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The "Conservative" Paths of the Rehnquist Court's Federalism Decisions

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This Article broadly examines the conservative Rehnquist Court's federalism doctrines and, in doing so, explores the connections between judicial conservatism and a commitment to federalism. Three conclusions emerge. First, although the Court has moved aggressively to advance federalism through well-known doctrines, it frequently proves more substantively conservative than it does pro-federalism when deference to state processes would shield liberal outcomes from federal reversal. Second, path dependence largely explains why the Court, to the puzzlement of some, has relied heavily on sovereign immunity doctrine while proceeding cautiously in limiting Congress's powers under the Commerce Clause. Third, when path dependence precludes the Court from advancing its vision through constitutional holdings, the pro-federalism majority has deployed a phalanx of sub-constitutional devices to protect local governments, especially from private lawsuits seeking damages. Overall, the Court's federalism revolution is distinctively a lawyers' revolution, with much of the significance inhabiting the often Byzantine details.

INTRODUCTION

It seems agreed on all sides now that the Supreme Court has an agenda of promoting constitutional federalism.[1] Since the appointment of Clarence Thomas in 1991 to fill the seat formerly occupied by Thurgood Marshall, the Court has maintained a relatively stable five-justice

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1 See, for example, *Symposium: Federalism after* Alden, 31 Rutgers L J 630 (2000) (noting that the "change in personnel" on the Court "enabled the federalism-enforcing side to gain ascendancy"); Alan J. Heinreich, *Symposium: New Directions in Federalism: Introduction*, 33 Loyola LA L Rev 1275 (2000) (examining the new judicially enforcable federalism doctrine outlined by the Court in *Alden*); *Symposium: State Sovereign Immunity and the Eleventh Amendment*, 75 Notre Dame L Rev 809 (2000) (examining the Court's Eleventh Amendment jurisprudence).

majority—consisting of Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas—committed to enforcing limits on national power and to protecting the integrity of the states. Over that period, the Court has held at least ten federal statutes to be constitutionally invalid, either in whole or in part, on grounds involving federalism.[2] By contrast, the Court had found only one federal statute to violate principles of constitutional federalism during the previous span of more than fifty years,[3] and it actually reversed the single anomalous decision less than ten years later.[4] Commentators unhesitatingly refer to a federalism "revival."[5] Law reviews echo with discussion of whether the Court has yet achieved, or is likely to effect, a federalism "revolution."[6]

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2 See *Board of Trustees of University of Alabama v Garrett*, 531 US 356, 372–74 (2001) (holding the Americans with Disabilities Act invalid insofar as it attempted to abrogate the states' sovereign immunity from suit); *United States v Morrison*, 529 US 598, 602 (2000) (invalidating portions of the Violence Against Women Act as an attempted exercise of legislative power reserved to the states); *Kimel v Florida Board of Regents*, 528 US 62, 67 (2000) (holding the Age Discrimination in Employment Act invalid insofar as it purported to abrogate state sovereign immunity); *Alden v Maine*, 527 US 706, 712 (1999) (holding the Fair Labor Standards Act ("FLSA") unconstitutional insofar as it purported to subject unconsenting states to private suits in state court); *College Savings Bank v Florida Prepaid Postsecondary Education Expense Board*, 527 US 666, 691 (1999) (holding the Trademark Remedy Clarification Act invalid insofar as it purported to abrogate state sovereign immunity); *Florida Prepaid Postsecondary Education Expense Board v College Savings Bank*, 527 US 627, 630 (1999) (invalidating the Patent and Plant Variety Protection Remedy Clarification Act as applied to the states); *Printz v United States*, 521 US 898, 935 (1997) (invalidating provisions of the Brady Act requiring state and local governmental officials to execute a federal regulatory program); *Seminole Tribe of Florida v Florida*, 517 US 44, 47 (1996) (invalidating a provision of the Indian Gaming Regulatory Act abrogating the states' Eleventh Amendment immunity from suit in federal court); *United States v Lopez*, 514 US 549, 551 (1995) (invalidating the Gun Free School Zones Act on the ground that it exceeded congressional power and invaded the states' regulatory domain); *New York v United States*, 505 US 144, 149 (1992) (invalidating "take-title" provision of Low-Level Radioactive Waste Policy Act on grounds that Congress may not compel the states to assume liability). See also *City of Boerne v Flores*, 521 US 507, 536 (1997) (holding the Religious Freedom Restoration Act unconstitutional, largely on separation-of-powers grounds, insofar as it imposed obligations on state and local governments).

3 See *National League of Cities v Usery*, 426 US 833, 852 (1976) (invalidating minimum wage and overtime provisions of the FLSA as applied to certain functions of state and local governments).

4 See *Garcia v San Antonio Metropolitan Transit Authority*, 469 US 528, 531 (1985) (holding that states are not exempt from complying with the minimum wage and overtime requirements of the FLSA).

5 See, for example, Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 Harv L Rev 2180, 2213 (1998); Kathleen M. Sullivan, *Dueling Sovereignties:* United States Term Limits, Inc. v. Thornton, 109 Harv L Rev 78, 80 (1995).

6 See Larry D. Kramer, *The Supreme Court 2000 Term—Foreword: We the Court*, 115 Harv L Rev 4, 129 (2001) (referring to a "revolution" in federalism doctrine); Charles A. Fried, *Revolutions?*, 109 Harv L Rev 13, 34 (1995) (weighing but rejecting the view that the Court has taken revolutionary steps); Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 Mich L Rev 752, 752 (1995) (terming the Court's decision in *Lopez* "revolutionary"). But see Robert F. Nagel, *Real Revolution*, 13 Ga St U L Rev 985, 1003–04 (1997) (characterizing the Court's federalism agenda as "modest and equivocal"). See also Judith Olans Brown and Peter D. Enrich, *Nostalgic Federalism*, 28 Hastings Con L Q 1, 1 (2000) (observing that the Court's federalism decisions "portend a jurisprudential sea-change").

In the Rehnquist Court's federalism revival, as it has developed so far, three categories of cases dominate the foreground. The first consists of cases restraining Congress's power to regulate private conduct under the Commerce Clause. By limiting Congress's regulatory capacity, decisions such as *United States v Lopez*[7] preserve spheres in which state and local governments are the exclusive lawgivers. The second prominent line of federalism cases establishes limits on Congress's authority directly to regulate state and local governments. Widely noted decisions have struck down legislation that attempted to "commandeer" state and local officials and compel their execution of a federally mandated agenda.[8] A third line of decisions involves the Eleventh Amendment and state sovereign immunity.[9] Subject only to narrow exceptions, these cases establish that Congress cannot compel the states to submit to private suits for money damages even when they violate federal rights.

Given these well-known lines of cases and the Court's recent record of invalidating federal statutes, no one should doubt that the Rehnquist Court has made the promotion of federalism an important priority.[10] Surprisingly, however, few if any scholars have carefully examined the overall pattern of Rehnquist Court decisions involving constitutional federalism. My first goal in this Article is to fill the resulting gap in the litera-

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7 514 US 549 (1995) (invalidating the Gun Free School Zones Act on the ground that it exceeded congressional power and invaded the states' regulatory power).

8 See *Printz*, 521 US at 935; *New York*, 505 US at 175.

9 See, for example, *Alden*, 527 US 706; *College Savings Bank*, 527 US 666; *Seminole Tribe*, 517 US 44.

10 Each Court term brings important new decisions. The October 2000 Term, for example, included *Garrett*, 531 US 356, 372–74 (holding that Congress lacked authority to abrogate state sovereign immunity from private suits for damages under the Americans with Disabilities Act). At the time of this writing, for the 2001 Term, the Court had already granted certiorari in five sovereign immunity cases: *Bell Atlantic Maryland Inc v MCI WorldCom*, 240 F3d 279 (4th Cir 2001) (raising the questions whether states implicitly waive their sovereign immunity when they participate in the regulatory scheme of the 1996 Telecommunications Act and whether Congress may require such a waiver as a condition of state participation), cert granted as *United States v Public Service Commission of Maryland*, 121 S Ct 2548 (2001); *South Carolina State Ports Authority v Federal Maritime Commission*, 243 F3d 165 (4th Cir 2001) (presenting the question whether state sovereign immunity applies in an administrative proceeding brought by a private party before a federal agency), cert granted as *Federal Maritime Commission v South Carolina State Ports Authority*, 121 S Ct 392 (2001); *Lapides v Board of Regents of the University System of Georgia*, 251 F3d 1372 (11th Cir 2001) (involving whether sovereign immunity requires a federal court to dismiss federal claims against a state on the motion of a state attorney general who had asserted the court's jurisdiction over those claims as a basis for removal), cert granted, 122 S Ct 456 (2001); *Illinois Bell Telephone Co v WorldCom Technologies, Inc*, 179 F3d 566 (7th Cir 1999) (presenting the issue whether state commission acceptance of congressional invitation to implement a federal regulatory scheme making commission determinations reviewable in federal court constitutes a waiver of Eleventh Amendment immunity), cert granted as *Mathias v WorldCom Technologies, Inc*, 121 S Ct 1224 (2001); *Regents of the University of Minnesota v Raygor*, 620 NW2d 680 (Minn 2001) (presenting the question whether a federal tolling statute, 28 USC § 1367(d) (1994), can be applied to abrogate a state law time limit on a state's waiver of sovereign immunity from suit), cert granted as *Raygor v Regents of the University of Minnesota*, 121 S Ct 2214 (2001).

ture. Looking beyond the three categories of cases that have dominated recent discussions, this Article surveys a broader sample of doctrines involving, for example, the constitutionally permissible scope of state regulatory authority, federal preemption of state law, Supreme Court review of state court judgments, federal judicial "abstention" in favor of state adjudication, and canons of statutory interpretation and judicially fashioned rules of "official immunity" which protect governments and their officials from legal liability.

When the lens is thus broadened, three notable conclusions emerge. First, the Court's federalism revolution includes what I shall describe as a number of "quiet fronts"—areas in which the Court has done little or nothing to promote federalism, despite having the opportunity to do so. For example, the Court has done more to tighten than to loosen the restrictions that the so-called dormant Commerce Clause imposes on state and local governments.[11] Moreover, some of the Court's most prominently pro-federalism justices are quick to find that federal regulatory statutes displace or preempt state regulations.[12]

Second, among the three lines of cases widely thought to constitute the federalism revival, there is an interesting divergence of approaches. Although the Court has imposed limits on Congress's general regulatory powers, its decisions in that domain have displayed a cautious tentativeness. Notably, the Court has not overruled a single case upholding congressional power to regulate commercial activities. Recent cases have put regulation of noncommercial activity largely off-limits to Congress, but it remains unclear whether this restriction will have broad significance.[13] Similarly, cases restricting Congress's power directly to regulate state and local governments have taken a narrow approach.[14] Although the Court has erected prohibitions against federal legislation that singles out state and local governments and compels the performance of distinctively governmental functions, it has not questioned Congress's authority to impose other kinds of regulatory burdens. Perhaps most significantly, the Court has left standing the holding of *Garcia v San Antonio Metropolitan Transit Authority*,[15] under which federal statutes generally regulating

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11 See notes 202–15 and accompanying text.

12 See notes 280–85 and accompanying text.

13 See Michael C. Dorf, *No Federalists Here: Anti-Federalism and Nationalism on the Rehnquist Court*, 31 Rutgers L J 741, 744 (2000) (predicting that "[e]ven if the Court occasionally strikes down an Act as beyond Congress' enumerated powers, on the whole, it will continue to give Congress wide latitude").

14 See Matthew D. Adler and Seth F. Kreimer, *The New Etiquette of Federalism:* New York, Printz, *and* Yeskey, 1998 S Ct Rev 71, 143 (arguing that the Court's decisions leave open other equally effective mechanisms for federal control or displacement of state policies and thus do little beyond establishing an "etiquette" of permissible federal action).

15 469 US 528 (1985).

terms and conditions of employment can apply to state and local governments on the same basis as to other employers.[16]

In comparison, recent decisions involving state sovereign immunity have effected bold revisions in the doctrinal structure.[17] Trumpeting the value of state sovereignty, the Court has overruled at least two precedents within the past five years.[18] In another recent case, the justices broke new ground by holding that the Constitution incorporates a principle of state sovereign immunity that applies as much in state courts as in federal courts.[19]

Third, the Rehnquist Court's efforts to advance federalism are by no means limited to constitutional rulings. On the contrary, many of the most important protections that the Court has afforded to state, and especially to local, governments and their officials formally involve statutory interpretation. Through equitable doctrines, interpretive canons, and other devices of statutory construction, the Court has conferred protections that would be difficult if not impossible to derive directly from the Constitution. If the Court's federalism revival has some quiet fronts, it also includes some areas of important activity that have largely escaped public notice.

Against the background of these empirical conclusions, my second principal aim in this Article is to account for the variegated, sometimes puzzling, pattern of the Rehnquist Court's federalism decisions. My explanatory thesis includes three main themes, which roughly correspond with my three principal descriptive claims.

The first explanatory theme involves judicial conservatism. In some senses of the term, the current Court is indisputably a conservative one,[20] and a commitment to protecting federalism constitutes a core component of conservative judicial philosophies.[21] As I shall emphasize, however, the

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16 Id at 554–57.

17 Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 S Ct Rev 1, 2 (noting that "the Court's most ... aggressive efforts have focused on the arcane doctrine of state sovereign immunity").

18 See *College Savings Bank*, 527 US at 680 (permitting constructive waiver of state immunity under the Federal Employers' Liability Act), overruling *Parden v Terminal Railway of the Alabama State Docks Department*, 377 US 184 (1964); *Seminole Tribe*, 517 US at 66, overruling *Pennsylvania v Union Gas Co*, 491 US 1 (1989) (granting Congress the power to abrogate state sovereign immunity under the Commerce Clause).

19 See *Alden*, 527 US at 754.

20 See, for example, Erwin Chemerinsky, *Further Thoughts*, 54 Okla L Rev 59, 61 (2001) (characterizing the Court as "conservative"); Louise Weinberg, *Of Sovereignty and Union: The Legends of* Alden, 76 Notre Dame L Rev 1113, 1131–32 (2001) (noting that the liberal legacy of the Warren Court has given way in response to "steadily conservative judicial appointments").

21 See, for example, Ann Althouse, *The* Alden *Trilogy: Still Searching for a Way to Enforce Federalism*, 31 Rutgers L J 631, 635–36 (2000) (identifying judicial enforcement of federalism as a "conservative" aim). For a general discussion, see M. David Gelfand and Keith Werhan, *Federalism and Separation of Powers on a "Conservative" Court: Currents and Cross-Currents from Justices O'Connor and Scalia*, 64 Tulane L Rev 1443 (1990) (comparing the "conservative" approaches to

"conservative" label is easier to apply than to define. In particular, the relationship between a commitment to constitutional federalism and other conservative values is by no means always obvious. In many if not most cases, judicial protection of federalism has the effect of limiting liberal forces and doctrines. Sometimes, however, state and local decisionmaking produces outcomes that judicial conservatives find substantively objectionable—for example, restrictive zoning schemes, or complex tangles of regulations for interstate businesses to navigate, or interpretations of the federal Constitution that give broad protections to criminal defendants.

To put my conclusion in a nutshell, the substantive conservatism of the Court's majority explains most, if not all, of the quiet fronts in the federalism revival. The Court's pro-federalism majority is at least as substantively conservative as it is pro-federalism. When federalism and substantive conservatism come into conflict, substantive conservatism frequently dominates.

My second explanatory theme involves the crucial, albeit limited, significance of path dependence in Supreme Court adjudication.[22] As I shall use the term, "path dependence" functions as a capsule reference to various ways in which history and surrounding attitudes and expectations influence judicial decisionmaking.[23] Within my usage, the phenomenon of

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federalism of Justices O'Connor and Scalia).

22 For other efforts to explain and criticize patterns of legal decisionmaking by reference to the notion of path dependence, see, for example, Oona Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 Iowa L Rev 601 (2001) (using "path dependence theory" to explore the influence of history on our common law system); Lewis A. Kornhauser, *Modeling Collegial Courts I: Path Dependence*, 12 Intl Rev L & Econ 169 (1992) (examining when and why the common-law process will be path dependent and arguing that such dependence is "benign"); Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 Harv L Rev 802, 814–23 (1982) (exploring criticisms of the Court, including a challenge to the Court as an institution based on its inconsistent decisions).

23 Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 Harv L Rev 641, 643 (1996), introduces the concept with exemplary lucidity:

> Consider the most basic instance of path dependency. We are on a road and wonder why it winds and goes here instead of there, when a straight road would have been much easier to drive. Today's road depends on what path was taken before.... It is time to resurface the road. Should today's authorities straighten it out at the same time? They see no reason to raze the factories and housing developments that arose on the path's bends.... Today's road, dependent on the path taken ... decades ago, is not the one the authorities would lay down if they were choosing their road today. But society, having invested in the path itself and in the resources alongside the path, is better off keeping the winding road on its current path than paying to build another.

In the economic literature, the forms and significance of path dependence are much debated, with special focus on the question whether historical events can have the effect of locking markets into inefficient equilibria. Compare W. Brian Arthur, *Increasing Returns and Path Dependence in the Economy* 14–15 (Michigan 1994) (arguing that path dependence can lock in inefficiencies), with S.J. Liebowitz and Stephen E. Margolis, *Path-Dependence, Lock-In, and History*, 11 J L, Econ, & Org 205, 224 (1995) (concluding that "[r]emedial inefficiency" resulting from path dependence is empirically rare). With this question in mind, economists have categorized a variety of stronger and weaker

path dependence encompasses the legal concept of stare decisis—the basic idea that past decisions must generally (though not always) be accepted as binding authorities, even by the Supreme Court,[24] and that legal reasoning in current cases should be consistent with judicial precedents.[25] But the notion of path dependence also links the *legal* force of precedent with an implication that the Court feels constrained by surrounding attitudes in the public and political culture.[26] Absent unusually strong foun-

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forms of path dependence, involving differing effects of earlier decisions and developments on the achievement of economically efficient current outcomes. See Liebowitz and Margolis, 11 J L, Econ, & Org at 206–07 (sketching three conceptions of path dependence that assert "progressively stronger claims" concerning the effect of past developments on the definition and attainment of contemporary efficiencies). See also Roe, 109 Harv L Rev at 646–52 (developing a similar typology recognizing three types of path dependence). Though important in their own right, debates about the capacity of market and related mechanisms to achieve efficiency are largely irrelevant for the purposes of this Article. The only proposition on which I mean to insist is one that is not seriously disputed: "[S]ensitive dependence on initial conditions [can] lead[ ] to outcomes that are regrettable" from some evaluative perspective, because a better outcome would have been possible if earlier events had unfolded differently, yet now "[are too] costly to change." Liebowitz and Margolis, 11 J L, Econ, & Org at 207.

24 For discussions of stare decisis, see, for example, Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 NYU L Rev 570 (2001) (arguing that stare decisis is a principle rooted in the Constitution and not merely a policy choice); John Harrison, *The Power of Congress over the Rules of Precedent*, 50 Duke L J 503 (2000) (characterizing stare decisis as a constitutionally permissible common law rule); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum L Rev 723 (1988) (defending stare decisis and discussing its compatibility with conceptions of originalism); James C. Rehnquist, Note, *The Power That Shall Be Vested in a Precedent: Stare Decisis, the Constitution, and the Supreme Court*, 66 BU L Rev 345 (1986) (concluding that stare decisis should be abandoned in constitutional adjudication).

25 Ronald Dworkin has sought to illuminate the characteristic role of precedent in legal reasoning by analogy to the task of an author charged with writing a chapter in a "chain novel," the previous chapters of which were written by other authors; each successive author retains creative license, including a capacity to reshape plot and character, but the license is restrained by obligations of textual integrity and of coherence with what has gone before. See Ronald Dworkin, *Law's Empire* 228–32 (Belknap 1986). For an insightful argument that the history of the Eleventh Amendment exemplifies Dworkin's theory of law as an unfolding narrative, see David L. Shapiro, *Wrong Turns: The Eleventh Amendment and the* Pennhurst *Case*, 98 Harv L Rev 61, 61–63 (1984).

26 See generally Robert G. McCloskey, *The American Supreme Court* 231 (Chicago 3d ed 2000) (arguing that the Supreme Court "has learned to be a political institution and to behave accordingly"); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J Pub L 279, 283–85 (1957) (arguing that the Supreme Court is typically part of the nation's governing coalition and generally tends to reflect prevailing political preferences).

Some theories of stare decisis subsume considerations of public attitudes and perceptions of judicial legitimacy as legally relevant considerations, at least in cases of great public moment. See *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 US 833, 864–69 (1992) (adhering to the central holding of *Roe v Wade* on stare decisis grounds and asserting, among its reasons, the need to preserve both "the substance and [public] perception" of its "legitimacy"); Deborah Hellman, *The Importance of Appearing Principled*, 37 Ariz L Rev 1107, 1109 (1995) (identifying a "*prudential conception* of *stare decisis*, in which the Court treats the effect of a decision on the esteem in which the Court is held as a significant factor to be weighed in the analysis"). By contrast, "traditional" conceptions of stare decisis acknowledge the significance of public reliance on judicial decisions, but deny that the Court may properly take into account "the effect of Court action on the Court's image." Hellman, 37 Ariz L Rev at 1109. See also *Casey*, 505 US at 997–98 (Scalia dissenting) (denouncing a judicial concern with public perceptions in determining whether to adhere to precedent as "not a

dations in constitutional text and the evolving public sense of fairness or necessity, the Court may believe that it would risk public confidence if, especially by a narrow margin, it were simultaneously to reverse its own precedent and to dramatically alter settled schemes of rights and responsibilities.[27]

Also encompassed within my capacious conception of path dependence is the idea that as the Court proceeds along a doctrinal path, both it and the attentive public assess what the justices may properly do next in light of past experiences.[28] Within this calculus, some lines of development look singularly unattractive because they would require the Court to move in directions that previously proved disastrous. For the Court to do so would not only violate principles of stare decisis, but also hazard confidence in the Court's collective sobriety of judgment: "If reasoning implies continuity for him who engages in it, all the more must it do so for those to whom it is addressed and who are asked to accept it."[29] By contrast, the Court may believe that it has made and can continue to make steady, even if meandering, progress along paths where it has previously proceeded without palpable misstep.[30]

Among my theses in this Article is that considerations of path dependence must loom large in any plausible explanation of why the Court has acted with such relative caution in reshaping constitutional doctrines involving Congress's general regulatory powers and its related authority to impose obligations on state and local governments under the Commerce and Spending Clauses. The Court's effort to restrict Congress's general regulatory powers occasioned embarrassment and near disaster during the economic and political crises of the 1930s. Then, when the Court shifted course and authorized broad assertions of congressional power, patterns of reliance developed. The Court's more recent efforts to enforce broadly applicable restrictions on Congress's regulation of state and local governments also ended in a sharp reversal.[31] Although eager to promote federalism through modest doctrinal reform and to shape new options for the future, the Court now hesitates to take aggressive steps, threatening entrenched regulatory regimes back into territory that it previously abandoned. By contrast, the path of sovereign immunity doc-

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principle of law . . . but a principle of *Realpolitik*—and a wrong one at that").

