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NEWS & ANALYSIS

Redefining Federalism

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Editors' Summary: Federalism has become a highly politicized term in environmental law, with some parties having adopted the term to signify an ideology of devolving federal authority over environmental protection back to the states. In this Article, the author argues that from the states' perspective, the U.S. Supreme Court is using federalism both too much and too little. Too much, in striking down federal law where even the states recognize that a federal role is necessary to address a national problem. Too little, in inappropriately limiting state experimentation. By listening more carefully to the states, the author argues that the Court could transform its federalism jurisprudence from a source of criticism and polarization to a doctrine that should win broad support from across the political spectrum.

In its current iteration, the U.S. Supreme Court's federalism jurisprudence presents a serious threat to environmental protection. The Court's efforts to reestablish formalistic limits on the U.S. Congress' power under the Commerce Clause in *United States v. Lopez*[1] and *Morrison v. United States*[2] has led to a flurry of claims that Congress has exceeded its regulatory authority in protecting single-state species under the Endangered Species Act (ESA)[3] and isolated waters and wetlands under the Clean Water Act (CWA).[4] The Court's expansive interpretations of Eleventh Amendment immunity—particularly as applied by lower courts such as the U.S. Court of Appeals for the Fourth Circuit in *Bragg v. West Virginia Coal Ass'n*[5]—threaten to undermine the entire cooperative federalism framework of laws such as the Clean Air Act (CAA)[6] and the CWA. In cases such as *Engine Manufacturers Ass'n v. South Coast Air Quality Management District*,[7] the Court has preempted important state environmental initiatives despite considerable ambiguity about the intent of Congress.

This pattern of rulings suggests the Court is adopting a form of "libertarian federalism" in striking down environmental protections at the federal, state, and local level. Ascending in concert with the Court's jurisprudence has been an effort by the libertarian right—comprised of grass-roots organizers such as Grover Norquist, legal activists such as Michael Greve, and legal scholars such as Prof. Richard Epstein—to establish federalism as a potential vehicle for advancing their antiregulatory political agenda. These advocates have constructed a definition of federalism that is hostile to government at all levels.

At the same time, a growing number of environmentalists in academia and the trenches have coalesced around a very different vision of federalism that promotes state and local government's role as the laboratories of environmental democracy. Elliott Spitzer and Arnold Schwarzenegger have become two of the nation's most important environmental leaders, and many of the nation's most important and aggressive recent environmental initiatives—such as California's recent Global Warming Emissions Rule—have come at the state level. At the local level, Prof. John Nolon has edited a series of Environmental Law Institute (ELI) books hailing what he calls "the advent of local environmental law."

Federalism is at once a threat and an opportunity for environmentalists. For this reason, environmentalists cannot react to the Court's federalism jurisprudence with a simple message that "federalism is bad." Rather, environmentalists need to treat the Court's focus on federalism as an opportunity to channel the Court to a version of federalism that provides leeway for the emergence of environmental law at the state and local level.

The model for such an approach already exists in a remarkable collection of Court amicus briefs filed over the

This Article is a highly abbreviated and slightly modified version of *Redefining Federalism: Listening to the States in Shaping "Our Federalism"* (Envtl. L. Inst. 2004). I edited *Redefining Federalism*, and wrote it together with five contributing authors: Jay Austin, Jennifer Bradley, Tim Dowling, Jim Ryan, and Jason Rylander. This Article draws heavily from contributions to the book drafted originally by each of the coauthors, who therefore deserve much of the credit for the Article. I am fully to blame for any inaccuracies or logical flaws that accompany the effort to reduce a 200-page book to a 40-page Article.

1. 514 U.S. 549 (1995).
2. 529 U.S. 598 (2000).
3. 16 U.S.C. §§1531-1544, ELR Stat. ESA §§2-18.
4. 33 U.S.C. §§1251-1387, ELR Stat. FWPCA §§101-607.
5. 248 F.3d 275, 31 ELR 20362 (4th Cir. 2001). *See also* Michael S. Greve, Real Federalism: Why It Matters, How It Could Happen 92 (1999).
6. 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618.
7. 124 S. Ct. 1756, 34 ELR 20028 (2004).

past decade by state attorneys general. Chronicled in a book called *Redefining Federalism: Listening to the States in Shaping "Our Federalism,"* published in November 2004, by ELI, these briefs contain both an indictment of the Court's current federalism and a roadmap for a new federalism jurisprudence that restores the vision of the great Justice Louis Brandeis of states and local governments as the laboratories of democracy.

The Court, according to the states, is protecting federalism too much and too little. The Court is protecting federalism too much by inappropriately limiting the federal government's ability to address national problems. Federalism, the states have argued, is not well protected by rules that prevent a federal role where one is plainly needed, and where the federal role is supported by an appropriately deferential reading of the Congress' Commerce Clause authority. Thus, states have overwhelmingly supported federal government participation in solving nationwide problems such as violence against women and the pollution of lakes and streams. Most decisively in the case involving the Violence Against Women Act (VAWA), the Court disregarded the states' views and struck down an important part of the VAWA as beyond federal Commerce Clause power, prompting Justice David H. Souter to note in dissent the irony that "the States will be forced to enjoy the new federalism whether they want it or not."

The Court is protecting federalism too little, according to the states, by inappropriately striking down state and local initiatives under the so-called dormant Commerce Clause and the Supremacy Clause. The Court frequently employs these doctrines to strike down social and economic experimentation by the states, based on its conclusion that the states' initiative conflicts with a federal statute or interferes with interstate trade. These doctrines—long expanded beyond their textual justifications—have become even more federalism-stifling over the past 15 years, even as the Court has moved aggressively to protect federalism in other areas.

By listening more carefully to the states in crafting its federalism jurisprudence, the Court could transform its most important jurisprudential legacy from a source of criticism and polarization to a neutral principle that should win broad support from across the political spectrum. Federalism, according to the states, is not a pitched battle between the federal government and the states over exclusive spheres of governmental authority. Federalism, rather, is about respect for the critical structural role states play in our federal system and about allocating government power in a way that improves how the government serves its citizens. The states' vision of federalism is neutral in the sense that the rules emerging from their briefs do not guarantee victory for the left or the right on a range of issues. The rules advocated by the states will lead to a conservative outcome in some cases and a liberal outcome in others, but they are not systematically skewed to favor either conservatives or liberals.

The question is whether the Court has any interest in listening to the states and the environmentalists who are promoting state and local solutions to environmental problems. The answer is that it might. The Court's more recent federalism decisions indicate some movement on the Court away from libertarian federalism. In recent preemption and dormant Commerce Clause cases, for example, Justice Clarence Thomas and Justice Antonin Scalia have indicated a willingness to recognize the need for state regulatory innovation.[8] Justice Sandra Day O'Connor also appears to now be listening to the states in their call for moderation in stripping the federal government of needed authority.[9]

Environmentalists have a tremendous amount at stake in the trajectory of the Court's federalism jurisprudence. Rather than simply opposing rulings that limit foundational laws such as the CWA and the ESA, environmentalists should promote an alternative vision of federalism, already well formulated in the briefs filed by state attorneys general, which would preserve appropriate federal authority while enhancing the role of state and local governments as the laboratory of environmental democracy. With the future of critical state initiatives, including California's Global Warming Emissions Rule, ultimately in the hands of the Court, important environmental progress hinges on the success of this effort.

I. Federalism and Environmental Protection

A. Why Federalism Works

The most important neutral value advanced by a federal system of government stems from federalism's ability to allow regional variation and thereby improve citizen satisfaction with political outcomes.

To illustrate this promise, it is useful to consider a highly simplified world with only two states, state Green and state Gray, each containing 100 voters.[10] The two are joined together by a national government that has the power to set standards that apply throughout both states. Assume that smog caused by automobiles affects both states, but causes more health problems in state Green. Assume that, therefore, 70 voters of the citizens of state Green want a ban on high-polluting vehicles, while only 40 voters in state Gray want such a ban. One option is for the national government to ban high-polluting vehicles and, because 110 voters support such a ban, national legislation would probably be enacted. The alternative would be for state Green to enact a ban and state Gray to forego any action. A state-by-state solution in this case will honor the preferences of 130 total citizens (70 from state Green, 60 from state Gray), 20 more than would be satisfied by a solution at the national level. If the population is mobile and citizens are sufficiently motivated by the policy choice in question to move because of it, the state-by-state solution could satisfy the policy preferences of an even greater total number of citizens as they move between states to satisfy their policy preference.

Now add a wrinkle. Assume that the different levels of support for pollution control in the two states are attribut-

8. Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 610 (1997) (Thomas, J., joined by Rehnquist, C.J., as to part one, and Scalia, J., dissenting) (calling the majority's dormant Commerce Clause decision against the states "overbroad" and "unnecessary"); Geier v. American Honda Motor Co., 529 U.S. 861, 886 (2000) (Stevens, J., joined by Souter, Thomas & Ginsburg, JJ., dissenting) (supporting Stevens' call for revisiting doctrine of obstacle preemption); American Ins. Ass'n v. Garamendi, 123 S. Ct. 2374, 2394 (2003) (Ginsburg, J., joined by Stevens, Scalia & Thomas, JJ., dissenting) (calling for changes in foreign policy preemption law).

9. *See* Nevada Dep't of Human Resources v. Hibbs, 538 U.S. 721 (2003); Tennessee v. Lane, 124 S. Ct. 1978 (2004).

10. This initial scenario is a modified version of a hypothetical used in Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1454, 1494 (1987). *See also* Michael S. Greve, *Federalism's Frontier*, 7 Tex. Rev. L. & Pol. 93 (2002).

able to the fact that smog from state Gray travels across the state's border and causes health problems in state Green. Under this scenario, it is unlikely that either state, acting alone, will ban high-polluting vehicles. State Gray would bear disproportionate costs for enacting the ban and receive fewer corresponding benefits. Voters in state Green would likely conclude that it made little sense for them to bear the costs of banning emissions without an emissions ban in state Gray. Thus, a state-by-state solution would only make 90 citizens happy (those who don't want any ban on emissions). In such cases, a national solution would result in the best policy outcome.

Now add one final wrinkle. What if state Green adopts a ban on high emission vehicles and automobile manufacturers respond by developing a new car that pollutes less but costs no more? When this occurs, opposition to the pollution ban will almost certainly evaporate in state Gray, which will then enact a similar ban. Conversely, if car owners in state Green end up paying inordinately high vehicle prices, support may in turn evaporate, and state Green might end up repealing its ban. This experimentation rationale for federalism has never been stated better than by Justice Brandeis, who famously wrote: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country."[11]

In the first and third scenarios lay the promise of federalism as a neutral principle. Environmentalists frequently protest that a state-by-state solution will lead to laws that are less protective of the environment overall than national environmental safeguards. This is indeed the outcome of the first example above, where more people get their preferred outcome, but the environment in state Gray is less protected than it would be under a national solution. But absent any pervasive flaws in the political process, it is just as likely that a state-by-state solution will result in greater protection for the environment.[12] Proponents and opponents of stronger environmental protections should each like federalism not because they always win, but because it improves the overall popularity of the measures.

This is not an argument for a weak national government. As scenario two demonstrates, there are very good reasons for national environmental laws. One of these reasons is interstate externalities or spillover effects. Another is the economies of scale that come in some instances with federal regulation. U.S. Environmental Protection Agency (EPA) spends a significant amount of money testing and setting standards for products like pesticides: it would be enormously inefficient for 50 states to try to duplicate this work. Similarly, there are good reasons in favor of preemption of state laws in some areas. Again, using the pesticide example, there is little sense in subjecting manufacturers to 50 different state label requirements.

Where these or other persuasive reasons justify a national solution, or a national minimum standard, Congress should act. Where such justifications are lacking, Congress should refrain from acting and state and local governments should be free to craft their own solutions.

And indeed state and local governments have been hard at work crafting those solutions. Some of the nation's most important and aggressive environmental initiatives in recent years have come at the state level. For example, in June 2004, the state of California announced an aggressive plan to combat global warming by requiring a 30% reduction in carbon dioxide emissions from passenger vehicles and light duty trucks over the next 10 years.[13] Similarly, the state of New York implemented regulations in 2003 that would cut sulfur dioxide (SO_2) emissions from power plants to one-half of what is allowed under the CAA, and also reduce nitrogen oxide (NO_x) emissions.[14] Massachusetts' new rules will require four power plants to cut their mercury emissions levels by 85% over the next four years and 95% over the next eight years.[15] The state previously established a gradual phasing down of SO_2 and NO_x emissions.[16]

At the local level, Professor Nolon speaks of "a remarkable and unnoticed trend among local governments to adopt laws that protect natural resources."[17] For example, Delaware, Florida, New York, and Washington require or allow localities' comprehensive plans to identify, conserve, and protect natural resources or important environmental areas.[18] Local zoning ordinances create specific overlay or conservation districts that protect wildlife habitats (as in Tucson, Arizona, Holladay, Utah, and Summit County, Colorado), and protect ecologically sensitive areas such as ridgelines and slopes (as in Putnam Valley, New York). Local officials also deploy land use regulations to protect water quality. In Wallingford, Connecticut, and Bedford, New York, ordinances ban or restrict potentially polluting land uses such as dry cleaning and disposal of hazardous waste in order to lower the risk of contamination of the local aquifer. Falmouth, Massachusetts, and the Long Island Pine Barrens, New York, use transferable development rights to restrict development affecting their drinking water supply. Other localities limit development in floodplains, on ridgelines or steep slopes, or in stormwater channels.

The federal environmental laws of the early and mid-1970s were premised, at least in part, on the notion that state

11. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). *See also* John R. Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, *in* New Ground: The Advent of Local Environmental Law 3, 38 (John R. Nolon ed., 2003).

