FEDERALISM'S FRONTIER

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I. INTRODUCTION

September 11 was supposed to change everything, including federalism. Federalism has in fact become more problematic, and the Supreme Court's federalism suggests an alarming obtuseness to political realities. But the reasons for the incongruence between the Supreme Court's federalism and the nation's vulnerabilities have nothing to do with terrorists; they have to do with trial lawyers.

II. THE NATION'S WAR, AND THE COURT'S

September 11 seemed to signal federalism's impending demise. Like any war, the thinking went, the war against terror would bring new respect for the national government, and wartime measures would entail new national programs and responsibilities.[1] The Supreme Court would have to revisit—and perhaps abandon—federalism.[2] Those predictions, though, have proven false. The federal government has grown, but mostly for reasons and in areas (from education[3] to agriculture[4] to corporate governance[5]) far removed from the war against terror. The Supreme Court, for its part, stayed its federalism course during the 2001-2002 Term[6] and, for the 2002-2003 Term, has

1. *See, e.g.*, James Conaway, *Suddenly, a Capital Back in Focus*, WASH. POST, Oct. 14, 2001, at B1; Robin Toner, *Now, Government is the Solution, Not the Problem*, N.Y. TIMES, Sept. 30, 2001, at D14; Jacob Weisberg, *Feds Up*, N.Y. TIMES MAG., Oct. 21, 2001, at 6.

2. *See, e.g.*, Linda Greenhouse, *Will the Court Reassert National Authority?*, N.Y. TIMES, Sept. 30, 2001, at D14.

3. *See, e.g.*, No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002), *available at* http://www.ed.gov/legislation/ESEA02/index.html (last modified Mar. 26, 2002).

4. *See* Rep. Ike Skelton, *Weekly Column* (Oct. 14, 2001), *at* http://www.house.gov/skelton/col011014.htm (noting that the Farm Security Act of 2002 provides $167 billion in government spending on agriculture through 2011).

5. *See, e.g.*, Sarbenes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

6. Building on its Eleventh Amendment precedents, the Court held that states are immune from suit not only in state and federal court but also in certain federal agency proceedings. Fed. Maritime Comm'n v. South Carolina, 122 S. Ct. 1864 (2002). Similarly, in a pair of cases that produced unremarkable outcomes but broadly reasoned majority opinions, the Justices extended a long line of decisions limiting the rights of private litigants to sue state and local governments under federal entitlement statutes. *See* Barnes v. Gorman, 122 S. Ct. 2097 (2002); Gonzaga Univ. v. Doe, 122 S. Ct. 2268 (2002).

already granted certiorari in a number of significant cases concerning federalism.[7]

Predictions of federalism's demise rested principally on the belief that federalism—or at any rate, the Supreme Court's federalism—distrusts the national government.[8] That distrust is a "luxury of peaceful times,"[9] and we no longer have that luxury. But the notion that the national government must be trusted or distrusted *tout ensemble* is only plausible, if at all, at an absurd level of generality.[10] At a constitutional level, federalism is about discreet powers. While the Rehnquist Court has of course limited the national government's powers *vis-à-vis* the states, it has not constrained, and will not constrain, any powers that the national government conceivably might need in the war against terror. What has become problematic is not judicial federalism per se, but its point and purpose.

The Rehnquist Court has waged its federalism campaign on behalf of "states' rights" against national impositions, but the rehabilitation of a plausible, constitutional federalism is a two-front war. Federalism surely must limit the national government's powers over the states and protect intergovernmental immunities (in some domain, to some extent). However, it must also protect states from aggression and exploitation *by other states*; moreover, it must protect the common economic market from regulatory balkanization.[11]

The New Deal Court dismantled the horizontal federalism norms that once safeguarded those principles.[12] We are now

7. *See, e.g.*, Nev. Dept. of Human Res. v. Hibbs, 273 F.3d 844 (9th Cir. 2001) (concerning sovereign immunity), *cert. granted*, 122 S. Ct. 2618 (2002); Pierce County v. Guillen, 35 P.3d 1218 (Wash. 2001) (focusing on a Spending Clause question), *cert. granted*, 122 S. Ct. 1788 (2002).

8. Erwin Chemerinsky, *Amending the Constitution*, 96 MICH. L. REV. 1561, 1566 (1998) ("[T]he Constitution's division of powers . . . and federalism, is based on such distrust.").

9. Greenhouse, *supra* note 2 (quoting Walter Dellinger).

10. I have argued the point elsewhere. *See* MICHAEL S. GREVE, AM. ENTER. INST., NATIONAL POWER, POST-9/11, *at* http://www.aei.org/fo/fo13437.htm (last visited Nov. 5, 2002).

11. Although these constitutional values overlap (since exploitative state regulation may easily produce conflicting regulation), they are not coextensive. Arguably, the principal threat behind much exploitative state legislation is collusion and cartelization, rather than fragmentation (*see infra* notes 31-62 and accompanying text). Conversely, state regulation may "balkanize" the national economy without necessarily being exploitative in purpose or effect; the state regulation of what we now call network industries provides examples.

12. *See infra* notes 72-85 and accompanying text. *See also* John O. McGinnis, *A New Agenda for International Human Rights: Economic Freedom*, 48 CATH. U. L. REV. 1029, 1030-

paying the price of that constitutional mass destruction. Unimpeded by constitutional injunctions, trial lawyers and activist state attorneys general are launching assaults on sister states. As shown below, the product liability crisis—as well as state litigation campaigns against the tobacco, financial, and pharmaceutical industries—demonstrate that state aggression presents an increasingly serious economic and constitutional problem.[13] The leaders of those campaigns proudly sail under the banner of "federalism and states' rights." Their initiatives, however, are not simply an attack on corporate America (which may deserve it); they are also, and inherently, an assault on the integrity, autonomy, and equality of sister states. The trial lawyers' states' rights parochialism is a false federalism and the antithesis of the real thing. It is "the spirit which must either be killed, or else it will kill the Constitution of the United States."[14]

The Rehnquist Court has ignored federalism's horizontal dimension. Worse yet, by exalting "states' rights" *vis-à-vis* the national government, the Court has provided the false federalists with potent ammunition. The Court will never prevent the nation from preempting Iraq. It has, however, brought us to the brink of being unable to preempt the trial bar. The struggle to contain false federalism is federalism's frontier. The Justices still may be able to correct their strategic mistake at this front. But they, and the nation, are running out of time.

III. THE SUPREME COURT'S FEDERALISM

The five Rehnquist Court Justices who have sustained federalism's constitutional revival[15] never have been very clear about federalism's ultimate point and purpose. The question, though, is neither trivial nor meaningless. One possible answer

31 (1999) ("In the New Deal, the structural checks of federalism and the separation of powers were weakened substantially.").

13. *See infra* notes 31-59 and accompanying text.

14. I have borrowed the snappy "false federalism" phrase from Walter Dellinger. *The Interstate Class Action Jurisdiction Act of 1999 and Workplace Goods Job Growth and Competitiveness Act of 1999: Hearing on H.R. 1875 Before House Comm. of the Judiciary*, 106th Cong. 118 (1999), *available at* http://commdocs.house.gov/committees/judiciary/hju62443_0f.htm (last visited Nov. 23, 2002) (statement of Walter Dellinger, Solicitor General). The ferocious kill-or-be-killed sentence is Alexander Hamilton's 1790 denunciation of Virginia's states' rights-based opposition to the proposed national assumption of the states' war debts. JOHN C. MILLER, THE FEDERALIST ERA 52 (1960).

15. The "federalism five" are Rehnquist, O'Connor, Scalia, Thomas, and Kennedy. William H. Pryor, Jr., *The Demand for Clarity: Federalism, Statutory Construction, and the 2000 Term*, 32 CUMB. L. REV. 361, 361-62 (2002).

is that federalism is "in the Constitution" and therefore ought to be enforced—even if it were otherwise no good for anyone or anything.[16] That argument, though, legitimates only some basic judicial protections for the states (and corresponding limitations on the national government). Beyond that point—which the Rehnquist Court has long passed—federalism is a question of structural principles and constitutional values. In adjudicating questions of federalism, one has to explain why one conception of it is more plausible, coherent, and attractive than another from a constitutional vantage point.

The Court's federalism value of choice has been the "dignity" of the states.[17] That concern underpins the Court's solicitude of "traditional state powers"[18] and its resolute defense of state governments, or "states as states," against national impositions.[19] The "dignity" concept, however, suffers from three serious defects.[20] First, it could mean anything. Individual judicial decisions shape the concept, rather than the other way around. Second, state "dignity" has no clear constitutional pedigree; in fact, it is just as easily described as an *anti*-constitutional (and most certainly an anti-federalist) notion.[21] "Dignity" becomes

16. "Our task [in construing federalism] would be the same even if one could prove that federalism secured no advantages to anyone. It consists not of devising our preferred system of government, but of understanding and applying the framework set forth in the Constitution." New York v. United States, 505 U.S. 144, 157 (1992).

17. *See, e.g.*, Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 268 (1997); Alden v. Maine, 527 U.S. 706, 714 (1999); and, most recently, Fed. Maritime Comm'n v. South Carolina, 122 S. Ct. 1864 (2002).

18. *See Alden*, 527 U.S. at 714-15.

19. *See id.* at 714; *Fed. Maritime Comm'n*, 122 S. Ct. at 1874.

