Georgia State University Law Review

Volume 20
Issue 2 *Winter 2003*

Article 5

12-1-2003

Vectoral Federalism

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VECTORAL FEDERALISM

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INTRODUCTION

To say that the Supreme Court's recent federalism jurisprudence has been erratic may be an understatement.[1] Take, for example, Eleventh Amendment state sovereign immunity, the right of a state to refuse to appear as a defendant in court.[2] The Court's pronouncements on state sovereign immunity have been overruled by constitutional amendment,[3] have been overruled by the Court itself,[4] have been gouged by exceptions that have not been fully justified,[5]

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1. *See* Frank B. Cross, *The Folly of Federalism*, 24 CARDOZO L. REV. 1, 6 (2002) ("[T]he Supreme Court's federalism decisions have been somewhat erratic . . . ."); Todd E. Pettys, *Competing for the People's Affection: Federalism's Forgotten Marketplace*, 56 VAND. L. REV. 329, 330 (2003) (asserting that the Court "has failed to articulate an overarching vision of federal-state relations"). For some stronger statements, see *infra* note 9 (citing authorities).

2. Seminole Tribe v. Florida, 517 U.S. 43, 76 (1996) ("The Eleventh Amendment prohibits Congress from making the state of Florida capable of being sued in federal court.").

3. In *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), the Court held that under Article III of the Constitution, which extends the judicial power to controversies between a state and citizens of another state, state sovereign immunity did not preclude federal courts from adjudicating common law suits brought by a citizen of one state against a different state. *See Chisholm*, 2 U.S. at 450-51 (Blair, J.); *id.* at 465-66 (Wilson, J.); *id.* at 467-68 (Cushing, J.); *id.* at 470-77 (Jay, C.J.). The passing of the Eleventh Amendment, which affords immunity to a state from suits brought by citizens of a different state, dramatically superceded the Court's decision in *Chisholm*. *See* U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State . . . ."). For a historical account of *Chisholm* and the Eleventh Amendment, see generally John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1926-34 (1983); John E. Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413, 1436-40 (1975).

4. In *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), a plurality of the Court held that Congress could eliminate state sovereign immunity pursuant to its power under the Interstate Commerce Clause of Article I. *See Union Gas*, 491 U.S. at 19. Seven years and several membership changes later, the Court overruled *Union Gas* in *Seminole Tribe*, a case that challenged Congress' abrogation authority under the Indian Commerce Clause of Article I. *See Seminole Tribe*, 517 U.S. at 72-73 ("In overruling *Union Gas* today, we reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government.").

5. The Court has held that Congress cannot abrogate state sovereign immunity when legislating pursuant to its Article I powers, but Congress can abrogate state sovereign immunity pursuant to the

and have taken on a scope that—even the Court itself admits—lacks foundation in the Constitution's text.[6] The result has been a protean

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Fourteenth Amendment. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976). Although the Court has attempted to justify this distinction, the attempt is both flawed and incomplete. *See generally* Vicki C. Jackson, *Holistic Interpretation:* Fitzpatrick v. Bitzer *and Our Bifurcated Constitution*, 53 STAN. L. REV. 1259 (2000) [hereinafter Jackson, *Holistic Interpretation*]. The *Ex parte Young* exception also presents problems. *See, e.g.*, Ann Althouse, *On Dignity and Deference: The Supreme Court's New Federalism*, 68 U. CIN. L. REV. 245, 265 (2000); *see infra* text accompanying notes 261-73, 288-316. I address these issues in Part III.

6. *See, e.g.*, Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 753 (2002) ("As a result, the Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but one particular exemplification of that immunity."); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 363 (2001) ("Although by its terms the Amendment applies only to suits against a State by citizens of another State, our cases have extended the Amendment's applicability to suits by citizens against their own States."); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 73 (2000) ("[W]e have made clear that the Constitution does not provide for federal jurisdiction over suits against nonconsenting States."); Alden v. Maine, 527 U.S. 706, 736 (1999) ("[T]he bare text of the Amendment is not an exhaustive description of the States' constitutional immunity from suit."); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 669 (1999) ("Though its precise terms bar only federal jurisdiction over suits brought against one State by citizens of another State or foreign state, we have long recognized that the Eleventh Amendment accomplished much more: It repudiated the central premise . . . that the jurisdictional heads of Article III superseded the sovereign immunity that the States possessed before entering the Union."); Fla. Prepaid Postsecondary Educ. Bd. v. Coll. Sav. Bank, 527 U.S. 627, 634-35 (1999) (quoting cases); Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 267 (1997) ("The Court's recognition of sovereign immunity has not been limited to the suits described in the text of the Eleventh Amendment."); *Seminole Tribe*, 517 U.S. at 54; Blatchford v. Native Vill., 501 U.S. 775, 779 (1991) ("[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms. . . ."); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 (1985) ("As we have recognized, the significance of this Amendment 'lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art[icle] III' of the Constitution.") (quoting Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 98 (1984)); Nevada v. Hall, 440 U.S. 410, 437 (1979) (Rehnquist, J., dissenting) ("The Eleventh Amendment is thus built on the postulate that States are not, absent their consent, amenable to suit in the courts of sister States."); Edelman v. Jordan, 415 U.S. 651, 662-63 (1974) ("While the Amendment by its terms does not bar suits against a State by its own citizens, this Court has consistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State."); Employees of the Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare, 411 U.S. 279, 280 (1973) ("Although the Eleventh Amendment is not literally applicable since petitioners who brought suit are citizens of Missouri, it is established that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State."); Principality of Monaco v. Mississippi, 292 U.S. 313, 322 (1934) ("Manifestly, we cannot rest with a mere literal application of the words of [section] 2 of Article III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States. Behind the words of the constitutional provisions are postulates which limit and control."); *Ex parte* New York, 256 U.S. 490, 497 (1921) ("[I]t has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given: not one brought by citizens of another State, or by citizens or subjects of a foreign State, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification."); Hans v. Louisiana, 134 U.S. 1, 12 (1890) (emphasizing the "force and meaning of the amendment"); *In re* Ayers, 123 U.S. 443, 505-06 (1887) ("To secure the manifest purposes of the constitutional exemption

doctrine whose boundaries are both uncertain and the subject of spirited debate among the members of the Court itself.[7] I join many others in attempting to anticipate the Court's next turn,[8] but the overwhelming conclusion is that this federalism doctrine is mightily confused.[9]

The Court's "state regulatory immunity" doctrine has experienced similar turbulence. In *Maryland v. Wirtz*,[10] the Court held that Congress could constitutionally regulate a state just as it could

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guaranteed by the Eleventh Amendment, requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose.").

7. *See, e.g.*, *Alden*, 527 U.S. at 761 (Souter, J., dissenting); *Seminole Tribe*, 517 U.S. at 76-100 (Stevens, J., dissenting); *id.* at 100-85 (Souter, J., dissenting); *Atascadero*, 473 U.S. at 247-302 (Brennan, J., dissenting); *see also Fed. Mar. Comm'n*, 535 U.S. at 778 (Breyer, J., dissenting) ("Considered purely as constitutional text, these words—'constitutional design,' 'system of federalism,' and 'plan of the convention'—suffer several defects. Their language is highly abstract, making them difficult to apply. They invite differing interpretations at least as much as do the Constitution's own broad liberty-protecting phrases, such as 'due process of law' or the word 'liberty' itself. And compared to these latter phrases, they suffer the additional disadvantage that they do not actually appear anywhere in the Constitution.").

8. I have argued that the Court currently envisions state sovereign immunity as inviolate to the extent of the original Constitution but subject to abrogation pursuant to certain amendments, even those antedating the Eleventh Amendment. *See generally* Scott Dodson, *The Metes and Bounds of State Sovereign Immunity*, 29 HASTINGS CONST. L.Q. 721 (2002) [hereinafter Dodson, *Metes & Bounds*]. Others have joined this debate, especially with respect to the Treaty Clause. *See, e.g.*, Susan Bandes, *Treaties, Sovereign Immunity, and "The Plan of the Convention,"* 42 VA. J. INT'L L. 743 (2002); Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403 (2003); Carlos Manuel Vázquez, *Treaties and the Eleventh Amendment*, 42 VA. J. INT'L L. 713 (2002).

9. *See, e.g.*, ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 7.1 (3d ed. 1999) (stating that the Court's Eleventh Amendment case law has been maligned as "tortuous" and "hodgepodge"); Dodson, *Metes & Bounds*, *supra* note 8, at 723 ("No coherent theory of the applicable state sovereign immunity readily arises from this bizarre quagmire."); Scott Fruehwald, *The Principled and Unprincipled Grounds of the New Federalism: A Call for Detachment in the Constitutional Adjudication of Federalism*, 53 MERCER L. REV. 811, 836-63 (2002) (criticizing state sovereign immunity jurisprudence as "unprincipled"); Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1652-53 & nn.400-02 (2002) (citing scholarly criticism); Swaine, *supra* note 8, at 482 (stating that "it is hard to defend the Court's linedrawing based on any particular sovereignty-oriented rationale"); Carlos Manuel Vázquez, *Eleventh Amendment Schizophrenia*, 75 NOTRE DAME L. REV. 859, 859-61 (2000) (identifying two conflicting strains of justification for the Eleventh Amendment doctrine). *But see* Daniel A. Farber, *Pledging a New Allegiance: An Essay on Sovereignty and the New Federalism*, 75 NOTRE DAME L. REV. 1133, 1142 (2000) (seeing, though not wholeheartedly endorsing, a coherent attempt to balance state sovereignty, federal supremacy, and individual rights in sovereign immunity jurisprudence); William H. Pryor, Jr., *Madison's Double Security: In Defense of Federalism, the Separation of Powers, and the Rehnquist Court*, 53 ALA. L. REV. 1167, 1169 (2002) ("The jurisprudence of the Rehnquist Court in matters of federalism is principled, coherent, and true to the text and structure of the Constitution.").

10. 392 U.S. 183 (1968).

regulate a private individual.[11] The Court partially overruled that decision eight years later in *National League of Cities v. Usery*,[12] which held that Congress may not regulate states when its legislation would intrude upon core state governmental functions that are essential to a state's separate and independent existence.[13] However, the Court did not clearly identify the constitutional source of this limitation.[14] In *City of Rome v. United States*,[15] the Court carved out an exception to *National League of Cities* for legislation authorized by the Civil War Amendments.[16] Further, in *Garcia v. San Antonio Metropolitan Transit Authority*,[17] the Court reconsidered *National League of Cities* and overruled it as unworkable.[18] *Garcia* relegated protection of state sovereignty to the structural incorporation of state interests in the procedural mechanisms of the federal government.[19]

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11. *See id.* at 196-97 ("[W]hile the commerce power has limits, valid general regulations of commerce do not cease to be regulations of commerce because a State is involved. If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation.").

12. 426 U.S. 833 (1976).

13. *See id.* at 845. "We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by [the Commerce Clause]." *Id.* at 852.

14. The Court was clear in defending the existence of affirmative constitutional limitations on Congress' Article I powers. *See id.* ("This Court has never doubted that there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce which are conferred by Art[icle] I of the Constitution."). The Court was far less clear in identifying the constitutional source of those affirmative limitations. *See id.* at 842 (citing the Tenth Amendment as "an express declaration of this limitation" but then not mentioning the Tenth Amendment or any constitutional provision thereafter).

15. 446 U.S. 156 (1980).

16. *See id.* at 178-80. *National League of Cities* had left open this question. *See Nat'l League of Cities*, 426 U.S. at 852 n.17 ("We express no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the spending power, Art[icle] I, [section] 8, cl[ause] 1, or [section] 5 of the Fourteenth Amendment.").

17. 469 U.S. 528 (1985).

18. *Id.* at 531.

19. *See id.* at 552. Others have used the terms differently than I do here. Perhaps the most common use refers to the decision of a state court to look to either other state courts (horizontally) or to the Court (vertically) for interpretive guidance. *See* STATE SUPREME COURTS xxi-xxii (M. C. Porter & G. Alan Tarr eds., 1982); Stewart G. Pollack, *Adequate and Independent State Grounds as a Means of Balancing the Relationships Between State and Federal Courts*, 63 TEX. L. REV. 977, 992 (1985) (defining horizontal federalism as federalism in which states look to each other for guidance). Professor Lynn Baker has used the terms vertical or horizontal to refer to governmental aggrandizement. *See* Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951, 955 (2001) ("Vertical aggrandizement involves efforts by the federal government itself to increase

Like the state sovereign immunity cases, the regulatory immunity cases have been mercurial.

Other federalism doctrines, though less pockmarked by reversals, are nonetheless notable for their controversial nature. In *United States v. Lopez*,[20] the Court found, for the first time since the New Deal, that Congress had exceeded its authority to enact legislation pursuant to the Commerce Clause.[21] The Court's recent anticommandeering doctrine, which prevents Congress from directing the states to administer or enforce federal law,[22] has provoked bitter dissents[23] and scholarly conflict.[24] To make matters more confusing, the Court first

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its own power at the expense of the states, and may occur, for example, when the federal government takes over regulatory functions traditionally exercised by the states, preempts sources of state revenue, or imposes regulatory burdens on state government. . . . The important thing is that the impetus for the expansion of federal power comes from the federal government itself or from interest groups operating at the federal level, and not from state governmental institutions or geographically based interests primarily concentrated at the state level. The second kind of threat to state autonomy, horizontal aggrandizement, focuses on the differences among the states in their substantive policy preferences. Here, the federal political process is the means by which a majority of states may impose their own policy preferences on a minority of states with different preferences.").

20. 514 U.S. 549 (1995).

21. *See id.* at 551.

22. *See* Printz v. United States, 521 U.S. 898, 935 (1997) (holding invalid a statute directing the activity of state and local officials); New York v. United States, 505 U.S. 144, 166 (1992) ("The allocation of power contained in the Commerce Clause . . . does not authorize Congress to regulate state governments' regulation of interstate commerce.").

23. *See Printz*, 521 U.S. at 944 (Stevens, J., dissenting) ("There is not a clause, sentence, or paragraph in the entire text of the Constitution of the United States that supports the proposition that a local police officer can ignore a command contained in a statute enacted by Congress pursuant to an express delegation of power enumerated in Article I."); *New York*, 505 U.S. at 211 (Stevens, J., dissenting) ("The Tenth Amendment surely does not impose any limit on Congress' exercise of powers delegated to it by Article I. Nor does the structure of the constitutional order or the values of federalism mandate such a formal rule. To the contrary, the Federal Government directs state governments in many realms.") (footnotes omitted); *id.* at 200 (White, J., dissenting) ("I fail to understand the reasoning behind the Court's selective distinctions among the various aspects of sovereignty that may and may not be waived and do not believe these distinctions will survive close analysis in future cases.").

24. *Compare* Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1059-61, 1087-88 (1995) [hereinafter Caminker, *State Sovereignty*] (rejecting a constitutional anticommandeering rule), *and* Martin H. Redish, *Doing It with Mirrors:* New York v. United States *and Constitutional Limitations on Federal Power to Require State Leigslation*, 21 HASTINGS CONST. L.Q. 593, 595-603 (1994) (same), *with* Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 831-47 (1998) (arguing for a constitutional anticommandeering rule that would apply to executive branches of state governments), *and* Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 2033 (1993) (rejecting a constitutional anticommandeering rule that would apply to executive branches of state governments but accepting such a rule that would apply to state legislatures), *and* H. Jefferson Powell,

implied that the doctrine was grounded in the Tenth Amendment[25] but subsequently disavowed reliance on that source.[26] What is clear from these cases is that the Court is struggling (perhaps unsatisfactorily) to find a sound anchor for its federalism jurisprudence.[27]

The Court has admitted that "the task of ascertaining the constitutional line between federal and state power has given rise to many of the Court's most difficult and celebrated cases."[28] The only real guidance that the Court has offered in these federalism decisions is that "our federalism requires that Congress treat these states in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation."[29]

In this Article, I offer a new framework for understanding federalism. "Vectoral federalism" engages directional metaphors—horizontal and vertical—to group various federalism doctrines together into two principal groups.[30] Horizontal federalism concerns

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The Oldest Question of Constitutional Law, 79 VA. L. REV. 633, 681-89 (1993) (arguing for a prudential, though not constitutional, anticommandeering rule).

25. *See New York*, 505 U.S. at 155-57.

26. *Printz*, 521 U.S. at 905 (admitting that "no constitutional text speak[s] to this precise question"); *id.* at 923 n.13 ("Th[e dissent's] argument also falsely presumes that the Tenth Amendment is the exclusive textual source of protection for principles of federalism. Our system of dual sovereignty is reflected in numerous constitutional provisions . . . .").

27. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 656 (2000) (Breyer, J., dissenting) ("I add that the majority's holding illustrates the difficulty of finding a workable judicial Commerce Clause touchstone—a set of comprehensible interpretive rules that courts might use to impose some meaningful limit, but not too great a limit, upon the scope of the legislative authority that the Commerce Clause delegates to Congress."); United States v. Lopez, 514 U.S. 549, 575 (1995) (Kennedy, J., concurring) (asserting that in questions of federalism "there seem to be much uncertainty respecting the existence, and the content, of standards that allow the Judiciary to play a significant role in maintaining the design contemplated by the Framers").

28. *New York*, 505 U.S. at 155; *accord* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 547 (1985) ("What has proved problematic is not the perception that the Constitution's federal structure imposes limitations on the Commerce Clause, but rather the nature and content of those limitations."); *id.* at 562 n.4 (Powell, J., dissenting) ("In *National League of Cities*, we referred to the sphere of state sovereignty as including 'traditional governmental functions,' a realm which is, of course, difficult to define with precision.").

