Federalism, Fig Leaves, and the Games Lawyers Play

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FEDERALISM, FIG LEAVES, AND THE GAMES LAWYERS PLAY

Robert C. Power*

I. INTRODUCTION

This excellent symposium has presented us with an opportunity to confront some of the core issues of the constitutional law flavor of the month—federalism. It is both a topic well suited for the sort of abstract theorists that inhabit law school faculties and a battleground for ideologically motivated advocates on both sides. Professor John L. Gedid, director of our Law and Government Institute, worked with the Widener Law Journal to present the "New Federalism" symposium and stoked the fire by giving the symposium the title "Is the Supreme Court Undoing the New Deal: The Impact of the Rehnquist Court's New Federalism." The series of talks on November 21, 2002, provided a dispassionate theoretical discussion that informed participants and listeners about policy and historical justifications for different views about national and state powers.

Assuming that the other speakers will continue to take the high road, I will choose the other. Two themes stand out in "support" of federalism. One is illustrated by those quotation marks—the notion that the supporters of greater state and reduced national powers are the supporters of federalism. In fact, they are "states' righters," which is fine, but this fact should not be obscured by the neutral, all-encompassing term. In this sense, "new federalism" is reminiscent of the pornography industry's usurpation of the word "adult" to refer to only one variety of entertainment suitable for a relatively small cohort of grown-ups. The second theme is that much of the debate over federalism seems to be dominated by lawyers' arguments about precedent and sources of authority. Not that there is anything wrong with that, of

* Vice Dean and Professor, Widener University School of Law. I thank Magdalene C. Zeppos and other members of the Widener Law Journal for their very fine research and editorial assistance.
course, but the debate too often seems more a lawyering skills competition than any sort of search for principled resolution. Both sides, if sides they are, suffer from this flaw. The result is that persons are not pushed to challenge their own assumptions and are able to wrap their selfish or self-interested opinions in the fancy dress of unassailable legal logic, without confronting the real institutional or policy issues.

II. FIG LEAVES

In a key sense, the use of the term "federalism" to denote the pro-state and local side of the political battle over government power is trivial. Who cares what the two sides call themselves? The issue is somewhat more than trivial, however, when two factors are considered. First, if either side can lay claim to the term "federalist," it should be those who support national, primarily congressional, powers. 1 Second, the use of the term "federalist" appears to be a conscious effort to distance this movement from its recent ancestors. A movement by the name of "states' rights" would not smell as sweet.

Federalism refers to the distribution of power between national and state governments, with "state" standing in for state and all smaller governmental units within a state, as in the "state action" doctrine. 2 Often called "Our Federalism," 3 this critical, if somewhat dry, subject remains one of the fundamental premises of the constitutional structure of this nation. In political science terms,

1 Of course, neither side is consistent, which is one reason to question the commitment of either to principle rather than politics. Much like "term limits," which are favored by outsiders rather than incumbents, the conservative commitment to states' rights seems somewhat less robust when there is a Republican President and Congress. In a surpassingly arrogant nationalist act, Attorney General John Ashcroft decided that Virginia should be the first state to prosecute the alleged Washington area snipers because he, a national official, found its death penalty laws more appropriate. Maryland, the state of the first and most murders and the state where the defendants were captured, was passed over. See Susan Schmidt & Josh White, Sniper Suspects Handed to Virginia for Trials, WASH. POST, Nov. 8, 2002, at A1; Gail Gibson, Sniper Suspects to be Tried First in Virginia Counties, BALT. SUN, Nov. 8, 2002, at A1.

2 E.g., DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989) (county department as state actor).

a federal government is one in which politically autonomous units participate in a national body that exercises certain powers, while others are left to the subunits. Federalists, therefore, should be those who support such a governmental structure.

Our history, however, states that the federalists were those who favored the creation of a strong national government. They were leaders such as Hamilton, Adams, Madison, Jay, and Marshall - those who believed, rightly or wrongly, in a national government to oversee issues of national scope. The opponents of the United States Constitution during the ratification process were the antifederalists. They lost, should get over it, and return the title "Federalists" to the students of the federal style of government or to supporters of national, as opposed to state, power on most issues.

