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# Federalism and Subsidiarity: Perspectives from U.S. Constitutional Law

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**Federalism and Subsidiarity:  
Perspectives from U.S. Constitutional Law**

**by Steven G. Calabresi<sup>1</sup> & Lucy D. Bickford<sup>2</sup>**

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<sup>1</sup> Class of 1940 Professor of Law, Northwestern University. Copyright (c) 2012—all rights reserved. Professor Calabresi would like to dedicate his work on this article to his Uncle Guido Calabresi.

<sup>2</sup> J.D. Northwestern University, Class of 2011. We would like to thank Jacob Levy, Jim Flemming, Corey Brettschneider, A.J. Bellia, Erin F. Delaney, Pablo Contreras, Michael Rosman, Andy Koppelman, and Bernie Black for their helpful comments. We presented this paper at the American Political Science Association annual meeting in 2011, at the Northwestern University School of Law internal faculty workshop series, and to a group at Notre Dame Law School and are very grateful for the many helpful questions and comments we received.

We live in an Age of Federalism.<sup>3</sup> Of the G 20 countries with the most important economies in the world, at least twelve have federal constitutional structures and several others are experimenting with federalism and the devolution of power. The first group includes the United States, the European Union, India, Germany, Brazil, Argentina, Canada, Indonesia, Australia, Russia, Mexico, and South Africa. The latter group includes the United Kingdom, Spain, Belgium, Italy, and Japan. Of the 10 countries with the highest GDPs in the world, only two – China and France – lack any semblance of a federal structure. Of the world’s 10 most populous countries, eight have federal or devolutionary structures -- every country except for China and Bangladesh. The only top ten countries by territorial size to lack a federal structure are China and Sudan, which recently experienced a secession.

Though the U.S. invented constitutional federalism only 220 years ago, today it has taken the world by storm. Every major country in the world has some federal structure except China and France (a European Union (“EU”) member). Nation states worldwide are under pressure to surrender power both to growing international entities such as the EU, NAFTA, GATT and NATO, and to regional entities as well. Thus, the EU’s twenty-seven member countries have all surrendered significant powers over trade, commerce, and their economies to the confederal EU government. At the same time, these countries have faced growing pressure to devolve power to their national subunits. Most evidently, the United Kingdom has devolved power to Scotland, Wales, and Northern Ireland and Spain has devolved power

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<sup>3</sup> Steven G. Calabresi, “*A Government of Limited and Enumerated Powers*”: *In Defense of United States v. Lopez*, 94 **Mich. L. Rev.** 752, 756-773 (1995).

to Catalonia and the Basque region. Even tiny Belgium has devolved most of its power to ethnic subunits in Flanders, Wallonia, and Brussels. Federalism limits meanwhile remain very constraining in such European countries as Germany and Switzerland. In North America, Canada has surrendered some economic power to NAFTA – a transnational free trade association – while surrendering other powers to the increasing assertive province of Quebec. It is not an exaggeration to say that our time is witness to the decline and fall of nation states as they dissolve from above and from below.

The United States has seen a revival of interest in federal limits on national power since the U.S. Supreme Court’s 1995 decision in *United States v. Lopez*.<sup>4</sup> Beginning in the 1990’s, the Rehnquist Court limited national power in a series of important federalism cases: mandatory retirement age for state court judges,<sup>5</sup> compelling state participation in a federal radioactive waste program,<sup>6</sup> compelling state officers to execute federal gun control laws,<sup>7</sup> federal protection of religious freedoms,<sup>8</sup> and federal protection for women against violence.<sup>9</sup> A major issue on the U.S. Supreme Court’s current agenda is whether President Obama and Congress exceeded the scope of national power with a national plan that forces otherwise uninsured individuals to buy health insurance. Constitutional federalism is more vibrant in the United States than at any time since the New Deal.

This Age of Federalism marks the end of an experiment with nationalism that began with the French Revolution’s rejection of provincial power and endorsement of hyper-

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<sup>4</sup> 514 U.S. 549 (1995).

<sup>5</sup> *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

<sup>6</sup> *New York v. United States*, 505 U.S. 144 (1992).

<sup>7</sup> *Printz v. United States*, 521 U.S. 898 (1997).

<sup>8</sup> *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>9</sup> *United States v. Morrison*, 529 U.S. 598 (2000).

centralization. This nationalism experiment gathered steam with Italian and German unification in the Nineteenth Century and with the carving up of the Austro-Hungarian and Turkish Empires after World War I into dozens of newly independent nation states. The last gasp of nationalism, in retrospect, came when many African and Asian countries that had once been Britain's and France's colonial subjects declared independence. In the 1950's and 1960's, post-colonial nations formed new transnational confederal entities to perform the defense and free trade functions that had once been performed by the European empires. Ultimately the G-20, NATO, the EU, NAFTA, and GATT fulfilled those needs.

Fundamentally, the Age of Federalism responds to one of the most urgent questions of democratic theory: What is the proper size of a democracy? It is all well and good to believe the people ought to rule themselves, but at which demos or territorial unit of the people?<sup>10</sup> Is the relevant territorial demos for a resident of Quebec City the Province of Quebec, the country of Canada, the whole area covered by NAFTA, or the whole area covered by NATO? The answer varies depending on whether the matter at hand is cultural, economic, or related to foreign policy and defense.

Proponents of democratic theory often ask: What are the rights of minority groups as against the will of the majority? But this question presupposes we know the appropriate territorial unit for addressing the issue. French speakers may be a majority in the Province of Quebec, a powerful minority with constitutional rights in Canada, or a small minority in NAFTA and NATO. Which unit – provincial, national, or international – is the correct one to decide a given matter? We will offer some thoughts on this question below.

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<sup>10</sup> The most sophisticated discussions of this issue of which we are aware include: **Robert A. Dahl & Edward R. Tufte, *Size and Democracy*** (1973); and **Alberto Alesina & Enrico Spolaore, *The Size of Nations*** (2005).

Our thesis is that constitutional federalism enforced through judicial review is the correct legal response to the demands of the principle of subsidiarity. Subsidiarity is the idea that matters should be decided at the lowest or least centralized competent level of government. We understand that subsidiarity grows from the belief that individual rights exist as a matter of natural law. Because rights belong naturally only to individuals, social entities (such as families, communities, cities, nations, or confederations) may legislate only to the extent that individuals or smaller social units lack competence. As Professor Daniel Halberstam has described it, the principle of subsidiarity holds that:

the central government should play only a supporting role in governance, acting only if the constituent units of government are incapable of acting on their own. The word itself is related to the idea of assistance, as in ‘subsidy,’ and is derived from the Latin ‘subsidium’, which referred to auxiliary troops in the Roman military.<sup>11</sup>

Subsidiarity “traces its origins as far back as classical Greece, and [is] later taken up by Thomas Aquinas and medieval scholasticism. . . . [S]ubsequent echoes of it [can be found] in the thought of political actors and theorists as varied as Montesquieu, Locke, Tocqueville, Lincoln, and Proudhon.”<sup>12</sup> Subsidiarity first appeared prominently in modern European political thought as a result of Catholic teachings in the 1930’s emphasizing the importance of the individual as a rights bearer in an era of fascism and communism. The papal encyclical *Quadragesimo Anno* (1931) provided:

Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the

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<sup>11</sup> Daniel Halberstam, *Federal Powers and the Principle of Subsidiarity*, in GLOBAL PERSPECTIVES ON CONSTITUTIONAL LAW 34 (Vikram David Amar & Mark V. Tushnet eds., 2009).

<sup>12</sup> Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 *Am. J. Int’l L.* 38 (2003).

community, so also it is an injustice and at the same time a great evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them.<sup>13</sup>

Or, as the current Catechism of the Catholic Church, says:

[A] community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to co-ordinate its activity with the activities of the rest of society, always with a view to the common good.<sup>14</sup>

The principle of subsidiarity formally entered EU law in the 1992 Treaty of Maastricht and was reaffirmed by the Treaty of Lisbon.<sup>15</sup> Subsidiarity was supposed to reassure small EU member state-nations that their rights and powers would be respected when the Council of Ministers voting rule switched from unanimity to qualified majority voting. Presently, subsidiarity in EU law appears in Article 5(3) of the Treaty on European Union:

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be

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<sup>13</sup> Available in English at [http://www.vatican.va/holy\\_father/pius\\_xi/encyclicals/documents/hf\\_p-xi\\_enc\\_19310515\\_quadagesimo-anno\\_en.html](http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_19310515_quadagesimo-anno_en.html). Pius XI's 1931 encyclical *Quadragesimo Anno* built on and explained an earlier papal encyclical – Leo XIII's **Rerum Novarum** issued in 1891 – in which the Catholic Church had tried to chart a middle way between the perceived excesses of laissez-faire liberal capitalist society and Marxism. By 1931, “the political circumstances of course were dramatically different, dominated more by the rising threat of totalitarianism than by the failure of the state to protect the constituent parts of society.” Carozza, *supra* note \_\_, at 41.

<sup>14</sup> Catechism of the Catholic Church, Para. 1883. Professor Follesdal argues that Catholic social teaching endorses not only subsidiarity but also the obligation of the wealthy to help those who are less well off. We agree with the Church that such a moral obligation exists, but we disagree with anyone who has ever suggested socialism as a means of attaining such an objective. We do not cite the Catholic Church here because we agree with all of its teachings. We don't. We cite the Catholic Church on subsidiarity because it happens to be right on that issue. We agree on the question of social justice with **John Tomasi, Free Market Fairness** (2012).

<sup>15</sup> Treaty on European Union, Feb. 7, 1992, 31 I.L.M. 247.

sufficiently achieved by the Member States, either at [the] central level or at [the] regional or [the] local level, but can rather by reason of the scale or effects of the proposed action, be better achieved at [the] Union level.<sup>16</sup>

Protocol 30 to the European Community Treaty spells out the EU's commitment to subsidiarity in more detail. Suffice it to say that the principle is very important to both EU law<sup>17</sup> and federal constitutions worldwide.

We believe the correct legal response to the demands of subsidiarity is constitutional federalism enforced through substantive judicial review. Thus, federalism and subsidiarity are interrelated themes. Our argument builds on an important 1994 law review article by George A. Bermann called *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*.<sup>18</sup> Professor Bermann argued, as we do, for taking subsidiarity very seriously,<sup>19</sup> but we strongly disagree with two of his claims.<sup>20</sup> First,

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<sup>16</sup> Treaty on European Union, art. 5, Feb. 7, 1992, 31 I.L.M. 247.

<sup>17</sup> The subsidiarity idea was extended to human rights law in the Charter of Fundamental Rights of the European Union. Carozza, *supra* note \_\_, at 39, 46-49,

<sup>18</sup> George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 **Colum. L. Rev.** 331 (1994).

<sup>19</sup> There is an extensive literature on subsidiarity aside from Professor Bermann's seminal article. *See generally* Chantal Millon-Delson, **L'Etat Subsidiare: Ingerence et Non-Ingerence de L'Etat: Le Principe de Subsidiarite aux Fondements de l'histoire Eruopeenne** (1992); Jonas Christoffersen, **Fair Balance: Proportionality, Subsidiarity, and Primarity in the European Convention on Human Rights** (2009); Antonio Estella, **The EU Principle of Subsidiarity and its Critique** (2002); Andrea Daniel, **Subsidiarity in the European Community's Legal Order** (1998); Mariya Pereginets, **The Application of the Principle of Subsidiarity in EU Law** (2010); Simeon Tsetim Iber, **The Principle of Subsidiarity in Catholic Social Thought** (2011); Aurelian Portuese, *The Principle of Subsidiarity as a Principle of Economic Efficiency*, 17 **Colum. J. Eur. L.** 231 (Spring 2011); Alex Mills, *Federalism in the European Union and the United States: Subsidiarity, Private Law, and the Conflict of Laws*, 32 **U. Pa. J. Int'l Law** 369 (2010); Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 **Am. J. Int'l L.** 38 (2003); Denis J. Edwards, *Fearing Federalism's Failure: Subsidiarity in the European Union*, 44 **Am. J. Comp. L.** 537 (1996); Gerald L. Neumann, *Subsidiarity, Harmonization, and Their Values: Convergence and Divergence in Europe and the United States*, 2 **Colum. J. Eur. L.** 573 (1996);



Bermann argues that the European Court of Justice should mainly enforce subsidiarity in the EU by forcing policy makers to establish the need for EU-wide laws. We think Bermann's approach is too deferential and that the EU would benefit from more vigorous substantive enforcement of subsidiarity. Second, Bermann argues that the subsidiarity idea is totally foreign to U.S. Constitutional Law and that the U.S. Supreme Court treats federalism issues as if they raise political questions. Bermann reiterates this claim in a short essay -- also published in 1994.<sup>21</sup> The Supreme Court proved Bermann wrong only a year later with *United States v. Lopez*<sup>22</sup> in 1995. Professor Bermann acknowledged the U.S. neo-federalist revival in a brief subsequent article, but he neither praises nor criticizes the development nor does he explain its deep roots in U.S. constitutional tradition.<sup>23</sup>

Since 1995, the U.S. Supreme Court has enforced constitutional federalism by striking down two laws on Commerce Clause grounds, four laws on the grounds that they exceeded federal power to enforce the Fourteenth Amendment, and it has ruled that Congress lacks power to make the states liable for money damages because of the constitutional doctrine of state sovereign immunity.<sup>24</sup> Bermann's claim is thus no longer sustainable, if it ever was.

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W, Gary Vause, *The Subsidiarity Principle in European Union Law – American Federalism Compared*, 27 **Case W. Res. J. Int'l L.** 61 (1995)..

<sup>20</sup> Subsidiarity in EU law is supplemented by the doctrine of proportionality – a different doctrine – by courts may determine whether (1) a measure bears a reasonable relationship to the legitimate objective it is meant to implement; (2) that the costs of the measure do not manifestly outweigh the benefits; and (3) that the measure represents the least burdensome solution to the problem identified. *Id.* at 386.

<sup>21</sup> George A. Bermann, *Subsidiarity as a Principle of U.S. Constitutional Law*, 42 **Am. J. of Comp. L.** 555 (1994).

<sup>22</sup> 514 U.S. 649 (1995).

<sup>23</sup> George A. Bermann, *The Lisbon Treaty: The Irish No. National Parliaments and Subsidiarity: An Outsiders View*, 4 **European Constitutional Law Review** 453 (2008).

<sup>24</sup> See TAN *infra* at notes \_\_\_ to \_\_\_.

Additionally, the Supreme Court's Dormant Commerce Clause doctrine,<sup>25</sup> the law of federal jurisdiction,<sup>26</sup> theoretical concerns underlying the law of federal preemption<sup>27</sup> and perhaps subsidiarity concerns with present federal conflict of law rules<sup>28</sup> belie Bermann's claim. As the litigation over President Obama's health care plan shows, constitutional federalism is alive and well on the U.S. Supreme Court, contrary to Bermann's 1994 article.

To defend the thesis that constitutional federalism enforced through substantive judicial review is the correct legal response to the demands of subsidiarity, we focus primarily on the United States over the last 221 years because it is the longest functioning federal regime and because of the post-1995 federalist revival.<sup>29</sup> We do not claim that the original understanding of the U.S. Constitution-as-amended always corresponds to the economically efficient design of competing jurisdictions and to the justificatory theory of subsidiarity. We do claim that reading the present-day doctrinal tests with an eye to what we call the Economics of Federalism provides the best understanding of the U.S. Supreme Court's

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<sup>25</sup> Their key article here which Bermann does not cite is: Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 **Mich. L. Rev.** 1091 (1986).

<sup>26</sup> **Martin H. Redish, Federal Jurisdiction: Tensions in the Allocation of Judicial Power** (2<sup>nd</sup> ed. 1990).

<sup>27</sup> Stephen F. Williams, *Preemption: First Principles*, 103 **Northwestern Univ. L. Rev.** 323 (2009).

<sup>28</sup> Alex Mills, *Federalism in the European Union and the United States: Subsidiarity, Private Law, and the Conflict of Laws*, 32 **U. Pa. J. Int'l L.** 369 (2010) describing how there are more concrete federal conflict of law rules in the EU than there are in the US and arguing in favor, as a matter of subsidiarity considerations, of the EU's approach. Mills suggests the U.S. revise its rules to make them more like those in the EU.