12. To illustrate, consider a variation of the first scenario where only 60 people in state Green want to ban high-polluting vehicles and only 30 people in state Gray want such a ban. In this scenario, a national ban would not be enacted (because it is favored by only 90 of the 200 total citizens). A state-by-state solution would result in a ban in state Green, no ban in state Gray, and again the satisfaction of the preferences of 130 citizens. A state-by-state solution in such a case would maximize both citizen satisfaction and environmental protection (given the political dynamic).

13. News Release, California Environmental Protection Agency Air Resources Board, ARB Releases Draft Proposal to Limit Greenhouse Gas Emissions From Cars (June 14, 2004), *available at* http://www.arb.ca.gov/newsrel/nr061404.htm (last visited May 12, 2005).

14. Press Release, Governor Pataki: Nation's Toughest Acid Rain Controls Approved: Strict New Rules to Reduce Emissions to Be Phased In Beginning in 2004 (Mar. 26, 2003), *available at* http://www.gorr.State.ny.us/gorr/03_26_03_acid_rain.htm (last visited May 12, 2005). New York's regulations have been blocked by the state superior court because of a technicality: the state did not hold the requisite public meetings for the laws. *See* Anthony DePalma, *State Judge Rejects Rules on Acid Rain*, N.Y. Times, June 5, 2004, at B1.

15. Stephanie Ebbert, *Mass. Sets New Limits on Mercury Emissions*, Boston Globe, May 26, 2004, at A1.

16. *Id*.

17. Nolon, *supra* note 11, at 3.

18. The examples of recent state and local environmental activity are drawn from *id*. at 18-30.

and local governments were unable or unwilling to take responsibility for safeguarding natural resources. But state and local activity over the last 30 years, and particularly over the last decade, undercuts this view of states and localities. State and local governments are not perfect guardians of the environment (neither is the federal government) but they can be competent partners in an allocation of authority that puts responsibility for different environmental problems at different governmental levels, or federalism.

B. Obstacles to Environmental Federalism

As sketched out above, careful attention to the proper allocation of authority between local, state, and federal governments can improve the government's ability to serve its citizens in many areas including environmental protection. For this reason, environmentalists should fully embrace environmental federalism.

Unfortunately, many if not most environmentalists are almost instinctually repelled by arguments in favor of environmental federalism because of the historic linkage between federalism and discredited notions of "states' rights" and, more recently the effort by libertarian activists to root in federalism an attack on any governmental interference into the free market. These concerns are valid, particularly given the Court's embrace of a version of federalism that appears to track, albeit in a much milder form, the tenets of libertarian federalism. Before coming back to the vision of federalism as a neutral principle being articulated by state attorneys general in recent Court briefs, this Article spends a little time explaining and refuting these alternative notions of federalism.

C. Federalism and "States' Rights"

Federalism has historically been tarred by an association between federalism and the cries of "states' rights" that were used to resist abolition of slavery in the 19th century and national civil rights laws in the mid-20th century. Constitutional federalism's history is not much brighter: starting with *Dred Scott v. Sandford*,[19] continuing in the *Civil Rights Cases*,[20] and culminating in the Court's resistance to the New Deal, judicial efforts to protect absolute spheres of state autonomy have all been problematic.

But federalism, neutrally defined, is not about states' rights at all. It is about allocating authority to the level of government best suited to address the problem at hand. There are two sides of federalism: one is protecting state authority where it is appropriate; the other is ensuring that the federal government has power where national rules are necessary. Few Americans now think that we should allocate authority to protect against racial discrimination exclusively to the states, and the Reconstruction Era Amendments guarantee an important federal role.

Serious consideration of constitutional and political federalism points in many areas to devolution of some power to the states, but not because federalism is about states' rights. Rather, federalism tends toward more state authority because in recent years so much has been federalized, some of it without much apparent forethought. A good example is the federalization of criminal law, which is in many respects the classic example of an area traditionally handled by state and local governments. As the American Bar Association concluded in 1998: "The expanding coverage of federal criminal law, much of it enacted in the absence of a demonstrated and distinctive federal juristification . . . has little to commend it and much to condemn it."[21]

It is within this context that the Court's 1995 ruling in *Lopez* draws its strongest support. Prof. Larry Kramer has noted that despite the nearly complete absence of judicial checks on federal power between 1937 and 1995, the vast majority of the law that most affects our lives is state law on topics such as trusts and estates, contracts, torts, family relations, property, and land use.[22] Professor Kramer uses this evidence to argue that the political process adequately protects states from federal intrusion. Professor Kramer's point is a good one, but the federalization of crime over the last two decades is an important counterexample. Congress passed the "Gun-Free School Zone Act" at issue in *Lopez* without even bothering to articulate how precisely the act of possessing a gun near a school affected interstate commerce. *Lopez* is, or should be, uncontroversial at least to the extent it simply insists that Congress articulate the need for a national law more fully than it did in passing the Gun-Free School Zone Act.

D. Federalism as Libertarian Fantasy

In the last decade, an even more dangerous vision of federalism has emerged. The libertarian right has seized on federalism as a potential vehicle for advancing their antiregulatory political agenda and has constructed a definition of federalism that is hostile to government at all levels.

The most comprehensive explanation of these views comes in a book entitled *Real Federalism: Why It Matters, How It Could Happen*[23] by Greve, who heads the Federalism Project at the American Enterprise Institute. Greve argues, "'real' federalism requires protection against both the federal government and State governments as well."[24] Indeed, Greve goes so far as to "denounce the states as real federalism's real enemies."[25] Greve argues that "real" federalism is protection from regulation of (almost) any sort.[26] Greve, moreover, argues that the U.S. Constitution

19. 60 U.S. 393 (1856).

20. 109 U.S. 3 (1883).

21. American Bar Ass'n, Task Force on the Federalization of Criminal Law, The Federalization of Criminal Law 55 (1998). *See*, *e.g.*, Edwin Meese III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 Tex. Rev. L. & Pol. 1, 4, 6 (1997) (describing federal criminal laws as "ineffective and partisan," and arguing that such laws increase "the potential . . . for an oppressive and burdensome federal police state"); William H. Rehnquist, *The 1998 Year-End Report of the Federal Judiciary*, *reprinted in* 11 Fed. Sentencing Rep. 134, 135-36 (1998) ("The trend to federalize crimes that traditionally have been handled in state courts not only is taxing the Judiciary's resources and affecting its budget needs, but it also threatens to change entirely the nature of our federal system.").

22. Larry Kramer, *Understanding Federalism*, 47 Vand. L. Rev. 1485, 1504 (1994).

23. Greve, *supra* note 5.

24. *Id.* at 81.

25. *Id.*

26. The parenthetical almost in this sentence reflects a twist to Greve's argument that is worth highlighting. It turns out, upon close inspection, that Greve does not oppose *all* laws and regulations that interfere with the private market. He is happy with certain kinds of laws and regulations that are compatible with his political and ideological

establishes clearly defined rules that hamstring both the federal and state governments from legislating in the public interest.

Real Federalism did not arise in a vacuum. It is an outgrowth of radical libertarian scholarship that began emerging two decades ago, most prominently in the work of Professor Epstein. Professor Epstein laid much of the intellectual groundwork for Greve's book in a 1987 article in the *Virginia Law Review* where he argued that the "affirmative scope of the commerce power should be limited to those matters that today are governed by the dormant commerce clause: interstate transportation, navigation and sales."[27] In 1996, Professor Epstein called for the Court to overrule "with a single blow" every Commerce Clause case decided by the Court since 1787.[28]

Like Greve, Professor Epstein argues for the Court to give a "one-two punch" to "reduce the effective size of government at both levels."[29] Explicitly seeking a return to the *Lochner* era (named for the 1905 case, *Lochner v. New York*),[30] Professor Epstein has also argued for the Court to enforce "restrictions on state regulation through the Contracts Clause and the Fourteenth Amendment, which have received narrow interpretations for so many years."[31] Even more famously, Professor Epstein argued in his 1985 book *Takings, Private Property, and the Power of Eminent Domain*, that "many of the heralded reforms and institutions of the twentieth century" including zoning, rent control, workers' compensation law, environmental protections, and even progressive taxation are "constitutionally infirm or suspect."[32]

Professor Epstein and some of his colleagues are open in their support of judicial activism in order to advance their legal agenda. As Professor Epstein readily admitted in *Takings*, implementing a return to the pre-New Deal powers of the federal and state governments would require "a level of judicial intervention . . . far greater than we have ever had." In the words of James Huffman, the Dean of Lewis and Clark Law School: "[L]iberty is too important to be sacrificed to an abstract commitment to judicial restraint." Huffman warned the Heritage Foundation in 1993 that "the Reagan revolution will come to nothing" if "judges sit on their hands in the name of a simplistic theory of judicial restraint."[33]

This fervor for judicial activism and radical libertarian ideas has only increased in recent years. For example, 20 years ago, Professor Epstein was virtually alone in openly calling for *Lochner*'s return; he is now joined by a justice on the California Supreme Court[34] and a growing list of academic disciples.[35]

More importantly, Greve's antigovernment vision of federalism is now being litigated in courts around the country by a well-funded collection of legal foundations including Pacific Legal Foundation and Washington Legal Foundation, both of whom join Greve in advocating against both federal and state power to address problems such as environmental protection.[36] The Cato Institute, of which Greve is a board member, launched an amicus curiae project after *Real Federalism* was published as part of an effort "to remind the Supreme Court that government has delegated, enumerated, and limited powers."[37] Since that time, Cato has filed briefs arguing that the federal government lacks constitutional authority to prevent violence against women, to regulate interstate wetlands, and to protect endangered species.[38] Like Greve, Cato is equally opposed to most government initiatives at the state level and it has in recent years filed briefs opposing state action to prevent tobacco deaths, to ban handguns, and to promote racial diversity.[39]

Finally, individuals with a vision of the Constitution that matches Greve's in its radicalism are winning lifetime appointments to the federal appellate bench in disproportion-

agenda. Thus, while he criticizes laws that seek to protect the environment, *id.* at 105-06, make products safer, *id.* at 100-04 and protect women from domestic violence, *id.* at 43, 127 he embraces laws that would prohibit private companies or public universities from engaging in affirmative action. *Id.* at 96. Similarly, he supports laws that would restrict access to abortion and limit the rights of gays and lesbians. *Id*. at 99-103. Here, finally, we understand what Greve's federalism stands for: a radical, largely antigovernment agenda, with certain exceptions for pet political causes. Lest readers think this is an exaggeration, Greve himself is not shy about identifying the constituency that he believes will most support his call for a return to "real federalism." He labels this group the "Leave-Us-Alone" constituency. This group, he suggests, consists of gun owners, conservative religious groups, property rights groups, and tax limitation groups. *Id.* at 87-123. It is their agenda that Greve is pushing under the banner of federalism, and this agenda lacks any neutral, consistent, or even coherent principle.

27. Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 Va. L. Rev. 1387, 1454 (1987).
28. Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 Notre Dame L. Rev. 167, 190 (1996).
29. *Id.* at 191.
30. 198 U.S. 45 (1905).
31. Epstein, *supra* note 28, at 190-91.
32. Richard A. Epstein, Takings, Private Property, and the Power of Eminent Domain x (1985).
33. James L. Huffman, *The Heritage Foundation Lectures and Education Programs: A Case for Principled Judicial Activism*, *at* http://www.heritage.org/research/legalissues/hl456.cfm (last visited July 23, 2004).
34. Janice Rogers Brown, "A Whiter Shade of Pale": Sense and Nonsense—The Pursuit of Perfection in Law and Politics, Speech to the Federalist Society, University of Chicago Law School (Apr. 20, 2000), at 7-8, *available at* http://www.communityrights.org/PDFs/4-20-00FedSoc.pdf [hereinafter A Whiter Shade of Pale]. *See also* Douglas T. Kendall & Timothy J. Dowling, Editorial, *Judicial Throwback*, Wash. Post, Sept. 19, 2003, at A25.
35. David E. Bernstein, Lochner-*Era Revisionism, Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism*, 92 Geo. L.J. 1 (2003) (supporting *Lochner*'s substantive due process protections for property rights); Michael J. Phillips, *The Progressiveness of the* Lochner *Court*, 75 Denv. U. L. Rev. 453 (1998) (challenging the view that *Lochner*-era decisions were illegitimately pro-business); Timothy Sandefur, *The Right to Earn a Living*, 6 Chap. L. Rev. 207 (2003) (denying that *Lochner* was an example of illegitimate "judicial activism").
36. Pacific Legal Foundation has filed briefs against federal authority in innumerable cases including *United States v. Lopez*, 514 U.S. 549 (1995), *United States v. Morrison*, 529 U.S. 598 (2000), and *Solid Waste Agency of N. Cook County (SWANCC) v. Corps of Eng'rs*, 531 U.S. 159, 31 ELR 20382 (2001), and against state power in cases including *Pharmaceutical Research & Mfrs. of Am. v. Walsh (Walsh)*, 538 U.S. 644 (2002) (arguing in favor of invalidating a state law under the dormant Commerce Clause). Similarly, Washington Legal Foundation argued against federal Commerce Clause authority in *SWANCC* and for preemption in *United States v. Locke*, 529 U.S. 89, 30 ELR 20438 (2000), *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2000), and *Walsh*.
37. *Cato Launches Amicus Curiae Project*, Cato Policy Report (Cato Institute, Washington, D.C.) (May/June 1999), *available at* http://www.cato.org/pubs/policy_report/v21n3/amicus.html.
38. *See* http://www.cato.org/pubs/legalbriefs/lbriefs.html (last visited July 29, 2004).
39. *Id.*

ate numbers. As noted in the next part of this Article, exactly one state attorney general, former Alabama Attorney General William H. Pryor, has argued for a radical reduction in federal power along the lines advocated by Greve, and for an interpretation of federalism "with a bias against government activism at all levels."[40] Pryor was nominated and then recess appointed to the U.S. Court of Appeals for the Eleventh Circuit by President George W. Bush. The outside counsel making these arguments on Pryor's behalf was typically Jeffrey Sutton, a private firm lawyer from Ohio who now sits on the U.S. Court of Appeals for the Sixth Circuit. D. Brooks Smith, who told the Federalist Society as a sitting judge that the Commerce Clause was intended by the Founders only "to permit the national government to eliminate trade barriers," sits on the U.S. Court of Appeals for the Third Circuit.[41] President Bush's nominee to the U.S. Court of Appeals for the Ninth Circuit, William G. Myers III filed a Court brief arguing that the federal government lacked Commerce Clause authority to protect the waters and wetlands that serve as habitat for migratory birds.[42]

Perhaps most disturbingly, President Bush has nominated California Supreme Court Justice Janice Rogers Brown to the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit, and Brown's name has been featured prominently on "short lists" for potential Bush Court nominees.[43] Brown, as mentioned above, is to our knowledge the only sitting judge in America to openly yearn for judicial activism and a return to *Lochner*-era review of economic regulations.[44] Two decades ago, when Professor Epstein began openly advocating for judicial activism and a return to *Lochner*, it was widely viewed as ending his hopes at being nominated to the Court.[45] That Brown, who cites Professor Epstein regularly and openly espouses nearly identical views, could now be on any short lists for the Court is a disturbing indicia of the ascendancy of the ideas that animate *Real Federalism*.