The defense of the new federalists, or antinationalists, is that their position merely looks unbalanced because changes in doctrine over the past two hundred years have so favored the national

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4 Black's Law Dictionary distinguishes between a confederation (such as the Confederacy during the Civil War) and a federal government. A confederation is "[a] league or compact for mutual support, particularly of nations, or states." BLACK'S LAW DICTIONARY, 296 (6th ed. 1990). A federal government is a "union" in which the several states retain "separate organization and "quasi sovereignty with respect to the administration of their purely local concerns, but so that the central power is erected into a true [state or nation.]"). Id. at 611.

5 BERNARD BAILYN, ET AL., THE GREAT REPUBLIC 317 (1977) ("By the mid-[seventeen] eighties many American leaders had come to believe that the state legislatures, not the govern[ments], were the political authority to be most feared."). These became the federalists. See id. at 330-41 (discussing federalists and anti-federalists). See also ROBERT ALLEN RUTLAND, THE ORDEAL OF THE CONSTITUTION: THE ANTIFEDERALISTS AND THE RATIFICATION STRUGGLE OF 1787-1788 (Northeastern Univ. Press ed. 1983) (1966); GEOFFREY R. STONE, ET AL., CONSTITUTIONAL LAW 1-7 (1996).

government that a substantial transfer of power back to the states is necessary to return to the original constitutional design. There is some merit to this argument. The scope of national power today would likely surprise most of the framers. In order for this defense to prevail, however, the reasons for that shift have to be a power grab by Washington rather than a choice through the constitutional process or through the natural development of the nation.

From this point in time, it is possible to view the whole of constitutional development for two hundred years. That view reveals that power shifts were more the result of legitimate change than of national usurpation.

The two most noteworthy aspects of modern congressional power are the interstate commerce and spending powers. Both were there from the outset, if latent, given the very different economic structures of the post-revolutionary era. It was certainly clear from quite early that the commerce power necessarily included business activities involving more than one state. While most business activities of the late 1700s were essentially local, almost all business activities of the early 2000s are interstate, if not international, in scope. New federalists point to United States v. Lopez as a necessary corrective to a Congress overreaching by trivial connections to interstate commerce. Lopez may well have been correctly decided. If it ends up standing for the principle

8 Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194 (1824) (constitutional power includes all "commerce which concerns more States than one").
9 See, e.g., Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 581 (1985) (O'Connor, J., dissenting) ("Due to the emergence of an integrated and industrialized national economy, this Court has been required to examine and review a breathtaking expansion of the powers of Congress.").
11 The Court held that the Gun-Free School Zones Act of 1990 exceeded Congress's authority to regulate interstate commerce. Id. at 551. The Act made it a federal offense "for any individual knowingly to possess a firearm . . . at a place that the individual knows, or has reasonable cause to believe, is a school zone." See 18 U.S.C. § 922(q)(2)(A) (2000). The Court concluded that the Act did not regulate a commercial activity, nor did it require that possession be connected to interstate commerce. See id. at 551.
that the word "commerce" requires a nexus to business activity, it will represent an appropriate limitation on congressional power. If, however, it becomes a talisman for the odd notion that Congress's hands are tied unless there is a direct connection between the individual litigant and interstate commerce, it will be a harmful step toward regulatory chaos.

Neither Congress nor the states regulate by individual person or business entity. They regulate on the basis of the type of business or activity. No regulatory scheme can succeed if federal authority depends on all participants having an individual effect on interstate commerce. Almost all commercial activities have interstate connections, even if individual businesses do not, and the states cannot effectively control business activities outside of their borders. The reality is that twenty-first century business activities are so national or international in scope that national regulation is constitutional in many more cases than in the 1700s. The 1700s Constitution, however, works quite nicely to allow congressional power over most business activities through its use of general terms such as "commerce among the states."\(^\text{12}\) State supervision of business activities that involve more than one state is anachronistic and unworkable, and new federalism objections to congressional oversight are objections to government regulation, not support of states' rights.