<sup>29</sup> For brief discussions of subsidiarity in the EU, see Bermann, **European Const. L. Rev.**, supra note and Aurelian Portuese, *The Principle of Subsidiarity as a Principle of Economic Efficiency*, supra note \_\_\_.

federalism doctrine as it stands in 2012. This approach gives substantive content to the subsidiarity idea.<sup>30</sup>

This paper will proceed in four parts. Part I will summarize the Economics of Federalism and of subsidiarity and will explain when activities are best conducted at a lower or higher level of government. Part II will address the U.S. Constitution's enumerated national powers in light of the Economics of Federalism and of subsidiarity. Part III will address the national constraints the Fourteenth Amendment to the U.S. Constitution imposes on the States, again in light of the Economics of Federalism and of subsidiarity. Part IV concludes.

## I. The Economics of Federalism and of Subsidiarity

Economics teaches us some simple but fundamental truths about when government decision-making is best done at the state or local level vs, the national level. Although Professor Calabresi has discussed this topic in three prior publications, it is necessary to briefly describe the Economics of Federalism before we discuss subsidiarity.<sup>31</sup>

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<sup>30</sup> See also Aurelian Portuese taking a similar but not identical view, *supra* note \_\_. Our approach could help correct for some of the erroneous, cartel-empowering outcomes that Michael Greve documents vividly in his important new book *The Upside-Down Constitution*. **Michael S. Greve, *The Upside-Down Constitution*** (2012).

<sup>31</sup> Steven G. Calabresi & Nicholas Terrell, *The Number of States and the Economics of American Federalism*, 63 **FLA. L. REV.** 1 (2011); Steven G. Calabresi, *Federalism and the Rehnquist Court: A Normative Defense*, **ANNALS, AM. ASS'N POL. & SOC. SCI.** 24-36 (Mar. 2001); Steven G. Calabresi, "A Government of Limited and Enumerated Powers": *In Defense of United States v. Lopez*, 94 **MICH. L. REV.** 752 (1995). Professor Calabresi's articles build on prior work done in: **David Shapiro, *Federalism: A Dialogue*** (1995); **Wallace E. Oates, *Fiscal Federalism*** (1972); Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 **J. Pol. Econ.** 416 (1956); **Michael W. McConnell, *Federalism: Evaluating the Founders' Design***, 54 **University of Chicago Law Review** 1484 (1987); Jacques LeBoeuf, *The Economics of Federalism and the Proper Scope of the Federal Commerce Power*, 31 **San Diego L. Rev.** 555 (1994). See also Williams, *supra* note \_\_ (calling for a reconceptualization of federal preemption law in light of the Economics of Federalism). Professor Calabresi's understanding of this subject grew out of lengthy conversations with his then colleague, Professor Thomas W. Merrill.

## A. The Advantages of State Lawmaking

Restricting lawmaking to the state or provincial level in any federation has at least four obvious advantages: 1) regional variation in preferences, 2) competition for taxpayers and businesses, 3) experimentation to develop the best set of rules, and 4) lower monitoring costs.

First, tastes, preferences, and real world conditions may often differ between territories in a large, continental-sized democracy. For example, some states like Alaska or Montana with a very low population density may prefer a higher speed limit for automobiles than a high-density state like New Jersey. If the national government decides all speed limits, the result may be too low for Alaska and too high for New Jersey. In contrast, if speed limits are decided at the state level, each state can tailor its speed limit to conform to local tastes, preferences, and real world conditions. Such a federal outcome will generally lead to higher overall levels of social utility assuming everything else is held equal. Thus, the first economic argument for smaller decision-making units is that they can better accommodate geographically varying tastes, preferences, and real world conditions.<sup>32</sup>

Second, in a federal system where states make certain decisions, the states compete for people, taxpayers, businesses, and other financial resources to the extent that property and persons are fully mobile (which is not always the case). Each state offers a different bundle of public goods, levels of taxation, and government services. Residents weigh these bundles to decide whether to stay put or to move if another state offers a perceived superior bundle. This argument is today most associated with Charles M. Tiebout.<sup>33</sup> As an example, consider the States of Texas and New York. Texas and New York's different levels of taxation and

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<sup>32</sup> McConnell, *supra* note \_\_\_, at 1493-94.

<sup>33</sup> Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 **J. POL. ECON.** 416 (1956).

government services reflect different philosophies about the role of government. Recently, people and businesses have been moving to Texas and away from New York; arguably, this competition among the States has been typical of American federalism. Monopoly providers are often inefficient and dismissive of consumer preferences. The same holds true for government monopoly providers of bundles of public goods. Therefore, competition among states is better if everything else is equal and property and persons are fully mobile.<sup>34</sup>

Language and cultural differences reduce mobility in the European Union. It is easier for an American to move from Virginia to California than it is for an Italian to move to the U.K.

Professor Follesdal notes that some federal governments, like Germany's, modify the competition among the States (called *Laander*), by redistributing wealth to some degree from richer to poorer States. Canada, the United States, and the European Union have done this to a lesser extent as well. But as the recent Greek debt crisis shows, the willingness of federal entities like Germany to subsidize inefficient monopoly providers of governmental services is limited, even in the EU. In a true federal system, inefficient state governments will pay a price for tax and regulatory excesses and mismanagement. This is a concrete benefit of constitutional federalism.

A third Economics of Federalism argument for state-level decisionmaking is that states will continually experiment with new bundles of services to attract new taxpayers and businesses. As Justice Brandeis famously said in his 1932 dissent in *New State Ice Co. v. Liebmann*:

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<sup>34</sup> Richard A. Epstein, *Exit Rights Under Federalism*, 55 **Law and Contemporary Problems** 147 (1992).

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State, may if its citizens choose, serve as a laboratory; and try novel social and economics experiments without risk to the rest of the country.<sup>35</sup>

Currently, the fifty United States are experimenting with legalizing gay marriage, allowing assisted suicide, and legalizing medical marijuana use. These experiments are beneficial for the country. Experimentation and competition among the States thus support reserving decision-making power to the state level.

Finally, monitoring state officials as compared to national officials may cost less. The smaller territorial size of state legislative districts may produce greater congruence between the mores of the legislators and the people.<sup>36</sup> Also, the people may more easily physically observe and question government officials in close proximity rather than many miles away. Local officials may thus avoid what has been called an “inside-the-beltway mentality.” Large, multi-layered bureaucracies cannot efficiently process new information -- neither in government nor in the private sector -- as Friedrich Hayek shows in **Law, Legislation, and Liberty** and Thomas Sowell shows in **Knowledge and Decisions**.<sup>37</sup> Federalism avoids overly centralized, top-down command and control mechanisms which national governments might otherwise tend to favor.

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<sup>35</sup> 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting).

<sup>36</sup> **Anthony Downs, An Economic Theory of Democracy** 253, 254, 259 (1957).

<sup>37</sup> **Friedrich Hayek, Law, Legislation, and Liberty** (1973 & 1976 in three volumes) (contrasting the efficiency in processing dispersed economic information of spontaneous systems of order, like markets, with the inefficiency of planned systems of order like those that exist in government bureaucracies); **Thomas Sowell, Knowledge and Decisions** (1980) (arguing that decentralized social orders process dispersed information better than do centralized social orders).

In our judgment, these four arguments for leaving governmental decision-making power at the state or provincial level establish a presumption in favor of state over national decision-making. This presumption gives effect to the principle of subsidiarity, discussed above. As the papal encyclical *Quadragesimo Anno* (1931) says, “it is an injustice and at the same time a great evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do.” As the Encyclical adds:

For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them. . . . Therefore, those in power should be sure that the more perfectly a graduated order is kept among the various associations, in observance of the principle of “subsidiary function,” the stronger social authority and effectiveness will be the happier and more prosperous the condition of the State.<sup>38</sup>

The Economics of Federalism helps us better understand when States and Provinces should act without federal or transnational intervention. Unless one of the arguments for national power described below applies, a matter ought to be decided at the state or provincial level.

## **B. The Advantages of National Lawmaking**

There are at least four arguments for allowing a national government to legislate and preempt state lawmaking power in some circumstances.

First, sometimes there are substantial economies of scale in undertaking an activity or financing a program only once rather than fifty times.<sup>39</sup> Surely economies of scale may be realized as a result, for example, of one federal space program rather than fifty separate

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<sup>38</sup> Available in English at [http://www.vatican.va/holy\\_father/pius\\_xi/encyclicals/documents/hf\\_p-xi\\_enc\\_19310515\\_quadragesimo-anno\\_en.html](http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno_en.html).

<sup>39</sup> Le Bouef, *supra* note \_\_\_, at 565-66.

programs. There are probably economies of scale in most national defense and foreign policy activities. One danger is that rent seeking efforts at regulatory capture may be rewarded more fully at the federal level because federal capture is more likely to yield rents in the absence of competing jurisdictions. This cost must be weighed against the benefits from economies of scale or otherwise that may be available when national governments act.<sup>40</sup>

Second, national action can overcome the high costs of collective action that the States would otherwise face.<sup>41</sup> It would be very time-consuming and expensive for the fifty States to act collectively on foreign policy, or defense, or national economic policy. Some States might refuse to join in policies that a majority of States representing a majority of the people endorse. Such hold out States might trigger a race-to-the-bottom and cause the legal standard of the most permissive state to forcing all other States to comply, even if a majority of the nation wished otherwise.<sup>42</sup> An example is no-fault divorce law; Nevada's easy divorce policies ultimately set a national standard. The states also famously raced to the bottom by allowing child labor in the first decades of the Twentieth Century. Federal action can stop races to the bottom and can overcome collective action problems, which is major justification for federal power in some circumstances.

Third, national action may be necessary if the States' activities generate serious external costs on out of state residents.<sup>43</sup> For example, when a state pollutes the air or the water and downwind states bear the burden, the polluting state may need incentives to reduce pollution.

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<sup>40</sup> Portuese, *supra* note \_\_\_\_, at 239.

<sup>41</sup> Le Boeuf, *supra* note 567-74.

<sup>42</sup> Ralph K. Winter, *Private Goods and Competition Among State Legal Systems*, 6 **Harv. J. L. Pub. Policy** 127 (1982); Richard Revesz, *Rehabilitating Interstate Competition: Rethinking "The Race to the Bottom" Rationale for Federal Environmental Regulation*, 67 **N.Y.U. L. Rev.** 1210 (1992).

<sup>43</sup> LeBoeuf, *supra* note, \_\_\_\_, at 567.



If a state could realize the economic benefits of a factory while the costs of its pollution fell mostly on other states, the polluting state would have no incentive to clean up its act.

National regulation of clean air and water is thus essential to correct for the externalities problem. Other circumstances may also necessitate national lawmaking when state action negatively affects other States.

Fourth, the national government is better at handling civil rights issues than are the States.<sup>44</sup> James Madison first predicted this phenomenon in *The Federalist No. 10* where he noted that the legislature of a large continental democracy would represent many more factions or interest groups than a small democratic city state.<sup>45</sup> Therefore it is less likely that a permanent, oppressive majority coalition will capture the legislature of a large federation than that it might capture the legislature of a member unit of the federation. There are more interest groups vying to capture Congress than vie to capture the Illinois legislature so it is harder to form and hold together a permanent entrenched majority coalition. Also, discrete and insular minorities face lower organizational costs in lobbying Congress than are faced by the so-called silent majority nationwide. Part of the reason national majorities are “silent” is because it is so hard and expensive for them to organize.<sup>46</sup>

As Madison predicted in *The Federalist No. 10*, the U.S. national government has in fact been much more protective of the civil rights of minority groups than the States. Congress freed the slaves, helped to end segregation, and was the first institution to protect the women’s equal rights in the 1964 Civil Rights Act. Federal action is thus warranted when a

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<sup>44</sup> This argument is developed in Calabresi & Terrell, *supra* note \_\_\_, at 26-32; and in Steven G. Calabresi, Note “A Madisonian Interpretation of the Equal Protection Doctrine, 91 **Yale L. J.** 1403 (1982).

<sup>45</sup> THE FEDERALIST NO. 10 (James Madison).

<sup>46</sup> **Mancur Olsen, *The Logic of Collective Action* (1965).**

matter concerns fundamental civil rights. Federal action may also be needed if state laws infringe on immobile property, like real estate, or on people who may find it overly burdensome to move, like the elderly.

One difficulty is that one person's fundamental civil rights issue may be another person's instance where varying tastes and cultural preferences favor state level decisionmaking. There is no easy answer to this problem. In general, we must fall back on practical wisdom and common sense to try to decide whether the issue implicates fundamental civil rights or varying tastes and cultural preferences. Decision-makers should approach this problem in a spirit of tolerance and of willingness to "live and let live."

### **C. How the Number of States in a Federation Affects the Balance**

The U.S. federation has grown from thirteen States at the Founding to fifty States today. How has this affected the Economics of Federalism and of subsidiarity? In general, increases in the number of member States in a federation augments the arguments both for state and federal power.<sup>47</sup>

In a fifty state federation, it is more likely that different States will reflect differing tastes, cultural preferences, and real world conditions than a thirteen state federation. A fifty state federation will also be more competitive than a thirteen state federation. There will also be more experimentation in a fifty state federation than there is in a thirteen state federation. And, finally, state governments ought to be easier to monitor in a fifty state federation, at least if everything else is held equal.

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<sup>47</sup> This subject is addressed in depth in Calabresi & Terrell, *supra* Note \_\_\_. See also Peter H. Aranson, *Federalism as Collective Action*, unpublished manuscript on file with the authors.

Conversely, in a fifty state federation, there will be more circumstances that would benefit from economies of scale at the national level. The costs of collective action are also higher if there are fifty States instead of thirteen, so this rationale also suggests the need for more federal power as the number of States increases. Fifty States also generate more externalities both because there are more States taking actions that might have external effects and because there are more States that might experience a negative external effect. Finally, a fifty state federation is likely to be even better at protecting civil rights because it will likely contain even more interest groups, which makes the likelihood of a self-dealing majority coalition less likely. In sum, the increase in the number of States in the U.S. federation from thirteen to fifty has led to a kind of hyper-federalism where both the economic case for leaving things at the state level and the economic case for handling things at the national level become augmented.

Is the optimal number of States thirteen, as at the Founding, or fifty, as we have today? We think the answer is probably between twenty and thirty.<sup>48</sup> Federations with too few States may have big or populous States that can realistically threaten secession to hold up the federation for special benefits. Canada with only ten provinces, one of which is Quebec, has too few States. On the other hand, the fifty U.S. States are so weak and powerless relative to the central government that too much centralization occurs. The necessary balance of power in a federation counsels for between twenty and thirty States. The EU, with twenty-seven member nations, and the G 20 economies, with twenty member nations, are both optimally sized federal or confederal entities.

#### **D. Balance: Decentralization versus Federalism**

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<sup>48</sup> Calabresi & Terrell, *supra* Note \_\_\_, at 30-44.

To sum, there is a strong economic case for presumptively leaving power at the state level unless the presumption is trumped by evidence that: 1) there are economies of scale to national action; 2) the States are suffering from a collective action problem; 3) the States are imposing negative external costs on their neighbors; or 4) there is a bona fide fundamental civil rights issue that is at stake. The economics of federalism thus sheds light on the subsidiarity principle discussed above. Subsidiarity suggests that power ought to be left presumptively at the state level unless the advocates of federal action can show an economics of federalism need for national intervention. The Economics of Federalism thus elaborates and gives content to the EU and Catholic doctrine of subsidiarity. Subsidiarity is desirable not because it maximizes utility, although it may often do that, but because it recognizes the natural right of individuals to have their problems addressed by the level of government that is closest to them.<sup>49</sup> It respects individual, natural rights. EU and U.S. courts enforcing federalism limits on national power should consider economics in determining matters that are inherently state and local and matters that require the aid of a national or transnational government.