20. "Dignity" suffers *at least* from the difficulties stated in the text. For a somewhat different, harsh, but fair-minded critique of the Supreme Court's reliance on the concept, see Evan H. Caminker, *Judicial Solicitude for State Sovereignty*, 547 ANNALS OF THE AM. ACAD. POL. & SOC. SCI. 81 (2001).

21. The Federalists at the Constitutional Convention argued vociferously, though not altogether persuasively, that the states were mere "artifacts" with all the inherent dignity of municipal corporations—that is to say, none. The echo of that debate appears in the Federalist Papers:

> Was, then, the American Revolution effected, was the American Confederacy formed, was the precious blood of thousands spilt, and the hard-earned substance of millions lavished, not that the people of America should enjoy peace, liberty, and safety, but that the government of the individual States, that particular municipal establishments, might enjoy a certain extent of power, and be arrayed with certain dignities and attributes of sovereignty?

THE FEDERALIST NO. 45, at 289 (James Madison) (Clinton Rossiter ed., 1961). Under the Constitution, of course, the states are more than administrative subunits of the national government; they are partially autonomous, rival centers of power. But the case for that

particularly problematic when it is mobilized to support rulings that appear to fly in the face of the constitutional text—for example, the Eleventh Amendment.[22]

Third, state "dignity"—unlike human dignity—is at most an instrumental value. Nobody believes that it is worth preserving for its own sake. Individual Justices have at times acknowledged that federalism must be good for someone and something above and beyond the protection of "states as states."[23] In search of that something, the Justices have at various times invoked a number of plausible constitutional values that are derived from *citizens'* concerns, rather than the states': political accountability, diversity, "closeness to the people," civic participation, decentralization, and others.[24] Generally speaking, though, the Rehnquist Court has failed to follow up on those dicta. In the aggregate, the Court's sovereign immunity decisions certainly suggest that state sovereignty and "dignity" are free-standing, non-instrumental values.[25] Citizen-centered values, on the other

construction rests on what is good for citizens and their liberty. State sovereignty is an instrumental value.

22. The text of the Eleventh Amendment does not speak of sovereign immunity, let alone dignity; it simply provides that "[t]he Judicial power *of the United States* shall not be construed to extend to any suit . . . against one of the United States *by Citizens of another State*." U.S. CONST. amend. XI (emphases added). Conventional interpretive canons do not suggest, and arguably preclude, an extension of Eleventh Amendment immunity to suits by a state's own citizens, in state court or federal agencies. The Rehnquist Court, of course, has dismissed an insistence on the text of the Amendment as "ahistorical literalism." *Alden*, 527 U.S. at 730. A plausible defense of that leap beyond the text would prove very complicated. There is nothing ordinary about trumping constitutional language with a value—least of all when the value (state "dignity") is supposed to flow from the constitutional text that it trumps.

23. "The Constitution does not protect the sovereignty of States for the benefit of the States . . . as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals." New York v. United States, 505 U.S. 144, 181 (1992).

24. *See, e.g.*, this oft-cited laundry list of federalism's advantages:

> Th[e] federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

25. *See* Jeff Powell, *The Complete Jeffersonian: Justice Rehnquist and Federalism*, 91 YALE L.J. 1317, 1320 (1982) ("Rehnquist has argued that the constitutional first principle intended by the Framers was the maintenance of the federal system and of the dignity and autonomy of the states. In his view, solicitude for the values of federalism must therefore remain a primary goal of judicial decision-making.").

hand, have remained underdeveloped. With few exceptions, the Court has failed to connect those values to a usable set of operational constitutional doctrines.[26]

Indeterminacy, extra-textualism, and a lack of theoretical precision do not uniquely characterize the Supreme Court's federalism—regardless of what the liberal intellectuals and politicians who rail against the Rehnquist Court's "activism" like to believe. But the Court's extra-constitutional forays have begun to make even conservative scholars nervous and, in one instance, quite angry.[27] For the most part, the growing criticism rests on the sensible proposition that the Rehnquist Court federalism legacy should be a *constitutional* legacy, not another penumbral emanation.[28] But the Court's states' rights enthusiasm has an added, most serious drawback: it leaves the Court ill prepared, and in some ways disarmed, for the confrontation with false federalism.

Federalism rests on principles of state autonomy and equality: each state governs its own territory and citizens but not, of course, the territory and citizens of sister states.[29] Equality and autonomy, in turn, translate into a principle of non-aggression—not because states do not want more extensive rights (they surely do) but because a world of limited territory and scarce resources renders any other principle incoherent. The precise contours of autonomy-maximizing non-aggression rules are quite problematic, as are the institutional arrangements that are best suited to protect those rules. By way of obvious example, it is devilishly difficult to specify a set of rules that will provide states with effective protection against economic exploitation by sister states, and those difficulties arise before one gets to the questions of whether the rules are judicially manageable and

26. For a more extensive discussion of this point and references to the voluminous law review literature, see Michael S. Greve, *Against Cooperative Federalism*, 70 MISS. L. REV. 557, 610-22 (2000).

27. The angry critic is JOHN T. NOONAN, JR., NARROWING THE NATION'S POWER (2002). For thoughtful critiques of the Rehnquist Court's federalism from conservative scholars, see, e.g., Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819 (1999); Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153 (1997).

28. *E.g.*, Rappaport, *supra* note 27, at 820 ("In all of the [federalism] cases, the Supreme Court has failed to adequately explain how the immunities derive from the text of the Constitution.").

29. *See* Healy v. Beer Inst., 491 U.S. 324, 336 (1989) (holding states may not impose extraterritorial legislation per the dormant Commerce Clause).

constitutionally legitimate. (For proof, consult any contribution to the burgeoning literature on the dormant Commerce Clause.[30]) Modern "states' rights" federalism, though, is more seriously problematic: it facilitates practices that undermine the principles of state equality and autonomy at their core.

IV. THE TRIAL LAWYERS' FEDERALISM

Products liability litigation under state law is the paradigmatic violation of state integrity. Manufacturers have no practical way of keeping their products out of particular jurisdictions. Plaintiffs, on the other hand, get to choose their own forum and law.[31] As a result, the most restrictive and plaintiff-friendly jurisdiction will effectively impose its liability and product norms on the entire country and redistribute income from out-of-state manufacturers (and their shareholders and workers) to in-state plaintiffs in the process.[32]

Liability litigation, under existing rules, presents a serious threat to state autonomy. Georgia, for example, may wish to be "gun-friendly," but a single liability verdict in, say, Los Angeles may vitiate that policy choice. Consumer advocacy groups reacted with alarm[33] over a multi-billion dollar verdict in an Illinois state court, resulting from a class action lawsuit alleging that auto insurers' use of so-called "aftermarket" auto parts (meaning replacement parts produced by someone other than the original car manufacturer[34]) constitutes common law fraud

30. This continuing struggle has included such issues as state customs duties, H.P. Hood & Sons v. DuMond, 336 U.S. 525, 539 (1949); preferences for local businesses over interstate competitors, Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1096-99 (1986); tax credits and exemptions for local businesses, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §6-17, at 453-58 (2d ed., 1988); and direct monetary subsidies to local businesses, Dan T. Coenen, *Business Subsidies and the Dormant Commerce Clause*, 107 YALE L.J. 965, 973-74 (1998).

31. *See* Peter J. Carney, Comment, *International* Forum Non Conveniens*: "Section 1404.5"—A Proposal in the Interest of Sovereignty, Comity, and Individual Justice*, 45 AM. U. L. REV. 415, 488 (1995).

32. The analysis in the text follows Michael McConnell, *A Choice-of-Law Approach to Products Liability Reform*, *in* NEW DIRECTIONS IN LIABILITY LAW 90 (Walter Olson ed., 1988).

33. Matthew L. Wald, *Suit Against Auto Insurers Could Affect Nearly All Drivers*, N.Y. TIMES, Sept. 27, 1998, at A29.

34. *Id.*

under Illinois law.[35] The verdict, the advocates feared, would effectively govern automobile insurance in all fifty states, some of which mandate the use of aftermarket parts so as to reduce insurance rates.[36]

The extraterritorial effects of products liability lawsuits, moreover, create an exploitative dynamic that no individual state can escape. State liability limitations are an act of unilateral disarmament: they leave the state's industries and citizens vulnerable to exploitation by all other jurisdictions, while disabling the state's judges and juries from responding in kind. When every jurisdiction can impose its rules on all other jurisdictions, the result is a race towards excessive liability levels—"excessive" in the sense that the rules are stricter than the rules that the citizens of autarkic states would choose.

The fateful dynamics of products liability litigation and their deleterious effects have prompted sporadic federal interventions over the past two decades, both in the form of piecemeal legislative liability reforms[37] and in judicial limitations on state courts and juries.[38] These efforts, though, have had only a limited effect in the face of powerful countervailing trends—the emergence of a highly organized and sophisticated trial bar; the rise to power of a cadre of ambitious, regulation-minded state attorneys general;[39] and increased cooperation between these groups.[40] Interstate exploitation, moreover, has been disconnected from tangible, often bodily harms; now, it typically proceeds under open-ended theories of fraud and misrepresentation. At the same time, exploitation has been organized and systematized.

The paradigmatic example is the 1998 Master Settlement Agreement (MSA) on tobacco litigation.[41] Nominally, the MSA

35. *Id.*

36. *Id.*

37. *See, e.g.*, Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995).

38. *See, e.g.*, BMW of N. Am. v. Gore, 517 U.S. 559, 575 (1996) (finding a state Supreme Court's award of punitive damages "grossly excessive").

