The Myth of State Sovereignty

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In recent years the Supreme Court has revived the concept of state sovereignty and used this concept as the basis for fundamentally altering existing constitutional doctrine governing relations between the federal and state governments. The problem posed by the Court's recent federalism decisions is that the state-sovereignty rationale used to support those decisions is much broader than necessary to justify the limited consequences of the rulings in which the rationale appears. Unlike earlier generations of state-sovereignty proponents, the Justices who support the new version of state-sovereignty theory have largely recoiled from the logical consequences of their theory. In the final analysis, the new state-sovereignty proponents do not really believe (or at least do not yet admit in public) that the states they have empowered are, in fact, "sovereign."

This article considers the Court's recent state-sovereignty rulings in light of a theoretically consistent theory of what it means to be "sovereign." Based on this analysis, the article concludes that the new state sovereignty is presently an incoherent and largely mythical concept that makes it difficult for the federal government to operate; however, in the end, this new state sovereignty does not interfere with federal primacy. This raises a basic question: Does the absence of a coherent rationale doom the new state sovereignty decisions to a short, ignominious life, or are these inconsistent decisions simply preparation for a truly radical return to real state sovereignty, in which fifty different parochial sovereigns can control their own destinies over large swaths of public policy, free of any coordination or control by the national government?

I. INTRODUCTION

It is now apparent that the United States is in the midst of a constitutional revolution. For the most part, it is a quiet revolution. The issues around which the revolution is being fought are so esoteric that anyone not possessing an unnaturally strong interest in the structural aspects of constitutional law will have a difficult time staying awake long enough to understand the details of what is happening. In short, during the last ten years a narrow but steadfast five-member majority of the Supreme Court has used a broad conception of state sovereignty to expand the power of state government (and simultaneously to restrict the power of the federal government) in virtually every area in which the two governments operate.

The battle over the new theory of state sovereignty has occurred on four fronts. First, the five states'-rights Justices have asserted the concept of state

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sovereignty as the rationale for broadening the states' Eleventh Amendment immunity from lawsuits brought by private litigants in federal court to redress state violations of federal law. Second, these Justices have used the concept of state sovereignty to restrict the federal government's ability to require state officials to enforce national social and environmental policies. Third, similar state-sovereignty concerns have motivated the majority of the Court to greatly expand the scope of the *Younger* abstention doctrine and related doctrines restricting federal court equitable authority to enforce federal law. Finally, the five states'-rights Justices have used the concept of state sovereignty as a primary justification for reversing a fifty-year trend of judicial deference and invalidating several federal statutes enacted under the Commerce Clause.

As these examples indicate, the new constitutional limitations on federal power have spread quickly to several different constitutional areas; however, these decisions are united by the majority Justices' reliance on the concept of state sovereignty. The concept becomes more grandiose with every passing day. In the five-member majority's latest pronouncement on the subject, the preservation of state sovereignty has become "a defining feature of our Nation's constitutional blueprint.... States, upon ratification of the Constitution, did not consent to become mere appendages of the Federal Government. Rather, they entered the Union 'with their sovereignty intact.'"[1]

Despite the concept's importance, both the source and the parameters of the new state-sovereignty principles are unclear. It seems that the Court's new theory of state sovereignty exists somewhere beyond the constitutional text. It is a mythical concept, and it has been applied not only to cases in which the constitutional text is silent, but also to those in which the constitutional text seems to directly contradict the concept. The Court's recent use of the Eleventh Amendment in *Alden v. Maine*[2] provides one measure of how much the Court has transformed and invigorated the concept of state sovereignty in only a decade. In *Alden*, the Court interpreted the Eleventh Amendment—which by its terms addresses only the power of federal courts—to hold that states could not be sued in their own courts for violations of federal law. The Court granted the states broad authority to avoid the enforcement of federal law and openly acknowledged that this authority fell "outside the literal text of the Eleventh Amendment."[3]

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[1] Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864, 1870 (2002) (quoting Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 779 (1991)).

[2] 527 U.S. 706 (1999).

[3] *Id.* at 727. The literal text of the Eleventh Amendment reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

What the text of the Eleventh Amendment did not provide, the Court was happy to fill in with the myth of state sovereignty.[4]

Of course, this has happened before. The last life-and-death battle for control of the Court and the Constitution occurred during the 1930s over precisely the same issues of state sovereignty and federal government power. There are significant differences between the new and old concepts of state sovereignty, however, which undermine much of what modern states'-rights proponents say about the concept. The old state-sovereignty proponents had the courage of their convictions; their concept of sovereignty truly envisioned forty-nine different sovereigns (forty-eight states plus the federal government) with independent sources of power and forty-nine different political constituencies. During the heyday of the old states'-rights jurisprudence, the Court effectively insulated each of these independent sovereigns from the political pressure imposed by competing sovereigns. The Court's new state-sovereignty proponents, on the other hand, do not have the same courage of their convictions and have largely recoiled from the logical consequences of their theory. When push comes to shove, they do not truly believe (or at least do not yet admit in public) that the states they have empowered are, in fact, "sovereign." Their mythical state sovereignty is therefore an empty concept, which makes it difficult for the federal government to do its various jobs, though, in the end, it does not stand in the way of federal primacy.

The problem this poses for the new state-sovereignty proponents is that the various rationales they employ to support the new decisions are much broader than are necessary to justify the limited consequences of the rulings in which those rationales appear. These rationales may support the old-fashioned concept of complete state sovereignty, under which states really were divorced from federal government control and could make policy independent of the national government, but the rationales do not support the half-hearted, inefficient, and ultimately meaningless incomplete state sovereignty that the Court's new majority has decided to embrace. This raises a question: Does the absence of a coherent rationale doom the new state-sovereignty decisions to a short, ignominious life, or are these inconsistent decisions simply preparation for a truly radical return to real state sovereignty, in which fifty different parochial sovereigns can control their own destinies in certain areas free of any coordination or control by the national government?

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[4] This is not the first article to identify mythical elements in the Court's recent states'-rights jurisprudence. The focus of this article is on the logic of the Court's conception of sovereignty as applied in the Court's states'-rights decisions. For another critique of the mythology of states' rights, which focuses on the Court's misuse of history and the practical problems the Court's new decisions pose for the enforcement of individual rights, see Louise Weinberg, *Of Sovereignty and Union: The Legends of Alden*, 76 NOTRE DAME L. REV. 1113 (2001).

This question cannot be answered until the Court's majority decides for itself which path it wants to take. But, it is worth reviewing the unsatisfactory situation we find ourselves in today, as lower courts try to sort out the meaning of several dozen recent Supreme Court decisions, all of which rest on theoretical premises that do not support the oddly inconclusive results in the cases.

This article will review three different aspects of the constitutional protection of state sovereignty. Part II will introduce the issues arising from disputes over state sovereignty by reviewing the Supreme Court's application of state-sovereignty concepts leading up to the constitutional crisis of 1933–1936. Part III will discuss the abstract concept of sovereignty and its application in the system of American federalism. Drawing on the work of Jean Bodin and John Austin, this Part will describe a concept of sovereignty that is defined by three characteristics. Under this theory, a government is properly described as "sovereign" only if (1) that government has the exclusive power to adopt policies in a given area, (2) the policies adopted by that government are final in the sense that they cannot be overridden by a superior political entity, and (3) that government has the authority to enforce those policies against all violators, including subordinate political entities. Part IV of the article will examine the Court's recent state-sovereignty decisions in light of this abstract conception of sovereignty. This Part will place particular emphasis on the logical inconsistencies of the Court's new state-sovereignty decisions. These decisions are justified by rationales that seem to incorporate the same broad conceptions of sovereignty described in Part III. But in the end, the modern Court has stopped short of providing states with the power to adopt and enforce policies that are exclusive and final in the sense that a coherent concept of sovereignty requires. Part IV will conclude with a discussion of the implications presented by this anomaly.

II. THE OLD STATE SOVEREIGNTY

The concept of state sovereignty was a focal point of American political theory both before and after the Constitution was adopted. The Articles of Confederation explicitly stated that "[e]ach state retains its sovereignty freedom and independence,"[5] and the Constitution was adopted largely in response to the problems posed by the conflicts (especially commercial in nature) among states generated by the Articles' broad recognition of state sovereignty.[6] The primary

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[5] U.S. ARTICLES OF CONFEDERATION art. II.

[6] *See* THE FEDERALIST NO. 42, at 267–68 (James Madison) (Clinton Rossiter ed., 1961):

> The defect of power in the existing Confederacy to regulate the commerce between its several members is in the number of those which have been clearly pointed out by experience. . . . The necessity of a superintending authority over the reciprocal trade of confederated States has been illustrated by other examples as well as our own.

objective of the new constitution's antifederalist opponents was to retain for the states as much political authority as possible.[7] On the theoretical question of state sovereignty, the antifederalist position was very clear and uncompromising: "A fundamental conviction of nearly all Antifederalists was that the Constitution established a national, not a federal, government, a consolidation of previously independent states into one, a transfer of sovereignty in which the states, once sovereign, would retain but a shadow of their former power."[8] The proponents of strong state sovereignty have never reconciled themselves to the loss of local political power, but the ideological orientation of those opposing strong federal authority has in subsequent years shifted 180 degrees. At the time the Constitution was framed, the proponents of strong state sovereignty were members of what, in modern political parlance, would be characterized as the "progressive" branch of the political culture.[9] Since the Civil War, however, proponents of state

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For a general summary of the problems during the period in which the country was governed by the Articles, see ANDREW C. MCLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES 137–47 (1935) and Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. REV. 43, 53–54 (1988).

[7] *See* JACKSON TURNER MAIN, THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION 1781–1788, at 184 (1961):

> We may conclude . . . that if the Antifederalists had dominated the Philadelphia Convention, the government of the nation would have continued to be a confederation of sovereign states, and that the democratic principle of local self-government would have been emphasized. . . . The states would have given Congress the power to regulate commerce, to collect duties on imports, and to levy direct taxes in states which did not comply with requisitions. How much farther they would have gone toward a compromise with the Federalist position is uncertain . . . .

See generally STEVEN R. BOYD, THE POLITICS OF OPPOSITION: ANTIFEDERALISTS AND THE ACCEPTANCE OF THE CONSTITUTION (1979); HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR (1981).

[8] MAIN, *supra* note 7, at 120.

[9] MERRILL JENSEN, THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION, 1774–1781, at 239–40 (1940). Jensen concludes:

> [The Articles of Confederation] were a natural outcome of the revolutionary movement within the American colonies. . . . The reiteration of the idea of the supremacy of the local legislatures, coupled with the social and psychological forces which led men to look upon "state sovereignty" as necessary to the attainment of the goals of the internal revolution, militated against the creation of such a centralized government as the conservative elements in American society desired. . . . Today "states' rights" and "decentralization" are the war cries of the conservative element, which is not wielding the influence in national affairs it once did and still longs to do. But in the eighteenth century decentralization and states' rights meant local self-government, and local self-government meant a form of agrarian democracy.

Id.

sovereignty have been identified largely with conservative political causes.[10] After the Civil War, for example, issues of state sovereignty became bound up with issues of race. This manifestation of the theory of states' rights first became evident in local opposition to federal control of state governments during Reconstruction,[11] then mutated into support for Jim Crow legislation throughout the South, and finally mutated again after World War II into opposition to federally mandated integration of public schools and other facilities.

As both George Wallace-style racial and states'-rights militancy has subsided, other causes favored by social and political conservatives have moved in to feed local opposition to federal authority. The issues that serve as the focal points for this opposition include federal gun control,[12] federal environmental

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[10] The political left never entirely abandoned the field, however. The archetypal social progressive Justice Brandeis argued that "courageous" states should be free to serve as policy "laboratories" in which local political actors would "remould, through experimentation, our economic practices and institutions to meet changing social and economic needs." New State Ice Co. v. Liebman, 285 U.S. 262, 280–311 (1932) (Brandeis, J., dissenting). Justice Douglas seemed to have similar sentiments in mind when he objected to the imposition of federal wage and hour laws on state-run enterprises. Maryland v. Wirtz, 392 U.S. 183, 201 (1968) (Douglas, J., dissenting). In the area of noneconomic constitutional matters, Justice Brennan urged states to use state constitutional protections of individual rights to correct for lax protection of federal rights in an increasingly conservative federal court system. William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986). The main distinctions between the liberal and conservative states'-rights advocates are that the liberal versions of these arguments were not motivated by skepticism about government in general, and were not accompanied by proposals to prevent the federal government from addressing social problems on the national level. Since they do not use claims of state sovereignty to hinder the exercise of sovereignty at the national level, the liberal states'-rights proposals are not subject to the criticisms leveled at the conservative versions below.

[11] Even some Congressional Republicans resisted supporting legislation necessary to protect the freed slaves on states'-rights grounds—in terms that are now reflected in modern arguments over state sovereignty. In the debate over the Ku Klux Klan Act of 1871 (which among other things contained the text of what is now 42 U.S.C. §1983):

> a small but articulate group of Republicans recoiled from this latest expansion of federal authority. Most outspoken was Lyman Trumbull, who echoed Democratic charges that the Ku Klux Klan Act would revolutionize the federal system. The states, he insisted, remained "the depositories of the rights of the individual"—if Congress could enact a "general criminal code" and punish offenses like assault and murder, "what is the need of the State governments?" Trumbull's views were seconded by Carl Schurz, who considered the Ku Klux Klan Act unwarranted by the Constitution; privately, he characterized it as "insane."

ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 456 (1988).

[12] *See* Printz v. United States, 521 U.S. 898 (1997) (holding unconstitutional the portion of the federal Brady Handgun Violence Prevention Act that required local law enforcement officials to conduct background checks of prospective gun purchasers).

regulation,[13] federal protection of abortion rights,[14] federal regulation of violence based on gender,[15] and even federally mandated speed limits.[16] Added to these social issues are a full range of local economic interests, which tend to oppose federal political power insofar as it subjects their entrenched parochial economic interests to the mandate of open competition from out-of-state participants in the national marketplace.[17]

This article is not concerned primarily with the particular facts of the cases in which state sovereignty arguments were made during the early constitutional debates (or for that matter with the details of the more recent disputes regarding federal control over local affairs) except insofar as those debates reflect specific conceptions of what it means to be "sovereign." A review of the debate over state and national sovereignty reveals that, until the Supreme Court's recent state-

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[13] *See* Solid Waste Agency of N. Cook County v. U. S. Army Corps of Eng'rs, 531 U.S. 159, 174 (2001) (interpreting section 404(a) of the Clean Water Act narrowly to avoid "significant constitutional and federalism questions" that would be raised by a broad interpretation of the statute because a broad interpretation giving the federal government the authority to regulate ponds and mudflats to protect migratory birds "would result in a significant impingement of the States' traditional and primary power over land and water use").

[14] Several Circuit Courts have rejected arguments that the federal Freedom of Access to Clinic Entrances Act is an invalid exercise of Congress' Commerce Clause authority. *See* United States v. Gregg, 226 F.3d 253, 261–67 (3d Cir. 2000), *cert. denied*, 532 U.S. 971 (2001); United States v. Hart, 212 F.3d 1067, 1074 (8th Cir. 2000); United States v. Weslin, 156 F.3d 292, 296 (2d Cir. 1998); Hoffman v. Hunt, 126 F.3d 575, 582–88 (4th Cir. 1997).

[15] *See* United States v. Morrison, 529 U.S. 598, 607–19 (2000) (holding unconstitutional civil damages portion of federal Violence Against Women Act).

[16] *See* Nevada v. Skinner, 884 F.2d 445 (9th Cir. 1989) (holding Nevada's challenge to the Constitutionality of the federally mandated speed limit to be without merit).

[17] The constitutional basis for restricting the influence of local economic interests is the dormant or negative Commerce Clause doctrine, which has been a prominent feature of federal constitutional law since *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Justice Scalia has argued that the entire doctrine is historically and textually unjustified, and that the Court's application of the doctrine has, "not to put too fine a point on the matter, made no sense." Tyler Pipe Indus., Inc. v. Wash. State Dep't. of Revenue, 483 U.S. 232, 260–65 (1987) (Scalia, J., concurring in part and dissenting in part). Chief Justice Rehnquist and Justice Thomas share Justice Scalia's views on this matter and have specifically linked their opposition to the doctrine to the need to protect state sovereignty. *See* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 610–12 (1997) (Thomas, J., dissenting) ("The negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application. . . . [T]he expansion effected by today's holding further undermines the delicate balance in what we have termed 'Our Federalism.'"). Justice Scalia has recently relented in his total opposition to enforcing dormant commerce clause limitations on state economic regulation in the limited respect that he has announced his willingness to enforce the doctrine "in two situations: (1) against a state law that facially discriminates against interstate commerce, and (2) against a state law that is indistinguishable from a type of law previously held unconstitutional by this Court." Gen. Motors Corp. v. Tracy, 519 U.S. 278, 312 (1997) (Scalia, J., concurring).

sovereignty opinions, almost everyone involved in that debate shared a conception of sovereignty that afforded to each sovereign virtually exclusive control over matters within its designated jurisdiction. This is significant because the precise holdings of the Court's modern decisions do not grant states the comprehensive control over their own destinies that the Court's broad justifications for those decisions portend. One reason for the modern Court's hesitation to pursue the logical consequences of the new state sovereignty is the Court's inability to fully explain away the logical and practical failures of the old state sovereignty.

A. *John Marshall's Imperfect Renunciation of State Sovereignty*

In several early cases, the Supreme Court did its best to renounce the concept of state sovereignty before it could get a footing in the new Constitution. The key early decisions that form the core of constitutional jurisprudence relating to the structure of government—decisions such as *Martin v. Hunter's Lessee*,[18] *Cohens v. Virginia*,[19] *Gibbons v. Ogden*,[20] and *McCulloch v. Maryland*[21]—all contain extensive discussions rejecting state claims of sovereignty to fend off federal legislation infringing on state policies. These discussions are phrased very broadly and several passages seem to deny the states any status as separate sovereign entities.[22] As Chief Justice Marshall wrote in *McCulloch*, once the states set in

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[18] 14 U.S. (1 Wheat.) 304 (1816).

[19] 19 U.S. (6 Wheat.) 264 (1821).

[20] 22 U.S. (9 Wheat.) 1 (1824).

[21] 17 U.S. (4 Wheat.) 316 (1819).

[22] See *Gibbons*, 22 U.S. (9 Wheat.) at 187, which observes:

> [R]eference has been made to the political situation of these states, anterior to [the Constitution's] formation. It has been said, that they were sovereign, were completely independent, and were connected with each other only by a league. This is true. But when these allied sovereigns converted their league into a government, when they converted their congress of ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a legislature, empowered to enact laws on the most interesting subjects, the whole character in which the states appear, underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected.

The *Gibbons* Court further states:

> [T]he sovereignty of congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States.

Id. at 197. In *McCulloch*, the Court notes:

motion the process that led to the adoption of the Constitution, the newly created federal government obtained from the citizenry a sovereignty that was beyond the states' control.[23]

The Court's vigorous rejection of state-sovereignty claims against federal action in these early cases is mitigated by the underlying assumption in each of these decisions that the federal government possesses only limited power over a narrow range of activities defined specifically by the powers enumerated in the Constitution.[24] Thus, while the early Court rejected all state-sovereignty claims

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> The assent of the states, in their sovereign capacity, is implied, in calling a [constitutional] convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the state governments. The constitution, when thus adopted, was of complete obligation, and bound the state sovereignties.

17 U.S. (4 Wheat.) at 404. The *Martin* Court asserted:

> It is a mistake, that the constitution was not designed to operate upon states, in their corporate capacities. It is crowded with provisions which restrain or annul the sovereignty of the states, in some of the highest branches of their prerogatives. The tenth section of the first article contains a long list of disabilities and prohibitions imposed upon the states. Surely, when such essential portions of state sovereignty are taken away, or prohibited to be exercised, it cannot be correctly asserted, that the constitution does not act upon the states.... When, therefore, the states are stripped of some of the highest attributes of sovereignty, and the same are given to the United States; when the legislatures of the states are, in some respects, under the control of congress, and in every case are, under the constitution, bound by the paramount authority of the United States; it is certainly difficult to support the argument, that the appellate power over the decisions of state courts is contrary to the genius of our institutions.

14 U.S. (1 Wheat.) at 343–44. The *Cohens* Court notes:

> With the ample powers confided to this supreme government, for these interesting purposes, are connected many express and important limitations on the sovereignty of the states, which are made for the same purposes. The powers of the Union, on the great subjects of war, peace and commerce, and on many others, are in themselves limitations of the sovereignty of the states; but in addition to these, the sovereignty of the States is surrendered, in many instances, where the surrender can only operate to the benefit of the people, and where, perhaps, no other power is conferred on congress than a conservative power to maintain the principles established in the constitution. The maintenance of these principles in their purity, is certainly among the great duties of the government.

19 U.S. (6 Wheat.) at 382.

[23] *McCulloch*, 17 U.S. (4 Wheat.) at 403–05.

[24] *See id.* at 405:

> This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent, to have required to be enforced by all those arguments, which its enlightened friends, while it was depending before the people, found it necessary to urge; that principle is now universally admitted.

that were leveled against the federal government's exercise of its enumerated powers under the new Constitution,[25] the Court nevertheless assumed that these enumerated powers defined only part—and probably a small part—of the political universe. The states not only would continue to exist as independent sovereigns with regard to powers not specifically granted to the federal government, but the quantum of sovereignty retained by the states would be quite extensive.[26] Chief Justice Marshall's offhand comment about the state-by-state mechanism for ratifying the Constitution also describes the intellectual atmosphere that established natural limits on the federal government's efforts to restrict the exercise of sovereignty by the states in their own spheres of influence: "No political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass."[27]

The early Court's assumption that the states would remain free of federal-government control over a broad range of local political policies seems at first glance to lend credence to the modern Court's recent insistence on reinvigorating the concept of state sovereignty. But a closer look at the early Court's concession to state sovereignty reveals a key difference between that Court's theory and the new theory of state sovereignty proposed by the modern Court. The difference is that, unlike most of the modern Court's opinions, which generally provide states only nonexclusive interests in adopting policies that may be overridden by preemptive federal action, the early Court's discussion of the relationship between the state and federal governments is predicated on the assumption that each government's area of sovereignty would be exclusive and absolute. The question in these early cases was not whether the states retained some aspects of sovereignty over purely local affairs, but rather whether this residuum of state sovereignty also allowed the states to avoid enforcing contrary federal policies undertaken in pursuit of the federal government's own independent sovereign interests. The early Court gave states this power essentially by creating two hermetically sealed compartments of sovereignty, between which there was no overlap.

The next Part will explain why exclusivity is a necessary attribute of any coherent theory of sovereignty, but for present purposes it is noteworthy that the exclusivity assumption permeates the Court's opinions in the early period of constitutional jurisprudence. In other words, the early cases assumed that the state and federal governments had exclusive control over their respective areas of

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[25] *Id.* ("If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action.").

[26] *See Gibbons*, 22 U.S. (9 Wheat.) at 203 (noting the "immense mass of legislation, which embraces every thing within the territory of a state, not surrendered to the general government; all which can be most advantageously exercised by the states themselves").

[27] *McCulloch*, 17 U.S. (4 Wheat.) at 403.

authority. The assumption of exclusivity was so strong that it generated a long discussion in the *Gibbons* majority opinion and Justice Johnson's *Gibbons* concurrence about whether the federal government's power under the Commerce Clause was so comprehensive that states were prohibited from acting regarding matters of "commerce" even in the absence of preemptive federal legislation.[28]

The Court eventually rejected Justice Johnson's theory that the grant of federal authority in the Commerce Clause itself prohibits the states from regulating particular aspects of interstate commerce when the federal government has not exercised its regulatory authority. Instead, by the end of the nineteenth century, the Court had adopted the basic structure of dormant Commerce Clause jurisprudence that still characterizes this area of constitutional law. Under this theoretical structure of interstate commerce regulation, states may regulate aspects of interstate commerce as long as they do not do so for the wrong reasons (i.e., to discriminate against or burden out-of-state commerce), but the federal government may preempt that state regulation simply by adopting a contrary policy through federal legislation or administrative action.[29] Thus, although the Court has rejected Justice Johnson's rigid allocation of authority over commercial regulation to the federal government, the Court continues to afford the federal government exclusive sovereignty in the sense that if a federal statute is legitimately enacted under the Commerce Clause, the federal statute prevails over any and all contrary state actions.[30]

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[28] *Gibbons*, 22 U.S. (9 Wheat.) at 209:

> It has been contended by the counsel for the appellant, that, as the word "to regulate" implies in its nature, full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated. There is great force in this argument, and the court is not satisfied that it has been refuted.