Spending is even more so. The framers, not the Warren Court, chose the broad language authorizing Congress to spend "to pay the Debts and provide for the common Defence and general Welfare of the United States."\(^\text{13}\) The federalists of the 1700s knew that this language encompassed spending on projects not otherwise within congressional powers.\(^\text{14}\) Federal spending to support and influence state decision-making goes back at least to the 1860s, with the Morrill Act.\(^\text{15}\) If congressional use of the spending power has become more a part of modern government than it should be, that is a fundamental policy question that we should resolve, but is

\(^\text{12}\) See U.S. Const. art. I, § 8, cl. 3.

\(^\text{13}\) U.S. Const. art. I, § 8, cl. 1.

\(^\text{14}\) See United States v. Butler, 297 U.S. 1, 63-67 (1936); see also extracts of the argument in Butler, 297 U.S. 1 (1936).

\(^\text{15}\) Morrill Land Grant College Act, ch. 130, § 1, 12 Stat. 503 (1862) (currently codified at 7 U.S.C. § 301 (2000)) (grants to public universities).
not a constitutional issue. The problem lies as much with states that seek national funding for their pet projects as with a national government that distributes federal dollars to meet national goals.

The expansion of commerce regulation and spending resulted from changes in our economy and the choice by most states, as well as the federal government, to have a big government. Other changes relate to political decisions by the people. The first two came long ago. The early 1800s saw conflicts over slavery and, somewhat more abstractly, the future of our economy. The Northern states were becoming more national in outlook; the Southern states retained their focus on an agrarian economy and state autonomy. In an attempt to resist northern domination, especially concerning threats to slavery, southern politicians developed the nullification doctrine, the theory that the states were empowered to refuse federal mandates. They lost. The same Supreme Court that propped up slavery in *Scott v. Sanford* never found any constitutional authority for this state right of refusal, and after a terrible war, the southern position receded.

Immediately after the war, Congress and the people, acting through the constitutionally mandated amendment process, enacted the Thirteenth, Fourteenth, and Fifteenth Amendments. While the amendments were properly focused on ending slavery and its vestiges, the Fourteenth Amendment went much further, imposing broad and open-ended constitutional obligations on the states and underscoring the national sovereignty that had existed since 1787. Through doctrines as dissimilar as substantive due process and incorporation, the courts have ever since insisted that whatever

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16 See generally ROY FRANKLIN NICHOLS, THE DISRUPTION OF AMERICAN DEMOCRACY 33-53 (The Free Press 1967) (1948); MORISON, supra note 6, at 468-84; BAILYN ET AL., supra note 5, at 428-64.


18 60 U.S. 393 (1856).

19 These Amendments were passed in 1865, 1868, and 1870. U.S. CONST. amend. XIII-XV.
powers the states have, they remain subject to the Constitution and laws of Congress enacted pursuant to it.

The third leg of the repudiation of state superiority came in judicial decisions interpreting and, since 1937, almost always upholding, federal statutes that assert national authority.\textsuperscript{20} It is this line of cases that Professor Gedid identified as bait for this symposium.\textsuperscript{21} The antinational cases that were decided in a short period before 1937 were the aberration and will not rise again.\textsuperscript{22} Rooted in economic theory masked as constitutional principle, they rejected the power of the people to regulate business and had nothing to do with the New Federalist preference for state power.\textsuperscript{23} The Commerce Clause decisions were poorly reasoned, such as \textit{Carter Coal},\textsuperscript{24} or addressed an unprecedented (and still unmatched) interference with market ordering, as in \textit{Schechter Poultry}.\textsuperscript{25} The Court soon regained its equilibrium, in decisions