II. An Abbreviated Critique of Libertarian Federalism

Space considerations do not permit a complete critique of libertarian federalism. A much more detailed critique is found in *Redefining Federalism*. For present purposes, just a couple of points need be made.

First, federalism and libertarianism are very different concepts that can and should be considered independently of one another. Individual liberties are constitutionally protected by the Court primarily through its interpretation of the rights guaranteed by the Bill of Rights and subsequent constitutional amendments. Since the incorporation of the protections of the Bill of Rights against the states, these liberties are protected from encroachment by any government: federal; state; or local.

One can thus be passionately libertarian—and advocate for an expansive view of rights protected by the Constitution against incursion by any level of government—without supporting libertarian federalism. Federalism is primarily about allocating the powers the government does have, not about determining what government can do in the first place.

Second, and more fundamentally, libertarian federalists are simply wrong in asserting that the Constitution supports their assault on environmental laws and other important safeguards. There was a time, to be sure, when the Court enforced strict limits on the power of both the federal and state governments to legislate on behalf of the common welfare. The Court did so during the infamous *Lochner* era of the early 20th century, prior to the New Deal. The Court did not rely just on principles of federalism, because those principles do not restrict all government power. Instead, the Court invented a fundamental right to economic liberty, which it used to block state laws that interfered with the free market.[46]

The problem for libertarian federalists is that the *Lochner* era has been thoroughly discredited, by judges and commentators across the political spectrum. Almost no one takes seriously a call to return to that era, when the Court imposed its own economic views upon Congress and state governments without any warrant in the Constitution for doing so. Greve's answer is to dress up Lochnerism in the guise of federalism and to call this vision "Real Federalism." To see

40. William H. Pryor, *Should Business Support Federalism*? Remarks Before the Federalist Society (Nov. 12, 1999), *available at* http://www.ago.state.al.us/speeches.cfm?Item=single&case=10. *See also* William H. Pryor, *The Future of Federalism*, Remarks Before the Federalist Society (Nov. 18, 2000), *available at* http://www.ago.state.al.us/speeches.cfm?Item=single&case=57; William H. Pryor, *Fighting for Federalism*, Remarks Before the Federalist Society (Mar. 28, 2001), *available at* http://www.ago.state.al.us/speeches.cfm?Item=single&case=63; William H. Pryor, *Madison's Double Security: In Defense of Federalism, the Separation of Powers, and the Rehnquist Court*, 53 ALA. L. REV. 1167 (2002).

41. D. Brooks Smith, Speech to the Pittsburgh Chapter of the Federalist Society (June 29, 1993).

42. Brief of the American Farm Bureau Fed'n, the National Cattlemen's Beef Ass'n, and the North Dakota Farm Bureau, Solid Waste Agency of N. Cook County v. Corps of Eng'rs, 531 U.S. 159, 31 ELR 20382 (2001), *available at* 2000 WL 1059641.

43. *See*, *e.g.*, Editorial, *A Bad Fit for a Key Court*, L.A. TIMES, Nov. 5, 2003, at B14; Editorial, *Brown Gets Borked*, WALL ST. J., Oct. 30, 2003, at A16; Bob Egelko, *California Contender: A Federal Appeals Court Nominee Could One Day Become the First Black Woman Justice on the U.S. Supreme Court*, S.F. CHRON., Oct. 26, 2003, at D1.

44. A Whiter Shade of Pale, *supra* note 34, at 8:

> In his famous, all too famous dissent in *Lochner*, Justice Holmes wrote that the "constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*." Yes, one of the greatest (certainly one of the most quotable) jurists this nation has ever produced; but in this case, he was simply wrong.

45. At the U.S. Senate confirmation hearings for Justice Clarence Thomas, Judiciary Chairman Joseph Biden (D-Del.) famously waived a copy of Epstein's book *Takings* in the air to leave the unmistakable impression that adherence to Epstein's views would be deemed disqualifying. *See* Evan Gahr, *A Man Who Speaks His Own Mind*, INSIGHT, Aug. 17, 1992, at 14 (noting that Epstein's *Takings* "is best known outside the legal community as the book that Sen. Joe Biden waved during Judiciary Committee hearings on the nomination of Clarence Thomas to the Court. The implication was that Thomas would be unfit for the job if he subscribed to Epstein's views."). *See also* Thomas Sowell, *Forbidden Grounds: The Case Against Discrimination Laws*, FORBES, Apr. 13, 1992, at 92 (reviewing RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST DISCRIMINATION LAWS (1992)):

> University of Chicago law professor Richard A. Epstein has been mentioned from time to time as a possible nominee to the U.S. Supreme Court. Not yet 50 years old, he may conceivably be able to outlive the current political climate in Washington, and someday reach the high bench. But there will have to be a radical change in political thinking for him to have any chance at all.

46. *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1332-52 (3d ed. 2000) (detailing the rise of the Court's economic substantive due process jurisprudence in the early 20th century).

this requires a little further discussion of the words of the Constitution, and the twisting of those words by libertarian federalists.

A. Playing by the Rules Laid Down: The Actual Constitution

The Constitution divides power between the states and federal government first and foremost by making it clear that the federal government is one of few and defined powers. Article I lists those powers, which include the power to raise and support the army and navy, declare war, coin money, and regulate immigration. Most importantly, the Constitution grants the federal government the authority to regulate interstate commerce. It also grants Congress the authority to enact any and all laws that are necessary and proper to carry out its enumerated powers.

At the same time that the Constitution grants the federal government certain powers, it prohibits the states from engaging in certain activities. States, for example, are prohibited from entering into treaties, taxing imports or exports, passing bills of attainder, or passing ex post facto laws. The Constitution also requires cooperation among the states and prohibits discrimination against out-of-state citizens.

The obvious import from the Constitution's text and structure is that the federal government is permitted to do only that which is explicitly authorized by the Constitution or that which is necessary and proper to carry out enumerated powers. By contrast, the Constitution permits states to do anything that the Constitution does not explicitly prohibit them from doing. Put differently, the Constitution envisions the federal government as one of few and defined powers, while it envisions state governments as possessing authority to govern for the general welfare of its citizens. To be sure, neither level of government can violate individual rights that are contained in the Bill of Rights and later constitutional amendments. But these rights, while incredibly important, do not really change the balance of power between the state and federal governments, except insofar as the Civil War Amendments—the Thirteenth through the Fifteenth—give Congress the authority to enforce them against the states.

The Constitution certainly leaves a good deal of power to the states, and it seems plain that the Framers could not have predicted that the federal government would expand in the ways that it has. But it is important to recognize that the actual text and structure of the Constitution do not create a weak federal government. On the contrary, as conservative law professor, and now federal appellate judge, Michael McConnell recognized, the federalism rules that the Framers wrote "are skewed in favor of national power."[47] To cite the most obvious and important example, when there are conflicts between state and federal laws, the Supremacy Clause of the Constitution makes clear that federal law prevails.

In addition, the enumerated powers that the Framers granted to the federal government were drafted in a way that would allow them to expand or contract in the face of technological and social change. The power to regulate interstate commerce is a perfect (and the most relevant) example. At the time of the founding, national markets were nascent and interstate commerce was relatively sparse. As a result, federal power was correspondingly limited. Now there is a national market for almost any and every product, and that market is so interconnected that activities in one state can affect the market in another. Congress' regulatory power is accordingly broader for the simple and logical reason that, as interstate commerce expands, Congress' power must expand as well because it has the power to regulate such commerce. As explained by Judge McConnell, upon whose work Greve purports to rely, this should not cause concern: "The framers and ratifiers of the Constitution established rules and standards for determining the proper scope of national authority; that those rules and standards produce different outcomes in later circumstances is neither surprising nor troubling."[48]

A more basic point to recognize is that the Constitution's sparse text does not provide concrete answers to the myriad questions that arise concerning the appropriate balance of state and federal power. This is why the issue of federalism gets complicated once one gets beyond the fact that federalism is generally about the distribution of power and starts to ask how that power *ought* to be distributed. The lack of certainty may make some uncomfortable, but is unavoidable in a document that simply lays out a basic framework of government and is designed to last for centuries.

Given that the Constitution is less than precise about the boundaries of state and federal power, it follows that a key issue—perhaps *the* key issue—for federalism concerns the proper scope of judicial review. What should courts do in light of the fact that the Constitution provides only limited guidance?

There are essentially two options: enforce only those limits on federal and state power that are clearly derived from the text and structure of the Constitution; or enforce those limits that individual Justices think are proper. The former approach recognizes that the Constitution establishes certain limits on state and federal governments, but within those limits democracy and majority rule ought to prevail. This approach acknowledges that we may not like the results produced by the political process, but that it is more important to preserve democratic decisionmaking than to ensure victory on each and every issue. The latter approach, by contrast, rests on a view that the unelected judiciary should go beyond the text and structure of the Constitution in an effort to block democratic decisions in the name of some normative, ideological, and ultimately personal vision.

B. The Rise and Fall of the Lochner *Era*

Prior to the New Deal, the Court favored the latter approach. The Court established strict limits on the federal government, and equally strict limits on the ability of state governments to regulate in the interests of the safety and welfare of its citizens.

The limits on the federal government were created by a cramped reading of Congress' power to regulate interstate commerce. Through a series of rulings, the Court sought to limit Congress' authority to regulate the market by drawing a number of seemingly arbitrary lines between permissible and impermissible regulation. Congress could regulate the channels or instrumentalities of commerce, but it could not

47. Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1488 (1987).

48. *Id.* at 1491.

regulate manufacturing, even of goods destined for interstate commerce, because manufacturing was not commerce. Thus, Congress could not prohibit the shipment of interstate goods produced with child labor. Congress also could not regulate goods at the point of sale, because this was commerce, but it was not interstate. In general, Congress could not regulate local economic activities, even if these had an effect on commerce.[49]

At the same time, the Court also limited the ability of state governments to protect the health and safety of workers and consumers. Without any basis in the text of the Constitution, the Court determined that the Constitution created a fundamental right to economic liberty and property. Restrictions on business practices, the Court often concluded, interfered with this fundamental right and therefore were unconstitutional. Thus, in the infamous *Lochner*[50] case that gave this era its name, the Court struck down a New York law that sought to regulate the hours of bakers in the interest of protecting the health and safety of both bakers and their customers. Such legislation, the majority concluded, interfered with the fundamental right of bakers and their employers to property and economic liberty. In so ruling, as Justice Oliver Wendell Holmes pointed out in his famous dissent, the majority acted without regard for the actual text of the Constitution.[51] They simply made up this right and used it to strike down duly enacted state laws.

The New Deal Court abandoned both lines of attack. On the federal front, the Court faced mounting pressure both from outside and from within the Court. The president and members of Congress criticized the Court for creating obstacles to economic recovery by inhibiting the ability of the federal government to respond to the Great Depression.[52] Internally, some Justices began to recognize that the lines the Court had drawn in its Commerce Clause jurisprudence were arbitrary. The essential truth was that interstate commerce had mushroomed, and markets were increasingly interconnected and national in scope. As a result, even local activities could have an impact on interstate commerce. Given that the Commerce Clause directly grants Congress the power to regulate interstate commerce, and given that Congress also has explicit power to adopt all laws "necessary and proper" to regulate such commerce, these Justices realized that the Constitution afforded them little basis for imposing severe restrictions on Congress' ability to regulate labor and capital markets.[53]

Ultimately, the Court changed course and dismantled the categories it had once used to limit federal authority under the Commerce Clause. The Court concluded that the Commerce Clause, properly read, gave Congress the power to regulate activities having a substantial effect on interstate commerce.[54] This was a broad power, indeed, and some thought that the Court had all but abandoned efforts to limit federal power. Where once the Court might have drawn arbitrary lines to limit federal power, now it seemed that the Court had gone to the opposite extreme and handed Congress a blank check. But the current Court has made clear that the Commerce Clause is not a blank check, and it has reminded Congress that there are lines beyond which it may not go in the name of regulating interstate commerce.

