonian limit on Congress’s ends.” *Id.* at 673.

114. Chief Justice Rehnquist limited his analysis to cases involving “activities” rather than “channels” of interstate commerce or “instrumentalities of” or “persons and things in” interstate commerce. 115 S.Ct. at 1629-1630. The government took the position that the possession of guns near schools did substantially affect interstate commerce. Brief for the United States at 5, 6.

115. 115 S.Ct. 1629, 1630, citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *id.* at 1642 (Kennedy, J., joined by O’Connor, J., concurring) (complaining that the test had been ineffective in limiting the commerce power over the past 60 years). *But see Lopez*, 115 S.Ct. 1629 (Rehnquist, C. J.) (also referring to the test of “a rational basis,” citing *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 276 (1981) and other cases). The whole tenor of Justice Breyer’s dissent was to illustrate that the test is “a rational basis.” *Lopez*, 115 S.Ct. at 1659 (Breyer, J., joined by Justices Stevens, Souter, and Ginsberg, dissenting). These tests are inherently subjective. *Cf. ALASDAIR MACINTYRE, WHOSE JUSTICE? WHOSE RATIONALITY?* (1988).

116. 317 U.S. 111 (1942).

117. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

118. *Katzenbach v. McClung*, 379 U.S. 294 (1964).

119. I pass over the Chief Justice’s complaint that Congress had not made findings of a nexus with interstate commerce or required that the United States plead

to confine Congress's commerce power to *commercial*¹²⁰ or *economic*¹²¹ activities. But he unguardedly acknowledged that this test was no test at all, remarking, "[D]epending on the level of generality, any activity can be looked upon as commercial."¹²² After all, to be taken seriously on this point the Chief Justice would have had to set himself at odds with *McCulloch v. Maryland*, in which it was forever laid down that Congress has power to do what is "necessary and proper" to achieve a legitimate end, like the regulation of interstate commerce.¹²³ No doubt John Marshall's position in *McCulloch* always presents an occasion for hand-wringing among strict constructionists. But the country would wind up with Marshall's position in the end anyway.¹²⁴ It would be unrealistic and even dangerous to deny Congress presumptive power to regulate an activity affecting national markets, whether that activity is commercial in itself or not.¹²⁵

one, *Lopez*, 115 S.Ct. at 1631, since such statutory defects are readily curable. Indeed, Congress had already attempted to cure the defects in the statute struck down in *Lopez*, but the Government did not rely on that subsequent change. *Id.* at 1632 n. 4. See, generally Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and United States v. Lopez*, 46 CASE W. RES. L. REV. 695 (1996); Barry Friedman, *Legislative Findings and Judicial Signals: A Positive Political Reading of United States v. Lopez*, 46 CASE W. RES. L. REV. 757 (1996).

120. *Lopez*, 115 S.Ct. at 1626, 1631.

121. *Id.* at 1630. Previously these words appear to have been used by the Court to test the effects of an activity on interstate commerce, rather than the activity itself. E.g., *Wickard v. Filburn*, 317 U.S. 111, 125 (1942).

122. *Lopez*, 115 S.Ct. at 1633.

123. Professor Powell argues that Chief Justice Rehnquist is a firm believer in *McCulloch*. H. Jefferson Powell, *Enumerated Means and Unlimited Ends*, 64 MICH. L. REV. 651, 653 (1995).

124. Professor Barnett ploughs the Annals of Congress and other sources in Randy E. Barnett, *Necessary and Proper*, 44 U.C.L.A. L. REV. 745 (1997), to show that Madison's and Jefferson's earlier views differed from Marshall's. But, as Professor Barnett acknowledges, in the presidency these men came to a more Marshallian understanding of national power.

125. In the wake of *Lopez*, some useful legislation on non-commercial activities affecting interstate commerce seemed at risk, but on the whole courts are favoring the legislation and construing *Lopez* narrowly. See, e.g., *Cargill v. United States*, 116 S.Ct. 407 (1995) (denying certiorari in a case sustaining the commerce power of Congress over migratory birds on wetlands,) and *id.*, Thomas, J. (dissenting from the denial); *United States v. Orozco*, 98 F.3d 105 (3d Cir. 1996) (sustaining the

(1997) 23 Oh.N.L.R. 1323 Nor did Chief Justice Rehnquist take refuge in the false idea that there are certain subjects so confided to the states that there can be no federal law concerning them. This idea is what I think of as “the fallacy of ‘matters.’” Rather, he drily remarked:

“Justice Breyer posits that there might be some limitations on Congress’s commerce power such as family law or certain aspects of education. These suggested limitations . . . are devoid of substance.”¹²⁶

constitutionality of the Drug-Free School Zones Act, which provides for enhanced sentences when a drug offense occurs within 1,000 feet of a school). The federal statute criminalizing possession of a firearm was sustained in *United States v. Polanco*, 93 F.3d 555 (9th Cir.), *cert. denied*, 117 S.Ct. 405 (1996), and also in the 1st and 6th Circuits. *See also, e.g.*, *United States v. Unterburger*, 97 F.3d 1413 (11th Cir. 1996) (sustaining the Freedom of Access to Clinic Entrances Act of 1994); the 4th, 7th, 8th, and 11th Circuits have also sustained the legislation. President Clinton issued a statement in August, 1995, stressing the importance of federal involvement in the interstate problem of the absconding parent. He was responding to federal court rulings purporting to strike down as unconstitutional under *Lopez* the criminal provisions of the federal Child Support Recovery Act of 1992 which criminalizes a failure to pay support due a child in another state, even though the Act contains a jurisdictional element, something the *Lopez* Court complained was missing under the Gun-Free School Zones Act of 1990. *Lopez*, 116 S.Ct. at 1631. *See, e.g.*, *United States v. Parker*, 108 F.3d 28 (3d Cir. 1997) (reversing the district court’s judgment striking down the Child Support Recovery Act as unconstitutional under *Lopez*); the 1st, 2d, 9th and 10th Circuits also have sustained the legislation. *See generally* Kathleen A. Burdette, *Making Parents Pay: Interstate Child Support Enforcement After United States v. Lopez*, 144 U. PA. L. REV. 1469 (1996); *United States v. DiSanto*, 86 F.3d 1238 (1st Cir. 1996) (sustaining the federal statute criminalizing arson for profit); but see *United States v. Denalli*, 73 F.3d 328 (11th Cir. 1996) (holding that the burning of a private building could not ground a federal prosecution without a showing of substantial nexus with interstate commerce); *United States v. Pappadopoulos*, 64 F.3d 522 (9th Cir. 1995) (same). Federal criminalization of illegal gambling was sustained over a strong dissent in *United States v. Wall*, 92 F.3d 1444 (6th Cir. 1996). In *Lopez* itself, the Court accepted federal regulation of loan sharking as involving “economic” activity. 115 S.Ct. at 1630 (citing *Perez v. United States*, 402 U.S. 146 (1971)). *See generally* Adam H. Kurland, *First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction*, 45 EMEORY L. J. 1 (1996); Note, Andrew Weis, *Commerce Clause in the Cross-Hairs: The Use of Lopez-based Motions to Challenge the Constitutionality of Federal Criminal Statutes*, 48 STAN. L. REV. 1431 (1996).

126. *Lopez*, 115 S.Ct. at 1632.