29. Alden v. Maine, 527 U.S. 706, 748 (1999).

30. Others have used these terms differently. Perhaps the most common use refers to the decision of a state court to look either to other state courts (horizontally) or to the Court (vertically) for interpretive guidance. *See* STATE SUPREME COURTS xxi-xxii (M. C. Porter & G. Alan Tarr eds., 1982); Pollack, *supra* note 19, at 992 (defining horizontal federalism as "federalism in which states look to each other for guidance").

the battle between the federal and the state governments for the power to regulate individuals. Vertical federalism concerns the federal government's power to regulate states and the states' concomitant power to resist this regulation. Viewing federalism doctrines as having vertical or horizontal vectors (or both) identifies their common justifications and characteristics, which can assist in understanding and in applying the principles of federalism. The directional synthesis also illuminates and helps to rectify the Court's errors. Vectoral federalism has the potential to become an important tool for understanding American federalism and for developing a more unified and coherent federalism doctrine.

I. NORMATIVE FEDERALISM

Because vectoral groupings are based in part on their normative commonalities, a brief overview of federalism values is helpful to the vectoral federalism discussion. The Constitution establishes a union of "dual sovereignty between the states and the Federal Government,"[31] with federal sovereignty superior to that of the states.[32] Federalism addresses how the states fit into their role as participatory but unequal sovereigns.

Why did the Framers devise such a system? What seems clear is that the sovereignty of the states has no independent or inherent value;[33] rather, the real value of federalism lies in enhancing democratic republicanism and reducing the risk of tyranny.[34] Thus,

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31. Gregory v. Ashcroft, 501 U.S. 452, 457 (1991).

32. *See id.* at 460 ("The Federal Government holds a decided advantage in this delicate balance: the Supremacy Clause. . . . As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States.").

33. *See* Coleman v. Thompson, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting) ("Federalism, however, has no inherent normative value: It does not, as the majority appears to assume, blindly protect the interests of States from any incursion by the federal courts. Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power."); Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1557 (2000); Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 135 (2001).

34. *See* United States v. Morrison, 529 U.S. 598, 616 n.7 (2000) ("[T]he Framers crafted the federal system of Government so that the people's rights would be secured by the division of power."); *Gregory*, 501 U.S. at 458 ("Perhaps the principal benefit of the federalist system is a check on abuses of

the normative justifications for dual sovereignty depend upon its enhancement of democracy and individual liberty.[35]

One justification for federalism is increased political diversity. Under a system that permits a diverse group of decentralized governments, citizens can develop (or move to) the government most amenable to their needs or beliefs.[36] Diversity also permits states to experiment with novel governmental matters.[37] A second justification is that states should have primary responsibility for governing matters in areas of historical and traditional state concern and also those in which they have developed a special expertise.[38] A third justification for federalism is the enhancement of responsive republicanism; the most effective and responsive government is one in which the representatives understand or at least have facile and ready access to information concerning local problems and issues.[39] Federalism also enhances citizen participation in the government by providing

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government power. . . . [A] healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."); Fed. Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 790 (1982) (O'Connor, J., concurring in part and dissenting in part) ("[O]ur federal system provides a salutary check on governmental power.").

35. I assume without comment the practical realities of these theories. For an empirical critique, see Cross, *supra* note 1.

36. *See* Baker & Young, *supra* note 33, at 150 ("[The] imposition of a uniform national solution almost always will satisfy fewer people . . . ."); Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 387 (1997) ("[D]ifferent governments can adopt a mix of policies that meet the preferences of different citizens, thus maximizing the way in which government as a whole satisfies individual preferences."); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 8 (1988) (stating that federalism permits the citizens of "each region [to] create the type of social and political climate they prefer"); Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

37. *See* United States v. Lopez, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring) (stating that a statute that exceeds Congress' Commerce power "forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise"); *Fed. Energy Regulatory Comm'n*, 456 U.S. at 788 (O'Connor, J., dissenting) ("Courts and commentators frequently have recognized that the 50 States serve as laboratories for the development of new social, economic, and political ideas."); New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 87-90 (1995); Friedman, *supra* note 36, at 397; Merritt, *supra* note 36, at 9.

38 *See Lopez*, 514 U.S. at 580 (Kennedy, J., concurring) ("If Congress attempts that extension, then at the least we must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern."); Friedman, *supra* note 36, at 401-02.

39. *See, e.g.*, James v. Valtierra, 402 U.S. 137, 143 (1971) (stating that a local referendum on a local housing project "ensures that all the people of a community will have a voice in a decision which [directly affects them]"); *see also* THE FEDERALIST No. 46, at 262-63 (James Madison) (Clinton Rossiter ed., 1999).

opportunities for aspiring local politicians to participate at the state level.[40] Such involvement stimulates democratic representation, improves the pool of interested representatives, and increases accountability.[41] Finally, the dispersion of power has the additional effect of providing a multi-layered government that increases the avenues of citizen appeal.[42]

Although these normative values provide support for various federalism doctrines,[43] they are sub-constitutional norms. The Constitution creates its own federalist structure, and it is in that document that federalism becomes an indelible rule of governance. Where the Constitution speaks to federalism, courts must enforce it. Where the Constitution does not, federalism norms find vindication only in judicially-devised rules of policy.

II. VECTORAL FEDERALISM

Although federalism is often discussed as a single, undifferentiated term, not all federalism is the same. The different federalism doctrines stem from different values and inexorably lead to different applications. The various federalism forms roughly represent two distinct concepts that lend themselves to vectoral metaphors. "Horizontal federalism" addresses the struggles to define the separate spheres of regulatory power of the states and the federal government. "Vertical federalism" addresses the federal government's power to

40. *See Fed. Energy Regulatory Comm'n*, 456 U.S. at 789 (O'Connor, J., concurring in part and dissenting in part) ("In addition to promoting experimentation, federalism enhances the opportunity of all citizens to participate in representative government."); Friedman, *supra* note 36, at 389, 391; S. Candice Hoke, *Preemption Pathologies and Civil Republican Values*, 71 B.U. L. REV. 685, 711 (1991).

41. *See* Friedman, *supra* note 36, at 395; Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1551-52 (1994); Merritt, *supra* note 36, at 7-8.

42. *See* Martha Minow, *Putting Up and Putting Down: Tolerance Reconsidered*, *in* COMPARATIVE CONSTITUTIONAL FEDERALISM 77, 96-99 (Mark Tushnet ed., 1990); Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 538 (1995).

43. Most of the normative values actually result from the decentralization of power, rather than dual sovereignty. *See generally* Cross, *supra* note 1 (arguing that replacing state government with decentralized federal government would enhance federalism values); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 910-26 (1994) (defining public participation, citizen choice, state competition, and experimentation as values of decentralization, rather than of state sovereignty).

regulate the states and the concomitant power of the states to resist this regulation. Although not always clearly demarcated, these federalism vectors illustrate a more coherent federalism doctrine.

A. Horizontal Federalism

Horizontal federalism addresses the states' role as participatory sovereigns and concerns the scope and the boundaries of the powers of the federal and of the state governments to regulate private parties. The concept is somewhat quantitative—how much regulatory power does each government have? The overriding principle of horizontal federalism is a limited national government. The paradigmatic question is this: "Which government—federal or state—has the authority to regulate private conduct in this way?"[44]

1. Constitutional Underpinnings

Although the virtues of horizontal federalism are found in its normative values, the authority to enforce it derives first and foremost from the Constitution. Although the Constitution does not mention "federalism," the text implicitly recognizes the continued existence and viability of states as governments. The Constitution provides for the physical territory of the states and gives the states a voice in determining their boundaries;[45] mandates state legislative,[46]

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44. Some commentators use the term "separate sphere" federalism; the imagery is reminiscent of the territoriality of the horizontal federalism discussed in this Article. *See* Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180, 2196 (1998) [hereinafter Jackson, *Federalism*].

45. *See* U.S. CONST. art. IV, § 3, cl. 1 ("New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.").

46. *See id.* art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."); *id.* art. I, § 8, cl. 17 (giving Congress the power "to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings"); *id.* art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed

executive,[47] and judicial[48] existence in a republican form of government;[49] contemplates affirmative obligations in the federal structure;[50] allows for state representation in the Article V

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an Elector."); *id.* art. IV, § 4 ("The United States shall guarantee to every State in this Union . . . protect[ion] . . . against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence."); *id.* art. V ("The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress . . . ."); *id.* art. VI, § 3 ("The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.").

47. *See id.* art. I, § 2, cl. 4 ("When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies."); *id.* art. IV, § 2, cl. 2 ("A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."); *id.* art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."); *id.* art. VI, § 3 ("The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."); *id.* amend. XVII, § 2 ("When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.").

48. *See id.* art. VI, § 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."); *id.* art. VI, § 3 ("The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.").

49. *See id.* art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . . .").

50. *See id.* art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."); *id.* art. VI, § 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."); *id.* art. VI, § 3 ("The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial

amendment process;[51] and erects a limited independence from federal intrusion.[52]

That the states exist as governmental entities, however, does not inform the *extent* of their powers. The Constitution expressly, though narrowly, limits the power of the states. States may not enter into treaties, coin money, pass bills of attainder or ex post facto laws, impair contracts, grant titles of nobility, tax imports or exports, keep troops or ships of war, or engage in warfare.[53] States must also give full faith and credit to the laws and privileges and immunities of other states and extradite fugitives from the criminal process of other states.[54] When it speaks to the states, the Constitution explicitly and narrowly addresses their limits.

By contrast, when it speaks to the federal government, the Constitution explicitly and narrowly grants powers. Congress has the power to tax; to provide for the common defense and the general welfare of the United States; to borrow money; to regulate international, interstate, and Indian commerce; to establish naturalization rules; to establish bankruptcy rules; to coin money; to fix standard weights and measures; to provide for punishment for

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Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . .").

51. *See id.* art. V ("The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided . . . that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.").

52. *See id.* art. I, § 3 ("The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof for six Years; and each Senator shall have one Vote."); *id.* art. I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.").

53. *See id.* art. I, § 10.

54. *See id.* art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."); *id.* art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."); *id.* art. IV, § 2, cl. 2 ("A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.").

counterfeiting; to establish the postal service; to provide copyright and patent laws; to establish inferior federal courts; to punish piracy and offenses against the law of nations; to declare war; to make rules concerning hostile captures; to raise and support armies and a navy; to govern the armed forces; to call for the militia; to govern the capital territory; and to make all laws necessary and proper to these ends.[55] The Senate and the President together have the power to make treaties and appointments.[56] The President alone may wield the executive power,[57] command the military,[58] and issue pardons.[59] Outside these enumerated powers (and even, under certain circumstances, within them),[60] the federal government lacks authority to regulate.[61]

55. *Id.* art. I, § 8.

56. *See id.* art. II, § 2, cl. 2 ("He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . . .").

57. *See id.* art. II, § 1, cl. 1.

58. *See id.* art. II, § 2, cl. 1.

59. *See id.*

60. Article 1, section 9 imposes restrictions on the federal government: The federal government may not unduly restrict interstate travel, suspend the privilege of the writ of habeas corpus, pass ex post facto laws or bills of attainder, tax interstate exports, or award titles of nobility. *See id.* art. I, § 9. In addition, the States have the power to appoint militia officers and train the militia. *See id.* art. I, § 8, cl. 16.

61. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 404 (1819) ("This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent, to have required to be enforced by all those arguments, which its enlightened friends, while it was depending before the people, found it necessary to urge; that principle is now universally admitted."); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) ("The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the [C]onstitution is written.").

The obvious meaning of the explicit enumerations of federal power and the explicit enumerations of the limits of state power in the original Constitution implies that the states retain power over the unenumerated areas of regulation and perhaps even concurrent power over certain enumerated areas.[62] The Tenth Amendment confirms this principle.[63]

The balance of power in the system of dual sovereignty that the original Constitution established has fluctuated with the enactment of various amendments. As a historical matter, the Bill of Rights initially protected state authority by limiting federal power to intervene in state activities.[64] Prior to the Civil War, the states had primary authority to regulate and define the civil rights of their residents.[65] The Reconstruction Amendments clearly removed from the states the power to regulate and define civil rights[66] by prohibiting slavery,[67] racially-based voting restrictions,[68] and

62. *See* THE FEDERALIST No. 45, at 260 (James Madison) (Clinton Rossiter ed., 1999) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 752 (1833) ("Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities . . . .").

63. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

64. The first eight amendments originally granted the people various civil rights only in relation to the federal government, not the state governments. *See* Barron v. Baltimore, 32 U.S. 243, 247 (1833); *see also, e.g.*, U.S. CONST. amend. I (explicitly restricting Congress but nowhere mentioning the states). Under its original meaning, the Bill of Rights created enclaves of state authority shielded from federal intrusion. Thus, the First Amendment would not restrict Oregon from establishing a state church. The federal government could not interfere with that action because the First Amendment prohibited the making of any federal law respecting the establishment of religion. *See* Akhil Reed Amar, *Hugo Black and the Hall of Fame*, 53 ALA. L. REV. 1221, 1223-24 (2002).

65. *See* Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 871 (1986) ("Prior to the Civil War, the states defined the status and enforced the rights of the individual.").

66. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) ("[T]he substantive provisions of the Fourteenth Amendment . . . embody significant limitations on state authority."); *Ex parte* Virginia, 100 U.S. 339, 346 (1879) ("The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power."); Daniel A. Farber & John E. Muench, *The Ideological Origins of the Fourteenth Amendment*, 1 CONST. COMMENT. 235, 276-77 (1984); Kaczorowski, *supra* note 65.

67. *See* U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

abridgment of the privileges and the immunities of national citizenship, such as due process and equal protection of the law.[69] In addition, the Due Process Clause of the Fourteenth Amendment has converted most of the Bill of Rights from protection of state power to restrictions on state power.[70] The Eighteenth Amendment outlawed liquor[71] and gave concurrent power of enforcement to the state and the federal governments.[72] The Twenty-First Amendment repealed the Eighteenth Amendment[73] and restored regulatory power over the sale of liquor to the states.[74] The Voting Rights Amendments restricted state power to define voting eligibility.[75]

Although these amendments have altered the original boundaries of state and federal power, the basic premise of horizontal federalism remains unchanged: The Constitution establishes a system of dual sovereignty with both the federal and the state governments directly regulating private conduct within their respective but overlapping

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68. *See id.* amend. XV, § 1 ("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.").

69. *See id.* amend. XIV, § 1 ("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.").

70. *See* Amar, *supra* note 64; Dodson, *Metes & Bounds*, *supra* note 8, at 759-60.

71. *See* U.S. CONST. amend. XVIII, § 1 ("After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.").

72. *Id.* amend. XVIII, § 2 ("The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.").

73. *See id.* amend. XXI, § 1 ("The eighteenth article of amendment to the Constitution of the United States is hereby repealed.").

74. *See id.* amend. XXI, § 2 ("The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.").

75. The Voting Rights Amendments prohibit voting discrimination on the basis of sex, *see id.* amend. XIX ("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 sex. Congress shall have power to enforce this article by appropriate legislation."), the ability to pay poll taxes, *see id.* amend. XXIV, § 1 ("The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax."), and age, *see id.* amend. XXVI, § 1 ("The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.").

spheres. Thus, whether Congress may regulate a particular activity depends on the sphere of that activity.

2. Horizontal Federalism in Action

Most clauses of positive or of negative power in the Constitution are actual or potential battlefronts for horizontal federalism issues. The Court's sinusoidal Commerce Clause jurisprudence is a paradigmatic example. Under Chief Justice John Marshall, the Court took an expansive view of this "great" federal power.[76] However, later decisions that mirrored the Court's commitment to *laissez-faire* economics reflected a narrower interpretation of the commerce power.[77] The Great Depression then prompted the Court to return to an expansive interpretation of the Commerce Clause to uphold New Deal legislation.[78] Although a return to pre-New Deal days appears unlikely, the Court has begun to apply the brakes.[79] In *United States v. Lopez*[80] and *United States v. Morrison*,[81] the Court struck down Commerce Clause legislation as exceeding Congress' authority under

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76. *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824) (proclaiming that the commerce power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution"); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407-24 (1819) (concluding that the Article I powers should be given a broad and flexible interpretation).

77. *See, e.g.*, Adair v. United States, 208 U.S. 161, 178 (1908) (refusing to recognize federal power over local union activities with effects on interstate commerce); United States v. E.C. Knight Co., 156 U.S. 1, 12 (1895) (distinguishing commerce from manufacture); Kidd v. Pearson, 128 U.S. 1, 20 (1888) (same).

78. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 125 (1942) (explaining that the Commerce Clause applies to activities which are purely local and not commercial but which have a substantial economic effect on interstate commerce); United States v. Darby, 312 U.S. 100, 118 (1941) ("The power of Congress . . . extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end . . . ."); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) (departing from the direct/indirect boundary of federal commerce power); Tex. & New Orleans R.R. Co. v. Bhd. of Ry. & S.S. Clerks, 281 U.S. 548, 570-71 (1930) (permitting the exercise of the commerce power over railroad union activities).

79. Unlike the other members of the current Court, however, Justice Thomas advocates a narrow interpretation of the commerce power, as did the pre-New Deal Court. *See* United States v. Morrison, 529 U.S. 598, 627 (2000) (Thomas, J., concurring); United States v. Lopez, 514 U.S. 549, 584 (1995) (Thomas, J., concurring).

80. The legislation in *Lopez* criminalized the possession of a firearm in a school zone. *Lopez*, 514 U.S. at 551.

81. 514 U.S. 598 (1995). The legislation in *Morrison* created a federal cause of action for victims of gender-related violence. *Id.* at 605.

Article I.[82] Although the Court has recently tempered its decisions that strike down federal laws by invoking the salutary effects of federalism,[83] the Court has not answered a fundamental question that underlies all of these cases: Where does federal power leave off and exclusive state power begin?