As for limitations on state authority, the Court ultimately abandoned its *Lochner* jurisprudence. The Court finally recognized that Justice Holmes was right in his dissent in *Lochner*, a dissent that conservative Judge Richard Posner has hailed as the greatest judicial opinion of the 20th century.[55] Justice Holmes argued that the Constitution did not enshrine a particular economic policy, namely laissez-faire economics, into the Constitution. As individuals, Justices might support laissez-faire economics. But as members of the Court, bound to enforce the Constitution, the Justices had no business reading this preference into the Constitution. This is precisely, Justice Holmes suggested, what the Court was doing in *Lochner* and similar cases.[56] The Court ultimately agreed, and the era of striking down economic legislation to protect some fictitious fundamental right to economic liberty came to an end.[57]

C. Longing for Lochner*'s Return*

Fast forward to the late 20th century. By this point, the notion that the Court can discern and enforce serious limitations on federal authority through a cramped reading of the Commerce Clause is a political and judicial nonstarter. To be sure, the Court, in *Lopez*, struck down federal legislation on the ground that Congress exceeded its power under the Commerce Clause.[58] It did so again in *Morrison*, a few years later, and it established a rule that Congress is essentially free to regulate economic affairs but limited in its ability to regulate noneconomic issues.[59] This creates another seemingly arbitrary category, both because it is not obvious how to distinguish economic from noneconomic issues, e.g., what is crime?, and because ostensibly noneconomic issues can affect markets, e.g., education. Putting that to one side, the more important point about these decisions is that the Court left untouched the bulk of its Commerce Clause jurisprudence.

The Court is thus prepared to remind Congress that there are some limits on federal authority to regulate interstate commerce, but it is not at all prepared to turn the clock back to before the New Deal Court. And with good reason: it is more apparent today than it was then that the power granted to the federal government to regulate interstate commerce is broad because of the economic realities of to-

49. *See* Tribe, *supra* note 46, at 810 (arguing that the Court denied "Congress the power to regulate . . . activities even if the *products* of those activities would subsequently enter what *all* agreed was 'interstate commerce.'" (emphasis original)).

50. 198 U.S. at 45.

51. *Id.* at 75 (arguing that the Constitution "is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*").

52. *See*, *e.g.*, Bernstein, *supra* note 35, at 50-51.

53. Justice Robert H. Jackson, for example, wrote in a memorandum about the famous case of *Wickard v. Filburn*, 317 U.S. 111 (1942), that "the determination of the limit [on Congress' power to regulate commerce] is not a matter of legal principle, but of personal opinion; not one of constitutional law, but one of economic policy." *Cited in* Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 Chi. L. Rev. 1089, 1142 (2000).

54. *See*, *e.g.*, *Filburn*, 317 U.S. at 111.

55. Richard A. Posner, Law and Literature: A Misunderstood Relation 285 (1988).

56. *Lochner*, 198 U.S. at 74-75.

57. *See* Tribe, *supra* note 46, at 1352-62 (tracing the swift decline of the *Lochner* era).

58. *Lopez*, 514 U.S. at 549.

59. *Morrison*, 529 U.S. at 610-11.

day's markets. To impose the same constraints that existed before the New Deal would be to impose artificial and judge-created limitations.

More specifically, it would mean the repeal of such laws as the Civil Rights Act of 1964, granting protection to minorities and women from discrimination in the workplace and in places of public accommodation. This law, and many others, rest on Congress' authority to regulate interstate commerce.[60] If that authority were sharply curtailed, these laws would all be called into question. Thus, even a conservative Court, interested in reviving "federalism," has thus far recognized that there is no constitutional basis for turning back the clock and repeating the mistakes of an earlier generation.

As for *Lochner*, by the late 20th century the case name had become an epithet.[61] For liberals and conservatives alike, *Lochner* came to stand for unbridled judicial activism and a dangerous disregard for the text and structure of the Constitution.[62] Indeed, conservatives accused the Court of "*Lochnerizing*" when the Court recognized rights of privacy and sexual autonomy.[63] Almost no one, at least publicly, is prepared to defend the *Lochner* era as a model of principled judicial decisionmaking.

Now imagine that you have the same substantive agenda as the libertarian federalists. You do not want either the federal or state governments interfering with the free market, which means that you oppose strong environmental, health, and safety laws. You long for the *Lochner* era, when the Court was serious about restricting the activities of both levels of government. But the *Lochner* era has been so discredited, by liberals and conservatives alike, that you risk ridicule if you simply advocate for a return to that era. So what do you do?

You pretend that this is all about federalism, and that the federalism you envision is enshrined in the Constitution. And this is precisely what Greve tries to do in *Real Federalism*. In advocating limits on both state and federal authority, he claims that these limits flow from a proper understanding of federalism. Consider, first, his argument about federal authority.

D. The Mysterious Doctrine of Enumerated Powers

In *Real Federalism*, Greve frequently laments what he calls the demise of the "doctrine of enumerated powers" at the hands of the Roosevelt Court. He claims that this doctrine imposes severe constraints on the power of the federal government. If only the Court would return and resurrect this doctrine of enumerated powers, Greve suggests, the proper constitutional order would be restored.[64]

But this is silly. It is of course true that the federal government is one of enumerated powers. That, however, is not the issue. The issue is the *scope* of those powers and, more precisely, the scope of Congress' power to regulate interstate commerce. Identifying the precise scope of that power is difficult, as the New Deal Court ultimately acknowledged. The current Court, though interested in reminding Congress that the Commerce Clause is not a blank check, also recognizes that there is no constitutional basis for resurrecting the artificial limitations used before the New Deal to hamstring Congress.

In order to be persuasive at the level of constitutional analysis, Greve must explain why the current Court ought to return to this earlier era of restrictions *as a matter of constitutional law*. But Greve offers no explanation. He simply suggests, over and again, that the doctrine of "enumerated powers" answers any and all questions about the proper scope of those powers. This is argument by fiat. It does not respond at all to the argument, accepted by liberals and conservatives alike, that the text of the Constitution grants Congress authority that is commensurate with the scope of the subject it is regulating—in this case, interstate commerce.

Greve also endorses Justice Thomas' concurring opinion in *Lopez*, in which Thomas argues that the Framers intended Congress' commerce power to be quite limited.[65] Not a single other Justice joined Justice Thomas' controversial opinion, suggesting that his particular view of the Framers' intent is not shared by a single other member of the Court. Justice Thomas' failure to persuade his colleagues might also be due to the fact that his main point leads nowhere. Justice Thomas emphasizes, again and again, that "commerce" is different from both manufacturing and agriculture. He argues that it follows that Congress cannot regulate the making of goods, for example, but only the trade of those goods.[66]

It takes but a moment to realize that this is not a very helpful distinction. Even if we grant that "commerce" means "trade" and nothing else—which is not at all clear—the ability to regulate interstate commerce also necessarily carries with it the ability to regulate how those items are manufactured. To see this, imagine Congress enacting a law that prohibits any items made by children under 10 years of age from being traded across state lines. Formally, this is a regulation of interstate trade. Just as clearly, however, such a law would affect how goods are manufactured. One could multiply the example thousands of times—no goods can be transported across state lines that are made in unsafe conditions, in conditions that pollute the air or the water or the ground, in conditions of unfair labor practices, etc. Are these restrictions within Congress' Commerce Clause powers? They certainly seem to be, as they are regulations of interstate commerce, even if we adhere to Justice Thomas' distinction between trade and other activities. Even accepting Justice Thomas' premises, therefore, does not lead to the conclusion that Congress' power to regulate interstate commerce, properly construed, is a very circumscribed grant of authority.

Even Justice Thomas, moreover, does not advocate overruling all of the Court's Commerce Clause cases after 1937. He instead suggests that the Court should "temper" and

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

61. *See*, *e.g.*, Bernstein, *supra* note 35, at 1 n.2.

62. Cass Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873, 874 (1987) (acknowledging and then questioning the common wisdom that *Lochner* was wrong because it involved judicial activism).

63. *See*, *e.g.*, then-Justice Rehnquist's dissent in *Roe v. Wade*, 410 U.S. 113, 174 (1973) (Rehnquist, J., dissenting), which accuses the majority of *Lochnerizing*. ("While the Court's opinion quotes from the dissent of Mr. Justice Holmes in *Lochner* . . . the result it reaches is more closely attuned to the majority opinion of Mr. Justice Peckham in that case.")

64. GREVE, *supra* note 5, at 13-14, 17-18, 20-22, 25-26, 80.

65. *Lopez*, 514 U.S. at 584 (Thomas, J., concurring).

66. *Id.* at 585-93.

"modify" its Commerce Clause jurisprudence. But he stops short of "totally rejecting [the Court's] more recent Commerce Clause jurisprudence."[67] Greve, by contrast, is not at all hesitant about overturning decades of settled law and understandings about the scope of federal and state power.[68] But he fails to offer any real constitutional argument in favor of doing so.

E. Lochner *as Horizontal Federalism*

Greve is no more persuasive when attempting to justify restrictions on state power. It seems clear that what Greve would prefer is a resurrection of *Lochner*, pure and simple. But he refrains from calling for this explicitly, recognizing in a moment of candor that "[t]he revival of substantive economic due process is a libertarian pipedream."[69] Instead, in *Federalism's Frontier*, he suggests that the Court in *Lochner* and similar cases created a doctrine of "horizontal federalism," which prevented states from exploiting one another.[70] Greve recognizes that the Court is not about to recreate the *Lochner* era and resurrect a fundamental right to contract as a means of protecting "horizontal federalism." So he turns to a second-best approach: federal preemption. Federal preemption, in Greve's view, is "a possible response to the abandonment of constitutional and judicial injunctions [such as *Lochner*] against State aggression."[71] Thus, he advocates "a more robust judicial presumption to the effect that congressional action in some field of interstate commerce was intended to preempt State action."[72]

Federal preemption is only a second-best approach for Greve because it requires an exercise of federal power. In Greve's ideal world, the world of *Lochner*, the states would be directly precluded by courts from legislating in a way that interfered with laissez-faire economic policies. Absent a return to that ideal world, Greve is willing to push for an aggressive role for federal preemption. In doing so, he creates problems for his entire argument, because he has to accept a broad regulatory power for the federal government in order to justify a broad power of federal preemption.

The inconsistency and incoherence are somewhat amusing aspects of Greve's argument. The dangerous and disturbing part is his disdain for democratic decisionmaking and his embrace of judicial overreaching. Preemption, as explained below, is all about statutory interpretation and legislative intent. The basic rule is that *if* Congress wants to preempt a field of regulation, it can, but if it does not want to do so, it need not. The Constitution neither compels nor forbids preemption. It gives Congress an option. The only role of any court, including the Court, is to discern whether Congress meant to preempt a field or not. Given this reality, the Court has on occasion expressed support for a clear-statement rule: it will find preemption only when Congress expresses preemptive intent clearly in the statute.[73]

This rule creates an easy, workable approach that both the Court and Congress can understand. It sends a clear message to Congress about what is needed for preemption, which will ensure that Congress, not the Court, will decide whether preemption is justified. It also creates a default rule against preemption, which limits federal authority and allows room for state autonomy and action. For anyone interested in preserving state authority and enhancing democratic decisionmaking, the clear-statement rule has much to commend it. Indeed, this helps explain why conservatives such as Kenneth Starr favor a clear-statement rule.[74]

The problem, of course, is that a clear-statement rule might not lead to as much preemption as Greve would like. And for this reason, he rejects the clear-statement rule. In so doing, he embraces an aggressive role for courts and condones courts that create rather than discover a legislative intent to preempt.[75] The ends, to Greve, apparently justify the means.

This is emblematic of Greve's entire approach to constitutional interpretation. While he chastises the Court for ignoring the commands of the Constitution, he makes a mockery of constitutional interpretation with his endorsement of jerry-rigged and results-oriented interpretations. He has little patience for the idea of judicial restraint, the notion that Courts ought to give the benefit of the doubt to legislatures in the absence of a clear constitutional command to the contrary. In so doing, he conveys disdain for the democratic process. Yet that process is at the heart of the Constitution itself, which provides a blueprint not for rule by judges, but for a democracy. Greve obviously does not think that the agenda that he and the "Leave-Us-Aloners" push would win on the merits. If he did, he would not be so intent on twisting and contorting the Constitution in an effort to encourage courts to impose his libertarian fantasy upon the rest of us.

F. Libertarian Federalism and the Court

The real question, of course, is not whether think tanks and legal foundations agree with Greve and other libertarian federalists, it's what the Court thinks about federalism. Greve recognizes this in his declaration that federalism's future "hangs on a pattern of cooperation between the Court and political constituencies."[76] If the Court does not act, Greve says, his vision of "federalism is dead and will remain dead."[77]

Greve advocates that the Leave-Us-Alone Coalition provide the Court with a constituency for actively limiting government power through a radically changed version of federalism jurisprudence. "The restoration of more robust, enumerated constraints requires a more hospitable political climate. The time must be right, and that means that some political force must find the constraints sufficiently useful to support their restoration. The Court needs help. Federalism

67. *Id.* at 585.

68. Greve, *supra* note 5, at 30 (criticizing Justice Thomas' refusal to endorse rejecting the Court's modern Commerce Clause decisions as "yield[ing] to politics" and "an unpersuasive plea").

69. Greve, *Federalism's Frontier*, *supra* note 10, at 110.

70. *Id.* at 95-96, 104-10.

71. *Id.* at 107.

72. *Id.*

73. *See*, *e.g.*, United States v. Locke, 529 U.S. 89, 106-07, 30 ELR 20438 (2000) (confirming that the clear-statement rule should apply when Congress regulates in an area traditionally reserved to the states); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (preemption requires that the Court "assum[e] that the historic police powers of the States [are] not to be superseded by [federal laws] unless that [is] the clear and manifest purpose of Congress").

74. *See* Kenneth Starr et al., The Law of Preemption 40-56 (1991).