The actual limiting principle, then, on which Chief Justice Rehnquist can be said to rely in *Lopez*, is the weirdly circular proposition that there must *be* a limiting principle. Courts examining what Congress has done must be able to hypothesize a limiting case.¹²⁷ The position is that when Congress acts, it acts illegitimately unless its supporting reasons take it only so far. There must be some morsel of state power, however tempting, that Congress would feel compelled, in order to avoid an attack of constitutional indigestion, to leave daintily on its plate. Otherwise nothing prevents the nation from devouring the states. Congress presumably would next be regulating not only guns near schools, but wills, divorces, and whiplash (1997) 23 Oh.N.L.R. 1324 injuries.¹²⁸ It could only be a matter of time until the states disappeared into the blimp-like figure of a now satiated Uncle Sam: the *consolidation catastrophe*.

The kicker is that Congress certainly can regulate wills, divorces, and whiplash injuries—to be sure, not in the absence of a national interest, but whenever the national interest does so require.¹²⁹ Congress could, for example, provide for the division of military benefits upon divorce.¹³⁰ Congress does regulate the personal injuries of railway workers and

127. “Thus, if we were to accept the Government’s arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate.” *Lopez*, 115 S.Ct. at 1632 (Rehnquist, C. J.).

128. *Lopez*, 115 S.Ct. at 1632 (Rehnquist, C. J.):

“[U]nder the Government’s ‘national productivity’ reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. . . . [I]t is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign.”

129. *But see Lopez*, 115 S.Ct. at 1650 (Thomas, J., concurring) (“If we wish to be true to a Constitution that does not cede a police power to the Federal Government, our Commerce Clause’s boundaries simply cannot be defined as being commensurate with the national needs. . .”). [Internal quotation marks omitted.]

130. *See, e.g.*, Uniformed Services Former Spouses’ Protection Act of 1981, 10 U.S.C. § 1408, enacted in response to *McCarty v. McCarty*, 453 U.S. 210 (1981) (striking down an application of state law treating veterans’ retirement benefits as community property); *cf. Mansell v. Mansell*, 490 U.S. 581 (1989) (under the Spouses’ Protection Act, veterans’ disability benefits may not be treated as community property divisible upon divorce, even when retirement benefits have been waived to receive them).

seamen, and, under the Federal Tort Claims Act, even the whiplash injuries the nation's drivers cause.¹³¹

As for guns, firearms have long been regulated by Congress, of course. You could argue, citing *Wickard v. Filburn*, that tolerance of guns near schools substantially affects the interstate market for guns;¹³² one need not attempt the more strained and risky¹³³ argument made by Justice Breyer, dissenting in *Lopez*, that guns near schools affect education, and education affects interstate commerce.¹³⁴ If the Brady handgun law is to be struck down this Term¹³⁵—that is the statute requiring sheriffs to perform background checks of gun buyers—it will be because of the anti-**(1997) 23 Oh.N.L.R. 1325** commandeering principle of *New York v. United States*,¹³⁶ not because of anything in *Lopez*. This is just a line so that 136 will continue from one page to another. While it didn't work

131. 28 U.S.C. § 1346(b) (incorporating state law by reference).

132. *Cf.* *United States v. Orozco*, 98 F.3d 105, 107 (3d Cir. 1996) (sustaining a federal statute which authorized a more severe sentence for drug possession when within 1,000 feet of a school: “A large interstate market exists for illegal drugs. Congress has the power to regulate that market just as it has the power to regulate food and drugs in general”).

133. Risky because inviting the majority's slippery slope argument, that if safe schooling affected interstate commerce, school curricula also affected interstate commerce. 115 S. Ct. at 1633.

134. *Lopez*, 115 S.Ct. at 1659-1661 (Breyer, J., dissenting).

135. *Mack and Printz v. United States*, 66 F.3d 1025 (9th Cir. 1995), *cert. granted*, 116 S.Ct. 2521 (1996); Brady Handgun Violence Prevention Act, 18 U.S.C. § 922(s)(1).

136. *New York v. United States*, 505 U.S. 144 (1992) (O'Connor, J.) (holding that Congress may not “commandeer” a state's legislative processes by forcing it to take title to hazardous wastes for which it has not found a disposal site by a given date). This current thinking seems traceable to a dissent by Justice O'Connor in *F.E.R.C. v. Mississippi*, 496 U.S. 742 (1982). For recent comment on *New York*, see Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001 (1995). The anti-commandeering idea appears in antebellum thinking. See *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 622 (1842) (Story, J.) (holding that, notwithstanding national preemption of lawmaking power over the rendition of fugitive slaves, the nation could not require state officials to cooperate in slave renditions, if prohibited by state law); cf. *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1861) (holding that Congress cannot require a state governor to extradite a fugitive from justice). Of course there is

The intriguing thing about Chief Justice Rehnquist's reasoning in *Lopez* is not that it is unconvincing, but that, even so, we tend to reason in exactly the same way ourselves, and have been doing so ever since law school. Like the Chief Justice, we tend to start with the observation that the Constitution has given us a nation of enumerated powers. From this it is easy to leap to the (counterfactual) conclusion that the nation is limited to the powers expressly enumerated. And, seeing that we have described a nation of "limited powers," we leap to the further conclusion that even the enumerated powers must be "limited" by some principle intrinsic to federalism.¹³⁷ Naturally, we assume we should be able to describe the "limiting" principle, whatever it is. And every once in a while we make the leap to the even wilder conclusion that there must be some matters inherently beyond the competence of Congress, matters exclusively for state governance.¹³⁸

(1997) 23 Oh.N.L.R. 1326 You see the problem in one of the questions from the Court during the Solicitor General's oral argument in *Lopez*:

judicial federal power over state officials. Justice O'Connor's opinion for the Court in *New York* acknowledges this. 505 U.S. at 179. *Cf. Cooper v. Aaron*, 358 U.S. 1 (1958); *Brown v. Board of Education*, 349 U.S. 294 (1955); *Ex parte Young*, 209 U.S. 123, 155-156 (1908).

137. Chief Justice Rehnquist used language from *Gibbons v. Ogden* to explain that the commerce power is "interpreted" to be limited: "'The enumeration [i.e., of a power over commerce that is interstate] presupposes something not enumerated' [i.e., power over commerce that is wholly internal to the state]." *Lopez*, 115 S.Ct. at 1627, quoting from *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194-95 (1824) (Marshall, C. J.) In *Gibbons*, of course, the context is quite different. The Court was striking down an exercise of *state* power under the dormant Commerce Clause.

138. *See, e.g.*, the discussion of *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 311 (1851) by Daniel M. Roper in *THE OXFORD DICTIONARY OF AMERICAN CONSTITUTIONAL HISTORY* 197 (1992) (arguing that Justice Curtis, for the Court, "was finally able to achieve a coherent resolution of the Commerce Clause issue" by defining the question "in terms of the subject matter of regulation rather than the nature of the commerce power, with some subjects being national in scope and others, like pilotage laws, local"). This is a delicious example of the fallacy of "matters." Of course, Congress had already federalized pilotage laws, as *Cooley* acknowledged. *Cooley*, 53 U.S. (12 How.) at 318. To be sure, Congress incorporated state laws by reference.

“QUESTION: Can you tell me, Mr. Days, has there been anything in our recent history in the last 20 years where it appears that Congress made a considered judgment that it could not reach a particular subject?”