\begin{footnotesize}
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\item[21] Professor John L. Gedid, Symposium at Widener University School of Law; Is the Supreme Court Undoing the New Deal: The Impact of the Rehnquist Court's New Federalism (Nov. 21, 2002).
\item[22] There were relatively few cases testing national power before the later 1800s. Those suggesting a pragmatic and broad congressional power over business activities outnumber the few landmark cases rejecting congressional power before the Depression Era. E.g., Houston, E. & W. Texas Ry. v. United States (the "Shreveport Rate Case"), 234 U.S. 342 (1914) (federal regulation of intrastate shipping rates); Swift & Co. v. United States, 196 U.S. 375 (1905) (local sales as part of current of interstate commerce); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (state law granting exclusive steam boat rights in New York waters); The Daniel Ball, 77 U.S. 557 (1871) (federal safety regulation of ship operated solely in Michigan).
\item[23] The best known of these cases is Lochner v. New York, 198 U.S. 45 (1905), which struck down a New York maximum hours statute for arbitrarily interfering with the liberty of contract. See also Coppage v. Kansas, 236 U.S. 1 (1915) (striking down law prohibiting antiunion contracts); Tyson & Brothers v. Banton, 273 U.S. 418 (1927) (striking down theater ticket sales regulations).
\item[24] Carter v. Carter Coal Co., 298 U.S. 238, 298-02 (1936) (commerce power does not include mining, agriculture, manufacture, or other business activities that precede buying and selling).
\item[25] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). The Court held that "where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power" and outside federal power. \textit{Id.} at 546.
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such as *National Labor Relations Board v. Jones & Laughlin Steel Corporation.*

With this case law, the forces that were allied against state supremacy became overwhelming. The Executive, through the Civil War and policy initiatives for well over a century; the Supreme Court, in the great majority of cases before and after 1937; and Congress, through constitutional amendments and one regulatory statute after another, clarified and wielded national power. The states may be sovereign, although it is debatable, but they are not sovereign on matters within the scope of the national government’s powers.

This establishes that the new federalists are not really federalists. Instead, they seek a change in governmental structure to a state orientation that reflects the distribution of power under the Articles of Confederation rather than the 1787 Constitution. There is nothing wrong with that. The national government has no monopoly on wisdom, and there are certainly many areas of law that the states simply cannot make worse than they are now.

But there is at least one such area—race relations—and that is why the new federalists avoid the more accurate name of "states' righters." "States’ Rights" was the term of choice for slavery advocates of the 1800s and segregationists of the 1900s. 27 28 "States’

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26 301 U.S. 1 (1937). The NLRB alleged that the company had committed unfair labor practices that affected interstate commerce. *Id.* at 22. The Court had no trouble finding that regulation of local aspects of a major interstate business corporation was within the commerce power. *Id.* at 25-28, 36-43.

27 Federal Circuit Judge John T. Noonan writes of the Supreme Court’s recent claim that the states are sovereign under the federal system: "To anyone familiar with the precedents of that [C]ourt or with the text of the [C]onstitution of the United States or with the history of the Civil War, it is an extraordinary statement." JOHN T. NOONAN, JR., NARROWING THE NATION’S POWER 2 (2002).

28 WILLIAM MANCHESTER, THE GLORY AND THE DREAM 946 (1974) (referring to Alabama Governor George Wallace in the 1960s, Calhoun, and nullification). Alexander H. Stephens, Vice President of the Confederate States of America, later wrote a book titled *A CONSTITUTIONAL VIEW OF THE LATE WAR BETWEEN THE STATES.* There he argued that the war was fought on the principle of states’ rights and that slavery was the question on which the principle was played out. ALEXANDER H. STEPHENS, A CONSTITUTIONAL VIEW OF THE LATE WAR BETWEEN THE STATES; ITS CAUSES, CHARACTER, CONDUCT AND RESULTS 9-12 (Nat’l Publ’g Co. 1970) (1868); Alexander H. Stephens, *The
Rights" was the slogan of Strom Thurmond's presidential campaign of 1948, based on opposition to antilynching laws and support of mandatory segregation across the culture. We learned in December 2002 that our racial conflicts are still too raw to permit praise of that campaign to be interpreted as anything other than a destructive and divisive act of racism.

The new federalists do not seem to be racists, and their arguments generally go to issues other than civil rights or equal protection. Still if states' rights is to again be a responsible policy, its supporters should give up the false name of federalism and hang their philosophical agenda with that of the antifederalists they emulate. Only then will their arguments really join issue with mainstream policy about governmental structure, and only then will they be able to avoid looking over their shoulders for claims that they are racists hiding under the name given to those who set up this nation.