Outside of the constitutional parameters of horizontal federalism, normative values provide some justification for non-constitutional judicial federalism doctrines. Perhaps the best examples are when a federal authority has the constitutional power to act but declines to do so because of normative federalism concerns. Both Congress and the federal courts exercise such non-constitutional self-restraint.

One example of congressional self-restraint is *Ankenbrandt v. Richards*,[84] where the Court held that Congress did not intend the diversity statute to extend federal jurisdiction to matters involving custody disputes.[85] Although Congress could have vested the federal courts with that jurisdiction, as authorized by Article III of the Constitution, the Court reasoned that Congress had not done so in part because of the state courts' traditional expertise in handling custody issues.[86]

The narrow grant of jurisdiction to the federal courts also reflects the normative federalism underpinnings of dual sovereignty. These concepts of federalism have given rise to judicially-created doctrines

82. *See Morrison*, 529 U.S. at 617-19; *Lopez*, 514 U.S. at 568.

83. *See Lopez*, 514 U.S. at 565 (arguing that an overbroad commerce power would enable the federal government to mandate state primary educational curricula); *id.* at 577 (Kennedy, J., concurring) ("Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory.").

84. 504 U.S. 689 (1992).

85. *See id.* at 703 ("[T]he domestic relations exception . . . divests the federal courts of power to issue divorce, alimony, and child custody decrees. Given the long passage of time without any expression of congressional dissatisfaction, we . . . reaffirm[] the validity of the exception as it pertains to divorce and alimony decrees and child custody orders.").

86. *See id.* at 704 ("As a matter of judicial economy, state courts are more eminently suited to work of this type than are federal courts, which lack the close association with state and local government organizations dedicated to handling issues that arise out of conflicts over divorce, alimony, and child custody decrees. Moreover, as a matter of judicial expertise, it makes far more sense to retain the rule that federal courts lack power to issue these types of decrees because of the special proficiency developed by state tribunals over the past century and a half in handling issues that arise in the granting of such decrees.").

that manifest themselves as judicial self-restraint when state court resolution would more likely further federalism norms than would federal court resolution. The *Burford*[87] abstention doctrine, for example, counsels federal court withdrawal when a case presents difficult questions of state law that bear on local policy matters whose importance transcend the disposition of the case.[88]

Abstention doctrines are often questions of horizontal federalism that address which government should properly resolve an issue. These questions arise not because the federal courts or Congress lack the power to act, but because concern for federalism norms counsels against federal action. Because the norms themselves are not constitutional, however, judicial rules to decline jurisdiction are defeasible by statute. After all, when Congress has the constitutional authority to legislate, the courts have an unflagging obligation to interpret that law.[89]

3. Conclusion

The central question horizontal federalism asks is: "Which government—state, federal, or both— has authority to regulate in this area?" The answer is found in the structure of the Constitution as a union of dual sovereigns and supported by normative justifications. Where it is constitutional, the limitations of horizontal federalism are not subject to waiver or consent. Where it is not constitutional, the courts may erect abstention doctrines rooted in federalism norms which may in turn be overridden by Congress.

B. Vertical Federalism

Unlike horizontal federalism, vertical federalism has little to do with the two governments' respective spheres of power over

87. Burford v. Sun Oil Co., 319 U.S. 315 (1943).

88. *See id.* at 334; *see also* Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976).

89. *See Colo. River*, 424 U.S. at 813, 817 (explaining that abstention is "the exception, not the rule[,]" because federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them").

individuals and everything to do with the power to regulate (or resist regulation by) the other. In this respect, vertical federalism is qualitative, rather than quantitative. Vertical federalism asks: How strong is the federal government's power over the states, in what forms can it be expressed, and when can the states resist? How "unequal" are the two sovereigns? The concern here focuses on the states' status as sovereign entities and what rights (as opposed to regulatory powers) attend to that sovereignty.

1. Constitutional Underpinnings

a. The Federal Government's Constitutional Superiority

One of the most prominent differences between the Constitution and the Articles of Confederation is the object of federal power. The Articles of Confederation empowered the national government to regulate the states but not the individuals.[90] The Framers deemed this aspect unworkable, in part because they believed that a sufficiently strong central government that could operate only on the states would devolve into a military regime to enforce its will against the states.[91] As a consequence, the Constitution instead enables direct national regulation of individuals.[92]

However, the Constitution's focus on individual regulation does not necessarily prohibit regulation of the states.[93] To the contrary, the

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90. *See* ARTS. OF CONFEDERATION art. IX.

91. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-87, 471-75 (1969); THE FEDERALIST No. 16, at 81-86 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

92. *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 133 (Max Farrand ed., 1966) (James Madison) ("Under the existing Confederacy, Cong[ress] represent[s] the *States* not the *people* of the States: their acts operate upon the *States* not on the individuals. The case will be changed in the new plan of Gov[ernment].") [hereinafter RECORDS]; *see also* Fed. Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 791 (1982) (O'Connor, J., dissenting) ("The principal defect of the Articles of Confederation, 18th-century writers agreed, was that the new National Government lacked the power to compel individual action. . . . The Constitution cured this defect by permitting direct contact between the National Government and the individual citizen . . . .").

93. The Court has on occasion gone to great lengths to attempt to prove that the Constitution was meant to prevent the federal government from acting directly on the states. *See* Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144, 163-66 (1992); *Fed. Energy Regulatory Comm'n*, 456 U.S. at 791-96 (O'Connor, J., concurring in part and dissenting in part). The Court's analysis leaves a logical gap unfilled. Nothing in the Court's argument supports the conclusion that the Constitution prohibits the federal government from regulating the states. *See New York*, 505 U.S. at 163-

Constitution leaves undefined the objects of the exercise of its grants of power, thus implicitly permitting regulation of both individuals and states. Moreover, because the Articles of Confederation specifically limited the national power to operating on the states, and because the Constitution was designed to augment national power, one can assume that the Constitution was not designed to withhold all regulation of the states, a power imparted to the federal government by the inferior Articles.[94] In addition, evidence exists that the Framers believed it to be within the power of the federal government to regulate the states.[95]

There are also concrete expressions of federal superiority. The Supremacy Clause of Article VI assures the supremacy of federal law, the Constitution, and treaties, and binds state judges to federal strictures.[96] Article III gives federal courts jurisdiction to issue orders adverse to, and binding upon, states.[97] The Habeas Corpus Clause

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66; *id.* at 210 (Stevens, J., dissenting) ("Nothing in th[e] history [of ratification] suggests that the Federal Government may not also impose its will upon the several States as it did under the Articles."). Indeed, powerful arguments exist to the contrary. *See Printz*, 521 U.S. at 941-55 (Stevens, J., dissenting) (marshalling evidence supporting federal commandeering powers).

94. *See* THE FEDERALIST No. 15, at 77 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (asserting that because limiting the exercise of federal power to states was ineffective under the Articles, "we must *extend* the authority of the Union to the persons of the citizens") (emphasis added); *id.* No. 27, at 144 (Alexander Hamilton) (interpreting the Constitution to "enable the [national] government to employ the ordinary magistracy of each [state] in the execution of its laws" "by *extending* the authority of the federal head to the individual citizens of the several States") (emphasis added).

95. *See id.* No. 15, at 76 (Alexander Hamilton); *id.* No. 27, at 177 (Alexander Hamilton) ("Thus the legislatures, courts, and magistrates, of the [states] will be incorporated into the operations of the national government *as far as its just and constitutional authority extends*; and will be rendered auxiliary to the enforcement of its laws."); *id.* No. 36, at 187 (Alexander Hamilton) (predicting that the federal government would conscript state officers to collect federal taxes); *id.* No. 45, at 260 (James Madison) (intimating extended roles for state officials and stating that it was "extremely probable that in other instances, particularly in the organization of the judicial power, the officers of the States will be clothed with the correspondent authority of the Union"); *cf.* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 343 (1816) ("It is a mistake that the [C]onstitution was not designed to operate upon states, in their corporate capacities."); WOOD, *supra* note 91, at 474 (stating that John Jay envisioned the states being to the national government as the counties were to the states); *id.* at 525 (asserting that the Federalists intended the Constitution to "prostrate" and "nearly annihilate" the states to a point of existence dependent upon their usefulness).

96. *See* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

97. *See id.* art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under

ensures the availability of federal habeas corpus relief to state detainees.[98] Finally, the Spending Clause enables Congress to purchase state compliance with its directives.[99]

In addition, the states have seen some attrition of their sovereign status since the Civil War. The great shifts in federal-state power after the Civil War gave Congress the power to enforce the provisions of the Reconstruction Amendments (and other constitutional provisions incorporated through the Due Process Clause) against the states.[100] The Voting Rights Amendments similarly empower Congress to enforce their strictures on the states.[101]

Thus, the Constitution directs that federal law is supreme to state law, that the federal courts can exercise jurisdiction over the states and issue orders compelling them to act, that Congress can regulate the states pursuant to its Article I powers, and that Congress can enforce the provisions of certain amendments against the states. The next question is whether, and to what extent, the states can resist those exercises of power.

b. The States' Power to Resist

In contrast to horizontal demarcations and federal supremacy vectors, broad state resistance vectors lack clear textual support in the

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their Authority;-to all Cases affecting Ambassadors, other public Ministers and Consuls;-to all Cases of admiralty and maritime Jurisdiction;-to Controversies to which the United States shall be a Party;-to Controversies between two or more States;-between a State and Citizens of another State;-between Citizens of different States;-between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."); *id.* (giving the Supreme Court original jurisdiction in all cases "in which a State shall be Party").

98. *See id.* art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

99. *See id.* art. I, § 8, cl. 1 ("The Congress shall have Power To . . . provide for the common Defence and general Welfare of the United States . . . ."); *accord* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981) (permitting Congress to "fix the terms on which it shall disburse federal money to the States").

100. *See* U.S. CONST. amend. XIII, § 2; *id.* amend. XIV, § 5; *id.* amend. XV, § 2.

101. *See id.* amend. XIX ("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 sex. Congress shall have power to enforce this article by appropriate legislation."); *id.* amend. XXIV, § 2 ("The Congress shall have power to enforce this article by appropriate legislation."); *id.* amend. XXVI, § 2 (same).

Constitution.[102] There are at least three constitutional sources for state resistance to federal authority over the states. First, the Eleventh Amendment precludes the exercise of federal court jurisdiction over suits brought against a state by citizens of a different state or by citizens of foreign states.[103] This provision is a clear and direct, though narrow, constitutional shield against the exercise of federal authority over the states.

Second, the Constitution implicitly contemplates the continued existence of state government.[104] One reasonable inference is that the Constitution prohibits any federal intrusion into state affairs which in effect destroys the governmental character of the states. Take the fiscal integrity of the states, for example. States cannot "simply go out of business" or declare bankruptcy or limit fiscal matters to profitable or risk-adverse investments.[105] A real need exists to maintain the states as viable political entities that cannot be completely left to the will of Congress.[106] The Constitution implicitly prohibits the federal government from eliminating the states as states.[107]

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102. Indeed, it is either evidence of the clear distinction between vertical and horizontal federalism or evidence of a severe case of schizophrenia that the Court resorts to constitutional text in its newest horizontal federalism cases, yet disparages strict constructionism in its vertical federalism cases. *Compare* United States v. Lopez, 514 U.S. 549, 552-53 (1995) (focusing on the language of the Commerce Clause), *with supra* notes 5, 13, and 22 (citing vertical federalism cases disavowing reliance on text).

103. *See* U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

104. *See supra* text accompanying notes 45-52.

105. Althouse, *supra* note 5, at 266.

106. *See id.*

107. *See* Metcalf & Eddy v. Mitchell, 269 U.S. 514, 523 (1926) (observing that "neither government may destroy the other nor curtail in any substantial manner the exercise of its powers"); Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1869), *overruled by* Morgan v. United States, 113 U.S. 476 (1885) ("[T]he preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."); Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1868) ("[T]he people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence. . . . [I]n many articles of the Constitution the necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized.").

Third, state sovereignty and its attendant attributes may provide support for state resistance.[108] Nowhere does the Constitution mention state sovereignty, much less define what attributes of sovereignty the states retained upon ratification.[109] Perhaps those who framed the Constitution meant to reject English notions of governmental sovereignty and build a new framework on popular sovereignty instead.[110] Perhaps the Framers assumed the existence of state sovereignty and the retention of certain attributes and felt no need to include them in the Constitution. Assuming that the states hold at least *some* degree of sovereignty,[111] it is an open—and difficult—question just *how much* sovereignty (or what attributes) they hold.[112]

Proponents of state sovereignty might look to the Tenth Amendment, which reserves to the states those "powers not delegated" to the federal government.[113] This confirmation is clearly tautological, however, offering no more to the states than the balance

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108. Perhaps state sovereignty is actually the only source of state resistance, and the other two—the Eleventh Amendment and the constitutional guarantees of state existence—are merely expressions of it. *See* Alden v. Maine, 527 U.S. 706, 751 (1999) ("If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen."); *id.* at 750 ("Private suits against nonconsenting States—especially suits for money damages—may threaten the financial integrity of the States."); *id.* at 750-51 ("A general federal power to authorize private suits for money damages would place unwarranted strain on the States' ability to govern in accordance with the will of their citizens."); Great N. Life Ins. Co. v. Read, 322 U.S. 47, 53 (1994) ("The principle of immunity from litigation assures the states and the nation from unanticipated intervention in the processes of government . . . ."); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 471 (1793) (Jay, C.J.) (explaining that sovereignty is the right to govern).

109. *See* Jackson, *Federalism*, *supra* note 44, at 2215 (observing that states' rights do not clearly appear in the Constitution's text); Jean Yarbrough, *Federalism and Rights in the American Founding*, *in* FEDERALISM AND RIGHTS 57, 64 (Ellis Katz & G. Alan Tarr eds., 1996) (explaining that the Constitution does not empower states with anything "inviolable" and instead constrains state power).

110. *See* STEPHEN M. GRIFFIN, AMERICAN CONSTITUTIONALISM 19-24 (1996); WOOD, *supra* note 91, at 530; *see also Chisholm*, 2 U.S. at 453-66 (Wilson, J.); *id.* at 473 (Jay, C.J.).

111. *See, e.g.*, THE FEDERALIST No. 39, at 213 (James Madison) (Clinton Rossiter ed., 1999) (asserting that the states retained a "residuary and inviolable sovereignty"); WOOD, *supra* note 91, at 530-31, 545-46 (explaining that the people, as ultimate sovereigns, could doll out sovereign power to state or national governments as they wished).

112. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1, 33 (1989), *overruled by* Seminole Tribe v. Florida, 517 U.S. 44 (1996) (Scalia, J., dissenting) ("What is subject to greater dispute, however, is how much sovereign immunity was implicitly eliminated by what Hamilton called the 'plan of the convention.'").

113. U.S. CONST. amend. X.

of what the Constitution does not grant to the federal government.[114] The drafters of the Tenth Amendment had the opportunity to further limit federal power, particularly that contained in the Necessary and Proper Clause, by inserting the word "expressly" in the phrase "not delegated" to reflect the predecessor phrase in the Articles of Confederation.[115] Nevertheless, the drafters repeatedly refused to include the term "expressly,"[116] in large part because they intended the Tenth Amendment to be no more than tautological.[117] Thus, the Tenth Amendment has been held to be no bar to the appropriate exercise of the power granted in Article I.[118]

Comparison of the Tenth Amendment to its predecessor in the Articles of Confederation provides even less help to sovereignty issues. The Articles ensured that "[e]ach state retains its sovereignty,

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114. *See* Printz v. United States, 521 U.S. 898, 942 (1997) (Stevens, J., dissenting) ("The Amendment confirms the principle that the powers of the Federal Government are limited to those affirmatively granted by the Constitution, but it does not purport to limit the scope of the effectiveness of the exercise of powers that are delegated to Congress."); New York v. United States, 505 U.S. 144, 211 (1992) (Stevens, J., dissenting) ("The Tenth Amendment surely does not impose any limit on Congress' exercise of the powers delegated to it by Article I. Nor does the structure of the constitutional order or the values of federalism mandate such a formal rule. To the contrary, the Federal Government directs state governments in many realms.") (footnotes omitted); Nat'l League of Cities v. Usery, 426 U.S. 833, 858 (1976), *overruled by* Garcia v. San Antonio Metro. Trans. Auth., 469 U.S. 528 (1985) (Brennan, J., dissenting) ("But there is no restraint based on state sovereignty requiring or permitting judicial enforcement anywhere expressed in the Constitution . . . ."); *id.* at 862 (Brennan, J., dissenting); United States v. Darby, 312 U.S. 100, 124 (1941) ("The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment . . . ."). *But see* EEOC v. Wyoming, 460 U.S. 226, 270-74 (1983) (Powell, J., dissenting) (arguing that the Framers originally intended for principles of state sovereignty to control the enumerated powers).

115. *Compare* U.S. CONST. amend X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."), *with* ARTS. OF CONFEDERATION art. II ("Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation *expressly* delegated to the United States, in Congress assembled.") (emphasis added).

116. *See* 3 WILLIAM WINSLOW CROSSKEY & WILLIAM JEFFREY, JR., POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 36 (1980).

117. *See* 1 ANNALS OF CONG. 790 (Joseph Gales ed., 1789) (James Madison) (explaining that the term "expressly" was excluded because "it was impossible to confine a Government to the exercise of express powers; there must necessarily be admitted powers by implication, unless the [C]onstitution descended to recount every minutia").

118. *See* Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127, 143 (1947) ("[T]he Tenth Amendment has been consistently construed 'as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end.'" (quoting United States v. Darby, 312 U.S. 100, 124 (1941)).

freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."[119] When the concept was codified in the Tenth Amendment, only state "powers" were reserved (and even then to be shared by the people); nothing about state sovereignty, freedom, independence, jurisdiction, or rights survived to the Constitution.[120] The Tenth Amendment, therefore, does not help resolve any sovereignty questions.