“(Laughter.)”¹³⁹

But to suppose that there are some “matters” so local as to be beyond the power of Congress is utterly to mistake the constitutional design. This is the theoretical wrong turn I call the fallacy of “matters.” The fallacy of “matters” entices the tidy as well as the fearful mind by marking off some set of subject matters for exclusive national governance by the nation. The residue is then designated as exclusively within the governance of the states. The same tidy mind may be flexible enough to make room for a subset of subject matters governable concurrently by the nation and the states, usually relying for that understanding on Justice Curtis’s opinion in *Cooley v. Board of Wardens*.¹⁴⁰ We can all recognize some of the subject-matters that recur in the three categories set up in this familiar (wrong) account of American federalism. Matters governing land, wills and estates, family law, education—these are all traditionally said to be within exclusive state governance, or at least “traditionally for the states.” In this thinking, it would be wrong and even unconstitutional if Congress or the Supreme Court purported to make law on the subjects of land, wills, divorce, or schooling. For people who think like this, the assertion that Congress has presumptive power to make law on such matters is simply wrong, or, if it is right, is right because the Supreme Court has been too loose in interpreting the Tenth Amendment.¹⁴¹ These old fallacies die hard, but if we rightly fear excesses of national power we will have to find something else to deal with them: the fallacy of “matters” produces only muddle. Like the old “compact” theories of sovereignty, it presupposes a

139. Tr. of Oral Arg., *United States v. Lopez*, No. 93-1260, 1994 WL 758950, at 7 (U.S. Oral Arg.) (November 8, 1994).

140. 53 U.S. (12 How.) 299, 311 (1851) (Curtis, J.).

141. E.g., Pete Du Pont, *Federalism in the Twenty-First Century: Will the States Exist?*, 16 HARV. J. L. & PUB. POL’Y 137, 140 (1993); Martin Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An “Institutionalist” Perspective*, 83 NW. U. L. REV. 761, 766 (1989).

prehistory that could not have happened. Over what “matters” could the states have “reserved” national lawmaking power?¹⁴²

(1997) 23 Oh.N.L.R. 1327 The other side of the “reserved powers” coin is the view that the nation is the unique repository of power over most of the subject matters enumerated in Article I—matters like copyright and currency—as well as inferred or inherent powers over subjects like the foreign affairs of the nation.¹⁴³ These are widely entertained beliefs. Those who hold them, if pressed, presumably would have to say that the nation is the exclusive repository of the commerce power, too. Yet surely state laws can affect interstate commerce.

It is astonishing that this late in the day such questions continue to vex us. There are real limits upon national power, as there are upon state power, but these limits on power are only tangentially related to the objects of its exercise. One cannot describe the structure of American federalism by identifying “matters” within the exclusive competence either of the states or the nation, or within their concurrent powers.¹⁴⁴ When we say a subject is “uniquely” federal or “traditionally” for the states we make use of a convenient shorthand, but in the end trying to isolate and identify matters within the exclusive or even usual governance of either the state or the nation can only carry you so far.

Take the subject of money. To be sure, only the nation can print dollar bills and mint coins. But the states have considerable powers over money. They can issue negotiable paper. They can regulate credit. They

142. Since the commerce power, for example, is lodged in the nation, no part of that power can be “reserved” to the states, even for “concurrent” deployment, whatever one imagines Justice Curtis to have said in *Cooley v. Board of Wardens*. It would be hard even to conceive of the interstate commerce powers of the nation as reserved in any degree to the states, since those powers are exercisable only supremely and uniformly. No state or even combination of states could exercise them.

143. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (holding the field of foreign relations to be uniquely and inherently federal).

144. *But see, e.g.*, Rehnquist, C. J., in *Lopez*, 115 S.Ct. at 1634: “Admittedly, some of our prior cases have. . . [given] great deference to congressional action. . . . The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that. . . there never will be a distinction between what is truly national and what is truly local. . . . This we are unwilling to do.”

can regulate banking.¹⁴⁵ And the nation, in turn, has its own very different powers over credit and banking.

But it is no less a fallacy to conclude from the fact that few if any matters can be assigned “exclusively” to the governance of either the nation or the states that there are matters over which nation and state can have coextensive powers. Obviously state powers cannot be coextensive with federal, however “concurrent” within the particular state. It does not necessarily matter at the first level of thinking whether we choose to focus **(1997) 23 Oh.N.L.R. 1328** on a particular issue as a problem of the commerce power or of some other identifiable national power, or as one of preemption, express or implied, or as one of the “dormant” or negative commerce power, or as one of federalization by Congress or the courts, or as one of supremacy, or as having to do with the jurisdictions of state and federal courts. In whatever context a clash of national and state powers arises, each remains unique and distinguishable from the other, exclusive within its own sphere.¹⁴⁶

It is true that state law is subject to the operation of the Supremacy Clause. But nothing in the Supremacy Clause authorizes the nation to make state law; the nation can no more make state law than a state can make federal.¹⁴⁷ An individual may concurrently have to pay state tax as

145. Cf. Martha A. Field, *The Differing Federalisms of Canada and the United States*, 55 LAW & CONTEMP. PROBS. 107, 108-109 (Winter 1992) (explaining that matters reserved for national governance in Canada, if neglected, remain neglected, there being no powers reserved to the provinces, even within their own borders, over those subjects).

146. Cf. Alexander Hamilton, Secretary of the Treasury, *Opinion on the Constitutionality of an Act to Establish a Bank*, (Philadelphia, February 23, 1791), VIII THE PAPERS OF ALEXANDER HAMILTON 98 (Harold C. Syrett ed. 1965):

“The . . . powers of sovereignty are in this country divided between the National and State Governments. . . . It does not follow from this, that each of the portion of powers delegated to the one or to the other is not sovereign with regard to its proper objects. . . . To deny that the Government of the United States has sovereign power as to its declared purposes [and] trusts, because its power does not extend to all cases, would be equally to deny that the state Governments have sovereign power in any case, because their power does not extend to every case. . . .”

147. Cf. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (Brandeis, J.) (“Congress has no power to declare substantive rules of common law applicable in a State. . .”).

well as federal tax, for example, but no one is confused about this. There are economic interactions between the two taxes, no doubt, that political economists can describe, and no doubt if Congress demands too much the states are in a weaker position to demand what they need. But the fact is that a federal tax does not delete a particular state tax, nor aggrandize it. The nation cannot collect a state tax and the state cannot collect a national one. Some item of federal law could nullify a state's tax, but only for reasons of national policy that would yield the same result if all states attempted such a tax.

Here there is a point I ought to emphasize: There is every reason to avoid a systematic *preference* of state governance to federal. To continue with my tax example, if we confined to the states the whole of the tax, after all, we would return the country to its condition at the time of the Articles of Confederation, when the nation could not pay the army. It is true that there must be some justification before law can be federalized. In this sense there is a presumption in favor of state law. Of course we recognize a state's presumptive power over anything within its legitimate sphere of governmental interest. Of course we refer to state law in default when some new federal rule seems unnecessary. It would be quite another thing to **(1997) 23 Oh.N.L.R. 1329** make a systematic rule against federal governance for the nation.¹⁴⁸ Of course, depending upon the particular matter under regulation, there will be strong reasons to prefer state regulation to federal in a given case, and even federalized law often will incorporate state law to furnish its content.