See also id. at 222 (Johnson, J., concurring).

[29] Congress may even exercise its authority to give states regulatory authority they would not otherwise possess. *See In re* Rahrer, 140 U.S. 545 (1891). In *Rahrer*, the Court upheld the Wilson Act, which permitted states to regulate liquor transported in its original packaging into state territory. The Court had previously held in *Leisy v. Hardin*, 135 U.S. 100 (1890), that state regulations of such products in the absence of federal authorization violated the dormant Commerce Clause. The effect of the *Rahrer* holding is that "Congress, if it chooses, may exercise [its] power [to regulate commerce] indirectly by conferring upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy." Lewis v. B.T. Inv. Managers, Inc., 447 U.S. 27, 44 (1980).

[30] See, for example, the expansive interpretation of federal preemption in the Court's recent preemption decisions. Gade v. Nat'l Solid Wastes Mgmt. Ass'n., 505 U.S. 88 (1992) (holding that states are preempted from violating either the letter or the intent of federal legislation).

Although three Justices have cast doubt upon the very existence of the dormant Commerce Clause,[31] the majority of the modern Court has not questioned the basic structure of dormant Commerce Clause jurisprudence set forth in the late nineteenth century, which gives the federal courts the formal authority to override undesirable state regulations of interstate commerce. Because of the Court's rulings in other areas, however, the theory of sovereignty that underlies the Court's dormant Commerce Clause jurisprudence is becoming increasingly unstable. The concept of sovereignty inherent in the modern Court's dormant Commerce Clause opinions is inconsistent with the limitations the Court has begun to impose on federal government sovereignty in other decisions, some of which involve aspects of the Commerce Clause itself.[32] At the very least, the modern Court's five-person states'-rights majority has undercut federal government power by making it difficult, if not impossible, for the federal government to sanction states directly for violating federal dictates.[33] By increasingly insulating the states from the effective enforcement of ostensibly supreme federal law, the Court has constructed a system of imperfect federal sovereignty, even while purporting to uphold the federal government's authority ultimately to dictate how interstate commerce is regulated.[34]

The modern Court's development of a new, imperfect form of federal sovereignty is more subtle than the overt attacks on federal authority by the Court's conservative majority during the period leading up to the constitutional crisis of 1933–1936, even though as a practical matter the new system often undermines the federal government's ability to govern just as effectively as the more brazen attacks of the previous era. Subtlety has its problems, however, because in most respects the earlier attacks on the federal government were more logical than the modern Court's contradictory and rather surreptitious attack on federal sovereignty. The Court's earlier attack on federal power took the form of

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[31] *See supra* note 17.

[32] *See* United States v. Lopez, 514 U.S. 549 (1995) (limiting the scope of Congress' power under the Commerce Clause in order to protect state government powers to control local affairs).

[33] *See, e.g.*, Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (prohibiting state employees from recovering monetary damages in federal courts from states for violations of the federal Americans with Disabilities Act); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (prohibiting the federal government from awarding financial relief against states that have violated individuals' rights under the Age Discrimination in Employment Act); Alden v. Maine, 527 U.S. 706 (1999) (prohibiting state employees from enforcing their rights under the federal Fair Labor Standards Act in state court); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (prohibiting the imposition of financial sanctions on states for violations of federal trademark laws). The details of state-sovereignty assertions in these and other Eleventh Amendment cases will be discussed in Part IV, *infra*.

[34] Part IV will elaborate on the various different ways the Court's modern opinions have undercut federal government control over areas in which it is presumptively sovereign. *See infra* notes 104–275 and accompanying text.

an explicit assertion of dual sovereignty, defined by strictly demarcated areas of state and federal control, with little overlap between the two. Most of the decisions that developed and applied this theory involved attacks on federal commercial regulations, and most of the earlier Court's opinions on the subject were framed by economic assumptions drawn from neoclassical economics.[35]

The Court developed this theoretical framework at the end of the nineteenth century, in opinions addressing the application of the first wave of comprehensive federal economic regulatory legislation.[36] For all their flaws as a blueprint for coordinating the growth of an increasingly complex industrial economy, these opinions exhibited a coherent and logical view of the relationship between the federal and state governments. The Court's federalism opinions during the nineteenth and early twentieth centuries explicitly embraced the concept of dual sovereignty—that is, the concept that the states were sovereign in certain areas and the federal government was sovereign in others. This concept, however, had overtones very different from those of the early Justice Marshall opinions on the same subject. Chief Justice Marshall's opinions were clearly oriented toward moving the political center of gravity from the parochial, squabbling state political fiefdoms to a predominant national sovereign with ultimate control over the country's destiny. The post-Civil War opinions had exactly the opposite goal. Unfortunately, Chief Justice Marshall's acceptance of dual sovereignty set the stage for the later Court's use of that concept to undermine the full implementation of Chief Justice Marshall's nationalistic political goals. The post-Civil War courts did not have to alter the constitutional landscape to accomplish their objective of enshrining constitutional parochialism because even the preeminent nationalist Chief Justice Marshall had already conceded the key issue—i.e., that some form of state sovereignty had survived the adoption of the Constitution.

Chief Justice Marshall himself implicitly accepted the concept of dual sovereignty when he acknowledged that some commercial activities might be so localized that the federal government would have no regulatory authority over them.[37] By recognizing some residue of state sovereignty, Chief Justice Marshall

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[35] *See infra* notes 38–49 and accompanying text.

[36] The most important of these early opinions are *Kidd v. Pearson*, 128 U.S. 1 (1888), and *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895), which are both discussed in the next subpart. *See infra* notes 38–49 and accompanying text.

[37] After insisting on a broad definition of the constitutional term "commerce," whose grant of power to the federal government "does not stop at the jurisdictional lines of the several States," Chief Justice Marshall then acknowledged that some laws—such as quarantine and health laws—may have so little effect on commerce that they would relate to the internal operations of the states, over which the federal government would have no control. Gibbons, 22 U.S. (9 Wheat.) 1, 195 (1824). These laws, Chief Justice Marshall concluded:

> form a portion of that immense mass of legislation, which embraces every thing within the territory of a state, not surrendered to the general government; all which can be most

made it possible for a later Court to undercut the very federal government authority that Chief Justice Marshall so carefully cultivated. The increasingly conservative Supreme Court in the late nineteenth and early twentieth centuries brought the theory of dual sovereignty into the open and expressly embraced the concept. At that point it remained only for the Court to describe economic activity in a way that allocated most of the significant economic regulatory decisions to the local sovereign, thus robbing the national sovereign of any authority to regulate much of the economic landscape.

B. *The Logical Consequences of State Sovereignty*

The conservative Courts of the period from approximately 1888 to 1936 implemented the theoretical framework created by Chief Justice John Marshall's grudging acceptance of dual sovereignty by integrating into this framework the prevailing economic theory of the time. The conservative Courts of this era simply plugged into the constitutional structure of dual sovereignty a variety of assumptions about economic reality drawn from the neoclassical economics that were the received wisdom of the age.[38] The economics of the era lent an objective, scientific gloss to the Court's political manipulation of the country's power structure. Most of the economic assumptions that form the basis of the Court's rulings during this period can be found in the Court's Commerce Clause rulings starting with the 1888 decision in *Kidd v. Pearson*,[39] large portions of which were quoted verbatim and used as the basis of the 1895 decision *United States v. E.C. Knight Company*,[40] which established the framework that would dictate the Supreme Court's Commerce Clause and state-sovereignty decisions for the next forty years.

Kidd involved the state regulation of liquor production intended for shipment out of state. The central issue was whether the production of this commercial commodity constituted "commerce" subject to Congress' regulatory authority under the Commerce Clause. The Court held that the state regulation did not infringe upon Congress' authority to regulate interstate commerce because the production process was inherently a local affair and therefore subject to regulation only by the state. *Kidd* embodies most of the key neoclassical economic themes that the Court incorporated into Commerce Clause jurisprudence during the

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> advantageously exercised by the states themselves. . . . No direct general power over these objects is granted to congress; and, consequently, they remain subject to state legislation.

Id. at 203.

[38] A full description of the linkage between neoclassical economic theory and the Court's constitutional jurisprudence relating to economic regulation during this period can be found in Steven G. Gey, *The Political Economy of the Dormant Commerce Clause*, 17 N.Y.U. REV. L. & SOC. CHANGE 1 (1989–1990).

[39] 128 U.S. 1 (1888).

[40] 156 U.S. 1 (1895).

period from 1888 to 1936. In short, four themes of neoclassical economics appeared prominently in the Court's Commerce Clause opinions during this period: (1) the virtually exclusive focus on microeconomic analysis; (2) the assumption that all economic markets gravitate toward a natural equilibrium of prices, demand, and supply; (3) the assumption that a perfect competition paradigm applies to capitalist markets, rendering all monopolies and oligopolies unstable and therefore short-lived; and (4) a deep opposition to all political intervention in economic markets.[41]

The first of these factors—the focus on microeconomic analysis—provides the framework around which the *Kidd* Court developed the view of economic activity that would define the universe of economic regulation and state sovereignty for the next half-century.[42] The focal point of the Court's opinion in *Kidd* was the dichotomy between manufacturing and commerce. "Manufacture is transformation—the fashioning of raw materials into [something else]," the Court wrote. "The functions of commerce are different."[43] It was irrelevant to the Court during this period that problems at the manufacturing stage of an economy would inevitably affect commerce in the thing being manufactured because the Court insisted on viewing the production and sale of economic articles as two distinct parts of a fragmented series of unrelated incidents. Likewise, the Court found it difficult to understand how the federal government could not only claim authority over the market for one product or commodity but also authority over the general marketplace for all products and commodities. The *Kidd* Court expressly recoiled at granting the federal government such extensive power over the national economy:

> If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry.... The power being vested in Congress and denied to the States, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform, and vital interests—interests which in their nature are and must be, local in all the details of their successful management.[44]

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[41] *See* Gey, *supra* note 38, at 26.

[42] For examples of the microeconomic focus of neoclassical economic theorists, see Gey, *supra* note 38, at 15–18.

[43] *Kidd*, 128 U.S. at 20.

[44] *Id.* at 21.

Although the Court focused on the impracticalities of regulating all economic activity on a national scale,[45] the real fear motivating the Court's rejection of national authority over the economy was the threat such regulation posed to the sovereignty of the states. According to the Court, "[a] situation more paralyzing to the state governments, and more provocative of conflicts between the general government and the States, and less likely to have been what the framers of the constitution intended, it would be difficult to imagine."[46]

As economic regulations go, the regulations at issue in *Kidd* were relatively insignificant. But seven years after *Kidd*, the Court ruled in *United States v. E. C. Knight Company* that the newly minted Sherman Antitrust Act was unconstitutional as applied to the corporate acquisitions of the American Sugar Company.[47] The acquisitions in question involved an attempt by American Sugar to monopolize sugar production in the United States by taking control of five remaining independent refineries.[48] The *Knight* decision added little to the joinder of economic and political theory already seen in *Kidd*; indeed, much of the analysis in *Knight* consisted of several pages of direct quotations from *Kidd*. The significance of *Knight* was that it used the *Kidd* analysis to render one of the most important pieces of federal economic legislation "a dead letter."[49] Thus, in *Knight* the Court served notice that it would apply its new theory of dual sovereignty to important as well as insignificant economic activities.

In early cases such as *Kidd* and *Knight*, the link between state sovereignty and neoclassical localism was mostly implicit in the way the Court described economic reality. The link between the economic and political messages of these early cases is the theme of fragmentation; the Court insisted on seeing the country as fragmented both politically and economically into small, largely uncoordinated units. The syllogistic logic was largely formal and simplistic: Manufacturing (and later mining) was inherently a local activity; inherently local activities were (as even Chief Justice Marshall acknowledged) subject to state rather than national authority; ergo, state sovereignty encompassed the exclusive right to regulate a broad range of "local" economic actors and activities. The Court did not go much

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[45] The *Kidd* Court observed:

> The demands of such a supervision would require, not uniform legislation generally applicable throughout the United States, but a swarm of statutes only locally applicable and utterly inconsistent. Any movement toward the establishment of rules of production in this vast country, with its many different climates and opportunities, could only be at the sacrifice of the peculiar advantages of a large part of the localities in it, if not of every one of them.

Id. at 21–22.

[46] *Id.* at 22.

[47] United States v. E.C. Knight Co., 156 U.S. 1 (1895).

[48] *Id.* at 18 (Harlan, J., dissenting).

[49] Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 230 (1948).

beyond this simple syllogism to identify the constitutional source of state sovereignty because it seemed so evident from the nature of the reality the Court described.

As the Court moved toward the constitutional crisis of the nineteen-thirties, the conservative majority began to make explicit its previously implicit assumptions about state sovereignty. The Court described in much greater detail the precise constitutional basis for dual sovereignty, and the Tenth Amendment figured prominently in all these explanations. In *Hammer v. Dagenhart*,[50] for example, the Court directly linked what it viewed as the economic reality of localized manufacturing activities to the political reality of independent state sovereigns. Federal authority to regulate interstate commerce, the Court noted, "was not intended to destroy the local power always existing and carefully reserved to the States in the Tenth Amendment to the Constitution."[51] According to the Court, the Tenth Amendment protection of state sovereignty covered all traditional police powers "relating to the internal trade and affairs of the States,"[52] and these "internal" affairs included all inherently localized economic activity conducted on state soil.

Except for analogizing the regulation of the wages and hours of child workers to inspection and quarantine laws, the Court did not elaborate on what other activities related to "the internal trade and affairs" of the states. But after *Hammer*, the list of economic activities falling into this category grew to encompass most of the economy, and the Tenth Amendment embodiment of state-sovereignty principles became a common justification for striking down federal economic regulations enacted under several of Congress' Article I powers, including the Commerce Clause,[53] the Spending Clause,[54] and the Taxing Clause.[55]

The modern significance of these cases is not in the results themselves, but rather in the theory of sovereignty used by the Court to arrive at the results. The theory of state sovereignty the Court implanted in the Tenth Amendment and used in these cases generated clear lines demarcating state and federal power. The federal government was forbidden to enact the legislation in question because, according to the Court, the entire subject matter of the legislation was off-limits to the national political agencies. In striking down the Child Labor Tax, the Court noted that "the States had never parted with" jurisdiction over the subject matter of child labor, and concluded somewhat grandiosely that the federal statute taxing

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[50] 247 U.S. 251 (1918).

[51] *Id.* at 274.

[52] *Id.*

[53] *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935); Carter v. Carter Coal Co., 298 U.S. 238, 293 (1936).

[54] *See* United States v. Butler, 297 U.S. 1, 68 (1936).

[55] *See* Bailey v. Drexel Furniture Co., 259 U.S. 20, 38 (1922).

such activities threatened to "break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the States."[56] Thus, the federal government could not tax economic activities *at all* if the tax had a regulatory effect in an area that the Court assigned the states to control.

The Commerce Clause decisions were to the same effect. In *Carter v. Carter Coal Co.*,[57] the Court once again used narrow neoclassical economic concepts to arrive at the conclusion that "the local character of mining, of manufacturing and of crop growing is a fact, and remains a fact, whatever may be done with the products."[58] So were the regulation of wages, working conditions, collective bargaining, and other labor matters.[59] The evils resulting from industry-wide labor disruptions were likewise "all local evils over which the federal government has no legislative control."[60] After all, "wages are paid for the doing of local work," and "[w]orking conditions are obviously local conditions."[61] Since all of these matters were local in nature, they were purely an internal concern of the sovereign states. "It is no longer open to question that the general government, unlike the states, possesses no *inherent* power in respect of the internal affairs of the states; and emphatically not with regard to legislation."[62]

The prospect of a national strike in the coal industry—which would have had the effect of crippling industrial production in all commercial commodities nationwide—offered the Court the opportunity to limit the economic havoc created by its theory of state sovereignty by creating an exigent-circumstances exception to the states' sovereign independence. But this very argument—i.e., that the federal government's interest in ameliorating the depression's national effects justified overriding the states' sovereignty—had been made by the federal government and rejected by the Court a year before *Carter Coal* in *Schechter Poultry*.[63] The Court's first generation of state-sovereignty decisions thus provided the states with such comprehensive authority that this authority could not be limited even to accommodate a national emergency that threatened to render the entire discussion of state sovereignty irrelevant.

For purposes of comparing the Court's new and old concepts of state sovereignty, the most salient characteristic of the first generation of state-sovereignty decisions is that these decisions all employed a theory of sovereignty that assigned absolute authority over certain narrowly defined activities to the

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[56] *Id.* at 38.

[57] 298 U.S. 238 (1936).

[58] *Id.* at 304.

[59] *Id.*

[60] *Id.* at 308.

[61] *Id.*

[62] *Id.* at 295 (citation omitted).

[63] *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 528–29 (1935) (rejecting the argument that a national emergency justified a federal statute).

federal government and equally absolute authority over everything else to the states. Federal and state sovereignty occupied two entirely separate categories, and their coverage did not overlap—even when (as the federal government asserted unsuccessfully in *Schechter Poultry*) a national emergency seemed to demand federal intervention. The Court clearly comprehended the peculiarity of one independent sovereign operating within the boundaries of another, but aside from tinkering with the nomenclature of sovereignty, the Court of this period adhered strictly to its determination that the states were, within large areas of concern, absolutely free of the national government's control. "While the states are not sovereign in the true sense of that term, but only *quasi*-sovereign, yet in respect of all powers reserved to them they are supreme—'as independent of the general government as that government within its sphere is independent of the States.'"[64] The states did not even have a say in the matter. "State powers can neither be appropriated on the one hand nor abdicated on the other."[65] The state's sovereignty was protected regardless of whether the sovereign wanted the protection or not.[66]

It is by now common historical understanding that this absolutist theory of state sovereignty and its companion theory of constitutionalized laissez-faire economics almost destroyed the Court and could have done the same thing to the country as a whole.[67] It is also commonly understood that the same Court that steadfastly protected states from the encroachment of the elected branches of the federal government simultaneously and paradoxically embraced other federal

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[64] *Carter*, 298 U.S. at 294 (quoting Collector v. Day, 78 U.S. (11 Wall.) 113, 124 (1870)).

[65] *Id.* at 295.

[66] In the *Child Labor Case*, the Court rejected the argument that federal legislation may actually assist states in accomplishing social objectives by preventing a race to the bottom among states competing for scarce economic resources. *See* Hammer v. Dagenhart, 247 U.S. 251, 273 (1918) ("Many causes may coöperate to give one State, by reason of local laws or conditions, an economic advantage over others. The Commerce Clause was not intended to give to Congress a general authority to equalize such conditions.").

[67] The Roosevelt Court-packing plan and Justice Roberts' notorious "switch in time that saved the Nine" are the most obvious political and judicial manifestations of the Court's vulnerability during this period, although not everyone is willing to accept the usual interpretation of these phenomena as gospel. *See* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 66–83 (1998) (arguing that the Court abandoned its laissez-faire constitutional principles in pre-1937 cases such as *Nebbia v. New York*, 291 U.S. 502 (1934)); William Lasser, *Justice Roberts and the Constitutional Revolution of 1937—Was There a "Switch in Time"?*, 78 TEX. L. REV. 1347, 1348 (2000) (book review) (arguing that Cushman "provides a clear and important discussion of the early and pre-New Deal cases, especially *Nebbia v. New York*," but "[l]ike most revisionists, . . . Cushman focuses far too intently on proving his own case [and] fails to provide either a convincing or a complete account of the New Deal constitutional crisis").

constitutional doctrines that effectively nullified state regulatory efforts.[68] It did not seem to occur to the Court that the Tenth Amendment/state-sovereignty logic that protected states from the regulatory efforts of Congress and the President also should limit the Court's ability to enforce nationalist constitutional values such as liberty and property rights against sovereign states. If, as the Court asserted in *Carter Coal*, "[i]t is no longer open to question that the general government, unlike the states, possesses no *inherent* power in respect of the internal affairs of the states,"[69] then *all* interference in the internal affairs of the states by agencies of the federal government—including interference by the federal courts—would seem to be prohibited.

If a sovereign government cannot act as it chooses, then that government's sovereignty is violated. Federal judicial restrictions on state action therefore interfere with state sovereignty just as much as federal legislation. There is little flex in the concept that "in respect of all powers reserved to them [states] are supreme—'as independent of the general government as that government within its sphere is independent of the States.'"[70] The fact that in *Lochner* and other cases the Court was enforcing the Fourteenth Amendment, which itself contains language limiting the powers of the states, does not resolve the dilemma created when a court of one sovereign (the federal government) enforces limitations on another (the states). Thus, even if the Fourteenth Amendment is read as a limitation on state sovereignty, that limitation should be enforceable (if one takes seriously the state-sovereignty logic adopted by the Supreme Court in the early twentieth century) only by the courts of the forty-eight states in existence at that time.

Of course, this system of localized enforcement would create forty-eight different interpretations of the Constitution and would also lead inevitably to the underenforcement (or nonenforcement) of national ideals that conflicted with the parochial interests and idiosyncratic local values of particular areas of the country. But respect for localized idiosyncrasies seems to be the whole point of taking state sovereignty seriously; the primary object of the state-sovereignty enterprise is to devolve governance from the national government to the various states. The fact that the same Supreme Court that endorsed an absolutist brand of state sovereignty also routinely violated that sovereignty by overturning state economic regulations speaks volumes about the viability of the concept of state sovereignty itself. Even the strongest proponents of political parochialism on the Supreme Court during this period could not make state-sovereignty principles conform to the overriding values enshrined in the Constitution and applicable throughout the

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[68] *See* United States v. Lopez, 514 U.S. 549, 605 (1995) (Souter, J., dissenting) ("It is most familiar history that during this same period the Court routinely invalidated state social and economic legislation under an expansive conception of Fourteenth Amendment substantive due process.").

[69] *Carter Coal*, 298 U.S. at 295 (citation omitted).

[70] *Id.* at 294 (quoting Collector v. Day, 78 U.S. (11 Wall.) 113, 124 (1870)).

nation. This inconsistency between national values and parochial politics, coupled with the political and economic disaster that the system of state sovereignty had become, led the Court to denounce and abandon absolutist notions of state sovereignty in 1937[71] and effectively bury the concept of judicially enforceable state sovereignty (via the Tenth Amendment) in 1941.[72]

Now, almost sixty years later, another conservative Court has breathed life into a mutated form of state sovereignty. The nature of the mutations are the interesting thing about the Court's new efforts because the modern Court's opinions in this area convey the impression that even the conservative majority of this Court seems to understand that the old manifestations of state sovereignty have been discredited forever. Readers of the Court's recent opinions will look in vain for proud announcements by the majority that the Court has once again adopted the theory set forth in *Carter Coal* and *Kidd v. Pearson*.[73] The question is whether the new form of state sovereignty is really any different than its discredited predecessor.

Before turning to the precise nature of the new version of state sovereignty, it is necessary to consider briefly what the second word of that phrase—i.e., "sovereignty"—entails. This detour is necessary because in the end the Court's description of its new version of state sovereignty is fatally flawed in one of two ways. First, if the Court's description of the limitations of its new version of state sovereignty is taken at face value, the theory is flawed because the authority it grants to the states cannot accurately be described as "sovereignty." Second, if the Court really does intend to grant the states true sovereignty, then the descriptions of the limitations on that theory in the Court's recent cases are inaccurate if not downright misleading. Allocation of true sovereignty to the states would entail far more state independence from national prerogatives than the Court has yet admitted. Under this latter view, it is difficult to see how a return to the world of *Carter Coal* could be avoided.