27 See *Casey*, 505 US at 864–69.

28 See Hathaway, 86 Iowa L Rev at 604 (cited in note 22) (asserting that "'path dependence' means that an outcome is shaped in specific and systematic ways by the historical path leading to it . . . with each stage strongly influencing the direction of the following stage").

29 Charles A. Fried, *Constitutional Doctrine*, 107 Harv L Rev 1140, 1156 (1994).

30 See Arthur, *Increasing Returns* at 152 (cited in note 23) (suggesting that "humans tend to over-exploit 'good' actions that pay off well early thereby inheriting the classic properties of strong self-reinforcement: path dependence . . . and possible lock-in to an inferior choice").

31 See Part III.B.2.

trine now appears to the Court as one along which it has so far progressed successfully and can travel without serious hazard.

My third explanatory theme involves what might be called the Court's doctrinal opportunism in promoting federalism and, in particular, in protecting governmental treasuries from damages liability. Especially when considerations of path dependence have made it difficult for the Court to protect its vision of federalism through direct constitutional rulings, the pro-federalism majority has relied on an array of other devices, including judge-made equitable doctrines, pro-federalism principles of statutory construction, and official immunity rules. The result is an inelegant patchwork of protective doctrines that makes it exceedingly difficult—even when not constitutionally impossible—for private plaintiffs to recover money damages from state and local governments and their officials.

When the dense cluster of subconstitutional protections for state and local governments comes into view, it becomes relatively easy to answer an otherwise perplexing question: Why has the Court made sovereign immunity a centerpiece of its federalism revival? As critics have noted, sovereign immunity doctrine appears a crude tool for promoting federalism.[32] Even in theory, state sovereign immunity does not bar congressional regulation of the states,[33] nor does it excuse the states from constitutional commands.[34] The doctrine's only effect is to thwart suits to enforce valid legal obligations—most paradigmatically, private suits for money damages seeking payment directly from a state's treasury as compensation for past harms. What is more, sovereign immunity doctrine is often easy to evade by a properly pleaded suit against a state official, rather than against the state itself.[35] And sovereign immunity has never been understood to give any protection to county and local govern-

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32 See, for example, Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 Notre Dame L Rev 1011, 1052 (2000) (calling the use of sovereign immunity doctrine to achieve federalist goals "ineffectual and counterproductive"); Young, 1999 S Ct Rev at 2 (cited in note 17); Charles A. Fried, *Supreme Court Folly*, NY Times A17 (July 6, 1999) (describing the Court's heavy reliance on sovereign immunity to promote federalism as "using a screwdriver to pound nails").

33 See *Kimel*, 528 US at 78–79, 91 (acknowledging congressional authority to enact the Age Discrimination in Employment Act and to make it binding on states, but holding that the states enjoy sovereign immunity from unconsented private suits for damages under the Act).

34 See *Alden*, 527 US at 755 (affirming that notwithstanding the states' sovereign immunity, "[t]he States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional design").

35 See id at 756–57; John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 Va L Rev 47, 49–50, 59 (1998) (pointing out that officer suits under Section 1983 provide a way around sovereign immunity); Henry Paul Monaghan, *The Sovereign Immunity "Exception"*, 110 Harv L Rev 102, 103 (1996) (arguing that despite the Court's vocal support of sovereign immunity, states are effectively accountable for violations of federal law through properly pleaded actions against state officials).

ments.[36] Why, anyone might wonder, does the Court believe that the game is worth the candle?

The answer, quite simply, is that it is a mistake to consider sovereign immunity in isolation from other, mostly subconstitutional doctrines that have been largely overlooked in prominent commentary on the Court's federalism revival. Taking opportunities where it finds them, the Court has deployed a phalanx of statutory, equitable, and interpretive doctrines to protect state and local treasuries from damages liability. The scheme of protections that the Court has put in place is incomplete and sometimes penetrable, but far from ineffectual.

As is probably evident already, my ambitions in this Article are large along two dimensions, but modest along a third. Along one dimension, I offer a broad (although not entirely comprehensive) survey of the Supreme Court's recent work in crafting and applying doctrines affecting constitutional federalism. Along another, I advance an ambitious, multipart explanation of the Court's diverse pattern of decisions. But my explanation is entirely positive. Although I shall offer a few evaluative remarks, this Article does not pretend to make any significant contribution to normative debates about federalism or the appropriate judicial role in promoting it.

The Article unfolds as follows. Part I introduces three concepts crucial to consideration of the Supreme Court's federalism revival—federalism, state sovereignty and sovereign immunity, and judicial conservatism. This Part identifies diverse strands among conservative judicial philosophies and preliminarily explores the connections between judicial conservatism and a commitment to federalism. Part II reviews judicial doctrines affecting constitutional federalism. It calls attention to the Court's comparative caution along some doctrinal paths and its relative boldness in stiffening sovereign immunity doctrine. Part II also identifies quiet fronts in the federalism revolution.

Part III offers a positive theoretical explanation of the mixed picture revealed in Part II. Part III invokes the substantive conservatism of the pro-federalism justices to account for the Court's failure to move more aggressively along certain quiet fronts. To explain the Court's caution in reshaping constitutional doctrine along other paths, Part III points to phenomena associated with path dependence. Path dependence also unravels part of the mystery of the Court's heavy reliance on sovereign immunity; in attempting to promote federalism, the Court has progressed most aggressively along the path where history has made it most

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[36] See, for example, *Garrett*, 531 US at 369 ("[T]he Eleventh Amendment does not extend to units of local government."); *Alden*, 527 US at 756 (same); *Mount Healthy Board of Education v Doyle*, 429 US 274, 280–81 (1977) (finding that whether a board of education is subject to suit depends upon whether it is a branch of the state government, or rather a separate entity like a county or city government).

confident. But Part III also argues that in order to grasp the role of sovereign immunity in the Court's federalism agenda, it is vital to understand how sovereign immunity interacts with subconstitutional doctrines to protect state and local governments and their officials against suits for money damages.

Part IV seeks perspective on the Court's federalism revival by examining the jurisprudential assumptions that underlie leading cases. This Part concludes that the Court's opinions are methodologically eclectic. If the Court's federalism agenda has been modest in some respects, it is aggressive and relatively undisciplined in others. Part V offers a brief conclusion.

I. CONCEPTUAL ANALYSIS

By all accounts, the current conservative Supreme Court is eager to protect federalism and sovereign immunity as an aspect of federalism.[37] Despite a blizzard of commentary, the central terms are often linked without much probing. What is federalism? What is sovereign immunity, and how does it relate to federalism? What is judicial conservatism, and why is support for federalism, and sovereign immunity as an aspect of federalism, a conservative position? Before more substantive analysis, it will help to pause over the concepts of federalism, sovereign immunity, and judicial conservatism and to explore ways in which they relate to each other.

A. Federalism

There is no agreed-upon definition of constitutional federalism. As a structural principle, federalism requires that power should be divided among layers of government. As the Constitution makes plain, the national government was designed to be one of limited powers,[38] with central responsibilities retained for the states.[39] Beyond these generalities lie

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37 See, for example, Althouse, 31 Rutgers L J at 635–40 (cited in note 21) (contrasting the prevailing majority's "conservative" view of sovereign immunity with that of the "liberal side"); Herbert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The Supreme Court's* Lopez *and* Seminole Tribe *Decisions*, 96 Colum L Rev 2213, 2245 (1996) (noting that "the conservatives on the Court carried the day" in advancing an abstract principle of state sovereignty and state sovereign immunity).

38 See US Const Amend X; Federalist 45 (Madison), in Clinton Rossiter, ed, *The Federalist Papers* 292–93 (Mentor 1961) ("The powers delegated . . . to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.").

39 See Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 161–202 (Knopf 1996) (describing shared and debated understandings among the Constitution's Framers and ratifiers). According to Rakove: "The existence of the states was simply a given fact of American governance" that the Framers never doubted that they needed to accommodate. Id at 162. Consistent with this design, much of the most basic law is historically if not necessarily state law. See David L. Shapiro, *Federalism: A Dialogue* 114–15 (Northwestern 1995) (noting that control over

deep disagreements about how precisely the federalism principle should be specified and implemented.[40]

Interestingly, however, nearly all agree[41]—as the Supreme Court has emphasized[42]—that federalism serves important values.[43] First, in comparison with the national government, state and local governments are closer to the people and more capable of reflecting local needs, values, and mores.[44] Second, the diversity of state and local governments permits experiment and competition.[45] If successful, an approach initiated in one place can be replicated elsewhere. Third, apart from its capacity to promote government that delivers goods and services effectively, federalism fosters connection and community.[46] In a nation of nearly three hundred million people, the national government is inevitably remote. By con-

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regulations concerning daily life remains with the states). This includes most criminal, tort, and contract law, and nearly all property and family law. See Larry Kramer, *Understanding Federalism*, 47 Vand L Rev 1485, 1504 (1994) (describing the chief structural, political and cultural factors responsible for shaping the allocation of power between the national government and the states).

40 See, for example, Jackson, 111 Harv L Rev at 2219 (cited in note 5) (disputing the definition offered by other commentators).

41 A prominent, provocative exception is Edward L. Rubin and Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L Rev 903, 907 (1994) (arguing that the purported benefits of federalism would either be attainable through a "decentralization" of national administration or are illusory). For a persuasive rejoinder, see Jackson, 111 Harv L Rev at 2213–19 (cited in note 5). At the end of the day, the strongest arguments advanced by Rubin and Feeley are, first, that the values of federalism (or "localism," as they call it) are sometimes outweighed in particular cases by competing values that call for nationalizing solutions and, second, that the sense of membership in the national political community is often more salient than the sense of membership in more local communities. See Rubin and Feeley, 41 UCLA L Rev at 948–50.

42 See, for example, *Printz v United States*, 521 US 898, 918–22 (1997) (discussing the merits of a "dual sovereignty" regime); *Gregory v Ashcroft*, 501 US 452, 458 (1991) (describing the advantages of a "federalist structure").

43 See, for example, Jackson, 111 Harv L Rev at 2213–28 (cited in note 5); Barry Friedman, *Valuing Federalism*, 82 Minn L Rev 317, 386–405 (1997); Shapiro, *Federalism* at 75–106 (cited in note 39); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum L Rev 1, 5–10 (1988). But see Richard Briffault, *"What About the 'Ism'?": Normative and Formal Concerns in Contemporary Federalism*, 47 Vand L Rev 1303, 1305–06 (1994) (arguing that it is crucial not to confuse the values served by localism or decentralization with the structure of states and federalism that is protected by the Constitution).

44 See, for example, *Gregory*, 501 US at 458.

45 See *United States v Lopez*, 514 US 549, 581 (1995) (Kennedy concurring) ("States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear."); *Gregory*, 501 US at 458; *San Antonio Independent School District v Rodriguez*, 411 US 1, 49–50 (1973) (identifying experimentation as a benefit of local control); *New State Ice Co v Liebmann*, 285 US 262, 311 (1932) (Brandeis dissenting) (recognizing the Court's power to limit experimentation and warning against applying capricious limitations); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U Chi L Rev 1484, 1498 (1987) (arguing that federalism creates the competition that in turn fosters innovation in governmental function).

46 See, for example, *Gregory*, 501 US at 458; Jackson, 111 Harv L Rev at 2221 (cited in note 5); Friedman, 82 Minn L Rev at 389–94 (cited in note 43); Merritt, 88 Colum L Rev at 7–8 (cited in note 43).

trast, there are more opportunities to participate in government, and to do so efficaciously, at the local level.[47]

Finally, state and local governments function as counterweights to national power.[48] At the time of the Constitution's framing, the states enjoyed palpable checking capacities. State legislatures elected the members of the United States Senate;[49] state militias provided a potential source of resistance to tyrannical assertions of federal authority.[50] Today, the states' capacity to protect liberty depends on more subtle considerations of allegiance and dependence. The role of state and local governments may divide citizens' allegiance and soften impulses to vest totalizing power in the national government.[51]

When the values of federalism are tallied against the spare features of the Constitution's design, a partial anomaly stands out. Nowhere does the Constitution refer specifically to local governments. Yet in functional analysis of the values that federalism serves, the significance of local governments is enormous. With respect to some values—such as those of political community or connectedness—local governments are likely to be more important than the states.[52] A jurisprudence of federalism that ignores local governments would, therefore, be functionally (even if not constitutionally) incomplete. Correlatively, arguments that invoke the benefits of federalism to support judicial protection of state but not local governments are likely to be at least partially mismatched with their conclusions. The question immediately arises whether such arguments do not prove either too much or too little.

B. State Sovereignty, Sovereign Immunity, and the Eleventh Amendment

The notion of state "sovereignty" is legally recurrent, but mysterious nonetheless. In the inherited European tradition, the sovereign was the single repository of ultimate lawmaking authority.[53] In the American con-

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47 See Shapiro, *Federalism* at 91–93 (cited in note 39); Merritt, 88 Colum L Rev at 7 (cited in note 43).

48 See, for example, *Printz*, 521 US at 921 ("'[A] healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.'"), quoting *Gregory*, 501 US at 458.

49 See US Const Art I, § 3, cl 1.

50 See David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 Mich L Rev 588, 605–07 (2000) (describing state militias as a "counterweight" to the national army); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L J 1425, 1494–1500 (1987) (describing the establishment of military powers under the Constitution).

51 See *Lopez*, 514 US at 576–77 (Kennedy concurring) (noting that "the Federal and State governments ... hold each other in check by competing for the affections of the people").

52 See H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 Va L Rev 633, 688 n 262 (1993) ("[M]any of the 'states' that are the historical and primary referents of federalism talk are part of the problem of remote and nonparticipatory government.").

53 See Amar, 96 Yale L J at 1430 (cited in note 50).

text, the idea of sovereignty—and especially of state sovereignty—proved problematic from the beginning.[54] For one thing, the Constitution identifies the ultimate lawgiver as "the People of the United States";[55] in this formulation, the sovereign merges with its subjects.[56] In addition, the Constitution divides lawmaking authority between state and federal governments and, accordingly, debars the states from performing a variety of functions.[57] More generally, the states are subject to federal law and the federal Constitution,[58] which authorizes Congress to enact legislation that then binds the states.

Within this institutional scheme, the states are partly if not wholly subordinate entities. They enjoy at most a residual sovereignty, consisting of such elements as remain after recognition of both the ultimate authority of "the People" and the superior juridical status of the Constitution, laws, and treaties of the United States.[59] What is perhaps more important, the content of the states' residual sovereignty cannot be specified by analysis of what "sovereignty," taken as a postulate, minimally or necessarily entails. As the Supreme Court has recognized, "[t]he framers split the atom of sovereignty,"[60] and the allocation of entitlements and powers among the resulting subatomic entities can only be defined by legal, historical, and functional analysis.

Largely as a result of the way that the American Constitution reshapes traditional conceptions of sovereignty, fights have occurred from the beginning about whether, and if so when, the states enjoy "sovereign immunity" from suit. In *Chisholm v Georgia*,[61] the Supreme Court determined that Article III of the Constitution, which contemplates federal judicial jurisdiction of suits involving the states,[62] stripped the states of sovereign immunity from suit in federal court. Congress promptly responded by proposing, and the states by ratifying, the peculiarly worded Eleventh Amendment to the Constitution: "The judicial Power of the

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54 See Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 Stan L Rev 1031, 1043 (1997).

55 US Const Preamble. But see *U.S. Term Limits, Inc v Thornton*, 514 US 779, 846 (1995) (Thomas dissenting) ("The ultimate source of the Constitution's authority is the consent of the people of each individual state, not the consent of the undifferentiated people of the Nation as a whole.").

56 See *United States v Lee*, 106 US 196, 208 (1882) ("Under our system the *people*, who are ... called *subjects* [under the frameworks of other governments], are the sovereign.").

57 These include making treaties, coining money, and conferring titles of nobility. See US Const Art I, § 10.

58 See US Const Art VI, § 3.

59 See Federalist 39 (Madison), in Clinton Rossiter, ed, *The Federalist Papers* 245 (Mentor 1961) (describing the states as possessing "a residuary and inviolable sovereignty").

60 *Saenz v Roe*, 526 US 489, 504 n 17 (1999) (Kennedy concurring), quoting *Thornton*, 514 US at 838.

61 2 US (2 Dall) 419 (1793).

62 See US Const Art III, § 2, cl 1 ("The judicial Power shall extend to ... Controversies between two or more States ... [and to Controversies] between a State and Citizens of another State").

United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[63]

Obviously enough, the Eleventh Amendment does not refer to "state sovereign immunity." Equally obviously, the wording of the Eleventh Amendment embarrasses claims that the original design was broadly to constitutionalize the states' immunity from suit. Read literally, the Amendment would allow a state to be sued in federal court by its own citizens, barring only suits by "Citizens of another State." To my mind, the best explanation of the Eleventh Amendment is the "diversity theory" developed during the 1980s by John Gibbons[64] and William Fletcher.[65]

The diversity theory emphasizes that Article III authorizes federal jurisdiction on bases. Some grants of jurisdiction are premised on subject matter—as, for example, when a suit "arises under" the Constitution, laws, or treaties of the United States.[66] Others are predicated on party status. For example, Article III authorizes federal "diversity" jurisdiction when a suit is between a state and citizens of another state.[67] According to the diversity theory, the Eleventh Amendment makes clear that Article III does not strip the states of their immunity in actions—such as that in *Chisholm*—brought under the federal diversity jurisdiction by "Citizens of another State" asserting claims based on state law. If states wish to assert sovereign immunity in suits under state law, nothing in Article III bars them from doing so. But the Eleventh Amendment, according to the diversity theory, does not invest the states with sovereign immunity as a matter of federal constitutional law; it thus leaves Congress free to subject the states to suit (by their own citizens, for example) in cases in which Article III contemplates federal jurisdiction based on subject matter, such as on the ground that a suit arises under federal law.

I find the diversity interpretation attractive because it fits the language of the Eleventh Amendment, because it is reasonably consistent with the historical record, and because it seems to me to make practical sense. Where the state is the lawgiver, it should be able (if it so chooses) to cloak itself with immunity. By contrast, where federal law governs, it

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63 US Const Amend XI.

64 John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 Colum L Rev 1889 (1983) (arguing that the Eleventh Amendment was intended solely to grant states immunity from suits in which the sole basis for federal jurisdiction was the presence of a diverse or alien party).

65 William Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition against Jurisdiction*, 35 Stan L Rev 1033 (1983) (arguing that the Eleventh Amendment was not intended to preclude federal jurisdiction over suits against a state arising under federal law).

66 See US Const Art III, § 2, cl 1.

67 See id.

seems to me inconsistent with federal supremacy for the states to be able to defy their lawful obligations and claim immunity from suit.[68]

Although the Eleventh Amendment might have been construed narrowly, and indeed was narrowly interpreted through the early years of its history,[69] the Supreme Court took a "wrong turn"[70] in its 1890 decision in *Hans v Louisiana*.[71] In *Hans*, the Court held that the Eleventh Amendment embodied a general principle of state sovereign immunity,[72] which bars federal jurisdiction of suits by citizens against their own states, even when those suits are based on alleged violations of the Constitution and laws of the United States.[73]

The *Hans* Court may have believed that no other path was open to it. On its facts, the suit involved an action against a southern state for failure to honor its bonds.[74] In the near aftermath of military reconstruction, there probably would have been no political will to enforce a judgment against the state.[75] And for the Court to enter a futile judgment might have had disastrous repercussions for the status and authority of the judicial branch.

The Court in *Hans* thus set out to develop a doctrine of state sovereign immunity that would be encompassing, but not too encompassing. As the Court appeared to recognize, state sovereign immunity would undermine the Constitution's supremacy if it rendered the states wholly unanswerable in court for their violations of federal law. If state sovereign immunity were recognized, a series of exceptions would thus be needed, and the Court began to list some even in *Hans* itself. Sovereign immunity, the Court said, would not bar appeals to the Supreme Court from state court judgments in suits (including criminal cases) to which a

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68 See David L. Shapiro, *The 1999 Trilogy: What Is Good Federalism?*, 31 Rutgers L J 753, 754–755 (2000) (arguing that when "state sovereign immunity does not limit national authority to impose certain obligations on the states," no "independent value of federalism is served by inserting sovereign immunity as an additional barrier to effective enforcement of those obligations").

69 See, for example, *Cohens v Virginia*, 19 US (6 Wheat) 264, 383 (1821) (construing the Eleventh Amendment as inapplicable to suits by citizens of the defendant state and to all cases, regardless of parties, "arising under the constitution or laws of the United States").

70 See Shapiro, 98 Harv L Rev at 63, 70 (cited in note 25).

71 134 US 1 (1890).

72 See id at 15–16 (asserting that the "suability of a state without its consent was ... unknown to law" and that the supposition the Eleventh Amendment might permit unconsented suits by a state's own citizens "is almost an absurdity on its face").

73 See id at 15.

74 See id at 1–2.

75 See Shapiro, 98 Harv L Rev at 70 (cited in note 25) (stating that this decision was prompted by "political exigencies" and was merely a recognition that efforts to coerce the states would prove unenforceable); Gibbons, 83 Colum L Rev at 1973–2003 (cited in note 64) (noting that the "Supreme Court faced a draconian choice between repudiation of some of its most inviolable constitutional doctrines and the humiliation of seeing its political authority compromised as its judgments met the resistance of hostile state governments"); John V. Orth, *The Interpretation of the Eleventh Amendment, 1798–1908: A Case Study of Judicial Power*, 1983 U Ill L Rev 423, 447–49 (observing that "the end of Reconstruction signaled the end of easy enforceability of orders to the states").

state was a party.[76] Neither would sovereign immunity preclude suits against a state by another state[77] or by the federal government,[78] nor suits to which a state consented.[79] Within a short time, the landmark case of *Ex parte Young*[80] had also reinforced the principle, traceable to some of the earliest decisions under the Eleventh Amendment,[81] that although the states cannot be sued in their own names, federal courts may entertain suits for injunctions against state *officers*—even when the officers are sued entirely for actions taken in their official capacities.[82] Nor was *Young* the end. In the years since, the Court has continued to work out functionally necessary or desirable exceptions to state sovereign immunity.

Without descending into the morass of Eleventh Amendment doctrine, I would offer three summary observations. First, whatever the Court's actual rationale for *Hans*, subsequent cases have ascribed values to sovereign immunity, of which two have assumed special importance. One involves the states' dignity: time and again, the Court pronounces it inconsistent with the dignity of the states for them to be subject to unconsented suits by private parties.[83] The other ascribed value involves the states' financial stability.[84]

Second, as I have noted already, exceptions to sovereign immunity are at least as functionally important, and some are probably as well entrenched, as the basic rule traceable to *Hans*.[85] As the Court has recog-

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76 See *Hans*, 134 US at 19–20.