148. Consider, for example, the rejection by the Burger Court of a federal common law of interstate environmental tort in *Milwaukee v. Illinois*, 451 U.S. 304 (1981), *overruling* *Illinois v. Milwaukee*, 406 U.S. 91 (1972). For the subsequent struggle to protect the environment from this wrong turn see LOUISE WEINBERG, *FEDERAL COURTS: CASES AND COMMENTS ON JUDICIAL POWER AND JUDICIAL FEDERALISM* 110-111 (1994) & 1997 SUPP. at 8-9. For other current writing on the problems of multistate governance of interstate pollution, problems theories of public (rational) choice predict, *see* Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570 (1996) (dealing with the problem of the interstate race to the bottom, among other consequences of a "decentralized" approach to environmental regulation, and proposing pragmatic strategies at either or both levels of governance); *see also* Richard L. Revesz, *The Control of Interstate Environmental Externalities in a Federal System*, 38 ARIZ. L. REV. 883 (1996).

We have to come back to this: What authorizes the exercise of federal power is a clear national interest. Just as the exercise of state power always requires justification, or, as lawyers say, “nexus,” or “a rational basis,” so too does the exercise of federal power. Of course, a given state and the nation will have different sorts of justifications for governing.

This requirement of justification has its roots in the appeal to reason that is the essence of the common law; without it law is arbitrary and capricious,¹⁴⁹ and, in this country, we cannot help requiring that minimum of rationality because without it law cannot be due process.¹⁵⁰

149. The idea that the government cannot wantonly, without purpose, deprive an individual of rights to life, liberty, or property is seen in Chief Justice Marshall’s declaration in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803), that a government official “cannot at his discretion sport away the vested rights of others.” In *Hurtado v. California*, 110 U.S. 516, 535-536 (1884), Justice Matthews, writing for the Court, declared, “It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. . . . Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude.” The second Justice Harlan described the principle in his celebrated dissent in *Poe v. Ullman*, 367 U.S. 497, 543 (1961): “Due Process. . . includes a freedom from all substantial arbitrary impositions and purposeless restraints. . . .” These ideas are about “substantive due process,” in the sense that pointless or irrelevant law violates the Due Process Clauses no matter how fair the procedures used.

150. *See, e.g.*, *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312, 320 (1982) (holding that a state does not violate the Due Process Clause by governing an issue with which it has significant contacts generating interests such that its governance is reasonable); *South Carolina Highway Dep’t v. Barnwell Bros.*, 303 U.S. 177, 184 (1938) (stating that a state has police power over matters of local policy concern); *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938) (holding that Congress may regulate an issue over which there is a rational basis for believing there is a national interest); *West Coast Hotel v. Parrish.*, 300 U.S. 379, 391 (1937) (stating that state regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process); *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 434 (1934) (pointing out that a state does not violate the Contract Clause when it regulates agreements within its sphere of public policy concern). *Cf. Nebbia v. New York*, 291 U.S. 502, 525 (1934): “And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.”

(1997) 23 Oh.N.L.R. 1330 This search for justification emphatically does not mean that an arbitrary ground can satisfy the requirement that law be non-arbitrary. The rationality requirement of law, whether found in equal protection¹⁵¹ or due process analysis does not represent some “toothless minimal scrutiny standard” or “virtual judicial abdication,” if it ever did.¹⁵²

V. WHAT SHOULD WE BE AFRAID OF?

“Congress could mandate a federal curriculum for local elementary and secondary schools because what is taught in local schools has a significant ‘effect on classroom learning,’ and that, in turn, has a substantial effect on interstate commerce.”

- Chief Justice William H. Rehnquist¹⁵³

Why should we fear national power today? What is really at stake? We have seen that there is little substance in concerns about a consolidated national power dissolving the states, or about federal encroachments upon state prerogatives. Let me suggest that what we should be worried about is federal abuse of national prerogatives.

I do not mean to raise here questions of separation of powers. I am still talking about federalism theory, and I do not mean simply that the policy of diffusion of power protects against abuse of national power,

151. The most interesting recent case seems to be *Romer v. Evans*, 116 S.Ct. 1620 (1996), in which the Court struck down a Colorado constitutional amendment banning application of anti-bias laws to homosexuals. The Court found the law inexplicable except as reflecting animus to the class of homosexuals. *Id.* at 1627.

152. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8, 19, 41-43 (1972).

153. *Lopez*, 115 S.Ct. at 1633 (Rehnquist, C. J.) (responding to Justice Breyer’s dissenting argument, *id.* at 1661-62, that Congress could regulate the possession of guns near schools because school safety affects education, and education in turn affects commerce).

although of course it does.¹⁵⁴ It is important to recognize that the policy of diffusion of power is national policy. It is made manifest in the federal structure of the Constitution. Whether or not it is state policy to govern a particular issue is almost a matter of indifference to this analysis. If the states are left in control of matters within the power of Congress, it must be because it is national policy that the state control. It seriously undervalues the national interest in the continuance of relatively autonomous state and (1997) 23 Oh.N.L.R. 1331 local governments when we indulge the careless habit of assigning that interest solely to the states.

If the autonomy of the states reassures us in our fears of the nation, it is precisely because what is intolerable to us and foreign to the constitutional design is monolithic governance by a centralized power; and if there is a rationale for this insistence on an imperishable federalism, it must be because federalism is a protection of liberty;¹⁵⁵ and what we mean when we say that federalism is a protection of liberty in this context, is that it is a restraint on tyranny.¹⁵⁶ Of course very few of us can get worked up over this. Most of us are not government-hating militia members holed up on some mountain. Threats of national tyranny are not something we worry about. We live in a very nice country. The idea of national tyranny for most of us evokes only the futuristic dystopias of fiction. I am thinking of a period piece of the 1930s, Sinclair Lewis's futuristic novel, *It Can't Happen Here*,¹⁵⁷ in which Senator Berzelius Windrip, backed by a jackbooted militia of "Minute Men," is "elected" president of the United States. Windrip, author of a book very like *Mein Kampf*, is a folksy, humorous anti-semitic. Within his first eight days the government of the United States becomes an insane dictatorship. Windrip

154. Cf. Alexander Hamilton, *The Federalist* No. 51 ("In the compound republic of America, the power surrendered by the people is . . . divided . . . Hence a double security arises to the rights of the people").

155. For a current expression of this traditional view, see Alan R. Arkin, *Inconsistencies in Modern Federalism Jurisprudence*, 70 TULANE L. REV. 1569, 1607 (1996).

156. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (O'Connor, J.) ("Just as the separation and independence of the coordinate branches of the Federal Government serves to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front").

157. SINCLAIR LEWIS, *IT CAN'T HAPPEN HERE* (1935).

seizes control of Congress, the Supreme Court, and the regular army. Immediately there are riots all over the country, but the riots are bloodily suppressed. Dissidents and intellectuals are sent off to labor camps. *It Can't Happen Here* comes to my mind now because, of all Windrip's assaults on the Constitution, the thing that really gets people's backs up against him is his decree abolishing the states.¹⁵⁸

Such stuff might not sustain the interest of readers today; there is no conceivable threat to the existence of the states. The states are too deeply embedded in the constitutional plan.¹⁵⁹ On the other hand, if you were Berzelius Windrip, and you wanted to trash the Constitution, it would not (1997) 23 Oh.N.L.R. 1332 be enough to destroy the Supreme Court or the lower federal courts; you would have to close down the state courts, those ultimate guardians, by default, of the Constitution.¹⁶⁰ It would certainly have been helpful to Berzelius Windrip to federalize local police forces as well as the regular army, and to federalize the schools and threaten the teachers. I will come back in a moment to these items on the tyrant's agenda, but my point here is that the concept of separation of powers cannot fully ground analysis of a hypothetical American tyranny. Federalism theory is also needed. The nation is the states, in more ways than we sometimes remember.