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[71] *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) (noting Congress' authority to regulate even intrastate effects on interstate commerce, and observing that although Congress' power "must be considered in the light of our dual system of government . . . [t]he question is necessarily one of degree").

[72] See the famous passage in *United States v. Darby*, 312 U.S. 100 (1941), concluding that the Court's interpretation of Congress' Commerce Clause authority "is unaffected by the Tenth Amendment" because the Amendment "states but a truism that all is retained which has not been surrendered." *Id.* at 123–24; *see also* Wickard v. Filburn, 317 U.S. 111, 120 (1942) (noting that "effective restraints on [the] exercise [of federal Commerce Clause authority] must proceed from political rather than from judicial processes").

[73] Justice Thomas is the exception to this statement. In *United States v. Lopez*, Justice Thomas spoke approvingly of *Kidd*, *Knight*, and *Carter Coal* and suggested that the Court should return to the standard set forth in those cases. *See Lopez*, 514 U.S. at 598–601 (Thomas, J., concurring).

III. THE MEANING OF "SOVEREIGNTY"

The current dispute over the structure of constitutional power in the United States is usually referred to as a battle about federalism.[74] This is a mischaracterization; the battle is actually about state sovereignty, not federalism. Despite that they are often used as interchangeable descriptions of the same legal phenomenon, the terms federalism and state sovereignty are not identical. The key differences between the two terms relate to conclusions about ultimate control over policy. Specifically, it is possible to have a political system defined by federalism without conceding the existence of state sovereignty. In such a system, states would exist as separate political entities and would play a significant role in the daily interactions of citizens and government, but the states' powers would be constantly subject to reallocation by the central government as an exercise of its sovereignty over subordinate political bodies located within its territory. Local control over many policy decisions would continue to be a dominant feature of such a system, but local control would always be subject to the overriding needs of the nation as a whole.

A system such as this can be described as "flexible federalism." It is a federalist system because it incorporates local governments within the larger political structure, but it is "flexible" in the sense that the allocation of power between national and local governments can be easily and quickly reconfigured to take account of the nation's immediate needs, the changing nature of social problems, and the relative effectiveness of local and national political entities. State authority under a flexible federalist system is defined by political pragmatism rather than legal formalism; there is no way to formally demarcate in advance the respective powers of the state and national governments because those powers are redefined constantly by the evolution of power within the system. Likewise, within a system of flexible federalism there can be no such thing as state sovereignty because ultimate control over the allocation of power between the national and state governments rests with the national government. In a flexible federalist system the national government is the only true "sovereign." Nevertheless, such a system remains legitimately "federalist" because as a practical matter the elected officials who control the national government will have neither the resources at their disposal nor the political incentive to dictate policies with regard to matters that truly have only local impact and importance.

In contrast to flexible federalism, a system characterized by what may be termed "rigid federalism" rests on a very different mode of determining political power, which in turn is defined by a very different concept of sovereignty. The term "rigid" is appropriate because this form of federalism is based on an external, abstract, and presumptively quasi-permanent distribution of power

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[74] See, for example, a recent symposium by the Rutgers Law Journal, *Federalism After* Alden, 31 RUTGERS L.J. 631 (2000).

between the national and local governments. Rigid federalism is characterized by the identification of particular subject areas over which each level of government is responsible and therefore "sovereign." The pre-1937 Supreme Court's allocation to states of sovereign power to regulate "local" economic activities is an example of rigid federalism. The allocation of power to states during this period was external to the political system in the sense that the allocation of political authority was made by the Supreme Court—an institution that was divorced from immediate political pressure and operated as an independent, outside arbiter of the relations between two levels of government that each claimed sovereignty over particular regulatory activities. During this period the Court decided cases involving federalism issues based on an abstract assessment of each political entity's formal allocation of power, without deferring to the judgments of the political branches of government and without engaging in a real-world critique of how the Court's formal allocation of power would affect the ability of *any* governmental body to carry out effectively the policies in question. And because the allocation of power was made in the language of constitutional law, the decisions were quasi-permanent in the sense that the Court's allocation of authority could be overridden only by fundamentally altering the nature of the political structure in a manner that would in effect inaugurate a completely new system of government.

The point of contrasting these two types of federalism is simply to highlight the fact that the real debate over the relationship between the national and state governments involves the issue of sovereignty, not federalism. That is, the debate concerns the location of ultimate authority over policy, not the existence and usefulness of local government per se. If the Court were to decide tomorrow to renounce all its state-sovereignty rulings of the last decade, it would not change the fact that the United States is—and will continue to be—a federalist system characterized by vigorous state and local governments, which will continue to exert extensive influence over a wide range of policies affecting citizens within their boundaries.

The concepts of federalism and state sovereignty have become confused because the modern champions of states' rights on the Supreme Court themselves often seem confused about which concept they are advocating. This confusion sometimes deteriorates into outright incoherence. In Justice O'Connor's *Garcia v. San Antonio Metropolitan Transit Authority*[75] opinion interpreting states' rights and the Tenth Amendment, she argues that "[t]he true 'essence' of federalism is that the States *as States* have legitimate interests which the National Government is bound to respect even though its laws are supreme."[76] But if the national government's "laws are supreme," then by definition that government is not "bound to respect" state interests that contravene those laws. Justice O'Connor

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[75] 469 U.S. 528 (1985).

[76] *Id.* at 581 (O'Connor, J., dissenting).

starts out the sentence discussing federalism and ends up expressing an opinion (and an inconsistent opinion at that) on state sovereignty.[77]

Justice Powell's dissent in the same case also tries to have it both ways. On the surface Justice Powell's dissent proposes merely a weak, flexible, and undefined federalism, which ostensibly would never allow the parochial interests of states to override a superior national concern. Justice Powell proposes a federalism that would "explicitly [weigh] the seriousness of the problem addressed by the federal legislation at issue in that case, against the effects of compliance on state sovereignty."[78] But the very notion that the concept of state sovereignty could ever outweigh the federal government's assertion of a strong national interest decides the key issue in favor of the states and undermines the flexibility that is supposedly built into the balancing test that Justice Powell proposes. Characterizing the matter in terms of a balancing test merely allows Justice Powell to avoid the difficulties inherent in then-Justice Rehnquist's earlier *National League of Cities* majority opinion,[79] which attempted to define the boundaries of state sovereignty, but failed to do so in a way that could be applied consistently in the modern world.[80] Justice Powell's attempt to salvage the issue of state sovereignty by incorporating it into an open-ended balancing test merely produces a doubly unsatisfactory decision: it does not provide states the absolute sovereignty that they seek to avoid expensive federal mandates, but it also does not give the federal government the unquestioned authority to pursue the national interest as defined by Congress and the President. The federal government is sovereign, Justice Powell asserts, except when it is not.

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[77] The Justices' confusion over issues of federalism and sovereignty are complicated further by the fact that they do not even use the terms consistently. For one effort to distinguish and quantify the various different ways in which the Court has used the term "state sovereignty," see H. Jefferson Powell & Benjamin J. Priester, *Convenient Shorthand: The Supreme Court and the Language of State Sovereignty*, 71 U. COLO. L. REV. 645 (2000). The authors conclude that "[d]espite the centrality of federalism to the American political landscape, the Court has never provided a precise definition of 'state sovereignty.' In fact, the Court has failed even to use the idea or language of 'state sovereignty' in a consistent way in its opinions." *Id.* at 647.

[78] *Garcia*, 469 U.S. at 562 (Powell, J., dissenting). Justice Powell's dissent in *Garcia* disingenuously attributes this balancing analysis to the majority opinion in *National League of Cities*. *Id.* at 562 ("*National League of Cities* adopted a familiar type of balancing test for determining whether Commerce Clause enactments transgress constitutional limitations imposed by the federal nature of our system of government."). In fact, the concept of a balancing test is not even mentioned in the *National League of Cities* majority opinion; rather, it appears only in the brief concurring opinion of Justice Blackmun, who would later write the *Garcia* opinion overturning *National League of Cities*. See *infra* notes 127–37 and accompanying text for a discussion of Justice Powell's version of the balancing test in his *Garcia* dissent.

[79] *See* Nat'l League of Cities v. Usery, 426 U.S. 833 (1976).

[80] The definitional problems in *National League of Cities*-style state-sovereignty standards are discussed *infra* at notes 120–22 and accompanying text.

In the end, the only clear part of Justice Powell's *Garcia* opinion is his raw assertion that some undefined aspect of state sovereignty is so important in the constitutional scheme that it will often override the federal government's assertion of a compelling national interest. This is consistent with the explicit message of then-Justice Rehnquist's *National League of Cities* opinion holding that traditional governmental functions are immune from federal government control. This theme of Justice Powell's *Garcia* and then-Justice Rehnquist's *National League of Cities* opinions will be dealt with in more detail in Part IV. But for present purposes, the key point is that both Justice Powell and then-Justice Rehnquist seem to believe that states would cease to exist as meaningful political units in the absence of some mechanism for immunizing states from the application of federal wage and hour laws.[81] In other words, sovereignty is the key to both opinions, not federalism.

The differences between arguments based on state sovereignty and arguments based on federalism are important because they are the basis of the central logical flaws in the Court's modern attempt to revive the constitutional protection of states' rights. As these brief examples from Justices O'Connor and Powell indicate, the logic employed by the states'-rights advocates on the Court inevitably leads them to support the concept of state sovereignty as the basis for some form of rigid federalism. In their clearer moments, the Justices' own statements acknowledge this. As Justice O'Connor states this point, "[t]he central issue of federalism, of course, is whether any realm *is* left open to the States by the Constitution—whether any area remains in which a State may act free of federal interference."[82] In other words, are states truly sovereign? The logical flaw in this conception is that the states'-rights proponents on the Court have not thought seriously about the meaning of the term "sovereignty," and as a result they produce opinions that purport to embrace state sovereignty, but in the end do not really create sovereign "area[s] . . . in which a State may act free of federal interference."[83] If the real debate is over whether states are sovereign, it is, therefore, essential to clarify what the term "sovereign" means.

It is my contention that the term "sovereign" implies a much more comprehensive range of authority than the states'-rights proponents on the modern Court have yet acknowledged. This fact has not always escaped the proponents of state sovereignty; indeed, comprehensive and absolute state sovereignty over certain matters is precisely the system the Court endorsed during the first period of rigid federalism, which ended in 1937.[84] The difference

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[81] Both *National League of Cities* and *Garcia* involved the application of the federal Fair Labor Standards Act to state and local governments.

[82] Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 580–81 (1985) (O'Connor, J., dissenting).

[83] *Id.* at 581.

[84] *See supra* notes 38–73 and accompanying text.

between the earlier period of strong federalism sentiments on the Court and our own era is that the modern states'-rights advocates on the Court have not yet mustered the courage to hold that states are absolutely sovereign in certain areas and likewise have not yet acknowledged the consequences of such a holding.

Deciding that the states possess absolute sovereignty over certain activities would necessarily entail the imposition of inflexible restrictions on the federal government's interference with the states' sovereignty—restrictions that logically should apply to all branches of the federal government, including the Court itself.[85] So far, instead of acknowledging the far-reaching consequences of allocating to states a measure of true sovereignty, the modern Court has chosen instead to finesse the issue by granting states partial immunity from federal government regulation and control (in ways that will be described in Part IV). Unfortunately, the Court has justified these conclusions with theoretical arguments that make sense only in the context of an absolute grant of sovereignty. This disjunction between the Court's limited states'-rights holdings and its expansive justifications for those holdings is the root of the logical flaws that plague the Court's current approach. Part IV will describe the various ways the Court hedges its state sovereignty bets.[86] The remainder of this Part explains why such half-hearted efforts are at odds with the entire concept of "sovereignty."

A. *Sovereignty as the Source of All Political Authority: The Concept of "Ultimate Sovereignty"*

The comprehensive nature of sovereignty as it relates to debates over the distribution of power between the state and federal governments can be described fairly easily once it is understood that the term "sovereignty" can be used to refer to two very different concepts. One of these concepts is relevant to state/federal power issues, and the other concept is not. Much of the theoretical literature on the subject of sovereignty deals with the source of authority for all governmental entities. In one sense this concept of sovereignty is the most important because without this type of sovereignty no government legitimately could exercise coercive authority over its citizens. I will refer to this variation on the concept of sovereignty as the question of "ultimate sovereignty." In this context

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[85] The only exception to this statement is the Court's abortive attempt to carve out of the Tenth Amendment an area of state sovereignty covering traditional governmental functions. *See* Nat'l League of Cities v. Usery, 426 U.S. 833 (1976). This attempt ended in failure nine years later when Justice Blackmun changed sides on the issue and wrote the new majority's opinion renouncing the earlier rule and formally overruling *National League of Cities*. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). Both decisions will be discussed in Part IV, *infra*. A discussion of the Court's recent Commerce Clause jurisprudence, which may provide another mechanism for granting absolute state sovereignty over local activities having only tangential effects on interstate commerce, can be found in Part IV.B.4, *infra*.

[86] *See infra* notes 104–275 and accompanying text.

"sovereignty" refers to the ultimate source of political legitimacy and legal authority exercised by all governments at every level of the political structure. In the modern era, the concept of ultimate sovereignty relates to the fact that (in Jefferson's formulation) "[g]overnments . . . [derive] their just powers from the consent of the governed."[87] The basic notion is that no government is truly "sovereign" in the ultimate sense because all governments must obtain their authority from those who consent to the exercise of that authority over them. The use of popular consent to justify the ultimate sovereignty of political bodies can take the form of everything from Hobbes' theory of citizen self-protection through consent to sovereign power[88] and Locke's notion of tacit contractarian consent to democratic sovereignty,[89] to Rousseau's utopian concept of the general will realized through popular participation in an all-encompassing sovereign power.[90] Theories of popular consent often generate a totalitarian circular logic according to which citizens "consent" to their own subjugation by the sovereign,[91] but theories of popular consent at least aspire to serve as limitations on the exercise of absolute authority by those who populate the government and use its agencies to pursue their own ideological goals.

The question of ultimate sovereignty is an interesting backdrop for the present discussion of American federalism, but it has played only a tangential role in the Supreme Court's discussions of the state sovereignty. The primary instance in which this aspect of sovereignty has been relevant to the issue of states' rights is in early discussions of the source of the federal government's authority. These discussions culminated in Chief Justice Marshall's pronouncement in *McCulloch v. Maryland* that the people, having what I have referred to as "ultimate sovereignty" over government of all sorts, always retain the authority to reallocate

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87 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

88 THOMAS HOBBES, LEVIATHAN 116 (Everyman ed., E.P. Dutton & Co. 1973) (1651). ("The Obligation of Subjects to the Soveraign is understood to last as long, and no longer, than the power lasteth, by which he is able to protect them.").

89 JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT 54 (Lester DeKoster ed., Wm. B. Eerdmans Publ'g Co. 1978) (1690) (discussing tacit popular consent to the exercise of sovereign power).

90 JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 15 (G.D.H. Cole trans., Dutton 1950) (1762) ("Each of us puts his person and all his power in common under the supreme direction of the general will, and, in our corporate capacity, we receive each member as an indivisible part of the whole.").

91 These circularities appear most explicitly in the work of Hobbes:

> For it has been already shewn, that nothing the Soveraign Representative can doe to a Subject, on what pretence soever, can properly be called Injustice, or Injury; because every Subject is Author of every act the Soveraign doth; so that he never wanteth Right to any thing, otherwise, than as he himself is the Subject of God, and bound thereby to observe the laws of Nature.

HOBBES, *supra* note 88, at 112.

what I will refer to here as "immediate sovereignty" from one level of government (i.e., the states under the Articles of Confederation) to another (i.e., the federal government under the new Constitution).[92]

The arguments about ultimate sovereignty to which Chief Justice Marshall felt the need to respond are no longer relevant to modern debates over state versus federal sovereignty. Not even the most avid states'-rights proponents argue today that the federal government has only the authority granted to it by the states. In any event, even if such arguments were still made, they would not resolve the debate over the precise contours of modern state sovereignty. Assertions about ultimate sovereignty do not help to resolve the relevant modern disputes over states' rights because the assertion that "the people" are the ultimate repository of sovereignty can logically be employed on behalf of either state or federal sovereignty. Debates about the nature and configuration of federalism are really arguments about the distribution of governmental power, not its source, and however these debates are resolved, the victor will logically claim "the people" as the ultimate source of its sovereignty.

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[92] See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), which states:

> The powers of the general government, it has been said, are delegated by the states, who alone are truly sovereign; and must be exercised in subordination to the states, who alone possess supreme dominion. It would be difficult to sustain this proposition. The convention which framed the constitution was indeed elected by the state legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. . . . [B]y the convention, by congress, and by the state legislatures, the instrument was submitted to the *people*. They acted upon it in the only manner in which they can act safely, effectively and wisely, on such a subject, by assembling in convention. . . .
>
> From these conventions, the constitution derives its whole authority. The government proceeds directly from the people; is "ordained and established," in the name of the people . . . . The assent of the states, in their sovereign capacity, is implied, in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the state governments. The constitution, when thus adopted, was of complete obligation, and bound the State sovereignties.
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> It has been said, that the people had already surrendered all their powers to the state sovereignties, and had nothing more to give. But, surely, the question whether they may resume and modify the powers granted to government, does not remain to be settled in this country . . . when, "in order to form a more perfect union," it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all. The government of the Union, then, (whatever may be the influence of this fact on the case), is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.

Id. at 402–05.

B. *Sovereignty as the Allocation of Governmental Power: The Concept of "Immediate Sovereignty"*

For purposes of assessing the Supreme Court's recent states'-rights decisions, the more important aspect of the theory of sovereignty is not the concept of ultimate sovereignty, but rather the more mundane concept of what I will call immediate sovereignty. Ultimate sovereignty asks how and from what source a government receives its authority. Immediate sovereignty focuses on the political and legal characteristics of that government's authority.[93] In other words, what sorts of authority must be granted to a particular government entity to justify characterizing that entity as "sovereign"? Phrasing the matter in yet another way: What characteristics are inherent in the exercise of sovereignty by a government? In governmental systems that do not incorporate federalist political structures, the question of immediate sovereignty is insignificant because only one national government exists, and by definition that government possesses all the immediate power granted by the system to make and implement policy.[94] In a federalist political system, however, the immediate sovereignty issue is extremely significant because issues of immediate sovereignty have to be settled before the citizens can know which legal directives from which level of government they are obligated to obey.

If, as the first theorist of modern sovereignty Jean Bodin once wrote, "the law is nothing but the command of a sovereign making use of his power,"[95] then an observer must be able to identify the sovereign to know whether a particular law

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[93] Thus, the question of immediate sovereignty will only arise after the question of ultimate sovereignty has been settled. The concept of immediate sovereignty assumes that ultimate sovereignty has been granted to some government entity. In other words, in a democratic political system the question of immediate sovereignty arises only after "the people" have in some formal way communicated their consent to the exercise of power by some governmental entity.

[94] This is not to say that the government in a non-federalist democratic system is unconstrained in its exercise of power. It is logically consistent to insist that even though a particular sovereign is unitary, it must still conform its behavior to what H.L.A. Hart called "rules of recognition" in order to legitimize its exercise of authority. *See* H.L.A. HART, THE CONCEPT OF LAW 92–96 (1961). "Rules of recognition" are the overreaching rules that structure the operations of the sovereign and certify its actions as legitimate.

> [W]hile primary rules are concerned with the actions that individuals must or must not do, these secondary rules [of recognition] are all concerned with the primary rules themselves. They specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined.

Id. at 92. A constitution is one example of a "rule of recognition," such that the sovereign's laws are invalid if they are enacted outside the structure of lawmaking defined by the constitution or in violation of specific constitutional prohibitions.

[95] JEAN BODIN, ON SOVEREIGNTY: FOUR CHAPTERS FROM THE SIX BOOKS OF THE COMMONWEALTH 38 (Julian H. Franklin trans., Cambridge Univ. Press 1992) (1576).

is valid. At least in this narrow sense, the concept of immediate sovereignty follows John Austin's axiom that law is simply the "command of a monarch or sovereign number in the character of political superior,"[96] with the term "superior" signifying nothing more than "the power of affecting others with evil or pain, and of forcing them, through fear of that evil, to fashion their conduct to one's wishes."[97] Alexander Hamilton made the same point in enumerating the problems with decentralized sovereignty under the Articles of Confederation:

> Government implies the power of making laws. It is essential to the idea of a law that it be attended with a sanction; or, in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws will, in fact, amount to nothing more than advice or recommendation.[98]

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[96] JOHN AUSTIN, PROVINCE OF JURISPRUDENCE DETERMINED 121 (1861).

[97] *Id.* at 15. I emphasize that I am using Austin's obedience postulate here only in the narrow sense that it is necessary in distinguishing between competing claims of sovereignty. I do not mean to imply agreement with the broader interpretations of Austin's linkage of sovereignty and obedience, which taken to the extreme would conclude that the power of a sovereign government is by nature not subject to legal limitations. In any event, these broader interpretations of Austin's theories probably go beyond what Austin himself intended. Julius Stone has argued, for example, that Austin was not describing unlimited sovereignty as a concrete political fact; Austin's claims were "rather an assertion that such logical coherence as the propositions of a legal order may have is likely to be most easily and most fully seen if we arrange them *as if* they were commands of such a sovereign. . . . [T]he Austinian sovereign is a formal postulate." JULIUS STONE, LEGAL SYSTEM AND LAWYERS' REASONINGS 73 (1964). Whether Austin believed that the sovereign is, as an empirical political fact, not subject to limitation by (for example) the provisions of a written constitution, is irrelevant to the issue addressed in the text, which simply attempts to assess whether the policy determinations of one political entity (a state government) are subject to limitations by a superior political entity (the federal government).

[98] THE FEDERALIST NO. 15, at 110 (Alexander Hamilton) (Clinton Rossiter ed. 1961). Hamilton goes on to note the problems that arise when multiple sovereigns have to compete for domination in having their commands obeyed:

> This penalty, whatever it may be, can only be inflicted in two ways: by the agency of the courts and ministers of justice, or by military force; by the COERCION of the magistracy, or by the COERCION of arms. The first kind can evidently apply only to men; the last kind must of necessity be employed against bodies politic, or communities, or States. It is evident that there is no process of a court by which the observance of the laws can in the last resort be enforced. Sentences may be denounced against them for violations of their duty; but these sentences can only be carried into execution by the sword. In an association where the general authority is confined to the collective bodies of the communities that compose it, every breach of the laws must involve a state of war; and military execution must become the only instrument of civil obedience. Such a state of things can certainly not deserve the name of government, nor would any prudent man choose to commit his happiness to it.

Several characteristics of immediate sovereignty follow from the conclusion that immediate sovereignty is defined primarily by the sovereign's ability to issue commands and have them obeyed. Three such characteristics are especially important in analyzing the Supreme Court's recent states'-rights jurisprudence: exclusivity, finality, and enforceability. Accordingly, a government entity can only be deemed "sovereign" (in the sense of immediate, rather than ultimate sovereignty) if that government's power to adopt policies in a given area is exclusive, if those policies are final, and if the government has the authority to enforce the policies (in Austin's phrase) "with evil or pain [or] through fear of that evil."[99] A sovereign government's power must be exclusive because if some other entity has the power to enact and enforce policies that contradict the government's policies, then the government is not a "political superior"[100] and therefore is not truly sovereign in the sense described above. For the same reason, a sovereign government's policies must be final because if some other entity can revise or override a government's policies the government is not superior in the sense required by the theory of immediate sovereignty.[101] Finally, a sovereign government's policies must be enforceable against inferior entities that violate those policies because if the policies are not enforceable the government cannot truly force the inferior entities to "fashion their conduct to [the government's] wishes"[102] in the sense necessary to satisfy the definition of immediate sovereignty.