39. Michael DeBow, *The State Tobacco Litigation and the Separation of Powers in State Governments: Repairing the Damage*, 31 SETON HALL L. REV. 563, 585 (2001) (noting the emergence of aggressive Democratic state attorneys general as a reaction against the Reagan administration).

40. *Id.* at 591.

41. MASTER SETTLEMENT AGREEMENT, *available at* http://caag.state.ca.us/tobacco/pdf/1msa.pdf (last visited Oct. 11, 2002).

"settled" a series of state liability lawsuits brought by coalitions of state attorneys general and trial lawyers.[42] In fact, it established a national regulatory regime governing the sale, advertising, and marketing of tobacco products.[43] The MSA also imposed a national tobacco sales tax, amounting to some $250 billion over the first twenty-five years of the agreement.[44]

The MSA has come to serve as a precedent. In the wake of the "dot com" and telecommunications meltdown on Wall Street, New York Attorney General Eliot Spitzer launched an investigation and legal proceeding against Merrill Lynch, whose research analysts touted, to an allegedly unsuspecting public, worthless stocks of companies with which Merrill Lynch had an undisclosed underwriting relation.[45] Merrill Lynch signed an agreement providing for internal management changes and payment of $100 million—$48 million to the lead underwriter of the investigation (New York), the remainder to the other states.[46] In the wake of the agreement, the states have agreed to pursue similar campaigns against other investment houses and to share the proceeds.[47]

The pharmaceutical industry also has become a target of potentially ruinous attacks. With the assistance of plaintiffs' firms, including some of those that rose to fame and fortune in the tobacco litigation, Nevada and Montana have filed suits against leading manufacturers.[48] The suits allege that the firms' "average wholesale prices" (AWP)—which are used, pursuant to federal law, as a basis for reimbursement under Medicare—are

42. Elizabeth Brown Alphin, *Federal Tobacco Regulation: The Failure of FDA Jurisdiction over Tobacco and the Possibility of Compromise Through a Federal Regulatory Scheme*, 40 BRANDEIS L.J. 121, 140 (2001).

43. Philip C. Patterson & Jennifer M. Philpott, *In Search of a Smoking Gun: A Comparison of Public Entity Tobacco and Gun Litigation*, 66 BROOK. L. REV. 549, 553-54 (2000).

44. Many analysts agree that the MSA establishes a national tax. *See, e.g.*, Ian Ayres, *Using Tort Settlements to Cartelize*, 34 VAL. U. L. REV. 595 (2000); Hanoch Dagan & James J. White, *Governments, Citizens, and Injurious Industries*, 75 N.Y.U. L. REV. 354, 426-28 (2000).

45. Dan Carney, Mike McNamee, & Emily Thorton, *The Street's New Cleanup Crew*, BUS. WEEK ONLINE, June 3, 2002, *at* http://www.businessweek.com/bwdaily/dnflash/jun2002/nf2002063_8860.htm (last visited Oct. 12, 2002).

46. Michael Gromley, *Two States Balk at $100 Million Merrill Lynch Deal; Action Could Be Bid for More from Spitzer's Settlement Plan*, TIMES-UNION (Albany, N.Y.), June 11, 2002, at E1. The states divided these proceeds and the defrauded customers received little or nothing. *Id.*

47. Carney et al., *supra* note 45.

48. Russell Gold & Andrew Caffrey, *States Suing Drug Makers Spurn Former Allies on Tobacco*, WALL ST. J., May 29, 2002, at B1.

higher than the actual prices that manufacturers charge to doctors and pharmacists (who pocket most of the price difference).[49] Though this has been known for three decades, Congress nonetheless explicitly rejected a Clinton administration proposal to reform the AWP system as recently as 1997,[50] principally because it deemed the price difference necessary to sustain doctors' and pharmacists' participation in the programs.[51] The state suits allege that the manufacturers' pricing practices constitute fraud.[52]

The state initiatives just sketched share two common features: they depend on interstate exploitation, and they pursue *national* regulatory objectives. Eventually, all states signed the tobacco agreement.[53] That outcome was practically a foregone conclusion once the first few states had obtained multi-billion dollar settlements;[54] consumers across the country were paying the costs of state-specific lawsuits on a proportional basis.[55] In other words, non-suing states could opt out of the proceeds of a national settlement, but not its costs. Given that choice, even states that had never filed suit against the manufacturers—and one state that had vehemently denounced the attorneys' general campaign[56]—eventually succumbed. So, too, with the Merrill Lynch settlement: states confronted a choice between jumping on the bandwagon or leaving the proceeds and the glory to Mr. Spitzer. And so with the pharmaceutical cases: price concessions one state extorted leave laggard states holding the bag.

The constituencies behind the state campaigns have accomplished the unlikely feat of portraying their advances as *both* pristine exercises of "states' rights" and laudable national reform initiatives. The tobacco settlement was concluded after a

49. James M. Spears & Jeff Pearlman, *Using Litigation to Regulate Drug Prices*, MED. MARKETING & MEDIA, June 1, 2002, at 70.

50. *Id.*

51. *Id.*

52. *Id.*

53. William H. Pryor, Jr., *A Comparison of Abuses and Reforms of Class Actions and Multigovernment Lawsuits*, 74 TUL. L. REV. 1885, 1910 (2000).

54. *Id.* at 1911.

55. *Id.* at 1911-12.

56. The state denouncing the campaign was Alabama. *See, e.g.*, Pryor, *supra* note 53 (detailing the logic behind Alabama's opposition); William H. Pryor, Jr., *The Law Is at Risk in Tobacco Suits*, N.Y. TIMES, Apr. 27, 1997, at D15. Mr. Pryor is, and was at all times relevant to the proceeding, the Attorney General of Alabama.

very similar measure failed to obtain congressional approval.[57] Attorney General Spitzer explicitly advertised his investigation as an attempt to "restructure" the nation's financial industries.[58] The initiators of the campaign against the pharmaceutical industry explicitly aim to reform America's health care system.[59]

The economic costs of systematized interstate exploitation are a matter of conjecture. Beyond peradventure, however, are the costs to constitutional government. For example, a national tobacco sales tax would be plainly unconstitutional if a single state attempted to impose it. The tax does not become constitutional because the states—and tobacco manufacturers—conspire to impose it.[60] By the time that a handful of attorneys general, trial lawyers, and tobacco lawyers, without the vote of any legislature (state or federal), put in place a national tax of over $250 billion,[61] accompanied by a massive national regulatory scheme, it ought to be obvious that something has gone quite wrong—and that the error cannot be a mere technicality. The fact such schemes are even arguably constitutional[62] illustrates the near-total collapse of states' constitutional protections against sister-state exploitation.

V. SUPERMARKET FEDERALISM

As noted, the injunction against interstate aggression and exploitation follows ineluctably from federalism's logic. The language and structure of the Constitution clearly reflect that logic.[63] In contrast to virtually all modern federalist constitutions, the United States Constitution does not actually spell out a

57. For a discussion of this proposal, see MARTHA DERTHICK, UP IN SMOKE: FROM LEGISLATION TO LITIGATION IN TOBACCO POLITICS 130-46 (2002).

58. Charles Gasparino, *Wall Street Has an Unlikely New Cop: Spitzer*, WALL ST. J., Apr. 25, 2002, at C1.

59. Gold & Caffrey, *supra* note 48 (quoting Ohio Attorney General Betty Montgomery, who is heading an attorneys general task force on pharmaceutical price control litigation).

60. *See* Ayres, *supra* note 44.

61. *See* Dagan & White, *supra* note 44, at 364.

62. I have attempted to show elsewhere that those state agreements are in fact unconstitutional. Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 67 MO. L. REV. (forthcoming 2003), draft *available at* http://www.federalismproject.org/masterpages/publications/Compacts.pdf (last visited Oct. 12, 2002). Federal courts, alas, have taken a different view. *See, e.g.*, Star Sci., Inc. v. Beales, 278 F.3d 339 (4th Cir. 2002), *cert. denied sub nom.* Star Sci., Inc. v. Kilgore, 2002 U.S. LEXIS 5557 (Oct. 7, 2002) (sustaining the tobacco agreement against multiple constitutional attacks).

63. Chemerinsky, *supra* note 8, at 1566-67.

sphere or a set of policy areas wherein the states must remain autonomous. What the Constitution does prominently list is a series of *prohibitions* (some absolute,[64] others qualified[65]) against the states. Most of those prohibitions specify what states may not do *to one another*, or to a sister state's citizens.[66] Most, moreover, prohibit state activities that fall comfortably under the umbrella of exploitation, protectionism, and predatory activity, such as state tariffs and duties,[67] and state laws impairing the obligation of contracts.[68] Naturally, the prevention of interstate exploitation is committed to the national government—to the federal courts, in the exercise of their ordinary jurisdiction;[69] and to the Congress, acting under its enumerated powers, especially the Commerce Clause.[70] The prevention of aggression and exploitation among the states is the central, irreducible purpose of the Commerce Clause.[71]

One much-overlooked legacy of the New Deal is the destruction of this constitutional framework, and particularly of meaningful horizontal federalism doctrines. The common view of the New Deal Court, which both conservative and liberal scholars share, is that it wrought a nationalist constitutional revolution.[72] It unleashed the national government from constitutional constraints (notably, the Commerce Clause).[73] What the national government gained, the states lost.

That common view, however, is largely wrong. As Stephen Gardbaum has argued in a compelling but unjustly ignored

64. Common examples of absolute prohibitions include the Contracts Clause, passing *ex post facto* laws, and granting of titles of nobility. *See* U.S. CONST. art. I, § 10, cl. 1.