75. Greve, *supra* note 5, at 110-26.

76. *Id.* at 135.

77. *Id.* at 21.

needs a constituency."[78] Greve admits that his proposed collaboration between the Court and Leave-Us-Aloners may seem "crass" and "unlikely, even odd" because "when the Court looks to the prevailing winds, it looks to elite culture, not the demands of the unwashed."[79] Likewise, many of the antigovernment organizations that make up the "Leave-Us-Alone" Coalition are suspicious of the elite Court. Nonetheless, Greve urges each side to "overcome its deep distrust of the other."[80] As Greve puts it, "[b]oth sides have more room for cooperation than they think they do, and that room defines the realm of future federalist possibilities."[81]

As noted above, the Court's federalism jurisprudence gives credence to the possibility that such a "crass" collaboration is actually possible. The Court's federalism cases during the last decade or so have been simultaneously aggressive in striking down exercises of federal power under the Commerce Clause and §5 of the Fourteenth Amendment and in striking down exercises of state power under the Supremacy Clause and other constitutional provisions.[82] As Greve desires, the combined effect of these doctrinal developments makes it more difficult for any level of government to address problems such as environmental degradation.

This curious pattern of rulings has led many to question the genuineness of the Court's commitment to federalism. An alternative explanation, of course, is that the Court is committed to the libertarian vision of federalism being promoted by Greve and his colleagues. For several reasons, however, it seems both hasty and overly simplistic to conclude from this pattern that the Court is advancing Greve's agenda. As an initial matter, the Court has taken only baby steps on the way to Greve's proposed constitutional revolution. To conclude from these baby steps that the Court has any interest in following Greve anywhere close to the bottom of his rabbit hole seems inappropriately presumptuous.

The Court's written opinions, moreover, provide scant support for Greve's thesis. The Court's rulings on federal power have all been replete with praise for the states and sonnets about the need for decentralization and local control. Greve calls this "faux federalism," and says the Court needs a "change in perspective" but none seems likely, at least in the 80-year old Chief Justice William H. Rehnquist, who has been the Court's driving force in promoting federalism since his lone dissent in 1975 in *Fry v. United States*.[83] It seems implausible to think that the Justices would assert the need for state dignity and power as a launching pad for an effort to undermine state power. The Court's rulings striking down state initiatives are similarly free of any of Greve's rhetoric about the need to discipline the states.[84] While the Court has not yet fully appreciated the federalism-stifling effect of their preemption and dormant Commerce Clause rulings, there is no evidence that they share Greve's view of the states as the enemy of federalism.

Finally, as detailed below, the Court's more recent federalism decisions indicate movement on the Court away from Greve's libertarian federalism. In recent preemption and the dormant Commerce Clause cases, for example, Justice Thomas and Justice Scalia have indicated a willingness to recognize the need for state regulatory innovation, in contradiction to Greve's desire to discipline the states.[85] Justice O'Connor also appears to now be listening to the states in their call for moderation in stripping the federal government of needed authority, at least under §5 of the Fourteenth Amendment.[86]

In short, it seems more plausible to think that the Court will continue to move in the direction of listening to the states in defining federalism than it is to worry that the Court will make dramatic moves in Greve's direction. For this reason, environmentalists need to pursue strategies to encourage the Court to move in the direction of the states.

III. Listening to the Voice of the States

Having described why environmentalists should support the emergence of federalist solutions to environmental problems and why environmentalists must forcefully combat libertarian federalism this Article turns to the most important question: what should federalism *jurisprudence* look like? A surprisingly compelling answer to this question can be found in the briefs prepared by state attorneys general and filed by the states in recent constitutional cases.[87]

While the states rarely speak unanimously about anything, and sometimes even file competing briefs in the same case, consensus positions emerge from the state briefs on many of the central federalism questions. This part compares and contrasts the states' vision of federalism with that being articulated by the Court. The discussion focuses on the three areas—Commerce Clause, dormant Commerce Clause, and preemption—where the contrast between the states' position and the Court's jurisprudence is most stark. It is in these areas that the states are asking for a redefinition by the Court of constitutional federalism. *Redefining*

78. *Id.* at 21-22.

79. *Id.* at 23.

80. *Id.*

81. *Id.* at 24.

82. *See* Richard H. Fallon, *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. Chi. L. Rev. 429 (2002). *See also* Frank B. Cross & Emerson H. Tiller, *The Three Faces of Federalism: An Empirical Assessment of Supreme Court Federalism Jurisprudence*, 73 S. Cal. L. Rev. 741 (2000); Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 Yale L.J. 1141 (2002).

83. 421 U.S. 542 (1975).

84. Indeed, the Court's preemption cases speak of the need for a presumption against preemption to protect the states. *See*, *e.g.*, City of Columbus v. Ours Garage & Wrecker Serv., Inc., 536 U.S. 424, 426 (2002) ("'We start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947))). The problem is that the Court seems to honor this presumption in the breach.

85. Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 610 (1997) (Thomas, J., joined by Rehnquist, C.J., as to part one, and Scalia, J., dissenting) (calling the majority's dormant Commerce Clause decision against the states "overbroad" and "unnecessary"); Geier v. American Honda Motor Co., 529 U.S. 861, 886 (2000) (Stevens, J., joined by Souter, Thomas & Ginsburg, JJ., dissenting) (supporting Stevens' call for revisiting doctrine of obstacle preemption); American Ins. Ass'n v. Garamendi, 123 S. Ct. 2374, 2394 (2003) (Ginsburg, J., joined by Stevens, Scalia & Thomas, JJ., dissenting) (calling for changes in foreign policy preemption law).

86. *See* Nevada Dep't of Human Resources v. Hibbs, 538 U.S. 721 (2003); Tennessee v. Lane, 124 S. Ct. 1978 (2004).

87. The discussion below is limited to the areas—Commerce Clause, dormant Commerce Clause, and preemption—where the contrast between the states' position and the Court's jurisprudence is most stark. *Redefining Federalism* contains a more expansive description of these areas of the law and a discussion of the briefs filed by the states in other important areas of federalism, including their views on the Court's rulings under the Tenth and Eleventh Amendments.

Federalism contains a more expansive description of these areas of the law and a discussion of the briefs filed by the states in other important areas of federalism, including their views on the Court's rulings under the Tenth and Eleventh Amendments.

A. Overprotecting Federalism Under the Commerce Clause

Virtually every major environmental statute was passed by Congress in reliance on the modern interpretation of Article I, §8, cl. 3, which empowers Congress to "regulate Commerce with foreign Nations, and among the several States." As a result, environmentalists have enormous stakes in the stability of the Court's Commerce Clause jurisprudence. With the Court's express reliance on a federalism rationale several recent rulings that chip away at the Commerce Clause foundation for environmental protection, environmentalists have every reason to pay close attention to the states, which have strongly supported the need for a federal role in combating national problems such as environmental degradation.

1. *Lopez*

Between 1937 and 1995, the Court gave broad latitude to Congress under the Commerce Clause, going decades without striking down a federal law as outside its scope. In 1995, in *Lopez*,[88] the Court surprised just about everyone by striking down a federal law banning gun possession near schools as outside the scope of the Commerce Clause. Its analysis was predicated on two key rulings. First, the Court held that the aggregation principle—which allows a court to consider the cumulative effect of all similar activities in evaluating whether the regulated activity substantially affects interstate commerce—applies only to activities that are commercial or economic in nature. After deciding gun possession near a school does not qualify as a commercial activity, the Court ruled that the Act could not be upheld by considering the aggregated economic effects of all similar activities regulated by the Act.[89]

Second, the *Lopez* Court rejected the government's argument that gun possession near schools substantially affects interstate commerce because the cost of violent crime is substantial and because guns threaten the educational process and thus ultimately impair national productivity. The key consideration in this part of the opinion was concern over the breadth of the Commerce Clause and the perceived need to limit the Commerce Clause's reach to protect the states. The Court concluded that the government's rationales had no limiting principle and could authorize federal regulation of virtually any activity. Accepting this attenuated chain of causation, in the Court's view, could "'obliterate the distinction between what is national and what is local.'"[90] The Court was unwilling "to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[91]

Given the Court's concern with preserving areas of exclusive state authority, it is interesting to note that the only two states filing briefs in *Lopez*—the states of Ohio and New York, joined by the District of Columbia—*defended* the federal school gun ban.[92] Unlike the *Lopez* majority, this coalition did not view the gun ban and similar federal laws as an unfortunate intrusion into areas of state concern. Instead, they made clear that due to the increasing frequency and severity of violence in schools, this problem was stretching to the breaking point the combined resources of state and local law enforcement authorities, and they welcomed federal efforts in this area to supplement state efforts.[93]

These amici states acknowledged that it might seem paradoxical for states to support the federal authority asserted in *Lopez*, but they argued there is a close nexus between the protection of public safety from gun violence and interstate commerce, and that Congress need not make express findings of the connection so long as the Court can posit a rational basis that would support the requisite connection to interstate commerce.[94] The state amicus brief concluded with soaring rhetoric emphasizing that joint federal and state efforts to protect public safety through law enforcement represent "the Nation's classic traditions of cooperative federalism."[95]

2. *Morrison*

The two state briefs supporting federal authority in *Lopez* paved the way for a much more dramatic statement five years later in *Morrison*,[96] where 36 states, with attorneys generals from across the political spectrum, were unified in supporting federal authority under the Commerce Clause to regulate domestic violence through the federal VAWA.[97]

Morrison involved the harrowing story of Christy Brzonkala, who reports being raped by two football players at a party during her freshman year at Virginia Tech University. After the university failed to significantly punish the players, Brzonkala filed suit under the VAWA, because their attack was motivated by gender animus. The VAWA, enacted in 1994 by overwhelming bipartisan majorities, creates a federal civil cause of action against anyone "'who commits a crime of violence motivated by gender.'"[98] The federal government intervened in the case to defend the con-

88. 514 U.S. at 549.

89. *Id*. at 561.

90. *Id.* at 567 (quoting A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 554 (1935) (Cardozo, J., concurring).

91. *Id*.

92. No state weighed in against the law at issue in *Lopez*, but a coalition of state and local government groups opposed the assertion of Commerce Clause authority in *Lopez*. *See* Brief of the National Conference of State Legislatures, National Governors' Association, National League of Cities, National Association of Counties, International City/County Management Association, and National Institute of Municipal Law Officers, Joined by the National School Boards Association, as Amici Curiae in Support of Respondent, United States v. Lopez, 514 U.S. 596 (1995) (No. 93-1260).

93. Brief for the States of Ohio and New York and the District of Columbia as Amici Curiae in Support of Petitioner at 1-2, United States v. Lopez, 514 U.S. 596 (1995) (No. 93-1260).

94. *Id.* at 3.

95. *Id.* at 16-19.

96. 529 U.S. at 598.

97. Brief of Arizona, Alaska et al., as Amici Curiae in Support of Petitioner, United States v. Morrison, 529 U.S. 606 (2000) (Nos. 99-5, 99-29). Only Alabama's Attorney General Pryor asked the Court to strike down the law. Brief for the State of Alabama as Amicus Curiae in Support of Respondents at 1, United States v. Morrison, 529 U.S. 606 (2000) (Nos. 99-5, 99-29).

98. *Morrison*, 529 U.S. at 827.

stitutionality of the Act, and the matter ultimately reached the Court styled as *Morrison*.

The 36-state coalition began its brief by observing that the National Association of Attorneys General supported the reauthorization of the VAWA. They argued that Congress' extensive findings showed that violence against women substantially affects interstate commerce, a conclusion supported by many other reports and the states' own experience. They stressed that this violence lowers productivity, increases health care costs, and imposes $3 billion to $5 billion in costs on businesses due to absenteeism and other direct consequences. They also stressed that large numbers of rape victims are fired or forced to quit their jobs after the crime, and that homicide is the leading cause of death for women in the workplace.

The state coalition also agreed with congressional findings that existing state-law remedies, while substantial and improving, are still inadequate. These findings were based on studies conducted by 21 state task forces concluding that state reform efforts do not sufficiently address gender-based violence. They argued that the VAWA's civil remedy complements state efforts and thus reinforces, rather than undermines, cooperative federalism, in the same way as parallel state-federal remedies for racial and other discrimination.[99]

On May 15, 2000, the same five-Justice majority that struck down the federal gun possession law in *Lopez* disregarded the views of the states and ruled that the VAWA's civil remedy provision goes beyond Congress' Commerce Clause authority. As in *Lopez*, the Court began its analysis by asserting that gender-motivated crimes "are not, in any sense of the phrase, economic activity."[100] Although the Court expressly declined to embrace an absolute rule against aggregating the affects of any noneconomic activity, it observed that it had upheld federal regulation of intrastate activity only where the activity is economic. The Court acknowledged that, in contrast with the bare congressional record supporting the statute in *Lopez*, the VAWA was well supported by findings that gender-based violence affects interstate commerce because it reduces national productivity, increases medical costs, and deters potential victims from traveling and engaging in employment interstate. But again citing federalism concerns, the Court rejected this evidence out of concern that accepting it would "obliterate the distinction between what is national and what is local by authorizing federal regulatory authority over virtually every activity."[101]

A four-Justice dissent penned by Justice Souter detailed the "mountain of data" Congress assembled regarding the effect violence against women has on commerce, including much of the evidence compiled by the state coalition showing that it costs this country's economy billions of dollars each year.[102] The dissent meticulously describes historical evidence of the Founders' belief, embedded in the Constitution, that the political process should sort out the respective allocation of state and national regulation as federal authority expands through the growth of national commerce. Citing the amicus brief from the 36-state coalition in support of the VAWA, the dissent observed that it is "not the least irony of these cases that the states will be forced to enjoy the new federalism whether they want it or not."[103] It concludes by predicting that the abstract federalism animating *Lopez* and *Morrison* will be no more enduring than the extra-constitutional laissez-faire economics that drove the *Lochner* era.