This definition of sovereignty may at first seem unduly inflexible and unrealistic because it denies that sovereign power may be shared by two levels of government in a federal system. In fact, this rigid definition is mandated by the simple political reality that the exercise of immediate sovereignty is a zero-sum game: if one governmental entity has sovereignty, then by definition the other does not. Attempts to recognize two supposedly equal sovereigns governing the same subjects in the same territory will inevitably fail. Whenever the policies of two different governments conflict, one government must concede power to avoid interminable governmental stasis or, if all else fails, civil war. Stasis is likely to

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Id. Hobbes phrases the same point more bluntly: "[C]ommand of the militia, without other Institution, make him that hath it Sovereign." HOBBES, *supra* note 88, at 94.

[99] AUSTIN, *supra* note 96, at 15.

[100] *Id.* at 121.

[101] The fact that the federal courts in the American constitutional system can invalidate federal legislation that does not conform to the Constitution does not mean the federal government is not sovereign. The theory of immediate sovereignty described in the text looks only to relationships between different levels of government, not to relationships between different branches of the same level of government or to questions of ultimate sovereignty that relate to constitutional limitations on all government. Therefore, the question of immediate sovereignty is whether a valid federal policy can be imposed on state governments, not whether one branch of the federal government can override the actions of another branch.

[102] AUSTIN, *supra* note 96, at 15.

result if the subject that causes the conflict is not sufficiently important to justify pushing the conflict to the point of a constitutional crisis. But policy conflicts over matters of primary importance to both governments can be resolved only through the ultimate subjugation of one government to the other. This can occur either through a peaceful renunciation of sovereignty by one government or the use of force (usually political, but occasionally military, in nature) by one government to impose its authority on the other.

It is possible to have two sovereigns that govern *different* subjects operating in the same physical territory without incurring the inevitable competition for supremacy, but in that situation the theoretical problems of dual sovereignty give way to the insuperable pragmatic problems of categorization and definition. Any attempt to subdivide a territory's governance of different subjects between two separate sovereign entities requires a clear, easily identifiable line between the respective governments' areas of sovereign authority. If the line is less than clear, the two governments will sooner or later compete for dominance in the zone of ambiguous authority. In the meantime, citizens of both governments will be confronted with contradictory legal directives from the two sovereigns. In a worst-case scenario, the two governments will resort to the use of increasingly coercive means of asserting their dominance. This battle will surely escalate as the stakes of losing the competition for political primacy increase, to the point that effective governance at either the national or local level becomes impossible.[103]

None of what has been said in this Part necessarily favors either a strong national government or a decentralized political system defined by strong local governments. The assertion here is simply that a coherent political system cannot have both a strong national government *and* strong state and local governments with coextensive jurisdiction over similar policy areas. Sovereignty is a mutually

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[103] This problem cannot be resolved by allocating to the courts the authority to identify the relative areas of state and national sovereignty because the abstract and formalistic mechanisms of judicial decision making are probably inadequate to the task of segregating into isolated compartments the various aspects of modern life over which state and national governments dictate policy. The one modern judicial effort to identify systematically matters falling within the control of sovereign states ended in confusion and failure. The judicial descriptions of state sovereign control simply did not work in the real world, and the Court quickly recognized that fact and gave up the effort. *See infra* notes 105–37 and accompanying text. Moreover, as a conceptual matter the very act of allocating to federal courts the role of identifying policy matters controlled by sovereign states undermines the theoretical basis for the action because the states thereby concede that the federal courts (which are part of the federal government) have the (presumably sovereign) authority to make the decision in the first place. By seeking judicial relief, the states implicitly concede that an agent of the federal government has the sovereign authority to allocate political power to the states. By recognizing the authority of the federal courts to make decisions concerning the political authority of the states, the states implicitly concede that what they are seeking is not true sovereignty, but rather the sovereign's voluntary (and impermanent) allocation to themselves of some portion of the sovereign's power. True sovereigns take power; they do not plead for it.

exclusive concept: if one government has it, then the other does not. In the first period of strong states'-rights jurisprudence, the Supreme Court seemed to understand this and allocated state and federal authority accordingly. But in the recent resurgence of states'-rights sentiments on the Court, things are much more ambiguous. The question, therefore, is whether any or all of the Court's recent state-sovereignty decisions are based on a coherent understanding of the term "sovereignty." The overwhelming weight of the evidence is that they are not. The next Part elaborates on this conclusion.

IV. THE LOGICAL LIMITS OF THE NEW STATE SOVEREIGNTY

Perhaps the best way of illustrating how the necessary components of sovereignty[104] operate in practice is to analyze the Supreme Court's recent attempts to revive the concept of state sovereignty in various constitutional contexts. The Court's recent activity in this area has unintentionally provided an excellent illustration of the concept of sovereignty outlined in the previous Part, while simultaneously demonstrating why this concept is logically and practically inapplicable to the states. Nevertheless, the Court persists in citing state sovereignty as a justification for overturning or effectively nullifying an increasing number of federal laws that were intended to apply to states.

The next three subparts trace the trajectory of the Court's recent state-sovereignty decisions. Subpart A describes the Court's short-lived attempt in the modern era to provide the states with true—i.e., exclusive, final, and enforceable—sovereignty. Subpart B reviews the various justifications for state sovereignty, all of which are consistent with the basic components of sovereignty outlined in the previous Part. Finally, subpart C describes the Court's unsuccessful efforts to preserve the concept of state sovereignty while avoiding the negative consequences true state sovereignty would inevitably entail. Subpart C also addresses the real issue raised by these new cases: Will the Court eventually be forced to abandon the mythical, partial "sovereignty" described in its most recent cases, or are those cases merely forerunners of yet another attempt to ascribe to the states true sovereignty: i.e., sovereign authority that is exclusive, final, and enforceable against everyone—including the federal government?

A. National League of Cities *and the Short-Lived Revival of Unadulterated State Sovereignty*

The best starting point from which to consider the Court's modern state-sovereignty opinions is the short-lived effort to use the Tenth Amendment as the basis for granting states absolute sovereignty over policies falling within the

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[104] Unless otherwise noted, all references to sovereignty in this Part will refer to the concept of immediate, rather than ultimate, sovereignty.

category of "traditional" state functions. As noted in Part II, the Court used the Tenth Amendment as the constitutional repository for absolutist state-sovereignty concepts in its pre-1937 states'-rights decisions, and in *National League of Cities v. Usery*,[105] the modern conservatives tried to update Tenth Amendment doctrine to fit modern circumstances. The effort did not last even a decade, and the Court's renunciation of *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority*[106] forced the states'-rights proponents on the Court to take a new and logically more dubious tack of granting the states a range of partial protections from federal control through a more limited interpretation of the Tenth Amendment,[107] a revitalization of the Eleventh Amendment,[108] and the invention of a variety of other implicit state-sovereignty doctrines.[109] In these post-*National League of Cities* cases, the Court also premised its holdings on the need to protect state sovereignty, but (unlike its decision in *National League*) conceded that the federal government had ultimate control over the policies in question. Unfortunately, this concession undermined whatever theoretical consistency that justified the rules protecting the states in the first place.

In contrast to its later efforts, at least in *National League of Cities*, the Court was consistent and forthright about its goals and the manner of achieving those goals. *National League of Cities* was the second in a line of three cases that raised almost exactly the same issues in almost exactly the same contexts.[110] The narrow legal issue in all these cases was whether the federal Fair Labor Standards Act rules regarding hours and wages (including overtime pay requirements) could be applied to state and local government employers. In *National League of Cities*, the Court held that the federal statute could not be applied to those aspects of state employment that fell within the "integral governmental functions of [those] bodies."[111] Application of maximum hour and minimum wage laws to state employees, the Court held, would "significantly alter or displace the States' abilities to structure employer-employee relationships in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation."[112]

Despite its stark departure from the perceived status quo regarding relations between the state and federal governments, the precise contours and rationale of

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[105] 426 U.S. 833 (1976).

[106] 469 U.S. 528, 557 (1985).

[107] *See infra* notes 138–78 and accompanying text.

[108] *See infra* notes 179–212 and accompanying text.

[109] *See infra* notes 213–51 and accompanying text.

[110] The first case was *Maryland v. Wirtz*, 392 U.S. 183 (1968), which *National League of Cities* overruled. *See Nat'l League of Cities*, 426 U.S. at 854. The third case was *Garcia*, which in turn overruled *National League of Cities* and returned to the rule in *Wirtz*. *See Garcia*, 469 U.S. at 557.

[111] *Nat'l League of Cities*, 426 U.S. at 851.

[112] *Id.*

the *National League of Cities* majority opinion were mysterious. It was a mystery, for example, why the Court felt that states would cease to exist if they had to pay their garbage collectors overtime, yet this was the Court's grandiose conclusion. "If Congress may withdraw from the States the authority to make those fundamental employment decisions upon which their systems for performance of these functions must rest, we think there would be little left of the States' 'separate and independent existence.'"[113] It was also a mystery where, precisely, in the Constitution the Court discovered this new rule of state sovereign immunity from the operation of general federal statutes. The Tenth Amendment[114] was the obvious textual source, but the majority opinion in *National League of Cities* did not dwell on that discredited constitutional relic of the thirties. In perhaps a puckish tweak at the dissenters, the only mention of the Tenth Amendment in the *National League of Cities* majority opinion is a quote from a previous opinion authored by *National League of Cities* dissenter Justice Marshall.[115] Other than this backhanded reference to the Tenth Amendment, there is no reference to a specific constitutional hook for the state-sovereignty principle.

Although the constitutional source and practical logic of the *National League of Cities* majority opinion was something of a puzzle, the majority had in mind a clear and definitive notion of sovereignty when they devised their holding. According to the majority:

> We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.[116]

The citation supporting this quote is to an opinion that articulated the rather petty proposition that states have the sovereign authority to decide where to locate their state capitals.[117] But in *National League of Cities*, the Court went beyond this narrow and uncontroversial proposition to embrace the much broader position that the wages and hours of state employees were "functions essential to [the states'] separate and independent existence"[118] and therefore protected aspects of state sovereignty. The Court went on to limit more generally the ability of

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[113] *Id.* (quoting Coyle v. Oklahoma, 221 U.S. 559, 580 (1911)).

[114] "The Powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

[115] *See Nat'l League of Cities*, 426 U.S. at 842–43 (quoting Fry v. United States, 421 U.S. 542, 547 n.7 (1975)) (upholding the application of federal wage and salary stabilization law to state employees).

[116] *Id.* at 845.

[117] *See id.* (citing Coyle v. Oklahoma, 221 U.S. 559 (1911)).

[118] *See id.* at 845, 851–52.

Congress to use its Commerce Clause authority to "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions."[119]

This general holding—i.e., that Congress could not exercise Commerce Clause regulatory authority over the states' "traditional governmental functions"—was the eventual undoing of *National League of Cities*. No one—especially among the lower court judges who were asked to enforce the standard—could ever figure out what a "traditional governmental function" entailed. The relevant tradition was very much in the eye of the beholder, and this amorphous standard led to wildly inconsistent lower court applications of the new states' rights. When Justice Blackmun switched sides to write the *Garcia* opinion overruling *National League of Cities*, he catalogued a representative sample of inconsistent lower-court holdings,[120] and concluded that:

> We find it difficult, if not impossible, to identify an organizing principle that places each of the cases in the first group on one side of a line and each of the cases in the second group on the other side. The constitutional distinction between licensing drivers and regulating traffic, for example, or between operating a highway authority and operating a mental health facility, is elusive at best.[121]

Justice Blackmun noted that the Court itself had previously failed to produce a coherent definition of the area of protected state sovereignty in the intergovernmental taxation cases, and extrapolated from that experience that the prospects were not good for arriving at a more satisfactory definition to apply in the intergovernmental regulation area.[122]

The problems Justice Blackmun identified in attempting to define the protected area of state sovereignty were very real and, as Justice Blackmun and the four other *Garcia* majority Justices concluded, probably insuperable. But even if the members of the *National League of Cities* majority never articulated a workable distinction between state and federal sovereignty, at least they understood what the concept of sovereignty entailed. Under the *National League of Cities* definition, the states were "sovereign" in the sense described in Part III—i.e., they had exclusive, final, and enforceable authority—over any and all matters falling within the category of "traditional governmental functions." At least the members of the *National League of Cities* majority had the courage of

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[119] *Id.* at 852.

[120] Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 538–39 (1985).

[121] *Id.* at 539.

[122] *Id.* at 540–47 (discussing various historical and non-historical tests for protected state sovereignty, including the governmental/proprietary distinction, the "uniquely" governmental functions test, and the "necessary" governmental functions test).

their convictions, even if those convictions ultimately turned out to be deeply flawed.

The same could not be said for either the *Garcia* majority or the *Garcia* dissenters. As the spokesman for the *Garcia* majority, Justice Blackmun tries to have it both ways. On one hand, Justice Blackmun quotes with approval Justice Powell's previous statement that states "retai[n] a significant measure of sovereign authority."[123] On the other hand, Justice Blackmun notes that "the sovereignty of the States is limited by the Constitution itself,"[124] and rejects the argument that the Court can "employ freestanding conceptions of state sovereignty when measuring congressional authority under the Commerce Clause."[125] In overturning the holding of *National League of Cities*, Justice Blackmun could have simply rejected outright the idea that the states are "sovereign" in any meaningful sense. Instead, he gives lip-service to the concept of state sovereignty, even while denying the states any mechanism (other than sending state-friendly officials to federal elective offices) to enforce that "sovereignty." Justice Blackmun concludes that "[s]tate sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power,"[126] but actually the *Garcia* majority buries the whole concept that states possess a reservoir of sovereignty that could be used to fend off federal government initiatives that intrude into state prerogatives.

Justice Blackmun's attempt to finesse the issue of state sovereignty can be attributed both to intra-Court realpolitik and to the extra-Court deference to a concept that continues to carry an emotional resonance in a country whose collective consciousness seems still to fancy itself created by a motley collection of yeoman democrats. Justice Powell's *Garcia* dissent also attempts to have it both ways, but without the rhetorical justification of providing politically necessary, but ultimately hollow, deference to the national political mythology of localized political power. Justice Powell rewrites *National League of Cities* in order to defend it against the many practical problems that arose from the effort to define "traditional governmental functions." But what began in *National League of Cities* as an honest attempt to define areas of sovereignty in which the state and federal governments operate largely independent of each other becomes, in Justice Powell's hands, an incoherent muddle of joint sovereignties in which the states sometimes can fend off federal interference, but sometimes cannot.

The specific way Justice Powell rewrites *National League of Cities* is by abandoning the concept of "traditional governmental functions"—which was the

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[123] *Id.* at 549 (quoting EEOC v. Wyoming, 460 U.S. 226, 269 (1983) (Powell, J., dissenting)).

[124] *Id.* at 548.

[125] *Id.* at 550.

[126] Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 552 (1985).

lodestar of the original opinion—in favor of a largely undefined balancing test. According to Justice Powell, "*National League of Cities* adopted a familiar type of balancing test for determining whether Commerce Clause enactments transgress constitutional limitations imposed by the federal nature of our system of government."[127] The category of "traditional governmental functions" was not an airtight category of functions that are always insulated from federal control, Justice Powell argued, but rather part of an ad hoc process in which "seriousness of the problem addressed by the federal legislation at issue in that case, [is weighed] against the effects of compliance on state sovereignty."[128] Justice Powell has some support for this position, in the ironic form of Justice Blackmun's own *National League of Cities* concurrence, which interpreted the holding in that case as establishing a balancing test.[129] No other member of the *National League of Cities* majority joined Justice Blackmun's concurrence, however, for the very good reason that the Rehnquist majority opinion not only did not refer even once to the concept of a balancing test, but was fundamentally inconsistent with the Blackmun approach. The entire thrust of the Rehnquist opinion in *National League of Cities* was to identify certain areas of activity in which the federal government could not tell states what to do. Balancing the federal interest against the state interest never entered the equation.

Having realized what the *National League of Cities* majority opinion really meant, Justice Blackmun abandoned the Court's states'-rights faction to write the *Garcia* majority opinion, only to have Justice Powell take the earlier Blackmun approach and use it to reinterpret the holding of *National League of Cities* in a way that purported to avoid the difficult interpretive issues that had befuddled the lower courts in trying to make sense of the "traditional governmental functions" concept. But Justice Powell's attempt to salvage *National League of Cities* managed only to undermine the very reason that case established a judicially enforceable variety of state sovereignty in the first place. Justice Powell cites several justifications for judicial intervention on behalf of states opposing federal regulatory mandates. Justice Powell offers a textual argument, a structural argument, and a functional argument. The textual argument is that the Tenth Amendment provides a specific textual protection of state sovereignty, which requires judicial enforcement.[130] The structural argument is that states serve as

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[127] *Id.* at 562 (Powell, J., dissenting).

[128] *Id.* (citation omitted).

[129] *See* Nat'l League of Cities v. Usery, 426 U.S. 833, 856 (1976) (Blackmun, J., concurring).

[130] *Garcia*, 469 U.S. at 560 (Powell, J., dissenting). According to Justice Powell, the *Garcia* majority's approach "effectively reduces the Tenth Amendment to meaningless rhetoric." *Id.* He even chides Justice Blackmun for including in his *Garcia* majority opinion "only a single passing reference to the Tenth Amendment." *Id.* Of course, this overlooks the fact that the *National League of Cities* majority opinion itself included only a single passing reference to the Tenth Amendment in the form of a citation to an earlier opinion authored by

"an effective 'counterpoise' to the power of the Federal Government," and will naturally engender more political loyalty from citizens because states tend to deal with more personalized and localized issues.[131] Finally, the functional argument is that there are some governmental functions—such as "fire prevention, police protection, sanitation, and public health"—which "the States and local governments are better able [to perform] than the National Government."[132]

Whatever the underlying merits of these political and legal arguments, and the empirical assumptions that lie behind them, the crucial fact is that each of these rationales is more consistent with the exclusive sovereignty granted the states by the *National League of Cities* majority opinion than with the balancing test Justice Powell proposes in *Garcia*. As for the textual argument, the phrasing of the Tenth Amendment treats power as a zero-sum game. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[133] Under this formulation, powers are either delegated to the United States, the states, or the people; the powers are not shared between two governments (or between one government and "the people"), and there is no specific provision for special exigencies that might allow the federal government to assume powers that are not otherwise delegated to it. If one reads the Tenth Amendment as an affirmative grant of power to the states, instead of as a mere "truism"[134] that the states must be able to act if the federal government cannot do so, then the natural meaning of the Amendment is that the states have exclusive sovereign authority over some areas, and the federal government has authority over others. This is not the framework of a judicially crafted balancing test.

Justice Powell's other two arguments are also more compatible with the theory of exclusive, final, and enforceable sovereignty set forth in the previous Part than with Justice Powell's own theory of shared sovereignty embodied in a balancing test. The argument that citizens will naturally have a stronger relationship with their local governmental bodies than with the federal government,[135] for example, suggests that this relationship will prevail regardless of the national interests embodied in specific examples of federal legislation. The logic of this political argument leads to the conclusion that, even where the national interest is strong, the local political body should still have the authority to avoid compliance with that national policy if the local citizenry so desires. Conversely, the point of ceding power to a national government is to give the

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Justice Marshall, which rejected state-sovereignty claims. *See Nat'l League of Cities*, 426 U.S. at 842–43 (quoting Fry v. United States, 421 U.S. 542, 547 n.7 (1975)) (upholding the application of the federal wage and salary stabilization law to state employees).

[131] *Garcia*, 469 U.S. at 571 (Powell, J., dissenting).

[132] *Id.* at 575–76.

[133] U.S. CONST. amend. X.

[134] *See* United States v. Darby, 312 U.S. 100, 123–24 (1941).

[135] *Garcia*, 469 U.S. at 571–72 (Powell, J. dissenting).

entire country a mechanism for favoring the commonweal of the entire country over parochial interests of particular states. That a particular state government might be very popular among those living within its borders is not just irrelevant to the latter system; it actually attests to the need for a strong national sovereign with the ultimate power to enact legislation and force recalcitrant states to comply. Only in this way can the national interest prevail.

Whether one favors a system defined by the political connection forged by a state government dealing with "personalized and localized issues," or a system defined by the subordination of local interests to the greater national good through federal government legislation, it is an unavoidable fact that, under both systems, one or the other government must have the final say over policy. A system of shared sovereignty guided only by an imprecise and constantly evolving "balance of interests" simply produces inefficiency and incoherence without any ultimate resolution of the basic issue: Does the nation as a whole set and enforce policy, or do local interests? Stating the matter more colloquially: Under the shared sovereignty system, no one knows in advance when the local tail will be allowed to wag the national dog.

Justice Powell's final argument is that local governments are simply better able to perform certain functions, such as "fire prevention, police protection, sanitation, and public health."[136] This is ultimately an empirical judgment, and the real question is whether state government or the federal government is empowered to make that judgment. By prejudging the matter via judicial *ipse dixit*, Justice Powell predetermines the key sovereignty issue in dispute, and does so in a manner that is inconsistent with his own conclusion that these matters are always subject to an ad hoc balancing test. If states as a matter of course are always better able to provide fire, police, sanitation, and public health services, what is left to factor into the balance on behalf of the federal government?

Ironically, the very fact that Justice Powell would allow the federal courts to employ the balancing test to assess the legitimacy of state-sovereignty claims is itself inconsistent with the basic thrust of his argument. If states are sovereign, after all, why should they be beholden to an analysis of that sovereignty undertaken by the primary judicial agent of the federal government? Justice Blackmun highlighted one aspect of this ironic arrangement in his *Garcia* opinion when he pointed out that it is inconsistent with the concept of state sovereignty to have the federal courts define that sovereignty by deciding for themselves (as even Justice Rehnquist would have them do under a *National League of Cities* regime) what constitutes a "traditional governmental function."[137] Federal court

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[136] *Id.* at 575 (Powell, J. dissenting).

[137] Justice Blackmun states:

> Any rule of state immunity that looks to the "traditional," "integral," or "necessary" nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes. . . . [T]he States

involvement is also inconsistent with Justice Powell's balancing analysis of state sovereignty. If states are truly sovereign, then they should settle their disputes like other sovereigns—by using the economic, political, social, and other weapons at their disposal to force competing sovereigns to cut deals favorable to the state's citizens and local interest groups. Like other sovereigns, each state must deal with the consequences that attend the failure to obtain favorable deals and forge successful coalitions with other states and the federal government to achieve its desired end. That Justice Powell would give the federal government's courts the ability to broker controversies between the state and federal governments—and enforce that decision through the coercive application of federal government power—means that he does not really view the states as sovereign. (Unless Justice Powell views the balance as so heavily weighted in favor of the states that a judicial decision in favor of the federal government is effectively foreclosed, in which case the balancing test is really the *National League of Cities* exclusive sovereignty concept in disguise.)

The point of this discussion is not that then-Justice Rehnquist's *National League of Cities* decision provides a better framework for determining state-sovereignty issues than does Justice Powell's. My own view is that each of these proposals is flawed for the reasons offered by Justice Blackmun in *Garcia*. But this Part speaks to a different point; it is intended to establish the narrow conceptual proposition that once the Court starts down the state-sovereignty road, the logic of the argument will eventually lead the Court to the rigid and exclusive conception of sovereignty set forth in Part III. Attempts to avoid that conclusion through the introduction of an escape-hatch mechanism for overriding state sovereignty—such as that provided by Justice Powell's balancing test—must be regarded either as ingenuously incoherent or as a disingenuous effort to return to a regime governed by *real* (that is, exclusive, final, and enforceable) state sovereignty without admitting that this is the goal. In the end, a coherent theory of state sovereignty must mean that states possess the authority to make final policy decisions with regard to some functions, and the federal government can do nothing about it. In other words, state sovereignty will always amount to something like the system described in *National League of Cities*.

B. *Mythical Sovereignty: States' Rights Since* National League of Cities

The theory that states possess sovereign powers that can be leveraged against the federal government did not die when the Court renounced *National League of Cities*, but it did mutate. The mutated form of sovereignty cropped up in different

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cannot serve as laboratories for social and economic experiment, see *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), if they must pay an added price when they meet the changing needs of their citizenry by taking up functions that an earlier day and a different society left in private hands.