65. Common examples of qualified prohibitions include the Import-Export Clause and the Tonnage Clause. *See id.* art. I, § 10, cls. 2-3.

66. Obvious examples of these horizontal injunctions include the Contracts Clause, the Import-Export Clause, and the Tonnage Clause. *See id.* art. I, § 10.

67. *See id.*

68. *See id.*

69. *See* U.S. CONST. art. III, § 2, cl.1.

70. *See id.* art. I, § 8.

71. *See, e.g.*, Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. REV. 43, 43-45 (1988). *See also* Saul Levmore, *Interstate Exploitation and Judicial Intervention*, 69 VA. L. REV. 563 (1983) (arguing that prevention of interstate exploitation should serve, and by and large has served, as the theoretical basis for the dormant Commerce Clause).

72. *See* Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 483-84 (1997) [hereinafter *Unshackling*].

73. *See id.* at 483-87.

article, the New Deal unleashed the national government *and the states*.[74] Gardbaum discusses five "specific preexisting constitutional constraints on state power that the Roosevelt era Court lifted or limited"[75]: (1) the demolition of the substantive due process limitations of the *Lochner*[76] era;[77] (2) the radical transformation of the dormant Commerce Clause from a subject-matter limitation on state power into a weak anti-discrimination rule;[78] (3) the displacement of virtually automatic federal field preemption with a presumption *against* preemption;[79] (4) a virtual halt to the previous trend of incorporating Bill of Rights guarantees into the Fourteenth Amendment;[80] and (5) an enormous expansion of state judicial power through the doctrine of *Erie Railroad Co. v. Tompkins*[81] and its corollaries[82]—newly created doctrines of federal abstention, an expansion of state court territorial jurisdiction, and the virtual elimination of constitutional limitations on state courts' choice of law.[83]

Substantive due process and incorporation, of course, celebrated a resurrection under the Warren/Brennan Court, but only with respect to personal, non-economic rights.[84] When it comes to the regulation of economic conduct, the Supreme Court has sustained the regime established under the New Deal: a vast realm of virtually unlimited, concurrent powers, which both the states and the national government occupy.[85]

The most striking feature of that program is its fantastic incoherence. One cannot unshackle the states without allowing them to exploit each other. If the choice of law is a state law

74. *See id.*

75. *See id.* at 487-90.

76. Lochner v. New York, 198 U.S. 45 (1905).

77. *See Unshackling*, *supra* note 72, at 487-89.

78. *Id.* at 489.

79. *Id.*

80. *Id.*

81. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) (overruling *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), which allowed federal courts sitting in diversity not to follow state common law but to insert what they believed state common law should be).

82. *E.g.*, Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941) (extending the prohibition against independent federal judicial determination to the area of conflict of laws).

83. *Unshackling*, *supra* note 72, at 489.

84. *See id.* at 493, 549-50.

85. *Id.* at 521.

question, or a question on which federal law must follow state law,[86] then most state courts will prefer their own law to that of a sister state. That is the sum and substance of extant choice-of-law doctrine,[87] and its predictable result is modern products liability law. Whatever values that monstrosity may serve, state autonomy is not among them.[88] Pursuing the thought a bit further yields a possible response to the abandonment of *constitutional* and judicial injunctions against state aggression: an expansion of congressional authority; or more precisely, a more robust judicial presumption to the effect that congressional action in some field of interstate commerce was intended to preempt state action. As Gardbaum shows, though, the New Deal Court took the opposite tack and *weakened* federal preemption doctrines.[89]

The only premise that renders the New Deal apparatus coherent, in its own perverse way, is a desire to maximize the incentives for regulation, and hence regulation itself, at every level of government. One state's exploitative regulation, unimpeded by the Constitution, prompts another state's response. That, again, is the basic dynamic of products liability. The regulatory race among the states in turn generates demand for federal preemptive regulation. Preemption, though, is rarely a ceiling—only a floor for the next round of state regulation.[90] In this manner, a "federalism" without horizontal protections maximizes governmental access points and eliminates the veto points. An interest group that fails to get its way in one forum can turn elsewhere because some government is always open for business. Let trial lawyers collude with a handful of state attorneys general and a stampede results. Let a few state "laboratories" launch an experiment on corporate guinea pigs from out of state and the animals will lead the campaign for

86. Thus, the extension of *Erie* in *Klaxon*. *See supra* notes 82-83.

87. Willis L. Reese, Book Note, 80 AM. J. INT'L. LAW 229, 229-30 (1986) (reviewing DAVID R. CAVERS, THE CHOICE OF LAW: SELECTED ESSAYS, 1933-1983 (1985)).

88. *See* Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249 (1992) (arguing that modern choice of law theories are incompatible with constitutional principles of state equality and integrity).

89. For a discussion, see *Unshackling*, *supra* note 72, at 532-40.

90. *Cf.* Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 149 (2002) (noting that the opportunity for states to experiment is limited by "a 'floor' of basic, federal constitutional guarantees").

national intervention.[91] There is no stopping point. The demise of constitutional limitations has deprived political institutions of the incentives and the means to declare the bazaar closed. That, in a nutshell, is "our federalism."

While the absurdity of this supermarket "federalism" should by now be apparent, the Rehnquist Court has ignored horizontal federalism questions. A handful of cases allude to those considerations, but most of the allusion has been the work of liberal opponents of the Court majority's federalism.[92] Not one case in the Rehnquist Court's federalism corpus shows a judicial recognition that interstate exploitation—even, and especially, under the guise of "states' rights"—is a federalism problem in its own right.

The most plausible and charitable explanation for the strangeness of the Rehnquist Court's federalism lies in its origin and its strategic orientation. From the get-go, the Rehnquist majority defined the federalism problem as national overreach and regimentation.[93] The "process federalism" of the post-New Deal era translated into wholesale nationalism, and that could not be the final word.[94] On the other hand, a revision of the New Deal's constitutional doctrines would translate into a wholesale

91. Justice Louis D. Brandeis' famous paean to states as "laboratories" exalts state tinkering "with novel social and economic experiments w*ithout risk to the rest of the country*." New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (emphasis added). Once the constitutional injunctions against extraterritorial exploitation have been removed, though, the risk of state experimentation to the "rest of the country" is massive. As the author and architect of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), Brandeis himself deliberately fostered that risk. His progressivist, anti-corporate aspirations always trumped his nominal commitment to federalism. On Brandeis' anti-corporate sentiments as the basis of *Erie Railroad*, see EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION 141 (2000).

92. *See, e.g.*, Healy v. Beer Inst., 491 U.S. 324, 336 (1989) (holding that the dormant Commerce Clause forbids extraterritorial state legislation); BMW of N. Am. v. Gore, 517 U.S. 559, 571 (1996) (finding that states' abilities to enforce rules with extraterritorial effects warrant constitutional limitations); Saenz v. Roe, 526 U.S. 489, 510-11 (1999) (holding that the Fourteenth Amendment forbids discrimination against newly-arrived citizens).

93. William H. Pryor, Jr., *Madison's Double Security: In Defense of Federalism, the Separation of Powers, and the Rehnquist Court*, 53 ALA. L. REV. 1167, 1171 (2002) [hereinafter *Double Security*] ("The court is performing its role as a check of the abuse of power by the federal government itself.").

94. Chief Justice Rehnquist famously argued this in his dissent in the Supreme Court's most explicit process federalism decision. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 580 (1985) (Rehnquist, C.J., dissenting) (stating that the principle of state sovereignty "will, I am confident, in time again command a majority of this Court.").

judicial assault on the administrative state, and that is simply out of the question. The task, then, is to salvage pieces of the federalist architecture *without mounting a frontal, politically unsustainable attack on the New Deal and its constitutional legacy.*[95]

The centerpiece of the Rehnquist Court's effort to expand federalism under the New Deal's constitutional umbrella has been inordinate emphasis on protecting the states "as states." The Court's federalism decisions under the Tenth Amendment,[96] the Eleventh Amendment,[97] and the Fourteenth Amendment[98] have exempted state (and, to an extent, local) governments from national regulations[99] and immunized them against liabilities to which *private* parties remain subject under federal law.[100] Congress' powers over the economy remain unlimited, except that the states enjoy a constitutional enclave.

95. *See* MICHAEL S. GREVE, REAL FEDERALISM: WHY IT MATTERS, HOW IT COULD HAPPEN 21, 79-82 (1999). "Fearless crusaders" is what Justice Stevens has called the federalist majority on the Bench. Barnes v. Gorman, 122 S. Ct. 2097, 2105 n.3 (2002) (Stevens, J., concurring). That is not quite right: crusaders or not, they are mortally afraid of tackling federalism's aunt in the attic—the New Deal. Witness, for instance, the Court's conspicuous reaffirmation of central New Deal precedents. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 556 (1995) (reaffirming Wickard v. Filburn, 317 U.S. 111 (1942)). Witness also the Court's extensive reliance on sub-constitutional canons of construction rather than constitutional doctrines. *See, e.g.*, Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001) (holding that the U.S. Army Corps of Engineers' interpretation of its powers under § 404(a) of the Clean Water Act exceeded its authority and did not reach the issue of Commerce Clause power).

96. *See, e.g.*, New York v. United States, 505 U.S. 144 (1992) (ruling Congress cannot commandeer state legislatures to enact waste disposal programs); Printz v. United States, 521 U.S. 898 (1997) (holding Congress cannot commandeer state officials to enforce the Brady Bill).