3. *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*[104]

A key environmental issue that is still to be resolved by the Court is how to determine, under the approach articulated in *Lopez* and *Morrison*, whether the regulated activity at issue is economic, thereby permitting an aggregation of effects in determining the impact on interstate commerce. Should a court look only to the activity as described by the regulatory regime? Or, alternatively, should the court look to the purpose of the actor being regulated?

Consider, for example, federal protections for endangered or threatened species. Injuring or killing an endangered species, viewed as an isolated act, might well seem like noneconomic activity. But most harm to endangered species occurs as a result of commercial development and other economic activity. Should a court focus on the specific target of the regulatory regime and decide against aggregation because the harming of the species is noneconomic, or on the underlying objective of the regulated entity and aggregate where the objective is commercial?

A coalition of eight states provided an insightful answer in a case involving federal regulation of isolated wetlands. Wetlands adjacent to navigable waterways are indisputably subject to federal authority over the channels of interstate commerce,[105] but wetlands isolated from navigable waters present a more complex issue. Congress' authority to regulate the filling of isolated wetlands was before the Court in *SWANCC*,[106] a challenge filed by a consortium of municipalities that wanted to fill an isolated wetland to develop a waste disposal site. The *SWANCC* Court avoided the constitutional issue by construing the CWA narrowly to preclude its application to the site.

The eight-state coalition filed an amicus brief enthusiastically supporting federal wetland controls.[107] These states began by noting the highly technical and uncertain nature of environmental protection, particularly the cumulative impact of seemingly unconnected behavior. They observed that just a short time ago, no one could have guessed that spraying an aerosol can could harm the earth's ozone layer, or that eating a hamburger could contribute to the loss of the rainforest, and they contended that our evolving understanding of nature argues strongly for great deference to

99. Brief of Arizona, Alaska et al. at 2-23, *Morrison* (Nos. 99-5, 99-29).

100. *Morrison*, 529 U.S. at 613.

101. *Id.* at 614-19.

102. *Id.* at 628-34 (Souter J., with Stevens, Ginsburg, and Breyer JJ., dissenting).

103. *Id.* at 654.

104. 531 U.S. 159, 31 ELR 20382 (2001).

105. *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 16 ELR 20086 (1985).

106. 531 U.S. at 159.

107. Brief of the States of California, Iowa, Maine, New Jersey, Oklahoma, Oregon, Vermont, and Washington as Amici Curiae in Support of Respondents, Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 31 ELR 20382 (2001) (No. 99-1178). Of the States, Alabama alone filed a brief opposing the law. Brief of the State of Alabama as Amicus Curiae in Support of Petitioners, Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 31 ELR 20382 (2001) (No. 99-1178).

congressional determinations that federal environmental protections are needed. The coalition also stressed that individual states greatly benefit from national wetlands protections because they protect water quality and groundwater supplies, provide flood and erosion control, and promote wildlife, particularly in the many states that would be harmed by failure to protect wetlands in other states.

Turning to the question posed above regarding economic activity, the states argued that the relevant class of activity to be considered is not simply isolated wetlands, but the discharge of dredged material into navigable waters and wetlands. They took this position because Congress rationally chose to regulate this class as a single, interrelated subject. Because such fill is typically associated with commercial activity, the states argued it is appropriate to aggregate the cumulative impact of such filling in considering the effect on interstate commerce. Indeed, the states expressed grave concern that an adverse ruling could undermine scores of federal environmental protections because many federal environmental laws regulate economic activity that is often seemingly intrastate but has a huge cumulative impact on interstate commerce.

4. Summing Up the Commerce Clause

The states reject the position, advanced by the dissent in *Morrison*, that the only limits upon Congress' Commerce Clause authority are those provided by the political process.[108] But the states' overwhelming support for the VAWA in *Morrison*, and the state support for wetlands protections at issue in *SWANCC*, make equally clear that the states care as much about ensuring the federal government has the power to address national problems such as violence against women and environmental degradation as they do about protecting large spheres where only the states can act. If we are to effectively combat the problems facing this nation, the Court needs to listen more closely to the voice of the states. They're warning the Court not to unduly constrain federal power in the name of federalism and state sovereignty, especially where the states themselves welcome a federal presence.

B. Unduly Limiting State Experimentation Under the Dormant Commerce Clause

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.[109]

Uttered in a lone dissent, Justice Brandeis' words about the Court's responsibility to preserve the role of states as democracy's laboratories have become the Court's most recognizable words on the topic of federalism. While famous, these words remain controversial, at least with respect to the effect that the Court's "grave responsibility" has on the outcome of cases before the Court. While adopted by the full Court in several majority opinions, Justice Brandeis' words are still more frequently employed by dissents that lament the Court's failure to take his teaching to heart. Cases challenging the states' ability to try novel social and economic experiments are most frequently brought under the so-called dormant Commerce Clause.

The dormant Commerce Clause is not a clause at all, but a purely judicial creation, found nowhere in the Constitution's text. Dormant Commerce Clause jurisprudence holds that Congress' enumerated Article I, §8 power to "regulate Commerce . . . among the several States" necessarily implies the Court's power to strike down state laws and policies that interfere with interstate commerce, even where Congress has not legislated in the relevant field. The classic example of these laws is a duty or tariff placed by one state on the goods of another, and the justification for invalidating these is often traced back to the Founders' concern to prevent the economic gridlock that had prevailed under the Articles of Confederation.[110] This "national unity" rationale was eloquently restated in modern times by Justice Robert Jackson:

> This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units. As the Court [has] said . . . "[w]hat is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation."[111]

Under this rubric, the Court has taken it upon itself to evaluate, and quite frequently to invalidate, a wide array of state taxes, surcharges, regulations, and standards that it deems to violate the prohibition of the dormant Commerce Clause: no "discrimination" against interstate commerce.

This need to prevent economic balkanization, of course, must be balanced against the Court's "grave responsibility" to protect state innovation and experimentation. The tension between these conflicting aspects of the Court's responsibility underlies the tangled results it has reached on dormant Commerce Clause issues. It also underlies a strident split between different factions of Justices on how the doctrine is applied, what is its rationale, and whether it should even exist.

The failure of the Court to strike this balance correctly is evidenced by the state voice in dormant Commerce Clause cases. To be sure, states do not like efforts of their sister states that actually discriminate against them and their citizens or industries. Indeed, states and local governments themselves occasionally bring dormant Commerce Clause challenges. But recently this is the rare exception, rather than the rule: over the past three decades, 56 of 61 dormant Commerce Clause cases in the Court have been filed by private companies seeking to limit state regulation.[112] In most

108. For example, as discussed below, the states support the imposition of Tenth Amendment limits on Congress' Commerce Clause authority.

109. New State Ice v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

110. *E.g.*, West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 193 n.9 (1994) ("The 'negative' aspect of the Commerce Clause was considered the more important by the 'father of the Constitution,' James Madison.").

111. H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 537-38 (1949) (quoting Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 527 (1935)).

112. Christopher R. Drahozal, *Preserving the American Common Market: State and Local Governments in the United States Supreme Court*, 7 Sup. Ct. Econ. Rev. 233, 257 (1999) (states challenged another state's law under the dormant Commerce Clause in only 5 of the 61 cases heard by the Court between 1970 and 1999).

cases, not a single state supported these industry suits.[113] Rather, states more typically support their sister states, even in the face of allegations that the states supporting the law are being discriminated against by the very statute under review. The Court, paradoxically, appears to view this state solidarity as a strike against the challenged statute, invalidating two-thirds of the statutes that come before it with such a pedigree.[114]

The states are telling the Court that its recent dormant Commerce Clause case law overprotects against the possibility of state-against-state discrimination. Federalism, according to the states, demands a shift back toward a dormant Commerce Clause doctrine that doesn't unduly limit state experimentation.

1. Dormant Commerce Clause: An Overview of a Clause in Crisis

Over the last 30 years, the Court has developed a two-tiered analysis to state laws challenged under the dormant Commerce Clause. The first tier asks whether the law in question "discriminates against interstate commerce"[115] in the sense of favoring or burdening some states more than others. If the law is held to be discriminatory, it is unconstitutional unless the state can "demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest."[116] In practice, this strict scrutiny almost invariably results in the law being struck down; the Court itself has described it as "a virtually *per se* rule of invalidity."[117]

In contrast, nondiscriminatory state legislation is subjected to a more lenient standard: "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[118] This so-called *Pike* balancing test (named for the case, *Pike v. Bruce Church, Inc.*)[119] typically results in the law being declared constitutional; once it is held to be nondiscriminatory and a legitimate local purpose has been established, courts are less likely to second-guess the state legislature's weighing of costs and benefits unless a compelling factual showing of interstate "burden" can be made.[120]

113. *Id.* at 258 (a state or local government claimant or amicus supported a dormant Commerce Clause challenge in only 13 of the 61 cases.)

114. *Id.* at 268 (states have lost 18 of 27 cases where a state or local government amicus supported a state statute challenged under the dormant Commerce Clause).

115. Hughes v. Oklahoma, 441 U.S. 322, 336, 9 ELR 20360 (1979).

116. C&A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 392, 24 ELR 20815 (1994).

117. City of Philadelphia v. New Jersey, 437 U.S. 617, 624, 8 ELR 20540 (1978). Indeed, there is only one Court case where a state law survived this test. In *Maine v. Taylor*, 477 U.S. 131 (1986), the Court upheld Maine's outright ban on the importation of out-of-state baitfish, finding that the state had no alternative means of preventing the spread of parasites to native fish species.

118. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

119. 397 U.S. 137 (1970).

120. *E.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 11 ELR 20070 (1981) (Minnesota law banning sale of milk in plastic containers held to be nondiscriminatory, to serve a legitimate local purpose, and to place only a "relatively minor" burden on interstate commerce).

121. General Motors Corp. v. Tracy, 519 U.S. 278, 299 n.12 (1997).

122. *E.g.*, Chemical Waste Mgmt., Inc. v. Hunt, 504 U.S. 334, 342, 22 ELR 20909 (1992) (quoting Hughes v. Oklahoma, 441 U.S. 322, 337, 9 ELR 20360 (1979): "At a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives.").

123. West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 201 (1994) (quoting Best & Co. v. Maxwell, 311 U.S. 454, 455-56 (1940)).

124. Julian Cyril Zebot, *Awakening a Sleeping Dog: An Examination of the Confusion in Ascertaining Purposeful Discrimination Against Interstate Commerce*, 86 MINN. L. REV. 1063, 1065 & n.15 (2002); *see* Michael A. Lawrence, *Toward a More Coherent Dormant Commerce Clause: A Proposed Unitary Framework*, 21 HARV. J.L. & PUB. POL'Y 395, 419 (1998) ("The Court has not clearly stated which of these three types of discrimination . . . should be given the most weight in determining the validity of a State statute or, for that matter, how these three types should interrelate.").

125. Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 270 (1984); *see also* Hunt v. Washington Apple Adver. Comm'n, 432 U.S. 333, 352-53 (1977) (dictum).

126. South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 596, 33 ELR 20260 (8th Cir. 2003), *cert. denied*, No. 03-1111 (May 3, 2004); *see* Zebot, *Awakening a Sleeping Dog, supra* note 124.

This two-tier analysis has been subject to scathing criticism from Justices, commentators, and litigants for a wide variety of reasons.

Perhaps the biggest problems with the Court's doctrine stem from the efforts to distinguish "discriminatory" state laws from those that are "evenhanded." Given the drastic difference between these two standards of review and their likely outcomes, one would expect this line to be relatively clear; but as the Court itself admits, "there is, however, no clear line between these two strands of analysis."[121]

The lines of analysis under the dormant Commerce Clause blur because so many forms of state and local law are considered discriminatory. Strict scrutiny most clearly applies to enactments that exhibit "patent" discrimination: facial language that differentiates between products, services, customers, or other commercial actors solely on the basis of their state of origin.[122] But the Court also has "eschewed formalism for a sensitive, case-by-case analysis of purposes and effects," claiming such an open-ended test is necessary because "the commerce clause forbids discrimination, whether forthright or ingenious."[123] Thus, claimants can seek strict scrutiny for any of three reasons: patent or facial discrimination; a discriminatory purpose; or discriminatory effects. Most plaintiffs simply allege all three forms of discrimination, in hopes of improving their chances that strict scrutiny will be applied.[124] In many cases they are successful. The Court's expansive definition of "discrimination" has rendered the *Pike* balancing test something of an afterthought to most dormant Commerce Clause plaintiffs.