Garcia, 469 U.S. at 546.

guises and in a variety of different contexts, including decisions involving the Eleventh Amendment, abstention, and even the Tenth Amendment—albeit in a kinder, gentler manifestation than the exclusive-sovereignty version of the Tenth Amendment reflected in *National League of Cities*. All of these recent decisions are united by their common presumption that states are sovereign, and also by their common concession that the sovereignty granted to states is not absolute. The tension inherent in this half-hearted grant of state sovereignty produces decisions that are theoretically unsatisfying (because they contradict the essential elements of sovereignty described in Part III), logically incoherent (because they attempt to explain why states simultaneously are and are not sovereign), and only inconsistently enforceable (because every case results in an unpredictable balancing act of state and federal sovereignty interests).

In the end, the current majority on the Court seems to have decided merely to announce the rules and ignore the inconsistencies generated by those rules. The version of state sovereignty promoted by these decisions does not make sense, but the assumption that states are sovereign remains the rule nevertheless. Meanwhile, the Court avoids any serious effort to define the nature and rationale for state sovereignty—i.e., the territory in which states have power that cannot be trumped by the federal government—because the recent state-sovereignty decisions acknowledge at the outset that, if the federal government legitimately needs to impose its will on the states, the flexibility built into these decisions permits the federal government to have its way.

A brief review of the four major areas in which the new theories of state sovereignty are being defined will highlight the unsatisfactory nature of the recent state-sovereignty jurisprudence. The primary question to keep in mind when reviewing these decisions is whether the Court is serious about defending the essentially vacuous form of sovereignty announced in these cases, or whether (in a more sinister reading) these sovereignty cases are merely the first steps in the march back to *real* state sovereignty; that is, a judicially enforced brand of state authority defined by the three essential components of sovereignty—exclusivity, finality, and enforceability.

1. *The (Partial) Revival of the Tenth Amendment*

Garcia briefly returned the Tenth Amendment to its post-*Darby*[138] status as an ineffectual textual artifact of an earlier era in which decentralized political power was the constitutional norm. For all of Justice Blackmun's encomia to the importance of the political structure in protecting the states,[139] the practical reality

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[138] *See* United States v. Darby, 312 U.S. 100, 123–24 (1941).

[139] The concept that the structure of national politics provides the primary safeguard for states' rights against federal interference is most closely associated with Professor Herbert Wechsler and Dean Jesse Choper, both of whom are cited by Justice Blackmun in defense of the holding in *Garcia*. *See Garcia*, 469 U.S. at 551 n.11 (citing JESSE CHOPER, JUDICIAL

of *Garcia* is that the majority permits the federal government to regulate the states under any of the federal government's enumerated powers without worrying about judicial intervention to protect the subordinate political entities.

This exercise of judicial restraint regarding the relationship between state and federal governments did not last long. A mere six years after *Garcia*, the Court resurrected judicially enforced Tenth Amendment protections of state prerogatives in *Gregory v. Ashcroft*.[140] In this case, the Court held that the general precepts of state sovereignty prohibited the federal government from applying the federal Age Discrimination in Employment Act to state judges.[141] One year later, in *New York v. United States*,[142] the Court used the same theory to strike down a federal statute forcing states to take title to low-level radioactive waste if the states

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REVIEW AND THE NATIONAL POLITICAL PROCESS 175–84 (1980); 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 generally* Jesse Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977).

The debate over this theory continues to rage, although since *Garcia* the Supreme Court has subtly renounced the structural safeguard theory by once again striking down federal legislation on Tenth Amendment grounds in the cases discussed in the remainder of this subpart. The specific problems with these cases are discussed extensively in the text; it is worth noting, however, that academic commentators who continue to reject the Wechsler/Choper structural safeguard position are relying upon the same two dubious assumptions that the Court relies upon in *National League of Cities* and the post-*Garcia* federalism decisions. These assumptions are: (1) that state sovereignty actually exists in a form that permits states to reject federal policies adopted as an exercise of the federal government's otherwise legitimate constitutional authority and (2) that the judicial protection of state sovereignty is necessary to the same extent and for the same general reason as judicial protection of individual rights, such as the right of free speech or the freedom from unreasonable searches. For a concise and recent discussion of these two assumptions by scholars who reject the structural safeguard position, see Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459, 1477–79 (2001). The fatal flaw in these assumptions is that a coherent theory of state sovereignty necessarily goes much farther in providing states with authority independent of federal government control than most proponents of state sovereignty would ever endorse explicitly. Professors Prakash and Yoo avoid confronting this problem by noting simply that granting judicial review over federalism issues "sheds little light upon the substantive lines that should limit the national government's powers," before concluding that "federalism presents the courts with hard questions, the courts cannot refuse to answer." *Id.* at 1523. But answers to the "hard questions" go hand-in-hand with the issue of whether the courts should exercise judicial review over such matters at all. The premise of this article is that the only plausible meaning of "state sovereignty" requires something like the arbitrary and schematic *National League of Cities* allocation of exclusive responsibility over entire subject areas to state governments. If this premise is accurate, then one must conclude that the judiciary could never provide a satisfactory answer to the "hard questions" of federalism and therefore should avoid getting involved in such matters at all.

[140] Gregory v. Ashcroft, 501 U.S. 452 (1991).

[141] *Id.* at 463–64.

[142] New York v. United States, 505 U.S. 144 (1992).

had not provided for the disposal of such waste by a certain date.[143] Finally, five years later in *Printz v. United States*[144] the Court struck down a federal gun control provision requiring local law enforcement officers to perform background checks of potential gun purchasers in the period before the federal background-check system went into effect.[145]

Although these three cases revived the Tenth Amendment insofar as the Court's majority once again introduced into the constitutional jurisprudence judicially-created limits on the enforcement of federal policies against the states, the cases were different from *National League of Cities* in one crucial respect. In *National League of Cities*, the Court held that the Tenth Amendment absolutely prohibited the federal government from enforcing national policies against states in certain subject areas. If a particular activity fell within the category of traditional governmental functions, then under *National League of Cities* the regulation of that activity was allocated to the states alone, and the federal government could not enforce against the states any policies that fell within that category. In the post-*Garcia* Tenth Amendment cases, the Court merely limited—but did not prohibit—the federal government from enforcing its policies against the states. In these later cases, the Court evinced more concern with the mechanisms for carrying out federal policies than with the substance of the policies themselves.

Each of the three post-*Garcia* Tenth Amendment decisions imposed a different type of limitation on the federal government. In *Gregory v. Ashcroft*, the Court introduced a "plain statement rule," which requires Congress to make unmistakably clear its intention to apply a federal statute to particular state employees and functions.[146] As Justice White pointed out in his *Gregory* concurring opinion,[147] Justice O'Connor's vaguely phrased majority opinion does not clearly describe the precise application of this plain statement rule. In the more broadly phrased passages of the majority opinion, Justice O'Connor alludes to something like the discredited *National League of Cities* categorization of traditional or unique governmental functions. She suggests, for example, that the plain statement rule applies whenever a statute threatens to interfere with or "upset the usual constitutional balance of federal and state powers,"[148] and also likens the state functions at issue in *Gregory* to "'traditionally sensitive areas . . .

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[143] *Id.* at 174–77.

[144] Printz v. United States, 521 U.S. 898 (1997).

[145] *Id.* at 933–35.

[146] *Gregory*, 501 U.S. at 460–61.

[147] *See id.* at 478 (White, J., concurring) ("[T]he majority fails to explain the scope of its rule. Is the rule limited to federal regulation of the qualifications of state officials? . . . Or does it apply more broadly to the regulation of any 'state governmental functions'?").

[148] *Id.* at 460.

affecting the federal balance'"[149] and "unique" functions that "'go to the heart of representative government.'"[150] Nevertheless, the actual holding of the case does not purport to disempower the federal government when it acts in these "traditionally sensitive" or "unique" areas; the case simply requires the federal government to make clear its intention to apply general policies to state as well as private actors.

In *New York v. United States*, the Court moved beyond a simple plain statement rule to a broader rule prohibiting certain mechanisms for carrying out federal legislation, although the Court again did not withdraw from the federal government power over entire subject areas, as it had in *National League of Cities*.[151] Specifically, in *New York v. United States*, the Court prohibited Congress from "'commandeer[ing]' state governments into the service of federal regulatory purposes."[152] The case involved a complicated federal scheme to provide for the safe disposal of low-level radioactive waste. The Court upheld the portions of the statute that set forth a timetable for states to establish facilities for the disposal of waste produced within their borders, either by building a facility in-state or by joining a regional compact for disposal out-of-state. Also the Court upheld federal financial penalties and incentives to pressure states into complying with the federal timetable.[153] After upholding most of the provisions of the statute, however, the Court struck down a provision that served as the ultimate incentive to induce states to comply with the final deadline by which states were required to have waste disposal facilities in place. Under this provision, states were required to take title to all the low-level radioactive waste produced within their borders if the state had not met the final deadline of January 1, 1996 for disposing of the waste in an approved site.[154]

The Court's majority found that the "take-title" provision of the federal statute interfered with the states' sovereign interests by shifting political responsibility for the federal mandate to state officials. According to the *New York v. United States* majority, "where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished."[155] This focus on political accountability explained the seemingly contradictory conclusions of the majority that, on the one hand, the federal government may not "direct or otherwise motivate the States to regulate in a particular field or a particular way,"[156] while on the other hand, the federal government may simply

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[149] *Id.* at 461 (quoting Will v. Mich. Dept. of State Police, 491 U.S. 58, 65 (1989)).

[150] *Id.* (quoting Sugarman v. Dougall, 413 U.S. 634, 647 (1973)).

[151] New York v. United States, 505 U.S. 144, 174–75 (1992).

[152] *Id.* at 175.

[153] *Id.* at 171–74.

[154] *Id.* at 174–75.

[155] *Id.* at 168.

[156] *Id.* at 161.

take matters into its own hands and impose an unpopular policy directly on a reluctant state government. A state government's view on a particular policy

> can always be pre-empted under the Supremacy Clause if it is contrary to the national view, but in such a case it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular.[157]

Like *Gregory v. Ashcroft*, *New York v. United States* stands in stark contrast to the view of state sovereignty articulated in *National League of Cities*: in both *Gregory* and *New York*, the state "sovereigns" are given no authority to fend off federal legislation with which they strongly disagree. If the federal government adopts and implements a particular policy within the broad areas of federal authority granted by the Constitution, then the "sovereign" states can do nothing but accede to the federal policies.

Printz v. United States represents another variation on the same limited state-sovereignty theme. In *Printz*, the Court imposed a third limitation on the federal government's ability to implement—but not to adopt—national policy that is binding on the states. In *Printz*, the Court struck down a provision in a federal gun control statute requiring the "Chief Law Enforcement Official" in each local jurisdiction to perform a background check of potential handgun purchasers for a five-year period during which the federal government would establish its own national background-check system.[158] The Court interpreted this requirement as the "compelled enlistment of state executive officers for the administration of federal programs"[159] in violation of the states' sovereign interest to resist being "pressed into federal service."[160] These conclusions were premised on very broad renditions of the concept of state sovereignty. The Court explicitly embraced the theory of dual sovereignty[161] and envisioned a system of government defined by two distinct political entities, "'each protected from incursion by the other, [with] its own set of mutual rights and obligations to the people who sustain it and are governed by it.'"[162] The focus on the independence and insulation of the states implies that states possess some variation of the elements of sovereignty set forth in Part III of this article—i.e., exclusive and final control over policy, and an ability to enforce those policies against other governmental or private entities.

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[157] New York v. United States, 505 U.S. 144, 168 (1992).

[158] Printz v. United States, 521 U.S. 898, 902–03, 935 (1997).

[159] *Id.* at 905.

[160] *Id.*

[161] *Id.* at 918 ("It is incontestable that the Constitution established a system of 'dual sovereignty.'") (citation omitted).

[162] *Id.* at 920 (Kennedy, J., concurring) (quoting U.S. Term Limits v. Thornton, 514 U.S. 779, 838 (1995)).

The odd thing about these grandiose statements on the subject of state sovereignty is that in the very same opinion in which the Court ascribed to states these characteristics of sovereignty, the Court also explicitly acknowledged that such state sovereignty does not really exist. First, the Court acknowledged that even if the federal government could not "commandeer" state executive officials to carry out federal law, it could certainly prohibit those same officials from obstructing federal law by enforcing contrary state policies. The Court recognized that states owe the federal government a duty "to enact, enforce, and interpret state law in such fashion as not to obstruct the operation of federal law, and the attendant reality that all state actions constituting such obstruction, even legislative Acts, are *ipso facto* invalid."[163] Thus, although the Court would use state-sovereignty principles to prohibit the enforcement of federal actions that require state action, the Court would abandon those state-sovereignty principles when the federal statute requires only state inaction.

The *Printz* Court's distinction between affirmative and negative federal mandates has two glaring flaws. First, if the federal government can force the state to comply with a policy that the state strongly disagrees with, then the state cannot be said to be sovereign in the sense described in Part III, (a conception that, as noted above,[164] is implicit in the Court's own description of sovereignty). In other words, under the Court's own description of the current reality, the state is not sovereign because (1) it has no exclusive control over a policy that comes within the federal government's constitutionally enumerated authority, (2) the state's policies in such a subject area are not final because they can always be superceded by preemptive federal action, and (3) such preemption prohibits the state from enforcing policies that inhibit the federal government from enforcing its superior commands. Second, if the state is not truly sovereign over a particular policy, then there is no logical reason to distinguish between a federal mandate requiring the state to do something and a federal mandate requiring the state *not* to do something. If a state has no sovereign authority to dictate a particular policy, then the state is, in effect, merely a subordinate political entity. Thus, the state has no sovereign authority to deny assistance to a superior government that—in the Court's own expressed view—has sovereign authority to enforce that policy.

In any event, the *Printz* Court itself acknowledged that in at least one respect even affirmative federal mandates require obedience by state officials. This acknowledgment came in the Court's discussion of a state court's obligation to enforce federal law with which the state disagrees.[165] This concession was inevitable given the clear phrasing and unavoidable implications of the Supremacy Clause, under which "the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound

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[163] *Id.* at 913.

[164] *See supra* text accompanying note 162.

[165] *See Printz*, 521 U.S. at 907.

thereby."[166] The Court concedes that this provision requires state judges to act affirmatively to carry out federal law but reads this obligation simply as an example of "'transitory' causes of action"—i.e., "laws which operated elsewhere [and] created obligations in justice that courts of the forum state would enforce."[167] But as the Court itself acknowledges, state courts must enforce legal obligations originating outside the state in large part because the federal government requires each state to afford full faith and credit to such obligations.[168] If the states were truly sovereign, they would each have the unfettered ability to decide which obligations to enforce and which obligations to ignore, much as national sovereigns decide to bind themselves by entering into treaties. For purposes of applying theories of sovereignty, there is nothing special about state courts as institutions. The state courts derive their authority from whatever sovereign power the states themselves possess. State courts have no authority to refuse to enforce federal law because the states themselves have no such power. And if the states cannot insulate their courts from affirmative federal directives, there is no logical argument derived from theories of sovereignty that would permit them to insulate other branches of state government from similar directives.

The internal contradictions in the Court's *Printz* opinion reflect the larger conceptual problem evident in each of the post-*Garcia* Tenth Amendment decisions: The fairly narrow and particularized holdings in these cases are based on broad and abstractly phrased state-sovereignty principles that, if applied consistently, would provide a far more extensive grant of authority to the states than the holdings themselves suggest—yet the Court in each of these cases denies that such authority exists. In Justice O'Connor's *Gregory v. Ashcroft* majority opinion, for example, she expresses the view that dual sovereignty is primarily a protection against the abuse of government power by the federal government.[169] As she phrases this aspect of state sovereignty, "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."[170] Thus, Justice O'Connor argues, the application of federal age discrimination laws to override a Missouri law that establishes mandatory retirement ages for judges "would upset the usual constitutional balance of federal and state powers."[171] But having defined the terms of debate in such stark terms, Justice O'Connor then produces the tepid plain statement rule to enforce her theory against an apparently rogue federal government. Under her rule, the federal government is not prohibited from (in Justice O'Connor's

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[166] U.S. CONST. art. VI, cl. 2.

[167] *Printz*, 521 U.S. at 907.

[168] *Id.*

[169] Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

[170] *Id.*

[171] *Id.* at 460.

apparent view) running roughshod over the state's sovereign prerogatives; the federal government merely has to announce in advance that this is its intent, then proceed apace. The mountains have labored and brought forth a mouse.[172]

In Justice O'Connor's *New York v. United States* majority opinion, she reiterates her strong endorsement of state-sovereignty principles,[173] and at first glance, seems to support those principles with more substantial protection of state sovereignty than that offered by the rather flimsy procedural nicety imposed by the *Gregory* plain statement rule. In the end, however, *New York v. United States* leaves the states just as vulnerable to effective federal control as *Gregory*. Recall that the actual holding of *New York* prohibited the federal government from requiring states to take title to low-level radioactive waste generated within the state if the state had not provided for an acceptable means of disposal of that waste by a federally mandated date.[174] "While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States," Justice O'Connor writes, "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions."[175]

The problem with this statement is that it is not true, even as applied to the facts in *New York v. United States*. This can be seen by considering how states would be affected by each of the three ways in which the Supreme Court itself acknowledged the federal government could deal with the problem of low-level nuclear waste disposal. As the Court acknowledged, the federal government could regulate the disposal of low-level radioactive waste by: (1) imposing such high surcharges on interstate shipments of radioactive waste that producers could not afford to ship the waste at all;[176] (2) using federal appropriations and commerce clause authority to purchase land inside a state for a waste disposal site and require all waste produced in that state to be disposed of at that site;[177] and (3) using federal commerce clause authority to preempt any state legislation that inhibited the location and operation of federal or privately operated low-level nuclear waste dump sites inside a state.[178] In effect the federal government

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[172] *See* HORACE, *Ars Poetica*, *in* THE SATIRES OF HORACE AND PERSIUS 190, 194 (Niall Rudd trans., Penguin Books 2d prtg. 1987) (approx. 19 B.C.) ("What can emerge in keeping with such a cavernous promise?/The mountains will labor and bring to birth a comical mouse.").

[173] New York v. United States, 505 U.S. 144, 155–59 (1992).

[174] *See supra* notes 151–57 and accompanying text.

[175] *New York*, 505 U.S. at 162.

[176] *See id.* at 171.

[177] *Id.* at 182 ("[I]t would be well within the authority of either federal or state officials to choose where the disposal sites will be . . . .").

[178] *Id.* at 167 ("[W]here Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of

therefore has the power to remove altogether any state's authority to deal with the issue of low-level radioactive waste disposal within that state. If that is true, then the state sovereignty protected by the anti-commandeering holding of *New York* is truly a hollow power; a state's authority may be rendered entirely irrelevant by the federal government. If the federal government can use its power of adopting and enforcing preemptive legislation to render the state irrelevant (as the *New York* majority acknowledges), then the state is not in any significant sense "sovereign," and so the anti-commandeering holding is revealed as little more than a reflection of the Supreme Court majority's punctilious credo of political etiquette: the federal government can make the states obey any policy it wants, but it cannot force the states to like it.

In the end, all three of the Supreme Court's post-*Garcia* Tenth Amendment cases contain an internal conflict that can only be resolved in one of two ways. The first way would have the Court adopt wholeheartedly the state-sovereignty rationale of the post-*Garcia* decisions, in which case the holdings of those cases represent merely the first step toward a return to judicial protection of true state sovereignty, in the form of state independence from federal control over policies falling within the state's sovereign territory. The second way of reconciling the internal conflict of these cases would involve conceding the failure of *National League of Cities* and recognizing the impossibility of installing a system of ineffectual state "sovereigns" that cannot make and enforce policies against the federal government. The first choice would require a return to the practical difficulties of *National League of Cities*. The second choice would require overruling the narrow holdings of *Gregory*, *New York*, and *Printz*. In any event, the current situation—in which the states are "sovereign" in name only—is indefensible as a coherent constitutional doctrine.

2. *The Intricate Nightmare of the Eleventh Amendment*

The large and growing body of Eleventh Amendment jurisprudence is a second major area defined by multiple and contradictory assertions about state sovereignty. Although the common perception—fed by the Court's own recent rhetoric—is that the Eleventh Amendment provides states with an impermeable cloak of sovereign immunity from process in federal court, in fact the Court has always denied states the sort of total independence from external judicial control that is normally associated with the concept of sovereignty. In recent years, the Court has made ever-broader statements about the significance of state sovereignty as the basis for its Eleventh Amendment holdings, but in reality the Eleventh Amendment cloak of sovereign immunity is defined by large gaps that allow the true sovereign—i.e., the federal government—to enforce its will on the

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regulating that activity according to federal standards or having state law pre-empted by federal regulation.").

states in some ways, but not others. The question is whether concepts of state sovereignty used to deny the federal government access to some enforcement mechanisms against lawbreaking states make sense in a context in which the Court itself repeatedly stresses that "sovereign" states are not allowed to disobey federal law.

The general contours of Eleventh Amendment jurisprudence are by now very clear. The Eleventh Amendment saga begins, of course, with the 1793 Supreme Court decision *Chisholm v. Georgia*,[179] in which the Court ruled against the state of Georgia in a diversity action brought in the Supreme Court and based on Georgia assumpsit law. Although it is uniformly recognized that the Eleventh Amendment was enacted in response to this case, in the years following the ratification of the Amendment the particular history of its enactment, as well as the text itself, would have little to do with the development of modern Eleventh Amendment jurisprudence. The modern Court's five-member majority has summarized this phenomenon of judicial interpolation:

> [W]e long have recognized that blind reliance upon the text of the Eleventh Amendment is "to strain the Constitution and the law to a construction never imagined or dreamed of." . . . The text dealt in terms only with the problem presented by the decision in *Chisholm*; in light of the fact that the federal courts did not have federal-question jurisdiction at the time the Amendment was passed (and would not have it until 1875), it seems unlikely that much thought was given to the prospect of federal-question jurisdiction over the States.[180]

As this quotation indicates, the diversion of Eleventh Amendment jurisprudence from both the text and history of the Amendment coincided with the Court's expansion of that Amendment to cover the federal courts' newly granted federal question jurisdiction in the notorious *Hans v. Louisiana* decision in 1890.[181] This development greatly increased both the importance and the theoretical and practical complexities of Eleventh Amendment jurisprudence. It is one thing to say that the states cannot immunize themselves from the operation of their own law; it is quite another to say that the states are immune automatically from the operation of federal law.

Much of the debate over the Eleventh Amendment has centered on the legitimacy of the Court's expansion of the Eleventh Amendment's scope in *Hans*.

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[179] 2 U.S. (2 Dall.) 419 (1793).

[180] Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 69–70 (1996) (citations omitted).

[181] *See* Hans v. Louisiana, 134 U.S. 1, 10 (1890).

Dissenting Justices—in particular Justice Brennan[182] and more recently Justice Souter[183]—and several academic commentators[184] have argued vigorously that the Eleventh Amendment was never intended to enshrine state sovereign immunity as a defense to federal question claims raised against states in federal court. If these critiques of the modern Court's expansive Eleventh Amendment jurisprudence are correct, then the entire enterprise is at best judicial lawmaking and at worst intellectually and legally duplicitous judicial lawmaking. But the most interesting thing about the modern Court's Eleventh Amendment jurisprudence is not that it may be based entirely on a huge historical and theoretical mistake; the most interesting thing about that jurisprudence is that the Court has never been willing to follow its principles to their logical conclusion. Whether the Court's expansion of the Eleventh Amendment's scope in *Hans* was originally justified is therefore less significant than the inconsistency of the Court's action in haphazardly applying that expanded body of law in ensuing years. The deep inconsistency of the Court's Eleventh Amendment decisions is the more significant issue because it indicates that the state-sovereignty principles the Court relies upon to justify those decisions are themselves both conceptually flawed and practically unworkable. In this sense, the Court's Eleventh Amendment jurisprudence shares the problems evident in the post-*Garcia* Tenth Amendment cases discussed in the previous Part. A brief review of the Court's conflicting Eleventh Amendment rules will illustrate this conclusion.