77 See id at 15.

78 See *United States v Texas*, 143 US 621, 643–45 (1892) (concluding that the Court must have jurisdiction over a case between the United States and a state).

79 See *Hans*, 134 US at 17.

80 209 US 123 (1908).

81 See, for example, *Osborn v Bank of the United States*, 22 US (9 Wheat) 738, 857–58 (1824) (reasoning that the Eleventh Amendment applies only insofar as a state itself is a party in the record).

82 *Young*, 209 US at 167–68. For a general discussion, see Alfred Hill, *In Defense of Our Law of Sovereign Immunity*, 42 BC L Rev 485, 541–58 (2001) (describing the pattern of availability and nonavailability of officer suits).

83 See, for example, *Alden v Maine*, 527 US 706, 715 (1999) ("The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity."); *Idaho v Coeur d'Alene Tribe of Idaho*, 521 US 261, 287–88 (1997) ("The dignity and status of its statehood allow Idaho to rely on its Eleventh Amendment immunity."); *Seminole Tribe of Florida v Florida*, 517 US 44, 58 (1996) (reasoning that the Eleventh Amendment exists to avoid the indignity of subjecting states to private suits).

84 See *Alden*, 527 US at 750 ("Private suits against unconsenting states—especially suits for money damages—may threaten the financial integrity of the states."). See also *Board of Trustees of University of Alabama v Garrett*, 531 US 356, 370 (2001) (holding that Congress lacks Fourteenth Amendment authority to abrogate the states' sovereign immunity from suit under the Americans with Disabilities Act and noting that "it would be entirely rational (and therefore constitutional) for a state employer to conserve scarce financial resources by hiring employees who are able to use existing facilities").

85 See Young, 1999 S Ct Rev at 9 (cited in note 17) (noting that the *Young* fiction "went hand in hand with the doctrine of sovereign immunity at common law, and it seems doubtful that the latter

nized repeatedly, there must be mechanisms permitting the enforcement of federal law against the states in order for federalism to be workable.[86] Although easily overlooked, this is a point of enormous significance. Even the staunchest judicial champions of state sovereign immunity are not states-rights absolutists.[87] In seeking a compromise between national authority and competing concerns of state governmental dignity and financial integrity, proponents of sovereign immunity would simply strike the balance at a different point than would their critics.[88]

Third, sovereign immunity doctrine has grown vastly complex. Although most sovereign immunity questions have tolerably clear answers, they often lie at the end of a maze of precedents that only a specialist could navigate with confidence.[89]

C. Judicial Conservatism

It is widely agreed that the current Supreme Court includes at least five conservative justices and that commitments to federalism and sovereign immunity are part of a conservative judicial philosophy.[90] But the elements of judicial conservatism are multifarious.[91] Provisionally, it may help to distinguish among strands of conservatism that I shall describe as substantive, methodological, and institutional.

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doctrine would have taken the broad form that it took absent the moderating influence of the officer remedy"); Monaghan, 110 Harv L Rev at 127 (cited in note 35) ("To characterize *Young* as an exception ... gets the matter backward: the Eleventh Amendment is an exception to *Young*.").

86 See, for example, *Alden*, 527 US at 755–57 (noting that sovereign immunity "does not bar all judicial review of state compliance with the Constitution and valid federal law" and that "[e]stablished rules provide ample means to correct ongoing violations of federal law and to vindicate the interests which animate the Supremacy Clause"); *Coeur d'Alene Tribe*, 521 US at 293 (O'Connor concurring) ("'Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law.'"), quoting *Green v Mansour*, 474 US 64, 68 (1985).

87 See Nagel, 13 Ga St U L Rev at 996 (cited in note 6) (observing that while it is not entirely beyond the pale for nationalists on occasion to consider abolishing the states outright, an equivalent pro-federalism proposal has not been mentioned, much less supported, by anyone on the Court or in the academy).

88 See Althouse, 31 Rutgers L J at 647 (cited in note 21).

89 See Shapiro, 31 Rutgers L J at 758 (cited in note 68) ("[T]he total picture is a Byzantine aggregation of rules and doctrines.").

90 See, for example, Althouse, 31 Rutgers L J at 635–40 (cited in note 21); Richard C. Kearney and Reginald S. Sheehan, *Supreme Court Decision Making: The Impact of Court Composition on State and Local Government Litigation*, 54 J Pol 1008 (1992) (finding that the conservative ideology of the justices is the most important factor in explaining variable success rates of state and local governments in Supreme Court litigation).

91 See, for example, Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 NC L Rev 619, 661 (1994) ("American conservatism is highly splintered."); Frank I. Michelman, *Property, Federalism, and Jurisprudence: A Comment on* Lucas *and Judicial Conservatism*, 35 Wm & Mary L Rev 301, 302–07 (1993) (distinguishing between two entirely separate "judicial-conservative projects"); Robin West, *Progressive and Conservative Constitutionalism*, 88 Mich L Rev 641, 651–62 (1990) (distinguishing types of conservatism and attempting to identify universal conservative ideals).

1. Substantive conservatism.

Along one dimension, judges and justices are widely counted as conservative when they tend to reach substantive conclusions generally associated with a conservative outlook. To identify substantively conservative positions, I shall rely on the categorizing scheme employed by the political scientists Jeffrey Segal and Harold Spaeth in a number of prominent studies that predict the votes of Supreme Court justices by reference to their political "attitudes"[92] or ideologies, as measured by newspaper editorials published at the time of their appointments.[93] Segal and Spaeth divide "civil liberties" cases from "economic" cases.[94] Within that scheme, conservative judicial positions are those disfavoring "the criminally accused" and "civil rights/civil liberties claimant[s],"[95] except in affirmative action and Takings Clause cases, where the conservative position is pro-claimant.[96] In economic cases, conservative positions are anti-union, pro-business (in cases involving challenges to the government's regulatory authority), anti-liability, and anti-injured-person.[97]

This categorical scheme is obviously crude. Self-identified political conservatives include both libertarians, who generally believe that that government governs best which governs least, and social conservatives, who favor governmental regulations to protect traditional values and structures.[98] Segal and Spaeth do not attempt to identify unifying values and concerns. Insofar as they aim to reflect prevalent cultural understandings of which positions count as liberal and which as conservative, their scheme may also be slightly dated, especially with respect to free speech issues.[99] In recent years, some of the justices usually identified as

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92 See Jeffrey A. Segal and Harold Spaeth, *The Supreme Court and the Attitudinal Model* 65 (Cambridge 1993).

93 See Jeffrey A. Segal, et al, *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J Pol 812 (1995) (using justices' liberal or conservative ideologies, as measured by newspaper editorials at the time of their appointments, to predict substantively liberal and conservative voting patterns). Other relevant work by Segal and coauthors includes Harold J. Spaeth and Jeffrey A. Segal, *The U.S. Supreme Court Judicial Data Base: Providing New Insights into the Court*, 83 Judicature 228 (2000); Jeffrey A. Segal and Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 Am Pol Sci Rev 557 (1989).

94 See Segal, et al, 57 J Pol at 815 (cited in note 93).

95 Id.

96 See id at 815 n 4.

97 See id at 815.

98 See West, 88 Mich L Rev at 654–58 (cited in note 91) (distinguishing among three types of conservatives).

99 See Eugene Volokh, *How the Justices Voted in Free Speech Cases, 1994–2000*, 48 UCLA L Rev 1191, 1198 (2001) (observing that the justices' voting records from 1994–2000 "reveal that we can no longer assume that the Left generally sides with speakers and the Right with the government"); J.M. Balkin, *Some Realism about Pluralism: Legal Realist Approaches to the First Amendment*, 1990 Duke L J 375, 383–84 (discussing an "ideological drift" with respect to First Amendment issues, as conservatives have become more libertarian in light of the shifting focus of the debate). Another explanation would be that the categorical scheme is inevitably at least somewhat over- and underinclu-

"conservative" have taken a more civil libertarian approach than the "liberals" with respect to hate speech,[100] campaign advertising,[101] and the rights of abortion protestors.[102] These complications and imperfections aside, the Segal and Spaeth catalog of substantively conservative positions has the virtues of being prominent[103] and relatively sharply defined, and reasonably well correlated with public perceptions.[104] Within that framework, Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas were all viewed as conservatives at the time of their appointment, and all have maintained substantively conservative voting records.[105]

2. Methodological conservatism.

Conservative judicial philosophies also include a methodological component. But just as the conservative rubric encompasses both substantive libertarians and substantive social conservatives, methodological conservatism includes competitive strands. Currently, the most prominent version is "originalism."[106] Except where ensconced precedents dictate otherwise, originalists assert that contemporary constitutional issues should be resolved in accordance with the "original understanding" of the Constitution's meaning.[107] Implicit in originalism is a commitment to

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sive, especially insofar as there is an overlap between the categories of "civil rights" and "economic" cases.

100 For example, in *R.A.V. v City of St. Paul*, 505 US 377 (1992), Chief Justice Rehnquist and Justices Kennedy and Thomas joined Justice Scalia's majority opinion invalidating a law prohibiting only those "fighting words" that vilified particular groups, on the grounds that such a prohibition was impermissibly viewpoint-based. The other justices concurred in the invalidation, finding that the challenged ordinance banned speech that did not come within the constitutionally regulable category of "fighting words," but rejected the view that it would violate the First Amendment to ban racist fighting words but not others. See id at 399–411 (White concurring).

101 For example, in the recent cases of *Federal Election Commission v Colorado Republican Federal Campaign Committee*, 533 US 431 (2001), and *Nixon v Shrink Missouri Government PAC*, 528 US 377 (2000), Justices Scalia, Kennedy, and Thomas voted to uphold free speech claims that were rejected by Court majorities, majorities that included all of the justices sometimes classed as "liberal"—Justices Stevens, Souter, Ginsburg, and Breyer.

102 In *Hill v Colorado*, 530 US 703, 741–42 (2000), and *Madsen v Women's Health Center, Inc*, 512 US 753, 784–814 (1994), Justices Scalia, Kennedy, and Thomas all dissented from majority rulings that rejected free speech claims in whole or in part.

103 See Segal, et al, 57 J Pol at 813 (cited in note 93) (noting widespread usage among political scientists).

104 See id at 815.

105 See id at 816 table 2.

106 See Young, 72 NC L Rev at 627–34 (cited in note 33).

107 See, for example, Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 38–47 (Princeton 1997); Clarence Thomas, *Judging*, 45 U Kan L Rev 1, 6–7 (1996); Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 143–46 (Macmillan 1990).

"textualism";[108] constitutional and statutory texts almost always provide the most reliable guide to the original understanding.[109]

Another strand of judicial conservatism treats adherence to nonoriginalist precedent not so much as exceptional as partly constitutive of the judicial function.[110] Within this approach, a conservative judge or justice is characterized largely by a Burkean sensibility.[111] Burkean conservatives conjoin a reverence for tradition with the embrace of constraining ideals of judicial role and craft.[112] They eschew theoretical generalizations and broad constitutional theories[113] and prefer to move in small steps.[114] Among modern justices, perhaps the leading exemplar of Burkean conservatism was the second Justice Harlan.[115] But Justice O'Connor frequently casts herself in this tradition,[116] as more occasionally do Justice Kennedy[117] and Chief Justice Rehnquist.[118]

In view of the disparate strands of both substantive and methodological conservatism,[119] it would be surprising if a single central linkage

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108 See Young, 72 NC L Rev at 627 (cited in note 33).

109 Justice Antonin Scalia, who has argued more prominently for an originalist methodology than any other justice, see, for example, Scalia, *A Matter of Interpretation* at 139–41 (cited in note 107), has also defended a strong preference for decision according to sharp, determinate rules. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U Chi L Rev 1175, 1187 (1989) (urging that "the law of rules [ ] be extended as far as the nature of the question allows"). Professor Young discerns a connection between rule-based decisionmaking and constitutional originalism: both seek to constrain constitutional decisionmaking by establishing a criterion of correctness external to the values of the individual judge or justice. See Young, 72 NC L Rev at 640–41 (cited in note 33). Among the current justices, Justices Scalia and Thomas identify themselves as originalists. See their works cited in note 107.

110 See Young, 72 NC L Rev at 688–715 (cited in note 33) (explicating a Burkean conservative judicial philosophy).

111 See id at 687–88 (noting that Burkeans believe that no theory can be "entirely satisfactory when brought into contact with the unruly facts of reality, and that theorizing can therefore only take us so far").

112 See id at 681; Charles A. Fried, *The Conservatism of Justice Harlan*, 36 NY L Sch L Rev 33, 51 (1991).

113 See Young, 72 NC L Rev at 687–88 (cited in note 91).

114 See id at 680–81. Burkeans tend, accordingly, to be what Cass Sunstein calls judicial "minimalists," wary of broad claims and especially of overarching theories. See Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* 3–23 (Harvard 1999) (defining and presenting a defense of judicial minimalism). But minimalism, as defined by Sunstein, is consistent with either liberal or conservative substantive decisionmaking. See id at 9 (characterizing Justices Souter, Ginsburg, and Breyer, as well as Justices O'Connor and Kennedy, as minimalists). Burkeanism, by contrast, includes attitudes of respect for tradition that align more consistently with substantive conservatism. See Young, 72 NC L Rev at 697–712 (cited in note 91).

115 See Young, 72 NC L Rev at 723–24 (cited in note 91).

116 See id at 721–22.

117 See id at 720–21.

118 See *Dickerson v United States*, 530 US 428, 443–44 (2000) (Rehnquist) (upholding the Court's ruling in *Miranda v Arizona*, 384 US 436 (1966), largely on the basis that its ruling had long been entrenched).

119 Kathleen Sullivan has traced a partially distinct fault line among judicial conservatives between those justices who prefer relatively determinate rules and those drawn to standards that require more case-by-case judgment in application. See Kathleen M. Sullivan, *The Supreme Court, 1991*

held the positions together. Nonetheless, several possible affinities stand out. First, an originalist methodology may tend to promote substantively conservative outcomes with respect to many issues.[120] Second, behind the specific preferences of substantive conservatives may lie a generalized desire for order and stability; if so, this preference may go hand-in-hand with a preference either for clear rules established by the Constitution's framers and ratifiers or for traditionalism and incrementalism in judicial methodology.[121]

3. Institutional conservatism.

Positions involving allocations of governmental power frequently also carry labels as conservative or liberal. Along this dimension, judicial conservatism is often measured by support for doctrines that protect the prerogatives of state and local governments within constitutional federalism[122] and that promote a strong, unitary executive branch.[123] In addition, conservatives often claim to favor a narrow role for the judiciary, or at least to disfavor judicial innovation.[124]

It is not obvious why support for a strong, unitary executive branch, or indeed for robust federalism, should count as conservative. But pro-executive and pro-federalism positions may both grow at least partly from a distrust of federal legislative power[125]—a view that Congress has assumed an overweening, potentially dangerous role in the structure of constitutional government and that countervailing institutions therefore need to be fortified. Moreover, there are a number of candidates to explain why pro-federalism positions merit designation as conservative. One straightforward possibility is that judicial conservatives distinguish themselves from liberals partly by attaching greater significance to the values associated with federalism, as described above. Liberals might care more about substantive outcomes, some or possibly many of which

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Term—Foreword: The Justices of Rules and Standards, 106 Harv L Rev 22, 122 (1992).

120 See Richard H. Fallon, Jr., *The Political Function of Originalist Ambiguity*, 19 Harv J L & Pub Pol 487, 492 (1996) (emphasizing originalists' characteristically conservative substantive agenda).

121 See West, 88 Mich L Rev at 658–62 (cited in note 91).

122 See note 90 and accompanying text.

123 See, for example, Charles A. Fried, *Order and Law: Arguing the Reagan Revolution—A Firsthand Account* 151–71 (Simon & Schuster 1991) (defending this view).

124 See Young, 72 NC L Rev at 634–37 (cited in note 91) (discussing the concept of judicial restraint as central to judicial conservatism); West, 88 Mich L Rev at 648 (cited in note 91) (asserting that conservative constitutionalists believe "judges should defer, whenever possible, to the will of legislators").

125 See *Printz v United States*, 521 US 898, 922–23 (1997) (invalidating a statute mandating that state and local officials enforce federal law partly on the ground that the "unity [of the Executive Branch] would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws").

cannot be realized effectively without national mandates.[126] Another possibility is that pro-federalism doctrines tend to promote substantively conservative outcomes; on average, state and local institutions may be more substantively conservative than Congress or the federal courts.[127] A third, by no means inconsistent, possibility is that an originalist methodology points to pro-federalism outcomes in many cases.[128]

4. Divisions and tensions revisited.

Although I do not pretend to have provided a comprehensive analysis of judicial conservatism, it seems plain that judicial conservatism is not a single philosophy, but a family of philosophies. On both substantive and methodological issues, important divisions exist within the conservative camp. In many cases, considerations of substantive and methodological conservatism will converge to support institutionally conservative, pro-federalism doctrines. But this will not always be so. For example, there may be issues—such as the question whether sovereign immunity should be extended from state to local governments—on which a pro-federalism outcome would be difficult to reach within a conservative methodology, whether originalist (because local governments were not originally understood to possess sovereignty)[129] or Burkean (because long-established precedent denies sovereign status to local governments).[130] There may also be cases in which a pro-federalism doctrinal structure would retard judicial efforts to achieve substantively conserva-

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126 See H. Geoffrey Moulton, Jr., *The Quixotic Search for a Judicially Enforceable Federalism*, 83 Minn L Rev 849, 922 (1999) (critiquing approaches that "mistake[] federalism for a theory of limited government, when it is in fact a theory of allocating government responsibility," and arguing that "the national government today concentrates on what it is best suited to handle"); Briffault, 47 Vand L Rev at 1304 (cited in note 43) (noting that many of the values of federalism are opposed by "compelling countervalues—widely accepted political norms that call for action at the national level rather than decentralization").

127 See Ronald J. Krotoszynski, Jr., *Listening to the "Sounds of Sovereignty" but Missing the Beat: Does the New Federalism Really Matter?*, 32 Ind L Rev 11, 12 (1998) ("One could reasonably argue that federalism *du jour* merely serves as a convenient shill for the policy preferences of the current members of the Supreme Court."); Michael Wells, *Naked Politics, Federal Courts Law, and the Canon of Acceptable Arguments*, 47 Emory L J 89, 121–23 (1998) (arguing that conservatives' support for federalism doctrines is entirely instrumental and linked to promotion of substantively conservative outcomes).

128 For critical discussion of the related hypothesis that the Supreme Court consistently attempts to adhere to the original understanding in cases involving constitutional federalism, see notes 383–84 and accompanying text.

129 See Gerald E. Frug, *The City as a Legal Concept*, 93 Harv L Rev 1057, 1090–1120 (1980) (describing eighteenth-century assimilation of cities to private corporations).

130 See, for example, *Board of Trustees of University of Alabama v Garrett*, 531 US 356, 369 (2001); *Alden v Maine*, 527 US 706, 756 (1999); *Mount Healthy Board of Education v Doyle*, 429 US 274, 280–81 (1977) (holding that the Eleventh Amendment bar to suit does not extend to counties or similar municipal corporations); *Lincoln County v Luning*, 133 US 529, 530–31 (1890) (holding that circuit court has jurisdiction over a county because the Eleventh Amendment only bars suits against a state).

tive outcomes—for example, if state legislatures or state courts adopted more liberal positions than their federal counterparts.

II. LINES OF FEDERALISM CASES

The aim of this Part is to provide a rough overview of the Supreme Court's federalism jurisprudence. As I have noted, the Court's most visible federalism cases run along three principal lines, which this Part initially surveys. But a fuller picture of the Court's agenda also requires attention to less noticed doctrines.[131] Vitally important to constitutional federalism are doctrines that limit the scope of state and local authority, either by defining individual rights or by identifying structural principles that state and local governments must not transgress. The Court also affects federalism through its interpretation of federal statutes as displacing more or less substantive state law. In addition, the Court interacts with Congress to produce doctrines prescribing the deference owed by federal courts to state courts and their judgments.

A. Doctrines Limiting Congress's General Regulatory Powers

As recently as a few years ago, Congress's substantive powers under Article I appeared virtually unlimited. In cases decided during the late New Deal era, and largely unquestioned for more than fifty years, the Court said that Congress could regulate any activity with a substantial effect on or relation to interstate commerce,[132] with substantial effects to be measured, not by looking at particular targets of regulatory enforcement, but by the cumulative impact of all regulated activities.[133] Subsequent cases reinforced these formulations,[134] which the Court relied on to uphold central provisions of the 1964 Civil Rights Act barring race discrimination by places of public accommodation.[135]

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131 See *Lopez*, 514 US at 578 (Kennedy concurring) (noting that "this Court has participated in maintaining the federal balance through judicial exposition of doctrines such as abstention, ... the doctrine of adequate and independent state grounds, ... the whole jurisprudence of preemption, ... and many of the rules governing our habeas jurisprudence").

132 See, for example, *Wickard v Filburn*, 317 US 111, 125 (1942) (holding that Congress may regulate the consumption of wheat because, though interstate, it has a substantial effect on interstate commerce); *United States v Darby*, 312 US 100, 119–20 (1941) (upholding the provision of the Fair Labor Standards Act prohibiting the shipment in interstate commerce of goods produced by employees whose wages and hours violate the Acts); *National Labor Relations Board v Jones & Laughlin Steel Corp*, 301 US 1, 37 (1937) (upholding the National Labor Relations Act because labor relations are activities that have "a close and substantial relation to interstate commerce").

133 See *Wickard*, 317 US at 127–28.

134 See, for example, *Perez v United States*, 402 US 146, 152–56 (1971) (upholding the Consumer Credit Protection Act's ban on "extortionate credit transactions" as applied to local activities).

135 See *Heart of Atlanta Motel, Inc v United States*, 379 US 241, 261 (1964) (holding that the Civil Rights Act did not exceed Congress's power to regulate commerce); *Katzenbach v McClung*, 379 US 294, 298 (1964) (same).