The Eleventh Amendment, which confirms that the judicial power of Article III is limited with respect to certain private suits against states,[121] may support a broad codification of inviolable state sovereignty. One attribute of sovereignty is sovereign dignity.[122] One could argue that a state's sovereign dignity (assuming that the states retained this attribute after ratification) is unacceptably impinged when the state is haled into court at the insistence of a private plaintiff.[123] This is a course that the Court has accepted—and even

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119. ARTS. OF CONFEDERATION art. II.

120. *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). Furthermore, "rights" are afforded to the people, not to states. *See* Dodson, *Metes & Bounds*, *supra* note 8, at 749 n.144.

121. *See* U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

122. *See* Seminole Tribe v. Florida, 517 U.S. 44, 96 (1996) (Stevens, J., dissenting) ("[I]t might have been unseemly to allow a commoner to hale the monarch into court."). There are other sovereign immunity justifications besides sovereign dignity. *See, e.g.*, *id.* at 95 (Stevens, J., dissenting); Nevada v. Hall, 440 U.S. 410, 415 n.7 (1979) ("The king, moreover, is not only incapable of *doing* wrong, but even of *thinking* wrong; he can never mean to do an improper thing[.]" (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES 246)); *Hall*, 440 U.S. at 414-15 (explaining sovereign immunity on the basis that no tribunal could be higher than the King). However, the colonists rejected these justifications. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States.").

123. *See, e.g.*, 2 THE COMPLETE ANTI-FEDERALIST 429 (Herbert Storing ed., 1981) (Brutus) ("It is improper, because it subjects a state to answer in a court of law, to the suit of an individual. This is humiliating and degrading to a government, and, what I believe, the supreme authority of no state ever submitted to.") (footnote omitted); FEDERAL FARMER, OBSERVATIONS LEADING TO A FAIR EXAMINATION OF THE SYSTEM OF GOVERNMENT PROPOSED BY THE LATE CONVENTION; AND TO SEVERAL ESSENTIAL AND NECESSARY ALTERATIONS IN IT. IN A NUMBER OF LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN (1788), *reprinted in* 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, at 41-42 (John P. Kaminski & Gaspere J. Saladino eds., 1983) ("How far it may be proper so to humble a state, as to bring it to answer to an individual in a court of law is worthy of consideration . . . .") (footnote omitted); *see also* THE FEDERALIST No. 81, at 487

expanded[124]—leaving the actual prohibitions of the Eleventh Amendment swallowed by the much broader effect of state dignity.[125]

There are highly persuasive arguments against this constitutional interpretation.[126] Nevertheless, assuming the validity of this interpretation, only a single limited conclusion follows: The Constitution implicitly recognizes the sovereignty of the states, one part of which is powerful enough to resist a state appearing as a defendant in federal court at the whim of a private plaintiff. It says nothing about what other attempts to encroach on state sovereignty might or might not succeed.

(Alexander Hamilton) (Clinton Rossiter ed., 1999) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*.").

124. *See* Scott Dodson, *Dignity: The New Frontier of State Sovereignty*, 56 OKLA. L. REV. (forthcoming 2004) (manuscript on file with author) [hereinafter Dodson, *Dignity*].

125. *See supra* note 6.

126. First, the Eleventh Amendment, like the Tenth, nowhere mentions state sovereignty or dignity. *See* U.S. CONST. amends. X, XI. Second, the Eleventh Amendment only restricts a very narrow class of suits, those brought by citizens of a different state or by citizens or subjects of a foreign state. *See* U.S. CONST. amend. XI. Third, ample historical evidence suggests that the real reason for the Eleventh Amendment was narrow and practical—to protect the financial viability of the states from creditors. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 406-07 (1821) ("There was not much reason to fear that foreign or sister States would be creditors to any considerable amount, and there was reason to retain the jurisdiction of the Court in those cases, because it might be essential to the preservation of peace. The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by States."). Had the Framers of the Eleventh Amendment really sought to protect the broad principle of state sovereign dignity, they surely would have worded the Amendment differently. *See* Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 771-72 (2002) (Stevens, J., dissenting) ("If the paramount concern of the Eleventh Amendment's framers had been protecting the so-called 'dignity' interest of the States, surely Congress would have endorsed the first proposed amendment granting the States immunity from process, rather than the later proposal that merely delineates the subject matter jurisdiction of courts."). Commentators and jurists have derided the dignity rationale. *See, e.g.*, *id.* at 770-72 (Stevens, J., dissenting); Alden v. Maine, 527 U.S. 706, 802-03 (1999) (Souter, J., dissenting) ("It would be hard to imagine anything more inimical to the republican conception, which rests on the understanding of its citizens precisely that the government is not above them, but of them, its actions being governed by law just like their own. Whatever justification there may be for an American government's immunity from private suit, it is not dignity."); *Seminole Tribe*, 517 U.S. at 96-97 (Stevens, J., dissenting) (quoting *Cohens*, 19 U.S. at 406-07); P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 151 (1993) (Stevens, J., dissenting) (lambasting the justification as "embarrassingly insufficient"); South Dakota v. North Carolina, 192 U.S. 286, 315 (1904) ("That [the Eleventh Amendment's] motive was not to maintain the sovereignty of a State from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of the amendment. . . . We must ascribe the amendment, then, to some other cause than the dignity of a State."). *See generally* Dodson, *Dignity*, *supra* note 124 (concluding that the dignity rationale lacks grounding in the Constitution, history, or conclusive precedent).

Thus, these boundaries are left to the federal courts to draw in consideration of comity,[127] respect for another sovereign's dignity,[128] and respect for another sovereign's right to govern.[129] The first is difficult to justify with normative values, but two federalism norms help courts draw boundaries with respect to the second. The more autonomous and independent the states are from federal control, the better the political accountability of each.[130] The continued existence of two separate and independent sovereignties also reduces the likelihood that the benefits of decentralization will be overcome.[131]

Strictly read, the Constitution at most creates a narrow jurisdictional bar to suits against states, guarantees the existence of the states as independent and functioning governmental entities, and implicitly recognizes their sovereign status. While the first two are quite narrow, the Constitution does not define the extent or strength of the third. In that respect, the courts must weigh the supremacy powers of the federal government against their impingement on the states' sovereignty.

127. *See, e.g.*, *Hall*, 440 U.S. at 416 ("[Immunity] must be found either in an agreement, express or implied, between the two sovereigns, or in the voluntary decision of the second to respect the dignity of the first as a matter of comity."). The comity rationale was recently tested by several states who urged the Court to overrule *Hall*. *See* Brief of Amici Curiae States of Fla. et al., Franchise Tax Bd. of Cal. v. Hyatt, 123 S. Ct. 1683 (2003) (No. 02-42). The Court declined to do so. *See* Franchise Tax Bd. of Cal. v. Hyatt, 123 S. Ct. 1683 (2003).

128. *See Hall*, 440 U.S. at 416.

129. *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 472 (1972) (Jay, C.J.).

130. *See, e.g.*, Caminker, *supra* note 24, at 1060-61 (explaining that federal commandeering of the states may blur political accountability lines); *id.* at 1076-79 (arguing that commandeering is no more in furtherance of tyranny than constitutional preemption); Jackson, *Federalism*, *supra* note 44, at 2202 ("Conditional spending regulatory requirements, though nominally involving a state's choice to accept federal funds, can result in a very confusing picture of responsibility for voters.").

131. *See supra* text accompanying notes 34-42. *But see* Caminker, *supra* note 24, at 1075 ("But here it is really constitutional limitations on Congress'[] authority, not the sovereignty of states, that does the work of restraining tyrannical power.") (footnotes omitted).

2. *Vertical Federalism in Action*

There are several different federalism doctrines with vertical vectors: state sovereign immunity, state regulatory immunity, anticommandeering, and *Ex parte Young* are just a few. State sovereign immunity questions ask whether a state's sovereign dignity vector can repel vectors of federal power. In most cases, the answer hinges on a test that balances the indignity to the state and the need for vindication of federal superiority. On this balance, the powers in Article I cannot outweigh sovereign dignity, but the powers of the Enforcement Clause of the Fourteenth Amendment can, because the Fourteenth Amendment was specifically designed to enable federal encroachment on state sovereignty.[132] In a different context, dignity protects the sovereign itself, but the need to enforce federal law requires that federal courts permit suits against state officers for injunctive relief.

State regulatory immunity allows a state to resist federal regulation of certain functions. The vertical federalism struggle pits the enforcement of legitimate federal goals against the continued existence of states as governments. Thus, Congress may regulate states if its legislation incidentally affects core state governmental functions[133] but may not, for example, condition a state's admission into the Union on the locality of the state capital.[134]

The anticommandeering cases illustrate a third vertical federalism doctrine. These cases deal with resolving state attempts to resist federal mandates directed at state governmental mechanisms. The commandeering cases ask whether federal supremacy can override the states' dignity and the constitutional guarantee of their autonomous governmental existence. For example, the federal government may direct state agencies to consider certain federal

132. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

133. *See, e.g.*, Garcia v. San Antonio Metro. Transp. Auth., 469 U.S. 528, 555-57 (1985) (holding that affording state employees the protections of the Fair Labor Standards Act did not exceed any constitutional limitation); Maryland v. Wirtz, 392 U.S. 183, 200 (1968), *overruled by* Nat'l League of Cities v. Usery, 426 U.S. 833 (1976), *overruled by Garcia*, 469 U.S. at 555-57.

134. *See* Coyle v. Oklahoma, 221 U.S. 559, 567 (1911) (asserting that the states of the Union are "equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself").

standards in their ratemaking functions,[135] but may not compel state legislatures to enact affirmative legislation[136] or state officials to execute federal mandates.[137]

Ex parte Young[138] is an exception to state sovereign immunity that allows suits against state officers for violations of federal law.[139] The doctrine balances the sovereign immunity of the states with the need for some enforcement of federal mandates.[140] Under *Ex parte Young*, sovereign immunity applies when the state is the "real, substantial party in interest[,]"[141] such as when a retrospective money judgment would operate against the state.[142] *Ex parte Young*, however, permits suits for prospective injunctive relief.[143] The retrospective/prospective distinction thus strikes a balance between the sovereignty of the states and the importance of compliance with federal law.[144]

These vertical federalism examples have similar characteristics. All involve a measure of direct federal power over the states and an opposing state power of resistance. The opposing state power stems from state sovereignty and manifests itself either in the constitutional

135. *See* Fed. Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 765-66 (1982).

136. *See* New York v. United States, 505 U.S. 144, 188 (1992).

137. *See* Printz v. United States, 521 U.S. 898, 935 (1997).

138. 209 U.S. 123 (1908).

139. P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993).

140. *See* Alden v. Maine, 527 U.S. 706, 747 (1999) ("[*Young*] is based in part on the premise that sovereign immunity bars relief against States and their officers in both state and federal courts, and that certain suits for declaratory or injunctive relief against state officers must therefore be permitted if the Constitution is to remain the supreme law of the land."); Green v. Mansour, 474 U.S. 64, 68 (1985) ("Both prospective and retrospective relief implicate Eleventh Amendment concerns, but the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law."); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 105 (1984) ("[T]he *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible . . . ."); Perez v. Ledesma, 401 U.S. 82, 106 (1971) (Brennan, J., concurring and dissenting) ("*Ex parte Young* was the culmination of efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution.").

141. *Pennhurst*, 465 U.S. at 101 (quoting Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459, 464 (1945)).

142. *See* Edelman v. Jordan, 415 U.S. 651, 664 (1974); Hawaii v. Gordon, 373 U.S. 57, 58 (1963) (per curiam).

143. *See Edelman*, 415 U.S. at 664.

144. *See Pennhurst*, 465 U.S. at 106 ("In sum, *Edelman*'s distinction between prospective and retroactive relief fulfills the underlying purpose of *Ex parte Young* while at the same time preserving to an important degree the constitutional immunity of the States.").

guarantee of state sovereign existence, the unmentioned attribute of state sovereign dignity, or comity.

C. A Caveat

As with many "rules" of law and political theory, the distinction between horizontal and vertical federalism is not immaculate. Mechanisms of horizontal federalism often exhibit vertical vectors, and mechanisms of vertical federalism often exhibit horizontal vectors. A particular federalism doctrine might appear to have a diagonal vector—a vector exhibiting both horizontal and vertical influences simultaneously. In most cases, however, the doctrine's horizontal and vertical components can be recognized and distinguished.

Take, for example, Congress' power under the Spending Clause.[145] The Spending Clause permits federal regulation of private conduct in areas outside of Congress' enumerated powers.[146] This is a question of horizontal federalism. Spending Clause legislation can also be used to purchase regulatory power over the states.[147] This is a question of vertical federalism. The mere fact that Spending Clause legislation does not fall wholesale into one category or the other is not particularly problematic. Once a particular piece of Spending Clause legislation is identified as having horizontal or vertical vectors, the vectors can be analyzed piecemeal.

Similarly, certain abstention doctrines exhibit attributes of horizontal federalism; they need not fall exclusively within that category. For example, the *Younger*[148] abstention doctrine operates to prevent federal court interference with pending state court

145. U.S. CONST. art. I, § 8, cl. 1.

146. *See* South Dakota v. Dole, 483 U.S. 203, 206 (1987) (affirming Congress' ability under the Spending Clause to regulate matters expressly reserved to the states under the Twenty-First Amendment); Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127, 143 (1947) (holding that the Tenth Amendment does not bar Spending Clause legislation otherwise authorized by Article I).

147. *See, e.g.*, Alden v. Maine, 527 U.S. 706, 755 (1999) (stating that Congress has the authority and the means to seek a state's voluntary consent to private suits).

148. Younger v. Harris, 401 U.S. 37 (1971).

proceedings.[149] The rationale for this type of abstention was grounded in part on the vertical federalism concern for the need for independent state governmental functions.[150]

This Article does not attempt to prove that every governmental action touching upon federalism concerns can be divided into horizontal or vertical federalism categories with exact precision.[151] To the contrary, the directional metaphors apply to the characteristics of the various federalism doctrines, not necessarily to the doctrines themselves.[152] The vertical and the horizontal vectors are different because they generally have different bases and different considerations. The federalism doctrines discussed in the following section have strong vectors in one particular direction. Thinking vectorally can illuminate their parallel or divergent parameters and characteristics.

149. *See id.* at 41 ("[W]e have concluded that the judgment of the District Court, enjoining appellant Younger from prosecuting under these California statutes, must be reversed as a violation of the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances."). Although *Younger* was a criminal proceeding, the *Younger* abstention doctrine has been extended to prohibit interference in state civil proceedings as well. *See* Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982); Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619, 627 (1986); Pennzoil Co. v. Texaco Inc., 481 U.S. 1, 11 (1987).

150. *Younger*, 401 U.S. at 44-45 ("This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as 'Our Federalism,' and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of 'Our Federalism.' The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, 'Our Federalism,' born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.").

151. Preemption is a particularly difficult example. Although primarily concerned with the regulation of individuals, a horizontal federalism trait, preemption has the effect of displacing state regulatory power under the authority of the Supremacy Clause, a vertical federalism power.

152. The Fourteenth Amendment is a prime example. *See supra* text accompanying notes 288-315.

III. A VECTORAL FEDERALISM CRITIQUE OF CURRENT FEDERALISM DOCTRINES

Applying vectoral federalism to the Court's various federalism doctrines has two effects. It helps explain and support certain aspects of the doctrines, such as those in the Court's Commerce Clause and state sovereign immunity jurisprudence. With respect to other federalism doctrines, such as anticommandeering and regulatory immunity, vectoral federalism suggests that the Court has seriously misconceived its position. Overall, viewing federalism from a vectoral standpoint helps to form a more coherent and unified federalism doctrine.[153]

A. State Sovereign Immunity

For the most part, viewing state sovereign immunity issues as questions of vertical federalism helps to explain a great deal about the Court's jurisprudence. Nevertheless, it also raises some questions for the future.

The Court has become increasingly bolder in invoking the dignity justification for state sovereign immunity.[154] Perhaps this trend is due in part to the realization that the Tenth Amendment cannot be the source of state sovereign immunity because that Amendment speaks only in confirmation of horizontal federalism principles.[155] Thus, the

153. One recent court of appeals case, *Hood v. Tenn. Student Assistance Corp.*, 319 F.3d 756 (6th Cir. 2003), is a paradigmatic example of confusion between horizontal and vertical federalism. There, the Sixth Circuit held that the Bankruptcy Clause of Article I permitted congressional abrogation of state sovereign immunity because it provided Congress with exclusive regulatory power to establish uniform bankruptcy laws. *See id.* at 761-62. An exclusive regulatory power does not necessarily include the power to abrogate. *See supra* note 4; Seminole Tribe v. Florida, 517 U.S. 44, 72 (1996). One reason is that the battle for regulatory power and needs for uniformity are horizontal queries, while the applicability of state sovereign immunity is vertical. *Hood* obfuscates this critical distinction by treating horizontal and vertical federalism as one doctrine. *See* Dodson, *Metes & Bounds*, *supra* note 8, at 744-46. Use of federalism vectors might have avoided further confusion.

154. *See supra* note 124.

155. *See* Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 767 n.18 (2002) ("The principle of state sovereign immunity enshrined in our constitutional framework, however, is not rooted in the Tenth Amendment."); Alden v. Maine, 527 U.S. 706, 761 (1999) (Souter, J., dissenting) ("There is no evidence that the Tenth Amendment constitutionalized a concept of sovereign immunity as inherent in the notion of statehood . . . .").

Court has looked elsewhere—outside the Constitution's bare language.