III. GAMES

The states' rights movement certainly has much to say for it. The nation is suspicious of the enormous bureaucracies that make up the executive branch; Congress is ridiculed by comedians almost every night on television; presidential candidates of both

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30 See Mary Leonard, Conservatives Say Lott Hurts Agenda They're Contending He Should Resign for Their Programs to Advance, BOSTON GLOBE, Dec. 20, 2002, at A3; Carl Hulse, Divisive Words: The Overview; Lott Fails to Quell Furor and Quits Top Senate Post; Frist Emerges as Successor, N.Y. TIMES, Dec. 21, 2002, at A1.

31 Congress' power is explicit in these areas. The Fourteenth Amendment delegates to Congress the "power to enforce, by appropriate legislation" the substantive provisions of the Amendment, which include equal protection. U.S. CONST. amend. XIV, § 5. Recent "New Federalism" decisions have nibbled at the edges of this power, however. E.g. Boerne v. Flores, 521 U.S. 507 (1997); United States v. Morrison, 529 U.S. 598 (2000).
parties in each election since 1976 ran against Washington. States, on the other hand, are seen as leading government reform efforts, and four of the last five presidents were former state governors. The Brandeisian laboratories of state and local government are, in many cases, fulfilling their function.

In this environment, it is disappointing that states’ rights advocates have chosen to make constitutional disability of the federal courts to adjudicate state constitutional violations a battleground. As shown above, arguments premised on lack of congressional powers are weak, given the breadth of the Constitution’s delegations to Congress and long-standing and straightforward case law. Arguments that instead focus on state immunity from judicial oversight suffer from the same flaws. All ultimately depend on the same sort of extra-constitutional value judgments that most states’ rights advocates revile in Warren Court decisions. They may be no further afield from text or precedent than many of that Court’s pronouncements, but they are no closer either.

Sovereign immunity is a good example of the result-oriented and freeform constitutional analysis of the states’ righters. The states’ rights angle on sovereign immunity concerns the lack of federal court jurisdiction to hear many cases brought against states or their agencies. Sovereign immunity is a poor choice for a

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32 Among the numerous political, legal, and economic works that refer to the role of the states as leaders are ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, THE QUESTION OF STATE GOVERNMENT CAPABILITY 23-24 (1985); Robert W. Hahn, State and Federal Regulatory Reform: A Comparative Analysis, 29 J. LEGAL STUD. 873 (2000); and the National Governors Association website, at www.nga.org (last visited July 6, 2003). The classic notion was expressed by Justice Brandeis in his dissenting opinion in New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), in which he referred to the states as laboratories for experiments about government policies.

poster child for federalism. It is a negative power, a way to escape liability for unlawful actions rather than a vehicle for positive government action. Like the Fourth Amendment's exclusionary rule, generally condemned by the same people who champion states' rights, it serves largely to allow the guilty to walk free. The fact that these violators are states and state agencies makes it no more palatable, and on balance rather an ironic argument for greater state authority.

Of more significance here, however, is the nature of sovereign immunity constitutional law. It is arcane, artificial, and in many cases, disingenuous. As such, it represents the worst of what lawyers can do. It makes the constitution a game like TEGWAR, the game described in Bang the Drum Slowly.\textsuperscript{34} TEGWAR stands for "[t]he [e]xciting [g]ame [w]ithout [a]ny [r]ules.\textsuperscript{35}"

The original Constitution of 1787 nowhere provided for sovereign immunity. Depending on whom you believe, this was either because there was no place for sovereign immunity in the courts of the national government or because it was such an obvious requirement that no mention was necessary.\textsuperscript{36} One portion of Article III provided for federal judicial jurisdiction of cases between a state and a citizen of another state.\textsuperscript{37} When the Supreme Court declared that sovereign immunity was no impediment to the natural reach of that language in Chisholm \textit{v.} Georgia,\textsuperscript{38} the game was on. Congress and the states enacted the Eleventh Amendment, which provides in full that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign

\textsuperscript{34} \textit{MARK HARRIS, BANG THE DRUM SLOWLY} (1956).
\textsuperscript{35} \textit{Id.} at 8.
\textsuperscript{36} The countering arguments were recently set forth in \textit{Federal Maritime Commission \textit{v.} South Carolina State Ports Authority}. 535 U.S. 743 (2002). For the majority, Justice Thomas expressed the view that sovereign immunity was implicit in the Constitution. \textit{See id.} at 751-54. Justice Breyer in dissent argued that the state sovereign immunity was outside of the constitutional scheme. \textit{Id.} at 779-81. (Breyer, J., dissenting). \textit{See also} \textit{Alden \textit{v.} Maine}, 527 U.S. 706 (1999) (opposing arguments provided by Justices Kennedy and Souter).
\textsuperscript{37} \textit{U.S. CONST.} art. III, § 2, cl. 1.
\textsuperscript{38} 2 U.S. (2 Dall.) 419 (1793).
State.\textsuperscript{39} Read literally, this excludes the federal jurisdiction asserted in \textit{Chisholm}. Arguably, it also precludes other actions cognizable in federal court in which a state and a citizen of another state are litigants.

In 1890, however, the Court decided that the amendment also bars actions by persons suing their own states.\textsuperscript{40} This extra-textual expansion of immunity was balanced by an end-run of immunity in 1908, when the Court approved of injunctive cases against state officials.\textsuperscript{41} The overall scheme for most of the twentieth century was therefore one of a corporate immunity for states, which prevented judicial actions at law well beyond the terms of the Eleventh Amendment, and hollow, formal immunity for actions in equity. This odd combination of rules reveals two types of lawyer tricks—gross manipulation of legal text and use of a legal fiction to serve policy ends unreachable under the literal terms of the law.

Eleventh Amendment law remained a sidelight, if occasionally a high-stakes one, of federal constitutional law until recently. New federalism, however, has now made state sovereign immunity more significant as a legal doctrine and as a policy issue. The Supreme Court, usually through the same five justices, has resolved numerous issues relating to the Eleventh Amendment by curtailing federal jurisdiction. Congress lacks the power to grant federal judicial power to resolve disputes arising under statutes exercising its congressional powers;\textsuperscript{42} states are immune from actions to enforce federal laws in state courts;\textsuperscript{43} state officials are immune in cases in which the state is the real party in interest.\textsuperscript{44} One of the most controversial of these cases is \textit{Federal Maritime Commission v. South Carolina Ports Authority}.\textsuperscript{45} In that 2002 decision, the Court expanded sovereign immunity to cases before federal administrative agencies.\textsuperscript{46} On several levels, this is unsurprising and perhaps of little practical effect. Once the Court

\textsuperscript{39} U.S. \textsc{const.} amend. XI.
\textsuperscript{40} See Hans v. Louisiana, 134 U.S. 1 (1890).
\textsuperscript{41} See \textit{Ex Parte} Young, 209 U.S. 123 (1908).
\textsuperscript{44} Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 269-70 (1997).
\textsuperscript{45} 535 U.S. 743 (2002).
\textsuperscript{46} \textit{Id}. at 760.
rejected textualism in *Hans*, the road has been open for a functional examination of state immunity from federal judicial authority. In the arena of Supreme Court analysis, function often tends to mirror policy preference, and on this Court, the policy preference of a consistent majority is to protect states from federal oversight. That view was helped by the nature of the underlying dispute in the *FMC* case, which closely resembled the sort of private damages action most clearly excluded from federal judicial power by sovereign immunity. It was also probably helped by the fact that most agencies do not conduct business in this fashion, thereby minimizing the parade of horribles likely to cause second thoughts by some of the majority justices.47

More important than the result in *FMC* was its reasoning. The Court clearly rejected the Eleventh Amendment as its source of law, relying instead on an originalist dual sovereignty that includes a generic sovereign immunity for states.48 To the majority, it is "an impermissible affront to a State's dignity to be required to answer the complaints of private parties."49 Whatever the accuracy of this rationale as a matter of history, it ironically provides a very broad delegation to the federal courts to create a common law of sovereign immunity that fits the views of the Court's shifting majorities.

The result of the Eleventh Amendment case law as a whole, however, is a prolix code of do's and don't's. The federal government and other states may sue states. States may be sued when they have waived sovereign immunity in any of a variety of ways. States are subject to judicial review in federal courts, even

47 E-mail from William Funk, Lewis & Clark Law School, to Admin (adminlaw@chicagokent.kentlaw.edu) (June 3, 2002, 17:43:48) (on file with author). In the e-mail, Professor Funk stated:

None of the health, safety and environmental laws I am familiar with authorize a private person to drag a state . . . before an administrative adjudicator. And it is this compulsory . . . process, requiring the state to defend itself on the merits in an administrative hearing, that is the crux of the violation of sovereign immunity. . . . Under everyone's interpretation of FMC [agency enforcement proceedings] would not be affected by the FMC decision.