A second conclusion is that federalism inherently calls for some balance between state and national power. Sometimes it will be a close judgment call as to whether the economic arguments for state level or national action predominate. Federalism is neither the same thing as nationalism nor is it the same thing as States rights. Federalism is inherently about

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<sup>49</sup> We thus disagree with the utilitarian conclusion reached by Aurelian Portuese, *The Principle of Subsidiarity as a Principle of Economic Efficiency*, supra note \_\_\_\_.

the need for a balance – a golden mean – between the extremes of nationalism and of states’ rights.<sup>50</sup>

Third, the analysis thus far has implications for national Supreme Courts enforcing vague human rights guarantees in national constitutions or in transnational conventions on human rights. Those courts must balance the need to protect fundamental human rights with the fact that tastes, cultural preferences, and real world conditions may differ at the state level in the U.S. or at the national state level in the EU or among the countries that are signatories to the European Convention on Human Rights. The economics of federalism thus has implications for the incorporation of the Bill of Rights in the U.S.<sup>51</sup> and for the margin of appreciation doctrine of the European Court of Human Rights.<sup>52</sup> We will come back to this subject in Part III below.

Finally, some American critics of constitutional federalism have suggested that the economic arguments presented above counsel in favor of decentralization at the grace of the national government.<sup>53</sup> We disagree.<sup>54</sup> The problem is it is too easy for the national government to legislate in circumstances where it ought to defer to the States because Congress and the President are self interested national actors. Ensuring the right balance requires a constitutional federal structure such that neither the central government nor the States are the sole judges of what gets nationalized and what is left to the States. It is a

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<sup>50</sup> Similarly, courage is thus often described as being a golden mean between recklessness and cowardice.

<sup>51</sup> Calabresi, *supra* Note \_\_\_, 94 **Mich. L. Rev.** at 811-826.

<sup>52</sup> We have benefitted in understanding the implications for American law of the Margin of Appreciation doctrine from a conversation in 2012 with Northwestern Law Professor-to-be Erin F. Delaney and from reading a draft paper she is working on on that subject.

<sup>53</sup> Edward L. Rubin & Malcolm Feely, *Some Notes on a National Neurosis*, 41 **U.C.L.A. Law Rev.** 903 (1994).

<sup>54</sup> Calabresi, 94 **Michigan L. Rev.** at 786-787.

fundamental maxim of Anglo-American constitutional law that no man ought to be a judge in his own cause.<sup>55</sup> The advocates of decentralization over constitutional federalism would wrongly make the national government the judge of the extent of its own powers vis a vis the States.

In his landmark 1994 article, Bermann identifies six values that he thinks are protected by constitutional federalism and subsidiarity.<sup>56</sup> Bermann argues that: (1) self determination and accountability are enhanced by constitutional federalism to the extent it requires that decisions be made at levels of government where people are effectively represented;<sup>57</sup> (2) political liberty is enhanced if power is constitutionally fragmented rather than being merely decentralized at the grace of a national government;<sup>58</sup> (3) subsidiarity makes government more flexible and responsive to the real needs of the people it serves;<sup>59</sup> (4) constitutional federalism helps preserve local social and cultural identity – an identity that often has deep historical roots and that is thus important;<sup>60</sup> (5) constitutional federalism and subsidiarity foster diversity which “may be valued in its own right;”<sup>61</sup> and (6) constitutional federalism may reinforce local, city, and county power in the component states of a federation.<sup>62</sup>

We agree with Bermann on all six of these points, most especially the argument that constitutional federalism and subsidiarity fragment political power in a way that mere decentralization does not do. We believe with Lord Acton that “[p]ower tends to corrupt,

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<sup>55</sup> Sir Edward Coke argued for this idea in Seventeenth Century England in *Dr. Bonham’s Case*. *Thomas Bonham v. College of Physicians*, 8 Co. Rep. 114 (1610).

<sup>56</sup> Bermann, *supra* note \_\_, at 340-44.

<sup>57</sup> *Id.*, at 340.

<sup>58</sup> *Id.*, at 341.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*, at 341-42.

<sup>62</sup> *Id.*, at 342.

and absolute power corrupts absolutely,”<sup>63</sup> and we think this counsels in favor of constitutional federalism and checks and balances rather than merely decentralization. We would add that constitutional federalism and subsidiarity might be more appealing to skeptics than to Cartesian rationalists because the former may instinctly value experimentation and competition and disfavor a one size fits all approach. As admirers of the empiricism and practicality of the Scottish Enlightenment, we feel drawn to federalism on these grounds as well.

Federal Supreme Courts enforcing subsidiarity guarantees in light of the Economics of Federalism ought to be deferential to nation/international law-making bodies. Such courts should strike down federal laws once every ten years, not ten times every year, so as to guard against too much judicial policy-making. They ought to invalidate national/international laws often enough to remind politicians that subsidiarity concerns are real and must be respected.

## **II. The U.S. Constitution’s Enumeration of Powers and Subsidiarity**

The principle of subsidiarity, as illuminated by the Economics of Federalism, suggests that the need for some constitutional federalism is rooted in the very nature of things (i.e., in Natural Law for those of us who believe in such a thing). It is highly unlikely that any territorially large or populous country would not benefit greatly from a federal system. The need for federalism is thus a fundamental fact of human existence. The reason for this Age of Federalism and vibrant discussion of subsidiarity is precisely that constitutional federalism and subsidiarity respond to essential aspects of the human condition. We would expect the

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<sup>63</sup> Letter to Bishop Mandell Creighton, April 5, 1887, published in J. N. Figgis & R. V. Laurence, eds. *HISTORICAL ESSAYS AND STUDIES* (1907).

U.S. constitutional structure to protect both ideas, then, since the U.S. is the world's oldest and longest functioning democratic federation.

So far, we have commented on the economic nature of the concepts of federalism and subsidiarity as they have developed historically in the United States, but we have not yet explained how these two concepts ought to affect American constitutional law. We now offer a perspective from American constitutional law on the relevance of judicially enforced subsidiarity. To reiterate, we believe that constitutional federalism enforced through judicial review is the correct legal response to the demands of subsidiarity. In Part A, we discuss recent arguments for and against judicial enforcement of federalism in the U.S.; in Part B, we show how the Framers infused the Constitution with the idea of subsidiarity; and in Part C, we discuss the caselaw involving Enumerated Federal Powers, the Dormant Commerce Clause, Intergovernmental Immunities, and Preemption all of which shows that judicial enforcement of subsidiarity is ongoing in U.S. constitutional law. We do not claim that the U.S. caselaw as it presently stands produces all the gains that might be ideal, but we do claim that it achieves many such gains.

### **A. Judicial Enforcement of Federalism in the U.S.**

How is constitutional federalism protected in U.S. constitutional law today? The primary protection no doubt is that both Houses of Congress and the President must approve of federal laws or, if the President does not approve, only two thirds of the House and the Senate may a presidential veto. This onerous process of bicameralism and presentment for federal lawmaking, coupled with such add-ons as the Senate filibuster, helps make federal law the exception and not the rule. As a result, many areas of law remain mostly at the state



level, even after 223 years of American federalism. This is true of tort law, family law, contract law, property law, and criminal law.

Judicial review, as exercised by the U.S. Supreme Court, also vigorously protects constitutional federalism. In Federal Enumerated Power Cases, Dormant Commerce Clause cases, Preemption Cases, and Intergovernmental Immunity Cases alike, the present Supreme Court has not hesitated to enforce constitutional limits against Congress's efforts to aggrandize its power.<sup>64</sup> From 1954 to the early 1990's, commentators sometimes claimed that federal courts did not have power to review limits on national enumerated powers because federalism cases raise political questions. Thus, Professors Jesse Choper and Herbert Wechsler argued that because the States are powerfully represented in Congress, political safeguards would protect federalism and obviate the need for judicial review in enumerated powers federalism cases. Choper believed that judicial review was more necessary in individual rights cases than in enumerated powers cases, and he urged the Supreme Court to spend all of its political capital in the former rather than the latter.

The Choper-Wechsler Theory prevailed 5 to 4 in the *Garcia* case<sup>65</sup> in 1985, but it was decisively rejected in *Gregory v. Ashcroft*,<sup>66</sup> *New York v. United States*,<sup>67</sup> and *United States v. Lopez*<sup>68</sup> and its progeny in the 1990's. Over the last twenty years, a majority of five justices have consistently believed the Supreme Court ought to decide enumerated powers

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<sup>64</sup> **Jesse H. Choper, *Judicial Review and the National Political Process* (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).

<sup>65</sup> *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

<sup>66</sup> 501 U.S. 452 (1991).

<sup>67</sup> 505 U.S. 144 (1992).

<sup>68</sup> 514 U.S. 549 (1995).

cases, even though four justices may have dissented for Choperian reasons. The Supreme Court is right to hear and decide enumerated powers cases for several reasons.<sup>69</sup>

First, the enumeration of federal powers is as much a part of our written Constitution as is the Bill of Rights. The *Marbury v. Madison*<sup>70</sup> argument for judicial review thus applies in federalism cases just as it applies in individual rights cases. When Congress passes a law that unconstitutionally aggrandizes national power, it is the Supreme Court's duty to hold up that statute against the Constitution and to follow the Constitution where there is a conflict.

Scholars have long recognized that judicial umpiring for federalism guarantees is centrally important to the global spread of judicial review.<sup>71</sup> Constitutional Courts and Supreme Courts often begin as federalism umpires and later expand to protect individual rights, as happened in the United States. Historically, Canadian and Australian courts enforced their Commerce Clause analogues very vigorously,<sup>72</sup> and the German Constitutional Court has done the same.<sup>73</sup> In the British Empire, the Privy Council in London enforced imperial federal allocations of power between Britain and its colonies and, in Canada, between the provinces and the national government. Ample precedent worldwide favors judicial umpiring in federalism cases – precedent which Bermann overlooks in his 1994 subsidiarity article.

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<sup>69</sup> The argument for federal judicial enforcement of U.S. federalism limits against the national government is developed in more depth in: Calabresi, supra Note \_\_, 94 **Michigan Law Review** 790-831.

<sup>70</sup> 5 U.S. 137 (1803).

<sup>71</sup> **Mauro Cappelletti & William Cohen, Comparative Constitutional Law** 10-11 (1979); see also **Allen R. Brewer-Carias, Judicial Review in Comparative Law** (1989).

<sup>72</sup> **Richard E. Johnston, The Effect of Judicial Review on Federal state Relations in Australia, Canada, and the United States** 233-78 (1969).

<sup>73</sup> **Donald P. Kommers, The Constitutional Jurisprudence of the Federal Republic of Germany** 69-120 (1989); **David P. Currie, The Constitution of the Federal Republic of Germany** 33- 101 (1994).

The text of the U.S. Constitution demands that the courts play such a role and that role is played by courts as well in Germany, Canada, Australia, India, and South Africa. Just as Federalism has spread all over the world, judicial enforcement of federalism has spread all over the world as well. Judicial review in federalism or subsidiarity cases is sometimes deferential<sup>74</sup> but it does take place and has had widespread consequences.<sup>75</sup> Bermann himself identifies possible politically accountable bodies for policing subsidiarity in the EU context in his short 2008 essay on *National Parliaments and Subsidiarity: An Outsiders View*.<sup>76</sup>

Second, abdication to Congress in all U.S. federalism, enumerated powers cases as Professors Jesse Choper and Herbert Wechsler call for would make Congress the judge of the scope of Congress's own powers. This is a form of putting the fox in charge of the hen house. It would quite improperly make Congress the judge in its own cause as to the scope of national congressional power. As Bermann recognizes, in the EU there are almost no political safeguards of nation state power against the EU<sup>77</sup> so there, especially, a more active judicial role in enforcing subsidiarity would be desirable. The political institutions of a national or transnational entity cannot safely be entrusted with the power to determine the scope of national or transnational powers. If federalism and subsidiarity are valuable, as we have argued they are, then they need to be enforced by a powerful independent entity like a Constitutional or Supreme Court.

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<sup>74</sup> Portuese acknowledges that the European Court of Justice has been very timid in its enforcement of subsidiarity, but he regrets this and urges more activism along many of the same economics of federalism lines that we discuss here. Portuese, *supra* note \_\_, at 246.

<sup>75</sup> Bermann, *supra* note \_\_, at 390-395. For discussion of one federalism clause that is not judicially enforced by the German Constitutional Court, see *id.* at FN249 on page 394. Other federalism provisions, some of them structural and not textually enumerated, are enforced by the German Constitutional Court.

<sup>76</sup> Bermann, **European Const. L. Rev.**, *supra* note \_\_.

<sup>77</sup> Bermann, **Columbia Law Review** article *supra* note \_\_, at 395-400.

There is no real danger that the U.S. Supreme Court will excessively limit national power in enumerated powers federalism cases. The nine Supreme Court justices are selected by the nationally elected President and by senators elected statewide, all of whom are national officers paid out from U.S. Treasury. It is extremely unlikely that the Supreme Court would long challenge a national majority sentiment -- a point made decades ago by Professors Robert Dahl and Gerry Rosenberg.<sup>78</sup> It is more likely that the Court might deferentially uphold laws that it ought to strike down, thus giving those laws an undeserved patina of legitimacy.<sup>79</sup> Supreme Court enforcement of enumerated powers thus poses small risks while offering substantial benefits.<sup>80</sup>

Third, a democracy's greatest challenge with the institution of judicial review is that it generates a counter-majoritarian difficulty. A tiny group of life-tenured judges have authority to disallow, for example, a popular law banning indecent speech on the Internet because it violates the First Amendment. This counter-majoritarian difficulty is always present in individual rights cases, but to a lesser degree in federalism cases. When the U.S. Supreme Court struck down the federal Gun-Free School Zones Act in *United States v. Lopez*, for example, it did not preclude Texas from passing a similar law at the state level.<sup>81</sup> The Court held simply that state-level majorities could constitutionally address guns in schools, but a national majority could not.<sup>82</sup> *United States v. Lopez* was thus not a counter-

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<sup>78</sup> Robert A. Dahl, *Decisionmaking in a Democracy: The Supreme Court as National Policymaker*, 6 **J. Pub. L.** 279 (1957); **Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?*** (1991).

<sup>79</sup> See, e.g., *Gonzales v. Raich*, 545 U.S. 1 (2005) (wrongly upholding the Controlled Substances Act in so far as it applied to ban possession of a few homegrown marijuana plants).

<sup>80</sup> Steven G. Calabresi, "*A Government of Limited and Enumerated Powers: In Defense of United States v. Lopez*," 94 **Mich. L. Rev.** at 806-811.

<sup>81</sup> 514 U.S. 549 (1995).

<sup>82</sup> 514 U.S. 549 (1995).

majoritarian decision like *Roe v. Wade*.<sup>83</sup> It was simply a decision that the majority with proper jurisdiction to legislate was at the state level and not the national level.<sup>84</sup>

Fourth, Professor Choper and his acolytes often argue that questions about the scope of national power or the Economics of Federalism are inherently normative and require an expertise which is lacking in the Supreme Court. This claim is also incorrect. The U.S. Supreme Court has historically enforced the Economics of Federalism in so-called Dormant Commerce Clause cases, and its efforts in this field have been almost universally praised.<sup>85</sup> In Dormant Commerce Clause cases, the Supreme Court strikes down state laws that discriminate against or unreasonably burden interstate commerce even if Congress has not yet legislated in the field. The Court thus uses economics to decide whether a state law intrudes on the national economic domain or whether its impact is exclusively local.<sup>86</sup> This economics of federalism analysis is no different from what the Supreme Court entertained in *United States v. Lopez*.

Finally, Professors Choper's and Wechsler's arguments about the political safeguards of American federalism simply no longer hold true in the United States, much less than in the EU. Wechsler argued, for example, that malapportionment of House seats in the 1950's gave the state huge power over Congress. Malapportionment, however, bit the dust in the U.S. way back in the 1960's as the result of the Supreme Court's one person, one vote decisions in

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<sup>83</sup> 410 U.S. 113 (1973).

<sup>84</sup> Steven G. Calabresi, Textualism and the Counter-majoritarian Difficulty, 66 **George Washington University Law Review** 1373-1394 (1998).

