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David J. Barron

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Fighting Federalism with Federalism: If It's Not Just a Battle Between Federalists and Nationalists, What Is It?

Cover Page Footnote

Professor, Harvard Law School. Law Clerk for Justice John Paul Stevens, October Term 1995. I wish to thank Jerome Barron, Richard Fallon, Jerry Frug, John Manning, and Daniel Meltzer for their extremely helpful comments on earlier drafts. A special thanks also goes to Abner Greene and Dean William Treanor for putting together a much-needed retrospective on the constitutional thought of a justly admired man.

FIGHTING FEDERALISM WITH FEDERALISM: IF IT'S NOT JUST A BATTLE BETWEEN FEDERALISTS AND NATIONALISTS, WHAT IS IT?

*David J. Barron**

INTRODUCTION

There are many ways to promote federalism. The most recent federalism revival, for example, protects states differently than earlier efforts by the United States Supreme Court to do so. That should not be surprising. The new federalism revival is occurring at a particular moment in American history and within a particular jurisprudential culture. But the distinct character of the contemporary defense of federalism also has implications for those who wish to challenge it. It is those implications, and what they suggest about the current state of the debate over federalism, that prompt this Essay.

It is no secret that the federalism revival has been subject to challenge. The four moderate-to-liberal Justices on what was the Rehnquist Court have countered the federalism revival at every turn. They even have indicated a desire to overturn aspects of it if they obtain a fifth vote. Nevertheless, the views of the dissenters have received scant attention, even though the decisions from which they have dissented—from *New York v. United States*¹ in 1992 to *United States v. Morrison*² in 2000—have garnered more than their share of negative scholarly reviews. In the main, commentary has focused on the opinions of the Justices in the majority—then-Chief Justice William Rehnquist, former Justice Sandra Day O'Connor, and current Justices Anthony Kennedy, Antonin Scalia, and Clarence Thomas (the “Federalism Five”)—rather than on the opinions of their critics on the Court—namely, Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg and Stephen Breyer.³

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1. 505 U.S. 144 (1992).

2. 529 U.S. 598 (2000).

3. This article was written prior to the confirmation of Chief Justice Roberts and Justice Alito. While there are good reasons to think that these new Justices will help to comprise a new Federalism Five, the discussion here does not attempt to predict how they will rule when it comes to federalism.

To the extent scholars have focused on the dissenters' views, moreover, the emphasis often has been on the similarity between their arguments and those of prior opponents of efforts to give judicially enforceable life to states' rights.⁴ In consequence, one could be forgiven for assuming that the current federalism debate sounds very much like the federalism debates of the past. On one side are the federalists, who view the founding moment as an affirmation of the sovereignty of the states as distinct and independent governments entitled to judicial protection from national power. On the other side are the nationalists, who view the founding moment (and certainly the Civil War) as a repudiation of the federalists' hostility to national power and a confirmation of the supremacy and breadth of federal legislative authority.⁵

Appeals to these stylized ideological constructs certainly can be found in opinions of both majority and dissenting Justices in contemporary federalism cases. But the current battle is more than a reenactment of the longstanding feud between federalists and nationalists. The current dissenters' arguments reveal a method of opposing the new federalism that does not conduce to a defense of nationalism. Indeed, the opponents of the new federalism repeatedly insist that the current defenders of states' rights are doing little to empower states and may, perversely, be restricting their authority in the name of protecting it. The opposition to the contemporary form of federalism, in other words, often fights federalism with federalism.

It is possible, of course, that the new rhetoric is just that—rhetoric. The nature of legal argument may be such that, at some point, opponents of any constitutional position will be tempted to complain that the majority's implementing doctrines are self-defeating. But it is also possible that this new turn in the debate is of greater than tactical import, and it is this possibility that the balance of this Essay explores. In particular, this Essay suggests that distinctive features of the new federalism doctrines insulate the current revival from some classic nationalist critiques. It suggests as well that sociocultural changes have made a full-throated defense of the nationalist position less attractive than it was a generation ago, even though these changes may not have undermined concerns about the propriety of judicially enforced, federalism-based limits on federal power. As a consequence, the dissenters' effort to fight federalism with federalism may reflect a new understanding of constitutional federalism. The repeated practice of fighting federalism with federalism may, over time, lead expected adherents of the nationalist position to experience it as at best a partial one. In the process, the question of what it means to favor

4. See, e.g., Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 *Duke L.J.* 223 (2001). A notable exception is the work of Ernest Young. See, e.g., Ernest Young, *The Rehnquist Court's Two Federalisms*, 83 *Tex. L. Rev.* 1 (2004). I discuss his view of the dissenters' position, with which I disagree, at the end of this Essay.

5. I borrow this terminology—"federalists" versus "nationalists"—from Professor Richard Fallon. See Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 *Va. L. Rev.* 1141 (1988).

federalism will itself be contested. The supposed federalists will be challenged to articulate their constitutional position on behalf of federalism in a different way. It will not be sufficient for them to argue that they wish to protect states. They will have to explain why they wish to protect them in the particular ways they have chosen, while declining to afford them other protections that they might instead have favored and that their opponents now claim to champion.

There are some signs that we may be in the midst of just such a shift in the debate over federalism, although it is premature to conclude that the federalist/nationalist rhetorical structure has dissolved. Nevertheless, the dissenters' consistent efforts to fight federalism with federalism in recent cases suggests that a key question is likely to be what kind of federalism one supports rather than whether one is for or against federalism. The Essay builds on that suggestion by offering some preliminary thoughts about what divides the Federalism Five from the dissenters if it is not the old dichotomy between a federalist and a nationalist constitutional worldview.

Specifically, I argue that both those within the Federalism Five, and those in dissent, have complex views about the distribution of national and state power. Each side favors expansive notions of federal power in some areas rather than others, and each side prefers states to be the primary actors in some areas rather than others. The divide, then, may be more usefully understood in terms that are orthogonal to the traditional federalist/nationalist frame.

The first newly important line of contention that the fighting-federalism-with-federalism arguments bring to the fore concerns the distinction between a realist and a more formalist approach to the vertical separation of national and local powers. The dissenters consistently strike a skeptical stance with respect to the possibility of any state, at this moment in the nation's history, being truly autonomous. Thus, they are more apt than adherents of the Federalism Five to see national power as a potential aid to the effective exercise of power at the state level, and they are more likely to see the exercise of unchecked state power as itself a threat to the values of federalism. By contrast, the federalism proponents seem unwilling to countenance the dissenters' attempt to deconstruct local autonomy, dismissing it as a fruitless effort to deny the essence of sovereignty.

Second, the dissenters' federalism-based challenges have made it increasingly clear that contemporary views about federalism are now deeply bound up with independent substantive constitutional commitments concerning the proper scope of governmental authority to regulate private business, vindicate individual civil rights, and preserve traditional social practices. The Federalism Five are associated with what we could crudely, but nonetheless usefully, call a conservative substantive constitutional view as to these matters, while the Justices in dissent are associated with a progressive approach to them. That does not mean that the Justices decide every individual case that is putatively about federalism solely on the basis

of whether it promotes their substantive preferences about regulatory authority or civil rights. It means instead that the Justices clearly perceive cases concerning the constitutional distribution of federal and state power with a keen sense of how that distribution will impact the degree to which business will be subject to governmental regulation and individual civil rights will be protected or traditional social practices will be affected.

The emergence of these newly visible fault lines should be welcomed. The old federalist/nationalist dichotomy circumscribes how we think about federalism. It assumes that there is some thing called "federalism" that one must be either for or against. In consequence, it encourages us to think that any decisions in which federal power is limited, or state power is vindicated, promote federalism. Conversely, it encourages us to think that any decisions favoring the exercise of national power undermine federalism. The emergence of the effort to fight federalism with federalism reveals the limits of that conventional frame for analysis. It suggests that the real debate over federalism turns as much on the kind of federalism that differing Justices favor as on whether they favor federalism as an abstract concept. And, it suggests that the substantive constitutional commitments of the Justices powerfully inform their views as to the proper allocation of federal and state powers.

In exploring the dissenters' fight against federalism, and what it suggests about the broader contemporary debate over federalism, I have chosen to focus largely, though not exclusively, on the opinions of Justice Stevens. This focus is appropriate not only because this Symposium is devoted to a study of the jurisprudence of the Court's Senior Associate Justice, but also because Justice Stevens came to the Court right before the first post-New Deal attempt to promote federalism—represented by the Court's short-lived decision in *National League of Cities v. Usery*.⁶ Since that time, he has become the leader of the opposition to the conservative majority on many topics, federalism foremost among them. For that reason alone, he is a good guide to the state of thinking among those troubled by the new federalism decisions. That his opinions are characteristically incisive makes his views in this area particularly worthy of study. That his opposition has been notably successful in recent terms—so successful that it at times seemed as if the Rehnquist Court had become the Stevens Court—only reinforces that judgment.

I. ROUND ONE

Rather than survey the whole of constitutional history, I confine my study of the rhetorical shift in the debate over federalism to two critical periods. The first concerns the initial federalism revival, which began with the Court's 1976 decision in *National League of Cities* and ended with that decision's reversal less than a decade later. The second concerns the

6. 426 U.S. 833 (1976).

Court's recent string of federalism decisions, which began with the 1992 decision in *New York v. United States*⁷ and continues to this day.

These two federalism revivals are different. The first involved only one case that actually imposed a judicially enforceable federalism limitation on the national government—*National League of Cities* itself. Although the precedent remained on the books for nearly a decade, it did not generate additional precedents at the Supreme Court level. By contrast, the current federalism revival involves a number of distinct lines of doctrine, each of which is somewhat developed and each of which imposes a constitutionally based limit on the federal government. The comparison is useful nonetheless. The rise and fall of *National League of Cities* provides the doctrinal and jurisprudential baseline against which the new federalism revival takes place.⁸ The sense that judicially enforceable federalism had been buried for good and sufficient nationalist reasons by the case that finally overruled *National League of Cities*—*Garcia v. San Antonio Metropolitan Transit Authority*⁹—is part of what makes the recent federalism revival such a striking development in constitutional law.

A. Before National League of Cities

National League of Cities followed an uninterrupted, four-decade period during which the Court adhered to what one might call a plenary view of federal power. During this period, the Court consistently construed the powers of the national legislature broadly. The chief congressional power at issue was the Commerce Clause. By relying on it, the national legislature successfully asserted its authority to regulate, among other things, race discrimination in a local barbecue joint¹⁰ and domestic wheat cultivation at a local farm.¹¹ The Court did not announce in any case during this era that the commerce power reached everything, but neither did it decide a single case in this time period that held otherwise. If a law school class in 1940 might have spent time puzzling over what constituted the regulation of interstate commerce, a similar class in 1990 would not have. It seemed as if the Court had concluded that, in the modern world, everything could be said to impact the national economy. For that reason, one could conclude legitimately that Congress did not need to demonstrate that its legislation addressed an activity that affected interstate commerce. It could simply assume that it did.

Things were less clear with respect to other congressional powers. Ever since the *Civil Rights Cases*,¹² there had been substantial questions regarding the scope of Congress's power under the enforcement clauses of

7. 505 U.S. 144 (1992).

8. See, e.g., William W. Van Alstyne, *The Second Death of Federalism*, 83 Mich. L. Rev. 1709 (1985).

9. 469 U.S. 528 (1985).

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

11. *Wickard v. Filburn*, 317 U.S. 111 (1942).

12. *Civil Rights Cases*, 109 U.S. 3 (1883).

the Civil War Amendments. But the trend line during the period in which the piecemeal view predominated clearly favored a broad view of this aspect of congressional power as well. The cases that did reach the Court—with limited exceptions¹³—construed the enforcement powers deferentially.¹⁴ Indeed, the Court referred to the commerce power precedents as setting forth the proper judicial approach to reviewing congressional authority.¹⁵ Even if the Court did hold that Congress lacked power under these clauses in some cases, it seemed that Congress could (always?) fall back on the Commerce Clause. After all, what matter of significance to the national legislature would not somehow impact the economy of the nation?