Accepting the Court's premise that the Constitution's structure protects state sovereign dignity, its sovereign immunity decisions make some coherent sense. If the Constitution leaves intact the dignity inherent in state sovereignty, then the default position is that dignity immunizes the states from suit, and the only question is whether other circumstances so justify federal supremacy that state dignity must yield. The Court has often declined to find a need for subjecting the states to suit because other means of ensuring state compliance with federal law exist.[156] Examples include the good faith of the states to abide by the law,[157] voluntary consent,[158] induced waiver,[159] the federal government's ability to sue for enforcement,[160] section 5 private enforcement,[161] suits brought by the other states, suits against local governments,[162] and suits against state officers.[163]

The dignity rationale provides some support for vindicating state sovereign immunity in suits by private parties in a state's own courts[164] or before federal administrative tribunals.[165] The need to vindicate federal rights is not dependent on the forum, and private suits impair state sovereignty regardless of the forum. Indeed, subjecting a nonconsenting state to suit in its own courts may offend its dignity to an even greater extent because it essentially coerces the state to sanction itself, if necessary.[166] Imposing jurisdiction on a

156. *See Alden*, 527 U.S. at 755.

157. *See id.* ("We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States.").

158. *See id.* ("Many States, on their own initiative, have enacted statutes consenting to a wide variety of suits."); Great N. Life Ins. Co. v. Read, 322 U.S. 47, 53 (1944) (proclaiming that immunity is "mitigated by a sense of justice which has continually expanded by consent the suability of the sovereign").

159. *See Alden*, 527 U.S. at 755 (citing South Dakota v. Dole, 483 U.S. 203 (1987)).

160. *See id.*

161. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

162. *See* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977); Lincoln County v. Luning, 133 U.S. 529 (1890).

163. *See Alden*, 527 U.S. at 755-57; Seminole Tribe v. Florida, 517 U.S. 44, 71 n.14 (1996).

164. *See Alden*, 527 U.S. at 749.

165. *See* Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 760 (2002).

166. Note how the two vertical federalism doctrines of sovereign immunity and anticommandeering tend to merge here. *See Alden*, 527 U.S. at 749 ("In some ways, of course, a congressional power to

nonconsenting state in a federal administrative proceeding may also be a more serious affront than a suit in an Article III court.[167] Accordingly, it is consistent with the dignity rationale to uphold state sovereign immunity in suits brought by private parties regardless of the forum.

There are two circumstances in which the Court has recognized that states lack sovereign immunity: suits brought by another state and suits brought by the federal government. These party-based exceptions are consistent with vertical federalism considerations because they weigh the need for federal superiority against the states' interest in immunity. State sovereign dignity still exists and such suits may infringe upon it, but perhaps to a lesser degree than in a suit brought by a private party for two reasons. First, the plaintiff is at least a coequal sovereign.[168] Second, the plaintiff is presumed to be

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authorize private suits against nonconsenting States in their own courts would be even more offensive to state sovereignty than a power to authorize the suits in a federal forum. Although the immunity of one sovereign in the courts of another has often depended in part on comity or agreement, the immunity of a sovereign in its own courts has always been understood to be within the sole control of the sovereign itself. A power to press a State's own courts into federal service to coerce the other branches of the State, furthermore, is the power first to turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will and at the behest of individuals. Such plenary federal control of state governmental processes denigrates the separate sovereignty of the States.") (citations omitted).

167. *See Fed. Mar. Comm'n*, 535 U.S. at 760 ("Simply put, if the Framers thought it an impermissible affront to a State's dignity to be required to answer the complaints of private parties in federal courts, we cannot imagine that they would have found it acceptable to compel a State to do exactly the same thing before the administrative tribunal of an agency, such as the FMC. . . . The affront to a State's dignity does not lessen when an adjudication takes place in an administrative tribunal as opposed to an Article III court. In both instances, a State is required to defend itself in an adversarial proceeding against a private party before an impartial federal officer.") (footnotes omitted); *id.* at 760 n.11 ("One, in fact, could argue that allowing a private party to haul a State in front of such an administrative tribunal constitutes a greater insult to a State's dignity than requiring a State to appear in an Article III court presided over by a judge with life tenure nominated by the President of the United States and confirmed by the United States Senate.").

168. *See* United States v. Texas, 143 U.S. 621, 646 (1892) ("Texas is not called to the bar of this court at the suit of an individual, but at the suit of the government established for the common and equal benefit of the people of all the States. The submission to judicial solution of controversies arising between these two governments, 'each sovereign,' . . . but both subject to the supreme law of the land, does no violence to the inherent nature of sovereignty." (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 400, 410 (1819))); *see also* Evan H. Caminker, *Judicial Solicitude for State Dignity*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 81, 84 (2001) [hereinafter Caminker, *Judicial Solitude*] ("[A] superior or at least coequal sovereign pose[s] less of an affront to states than suits by private persons . . . .").

guided by political responsibility and judgment.[169] State dignity interests are therefore low. Against those interests are the ubiquitous need to vindicate federal law and the particular need to provide an available judicial forum to prevent disunion.[170] On balance, dignity loses, and states may be sued.

Also consistent with the dignity rationale is the Court's recognition that immunity applies regardless of the remedy sought.[171] Subjecting a state to suit against its will infringes upon the state's dignity. Although compulsory payment of a money judgment from the sovereign treasury would certainly insult a state's dignity to an even greater extent, the mere compulsory appearance itself is sufficient to enable the state to resist suit.[172]

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169. *Alden*, 527 U.S. at 756 ("Suits by the United States itself require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue nonconsenting States.").

170. *See* South Dakota v. North Carolina, 192 U.S. 286, 318 (1904) (asserting that the federal forum serves as an important and impartial arbiter); *Texas*, 143 U.S. at 644-45 (explaining that the peace of the Union might be threatened were federal courts not empowered to adjudicate controversies between states and the federal government); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 406-07 (1821) ("There was not much reason to fear that foreign or sister States would be creditors to any considerable amount, and there was reason to retain the jurisdiction of the Court in those cases, because it might be essential to the preservation of peace. The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by States."); *see also* THE FEDERALIST No. 80, at 445 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (same).

171. *See, e.g.*, Seminole Tribe v. Florida, 517 U.S. 44, 58 (1996) ("But we have often made it clear that the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment."); Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 48 (1994) (stating that state sovereign immunity does not solely "preven[t] federal-court judgments that must be paid out of a State's treasury"); P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993) ("While application of the collateral order doctrine in this type of case is justified in part by a concern that States not be unduly burdened by litigation, its ultimate justification is the importance of ensuring that the States' dignitary interests can be fully vindicated."); Cory v. White, 457 U.S. 85, 90 (1982) ("It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the State itself simply because no money judgment is sought."); Missouri v. Fiske, 290 U.S. 18, 27 (1933) ("Expressly applying to suits in equity as well as at law, the Amendment necessarily embraces demands for the enforcement of equitable rights and the prosecution of equitable remedies when these are asserted and prosecuted by an individual against a State.").

172. *Fed. Mar. Comm'n*, 535 U.S. at 765-66 ("[T]he doctrine's central purpose is to 'accord the States the respect owed them as' joint sovereigns. It is for this reason, for instance, that sovereign immunity applies regardless of whether a private plaintiff's suit is for monetary damages or some other type of relief. Sovereign immunity does not merely constitute a defense to monetary liability or even to all types of liability. Rather, it provides an immunity from suit." (quoting *Metcalf & Eddy*, 506 U.S. at 146)); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100 (1984) (explaining that immunity applies "regardless of the nature of the relief sought").

The dignity rationale may also help to harmonize immunity-waiver jurisprudence. When a state properly asserts sovereign immunity, the forum court lacks subject matter jurisdiction over the action.[173] Subject matter jurisdiction is never waivable,[174] yet states may waive their sovereign immunity and consent to suit.[175] The Court has not justified this paradox.

One possible answer lies in the dignity rationale, under which a jurisdictional bar arises only when a state's dignity is impermissibly impugned absent a compelling need to vindicate federal law. Normally, a compelled suit suffices to impermissibly impugn state dignity. If the state consents to suit, however, its appearance is both voluntary and consensual. State dignity is not denigrated, and jurisdiction therefore applies. In this case, the state does not waive the court's lack of subject matter jurisdiction; rather, the state refuses to assert the necessary predicate for the jurisdictional bar in the first place.[176]

173. The Eleventh Amendment expressly limits "judicial Power." U.S. CONST. amend. XI. The Court has interpreted that amendment as "partak[ing] of a jurisdictional bar." Edelman v. Jordan, 415 U.S. 651, 678 (1974).

174. *See, e.g.*, Sosna v. Iowa, 419 U.S. 393, 398 (1975); Jackson v. Ashton, 33 U.S. (8 Pet.) 148, 149 (1834).

175. *See* Clark v. Barnard, 108 U.S. 436, 447 (1883); *see also* Lapides v. Bd. of Regents of Univ. Sys. of Ga., 535 U.S. 613, 624 (2002) (holding that a state's voluntary removal to federal court waives Eleventh Amendment immunity); Idaho v. Couer d'Alene Tribe, 521 U.S. 261, 267 (1997) ("[A] State can waive its Eleventh Amendment protection and allow a federal court to hear and decide a case commenced or prosecuted against it."); 3 ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 533 (2d ed. 1891) (James Madison) (stating that the Constitution "give[s] a citizen a right to be heard in the federal courts; and if a state should condescend to be a party, this court may take cognizance of it"); THE FEDERALIST No. 81, at 455 (Alexander Hamilton) (Clinton Rossiter ed., 1999) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*.").

176. *See* Dodson, *Dignity*, *supra* note 124.

In the alternative, the Court could, consistent with the dignity rationale, reconceive the nature of state immunity from suit. Dignity is a personal right of the sovereign, as is the immunity which follows. In this respect, state sovereign immunity is more akin to a limitation on personal jurisdiction, not subject matter jurisdiction.[177] Being a personal right, personal jurisdiction is, of course, waivable. In either case, use of the dignity rationale could help ameliorate the conflict between a state's ability to waive immunity and its effect on subject matter jurisdiction.[178]

On its face, language from a number of cases, most notably *Cohens v. Virginia*,[179] opposes the dignity rationale as a unifying force in the state sovereign immunity cases. In *Cohens*, Chief Justice John Marshall held that the Supreme Court could review a state court interpretation of federal law even if the state was the victorious party in the state court decision.[180] In deciding that the Eleventh Amendment did not bar federal review, the Chief Justice emphatically disavowed that state dignity was a justification for the Eleventh Amendment.[181]

Cohens need not be read as completely derailing the dignity rationale. If Justice Stevens is correct that Eleventh Amendment immunity is different than state sovereign immunity,[182] then dignity need not have anything to do with the former in order to have everything to do with the latter. Chief Justice Marshall may have been entirely correct in stating that the Eleventh Amendment is not

177. *See* Nelson, *supra* note 9, at 1653.

178. The Eleventh Amendment literally precludes jurisdiction over certain suits, even in the face of state consent. One way to reconcile this inconsistency would be to adopt Justice Stevens' dualistic interpretation of state sovereign immunity, that the Eleventh Amendment restriction on federal court jurisdiction is nonwaivable, while non-amendment state sovereign immunity is waivable. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1, 25-26 (1989), *overruled by* Seminole Tribe v. Florida, 517 U.S. 44 (1996) (Stevens, J., concurring).

179. 19 U.S. (6 Wheat.) 264 (1821). For a list of other cases, see *supra* note 124.

180. *See Cohens*, 19 U.S. at 415.

181. *See id.* at 406 ("That [the Eleventh Amendment's] motive was not to maintain the sovereignty of a State from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of the amendment. . . . We must ascribe the amendment, then, to some other cause than the dignity of a State.").

182. *See supra* note 178.

grounded in state dignity,[183] while at the same time leaving open the availability for state sovereign dignity to resist certain federal incursions that do not literally implicate the Eleventh Amendment.

In any case, the procedural stance of *Cohens* is not at all inconsistent with the vertical federalism principles of state sovereign immunity. If the state is a plaintiff in its own courts, as was the case in *Cohens*, it has invoked the jurisdiction of its own courts and should be held to have thereby consented to any appellate review, whether initiated by the state itself or by the defendant.[184] As a corollary, if the state has allowed itself to be sued as a defendant in its own courts, then it has waived the immunity afforded to it by the rule of *Alden* when the case comes before the Supreme Court.[185] Having consented, the state may not invoke the dignity rationale to bar federal jurisdiction in such a case. In addition, the countervailing vertical vector in favor of national power, the need for federal appellate review to vindicate federal law, is strong.[186] It would be entirely

183. Virginia and one of its citizens were the parties in *Cohens*; accordingly, the Eleventh Amendment was not literally applicable. *See* U.S. CONST. amend. XI.

184. *See* McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, 496 U.S. 18, 30 (1990) ("[W]hen a state court takes cognizance of a case, the State assents to appellate review by this Court of the federal issues raised in the case 'whoever may be the parties to the original suit, whether private persons or the state itself.'" (quoting Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420, 585 (1837) (Story, J., dissenting))); Smith v. Reeves, 178 U.S. 436, 445 (1900) ("[Consent to suit in state court is] subject always to the condition, arising out of the supremacy of the Constitution of the United States and the laws made in pursuance thereof, that the final judgment of the highest court of the State in any action brought against it with its consent may be reviewed or reëxamined [by this Court]."); *Cohens*, 19 U.S. at 380 (recognizing that states may have waived portions of their sovereign immunity by ratifying the Constitution).

185. This issue does not implicate the problem of legislative consent to suit in state court, which has been held inadequate under the rule requiring states to consent to suit in federal court. *Compare* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 241 (1985) ("Thus, in order for a state statute or constitutional provision to constitute a waiver of Eleventh Amendment immunity, it must specify the State's intention to subject itself to suit in *federal court*. . . . In the absence of an unequivocal waiver specifically applicable to federal-court jurisdiction, we decline to find that California has waived its constitutional immunity."), *with Cohens*, 19 U.S. at 256 n.8 (Brennan, J., dissenting) (noting the "longstanding, though unarticulated, rule that the Eleventh Amendment does not limit exercise of otherwise proper federal *appellate* jurisdiction over suits [against states] from state courts"), *and* Smith v. Reeves, 178 U.S. 436, 445 (1900) (holding that a state's consent to suit in state court is "subject always to the condition, arising out of the supremacy of the Constitution of the United States and the laws made in pursuance thereof, that the final judgment of the highest court of the State in any action brought against it with its consent may be reviewed or reexamined [by this Court]").

186. *See Cohens*, 19 U.S. at 407 ("A general interest might well be felt in leaving to a State the full power of consulting its convenience in the adjustment of its debts, or of other claims upon it; but no interest could be felt in so changing the relations between the whole and its parts, as to strip the

consistent with other state sovereign immunity cases to reason that the need for federal appellate review outweighs any state dignity interest in immunity from review.

Dignity does not fully explain the rationale of either *Principality of Monaco v. Mississippi*,[187] which held states immune from suits by a foreign state,[188] or *Blatchford v. Native Village of Noatak*,[189] which held the Eleventh Amendment applicable to suits by Indian tribes.[190] Those cases rested on the conclusion that the states did not consent to such suits in ratifying the Constitution.[191] *Monaco* and *Blatchford* simply hold that states have immunity from such suits because the states did not relinquish the immunity in ratification.[192]

If the immunity rationale is grounded primarily in state dignity, however, these cases may need rethinking. A suit brought by a plaintiff with sovereignty at least equal to that of a state certainly impugns dignity less than a suit brought by a private citizen. Moreover, a state's invocation of immunity in its own courts from a suit by a foreign sovereign implicates important national interests. Generally, foreign and Indian affairs are the exclusive province of the national government, and the need for national uniformity and diplomacy is an important national interest. If the Court pursues its dignity rationale, it owes an explanation for the results in these two cases.

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government of the means of protecting, but the instrumentality of its Courts, the constitution and laws from active violation."); *see also McKesson*, 496 U.S. at 28-29 ("To secure state-court compliance with, and national uniformity of, federal law, the exercise of jurisdiction by state courts over cases encompassing issues of federal law is subject to two conditions: State courts must interpret and enforce faithfully the supreme Law of the Land, and their decisions are subject to review by this Court." (quoting U.S. CONST. art. VI)) (footnotes omitted).

187. 292 U.S. 313 (1934).

188. *See id.* at 330 ("The foreign State lies outside the structure of the Union. The waiver or consent, on the part of a State, which inheres in the acceptance of the constitutional plan, runs to the other States who have likewise accepted that plan, and to the United States as the sovereign which the Constitution creates. We perceive no ground upon which it can be said that any waiver or consent by a State of the Union has run in favor of a foreign State.").

189. 501 U.S. 775 (1991).

190. *Id.* at 782 ("What makes the States' surrender of immunity from suit by sister States plausible is the mutuality of that concession. There is no such mutuality with either foreign sovereigns or Indian tribes. . . . [I]f the convention could not surrender *the tribes'* immunity for the benefit of the *States*, we do not believe that it surrendered the States' immunity for the benefit of the tribes.").

191. *See id.* at 781-82; *Monaco*, 292 U.S. at 329-30.

192. *See Monaco*, 292 U.S. at 330; *Blatchford*, 501 U.S. at 781.

B. Regulatory Immunity

State regulatory immunity is the ability of a state to resist federal regulation of state governmental functions. In cases discussing this doctrine, there is no question that the Constitution grants the federal government the power to make such regulations; rather, the principal question is whether some other power entitles the states to resist application of these regulations. The federal vector of power supporting the applicability of federal regulation to the states stems from the need for validation of federal supremacy, and the state vector of resistance to these regulations stems from the need for the continued existence of states as governments. Because the doctrine of regulatory immunity concerns vertical federalism, the question is not whether Congress lacks the power to interfere, but whether the threat to the continued existence of the states as governments is sufficient to negate that power.