97. *See, e.g.*, Seminole Tribe v. Florida, 517 U.S. 44 (1996) (holding that the Eleventh Amendment barred Congress from subjecting states to suits by private parties in federal courts); Alden v. Maine, 527 U.S. 706 (1999) (ruling that Congress lacked the power under Article I to subject non-consenting states to private damage suits in state courts, in light of the state sovereignty principles noted by the Eleventh Amendment and the states' understandings when ratifying the Constitution).

98. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507 (1997) (holding Congress did not have the power to impose on states more stringent protections of religious liberties that those the Constitution requires); Kimel v. Fla. Bd. of Regents, 528 U.S. 356 (2000) (holding Congress cannot abrogate state immunity in the area of age discrimination when no evidence of substantial unconstitutional discrimination occurred).

99. *Double Security*, *supra* note 93, at 1179-82.

100. *See* Kristen Healey, *The Scope of Eleventh Amendment Immunity from Suits Arising Under Patent Law After* Seminole Tribe v. Florida, 47 AM. U. L. REV. 1735, 1771-72 (1998) (noting the disparity in treatment of states and individuals under federal patent law under the Rehnquist court).

That way of splitting the baby is in many ways implausible.[101] It has, however, rendered federalism safe for the regulatory state.

The Rehnquist Court's failure to attend to the problem of state aggression is the flipside of the single-minded protection of "states as states," collectively, against the national government. The phrase itself reduces federalism to its vertical dimension and screens out the bad things that states may do to one another.[102] Having persuaded themselves that federalism is "about" protecting the states against national impositions, federalism's friends on the Supreme Court lack the conceptual tools to fight at the false federalism front. Worse yet, now that the Justices have expanded states' rights, a rediscovery of horizontal states' rights protections may, perversely, begin to look like a retreat from federalism. Persuaded by their own rhetoric, federalism's crusaders may give aid and comfort to false federalism.

VI. PREEMPTION

The New Deal's state-unleashing, exploitation-enhancing reforms are practically sacrosanct.[103] The revival of substantive economic due process is a libertarian pipedream,[104] and the odds that the United States Supreme Court would revisit the *Erie* doctrine[105] or federal abstention doctrines[106] are virtually nil. So, too, with meaningful prohibitions against extraterritorial

101. For example, many of the statutes that remain fully enforceable under the Supreme Court's Fourteenth Amendment and sovereign immunity decisions against private entities, but *not* against state governments, are anti-discrimination statutes, such as the Americans With Disabilities Act. *See, e.g.*, Univ. of Ala. v. Garrett, 531 U.S. 356 (2001). There is no substantive reason to assume that state governments are somehow less likely to engage in discrimination than are private parties—quite the opposite.

102. For an analogous argument in the context of conditional spending statutes, see Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 CHAPMAN L. REV. 195, 219-220 (2001).

103. Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 806-807 (1994).

104. *Unshackling*, *supra* note 72, at 503-504 (noting the explicit rejection of substantive due process in *Olsen v. Nebraska*, 313 U.S. 236 (1941), and that substantive due process has not been revived to protect economic rights as it has been for reproductive rights).

105. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

106. For a discussion, see Donald L. Doernberg, *'We the People': John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CAL. L. REV. 52, 85 n.213 (1985) (noting that the *Younger* doctrine, a federal abstention doctrine based on considerations of comity, equity, and federalism that was established and developed in the 1970s, often has been critiqued by scholars but never overturned by the courts).

legislation. The dormant Commerce Clause essentially boils down to a test of whether the state legislature has a stupid staff.[107] In short, horizontal federalism issues are settled, so far as the Supreme Court and the legal community are concerned, in favor of the New Deal, "states' rights," and interstate exploitation. The last line of defense, and the central battlefield along federalism's frontier, is federal preemption. In that theater, the Rehnquist Court's states' rights defenders have handed the false federalist a deadly weapon.

Trial lawyers and state attorneys general, supported by well-meaning but misguided conservative defenders of states' rights,[108] have advanced under the Rehnquist Court's banners of state "dignity" and "traditional state powers."[109] We know (they say) that the states' "dignity" demands exquisite protection against federal commandeering and abrogations of sovereign immunity.[110] Why, the false federalists ask, should dignity not also command protection against preemption?[111] And what is tort law if not the most "traditional" of state powers?[112]

In cases involving state immunities, the interpretive doctrine that the Court has mobilized most often in the defense of "traditional" state functions is the so-called clear statement rule: Congress may not abrogate the states' immunity or impose regulatory obligations under federal entitlement statutes unless

107. The "stupid staff" invective is too clever to be mine; I have borrowed it from Justice Scalia, who used it in a different context. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1025 n.12 (1992). The dormant Commerce Clause subjects *facially* discriminatory state statutes to a "a virtual per se rule of invalidity." City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978). Neutral rules typically are subject only to a balancing test, as in *Pike Church v. Bruce*, 397 U.S. 137, 142 (1971), under which the state usually wins. (The only modern exception to that pattern appears to be *Hunt v. Washington Apple Comm'n*, 432 U.S. 333 (1977)). Since clever legislators can formulate most facially discriminatory rules as neutral rules, a prohibition against facial discrimination, coupled with a toothless test for purportedly neutral rules, deters only dumb legislators, or their staffers. It is an exaggeration to say that this is the state of the dormant Commerce Clause, but it is not much of an exaggeration.

108. *See, e.g.*, KENNETH STARR ET AL., THE LAW OF PREEMPTION (1991).

109. *See, e.g.*, Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 HASTINGS CONST. L. Q. 69, 112 (1988); Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349 (2001) [hereinafter *Two Cheers*].

110. *See* cases cited *supra* at note 17.

111. Sven Krogius, Dewey v. R.J. Reynolds Tobacco Co.*: A Welcome Exercise of Restraint in Applying Preemption Doctine to State Tort Actions*, 57 BROOK. L. REV. 209, 240-41 (1991) (arguing that principles of federalism create a strong presumption against preemption).

112. *Id.* at 241 (noting that the presumption against preemption is heightened when dealing with historical state concerns such as torts).

those obligations are clearly stated in the law.[113] The obligations may not be implied.[114] So far, the Court has applied the rule only when Congress *regulates* the states, either directly[115] or under conditional funding statutes.[116] False federalists insist that a comparable "clear statement" rule should apply to preemption.[117]

Nominally, something like a clear statement rule already applies to preemption. Extant law—going back, not surprisingly, to the New Deal—establishes a "presumption against preemption" in areas where state regulation has traditionally played a predominant role: federal law should be read to displace traditional state powers only if the statute says so on its face, or else indicates a "clear and unmistakable" congressional intent to preempt the states.[118] Mercifully, though, the Supreme Court has often ignored that presumption.[119] If it were deployed with consistency and bite (as states' rights advocates propose), no federal statute would preempt much of anything.[120]

113. *See, e.g.*, Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) (finding that mere acceptance of federal funds does not imply waiver of sovereign immunity; congressional intention must be "unmistakably clear in the language of the statute"); Dellmuth v. Muth, 491 U.S. 223, 232 (1989) (holding the same).

114. *Scanlon*, 473 U.S. at 242 (saying Congress must "unequivocally express its intention to abrogate the Eleventh Amendment bar to suits against the states in federal court.").

115. Gregory v. Ashcroft, 501 U.S. 452, 481 (1991).

116. *See, e.g.*, Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 16-17 (1981); Alexander v. Sandoval, 532 U.S. 275, 293 (2001).

117. *See, e.g.*, STARR ET AL., *supra* note 108, at 40-56 (listing reasons why a requirement of clear intent would be preferable); Wolfson, *supra* note 109, at 112.

118. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

119. *See generally* Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L. J. 2085, 2105, 2109 (2000) (arguing that the general presumption against preemption is inconsistent with generally accepted preemption principles, such as field preemption and dormant Commerce Clause preemption).

120. Although the point is rarely acknowledged, it is conceptually impossible to apply the precise analogue of the clear statement rule as developed in regulatory cases to preemption. There, the rule applies to explicit statutory provisions that run against the states; if the provision permits the slightest doubt about congressional intent to regulate the states, it will be construed against Congress. *A fortiori*, the rule forbids any and all "implied" impositions on the states. Were that rule to apply to preemption, explicit preemption provisions would be construed against the Congress, and implied preemptions would be barred. To my knowledge, only one-half of one Supreme Court majority opinion has ever suggested such a position. Cipollone v. Liggett Group, 505 U.S. 504, 517 (1992). The second half of the opinion concedes that there must be such a thing as implied preemption. *See id.* at 522. Even the most ardent advocates of a "clear statement" rule for preemption usually assume that to be the case. In other words, clear statement proposals go to the amount of (non-explicit) evidence of congressional intent that should be required to infer preemption of a given range of state laws and activities.

As developed in regulatory cases, the clear statement rule operates with brutal strength: it trumps every other canon of construction,[121] and it is almost always fatal to an assertion of congressional authority.[122] At the same time, federal preemption statutes are rarely clear in delineating the intended scope of preemption. While lack of clarity may sometimes, perhaps often, result from poor drafting, it is essentially inevitable. First, preemption statutes necessarily operate on unanticipated and unknowable facts and circumstances—in particular, on a universe of state laws that will undoubtedly be enacted in response to, and *in an effort to circumvent*, the statutory preemption. Second, short of a complete wipeout of state law, preemption statutes must strike some balance between the federal prohibition and the preserved state law. For this reason, many statutes contain both an explicit preemption provision and an explicit "saving clause" (usually, protecting state common law against preemption).[123] To strike a balance, though, is to produce a lack of clarity. At least some state rules and conduct will arguably fall on either side, or both sides, of the state-federal line. Thus, a clear statement rule would be fatal to preemption. In particular, the common law actions that are the false federalists' vehicle of choice would be preserved.