Constitutional doctrine developed similarly with respect to claims that states enjoyed special constitutional protections from federal interference even when Congress did act within its enumerated powers. The Court consistently held in this era that states enjoyed virtually no independent constitutional trumps.¹⁶ Just as the clauses enumerating Congress's powers were read broadly, the provisions protecting states' rights—and the Tenth Amendment in particular—were read narrowly. If the Court did not actually treat the Tenth Amendment as a "truism,"¹⁷ it did not treat it as much more than that. The Court reviewed federal legislation affecting states much as it reviewed regulation affecting economic matters—with utmost deference. No heightened scrutiny applied, and states' rights enjoyed no preferred position.

The reason for this nationalist turn is well known. It was of a piece with (and, to some extent, the culmination of) the revolt against *Lochner*ism and what was known as the laissez-faire constitutionalism of a prior era. The post-New Deal decisions were not invariably hostile to state power.¹⁸ As Stephen Gardbaum has rightly emphasized, many of them freed states from national restrictions.¹⁹ They overturned broad interpretations of the Due Process Clause and the Contracts Clause, which *Lochner*-era courts had relied upon to invalidate state and local laws that sought to regulate business.²⁰ But an important part of this turn stemmed from an embrace of broad national legislative and administrative powers. The spirit of the times assumed that societal problems were national in scope and thus demanded

13. See *Oregon v. Mitchell*, 400 U.S. 112 (1970) (concerning Congress's power to lower the voting age).

14. The most important of these was *Katzenbach v. Morgan*, 384 U.S. 641 (1966), adopting an expansive view of Congress's power to enforce voting rights. See also *Jones v. Mayer*, 392 U.S. 409 (1968) (upholding the Fair Housing Act).

15. See *Morgan*, 384 U.S. at 652-53 n.11.

16. See, e.g., *Maryland v. Wirtz*, 392 U.S. 183 (1968) (upholding Congress's power to apply the Fair Labor Standards Act to state employees).

17. *United States v. Darby*, 312 U.S. 100, 123-24 (1941).

18. See *United States v. Morrison*, 529 U.S. 598, 628-55 (2000) (Souter, J., dissenting) (recounting this history).

19. See Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. Chi. L. Rev. 483, 491 (1997).

20. See *id.* at 486-89 & n.19.

national solutions.²¹ The so-called Second Reconstruction—which involved a national civil rights movement that aimed at directly and dramatically countermending state resistance²²—reinforced this New Deal view. A strong, judicially enforceable view of the constitutional rights of states seemed out of synch with social reality and inconsistent with the legacy of both the New Deal and the Civil Rights Movement.

Consistent with this trend, in 1968 the Court, in *Maryland v. Wirtz*,²³ easily dismissed a challenge to a statute that extended the Fair Labor Standards Act (“FLSA”) to cover state and municipal employees. The *Wirtz* Court explained that states and cities participate in the interstate market and so their ability to keep their wholly local workers happy—and thus unlikely to strike—could affect interstate commerce.²⁴ It further explained that the Constitution did not interpose an independent limitation on Congress’s power to regulate interstate commerce.²⁵ The *Wirtz* Court noted that a long line of post-New Deal cases made that constitutional “fact” crystal clear.²⁶

Demonstrating the breadth of the plenary power approach that *Wirtz* symbolized, none other than Justice William O. Douglas—a longtime proponent of a broad commerce power and a leading member of the New Deal brain trust—dissented from the case. How, he asked, could the Court affirm this decision and avoid holding that Congress henceforth possessed the power to “virtually draw up each State’s budget to avoid ‘disruptive effect[s] . . . on commercial intercourse?’”²⁷ Even Douglas believed that such a view took the nationalist position too far. But the majority’s response to that concern was hardly reassuring,²⁸ and perhaps intentionally so. Congress, it seemed, would be permitted to do whatever needed to be done.

B. *The Rise of National League of Cities*

Then came *National League of Cities*. The decision overruled *Wirtz*, and, in doing so, appeared to constitutionalize an emerging post-New Deal view of the world—one that no longer treated federalism as a dirty word. This shift could be seen everywhere—whether in changes in federal funding

21. See generally James M. Landis, *The Administrative Process* (1938); see also Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 Colum. L. Rev. 267 (1998) (stating this New Deal view).

22. See C. Vann Woodward, *The Strange Career of Jim Crow* 122-47 (2d ed. 1966) (detailing the executive, judicial, and legislative roots of the Second Reconstruction).

23. 392 U.S. 183 (1968).

24. *Id.* at 191-93.

25. *Id.* at 196-97. In *Wirtz*, the majority discusses the Eleventh Amendment but does not explicitly mention the Tenth Amendment. The dissent, however, does discuss the Tenth Amendment. See *id.* at 201 (Douglas, J., dissenting).

26. *Id.* at 188 (majority opinion).

27. *Id.* at 205 (Douglas, J., dissenting) (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257 (1964) (alteration in original)).

28. See *id.* at 196-97 n.27 (majority opinion).

programs under the rubric of President Richard Nixon's new federalism, in school desegregation cases in which new Justices invoked respect for local control and state autonomy in resisting extensions of federal judicial supervision,²⁹ or in cases concerning the constitutional law of criminal procedure or the law concerning habeas review of state criminal convictions.³⁰ Though important, these new developments were also limited. They did not place constitutional restrictions on the power of the national legislature. *National League of Cities*, therefore, reflected an approach to federalism that had not been seen in some time—the assertion of an actual constitutional limitation on the power of Congress to regulate.

The author of the opinion was then-Justice Rehnquist, and he held that the FLSA's coverage of state and local workers, which had been upheld in *Wirtz*, violated a Tenth Amendment (or perhaps implied) limitation on the commerce power. The statute, he explained, "displace[d] the States' freedom to structure integral operations in areas of traditional governmental functions."³¹ Rehnquist's argument rested on three grounds. First, he suggested there had to be some federalism-based limit on national power. Implicit in that view was the judgment that the limit had to be susceptible to judicial enforcement.³² Second, he contended that

[o]ne undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime.³³

Third, he argued that the new federal rules substantially interfered with that "attribute of state sovereignty"³⁴ by imposing significant new costs that would in many instances "force[] relinquishment of important governmental activities"³⁵ or "displace[] state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require."³⁶ Importantly, Justice Harry Blackmun provided the fifth vote in a concurrence that applied a balancing test: "I may misinterpret the Court's opinion, but it seems to me that it adopts a balancing approach, and does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater

29. See, e.g., *Milliken v. Bradley*, 418 U.S. 717 (1974) (invalidating a judicially imposed metropolitan desegregation plan on localist grounds); see also Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 Colum. L. Rev. 1 (1990).

30. See generally Louis D. Bilionis, *Conservative Reformation, Popularization, and the Lessons of Reading Criminal Justice as Constitutional Law*, 52 UCLA L. Rev. 979 (2005).

31. *Nat'l League of Cities v. Usery*, 426 U.S. 833, 852 (1976).

32. *Id.* at 842.

33. *Id.* at 845.

34. *Id.*

35. *Id.* at 847.

36. *Id.*

and where state facility compliance with imposed federal standards would be essential.”³⁷

The main dissent—written by Justice William Brennan—did not focus on the flabbiness of the new doctrine. It noted that Justice Rehnquist’s opinion said little about what constitutes an “attribute of state sovereignty” or a traditional sovereign function,³⁸ and it expressed concern that the new balancing approach would invite the Court to pass judgment on the wisdom of the underlying congressional policy.³⁹ It even suggested that the Court’s decision reflected hostility to the government’s regulation of the employment relationship.⁴⁰ But these were minor chords. The main theme concerned the threshold issue: Did the Constitution require some limit on Congress’s power to affect states even when Congress was concededly regulating interstate commerce?

Elaborating the position set forth most recently in *Wirtz*, Justice Brennan argued that it did not. He cited an unbroken string of cases in support of that conclusion, and he pointedly noted that the federal government and the states are not equals.⁴¹ When Congress operates within its enumerated powers, he maintained, it is supreme. Nothing in the Tenth Amendment, nor any structural inference, compelled an opposite conclusion. As to whether that strong view of national supremacy effectively left states with no constitutional protection, Brennan concluded, they should look to the political process.⁴²

C. *The Fall of National League of Cities: Enter Justice Stevens*

It was at this point that Justice Stevens joined the federalism debate. New to the Court, Stevens did not join in Justice Brennan’s dissent in *National League of Cities*. But neither did he refrain from dissenting in the case. Instead, the newest Republican appointee broke with the other Republican appointees in the majority and sided with the dissenters. But he did so in a separate dissent in which no one else joined. Stevens emphasized the difficulty—even impossibility—of distinguishing the federal interference with state operations at issue in *National League of Cities* from the types of interference that Congress could clearly cause. As Stevens explained,

The Federal Government may, I believe, require the State to act impartially when it hires or fires the janitor, to withhold taxes from his paycheck, to observe safety regulations when he is performing his job, to forbid him from burning too much soft coal in the capitol furnace, from dumping untreated refuse in an adjacent waterway, from overloading a state-owned garbage truck, or from driving either the truck or the

37. *Id.* at 856 (Blackmun, J., concurring).

38. *Id.* at 873-74 (Brennan, J., dissenting).

39. *Id.* at 876.

40. *Id.* at 873-74.

41. *Id.* at 859-61.

42. *Id.* at 876-77.

Governor's limousine over 55 miles an hour. Even though these and many other activities of the capitol janitor are activities of the States *qua* State, I have no doubt that they are subject to federal regulation.⁴³

In short, Stevens's dissent contended only that this form of federal regulation could not be distinguished from others that seemed clearly permissible. For that reason, he concluded, judges had no basis for limiting this exercise of federal power.⁴⁴

Stevens's basic insight—that Rehnquist pursued an unworkable path in *National League of Cities*—has haunted efforts to revive federalism-based limits on national power ever since. Indeed, the specter of unworkability in many ways defines the shape of the Court's current federalism revival. But Stevens's objection also proved to be decisive against *National League of Cities* itself, as the Court's subsequent decision in *Garcia*⁴⁵ demonstrated.

In *Garcia*, Justice Harry Blackmun reversed course and, in an opinion that Justice Stevens joined, overruled *National League of Cities*. *Garcia* also concerned an application of the FLSA, this time posing the question whether the operation of a municipal transit system constituted a traditional sovereign function. If so, employees of such a system could not constitutionally benefit from a federally mandated wage. But in resolving the case, Blackmun chose not to determine how the rule of *National League of Cities* should be applied on the particular facts at hand. Instead, he dispensed with the sovereign functions test altogether.

Blackmun explained that the test was “unworkable,”⁴⁶ just as Stevens had intimated. But he then sought to explain why the “unworkability” of the sovereign functions test counseled against the judicial enforcement of federalism-based limits on national power as a general matter. After all, perhaps the fact that the sovereign functions test failed to generate coherent results indicated only that some other test would be workable. Or perhaps it indicated that many more state actions should be immune from federal interference that Justice Stevens had assumed. One might think that the emphasis on the unworkability of the *National League of Cities* standard was intended to demonstrate that courts lack the institutional capacity to enforce limitations on federal power even if the Constitution clearly contemplates them. But, in fact, Blackmun argued that the unworkable nature of the *National League of Cities*' sovereign functions test demonstrated a more important point—that the Constitution itself did not establish a clear core of inviolate state sovereignty.⁴⁷

Again and again, Blackmun's opinion argued, the Constitution recognized states as critical institutions but derogated their sovereignty by subjecting them to intrusive oversight by the federal courts and the national

43. *Id.* at 880-81 (Stevens, J., dissenting).

44. *Id.* at 881.

45. 469 U.S. 528 (1985).

46. *Id.* at 531.

47. *Id.* at 548.

legislature.⁴⁸ For this reason, he concluded, it was not surprising that courts had been unable to enumerate the fundamental attributes of state sovereignty. The Constitution itself did not do so. Thus, Blackmun argued, the very failure of the sovereign functions test to produce a workable doctrine supported the judgment that states were intended to secure protection from national power solely through their unique capacities to wield influence within the national political process.⁴⁹

In other words, Blackmun reaffirmed Brennan's original dissenting position in *National League of Cities*. The Constitution did not protect state sovereignty as a limit on federal power. National supremacy was in that sense all but unbounded. States were key institutions within the national political process, but they were intended to secure that measure of protection the framers intended for them almost exclusively through their participation in that process. The plenary view of national legislative power, therefore, had emerged triumphant.