<sup>85</sup> Donald H. Regan, *The Supreme Court and state Protectionism: Making Sense of the Dormant Commerce Clause*, 84 **Michigan L. Rev.** 1091 (1986)

<sup>86</sup> *Id.*

*Baker v. Carr*<sup>87</sup> and *Reynolds v. Sims*.<sup>88</sup> Campaign finance reforms in the meantime have led Representatives and Senators to raise most campaign funds in increments of less than \$2,500 from national interest groups, whose members mostly live outside the election district. This tends to mean that elected Representatives and Senators share views with national special interests as much as their districts or States. We doubt the political safeguards of federalism were ever as great as Wechsler and Choper claimed they were, but, whatever such safeguards may once have existed, they no longer exist today.<sup>89</sup>

In sum, a polity that wants to garner the economic benefits of federalism and subsidiarity needs to constitutionally protect those concepts in a written Constitution that is enforced by judicial review. Decentralization at the grace of the national government leads to over-centralization, which is costly, and the absence of judicial review to enforce federalism and subsidiarity ideas leads to the same pitfall. Happily, the Framers of the U.S. Constitution understood these points and so in 1787 they enumerated and limited national power in a document which the federal courts have the power to enforce. We will now turn to the historical origins and subsequent development of subsidiarity in U.S. constitutional law.

## **B. Subsidiarity, the Philadelphia Convention, and Two Centuries of Practice**

In order to understand fully subsidiarity's relevance to U.S. constitutional law, it is necessary to begin with the enumeration of federal power in Article I, Section 8 of the U.S. Constitution. The Framers of the Constitution were quite familiar with a rudimentary instinct

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<sup>87</sup> 369 U.S. 186 (1962).

<sup>88</sup> 377 U.S. 533 (1964).

<sup>89</sup> Calabresi, *supra* Note \_\_\_, 94 *Michigan L. Rev.* at 790-799.

as to the Economics of Federalism even though they did not use that term or understand the concept as well as we do today.<sup>90</sup>

Between May and September of 1787, a constitutional convention of fifty-five delegates drafted the U.S. Constitution. The delegates met in secret in Philadelphia, but thanks to James Madison's copious notes and other records we know a fair bit about the Convention's deliberations and the delegates' understanding of the Article I, Section 8 enumeration of powers.

Before the Philadelphia Convention, the Virginia delegates, led by James Madison, met and drafted the so-called Virginia Plan as to what the new constitution ought to look like. This plan is sometimes referred to as the Randolph Plan because Virginia Governor Edmund Randolph presented it early on to the Philadelphia Convention. Resolution 6 of the Virginia Plan addressed the scope of the new federal government's power. This Resolution proposed a two branch Congress, and it said:

6. Resolved that each branch ought to possess the right of originating Acts; that the National Legislature ought to be empowered to enjoy the Legislative Rights vested in Congress bar the Confederation & moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation; to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union; and to call forth the force of the Union agst any member of the Union failing to fulfill its duty under the articles thereof.<sup>91</sup>

The Virginia Plan then openly proposed to give Congress: 1) the same very limited powers it had enjoyed under the Articles of Confederation; 2) the power to legislate in all cases to

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<sup>90</sup> These points are developed in more depth in: **Paulsen, Calabresi, McConnell, and Bray, The Constitution of the United States** pp. 708-709 and 759-761 (2010).

<sup>91</sup> Virginia Plan, Presented by Edmund Randolph to the Federal Convention, May 29, 1787, available at [http://avalon.law.yale.edu/18th\\_century/vatexta.asp](http://avalon.law.yale.edu/18th_century/vatexta.asp).

which the separate States are incompetent; 3) the power to legislate in cases where the harmony of the United States may be interrupted by the exercise of individual Legislation; and 4) the power to negative all state laws that contravened the Constitution in Congress's opinion.<sup>92</sup> In addition, the eleventh resolution of the Virginia Plan gave the national government the power and duty of guaranteeing to every state a republican form of government.<sup>93</sup>

The Virginia Plan is striking because it essentially proposes to give the national government the power to act in cases where the States face collective action problems and are separately "incompetent to act," i.e. where there are economies of scale, and where state laws have major external effects that disrupt the harmony of the Union. The Virginia Plan does not use such modern economic terms as "collective action problem," or "economy of scale," or correction of "negative externalities," but this seems pretty plainly to be what the Plan's authors aimed to say. James Madison, and the Virginia delegations, understood at a gut level that States could not carry out some activities on their own and that a federal government that should act in those unusual and limited situations.

The Virginia Plan was not the last word on the scope of national power, however. The small States, led by New Jersey, resisted giving the federal government the powers specified in the Virginia Plan. New Jersey put forward a plan of its own that categorically limited and enumerated national power.<sup>94</sup> The New Jersey Plan contemplates a national government

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<sup>92</sup> Virginia Plan, Presented by Edmund Randolph to the Federal Convention, May 29, 1787, available at [http://avalon.law.yale.edu/18th\\_century/vatexta.asp](http://avalon.law.yale.edu/18th_century/vatexta.asp).

<sup>93</sup> Virginia Plan, Presented by Edmund Randolph to the Federal Convention, May 29, 1787, available at [http://avalon.law.yale.edu/18th\\_century/vatexta.asp](http://avalon.law.yale.edu/18th_century/vatexta.asp).

<sup>94</sup> The first two articles of the New Jersey Plan address the vision of the small States as to the scope of national power:



which has very limited and categorically enumerated powers and which cannot correct all collective action problems or negative externalities imposed by state laws.

The Philadelphia Convention argued back and forth for weeks over the merits of the Virginia and New Jersey Plans, and eventually reached a Great Compromise that incorporated parts of both plans. States were equally represented in the Senate but population size determined representation in the House of Representatives. The Bedford Resolution was the Philadelphia Convention's final resolution on the scope of national power before sending the Constitution to the Committee of Style for drafting. It was introduced by Rep. Gunning Bedford, of Delaware, and it provided:

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1. Resd. that the articles of Confederation ought to be so revised, corrected & enlarged, as to render the federal Constitution adequate to the exigencies of Government, & the preservation of the Union.

2. Resd. that in addition to the powers vested in the U. States in Congress, by the present existing articles of Confederation, they be authorized to pass acts for raising a revenue, by levying a duty or duties on all goods or merchandizes of foreign growth or manufacture, imported into any part of the U. States, by Stamps on paper, vellum or parchment, and by a postage on all letters or packages passing through the general post-office, to be applied to such federal purposes as they shall deem proper & expedient; to make rules & regulations for the collection thereof; and the same from time to time, to alter & amend in such manner as they shall think proper: to pass Acts for the regulation of trade & commerce as well with foreign nations as with each other: provided that all punishments, fines, forfeitures & penalties to be incurred for contravening such acts rules and regulations shall be adjudged by the Common law Judiciaries of the State in which any offence contrary to the true intent & meaning of such Acts rules & regulations shall have been committed or perpetrated, with liberty of commencing in the first instance all suits & prosecutions for that purpose in the superior common law Judiciary in such State, subject nevertheless, for the correction of all errors, both in law & fact in rendering Judgment, to an appeal to the Judiciary of the U. States.

Resolution three of the New Jersey Plan goes on to give Congress specific power to requisition funds from the States, power which Congress lacked under the Articles of Confederation. New Jersey Plan, Madison Debates, June 15, 1787, available at [http://avalon.law.yale.edu/18th\\_century/debates\\_615.asp](http://avalon.law.yale.edu/18th_century/debates_615.asp).

[T]he national legislature ought to possess the legislative rights vested in Congress by the Confederation [and the right] to legislate in all cases for the general interests of the Union, and also in those to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation.<sup>95</sup>

Here, the Philadelphia Convention endorsed the Virginia Plan's Economics of Federalism intuition as to the scope of the power of the new federal government. Judge Stephen Williams, of the U.S. Court of Appeals for the D.C. Circuit, reached much the same conclusion after Professor Calabresi called this legislative history to his attention.<sup>96</sup> The Bedford Resolution dropped James Madison's proposal to give Congress the power to negative state laws, however. Bermann does not discuss this history in claiming that the subsidiarity idea has no roots in U.S. constitutional law.

The Committee on Style of course had no authority to make substantive changes or decisions in drafting the U.S. Constitution; its charge was only to mechanically reduce resolutions like the Bedford Resolution to a legal text. The Committee on Style adopted constitutional text for Article I, Section 8 that was quite different from the Economics of Federalism text approved as the Bedford Resolution. As Professor Kurt Lash notes, the Committee on Style opted instead for a categorical approach to federalism in which the national government was given power in certain categories of situations.<sup>97</sup> National power

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<sup>95</sup> 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 21, 27.

<sup>96</sup> Williams, *supra* note \_\_, at 325-328; Robert Stern, *That Commerce Which Concerns More States than One*, 47 **HARV. L. REV.** 1335, 1339 (1934).

<sup>97</sup> Kurt T. Lash, "Resolution VI: National Authority to Resolve Collective Action Problems Under Article I, Section 8, Illinois Public Law and Legal Theory Research Paper Series No. 10-40, January 2012 at: <http://papers.ssrn.com/abstract=1894737>. Lash argues that the open-ended language of the Bedford Resolution was not an endorsement of a national power to solve collective action problems but that it was instead a placeholder for the future insertion of categorical national powers. Lash may or may not be right, as a matter of the original meaning of Article I, Section 8, but over the last 220 years the Supreme Court has in a series of cases read Article I, Section 8 to allow

was extended to the following categories: 1) taxing and spending to promote the general welfare; 2) borrowing money; 3) regulating interstate and foreign commerce; 4) passing naturalization and bankruptcy laws; 5) coining money and regulating the standard of weights and measures; 6) punishing counterfeiting; 7) establishing post offices and post roads 8) establishing patents and copyrights; 9) creating lower federal courts; 10) punishing piracy and offense against the law of nations; 11) all powers over foreign policy and the waging of war including the power to raise armies and navies; 12) power to legislate for the District of Columbia and the territories; 13) power to guarantee to the States a republican form of government; and finally 14) power to adopt all necessary and proper laws for carrying into execution the foregoing powers.

When the Constitution was up for ratification, many people argued – rightly in retrospect – that the broad enumerated powers generally, and the Necessary and Proper Clause in particular, would give Congress sweeping power to act to solve collective action problems. Fearful of that outcome, the Anti-Federalist opponents of the Constitution insisted on adding the Bill of Rights to the document as the first order of business of the new national government. Representative James Madison, serving in the First Congress, promptly drafted the Bill of Rights and included this federalism protection in the Tenth Amendment:

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the national government especially broad leeway when it is attempting to solve a state collective action problem. If Professor Lash were right about the meaning of Article I, Section 8, the Clean Air and Clean Water Acts would be unconstitutional along with the immigration laws, paper money, the federal labor laws, and aspects of the Civil Rights Act of 1964. It is well settled as a matter of stare decisis that the laws mentioned above are all constitutional and that the federal government can act to solve genuine state collective action problems.

The powers not delegated by the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.<sup>98</sup>

This provision hardly protected the States from ever-expanding federal power because it did not enumerate the reserved powers of the States over such topics as manufacturing, mining, agriculture, education, criminal law, and regulation of local health and safety. The Tenth Amendment was thus easily dismissed as stating a truism – all is retained which is not delegated – as the U.S. Supreme Court explicitly held in *United States v. Darby Lumber Co.*, where the manufacturing regulation at issue was a necessary and proper means for carrying into execution Congress’s commerce power.<sup>99</sup>

Some have argued that the Tenth Amendment suggests that the Framers split the atom of sovereignty and that it makes the states co-sovereign together with the national government. We do not buy that argument and would note that the Tenth Amendment does not use the word sovereignty any more than did Article I, Section 8. We agree with Paolo Carozza that the sovereignty idea is inconsistent with the idea of subsidiarity and that it is an unhelpful idea at best.<sup>100</sup> In any event, sovereignty under the U.S. Constitution lies not with the States or the federal government but with We the People of the United States who made the Constitution by a majority vote of three quarters of the states that sent representatives to the Philadelphia Convention. Article V requires a majority in three quarters of the States to acquiesce to changes to the Constitution, so it seems sovereignty must lie at that threshold. From 1789 to the present, the Supreme Court has consistently read the Constitution as giving the federal government the power under the Necessary and Proper Clause “to legislate in all cases for the general interests of

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<sup>98</sup> U.S. CONST. amend. X.

<sup>99</sup> 312 U.S. 100 (1941).

<sup>100</sup> Carozza, *supra* note \_\_\_, at 52, 63-68.

the Union, and also in those to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation.”<sup>101</sup>

The categorical listing of powers in Article I, Section 8, Clauses 1 to 17 did not prevent the Supreme Court from reading the Constitution as if it had enacted the words of the Bedford Resolution rather than a categorical enumeration of powers.

Thus, the Supreme Court upheld laws regulating navigation in intercoastal waterways – laws that Chief Justice Marshall said were constitutional in *Gibbons v. Ogden*.<sup>102</sup> Federal navigation laws governing intercoastal waters are appropriate under an Economics of Federalism approach, but they are harder to justify under the categorical federalism of Article I, Section 8.<sup>103</sup> Arguably, Congress can regulate even recreational navigation or intrastate navigation under the Necessary and Proper Clause if it has a substantial effect on interstate commerce, but if Congress can do that the effort to limit federal power categorically is a failure.

The U.S. Supreme Court read the Necessary and Proper Clause broadly in *McCulloch v. Maryland*, holding that Congress had the implied power to charter a national bank of the United States because doing so was a convenient, useful, and appropriate means of executing such

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<sup>101</sup> 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 21, 27.

<sup>102</sup> 22 U.S. 1 (1824).

<sup>103</sup> Chief Justice Marshall said in *Gibbons* that navigation is commerce, which includes all forms of social intercourse or interaction, but this is almost certainly wrong. Commerce comes from the Latin words “com” meaning “with” and “merce” meaning “buying and selling.” It comes from the same Latin roots as the words mercenary, mercantile, market, and merchandise. Navigation in the course of buying and selling things may thus be a form of commerce, but recreational navigation is almost certainly not.

enumerated powers as the powers of taxation, spending, regulation of commerce, and the raising of armies.<sup>104</sup> Chief Justice Marshall said:

Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adopted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.<sup>105</sup>

Note that Marshall's test in *McCulloch* replaces the Constitution's categorical textual requirement that means be "necessary and proper" with the weasily requirement that they be merely "appropriate."<sup>106</sup> *McCulloch v. Maryland* implied a greatly expanded sphere of federal power and the "appropriateness" inquiry almost invites a consideration of the Economics of Federalism. *McCulloch* is striking because the Framers at Philadelphia had specifically considered -- and decided against -- empowering the federal government to charter corporations. John Marshall almost certainly knew this history when he authored *McCulloch*.

In two post-Civil War cases, the Supreme Court built on *McCulloch*'s foundation for a sweeping understanding of national power. In *Knox v. Lee*, the Court held that Congress had power under the Necessary and Proper Clause to issue paper money during the Civil War<sup>107 108</sup> – a striking decision because Congress has a categorically enumerated power to "coin" money under Article I, Section 8, Clause 5.<sup>109</sup> That power is superfluous if the Necessary and Proper Clause provides Congress the power to print paper money – something James Madison railed

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<sup>104</sup> 17 U.S. 316 (1819).

<sup>105</sup> 17 U.S. 316, 421 (1819).

<sup>106</sup> Professor Calabresi is indebted to Professor Richard Epstein for this point.

<sup>107</sup> 79 U.S. 457 (1871) (Opinion of Justice Strong).

<sup>108</sup> 75 U.S. 603 (1870).

<sup>109</sup> U.S. CONST. art. I, § 8, cl. 5.

against at the end of *The Federalist No. 10*.<sup>110</sup> The Supreme Court also followed an Economics of Federalism non-categorical approach in its 1893 decision in *Fong Yue Ting v. United States*, holding Congress had power to expel long-time resident aliens under the Necessary and Proper Clause.<sup>111</sup> This implied national power over immigration generally goes well beyond Congress's enumerated power to pass naturalization laws. *Fong Yue Ting*, like *Knox v. Lee*, is compatible with an Economics of Federalism approach, but not with a categorical approach to federalism.