In *National League of Cities v. Usery*, the Court stated that unexpressed aspects of state sovereignty create affirmative limitations on Congress' power under the Commerce Clause.[193] While acknowledging Congress' ability to impose the same Commerce Clause power over individuals, the Court proclaimed regulation of the states to be different.[194] The Court explained that the states have sovereign characteristics that limit the otherwise proper application of federal power.[195] States are not mere actors in an economic market, but rather a sovereign government.[196] "If Congress

193. *See* Nat'l League of Cities v. Usery, 426 U.S. 833, 842 (1976).

194. *See id.* at 845 ("It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside. It is quite another to uphold a similar exercise of congressional authority directed, not to private citizens, but to the States as States.").

195. *See id.* at 842 ("This Court has never doubted that there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce which are conferred by Art[icle] I of the Constitution."); *id.* at 845 ("We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.").

196. *See id.* at 854 ("But we have reaffirmed today that the States as States stand on a quite different footing from an individual or a corporation when challenging the exercise of Congress' power to regulate commerce.").

may withdraw from the States the authority to make those fundamental employment decisions upon which their systems for performance of these functions must rest, we think there would be little left of the States' 'separate and independent existence.'"[197] Thus, when legislation purports to intrude upon state governmental functions that are essential to separate and to independent existence, state sovereignty limits Congress' powers.[198]

National League of Cities overruled *Maryland v. Wirtz*,[199] which held that:

> "valid general regulations of commerce do not cease to be regulations of commerce because a State is involved. If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation."[200]

Both cases contemplated the existence of a line of federal encroachment beyond which state sovereign existence would be impermissibly threatened.[201] The two cases just disagreed as to where that line was.[202]

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197. *Id.* at 851 (quoting Coyle v. Oklahoma, 221 U.S. 559, 580 (1911)).

198. *See Nat'l League of Cities*, 426 U.S. at 852, *overruled by* Garcia v. San Antonio Metro. Trans. Auth., 469 U.S. 528 (1985).

199. 392 U.S. 183 (1968).

200. *Id.* at 196-97.

201. *See id.* at 196 (noting that the states had "ample power to prevent . . . 'the utter destruction of the State as a sovereign political entity'") (citation omitted in original); *Nat'l League of Cities*, 426 U.S. at 845 ("The question we must resolve here, then, is whether these [objects of federal regulation] are 'functions essential to separate and independent existence' [of the states.]" (quoting Lane County v. Oregon, 74 U.S. 71 (1868))).

202. The application of federal fair labor standards to state employers does not really jeopardize the states' independent sovereign existence enough to justify exemption. *See Wirtz*, 392 U.S. at 196-97. Why would federal regulation of overtime provisions for state employees effectively nullify the states' separate and independent existence? *See Nat'l League of Cities*, 426 U.S. at 851. The Court gave no reasonable answer to this question. Because the justification for the exemption is the Constitution's recognition of continued sovereign existence of the states, the court should only exempt states from federal regulation that imposes a real threat to that existence.

For the most part, the methodology of *National League of Cities* is appropriate vertical federalism analysis.[203] *National League of Cities* recognized the legitimacy of federal regulations in general but noted that other questions arise when a regulation affects states as governmental entities because states have guaranteed continued existence under the Constitution.[204] The Court simply determined that state sovereign interests outweigh the importance of the federal regulation's application to the states, in effect drawing the line of impermissibility differently than the Court did in *Wirtz*.

National League of Cities, however, did not cleanly rely on vertical federalism vectors. Indeed, the opinion twice straddles the line between horizontal and vertical federalism doctrines by relying on the inherent limits of Congress' powers and the Tenth Amendment for affirmative limitations. For example, the Court stated: "We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by [the Commerce Clause]."[205] The phrase "not within the authority granted Congress" sounds like a horizontal federalism constraint based on the limited nature of federal powers.[206] In a vertical federalism case like *National League of Cities*, a more accurate statement would be that the regulations actually are within the authority granted to Congress but that the Constitution's recognition of the states as working state governments affirmatively limits their application to core state functions. In addition, *National League of Cities* could be read as relying in part on affirmative limitations in the Tenth Amendment.[207] The Tenth

203. *National League of Cities* even characterized the federal government's ability to intrude upon core state governmental functions as "abrogation," a common term in Eleventh Amendment cases. *See Nat'l League of Cities*, 426 U.S. at 846-55.

204. *See id.*

205. *Id.* at 852.

206. *Id.*

207. Although *National League of Cities* conspicuously dodged direct reliance on the Tenth Amendment (referring to it only once), later cases have characterized *National League of Cities* in horizontal federalism terms grounded in the Tenth Amendment. *See* EEOC v. Wyoming, 460 U.S. 226, 236 (1983) (asserting that *National League of Cities* "drew from the Tenth Amendment an 'affirmative limitation on the exercise of [congressional power under the Commerce Clause] akin to other commerce

Amendment is not an affirmative limitation on congressional power; rather, the Tenth Amendment is a confirmation of horizontal federalism—the *scope* of congressional power. In assessing the relative *strengths* of state and of federal power, the Tenth Amendment is of no help. These two flaws in the reasoning of *National League of Cities* confound proper application of vertical principles to the case.

Garcia v. San Antonio Metropolitan Transit Authority,[208] which overruled *National League of Cities* as unworkable,[209] fares no better. *Garcia* begins the right way for a vertical federalism case by proposing to look for constitutional "postulates" behind the bare text of the Constitution to support state resistance to enumerated powers.[210] But the Court then turns to three factors of little relevance to the inquiry: the grants and withholdings of power in Article I, the federal power of judicial review in Article III, and the incorporation of the Bill of Rights limitations through the Fourteenth Amendment.[211] The grants and withholdings of power in Article I are quintessentially horizontal federalism vectors that allocate the areas of regulation between the state and the federal governments. These grants and withholdings have little bearing on the question of federal regulation of state activities that was at issue in *Garcia*. The judicial power of Article III is a vertical vector without particular connection to that regulation. The incorporation argument, as I have explained, is predominantly horizontal in nature.[212]

A more appropriate inquiry would have been one analogous to the method that the Court used in *National League of Cities* and similar to the test proposed by Justice O'Connor in her dissent in *Garcia*.[213] The Constitution guarantees the continued existence of the states as

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power affirmative limitations contained in the Constitution'" (quoting *Nat'l League of Cities*, 426 U.S. at 841)).

208. 469 U.S. 528 (1985).

209. *Id.* at 531.

210. *Id.* at 547.

211. *See id.* at 548-49.

212. *See supra* note 71; *see also infra* Part III.F.

213. *See Garcia*, 469 U.S. at 588 (O'Connor, J., dissenting) ("The proper resolution, I suggest, lies in weighing state autonomy as a factor in the balance when interpreting the means by which Congress can exercise its authority on the States as States.").

independent governmental entities. Does a federal regulation impermissibly infringe upon that guarantee? If so, the states are exempt from that regulation. If not, that regulation can apply to the states.[214]

The Court in *Garcia* found protection of state sovereignty in the structural incorporation of state interests in the procedural mechanisms of the federal government.[215] I am troubled by the faith of the majority in *Garcia* in congressional self-restraint, and its abdication of judicial responsibility because I fail to see how the structural federalism protections built into national representation adequately protect the Constitutional guarantee of state existence. The national government's structural representation of state interests, while perhaps comforting to federalist concerns, does not necessarily guarantee the states' continued existence, and it most certainly does not remove the federal encroachments on state sovereignty beyond constitutional question. Our system of government depends on constitutional limitations and external checks and balances, not hopes for internal self-restraint in the face of speculative electoral pressure.

Thankfully, *Garcia* leaves open the possibility that process federalism is not the sole protection against impermissible encroachment of state sovereign existence. The Court in *Garcia* concluded that the statute as applied to state employers did not deprive state governments of their guaranteed existence, and thus crossed no constitutional line.[216] In the absence of a congressional act actually crossing that constitutional line, process federalism adequately protects normative federalism, and the courts should usually defer to Congress rather than create prophylactic buffer zones

214. It is possible that some prophylactic rule could exempt states from regulation that would not fully eliminate the states as governments. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 302 (1978) ("Of course, no one expects Congress to obliterate the states, at least in one fell swoop. If there is any danger, it lies in the tyranny of small decisions—in the prospect that Congress will nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell.").

215. *See Garcia*, 469 U.S. at 550-51 (explaining that "the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress").

216. *See id.* at 556 ("These cases do not require us to identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause.").

for state protection.[217] In other words, *in this case*, the states' vertical resistance vector was not strong enough to justify constitutional regulatory immunity. If that is what the majority meant, then perhaps *Garcia* leaves open the possibility that in a case of more pronounced federal encroachment, the states' resistance vector might prevail.

The dissenters struggled with the confusion generated by *National League of Cities*. Justices Powell and O'Connor both mistakenly focused on the Tenth Amendment.[218] As I have argued, the Tenth Amendment is simply inapplicable to questions of vertical federalism, and the *Garcia* majority was correct to disregard it. Justice O'Connor's dissent likewise wavered on whether the Commerce Clause by itself contained sufficient authorization for the federal legislation in question,[219] an inquiry reserved for horizontal federalism analysis.

Although the most defensible argument for regulatory immunity is the constitutional guarantee of independent state existence, the counterargument that states should be immune from the indignity of federal regulation of traditional or core state governmental functions is consistent with vertical federalism principles.[220] Such regulation, the counterargument posits, would offend the dignity of the states as independent sovereign entities and demote them to the same level as individuals. This counterargument would have to reason around the more deferential Articles of Confederation, which subjected the states to direct congressional regulation.[221] In addition, any indignity would then be properly subject to amelioration by the process federalism argument endorsed by *Garcia*. If *Garcia* truly left future state regulatory immunity questions open, the recent influx of dignity language may prompt a new line of state regulatory immunity cases.

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217. I say "usually" because I am unprepared to dispense with prophylaxes entirely. *See supra* note 214.

218. *See Garcia*, 469 U.S. at 568-74 (Powell, J., dissenting); *id.* at 585 (O'Connor, J., dissenting) (focusing on the "*spirit* of the Tenth Amendment").

219. *See id.* at 584-85 (O'Connor, J., dissenting).

220. *See* Dodson, *Dignity*, *supra* note 124.

221. *See* Printz v. United States, 521 U.S. 898, 945-47 (1997) (Stevens, J., dissenting); New York v. United States, 505 U.S. 144, 210 (1992) (Stevens, J., concurring in part and dissenting in part).

C. *Anticommandeering*

The anticommandeering cases illustrate a third vertical federalism doctrine. These cases deal with resolving state attempts to resist federal mandates directed at state governmental mechanisms. Federal commandeering implicates primarily sovereign dignity but also a touch of sovereign existence. Where the effect of the regulation would essentially destroy the states as independent sovereign governments, the Constitution's guarantee of state existence bars the regulation. When it does not, state dignity may still demand that Congress not use the commandeering mechanism on the states.

In *Federal Energy Regulatory Commission v. Mississippi*,[222] the Court considered the validity of a federal regulation that directed state utilities agencies to consider specified standards in their ratemaking functions.[223] Although it recognized that sovereignty entails the authority to make fundamental legislative decisions,[224] the Court upheld the federal statute because it only instructed the state to *consider* certain standards, not to adopt them.[225] Because the regulation was not a direct compulsion of state legislation sufficient to threaten the state's "separate and independent existence,"[226] and because the regulation was within Congress' Commerce Clause power,[227] the Court held the regulation valid.[228]

The dissenters argued in favor of affirmative Tenth Amendment limitations.[229] Indeed, in Justice O'Connor's view, the Tenth Amendment affirmatively prohibits federal regulation which impairs

222. 456 U.S. 742 (1982).

223. *See id.* at 746-47.

224. *See id.* at 761 ("Indeed, having the power to make decisions and to set policy is what gives the State its sovereign nature.").

225. *See id.* at 764 ("Titles I and III of PURPA require only *consideration* of federal standards.").

226. *See id.* at 765-66 (quoting Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1868)).

227. *See Fed. Energy Regulatory Comm'n*, 456 U.S. at 753-59.

228. *See id.* at 771 (holding that "Congress can require a state administrative body to consider proposed regulations as a condition to its continued involvement in a pre-emptible field"); *see also id.* at 769 n.32 ("We hold only that Congress may impose conditions on the State's regulation of private conduct in a pre-emptible area.").

229. *See id.* at 773 (Powell, J., dissenting) ("[T]he Commerce Clause and the Tenth Amendment embody distinct limitations on federal power."); *id.* at 778 (O'Connor, J., dissenting).

"a state's ability to function as a state."[230] She may have the right idea of protecting state sovereign existence, but she certainly uses the wrong weaponry with the Tenth Amendment horizontal vector.[231]

Justice O'Connor could have advocated the stronger consideration of state sovereign dignity.[232] Federal preemption of state regulation and federal commandeering of state mechanisms is different, even if the end result is the same. That difference is in part due to the *treatment* of the states by the federal government. Coercing unwilling state governments to do the federal government's bidding subjects the states to some indignity, as if they were federal prefectures rather than independent sovereignties. Better to preempt the field, the states might say, than to order us to fetch, as a master does his dog. Indeed, Justice O'Connor hinted at that suggestion, albeit for practical reasons.[233]

230. *See id.* at 778, 785-86 (O'Connor, J., dissenting) (quoting Transp. Union v. Long Island R.R. Co., 455 U.S. 678, 686 (1982)).

231. *See* Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127, 143 (1947) ("[T]he Tenth Amendment has been consistently construed 'as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end.'" (quoting United States v. Darby, 312 U.S. 100, 124 (1941))).

232. In all fairness, none of the opinions considered state dignity at all, perhaps in large part because the proponents of the rationale had not yet formed the concept into a meaningful weapon.

233. *See Fed. Energy Regulatory Comm'n*, 456 U.S. at 787 (O'Connor, J., dissenting) ("The States might well prefer that Congress simply impose the standards [through preemption].").

In *New York v. United States*,[234] Justice O'Connor took revenge. New York challenged a federal statute that required the state to regulate according to Congress' instructions or accept ownership of hazardous waste.[235] The Court held that Congress could not compel the states to choose between commandeered regulation and forced title to the waste.[236] The Court did not question that Congress had the power under the Commerce Clause to regulate the disposal of radioactive waste.[237] The Court did not question that Congress could preempt state regulation under the Supremacy Clause or induce state compliance under the Spending Power.[238] Rather, the Court took issue with the method of Congress in *directing* the states to act.[239]

The problem with Justice O'Connor's majority opinion, however, is that it mistakenly looked to horizontal sources for vertical resistance vectors. Although acknowledging that the question of the limits of federal power was the inverse of the question of the scope of the Tenth Amendment,[240] the Court nevertheless engaged in an analysis of unexpressed limitations "confirm[ed]" by the Tenth Amendment.[241] The problem with this reasoning is not necessarily its treatment of the Tenth Amendment as something beyond its text but its treatment of unexpressed postulates as horizontal federalism vectors.[242] Horizontal federalism merely delineates the very

234. 505 U.S. 144 (1992).

235. *Id.* at 154.

236. *Id.* at 149.

237. *See id.* at 159-60.

238. *See id.* at 158-60.

239. *See New York*, 505 U.S. at 161 ("This litigation instead concerns the circumstances under which Congress may use the States as implements of regulation; that is, whether Congress may direct or otherwise motivate the States to regulate in a particular field or a particular way.").

240. *Id.* at 156 ("In a case like these, involving the division of authority between federal and state governments, the two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress."); *id.* at 157 ("[The Tenth Amendment] is essentially a tautology."). The Court omitted the obvious third possibility: That a congressional act might exceed its Article I powers but nevertheless not be within the states' Tenth Amendment reserved powers.

241. *See id.* at 157 ("[T]he Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States.").

242. *See id.* at 177 ("Whether one views the take title provision as lying outside Congress' enumerated powers, or as infringing upon the core of state sovereignty reserved by the Tenth

boundaries of federal and state power that the Court already resolved when it determined that the Commerce Clause authorized the legislation.

A rationale for the Court's result that is more consistent with vertical vectoral analysis would eschew the Tenth Amendment's horizontal federalism in favor of some state power to resist otherwise valid exercises of federal power, such as state dignity interests. Surely, ordering the state legislatures to legislate impinges the states' dignity. Like sulking children, the states must then obey under penalty of punishment. A more appropriate analysis would weigh the state sovereign dignity interest against the need for federal superiority. If preemption or Spending Clause legislation could have accomplished the permissible federal mandates, perhaps dignity would have sufficed to resist the particular federal commandeering in *New York*.[243]

However, the dignity rationale might actually work against the end result in *New York*. By phrasing the issue as one of horizontal federalism, the Court rejected the waiver argument. If the Constitution does not authorize a congressional regulation, it is void, regardless of whether the states consent to it. But if the dignity of the sovereign is the justification for shielding the states from federal regulation, the regulation may be valid with the states' consent.

In *New York*, that is exactly what happened. The state of New York *requested*, and then consented to, the federal regime and only later, after losing its gamble, objected.[244] The United States argued that New York had waived its objection to the legislation, but the Court, holding that the legislation was beyond the authorization of Article I, refused to consider the waiver.[245] As Justice White pointed out, that

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Amendment, the provision is inconsistent with the federal structure of our Government established by the Constitution."); *id.* at 178 ("No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate.").

243. *Cf. id.* at 149 ("We conclude that while Congress has substantial power under the Constitution to encourage the States to provide for the disposal of the radioactive waste generated within their borders, the Constitution does not confer upon Congress the ability simply to compel the States to do so.").

244. *See New York*, 505 U.S. at 189-90 (White, J., concurring in part and dissenting in part).