There was one respect, however, in which Blackmun's opinion struck a different key. Blackmun argued at the conclusion of his opinion that the traditional sovereign functions test was problematic for an additional reason: It was "inconsistent with established principles of federalism and, indeed, with those very federalism principles upon which *National League of Cities* purported to rest."⁵⁰ This claim was not nationalist in orientation. It did not emphasize the essentially subordinate position of states or the plenary authority of the national government. Blackmun instead explained that, as a constitutional matter, states were supposed to experiment, stretching their powers or contracting them as they saw fit. Indeed, he suggested that if there was an essence to constitutional federalism, it was this experimentalist idea.⁵¹ But, he contended, a federalism doctrine that identified some integral or traditional aspect of state power conflicted fundamentally with that idea. In the name of protecting federalism, it would induce states to do only those things they had done in the past.⁵²

The argument had a Foucaultian quality. The recognition of a right would trap the rights bearer. Perhaps for that reason, the argument seemed strained. But the instinct to root an objection to federalism in a defense of federalism—the instinct, in other words, to fight federalism with federalism—was an important departure from the nationalist line of argumentation. And it is one that the opponents of the current federalism revival, including Justice Stevens, have deployed repeatedly in Round Two.

48. *Id.* at 549.

49. *Id.* at 552.

50. *Id.* at 531.

51. *Id.* at 546.

52. *Id.* at 543-44.

II. ROUND TWO

Notwithstanding Justice Brennan's success in turning back the first federalism revival, the elections of President Ronald Reagan and President George Herbert Walker Bush—each of whom made federalism (at least rhetorically) an important piece of their political programs—solidified support for President Nixon's new federalism. Eventually, the composition of the Court began to reflect that political shift, and the result has been a second federalism revival. This revival has not overturned the Court's precise holding in *Garcia*, but it has been sustained, unfolding over the course of more than a decade. In the process, it has invalidated, either in whole or in part, numerous federal statutes on states' rights grounds, thereby limiting Congress's power to provide protection against gender-based violence, gun violence, discrimination in the workplace, and even the theft of intellectual property.

The second federalism revival, however, has done more than reject the plenary view of federal power that *Garcia* appeared to reestablish. It has also set forth an entirely new framework for limiting national authority. Even if the new federalism cases seem to embrace what is often known as dual federalism—the categorization of governmental power into separate state and national domains that must not be permitted to overlap—it is a new kind of dualism. The divide between the national and local domains emerges at most indirectly from the new doctrines, which then apply categorically. In consequence, the second federalism revival presents a very different target for its opponents than did the last challenge to the plenary view of national authority.

A. *The New Cases*

The second federalism revival began with Justice O'Connor's opinion for the Court in the 1992 case of *New York v. United States*.⁵³ There, the Court invalidated provisions of the Low-Level Radioactive Waste Act for impermissibly commandeering the state legislative function. The Court thus imposed, for the first time since *Garcia*, a federalism-based limit on an exercise of an enumerated congressional power. The decision was no sport. In the 1997 case of *Printz v. United States*,⁵⁴ a now solid pro-federalism majority extended *New York* in striking down the Brady Handgun Violence Prevention Act for impermissibly commandeering state and local law enforcement officers to conduct background checks on prospective gun purchasers.

Even before *Printz* established the anti-commandeering rule, the second federalism revival was well underway. In assessing the boldness of the second revival, it is important to remember that *National League of Cities* did not purport to limit the scope of the Commerce Clause. It instead

53. 505 U.S. 144 (1992).

54. 521 U.S. 898 (1997).

imposed an independent constitutional limit on some actions taken pursuant to the commerce power. But two years before *Printz*, in *United States v. Lopez*,⁵⁵ the Rehnquist Court's pro-federalism majority did the seemingly unthinkable. It invalidated a congressional statute for want of Commerce Clause authority. That same majority, in 2000, reasserted its willingness to limit the scope of the commerce power in *United States v. Morrison*.⁵⁶ The Court explained in *Morrison*, which invalidated the federal civil remedy established by the Violence Against Women Act, that "[w]hile we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."⁵⁷ Applying this presumption against the regulation of noneconomic activity, the Court criticized Congress for relying upon a "but-for causal chain from the initial occurrence of violent crime . . . to every attenuated effect upon interstate commerce"⁵⁸—the same attenuated causal chain that *Lopez* had rejected in invalidating the federal statute prohibiting the possession of a gun within 1000 feet of a school.

In addition, one year after *Lopez*, the same five Justices imposed yet another federalism-based limit on Congress. Although in 1989 the Supreme Court had expressly held that Congress could override state sovereign immunity and authorize private suits using any of its affirmative legislative powers,⁵⁹ the 1996 case of *Seminole Tribe of Florida v. Florida*⁶⁰ overruled that earlier decision. It held that Congress may not exercise the commerce power to authorize private individuals to sue states in federal court. In 1999, the Federalism Five extended this ruling in *Alden v. Maine*⁶¹ to prevent Congress from authorizing a private individual to sue an unconsenting state in its own state court system.

With Congress's commerce power newly circumscribed, and with Congress's ability to rely on its Article I powers to overcome state sovereign immunity now limited, the boundaries of a formerly somewhat marginal congressional power also became significant. But here, too, the new pro-federalism majority imposed new limits. Earlier precedents addressing civil rights legislation⁶² expressly rejected the view that Congress's power under Section 5 of the Fourteenth Amendment is confined "to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional."⁶³ But the

55. 514 U.S. 549 (1995).

56. 529 U.S. 598 (2000).

57. *Id.* at 613.

58. *Id.* at 615.

59. *See Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989).

60. 517 U.S. 44 (1996).

61. 527 U.S. 706 (1999).

62. *See, e.g., Katzenbach v. Morgan*, 384 U.S. 641 (1966).

63. *Id.* at 649.

Federalism Five, in a 1997 decision, *City of Boerne v. Flores*,⁶⁴ struck down the Religious Freedom Restoration Act (“RFRA”) insofar as it barred state and local governments from “substantially burdening” the exercise of religion except upon a showing that the burden served a compelling governmental interest by the least restrictive means. The majority held that Congress may not rely on the Section 5 power unless there is a “congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”⁶⁵ That test has led to the invalidation of portions of a number of other federal statutes.⁶⁶

The course of this second revival has not always run smoothly. Most recently, in *Gonzales v. Raich*,⁶⁷ the Court seemed to cut back on *Lopez* and *Morrison*. There, Justices Scalia and Kennedy joined with the opponents of the revival in upholding as a valid exercise of commerce authority application of the Controlled Substances Act (“CSA”) to individuals who locally grew and used marijuana for medical purposes, as authorized by California law.⁶⁸ Similarly, recent Section 5 cases have appeared to limit the *Boerne* doctrine,⁶⁹ and the most recent decision on commandeering, *Reno v. Condon*,⁷⁰ upheld the Driver’s Privacy Protection Act on the ground that it was a prohibition of conduct rather than an affirmative mandate to enact laws or regulate private individuals. Nevertheless, these decisions do not, as *Garcia* did, overturn past precedents. They merely refrain from extending them. In consequence, the second federalism revival is still very much alive.

B. *How the New Cases Avoid the Problems of the Last Revival*

That the second federalism revival lives does not mean that its future is clear. In particular, it is not clear what, if any, theory of federalism unites the mix of doctrines that comprises the second federalism revival. For that reason, it is not clear what principle would guide their extension in future

64. 521 U.S. 507 (1997).

65. *Id.* at 520.

66. *United States v. Morrison*, too, addressed Congress’s affirmative power under Section 5, and found it lacking. 529 U.S. 598 (2000). Several more recent decisions have developed the *Boerne* approach, invalidating, among other things, a portion of the Americans with Disabilities Act (“ADA”) that authorized private parties to sue states for damages if they failed to make special accommodations for disabled persons. See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001).

67. 125 S. Ct. 2195 (2005).

68. The Supreme Court distinguished *Lopez* and *Morrison* primarily on the grounds that the activities regulated formed part of an economic class of activities that has a substantial effect on interstate commerce. *Id.* at 2209-10.

69. In *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), the Court upheld as a valid exercise of Section 5 authority a provision of the Family and Medical Leave Act (“FMLA”) that authorized private damage suits against the states. And the following year, in *Tennessee v. Lane*, 541 U.S. 509 (2004), the Court upheld a provision of the ADA that authorized private suits against states who denied persons with disabilities physical access to the courts.

70. *Reno v. Condon*, 528 U.S. 141 (2000).

cases. The vague sense that the federal balance has tilted too far in the direction of national power hardly establishes a predictive principle for future cases. But the failure of the Federalism Five to articulate a coherent theory of federalism has been less problematic than one might think. The very rhetorical frame that *National League of Cities* and *Garcia* established for constitutional disputes over federalism helps to excuse the failure. Insofar as the opponents of the second revival attack the new federalism doctrines on the nationalist grounds laid out by Justices Brennan and Blackmun, they invite the authors of these doctrines to counter that they have addressed those very concerns. The new doctrines, they can argue, are both more administrable and less threatening to national supremacy than the rule laid down by *National League of Cities*. To the extent this rejoinder is persuasive, moreover, it shifts the burden back to the dissenters. Or, at the least, it requires them to press a defense of national authority that is seemingly without limit. After all, defenders of enforceable federalism limits can now ask: Why should states not receive a form of judicially enforceable constitutional protection that is both workable and preservative of national supremacy?⁷¹

1. Answering the Unworkability Objection

If the second federalism revival has succeeded at anything, it has shown that administrable tests in the field of federalism are available.⁷² In this way, the second revival has undermined one of the central arguments that had been used by Justice Blackmun in *Garcia* to shore up the nationalist position in Round One—namely, that the lack of a workable test for identifying core sovereign interests revealed the Constitution's implicit rejection of such an inviolate conception of the states' structural position.

71. See Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 Duke L.J. 75 (2001); Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 Wm. & Mary L. Rev. 1733 (2005); see also Transcript of Oral Argument at 22-25, *United States v. Lopez*, 514 U.S. 549 (1995) (No. 93-1260).

72. That is not to say the new federalism doctrines are legitimate. They remain open to the critique that they are made up out of thin air, and Justice Stevens has been quick to echo Justices William Brennan and Harry Blackmun in leveling this accusation—particularly at the sovereign immunity and commandeering decisions, neither of which even pretend to be rooted in the constitutional text. But on this dimension, too, the second federalism is arguably an improvement. Its Commerce Clause and Section 5 jurisprudence at least claim to be giving content to limitations on congressional power that the Constitution quite clearly sets forth. Justice David Souter essentially conceded the point with respect to the Commerce Clause in his dissent in *Morrison*: “Obviously, it would not be inconsistent with the text of the Commerce Clause itself to declare ‘noncommercial’ primary activity beyond or presumptively beyond the scope of the commerce power.” *United States v. Morrison*, 529 U.S. 598, 640 (2000) (Souter, J., dissenting). And while the sovereign immunity cases can claim no real textual support, they do at least arguably implement the now century-old precedent of *Hans v. Louisiana*, 134 U.S. 1 (1890). *National League of Cities* had no similarly on-point precedent on which to rely. The negative pregnant is the commandeering line of cases, for which neither textual support nor *Hans*-like direct precedent can be found.

The most important way in which the second federalism revival addresses the unworkability objection is by rejecting the “sovereign functions” test that was central to *National League of Cities*. To be sure, recent federalism decisions do make occasional references to something that sounds a lot like the sovereign functions test. In its decisions in *Lopez* and *Morrison*, for example, the Court suggests that there is some line that distinguishes the truly local from the truly national.⁷³ Categorizing subject areas as local or national would seem to present many of the same conceptual difficulties—and thus invite many of the same critiques—that are presented by denominating some but not all state activities as sovereign functions.