The Supreme Court famously rejected categorical federalism in favor of an Economics of Federalism approach in *The Shreveport Rate Cases*, decided in 1914. In that series of cases the Court considered whether the Interstate Commerce Commission could regulate wholly intrastate rates along interstate railway lines.<sup>112</sup> Justice Charles Evans Hughes wrote that congressional power in these circumstances “necessarily embraces the right to control... operations in all matters having a close and substantial relation to interstate traffic, to the efficiency of interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms.”<sup>113</sup> The power to regulate wholly intrastate railway shipments that have “a close and substantial relation” to interstate commerce is a Bedford Resolution type power accomplished under the guise of the Necessary and Proper Clause. Between 1895 and 1937, the Supreme Court did strike down acts of Congress to enforce categorical constitutional federalism in a series of cases that Professor Bermann declines to mention, presumably because most of them are no longer good law. In those cases the Court distinguished between commerce, which Congress could regulate, and manufacturing or agriculture, which it could not. Among

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<sup>110</sup> THE FEDERALIST NO. 10 (James Madison).

<sup>111</sup> 149 U.S. 697 (1893).

<sup>112</sup> *Houston E. & W. T. Ry. Co. v. United States*, 234 U.S. 342 (1914).

<sup>113</sup> *Houston E. & W. T. Ry. Co. v. United States*, 234 U.S. 342, 351 (1914).

these cases are: *United States v. E.C. Knight Co.*;<sup>114</sup> *Hammer v. Dagenhart*;<sup>115</sup> *Bailey v. Drexel Furniture Co.*;<sup>116</sup> *Schechter Poultry Corp. v. United States*;<sup>117</sup> *Carter v. Carter Coal Co.*;<sup>118</sup> and *United States v. Butler*.<sup>119</sup> Though these cases are all now overruled (except for *Bailey*), they importantly foreshadow the reemergence of judicially enforced constitutional federalism in the 1995 *United States v. Lopez* decision discussed below.

During the New Deal Constitutional Revolution of 1937, the Supreme Court decisively rejected categorical federalism for all time, holding that all wholly intrastate commerce that substantially affects commerce among the States is regulable under the Necessary and Proper Clause. The Court held in *National Labor Relations Board v. Jones & Laughlin Steel Corp.* that the National Labor Relations Act of 1935, popularly known as the Wagner Act, was constitutional.<sup>120</sup> The Wagner Act effectively governed labor law in manufacturing entities that shipped goods nationwide. Chief Justice Charles Evans Hughes found the same “close and substantial” connection between a wholly intrastate activity and interstate commerce that he had found as an associate justice in *The Shreveport Rate Cases*. *Jones & Laughlin Steel* says that labor peace is so important to commerce among the several States that Congress can regulate it as a means (under the Necessary and Proper Clause) toward promoting interstate commerce. *Jones & Laughlin Steel*, together with *McCulloch*, *Knox v. Lee*, *Fong Yue Ting*, and the

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<sup>114</sup> 156 U.S. 1 (1895).

<sup>115</sup> 247 U.S. 251 (1918).

<sup>116</sup> 259 U.S. 20 (1922).

<sup>117</sup> 295 U.S. 495 (1935).

<sup>118</sup> 298 U.S. 238 (1936).

<sup>119</sup> 297 U.S. 1 (1936).

<sup>120</sup> 301 U.S. 1 (1937).



*Shreveport Rate Cases*, made it clear beyond any doubt that the federal government has power under Article I, Section 8 to solve all collective action and Economics of Federalism problems.<sup>121</sup>

In conclusion, U.S. Constitutional Law has been infused with subsidiarity considerations from the outset, as the Bedford Resolution history indicates. Further, in a series of landmark Supreme Court opinions from the Founding Era up until 1995, the Supreme Court has held that the national government may regulate all wholly intrastate activities that *substantially* affect commerce or any other federal power. This is a test that is on its face indeterminate and which invites consideration of the Economics of Federalism as a way to supply needed content. We turn now to four areas where the U.S. Supreme Court currently enforces constitutional federalism that might benefit from an Economics of Federalism analysis.

### C. Supreme Court Caselaw and Subsidiarity

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<sup>121</sup> The New Deal Supreme Court codified the new understanding in *United States v. Darby*, in 1941 and in *Wickard v. Filburn*, 317 U.S. 111 (1942). *Wickard* held that in determining whether Congress had power to regulate the growing of wheat for one's own consumption, the Supreme Court ought not to look only at the wheat grown by one particular farmer-litigant but it should look in the aggregate at all the wheat grown for such purposes nationwide. During the Great Society years of the 1960's, the Supreme Court expanded *Darby* and *Wickard* by holding in *Katzenbach v. McClung*, 379 U.S. 294 (1964) that in applying the *Wickard* aggregation test to wholly intrastate activities that affect substantially commerce, the Supreme Court ought to defer to Congress if it had some rational basis for thinking, after aggregation, that a wholly intrastate activity substantially affected commerce among the States. The combination of the *Wickard* aggregation test, together with the *Katzenbach v. McClung*, rational basis test meant that anything Congress wanted to do under the Commerce and Necessary and Proper Clauses was now potentially within Congress's reach. These two opinions, in our view, run counter not only to categorical federalism but also to the economics of federalism by giving Congress the power to legislate without any constitutional constraint. As we explained above, we do not think the benefits of the economics of federalism are likely to be realized in a world where Congress has the last word on the scope of Congress's own powers.

The four areas of current Supreme Court caselaw that enforce subsidiarity include: 1) Congress's Enumerated Lawmaking Powers, 2) the Dormant Commerce Clause, 3) Intergovernmental Immunities and Preemption, and 4) federal jurisdiction caselaw. In each area, fleshing out the subsidiarity idea with an open consideration of the Economics of Federalism could help to clarify the law.<sup>122</sup>

### **1. Congress's Enumerated Lawmaking Powers**

In its 1995 decision in *United States v. Lopez* the U.S. Supreme Court held by a vote of 5 to 4 that Congress lacked power under the Commerce and Necessary and Proper Clauses to criminalize bringing a gun within 1,000 feet of a school.<sup>123</sup> The Court distinguished all the cases previously discussed, noting they all involved commercial activities whereas *Lopez* involved a garden variety state law crime. Further, over forty States criminalized bringing guns to school, which meant there was no race to the bottom over the issue. It was also clear from the facts of the case that federal regulation would realize no economies of scale, there were no negative external effects of state law to correct, and there were no civil rights issues lurking in the case. The outcome in *United States v. Lopez* was thus entirely consistent with the Economics of Federalism.<sup>124</sup> *Lopez* reiterated the doctrine of *Jones & Laughlin Steel* that Congress could only regulate wholly intrastate activities that *substantially* burdened interstate commerce, but this time it struck down a federal statute instead of upholding it.

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<sup>122</sup> See also Mills, *supra* note \_\_ arguing that the U.S. could improve its conflict of laws rules if it would follow the EU's subsidiarity optimizing approach.

<sup>123</sup> 514 U.S. 549 (1995).

<sup>124</sup> Nonetheless, the justices explained their holding by trying to draw a categorical distinction between commercial activities which were federally regulable and noncommercial activities that were not. This distinction was to prove to be very difficult to sustain in the post-*Lopez* caselaw.

Since *Lopez*, the Supreme Court has applied the Substantial Effects Test twice – and reached the wrong result both times in our view. In *United States v. Morrison*, the Supreme Court wrongly struck down a civil rights measure, the Violence Against Women Act,<sup>125</sup> while in *Gonzales v. Raich*, the Court wrongly upheld a federal statute that criminally punished a woman who grew six marijuana plants in her house – which was legal under California state law.<sup>126</sup> The Court’s holding in *Morrison* was consistent with a categorical approach but inconsistent with the Economics of Federalism. The law at issue in *Morrison* was a civil rights law, and, as we argued above, the federal government ought to have the power to adopt such measures.<sup>127</sup> The Court’s holding in *Gonzales v. Raich* was problematic because states differed in their tastes, preferences, and conditions on the medical use of marijuana, and because the federal interest in regulating possession of very small amounts of home grown marijuana by very ill people was quite small. We agree with the dissenters in both *Morrison* and *Raich* for Economics of Federalism reasons.

Thus, with these three cases since 1995, the Supreme Court is back in the business of policing Article I, Section 8 of the Constitution. The justices’ vigorous oral arguments in March

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<sup>125</sup> 529 U.S. 598 (2000).

<sup>126</sup> 545 U.S. 1 (2005).

<sup>127</sup> Moreover, there was state action in this case because the States are under a Fourteenth Amendment obligation to provide women with the equal protection of the laws – an obligation they were failing to fulfill. The failure of the States to give women the same protection of the laws they were giving to men was thus forbidden state action that Congress could legislate against.

2012 over the constitutionality of President Barack Obama's newly enacted national health care mandate especially illuminated this revival.<sup>128</sup>

Three other post-*Lopez* cases enforcing the limits of federal enumerated powers also deserve mention. First, in *City of Boerne v. Flores*, the Supreme Court struck down the Religious Freedom Restoration Act.<sup>129</sup> This Act purported to protect religious freedom more expansively than the Supreme Court's interpretation of Section 1 of the 14<sup>th</sup> amendment, but the Court did not agree that Congress's Section 5 power to enforce the Fourteenth Amendment by enacting "appropriate" laws authorized the Act. *City of Boerne v. Flores* announced a new test of

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<sup>128</sup> The most recent enumerated power/federalism/subsidiarity issue to confront the U.S. Supreme Court involves the constitutional challenges to President Obama's National Health Care law – a law that was passed by Congress on March 21, 2010.<sup>128</sup> This law requires that individuals who lack health insurance to either buy it or pay a tax penalty for their failure to do so. The Health Care Mandate that requires individuals who lack health insurance to buy it is defended as being a necessary and proper means of carrying into execution Congress's commerce power to regulate the national, commercial health insurance industry. The proponents of the law argue that the States cannot themselves regulate healthcare because doing so would set off a race-to-the-bottom, collective action problem. This argument seems dubious since only one state – Massachusetts – has so far tried to mandate the purchase of health insurance, and its efforts to do so have not in fact been stymied by any race to the bottom. Moreover, Congress has never before forced people to buy something – to enter into commerce. Past regulations of commerce have always involved the regulation of buying and selling that is already going on.

Is the health care mandate congruent and proportionate? We think the answer is no for two reasons. First, in 220 years of American constitutional history Congress has never previously imposed a mandate that compelled people to buy something they did not want to buy. Obviously, there is a first time for everything, but the fact this has never, ever been done before is certainly enough to raise suspicion. And, second, if Congress can henceforth mandate the buying of things -- if it can compel people to enter into commerce as well as regulating commerce that is already ongoing – there will open up a vast prospect of new rent seeking legislation by the special interests to which the government in Washington, DC is already enthralled. GM and Chrysler will seek mandates forcing people to buy their cars, dairy farmers will seek mandate forcing people to buy milk, and chiropractors and acupuncturists will seek legislation to force consumers to buy their services.

<sup>129</sup> 521 U.S. 507 (1997).

“congruence and proportionality” to determine whether laws were “appropriate” measures to enforce Section 1 of the 14<sup>th</sup> amendment. The Supreme Court went on to invalidate federal laws in three subsequent cases: 1) *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*;<sup>130</sup> 2) *Kimel v. Florida Board of Regents*;<sup>131</sup> and 3) *Board of Trustees of the University of Alabama v. Garrett*.<sup>132</sup> Eventually, the Supreme Court paused in its vigorous application of the “congruence and proportionality” test, and upheld the two of Congress’s acts.<sup>133</sup> Nonetheless, by invalidating federal laws in *City of Boerne*; *Florida Prepaid*; *Kimel*; and *Garrett*, as well as *Lopez* and *Morrison*, the Court starkly reminded Congress that it was very definitely back in the business of policing and enforcing the enumeration of federal powers.

Second, in *Printz v. United States*<sup>134</sup> the Court held 5 to 4 that Congress could not commandeer states into helping to execute federal laws under the Necessary and Proper Clause. This important opinion built on the Court’s prior holding in *New York v. United States*<sup>135</sup> that Congress could not conscript state legislatures. In 2010, the Supreme Court decided another Necessary and Proper Clause case, *United States v. Comstock*, addressing whether Congress had power to authorize committing a mentally ill and sexually dangerous prisoner to federal custody beyond the date the prisoner would otherwise be detained.<sup>136</sup> The Court allowed that federal power in this case, but the very narrow and closely reasoned decision suggested the justices took the issue seriously. Justice Breyer’s opinion for the Court upheld Congress’s claimed power

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<sup>130</sup> 527 U.S. 627 (1999).

<sup>131</sup> 528 U.S. 62 (2000).

<sup>132</sup> 531 U.S. 356 (2001).

<sup>133</sup> *Tennessee v. Lane*, 541 U.S. 509 (2004); *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003).

<sup>134</sup> 521 U.S. 898 (1997).

<sup>135</sup> 505 U.S. 144 (1992).

<sup>136</sup> 130 S. Ct. 1949 (2010).

only because of five very specific concerns. Justice Thomas’s dissent, joined by Justice Scalia, complained that the federal prisoner civil commitment statute was not necessary and proper for carrying into execution some other federal enumerated power. Justices Alito and Kennedy voted with the majority and wrote the federal law carried into execution the same enumerated power that had supported the prisoner’s original conviction.

Third, in two sovereign immunity cases – *Seminole Tribe of Florida v. Florida*<sup>137</sup> and *Alden v. Maine*<sup>138</sup> -- the Supreme Court held that an Act of Congress purporting to give state employees a right to sue state governments for money damages in federal and state court was an unconstitutional exercise of federal enumerated powers. These two decisions thus strongly support the proposition that there has been a strong federalist revival in U.S. constitutional law in recent years.

In summary, since the 1995 decision in *United States v. Lopez* the Supreme Court has vigorously enforced federalism limits on congressional legislative power. It struck down two federal statutes on Commerce Clause grounds and four statutes on the grounds they were not “appropriate” laws for the enforcement of the Fourteenth Amendment. The Supreme Court decided two big Necessary and Proper Clause cases during this period, *Printz v. United States* and *United States v. Comstock*, in which it upheld a federal law only because five separate considerations taken together suggested that the law was necessary and proper. Finally, the court held federal laws allowing individuals to sue state governments for money damages in federal or state court were unconstitutional. The message from the Supreme Court is loud and clear: it is policing the enumeration of federal powers in a serious way.

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<sup>137</sup> 517 U.S. 44 (1996).

<sup>138</sup> 527 U.S. 706 (1999).

The Supreme Court has not, however, articulated a very useful test to evaluate whether a federal law is unconstitutional. It continues to use Chief Justice Hugh’s test from *Jones & Laughlin Steel* that Congress can only regulate wholly intrastate activities if they substantially affect interstate commerce. But what does the word “substantially” really mean? How do we know which wholly intrastate activities “substantially” affect interstate commerce and which do not? The Supreme Court simply never says.

The Court has no better test for enforcing Section 5 of the 14<sup>th</sup> amendment, which gives Congress power to pass “appropriate” legislation. Since *City of Boerne v. Flores* the Court has asked whether Section 5 legislation is a “congruent and proportional” measure to secure Section 1 Fourteenth Amendment rights. But what does “congruence and proportionality” mean? In *Tennessee v. Lane*,<sup>139</sup> Justice Scalia announced that he would no longer follow the “congruence and proportionality” test because it was too indeterminate.<sup>140</sup> Instead, he would uphold any rational Section 5 legislation targeted at race discrimination, and he would strike down anything else. Justice Scalia’s approach is inadequate and, moreover, it is even less faithful to the original meaning of the Fourteenth Amendment than is the congruence and proportionality test.<sup>141</sup>

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<sup>139</sup> 541 U.S. 509 (2004)

<sup>140</sup> *Id.* at [get cite]

<sup>141</sup> Professor Calabresi’s views on the original meaning of the Fourteenth Amendment are set out in: Steven G. Calabresi & Nicholas Stabile, On Section Five of the Fourteenth Amendment, 11 **University of Pennsylvania Journal of Constitutional Law** 1431 (2009); Steven G. Calabresi & Julia Rickert, Originalism and Sex Discrimination, forthcoming with the **Texas Law Review** (2011); Steven G. Calabresi, Substantive Due Process After Gonzales v. Carhart 106 **Michigan Law Review** 1517 (2008); and Steven G. Calabresi & Sarah E. Agudo, Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition? 87 **Texas Law Review** 7 (2008).