While expansive, the Court's definition of discrimination is far from clear. For example, while the Court has indicated that a discriminatory purpose, as evinced in legislative history or other materials, can lead to strict scrutiny of an otherwise neutral law,[125] it "has not laid out a specific test for determining discriminatory purpose," so far leaving this determination to the lower courts, which have, in turn, been confounded by the issue.[126] The results of the Court's analysis also appear arbitrary because, although the same standards ostensibly apply to all state enactments regardless of subject matter, the Court's cases tend to fall into groupings that reveal distinctly different approaches depending on the object of regulation or the means chosen to effect it.[127]

The Court's dormant Commerce Clause decisions have also taken the Court far from its core function of preventing economic balkanization. For example, the Court's routine invalidation of facial geographic distinctions has led it to strike down as "discriminatory" even laws that were not proven to actually burden interstate commerce or out-of-state interests.[128] The Court has also created important exceptions to the doctrine, such as those for state regulations that merely subsidize local industry or position the state as a "market participant," which are shielded from scrutiny even if they overtly favor in-state interests.[129]

The fact-specific nature of both tiers of review has also led to criticism of the entire framework as unduly susceptible to judicial legislation. The strict scrutiny test requires courts to consider—and most often to override—states' assertions that they lack actual alternative, less discriminatory means of achieving the same purpose. The *Pike* balancing test, with its inherently factual weighing of burdens and benefits, is frequently derided; Justice Scalia has likened it to "judging whether a particular line is longer than a particular rock is heavy,"[130] and the states dislike its unpredictability. Such wide leeway for judicial discretion, the argument runs, is particularly inappropriate for implementation of a mandate that has no basis in constitutional text, and that in essence amounts to federal common law.[131]

In light of this collection of problems, many commentators and some Justices, from across the political spectrum, have labeled the Court's dormant Commerce Clause jurisprudence a "quagmire" and argued for its modification or outright abandonment.[132] The states have not yet reached the conclusion that the dormant Commerce Clause should be abandoned, at least not collectively.[133] But many of the critiques of the doctrine chronicled above feature prominently in their briefs in dormant Commerce Clause cases. Most loudly and importantly, the states have been arguing that the Court errs when it strikes down important state

127. At a minimum, most commentators and the Court itself acknowledge a distinction between cases involving state taxation and those involving other kinds of state regulation. *E.g.*, Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1101 (1986). Prof. Laurence Tribe breaks the regulation cases down further, as follows: restrictions on access to local markets; restrictions on access to local transportation facilities; restrictions on access to local resources; restrictions that put pressure on out-of-state businesses to relocate within the state; state ownership of natural resources; or regulations discouraging multi-state business structures. *See* Tribe, *supra* note 46, at 440 (2d ed. 1988). For a full survey of various classifications, see Lawrence, *Toward a More Coherent Dormant Commerce Clause*, *supra* note 124, at 414.

128. *E.g.*, C&A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 24 ELR 20815 (1994); Oregon Waste Sys., Inc. v. Department of Envtl. Quality of Oregon, 511 U.S. 93, 24 ELR 20674 (1994). See discussion *infra* at note 136.

129. West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 199 n.15 (1994) ("'[d]irect subsidization of domestic industry does not ordinarily run afoul' of the negative Commerce Clause"); Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810 (1976) ("market participant" exception). Justice Scalia has criticized the ad hoc nature of the results the Court reaches by invoking various exceptions. *See* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 607 (1997) (Scalia, J., dissenting).

130. Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring).

131. *See, e.g.*, *Camps Newfound*, 520 U.S. at 612-20 (Thomas, J., dissenting).

132. *See*, *e.g.*, *id*. at 621-37 (Thomas, J., dissenting, joined by Justice Scalia, calling for replacement of the dormant Commerce Clause with the Import-Export Clause); Lisa Heinzerling, *The Commercial Constitution*, 1995 Sup. Ct. Rev. 217; *see generally* Lawrence, *Toward a More Coherent Dormant Commerce Clause*, *supra* note 124, at 397-407 (cataloguing various arguments for and against the doctrine).

133. *But see* South Cent. Bell Tel. Co. v. Alabama, 526 U.S. 160 (1999), in which former Alabama Attorney General Pryor urged the Court to overturn the dormant Commerce Clause and replace it with the Import-Export Clause. Brief for Respondents at 28-50, *South Cent. Bell*, 526 U.S. 160 (1999) (No. 97-2045).

134. 504 U.S. 353, 22 ELR 20904 (1992).

135. Amicus Brief of the States of Pennsylvania, Georgia, Idaho, Illinois, Montana, Nebraska, Nevada, North Dakota, Ohio, South Carolina, South Dakota, Tennessee, West Virginia, Wyoming in Support of Respondents, *Fort Gratiot*, 504 U.S. at 353 (No. 91-636); Brief for the States of Alabama, Arizona, Delaware, Indiana, Kentucky, Oregon, and Virginia as Amicus Curiae in Support of Respondents, *Fort Gratiot*, 504 U.S. at 353 (No. 91-636). No state supported the landfill's claim against the Michigan law.

136. *Fort Gratiot*, 504 U.S. at 361-63.

137. *Id.* at 366.

138. 511 U.S. 383, 24 ELR 20815 (1994).

initiatives that are justified by compelling nondiscriminatory purposes.

For example, in *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*,[134] 21 states joined an amicus brief in support of a Michigan law that allowed counties to prohibit landfill operators from accepting waste from outside the county.[135] The states maintained that this and similar "flow control" measures were a central part of comprehensive waste management schemes designed to sensibly manage an ever-expanding tide of garbage. They argued that waste disposal is a classic example of state and local police powers and that economic protectionism was not the motive for the law, which if anything had the effect of *raising* costs for local citizens.

In a 7-2 decision, the Court rejected the state's position. The Court decided that the Michigan law "facially" discriminated against interstate commerce even though the county-level ban burdened other Michigan counties' waste equally with out-of-state waste.[136] The Court also rejected the states' attempt to justify the law as part of a comprehensive environmental regulation finding: "Because those provisions unambiguously discriminate against interstate commerce, the State bears the burden of proving that they further health and safety concerns that cannot be adequately served by nondiscriminatory alternatives."[137]

Similarly in *C&A Carbone, Inc. v. Town of Clarkstown*,[138] one-half of the states (including three of the four states who would have lost business if the Clarkstown law was upheld) supported Clarkstown, New York, in a 1994 challenge to a local ordinance that required all solid waste to be sorted at the municipally owned transfer station en route to its final disposal. The plaintiff was a local private recycling center that failed to send its nonrecyclable residue to the transfer station, as required by the ordinance. Instead, it was shipping the waste to landfills in Florida, Illinois, Indiana, and West Virginia, something that was discovered only after the police investigated an accident involving one of Carbone's trucks.

The states argued that such local government control is the last bastion of the police power, has no effect on out-of-state interests, and simply guarantees the town a steady flow of waste that is crucial for planning purposes.[139] Absent this guarantee, they argued, it becomes difficult for local government to offer publicly financed alternatives to private landfills, such as recycling, composting, or energy recovery, which are necessary, innovative steps for dealing with the waste crisis.[140]

The *Carbone* Court fractured. Writing for a bare majority of five Justices, Justice Anthony M. Kennedy applied strict scrutiny to strike down the law, holding that the ordinance discriminated against out-of-state providers of waste processing services, and that Clarkstown did in fact retain the option of subsidizing its facility through general taxes or municipal bonds.[141] Justice O'Connor concurred in the judgment, but found that the ordinance discriminated neither facially nor in its effect; instead, applying the *Pike* balancing test, she also concluded that the town's financial goals could be achieved by less burdensome means than a monopoly.[142] Justice Souter, joined by perennial dissenters Chief Justice Rehnquist and Justice Harry Blackmun, chastised the majority for striking "an ordinance unlike anything this Court has ever invalidated."[143] Adopting large portions of the states' argument, he found no facial discrimination, no evidence of any harm to out-of-state interests (plaintiff Carbone being a *local* competitor), and no Commerce Clause justification for second-guessing the town's financing decision.[144]

Underlying the dissents in *Fort Gratiot, Carbone*, and other recent Commerce Clause cases—and the state briefs from which they borrow—is a call for returning to a dormant Commerce Clause doctrine that explicitly links purported discrimination with classic economic protectionism. At least two Justices, Justice Scalia and Justice Thomas, signed on to Justice Scalia's 1994 pledge to draw the line at facially discriminatory laws and laws "indistinguishable from a type of law previously held unconstitutional by this Court."[145] A third, Chief Justice Rehnquist, shares their criticism of the dormant Commerce Clause, though he grounds it in his approval of "resource protectionism" and other state police powers, and sometimes seems to prefer no constitutional rule shielding interstate commerce at all.[146] And Justices Souter, Ruth Bader Ginsburg, and O'Connor, while usually voting in the majority, all have expressed reservations about the discrimination test as expanded in the Court's recent cases. While no precise rule unites these factions, most would seem to welcome a form of review that hews much closer to the doctrine's roots.

More specifically, at least four Justices appear willing to reconsider the question of whether a finding of discrimination should always (or virtually always) be fatal to a state or local law. The Court's current doctrine mandates invalidation of a discriminatory law if there is *any* nondiscriminatory alternative, real or hypothetical. This doctrine precludes the states from proving that the law has a *benign* pur-

139. *E.g.*, Amicus Brief in Support of Respondent Submitted by the State of Ohio on Behalf of the States of Alaska, Arizona, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Maine, Massachusetts, Michigan, Minnesota, Montana, North Carolina, Oregon, Pennsylvania, South Carolina, Virginia, Wisconsin, and the Commonwealth of Puerto Rico, *C&A Carbone*, 511 U.S. at 383 (No. 92-1402).

140. *Id.* at 9-10.

141. *C&A Carbone*, 511 U.S. at 390-94.

142. *Id.* at 401-06 (O'Connor, J., concurring in the judgment).

143. *Id.* at 410 (Souter, J., dissenting).

144. *Id.* at 411-30. Souter's opinion explicitly paints the majority as *Lochner*-ites for favoring private-market solutions over municipal financing: "No more than the Fourteenth Amendment, the Commerce Clause 'does not enact Mr. Herbert Spencer's Social Statics [or] embody a particular economic theory, whether of paternalism . . . or of *laissez faire*.'" *Id.* at 424-25. Here again, Justices Scalia and Thomas voted to strike down the waste ordinance, despite their vocal criticism of the dormant Commerce Clause in other contexts.

145. West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 210 (1994) (Scalia, J., concurring).

146. Michael S. Greve, *Commerce and the Constitution*, 15 Federalist Outlook, AEI Online 4, 7 & n.6 (Dec. 1, 2002), *at* http://www.aei.org/publications/pubID.57/pub_detail.asp (last visited May 12, 2005).

147. 520 U.S. 564, 568 (1997).

148. *Id*. at 602-03.

149. 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.

pose, even if that purpose is readily apparent; that it is the *best* way of solving the problem; and that it has a discriminatory impact that is small or nonexistent. But in 1997, in *Camps Newfound/Owatonna v. Town of Harrison*,[147] four dissenting Justices indicated that this is an assumption they would be willing to revisit. "The most remarkable thing about today's judgment," they wrote, "is that it is rendered without inquiry into whether the purposes of the tax exemption *justify* its favoritism. . . . Facially discriminatory or not, the exemption is [not] an artifice of economic protectionism."[148]

2. Dormant Commerce Clause Summary

Nowhere in the law is the voice of the states stronger or more persuasive than in its call for reform of the dormant Commerce Clause. The very premise of the doctrine suggests that states should be divided over the Court's application of the doctrine, depending on whose ox is gored by a particular enactment. Instead, the states' united voice in opposition to the Court's recent decisions indicates just how badly those decisions have skewed the law toward stamping out any whiff of economic protectionism, at the expense of much-needed state experimentation. If federalism has anything to do with protecting such experimentation, as Justice Brandeis first insisted, and if the Court really cares about federalism, it must listen to the states' call for reform of the dormant Commerce Clause.

C. Stifling Federalism Under the Supremacy Clause

The Supremacy Clause of the Constitution provides that the Constitution and the laws of the United States "shall be the supreme Law of the Land," binding on judges in every state, notwithstanding anything to the contrary in any state constitution or law.[149] While it is indisputable that federal law trumps conflicting state law, the Court has not always had an easy time determining when conflicts exist. The Court's difficulty arises in large measure because the Congress often is unclear as to whether it wants a particular federal law to preempt state law.

Complicating the analysis is the Court's rather schizophrenic commitment to federalism in preemption cases. On the one hand, the Court has insisted time and again that it must preserve the police power of the states to regulate in the public interest unless Congress clearly states that federal law trumps those state protections: "We start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[150] In other words, the Court says it protects traditional state police power by adhering to a presumption against preemption and requiring a "clear and manifest" statement by Congress to overcome that presumption.

On the other hand, preemption jurisprudence often appears to pay mere lip service to the Court's professed commitment to federalism. In recent years, the Court has held that federal law preempts a wide range of state and local protections, including: remedies against health maintenance organizations that unreasonably deny insurance coverage for physician-recommended treatment[151]; environmental safeguards in the Los Angeles Basin that required the use of cleaner trucks and cars[152]; a California law designed to facilitate insurance claims by Holocaust survivors[153]; Washington State regulations of oil tankers designed to protect the Puget Sound[154]; and Illinois licensing requirements for hazardous waste workers.[155] Indeed, the success rate of state governments before the Court in preemption cases appears to have fallen even as the Court has moved aggressively to protect federalism in other areas.[156]

In these cases, the Court has found "express" preemption without a clear statement from Congress that the state or local law in question was subject to preemption. The Court has also developed two different forms of "implied" preemption that seem to allow the Court to sidestep any finding of a clear congressional statement of intent to preempt.

The states in preemption cases advocate that the Court adopt a real clear-statement rule, one with teeth, and one that requires preemption only for direct conflicts or where Congress has made crystal clear its desire to trump state law.

1. *Engine Manufacturers*

Express preemption is the most straightforward type of preemption: it occurs where and to the extent Congress says so. Because Congress frequently speaks in ambiguous terms, however, even express preemption is a battleground. In the view of the states, the Court too frequently finds express preemption based on congressional mandates that are far from clear.

A good example is the *Engine Manufacturers* case, decided in March 2004, where the Court struck down the South Coast Air Quality Management District's (District's) rules dictating the types of car and trucks that could be purchased for vehicle fleets. A coalition of 17 states supported the District and argued vigorously that the CAA preempted

150. City of Columbus v. Ours Garage & Wrecker Serv., Inc., 536 U.S. 424, 426 (2002) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

151. Aetna Health Inc. v. Davila, 124 S. Ct. 2488 (2004).

152. Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist., 124 S. Ct. 1756, 34 ELR 20028 (2004).