But importantly, neither *Lopez* nor *Morrison* actually holds any state activities to be either exclusively local or exclusively national. Instead, each case protects state power by imposing a limited interpretation of Congress’s enumerated authority under the Commerce Clause. The federalism-based limitation in the commerce power cases emanates not from the determination that some class of activities involves inherently state sovereign functions or inherently local matters. It emanates from the Court’s conclusion that the particular delegation of power to the federal government at issue presumptively permits the regulation of only economic activity. The nature of the state activity impacted by the federal legislation is beside the point. It is the economic or noneconomic character of the federal activity that is legally significant, and it is the fact that the Constitution empowered Congress with respect to “commerce” that justifies the use of that test. Importantly, one needs no theory of federal/local relations or of the boundary between sovereign and non-sovereign actions to determine whether something is “economic” activity or not. That inquiry is not logically bound up with a local/national, sovereign/non-sovereign categorization.

Similarly, the recent Section 5 cases focus on whether Congress has exceeded the limit of a textual provision that grants an enumerated power—here, the power to “enforce” the Fourteenth Amendment⁷⁴—rather than on whether state activities fall within some domain of state sovereignty or inherently local matters. Congress must be enforcing the Fourteenth Amendment, the Court has held,⁷⁵ and Congress therefore needs to demonstrate that it is enforcing rights rather than creating new ones. Whether the state is running a prison or regulating employment on a state transit system is relevant only to that question. The Court need not determine whether the state function at issue is a sovereign one, nor need it determine whether it is intrinsically of local concern. It need only

73. See *Morrison*, 529 U.S. at 617-18; *Lopez*, 514 U.S. at 567-68 (Kennedy, J., concurring).

74. U.S. Const. amend XIV, § 5. Section 5 of the Fourteenth Amendment states, “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”

75. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

determine whether it is enforcing rather than creating rights. Again, the enforcing/creating distinction is logically independent of the sovereign/non-sovereign or national/local one.

The final two categories of cases—those protecting state sovereign immunity and those barring commandeering—do appear to rest on something like a sovereign functions test. But, importantly, each of these lines of doctrine takes a form that makes the constitutional inquiry much less problematic than the open-ended investigation of the nature of sovereignty required by *National League of Cities*.

The sovereign immunity cases plainly do protect what the Court claims is a fundamental attribute of state sovereignty. Nevertheless, they still avoid the troublesome inquiry into the nature of state sovereignty that *National League of Cities* necessitated. That is because all state functions enjoy the limited, albeit important, form of protection that the state sovereign immunity cases provide.⁷⁶ The conclusion that a state cannot be forced to pay its employees a federal wage inevitably raises questions about why that same state may be forced to provide its employees a workplace that the federal government certifies as safe. That was the point of Stevens's incisive—and ultimately decisive—objection in *National League of Cities*. But a conclusion that the state cannot be sued when performing any of its functions is different. The constitutional immunity is from a mechanism of federal enforcement rather than from federal regulation of certain functions deemed to be fundamental to state sovereignty. The only question, then, is why that particular mechanism of federal enforcement should be uniquely precluded. That may well be a problematic question for the federalists to answer—though it must be conceded that the majority does have some precedent on its side⁷⁷—but it is a quite different question from the one that Stevens posed in dissenting in *National League of Cities*. The question focuses attention on what the federal government may do, rather than on what states do that is uniquely bound up with sovereignty.

Only the commandeering cases actually raise the same conceptual difficulty posed by the sovereign functions test of *National League of Cities*. These cases seem to distinguish between types of state activities, making state regulation somehow more sovereign than state service provision or even state information gathering and dissemination.⁷⁸ Hence, it appears that the federal government can command the state to provide notice but not to actually regulate. The cases in this way suggest that the Court is back in the business of independently classifying certain state functions—here, regulation—as being more “sovereign” than others. But even the Court's commandeering jurisprudence attempts to avoid such classification. *Printz* makes clear that this doctrine, too, focuses on the

76. There are, however, complicated questions concerning what institutions constitute arms of the state.

77. See *Hans*, 134 U.S. at 1. But see *Seminole Tribe of Fla.*, 517 U.S. at 76 (Stevens, J., dissenting).

78. See *Printz v. United States*, 521 U.S. 898, 935-36 (1997) (O'Connor, J., concurring).

mechanism by which the federal government purports to exercise its supreme authority over the state's power to regulate. Thus, once again, the constitutional problem the Court has identified is less that a special sovereign function has been infringed, than that the federal government has infringed it in a certain way. The Court focuses for this reason primarily on the distinction between commandeering and preempting rather than on the distinction between those functions associated with sovereignty and those that are not.⁷⁹

The new doctrines also attempt to fend off the unworkability objection by rejecting the balancing approach that *National League of Cities* seemed to embrace. *National League of Cities* appeared to establish that the infringement of state sovereignty would be weighed against the strength of the federal interest in each case. That aspect of the doctrine initially made it attractive to Justice Blackmun, but it inevitably raised concerns about the propriety of judges engaging in such an inquiry. Indeed, such a balancing test seemed to all but require some formal judicial categorization of what matters were national in character and what matters were local.

Under the new doctrines, however, the weighing of interests is largely irrelevant. Congress is either regulating an economic matter or it is not. A Fourteenth Amendment right is either being enforced or it is being established. A private suit is either being brought against the state or it is not. A command to regulate either has been issued or it has not.⁸⁰ Indeed, the new jurisprudence is so categorical that it does not even admit, in the case of *Printz*, of an exception for terrorism or war. Accordingly, current critiques of these doctrines are as likely to focus on the doctrine's inflexibility as on its vagueness.⁸¹

These two aspects of the new federalism doctrines substantially diminish the force of the chief argument Justice Blackmun relied on in pressing the nationalist case in *Garcia*—namely, that the impossibility of coherently distinguishing sovereign functions from all other state activities supported the conclusion that the Constitution did not establish a clear and inviolable core of state sovereignty enforceable by judges. The new tests distinguishing between economic and noneconomic activities, creating and

79. The Court's most recent commandeering decision—*Reno v. Condon*, 528 U.S. 141 (2000)—is instructive. Even though the case involved the commercial sale of personal data, the Court, in turning back the commandeering challenge, did not invoke the proprietary/governmental distinction that was important under the *National League of Cities* framework. Instead, it denied that the federal government had commandeered the state's regulatory apparatus, suggesting instead that it had merely preempted a state decision. *Id.* at 151.

80. The one exception, arguably, is the allowance the Court makes for Congress to abrogate sovereign immunity pursuant to its power under Section 5. Even here, however, the Court shows discomfort with balancing federal and state interests. It simply asserts that the later-enacted Fourteenth Amendment trumps the earlier-enacted Eleventh. That is by no means a satisfactory account, but the very formalism of the reasoning comports with the contention that the Court's Federalism Five have no desire to perform the balancing act that *National League of Cities* contemplated.

81. See, e.g., *Printz*, 521 U.S. at 939 (Stevens, J., dissenting).

enforcing rights, or preempting and commandeering, though by no means clear, are hardly unworkable in the way that the sovereign functions test proved to be.⁸² And thus, the workability of the current doctrines undermines the judgment that Justice Blackmun and others made regarding the absence of federalism-based constitutional limits on national power.

Similarly, the categorical cast of the new decisions protects the Court from the problematic task of weighing the significance of the federal interest in evaluating a state's federalism-based challenge to national authority. Though commentators often contend otherwise,⁸³ the fact is that the new doctrines do not formally require judges to categorize matters along a state/local axis. The new doctrines simply do not single out certain areas of governmental activity as being exclusively the province of one level of government.

2. Answering the Supremacy Objection

Just as the new federalism doctrines address Justice Blackmun's primary claim in *Garcia* on behalf of the nationalist position, they also address his second claim—namely, that the federal government is supreme and that a federalism doctrine that challenges that basic fact is inconsistent with the constitutional plan. To be sure, the notion that states are entitled to some protection from the exercise of powers that Congress clearly possesses necessarily challenges a basic premise of the nationalist position. For that very reason, the assertion of federal supremacy represented a direct challenge to the first federalism revival. But the form that the new federalism doctrines take mitigates the force of that familiar nationalist objection. The assertion of national supremacy, therefore, does not strike at the heart of the second federalism revival in the way that it threatened the first.

Assertions of supremacy are essentially non sequiturs to cases that narrowly construe Congress's enumerated powers under the Commerce Clause and Section 5. Those cases concern the scope of congressional authority to act, not the supremacy of the actions that the national government validly undertakes. That Congress's commerce power may be unlimited where applicable says little about the extent of its application. The very same passages from prior cases concerning federal supremacy that Justice Brennan could cite forcefully in his dissent in *National League of Cities*, therefore, do not carry the same weight in dissents in *Morrison* and *Lopez*. Those cases concern the logically prior question of whether Congress has any affirmative authority to begin with.

82. The line between the economic and the noneconomic is not pellucid, but neither is it as clearly without definite content as was the sovereign functions test. Even Justice Stevens's own most recent definition of economic activity in *Raich* would not seem to cover the gender-based violence deemed noneconomic activity in *Morrison*.

83. See, e.g., Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 Yale L.J. 619 (2001) (discussing family law, federalism, and *Morrison*).

In addition, the commandeering and sovereign immunity cases pose less of a threat to national supremacy than the threat posed by the immunity for sovereign functions that *National League of Cities* conferred. Under both *New York* and *Printz*, the federal government may not be permitted to commandeer state regulators, but it can directly preempt any local action within its enumerated powers. The sovereign immunity cases also permit the federal government to sue states whenever they violate federal law, no matter the activity in which the state is engaged. Of course, the newly minted limitations may be practically significant in many cases.⁸⁴ The more enforcement mechanisms the federal government possesses, the easier it will be to enforce federal law as supreme. But the tools of enforcement that remain are not so minimal—including, as they do, the power in many cases to seek injunctive relief against state officials—as to make supremacy unenforceable. Supremacy, then, seems less directly at issue in the current round than it was the last time the Court attempted to revive federalism.

Whatever else may be wrong with the second federalism revival, therefore, it is not making the frontal assault on the hierarchical relation between state and nation that *National League of Cities* mounted. The cases suggest that the national government is a government of limited powers, but a government that is nonetheless formally supreme over all matters within its enumerated jurisdiction. Put that way, the new federalism seems less obviously aggressive and thus much less controversial than its predecessor.

3. The Sociocultural Shift Against Centralization

These doctrinal adjustments do not suffice to justify the new federalism rulings. At most, they shore it up against familiar lines of attack. Perhaps most crucially, they do not explain why federalism would be attractive or functionally useful. But significantly, the federalism majority has made these doctrinal adjustments at a time when, as a sociocultural matter, functionalist arguments for the centralization of power have lost some of their resonance.

The plenary view of national power drew strength from its association with two powerful centralizing forces: the New Deal and the Second Reconstruction. But the association of states' rights rulings with *Lochnerism* is now somewhat ironic given that the federal government is firmly in the hands of a party that is hardly committed to preserving the New Deal legacy.⁸⁵ And the argument that the national political process will protect states has surely lost some of its punch. The political safeguards of federalism seemed a fact of nature during the era of massive

84. See Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 *Notre Dame L. Rev.* 1011 (2000).

85. See generally David J. Barron, *Reclaiming Federalism*, *Dissent*, Spring 2005, at 64.

resistance and the Southern filibuster.⁸⁶ But that era has now passed. The very nationalization of the economy—and the media—that underlies the dissenters' hostility to the Court's developing Commerce Clause jurisprudence makes it difficult to conceive of states—as opposed to conventional national interest groups—as being meaningful obstacles to federal policy making.

Fundamentally, then, the appeal of decentralization is now bipartisan in a way it was not during the era of plenary power. The content of the major party platforms bears this out.⁸⁷ Even some of the Court's key opponents of the new federalism jurisprudence are associated with a president who was quite comfortable with questioning the value of "big government"⁸⁸ and embracing a more decentralized vision of governmental authority.⁸⁹ That is in part because the very complexity of modern life that makes state sovereignty seem anachronistic also seems to make centralization appear to be at best a partial solution. The need for experimentation—for some freedom of action at the local level—seems imperative to all sides, if only because it has become clear that no one vision of government is likely to have a lock on national institutions.