To justices of a conservative bent, a situation in which Congress possessed virtually unbounded regulatory power was clearly unattractive. Among other considerations, some of the justices may have believed that judicial underenforcement of federalism norms had both a submerged political motivation and a discernible political effect: rightly or wrongly, Washington, D.C. has acquired a reputation as a seat of liberalism and elitism, while state and local governments are widely viewed as more conservative and populist. In 1995, the Court's five conservative justices took a first step toward altering this situation by invalidating a federal statute forbidding the possession of guns in school zones in *Lopez*.[136] Yet the Court's message was uncertain. Although its invalidation of the challenged statute was undeniably extraordinary, the Court purported not to overrule any previous decisions.[137] Nor, equally remarkably, did *Lopez* alter the entrenched formulations defining Congress's commerce power:

> First, Congress may regulate the use of the channels of interstate commerce.... Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.... Finally, Congress's commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce,... i.e., those activities that substantially affect interstate commerce.[138]

More recently, the Court appeared to stiffen the third prong of the *Lopez* test by holding in *United States v Morrison*[139] that Congress exceeded its authority by enacting a statute imposing penalties for violence against women.[140] In explaining its ruling, the 5–4 majority emphasized that violence against women is not distinctively associated with commercial activity.[141] *Morrison* thus appears to establish that only commercial activities are subject to federal regulation under the third prong of the *Lopez* test.[142]

Matching the Supreme Court's holdings that limit Congress's general regulatory power under the Commerce Clause are decisions enforcing limits on Congress's power to regulate private conduct under Section

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136 See *Lopez*, 514 US at 551.

137 Id at 559–60 (suggesting that possession of a gun in a school zone is not an activity that substantially affects interstate commerce under even the broadest precedent).

138 Id at 558–59.

139 529 US 598 (2000).

140 Id at 602 (holding that Congress exceeded its authority in providing a federal civil remedy in the Violence Against Women Act).

141 See id at 612–13 ("Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity.").

142 See id at 613 ("While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far ... our cases have upheld Commerce Clause regulation of interstate activity only where that activity is economic in nature.").

5 of the Fourteenth Amendment. For example, *Morrison* restates the controversial, but entrenched, rule that Congress's power to "enforce" the Fourteenth Amendment generally encompasses no authority to regulate "private" conduct, as opposed to that of states and their officials.[143]

B. Doctrines Limiting Congress's Power to Regulate State and Local Governmental Activities

A second line of federalism cases limits Congress's capacity directly to regulate state and local governments, even with respect to activities linked to interstate commerce. *Garcia v San Antonio Metropolitan Transit Authority*[144] furnishes relevant background. Reversing an earlier decision that survived for less than a decade,[145] *Garcia* upheld congressional power to regulate the wages and hours of state and local governmental employees under the Fair Labor Standards Act.[146] More than that, *Garcia* suggested that it was "unworkable" for the Court to identify state governmental functions that were immune from federal regulation;[147] the principal if not exclusive protections of state sovereignty, the Court ruled, lay in the political processes through which national legislation is enacted.[148] Without directly challenging *Garcia*'s holding, the Rehnquist Court has chipped away at the decision's broadest implications, and in doing so has identified several judicially enforceable protections of state and local governmental autonomy. A 1992 decision, *New York v United States*,[149] held that Congress could not single out state legislatures and compel them to enact legislation.[150] Writing for the Court, Justice O'Connor explained this noncommandeering rule as necessary to maintain the clear lines of political accountability that healthy federalism requires.[151] In *Printz v United States*,[152] the Court extended *New York*'s noncommandeering rule from state legislatures to executive officials. Under *Printz*, Congress may not require state and local officials to enforce federal law.[153]

Interestingly, the noncommandeering principle as specified in *Printz* reaches local as well as state governments,[154] even though the former do

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143 See id at 621.

144 469 US 528 (1985).

145 *National League of Cities v Usery*, 426 US 833 (1976).

146 See *Garcia*, 469 US at 555–56.

147 See id at 531, 543, 546–47.

148 See id at 551–52.

149 505 US 144 (1992).

150 Id at 161.

151 See id at 168–69 ("[W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished.").

152 521 US 898 (1997).

153 See id at 933, 935.

154 See id at 931 n 15, 935 ("[T]he distinction in our Eleventh Amendment jurisprudence be-

not possess sovereign immunity.[155] The noncommandeering rule of *New York* and *Printz* does not, however, apply to state courts.[156] It is long settled that state courts must entertain federal claims on a nondiscriminatory basis.[157] Nor, as the Court stated in *Reno v Condon*,[158] does the noncommandeering principle extend to general regulatory legislation, applicable to private parties as well as governmental bodies, that does not "require the states to act in their sovereign capacity to regulate their own citizens."[159] In that case, the Court thus unanimously upheld the Driver's Privacy Protection Act, which bars state motor vehicle departments, among others, from disclosing personal information required for a driver's license.[160] Nor, finally, has the Court applied the noncommandeering principle to congressional action under the Spending Clause. The Court's 1987 decision in *South Dakota v Dole*,[161] written by Chief Justice Rehnquist, holds that Congress can condition federal financial grants on the states' performance of functions—including presumably the enactment of legislation—that Congress could not directly command the states to perform.[162]

Outside Article I, questions about Congress's power to regulate state and local governments have also arisen under Section 5 of the Fourteenth Amendment, which authorizes Congress "to enforce, by appropriate legislation, the provisions of this article."[163] The most important recent case is *City of Boerne v Flores*,[164] which held that Congress overstepped its authority by enacting the Religious Freedom Restoration Act ("RFRA"), a statute purporting to create broader rights to free exercise of religion than the Supreme Court had found in the Constitution.[165] The central issue in *Boerne* involved the separation of powers: Did Con-

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tween States and municipalities is of no relevance here.").

155 See, for example, *Board of Trustees of University of Alabama v Garrett*, 965, 531 US 356, 357 (2001); *Alden v Maine*, 527 US 706, 756 (1999); *Mount Healthy Board of Education v Doyle*, 429 US 274, 280–81 (1977); *Lincoln County v Luning*, 133 US 529, 530 (1890). For an ingenious effort to ground some protections of local as well as state governmental autonomy on an analogy between governments and private organizations whose efforts to promote federal ends could not be conscripted without a payment of just compensation, see Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 Mich L Rev 813 (1998).

156 See *Printz*, 521 US at 928–29; *New York* 505 US at 178–79.

157 See, for example, *Howlett v Rose*, 496 US 356, 369 (1990) (holding that state courts may not discriminate against federal claims); *Testa v Katt*, 330 US 386, 389 (1947) (holding that state courts may not decline to enforce federal laws).

158 528 US 141 (2000).

159 Id at 151.

160 Id at 143–46.

161 483 US 203 (1987).

162 Id at 211–12.

163 US Const Amend XIV, § 5.

164 521 US 507 (1997).

165 Id at 513–16.

gress's power to "enforce" the Fourteenth Amendment authorize it to go further than the Court in defining substantive rights? But the case also had a federalism dimension. If constitutionally valid, the RFRA would have mandated greater state and local accommodation of religiously motivated conduct than the Supreme Court had construed the Free Exercise Clause to require.

In *Boerne*, the Court held that Congress has no power under Section 5 to define constitutional rights binding on state and local governments; Congress's only authority is to "remedy or prevent unconstitutional actions" as defined by the courts.[166] This is a formulation with potentially significant consequences. Prior decisions had left the scope of congressional power to enforce the Fourteenth Amendment cloaked in some uncertainty,[167] but the Court had said explicitly that Section 5 gave Congress "discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,"[168] and it had suggested that the judicial role in determining appropriateness was limited to testing the rationality of the connection between legislative means and ends.[169] Of more tangible significance, the Court had previously upheld important federal statutes forbidding the use of voting qualifications and practices that Congress thought likely to be used to abridge rights on racial grounds.[170] Despite the potential breadth of *Boerne*'s reach, the Court has not so far applied it to overrule any earlier decisions.

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166 Id at 519.

167 The uncertainty arose partly because the Court's opinion construing Congress's power under Section 5 of the Fourteenth Amendment in *Katzenbach v Morgan*, 384 US 641 (1966), blended a puzzling mix of rationales. As the Court recognized in *Flores*, 521 US at 528, "[t]here is language in . . . *Katzenbach v Morgan* . . . which could be interpreted as acknowledging a power in Congress to enact legislation that expands the [substantive] rights contained in § 1 of the Fourteenth Amendment," but the decision could also be read to rest on narrower grounds. In the aftermath of *Morgan*, the Court splintered and was unable to produce any majority opinion in *Oregon v Mitchell*, 400 US 112, 117–18 (1970) (ruling that Congress had the power to lower the voting age to 18 in federal elections, but not in state elections). Prior to *Boerne*, Professor Tribe's influential treatise characterized *Mitchell* as "incomprehensible" and apparently for that reason described *Morgan*, with its perplexing mix of rationales, as "the leading case." Laurence H. Tribe, *American Constitutional Law* 342 (Foundation 2d ed 1988).

168 *Morgan*, 384 US at 651.

169 See id, citing *McCulloch v Maryland*, 17 US (4 Wheat) 316 (1819).

170 See, for example, *City of Rome v United States*, 446 US 156, 160–62 (1980) (upholding under the Fifteenth Amendment an extension of the Voting Rights Act's requirement that certain jurisdictions obtain advance federal authorization of changes in voting standards, practices, and procedures); *Morgan*, 384 US at 652 (upholding congressional power under the Fourteenth Amendment to bar use of literacy tests to prohibit certain Puerto Rico natives from voting); *South Carolina v Katzenbach*, 383 US 301, 333–34 (1966) (sustaining under the Fifteenth Amendment a suspension on literacy tests to combat discrimination in voting, even though such tests were not per se unconstitutional under *Lassiter v Northampton County Board of Elections*, 360 US 45 (1959)).

C. Sovereign Immunity and Related Cases

The third prominent line of recent federalism cases involves the Eleventh Amendment and state sovereign immunity. Within this line, the Court's boldest step came in 1996, when it held in *Seminole Tribe of Florida v Florida*[171] that Congress lacks power under Article I to abrogate the states' immunity from private suits.[172] To reach that result, the 5–4 majority needed to overrule a seven-year-old precedent,[173] but it did so with brisk efficiency, bordering on disdain.[174]

Significantly, a 1997 decision[175] reaffirmed the vitality of *Young*, which held the Eleventh Amendment generally inapplicable to suits seeking injunctive relief against state officials alleged to have violated federal law.[176] Justice Kennedy, joined on this point only by Chief Justice Rehnquist, characterized the rule of *Young* as largely discretionary and dependent on case-by-case balancing.[177] But the other pro-federalism conservatives rejected the effort to "recharacterize[ ] and narrow[ ] much of our *Young* jurisprudence,"[178] even though they did, on the facts, recognize a single applicable exception and hold that the state's immunity barred an action challenging the state's regulatory jurisdiction over a lake bed and naming state officials as the defendants.[179]

With the *Young* distinction between actions seeking injunctions against state officials and suits seeking damages from state treasuries thus generally reaffirmed,[180] the Court again moved aggressively to protect the states from damages liability in 1999, when it decided a trilogy of sovereign immunity cases. Perhaps the most important of the cases, *Alden v Maine*,[181] expressly broke new ground by holding that Congress lacks Article I authority to force the states to submit to private suits for damages in state (as well as federal) court, even when the states have

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171 517 US 44 (1996).

172 Id at 72–73.

173 See id at 66, overruling *Pennsylvania v Union Gas Co*, 491 US 1 (1989).

174 See id at 66 ("The decision has, since its issuance, been of questionable precedential value, largely because a majority of the Court expressly disagreed with the rationale of the plurality.").

175 *Idaho v Coeur d'Alene Tribe of Idaho*, 521 US 261, 287–88 (1997) (finding that the Eleventh Amendment bars a suit against state officers seeking a declaration that submerged lands were outside a state's regulatory jurisdiction).

176 209 US at 167–68.

177 See *Coeur d'Alene Tribe*, 521 US at 280 (characterizing application of "the *Young* fiction," that state officials sued for injunctive relief are not protected by a state's sovereign immunity, as "an exercise in line-drawing" historically conducted pursuant to a "case-by-case" approach).

178 Id at 291 (O'Connor concurring).

179 See id at 296–97.

180 According to Justice O'Connor's apparently controlling formulation, a *Young* suit against a state officer is available, because not barred by the Eleventh Amendment, "where a plaintiff alleges an *ongoing* violation of *federal* law, and where the relief sought is *prospective* rather than *retrospective*." Id at 294.

181 527 US 706 (1999).

violated valid federal law.[182] A second case, *College Savings Bank v Florida Prepaid Postsecondary Education Expense Board*,[183] overruled a Warren-era precedent and held that just as Congress cannot directly abrogate the states' immunity from suit when legislating under Article I, neither can Congress validly deem that the states "constructively waive[ ]" their immunity by engaging in congressionally specified activities.[184]

The third decision gave a starkly narrow construction of Congress's authority to strip the states of their sovereign immunity when legislating under Section 5 of the Fourteenth Amendment. Although the Court held in 1976 that Section 5 authorizes Congress to abrogate state sovereign immunity,[185] recent cases demand that abrogating legislation must be "congruent" with and "proportional" to a congressionally identified pattern of constitutional violations.[186] In *Florida Prepaid Postsecondary Education Expense Board v College Savings Bank*,[187] the Court found that legislation abrogating the states' immunity in suits for patent infringement—which the government sought to characterize as involving deprivations of protected property interests without due process of law—could not satisfy this test.[188]

Since *Florida Prepaid*, the Court has continued its effort to rein in Congress's abrogation power and thus to enhance the protective force of state sovereign immunity. In *Kimel v Florida Board of Regents*,[189] for example, the justices held that Congress lacks power under Section 5 to subject the states to suit for money damages under the Age Discrimination in Employment Act ("ADEA").[190] *Kimel* illustrates the peculiar bite of the Court's Section 5 cases in the domain of state sovereign immunity. Even in its application to state and local governments, the ADEA is a valid exercise of Congress's regulatory authority under the Commerce Clause.[191] The significance of *Kimel* thus involves suability for damages, not the states' obligation—potentially enforceable through suits for injunctions—to obey the federal statute.

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182 Id at 712.

183 527 US 666 (1999).

184 Id at 679–80, overruling *Parden v Terminal Railway of the Alabama State Docks Department*, 377 US 184 (1964).

185 *Fitzpatrick v Bitzer*, 427 US 445, 456 (1976).

186 The language comes from *Flores*, 521 US at 519–20.

187 527 US 627 (1999).

188 Id at 639–48.

189 528 US 62 (2000).

190 Id at 67. Following precisely the same line of reasoning, the Court ruled even more recently that the states retain their sovereign immunity in suits alleging violations of the Americans with Disabilities Act. See *Board of Trustees of University of Alabama v Garrett*, 531 US 356, 360 (2001).

191 See *Kimel*, 528 US at 78 (noting that the Court had previously upheld Congress's authority under the Commerce Clause to subject the states to the ADEA in *EEOC v Wyoming*, 460 US 226, 243 (1983)).

When the Supreme Court's sovereign immunity cases are compared with those in the other two prominent federalism lines, two features stand out. The first is the relative boldness of the sovereign immunity decisions, as signified by the Court's brash willingness to overrule prior cases and reformulate doctrinal tests. In addition, even when not overruling cases, the Court, as in *Alden*, has not hesitated to define broad categorical limits on congressional power.

The second striking feature of the sovereign immunity cases is their apparent relative inefficacy as devices for protecting federalism. "Sovereign immunity" has consequence only in cases in which the states are not in fact "sovereign" in any robust sense; the question of suability arises because state power is limited either by the federal Constitution or by binding federal law. Nor are the states actually "immune" from suit in a significant practical sense. Nearly without exception, state officials can be sued for prospective injunctive relief, and they can often be sued for damages in their individual capacities. Another loophole, which the Court itself recently emphasized, is that the states can be sued directly by the United States.[192] And, again, local governments remain wholly beyond sovereign immunity's protections.[193]

D. Constitutional Doctrines That Directly Limit State and Local Governmental Authority

Doctrines that define constitutional rights limit the discretionary authority of state and local governments.[194] The Supreme Court's substantive doctrines are too numerous to permit a brief summary,[195] and I shall not assay a lengthy review. Suffice it to observe that in recent years the Court has loosened some restraints on state and local governments—under the Establishment Clause,[196] for example—while stiffening others. For instance, the Court has erected high barriers for state and local governments that wish to implement affirmative action programs,[197] and it

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192 See *Alden*, 527 US at 755, 759–60.

193 See *Garrett*, 531 US at 369; *Alden*, 527 US at 756; *Mount Healthy Board of Education v Doyle*, 429 US 274, 280–81 (1977); *Lincoln County v Luning*, 133 US 529, 530 (1890).

194 See Daniel A. Farber, *Pledging a New Allegiance: An Essay on Sovereignty and the New Federalism*, 75 Notre Dame L Rev 1133, 1140 (2000) ("The Court's interest in states' rights ends at the point where its commitment to individual rights begins.").

195 A full review could not stop with provisions defining substantive rights, but would also need to include doctrines involving the separation of powers, which may protect federalism by restraining federal lawmaking. See Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex L Rev 1321, 1325 (2001) (explaining the Court's separation of powers decisions and suggesting that many of these decisions also safeguard federalism).

196 See, for example, *Mitchell v Helms*, 530 US 793, 801, 829–30 (2000) (upholding a program involving the loaning, on a nondiscriminatory basis, of secular educational materials to religious schools).

197 See, for example, *Richmond v J.A. Croson Co*, 488 US 469, 505, 508 (1989) (invalidating an affirmative action program as not narrowly tailored to promote a compelling governmental interest).

has toughened judicial scrutiny of governmental action under the Takings Clause.[198]

Also important to federalism are constitutional doctrines that identify structural limits on state and local authority. Federalism implies that states and localities must be able to afford some preferences to citizens—such as free or highly subsidized public education—that they do not provide to noncitizens.[199] Equally plainly, however, the Constitution reflects a competing principle of unitary nationhood. This principle finds embodiment in the Privileges and Immunities Clause,[200] which forbids state discrimination against out-of-staters in matters involving "fundamental" rights, except when "non-citizens constitute a peculiar source of the evil at which [a] statute is aimed."[201] More controversially, the Supreme Court has also construed the Commerce Clause, which is framed as an affirmative grant of power to Congress, as including an implied "negative" dimension that forbids states and municipalities to enact legislation unduly restricting interstate commerce.[202]

In its central dimension, negative or "dormant" Commerce Clause doctrine forbids states and localities to adopt tax or regulatory structures that discriminate against interstate commerce.[203] But the Court has also held that when nondiscriminatory statutes impose an "incidental" burden on commerce, they too may be invalidated if the local benefits are insufficiently substantial or "could be promoted as well with a lesser impact on interstate activities."[204]

It is easy to imagine that a Supreme Court committed to revitalizing constitutional federalism might adopt a revisionist stance toward dormant Commerce Clause doctrine.[205] The doctrine draws little support

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198 See, for example, *Dolan v Tigard*, 512 US 374, 383–86 (1994) (finding that a zoning grant made conditional on a petitioner's allocation of a portion of land to public use is a taking); *Lucas v South Carolina Coastal Council*, 505 US 1003, 1014–15, 1031–32 (1992) (holding that a regulatory statute depriving land of all economic value constitutes a taking).

199 See, for example, *Martinez v Bynum*, 461 US 321, 328 (1983) (finding that a "bona fide residence requirement . . . with respect to attendance in public free schools does not violate the Equal Protection Clause" nor "penalize the constitutional right of interstate travel").

200 See US Const Art IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

201 *Toomer v Witsell*, 334 US 385, 398 (1948).

202 See, for example, *West Lynn Creamery, Inc v Healy*, 512 US 186, 193 n 9 (1994) (explaining the rationale for the negative dimension).

203 See, for example, *Fulton Corp v Faulkner*, 516 US 325, 346 (1996) (invalidating a discriminatory tax); *Oregon Waste Systems, Inc v Department of Environmental Quality of Oregon*, 511 US 93, 108 (1994) (invalidating a surcharge imposed on other states for the disposal of waste); *Wyoming v Oklahoma*, 502 US 437, 454–55 (1992) (finding unconstitutional a requirement that power plants use in-state fuel sources).

204 *Pike v Bruce Church, Inc*, 397 US 137, 142 (1970).

205 See, for example, *Camps Newfound/Owatonna, Inc v Town of Harrison*, 520 US 564, 611–12 (1997) (Thomas dissenting) (protesting that the dormant Commerce Clause doctrine "undermines the delicate balance in what we have termed 'Our Federalism'"), quoting *Younger v Harris*, 401 US 37, 44 (1971); Martin H. Redish and Shane Nugent, *The Dormant Commerce Clause and the Constitu-*

from the text of the Commerce Clause, which is framed as a grant of congressional authority, not a limit on state power.[206] Evidence concerning the original understanding provides little or no support.[207] And the Court's "balancing" methodology in cases involving "incidental" burdens has drawn scornful protests from Justices Scalia and Thomas.[208] Perhaps most important, dormant Commerce Clause doctrine directly impedes efforts by state and local governments to promote distinctively local ends.[209] Nonetheless, the Court persists in the traditional approach.

Indeed, a 1994 case, *West Lynn Creamery, Inc v Healy*,[210] broke new ground by invalidating a scheme of state *subsidies* for its domestic dairy industry.[211] In *West Lynn Creamery* itself, the Court emphasized that the constitutional difficulty arose from the conjoint operation of the subsidies and a special tax on sales of milk that was used to fund the subsidies.[212] All milk was taxed equally, but because only Massachusetts farmers received subsidies, they were advantaged in competition with out-of-staters in nearly the same way that a discriminatory tax would have benefited them.[213] The broader implications of *West Lynn Creamery* are uncertain, but as Professor Tribe has noted, the uncertainty itself is new.[214] Before *West Lynn Creamery*, the constitutionality of state subsidies for in-state industries was largely unquestioned. "After *West Lynn Creamery*, no state action ... that has the effect of benefiting in-state interests at the expense of out-of-state interests is clearly immune from scrutiny under the dormant Commerce Clause."[215]

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tional Balance of Federalism, 1987 Duke L J 569, 573 (arguing that dormant Commerce Clause doctrine "undermines[ ] the Constitution's carefully established textual structure for allocating power between federal and state sovereigns").

206 See, for example, *Oklahoma Tax Commission v Jefferson Lines, Inc*, 514 US 175, 200 (1995) (Scalia concurring); Redish and Nugent, 1987 Duke L J at 571, 573 (cited in note 205) (noting the absence of the dormant Commerce Clause in the text of the Constitution and arguing that the Commerce Clause is best seen as empowering Congress rather than hamstringing the states).

207 See Redish and Nugent, 1987 Duke L J at 585–88 (cited in note 205) ("In any event we believe that historical evidence provides no firm support for the dormant commerce clause's existence.").

208 See, for example, *Camps Newfound/Owatonna*, 520 US at 618–20 (Thomas dissenting) (arguing that the "balancing" methodology invites judgments based upon policy rather than text); *Bendix Autolite Corp v Midwesco Enterprises, Inc*, 486 US 888, 897–98 (1988) (Scalia concurring) (stating that the balancing test is "like judging whether a particular line is longer than a particular rock is heavy").

209 But see Shapiro, *Federalism* at 74 n 67 (cited in note 39) (arguing that dormant Commerce Clause doctrine strengthens federalism by "protecting state interests against unfair treatment by other states").