We think the “substantially affecting” test under the Commerce Clause and the “congruence and proportionality” test under Section 5 of the Fourteenth Amendment are inherently indeterminate. The Economics of Federalism approach would better resolve whether an act inherently falls within the sphere of national power or state power. The Economics of Federalism reveals the Gun Free School Zones Act in *Lopez* was unnecessary grandstanding; the States had no race to the bottom or other problem to correct. The statute in *United States v. Morrison*, on the other hand, might have been a valid federal civil rights measure. Finally, the Controlled Substances Act, as applied in *Gonzales v. Raich*, and the federal statute in *Wickard*, hardly met the “substantial” effects test because homegrown marijuana or wheat has at most an indirect effect on national markets. Also, California is among sixteen States that have legalized medical marijuana in recent years. Given that nearly one-third of the fifty States have spoken on the issue it is apparent that tastes and cultural preferences vary sharply across the United States. It is thus a classic Economics of Federalism issue which ought to be left at the state level to accommodate many viewpoints and to permit this experiment with the medical marijuana to proceed.

We have no idea what the future will hold for the Supreme Court’s enforcement of federal constitutionally enumerated powers. We think the post-1995 Supreme Court caselaw conclusively indicates that constitutional federalism and subsidiarity are alive and well in present-day American constitutional law. Students of U.S. constitutional law ought to study the Economics of Federalism and subsidiarity to analyze enumerated powers and the Dormant Commerce Clause.<sup>142</sup> Both concepts are essential to understanding American federalism from the days of the Bedford Resolution, at the Philadelphia Convention, on up to *United States v.*

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<sup>142</sup> Regan, *supra* Note \_\_.



*Lopez*'s holding that federal power extends only to those "intrastate activities that substantially affect interstate commerce." Both answer what "substantial" effects and "necessary and proper for carrying into execution" the enumerated powers really mean.

## 2. Dormant Commerce Clause

Under the Dormant Commerce Clause doctrine, the U.S. Supreme Court says the Constitution implicitly preempts state laws that burden interstate commerce in certain prohibited ways. The doctrine was born in *Gibbons v. Ogden*,<sup>143</sup> percolated in *Wilson v. Black-Bird Creek Marsh Co.*<sup>144</sup> and first flourished in a recognizable holding in *Cooley v. Board of Wardens*<sup>145</sup>-- where the Supreme Court upheld a Pennsylvania law that required that all ships entering or leaving the port of Philadelphia have a local pilot.

*Cooley*, decided in 1851, says that sometimes the Commerce Power was an exclusively national power that preempted conflicting state laws, but at other times it was merely a concurrent national power that did not constitutionally preempt state laws. Justice Curtis's opinion for the Court explained that:

Either absolutely to affirm, or deny that the nature of [the commerce] power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage is plain.<sup>146</sup>

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<sup>143</sup> 22 U.S. 1 (1824).

<sup>144</sup> 27 U.S. 245 (1829).

<sup>145</sup> 53 U.S. 299 (1852).

<sup>146</sup> *Id.* at 319.

The Court thus essentially upheld the Pennsylvania law requiring local pilots based on an Economics of Federalism intuition. Justice Curtis thought the law was a bona fide local health and safety measure and not economic protectionism which unreasonably burdened interstate commerce.

Since *Cooley*, the Supreme Court has enforced the Dormant Commerce Clause with some regularity. And since the New Deal, the Court has almost exclusively used the Dormant Commerce Clause to prevent state economic protectionism. Professor Donald H. Regan explained in an important law review article, “Not only is this what the Court has been doing, it is just what the Court should do. This and no more.”<sup>147</sup> In *Pike v. Bruce Church*,<sup>148</sup> a landmark 1970 Dormant Commerce Clause case, the Supreme Court said:

Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will, of course, depend on the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.<sup>149</sup>

*Pike v. Bruce Church* thus announced a two-part test for identifying whether state laws fall afoul of the Dormant Commerce Clause. State laws are invalid if either (1) they discriminate on their face against interstate commerce, or (2) the burden on interstate commerce outweighs any state or local benefit. Professor Regan explains *Pike v. Bruce Church* and its progeny as cases that

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<sup>147</sup> Regan, *supra* note \_\_, at 1092.

<sup>148</sup> 397 U.S. 137 (1970).

<sup>149</sup> *Id.* at 142.

prevent the states from engaging in economic protectionism with tariffs and embargoes, for example.

The Dormant Commerce Clause caselaw asks Court to distinguish between state laws that only reflect varying state preferences and conditions and those which also burden interstate commerce. The Court must police a line between laws that mainly affect one state and ones that affect national interests and are thus preempted. In practice, state laws with significant negative external affects on other states are struck down under the Dormant Commerce Clause. In *Pike v. Bruce Church* itself, the Court invalidated an Arizona law that required that Arizona cantaloupes be packed in Arizona and be labeled as Arizona-grown rather than being packed across the border in California. The Supreme Court easily decided that whatever state interest this law served was outweighed by its protectionist effect on interstate commerce.

The Supreme Court has decided several Dormant Commerce Clause cases since the New Deal, and all of them address the economic line between matters that affect mainly one state and matters that are protectionist and affect interstate commerce. The Court thus applies the Economics of Federalism and, in effect subsidiarity, in its Dormant Commerce Clause caselaw. Therefore, subsidiarity cannot be a stranger to U.S. constitutional law. Subsidiarity concerns are quite evident in in the Dormant Commerce Clause context and the Supreme Court routinely enforces them.

### **3. Intergovernmental Immunities and Preemption**

The Supreme Court has long held that the different levels of American government cannot single out each others' officers and instrumentalities for discriminatory treatment. This principle

is evident in *McCulloch v. Maryland*.<sup>150</sup> In *McCulloch*, the Supreme Court struck down a Maryland state tax on a Maryland branch of the federally chartered Bank of the United States. A critical fact in the Court's analysis was that state only taxed the Bank of the United States and not all other Maryland banks. The Supreme Court held that Maryland could equally tax all banks doing business in the state, but that it could not single out the federal bank. In the Court's view, the Constitution preempted such action even without a preempting act of Congress.

John Hart Ely praises *McCulloch* in **Democracy and Distrust**, writing that if majorities in one state could tax all U.S. citizens on federal instrumentalities there would be an obvious failure in the political process.<sup>151</sup> This explains why we allow states to tax federal employees' income, but at the same rates private employees pay. Similarly, the federal government may tax state employees' income at the same rates private employees pay. Neither level of government can constitutionally single out the officers or instrumentalities of another level of government for unusual treatment.

This insight underlies the Supreme Court's New Federal Common Law doctrine, first announced in *Clearfield Trust Co. v. United States*.<sup>152</sup> That case held that federal negotiable instruments issued by the Federal Reserve Bank of Philadelphia were governed by a federal common law rule, rather than by state common law under *Erie Railroad Co. v. Tompkins*.<sup>153</sup> The court's conclusion rested on the important Economics of Federalism interest the uniformity context. The Court reached a similar conclusion in 1988 in *Boyle v. United Technologies*

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<sup>150</sup> 17 U.S. 316 (1819).

<sup>151</sup> **John Hart Ely, Democracy and Distrust (1980).**

<sup>152</sup> 318 U.S. 363 (1943).

<sup>153</sup> 304 U.S. 64 (1938).

*Corp.*<sup>154</sup> which held that a federal common law rule protected military contractors from state tort suits for damages caused by their design specifications. The Court held the Constitution preempted such state tort suits because of the national government's Economics of Federalism interest in designing military equipment free from state tort juries' second-guessing. The Supreme Court's New Federal Common Law doctrine thus represents another area of caselaw that addresses subsidiarity concerns.

Finally, in *New York v. United States*<sup>155</sup> and *Printz v. United States*<sup>156</sup> the Supreme Court held that Congress could neither commandeer state legislatures or executive officials to pass certain laws nor impose unfunded mandates on state law enforcement officers. Economics of Federalism concerns animate both of these cases because state officers should set policies that reflect state majorities' differing tastes, conditions, and preferences. The Court expresses concern that lines of voter accountability will be blurred and the benefits of federalism lost if Congress can force state legislatures and executives to do its bidding using state resources and personnel. *New York v. United States* and *Printz* reflect the concern in *McCulloch* and in the Dormant Commerce Clause cases that one level of government ought not to be able to burden or discriminate against the other in American constitutional federalism. The intergovernmental immunities cases all involve the Constitution preempting state laws that burden national interests or institutions, but often very important cases also arise as to whether federal statutes preempt state law. Under the Supremacy Clause of Article VI, federal law preempts state law, including state constitutional law, when federal and state law conflict.<sup>157</sup> It is Congress's intent that

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<sup>154</sup> 487 U.S. 500 (1988).

<sup>155</sup> 505 U.S. 144 (1992).

<sup>156</sup> 521 U.S. 898 (1997).

<sup>157</sup> *Altria v. Good*, 555 U.S. 70 (2008).

controls in statutory preemption cases, and Congress may indicate its preemptive intent either expressly or through the structure and purpose of the statute enacted. Statutes may impliedly preempt state law where: 1) federal law is in conflict with state law or 2) where Congress's regulatory structure is so comprehensive that it occupies the whole field in that area of law.

The Supreme Court's statutory preemption cases turn on the language and history of each federal statute and on the facts of each case. Critics find it at best to be a muddle and at worst to be an invitation to judges to fall back on their own policy views in federal statutory preemption cases. One judge, Judge Stephen F. Williams, has openly called on federal judges to apply the Economics of Federalism in these decisions.<sup>158</sup> We agree with Judge Williams that this would improve the federal statutory preemption caselaw.

Federal statutory preemption is yet another context where federal judges weigh whether a state law intrudes on a federal interest or concerns only a state matter as to which tastes, preferences, and conditions may legitimately vary. It is simply inevitable that the federal courts will have to consult the Economics of Federalism and thus subsidiarity in these cases. Subsidiarity may not be mentioned in the text of the Constitution, but the document is of necessity infused with subsidiarity concerns.

#### **4. Federal Jurisdiction**

Federal jurisdiction is the final area of caselaw where subsidiarity concerns are clearly present. Professor Richard H. Fallon, Jr. of Harvard Law School argues that federal jurisdiction approaches have tended to display either a federalist sympathy for state power or a nationalist

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<sup>158</sup> Williams, *supra* note \_\_\_\_.

sympathy for federal court power.<sup>159</sup> Professor Martin H. Redish has made much the same point in an important book in the field.<sup>160</sup> There are several doctrines in the field of federal jurisdiction that proponents of state autonomy have used to guarantee that federal power should only be used where it is a vital *subsidiium* or form of aid for the federal courts.

The law of federal jurisdiction protects the autonomy, and some would even say the primacy, of state over federal courts. This is due to the Anti-Injunction Act, which limits federal court injunctions of state judicial proceedings,<sup>161</sup> to the various abstention doctrines, which require federal courts to often abstain from acting until proceedings have finished in the state courts<sup>162</sup> and to federal protection of state sovereign immunity.<sup>163</sup> Recent Supreme Court cases have also cut back on federal habeas corpus review, which review remains nonetheless as a significant limit on congressional power.<sup>164</sup> The state courts also share concurrent jurisdiction with the federal courts over at least some federal question and diversity cases.<sup>165</sup>

Federalism subsidiarity concerns took center stage in 1938 when the New Deal Supreme Court abandoned *Swift v. Tyson*'s<sup>166</sup> so-called general federal common law in *Erie Railroad Co. v. Tompkins*'<sup>167</sup> landmark holding. The New Deal Court valued federalism in this area of law because it promoted experimentation and competition, which are core subsidiarity concerns. Given that the New Dealers abandoned enumerated powers federalism, it is striking that the

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<sup>159</sup> Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 **Va. L. Rev.** 1141 (1988).

<sup>160</sup> **Martin H. Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power*** (1990).

<sup>161</sup> 28 U.S.C. Section 2283 (1982).

<sup>162</sup> *Younger v. Harris*, 401 U.S. 37 (1971) and *Railroad Commission v. Pullman Co.*, (1941).

<sup>163</sup> See TAN st notes \_\_\_, *supra*.

<sup>164</sup> *Boumedienne v. Bush*, 553 U.S. 723 (2008).

<sup>165</sup> 28 U.S.C. Sections 1331 & 1332.

<sup>166</sup> 41 U.S. 1 (1842).

<sup>167</sup> 304 U.S. 64 (1938).

Supreme Court in that era championed federalism in most federal common law contexts (excepting the *Clearfield Trust* line of cases mentioned above).

The *Erie* doctrine is motivated by subsidiarity concerns, though Michael Greve has criticized it for leading to “upside-down federalism” because it enhances state efforts at maintaining cartels. We are quite sympathetic, as a policy matter, with Greve’s criticisms of *Erie*, but there is no doubt as an historical matter that the opinion reflects in part Justice Brandeis’s devotion to subsidiarity. Brandeis authored the *Erie* opinion and the dissent in *New State Ice Co. v. Liebmann*, which lauded the states as laboratories of experimentation. *Erie* is additional evidence of how intricately the law of federal jurisdiction is intertwined with subsidiarity concerns.

In summary, the law of federal jurisdiction supports our thesis that subsidiarity concerns have long animated the U.S. Supreme Court even without the label “subsidiarity.” We think that a better understanding of subsidiarity and the Economics of Federalism would thus be of great value to the U.S. Supreme Court in deciding federal jurisdiction cases.

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We think judicial enforcement of constitutional federalism is a good idea; that the Framers of the U.S. Constitution infused that document with the idea of subsidiarity; and that the U.S. Supreme Court’s caselaw involving Congress’s Enumerated Lawmaking Powers, the Dormant Commerce Clause, intergovernmental immunities, preemption, and federal jurisdiction suggests that there is judicial enforcement of subsidiarity in present day U.S. constitutional law. We do not claim that the current U.S. caselaw generates all the gains that



judicial enforcement of subsidiarity ideally would realize, but we do believe it achieves many such gains. In any event, current doctrine could be improved if its relationship to the Economics of Federalism and subsidiarity were more widely understood.

### **III. Incorporation of the Bill of Rights and the Margin of Appreciation**

The economics of federalism and subsidiarity are relevant as well to a second big problem in American constitutional law: the debate over whether and to what degree the Fourteenth Amendment incorporates the Bill of Rights and applies it against the States.<sup>168</sup> This question recently took center stage in *McDonald v. City of Chicago*, where the Supreme Court held that the Second Amendment right to keep and bear arms was incorporated by the Fourteenth Amendment which applied that right against the States.<sup>169</sup> This issue ended up splitting the Supreme Court 5 to 4 and even the five justices in the majority were unable to agree among themselves on a rationale.

We consider here what relevance the economics of federalism has for the question of when to guarantee human rights across the whole continental United States plus Hawaii and when the Supreme Court ought to leave a matter for decision by the States.<sup>170</sup> We begin in Section A below by discussing the applicability of the economics of federalism to the problem of whether

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<sup>168</sup> Calabresi, 94 **Michigan L. Rev.** 813-823. Erin F. Delaney who has recently accepted an appointment as an Assistant Professor of Law at Northwestern University School of Law is working on a project now that addresses the incorporation doctrine in the United States and the margin of appreciation in the European Union in more depth. Professor Calabresi has benefitted from talking with her about her work.

<sup>169</sup> 130 S. Ct. 3020 (2010).

<sup>170</sup> This question is addressed in part in: Carozza, *supra* note \_\_.

to incorporate the Bill of Rights against the States. We then turn in Section B to a discussion of the original meaning of the Fourteenth Amendment as it bears on the incorporation problem. Section C considers the three main approaches taken in practice by Supreme Court justices to the incorporation issue between 1897 and 2010. Section D discusses the approach we think the Supreme Court ought to follow to incorporation cases. And, Section E then analyzes the opinions in *McDonald v. City of Chicago* in light of our interpretive theory.