Hans set in motion a series of decisions that created the maze known as Eleventh Amendment jurisprudence. First, in recognition of the obvious fact that a consistent application of *Hans* would render enforcement of federal law impossible, the Court ruled in *Ex parte Young* that federal courts could issue injunctions against state officials to force those officials to obey federal law.[185] The theory of *Ex parte Young* is that in lawsuits brought against state officials to enforce federal law those officials are being sued in their personal, rather than their official capacities; therefore, federal court injunctive relief in such cases does not impinge upon the state sovereignty protected by the Eleventh Amendment because the state is not really involved in the case.[186] Of course, as Justice Harlan

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[182] *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 247 (1985) (Brennan, J., dissenting).

[183] *See Seminole Tribe*, 517 U.S. at 100 (Souter, J., dissenting).

[184] *See* William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1034 (1983); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1894–95 (1983).

[185] *Ex parte* Young, 209 U.S. 123, 155–56 (1908).

[186] The Court noted:

> If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or

pointed out in his *Ex parte Young* dissent,[187] this explanation never made much practical sense when viewed in the context of real-world litigation, and even less sense as a matter of theory when the concept of state action came into play.[188] When a federal court rules against a state official in a lawsuit regarding that official's failure to obey federal law, the state itself is being forced to conform its

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representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

Id. at 159–60.

[187] Justice Harlan reasoned:

> Let it be observed that the suit instituted by Perkins and Shepard in the Circuit Court of the United States was, as to the defendant Young, one against him *as, and only because he was*, Attorney General of Minnesota. No relief was sought against him individually but only in his capacity *as* Attorney General. And the manifest, indeed the avowed and admitted, object of seeking such relief was *to tie the hands* of the *State* so that it could not in any manner or by any mode of proceeding, *in its own courts*, test the validity of the statutes and orders in question. It would therefore seem clear that within the true meaning of the Eleventh Amendment the suit brought in the Federal court was one, in legal effect, against the State—as much so as if the State had been formally named on the record as a party . . . .

Id. at 173–74 (Harlan, J., dissenting).

[188] In the *Civil Rights Cases*, 109 U.S. 3, 6 (1883), the Court held that the Fourteenth Amendment applies only to state action. In *Ex parte Young*, the Court held that the Eleventh Amendment embodiment of state sovereign immunity does not bar federal courts from issuing injunctions against state officials who are violating federal law because such suits are not really suits against the state, but are instead suits against private individuals (i.e., the state officials) acting beyond the scope of their official authority. *Ex parte* Young, 209 U.S. at 155–56. But if this theory is accurate, then state action would be lacking in all *Ex parte Young* lawsuits, and therefore the officials could not be sued for violating the federal constitution because that document applies only to state action. The Court resolved this anomaly five years after *Ex parte Young* by simply creating another theory of state action to apply to the merits of lawsuits enforcing federal constitutional rights against state officials. According to the Court:

> [T]he theory of the [Fourteenth] Amendment is that where an officer or other representative of a State in the exercise of the authority with which he is clothed misuses the power possessed to do a wrong forbidden by the Amendment, inquiry concerning whether the State has authorized the wrong is irrelevant and the Federal judicial power is competent to afford redress for the wrong by dealing with the officer and the result of his exertion of power.

Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278, 287 (1913). In a more recent variation on the same theme, the Court held in *Hafer v. Melo*, 502 U.S. 21, 31 (1991), that the state's Eleventh Amendment sovereign immunity does not protect a state employee sued in his or her personal capacity for constitutional violations despite the official nature of the employee's actions. Thus, state officials involved in federal court lawsuits over the application of federal constitutional rights to the conduct of their official duties are simultaneously private actors (for purposes of Eleventh Amendment jurisdiction) and state actors (for purposes of determining the merits of a federal constitutional claim).

behavior to federal law. The Supreme Court is happy to tolerate that conclusion, notwithstanding that such coerced conformity interferes directly with the state's "sovereign" independence.

These obvious problems have led the Court in modern times to dispense with even the pretense that *Ex parte Young* is anything but an outright "fiction"[189] made necessary by the intolerable consequences of the Court's bold expansion of the Eleventh Amendment to cover federal question cases in *Hans v. Louisiana*. Having abandoned its reliance on the illogically formalistic notion that a state official is really being sued as a private individual instead of as a representative of the state, the Court has had to come up with an alternative explanation for not permitting lawsuits directly against the real party in interest—i.e., the state itself. The alternative the Court has crafted to explain the necessity of the *Ex parte Young* mechanism is the concept of state sovereignty. The Court explains:

> While the constitutional principle of sovereign immunity does pose a bar to federal jurisdiction over suits against nonconsenting States, . . . this is not the only structural basis of sovereign immunity implicit in the constitutional design. Rather, "[t]here is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the convention.'" . . . This separate and distinct structural principle is not directly related to the scope of the judicial power established by Article III, but inheres in the system of federalism established by the Constitution.[190]

But as in the Court's recent Tenth Amendment decisions, the application of the state-sovereignty principle in the Eleventh Amendment area is riddled with multiple inconsistencies. The increasingly byzantine rules that govern Eleventh Amendment law cannot be explained by reference to the concept of state sovereignty because many of those rules—such as *Ex parte Young*—specifically trump any claim of state sovereignty by permitting the federal courts to enforce federal law against states through injunctions enforceable by contempt sanctions. The *Ex parte Young* mechanism of enforcing federal law is far more intrusive into state prerogatives than some other mechanisms that the Court has refused to uphold on the theory that they would violate the states' sovereign independence.

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[189] *See, e.g.*, Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 281 (1997) (referring to the "*Ex parte Young* fiction"); Pennsylvania v. Union Gas Co., 491 U.S. 1, 26 (1989) (Stevens, J., concurring) (referring to "the fiction established in *Ex parte Young*"); Monell v. Dept. of Soc. Servs., 436 U.S. 658, 712 (1978) (Powell, J., concurring) (referring to the "fiction of *Ex parte Young*"). The Court long ago refrained even from requiring plaintiffs to formally plead *Ex parte Young* cases against state officials in their individual capacities, choosing instead to look to the "course of proceedings" to determine whether the defendant is being sued in his personal or official capacities. Kentucky v. Graham, 473 U.S. 159, 167 n.14 (1985).

[190] Alden v. Maine, 527 U.S. 706, 730 (1999) (quoting Principality of Monaco v. Mississippi, 292 U.S. 313, 322–23 (1934)) (citations omitted).

In *Edelman v. Jordan*, for example, the Supreme Court held that the Eleventh Amendment bars lower federal courts from ordering the states to pay any retroactive relief—even the restitution of federal social welfare funds that the states had impermissibly withheld from qualified recipients.[191] *Edelman* involved the federal Aid to the Aged, Blind, and Disabled program, which required states administering the program to distribute federal money to qualified recipients within thirty to forty-five days.[192] The state of Illinois had withheld money for as long as four months.[193] The Supreme Court reversed a lower court order requiring the state to pay money that had been withheld in the past, on the grounds that such funds would necessarily come out of the state treasury and therefore negatively affect the state's current budget.[194] But the Supreme Court simultaneously upheld the lower court injunction requiring the state to conform its behavior to the federal requirements in the future,[195] which would affect not only the state's current budget, but also every other budget in the future for as long as the state participated in the federal program and the federal program contained a rapid distribution schedule.

The Court explained the difference between impermissible retroactive relief and permissible prospective relief by reference to the relative effects on the state budget. "[T]he subsequent ordering by a federal court of retroactive payments to correct delays in such processing will invariably mean there is less money available for payments for the continuing obligations of the public aid system."[196] In other words, the retroactive portion of the *Edelman* order dealt with a situation in which the state had already spent the money that would be necessary to reimburse those aged, blind, and disabled citizens whose money had been illegally withheld, whereas the money to satisfy the prospective portion of the order was still in the state's coffers. The Court recognized that future compliance with the federal statute would have a financial effect on the state since the state would have to spend money that state officials would prefer to allocate to other programs, but the Court dismissed the long-term financial effect as a "necessary consequence of compliance in the future with a substantive federal-question determination."[197] This is obviously true, but it is a mystery why the financial effects of future compliance are any less intrusive into the "sovereign" activities of the states than retroactive enforcement of the same obligatory federal statutory mandate. A truly sovereign entity would have authority to withhold money in the

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[191] Edelman v. Jordan, 415 U.S. 651, 678 (1974).

[192] *Id.* at 654.

[193] *Id.* at 655–56.

[194] *Id.* at 665.

[195] *Id.* at 664–65.

[196] *Id.* at 666 n.11.

[197] Edleman v. Jordan, 415 U.S. 651, 668 (1974).

past and the future; an entity that is not sovereign would not have the authority to withhold the money at all.

The Court's approach to state power in *Edelman* cannot be properly categorized as the recognition of state sovereignty because obligating the state to obey the federal law at all means that the state is not, with regard to that mandate, sovereign. And if the state lacks the sovereign power to avoid complying with the federal government's commands in the future, then it is illogical to permit the state to avoid suffering the consequences of its violations of the same mandate in the past. It is as if the Court devised a regime of criminal law under which criminals could be barred from violating the law in the future but were given immunity from any sanctions for violations that occurred before they got caught.

The *Edelman* distinction between retroactive and prospective relief is only one of the myriad instances in which the Court applies the concept of state sovereignty inconsistently in the Eleventh Amendment cases. Other rules are equally contradictory. For example, the Court has long adhered to the rule that the federal government as a litigant is not bound by Eleventh Amendment sovereign immunity rules and may therefore sue states directly for all forms of relief.[198] In other words, the *Edelman* retroactive relief restriction does not apply when the federal government itself sues a state in federal court. The Court's rationale is that an exemption to the Eleventh Amendment is necessary for the federal government on the grounds that "the permanence of the Union might be endangered if to some tribunal was not entrusted the power to determine [controversies involving the States] according to the recognized principles of law."[199] Of course, this explanation would also justify federal court intervention on behalf of private litigants to enforce federal law against recalcitrant states. The "permanence of the Union" presumably refers to the sovereign power of the federal government to make and enforce national policy. This power is undermined whenever federal law is violated by subordinate political entities, and the erosion of the true sovereign's power does not change depending on whether a private citizen or the federal government itself is in court to defend federal law. Conversely, if the states indeed have a sovereign interest in controlling their own budgets without interference from the competing national sovereign, then it should not be relevant that an agent of the federal executive, rather than an aggrieved private party, has urged the federal judiciary to intervene.

Similar inconsistencies appear in the Court's recent extension of the Eleventh Amendment to prohibit private entities from bringing complaints against states in federal administrative agencies. In *Federal Maritime Commission v. South Carolina State Ports Authority*,[200] the Court held that the Eleventh Amendment

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[198] *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 71 n.14 (1996), *reaffirming* United States v. Texas, 143 U.S. 621 (1892).

[199] United States v. Texas, 143 U.S. at 645.

[200] 122 S. Ct. 1864 (2002).

barred federal agencies from adjudicating private complaints in order to determine whether state agencies had violated federal law. The Court's rationale for expanding the reach of the Eleventh Amendment (which by its terms only applies to "the *Judicial* power")[201] from the federal courts to agencies of the Executive branch stems from the Court's perceived need to protect the states' delicate sensibilities. The Court asserts that "[t]he preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities."[202] Likewise, "the primary function of sovereign immunity is not to protect State treasuries, . . . but to afford the States the dignity and respect due sovereign entities."[203] Thus, the Court concludes:

> [I]f the Framers thought it an impermissible affront to a State's dignity to be required to answer the complaints of private parties in federal courts, we cannot imagine that they would have found it acceptable to compel a State to do exactly the same thing before the administrative tribunal of an agency . . . .[204]

For all the Court's talk about "afford[ing] the States the dignity and respect due sovereign entities,"[205] in the end the Court recoils from barring federal agencies from intruding directly into any situation in which the agency believes a state is violating federal law. The Court acknowledges that the federal agency:

> remains free to investigate alleged violations of [federal law], either upon its own initiative or upon information supplied by a private party . . . and to institute its own administrative proceeding against a [State] . . . . Additionally, the [agency] "may bring suit in a district court of the United States to enjoin conduct in violation of [the Act]."[206]

As Justice Breyer's dissent explains, the Court's ruling will make the enforcement of federal law more difficult,[207] but federal law remains supreme and the states must obey that law whether they like it or not.

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201 U.S. CONST. amend. XI (emphasis added).

202 *S.C. State Ports Authority*, 122 S. Ct. at 1874.

203 *Id.* at 1879.

204 *Id.* at 1874.

205 *Id.* at 1879.

206 *Id.* at 1878–79 (quoting 46 U.S.C. app. § 1710(h)(1) (1994)).

207 Justice Breyer contends:

> The decision, while permitting an agency to bring enforcement actions against States, forbids it to use agency adjudication in order to help decide whether to do so. Consequently the agency must rely more heavily upon its own informal staff investigations in order to decide whether a citizen's complaint has merit. The natural result is less agency flexibility, a larger federal bureaucracy, less fair procedure, and potentially less effective law enforcement.

Despite the Court's sensitive appreciation of state feelings, the fact remains that states violating federal law do not deserve respect, and their dignity is as meaningless as any other lawbreaker's because true state sovereignty does not exist. By recognizing ultimate federal agency power to enforce federal law against states, the Court itself recognizes that states are in the end no different than any other corporate entity operating within the territory governed by the federal government. In this respect the state of South Carolina is no more sovereign than General Motors.

The inconsistencies in the Court's application of state-sovereignty theory in the Eleventh Amendment cases persists because the attribution of real sovereignty to the states would, if interpreted and applied consistently, undermine the basis of all exceptions to the rule that federal law may not be enforced in court against lawbreaking states. This logic would apply most strongly to the oldest and most important exception to state sovereign immunity, *Ex parte Young*—the premier tool of federal enforcement power against renegade states. *Ex parte Young* is simply inconsistent with any notion that the states are independent sovereigns. Justice Harlan cited this very principle in his *Ex parte Young* dissent. If states may be sued in federal courts through their employees and agents, Justice Harlan argued:

> It would enable the subordinate Federal courts to supervise and control the official action of the States as if they were "dependencies" or provinces. It would place the States of the Union in a condition of inferiority never dreamed of when the Constitution was adopted or when the Eleventh Amendment was made a part of the Supreme Law of the Land.[208]

A minority of the present membership of the Supreme Court has returned to this theme. Justice Kennedy, joined by Chief Justice Rehnquist, has argued that *Ex parte Young* should be applied narrowly, and only after a case-by-case examination of several factors to determine whether the state's interests should be overridden by the plaintiff's interest in enforcing the federal claim.[209] "The *Young* exception may not be applicable if the suit would 'upset the balance of federal and state interests that [the Eleventh Amendment] embodies.'"[210] But it would be an odd balance if plaintiffs seeking redress for violation of a federal claim had no federal avenue for relief whatsoever. Justice Kennedy's opinion comes closer

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Id. at 1888 (Breyer, J., dissenting).

[208] *Ex parte* Young, 209 U.S. 123, 175 (1908) (Harlan, J., dissenting).

[209] *See* Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 270–80 (1997) (plurality opinion). The factors to be considered include: (1) the availability of a state forum, *id.* at 270–74, (2) the nature of the federal issue, *id.* at 274–78, and (3) the presence of other "special factors counseling hesitation," *id.* at 280 (quoting Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 396 (1971).

[210] *Id.* at 277 (quoting Papasan v. Allain, 478 U.S. 265, 277 (1986)).

than any other modern statement from the Supreme Court to providing a negative answer to the real issue in these state sovereignty/Eleventh Amendment cases: Can the federal government force the states to obey federal law? In rejecting the Kennedy approach, Justice O'Connor and the two other Justices who usually join the current majority's expansive approach to Eleventh Amendment jurisprudence cite basic principles of federal supremacy: "We have frequently acknowledged the importance of having federal courts open to enforce and interpret federal rights."[211] Unfortunately, most aspects of Eleventh Amendment law outside the context of *Ex parte Young* operate to deny the importance of both the federal forum and the enforceability of federal rights generally.[212] As in its modern Tenth Amendment jurisprudence, the Court begins its Eleventh Amendment decisions trying to balance state sovereignty and federal supremacy but ends up producing nothing more than doctrinal incoherence and confusion.

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[211] *Id.* at 293 (O'Connor, J., concurring).

[212] Limitations on federal court jurisdiction have the effect of rendering federal law completely unenforceable against states in two major contexts. First, in *Seminole Tribe v. Florida*, 517 U.S. 44, 61–76 (1996), the Court closed one window for holding states accountable in federal court for violating federal law by prohibiting Congress from using its Commerce Clause authority to abrogate states' Eleventh Amendment immunity. Thus, Congress cannot by statute subject states to federal court jurisdiction in any legislation that is not passed under the Court's increasingly narrow conception of the Fourteenth Amendment. *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001) (rejecting statutory abrogation of states' Eleventh Amendment immunity in the federal Americans with Disabilities Act on the grounds that the statute was not a valid exercise of Congress' Fourteenth Amendment enforcement authority); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91 (2000) (rejecting statutory abrogation of states' Eleventh Amendment immunity in the federal Age Discrimination in Employment Act on the grounds that the statute was not a valid exercise of Congress' Fourteenth Amendment enforcement authority); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 637–48 (1999) (rejecting statutory abrogation of states' Eleventh Amendment immunity in federal patent laws on the grounds that the statute was not a valid exercise of Congress' Fourteenth Amendment enforcement authority). Several major federal statutes that provide for exclusive federal court enforcement—including bankruptcy, antitrust, and copyright statutes—were enacted under constitutional authority other than the Fourteenth Amendment. Therefore, since Congress may not subject states to federal court enforcement and since state courts may not enforce these statutes at all, states are effectively immune from these federal statutes altogether. The current majority on the Supreme Court has recognized this consequence and seemingly approved of it (although the majority denies that this exclusion is significant). *See Seminole Tribe*, 517 U.S. at 72 n.16.

The second situation in which federal law may be effectively unenforceable involves state violations of federal statutes that are concluded by the time litigation begins. In that case, *Edelman* prohibits retroactive relief against states, and the doctrine of qualified immunity will often prohibit retroactive relief against state officials who are sued in their personal capacities. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818–19 (1982) (providing qualified immunity against civil liability for a public official who violates federal rights as long as the official does not violate any law "clearly established at that time").

3. *Abstention and "Our Federalism"*

The current five-Justice majority of the Rehnquist Court on Tenth and Eleventh Amendment matters is not the first modern alignment of Justices on the Court to finesse the problems inherent in the concept of state sovereignty by granting states only partial authority to avoid federal mandates. The Court's *Younger* abstention jurisprudence provides an example of limitations placed on federal courts during a slightly earlier era, which reflects many of the conceptual problems with state sovereignty that are becoming increasingly evident in the Court's modern Eleventh Amendment jurisprudence. From the perspective of those seeking strong enforcement of federal law, abstention jurisprudence presents an even more problematic area than that governed by the Eleventh Amendment cases, if for no other reason than that the abstention doctrine allows far fewer ways to avoid the limitations imposed on federal courts than those available under the Eleventh Amendment.

Younger abstention refers to the doctrine that federal courts must abstain from hearing cases involving federal issues that are already being litigated in state fora. The Court's *Younger v. Harris* opinion imposed this mandate in 1971.[213] In its original manifestation, the mandate applied only when the federal court was asked to litigate federal issues that were already being litigated in an ongoing state criminal proceeding.[214] During the decade following *Younger*, the doctrine expanded to require federal courts to abstain in favor of state civil court proceedings if the state was a party and the subject of the proceeding was closely related to the criminal law.[215] Then, in 1987 the Court expanded the doctrine again to encompass all state civil proceedings, even if the state itself was not a party.[216] At approximately the same time, the *Younger* abstention doctrine was expanded to include state administrative proceedings, as long as the state provided some judicial review for the administrative determinations.[217]

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[213] 401 U.S. 37, 38–42 (1971).

[214] *Id.* at 43–45, 53.

[215] *See* Huffman v. Pursue, Ltd., 420 U.S. 592, 594 (1975) (ruling on a civil public nuisance action against a theater showing obscene movies); Juidice v. Vail, 430 U.S. 327, 334–39 (1977) (deciding whether there is criminal contempt for failing to pay civil judgments); Trainor v. Hernandez, 431 U.S. 434, 444 (1977) (considering a civil action to recover fraudulently obtained welfare funds).

[216] Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 14 (1987) (requiring a lower federal court to abstain from hearing a due process challenge to a Texas state court's appellate bond requirement in a civil action between two private parties).

[217] *See* Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc., 477 U.S. 619, 626–28 (1986).

The *Younger* abstention doctrine stems from the traditional rule that equity courts will not enjoin ongoing criminal proceedings.[218] The controversial part of *Younger* is that it extends this doctrine to situations in which the judicial officers of an inferior governmental entity—i.e., the states—are allegedly misapplying the law of the superior governmental entity—i.e., the federal government. Indeed, several years prior to the Court's reaffirmation of the equitable abstention doctrine in *Younger*, the Court had held that federal courts did not have to defer to state court determinations in many First Amendment (and by implication other constitutional rights) cases.[219] In *Younger*, the Court not only squelched the suggestion that violations of federal law generally justify federal court intervention to fend off state court criminal proceedings,[220] but also went beyond the traditional equitable basis of the abstention doctrine to ground the abstention

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[218] The Court's earlier application of this doctrine arrived at the same result as *Younger*, but relied solely on the federal courts' lack of equity jurisdiction, without emphasizing a state-sovereignty basis for the ruling. See *Douglas v. City of Jeannette*, which held:

> Notwithstanding the authority of the district court, as a federal court, to hear and dispose of the case, petitioners are entitled to the relief prayed only if they establish a cause of action in equity. Want of equity jurisdiction, while not going to the power of the court to decide the cause, . . . may nevertheless, in the discretion of the court, be objected to on its own motion. . . . Especially should it do so where its powers are invoked to interfere by injunction with threatened criminal prosecutions in a state court.

319 U.S. 157, 162 (1943) (citations omitted).

[219] Dombrowski v. Pfister, 380 U.S. 479, 482–92 (1965). In *Dombrowski*, the Court held that federal courts did not have to abstain where "statutes are justifiably attacked on their face as abridging free expression, or as applied for the purpose of discouraging protected activities." *Id.* at 489–90. It is fair to assume the Court did not intend to stop with the First Amendment. Owen Fiss has pointed out that Justice Brennan, who authored the *Dombrowski* majority opinion, had already concluded that the expansion of federal jurisdiction subsequent to the Civil War fundamentally altered the legal landscape by providing plaintiffs seeking to enforce federal rights the option of choosing to vindicate those rights in what they perceived to be a friendly federal court rather than a hostile state court. *See* Owen M. Fiss, Dombrowski, 86 YALE L.J. 1103, 1107 (1977). The traditional equity rules simply had been superceded by the expansion of federal rights and the development of mechanisms to enforce those rights. In Fiss' succinct summary of this point, "*Dombrowski* was of course not a struggle about remedies but about judges." *Id.* at 1116.

[220] The Court effectively overruled *Dombrowski* in *Younger*, although it recognized that a shell of the *Dombrowski* exception to the abstention mandate would apply in situations of bad faith harassment in the state courts or where the state statute being challenged was "'flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph.'" Younger v. Harris, 401 U.S. 37, 53 (1971) (quoting Watson v. Buck, 313 U.S. 387, 402 (1941)). Two years prior to *Younger*, the Supreme Court itself had struck down by a unanimous vote a statute essentially identical to the statute challenged in *Younger*. *See* Brandenburg v. Ohio, 395 U.S. 444, 444–45, 449 (1969). The fact that the *Younger* Court refused to apply the flagrant unconstitutionality exception to a statute that easily fit the flagrant unconstitutionality criteria indicates that the exception is at best uncertain and at worst meaningless.

mandate on the much broader foundation of state sovereignty. In particular, the Court asserted that state-sovereignty issues would be implicated if federal courts consistently enforced federal law in the face of contrary state court determinations. Thus, after *Younger*, it was not the structure of traditional equity jurisprudence that prevented federal courts from intervening to protect claimants' federal rights, but rather the superior sovereign interests of the states whose agents were violating the federal law that they were supposedly bound to obey.