245. *See id.* at 182 ("Where Congress exceeds its authority relative to the States, therefore, the departure from the constitutional plan cannot be ratified by the 'consent' of state officials. . . . State

conclusion was in conflict with the ability of a state to waive another unenumerated constitutional attribute of state sovereignty—immunity from suit.[246]

By using horizontal vectors, the Court skirted the very relevant vertical federalism issue of waiver and placed its anticommandeering jurisprudence in considerable tension with its state sovereign immunity jurisprudence.[247] Resort to the vertical vector of state sovereign dignity and its attendant waivability would have better aligned the two doctrines.

In *Printz v. United States*,[248] the Court followed the precedent set in *New York* in striking down a portion of the Brady Handgun Control Act that commanded state and local officials to conduct background checks on gun purchases.[249] Unlike prior anticommandeering cases, the Court correctly admitted that "no constitutional text speak[s] to this precise question"[250] and turned to state sovereignty principles, a proper methodology for vertical federalism questions.[251] The Court listed several state "sovereignty" provisions, including the Tenth Amendment but noted that the Tenth Amendment merely "rendered express" the limited enumeration of Article I powers.[252] The Court never actually relied upon that Amendment in its reasoning. Indeed, the Court only mentioned it for background and, in response to the dissent, avoided direct reliance on it: "Th[e dissent's] argument also falsely presumes that the Tenth Amendment is the exclusive textual source of protection for

officials thus cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution.").

246. *Id.* at 200 (White, J., concurring in part and dissenting in part) ("I fail to understand the reasoning behind the Court's selective distinctions among the various aspects of sovereignty that may and may not be waived and do not believe these distinctions will survive close analysis in future cases.").

247. Indeed, prohibiting the states from consenting to the regulation at issue actually infringes on their independent and autonomous authority to do so, thus pitting judicial protection against the very state dignity vertical federalism strives to protect.

248. 521 U.S. 898 (1997). Whereas *New York* involved the commandeering of state legislatures, *Printz* involved the commandeering of state and local executive officers.

249. *See id.* at 902.

250. *Id.* at 905.

251. *See id.* at 918 (turning to the Constitution's "'essential postulate[s]'" (quoting Principality of Monaco v. Mississippi, 292 U.S. 313, 322 (1934))) (alteration in *Printz*).

252. *Printz*, 521 U.S. at 919.

principles of federalism. Our system of dual sovereignty is reflected in numerous constitutional provisions . . . ."[253]

The Court instead turned to history and emphasized that nothing indicated that "Congress could impose these [commandeering] responsibilities *without the consent of the States*."[254] This language harkens to the dignity rationale of the state sovereign immunity doctrine. While this language brings the anticommandeering doctrine more in line with its vertical federalism counterpart, it makes explicit the tension with the conclusion in *New York* that the states could not consent to the commandeering.

Although the Court did not pursue the dignity rationale, it turned to the other appropriate commandeering issue: the guarantee of independent state government. The Court stated:

> Preservation of the States as independent and autonomous political entities is arguably less undermined by requiring them to make policy in certain fields than . . . by "reduc[ing] [them] to puppets of a ventriloquist Congress[.]" . . . It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority. It is no more compatible with this independence and autonomy that their officers be "dragooned" . . . into administering federal law, than it would be compatible with the independence and autonomy of the United States that its officers be impressed into service for the execution of state laws.[255]

Aside from skirting development of the dignity and of the waiver implications, the majority opinion in *Printz* correctly looked to principles of vertical federalism. The Court avoided the troublesome Tenth Amendment and focused on the states' ability to resist federal incursions into their sovereignty. It is highly unlikely that the line drawn by *Printz* actually accords with the constitutional line that

253. *Id.* at 923 n.13.
254. *Id.* at 910-11.
255. *Id.* at 928 (citations omitted).

protects states from virtual elimination as governmental entities,[256] or even that it offends state sovereignty to a degree rendered impermissible by the Constitution, but at least the Court stayed away from horizontal federalism principles.

Vertical federalism permits a principled distinction between commandeering of state legislators and commandeering of state executives. The vertical power of the federal government to commandeer any branch of state government remains the same, but the resistance vectors of state legislatures are arguably greater than that of state executive officials. Directing state legislatures to legislate may be a deeper affront to state dignity and a more caustic erosion of state governmental power than commanding state officials to execute federal law. Therefore, anticommandeering may have a sounder basis in the former than in the latter.

I see no reason, however, for the Court's application of the anticommandeering doctrine to local governments. The plaintiffs in *Printz* were local government officials, not state officers.[257] I find no basis exists for local government sovereign dignity in the Constitution, much less for any recognition of local sovereignty.[258] Moreover, the application of anticommandeering principles to local governments is in tension with the exemption of local governments from the protections of sovereign immunity.[259]

Should the Court decide to act as the guardian of normative federalism values, it may be appropriate to consider protecting local governments from federal intrusion upon a weighed balancing of the federalism issues affecting local governments. But local governments have no constitutional status. If the Court's protection of the states stems from something inherent in statehood, it is difficult to understand how local governments could have the same protections.[260]

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256. *See id.* at 932 (refusing to apply a type of balancing test suggested by *National League of Cities v. Usery*, 426 U.S. 833 (1976)).

257. *See Printz*, 521 U.S. at 955 n.16 (Stevens, J., dissenting).

258. *Printz* itself relied only on precedent, namely the overruled case *National League of Cities*, as support for its defense of local sovereignty. *See id.* at 931 n.15.

259. *See id.* at 955 n.16 (Stevens, J., dissenting).

260. *See* Althouse, *supra* note 5, at 262.

D. Ex parte Young

The *Ex parte Young*[261] doctrine "carv[ed] out a necessary exception to Eleventh Amendment immunity" to permit certain suits for prospective injunctive relief against state officers who, acting under the authority of state law, violate federal law.[262] Because federal law is superior to state law, the state law is in effect invalid, and therefore, the officer acts without the sovereign protection of the state.[263] *Ex parte Young* is justified as necessary to assure the supremacy of federal law.[264]

As a vertical federalism issue, *Ex parte Young* is consistent with the dignity rationale. Although suits against the states impermissibly implicate state sovereign dignity, violations of federal law by state officers are divorced from the authority of the state. Because suits against state officers are not suits against the state, officers have little ability to resist vertical federal power. In addition, suits against officers are arguably less offensive to state dignity than suits against the state itself.[265]

Moreover, dignity helps to reconcile the tension between the availability of injunctive relief against state officers under *Ex parte*

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261. 209 U.S. 123 (1908).

262. P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993).

263. *See Young*, 209 U.S. at 160 ("The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States."); Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 699 (1949) (extending the concept of *Young* to violations of federal statutes by federal officers). At English common law, the King was assumed never to have authorized an illegal act by his agents, and therefore the illegal acts of the agents could not be attributable to the King. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES 244.

264. *See* Alden v. Maine, 527 U.S. 706, 747 (1999) ("[*Young*] is based in part on the premise that sovereign immunity bars relief against States and their officers in both state and federal courts, and that certain suits for declaratory or injunctive relief against state officers must therefore be permitted if the Constitution is to remain the supreme law of the land."); Green v. Mansour, 474 U.S. 64, 68 (1985) ("Both prospective and retrospective relief implicate Eleventh Amendment concerns, but the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law."); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 105 (1984) ("[T]he *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible . . . ."); Perez v. Ledesma, 401 U.S. 82, 106 (1971) (Brennan, J., concurring in part and dissenting in part) ("*Ex parte Young* was the culmination of efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution.").

265. *See* Caminker, *Judicial Solitude*, *supra* note 168, at 84.

Young and the prohibition on the commandeering of state officers under *Printz*.[266] In the former, the states and their officers are given a chance to self-conform to binding federal law and are only directed by federal courts if they fail. Giving state officers prior opportunity to conform to binding federal law ameliorates any subsequent enforcement's affront to state dignity. The resulting failure to abide by federal law also justifies a greater need for the exercise of direct federal power over the recalcitrant state officers. In the latter case, Congress takes state autonomy out of the officers' hands in the first instance. Indignity is arguably greater in the latter.[267] The vertical federalism rationale of dignity then helps resolve the apparent misalignment between anticommandeering and prospective injunctions, two closely related vertical federalism doctrines.

However, dignity alone cannot explain why *Ex parte Young* suits are limited to prospective injunctive relief.[268] Sovereign immunity bars officer suits seeking monetary relief from the state treasury.[269] If the state cannot order the officer's conduct, the suit should not offend state dignity regardless of whether compensatory retroactive damages are sought.[270] To the extent that a state officer's violation of federal law implicates the state itself, the state suffers greater indignity when a court forces it to act by injunction than by simple payment of a money judgment. Some measure of indignity exists regardless of its result. The compensatory/injunctive distinction walks a tight line between the state's dignity interest and the competing need

266. *See* Althouse, *supra* note 5, at 265 ("If we were really concerned about 'commandeering' the states with lawsuits, we shouldn't tolerate the injunctions that can be had through the Ex Parte Young [sic] device or the lawsuits permitted when sovereign immunity is abrogated using the Fourteenth Amendment power.").

267. *Cf.* RECORDS, *supra* note 92, at 28 (Gouvernor Morris) (arguing that a congressional negative on state laws "would disgust all the States" but finding acceptable judicial invalidation of state law).

268. *See* Edelman v. Jordan, 415 U.S. 651, 664 (1974).

269. *See id.*; Ford Motor Co. v. Dep't of Treasury of Ind., 323 U.S. 459, 464 (1945) ("[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.").

270. *See In re* Ayers, 123 U.S. 443, 507 (1887) ("If, therefore, an individual, acting under the assumed authority of a State, as one of its officers, and under color of its laws, comes into conflict with the superior authority of a valid law of the United States, he is stripped of his representative character, and subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.").

to enforce federal law—a line which, though perhaps possible to defend on the dignity rationale alone, has not been sufficiently defended by the Court.

Dignity is not the only ammunition in the vertical federalism battle, however. Suits for money damages that would draw from the state treasury may interfere with the ability of the state to govern effectively.[271] Indeed, the very threat of multiple damage awards in favor of a very limited number of individual plaintiffs, perhaps not even citizens of the defendant state, would risk emptying the state treasuries at the expense of the state's ability to provide for its citizens' general welfare. To the extent that private lawsuits would bankrupt state treasuries, states would lose the ability to function as governments. The vertical vector of maintaining the states as viable, functioning sovereign governments, featured so prominently in the regulatory immunity cases, helps[272] justify the compensatory/injunctive distinction of *Ex parte Young*.[273]

E. Commerce Clause Limitations

The question of the scope of Congress' power under the Commerce Clause is principally a horizontal federalism vector.[274] Certain members of the Court have not been consistent in treating it as such, however. The majority opinion and Justice Breyer's dissent

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271. *See* Dugan v. Rank, 372 U.S. 609, 620 (1963) ("The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'") (internal citations omitted).

272. "Helps" is an appropriate term here because the constitutional guarantee of state governmental existence is a very difficult line to cross. The line that the Court draws with the compensatory/injunctive relief distinction may not adequately enforce federal law, especially because practical methods, such as damages caps, may help ensure continued state viability even in the face of retrospective compensatory liability. The goal of this Article, however, is not to test the empirical validity of the Court's federalism doctrines or quibble about where the lines should be drawn so much as to try to understand the basic premises and create a coherent framework for reconciling federalism theories.

273. The Court has hinted at importing the sovereign existence vector into *Ex parte Young* in earlier opinions. In *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997), the Court held that non-monetary relief which significantly affects state sovereignty is not amenable to the *Ex parte Young* exception. *See id.* at 287 (refusing to permit *Ex parte Young* suits for de facto quiet title to land because "Idaho's sovereign interest in its lands and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury").

274. *See supra* Part II.A.

in *United States v. Lopez* are fine examples of proper horizontal federalism analysis.[275] The Court began with the horizontal federalism principle of limited national government, and noted that separate regulatory spheres of power guard against the risk of tyranny.[276] After reviewing precedent, the Court concluded that the legislation exceeded the power granted by the Commerce Clause.[277] Justice Breyer, relying mostly on precedent and the factual realities of the impact of guns on interstate commerce, reached the opposite conclusion.[278] Although these opinions reached different conclusions, neither strayed far from horizontal federalism vectors.

Justice Kennedy's concurrence is another matter. He likened the Court's role in enforcing horizontal federalism to that of vertical federalism when he referenced several doctrines with strong vertical vectors.[279] He also intimated that expansive, though correct, interpretations of the Commerce Clause might impermissibly intrude on state sovereignty, a vertical problem.[280] "Absent a stronger connection or identification with commercial concerns that are central to the Commerce Clause, that interference [with state sovereignty] contradicts the federal balance the Framers designed and that this Court is obliged to enforce."[281]

It is unclear if Justice Kennedy attempted to import from vertical federalism cases affirmative resistance vectors to limit otherwise valid exercises of the Commerce Clause power. He probably did not do so wholeheartedly, because he agreed with the majority that the legislation at issue exceeded the bare terms of the Commerce Clause power.[282] But to the extent that he would incorporate vertical vectors or counsel judicial abstention in cases otherwise controlled by text

275. *Lopez*, 514 U.S. at 567-68 (striking down a law regulating gun possession in areas near schools).

276. *See id.* at 552.

277. *See id.* at 567-68.

278. *See id.* at 615-16 (Breyer, J., dissenting).

279. *See id.* at 578-79 (Kennedy, J., concurring) (citing abstention cases, choice-of-law cases, federal review cases, preemption cases, and habeas corpus cases).

280. *See Lopez*, 514 U.S. at 583 (Kennedy, J., concurring); *id.* at 580 (Kennedy, J., concurring) ("If Congress attempts that extension, then at the least we must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern.").

281. *Id.* at 583 (Kennedy, J., concurring).

282. *See id.* at 568 (Kennedy, J., concurring).

and interpretative precedent, without some stated reason for doing so, his opinion is unsettling. Better to overrule precedent and ground Commerce Clause power in a horizontal relationship supported by original understanding, as Justice Thomas suggests,[283] than to devise *a priori* affirmative vertical limitations on congressional power to regulate individuals and further confound federalism coherence.

Vertical and horizontal mixing finds its way from Justice Kennedy's concurring opinion in *Lopez* to the majority and Justice Breyer's dissenting opinions in *United States v. Morrison.*[284] Although essentially tracking much of the *Lopez* opinion, the Court referenced the importance of maintaining "areas of traditional state regulation,"[285] a reference that harkens to the regulatory immunity cases. The Commerce Clause makes no mention of any exception for areas of regulation traditionally reserved to the states, and that analysis has no place in horizontal federalism inquiries. The textual limits of the Commerce Clause, wherever one deems them applicable, are both real and constitutional, and must be the primary guideposts for estimating whether that power has been exceeded.

The practical problem with which the Justices wrestled was that virtually any local activity of any import in American society today affects interstate commerce. The fears of the majority in *Lopez* and *Morrison* were real: The Commerce Clause is probably expansive enough to swallow most regulation of local activity. As Justice Breyer points out, the focal concern is "the difficulty of finding a workable judicial Commerce Clause touchstone—a set of comprehensible interpretive rules that courts might use to impose some meaningful limit, but not too great a limit, upon the scope of the legislative authority that the Commerce Clause delegates to Congress."[286]

283. *See id.* at 584 (Thomas, J., concurring).

284. 529 U.S. 598 (2000). There, the Court struck down Commerce Clause legislation protecting the victims of gender-motivated violence because the law exceeded Congress' authority under Article I. *See id.* at 617-19.

285. *Id.* at 615-16.

286. *Id.* at 656 (Breyer, J., dissenting).

An unlimited Commerce Clause might threaten the legislative abilities of the states to such a degree that the salutary benefits of horizontal federalism become negligible. This concern is a practical one, however, without clear constitutional dimension, and is not an affirmative constitutional limitation on otherwise valid exercises of federal power. The decision whether to exercise permissible federal power rightly belongs to the reasoned judgment of Congress, which presumably takes federalism norms into consideration.[287] The Court could help ensure application of only clear congressional intent by implementing a clear statement rule, for example, but it is undeniable that Congress can exercise Commerce Clause power, if it chooses to do so, when authorized by the Constitution, regardless of its disregard for salutary federalism norms.

Congress could exercise the permissible federal power to such a grand scope and with such little self-restraint that the very existence of the states would be threatened. Vectoral federalism analysis might pose a solution. The question of whether Congress is within its authorized scope is clearly horizontal, and the answer to the inquiry is that the power is permitted. However, excessive regulation implicates the guaranteed existence of the states, the vertical vector of the regulatory immunity cases, for part of state existence is the ability to regulate citizens. If federal regulation becomes so pervasive as to threaten the very existence of the states as regulatory governments, vertical resistance vectors may provide some affirmative protection. Until vertical federalism incursions are implicated, however, the scope of the Commerce Clause remains a peculiarly horizontal federalism question, with horizontal federalism answers.

287. *See id.* at 647-48 (Souter, J., dissenting). It is not inconsistent to argue that the Court should defer to structural federalism protections within the permissible range of horizontal federal power, but that the Court should not necessarily defer to structural federalism to protect the constitutional guarantee of the continued existence of the states in the regulatory immunity cases. In the former case, no vertical vector arises, and so the Court should defer to Congress' decision to exercise the federal power granted to it. In the latter, the vertical vector of guaranteed state existence creates a constitutional question that the Court must enforce.