There is no imminent threat to the existence of the states *as states*, although the Supreme Court recently, until *Lopez*, seemed to confine itself to that question.¹⁶¹ But although *Lopez* may seem to you, as it does to

158. *Id.* at 133-35 (Signet 1993).

159. For the interesting suggestion that "federalism in America achieves none of the beneficial goals that the Court claims for it," and that any advantages of decentralized governance could just as well be provided by counties and cities as states, see Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 U.C.L.A. L. REV. 903, 907-908 (1994). Query whether this would simply be to substitute smaller local units for the states, rather than to do away with federalism.

160. *Cf.* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1401 (1953) (the state courts are "the primary guarantors of constitutional rights").

161. *E.g.*, *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996) (holding that the Eleventh Amendment bars Congress from requiring a state to defend a federal claim in federal court); *New York v. United States*, 505 U.S. 144 (1992) (holding that Congress may not commandeer a state's legislative processes).

some others, a return to a failed programme of judicial review, or at best wide of the mark, there are possibilities for abuse of national power that arguably should elicit a more serious concern. It could be that the sort of minimal scrutiny for rational basis that justifies an exercise of the commerce power is insufficient; there might be abuses of national power warranting a more heightened scrutiny.

Little or no writing has been done focusing on the constitutional significance of something that I think was a matter of real concern in *Lopez: delivery of certain governmental services*. In a sense *Lopez* could be read as a case about the allocation of governmental obligations to provide services, rather than the allocation of governmental powers over crimes. Read this way, *Lopez* was not about guns near schools: it was about *schools*. Think of the *Lopez* Court's concern that Congress might next be regulating not only guns near schools, but school curricula.¹⁶² It may strike the reader, as it does me, that a centralized school curriculum is something we ought, indeed, to be afraid of.¹⁶³ A fear that Congress (1997) 23 Oh.N.L.R. 1333 might prescribe school curricula is not the same sort of fear as the fear that Congress might regulate wills, divorces, or whiplash injuries. This fear goes much deeper, too, than any abstract concern about the allocation of power.

One cannot lay this ghost by denying its existence. Although it is very disturbing to say so, I have no doubt that it is within the presumptive power of Congress to enact school curricula for the nation. I pass over the fact that under their Fourteenth Amendment powers, in the interest of

See also Gregory v. Ashcroft, 501 U.S. 452 (1991) (in the absence of a clear statement to the contrary, refusing to apply the Age Discrimination in Employment Act to state judges); Wisconsin v. Mueller, 117 S.Ct. 1077 (1997) (mem. op. vacating and remanding a judgment applying a provision of the Fair Labor Standards Act to state employees); *but see*, Auer v. Robbins, 117 S.Ct. 905 (1997) (deferring to the Labor Department's interpretation of the Fair Labor Standards Act in an action by police sergeants for overtime pay).

162. *Lopez*, 115 S.Ct. at 1633. Professor Merritt characterizes the Court's reaction to this speculation as "with some horror." Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 699 (1995).

163. I discover that the position I take here is a position of "people on the right who hate the word national." Chester Finn, former Reagan administration official, quoted in Joshua Wolf Shenk, "Testing, Testing-1, 2, 3," U.S. News & World Rep., p. 40, col. 1, April 21, 1997.

racial desegregation, both the courts and Congress have been regulating schools for decades, and under its spending and other powers, funding them.¹⁶⁴ After all, there are increasing pressures on the President and on Congress to do something about declining educational performance. In his 1997 State of the Union address President Clinton proposed the formulation of national educational standards. To be sure, under the President's plan, a state's compliance with the standards would be voluntary with the state. But what is "voluntary" in this proposal we owe to the President's sense of constitutional limits. The fact is that national educational standards now seem to be on the table. Suppose Congress responded to the President's challenge by enacting mandatory educational standards? A uniform curriculum? What if Congress purported to "preempt" state educational curricula altogether? Congress is quite capable in an access of enthusiasm of purporting to preempt all state law "relating to" school curricula.¹⁶⁵

The prospect of federal school curricula seems something genuinely to be "feared," even when the form of "voluntariness" is observed, and even though federal standards need not deprive a state of its power to do more. If something intrinsic to federalism theory, some supposed limit on the commerce power—the Tenth Amendment, say¹⁶⁶—were deployed to put a stop to this, we would all breathe a sigh of relief. But would you be convinced that Congress's power over national educational standards is limited in that way? That the commerce power does not go that far?

164. *E.g.*, *Brown v. Board of Education of Topeka, Kansas*, 347 U.S. 483 (1954) (holding that the states may not require racially segregated public schooling); *E.g.*, Civil Rights Act of 1964, Title VI, 42 U.S.C. § 2000d-5, d-6 (regulating discrimination in local schooling); Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 2701 *et. seq.* (funding certain school districts).

165. *See, e.g.*, The Employees Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, 1144 (ERISA) (expressly preempting state laws that "relate to" employee benefit plans). The result has been an avalanche of holdings stripping the intended beneficiaries of the statute of valuable state-law protections. *See*, for recent discussion, Catherine L. Fisk, *The Last Article About the Language of ERISA Preemption? A Case Study of the Failure of Textualism*, 33 HARV. J. LEGIS. 35 (1996).

166. *Cf.* *United States v. Darby*, 312 U.S. 100, 124 (1941) (Stone, J.): "The [tenth] amendment states but a truism that all is retained which has not been surrendered. . . ."

(1997) 23 Oh.N.L.R. 1334 Minimal, rational-basis scrutiny would not work here. What would be needed is a heightened scrutiny, and it is very hard to articulate convincing standards for strict scrutiny of exercises of the commerce power.

Whatever is troubling about the exercise of such national power has little to do with federalism. It is not that a prerogative of the states is invaded. The fact of consolidation of education, simpliciter, is in itself considerably more disturbing. Suspicion of educational regimentation, without more, is reflected in some of our basic jurisprudence. I am thinking of *Meyer v. Nebraska*,¹⁶⁷ the 1923 case so often found at the end of a string of citations on the liberties courts find in the Due Process Clauses. The improbable author of *Meyer*, you recall, was Justice McReynolds, one of the “four horsemen” of the anti-New Deal Court, and by all accounts not only a curmudgeon but a bigot. McReynolds’ ideas about “liberty” were rooted in the Court’s now discredited *Lochner*-era jurisprudence on “liberty of contract.” Of course Americans do have a liberty of contract; and the idea of “liberty of contract” in labor cases had its antecedents in the “free labor” ideology of the old abolitionists.¹⁶⁸ But the Fuller Court’s assumptions about the contractual freedom of sweated workers sound fatuous to us today. Just the same there is something wonderful about that moment in *Meyer* when Justice McReynolds starts talking about laws that would turn our children into Spartan automatons:¹⁶⁹

167. *Meyer v. Nebraska*, 262 U.S. 390 (1923) (McReynolds, J.) (finding a due process right to instruction in a foreign language; *id.* at 402, characterizing a local ban on instruction in German as arbitrary because motivated solely by hostility associated with the then recent World War); *cf.* *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (McReynolds, J. holding that under *Meyer v. Nebraska* parents have a right to choose a private education for their children). For interesting recent writing on these issues see WILLIAM G. ROSS, *FORGING NEW FREEDOMS: NATIVISM, EDUCATION, AND THE CONSTITUTION, 1917-1927* (1994).