210 512 US 186 (1994).

211 Id at 194.

212 See id at 194–95, 199–200.

213 See id at 194.

214 See Laurence H. Tribe, *American Constitutional Law* § 6-23 at 1150 (Foundation 3d ed 2000).

215 Id.

E. Protection of Federalism through Interpretation of Substantive Regulatory Statutes

As Justice Breyer recently observed:

> [T]he true test of federalist principle may lie, not in the occasional effort to trim Congress'[s] commerce power at its edges . . . or to protect a state treasury from a private damage action . . . but rather in those many statutory cases where courts interpret the mass of technical detail that is the ordinary diet of the law.[216]

Through its interpretation of federal statutes, the Supreme Court has myriad opportunities to promote federalism. The Court's cases and doctrines present a study in diversity. One important doctrine addresses federal "preemption" of state law.[217] In cases of actual conflict between state and federal commands, federal law indisputably prevails under the Supremacy Clause of Article VI.[218] The recurring question is whether Congress, although possessed of power to displace state rules, has manifested its intent to do so.

So far as I am aware, no commentator has affirmatively linked the Supreme Court's preemption cases to its federalism agenda.[219] The explanation resides partly in preemption doctrine's entrenched tenets. The doctrine has long expressed a pro-federalism presumption against inferring preemption, especially in areas of traditional state regulation.[220] But part of the explanation, too, involves the unwillingness of the Rehnquist Court consistently to enforce a robust presumption against preemption. Over the decade since Clarence Thomas joined the Court and produced the current pro-federalism five-member majority, the Court has decided thirty-five preemption cases and found state statutes or causes of action to be preempted, either in whole or in part, in twenty-two.[221] Indeed, during the Court's 1999 and 2000 Terms, the Court decided seven

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216 *Egelhoff v Egelhoff*, 121 S Ct 1322, 1335 (2001) (Breyer dissenting).

217 On the connection between preemption doctrine and constitutional federalism, consider S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 BU L Rev 685 (1991).

218 US Const Art VI, § 2.

219 See Young, 1999 S Ct Rev at 3–4 (cited in note 17) (noting the importance of preemption cases to constitutional federalism, but discussing a case in which the Court had found that federal law preempted state law).

220 See, for example, *Rice v Santa Fe Elevator Corp*, 331 US 218, 230 (1947) ("[I]n a field which the States have traditionally occupied . . . we start with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.").

221 These figures come from a Westlaw search of all cases from the 1991 Term onwards for which the case syllabus included any derivative of the word "preemption." This search yielded forty-five cases, ten of which did not involve issues involving federal preemption of state statutes or causes of action. Among the remaining thirty-five cases, the Court found the challenged statute or cause of action to be preempted in sixteen cases. In six cases, some statutes or causes of action were deemed to be preempted, while others were not. The Court rejected preemption claims in thirteen cases.

preemption cases and held that federal law preempted state law in all of them.[222]

Another set of interpretive questions involves the application of federal statutes to state and local governments. When the question is whether a federal statute regulates the states, the Court employs a "clear statement" requirement: it will not construe regulatory legislation as encompassing the states or attempting to abrogate their immunity unless Congress makes its intent "unmistakably clear in the language of the statute."[223]

So far, the Court has not applied the clear statement rule to give similar protection to local governments. The Court has, however, developed a variety of other doctrines to protect local treasuries from private suits for damages. Perhaps the most important involve 42 USC § 1983, ("Section 1983") which creates a cause of action against any "person" who "under color" of state law or custom violates or causes the violation of federal rights. A 1978 Supreme Court decision, *Monell v Department of Social Services*,[224] holds that local governments—unlike states—are suable "persons."[225] Although the Court has not moved to reconsider *Monell*, its subsequent decisions establishing standards of municipal liability make it exceedingly difficult to prove that local governments are causally responsible, and thus directly liable, for wrongs committed by their officials.[226]

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222 See *Lorillard Tobacco Co v Reilly*, 121 S Ct 2404, 2419 (2001) (finding preemption of location restrictions on cigarette advertising under the Federal Cigarette Labeling and Advertising Act); *Egelhoff*, 121 S Ct at 1325–26 (holding that a state statute governing the rights of divorced spouses under provisions made prior to the divorce was preempted by the Federal Employee Retirement Income Security Act); *Buckman Co v Plaintiffs' Legal Committee*, 121 S Ct 1012, 1015 (2001) (ruling that state law claims that a manufacturer committed fraud on the federal Food and Drug Administration were preempted by federal law); *Crosby v National Foreign Trade Council*, 530 US 363, 366 (2000) (finding federal preemption of a state law barring state entities from buying goods or services from companies doing business with Burma); *Geier v American Honda Motor Co*, 529 US 861, 881 (2000) (determining that a state law tort action posed an obstacle to the purposes of the Federal Motor Vehicle Safety Act and was therefore preempted); *Norfolk Southern Railway Co v Shanklin*, 529 US 344, 347 (2000) (concluding that the Federal Railroad Safety Act and its implementing regulations preempted state tort claims concerning a railroad's failure to maintain adequate warning devices at crossings). Consider *United States v Locke*, 529 US 89 (2000) (finding some state oil spill prevention regulations preempted by the federal Ports and Waterways Safety Act and remanding for a decision on others).

223 *Gregory v Ashcroft*, 501 US 452, 460–61 (1991) (internal quotation marks omitted), quoting *Atascadero State Hospital v Scanlon*, 473 US 234, 242 (1985).

224 436 US 658 (1978).

225 Id at 663.

226 See, for example, *McMillian v Monroe County*, 520 US 781, 786 (1997) (reaffirming that state, rather than federal, law determines who is a policymaking official capable of establishing policies for which a county or municipality is causally responsible); *Board of County Commissioners v Brown*, 520 US 397, 400, 415 (1997) (ruling that in the absence of a claim that a policymaking official violated federal law or directed a violation of federal rights, municipal liability requires proof of deliberate indifference by policymaking officials to the risk of the particular injury suffered by the plaintiff). These and other relevant Supreme Court cases implement the basic holding of *Monell*, 436

The Court has also developed subconstitutional doctrines that protect local governments, and states too, against vicarious liability for damages awards against their officers and employees. Regardless of whether a state or local government can be sued directly, state and local officials who violate federal rights can typically be sued for damages under Section 1983 in their "individual" capacities.[227] Although this styling signals that relief is wanted from the officials' personal resources, not the public treasury,[228] most state and local governments apparently indemnify their employees, at least most of the time.[229] In "officer suits" under Section 1983, the Supreme Court has developed elaborate doctrines of official immunity. Officials performing a few functions enjoy "absolute immunity" from damages liability.[230] More typically, officials possess "qualified immunity," which shields them from damages claims unless they violated "clearly established" federal rights.[231]

In shaping official immunity doctrines, the Court has built on common law foundations. It assumes that Congress, when enacting Section 1983, intended to retain the immunities prevailing at common law.[232] Ac-

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US at 663, that although counties and municipalities are suable "persons" under Section 1983, they cannot be liable on a respondeat superior theory, id at 691, but are only liable when tortious acts occur in the execution of a governmental body's policy or custom, id at 694. In light of decisions such as these, John Jeffries, 84 Va L Rev at 58 (cited in note 35), concludes that the Supreme Court "majority seems eager to take any opportunity to defeat" municipal liability. See also Brian J. Serr, *Turning Section 1983's Protection of Civil Rights into an Attractive Nuisance: Extra-Textual Barriers to Municipal Liability under* Monell, 35 Ga L Rev 881, 902 (2001) (asserting that "the Court repeatedly strives to read § 1983 to foreclose a remedy"); Mark R. Brown, *The Failure of Fault Under Section 1983: Municipal Liability for State Law Enforcement*, 84 Cornell L Rev 1503, 1505–06 (1999) (emphasizing the extent to which limitations on municipal liability make it difficult to vindicate federal rights).

227 See *Hafer v Melo*, 502 US 21, 31 (1991) (allowing state officials to be sued for damages under Section 1983 for actions undertaken in their individual, but not official, capacities); Jeffries, 84 Va L Rev at 49–50, 59 (cited in note 35).

228 See *Kentucky v Graham*, 473 US 159, 165–68 (1985) (discussing the difference between personal capacity and official capacity suits).

229 See Meltzer, 75 Notre Dame L Rev at 1018–20 (cited in note 32) (reporting that indemnification is "generally thought to be widespread"); Jeffries, 84 Va L Rev at 50 (cited in note 35). But see Peter H. Schuck, *Suing the Government: Citizen Remedies for Official Wrongs* 85 (Yale 1983) (describing indemnification of state and local officials sued under Section 1983 as "neither certain nor universal"). It appears that no good empirical study has been done to date. Jeffries, 84 Va L Rev at 50 & n 16 (cited in note 35), for example, candidly acknowledges that "the best evidence" for his conclusion that indemnification is "pervasive[ ] and dependabl[e]" comes from his "personal experience." At law enforcement seminars at which he regularly lectures, Jeffries asks "whether the officers there assembled know personally of any case where an officer sued under § 1983 was not defended and indemnified by his or her agency," and "[t]he uniform answer is 'no.'" Id.

230 See, for example, *Harlow v Fitzgerald*, 457 US 800, 807–08 (1982) (discussing absolute immunity and noting that it extends to judges in their judicial capacity and legislators in their legislative capacity); *Imbler v Pachtman*, 424 US 409, 430 (1976) (recognizing absolute prosecutorial immunity when a prosecutor is acting as an advocate rather than an investigator or an administrator).

231 See *Harlow*, 457 US at 818.

232 See *Tower v Glover*, 467 US 914, 920 (1984) ("If an official was accorded immunity from tort actions at common law when the Civil Rights Act was enacted in 1871, the Court next considers whether § 1983's history or purposes nonetheless counsel against recognizing the same immunity in

cordingly, to determine the immunity to which an official is entitled, the Court looks first to the common law.[233] At least sometimes, however, the Court has appealed directly to policy concerns. It did so most notably in *Harlow v Fitzgerald*,[234] the case framing the currently applicable qualified immunity standard. Reasoning that the previously formulated rule had permitted too many harassing and vexatious lawsuits, *Harlow* adjusted the framework to afford officials enhanced protection.[235]

F. Doctrines of Judicial Federalism

Federal judicial jurisdiction frequently overlaps state judicial jurisdiction.[236] Questions thus arise about whether and when federal courts should await the outcome of state court processes or defer to their judgments. In the first instance, responsibility to answer these questions resides in Congress. Nonetheless, federal courts have long assumed what David Shapiro terms a "principled discretion"[237] in "fine tuning"[238] open-ended jurisdictional grants. Exercising its discretion, the Supreme Court has historically weighed interests of comity and federalism in limiting federal habeas corpus jurisdiction, in restricting federal judicial interference with pending state court proceedings, and in construing its own jurisdiction to review state court judgments.[239] Interestingly, however, these doctrines have not figured in the current Court's federalism agenda as sites of judicially driven, pro-federalism reforms.

With respect to habeas corpus, at least since 1996, the Court has taken a back seat to Congress. Federal habeas review of state convictions reached its zenith under the Warren Court. The Burger Court then implemented significant cutbacks, and the Rehnquist Court followed with more restrictions.[240] Of particular importance was *Teague v Lane*,[241] decided in 1989, which held that federal courts could not grant habeas relief based on "new constitutional rules of criminal procedure" the recognition and application of which were "not dictated by precedent existing at the time the defendant's conviction became final."[242] It is unclear how

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§ 1983 actions.").

233 See id.

234 457 US 800 (1982).

235 Id at 814–18.

236 See Richard H. Fallon, Jr., Daniel J. Meltzer, and David L. Shapiro, *Hart & Wechsler's The Federal Courts and the Federal System* 1187 (Foundation 4th ed 1996).

237 David L. Shapiro, *Jurisdiction and Discretion*, 60 NYU L Rev 543, 578 (1985).

238 Id at 574.

239 See Shapiro, *Federalism* at 1–3 (cited in note 39) (identifying doctrines sensitive to federalism concerns).

240 For a critical review of restrictions on habeas jurisdiction imposed between 1976 and 1995, see Barry Friedman, *Failed Enterprise: The Supreme Court's Habeas Reform*, 83 Cal L Rev 485 (1995).

241 489 US 288 (1989).

242 Id at 301. The rationale depended heavily on concerns of federalism:

much further the Court might have gone in restricting federal habeas review if left on its own.[243] Congress substantially mooted the question by enacting the Antiterrorism and Effective Death Penalty Act of 1996.[244] Among its myriad cutbacks on federal habeas jurisdiction, the 1996 Act precludes relief on any claim "adjudicated on the merits in State court proceedings unless the adjudication of the claim ... resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[245] In the wake of Congress's action, a host of interpretive questions confronts the Court, but there can be little felt need for Court-initiated reform to protect federalism.

Neither has the current Court deployed so-called abstention doctrines to expand protections of federalism beyond previous bounds. The prevailing regime generally took shape during the 1970s and 1980s, when the Burger and early Rehnquist Courts invoked the rubric "Our Federalism"[246] to justify doctrines forbidding federal injunctions against state judicial and administrative proceedings. The germinal case was *Younger v Harris*,[247] which on its facts merely applied the venerable maxim that equity will not enjoin a pending criminal prosecution.[248] But *Younger* marked only the beginning. In a series of decisions that seemed at the

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> The "costs imposed upon the State[s] by retroactive application of new rules of constitutional law on habeas corpus ... generally far outweigh the benefits of this application." ... [T]he application of new rules to cases on collateral review ... *continually* forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards. Furthermore, ... "[s]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands."

Id at 310 (internal citations omitted).

243 *Teague* raised many questions, especially about the definition of "new rules" not retroactively applicable on habeas. Perhaps more significantly, it opened new avenues for legal argument. In particular, some of its language suggested the controlling significance of what a reasonable judge, at the time of a criminal trial and appeal, would necessarily have understood the law to be. This strand in *Teague*'s analysis helped license the argument that federal habeas relief should issue only when a state court's decision of a constitutional issue was not "reasonable" in light of preexisting federal authority. Interestingly, the Court bypassed an invitation to move in this direction in *Wright v West*, 505 US 277 (1992). In *Wright*, Justice Thomas's plurality opinion sympathetically summarized the state's argument that federal habeas courts should defer to reasonable state court decisions of mixed questions of law and fact, id at 285–95, but ultimately dismissed the claim on the merits, id at 295. Significantly, Justices Kennedy and O'Connor, the two conservative justices who most frequently display a Burkean methodological disposition, both distanced themselves from the plurality's dicta and maintained that *Teague* established a nonretroactivity rule, not a more general principle of deference. See id at 297–306 (O'Connor concurring); id at 306–10 (Kennedy concurring).

244 Pub L No 104-132, 110 Stat 1214, codified in scattered sections of the United States Code.

245 28 USC § 2254(d)(1) (1994 & Supp 1998).

246 The label comes from *Younger v Harris*, 401 US 37, 44 (1971).

247 401 US 37 (1971).

248 Id at 53 ("[W]e hold that the *Dombrowski* decision should not be regarded as having upset the settled doctrines that have always confined very narrowly the availability of injunctive relief against state criminal prosecutions.").

time to have no end, the Court held that *Younger*'s policies of equity, comity, and federalism extended from criminal cases to civil enforcement proceedings brought by the state,[249] to suits between private parties involving the coercive enforcement of important state interests,[250] and to state administrative proceedings of a judicial nature.[251]

By the end of the 1980s, however, the Court appeared to have lost interest in significant further expansions. The trend-breaking decision came in 1989 in *New Orleans Public Service, Inc v Council of the City of New Orleans* ("*NOPSI*").[252] In an opinion by Justice Scalia, the Court ruled that a federal court should not abstain from deciding a suit for injunctive and declaratory relief due to the pendency of a state-initiated declaratory judgment action in state court.[253] A declaratory judgment suit, the Court held, was not the type of proceeding to which *Younger* applies, apparently because it did not seek a coercive enforcement of state law.[254] The Court also rebuffed abstention arguments in *Quackenbush v Allstate Insurance Co*,[255] which denied the applicability of *Younger* policies to a suit for damages.[256] *Quackenbush* reasoned that "federal courts have the power to dismiss or remand cases based on abstention principles only where the relief being sought is equitable or otherwise discretionary."[257]

A final doctrine of judicial federalism, the so-called adequate and independent state ground doctrine,[258] also merits notice. The Supreme

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249 See, for example, *Trainor v Hernandez*, 431 US 434, 444 (1977) (applying *Younger* to an action to recover welfare payments allegedly obtained by fraud); *Huffman v Pursue, Ltd*, 420 US 592, 594–95 (1975) (applying the *Younger* doctrine to a state civil action to "abate" the showing of obscene movies).

250 See, for example, *Pennzoil Co v Texaco, Inc*, 481 US 1, 10–11 (1987) (finding that *Younger* barred a federal injunction against enforcement of rights arising from a state court judgment while appeal of that judgment was pending in state court); *Juidice v Vail*, 430 US 327, 329–30 (1977) (applying *Younger* to civil contempt proceedings arising from private litigation).

251 See, for example, *Ohio Civil Rights Commission v Dayton Christian Schools, Inc*, 477 US 619, 621–22 (1986) (applying *Younger* to administrative proceedings before a state civil rights commission); *Middlesex County Ethics Committee v Garden State Bar Association*, 457 US 423, 425 (1982) (applying *Younger* to bar discipline proceedings).

252 491 US 350 (1989).

253 Id at 367–68.

254 See id at 368:

> [I]t has never been suggested that *Younger* requires abstention in deference to a state judicial proceeding reviewing legislative or executive action [and not involving a claim to a coercive enforcement remedy]. Such a broad abstention requirement would make a mockery of the rule that only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States.

255 517 US 706 (1996).

256 Id at 731.

257 Id. Curiously, the Court acknowledged that a federal court could "stay" or "postpone" adjudication of a damages action pending adjudication of a parallel action in state court, even though the practical effect—due to the application of claim and issue preclusion doctrines—would be virtually identical to that of a dismissal or remand. Id at 721.

258 See Fallon, Meltzer, and Shapiro, *Federal Courts* at 524–28 (cited in note 236) (introducing and explicating the doctrine).

Court has long held that it lacks jurisdiction to review a state court's decision concerning federal law when the state court's judgment is supported by an "adequate and independent" state ground[259]—a state law basis for decision that would mandate the same ultimate result, irrespective of how the Supreme Court might resolve any federal issue.[260] Although largely unchallenged as a matter of principle, the adequate and independent state ground doctrine is of course not self-applying. Difficult questions sometimes arise about whether a state court's decision of a state law issue is independent of, rather than controlled by, its understanding of federal law.[261] Prior to 1983, the Court's usual (though not invariable) practice in doubtful cases was to ask state courts to clarify the basis for their rulings.[262] In *Michigan v Long*,[263] the Burger Court adopted a new approach. In ambiguous cases, the Court now presumes that state grounds of decision are not independent of federal grounds.[264]

Long's effect is to increase the incidence of Supreme Court review and reversal of decisions by states' highest courts. Reversion to the prior practice would spare state courts the indignity of being reversed on federal issues that may not determine ultimate results.[265] Yet the Court's pro-federalism justices have shown no disposition to reconsider *Long*, even in the midst of a purported federalism revolution.[266]

III. EXPLAINING THE MIXED PICTURE

The lines of federalism cases discussed in Part II present a mixed picture that cries out for explanation. First, there are some doctrinal ar-

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259 *Michigan v Long*, 463 US 1032, 1037–38 (1983). See also *Fox Film Corp v Muller*, 296 US 207, 210 (1935).

260 *Fox Film*, 296 US at 210.

261 See Fallon, Meltzer, and Shapiro, *Federal Courts* at 528–64 (cited in note 236) (critically reviewing relevant Supreme Court cases).

262 See, for example, *Philadelphia Newspapers, Inc v Jerome*, 434 US 241, 241–42 (1978) (remanding to state court for clarification of the record); *Herb v Pitcairn*, 324 US, 117, 127–28 (1945) (remanding to state court for an explanation of the basis for its decision); *Minnesota v National Tea Co*, 309 US 551, 557 (1940) ("Intelligent exercise of our appellate powers compels us to ask for the elimination of the obscurities and ambiguities from the opinions" of state courts.). Other approaches sometimes taken by the Court—including dismissal and independent examination of state law by the Court itself—are catalogued in *Long*, 463 US at 1038–40.

263 463 US 1032 (1983).

264 Id at 1040–41.

265 In *Long*, the Court asserted that its approach displayed "respect for state courts," id at 1040, by "avoid[ing] the unsatisfactory and intrusive practice of requiring state courts to clarify their decisions to the satisfaction of [the] Court," id at 1041. But as Justice Jackson noted nearly forty years earlier, it is more "consistent with the respect due to the highest courts of states of the Union that they be asked rather than told what they have intended. If this imposes an unwelcome burden it should be mitigated by the knowledge that it is to protect their jurisdiction from unwitting interference." *Herb*, 324 US at 128 (1945).

266 See Fallon, Meltzer, and Shapiro, *Federal Courts* at 540–43 (cited in note 236) (tracing subsequent developments).

eas that seem, at least at first blush, to be surprisingly unaffected by the federalism revival or revolution that is burgeoning in other fields. Why, for example, has the Court bypassed opportunities to promote federalism through doctrines involving the dormant Commerce Clause and federal preemption? Why has it not insisted on greater deference to state courts under doctrines governing judicial federalism? Second, the Court has proceeded with relative caution in two of the lines of cases at the heart of its federalism agenda—those involving Congress's general regulatory powers and its powers directly to regulate the states under the Commerce Clause. Why? Third, the Court has assumed a more aggressive posture in expanding state sovereign immunity. Why has the Court done so, despite that doctrine's apparent crudeness as a tool for promoting constitutional federalism?

In response to these and related questions, this Part draws three main conclusions. First, the Court's most pro-federalism justices are also substantively conservative, and when substantive conservatism conflicts with federalism values, substantive conservatism frequently prevails. Second, even in areas central to the Court's federalism agenda, considerations associated with path dependence often exert constraining influence. Third, finding themselves blocked or divided in some areas, the Court's five most pro-federalism justices have made the most of other opportunities. At least in part, the Court's heavy reliance on sovereign immunity reflects contingency and opportunism within a multifaceted effort to protect state and local governments from damages liability.