Only a year after dissenting in *National League of Cities*, even Justice Brennan began to sing from the states' rights songbook in defending a vigorous state constitutionalism.⁹⁰ It had become clear that the federal judiciary no longer embraced a jurisprudence that was consonant with the Second Reconstruction. But now a similar transformation has occurred with respect to the national legislative and executive branches. Hence, the modern heirs to the constitutional tradition that emerged from the New Deal through the Second Reconstruction have begun to rediscover the functional benefits of federalism.

Thus, for reasons both doctrinal and functional, arguments of the kind that Blackmun first suggested in *Garcia*—namely, that the effort to revive federalism fails even to serve the values of federalism—may be more salient today than are the familiar nationalist invocations of the imperative of federal supremacy, the incoherence of state sovereignty, or the functional

86. The political safeguards argument was written in 1954, the very year that the Second Reconstruction arguably began. See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543 (1954); see also Robert A. Caro, *The Years of Lyndon Johnson: Master of the Senate* (2002).

87. See Juliet F. Gainsborough, *Fenced Off: The Suburbanization of American Politics* (2001).

88. The Era of Big Government Is Over (radio broadcast Jan. 27, 1996), available at http://www.cnn.com/US/9601/budget/01-27/clinton_radio/ (radio address of President William J. Clinton).

89. Indeed, while one Clinton appointee came from a classic, New Deal—hence nationalist—jurisprudential background, another had made news prior to her appointment by emphasizing that *Roe v. Wade* may have erred in forestalling the development of constitutional views at the state level.

90. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977).

superiority of centralization. At the least, one may expect that the effort to fight federalism with federalism will continue to have appeal to those seeking to counter the federalism revival, particularly if it continues to develop doctrinally in a form that avoids some of the pitfalls of its most recent predecessor.⁹¹ As a consequence, it is important to attend to the way Justice Stevens and his fellow dissenters have begun to assert that the Court's developing federalism jurisprudence is, to paraphrase Blackmun, "inconsistent with established principles of federalism, and, indeed, with those very federalism principles on which [the new pro-federalism doctrine] purport[s] to rest."⁹²

C. *Fighting the New Federalism with New Arguments*

The dissenters' new effort to fight federalism with federalism consists of three distinct types of arguments. The first contends that the new

91. Of course, the new doctrines occasion other new objections as well. For example, the Eleventh Amendment is a centerpiece of the latest federalism revival, but the protection of state sovereign immunity has never been thought to extend to cities. The dissenters have been quick, therefore, to question why cities should enjoy other federalism protections—such as the protection against commandeering—that the current revival also confers. *Lincoln County v. Luning* held that the Eleventh Amendment did not protect a local government because it was "a corporation created by and with such powers as are given to it by the State." 133 U.S. 529, 530 (1890). Justice Stevens therefore argued in *Printz*, which did not involve state officials, that

[t]his Court has not had cause in its recent federalism jurisprudence to address the constitutional implications of enlisting nonstate officials for federal purposes. (We did pass briefly on the issue in a footnote in *National League of Cities* . . . but that case was overruled in its entirety by *Garcia* The question was not called to our attention in *Garcia* itself.) It is therefore worth noting that the majority's decision is in considerable tension with our Eleventh Amendment sovereign immunity cases.

Printz v. United States, 521 U.S. 898, 955 n.16 (1997) (Stevens, J., dissenting). He concluded, "If the federal judicial power may be exercised over local government officials, it is hard to see why they are not subject to the legislative power as well." *Id.* at 956 n.16. Justice Antonin Scalia, writing for the Court, responded with *ipse dixit*. *Id.* at 931 n.15. Stevens's point would seem to be all the stronger after *Alden*, which held that states enjoy sovereign immunity from federal attempts to make them subject to suit not only in federal court but also in their own state courts on the basis of basic principles of federalism rooted in the Tenth Amendment. *Alden v. Maine*, 527 U.S. 706, 713-14 (1999). *Alden* made clear that cities, unlike states, did not enjoy any such immunity, *id.* at 756, but if the state/city distinction is no longer "peculiar to the question of whether a governmental entity is entitled to Eleventh Amendment sovereign immunity," *Printz*, 521 U.S. at 931 n.15, why should cities not be distinguished from states with respect to federalism protections more generally? A similar issue concerning the uncertain legal status of cities has been a source of controversy in the Court's decisions concerning Section 5 of the Fourteenth Amendment. Under the new jurisprudence, in order to act under Section 5, Congress must be making a congruent and proportionate response to past unconstitutional state conduct. Does evidence of unconstitutional conduct by cities count? Justices Breyer and Stevens have argued that it should, while Scalia and William Rehnquist have taken the opposite view. But it might seem that, if cities can bring challenges to congressional action for exceeding the Section 5 power, unconstitutional actions by cities should be able to trigger the exercise of that power. *Cf. Tennessee v. Lane*, 541 U.S. 509, 527 n.16 (2004). *Compare Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 368-69 (2001), *with id.* at 378 (Breyer J., dissenting).

92. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985).

federalism doctrine creates perverse incentives for the national government to undertake even more forceful assertions of federal authority. The second contends that some of the new attempts to protect state sovereignty infringe upon state sovereignty. The third claims that the Court takes a very selective view of what counts as a case about federalism, thereby leaving states with little protection in cases where they very much need it.

These arguments do not themselves constitute a coherent theory of federalism, any more than the doctrines that they resist clearly reflect one. In fact, the third type of argument is quite distinct from the first two. It focuses on the substance of the outcomes in federalism cases rather than on the perverse ways in which federalism protections may undermine the effective exercise of state power. But collectively, these arguments do constitute a different language for critiquing federalism than was used to challenge the first federalism revival. In consequence, they suggest that the debate over federalism may be entering a new phase. The new fighting-federalism-with-federalism arguments shift the focus away from the issue of whether one is a federalist or a nationalist. They suggest instead that each side in the contemporary debate over federalism is solicitous of state authority in some contexts but not others. The classic nationalist position does not share this sensibility. It concedes all of the federalist ground, associating instead with the view that the Constitution fundamentally aimed to centralize power and that such centralization is functionally desirable.

1. The New Federalism Creates Perverse Incentives to Expand Federal Authority

One of the most important ways in which Justice Stevens and his fellow dissenters have been fighting federalism with federalism involves the assertion that the new “state-friendly” constitutional doctrines create perverse incentives to augment national control. Here, Stevens and his fellow dissenters exploit the fact that the new federalism doctrines seek to avoid the perceived errors of *National League of Cities*.

That earlier case prohibited the national government from mandating wages for state and local governmental workers. In so doing, it left the federal government with little recourse. The federal government could not get around the Court’s constitutional limitation by federalizing all state and local governmental services and functions. That extreme solution would be both clearly impracticable and arguably violative of the very limitation that *National League of Cities* imposed. Thus, as Justice Blackmun saw it, *National League of Cities* threatened federalism, if at all, only to the extent that its solicitude for the exercise of traditional state sovereign functions induced states to regulate too little.

The contemporary dissenters repeatedly argue, by contrast, that the new federalism doctrine operates quite differently. The dissenting Justices contend that, in eschewing the sovereign functions test, the Court has generated an opposite threat to federalism. It has constructed doctrines that

induce the federal government to be even more assertive than it would otherwise be. In other words, the dissenters argue, the very fact that the new federalism doctrines are more workable makes them worse mechanisms for protecting states.

As Justice Stevens's dissent in *Printz* points out, the anti-commandeering rule set forth in that case does not impose a blanket limitation on the federal government's authority to intervene in certain areas that have been traditionally regulated by the states.⁹³ Instead, it prohibits the federal government from commanding states to regulate their own citizens in all cases. But that means that the federal government may get around the rule by establishing an even more comprehensive federal regulatory response. Hence, the rule actually may encourage the federal government to assume even greater authority. As Justice Stevens argued in *Printz*,

Perversely, the majority's rule seems more likely to damage than to preserve the safeguards against tyranny provided by the existence of vital state governments. By limiting the ability of the Federal Government to enlist state officials in the implementation of its programs, the Court creates incentives for the National Government to aggrandize itself. In the name of States' rights, the majority would have the Federal Government create vast national bureaucracies to implement its policies. This is exactly the sort of thing that the early Federalists promised would not occur, in part as a result of the National Government's ability to rely on the magistracy of the States.⁹⁴

Justice Breyer advances a similar argument in his dissents in the sovereign immunity cases. He consistently emphasizes the ways in which these holdings may encourage federal overreaching. By precluding Congress from authorizing private suits to enforce state violations, he contends, the Court has encouraged the federal government to bring them directly. That only leads the federal government to conceive of itself as the primary enforcer. In this way, the doctrine substitutes a centralized enforcement process for a decentralized one.⁹⁵

There are problems with this objection, not the least of which concerns its plausibility. It is not at all clear that Justices Stevens and Breyer are identifying likely federal responses to the doctrines that the Court has set forth. The limits on the federal enforcement power that the Court has established may be quite difficult to get around politically. Even if Congress could in theory establish an expansive national bureaucracy to control gun sales, for example, it would appear to be much more difficult to do that than to order state law enforcement officers to carry them out.⁹⁶

93. See *Printz*, 521 U.S. at 939 (Stevens, J., dissenting).

94. *Id.* at 959.

95. See, e.g., *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 693 (1999) (Breyer, J., dissenting); see also Stephen Breyer, *Madison Lecture: Our Democratic Constitution*, 77 N.Y.U. L. Rev. 245, 258 (2002).

96. See David J. Barron, *A Localist Critique of the New Federalism*, 51 Duke L.J. 377, 412-13 n.109 (2001).

Nevertheless, there is something to the point. It is not always the case that Congress will find it politically harder to assert more rather than less authority. The Court's decision in *Seminole Tribe* arguably demonstrates the risk. There, the Indian Gaming Regulatory Act required a state to negotiate in good faith with a tribe concerning gaming compacts. But the Court's holding, by depriving tribes of the right to sue states that refuse to negotiate in good faith, may encourage federal authorities to exercise their authority to impose a preemptive federal resolution of the impasse.⁹⁷ In that event, the federalism restriction would have the perverse consequence of inducing a federal resolution that might have been forestalled through negotiations with the state.

Similarly, in *Gonzales v. Raich*, Justice Stevens exploited a similar aspect of the new federalism doctrine—its paradoxical tendency to encourage the federal government to do more rather than less—in obtaining a majority to cabin the holdings in *Lopez* and *Morrison*. In *Raich*, Stevens concluded that Congress could regulate home grown marijuana pursuant to a more general regulatory scheme even if it could not regulate it in isolation, and even if Congress did not independently explain how prohibiting the homegrown product furthered the general regulatory scheme.⁹⁸ This conclusion permitted him to avoid the force of the holding in *Lopez*, which emphasized that the targeted federal regulation of the possession of guns within 1000 feet of a school in no sense constituted the regulation of economic activity. Stevens explained that the general prohibition against the possession of drugs was clearly aimed at regulating market behavior, even though, he implied, the discrete regulation of the possession of homegrown marijuana for medicinal purposes might not have been.⁹⁹ In other words, the commerce power permitted Congress to regulate comprehensively even though it might have prohibited it from regulating in a more targeted fashion. In a delicious bit of irony, Justice O'Connor dissented in *Raich*, arguing in part that Stevens's new test "gives Congress a perverse incentive to legislate broadly pursuant to the Commerce Clause—nestling questionable assertions of its authority into comprehensive regulatory schemes—rather than with precision."¹⁰⁰ That argument is identical in form to the one that Justice Stevens set forth in his dissent from the opinion that Justice O'Connor herself joined in *Printz*.