Geier v. Honda Motor Co.[124] illustrates these points. *Geier* is a paradigmatic modern preemption case, posing a conflict between federal law and state common law (rather than

121. *See, e.g.*, Blatchford v. Noatak, 501 U.S. 775, 786 (1991) (holding that the clear statement rule trumps the presumption that Indian statutes are to be liberally construed); Gregory v. Ashcroft, 501 U.S. 452, 464 (1991) (applying the clear statement rule, while conspicuously failing to apply the ordinary deference that is typically used when a statutory term is undefined or ambiguous and the agency charged with administering that statute has a reasonable interpretation of the term).

122. For example, the Rehnquist Court's demand for a "clear statement" of a congressional intent to abrogate sovereign immunity appears to have proven fatal in all but two cases. *See, e.g.*, Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 67 (2000) (relating to the Age Discrimination in Employment Act); Univ. of Ala. v. Garrett, 531 U.S. 356, 363-64 (2001) (concerning the Americans with Disabilities Act). In those two cases, moreover, the Court proceeded to find that the statutes in question did not constitute valid legislation under Section 5 of the Fourteenth Amendment. *See Kimel*, 528 U.S. at 82-83; *Garrett*, 531 U.S. at 374.

123. *See, e.g.*, Federal Boat Safety Act of 1971, 46 U.S.C. § 4311(g) (1994) (preserving state law liability); Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b) (2000); Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1144(b)(2)(A) (2000) (preserving state insurance, banking, and securities regulation).

124. 529 U.S. 861 (2000).

legislation).[125] The federal law at issue was a car safety standard providing for a gradual phase-in of automobile airbags over several model years.[126] The state common law rules at issue permitted the imposition of liability on manufacturers for failure to install airbags in a portion of the new car fleet during the transition years.[127]

The question in *Geier* was whether the federal standard preempted such design defect liability.[128] The statute at issue—and here, too, *Geier* is paradigmatic—contains both an expansive preemption provision, prohibiting any state automobile safety standard that is not identical to the federal standards;[129] *and* an explicit "saving clause," providing that compliance with the statute "does not exempt any person from any liability under [state] common law."[130] The *Geier* Court determined that the federal statute did not explicitly preempt the tort suit at issue.[131] The saving clause, according to the Court, precluded that interpretation.[132] Nonetheless, the Court found that design defect liability, although technically a common law cause of action, would effectively establish a state safety "standard" that would frustrate, or actually conflict with, the federal phase-in policy.[133] Hence, the federal standard preempted those tort actions.

As Justice Stevens' scathing dissent in *Geier* points out, the decision is difficult to justify as reflecting a presumption against a federal preemption in areas of "traditional" state authority.[134]

125. *See Two Cheers*, *supra* note 109, at 1384 (noting that preemption cases increasingly involve tort law); *id.* at n.151 (citing case examples).

126. *Geier*, 529 U.S. at 864.

127. *Id.*

128. *Id.*

129. The statute says:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or continue in effect, with respect to any motor vehicle or item of motor vehicle equipment[,] and safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

National Traffic and Motor Vehicle Safety Act of 1966 (NTMVSA), 15 U.S.C. § 1392(d) (1988 ed.) (repealed 1994).

130. *Id.* § 1397(k).

131. *Geier*, 529 U.S. at 867.

132. *Id.* at 868-69.

133. *Id.* at 870-71.

134. *Id.* at 886-87 (Stevens, J., dissenting).

Most certainly, the statute at issue indicates no *congressional* intent to preempt, let alone a "clear and unmistakable" intent.[135] (Witness the saving clause.) The intent, Stevens continues, must come from the administrative standard or policy.[136] Such delegated or administrative preemption is exceedingly hard to square with a presumption against preemption; and in any event, even the federal agency action revealed little evidence of a preemptive intent.[137] The *Geier* majority responded to these arguments in a most economical fashion—by ignoring them. Justice Breyer's opinion for the Court makes no mention whatever of the presumption against preemption.

Geier is consistent with a string of precedents in which the Supreme Court effectively abandoned its "clear and unmistakable intent" standard by creating ad hoc exemptions to the presumption against preemption. The first of those exemptions, for state regulations affecting foreign policy, was established in *Hines v. Davidowitz*,[138] the first modern case to address preemption.[139] There are similar exceptions for reasons of administrative convenience and economic efficiency;[140] there is a breathtakingly broad preemption doctrine for civil rights concerns.[141] But while *Geier* fits this pattern, it may be a gasp, not another precedent. The central modern preemption problem is that the pragmatic reasons for preemption no longer do the job.

The New Deal Court viewed state governments essentially as suppliers of regulation; from that vantage point, a break with the presumption against preemption is a pragmatic exercise in supply management. The Rehnquist Court's states' rights enthusiasm has changed that equation. Now, the trade-off is between a constitutional principle ("states' rights") and pragmatic considerations of no constitutional moment

135. *Id.* at 887-88 (Stevens, J., dissenting).

136. *Geier*, 529 U.S. at 887-88 (Stevens, J., dissenting).

137. *Id.* at 900 (Stevens, J. dissenting).

138. 312 U.S. 52, 56 (1941).

139. *See* Jonathan Dotson, Egelhoff v. Egelhoff*: The Supreme Court's Latest Attempt to Clarify ERISA Preemption and the Decision's Effect on Texas State Law*, 54 BAYLOR L. REV. 503, 506 (2002).

140. Cases involving so-called "field preemption" fit this description. *See, e.g.*, City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, 633-34 (1973).

141. Felder v. Casey, 487 U.S. 131, 138-39 (1988) (noting that state laws immunizing government conduct otherwise subject to suits under § 1983 are preempted even in state courts and that federal statutes of limitation preempt truncated state statutes of limitation in such trials in federal courts).

(economic efficiency, for instance). Put differently, the gravitational force of the Rehnquist Court's federalism may soon convert the nominal "clear and unmistakable intent" doctrine[142] into a real "clear statement" rule. In the process, it may turn federalism into a trial lawyers' bill of rights.

VII. THE SHAPE OF THINGS TO COME

On the Supreme Court, the anti-preemption forces have a virtual lock on four votes. Justices Breyer, Ginsburg, Souter, and Stevens—aggressive nationalists, when federalism threatens to constrain government—have penned paeans to federalism and its glories when and where states' rights can be relied on to maximize regulation, especially in preemption cases.[143] The defense of preemption thus depends on the five conservative Justices who have carried the federalism torch in constitutional cases.[144] A single defection to the preemption-minimizing, regulation-maximizing camp often will tip the balance.

Those Justices are torn between their "states' rights" impulse and their suspicion that the trial lawyers' federalism cannot possibly be the real thing. When confronted with arguments that this or that pro-preemption ruling slights federalism concerns, the Justices have tended to insist that preemption cases are about statutory construction exclusively, not about federalism.[145] But while preemption analysis obviously must start with the

142. *See* cases cited *supra* at note 121.

143. *See, e.g.*, AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 412 (1999) (Breyer, J., dissenting); Geier v. Honda Motor Co., 529 U.S. 861, 886 (2000) (Stevens, J., dissenting). Individual Justices will occasionally defect from this regulation-maximizing rule. Justice Breyer may permit preemption upon a showing that the federal regulators are, or acted as if they were, as smart he is. (Justice Breyer's pro-preemption opinion in *Geier* plainly was driven by his conviction that the preemptive rule at issue—mandating a graduated phase-in of automobile airbags—was the efficient rule. *Geier*, 529 U.S. at 877-81 (noting and agreeing with the Department of Transportation's in-depth policy analysis behind its regulation requiring a gradual phase-in of airbags as opposed to an immediate conversion)). Justice Stevens turns aggressively preemptive when he himself, rather than some mere legislator or bureaucrat, does the preempting. He is the Court's most forceful advocate of constitutional preemption under the Due Process Clause and the dormant Commerce Clause. *See, e.g.*, West Lynn Creamery v. Healy, 512 U.S. 186 (1994) (holding that tariffs, as well as all state regulations "neutralizing the advantage possessed by lower cost out-of-state producers," are unconstitutional); BMW of N. Am. v. Gore, 517 U.S. 559 (1996) (arguing that Alabama's punitive damages of two million dollars for failure to disclose defects in automobiles was arbitrary per the Due Process Clause).

144. The "federalism five" are Rehnquist, O'Connor, Scalia, Thomas, and Kennedy. Pryor, *supra* note 15, at 361-62.

145. *See* Dinh, *supra* note 119, at 2087-88. *See also, e.g.*, Justice Scalia's bewildered statement about the appearance of "states' rights" argument in a preemption case in Iowa Utils. Bd., 525 U.S. at 379 n.6.

question of what Congress actually did, nobody seriously believes that the interpretation of unclear preemption statutes can proceed without any interpretive canon; the question is what that canon is supposed to be. Moreover, the regulatory cases are also about statutory construction, yet the Rehnquist Court majority has applied an exceedingly robust clear statement rule to those statutes.[146] The conservative Justices' "statutory interpretation" argument thus begs the anti-preemption camp's central question: if regulatory cases are "about" federalism, why is that not also true of preemption cases?