168. See generally WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* (1991); William E. Forbath, *The Ambiguities of Free Labor: Labor and The Law in the Gilded Age*, 1985 WIS. L. REV. 767 (1985).

169. *Meyer*, 262 U.S. at 402 (discussing with disapproval the ancient Spartans’ regimentation of education, and similar proposals by Plato); *cf.* *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (McReynolds, J.) (“The fundamental theory of liberty upon which all governments in this Union repose excludes any

“In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any (1997) **23 Oh.N.L.R. 1335** Legislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution.”¹⁷⁰

Justice McReynolds was a curmudgeon, but he was an American curmudgeon.

It would be a matter of additional concern, of course, that the young in every state might be forced to study subjects of importance only to some single clamorous interest group. But the overriding fear would be that under an acknowledged power the minds of the young could be laid open *en masse* to whatever teachings—propaganda, ideology—the central government might want to pour into them. And it would not completely allay such a fear that the government in exercising a national power to regulate education might in practice scrupulously avoid any such abuse. But a challenge on *federalism* grounds to a federalized curriculum, a challenge under the Commerce Clause or Tenth Amendment, would not work. Not in a convincing way. It would not work because education does have “a substantial effect” on commerce. There is plenty of raw national power over education. Perhaps it is this that prompted Chief Justice Rehnquist in *Lopez* to insist that Congress’s power over activities affecting commerce be limited arbitrarily to “commercial” or “economic” activities. That test might be very welcome in the case of education, but it is not going to work for most of the other activities affecting commerce that Congress in fact regulates.

Might a challenge be mounted under the First Amendment? Under the Due Process Clause? For this particular problem the protections we have, if any, may have to come back, again, to such cases as *Meyer v.*

general power of the state to standardize its children by forcing them to accept instruction from public teachers only”).

170. *Meyer*, 262 U.S. at 402 (ruling under the Fourteenth Amendment; but the same reasoning would apply under the Fifth).

Nebraska.¹⁷¹ The cases that build on Meyer are about the fundamental rights of Americans—privileges, in Justice McReynolds’ words, “long recognized by common law as essential to the orderly pursuit of happiness by free men.”¹⁷² Another of McReynolds’ opinions becomes invaluable here, his opinion in the case of *Pierce v. Society of Sisters*,¹⁷³ holding that Americans enjoy a constitutional right to educate their children privately. I am thinking also of Justice Jackson’s illustrious opinion in the “flag salute” case, *West Virginia Board of Education v. Barnette*,¹⁷⁴ in which he explained that even to promote “national unity” a public school could not make a child salute the flag or recite the Pledge of Allegiance. Justice Jackson was clear that the First Amendment’s guarantee of freedom of speech shields the individual’s intellect from intrusions by the state: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox. . . .”¹⁷⁵ My point, of course, is that whatever their bearing on federalized curricula, these cases are engaged not with principles of federalism, but with principles of fundamental liberty.¹⁷⁶

171. 262 U.S. 390 (1923).

172. 262 U.S. at 399.

173. 268 U.S. 510 (1925) (McReynolds, J.) (holding that, under Meyer v. Nebraska, parents have a right to choose a private education for their children). See also *Farrington v. Tokushige*, 273 U.S. 284, 298-99 (1927) (McReynolds, J.) (applying the due process principles of Meyer and Pierce under the Fifth Amendment).

174. 319 U.S. 624, 625 (1943) (Jackson, J.).

175. *Id.* at 642.

176. See also, e.g., *Board of Education v. Pico*, 457 U.S. 853, 871 (1982) (holding, under the First Amendment, that a school board may not remove books it deems anti-American from the school library); *Abood v. Detroit Board of Education*, 431 U.S. 209, 235 (1977) (stating that beliefs cannot be shaped by the state); *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (holding that the state may not “invade the sphere of intellect” by forcing an individual to display the state motto, “Live Free or Die,” on her license plates); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 67 (1973) (stating that the state cannot regulate the mental adventures of users of narcotics); *Tinker v. Des Moines School District*, 393 U.S. 503 (1969) (holding that the state may not prohibit the wearing of arm bands in protest against the war in Viet Nam); *Engel v. Vitale*, 370 U.S. 421 (1962) (holding that official prayers in public schools violate the Free Exercise Clause). Cf. *Stanley v. Georgia*, 394 U.S. 557, 565-66

Are there other kinds of governmental services which, like education, must, in the nature of the Constitution, be delivered locally? In suggesting the category, *Lopez* invites speculation. In oral remarks in this Symposium, Dean Redlich offered the example of an act of Congress requiring local governments to submit their budgets to Congress for review. Or consider the question whether Congress has power to form a national police force. A national police force is so antithetical to the nature of this country that the Constitution probably cannot be read to permit it. (I am not talking about national “police power,” which of course is something very different.) Federalized education seems at present a less unlikely possibility than a federalized police force or federal surveillance of city budgets. Yet even for that case the Court’s existing jurisprudence limiting national power would be, at best, unconvincing.

(1997) 23 Oh.N.L.R. 1337VI. CLOSING REMARKS.¹⁷⁷

The way writers have been formulating the problem of federalism may be somewhat unfocused. The question for purposes of thinking about judicial review of issues of federalism has usually been whether we can fashion a theory of intergovernmental relations that will preserve the states’ autonomy and independence without creating artificial and unrealistic barriers to needed national legislation. And the Supreme Court recently has tried to erect barriers to national encroachment upon state prerogatives. But our fears for state autonomy are for the most part overblown. At the same time, there seems little in our current or past federalism jurisprudence that necessarily protects us from the sorts of excesses that we have just been discussing. Under our current theory of federalism, *Lopez* to one side, exercises of national power over matters the states previously regulated themselves are legitimate if rationally related

(1969) (Marshall, J.) (explaining that the “philosophy of the first amendment” does not permit government “to control men’s minds”).

177. I have not found a way to refer to some of the articles helpful to me in the federalism symposium at 46 CASE W. RES. L. REV., *supra* note 119. See in particular Robert F. Nagel, *The Future of Federalism*, *id.* at 643, 659; Melvyn R. Durchslag, *Will the Real Alfonso Lopez Please Stand Up: A Reply to Professor Nagel*, at 671; Larry Kramer, *What’s a Constitution for Anyway? Of History and Theory*, Bruce Ackerman and the New Deal, *id.* at 885.

to some legitimate national purpose. Assuming Congress has a rational basis for national action, right now we have no convincing theory of federalism that would control abuses at the national level of powers that we can identify as among the most important to leave with the states.

Since courts must sit to consider abuses of national power in the sort of “worst case” we have been discussing, the Supreme Court seems right to insist, as it does when it imposes even unconvincing limits on national power, that we cannot do without some judicial review.¹⁷⁸ And courts

178. See generally Redish, “Political Structure,” *supra* note 10 (arguing the case for judicial supervision of federalism); Ann Althouse, *Enforcing Federalism After United States v. Lopez*, 38 ARIZ. L. REV. 793 (1996) (arguing for pragmatic assessments of institutional capabilities); see also James F. Blumstein, *Federalism and Civil Rights: Complimentary and Competing Paradigms*, 47 VAND. L. REV. 1251 (1994) (arguing for judicial enforcement of constraints of federalism, but carefully excepting civil rights cases); and see generally Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court’s “Unsteady Path”: A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447 (1995); Steven G. Calabresi, “A Government of Limited and Enumerated Powers:” *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752 (1995).