It may be that Justice O'Connor's concern in *Raich* is no more realistic than Justice Stevens's in *Printz*, but it is undeniable that the logic of *Raich* does create incentives for legislative drafters to couch limited statutes in broader regulatory schemes. As a result, it does seem that the effort to create a workable federalism doctrine—and in particular one that would not require the Court to define inviolable state sovereign functions—has opened the way for an even more expansive assertion of federal authority. The

97. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

98. See *Gonzales v. Raich*, 125 S. Ct. 2195, 2209 (2005).

99. See *id.* at 2211.

100. *Id.* at 2221 (O'Connor, J., dissenting).

capacity for the new federalism doctrine to turn in on itself surely constitutes one of its weaknesses.

As *Raich* itself demonstrates, the concern about perverse incentives does not imply a need to limit the scope of federalism-based limitations on federal power. To the contrary, the point of fighting federalism with federalism in this way is to highlight once again the unworkability of federalism doctrine. Here, the dissenters seem to suggest, if the only administrable federalism doctrines encourage even greater assertions of federal authority, then the game will not have been worth the candle. Ultimately, this type of argument may even set the stage for the writing of a future opinion that sounds very much like *Garcia*. Showing the federalism revival to have perversely approved of even more intrusive federal interventions than those it struck down, a future majority might conclude that the revivalists erred once again in assuming that the Constitution intended to protect states by imposing limits on federal power.

But precisely because this type of argument trades on concerns about the exercise of broad national powers, it also suggests a future path for the dissenters to pursue that is much less rooted in the nationalist tradition. On this view, the problem with the new federalism revival is precisely that it fails to encourage the federal government to be sufficiently sensitive to the contexts in which the exercise of state power might be useful or even preferable. Arguments in this vein reflect a skepticism of national authority that is hard to find in the arguments pressed a generation ago by Brennan and Blackmun. This new way of justifying national power, then, may over time create space for the development of a position between the classic nationalist view and what presently passes for the federalist position.¹⁰¹ And even if it does not, it at least demands that the Federalism Five explain the virtues of a federalism doctrine that makes broader exercises of national power more legitimate than narrower ones. In this respect, the new rhetoric of the opposition presses the federalists in ways that the nationalist challenge did not. It refuses to take the federalist position at face value. It questions why even defenders of decentralized government would like what its supposed proponents are pushing.

2. The New Federalism Often Protects State Sovereignty Only by Infringing It

Additional support for the view that fighting federalism with federalism has become a full-fledged rhetorical strategy can also be found in a distinct kind of objection the dissenters have raised. This line of argument took root in the second federalism revival's inaugural case, *New York v. United States*.¹⁰² The concern here is not that the new federalism doctrine

101. Cf. Ryan Goodman, *Humanitarian Intervention and Pretexts for War*, 100 Am. J. Int'l L. (forthcoming 2006) (discussing the way that the language used to justify a position can shape the substance of the position itself over time).

102. 505 U.S. 144 (1992).

encourages the federal government to be even more aggressive in the future, but rather that it infringes state sovereignty directly. The second federalism revival, on this view, hurts states even in those cases in which it purports to help them.

New York concerned the constitutionality of a federal statute enacted in response to a complex interstate effort to resolve difficult issues concerning hazardous waste treatment. The basic problem arose because no state wanted to open a treatment facility. Each feared that doing so would make it the dumping ground for waste from other states. The federal statutory solution required states either to take title to locally generated waste or to establish a regulatory program for disposing of it. The Court held that the legislation impermissibly commandeered the state legislative function in contravention of the Tenth Amendment.¹⁰³

Justice White's strong dissent, which Justice Stevens joined, echoed the arguments concerning national supremacy, judicial overreaching, and the sanctity of the political process that *Garcia* emphasized in defending the plenary view of federal power.¹⁰⁴ But the dissent also echoed Blackmun's concluding refrain in *Garcia* concerning the anti-federalist implications of the federalist position. It contended that the Court's decision paradoxically frustrated a creative effort by the states themselves to solve a difficult problem. Far from freeing states from federal coercion, the Court's Tenth Amendment ruling merely prevented states from enlisting the federal government to limit their capacity to coerce one another. For that reason, White contended, the decision hardly promoted the values of federalism.¹⁰⁵

Justice Stevens highlighted this same point in his separate dissenting opinion, which emphasized that "[t]he Constitution gives this Court the power to resolve controversies between the States."¹⁰⁶ He argued that this longstanding body of federal common law—crafted to mediate “disputes between States involving interstate waters”¹⁰⁷—resulted in judicial commands for states to take reasonable steps to protect their water supplies so that other states might enjoy them. Commands that the Supreme Court itself could issue, Stevens argued, could not be beyond the powers of Congress.¹⁰⁸ In making this point about the comparative institutional power of the federal judiciary and the national legislature, Justice Stevens called attention to the fact that the Court had, in the name of protecting state sovereignty, frustrated a national legislative effort to resolve an interstate dispute. The case, in other words, did not present a true contest between state and national power.

103. *Id.* at 176 (quoting *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981)).

104. *See id.* at 205-06 (White, J., concurring in part and dissenting in part).

105. *Id.* at 210.

106. *Id.* at 211 (Stevens, J., concurring in part and dissenting in part).

107. *Id.* at 212.

108. *Id.* at 212-13.

This pro-state defense of national power is generalizable in two respects. First, state interests conflict in many cases that involve disputes over whether national power should be limited. For that reason, federal intervention that limits the powers of some states often may simultaneously provide protection to other states. Limiting national authority to intervene, therefore, is not an unqualified good for those interested in protecting "states." A case like *Printz* reveals the point. States with effective gun control laws would be harmed if the federal government could not ensure the performance of background checks in states that had no such laws. That is because gun markets are interstate in operation.¹⁰⁹

In related contexts, Justice Stevens has been quite sensitive to the possibility of interstate conflict—and its implications for defenders of state sovereignty. For example, Justice Stevens's opinion in *Nevada v. Hall*,¹¹⁰ decided just three years after *National League of Cities*, highlights the problem that interstate conflicts present to those enamored of strong claims to state sovereignty. There, the plaintiff sued the state of Nevada in connection with a collision with a state-owned vehicle, but it did so in a California court. Nevada objected that it retained its sovereign immunity, but California declined to dismiss the suit. Nevada therefore argued to the Supreme Court that its immunity was constitutionally protected. Justice Rehnquist argued vigorously in dissent in favor of Nevada's position, contending that immunity from suit was a fundamental attribute of sovereignty.¹¹¹ But Stevens replied that California had a strong sovereign interest of its own in furthering its policy of providing

full compensation in its courts for injuries on its highways resulting from the negligence of others, whether those others be residents or nonresidents, agents of the State, or private citizens. Nothing in the Federal Constitution authorizes or obligates this Court to frustrate that policy out of enforced respect for the sovereignty of Nevada.¹¹²

Nevada v. Hall did not involve an exercise of federal power, but in other doctrinal areas, Justice Stevens has expressly connected the fact of interstate conflict to the defense of national authority. His decisions supporting federal constitutional limitations on state punitive damages awards based on out-of-state conduct¹¹³ and his broad view of the dormant Commerce Clause¹¹⁴ both emphasize the need for the central government to protect states from the regulatory overreaching of neighboring states. They thus reflect a consistent theme in his jurisprudence: Federal power is a critical mechanism for protecting, rather than simply overriding, state interests.

109. See Barron, *supra* note 96, at 414-15.

110. 440 U.S. 410 (1979).

111. *Id.* at 432 (Rehnquist, J., dissenting).

112. *Id.* at 426.

113. See, e.g., *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996).

114. See, e.g., *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994).

The second way that the argument may be generalized relates to the fact that states themselves often seek out federal intervention. While *New York* was a case in which that very thing seemed to have occurred, *New York* is hardly unique. States often mobilize for federal intervention. Indeed, the famous laboratories-of-democracy metaphor that Justice Louis Brandeis deployed¹¹⁵ is only intelligible if one imagines the courageous state experiment being adopted ultimately as a national rule, presumably in accord with the desire of many states. Again, it is not surprising that Justice Stevens in particular would be sympathetic to this view. As Robert Schapiro nicely points out in this Symposium, such an argument is quite similar to the one set forth by Justice Wiley Rutledge, for whom Justice Stevens clerked, in his famous defense of a broad view of Congress's commerce power.¹¹⁶ Rutledge explained that "[i]t would be a shocking thing, if state and federal governments acting together were prevented from achieving the end desired by both, simply because of the division of power between them."¹¹⁷

Though the Rutledge quotation demonstrates that this argument is not novel, this argument also made no appearance in the debate over *National League of Cities*. There, it was assumed that the federal rule was one that no state desired, let alone one that most states sought. *Garcia* did not suggest otherwise. Now, however, this argument has become a quite familiar means by which the dissenters critique the new federalism. In his dissent in *Morrison*, for example, Justice Souter explained that thirty-six states had filed briefs supporting the constitutionality of the Violence Against Women Act, and only one state had filed on the other side.¹¹⁸ For that reason, Souter suggested,

It is, then, not the least irony of these cases that the States will be forced to enjoy the new federalism whether they want it or not. For with the Court's decision today, Antonio Morrison, like *Carter Coal's* James Carter before him, has "won the states' rights plea against the states themselves."¹¹⁹

Justice Breyer pressed a similar theme in his own dissent in that case. He argued that the legislative history suggested that the Violence Against

115. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Justice Louis Brandeis stated,

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

Id.

116. See Robert A. Schapiro, *Justice Stevens's Theory of Interactive Federalism*, 74 *Fordham L. Rev.* 2133, 2144 (2006).

117. *Id.* (quoting *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 439 n.52 (1946) (Rutledge, J.) (quoting F.D.G. Ribble, *State and National Power over Commerce* 211 (1937))).

118. *United States v. Morrison*, 529 U.S. 598, 654 (2000) (Souter, J., dissenting).

119. *Id.* (quoting Robert H. Jackson, *The Struggle for Judicial Supremacy* 160 (1941)).

Women Act “seems to represent an instance, not of state/federal conflict, but of state/federal efforts to cooperate in order to help solve a mutually acknowledged national problem.”¹²⁰

The more opponents of the new federalism defend federal power as a means of vindicating state interests, the more they challenge the notion that the current federalism revival usefully protects states. In pressing this line of argument, moreover, the dissenters force defenders of the federalist account to grapple with the fact of interstate conflict, a fact that their familiar appeals to the imperative of protecting the states from unlimited national power generally overlook. Furthermore, it forces them to acknowledge the interests of states themselves in the exercise of federal authority.

But even if federalists slough off these objections on the ground that federalism is not actually intended to benefit states, the very fact that these objections are cast in a new, non-nationalist language may be important. The more that defenders of national power come to understand their own position as a state-protecting one, the more willing they may be to question the need for federal rules that do not seem to be aimed at responding to interstate conflicts or meeting a state demand for federal action. That may not lead them to embrace restrictive readings of the Commerce Clause—though, in time, it could. But it might, over time, influence their interpretations of constitutional limitations on state power generally, or their interpretations of federal statutes. Repetition of the traditional nationalist position, by contrast, is much less likely to inculcate (or to reflect) a similarly skeptical sensibility. Indeed, if anything, it is likely to reinforce the general distrust of state power that has long animated the nationalist view.