As it turns out, that question has at least one good answer: regulatory statutes demand from the states, in their political capacity, specific performance on commands that federal bureaucrats or federal judges issue, pursuant to federal statutes. Preemptive statutes, in contrast, merely establish limits within which states remain free to do as they wish. Preemptive statutes are inherently less intrusive than regulatory statutes. Thus, there is no functional justification for subjecting them to a judicial test of the devastating force of the clear statement rule.

The Supreme Court has at times recognized this logic.[147] Unfortunately, though, it has failed to articulate the distinction between command and limitation, between regulation and preemption, with clarity and force.[148] One must apprehend, moreover, that the invocation of state "dignity" in seemingly unrelated cases has a corrosive effect. If "dignity" can be mobilized to trump the text of the Eleventh Amendment,[149] why should it not eviscerate a conceptual distinction? Why, for example, is a massive preemptive scheme that divests states of a vast amount of authority a lesser affront to state dignity than a narrowly drawn regulatory command?[150]

Recent decisions and opinions suggest that the conservative Justices may be succumbing to the gravitational pull of states' rights rhetoric. Justice Kennedy has signed on to an astonishingly broad defense of states' rights in preemption

146. Bradford C. Mank, *Textualism's Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 KY. L.J. 527, 555-56 (1998).

147. It appears to underlie the holding in *Reno v. Condon*, 528 U.S. 141 (2000).

148. Dinh, *supra* note 119, at 2088.

149. *See* cases cited *supra* at note 17.

150. For a suggestion to this effect, see Iowa Utils. Bd., 525 U.S. at 427 (Breyer, J. dissenting).

cases.[151] Justice Thomas switched sides in *Geier*,[152] only Justice Breyer's switch in the opposite direction precluded a finding against preemption.[153] Justice O'Connor defected in last Term's *Rush Prudential HMO, Inc. v. Moran*,[154] an important ERISA case; this time, the switch produced a crucial fifth vote for the Court's departure from earlier, broader constructions of ERISA preemption.[155]

This Term, the confrontation with false federalism will come to a head. A half-dozen cases on the Supreme Court's 2002-2003 docket centrally implicate interstate exploitation and the national government's authority to curb it. Prominent on the list are two health care cases. In *Pharmaceutical Research and Manufacturers of America v. Concannon*,[156] the Court will determine whether states may leverage the federal Medicaid program to exact price concessions from pharmaceutical firms for *non*-Medicaid consumers. "Maine Rx," the state statute at issue, effectively would exclude manufacturers who fail to make price concessions from the list of Medicaid-approved prescription drugs.[157] The manufacturers' trade association is challenging the statute on preemption and on dormant Commerce Clause grounds.[158] In *Kentucky Association of Health Plans, Inc. v. Miller*,[159] a sequel to the past Term's *Rush Prudential* decision,[160] the Court will determine whether ERISA preempts the state's "any willing

151. Cipollone v. Liggett Group, 505 U.S. 504, 535-36 (1992) (Blackmun, J., concurring and dissenting) (arguing that Congress' intent to preempt "State law" under 15 U.S.C. § 1334(b) does not cover state common law rules).

152. Justice Thomas joined Justices Stevens, Souter and Ginsburg in dissenting in *Geier v. Honda Motor Co.*, 529 U.S. 861, 886 (2000) (Stevens, J. dissenting).

153. Rehnquist, O'Connor, Scalia and Kennedy sided with Breyer's majority opinion in *Geier*. *See id.*

154. 122 S. Ct. 2151 (2002) (holding that ERISA permits states to legislate and enforce the sorts of "patients' bill of rights" measures that have consistently failed to pass the Congress). *Rush Prudential* departs from precedents in which the Supreme Court had expressed a broad understanding of ERISA preemption. *See id.* at 2171 (Thomas, J., dissenting) (citing Pilot Life Ins. v. Dedeaux, 481 U.S. 41 (1987); and Mass. Mut. Life Ins. v. Russell, 473 U.S. 134 (1985)).

155. *See, e.g.*, *Mass. Mut. Life*, 473 U.S. 134, 148 (1985) (holding that ERISA neither creates nor allows a private right of action by a beneficiary for extra-contractual or punitive damages caused by improper or untimely processing of claims); *Pilot Life*, 481 U.S. at 50-54 (espousing a broad scope of ERISA preemption by holding that the exemption for states' laws "regulating insurance" is relatively narrow).

156. 249 F.3d 66 (1st Cir. 2001); *cert. granted*, 122 S. Ct. 2657 (2002).

157. *Id.* at 71-72.

158. *Id.* at 72.

159. Ky. Ass'n of Health Plans v. Nichols, 227 F.3d 352 (6th Cir. 2000); *cert. granted sub nom.* Ky. v. Miller, 122 S. Ct. 2657 (2002).

160. 122 S. Ct. 2151 (2002).

provider" statute, which guarantees HMO-insured consumers access to doctors outside the organization's list of approved practitioners.[161]

The health care cases illustrate that horizontal federalism questions have become a leading economic and constitutional problem. After the failed 1993 attempt to "reform" the entire health care system,[162] federal politicians of both parties have contented themselves with piecemeal interventions.[163] More ambitious proposals, such as the perennially pending "Patients' Bill of Rights," have stalled amidst partisan squabbling and serious disagreement about priorities and costs.[164] As a result, the political demand for higher benefits and lower individual costs has shifted to the states.[165] The stunning pace of reform in the states[166]—or, to put it differently, the galloping regulatory disintegration of the health care system—is largely explained by the fact that states, unlike the national government, can export the costs of reform to other jurisdictions.[167] Maine Rx is the

161. *Nichols*, 227 F. 3d at 355.

162. For a discussion, see Sylvia Law, *Patients' Rights without Human Rights?*, 17 BERKELEY WOMEN'S L.J. 188 (2002).

163. *See* Judith L. Maute, *Pre-Paid and Group Legal Services: Thirty Years after the Storm*, 70 FORDHAM L. REV. 915, 941-42 (2001).

164. Joachim Zekoll, *American Law in a Time of Global Interdependence: U.S. National Reports to the Sixteenth International Congress of Comparative Law: Section II Liability for Defective Products and Services*, 50 AM. J. COMP. L. 121, 137 (2002) (noting the continuing delay in Congress' passing the "Patients' Bill of Rights").

165. Jennifer M. Jendusa, *The Denial of Benefits Quandary and Managed Care:* McGraw v. Prudential Insurance Company, 3 DEPAUL J. HEALTH CARE L. 115, 141 (1999) (noting the varying approaches states have taken in their own versions of patients' bills of rights in the absence of federal protection).

166. Peter B. Jurgeleit, *Physician Employment Under Managed Care: Toward a Retaliatory Discharge Cause of Action for HMO-Affiliated Physicians*, 73 IND. L.J. 255, 293 (1997) (noting that all fifty states were considering some form of statutory protection for health care consumers against HMOs by the late 1990s).

167. The ability to export costs is in this instance enhanced by the odd pricing of pharmaceutical products: the first pill may cost $800 million, whereas the second costs next to nothing. Thus, "Maine Rx"-style programs limit the customer base over which the manufacturer can hope to recoup the average price of the product. But since manufacturers can still turn a profit in price-controlling jurisdictions, such control will not induce a refusal to deal. *See* Pharm. Research & Mfrs. of Am. v. Concannon, 249 F.3d 66, 82-83 (1st Cir. 2001) (noting that PhRMA's concern is over lower profits, not that negotiated prices could drop below the cost of manufacturing); *cert. granted*, 122 S. Ct. 2657 (2002).

Not all jurisdictions have an equal incentive to exploit. In the case at hand, closeness to the Canadian border is a crucial variable. (In addition to Maine, Vermont has been a leader at the price control front. Frederik Bever, *Maine Passes Vermont-Style Drug Price Controls*, RUTLAND HERALD, Apr. 13, 2000, *available at* http://rutlandherald.nybor.com/News/ Story/6279.html.) The pricing behavior of pharmaceutical products prompts manufacturers to sell their products in Canada despite the price controls prevailing there. Canada is getting a free ride on the United States,

legislative equivalent of the state AWP litigation mentioned earlier.[168] Price rebates that Maine obtains will make citizens in other states feel cheated.[169] State politicians have every incentive to join the price control parade, just as they have a nearly irresistible incentive to join the AWP litigation.[170]

The most important preemption cases of the current Term arise over state *tort* law, rather than state legislation, reflecting the fact that tort actions, not statutes, now generate the most serious state impositions on interstate commerce and on sister states. *Sprietsma v. Mercury Marine*[171] (which reads like a moot court exam on the true scope of implied preemption under *Geier*) concerns the question of whether a manufacturer's failure to install a propeller guard for outboard motors is a product design defect for which the manufacturer may be held liable under state tort law.[172] The defendants argue that the Federal Boat Safety Act of 1971,[173] which grants the U.S. Coast Guard exclusive authority to establish boat safety standards, preempts such lawsuits.[174] The plaintiffs argue that preemption requires an actual Coast Guard rule; the agency's mere decision *not* to require propeller guards should have no preclusive effect.[175] Here, too, the horizontal federalism issue is manifest: if the

and that free ride in turn induces border states to declare themselves Canadian health care provinces—both because their citizens prefer a free ride to a bus ride, and because the manufacturers are likely to accede (since they cannot control the cross-border arbitrage in any event). But the free-ride logic will ripple; as Maine goes, so eventually will the nation. That insight explains the industry's vehement opposition to Maine Rx, or any program resembling it. *See, e.g.*, Pharm. Research & Mfrs. of Am. v. Concannon, 249 F.3d 66 (1st Cir. 2001); *cert. granted*, 122 S. Ct. 2657 (2002); Pharm. Research & Mfrs. of Am. v. Thompson, 251 F.3d 219 (D.C. Cir. 2001); Pharm. Research & Mfrs. of Am. v. Meadows, 2002 WL 31000006 (11th Cir. 2002); Pharm. Research & Mfrs. of Am. v. Thompson, 191 F. Supp. 2d 48 (D.D.C. 2002), *appeal docketed*, No. 02-5110 (D.C. Cir. June 3, 2002).