A. Quiet Fronts in the Federalism Revival

As suggested in Part II, there are areas in which the Supreme Court has done notably little to advance federalism. In several, it is hard not to detect the influence of the pro-federalism justices' methodological, and especially their substantive, conservatism.[267]

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267 Studies that have drawn similar conclusions include Frank B. Cross, *Realism about Federalism*, 74 NYU L Rev 1304, 1306 (1999) (arguing that purportedly pro-federalism judges merely use the doctrine as a means of promoting their own ideological agendas); Wells, 47 Emory L J at 121–25 (cited in note 127) (observing that federalism doctrine is influenced by political views); Emerson H. Tiller, *Putting Politics into the Positive Theory of Federalism: A Comment on Bednar & Eskridge*, 68 S Cal L Rev 1493, 1496–1501 (1995) (suggesting that the political climate at a given time determines whether judges will support federal claims); William N. Eskridge, Jr. and John Ferejohn, *The Elastic Commerce Clause: A Political Theory of American Federalism*, 47 Vand L Rev 1355, 1396 (1994) (charting the relationship between ideologies and federalism in Commerce Clause cases); Michael Wells, *The Impact of Substantive Interests on the Law of Federal Courts*, 30 Wm & Mary L Rev 499, 499 (1989) ("[S]ubstantive factors exert a powerful and often unrecognized influence over the resolution of jurisdictional issues.").

1. Constitutional doctrines affecting state and local governments' regulatory authority.

As noted earlier, it would be a hopeless task to attempt to chart the influence of federalism values on the Supreme Court's efforts to define individual rights. Surely, however, it escapes no one's notice that the justices who purport to be most solicitous of democracy and federalism in some areas insist on expanding controversial definitions of constitutional rights in others.[268] Doctrinal prohibitions against affirmative action[269] and "regulatory" takings of private property[270]—which the Court's conservative justices support—limit the autonomy of state and local governments fully as much as would bars against various kinds of support for religion, which the same justices have tended to relax.[271] Nor can the Court's affirmative action and takings decisions be explained as dictated by the original understanding. Throughout the period surrounding the proposal and ratification of the Fourteenth Amendment, Congress enacted statutes specifically providing benefits for "colored" persons;[272] in light of these statutes, "those who profess fealty to the 'original understanding' . . . cannot categorically condemn color-based distribution of governmental benefits."[273] Similarly, the Court has departed from the original understanding in concluding that governmental regulation of permissible land uses can constitute a "taking" in the absence of any physical seizure.[274]

More interesting, in some ways, is the current conservative Court's failure to extend its federalism agenda to the dormant Commerce Clause. Considerations of stare decisis might make it difficult for the Court simply to renounce dormant Commerce Clause doctrine. Nonetheless, a Court minded to pare back restrictions as a means of empowering state and local governments could easily do so—for example, by establishing that only expressly discriminatory taxes and tariff-like devices are forbidden.[275] Among the most plausible explanations for the Court's fail-

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268 See, for example, Cross, 74 NYU L Rev at 1309–10 (cited in note 267) (citing similar evidence as establishing that the justices invoke federalism doctrines "selectively to promote policy objectives").

269 See, for example, *Richmond v J.A. Croson Co*, 488 US 469, 493, 507–08 (1989).

270 See, for example, *Dolan v City of Tigard*, 512 US 374, 396 (1994); *Lucas v South Carolina Coastal Council*, 505 US 1003, 1030–32 (1992).

271 See, for example, *Mitchell v Helms*, 530 US 793, 801 (2000) (upholding a program involving the loaning, on a nondiscriminatory basis, of secular educational materials to religious schools).

272 See Jed Rubenfeld, *Affirmative Action*, 107 Yale L J 427, 430–32 (1997).

273 Id at 431–32.

274 See J. Peter Byrne, *Regulatory Takings and "Judicial Supremacy"*, 51 Ala L Rev 949, 955 (2000) (noting that "regulatory takings doctrine is very vague and rests on no textual or historical support"); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum L Rev 782, 791 (1995) (stating that the original understanding of the Takings Clause was that it "only mandated compensation when the government physically took property").

275 See *West Lynn Creamery*, 512 US at 210 (Scalia concurring) (rejecting any extension of dormant Commerce Clause doctrine, but accepting "on stare decisis grounds" enforcement of prohibi-

ure to do so, despite the frequent dissenting protests of Justices Scalia and Thomas,[276] is that the substantive conservatism of Justices O'Connor and Kennedy draws them to view the Commerce Clause as embodying antiregulatory, procompetitive ideals.[277] Surely rival explanations rooted in stare decisis and path dependence cannot explain their joining of Justice Stevens's opinion in *West Lynn Creamery*, which can be read to signal an expansion of dormant Commerce Clause doctrine to threaten traditional state subsidies of domestic industries.[278]

2. Protection of federalism through interpretation of substantive regulatory statutes.

Whereas one might expect pro-federalism Justices to disfavor claims of federal preemption of state law, substantive conservatism may help to explain why the Court has so frequently upheld preemption claims in recent years. Because federal preemption eliminates state regulatory burdens, preemption rulings have a tendency—welcome to substantive conservatives—to minimize the regulatory requirements to which businesses are subject.[279] As noted above, the Court held that state law was preempted in every one of its seven preemption cases during the 1999 and

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tions "(1) against a state law that facially discriminates against interstate commerce, and (2) against a state law that is indistinguishable from a type of law previously held unconstitutional by this Court").

276 See, for example, *Camps Newfound/Owatonna, Inc v Harrison*, 520 US 564, 609–20 (1997) (Thomas, joined by Scalia, dissenting); *Bendix Autolite Corp v Midwesco Enterprises, Inc*, 486 US 888, 897–98 (1988) (Scalia concurring).

277 Both Justices O'Connor and Kennedy have joined important recent opinions expressing this philosophy. See, for example, *Camps Newfound/Owatonna*, 520 US at 575–88 (noting that the dormant Commerce Clause is meant to prevent economic protectionism); *West Lynn Creamery, Inc v Healy*, 512 US 186, 205–07 (1994) (internal quotation marks omitted), quoting *H.P. Hood & Sons, Inc v DuMond*, 336 US 525, 539 (1949):

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any.

278 See notes 210–15 and accompanying text. Another possible explanation, also difficult to square with *West Lynn Creamery*, would be that Justices O'Connor and Kennedy subscribe to a theory of federalism under which the states are permitted to benefit their citizens, but should not be able to impose the costs of their doing so on other states. For a general discussion, see Jenna Bednar and William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S Cal L Rev 1447 (1995) (seeking to explain the Court's decisions in federalism cases on this basis).

279 See Segal and Spaeth, *Supreme Court* at 305 (cited in note 92) (characterizing pro-business positions in cases challenging regulatory governmental regulations as "conservative"). See also Cross, 74 NYU L Rev at 1310 (cited in note 267) ("[C]onservative justices blithely strike down state legislative regulation of business in preemption cases, with scarcely a nod to the interests of federalism."); Hoke, 71 BU L Rev at 691 (cited in note 217) (noting that business interests are leaders in seeking rulings of preemption).

2000 Terms.[280] Four of the Court's five most conservative, generally pro-federalism justices—Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy—found federal preemption in each instance, and Justice Thomas agreed in every case but one.[281] In one of the cases, *Lorillard Tobacco Co v Reilly*,[282] the Court's five most conservative justices were unanimous in finding that the Federal Cigarette Labeling and Advertising Act preempted Massachusetts regulations restricting outdoor and point-of-sale advertising of cigarettes,[283] while the four more liberal justices all reached the opposite conclusion;[284] they read the federal statute as tolerating state regulation of the location, but not the content, of cigarette ads.[285]

3. Doctrines of judicial federalism.

Congress's initiative in enacting restrictive legislation easily explains the Court's failure to press a pro-federalism *judicial* agenda with respect to habeas corpus. For the time being, Congress has gone at least as far as the Court's majority would plausibly have wanted to go.[286]

The reasons that the pro-federalism justices have not pressed further with *Younger* abstention are harder to plumb. The 1996 decision in *Quackenbush*, which held *Younger* policies inapplicable to suits at law (rather than equity),[287] seems partly explainable on grounds involving methodological conservatism. Justices Scalia and Thomas, in particular, profess to be textualists in matters of statutory construction. As such, they might have found it awkward to read a statute conferring jurisdiction over actions at law as licensing a residual judicial discretion to abstain.[288] Suits for equitable remedies differ along this dimension, because long tradition characterizes equity jurisdiction as discretionary.[289]

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280 See note 222 and accompanying text.

281 The exception was *Geier v American Honda Motor Co*, 529 US 861, 863 (2000).

282 121 S Ct 2404 (2001).

283 Id at 2419.

284 Id at 2444–45 (Stevens dissenting in part).

285 Id at 2440–41 (Stevens dissenting in part). In the one other case to be decided by 5–4, *Geier v American Honda Motor Co*, three of the more liberal Justices (Stevens, Souter, and Ginsburg) dissented, joined by Justice Thomas. 529 US at 867. In the only other two decisions in which there were dissenting opinions, the dissents came from the Court's liberals—Justice Breyer, joined by Justice Stevens, in *Egelhoff v Egelhoff*, 121 S Ct 1322, 1325 (2001), and Justice Stevens, joined by Justice Ginsburg, in *Norfolk Southern Railway Co v Shanklin*, 529 US 344, 345 (2000).

286 See notes 243–45 and accompanying text.

287 See *Quackenbush*, 517 US at 718–23.

288 See id at 731–32 (Scalia concurring) (insisting that discretionary dismissal of suits at law should not be available under any circumstances).

289 For a general discussion, see Fallon, Meltzer, and Shapiro, *Federal Courts* at 1234–35 (cited in note 236) (discussing the equitable tradition and considering whether grants of jurisdiction over suits at law should also be interpreted as including a presumptive, albeit unstated, discretion to abstain).

In *NOPSI*,[290] which held that declaratory judgment actions by state and local governments do not trigger *Younger* abstention,[291] it may have mattered that the state sought to extend *Younger* into the domain of challenges to state economic regulation. Although substantive conservatives dislike interference with traditional state criminal processes,[292] they may feel differently about civil challenges to economic regulatory legislation in cases such as *NOPSI*.[293] Within the coding framework of the political scientists Segal and Spaeth, votes disfavoring "persons accused of crimes" count as liberal,[294] whereas pro-business rulings in economic cases count as conservative.[295]

It seems equally plausible, however, that the best explanation for *NOPSI*—and, more generally, for the end to the expansion of *Younger* doctrine—is an almost embarrassingly simple one: not even the most pro-federalism justices would wish to go to the furthest possible extent in minimizing federal interference with state judicial processes. If the Court had mandated abstention in *NOPSI*, it would virtually always be possible for state officials sued for declaratory or injunctive relief in federal court effectively to remove the dispute to state court by filing a declaratory judgment suit in a state forum.

Perhaps in contrast, the Court's approach to the final doctrine of judicial federalism discussed in Part II, the adequate and independent state ground doctrine, is virtually impossible to explain except by reference to the justices' substantively conservative commitments.[296] The paradigmatic fact situation covered by *Michigan v Long*[297] is one in which a state court has *upheld* a claim of constitutional right and cited both state and federal authorities in support.[298] (If a state court denies a constitutional claim, citing both state and federal authorities, Supreme Court jurisdiction indisputably exists.[299]) In cases fitting the paradigm, the conservative Supreme Court that decided *Long* authorized itself to presume jurisdiction to determine whether state courts have gone too far in recognizing federal constitutional rights, notably including rights to procedural protections in criminal cases.[300] Rejection of the *Long* presumption would

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290 491 US 350 (1989).

291 Id at 368.

292 See notes 92–97 and accompanying text.

293 See id.

294 Segal and Spaeth, *Supreme Court* at 107, 123 (cited in note 92).

295 See id at 305.

296 See Wells, 30 Wm & Mary L Rev at 523–27 (cited in note 267) (explaining *Long* on this basis).

297 463 US 1032 (1983).

298 Id at 1037–38.

299 Id at 1044. See Fallon, Meltzer, and Shapiro, *Federal Courts* at 525–26 (cited in note 236) (noting the clear availability of Supreme Court review when a state court finds governmental action "valid under both" state and federal constitutions).

300 By contrast, the Court has held the *Long* presumption that ambiguous state court decisions

heighten comity among state and federal courts and decrease the number of cases in which the Supreme Court reviews and reverses state court judgments. For the Court's *generally* pro-federalism majority, however, considerations of federalism are outweighed by interests in advancing a substantively conservative constitutional agenda.[301]

4. A partial summary.

Clearly, the Supreme Court has not pressed its federalism revolution along all possible paths. To draw the most banal conclusion, even the most pro-federalism justices care about values besides federalism. But the evidence also supports a more pointed inference: there are a number of doctrinal areas in which the Court is more substantively conservative than it is pro-federalism.[302]

B. Paths of Cautious Advance

At the core of the Court's federalism revival lie doctrines restricting Congress's power to regulate private conduct and limiting Congress's capacity to impose regulatory burdens on state and local governments. In these areas the Rehnquist Court unquestionably has been active. But it has also been cautious, at least when dealing with the scope of Congress's power under the Commerce Clause, largely because it is hemmed in by considerations involving path dependence.

1. The path of limiting Congress's general regulatory power.

By the time of the stirring of the Rehnquist Court's federalism revolution in the 1990s, the near fiasco of the Court's attempt to resist the New Deal, coupled with the law's subsequent development, made it al-

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rest on federal grounds to be *inapplicable* in several cases in which petitioners have sought review of state court judgments denying claims of federal right. See *Ylst v Nunnemaker*, 501 US 797, 806 (1991) (refusing to presume that a state court decision adverse to a federal claim rested on federal substantive rather than state procedural grounds); *Coleman v Thompson*, 501 US 722, 740 (1991) (same); *Capital Cities Media, Inc v Toole*, 466 US 378, 379 (1984) (same).

301 See Wells, 30 Wm & Mary L Rev at 523–27 (cited in note 267); Fallon, Meltzer, and Shapiro, *Federal Courts* at 542–43 (cited in note 236) (suggesting that "jurisdictional rules tend to move in the direction of allowing more intensive supervision of the law where the Supreme Court is in the process of changing the relevant substantive rules and wants to assure itself that the state courts are complying").

302 It is, of course, strongly arguable that judicial liberals' invocation of constitutional federalism tends to be comparably strategic or result-oriented. Ironically, in the eyes of some, "[t]he story of the modern state constitutionalism movement," under which state courts recognize broader state constitutional rights than exist under the federal Constitution, "begins with" an article by the liberal nationalist Justice William J. Brennan, Jr. Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 Hastings Con L Q 93, 93 (2001). As Friedman recognizes, Brennan's call for a new judicial federalism came after the Supreme Court of the United States had taken a decidedly conservative turn and had "suffered criticism for its programmatic, result-oriented cast." Id at 93–94.

most unthinkable for the Court to attempt straightforwardly to limit economic regulation by Congress.[303] Nor could the Court plausibly formulate a test forbidding Congress to act when its actual purpose involved noneconomic justice. Such a test would threaten the 1964 Civil Rights Act, which rested primarily on an ideal of equality, not economic policy.[304] In the legal and political culture of the late twentieth and early twenty-first centuries, it is hard to imagine a judicial decision that would trigger more outrage than one invalidating central provisions of the 1964 Civil Rights Act, a statute now deeply assimilated into American life and widely embraced as a triumph of simple justice.[305]

Against this background, the Court sent shudders through many liberal nationalists when its 1995 decision in *Lopez* invalidated a federal statute forbidding the possession of guns in school zones.[306] Yet the Court's opinion reflected the conservative justices' clear awareness that they were on a path not only proven treacherous by history, but also occluded by judicial and congressional practice and entrenched expectations.[307] *Lopez* neither overruled any precedents nor revised the established doctrinal formulations used to define Congress's commerce power.[308] Instead, the Court's 5–4 ruling rested on a congeries of factors[309] that gave the decision uncertain precedential status and seemingly made

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303 See, for example, *Lopez*, 514 US at 568–83 (Kennedy, joined by O'Connor, concurring):

> The history of the judicial struggle to interpret the Commerce Clause during the transition from the economic system the Founders knew to the single, national market still emergent in our own era counsels great restraint before the Court determines that the Clause is insufficient to support an exercise of national power.

304 See *Heart of Atlanta Motel, Inc v United States*, 379 US 241, 257 (1964) ("That Congress was legislating against moral wrongs in many of these areas rendered its enactments no less valid.").

305 See William N. Eskridge, Jr. and John Ferejohn, *Super-Statutes*, 50 Duke L J 1215, 1238 (2001) (characterizing the 1964 Civil Rights Act as a "super-statute" that has deep support in the public consciousness, such that prior narrowing Court decisions "triggered a public normative alarm that a bedrock statute was being undermined" and provoked restorative action by "[l]arge majorities in Congress"). The Court has manifested its reluctance to overturn precedents that have become widely assimilated into day-to-day life in cases as otherwise dissimilar as *Dickerson v United States*, 530 US 428, 443–44 (2000) (upholding *Miranda v Arizona*, 384 US 436 (1966)), and *Planned Parenthood v Casey*, 505 US 833, 846 (1992) (affirming the "essential holding" of *Roe v Wade*, 410 US 113 (1973)).

306 514 US at 551.

307 See id at 553–58 (reciting the history of judicial interpretation of the Commerce Clause). In a concurring opinion joined by Justice O'Connor, Justice Kennedy was even more explicit: "The history of the judicial struggle to interpret the Commerce Clause ... counsels great restraint before the Court determines that the Clause is insufficient to support an exercise of the national power. That history gives me some pause." Id at 568.

308 See id at 558–59 (citing authorities establishing the applicable tests of congressional power). See also id at 573–74 (Kennedy, joined by O'Connor, concurring) (expressly affirming that *Lopez* does not threaten the Court's decisions in *Heart of Atlanta Motel* and *Katzenbach v McClung* upholding the constitutionality of the 1964 Civil Rights Act).

309 See Deborah Jones Merritt, *Commerce!*, 94 Mich L Rev 674, 692 (1995) (observing that "[t]he Court's decision rests on the confluence of almost a dozen factors making the case virtually unique").

it easy to evade. In the wake of *Lopez*, it apparently would suffice for Congress to amend the statute to prevent the possession within a school zone of any gun that had traveled in interstate commerce[310]—a condition sure to be satisfied in nearly every case.

United States v Morrison,[311] which invalidates the federal Violence Against Women Act, undoubtedly goes further, but not much further, by establishing that only commercial activities are subject to federal regulation under the third prong of the *Lopez* test.[312] As *Morrison* demonstrates, this is by no means a trivial limitation, but neither is it one that appears to threaten the great bulk of federal regulatory legislation.[313]

Opportunities will remain for the Court to define limits and, in the process, to invite arguments that its successive rationales for decision imply yet further limits.[314] For at least the intermediate term, however, it ap-

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310 See *Lopez*, 514 US at 561–62 (noting that the challenged statute "contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce").

311 529 US 598 (2000).

312 Id at 610–11.

313 See Dorf, 31 Rutgers L J at 744 (cited in note 13) (noting that the Court "will continue to give Congress wide latitude").

314 Justice Thomas has urged that the Court comprehensively reexamine current doctrine based on "the original understanding" of the Commerce Clause. See, for example, *Morrison*, 529 US at 627 (Thomas concurring); *Printz*, 521 US at 937 (Thomas concurring) (advocating a "return to an interpretation better rooted in the Clause's original understanding"); *Lopez*, 514 US at 584–602 (Thomas concurring) (observing "that our case law has drifted far from the original understanding of the Commerce Clause"). Without meaning to prejudge what an originalist inquiry might yield, see Lawrence Lessig, *Translating Federalism:* United States v. Lopez, 1995 S Ct Rev 125, 125–27 (discussing the need to "translate" the understandings of the framing and ratifying generation in order to express their meaning in a dramatically changed context), I would insist—as I believe that even a majority of the pro-federalism justices would agree—that considerations of path dependence sharply circumscribe the Court's practical discretion. Justice Kennedy, joined by Justice O'Connor, has said so expressly:

> [T]he Court as an institution and the legal system as a whole have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point. *Stare decisis* operates with great force in counseling us not to call in question the essential principles now in place respecting the congressional power to regulate transactions of a commercial nature.

Lopez, 514 US at 574 (Kennedy, joined by O'Connor, concurring).

In a thoughtful essay, Donald Regan has argued that apart from regulating commerce in the narrow sense—the interstate movement of goods and their sales as part of the stream of commerce—congressional regulation under the Commerce Clause should be limited to matters of general national interest in which the states are separately incompetent. See Donald H. Regan, *How to Think about the Federal Commerce Power and Incidentally Rewrite* United States v. Lopez, 94 Mich L Rev 554, 583 (1995). According to Regan, this formulation reflects (at a suitably high level of generality) the original understanding of the commerce power within the constitutional design. See id at 555. He also believes that it captures both the scope and limits of appropriate national power under a structure designed to promote robust federalism. See id at 557–59.

Though attractive in principle, Regan's proposed formula would be a nightmare to implement—as is revealed, I think, in his effort to identify areas in which the states are and are not separately incompetent, including gun control legislation. See id at 611 (discussing the relevance of state incapacity to enact gun control legislation, due to the political influence of groups such as the National Rifle Association). Because state incompetence can be measured only by reference to substantively desir-

pears that any straitening will—and for reasons involving path dependence virtually must—stop short of calling into question the constitutionality of New Deal-type regulatory legislation and, of comparable salience, the 1964 Civil Rights Act.

With respect to the reach of Congress's power to regulate private conduct under Section 5 of the Fourteenth Amendment, considerations of path dependence do not leave the Court similarly circumscribed. But neither, even prior to the Court's federalism revival, was this a path that offered much potential for significant cutbacks on federal authority. As long ago as the *Civil Rights Cases*,[315] decided in 1883, the Court established that the Fourteenth Amendment's prohibitions and Congress's authority to "enforce" them extend only to state (and not private) action.[316]

It would be a mistake to ascribe no significance to the Court's recent decisions holding that Congress cannot regulate private conduct under Section 5. The precedents that gave a narrow interpretation of Congress's power are themselves controversial;[317] a Court dominated by liberal nationalists might have moved toward a more expansive conception of Congress's mandate. Even so, the Court's recent decisions reflect no dramatic advance toward a more robust constitutional federalism.

2. The path of limiting Congress's power to regulate state and local governments.

Considerations of path dependence have also made it difficult for the Court to establish broadly effective limits on Congress's capacity to regulate state and local governments under Article I. In a 1968 decision, *Maryland v Wirtz*,[318] the Court held that Congress could regulate the wages and hours of state and local government employees on the same

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able outcomes that the states would be unable to attain in the absence of federal legislation, the requisite judgments would be almost transparently political. Regan may have identified a standard that conscientious legislators should view as defining the proper limit of their Commerce Clause powers, but the limit is not sufficiently manageable for a court to enforce it directly. For proposals that similarly call for heightened judicial scrutiny of Congress's deliberative processes in enacting legislation under the Commerce Clause, see Jackson, 111 Harv L Rev at 2245–46 (cited in note 5); Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 Tex L Rev 795, 823–26 (1996).

315 109 US 3 (1883).