### **A. Subsidiarity and Incorporation of the Bill of Rights**

While the Bill of Rights applies only to actions by the federal government, the Fourteenth Amendment applies to state and local governments. The Fourteenth Amendment was ratified in 1868, but the incorporation of the Bill of Rights into the Amendment so that the Bill of Rights would apply against the States did not begin until 1897 in *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*<sup>171</sup> and even today several provisions of the Bill of Rights have not been incorporated. Thus, today, the Third Amendment guarantee against the quartering of soldiers in private homes, the Fifth Amendment guarantee of indictment only by a grand jury, and the Seventh Amendment right of civil jury trial have not been incorporated. Moreover, while the Sixth Amendment right to a jury trial has been incorporated it means a lot less at the state level than it does at the federal level. The States are allowed to have criminal juries of only six persons while a common law jury of twelve persons is required at the federal level. What, then, are the economic and subsidiarity-based arguments against and in favor of the recognition of a new, national individual constitutional right?

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<sup>171</sup> 166 U.S. 226 (1897).

The first argument against the recognition of new national or transnational individual rights is that tastes, cultural preferences, and real world conditions may vary from one state to another. Thus, the residents of large, scarcely populated western States where there is a lot of hunting may have a different preference with regard to gun rights than is held by smaller, more densely populated northeastern States. The Supreme Court may be well advised to avoid recognizing new national laws until they are supported by an overwhelming proportion of the population. This concern counsels not only against incorporation of parts of the Bill of Rights, but also against the creation of new national, substantive due process rights such as a right to an abortion or to gay marriage.<sup>172</sup>

The second and third arguments against the creation or recognition of new national individual rights are that in the absence of such rights the States will compete with one another and experiment in order to obtain an optimal and popular Bill of Rights climate. State competition and experimentation with gay rights, including gay marriage, has been a relatively peaceful and harmonious process in part because the Supreme Court has only acted to protect gay rights after national public opinion had shifted in their favor. The Supreme Court did not act as an agent of social change in its decisions in *Romer v. Evans*,<sup>173</sup> where it invalidated one highly idiosyncratic state law, or in *Lawrence v. Texas*,<sup>174</sup> where it invalidated thirteen state sodomy laws that were never enforced after thirty-seven other States had already repealed their sodomy laws. In contrast, the Supreme Court did act as an agent of national social change and it did

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<sup>172</sup> See Calabresi, “Substantive Due Process and *Gonzales v. Carhart*,” supra Note \_\_\_ and Calabresi & Agudo, “Individual Rights Under State Constitutions When the Fourteenth Amendment was Ratified in 1868: What Rights are Deeply Rooted in American History and Tradition?” supra Note \_\_\_.

<sup>173</sup> 517 U.S. 620 (1996).

<sup>174</sup> 539 U.S. 558 (2003).

stifle competition and experimentation with its sweeping abortion ruling in *Roe v. Wade*.<sup>175</sup> The public controversy and ill will engendered by *Roe* can be usefully contrasted with the comparative harmony on gay rights issues.

The fourth and final argument against the creation or recognition of new national, individual rights by the U.S. Supreme Court is the higher cost of monitoring a national life tenured institution as compared with the much lower cost of monitoring state Supreme Courts the justices of which are often term-limited or are even subject to election. There is no question but that it is very hard and expensive for state voters to monitor and rein in the U.S. Supreme Court when it makes a mistake.

On the flip side, however, there are also powerful economic arguments in favor of incorporation of the Bill of Rights or in favor of substantive due process, national rights creation. First, the fifty United States are so territorially small and numerous that they may be unable collectively to guarantee individual rights. Consider the First Amendment protection of freedom of speech and of the press. Much of what we say or publish today gets disseminated in a national market. If our rights of freedom of speech or of the press existed only at the state level, we might be liable to prosecution in some States where our remarks would broadcast or published. There are economies of scale to protecting First Amendment rights nationally, and the cost to the States of protecting such rights collectively might be prohibitively high.

Second, state laws that experiment too boldly or that stray too far from the national consensus may impose a huge negative external cost on other States. In the late Nineteenth Century, Congress and the Supreme Court reached a consensus opinion that States like Utah or

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<sup>175</sup> 410 U.S. 113 (1973).

Idaho ought not to be allowed to have legal polygamy. This view was epitomized in the Supreme Court's unanimous 1879 decision in *Reynolds v. United States*.<sup>176</sup> Essentially, the national majority concluded that polygamy was too disruptive a social experiment for it to be allowed to go forward. Just as States are not allowed to experiment with aristocratic or theocratic Constitutions under the Guarantee Clause so too could the States not be allowed to experiment with polygamy. One can argue with the judgment call in *Reynolds* itself, but the principle is undoubtedly a correct one. It is for this reason that we no longer allow States to experiment with laws that discriminate on the basis of race.

Third, the civil rights rationale for national power in the theory of the economics of federalism suggests that some core civil rights guarantees such as protection from discrimination based on race or religion or sex ought to be nationally guaranteed. National governments in fact do a better job of protecting civil rights than do state and local governments. For the same reason, national Supreme Courts may do a better job of protecting civil rights than state Supreme Courts will do. There is value in having a geographically distant, life tenured tribunal reviewing the decisions of entrenched majorities in state capitals. Geographic distance can lead to impartiality and fairness.

In summary, the economics of federalism tends to support some degree of variation in national, individual rights from state to state, but no variation as to fundamental, civil rights especially rights of political participation and rights against discrimination on the basis of race, religion, or sex. Indeed, laws that limit rights of political participation, or that discriminate, may actually close down the political processes of change that John Hart Ely described in *Democracy*

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<sup>176</sup> 98 U.S. 145 (1878).

*and Distrust*.<sup>177</sup> If that happens federalism may cease to work effectively because an entrenched state majority may just shut out and completely tyrannize a minority. This is, of course, precisely what happened with the Jim Crow laws in the south prior to 1964.

The economics of federalism suggests powerful reasons overall for protecting the rights of political participation that John Hart Ely wrote about such as the rights of freedom of speech and of the press, freedom of association, freedom of religion, freedom from racial and sex discrimination, and the right to one person, one vote. The economics of federalism do not, however, necessarily suggest that we ought to have national codes and rights of criminal or civil procedure, unless those rights are needed for the protecting of a racial or other minority's civil rights. Competition and experimentation among the States as to criminal procedural or civil procedure rights might well be better than a one size fits all, fifty state approach. The economics of federalism points us toward some kind of selective incorporation of the Bill of Rights of the kind favored by Justices Felix Frankfurter and the younger Justice John Marshall Harlan, although without the substantive due process that both those justices favored. Substantive due process often leads to major federalism problems as happened with *Roe v. Wade* and before *Roe* with *Lochner v. New York*.<sup>178</sup>

## **B. Original Meaning and Incorporation**

Selective or partial incorporation with no substantive due process may be optimal as a policy matter, but is it consistent with the original public meaning of the Fourteenth Amendment? A full exposition of our views on the original and present day meaning of the Fourteenth

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<sup>177</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

<sup>178</sup> Get cite

Amendment is set out in the sources cited in the footnote at the start of this section of our article.<sup>179</sup> Suffice it to say here that not everything that is wise is constitutionally mandated and not everything that is unwise is constitutionally prescribed.

Analysis of whether the Fourteenth Amendment and the incorporation question must begin with its text. Section 1 of the amendment provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>180</sup>

Scholars agree that the rights conferring clause in the language quoted above was meant to be the Privileges or Immunities Clause which protected all common law rights, rights in state Bills of Rights, and possibly rights in the national Bill of Rights from “abridgement.” The Due Process Clause in 1868 was almost certainly understood as a guarantee only of procedural regularity as against arbitrary executive branch and judicial action. The Equal Protection Clause was understood originally as guaranteeing each citizen a right to equal “protection” of those laws against murder and violence and theft that were already on the books. The Equal Protection Clause thus protected against non-enforcement of a State’s murder laws when there had been a lynching. The Clause was about the equal protection of those laws that were already on the books and not about protection from discrimination in the making of laws.<sup>181</sup>

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<sup>179</sup> See Note \_\_, supra.

<sup>180</sup> U.S. CONST. amend. XIV, § 1.

<sup>181</sup> Id.

The only Clause in the Fourteenth Amendment that addresses equality and the making of laws is the Privileges or Immunities Clause. This Clause explicitly says “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” How does this Clause ban race discrimination? It says no state can give an abridged or shortened set of rights to one class of citizens, like African Americans, as compared to another class of citizens, like whites. Abridgments can be targeted at a class of citizens, which is why the Fifteenth Amendment says: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.”<sup>182</sup>

But abridgments need not be targeted at a class of people to qualify as abridgments. Some abridgments burden only an individual and his individual rights. This is evident in the First Amendment which bans “abridgments” of individual rights. The text of the First Amendment provides that: “Congress shall make no law ... abridging the freedom of speech, or of the press.”<sup>183</sup> The Privileges or Immunities Clause then protected both against discrimination and against depriving an individual of his rights.

What rights did the Privileges or Immunities Clause protect? What were the privileges or immunities of citizens of the United States? First, we know that everyone born in the United States is by operation of the first sentence of the Fourteenth Amendment a citizen both of the United States and of the state wherein he resides. It follows *a fortiori* that the privileges or immunities of a citizen of the United States include not only his privileges or immunities as a citizen of the nation but also his privileges or immunities as a citizen of the state wherein he

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<sup>182</sup> U.S. CONST. amend. XV.

<sup>183</sup> U.S. CONST. amend I.



resides. This has to be true because we know the Fourteenth Amendment was meant to protect the right of African Americans to exercise the same common law rights of contract, property ownership, and torts etc ... as state law allowed white citizens to exercise. The privileges or immunities of citizens of the United States thus included not only their common law rights but also their rights under state Bills of Rights.<sup>184</sup>

The general consensus on the original meaning of the Privileges or Immunities Clause is that it protected as privileges or immunities those privileges and immunities that Article IV, Section 2 guarantees to out-of-staters when they are in another State. The content of those privileges and immunities is described in a rambling opinion by Justice Bushrod Washington (George's nephew) that all the Framers of the Fourteenth Amendment seemed to regard as talismanic. Justice Washington said the following in *Corfield v. Coryell* about what were and were not privileges or immunities:

The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture,

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<sup>184</sup> Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under state Constitutions When The Fourteenth Amendment Was Ratified In 1868: What Rights Are Deeply Rooted In American History And Tradition?*, 87 TEX. L. REV. 7 (2008).

professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state, in every other state, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old articles of confederation) “the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union.”<sup>185</sup>

The bottom line under *Corfield v. Coryell* is that all common law rights and state constitutional rights that were deeply rooted in history and tradition were protected as privileges or immunities but that those rights could be trumped by a States police power to promote the common good. Note the passage underlined above which says that all rights are: “subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.” Under *Corfield v. Coryell*, there is a right to liberty of contract and probably also a right to bodily integrity but it is subject to reasonable police power regulation that promotes the common good. *Corfield* grants a huge number of rights with one hand, but it makes all those rights subject to police power negation so long as the state government is acting “justly” to promote “the general good of the whole.”

What does this indicate about the question of whether the Fourteenth Amendment was originally meant to apply the federal Bill of Rights to the States or to offer federal constitutional protection to items in state Bills of Rights? It suggests the Framers of the Fourteenth

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<sup>185</sup> 6 Fed. Cas. 546, 551-52 (No. 3,230) (C.C.E.D. Pa., 1823).

Amendment did mean to protect a broad array of individual rights but all of those rights could be trumped by a state government that was acting “justly” and that was trying to secure “the general good of the whole [people].” So read, the Fourteenth Amendment is little more than a protection against special interest or class based laws. It offers little protection for individual rights.

### **C. Incorporation and Practice from 1868 to 2010**

The Framers of the Fourteenth Amendment never gave us any clear guidance on their vision of a Privileges or Immunities Clause that protected everything but did not protect it very much. And, in any event, the Supreme Court almost immediately read the Privileges or Immunities Clause to be a nullity in *The Slaughter-House Cases*.<sup>186</sup> As a result, the individual rights protecting function of the Privileges or Immunities Clause came to be performed by the doctrine of substantive due process and the anti-discrimination function of the Privileges or Immunities Clause came to be performed by the Equal Protection Clause. Incorporation of the federal Bill of Rights against the States began in 1897 as a matter of protecting fundamental rights through substantive due process, and, in the recent *McDonald v. City of Chicago* incorporation case, substantive due process remained the textual underpinning of the incorporation doctrine. In practice, the justices of the Supreme Court have weighed three different theories of incorporation between 1897 and 2010. All of these theories are open to criticism in light of the history recounted above.

The first clearly articulated theory of incorporation was Justice Felix Frankfurter’s idea that the Fourteenth Amendment protected only fundamental rights – a category that was both larger than and smaller than the Bill of Rights. Frankfurter articulated his theory in *Adamson v.*

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<sup>186</sup> 83 U.S. 36 (1873).

*California* where he made it clear that freedom of speech and of the press, freedom of religion, and protection of private property from takings were all secured by the Fourteenth Amendment but that the amendment did NOT protect the criminal procedure guarantees in the Bill of Rights.<sup>187</sup> Frankfurter's approach made sense as a policy matter since all western democracies recognize and protect the rights he labeled as fundamental while many Civil Law nations do not recognize a right to jury trial or to protection from self incrimination or double jeopardy.

The problem with Justice Frankfurter's position, as Justice Hugo Black frequently pointed out, was that in the Anglo-American constitutional tradition as it stood in 1868 the criminal procedure rights that Justice Frankfurter disparaged were all clearly recognized as being fundamental rights. More than three quarters of the state Bills of Rights in 1868 protected the rights to criminal and civil jury trial and to freedom against self-incrimination or double jeopardy. Justice Frankfurter's position was thus exposed as being in tension with Anglo-American constitutional history.

The second clearly articulated theory of incorporation was Justice Hugo Black's idea, set forth in his dissenting opinion in *Adamson v. California*.<sup>188</sup> Justice Black thought the Fourteenth Amendment incorporated the rights in the first eight amendments in the Bill of Rights and nothing more and nothing less. Justice Black eschewed substantive due process, and he called for lashing Section 1 of the Fourteenth Amendment to the first eight amendments in the federal Bill of Rights. Justice Black may well have been right that the Fourteenth Amendment was

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<sup>187</sup> 332 U.S. 46 (1947).

<sup>188</sup> 332 U.S. 46 (1947) (Black, J., dissenting). Justice Black's views are for the most part defended in **Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (2000).**

originally meant to apply the federal Bill of Rights against the States but there are multiple weaknesses in his argument.

First, if Section 1 of the Fourteenth Amendment was meant to incorporate the federal Bill of Rights and only the federal Bill of Rights against the States, why does it talk open-endedly about protecting the privileges or immunities of national and state citizenship? Surely, the Privileges or Immunities and Due Process Clauses of the Fourteenth Amendment are a strange way of incorporating the rights in the first eight amendments to the federal Constitution. This is especially the case since the first eight amendments include the Due Process Clause of the Fifth Amendment. Why would it be necessary to include a Due Process Clause in the Fourteenth Amendment if that amendment had been meant to incorporate the federal Bill of Rights?

Second, under Justice Black's reading, Section 1 of the Fourteenth Amendment does not protect such state common law rights as liberty of contract, the right to own property, family law, the right to sue in torts etc ... If so, then Section 1 of the Fourteenth Amendment fails in its goal to outlaw race discrimination by the States as to common law rights. It is implausible to read Section 1 of the Fourteenth Amendment in a way that causes it to fail to accomplish the central goal of its drafters.<sup>189</sup>

Third, Justice Black is wrong in so far as he argues that Section 1 of the Fourteenth Amendment does not protect at least some common law liberty rights such as freedom to pursue one's livelihood or occupation. A brief glance back at the passage we quoted from *Corfield v.*

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<sup>189</sup> This argument is developed further in: Steven G. Calabresi & Andrea Matthews, *Originalism and Loving v. Virginia* (forthcoming in the **B.Y.U. L. Rev.** (2012)).

*Coryell* above makes it clear that Section 1 was meant to apply to economic rights that go well beyond anything to be found in the first eight amendments to the Constitution.

Ultimately, the deficiencies of Justices Black's and Frankfurter's opinions in *Adamson* led to a third theory of selective incorporation – a theory that was put forward and championed by former Justice William J. Brennan. Justice Brennan argued that Justice Black was right that the Fourteenth Amendment incorporated the criminal procedure rights in the first eight amendments to the federal Constitution while Justice Frankfurter and the younger Justice Harlan were right that the Fourteenth Amendment protected such unenumerated rights as the right to privacy that was elaborated in *Griswold v. Connecticut* and *Roe v. Wade*. Justice Brennan's view largely carried the day on the Supreme Court as most of federal criminal procedure came to be incorporated even while the Supreme Court also used the Fourteenth Amendment as a font of unenumerated rights.