The version of state-sovereignty principles on which the Court based its concern was labeled "Our Federalism."[221] The term was said to represent:

> a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.[222]

This conception does not entail "blind deference to 'States' Rights,'" the Court declared, but rather

> a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.[223]

Younger has been heavily criticized from several different angles. Much has been made of the Court's misreading of history,[224] of the Court's improper conflation of equity law and federalism,[225] and of the inadequacy of the state criminal prosecution to provide systematic vindication of federal rights.[226] There is a much more basic problem with *Younger*—the case not only improperly intermingled equity law and federalism, but also improperly viewed the state court institutions as somehow worthy of respect despite the fact that they were

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[221] *Younger*, 401 U.S. at 44.

[222] *Id.*

[223] *Id.*

[224] *See* Douglas Laycock, *Federal Interference with State Prosecutions: The Cases* Dombrowski *Forgot*, 46 U. CHI. L. REV. 636 (1979) (noting numerous instances where federal courts enjoined future prosecutions based on invalid state statutes); Burton D. Wechsler, *Federal Courts, State Criminal Law and the First Amendment*, 49 N.Y.U. L. REV. 740 (1974) (arguing that prior to *Younger* federal courts routinely invalidated state criminal law and enjoined prosecutions based on statutes that violated federal law).

[225] *See* Fiss, *supra* note 219.

[226] *See* Douglas Laycock, *Federal Interference with State Prosecutions: The Need for Prospective Relief*, 1977 SUP. CT. REV. 193.

violating the federal law by which they were bound. Neither *Younger* nor its progeny have ever suggested that state courts are not bound by the federal law that they are supposedly enforcing. Yet, *Younger* holds that, although the states are not sovereign in the sense that state law is superior to federal law, the states are sovereign in the sense that the structural components of the state—in this case the state courts—must be afforded deference by the federal courts even when they are misapplying federal law.

If state sovereignty is viewed through the lens of the concept of sovereignty set forth in the previous Part, it is difficult to justify the sort of structural (as opposed to policy) sovereignty set forth in *Younger*. As the conception of sovereignty set forth in the previous Part makes clear, sovereignty is primarily a means of allocating authority to make and enforce policy as law. The governmental structures of a sovereign entity are, therefore, merely the tools by which to implement the primary function of sovereignty—i.e., to make and enforce policy. If a given structure does not represent the authority to make and enforce policy, then that structure does not deserve respect as the agent of a sovereign entity. It would be one thing if the superior sovereign (defined as the entity that does have authority to make and enforce policy) decided as a matter of efficiency to allocate to the subordinate governmental entity (here, the state courts) the enforcement of any federal law that arises in the normal course of that subordinate entity's affairs. But *Younger* states as a matter of federal constitutional law that the relevant entities of the superior government—i.e., the federal courts—have no authority to interfere with the subordinate state entity, even to correct the subordinate entity's failure to enforce the superior entity's law.

The logical corollary of *Younger* is the proposition that the state courts are just as capable as the federal courts of determining the meaning of federal law. The state courts have taken this corollary to heart. State courts not only routinely review claims of federal law and reach results different than those reached by the federal courts, they also frequently decide federal questions in ways that directly contradict the interpretation of federal law given by the lower federal courts governing their territory.[227] As one Texas state court summarized its perception of state judicial independence, "[w]e are not bound to follow [a Fifth Circuit United States Court of Appeals decision] merely because Texas lies within the geographical limits of the Fifth Circuit. [That decision] is as persuasive as its logic."[228] The hubris of state courts that refuse to follow the definitive interpretations of federal law made by the federal courts with jurisdiction over the

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[227] *See* Donald H. Zeigler, *Gazing into the Crystal Ball: Reflections on the Standards State Judges Should Use to Ascertain Federal Law*, 40 WM. & MARY L. REV. 1143, 1153 (1999) ("The state courts take an extraordinary number of different positions on the 'elusive' question of the effect of lower federal court decisions. The positions fall on a spectrum ranging from 'slavishly follow' to 'totally disregard' and include just about every position imaginable in between.").

[228] Barstow v. State, 742 S.W.2d 495, 500–01 (Tex. Ct. App. 1987).

state's territory is remarkable, but it is only a short step from the principle of deference toward state courts at the heart of *Younger*.

As a matter of sovereignty theory, it is inconsistent to grant state courts the power to make definitive determinations of federal law that are at odds with the interpretations of federal courts themselves. If federal law is supreme—as *Younger* and the other abstention cases assume—then that law is binding on the states because they are not "sovereign" in the sense of that term discussed in the previous Part of this article. Yet, if the states may freely interpret federal law in their own self-interest (or at least against the federal interest in particular policies), as *Younger* effectively permits, then the state courts are effectively negating the sovereign power of the federal government. The judicial institutions of a particular government derive their power from the sovereign authority of the overall government itself. Thus, if a state government cannot avoid obeying federal law, as the Supreme Court routinely acknowledges, then state courts should not receive deference in situations where their actions essentially do just that.

Younger is important not only because it removes *enforcement* of federal law from the exclusive control of federal courts, but also because it removes *interpretation* of federal law from the exclusive control of federal courts. As Justice Harlan noted in objecting to the Court's pre-*Younger* tendency to allow federal court intervention in state proceedings that violate federal law, "[u]nderlying the Court's major premise . . . seems to be the unarticulated assumption that state courts will not be as prone as federal courts to vindicate constitutional rights promptly and effectively."[229] This is indeed the assumption traditionally used to justify favoring federal courts to enforce federal law,[230] but the more important theoretical point about *Younger* is that it permits the state courts to dictate the meaning of federal law that those courts have no sovereign authority to control. The power and authority of the state courts are subordinate to the sovereign power of the national government whose constitutional authority creates federal law and gives it force. *Younger* ignores this reality by permitting the state court tail to wag the federal law dog, while inconsistently maintaining that federal law is supreme. As with other areas in which the Court has granted states only partial sovereignty, *Younger* attributes to states characteristics of sovereignty that in the end the Court admits the states really do not have while it denies to the federal government effective power to enforce political authority that the Court admits the federal government *does* have. This is the defining paradox of the modern Court's states'-rights jurisprudence.

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[229] Dombrowski v. Pfister, 380 U.S. 479, 499 (1965) (Harlan, J., dissenting).

[230] The classic statement of federal court superiority in matters of interpreting and enforcing federal law is Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

4. *State Sovereignty and the Commerce Clause*

The Commerce Clause is a final area in which the Supreme Court has recently used the concept of state sovereignty to limit federal authority in inconsistent ways. The Court has been more subtle in relying on the concept of state sovereignty to limit federal power under the Commerce Clause than it has in the other three areas discussed in this Part, but state sovereignty clearly provides the broad theoretical basis for the Court's recent Commerce Clause decisions. To the extent that the Court finds itself once again groping toward a formal delineation of federal and state power, the Court's recent Commerce Clause decisions may represent a return to the *National League of Cities* style of state-sovereignty jurisprudence. This may produce a more logical scheme of sovereignty decisions, but only at the risk of thrusting the Court back into the morass of unsatisfactory formalistic determinations that the Court found untenable in a previous generation of Commerce Clause and Tenth Amendment jurisprudence.

In theory, the state-sovereignty restrictions placed on Congress's power since *United States v. Lopez*[231] are merely ancillary to the routine matter of interpreting the Commerce Clause language of Article I. The actual holding of *Lopez*, after all, is simply that the mere possession of guns within one thousand feet of a school is not "commerce" within the meaning of Article I, section 8 of the Constitution.[232] But the background of this textual interpretation is a theoretical assumption about the relative limits of federal and state sovereignty, and the proper roles of federal and state governments. Chief Justice Rehnquist's majority opinion in *Lopez* refers to this assumption only in passing, as if the underlying principle were so clear as to go unmentioned. If the Court were to uphold federal regulation of gun possession in proximity to schools, Chief Justice Rehnquist argued, "there never [would] be a distinction between what is truly national and what is truly local,"[233] because Congress could use the Commerce Clause to regulate anything having an economic impact upon society—as does virtually every human activity. "[I]f we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate."[234]

The immediate answer to these assertions is: So what? The relevant constitutional term defining Congress' power is "commerce," as the *Lopez* majority concedes. Likewise, the practical (as opposed to legal) definition of "commerce" in a modern industrial society rationally includes all economic

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231 514 U.S. 549 (1995).

232 *Id.* at 551.

233 *Id.* at 567–68.

234 *Id.* at 564.

activity, as the Court also implicitly concedes.[235] Therefore, the fact that the macroeconomic fabric of the country is such that the legal meaning of "commerce" has become broad enough to encompass virtually all human activity should be viewed as simply a reflection of natural economic evolution.[236] The reason the Court resists this conclusion about the broad reach of federal power is attributable to the Court's introduction of a variable that is completely extraneous to economic analysis (and for that matter, completely extraneous to an interpretation of the Commerce Clause). That variable is state sovereignty. The problem is that—as in Chief Justice Rehnquist's very similar majority opinion in *National League of Cities*—the Chief Justice does little to identify either the constitutional location or the precise contours of the state-sovereignty doctrine being used to limit Congress's Commerce Clause authority. As in *National League of Cities*, Chief Justice Rehnquist simply assumes that state sovereignty exists. One of Chief Justice Rehnquist's few explicit references to the parameters of this sovereignty also echoes his failed effort in *National League of Cities* by referring to "areas such as criminal law enforcement or education where States historically have been sovereign."[237]

The suggestion of a categorical allocation to the states of certain areas of regulation was raised by Chief Justice Rehnquist once again in his majority opinion in *United States v. Morrison*.[238] In this case the Court struck down the civil remedy provisions of the federal Violence Against Women Act, which provided federal civil relief for victims of gender-motivated violence. As in *Lopez*, the Court struck down this provision as an unconstitutional intrusion into

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[235] The *Lopez* majority does not dispute the factual basis of the contention by the government—which is also the central theme of Justice Breyer's dissent in *Lopez*, 514 U.S. at 615—that gun violence around schools has a measurable economic effect. Rather, the majority disputes the government's attempt to translate this real-world economic effect into a broad legal definition of "commerce."

[236] The Court's insistence on separating the economic effects of an activity from "commerce" makes sense only if the Court is willing to go as far as Justice Thomas and argue that the term "commerce" is limited to transactional activities—i.e., the actual buying and selling of goods and services. *See Lopez*, 514 U.S. at 585–89 (Thomas, J., concurring). This narrow, neoclassical definition of commerce was adopted by the Court during the latter part of the nineteenth century. *See, e.g.*, United States v. E.C. Knight Co., 156 U.S. 1 (1895); Kidd v. Pearson, 128 U.S. 1 (1888). Also, this definition was used to frame many of the Court's most notorious decisions striking down legislation during the New Deal. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). The memory of the political ramifications these opinions had on the Court, coupled with the economic flaws of the neoclassical worldview that generated this constricted view of "commerce" probably explains the fact that no other Justice joined Justice Thomas' opinion urging a return to this interpretation of the Commerce Clause. For a description and critique of the development of the neoclassical views of the Commerce Clause, see Gey, *supra* note 38.

[237] *Lopez*, 514 U.S. at 564.

[238] 529 U.S. 598 (2000).

the sovereign powers of the states, despite the Court's acknowledgment that the behavior in question had significant aggregate effects on the national economy.[239] These economic effects were insufficient to permit Congress to regulate violent criminal behavior under the Commerce Clause, the Court ruled, because the same rationale could be applied to many other categories of "traditional state regulation."[240] The other areas of "traditional state regulation" mentioned by the Court in *Morrison* include "marriage, divorce, and childrearing."[241] The most newsworthy aspect of language such as this is the interesting prospect that much of the federal criminal code may be unconstitutional, but the more significant theoretical point is that the Court seems to be returning to a *National League of Cities*-style absolutist, zero-sum approach to identifying aspects of state and national sovereignty. As the Court notes at one point in *Morrison*, "we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims."[242]

The problems this theory poses for the Court are obvious in light of the quick demise of *National League of Cities*. As the Court discovered in trying to apply its earlier traditional governmental functions analysis, it is not always easy to determine which functions fit that description. Does the Court in *Lopez* and *Morrison* really mean to suggest that the criminal law itself is exclusively the province of states, except where the crime consists of major economic transactions? If so, then the Court probably erred in its recent medical marijuana ruling.[243] In that case the Court upheld a federal statute that prevents the distribution of controlled substances, including marijuana that is used for medicinal purposes. But based on the Court's analysis in *Lopez* and *Morrison*, that statute probably violates the inherent state authority to deal with such matters on a local level.[244] Likewise, does prosecution of a local robbery by the federal

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[239] *Id.* at 615–16.

[240] *Id.* at 615.

[241] *Id.* at 616. In a third case, the Supreme Court suggested in dicta that the states have "traditional and primary power over land and water use." Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 174 (2001).

[242] *Morrison*, 529 U.S. at 618.

[243] *See* United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483 (2001) (upholding a federal injunction based on the Controlled Substances Act against nonprofit groups distributing marijuana used for medical purposes).

[244] The federal statute prohibits the distribution or manufacture of controlled substances, so it could be argued that a commercial element is present. Aside from the fact that the commercial nature of an inherent state activity should not (according to the Court's logic) undermine the state's ability to exercise its inherent sovereign authority to deal with such matters, the commercial element could easily be taken out of the case by projecting its application to individuals who grow marijuana for their own use or who receive marijuana from groups that do not charge for the substance. In these situations it would seem the federal statute should not apply (again, according to the Court's logic in *Lopez* and *Morrison*), but the

government depend on how much property is taken? Why would such an analysis be relevant at all, assuming that the underlying activity itself—crime and violence—is the matter of "traditional state regulation" that "the Founders denied the National Government and reposed in the States"?[245] Economic effects should be irrelevant if crime is, by its very nature, a noncommercial activity subject only to the states' apparently exclusive police power. The effect a consistent application of this doctrine would have on federal criminal regulation of drug trafficking goes without saying.

The problem raised by these questions is that in the modern world neither crime nor, for that matter, marriage, divorce, and childrearing are local affairs. The total exclusion of the federal government from the regulation of crime and other activities mentioned by the Court in *Lopez* and *Morrison* would render many of these national problems insoluble.[246] Even the pre-1937 Court recognized some national aspects to criminal behavior.[247] There are, in fact, indications that at least two members of the *Lopez* and *Morrison* majority have no stomach for the chaos that would ensue if the Court followed its instincts and granted states true—i.e., final and exclusive—sovereignty over entire categories of social policy. In *Lopez*, Justice Kennedy filed a concurring opinion, which was joined by Justice O'Connor, in which he argued in favor of a "practical approach" to the demarcation of federal and state power.[248] Justice Kennedy specifically eschews the sort of categorical approach that seems to be the central theme of Chief Justice Rehnquist's majority opinions in both *Lopez* and *Morrison*. One of

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injunction upheld by the Court prohibited all distribution or manufacture of marijuana, without reference to a commercial element of the transaction. *See id.* at 487 n.1.

[245] *See Morrison*, 529 U.S. at 615, 618.

[246] The problem of recovering child support payments from noncustodial parents who flee the jurisdiction of their child support obligations is one obvious example. *See* Child Support Recovery Act of 1992, 18 U.S.C. § 228(a)(1) (2000), Deadbeat Parents Punishment Act of 1998, 18 U.S.C. § 228(a)(3) (2000); *see also* United States v. Lewko, 269 F.3d 64 (1st Cir. 2001) (upholding both statutes against a Commerce Clause challenge based on *Lopez* and *Morrison*); United States v. Faasse, 265 F.3d 475 (6th Cir. 2001) (same). Another example would be federal regulation of pollution. *See Solid Waste Agency*, 531 U.S. at 174 (interpreting the federal Clean Water Act narrowly to avoid the "significant constitutional questions" posed by the federal government's claim of jurisdiction over ponds and mudflats, which the Court found "would result in a significant impingement of the States' traditional and primary power over land and water use").

[247] The earlier Court tended to limit its flexibility, however, to crimes that the Court characterized as involving moral "pestilence." *See* Champion v. Ames (The Lottery Case), 188 U.S. 321, 356 (1903) (referring to the "pestilence of lotteries" and upholding federal regulation of interstate trafficking in lottery tickets); Hoke v. United States, 227 U.S. 308 (1913) (upholding federal regulation of interstate transportation of women and girls for immoral purposes).

[248] *See* United States v. Lopez, 514 U.S. 549, 572 (1995) (Kennedy, J., concurring) (noting with favor several decisions in which the Court has adopted a "practical conception of the commerce power").

the lessons Justice Kennedy draws from the history of the Court's Commerce Clause decisions is "the imprecision of content-based boundaries used without more to define the limits of the Commerce Clause."[249]

Justice Kennedy takes the Tenth Amendment cases following *Garcia* as the model for his "practical approach" to the meaning of the Commerce Clause. Indeed, he includes in his *Lopez* concurrence a long quotation from Justice O'Connor's majority opinion in *New York v. United States* describing the constitutional balance of federal and state power.[250] Just as Chief Justice Rehnquist's Commerce Clause opinions echo his categorical approach to the Tenth Amendment, Justice Kennedy's "practical approach" to the Commerce Clause echoes Justice Powell's effort in *Garcia* to articulate a flexible balancing approach to the issue of state sovereignty.

Unfortunately, Justice Kennedy is no more successful than Justice Powell in devising a clear demarcation between state and federal power under a noncategorical approach. In the Commerce Clause area, as in the Tenth Amendment cases, the central logical dilemma—which neither Justice Kennedy nor Justice Powell answered satisfactorily—is how to grant states sovereign power that exists only up to the point at which the federal government's interest is strong enough to convince the Court to remove from the states the protective cloak of sovereignty. For all his overtures to practicality and flexibility in such determinations, Justice Kennedy eventually relies on the same categories as Chief Justice Rehnquist. The central question in Justice Kennedy's analysis, as in Chief Justice Rehnquist's, is "whether the exercise of national power seeks to intrude upon an area of traditional state concern."[251] If so, then the attempt to exercise national power under the Commerce Clause is unconstitutional, regardless of the federal government's strong interest in the matter, and regardless of the fact that (unlike the federal actions considered in the Tenth Amendment cases) the federal action operates on private individuals and therefore does not directly affect the states *qua* states at all.

As illustrated by Justice Kennedy ultimately resorting to a *National League of Cities*-style approach of allocating sovereignty over certain "traditional" policy matters to the states, the effort to devise a "practical" solution to the matter of state sovereignty is probably futile. Efforts to use the concept of state sovereignty to limit Congress' enumerated power under the Commerce Clause will either fail for lack of coherent definitions of "traditional" functions or will evolve into a full-fledged body of doctrine isolating important areas of national concern from federal regulation. In this as in other areas of constitutional doctrine, states either are sovereign or they are not. If Justice Kennedy and the other members of the

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[249] *Id.* at 574 (Kennedy, J., concurring).

[250] *Id.* at 574–75 (Kennedy, J., concurring) (quoting New York v. United States, 505 U.S. 144, 157 (1992)).

[251] *Id.* at 580 (Kennedy, J., concurring).

Court's current majority are serious about granting the states real sovereignty, they must abandon any effort to sugarcoat the effort and acknowledge the consequences of removing power from the national government to address national problems. The fact that the Justices are reluctant to do so explicitly and without equivocation says a great deal about the wisdom of the path they have chosen.

C. *The Theoretical Rationales for State Sovereignty*

The premise of this article is that the only coherent theory of sovereignty is one that does not permit the sharing of "sovereign" powers by the state and federal governments. One or the other government must be deemed sovereign; not both. The preceding portions of this Part have attempted to bolster this conclusion by providing several examples of the Court hedging its bets on granting states true sovereignty, in ways that render theoretically inconsistent a range of decisions in several major constitutional areas. A possible response to the argument that the Court has produced an incoherent body of doctrine is that the Court simply has not done a very good job of articulating what Justice Kennedy calls the "practical approach" to the issue of state sovereignty. Perhaps it is possible to provide a more precise rationale for this "practical" version of state sovereignty than the Court has been able to muster, and thereby justify the sharing of sovereign powers by states and the federal government.

The problem with this response is that the real difficulty with the concept of state sovereignty goes much deeper than the simple inability of the Supreme Court to determine how to articulate the balance it has struck between the state and federal sovereign roles. Every plausible substantive rationale for granting states sovereign power either can be achieved without granting states sovereignty at all or, conversely, would require ascribing to the states absolute sovereignty over certain policy matters of the sort described in Part III of this article—i.e., sovereignty that is exclusive, final, and enforceable against every other entity, including the federal government. Under the substantive rationales usually offered to justify state sovereignty, anything short of exclusive sovereignty (such as Justice Powell's *Garcia* proposal to grant states an undefined and amorphous half-sovereign power based on a balancing test of national and state interests) will fail utterly to provide the benefits allegedly to be realized under a regime governed by the comprehensive protection of states' rights.

A great deal of effort has been expended attempting to justify state sovereignty within a system of judicially enforced federalism, but the primary arguments in favor of such a system can be summed up in four basic assertions: (1) sovereign states would be laboratories of experimentation capable of developing new and beneficial social and political policies; (2) governance on the state level would be more sensitive to local conditions and idiosyncrasies than national governance; (3) the independent policy making authority provided by

judicially protected state sovereignty would allow for ideological diversity among the various regions of the country and thereby facilitate individual choice of political affiliation and association; and (4) diversifying political power by allocating specific authority to the states would prevent the accumulation of power by the federal government, and therefore avoid federal government tyranny.[252] A review of these assertions reveals that they either do not require the judicial protection of state sovereignty, or they require exclusive sovereignty of a sort that none of the current Justices apparently want to endorse forthrightly.

With regard to the first assertion, for example, even if one assumes that the laboratories-of-experimentation assertion is a valid description of the benefits of state governance, the realization of those benefits does not require a system of judicially protected state sovereignty. The basic thrust of the first rationale is that independent states will foster a healthy competition to develop new social policies that will ultimately benefit the entire nation. In Justice Brandeis' famous formulation, "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."[253] Justice Kennedy echoes this sentiment in *Lopez* to justify limiting Congress' power to impose criminal law solutions on social problems such as gun violence.[254] One academic version of this argument modifies Justice Brandeis' phrasing to emphasize that it is really the possibility of innovation, rather than experimentation per se, that is the great benefit of federalism:

> Countless state and local governments, remote from one another but facing similar problems, develop numerous twists on solving them. . . . [G]overnments learn of techniques employed elsewhere. The ones that seem sensible, that work, survive; many other ideas die on the vine. This evolutionary process works best precisely because many governments concoct ideas on their own . . . .[255]

The factual premise of the assertion that states are likely to experiment is open to question,[256] but the more important point for the purposes of the present

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[252] For standard references containing different, but similar, renditions of these four themes, see Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 386–405 (1997); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 3–10 (1988); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493–511 (reviewing Raoul Berger, FEDERALISM: THE FOUNDERS' DESIGN (1987)); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After* Garcia, 1985 SUP. CT. REV. 341, 380–414.

[253] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[254] *See Lopez*, 514 U.S. at 581 (Kennedy, J., concurring).

[255] Friedman, *supra* note 252, at 399–400.