*Id.*


49 *Id.* at 760.
when they are defendants in state litigation. States are immune from state court litigation about federal law, but not from either federal or state litigation under congressional enactments pursuant to powers that override the Eleventh Amendment. The Young doctrine, although battered, survives to allow many federal actions challenging official state conduct, with the dominant factor being whether the action can be recast as an action to require an officer to comply with federal or constitutional law from the date of judgment on. And, of course, it is a state and state agency immunity—political subdivisions remain subject to suit.

This is only a simple summary of rules in what we still, if erroneously, call Eleventh Amendment law. There are enough additional variations, exceptions, corollaries, and hidden ball tricks to satisfy fans of either the common law forms of action or the Harlem Globetrotters. Can this be what the framers intended? The obvious answer is "no." If the constitutional design did not include sovereign immunity, as contended by the four dissenting justices in most current cases, then the Eleventh Amendment should represent the full extent of the immunity. That would make sense as both a matter of early American politics and federalism. Ending federal judicial oversight of diversity actions involving states would serve state dignity, while preserving the 1787 Constitution's "surrender" of state sovereignty on actions arising under the Constitution or federal law. If, however, the majority is correct, and the states are properly exempt from federal judicial power, it is hard to believe the principle could be served by such a honeycomb of doctrinal excess. Only lawyers playing the "reconcile and distinguish" game before willing judges could create such a system. Whatever else it is, the present law of Eleventh Amendment immunity is neither text nor intent based. It is plainly based on "will," despite the claims of Federalist No. 78.

If only lawyers could create or love such a system, it is doubly unfortunate that the new federalists have embraced sovereign immunity so happily. As a matter of national-state distribution of power, it is a states' rights position. That is, it favors state autonomy over the federal judiciary (and now the federal executive

50 See, e.g., NOWAK & ROTUNDA, supra note 7, at 51.
51 THE FEDERALIST NO. 78 (Alexander Hamilton).
branch). On a more basic level, however, it sends a message of state exemption from binding constitutional law, which is not a message that the new federalists should want to send. It underscores the subliminal connection to the nullification and anti-integration movements of the past, and it uses a procedural rule to avoid accountability.

If new federalism is to be founded on exemption from binding federal law, it deserves the criticism that it seeks political results rather than legal principles, and that it seeks evasion of binding law because it disagrees with that law. It is not quite John C. Calhoun, but it is too close for comfort.  

IV. THE GOOD NEW FEDERALISM

Federalism should return to mean the search for the optimal power-sharing between the national and state governments rather than simply pushing for more power for one side of the debate. It may be that from the New Deal through the 1970s, power shifted too much to the national side, both as a matter of politics and constitutional interpretation. Things have now changed, and there is no present danger creating a need for the new federalists to act as an advocacy group.

The best emphasis on federalism is cooperative federalism—joint federal-state projects to achieve joint objectives. Such projects go back many years, and plainly represent the sort of national consensus about good policy that reflects careful and open decision-making. Before the phrase "new federalism" was appropriated by the states' righters, it was sometimes used to describe this approach to government. Perhaps it is time to return the phrase to refer to the notion that better decisions and execution will occur when the national and state governments work together. The present emphasis on conflict between the national and state

52 Calhoun was the philosophical and political leader of the nullification movement. See sources cited at supra note 17.
53 Among many worthwhile materials on this subject are Sally F. Goldfarb, The Supreme Court, the Violence Against Women Act, and the Use and Abuse of Federalism, 71 FORDHAM L. REV. 57, 79-84 (2002); Philip J. Weiser, Chevron, Cooperative Federalism, and Telecommunications Reform, 52 VAND. L. REV. 1, 31 (1999).
governments will in the end weaken both and disserve the very strong arguments in support of robust states, as it did in the 1930s.