316 Id at 11. Cases presenting the question whether "state action" or solely private conduct has occurred, and thus whether constitutional constraints apply, are accordingly another predictable battleground between conservative pro-federalism justices and more liberal justices eager to extend national authority. For example, in the Court's sole "state action" case during the 2000 Term, *Brentwood Academy v Tennessee Secondary School Athletic Association*, 121 S Ct 924 (2001), four of the characteristically conservative, pro-federalism justices found no state action to be present, id at 935, although Justice O'Connor joined the other four justices in reaching a contrary conclusion, id at 927.

317 See, for example, *United States v Guest*, 383 US 745, 782–85 (1966) (Brennan concurring in part and dissenting in part) (arguing that the *Civil Rights Cases* were wrongly decided and that Congress had authority under Section 5 to regulate private conduct).

318 392 US 183 (1968).

basis that it regulated their private-sector counterparts.[319] Less than a decade later, by a vote of 5–4, the Court reversed itself. In *National League of Cities v Usery*,[320] it ruled that the Tenth Amendment forbids Congress "to directly displace the States' freedom to structure integral operations in areas of traditional government functions."[321] But the *National League of Cities* test proved difficult if not impossible to administer,[322] and ten years later the Court reversed itself again. In *Garcia v San Antonio Metropolitan Transit Authority*,[323] the Court overruled *National League of Cities* and announced that the principal if not exclusive protections of state and local governmental integrity must come from the political process.[324]

In *Garcia*, then-Justice Rehnquist and Justice O'Connor both wrote dissenting opinions forecasting a day when *Garcia* itself would be overruled and the regime of *National League of Cities* restored.[325] But a move to achieve that result—especially if by a precarious 5–4 majority—would risk making the Court look foolishly inconsistent. It also would invite derisive speculations about the Court's proneness to flip-flop with turns of the political tide and raise questions about the justices' capacity to function as relatively apolitical umpires of federal-state relations.[326]

Rather than doubling back along the precedential path, overruling *Garcia*, and returning to *National League of Cities*, the Court has so far elected to take a different, much more modest route toward the protection of federalism values. In *New York*, it laid down the clear but limited rule that Congress may not enact legislation under Article I that singles out state legislative bodies and compels them to legislate.[327] In *Printz*, the Court extended *New York*'s noncommandeering principle to apply to state and local executive officials.[328]

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319 Id at 195–99.

320 426 US 833 (1976).

321 Id at 852.

322 See *Garcia*, 469 US at 538–47.

323 469 US 528 (1985).

324 Id at 551–54.

325 Id at 579–80 (Rehnquist dissenting), 589 (O'Connor dissenting).

326 See Meltzer, 75 Notre Dame L Rev at 1050 (cited in note 32):

> [E]ven if five of today's Justices would not, as a matter of first impression, have joined the *Garcia* opinion, they might hesitate to overrule it in a case like *Alden*. For to have done so would have meant that in each of the last four decades... the Court would have shifted its position on whether Congress may subject state and local governments to fair labor standards. Imagine this citation: *Maryland v Wirtz*, 392 U.S. 183 (1968), overruled by *National League of Cities v Usery*, 426 U.S. 833 (1976), overruled by *Garcia v San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), overruled by *Alden v Maine*, 119 S. Ct. 2240 (1999).

327 505 US at 149.

328 521 US at 935 ("The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.").

The rules of *New York* and *Printz* are important, but also narrow.[329] As noted above, they protect state and local governments only against peculiar forms of federal legislation that single out governmental entities and expressly command them to enact legislation or enforce federal law.[330] More recent decisions have expressly acknowledged Congress's power to regulate state and local governments under the Commerce Clause, even while denying that Congress can strip the states of sovereign immunity and subject them to private suits for money damages.[331]

What is more, decisions limiting Congress's power under the Commerce Clause operate as a bar only to federal legislation framed as an unconditioned command. *New York* and *Printz* do not affect congressional authority under the Spending Clause, as upheld in *South Dakota v Dole*,[332] to condition federal financial grants on the states' performance of regulatory functions, including the enactment of legislation.[333] In the not too distant future, the Court will surely be called upon to reconsider *Dole*. When it does so, the outcome will be difficult to predict,[334] though I would again expect considerations of path dependence to exert a large influence.[335] For now, my argument is not that the Court has no room for

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329 See, for example, Evan H. Caminker, Printz, *State Sovereignty, and the Limits of Formalism*, 1997 S Ct Rev 199, 199–200 (noting that some would characterize *Printz*'s "immediate practical impact as relatively minor"); Jesse H. Choper, *On the Difference in Importance between Supreme Court Doctrine and Actual Consequences: A Review of the Supreme Court's 1996–1997 Term*, 19 Cardozo L Rev 2259, 2269 (1998) (referring to *Printz* as "somewhat ambiguous in scope" and "of very limited consequence at all levels of impact").

330 See notes 144–60 and accompanying text.

331 See *Kimel v Florida Board of Regents*, 528 US 62, 78–79, 91 (2000) (acknowledging congressional authority to enact the Age Discrimination in Employment Act, and to make it binding on states, but holding that the states enjoy sovereign immunity from unconsented private suits for damages under the Act); *Alden v Maine*, 527 US 706, 755 (1999).

332 483 US 203 (1987).

333 Id at 211–12.

334 Because Spending Clause doctrine permits Congress to achieve results through the power of the purse that it could not effect by direct regulation under the Commerce Clause, commentators regard it as anomalous. See, for example, Lynn A. Baker, *Conditional Spending after* Lopez, 95 Colum L Rev 1911, 1914 (1995) (noting that "prevailing Spending Clause doctrine appears to vitiate much of the import of *Lopez*"); Thomas R. McCoy and Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 S Ct Rev 85, 86–87. But two of the justices most eager to protect constitutional federalism, Chief Justice Rehnquist and Justice Scalia, have maintained that when the government acts as a subsidizer or a purchaser, rather than a regulator, only the loosest constitutional restrictions apply. See, for example, *Legal Services Corp v Velazquez*, 531 US 533, 553–54 (2001) (Scalia, joined by Rehnquist, O'Connor, and Thomas, dissenting) (arguing that a selective funding program is not coercive and therefore does not "abridge" the freedom of speech); *National Endowment for the Arts v Finley*, 524 US 569, 599 (1998) (Scalia, joined by Thomas, concurring) ("I regard the distinction between 'abridging' speech and funding it as a fundamental divide, on this side of which the First Amendment is inapplicable."). See also Young, 1999 S Ct Rev at 35, 62 (cited in note 17) (noting Chief Justice Rehnquist's resistance to the unconstitutional conditions doctrine).

335 Apart from the precedential force of the decision itself, the Court attempted to rationalize the distinction between coercive regulation and conditions on the award of gratuities in *College Savings Bank*, 527 US at 686–87. The Court would not need to overrule *South Dakota v Dole* expressly in order to limit Congress's spending clause authority significantly. In *Dole* itself, the Court observed

movement, but only that, for reasons involving path dependence, it has tended to move and is likely to continue to move slowly, even cautiously.

With respect to Congress's power to regulate the states under Section 5 of the Fourteenth Amendment, *City of Boerne* clearly confines Congress to "remedy[ing] or prevent[ing] unconstitutional actions" as defined by the courts.[336] This formulation importantly crimps congressional power. In Professor Tribe's words, it "saddle[s]" Section 5 legislation for the first time "with something between intermediate and strict scrutiny, effectuating what can only be understood as a substantial, albeit not conclusive, presumption of unconstitutionality."[337] Nonetheless, the Court's concern with path dependence is plainly signaled by its failure to overrule any previous cases upholding federal legislation to enforce the Civil War Amendments. In particular, the Court has distinguished and affirmed decisions upholding voting rights legislation through which Congress has forbidden practices—such as the use of literacy tests—likely to be used "to deny and abridge voting rights on racial grounds."[338]

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that "our cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if unrelated 'to the federal interest in particular national projects or programs.'" 483 US at 207–08, quoting *Massachusetts v United States*, 435 US 444, 461 (1978). It also stated that some financial incentives might "pass the point at which 'pressure turns into compulsion.'" *Dole*, 483 US at 211, quoting *Steward Machine Co v Davis*, 301 US 548, 590 (1937). Although the Court might attempt to enforce these or similar restrictions, significant obstacles would confront it. For analysis of the difficulties involved in identifying impermissible "coercion," see Sullivan, 106 Harv L Rev at 27 (cited in note 119). It would be equally difficult, as Professor Meltzer has observed, to enforce a distinction, proposed by Baker, 95 Colum L Rev at 1916 (cited in note 334), and McCoy and Friedman, 1988 S Ct Rev at 103 (cited in note 334),

> between those conditions specifying the purpose for which funds will be spent (which are valid) and those seeking to purchase compliance with a regulatory objective (which are invalid insofar as they regulate the states in a fashion that Congress could not undertake directly). Does a federal requirement that grants to a state university for biological research not be used to subsidize action infringing valid patents specify how funds shall be spent or purchase a regulatory objective? Can the grants also be conditioned on the university's not infringing the copyright laws in its preparation of course materials for students—on the theory (well known by university fundraisers) that money raised for one activity (biological research), by freeing up funds in the general budget, may indirectly support other activities (operation of the copy center)?

Daniel J. Meltzer, *The* Seminole *Decision and State Sovereign Immunity*, 1996 S Ct Rev 1, 54 n 250 (internal citations omitted).

336 521 US at 508.

337 Tribe, *American Constitutional Law* § 5-16 at 959 (cited in note 214).

338 *City of Boerne*, 521 US at 533, quoting *South Carolina v Katzenbach*, 383 US 301, 355 (1966) (Black concurring and dissenting). See *Board of Trustees of University of Alabama v Garrett*, 121 S Ct 955, 967 (2001) (distinguishing and approving *South Carolina*, which upheld the remedial scheme established by the Voting Rights Act of 1965). The Court's view of the constitutionality of key provisions of the current Voting Rights Act, 42 USC §§ 1971, 1973a–1973p, 1973aa–1973bb-1 (1994), which includes provisions going further than those previously upheld, is impossible to predict with confidence. See Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 Harv L Rev 1663, 1736–37 (2001) (noting the looming issue of the constitutionality of provisions of the Voting Rights Act and proposing an analysis to meet possible objections); Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After* Flores, 39 Wm & Mary L Rev 725, 731–41 (1998) (arguing that the "two key provisions of the modern Voting Rights Act" should both survive applica-

C. The Path of Sovereign Immunity Doctrine

The Supreme Court's expansive sovereign immunity decisions resist simple explanation. As I have suggested, sovereign immunity doctrine would appear to be a crude and largely ineffectual device for protecting federalism. To recapitulate briefly, sovereign immunity generally does not bar properly pleaded suits against state officials, either for injunctive or for damages relief. Nor does it confer any protection on local governments. Nor, finally, does it safeguard even the states against suits by the United States. As commentators have emphasized, the Court's sovereign immunity decisions thus create an incentive for Congress to police state compliance with federal law through federal oversight and federal lawsuits—hardly a victory for federalism, if it were to occur.[339] Why, then, does the Court devote so much energy to refining and incrementally expanding a doctrine that promises the states so little ultimate practical protection and gives local governments none at all?

1. Why sovereign immunity?

As noted above, the Eleventh Amendment expressly bars only suits in federal court against a state by "Citizens of another State," not suits by a state's own citizens to enforce federal law. If anything, the constitutional text thus embarrasses the Court's enterprise, and the Court has not contended otherwise.[340] Nor can the Court's sovereign immunity decisions be explained as dictated by the original understanding. The history is complex and controverted. In *Seminole Tribe*, the Court declined to rely on history alone, but instead emphasized that relevant historical data are consonant with the understanding of sovereign immunity reflected in past cases, most notably *Hans*.[341] In *Alden*, the Court rested more heavily on evidence of historical understandings,[342] but its analysis was plausibly controverted by Justice Souter's dissent on nearly every salient point.[343]

Just as history will not bear the full weight of the Court's sovereign immunity rulings, neither will stare decisis. The Court sometimes suggests that *Hans* must be accepted as a fixed point and that its decisions reflect the careful application of *Hans*'s logic.[344] But this suggestion lacks credi-

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tion of the "congruence" and "proportionality" test of *City of Boerne*).

339 See Young, 1999 S Ct Rev at 62–63 (cited in note 17) (observing that federal suits against state governments "would surely be both an irritant in federal-state relations and a step backward for state independence").

340 See, for example, *Seminole Tribe*, 517 US at 69 ("The dissent's lengthy analysis of the text of the Eleventh Amendment is directed at a straw man.").

341 Id at 68–70, discussing *Hans*, 134 US 1.

342 See *Alden*, 527 US at 741–45.

343 See id at 762–94 (Souter dissenting).

344 See, for example, *Kimel v Florida Board of Regents*, 528 US 62, 79–80 (2000) (protesting that "the present dissenters' refusal to accept the validity and natural import of decisions like *Hans*, ren-

bility. *Hans* could be read narrowly—for example, as recognizing that the states enjoy a common law sovereign immunity, not directly displaced by Article III, but nonetheless capable of being stripped by Congress.[345] Moreover, the Court's recent, harsh practice with respect to decisions other than *Hans* belies rationales rooted in stare decisis. Over the past five years, the Court has expressly overruled at least two cases that had limited state sovereign immunity.[346]

Any credible explanation of the Court's drive to expand sovereign immunity doctrine must clearly involve constitutional federalism. As I have suggested, however, the bare invocation of federalism seems frustratingly inadequate. Without more, it cannot explain why the Court has pressed sovereign immunity doctrine as far as it has, especially in comparison with other doctrines that would seem better adapted to advancing federalism values.

The best explanation includes two parts. The first involves path dependence. A conservative Court wishes to expand protections for constitutional federalism. Significant obstacles impede aggressive steps to protect federalism along other paths, even though the Court has by no means been thwarted entirely. By contrast, the Court has learned how to deploy sovereign immunity to symbolize and protect federalism.[347] Professor Fried has described the Court's reliance on sovereign immunity to promote federalism as akin to "using a screwdriver to pound nails."[348] If so, I would suggest that the Court's majority regards itself as practiced and adept in the use of its screwdriver and as prone to mishap when it wields a hammer.[349]

A second partial explanation of the Court's sovereign immunity decisions involves the conservative justices' characteristic (although by no means universal) hostility to suits for money damages in federal court,[350]

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dered over a full century ago by this Court, makes it difficult to engage in additional meaningful debate on the place of state sovereign immunity in the Constitution"); *Seminole Tribe*, 517 US at 68 (asserting that consideration of Congress's capacity to abrogate the states' immunity from suit "must proceed with fidelity to [the] century-old doctrine" originating in *Hans*).

345 See *Seminole Tribe*, 517 US at 117 (Souter dissenting). But see Meltzer, 1996 S Ct Rev at 25–27 (cited in note 335) (emphasizing language in *Hans* that is difficult to reconcile with the theory that it recognized only a common law immunity subject to abrogation by Congress).

346 See *College Savings Bank*, 527 US at 680, overruling *Parden v Terminal Railway of the Alabama State Docks Department*, 377 US 184 (1964); *Seminole Tribe*, 517 US at 66, overruling *Pennsylvania v Union Gas Co*, 491 US 1 (1989).

347 One of the characteristic features giving rise to path dependence is a familiar human tendency to "over-exploit 'good' actions that pay off well early" and, over time, to become "lock[ed]-in" to a suboptimal pattern of behavior. Arthur, *Increasing Returns* at 152 (cited in note 23).

348 Fried, *Supreme Court Folly*, NY Times at A17 (cited in note 32).

349 See Meltzer, 75 Notre Dame L Rev at 1052 (cited in note 32) ("Lacking a robust theory of what limits (or what judicially enforceable limits) the Constitution places on congressional regulatory authority, the Court directs its primary effort to limiting the scope of the remedies that Congress may deploy.").

350 See Vicki C. Jackson, *Seductions of Coherence, State Sovereign Immunity, and the Denation-*

especially against state and local governments and their officials. Although sovereign immunity does not preclude most properly pleaded complaints against state officers or against local governments and their officials, the Court has developed a number of subconstitutional doctrines that pose considerable barriers.[351] In particular, the Court has made it extremely difficult to establish local governments' causal responsibility for their officials' tortious misconduct in suits under Section 1983.[352]

When the Court's sovereign immunity cases are viewed in conjunction with its Section 1983 cases involving municipal liability, it becomes apparent that the pro-federalism majority is pursuing a multi-front battle against suits for damages that disrupt state and local governments' budgets and planning processes: the states are protected by sovereign immunity, while local governments achieve considerable (although not total) protection from the Court's construal of statutory standards for governmental liability.[353] If this is the pro-federalism justices' general strategy, then the risk of damages suits against the states by the federal government—cited by critics as showing that the Court's sovereign immunity rulings may do more to undermine than to advance federalism[354]—can also be seen in a new light. Precluded by considerations of path dependence from holding directly that local governments possess sovereign immunity,[355] the Court has abandoned any aspiration to impose a single, elegant solution on the "problem" of litigious disruptions of governmental budgetary and planning processes. Its approach is determinedly case-by-case.

Moreover, insofar as indemnification policies may make state and local governments the real parties in interest in damages actions against their officials,[356] one can only speculate that the conservative, pro-federalism justices are reasonably satisfied with the balance struck by official immunity doctrines.[357] Although suable in principle for any violation of federal law, state and local officials generally enjoy a personal (as opposed to "sovereign") immunity from damages liability unless they vio-

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alization of Federal Law, 31 Rutgers L J 691, 706–18 (2000) (discussing the conservative justices' hostility to litigation generally, but especially to litigation against the government).

351 For a richly provocative probing of the connections, see Jeffries, 84 Va L Rev 47 (cited in note 35).

352 See note 226 and accompanying text.

353 See id.

354 See note 339 and accompanying text.

355 See notes 129–30 and accompanying text.

356 See note 229 and accompanying text.

357 See Carlos Manuel Vazquez, *Eleventh Amendment Schizophrenia*, 75 Notre Dame L Rev 859, 902 (2000) (noting that "the Court appears to conceive of the doctrine of qualified immunity as designed to produce the optimal amount of deterrence of state violations of federal laws"); Jeffries, 84 Va L Rev at 53 (cited in note 35) (asserting that "the law of governmental liability for constitutional torts aligns on a requirement of fault" and claiming that "a constitutional tort regime based on fault is wise policy").

late "clearly established" federal rights.[358] Under this standard, officials (and their indemnifiers) cannot be liable for reasonable mistakes, but only for clear transgressions of previously specified rights.[359]

Liberal critics have argued that the existing regime of liability and immunity rules in officer suits, when coupled with doctrines that make it difficult to prevail in direct suits against governmental bodies, fails to provide fair compensation to victims, an adequate deterrent to official misconduct, or a sufficient incentive to state and local governments to train and supervise their officials.[360] But this is where the line is effectively drawn by a series of interlocking doctrines developed by a conservative Court. Federal law can be enforced through suits for injunctions against ongoing violations of legal rights;[361] deprivations of clearly established rights are generally actionable in suits for damages against government officials;[362] but state and local governments generally are not liable, even through suits against their officers, for reasonable mistakes that resulted in rights violations.[363]

The crucial point should not be lost in the details: sovereign immunity does not stand alone in protecting governmental treasuries from suits for damages. Whether approved or disapproved, the Court's sovereign immunity decisions are part of a broader agenda for the protection of a conservative vision of constitutional federalism, and that agenda has a statutory as well as a constitutional component.

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358 See notes 230–31 and accompanying text.

359 Within the sample examined by one recent study, defendants prevailed on qualified immunity motions in roughly 80 percent of cases in which the defense was asserted. See Diana Hassel, *Living a Lie: The Cost of Qualified Immunity*, 64 Mo L Rev 123, 145 n 6 (1999).

360 For critical discussions, see Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 Ga L Rev 845 (2001); Jack M. Beerman, *Municipal Liability for Constitutional Torts*, 48 DePaul L Rev 627 (1999); Mark R. Brown, *The Demise of Constitutional Prospectivity: New Life for* Owen*?*, 79 Iowa L Rev 273 (1994); Laura Oren, *Immunity and Accountability in Civil Rights Law: Who Should Pay?*, 50 U Pitt L Rev 935 (1989); Schuck, *Suing the Government* (cited in note 229).

361 See *Idaho v Coeur d'Alene Tribe of Idaho*, 521 US 261, 294 (1997) (O'Connor, joined by Scalia and Thomas, concurring) (arguing that a *Young* suit against a state officer is available, because not barred by the Eleventh Amendment, "where a plaintiff alleges an *ongoing* violation of *federal* law, and where the relief sought is *prospective* rather than *retrospective*").

362 See *Harlow*, 457 at 815 (recognizing immunity of officials who have not violated clearly established rights).

363 For a general defense premised on the notion that governmental liability should be fault-based, see Jeffries, 84 Va L Rev at 53 (cited in note 35). For the argument that the doctrinal structure created by the conservative pro-federalism justices is ironic, if not self-defeating, because it encourages suits for injunctions that may be more invasive than the suits for damages that are effectively barred, see Pamela S. Karlan, *The Irony of Immunity: The Eleventh Amendment, Irreparable Injury, and Section 1983*, 53 Stan L Rev 1311, 1314 (2001).

2. Exceptions that prove the rule.

To the thesis that I have just developed, one important qualification needs to be added—but it is a qualification that is entirely consistent with my claims that the Court's protection of state and local treasuries has a patchwork quality and that the Court's federalism agenda often bends to considerations of substantive conservatism.

Although *Alden* holds that sovereign immunity generally protects the states from private suits for damages even in state courts,[364] the Court appears to recognize two exceptions. First, the Court unanimously insisted in a 1994 decision, *Reich v Collins*,[365] that states that promise refund remedies for coercively collected taxes are constitutionally obliged to provide such remedies, "the sovereign immunity States traditionally enjoy in their own courts notwithstanding."[366] Second, the Court has suggested that state sovereign immunity must yield in suits asserting takings claims.[367]

It hardly seems coincidental that these exceptions to generally applicable sovereign immunity doctrine both involve "old property" rights generally looked on with more solicitude by conservatives than by liberals.[368] Even in the core of sovereign immunity doctrine, the most pro-federalism justices' substantive conservatism appears to exert a shaping influence.

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364 527 US at 712.

365 513 US 106 (1994).

366 Id at 110. Further complicating the picture are cases appearing to mandate that decisions establishing the invalidity of state taxes must be given full retroactive effect, thereby triggering an obligation to make refund payments from state treasuries, even when the decisions of invalidity are novel or surprising. See, for example, *Harper v Virginia Department of Taxation*, 509 US 86, 97 (1993); *James B. Beam Distilling Co v Georgia*, 501 US 529, 544 (1991); *American Trucking Association v Smith*, 496 US 167, 188 (1990). In *Harper*, 509 US at 97, the only one of these cases to produce a majority opinion, Justice Thomas wrote for the Court that "[w]hen this Court applies a rule of federal law to the parties before it, that rule ... must be given full retroactive effect in all cases still open on direct review." In a dissenting opinion, Justice O'Connor, joined by Chief Justice Rehnquist, argued that the Court should apply the "traditional equitable balancing test" to determine whether retroactivity was appropriate. Id at 117. Applying such a test, she would have weighed the effect on states forced to refund huge sums. Id at 129–30. Justice Kennedy, concurring in part and dissenting in part, expressed views similar to Justice O'Connor's. See id at 110–11. Concurring, Justice Scalia sharply attacked the practice of making judicial opinions prospective only, terming this practice "the handmaid of judicial activism" and "quite incompatible with the judicial power." Id at 105–06.