[256] Susan Rose-Ackerman's famous rejoinder to the "laboratory of experimentation" argument notes that the political reality of risk-averse ambitious local politicians is such that

discussion is that even if the laboratories-of-experimentation argument is correct, judicial enforcement of state sovereignty will do little to increase the incidence of beneficial sociopolitical experiments if those experiments can be exported easily to other states. Local experiments will not cease under a system denying states true sovereign power. Even if the federal government is recognized as the only true sovereign, states will continue to exist and pursue individualized policies until the federal government intervenes under one of its enumerated powers and preempts further state action. Thus, if local experiments are beneficial generally to citizens everywhere regardless of their geographic location, then other states will recognize the benefits and adopt the same policies (thus creating a de facto national system of regulation) or the federal government will adopt legislation extending the policies nationwide through a system of nationally applicable laws.

To the extent that state sovereignty generates unique local policy experiments that are not adopted by other states or the federal government, those experiments are likely to be ones that benefit only one or a small number of similar states. If those unique local laws do not harm neighboring states, the laws will result in a net gain in overall well-being. But if those local experiments do harm to neighboring states, then the laboratories-of-experimentation argument cannot be viewed as a positive development. The laboratories-of-experimentation argument succeeds as a justification for state sovereignty only if it increases the general well-being of the entire country (since the alternative is an argument for deleterious competition among the states for exclusive advantage over their neighbors). If experiments in state "laboratories" will ultimately benefit only some states (especially if these benefits come at the expense of other states), then these experiments actually amount to invidious competition among states to the detriment of the nation as a whole. This is precisely the sort of situation in which the federal government should have the authority to represent the commonweal; it is also precisely the sort of nationalistic action that would be prevented by a system defined by true state sovereignty. In such situations the laboratories-of-experimentation model actually provides an argument *against* state sovereignty, not for it.[257]

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radical experiments are unlikely to happen very often. *See* Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593 (1980).

[257] The classic example would be child labor. In times of severe economic depression some states may "experiment" with lowering the legal working age to allow children to work, thereby reducing labor expenses for companies within that state (by increasing the pool of available workers) and attracting scarce investment dollars to that state. Such an "experiment" would not benefit the country as a whole (assuming there is a rough consensus that children should not be allowed to work in factories at young ages) and would benefit the experimenting state only by attracting investment away from other states with more rigorous work rules. This is, of course, the "race to the bottom" argument that failed to convince the Supreme Court during the pre-1937 era of state sovereignty, which constitutionalized laissez faire economics. See *Hammer v. Dagenhart*, 247 U.S. 251 (1918), in which the Court observes:

The second argument in favor of state power—i.e., that governance on the state level is more sensitive to local conditions than national governance—is likewise not dependent on a regime of judicially enforced state sovereignty. In the Court's formulation of this argument, federalism "assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society."[258] At some level theorists on both sides of the state-sovereignty debate would agree with this statement. Even the strongest proponent of national power is unlikely to oppose some condition-specific local policies. As the Supreme Court has recognized in its dormant Commerce Clause decisions, local conditions occasionally justify even discriminatory state legislation to protect certain natural resources that could be destroyed or poisoned by the introduction of foreign substances from other states.[259] Conversely, policies that attempt to isolate one state from national economic problems, or from the general operation of the national marketplace, are "virtually per se invalid."[260] In the commercial arena, states may not even monopolize for the beneficial use of their own residents natural resources located within their geographic boundaries. The Court has "consistently . . . held that the Commerce Clause . . . precludes a state from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders or to the products derived therefrom."[261]

In its dormant Commerce Clause decisions, the Court draws a distinction between local favoritism that is benign because it is absolutely necessary to prevent a localized natural catastrophe and local favoritism that is invidious because it is intended simply to leverage some natural advantage into a commercial windfall for one state and its residents. The prohibition of "economic Balkanization"[262] reflects a more general disfavor of state actions that have the effect of undermining the national interest as a means of aggrandizing the interests of a single state and its residents. A system of judicially enforced state sovereignty would have little positive effect on benign state actions responding to

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> There is no power vested in Congress to require the states to exercise their police power so as to prevent possible unfair competition. Many causes may coöperate to give one State, by reason of local laws or conditions, an economic advantage over others. The Commerce Clause was not intended to give to Congress a general authority to equalize such conditions.

Id. at 273.

[258] Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

[259] *See, e.g.*, Maine v. Taylor, 477 U.S. 131 (1986) (upholding the constitutionality of a Maine statute prohibiting the importation into the state of nonnative baitfish, which could potentially transmit parasites that were lethal to local species).

[260] Or. Waste Sys., Inc. v. Dept. of Envt'l Quality, 511 U.S. 93, 99 (1994).

[261] New England Power Co. v. New Hampshire, 455 U.S. 331, 338 (1982).

[262] *See* Hughes v. Oklahoma, 441 U.S. 322, 325 (1979).

legitimate problems created by local conditions because, if those conditions are truly idiosyncratic and unrelated to the conditions in other states, there is little cause for the federal government to forbid states from acting to resolve the local problem and likewise little cause for other states to object. On the other hand, a system of judicially enforced state sovereignty would have decidedly negative effects on the national interest if it were used to protect states that act in self-interested ways to favor their own residents at the expense of their neighbors.[263]

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[263] One example of how the concept of state sovereignty is already used in this way is the market participation exception to the normal dormant Commerce Clause rule prohibiting states from discriminating against out-of-state economic actors. In *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976), the Court held that a state may discriminate against out-of-state residents if the state participates in a particular economic market, rather than if the state simply regulates that market. The Court reasoned that "[n]othing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." *Id.* at 810. *Hughes* was decided the same day as *National League of Cities*, and although the Court did not expressly link the two decisions, *Hughes* unmistakably echoes many of the same state-sovereignty themes highlighted in *National League of Cities*. Four years later the Court acknowledged the linkage between the market participation exception, the concept of state sovereignty, and *National League of Cities*:

> Considerations of sovereignty independently dictate that marketplace actions involving "integral operations in areas of traditional governmental functions"—such as the employment of certain state workers—may not be subject even to congressional regulation pursuant to the commerce power. National League of Cities v. Usery, 426 U.S. 833, 852 (1976). It follows easily that the intrinsic limits of the Commerce Clause do not prohibit state marketplace conduct that falls within this sphere. Even where "integral operations" are not implicated, States may fairly claim some measure of a sovereign interest in retaining freedom to decide how, with whom, and for whose benefit to deal.

Reeves, Inc. v. Stake, 447 U.S. 429, 438 n.10 (1980).

The Court's grandiose visions of state sovereignty are hard to reconcile with the particularized and brazenly discriminatory effects of the state's action in *Reeves*. The case involved a cement company that the state of South Dakota had owned for fifty years. Traditionally, the company had sold cement to buyers both inside and outside the state. From 1970–1977, 40% of the plant's production had been sold to purchasers outside the state. The plaintiff was a contractor from an adjoining state who had purchased cement from the South Dakota plant for twenty years. The South Dakota plant provided him with 95% of his cement needs. In 1978, a cement shortage developed in the region, and the South Dakota legislature passed a law requiring the state's plant to sell to all South Dakota buyers before selling to any out-of-state purchasers. As a result, the plaintiff had to reduce his business by 75% and lost substantial business to South Dakota contractors who had a secure supply of cement. It is difficult to reconcile the discrimination permitted in *Reeves* with the absolute rule against discrimination in cases such as *Philadelphia v. New Jersey*, 437 U.S. 617 (1978). In both cases the states are using their governmental authority to warp the marketplace in a way that favors one group of Americans to the direct harm of another group of Americans. But at least in *Reeves*, the Court is not shy about acknowledging the true nature of the concept of state sovereignty: "Such policies, while perhaps 'protectionist' in a loose sense, reflect the essential

With regard to the second purported benefit of local political power, the concept of judicially protected state sovereignty adds little to the states' authority to pursue bona fide local interests; the concept is important only insofar as it would protect self-interested state policies that have deleterious extraterritorial effects.[264]

The third and fourth arguments in favor of localized political power probably do require a system governed by true state sovereignty. The third argument asserts that state power will lead to the adoption of a range of different choices on social and political policy, which in turn will facilitate individual choice by providing a localized body of law more consistent with the desires of those living in an area more geographically compact and socially homogeneous than the nation as a whole. In Michael McConnell's description of this argument, granting states the authority to make major policy decisions on a local level will offer a greater proportion of citizens of the nation as a whole the ability to have their preferred policy chosen by the relevant political jurisdiction.[265] McConnell reasons:

> [A]ssume that there are only two states, with equal populations of 100 each. Assume further that 70 percent of State A, and only 40 percent of State B, wish to outlaw smoking in public buildings. The others are opposed. If the decision is made on a national basis by a majority rule, 110 people will be pleased, and 90 displeased. If a separate decision is made by majorities in each state, 130 will be pleased, and only 70 displeased.... In the absence of economies of scale in government services, significant externalities, or compelling arguments from justice, this is a powerful reason to prefer decentralized government.[266]

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and patently unobjectionable purpose of state government—to serve the citizens of the State." *Reeves*, 447 U.S. at 442.

[264] The distinctions between local governance in a system defined by state sovereignty and local governance operating within a framework defined by a single national sovereign is also the focal point of one of the best (and most vociferous) academic critiques of the Court's states'-rights jurisprudence. *See* Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994). Professors Rubin and Feeley's central thesis is that the benefits of decentralization have little or nothing to do with the concept of states' rights. Rubin and Feeley argue that states' rights are largely about political symbolism and the mythology of rural, small-town America. They view federalism as "a neurosis, a dysfunctional belief to which we cling despite its irrelevance to present circumstances." *Id.* at 950. Unfortunately, since Rubin and Feeley published their article the Court has gone out of its way to make federalism increasingly relevant to present circumstances. It is no longer possible to say, as Rubin and Feeley wrote in 1994, that the Supreme Court's "enthusiasm for federalism seems inversely related to the significance of the issue at hand." *Id.* at 949. It is also no longer possible to say that the Court "has remained silent, or granted its approval, when significant national policies have displaced state authority." *Id.* at 950. Federalism may still be a neurosis, but now it is one that requires professional treatment.

[265] McConnell, *supra* note 252, at 1494.

[266] *Id.* (footnotes omitted).

Likewise, McConnell argues, just as localized policymaking is likely to produce a greater correlation between legal action and public policy preferences of the local population, it is also less likely than a national policymaking process to produce oppressive legislation. Specifically, McConnell asserts:

> The main reason oppression at the federal level is more dangerous is that it is more difficult to escape. If a single state chose, for example, to prohibit divorce, couples seeking a divorce could move (or perhaps merely travel) to other states where their desires can be fulfilled. Oppressive measures at the state level are easier to avoid.... On the other hand, a nationwide rule—either voted by Congress or adopted by the courts as a construction of the due process clause—would have far more dramatic consequences.[267]

It would be easy to propose rejoinders to these arguments. The notion that popular majorities always get their way in state political processes may not always be true, especially when those majorities come up against the concentrated power of local economic interests (the tobacco lobby in states such as North Carolina, for example). The dilution of locally powerful factions through the nationalization of political authority was one of the primary rationales justifying the transition from the Articles of Confederation to the Constitution, as Madison's forceful argument in Federalist 10 exemplifies.[268] Moreover, the state in which a person lives is often defined more by chance than by choice. Personal and economic factors are probably more important in dictating an individual's choice of a homestead than that individual's ideological compatibility with his or her home state's political policies. It is not uncommon for individuals to move to (or remain at) a particular place to be close to family, friends, or a job. It would be

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[267] *Id.* at 1503.

[268] *See* THE FEDERALIST NO. 10, at 83 (James Madison) (Clinton Rossiter, ed., 1961):

> The other point of difference is the greater number of citizens and extent of territory which may be brought within the compass of republican than of democratic government; and it is this circumstance principally which renders factious combinations less to be dreaded in the former than in the latter. The smaller the society, the fewer probably will be the distinct parties and interests, composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other.... Hence, it clearly appears that the same advantage which a republic has over a democracy in controlling the effects of faction is enjoyed by a large over a small republic—is enjoyed by the Union over the States composing it.

Id.

highly unusual for someone to move to New York simply because the state typically votes Democratic.

In any event, even if the ideological diversity arguments in favor of local political power are accurate, the important point for present purposes is that these arguments require the states to be given real power over significant issues, and also prohibits the national government from taking that power away. Thus, state sovereignty—true state sovereignty, not the loose, indefinite variety proposed by Justice Powell in *Garcia*—is an unavoidable mandate if one takes the ideological diversity argument seriously. The same mandate of true state sovereignty arises from the fourth argument in favor of localizing political power. As Steven Calabresi summarizes the fourth argument:

> Constitutionally mandated decentralization keeps government nearer the people, where it can be watched more closely and where it is more likely to have good information about popular preferences as to good policy. In economic terms, monitoring, agency, and information costs all should be lower at the state level because there is a closer identity of interests between state governments and the governed than is possible at the national level, where government is inevitably more remote from the citizenry.[269]

This is viewed by many proponents of strong federalism (including the current majority on the Supreme Court) as the most important argument because wide dissemination of power to local governments serves to prevent the political tyranny threatened by the accumulation of power in one national government. "Perhaps the principal benefit of the federalist system is a check on abuses of government power."[270]

As with the ideological diversity argument, the factual basis of the avoidance of tyranny argument is questionable. The issue of whether a government is "remote from the citizenry" involves much more than simple geography. The vast differences in information available to the general public regarding federal and state government action alone may undermine any sense that the federal government is more "remote" than state government. Few states have the equivalent of in-state versions of the *New York Times*, the national news magazines, or television network news organizations to inform them about the workings of their state government. Since few citizens physically travel to either Washington, D.C. or their state capital to see their governments at work, the fact that the state capital may require a shorter journey than the trip to Washington, D.C. is far less significant than the fact that most citizens would have a more difficult time naming their state representatives and senators than they would naming the equivalent officeholders at the national level.

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[269] Steven G. Calabresi, *Federalism and the Rehnquist Court: A Normative Defense*, 574 ANNALS OF THE AM. ACAD. POL. & SOC. SCI. 24, 27–28 (2001).

[270] Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

Nevertheless, the significant factor here is that the prevention-of-tyranny argument, like the ideological diversity argument, requires a system of state governments in which the states are truly sovereign and can enforce that sovereignty by judicial prohibition of federal encroachment. Without the authority to enforce their sovereign interests through legal processes, the states' sovereign powers would exist entirely at the whim of the federal government, which (as the proponents of states' rights like to point out) will often find itself at odds with officials in the states. "The realities of political life . . . suggest that congressional interests frequently clash with those of state and local governments. . . . In general, the 'hydraulic pressure inherent within each of the separate Branches [of government] to exceed the outer limits of its power' will reduce any congressional solicitude for state autonomy."[271]

The fact that the federal government has exempted state and local governments from the operation of many federal regulations may belie this statement,[272] or at least indicate that there are a few leaks in the hydraulics of the federal government power grab. Nevertheless, it is a political truism that any entity that has power will seek to keep that power intact and increase it if possible.[273] The same truism applies to the states, however, and more

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[271] Merritt, *supra* note 252, at 17 (quoting INS v. Chadha, 462 U.S. 919, 951 (1983)). For a more comprehensive explanation of the reasons federal government officials are unlikely to protect state-sovereignty interests, see Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752, 790–99 (1995). The reasons Calabresi enumerates include: (1) the nationalization of politics, (2) the diminished role of state legislatures in controlling the process of sending representatives to Congress, (3) the reduced influence of state political party machines and the growing influence of national PACs and special interest groups, (4) the political incentives at the national level for representatives to increase the amount of federal largess they can allocate to their districts, and (5) the equally strong incentive for local political figures to grab as many federal government resources as possible. What is striking about all these arguments is that none of them assert that an increase in national government power will directly harm the local citizenry in a concrete way; rather, the arguments assert that an increase in national government power will directly harm the local *governments* and their officials by transferring power away from them. The asserted harm to the local citizens is largely abstract in nature, in the sense that the citizens are assumed to benefit from parochial governance, and are therefore presumptively harmed by any exercise of national power that inhibits local politicians from pursuing their policy agendas.

[272] Justice Blackmun collected several examples of these exemptions in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 553, 553 n.16 (1985). Following *Garcia*, which involved the application of the Fair Labor Standards Act to state workers, the states negotiated with Congress and received additional exemptions covering state and local police and firefighters. *See* 29 U.S.C. § 204(f) (2000).

[273] As Hobbes recognized, this is as much a psychological as a political phenomenon:

> I put for a generall inclination of all mankind, a perpetuall and restlesse desire of Power after power, that ceaseth onely in Death. And the cause of this, is not always that a man hopes for a more intensive delight, than he has already attained to; or that he cannot be

importantly, to state politicians. The politicians are important because the real antagonists in battles over federalism are not philosophical abstractions labeled "state government" and "the federal government." The conflicts described in the federalism literature between federal and state governments are really conflicts between the ambitious politicians and bureaucrats who run the federal and state governments.

There is little to distinguish between the mindsets of local and national politicians. The righteous, self-consciously populist tone of many proposals to empower the states is seriously misplaced; the ongoing struggle for power between the federal and state governments is not a fight between rapacious, self-interested national politicians and passive, public-spirited local politicians. Both antagonists are, in the end, seeking to boost their own political fortunes by satisfying their very different constituencies. Ironically, the arguments used by proponents of states' rights—i.e., that national politicians are divorced from their state roots and, therefore, cannot be counted upon to defend local interests—highlight the insurmountable problem with states rights, which is that parochial interests are the root of the movement for states' rights, and these parochial interests very often are incompatible with the national interest. Just as the national government and its politicians cannot be expected to give undue deference to the wishes of narrow local concerns, the states and their politicians cannot be expected to defer to any national policy that conflicts sharply with their own insular self-interest. Alexander Hamilton recognized this underlying political reality of state sovereignty long ago when he noted:

> [T]here is in the nature of sovereign power an impatience of control that disposes those who are invested with the exercise of it to look with an evil eye upon all external attempts to restrain or direct its operations. From this spirit it happens that in every political association which is formed upon the principle of uniting in a common interest a number of lesser sovereignties, there will be found a kind of eccentric tendency in the subordinate or inferior orbs by the operation of which there will be a perpetual effort in each to fly off from the common center. This tendency is not difficult to be accounted for. It has its origin in the love of power. Power controlled or abridged is almost always the rival and enemy of that power by which it is controlled or abridged. This simple proposition will teach us how little reason there is to expect that the persons intrusted with the administration of the affairs of the particular members of a confederacy will at all times be ready with perfect good humor and an unbiased regard to the public weal to execute the resolutions or decrees of the general authority. The reverse of this results from the constitution of man.[274]

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content with a moderate power; but because he cannot assure the power and means to live well, which he hath present, without the acquisition of more.

HOBBES, *supra* note 88, at 49–50.

[274] THE FEDERALIST NO. 15, at 111 (Alexander Hamilton) (Clinton Rossiter, ed., 1961).

If, in the end, localism is as valued as the principles of equal protection, free speech, and religious freedom in the American constitutional scheme, then the proponents of localism have an obligation to acknowledge the consequences of this position. It is not possible to argue consistently in favor of strong constitutional protection of local governmental authority and at the same time deny the unsettling consequences of state sovereignty.[275] If we are to have judicial enforcement of federalist values, then we must have some form of state sovereignty, and if we are to have state sovereignty, then some form of a *National League of Cities*-style demarcation of state and federal influence is necessary. Once the realm of the sovereign states is defined precisely, the federal government must be rendered powerless to intrude into the sovereign states' prerogatives, no matter how great the national interest.

This is where the logic of state sovereignty leads. The fact that the courts thus far have refused to follow that logic to its ultimate (and probably disastrous) conclusion means that, despite the many references to the concept in the Court's recent opinions, even the current majority on the Court is hesitant about the possible ramifications of their theory. But in the absence of a whole-hearted embrace of state sovereignty, the Justices' existing partial defense of states' rights

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[275] For one of the more interesting attempts to salvage judicial protection of states' rights while renouncing the concept of state sovereignty, see Rapaczynski, *supra* note 252. Rapaczynski relies on a definition of sovereignty similar to that set forth in Part III of this article. *See id.* at 347–48 (asserting that sovereignty entails: (1) the control of particular subjects and a particular domain, (2) the ability to issue legally valid, enforceable dictates, and (3) the final authority over relevant subject matters). When defined in this way, Rapaczynski notes that the concept of state sovereignty is largely incompatible with the purposes and operation of the Constitution. "The very recognition of the existence of the American nation and the creation of the United States as the expression of its political will mean that the Framers recognized the degree of interdependence among the states that made thinking of them in terms of sovereignty largely inappropriate." *Id.* at 353–54. Having rejected the concept of state sovereignty, however, Rapaczynski then proposes that the courts devise a functional analysis of federalism, which would then be used to restrict federal government activity interfering with certain central aspects of state activity. This functional analysis is drawn from many of the same rationales justifying state sovereignty discussed in this Part. Rapaczynski argues that two of these traditional rationales—"tyranny prevention and the provision of a space for participatory politics"—should be the basis for this new "functional" protection of the states. *Id.* at 414. The problems with using these rationales to protect state activity have been discussed above. *See supra* notes 231–51 and accompanying text. These problems doom Rapaczynski's attempt to salvage some system of judicially protected states' rights because no matter how that system is repackaged, it still amounts to a system of state sovereignty. Even if the problems of defining and applying these principles could be surmounted (which even Rapaczynski acknowledges would be difficult), the courts would in effect be carving out a particular set of policies in which regulation would be allocated to states and denied to the federal government. Using Rapaczynski's terminology, the states would be provided a domain, final authority over policies enacted within that domain, and legal enforceability of the policies against the federal government and others. In other words, the states would be given sovereignty of a sort that Rapaczynski himself recognizes is incompatible with the American constitutional scheme.

is robbed of any substantive justification. The good news is that the powers the Court has conferred on the states in recent Tenth Amendment, Eleventh Amendment, Commerce Clause, and abstention decisions should be easy to overturn once some future Court thinks about these matters carefully and dispels once again the myth of state sovereignty.

V. CONCLUSION

It might be true, as Justice Holmes famously suggested, that the "life of the law" is experience, not logic.[276] But a little logic now and then is still a good thing. The logic of state sovereignty is unmistakable. If states are not sovereign, then there is no logical reason that the federal government should be prohibited from exercising fully its enumerated powers, even if the exercise of those powers interferes with the operations or policies adopted by certain states. If states are sovereign, on the other hand, then the Court has been far too accommodating of federal government policies that intrude into state prerogatives. These two options are mutually exclusive; the Court cannot continue to try having it both ways by denying states true sovereignty—i.e., exclusive, final, and enforceable power over matters within clearly defined sovereign domains—while simultaneously granting states the authority to fend off unwanted federal encroachments under ambiguous rules that defy clear explanation and sometimes (see, for example, the morass of Eleventh Amendment law) common sense.

There would be little downside to an outright recognition that states lost their sovereignty with the adoption of the Constitution. States operating within a federal system defined by a single national sovereign would not be able to use the courts to thwart unwanted federal policies, but neither would the states go out of existence or lose effective control over policy matters that are truly local in nature. The parochial and mundane nature of most local issues insulates the states from federal interference for the simple reason that there is little to merit the attention of ambitious politicians who populate the policymaking institutions of the national government. Grabbing control over issues that general consensus dictates are largely local in nature is not the way to advance a national political career.

In contrast, granting states true sovereignty would finally require the courts to define the parameters of that sovereignty—a task the Court so badly bungled in *National League of Cities* that even those who defended the general theory of *National League* (see Justice Powell's dissent in *Garcia*, for example) sheepishly gave up the effort to defend that decision's actual holding. The only thing worse than a situation defined by the open-ended quasi-sovereignty advanced by the likes of Justice Powell would be a situation in which the Court actually did define the specific boundaries of the new state sovereigns, which would then be the catalyst for a Yugoslavian-style battle among parochial sovereign entities that

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[276] *See* OLIVER W. HOLMES, JR., THE COMMON LAW 1 (1881).

have the same primary objective as every other true sovereign: i.e., dominance of neighboring sovereigns. Why embracing the myth of state sovereignty makes sense as political theory in the modern age is a question that the Court has not yet answered, nor, in its haste to evade acknowledging the extreme implications of its actions, even seen fit to address.