You might conclude that the “switch in time” of 1937 had never occurred from this upsurge of satisfaction with judicial review, however qualified. Justice Souter, dissenting in *Lopez*, fretted that the Court would return the country to the pre-1937 order. 115 S.Ct. at 1652. And see MICHAEL J. PERRY, *THE CONSTITUTION IN THE COURTS: LAW OR POLITICS?* 89, 196 (1994) (arguing for minimal judicial review in federalism cases); Lino A. Graglia, *United States v. Lopez: Judicial Review under the Commerce Clause*, 74 TEX. L. REV. 719 (1996) (arguing against judicial review). For earlier important contributions to the debate, See JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980) (arguing that the courts lack the same institutional capacity for judicial review of issues of allocation of power as they have for claims of individual right); Gene Nichol, *The New and Unfortunate Face of Judicial Federalism*, 23 OHIO N.U.L. REV. 1197 (1997) (same); (but see William Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709 (1985) (arguing that the Constitution could not have been ratified under Professor Choper’s understandings). On Professor Choper’s proposal, I am persuaded by Chief Justice Marshall’s argument to the contrary in *McCulloch*, 17 U.S. (4 Wheat.) 316, 418 (1819):

“But [the question] must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the supreme court of the United States has the constitution of our country devolved this important duty.”

(1997) 23 *Oh.N.L.R.* 1338 probably cannot protect individuals from serious abuses of national power without at the same time taking some care to guard the autonomy of the states. This the Court has been trying to do, and it is defining a true limit on the powers of Congress in that Congress may not interfere with the essential features of the states “as states.”¹⁷⁹ Recently the Court has been perhaps over-protective of the states “as states” in excusing them from having to defend their violations of federal law in federal courts.¹⁸⁰ I assume reasonable people could think it right to protect the states from Congressional “commandeering” of their legislative processes, as the Court purported to do in *New York v. United States*.¹⁸¹ I am not sure that I see how requiring the states, however coercively, to take legal responsibility for wastes within their borders need fit that description. Nor am I sure that the nation should not be able to put state officials to work to enforce national policy,¹⁸² particularly in view of

See on this point Hon. John J. Gibbons, *Judicial Review of the Constitution*, 48 U. PITT. L. REV. 963, 972 (1987). Other earlier work of interest includes Martha A. Field, *Garcia v. San Antonio Metropolitan Transit Authority: The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84 (1985) (arguing that federalism limits on Congress’s delegated powers should be jettisoned). And see Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987) (arguing that the judicial review of federalism on the merits exercised by Chief Justice Marshall in *Gibbons v. Ogden* would be revolutionary today).

179. This is so despite the fact that the concept got off to a rocky start in *Nat’l League of Cities v. Usery*, 426 U.S. 833, 852 (1976), *overruled*, *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

180. *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996) (holding that Congress has no Article I power to override the Eleventh Amendment’s bar against suit against a state in federal court even for a violation of federal law, but see *id.* at 1125, distinguishing Congress’ acknowledged power under Section 5 of the Fourteenth Amendment).

181. 505 U.S. 144, 176 (1992) (O’Connor, J.) (Congress may not “commandeer” the state’s legislative processes or force it to take title to hazardous wastes for which it has not found a disposal site by a given date).

182. This is an issue before the Court in the Brady Act case, since the Act requires local officials to check the backgrounds of those seeking to purchase handguns. *Mack and Printz v. United States*, 66 F.3d 1025 (9th Cir. 1995) (sustaining the Act), *cert. granted*, 116 S.Ct. 2521 (1996); Brady Handgun Violence Prevention Act, 18 U.S.C. § 922(s)(1). *But see* *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 622 (1842) (Story, J.) (in an exception to the preemptive cast of his opinion, remarking that the *states could prohibit* state officers from cooperating in enforcement of the

the Supremacy Clause.¹⁸³ In New York, (1997) 23 Oh.N.L.R. 1339 the Court buttressed its anti-“commandeering” holding with the policy argument that the lines of political accountability must be kept intelligible to the voter. That is an important consideration, but it has not prevented joint administration of a host of programs, at least under the spending power. In any event, the lines-of-political-accountability concern seems only indirectly relevant to the questions of individual liberty, fortunately hypothetical, that I have been trying to raise here. But my point is that all these efforts to build a protective wall around state autonomy must be conceded to have a certain value.

On the very different problem of federal encroachment upon state law, much could be accomplished were the Court to tighten its standards for preemption of a field. Preemption of this kind can justly be termed “the new “*Lochner*.”¹⁸⁴ Courts are struggling to save state law from the black holes of statutory “preemption clauses” that purport to preempt all state law “related to” the subject of the statute.¹⁸⁵ To do it justice, I think the Supreme Court is beginning to try to control the hemorrhage. Courts should understand that crude applications of statutory language to tear the fabric of pre existing laws cannot be good judicial process. Rather, reason requires that Courts rigorously preserve the protections of state law for the beneficiaries of federal, no matter what the ineptitude or inadvertency of “clear language” suggests to the contrary. Justice Stevens, writing for the

Fugitive Slave Act of 1793); *and see* Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1861) (holding that Congress cannot require the governor of a state to perform the merely moral duty of extradition to another state of a fugitive from justice).

183. U.S. Const., Art. VI, cl. 3.

184. *Cf.* *Lochner v. New York*, 198 U.S. 45 (1905) (striking down state law giving bakers a 60-hour week as violating the parties’ liberty of contract); *see* Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 HAST. CONST. L. Q. 69, 69 (1988).

185. The worst example probably is the Employees Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001, 1144(a), which preempts state laws that “relate to” employee benefit plans; since everything “relates to” everything else, ERISA has been enormously destructive of pre existing law. *See* Jay Conison, *ERISA and the Language of Preemption*, 72 WASH. U. L. Q. 619 (1994). Similarly, another legislative brainstorm, the Airline Deregulation Act of 1978, 49 U.S.C. § 1305(a)(1), preempts all state law “relating to” rates.

Court in the 1996 case of *Medtronic v. Lohr*,¹⁸⁶ relied on no general principle, but instead only on specific legislative history, to save state tort law from federal statutory preemption. Stevens reasoned in *Medtronic* that “any fears regarding regulatory burdens were related more to the risk of additional federal and state regulation. . . than the danger of preexisting (1997) 23 Oh.N.L.R. 1340 duties under common law.”¹⁸⁷ But those relying on the ordinary protections of state law should have more general assurances than that. In *California Division of Labor Standards Enforcement v. Dillingham Construction Co.*, the Court, by Justice Thomas, reversing the court below, saved California’s prevailing wage law from ERISA preemption.¹⁸⁸ Justice Scalia, joined by Justice Ginsburg, concurred separately to point out that the Court had, in fact, assimilated its ERISA preemption cases to its nonstatutory preemption cases, and ought to admit it. This development, they argued, was inevitable, since everything “relates to” everything else; the phrase “related to” is meaningless.¹⁸⁹

Preemption of whole fields, express or implied, can be very injurious to the rule of law. The Court is correct, of course, that such “matters” as, for example, the foreign relations of the United States, are within the national powers. But there is scant reason, absent some specific conflict with national policy, to destroy a state’s ability to govern cases within its own competence, on the speculation that in a given case American foreign policy might be embarrassed.¹⁹⁰ The Court, for example, should find a

186. 116 S.Ct. 2240 (1996) (Stevens, J.) (holding that the broad preemption clause in an act of Congress regulating medical devices preempted state *regulation* as opposed to state tort remedies).