153. American Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003).

154. United States v. Locke, 529 U.S. 89, 30 ELR 20438 (2000).

155. Gade v. National Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 22 ELR 21073 (1992).

156. Richard H. Fallon, *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 49 U. Chi. L. Rev. 429, 462-63 (2002). According to Richard Fallon, the Court decided 35 preemption cases between 1990 and 2001 and ruled that the state statute or cause of action was preempted in whole or part in 22 of these cases. Between 2000 and 2001, the two most recent years he examined, the Court decided seven cases and found preemption in all seven.

157. Brief Amici Curiae of the States of California, Arizona, Georgia, Illinois, Maine, Massachusetts, Nevada, New Hampshire, New Jersey, New York, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Texas, Vermont, Washington, and Washington in Support of Respondent, Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist., 124 S. Ct. 1756, 34 ELR 20028 (2004) (No. 02-1343).

158. 529 U.S. 861 (2000).

159. *Id.* at 868.

160. Brief Amici Curiae of the States of Missouri, Arizona, California, Colorado, Connecticut, Delaware, Iowa, Kansas, Montana, New Hampshire, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington in Support of Petitioners at 3, Geier v. American Honda Motor Co., 529 U.S. 861 (2000) (No. 98-1811).

only "numerical standards" applicable to vehicle manufacturers and had no application to rules directed at the potential purchasers of new vehicles.[157] The Court rejected this argument, with only Justice Souter dissenting based on federalism concerns.

2. *Geier v. American Honda Motor Co.*[158]

The disconnect between the states and the Court in preemption cases played out even more dramatically in 2000 in *Geier*.

In 1992, teenager Alexis Geier crashed into a tree while driving a 1987 Honda Accord in Washington, D.C. She suffered severe head and facial injuries that required 14 reconstructive surgeries. The car did not have an airbag or other passive restraint devices, but was equipped with a manual seat belt, which Geier had buckled at the time of the accident. Her parents sued American Honda Motor Company for damages, contending the car had a negligent and defective design due to its failure to have passive restraints. After lower courts ruled that the Geiers' common-law claims were preempted by the National Traffic and Motor Vehicle Safety Act of 1966, the Geiers took the case to the Court.

The Act preempts "any safety standard" that is not identical to a federal standard issued under the Act. In 1984, the U.S. Department of Transportation issued a rule requiring some, but not all, new cars to have passive restraints. But the Act also expressly states that compliance with federal standards "does not exempt any person from any liability under common law."[159]

A coalition of 17 states—led by Missouri and including Arizona, California, Colorado, Connecticut, Delaware, Iowa, Kansas, Montana, New Hampshire, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington—pressed hard for a strong clear-statement rule to preserve the role of the states in our federal system. "Ambiguity is not tolerated" on preemption issues, they insisted.[160] Quoting Justice Felix Frankfurter, the states contended that "[a]ny indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority, completely displacing the States."[161] They urged the Court to clarify that express preemption analysis should be limited to the text of the statute, which must be interpreted in light of the strong presumption against preemption.

They also argued for a limitation on the doctrine of implied preemption, especially where the federal law in question contains a provision that is designed to preserve state laws. They stressed that the states reasonably relied on the Act's savings provision in deciding whether to support or oppose the federal law, and that the savings clause should not be given an unnaturally narrow reading that would retroactively deprive the states of any meaningful role in the legislative process.

Notwithstanding the persuasive arguments marshaled by the states, the Court ruled by a 5-4 vote that the Act prevented the Geiers from seeking redress through their lawsuit. Writing for the majority, Justice Stephen G. Breyer agreed with the states that the Act does not expressly preempt common-law suits, especially in view of the savings clause, which assumes that some significant number of common-law suits remain intact. Nevertheless, the Court went on to conclude that lawsuits like the Geiers' would conflict with the objectives of the Act and the 1984 implementing airbag regulation, and thus are impliedly preempted. According to the Court, the airbag rule was designed to provide carmakers a range of options among passive restraints to be achieved through a gradual phase-in, a mix that would lower costs, encourage new technologies, and win consumer acceptance. A successful negligence lawsuit premised on a state common-law duty to install airbags in 1987 Honda Accords and similar cars, in the Court's view, would thwart this objective.

A four-member dissent, consisting of Justices John Paul Stevens, Souter, Thomas, and Ginsburg, accused the majority of "an unprecedented extension" of preemption doctrine.[162] The dissenting opinion, authored by Justice Stevens, begins by lambasting the Court for imposing a judge-made rule found in neither the Act nor the airbag rule, a rule that implicitly rejects the long-standing presumption again preemption and improperly invokes regulatory commentary rather than regulatory text in divining the scope of preemption.[163] Noting that the overall purpose of the Act is to reduce traffic injuries and deaths, the dissent excoriates the majority for concluding that the Geiers' negligence suit would undermine congressional objectives.[164]

Following the lead of the states' amicus brief, the dissent emphasizes the critical connection between state sovereignty and a properly restrained application of preemption doctrine. Justice Stevens sets the stage early on, intoning: "This is a case about federalism, that is, about respect for the 'constitutional role of the States as sovereign entities.'"[165] The dissent insists "the Supremacy Clause does not give unelected federal judges *carte blanche* to use federal law as a means of imposing their own ideas of tort reform on the States."[166]

161. *Id*. at 3 (quoting Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767, 780 (1947) (Frankfurter, J., dissenting); *cf.* Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 616, 21 ELR 21127 (1991) (rejecting an implied preemption argument based on concerns about large-scale crop damage by insects by noting that "Congress is free to find that local regulation does wreak such havoc and enact legislation with the purpose of preventing it").

162. *Geier*, 529 U.S. at 886.

163. *Id.* at 888.

164. *Id.* at 888-89.

165. *Id.* at 886 (citations omitted).

166. *Id.* at 894.

167. *Id.* at 907.

168. *Id.* at 908 n.22 (quoting Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 231-32 (2000) ("Under the Supremacy Clause, preemption occurs if and only if state law contradicts a valid rule established by federal law, and the mere fact that the federal law serves certain purposes does not automatically mean that it contradicts everything that might get in the way of those purposes.")); *id*. at 911 (quoting TRIBE, *supra* note 46, §6-28, at 1177 ("[P]reemption analysis is, or at least should be, a matter of precise statutory [or regulatory] construction rather than an exercise in free-form judicial policymaking.")).

169. *Id.* at 910-11.

170. *Id.* at 912.

171. South Dakota v. Dole, 483 U.S. 203, 207 (1987) (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

172. Nixon v. Missouri Mun. League, 124 S. Ct. 1555, 1565-66 (2004); Gregory v. Ashcroft, 501 U.S. 452, 460-61 (1991).

173. Board of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 363 (2001); Kimel v. Florida Bd. of Regents, 528 U.S. 62, 73-78 (2000).

Then comes a frontal assault on the whole doctrine of obstacle preemption. Characterizing the doctrine as "perhaps inadequately considered,"[167] the dissent cites prominent scholars who have criticized the doctrine.[168] As the dissent also observes, absent any obligation by Congress or the executive branch to state clearly an intent to preempt, the states are deprived of notice in the legislative or regulatory process that their sovereignty might someday be impaired by an inchoate obstacle preemption analysis, and thus deprived of any opportunity to urge the federal political branches to protect state interests.[169] The dissent concludes by articulating a rule requiring administrative agencies to provide clear notice to the states and the public of an intent to preempt, and to solicit comment on this intent, in order to respect the federalism that underlies the presumption against preemption.[170]

3. A Genuine Clear-Statement Rule

The notion of implied obstacle preemption, i.e., an implied clear statement, is an unworkable oxymoron. Fortunately, the antidote of a clear-statement rule of the kind recommended by the states and the *Geier* dissent finds ample precedent in the law. For instance, when Congress imposes conditions on the states' receipt of federal funding, it "must do so unambiguously" so that states can exercise an informed choice as to whether to accept the funding notwithstanding whatever concomitant impairment of their sovereignty the funding conditions entail.[171] Federal laws that intrude on the states' ability to conduct their own affairs, such as laws that affect state-law qualifications for state judges or state restrictions on municipalities, require a "plain statement" in the text of the law.[172] And Congress may override the states' Eleventh Amendment immunity from suit in federal court only if it makes its intention "unmistakably clear in the language of the statute."[173]

These plain statement rules are not toothless tigers. In one recent case, federal law authorized "any entity" to provide telecommunications services. Despite the breadth of the phrase "any entity," it was not clear enough to trump a Missouri law prohibiting cities, counties, and public utilities from doing so because the Court viewed control over municipalities as an essential part of state sovereignty. The Court also has held that state judges are not covered under federal age discrimination laws due to an exclusion for "policymakers," even though it was not entirely certain whether the exclusion applied, stating that it would not read the law to cover state judges unless Congress clearly did so.[174]

The message of the states on preemption makes good sense. If Congress wants to preempt state law, it is perfectly capable of doing so with clarity. Rulings that find "express" preemption in the face of ambiguous federal mandates, and wide ranging judicial inquiries into "obstacles" and "frustration of purposes" are far too loose for a federal system that purports to respect the sovereign role of the states and their ability to enact laws that protect their citizens.

The coalitions on the Court are shifting, and there is reason to hope the Court may some day adopt a genuine clear-statement rule. Just last year, Justices Stevens, Scalia, and Thomas joined an opinion by Justice Ginsburg arguing against implied preemption based on an alleged frustration of federal objectives even in the area of foreign affairs, a domain in which federal authority is viewed as paramount.[175] In voting to uphold a California law designed to help Holocaust victims and their descendents collect unpaid insurance proceeds, these four Justices displayed appropriate judicial humility and restraint by insisting that "judges should not be the expositors of the Nation's foreign policy, which is a role they play by acting when the president himself has not taken a clear stand" by speaking definitively to a foreign policy issue.[176]

It is hypocritical for the Court to assert that it finds preemption only where congressional intent to preempt is clear and manifest, but then to discern the requisite clarity in vague manipulations of perceived purposes. Elimination of obstacle preemption, and sincere adherence to a clear-statement rule with bite under the Supremacy Clause, would fit hand in glove with the Court's parallel efforts to promote federalism and state sovereignty under other constitutional provisions. Indeed, as stated by Justice Breyer in a 2001 preemption case, adherence to such rules might well be the best test of real federalism:

> [T]he true test of federalist principle may lie, not in the occasional constitutional effort to trim Congress' commerce power at its edges, or to protect a State's treasury from a private damages action, but rather in those many statutory cases where courts interpret the mass of technical detail that is the ordinary diet of the law.[177]

Justice Breyer has eloquently laid down the federalist challenge facing the Court in preemption cases. He and his colleagues in the *Geier* majority must now recognize that opinions like *Engine Manufacturers* that find express preemption in ambiguous federal mandates, and *Geier* that improperly imply preemption of critical state laws, fail this federalist test.

IV. Conclusion

Judicial review of federalism cases is both inevitable, and inevitably controversial. The Court has declared its commitment to constitutional federalism in dozens of cases over the last decade, but the results of the Court's work are both chaotic and extremely controversial. It is chaotic because the Court has been aggressive in protecting federalism in some areas, but not others. It is controversial because this pattern of opinions seems to track closer to the political ideology of the Justices than to the text of the Constitution.

The Court will have to sort out this tangled doctrine in cases that will be decided in the coming decade. It really only has two options. One is to listen to Greve, who believes that federalism's future "hangs on a pattern of cooperation between the Court and political constituencies" and "must be an ideological affair." Greve notes that "this picture will strike some as an unsuitably crass and political account of an institution that ought to be beyond politics." He's right, and it seems likely to strike the Court this way too.

The other option is to listen to the states. In the last decade, the states have filed Court briefs that provide an outline of a federalism jurisprudence that is neither controver-

174. *Gregory*, 501 U.S. at 467.

175. American Ins. Ass'n v. Garamendi, 123 S. Ct. 2374, 2394 (2003) (Ginsburg, J., joined by Stevens, Scalia, & Thomas, JJ., dissenting).

176. *Id.* at 2401.

177. Egelhoff v. Egelhoff, 532 U.S. 141, 160-61 (2001) (citations omitted) (Breyer, J., with Stevens, J., dissenting).

sial nor chaotic, a vision of federalism as a neutral principle. States and local governments have also proven the benefits of the good government form of federalism they are promoting through their leadership in addressing problems such as environmental protection.

Listening to the states yields important rules for the Court in policing federalism. The states' powerful and consistent opposition to overreaching preemption and dormant Commerce Clause rulings indicates that the Court should follow the teachings of Hippocrates and "first, do no harm." The Court's current dormant Commerce Clause and preemption cases undercut federalism considerably by invalidating state initiatives with little evidence of conflict with federal objectives. If the Court wants to promote federalism as a neutral principle, reform of its existing doctrine in these areas is the first place to start.

The state briefs in support of federal laws such as the VAWA and the CWA demonstrate the need for the Court to exercise caution in returning to the historically treacherous endeavor of placing formalistic restrictions on Congress' power under the Commerce Clause. The state briefs teach that these cases often involve competing federalism concerns, and the states are just as concerned about protecting the power of the federal government in areas where a federal role is necessary as they are about preserving particular large spheres where states only are permitted to act.

Federalism as explained by the states is not a zero-sum game where every expansion of the national government's power is viewed as an intrusion into the power of the states. Federalism instead is about respect for the critical structural role states play in our federalist system. This understanding of federalism restores it to its proper place as a neutral principle, not a partisan political tool. The federal system bequeathed to us by our Framers is not a means to a conservative or liberal end. The ends that it serves are a better political process, more robust political participation, and the allocation of power in a way that improves how government serves its citizens. These ends are the essence of democracy, and ones that all Americans, whatever their political views, should hope to attain.