F. Fourteenth Amendment

The Fourteenth Amendment is a combination of horizontal and vertical vectors. The first two sections are horizontal because they constrict state power by stripping the states of their power to abridge civil rights.[288] Section 5[289] is vertical, however, because it enables the federal government to enforce the preceding provisions against the states themselves.[290]

Section 5 is a powerful vertical vector. It authorizes federal power directly upon the states in ways not contemplated by the original Constitution.[291] It is, therefore, entirely appropriate for vertical federalism questions to favor federal power when Congress exercises its enforcement power under section 5. Moreover, attempts to enforce state compliance with the Constitution pose less of an affront than those to enforce mere statutory rights.[292] Thus, the Court has recognized increased congressional power to abrogate state sovereign immunity[293] and to regulate state governments[294] when acting

288. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (asserting that the substantive sections of the Fourteenth Amendment "themselves embody significant limitations on state authority"); *Ex parte* Virginia, 100 U.S. 339, 346 (1880) ("The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power.").

289. U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

290. Section 5 has also been interpreted from a horizontal federalism viewpoint. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Court held Congress' attempt to enact legislation under section 5 to have exceeded its enforcement powers. This is a horizontal federalism inquiry because it goes to the scope of federal power rather than its application to the states. *Id.* at 536.

291. *See* Seminole Tribe v. Florida, 517 U.S. 44, 59 (1996) ("We noted that [section] 1 of the Fourteenth Amendment contained prohibitions expressly directed at the States and that [section] 5 of the Amendment expressly provided that 'The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.'" (quoting U.S. CONST. amend. XIV, § 5)).

292. *See* Caminker, *Judicial Solitude*, *supra* note 168, at 84.

293. *See Fitzpatrick*, 427 U.S. at 456.

294. *See* EEOC v. Wyoming, 460 U.S. 226, 243 n.18 (1983) (reaffirming "that when properly exercising its power under [section] 5, Congress is not limited by the same Tenth Amendment constraints that circumscribe the exercise of its Commerce Clause powers"); City of Rome v. United States, 446 U.S. 156, 179 (1980) ("[P]rinciples of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments 'by appropriate legislation.' Those Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty."); *see also* Nat'l League of Cities v. Usery, 426 U.S. 833, 852 n.17 (1976), *overruled by* Garcia v. San Antonio Metro. Trans. Auth., 469 U.S. 528 (1985) ("We express no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the spending power . . . or . . . the Fourteenth Amendment.").

pursuant to its enforcement powers. The same should also apply to federal attempts to commandeer state governments,[295] another vertical federalism doctrine. All three concepts are consistent with proper vectoral federalism analysis: All are based on the same vertical vectors, and the Fourteenth Amendment simply tips the balance of vertical power in favor of the federal government in each case. While the enforcement power probably does not permit wholesale elimination of the states, it should at least abrogate state resistance based on dignity, and it might justify abrogation of any prophylactic rules created for the protection of other state sovereignty interests.

In a recent essay, Professor Vicki Jackson posed a very important question.[296] The Court has held that Article I confers no power on Congress to abrogate state sovereign immunity but that section 5 of the Fourteenth Amendment does.[297] The articulated distinction between section 5 and Article I is that the Fourteenth Amendment somehow modifies or limits state sovereign immunity but Article I does not. Professor Jackson argued that the only credible distinction between the Fourteenth Amendment and Article I is one of chronology. The Fourteenth Amendment altered the immunity doctrine because the Amendment came after the immunity doctrine, while Article I either came before or contemporaneously with the doctrine.[298] She then asks why the Fourteenth Amendment, and the accompanying shift in federal-state power, could not have also

295. Caminker, *State Sovereignty, supra* note 24, at 1006 n.13 ("Arguably, congressional commandeering as a means of exercising its section 5 power to enforce the Fourteenth Amendment's limitations on state authority (or its similar section 2 power to enforce the Thirteenth and Fifteenth Amendments) does not raise the same federalism issues, since the Reconstruction Amendments were openly designed to curb state sovereignty."); Jackson, *Federalism, supra* note 44, at 2211 ("The line apparently drawn in the Eleventh Amendment caselaw, between Article I powers and powers granted by later-enacted amendments, offers a plausible stopping point for the Court's anticommandeering rule.") (footnotes omitted); *accord City of Rome*, 446 U.S. at 179; *cf. Fitzpatrick*, 427 U.S. at 455 (explaining that section 5 legislation may be valid even if it prohibits conduct that intrudes into "legislative spheres of autonomy previously reserved to the States").

296. *See* Jackson, *Holistic Interpretation, supra* note 5.

297. *See Fitzpatrick*, 427 U.S. at 456.

298. *See* Jackson, *Holistic Interpretation, supra* note 5, at 1273 (arguing that chronology most persuasively explains the distinction).

modified the antecedent Article I powers.[299] She hypothesized that the Fourteenth Amendment might have expanded Article I powers such as Congress' Commerce Clause power in such a way as to justify a different result than that reached in *United States v. Morrison* and provide a different abrogation power than that rejected in *Seminole Tribe of Florida v. Florida*.[300]

Professor Jackson asked a good question, but her analysis was ultimately incomplete without a vectoral view. Good reason exists to query whether the Fourteenth Amendment altered other constitutional provisions, especially if chronology provides the sole justification. Chronology is not the sole justification, however, and she dismissed other justifications too quickly.

Professor Jackson identified four possible bases other than chronology for the distinction between the Fourteenth Amendment's effect on state sovereign immunity and the non-effect of Article I: text, purpose, intent, and functionality.[301] She dismissed text because "the Fourteenth Amendment no more explicitly addresses the Eleventh Amendment than it does the Commerce Clause."[302] She also

299. *See id.* at 1259 ("This essay asks why we should not read other preexisting parts of the Constitution—including Article I powers of Congress—as having been modified by the Fourteenth Amendment as well. . . . Considering Congress' Article I powers together with and in the light of Congress' Fourteenth Amendment powers might lead to the conclusion that, where Congress is seeking to remove barriers to the participation in the national economy of historically disadvantaged groups like women or racial minorities, its Article I Commerce Clause powers should be read in light of the later Constitution's commitments to equality."); *id.* at 1261 ("And if, as the Court held in *Fitzpatrick v. Bitzer*, the Fourteenth Amendment implicitly modified the Eleventh Amendment—which the Court has repeatedly asserted in recent years to be an important part of the federalism protections for states—why has the Fourteenth Amendment not also modified the scope of federal powers under Article I of the Constitution?") (footnote omitted); *id.* at 1264 ("If the Fourteenth Amendment modified the Eleventh Amendment, why could it not also have modified Article I's enumerations of national powers?"); *id.* at 1269 ("[C]hronology does not explain why the Fourteenth Amendment has not modified Article I powers in ways relevant to the scope of national power to promote equality of citizenship, as the Fourteenth Amendment is deemed to have modified the Eleventh Amendment and related sovereign immunity doctrines.").

300. *See id.* at 1259 ("This approach would support a longer chain of connection than might otherwise be permitted under *United States v. Lopez* and lead to a different result in *United States v. Morrison*. Finally, the essay raises the question of whether reading Article I powers in light of the Fourteenth Amendment's commitment of national citizenship might afford a basis (without having to overrule *Seminole Tribe*) for permitting congressional abrogation of state immunity from suit under Article I statutes.").

301. *See id.* at 1269.

302. *See id.*

dismissed purpose because Article I grants of power, such as the dormant Commerce Clause, constrain the states just as the Fourteenth Amendment does.[303] These are really two quite different arguments: that the Fourteenth Amendment does not speak to state sovereign immunity any more than it speaks to Article I and that the Fourteenth Amendment does not speak to constraining state power any more than Article I does.

These two issues form a clearer picture through vectoral lenses. Part of the problem stems from the vectoral dualism of the Fourteenth Amendment. Article I, like section 1 of the Fourteenth Amendment, is composed of predominantly horizontal vectors. In contrast, state sovereign immunity, like section 5 of the Fourteenth Amendment, is a vertical vector. Thus, as vectoral kin, section 5 and state sovereign immunity have stronger relationships and effects upon each other than either has with Article I. Similarly, section 1 of the Fourteenth Amendment and Article I inform each other more than either speaks to state sovereign immunity because they are both horizontal vectors.

Thus, Professor Jackson's first argument, that the Fourteenth Amendment no more addresses state sovereign immunity than Article I does, is not so simple. Section 1 no more addresses state sovereign immunity than does Article I (indeed, it addresses it far less), but section 5 does. Section 5, as a vertical vector, clearly augments federal power with respect to vertical federalism issues such as state sovereign immunity. Section 5 does not, without some clear reference, affect the horizontal vectors of Article I. Any such reference to Article I is absent from section 5, which only permits enforcement of the substantive provisions of the Fourteenth Amendment. By its own terms, it is a vertical vector relating only to the Fourteenth Amendment's horizontal limitations on the states.[304]

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303. *See id.* at 1270.

304. The Fourteenth Amendment could have altered the jurisdictional grant of Article III in historical ways similar to those suggested by Professor Jackson. Before the Civil War, general federal jurisdiction extended only to diversity actions. Michael G. Collins, *"Economic Rights," Implied Constitutional Actions, and the Scope of Section 1983*, 77 GEO. L.J. 1493, 1511 (1989). In 1875, Congress enacted a general federal question jurisdiction statute based on the reshaped understanding of federalism and the federal courts' role in enforcing civil rights. *See* STEPHEN C. YEAZELL, CIVIL PROCEDURE 216 (5th ed. 2000). While there is no indication that antebellum Congresses doubted that Article III reached federal

Section 5, therefore, affects state immunity with respect to Fourteenth Amendment issues but does not itself speak to Article I.

The second argument, that the Fourteenth Amendment does not speak to constraining state power any more than Article I does, is incomplete without the vertical half of the vectoral analysis. The substantive provisions of the Fourteenth Amendment and Article I both constrain state regulatory power through horizontal mechanisms.[305] However, section 5 gives the federal government a strong vertical enforcement power against the states that is very different from the horizontal vectors of Article I. The closest Article I analogy would be the Necessary and Proper Clause, which is confined to the execution of the affirmative horizontal powers of the federal government,[306] not vertical enforcement of negative restrictions on the states.[307]

The Supremacy Clause, a vertical power, is also overpowered by the vertical resistance vector of state sovereign immunity.[308] Section

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question cases, the congressional expansion of federal jurisdiction does seem to be a flexing of newfound strength. Although intriguing, such a consideration is beyond the scope of this Article.

305. *Compare* U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . ."), *with id.* amend. XIV, § 1 ("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.").

306. *See id.* art. I, § 8, cl. 18 (giving Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States").

307. The Court has resolved that state sovereignty limits the Necessary and Proper Clause in the same way as any other Article I power. *See, e.g.*, Alden v. Maine, 527 U.S. 706, 732-33 (1999); Printz v. United States, 521 U.S. 898, 923-24 (1997). The underlying basis for state resistance may be direct limitations on that Clause alone, rather than on Article III or Article I in general. The possibility that section 5, as a vertical vector, infuses the Necessary and Proper Clause, also a vertical vector, with the same abrogation power is intriguing, but the language of section 5 does not permit extension beyond the other provisions of the Fourteenth Amendment so easily. For some commentary on the effect of the Fourteenth Amendment on the constitutionality of federal commands, see Evan H. Caminker, Printz, *State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 236-42 (1997).

308. *See Alden*, 527 U.S. at 731 ("Appeal to the Supremacy Clause alone merely raises the question whether a law is a valid exercise of the national power."); *see also* Dodson, *Metes & Bounds*, *supra* note 8, at 752 ("If the Supremacy Clause does not permit overriding state sovereign immunity under the authority of Article I statutes, then, *ipso facto*, neither does it for laws made under the authority of other provisions of the Constitution. In effect, *Seminole Tribe* and its progeny can perhaps be more appropriately read not as Article I cases, or even as Eleventh Amendment cases, but rather as Supremacy Clause cases: that the Supremacy Clause alone does not contemplate the abrogation of state sovereign immunity."). The possibility exists, however, that the Fourteenth Amendment may have strengthened

5 is an enforcement mechanism with vertical federalism force over and above mere preemption. The Fourteenth Amendment speaks to the vertical enforcement of horizontal constriction of the states to a greater extent than any part of the original Constitution.

Although vectoral federalism permits a principled distinction between the Fourteenth Amendment's effect on the Eleventh Amendment and its hypothetical alteration of Article I powers, Professor Jackson's original query remains unanswered. Combining horizontal and vertical federalism vectors, could not section 1 have incorporated certain Article I rights into its purview and made them enforceable under section 5? The Due Process Clause is insufficient under current doctrine because that Clause only incorporates "fundamental" rights protected by the Constitution.[309] As Professor Jackson astutely recognizes, the Privileges or Immunities Clause appears to empower Congress to define, through its Article I powers, civil rights of national citizenship which would then be enforceable through section 5 of the Fourteenth Amendment.[310] After all, the Privileges or Immunities Clause of the Fourteenth Amendment originally paralleled the tamer Privileges and Immunities Clause of Article IV but was changed to reflect an intent to incorporate "other and different privileges and immunities . . . which were not limitations on the power of the States before the [F]ourteenth [A]mendment."[311]

A large obstacle stands in the way of the vindication of that theory—the Slaughter-House Cases,[312] which effectively eviscerated

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the Supremacy Clause in vertical federalism ways. *Cf. supra* note 307 (making the point with respect to the Sweeping Clause).

309. *Compare, e.g.*, Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 642-43 (1999) (holding the Enforcement Clause applicable only to the Due Process Clause protections, not those created by statute), *with* Dodson, *Metes & Bounds*, *supra* note 8, at 762-63 (listing the civil rights contained in the Bill of Rights that have been incorporated by the Due Process Clause). The idea that the Due Process Clause altered the Bill of Rights makes sense because both deal with fundamental civil rights of, and fundamental fairness to, citizens. Reading the Fourteenth Amendment as expanding Congress' Article I powers, such as the Commerce Clause power, to fit the purposes of the Due Process Clause is an entirely different matter.

310. *See* Jackson, *Holistic Interpretation*, *supra* note 5, at 1304.

311. CONG. GLOBE, 42d Cong., 1st Sess. app. at 84 (1871) (statement of Rep. Bingham).

312. 83 U.S. (16 Wall) 36 (1872).

the Clause.[313] Nevertheless, the Privileges or Immunities Clause is experiencing academic revival,[314] and even some members of the Court might be willing to revisit its impact.[315] Although I share Professor Jackson's belief that the Court is unlikely to expand the Privileges or Immunities Clause as far as to link section 5 abrogation to Article I causes of action,[316] vectoral federalism suggests that perhaps the Court should at least consider it.

CONCLUSION

Vectoral federalism takes a pictorial representation of two basic but fundamentally different forms of federalism. Horizontal federalism, in which the national and state governments compete for regulatory power over individuals, involves the extent of the national and state powers. Vertical federalism, in which the national government attempts to exercise power directly over the states and in

313. *See id.* at 77-78 (concluding that the Fourteenth Amendment did not "transfer the security and protection of all the civil rights [previously mentioned] from the States to the Federal government," and instead interpreting the Privileges or Immunities Clause to refer only to those rights uniquely associated with national citizenship). *But see* Kevin Christopher Newsom, *Setting Incorporation Straight: A Reinterpretation of the Slaughter-House Cases*, 109 YALE L.J. 643 (2000) (arguing that the Slaughter-House Cases need not be read as stripping the Privileges or Immunities Clause of all efficacy).

314. *See* Farber & Muench, *supra* note 66, at 275-77; Kaczorowski, *supra* note 65; Newsom, *supra* note 313. William J. Rich, *Taking "Privileges or Immunities" Seriously: A Call to Expand the Constitutional Canon*, 87 MINN. L. REV. 153, 223 (2002).

315. *See* Saenz v. Roe, 526 U.S. 489, 503-04 (1999).

316. To permit the expansion of an enumerated power beyond what Article I expressly permits would threaten the very concept of limited government to which the majority strongly adheres. *See* United States v. Morrison, 529 U.S. 598, 617 (2000); Printz v. United States, 521 U.S. 898, 918-19 (1997); United States v. Lopez, 514 U.S. 549, 565 (1995); *cf.* Pennsylvania v. Union Gas Co., 491 U.S. 1, 40 (1989), *overruled by* Seminole Tribe v. Florida, 517 U.S. 44 (1996) (Scalia, J., dissenting) ("If private suits against States, though not permitted under Article III (by virtue of the understanding represented by the Eleventh Amendment), are nonetheless permitted under the Commerce Clause, or under some other Article I grant of federal power, then there is no reason why the other limitations of Article III cannot be similarly exceeded. That Article would be transformed from a comprehensive description of the permissible scope of federal judicial authority to a mere default disposition, applicable unless and until Congress prescribes more expansive authority in the exercise of one of its Article I powers. That is not the regime the Constitution establishes."). Indeed, the Court has pointedly rejected an interpretation of section 5 as expanding the rights contained in the Fourteenth Amendment. *See* City of Boerne v. Flores, 521 U.S. 507, 527-28 (1997) ("There is language in our opinion in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), which could be interpreted as acknowledging a power in Congress to enact legislation that expands the rights contained in [section] 1 of the Fourteenth Amendment. This is not a necessary interpretation, however, or even the best one.") (parallel citations omitted). How much less willing would the Court be to expand enumerated powers?

which the states attempt to resist that power, involves the relative strengths of the national and state powers. These two federalism forms are generally different and distinct inquiries.

Viewing the various federalism doctrines through a vectoral lens helps to understand them and their relationships to each other. Preliminary vectoral analysis suggests that the Court may be unwittingly—and erroneously—confusing the two forms and that separating out the vectoral components and attributes would clarify and unify the Court's federalism jurisprudence.

I have not attempted to address all of the implications that a vectoral federalism analysis might have on the issues discussed in this Article. This discussion is merely preliminary, and the framework is untested. Whether the vectoral principles will survive further scrutiny and whether they even apply to issues such as habeas corpus, federal appellate review, abstention, or preemption remains to be seen. At the very least, vectoral federalism provides a new forum for future discussion.