187. *Id.* at 2253.

188. 117 S.Ct. 832 (1997) (Thomas J.) (saving the state’s prevailing wage law from preemption under the Employees Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq. (ERISA)).

189. *Id.* at 843 (Scalia, J., dissenting).

190. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 412 (1964) (Harlan, J.) (reasoning that courts may not inquire into the validity of acts of foreign states because the executive might be embarrassed in its foreign relations); *id.* at 439 (White, J., dissenting) (“[Under this] backward-looking doctrine, never before declared in this Court,. . . not only are the courts powerless to question acts of state proscribed by international law but. . . they must render judgment and thereby validate the lawless act. . .”).

way of saying clearly that alternative state-law theories of relief for those pleading under federal law ordinarily should be unobjectionable. Very probably more could be done for federalism by carving back on needless federal preemptions of state law than in any other way.

For the still different category of commerce power cases, like *Lopez*, the hope seems to be that the Court could develop an expansive “Our Federalism” jurisprudence, as a matter of federal common law, as it has done in limiting the powers of federal courts¹⁹¹—but of a kind more suited to limiting the powers of Congress.¹⁹² It is hard to see how this **(1997) 23 Oh.N.L.R. 1341** could turn out to be more convincing than the Court’s previous and current attempts to limit the commerce power. Moreover, judicial review is not without risk in cases testing exercises of national power on federalism grounds. There is a danger, of which history affords enough examples, that on some wrong theory of federalism the Supreme Court will deny a needed power to Congress. That is what happened in cases like *Hammer v. Dagenhart*¹⁹³ and *Adkins v. Children’s Hospital*.¹⁹⁴ That is a risk of the new tests the Court sets out in *Lopez*. It seems to me to be almost always a mistake for the judiciary to try to deny power to the legislative branch over a matter within its sphere of governmental interest. Congress has a presumptive power, and I doubt that the presumption should be held overcome very often, if nothing in the Bill of Rights is offended. There is, obviously, another risk of judicial review, that courts

191. Late examples include *Quackenbush v. Allstate Ins. Co.*, 517 U.S.---, 116 S.Ct. 1712 (1996) and *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995) (unifying the Court’s various abstention doctrines; recognizing broad discretion in the district courts to dismiss actions in equity on grounds of comity and federalism, and on the same grounds to stay actions for damages); *Teague v. Lane*, 489 U.S. 288 (1989) (barring state prisoners from raising novel federal claims in federal habeas corpus). The *locus classicus* of “Our Federalism” is *Younger v. Harris*, 401 U.S. 37, 43 (1971) (“Our Federalism” requires dismissal of civil rights suits seeking injunctions against pending state criminal proceedings).

192. See Martin H. Redish, *Constitutionalizing Federalism: A Foundational Analysis*, 23 OHIO N. L. REV. 1237 (1997) (suggesting that officials and courts might usefully be required to take “federalism considerations” into account in decisionmaking).

193. *Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918) (Day, J.) (holding that Congress has no power to exclude from interstate commerce products made with child labor because child labor is “purely local”).

194. 261 U.S. 525 (1923) (same; substandard wages).

might legitimize illegitimate assertions of national power by passing favorably upon them. One thinks of *Prigg v. Pennsylvania*,¹⁹⁵ in which the Court, among other things, wrongly sustained the constitutionality of the Fugitive Slave Act of 1793.¹⁹⁶ But on the other side of the ledger must be counted the advantage that, by passing on them, courts can legitimize appropriate but expansive exercises of national power.

Then there is the category of clearly inappropriate assertions of national power. Surely we have to leave it open to courts on any plausible theory to strike down those sorts of abuses. The much maligned *Schechter Poultry*¹⁹⁷ and *Carter v. Carter Coal Co.*¹⁹⁸ plausibly could be viewed as cases of that kind, although their Commerce Clause or separation-of-powers reasoning might not satisfy us today. Courts should no more permit Congress to change the sort of country we are than to violate the Bill of Rights. In retrospect, the corporate statism and national cartelization that were features of the early New Deal seem simply unsuitable for this country, even if the measures struck down in those cases would have been **(1997) 23 Oh.N.L.R. 1342** effective in any substantial way—I doubt it—to lift the country out of the Great Depression. But the national marshaling of industry and labor in such examples are phenomena differing somewhat from such abuses as the nationalization of education or of ordinary policing. The national marshaling of private resources¹⁹⁹ and delegation of governmental powers to private groups attempted in the early New Deal were not powers we traditionally expect to be asserted by the states, either.

195. 41 U.S. (16 Pet.) 539, 621-626 (1842).

196. Act of Feb. 12, 1793, ch. 7, §§ 3,4, 1 Stat. 302, *repealed*, Act of June 28, 1864, ch. 166, 13 Stat. 200.

197. *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (holding that Congress has no commerce power to regulate a business when much of the business regulated is, like the Schechter brothers' chicken business, essentially local).

198. 298 U.S. 238, 311 (1936) (it is a violation of the Fifth Amendment's Due Process Clause for Congress to delegate governance to private parties).

199. *Cf. Youngstown Sheet & Tube v. Sawyer (The Steel Seizure Case)*, 343 U.S. 579 (1952) (approving an injunction restraining a member of the cabinet from obeying a presidential order to nationalize the steel industry although the industry was threatened in wartime by a strike).

Finally, there is the problem I have raised here, the possibility of attempts by the nation to deliver services, like education, that in this country must be delivered locally. What current theory of federalism could usefully protect individuals in that sort of case? The unlikely scenario of federalized schooling, I suspect, was behind Chief Justice Rehnquist's proposal in *Lopez* of the crude test of "commercial" or "economic" activity as a potential shield against wrongheaded exercises of the commerce power. But we have little reason to believe that such distinctions can be more effective than the Court's earlier distinctions between effects upon interstate commerce that are "direct" and "indirect." A principled way of bringing heightened scrutiny to bear on the commerce power has proved too elusive.

A naked exercise of wrong national power, in the end, probably has to be controlled directly under the Bill of Rights, rather than through structural federalism arguments.²⁰⁰ Fortunately such exercises of national power are probably the least likely—least likely precisely because they are most to be feared.

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["Of Theory and Theodicy: The Problem of Immoral Law, in Law and Justice in a Multistate World: A Tribute to Arthur T. von Mehren,"](#) pp. 473-502 SYMEON SYMEONIDES (2002).

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200. Cf. Alexander Hamilton, Secretary of the Treasury, *Opinion on the Constitutionality of an Act to Establish a Bank*, (Philadelphia, February 23, 1791), VIII THE PAPERS OF ALEXANDER HAMILTON 107 (Harold C. Syrett ed. 1965) ("There is also this further criterion which may materially assist the decision. Does the proposed measure abridge a pre existing right of any State, or of any individual? If it does not, there is a strong presumption in favour of its constitutionality. . .").

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