3. The New Federalism Is Inherently Selective

The final way in which the dissenters use the language of federalism to challenge the second federalism revival emphasizes the new federalism’s selective hostility to federal power. Conventionally, federalism cases are assumed to concern two issues: the existence of constitutional limitations on the enumerated powers of Congress to regulate in areas that would otherwise be left to the states; and the need for constitutional limits on federal power in order to protect certain aspects of state sovereignty. On this view, the recent cases limiting Congress’s commerce and Section 5 powers, as well as those protecting states from private suits or federal commands, all seem to be cases about federalism. In deciding these cases in a way that limits federal power and confers constitutional protections on states, moreover, the Court seems to be staking out a strong pro-federalism position. Justice Stevens and his fellow dissenters, however, have repeatedly argued that cases concerning the limits of enumerated power and the scope of sovereign protections do not exhaust the category of cases that

120. *Id.* at 662 (Breyer, J., dissenting).

are properly understood as being about federalism. Rather, they have argued, the Court often decides cases outside of these contexts that significantly enhance national power at the expense of the states. Indeed, Justice Stevens made the point quite plain in dissenting from a recent case, *Geier v. American Honda Motor Co.*, that set forth an unusually broad view of federal preemption. There, quoting from a prior opinion of Justice O'Connor which had narrowed the scope of federal habeas relief, Justice Stevens declared, "This is a case about federalism."¹²¹

One sees this same move in a key passage in Justice Stevens's dissent in *Boy Scouts of America v. Dale*.¹²² In that case, the Supreme Court, per Justice Rehnquist, struck down a state public accommodations law on First Amendment grounds insofar as it precluded the Boy Scouts from discriminating on the basis of sexual orientation in selecting scout leaders. Justice Stevens responded in dissent by questioning the Court's freedom of association analysis, but he also reframed the decision as being "about federalism" by invoking Justice Brandeis's famous metaphor of states as laboratories of democracies.¹²³

By making the case about state power, and the authority of states to protect civil rights, Stevens did more than identify a circumstance in which the supposed nationalists were more solicitous of state power than the supposed federalists. He also implicitly reframed the pro-federalism majority's Section 5 decisions. Considered alongside *Dale*, those cases can no longer be understood solely as stemming from a judicial desire to protect states from federal interference. It seems equally plausible to conclude that they rest on a distinct concern with expansive civil rights protections that applies no matter which level of government is providing them.

121. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 887 (2000) (Stevens, J., dissenting) (quoting *Coleman v. Thompson*, 501 U.S. 722, 726 (1991)).

122. 530 U.S. 640 (2000).

123. *Id.* at 664 (Stevens, J., dissenting). Stevens stated,

Because every state law prohibiting discrimination is designed to replace prejudice with principle, Justice Brandeis' comment on the States' right to experiment with "things social" is directly applicable to this case.

"To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold."

Id. (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

Stevens performs a similar reframing in his dissenting opinion in *Lorillard Tobacco Co. v. Reilly*.¹²⁴ The case concerned whether the Federal Cigarette Labeling and Advertising Act ("FCLAA") preempted a local zoning ordinance that prohibited cigarette advertising on billboards within 1000 feet of a school or playground. The Court held that it did, even though a long line of precedent counseled against construing federal statutes to preempt "the historic police powers of the States."¹²⁵ Stevens noted that the "suit[s] implicate two powers that lie at the heart of the States' traditional police power—the power to regulate land usage and the power to protect the health and safety of minors."¹²⁶ But Justice Stevens then expanded the debate beyond the terms of preemption doctrine. He paired the Court's broad preemption ruling with its earlier holding in *Lopez*, finding it ironic that the Court held that federal law bans "States and localities from protecting children from dangerous products within 1,000 feet of a school . . . given the Court's conclusion six years ago that the Federal Government lacks the constitutional authority to impose a similarly motivated ban."¹²⁷ Stevens does not link the two cases in order to demonstrate their logical inconsistency. He does so to challenge the functional coherence of a federalism revival that, in interpreting two ambiguous legal texts—the Commerce Clause and FCLAA—limits federal power in one and confirms it in the other. As he concludes, "I wonder why a Court sensitive to federalism concerns would adopt such a strange construction of statutory language whose quite different purpose Congress took pains to explain."¹²⁸

To be sure, the selectivity claim is double-edged. Given that the dissenters do not favor the federalist position in the commerce power area, they themselves are selective in promoting state independence in the preemption cases. The dissenters might respond that the Court should establish the principle that Congress must clearly intend to limit state power before going the further step of holding that Congress is constitutionally barred from doing so. Even here, however, the selectivity claim runs into problems. Stevens and his fellow dissenters do not themselves uniformly read ambiguous federal statutes narrowly. Justice Stevens authored the opinion that gave rise to the modern doctrine affording federal administrative agencies great deference in reading federal statutes extremely broadly even when they are ambiguous.¹²⁹ And, in the context of federal conditional spending statutes, those who dissent in the preemption cases are

124. 533 U.S. 525 (2001).

125. *Id.* at 542 (quoting *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N. A., Inc.*, 519 U.S. 316, 325 (1997)).

126. *Id.* at 591 (Stevens, J., dissenting).

127. *Id.* at 598-99 n.8.

128. *Id.* at 599 n.8.

129. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.* 467 U.S. 837 (1984). Stevens does not carve out exceptions for cases in which the broad reading might displace state decision makers. Indeed, Breyer, himself a proponent of *Chevron*, wrote the Court's broad preemption ruling in *Geier*.

often quite willing to read ambiguous statutory provisions to increase state obligations.¹³⁰ They also regularly read federal civil rights laws broadly, notwithstanding that in doing so they supply a federal rule where the state has not chosen to adopt a similar one.¹³¹

The significance of the selectivity charge, then, cannot be that it demonstrates the hypocrisy of the federalist position in “federalism” cases. It arguably simultaneously demonstrates the hypocrisy of the position the dissenters stake out in those same “federalism” cases. But the selectivity charge does make the point that the second federalism revival does not reflect a consistent preference for state decision making. It instead reflects a highly selective means of limiting federal power. Thus, the dissenters suggest, even if the Federalism Five have avoided the selectivity inherent in denominating some state activities “sovereign functions,” they have failed to avoid the selectivity that implementing any theory of federalism involves. No form of federalism frees states from all federal limitations, they seem to be suggesting, and thus any version of it necessarily favors some limits on federal power and not others. For that reason, even the new federalism, for all of its careful avoidance of the sovereign functions test, still invites questions similar to those Justice Stevens first posed to the majority in *National League of Cities*. Why, the dissenters ask, is the new federalism solicitous of attempts to limit federal power in some domains rather than others?

III. AFTER ROUND TWO

The dissenters’ new and well-developed federalism-based challenge to the second federalism revival raises an interesting possibility. Perhaps the nature of the divide on the current Court is no longer between nationalists and federalists. Perhaps the divide is now between “two federalisms,” as Professor Ernest Young has recently put it.¹³² In making this claim, Professor Young goes on to define the nature of those two federalisms. He contends that for the Federalism Five, the paramount goal is to protect “state sovereignty,” understood as the “notion that states should be unaccountable for the violation of federal norms.”¹³³ For the Dissenting Four, by contrast, the paramount goal is to protect state autonomy, understood as the “ability of states to govern.”¹³⁴ Each side in the contemporary debate, then, is attempting to protect federalism, but each side sees the protection that the Constitution affords states in quite different terms. Important as the “two federalisms” insight is, however, it is a mistake to view the contemporary federalism debate in terms of an autonomy/sovereignty distinction.

130. See, e.g., *Jackson v. Birmingham Bd. of Educ.* 544 US 167 (2005).

131. See, e.g., *Morse v. Republican Party of Va.*, 517 U.S. 186 (1996).

132. Young, *supra* note 4.

133. *Id.* at 2.

134. *Id.* at 4.

For one thing, it is not clear that the Federalism Five are concerned solely—or even primarily—with sovereignty as opposed to autonomy as Professor Young uses those terms. The key doctrines that comprise the second revival do not clearly protect states from central commands to comply with federal law. As *Reno v. Condon* demonstrates, the commandeering cases still permit the federal government to preempt state regulators and hold them liable for failing to comply with federal dictates in a broad range of cases. Indeed, it is a little odd to view the ban on commandeering as an entitlement to violate federal norms. It seems much more like a prohibition against the establishment of the norm that states may be commandeered. Moreover, the sovereign immunity cases do reduce states' risk of liability for violating federal law, but they also permit the federal government to enforce federal requirements directly against states. And they permit private injunctive actions against state officials.

These lines of case law, then, seem to be about something more than ensuring that states are free to “violate federal norms.” Indeed, they even seem aimed at freeing states to pursue their own policies and thus to be self-governing. The Court's invalidation of the Brady Act in *Printz*, for example, cannot easily be understood independent of the significant central/local battle over gun control policy that was then unfolding. Justice Thomas's concurring opinion expressly makes that aspect of the dispute of central import.¹³⁵ Similarly, the sovereign immunity cases seem to be quite concerned with the budgetary effects of private lawsuits against state governments. By protecting the state fisc, the Court would seem to be intending to promote local self-government in much the same way as the Court's initial decision in *National League of Cities*. In each case, the federalism-based limitation on federal power reduced the financial costs on cash-strapped states that federal legislation otherwise would have imposed.

For another thing, the notion that a commitment to sovereignty rather than autonomy drives the Federalism Five fails to make sense of the Court's Commerce Clause and Section 5 decisions. These cases seem designed to do much more than free states from federal oversight. They often expressly sound in autonomy. They frankly appeal to the importance of giving states the space within which to experiment with their own solutions to pressing public policy problems, such as the zoning issues at stake in the *Boerne* case or the problems of crime in schools presented in *Lopez*. Indeed, if a narrow view of preemption stems from a concern about autonomy, as Professor Young suggests, then it is difficult to see how constitutional limitations that preempt federal regulatory power over entire domains do not do so as well.

That the decisions comprising the second federalism revival reflect an interest in both sovereignty and autonomy should not be surprising. The current federalism doctrines feel as if they have been seized upon as much to evade past critiques and precedents as to implement a single conception

135. See *Printz v. United States*, 521 U.S. 898, 936-37 (1997) (Thomas, J., concurring).

of the proper place of the states within the constitutional system. Most likely, the Federalism Five understand both sovereignty and autonomy to be important values and thus legitimate grounds for constraining federal power. It may be, then, that the Justices in the majority are very much in the federalist tradition but are simply taking their opportunities as they find them, in light of their sense of what doctrinal innovations are most likely to avoid the kind of objections that proved decisive in ending the last federalism revival.

Symmetrically, the Dissenting Four do not embrace state autonomy in any simple sense. In fact, as the tensions between the three fighting-federalism-with-federalism arguments just described demonstrate, they seem to be quite conflicted about the very idea of state autonomy. Their arguments about the pervasiveness of interstate conflict and the extent of state mobilization for federal intervention, for example, seem premised on a rejection of one quite conventional view of what state autonomy would entail. Instead of portraying each state as an independent sovereign, free to chart its own destiny if only the national government would get out of the way, the dissenters portray states as inevitably influenced by, and interdependent with, both their neighbors and the federal government as a whole. By contrast, their objections to the broad preemption rulings of the Court sound in the language of autonomy that they otherwise seem wary of embracing.

Of course, even when the dissenters do embrace the language of autonomy, they do so in a quite transparently constrained way. The dissenters' preference for viewing the preemptive effect of federal law narrowly in a range of cases cannot easily be chalked up to an embrace of local self-government as a general matter. The same Justices tend to read civil rights statutes quite broadly, notwithstanding that, by doing so, they substitute national rules for local ones. The dissenters have not, in short, adopted a general policy of reading federal statutes narrowly in order to ensure that states have the maximum room to make autonomous decisions.

Thus, the dissenters' appeals to state autonomy must be read with some skepticism. They reflect an acceptance of a thirty-year period in which the plenary view of national power has been on the defensive both politically and rhetorically. And they respond to the fact that the current doctrine has successfully dispensed with many criticisms that the last federalism revival occasioned. They do not, however, signal a sudden embrace of state autonomy in the abstract.

All of this might seem to suggest that the federalist/nationalist dichotomy actually does persist, notwithstanding the new fighting-federalism-with-federalism rhetoric. The Federalism Five are just implementing a path-dependent form of the federalist world view, while the dissenters are in the end largely restating the nationalist one. But that conclusion seems mistaken as well. Professor Young's instinct to cast the current debate over the federal/state balance as a contest between two distinct visions of

federalism—though problematic in its particulars—is useful and significant at a more general level.