367 See *First English Evangelical Lutheran Church of Glendale v Los Angeles County*, 482 US 304, 307, 314–16 (1987) (affirming that the Constitution mandates just compensation for takings of private property for public use). But see Richard H. Seamons, *The Asymmetry of State Sovereign Immunity*, 76 Wash L Rev 1067, 1077 (2001) (arguing that *First English* "only hints, without firmly deciding ... that the just-compensation principle overrides the sovereign immunity principle").

368 See Ann Woolhandler, *Old Property, New Property, and Sovereign Immunity*, 75 Notre Dame L Rev 919, 932–33, 942 (2000) (seeking to rationalize the distinction partly by reference to nineteenth-century judicial history and partly on the ground that new property claims are more likely to subject states to large and unpredictable financial dislocations).

IV. PERSPECTIVES

So far I have sought to explain the nature and limits of the Supreme Court's federalism revival by identifying considerations that motivate and constrain the most pro-federalism justices. In this Part, I seek further perspective on the Court's recent decisions by examining their methodological assumptions and their implicit conception of the Supreme Court's role.

A. Methodological Considerations and Constraints

In implementing its federalism revival, the Supreme Court has not pursued a single methodology in either constitutional or statutory cases. For example, in construing Section 5 of the Fourteenth Amendment in *City of Boerne*, the Court rested heavily on an originalist examination of language and legislative history.[369] By contrast, in cases involving the scope of Congress's power to regulate private conduct under the Commerce Clause, only Justice Thomas has called for the Court to pursue originalist inquiries.[370]

In limiting Congress's powers to regulate state and local governments directly in *New York* and *Printz*, the Court depended on inferences from the Constitution's structure[371] not tied tightly to particular constitutional language.[372] The opinions discussed the original constitutional understanding,[373] but in *Printz* Justice Scalia acknowledged that the most directly relevant historical evidence was "not conclusive."[374] Although he found support for the Court's ruling in a number of sources, he termed judicial precedent "most conclusive[ ] in the present litigation."[375]

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369 See 521 US at 520–24. See also Evan H. Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 Stan L Rev 1127, 1158–65 (2001) (noting that "the Court relied heavily on an originalist methodology," but arguing that the majority misapprehended the relevant history).

370 See, for example, *Morrison*, 529 US at 627 (Thomas concurring); *Printz v United States*, 521 US at 937 (Thomas concurring); *Lopez*, 514 US at 584–602 (Thomas concurring).

371 See *Printz*, 521 US at 918–25.

372 According to *Printz*, the states' retention of a residual sovereignty "is reflected throughout the Constitution's text," including its enumeration of only limited congressional powers. Id at 919. See also id at 923 n 13 ("Our system of dual sovereignty is reflected in numerous constitutional provisions, . . . and not only those, like the Tenth Amendment, that speak to the point explicitly.").

373 See *Printz*, 521 US at 905–23; *New York*, 505 US at 163–66.

374 521 US at 918. Prior to *Printz*, several commentators had concluded that congressional reliance on state officials to enforce federal law accorded with the Constitution's original understanding. See, for example, Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 Colum L Rev 1001, 1042–50 (1995); Powell, 79 Va L Rev at 661–64 (cited in note 52). For a critique of *Printz* and especially of the majority's treatment of arguments involving the original understanding, see Gene R. Nichol, *Justice Scalia and the* Printz *Case: The Trials of an Occasional Originalist*, 70 U Colo L Rev 953 (1999).

375 *Printz*, 521 US at 925.

An interesting disparity thus arises. As Professor Tribe has noted, in cases involving substantive rights, the conservative justices commonly scorn arguments based on inferences from the Constitution's structure and otherwise supported principally by judicial precedent.[376] By contrast, in federalism cases, the conservatives themselves rely on structural inferences supported by judicial precedent, with other kinds of argument—including those based on the Constitution's plain language—sometimes relegated to subordinate roles.[377]

The Court's sovereign immunity cases betray methodological inconsistencies even among themselves. In *Seminole Tribe*, Chief Justice Rehnquist framed the Court's holding as based on the Eleventh Amendment[378]—even though he recognized that the Amendment's plain text would not support the result.[379] Instead the Chief Justice relied on the view of the original understanding adopted in *Hans* and, in response to challenges to that view, on stare decisis.[380] With minimal engagement, he derided the principal dissenting opinion for "disregard[ing] our case law in favor of a theory [of the original understanding] cobbled together from law review articles and its own version of historical events."[381] In *Alden*, the Court sought a new foundation for its sovereign immunity jurisprudence, not in the Eleventh Amendment but in the Tenth Amendment and the original understanding of the Constitution's structure.[382]

Overall, a defender of the Court's approach might assert that the five-justice, pro-federalism majority has followed the original understanding except when considerations of path dependence make that course infeasible: only in defining Congress's power under the Commerce Clause has the Court not tried to reach results consistent with originalist principles. But this explanation is too neat. Among other things, it cannot account for why the Court has so regularly fractured along the same 5–4 line, even when the dissenting justices, as much as the majority, have engaged in evidently sincere originalist argumentation.[383]

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376 See Laurence H. Tribe, Saenz *Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—Or Reveal the Structure of the Present?*, 113 Harv L Rev 110, 139–40, 158–72 (1999).

377 See id at 139–40.

378 See *Seminole Tribe*, 517 US at 76.

379 Id at 69.

380 Id at 68–70. This response was not unprecedented. The plurality opinion in *Welch v Texas Department of Highways and Transportation*, 483 US 468, 479, 483–84 (1987), also described historical evidence on the meaning of the Eleventh Amendment as "ambiguous" and defended *Hans* largely on the basis of stare decisis. Justice Scalia took a similar approach in his opinion concurring in part and dissenting in part in *Pennsylvania v Union Gas Co*, 491 US 1, 31–32, 34–35 (1989).

381 *Seminole Tribe*, 517 US at 68.

382 See *Alden*, 527 US at 712–13 (terming references to Eleventh Amendment immunity as "something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment").

383 See, for example, *Alden*, 527 US at 762–94 (Souter dissenting) (arguing that the founding and ratifying generation did not regard sovereign immunity as unalterable by statute); *Printz*, 521 US at

Nor can this defense explain why the Court has paid so little heed to the original understanding along some of the quiet fronts of the federalism revolution—for example, with respect to the dormant Commerce Clause.[384]

The Court has also taken a variable approach to cases that formally involve statutory interpretation. Sometimes the Court invokes literal and historical understandings of statutory terms.[385] In other contexts, the Court cites an interpretive canon that Congress would not have wished to regulate state governments or their officials unless it made its intent to do so unmistakably clear.[386] In yet other contexts, the Court deploys interpretive presumptions that Congress would have wished to authorize the creation of judge-made doctrines shielding governmental officials from suit or otherwise protecting constitutional federalism.[387] As I have noted, however, the Court frequently relaxes the application of pro-federalism interpretive principles in preemption cases in which a finding of preemption advances substantively conservative ends.[388]

Overall, much of the Court's pattern of pro-federalism and substantively conservative decisions is consistent with the view of legal realists[389] and those political scientists who regard the justices as engaged in the single-minded pursuit of policy goals.[390] The alignment of data in support

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945–54 (Stevens dissenting) (arguing that the original understanding contemplated federal mandates to state officials to enforce federal law); *Seminole Tribe*, 517 US at 101–16 (Souter dissenting) (discussing the history and original understanding of the Eleventh Amendment). As noted above, in *Seminole Tribe*, the majority attempted to fend off the dissenting Justices' forceful originalist arguments at least partly by relying on the precedential authority of *Hans*, see notes 341, 380–81 and accompanying text; and in *Printz*, Justice Scalia stated flatly that the strongest arguments supporting the Court's conclusion came from precedent, see note 375 and accompanying text. See James Eugene Fitzgerald, Comment, *State Sovereign Immunity: Searching for Stability*, 48 UCLA L Rev 1203, 1220, 1233 (2001) (concluding that "compelling historical arguments" are paired against one another in the sovereign immunity cases and that "[r]eliance on the grab bag of history is simply indecisive").

384 See notes 205–09 and accompanying text.

385 For criticisms of the Court's purportedly historically grounded interpretations of Section 1983, and suggestions that its conclusions are in fact policy driven, see, for example, Michael J. Gerhardt, *The* Monell *Legacy: Balancing Federalism Concerns and Municipal Accountability under Section 1983*, 62 S Cal L Rev 539, 541 (1989); John C. Jeffries, Jr., *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 Mich L Rev 82, 86 n 24 (1989).

386 See, for example, *Gregory v Ashcroft*, 501 US 452, 460–61, 467 (1991); *Will v Michigan Department of State Police*, 491 US 58, 64–65 (1989).

387 See, for example, *Tower v Glover*, 467 US 914, 920 (1984) (involving official immunity in suits under Section 1983); *Younger*, 401 US at 43–46 (invoking traditions of equity to justify federal judicial abstention in a suit to enjoin state judicial proceedings).

388 See Part III.A.2.

389 See, for example, Wells, 30 Wm & Mary L Rev at 502–03 (cited in note 267) (arguing that substantive interests independent of doctrine and jurisdictional policy determine outcomes in federal courts cases).

390 See, for example, Lee Epstein, Jack Knight, and Andrew D. Martin, *The Supreme Court as a Strategic National Policymaker*, 50 Emory L J 583, 592–95 (2001) (hypothesizing that the justices are "single-minded seekers of legal policy" but that they will temper their decisions, for strategic reasons, to "avoid reaching decisions considerably outside the range acceptable to the legislature and the

of this theory is not perfect, however. I have suggested that the justices' methodological commitments play an independent explanatory role in some, though not all, cases. Moreover, other plausible explanations of the justices' decisions also exist. One emerges from Ronald Dworkin's well-known theory that judges deciding "hard cases" must choose among rival legal theories.[391] According to Dworkin, selection among otherwise plausible theories requires judges and justices to determine which would portray existing law in the "best" normative light or emphasize principles that most deserve to be extended into the future.[392] Within a framework of this kind, assessment of the normative attractiveness of competing conceptions of constitutional federalism is a constitutive element of legal reasoning, not the prelude to pursuit of an external policy aim. Considerations of substantive conservatism can come similarly into play in an assessment of which interpretation counts as "best."

The evidence of the Court's federalism cases also fits Duncan Kennedy's depiction of judges as motivated to test whether results that they find attractive on ideological grounds can be achieved within the medium of law.[393] According to his account, ideology spurs imaginative effort, but does not guarantee its success.[394] Sometimes perceived legal impediments will prove insurmountable.

Overall, the pattern of the federalism revival confirms that ideology is relevant to Supreme Court decisionmaking, but does not establish precisely how the influence occurs. Despite its apparent methodological inconsistencies, the Court operates within the conventions of legal argumentation. Never does the majority simply impose its will in the absence of colorable supporting arguments. Nevertheless, the key to understanding the federalism revival does not lie in any particular methodology.[395]

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president") (internal citations omitted); Segal and Spaeth, *Supreme Court* at 64–73 (cited in note 92) (developing an "attitudinal model" according to which judges and justices decide cases based solely on their ideological values).

391 See Dworkin, *Law's Empire* at 255–56 (cited in note 25):

> Hard cases arise, for any judge, when his threshold test does not discriminate between two or more interpretations of some statute or line of cases. Then he must choose between eligible interpretations by asking which shows the community's structure of institutions and decisions—its public standards as a whole—in a better light from the standpoint of political morality.

392 See id at 256, 257.

393 See Duncan Kennedy, *A Critique of Adjudication: Fin de Siecle* 157, 159 (Harvard 1997) (discussing how judges make "strategic choice[s]" about "how to deploy their resources for legal research and writing" in the "medium" of law to bring about, if they can succeed, "the rule choices" they think just).

394 See id at 159–60.

395 See Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 Stan L Rev 51, 101 (1989) (characterizing the Court's "manipulation of text, legislative history and policy" as "transparent, especially when it jumps merrily from one source of law to another").

B. Institutional Role

Although it is sometimes said that judicial conservatives believe in a narrow, deferential judicial role,[396] the Rehnquist Court's federalism revival constitutes a counterexample to that claim. In cases involving federalism, the Court—led by its most conservative justices—has either wholly or partly invalidated at least ten acts of Congress within the past seven years.[397] My point here is not to accuse the pro-federalism majority of failing to adhere to a consistent conservative philosophy. As I have said, there are multiple strands of diverse judicially conservative philosophies.[398] In addition, principles that apply in one context may have exceptions or may simply be outweighed in others. My point, instead, is that the Court, determined to limit congressional power in the name of federalism, has not been deferential. Nor, given the nature of its federalist agenda, could it be.

Viewed from one perspective, the Court's reform agenda so far appears quite modest.[399] As Robert Nagel has argued,[400] across the sweep of history the balance of constitutional federalism has tipped heavily in a nationalist direction. Against the backdrop of the New Deal and the Great Society and the judicial decisions that ratified them, Nagel contends, the Court is attempting no more than a minor adjustment, necessary to ensure that state and local governments retain integrity and vitality.[401]

When attention focuses just on the three principal paths along which the Court has altered the balance of national and state prerogatives, this claim seems plausible. But a broadened view complicates the picture. Beyond the principal paths of the Court's federalism revival lies a thickening underbrush of subconstitutional doctrines comprising clear statement rules, equitable doctrines restricting federal judicial power, statutory interpretations that shield local governments from liability, and official immunity doctrines. This underbrush is substantively inelegant and methodologically undisciplined.[402] Moreover, as I have emphasized, the Court's efforts to promote federalism are frequently entangled in,

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396 See note 124 and accompanying text.

397 See note 2 and accompanying text. Of the ten cases cited in note 2 as wholly or partly invalidating federal statutes on federalism grounds, all but *New York* were decided within the past seven years. In addition, *City of Boerne*, 521 US at 511 (invalidating the Religious Freedom Restoration Act in its application to state and local governments), is fairly classified as a case "involving judicial federalism," even though the Court's conclusion rested principally on separation-of-powers grounds.

398 See Part I.C.

399 See Althouse, 31 Rutgers L J at 689 (cited in note 21) (characterizing the Court's federalism cases as "reasonably moderate" because they have "for the most part sought to limit the way Congress can do things, not place areas of regulation wholly off-limits to Congress").

400 See Nagel, 13 Ga St U L Rev at 987 (cited in note 6).

401 See id at 996–1004.

402 See notes 223–35, 350–63 and accompanying text.

and occasionally subordinate to, its substantively conservative dispositions. Under the circumstances, the claim of judicial modesty could scarcely disarm criticism by those with more liberal or nationalist views, or even by those who hold a different conception of appropriate judicial restraint.[403]

C. Path Dependence and Doctrinal Complexity

In implementing a federalism revival, the Court has struggled to reconcile competing goals. One is to afford a decent respect to stare decisis. Another is to effect significant doctrinal reform to promote constitutional federalism. In some doctrinal areas, the Court has tipped discernibly in one or the other direction. For example, the Court has moved cautiously in restricting Congress's general regulatory powers under the Commerce Clause; in this doctrinal area, stare decisis and related considerations of path dependence have had a significant constraining effect.[404] By contrast, in the domain of sovereign immunity jurisprudence, the Court has felt freer to overrule cases and otherwise revise the doctrinal landscape.[405]

Often, however, the Court has attempted to achieve significant change without overruling cases. Instead, the Court's pro-federalism majority has purported to leave leading cases undisturbed, while at the same time surrounding them with exceptions and qualifications. A plain example comes from *Monell*, which establishes that municipalities are suable persons under Section 1983, but that liability cannot attach on a respondeat superior basis.[406] Although the Supreme Court has left *Monell* formally intact since 1978, it has progressively stiffened the standards for finding municipalities causally responsible for their employees' torts.[407]

To cite just one more example of increasing complexity, although continuing to affirm the basic rule of *Young* that state officials do not partake of the states' immunity from suit and are suable for injunctions to stop ongoing violations of federal law,[408] the Court has carved out a series of exceptions (even while a majority of even the conservative justices deny that they are employing a case-by-case balancing test[409]). The Court thus has held that *Young* does not apply to suits in federal court

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403 See, for example, Shapiro, 31 Rutgers L J at 753–55 (cited in note 68) (attacking the Court's development of immunity doctrines as being neither disciplined by constitutional text nor warranted by history).

404 See Part III.B.1.

405 See Part III.C.

406 436 US at 691.

407 See note 226 and accompanying text.

408 209 US at 167–68.

409 See notes 177–78 and accompanying text.

seeking to enjoin state officials from violating state law;[410] nor to cases in which it can be inferred that Congress meant other remedies to be exclusive (even if Congress did not say so);[411] nor to suits that implicate state sovereign interests in ways that the Court deems fundamental.[412] In the tension between a commitment to pro-federalism change and to respect for stare decisis, exception builds on exception.

Yet a further level of complexity comes into the picture as a result of the Court's third, partly distinct goal of creating doctrines that either promote or accord with its substantive conservatism. Consider the Court's relatively recent practices in recognizing exceptions to *Hans*. As noted above, the Court has developed exceptions—seemingly unrelated to federalism—for suits to recover coercively collected taxes[413] and apparently to compel the payment of just compensation for "takings" of private property.[414]

When the Court's reluctance to overrule cases is coupled with a readiness to create exceptions and draw fine distinctions, and sometimes to advance substantive as well as structural goals, federalism doctrine inevitably grows complex, and occasionally bewildering. In creating and sustaining a complex doctrinal structure, the current Court has not necessarily performed worse than its predecessors.[415] Doctrinal complexity bordering on contradiction has long persisted in federal courts doctrine.[416] But if the Rehnquist Court's federalism revival has not rendered federal courts law dramatically less coherent, neither has it arrested the slide into Byzantine complexity.[417]

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410 *Pennhurst State School & Hospital v Halderman*, 465 US 89, 117–21 (1984).

411 See *Seminole Tribe*, 517 US at 74 (1996) (holding that specifically provided statutory remedies preclude other remedies); *Middlesex County Sewerage Authority v National Sea Clammers Association*, 453 US 1, 14 (1981) (same).

412 See *Idaho v Coeur d'Alene Tribe of Idaho*, 521 US 261, 281 (1997).

413 See notes 365–66 and accompanying text.

414 See note 367 and accompanying text.

415 In addition, it is only fair to emphasize that the Court lacks a collective mind. Decisions reflect the sum of the votes of justices who may have different rationales for reaching an agreed result. See generally Easterbrook, 95 Harv L Rev at 813 (cited in note 22) (noting the difficulties of collective decisionmaking and explaining why some criticisms of the Court are therefore unfair). In an extreme but readily imaginable situation, eight of the nine justices voting in a 5–4 decision might believe the case at bar to be indistinguishable from a precedent that four justices would follow and four justices would overrule. But if one justice believed that the precedent could and should be distinguished, there would be no majority to overrule the precedent, and an "exception" would enter (and complicate) the doctrine.

416 See Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 Va L Rev 1141, 1142 (1988) (complaining that "[t]he law of judicial federalism . . . is wracked by internal contradictions").

417 But see Fried, 109 Harv L Rev at 76–77 (cited in note 6) (suggesting that the Rehnquist Court "may be clearing away" the "detritus" left by the less principled Warren and Burger Courts).

CONCLUSION

In this Article I have offered an overview of the Supreme Court's federalism revival, and in doing so have attempted to put both the parts and the whole in a fresh perspective. In commentary on the Court's federalism agenda, three lines of cases have dominated attention. That attention is merited, but it should not obscure surrounding developments. If the federalism revolution has proceeded along three main paths, important developments have also occurred along a variety of subpaths. Moreover, the rates of advance along the various paths have varied widely. Indeed, there are some available paths for the promotion of constitutional federalism along which nothing has occurred.

In seeking to explain this pattern, I have emphasized the widely recognized judicial conservatism of the current Supreme Court, in particular the relation between "substantive" and "methodological" conservatism and a commitment to constitutional federalism. The term "conservatism" does not denote a single philosophy so much as encompass a family of related, but occasionally mutually inconsistent, dispositions. Amid the competition internal to judicial conservatism, a commitment to federalism by no means always predominates. In order to make sense of the overall structure of federalism jurisprudence, it is crucial to understand that the Court's prevailing majority is at least as substantively conservative as it is pro-federalism. The Court's substantive conservatism helps to explain the existence of what I have called "quiet fronts" in the federalism revolution. It also helps to explain otherwise puzzling exceptions to the general rule that sovereign immunity protects the states from unconsented private suits for damages. This rule must yield, the Court has suggested, in cases involving takings and coercive collections of taxes—two types of "old property" rights of which substantive conservatives tend to be solicitous.

My second explanatory theme involves path dependence. The Court has proceeded cautiously along doctrinal paths where previous efforts to protect federalism occasioned embarrassment, where reliance interests make dramatic change difficult, and where the attentive public has conspicuously embraced prevailing doctrine. By contrast, the Court has proceeded most vigorously in sovereign immunity cases, in which the way has appeared clear for notable reforms.

More needs to be said, however, to explain the place of sovereign immunity in the federalism revolution. At its center, the doctrine protects states—but only states—from private suits for damages. Sovereign immunity does not restrict the regulatory power of Congress, it seldom bars suits for injunctions to force compliance with federal law, and it does not protect local governments at all. Why, then, has the Court made sovereign immunity a centerpiece of its drive to revive constitutional federal-

ism? In answering this question, I have argued that sovereign immunity needs to be seen in context, as one of an arsenal of doctrines—most of them technical and subconstitutional—that the Court has employed to shield state and local governments from damages liability. In affording protections from damages liability, the Court has not relied on a single elegant strategy, but on a congeries of mutually supportive tactics.

Overall, there is both less and more to the federalism revolution than generally meets the eye. There is less consistency; the federalism revolution has not advanced equally along all fronts. In addition, two of the main paths have exhibited fewer grand developments than some might have predicted. But a broadened perspective also reveals more than is sometimes noticed, as the Court has pushed its federalism agenda along a myriad of subpaths, mostly involving subconstitutional doctrines and statutory interpretation. Individually, the steps may be small, but their cumulative impact is large.

If the Supreme Court is implementing a federalism revolution, it is thus distinctively a lawyers' revolution. Though the rhetoric is sometimes audacious, few landmarks have toppled. Much of the significance, if not the devil himself, inhabits the details.