Justice Brennan's views were sharply criticized, however, by Justice William Rehnquist and later Justice Antonin Scalia in a series of dissenting opinions. Rehnquist and Scalia directed their most withering fire at the notion of substantive due process. They argued that the only rights protected by the Fourteenth Amendment are those that are deeply rooted in history and tradition. They expressed this view in majority opinions in *Michael H. v. Gerald D.*;<sup>190</sup> *Washington v. Glucksberg*;<sup>191</sup> and Justice Alito followed this approach in incorporating the Second Amendment in *McDonald v. City of Chicago*.<sup>192</sup> Justice Thomas declined to join Alito's

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<sup>190</sup> 491 U.S. 110 (1989).

<sup>191</sup> 521 U.S. 702 (1997).

<sup>192</sup> 130 S. Ct. 3020 (2010).

opinion because he would have correctly based incorporation on the Privileges or Immunities Clause of the Fourteenth Amendment rather than the Due Process Clause.

The bottom line, today, is that the Supreme Court has mostly backed away from unenumerated rights substantive due process of the kind Justice Brennan has favored, and it has adhered to its past precedents where it has already explicitly incorporated criminal procedure rights against the States. The Court has gone out of its way, however, to avoid any further application of the federal criminal procedure rights in the first eight amendments to the States. The Court has declined to grant certiorari in cases where it has been asked to impose a twelve rather than six person criminal jury trial right on the States. It also has shown no interest in forcing the States to indict only by a grand jury or to use jury trial in civil cases. The Court has also pruned back its understanding of the Fourth Amendment exclusionary rule and the Fifth Amendment *Miranda* warning to allow for greater state experimentation in these areas. From the late 1970's down to the present day, the U.S. Supreme Court has so thoroughly backed off in these areas that state Supreme Courts have largely taken the lead in Bill of Rights innovation and enforcement.<sup>193</sup>

#### **D. The Right Answer**

So what is the right answer to the question of what limits Section 1 of the Fourteenth Amendment imposes on the States? The original history suggests that lots of rights were protected but none of them very much. Justice Frankfurter's approach is unhelpful because he discounts the importance of Anglo-American procedural rights that the Framers of the

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<sup>193</sup> RANDY J. HOLLAND, STEPHEN R. MCALLISTER, JEFFREY M. SHAMAN, & JEFFREY S. SUTTON, *STATE CONSTITUTIONAL LAW: THE MODERN EXPERIENCE* (2010). *See also* JEFFREY M. SHAMAN, *EQUALITY AND LIBERTY IN THE GOLDEN AGE OF STATE CONSTITUTIONAL LAW* (2008).

Fourteenth Amendment thought were fundamental. Justice Black's approach fails because it does not explain how the Fourteenth Amendment protected the common law rights of free African-Americans. And, Justice Brennan's approach seems ad hoc and led to a virulent right to abortion in *Roe v. Wade* which the nation is still troubled by thirty-eight years later.

We think all of the three approaches taken by Justices Frankfurter, Black, and Brennan have something to recommend them when we look at them in terms of the economics of federalism and of subsidiarity. Justice Frankfurter's instinct that rights of freedom of speech, political participation, and anti-discrimination were more fundamental than criminal procedural rights is we think entirely sound. John Hart Ely's work in *Democracy and Distrust* shows that freedom of speech and of the press; one person, one vote; freedom of religion; and protection against all forms of discrimination are essential if the States are to function effectively as democracies.<sup>194</sup> The Supreme Court is most effective when it sticks to policing rights of political participation and anti-discrimination rights, and it is most likely to get itself into political trouble when it prescribes a federal code of abortion law or of criminal procedure which the States must follow. This is part of the insight of footnote 4 of *United States v. Carolene Products Co.*<sup>195</sup>

This emphatically does NOT mean that criminal procedure rights or rights to liberty of contract or to bodily integrity are not fundamental rights under the Fourteenth Amendment. They are. What it does mean is that in figuring out which exercise of the police power are "just" efforts to legislate to promote "the general good of the whole [people]" we have to look at our practice from 1868 to the present day and perhaps even to the practice in other western constitutional democracies. Whatever people might have thought in 1868 about the proper scope

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<sup>194</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

<sup>195</sup> 304 U.S. 144 (1938).



of the police power, we know today that we must be far more cautious about police power interferences with freedom of speech or of the press than we need to be concerned about six person criminal juries or a sixty hour work week limit for bakers. The Framers of the Fourteenth Amendment did not protect fundamental rights absolutely. In their world, all rights were fairly easily trumped by the police power. We know better thanks to 143 years of practice living under the Fourteenth Amendment since 1868. We know that rights of political participation and anti-discrimination rights ought only to be trumped where there is the most compelling of governmental interest while many other rights are properly protected only by rational basis scrutiny. Other rights such as the right to a criminal jury trial in state cases get middle level scrutiny which is why six person juries are OK at the state level but are not OK at the federal level.

Justice Hugo Black's approach to incorporation had the advantage that it led him to dissent in *Griswold v. Connecticut*,<sup>196</sup> a case which foreshadowed the calamity of *Roe v. Wade*. Justice Black was very aware of the mistakes that Supreme Court justices enforcing their own ideas about fundamental justice could cause. But Justice Black had no theory that was rooted in the 1860's as to why he gave First Amendment rights such elevated protection while not recognizing economic liberties as being protected at all. There is more evidence from 1868 that tends to suggest the Framers of the Fourteenth Amendment cared about economic liberty than there is evidence to suggest they cared about free expression. Justice Black's theory of the Fourteenth Amendment is thus more deeply rooted in the history and tradition of the Court Packing Fight of the 1930's than it is rooted in the civil rights struggles of the 1860's.

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<sup>196</sup> 381 U.S. 479 (1965).

Justice William Brennan's selective incorporation approach had the advantage that it could explain why the Fourteenth Amendment recognized so many rights, including criminal procedure rights, but it suffered from the disadvantage that he gave insufficient weight to the State's police power that could trump fundamental right. Justice Brennan's nemesis former Chief Justice William H. Rehnquist, on the other hand, gave too much weight to the police power and was insufficiently protective of fundamental rights. As is often the case, the correct answer lay somewhere in the middle of these two extremes.

#### ***E. McDonald v. City of Chicago***

So what does all of this indicate with respect to the recent Supreme Court opinion incorporating the Second Amendment into the Fourteenth so that it now applies against the States? Was the Court right to strike down Chicago's ban on gun ownership? Did Justice Alito's plurality opinion analyze the issues correctly or did Justice Thomas's concurrence or Justice Stevens' or Breyer's dissents analyze the issues correctly?

We think the majority was right to strike down the Chicago ban on gun ownership. To begin with, there is no question, in our view, but that the right to keep and bear arms is deeply rooted in English and American history and tradition. Both Justice Alito's plurality opinion and Justice Thomas's concurrence clearly prove as much. Moreover, the right to own guns has traditionally been viewed as being a political right in American law. We have a right to own guns at least in part because it protects our liberty as against the government. We may also have a right to defend ourselves and to hunt but a key part of the right to keep and bear arms is political. A local or state law that completely deprives the citizenry of any right to even own a gun is not a

“just” law enacted for “the general good of the whole [people]” in light of American history and tradition.

Would other regulations of the right to keep and bear arms such as laws that prohibit concealed carry in schools or other public places be constitutional? We would have to analyze these issues one by one as they arose with careful attention to the facts of each case. Some kinds of guns are more dangerous today than guns were in 1791 or 1868. Fundamental rights can be regulated, and even the First Amendment is subject to a time, place, and manner restriction. We think it is permissible in our legal tradition to outlaw machine guns, privately owned tanks, heat-seeking missiles, and other military weapons. On the other hand, state governments cannot under the guise of regulation render the right to own a gun totally meaningless.

#### **F. The Margin of Appreciation**

There is a doctrine in European law that is related to the concept of subsidiarity which the European Court of Human Rights invokes in deciding cases under the European Convention on Human Rights. That doctrine is one that recognizes that large continental human rights courts have to tolerate some reasonable diversity of enforcement among the member units of any such federation. The European Court of Human Rights calls this sphere of “live and let live” toleration a “margin of appreciation.”<sup>197</sup> The margin of appreciation is the fudge factor by which

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<sup>197</sup> There is a substantial literature on the margin of appreciation doctrine which includes: **Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*** (2002); Eyal Benvenisti, *Margin of Appreciation, Consensus and Universal Standards*, 31 **N.Y.U. J. Int. L. & Pol’y** 843 (1999); George Letsas, *Two Concepts of the Margin of Appreciation*, 26 **Oxford Journal of Legal Studies** 705 (2006); Javier Garcia Roca, *La Muy Discrecional Dontrina del Margen di Apreciacion Nacional segun el Tribunal Europeo de Derechos Humanos: Soberania e Integracion*, 20 **Teoria y Realidad Constitucional** 117 (2007); **Howard Charles Yourow, *The***

the European Court of Human Rights allows some of the forty-seven member countries to deviate from international human rights norms.

The idea of a margin of appreciation is somewhat less rights protective than is the idea of subsidiarity because the former is a doctrine of judicial deference while the latter is a theory of federalism.<sup>198</sup> Nonetheless, the margin of appreciation doctrine has come to be recognized as a foundational feature of European Human Rights law. The margin of appreciation doctrine could be described as a federalism discount extended by some national or international courts whereby some regions are allowed to vary from the approach followed by other regions in the enforcement of rights.

The European Court of Human Rights invoked the margin of appreciation concept in two striking instances in recent years. First, in *Leyla Sahin v. Turkey*, the European Court of Human Rights allowed Turkey to ban the wearing of an Islamic headscarf in major educational institutions notwithstanding the European Convention's protection of religious freedom.<sup>199</sup> The Court reasoned that Turkey faced unusual threats from militant Islamists, and it thus concluded that Turkey had the right to ban the wearing of a headscarf in schools even if in other countries that right might be protected. Second, in *Lautsi v. Italy*, the European Court of Human Rights also upheld an Italian state policy of displaying crucifixes on the walls of classroom in state run

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**Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence** (1996); Steve Greer, **The Margin of Appreciation: Interpretation and Discretion Under the European Convention of Human Rights** (2000); Rafaella Nigro, *The Margin of Appreciation Doctrine and the Case-Law of the European Court of Human Rights on the Islamic Veil*, 11 **H.R. Rev.** 531 (2010). Professor Calabresi also wishes to acknowledge an unpublished paper written by Pablo Contreras entitled *The Margin of Appreciation and the European Court of Human Rights* (on file with the authors).

<sup>198</sup> Carozza, *supra* note \_\_, at 69-71.

<sup>199</sup> App. No. 44774/98 Eur. Ct. H.R. (2005).

schools.<sup>200</sup> Once again, the state action was challenged as impairing religious freedom and once again the European Court of Human Rights invoked the margin of appreciation to recognize the cultural importance of the crucifix and of Catholicism to Italy.

We think these cases make a lot of sense for a Human Rights Court that seeks to protect human rights in the forty-seven member Council of Europe. The Council includes an incredibly diverse collection of nations some of which are very secular while others are quite traditional and religious. The Council's members include countries with Protestant, Catholic, Eastern Orthodox, and Islamic majorities, and it seems highly likely that tastes, cultural preferences, and real world conditions vary sharply among the Council of Europe's 47 member nations. The failure by the European Court of Human Rights to embrace a margin of appreciation would be more likely to torpedo efforts at international human rights protection in Europe than it would be to get crucifixes removed from classroom walls. Moreover, some cultural variation among the member countries ought to be viewed as being no more threatening than the prevalence of different languages and cultures among these countries. European human rights law bans all across the continent of Europe: 1) the death penalty, 2) water-boarding, and 3) denials of gay rights to have sexual relationships. It is thus hard to see much of a threat to European constitutional freedoms coming from the allowance of national flexibility as to public displays of a religious sort. This is especially true since the European Court of Human Rights did for example protect the right of Jehovah's Witnesses aggressively to proselytize in *Kokkinakis v. Greece*.<sup>201</sup>

Strikingly, the U.S. Supreme Court has recently taken a similar margin of appreciation approach to issues of religious endorsement. In *Arizona Christian School Tuition Org. v. Winn*,

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<sup>200</sup> App. No. 30814/06 Eur. Ct. H.R. (2011).

<sup>201</sup> App. No. 14307/88 Eur. Ct. H.R. (1993).

the Supreme Court made it substantially harder for taxpayers who object to public religiosity to get standing to sue in such cases.<sup>202</sup> The Court held that taxpayers did not have standing to sue to block the provision of tax credits by a state to individuals who donate to school tuition organizations which then provide scholarships to students attending religious schools. This case built on a 2007 opinion in *Hein v. Freedom from Religion Foundation*<sup>203</sup> where the Supreme Court held that taxpayer standing under *Flast v. Cohen*<sup>204</sup> to challenge government religiosity does not apply when the taxpayer is challenging discretionary executive branch action instead of a legislative appropriation. Taken together, the Supreme Court's decisions in *Hein* and in *Winn* suggest that the Court is moving sharply to cut back on taxpayer standing to object to public displays of religiosity.

We think this is a salutary development. Tastes and cultural preferences vary widely across the United state just as they vary widely among the 47 members of the Council of Europe. Parts of the United States are very religious, while other parts are quite secular. It makes sense to leave state governments and federal executive branch personnel some freedom to engage in religious speech or to facilitate the funding of religious schools so long as the state does not discriminate against people as to their religion and so long as it does not mandate an official state church whose clergy are taxpayer funded. Federalism concerns call for a margin of appreciation to be given here to the state just as the European Court of Human Rights recognizes in Europe.

More fundamentally, we think the margin of appreciation idea counsels against the U.S. Supreme Court handing down substantive due process decisions like the decision in *Roe v. Wade*

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<sup>202</sup> No. 09–987 (U.S. Apr. 4, 2011).

<sup>203</sup> 551 U.S. 587 (2007).

<sup>204</sup> 392 U.S. 83 (1968).

creating a hitherto unknown and highly specific constitutional right to an abortion. Federal substantive due process is only appropriate where: 1) the right in question is very deeply rooted in American history and tradition such that evidence of it can be seen as long ago as 1868 when the Fourteenth Amendment was ratified; and 2) where the state police power justification for regulating a right seems plainly excessive. This suggests that the Supreme Court got things right in *McDonald v. City of Chicago*, but it got things wrong in *Roe v. Wade*.

#### **IV. Conclusion**

In conclusion, we hope we have been able to shed some light on why federalism and subsidiarity are both very important concepts when viewed from the perspective of law. Specifically, the European constitutional ideas of subsidiarity and a margin of appreciation are in our view directly relevant to U.S. constitutional law. The “substantial effects” test of *United States v. Lopez* is neither more originalist nor is it more law-like than is the idea of subsidiarity, as illumination by a consideration of the economics of federalism. Similarly, the question of when and to what degree the concept of the police power ought to be allowed to trump fundamental rights in the Fourteenth Amendment context is quite indeterminate. Borrowing ideas like the margin of appreciation from European law well worth considering.

The bottom line is that federalism remains very important in U.S. constitutional law as will be shown when the Supreme Court rules on the constitutionality of President Obama’s national healthcare law and as was shown last summer in *McDonald v. City of Chicago*. On Friday, June 16, 2011, the U.S. Supreme Court handed down a federalism decision in which Justice Anthony

M. Kennedy described the importance of federalism. We close with this quotation for Justice Kennedy's opinion for the Court:

Federalism is more than an exercise in setting the boundary between different institutions of government for their own integrity. . . . Federalism also protects the liberty of all persons within a state by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. . . . By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake. . . . The limitations that federalism entails are not therefore a matter of rights belonging only to the States. States are not the sole intended beneficiaries of federalism. . . . An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable. Fidelity to principles of federalism is not for the States alone to vindicate.<sup>205</sup>

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<sup>205</sup> Bond v. United States, 131 S.Ct. 2355, 2364 (2011) (as quoted in The Wall Street Journal, Notable and Quotable, June 20, 2011).