No one mistook the first federalism revival for a debate between two federalisms. It was a classic restatement of the familiar nationalist/federalist divide. That stock divide has now, however, plainly blurred. It is increasingly apparent that the current “federalism” revival does not protect states’ rights so much as it allocates powers between the federal government and state and local ones, simultaneously limiting and extending the scope of each. As much as the Federalism Five can be said to be picking their spots for reasons of precedent and history, there are many areas in which they seem to be vindicating a broad view of national authority even though there would seem to be no barrier to them siding with the states. Similarly, as much as the dissenters have not yet signed on to a federalism-based constitutional limitation on congressional authority, it is becoming increasingly apparent that it is a mistake to view the dissenters as unqualified defenders of national authority. Justice Stevens’s efforts to expand the frame of what counts as a case about federalism, as do the other instances in which the dissenters make a point of fighting federalism with federalism, have helped to bring that point to the fore in a way that the familiar nationalist rhetoric simply did not.

So, if the nationalist/federalist divide no longer accounts satisfactorily for the nature of the divide, and the sovereignty/autonomy binary also does not capture it, what might? Two possibilities seem worth exploring, each of which grows out of the dissenters’ novel uses of the language of federalism in the recent cases.

The first possibility is that a major fault line separating the two camps concerns the distinction between a realist and a formalist conception of federal/state relations. For the realist, there is a tremendous baseline problem when it comes to protecting state sovereignty or autonomy. That is because, in the modern world, states are always influencing each other, and they are inevitably deeply entwined with the federal government in myriad ways. From this perspective, the very project of securing state autonomy by limiting federal power is a misguided one. Indeed, it seems to be just as misguided as was the old formalist project of protecting freedom of contract or the right to property by limiting governmental authority. There, too, there was no Eden that one could protect from the government.

Many of the dissenters’ fighting-federalism-with-federalism arguments reflect a realist sensibility. The notion that states’ interests conflict—as well as the notion that the federal government often serves state interests—are each, at bottom, realist claims. They deny the view that there is some free world in which states operate independently. So, too, the argument about perverse incentives seems to draw sustenance from a similar sensibility. There is no way, on this view, to limit federal power in a manageable way without simply encouraging the federal government to get around the rule in some way that might even be more restrictive. The view seems to be that the federal government and the states are simply too

interested in the affairs of each for judges to be able to enforce their separation in a tolerable manner. As a result, the dissenters have a deep suspicion of federalism-based rules that seem aimed at enforcing a separation between these two levels of government. That suspicion seems to arise less from a generally nationalist orientation than from an embrace of complexity, interdependence, and a skepticism about formalist claims as a general jurisprudential matter. It is no surprise, then, that Justices Stevens and Breyer, the two members of the Court most clearly heirs to the realist tradition, have taken the lead in formulating these federalism-based critiques. The formalists, by contrast, see no such problem. States do retain their independence in the modern world, both from each other and from the federal government. The role of the judge is to protect that preexisting independence from intrusion.

Another important fault line seems to relate to the two camps' differing substantive visions of government—rooted in what we might call conservative versus progressive constitutional visions. In this respect, the current federalism fight is really a fight about something more than federalism as an abstraction. The Federalism Five may be expected to have chosen an allocation of state and federal power that in general promotes a substantively conservative political philosophy, given the Justices who comprise that group. Similarly, the Dissenting Four may be expected to favor an allocation that would promote a more progressive governing philosophy, given who those Justices are.

At some level, it would be odd if a constitutional concept as open-ended as federalism were not inflected politically or substantively in this way. One should not be altogether surprised, therefore, if the new federalism does, on balance, comport with a pro-business, small government, socially conservative policy agenda, while the dissenters' vision promotes greater governmental regulation and strong protection for civil rights. That precise divide crudely captures a large part of what we take to be the divide between the progressive and conservative constitutional visions at the present moment.

Of course, it is child's play to demonstrate areas in which the fit is not perfect (witness the Federalism Five's striking down the RFRA in *Boerne* and the Dissenting Four's upholding a federal ban on medical marijuana in *Raich*). But taken as a whole, it does not seem controversial to assert that the body of work produced by the Federalism Five has a clearly conservative cast while the Dissenting Four's does not. That is particularly true when one compares the areas in which the Federalism Five's usual solicitude for state decision making gives way with the areas in which the Dissenting Four's usual embrace of federal power weakens.

The Federalism Five have had no trouble invalidating state antidiscrimination laws under federal law in *Dale*; four of the five also had no trouble relying on federal law to override local authority to trump private

property rights, as in the recent eminent domain case.¹³⁶ Nor have many of them shown much concern about invalidating state regulations of business on the grounds that they conflict with federal statutes that are at best ambiguous. Moreover, their narrow constructions of the commerce power and Section 5 comport with a general skepticism about both civil rights enforcement and the regulation of business and property. Even their anti-commandeering and sovereign immunity rulings reflect a concern about the propriety of the federal bureaucracy and the importance of protecting the state fisc from activist judges that has some resonance with contemporary conservative ideology.

By contrast, the dissenters have been willing to invoke the historical powers of the states in construing narrowly the preemptive effect of federal statutes on business regulation even as they read federal civil rights statutes broadly. Consistent with this more progressive substantive orientation, they defend broad exercises of congressional power under the Commerce Clause and under Section 5. Furthermore, their hostility to the anti-commandeering rule and the sovereign immunity cases may well reflect a basic comfort with both the assertion of federal judicial power and the legitimacy of the federal bureaucracy that has its roots in old battles waged at the time of the New Deal itself.

That these respective allocations of power seem rooted less in abstractions than real-world substantive constitutional visions or orientations hardly makes federalism jurisprudence unique. Debates over the proper bounds of the First Amendment are famously inflected by views about *Lochnerism*, as Professor Cass Sunstein has suggested in critiquing *Buckley v. Valeo*,¹³⁷ and as debates over the legitimacy of commercial speech protections suggest. Justices with strong pro-regulatory political commitments may be expected to be hostile to a strong commercial speech doctrine, even though they may be quite willing to adopt a robust view of First Amendment protections for protesters, and vice versa.

Nevertheless, those who purport to take federalism jurisprudence seriously tend to object to the view that it is politicized. They fear that once it is admitted that substantive commitments shape judicial views about federalism, then federalism ceases to be a meaningful constitutional concept altogether. The fear is understandable. Indeed, if the current divide on the Court really has nothing to do with federalism, it would be nonsensical to conceive of Justice Stevens as truly fighting federalism with federalism. Federalism would be beside the point. It would be equally wrong to think that the battle on the Court is really between two federalisms. More likely, there would be no federalisms. Assumptions such as these underlie the familiar scholarly conceit that moves from the claim that federalism arguments are politically inflected to the claim that there is nothing to

136. *Kelo v. City of New London*, 125 S. Ct. 2655 (2005). Justice Kennedy sided with the federalism dissenters in this case.

137. See Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 Colum. L. Rev. 1390, 1394 (1994).

federalism.¹³⁸ And they underlie the effort to inspect the Federalism Five's pattern of decision making to show that in an important range of cases "conservatism" trumps federalism.¹³⁹ In other words, federalism is, on this view, either epiphenomenal or largely symbolic. The claim is that commitments to it ultimately give way in the face of more substantial constitutional concerns.

This objection, however, seems misplaced. There are many federalism cases in which text, precedent, history, and even interpretive methodological commitments (whether to originalism or its rivals) provide plenty of room for judicial choice. In such cases, judges may have no choice but to make their decisions on the basis of some view of how federal and state power should be allocated. But it seems unlikely that judges decide such federalism cases solely on the basis of the substance of the governmental action at issue and with no regard to the level of government deciding it. More likely, in cases where they have this kind of interpretive discretion, judges are influenced by the fact that certain substantive constitutional commitments are themselves associated with broad or narrow conceptions of federal authority.

For example, as a matter of historical fact, broad conceptions of national power were associated with commitments to the legitimacy of governmental regulation of business and the protection of civil rights. At the same time, narrow conceptions of federal power were associated with skepticism about regulatory authority and civil rights enforcement, as well as the protection of traditional social practices. In consequence, the question of whether federal power should be limited or expanded in a particular case will often be understood to have clear, practical implications for future assertions of regulatory authority, attempts to protect minority rights, or the preservation of folkways. But if there really is no way to think about civil rights independent of one's views about federal power, then one should expect that many federalism cases that do not concern civil rights directly will be resolved independent of the judge's substantive view of the particular governmental action at issue in the case at hand. Instead, concerns about limiting federal power that emanate from the broader substantive commitment to civil rights enforcement will be determinative. In this way, then, substantive commitments and views about federalism are interdependent—but only in gross. And, for this reason, a judicial preference for broad or narrow federal power will influence the resolution of a particular federalism dispute independent of the substantive issue directly presented. Understood this way, it is a mistake to inquire whether substantive conservatism takes precedence over federalism, just as it is a mistake to examine whether substantive progressivism trumps nationalism in some cases. Rather, I am suggesting, competing conservative and

138. Richard Fallon may be understood to have made just such a suggestion. See Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. Chi. L. Rev. 429 (2002).

139. See *id.*

progressive constitutional vision each produce their own competing ideas of how national and state powers should be distributed.

There is abundant evidence of this phenomenon—as the recent decision in *Raich* perhaps reveals. Justice Stevens wrote the majority decision upholding the preemption even though he is also on record raising constitutional doubts about states' laws that limit access to pain medications.¹⁴⁰ And Justice O'Connor dissented in *Raich*, even though she made plain in her dissent that she supported the prohibition. To be sure, the precise relationship between substance and procedure in this context—as in so many—is not easily disentangled. But it seems hard to understand *Raich* as merely about the Justices' competing views of the legitimacy of the underlying regulation of marijuana. Instead, it seemed to be about their convictions about the powers of the federal and state governments as a general matter. Those general views may themselves have been influenced by substantive commitments concerning the propriety of governmental regulation of business and the need for the governmental protection of civil rights. But that is only because those substantive commitments had become associated with a particular level of governmental authority in the judicial mind.

As a result, there would be no reason to think that a broad view of Congress's commerce power would comport with a judgment that federal statutes should be construed broadly to preempt state business regulation. The broad view of the commerce power was itself reflective of a generally pro-regulatory constitutional vision. Similarly, one should not expect that the federalism-based deference Justice Stevens calls for in *Dale* should lead him to take a narrow view of Congress's power to enforce civil rights under Section 5. Those two positions comport with a consistent attempt to implement a substantive commitment to the civil rights tradition in modern constitutional law.

In this sense, the shared view that maintaining two levels of government—each empowered but constrained—is an attractive feature of the constitutional framework adds an important dimension to the way that substantive constitutional positions must be articulated and implemented. It is simply not sufficient to have a substantive constitutional vision that does not also have a conception of what powers should be exercised by which levels of government within it so that such a vision might be implemented. The conception of how that allocation should be made may well change over time. Indeed, it may be changing even as we speak. The progressive constitutional position may soon come to see assertions of broad federal power as a threat to state-sponsored efforts to vindicate individual rights. But any Justice who has anything like a substantive constitutional vision should also be expected to have some such conception of the proper vertical allocation of powers and one that will promote rather than undermine that

140. See *Washington v. Glucksberg*, 521 U.S. 702, 738-52 (1997) (Stevens, J., concurring).

vision. That does not mean the Justices do not believe in federalism or that federalism is a sideshow any more than conceptions about whether judicial review should be broad or narrow are just a sideshow.

CONCLUSION

To the extent that either of these possibilities is persuasive, Justice Stevens and his fellow dissenters should be taken at their word. Their fight against the current Court's federalism revival is not a fight against federalism itself. Nor is it a restatement of the nationalist worldview. It is a fight against a particular conception of federalism—one that is both too formalist and too inconsistent with certain substantive constitutional commitments that regularly place these same four Justices on the opposing side in debates over the meaning of the First Amendment, the Equal Protection Clause, and the extent of regulatory power that should be permitted to be exercised for them to be comfortable with it.

If that is right, then it may be that we are at last on the verge of having just the kind of fight over federalism that is needed. Federalism is too important a constitutional concept to be defended only by one side. And the world has shifted in ways that make the classic nationalist position as ill-suited to a progressive constitutional vision as the classic federalist one is to contemporary conservative constitutionalism. For that reason, it should be viewed as a welcome development that even the opponents of the second federalism revival have begun to speak in the language of federalism. At last, the meaning of federalism—and not just the need for it—will be challenged.

Notes & Observations