168. *See* notes 48-52 and accompanying text *supra*.

169. Whitney Magee Phelps, *Maine's Prescription Drug Plan: A Look into the Controversy*, 65 ALB. L. REV. 243, 256-58 (2001) (analyzing the impact that Maine Rx has on other states and arguing that drug makers likely will charge higher prices in other states to compensate for rebates negotiated with Maine).

170. "Maine Rx"-style programs have been proposed in several states. For up-to-date information on the flurry of state price control initiatives, see NAT'L CONFERENCE OF STATE LEGISLATURES, 2002 PRESCRIPTION DRUG DISCOUNT, BULK PURCHASING, AND PRICE-RELATED LEGISLATION, *at* http://www.ncsl.org/programs/health/drugdisc02.htm (last visited Nov. 9, 2002).

171. 757 N.E.2d 75 (Ill. 2001); *cert. granted*, 534 U.S. 1112 (2002).

172. *Id.* at 77.

173. 46 U.S.C. § 4311(g) (1994).

174. *Sprietsma*, 757 N.E. 2d at 77.

175. *See id.* at 77, 82-83.

Sprietsma plaintiffs prevail, a single local jurisdiction will have established a safety standard for the entire country.

The Court has noted a number of tort cases for review—including, in addition to *Sprietsma*, an important question on the scope of federal diversity jurisdiction in class actions,[176] a $145 million punitive damage award from the Utah Supreme Court,[177] a case concerning the removal of tort claims into federal court,[178] and another foray into the thicket of asbestos liability litigation.[179] This signals a judicial recognition that we have a federalism problem with torts and state court class actions. Indeed we do, and the Supreme Court can no longer avoid it. But the problem is a *horizontal* federalism problem. It will get entirely out of hand if states' rights enthusiasts continue to ignore that dimension and to approach preemption cases as a series of confrontations between the national government and "traditional states' rights."

The states' rights majority on the Rehnquist Court has taken a relentless beating for its unprincipled preemption decisions—in the law reviews, where scholars hammer away at the perceived inconsistency between the Court's states' rights decisions and its failure to apply comparably state-friendly doctrines to preemption;[180] and in the political arena, where conservative legislators and executive officials have made strenuous efforts to extend a "clear statement" rule to preemption, either by legislative enactment or by executive order.[181] At some point, this drumbeat will take its toll—unless the Justices manage to develop a coherent preemption doctrine that recognizes horizontal federalism values.

VIII. STATES AND POLITICS

Preemption has become a central federalism pressure point because it is horizontal federalism's last line of defense. More

176. *In re* Ford Motor Co., 264 F.3d 952 (9th Cir. 2001); *cert. dismissed as improvidently granted sub nom.* Ford Motor Co. v. McCauley, 71 U.S.L.W. 3264 (2002).

177. Campbell v. State Farm Mut. Auto. Ins. Co., 893 F.2d 1338 (9th Cir. 1990); *cert. granted*, 122 S. Ct. 2326 (2002).

178. Syngenta Crop Protection, Inc. v. Henson, 123 S. Ct. 336 (2002).

179. Norfolk & Western Ry. Co. v. Ayers, *cert. granted*, 122 S. Ct. 1434 (2002).

180. *See supra* discussion accompanying notes 103-42.

181. *See, e.g.*, Federalism Accountability Act, S. 1214, 106th Cong. (1999). Originally proposed by Sen. Fred Thompson (R-TN) and Rep. David McIntosh (R-IN), the bill was withdrawn after business lobbies launched a bare-knuckles campaign. *See* Cindy Skrzycki, *The Regulators: The Chamber Reached a Sticking Point*, WASH. POST, Sept. 17, 1999, at E1.

accurately, perhaps, one might say that preemption, a nationalist doctrine, has become the only functional response to the collapse of all other horizontal federalism doctrines. For that reason, the defense of preemption against false federalism is the most urgent task at hand.

That is not to say that a truly federalist preemption regime can be rebuilt in isolation from the larger federalist universe. It is tempting to think—or at any rate, to hope—that a coherent preemption doctrine could be rebuilt on existing statutory precedents, even if the dormant Commerce Clause were to enter a permanent constitutional coma. In the end, though, this separation between statutory and constitutional law seems hard to sustain, and an endeavor to make preemption doctrines do all the work that the defunct horizontal federalism norms used to is to put more weight on those doctrines than they will bear. Moreover, it is undesirable to substitute preemption for horizontal federalism. Preemption precludes interstate exploitation, and that is a step forward. But it does mean centralization, and that is a step short of a truly federalist regime of decentralized, *non*-exploitative state competition. In that light, it seems sensible to look beyond the demand for a recognition of horizontal federalism values in preemption cases and to ask a more elementary question: Why have those values fallen into such disrepair?

The most casual acquaintance with the constitutional debates and their historical context provides ample evidence of the Founders' preoccupation with interstate relations gone bad.[182] For the most part, of course, it was the Federalists who warned of state conflicts in an effort to make the case for a federal Constitution.[183] But even the most zealous anti-federalist must eventually concede the underlying logic: state equality, autonomy, and integrity all go together. State autonomy cannot possibly entail a license to aggress and exploit. We still understand the logic when it comes to individual rights: my right to punch you in the nose, even if a reciprocal right for you matched it, cannot possibly produce a net gain in equal rights.

182. *See, e.g.*, Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 281 (1992) (noting the Founders' complaints of bad treatment in state courts of citizens of other states when they created diversity jurisdiction for federal courts in Article 3 of the Constitution).

183. *See, e.g.*, THE FEDERALIST NO. 7 (Alexander Hamilton).

When the territory is limited, non-aggression is the only plausible rule. Why is that so hard to comprehend when it comes to states' rights?

The comparison between individual and states' rights breaks down not in the logic but in the agents. When your fist hits my face, you (personally) are the aggressor and I (personally) am the victim. The compelling logic of reciprocal non-aggression will be obvious to us and to an arbiter. But that is not true of states' rights conflicts; a state seeking to exploit its sister state does not really seek to exploit it *as a state*. It seeks to exploit its sister state's citizens. More precisely, an interest group coalition in any given state would rather exploit a sister state's citizens than its own state's citizens, and it will urge that preference on its government agents. Comparable coalitions in other states have the same objective in mind. Unless voters possess perfect information and full control over their governor-agents, state governments—"states as states," in the Supreme Court's parlance—will prefer bilateral exploitation to non-aggression (i.e., let me rob your citizens, and I will let you rob mine). Put differently, the states' horizontal federalism agenda is not to protect autonomy but to ensure a rough average reciprocity of exploitation.

The Founders understood this point, though some understood it better than others. At the Philadelphia convention, James Madison rested his case for a powerful national government in large measure on the need to suppress interstate aggression and exploitation—the states' proclivity "to harass each other with rival and spiteful measures dictated by mistaken views of interest."[184] Madison had more than empirical evidence to buttress his case; he had a coherent theory. Mistaken views of interest, Madison argued, flowed from the operation of factions at the state level.[185] Factions exist to exploit.[186] If their ability to exploit is stopped at the state's border, the factions will have to exploit their own citizens, and that is neither as easy nor as enjoyable as the exploitation of outsiders.[187] (Let one state exploit productive citizens, and those

184. Letter from James Madison to George Washington (Apr. 16, 1787), *in* 9 PAPERS OF MADISON 382, 384 (Robert A. Rutland et al. eds., 1975).

185. Larry D. Kramer, *Madison's Audience*, 112 HARV. L. REV. 611, 612 (1999).

186. *Id.* at 612.

187. *Id.* at 612.

citizens will move to a more hospitable jurisdiction.) Horizontal federalism protections limit the range of exploitation.[188]

The New Deal wiped out horizontal federalism norms, not because it missed Madison's point, but because it perceived it with perfect clarity: Constitutional barriers against interstate exploitation would leave too little room for interest group politics and redistribution. The New Deal did change the labels, of course. Where Madison scrambled for fences against interest group selfishness,[189] the New Deal labeled disincentives to in-state redistribution a "race to the bottom."[190] The analysis, though, is substantially the same.

Contemporary states' rights advocates (left and right) slight or ignore federalism's horizontal dimension because they take no account of interest group conflict in the states. Where Madison saw rent-seeking, factionalism, and (consequently) strife among the states, states' rights advocates see public-interested state governments that provide public goods to fully informed citizens. In a splendid illustration of that premise and its use, Professor Ernest A. Young has argued that states can function as rival centers of power only if they have a fair amount of work to do.[191] Otherwise, citizens will transfer their attention and loyalty wholesale to the national government.[192] Young concludes that "the most important constitutional imperative" is to protect the "state regulatory authority by limiting the preemptive effect of federal law."[193] But that conclusion is reasonable solely because "preemption undermines the states' ability to win, *through provision of public goods and services*, the popular loyalty necessary

188. Madison was sufficiently fearful of state factionalism to propose a drastic remedy: a federal "negative" over all state laws whatsoever. That proposal, of course, was rejected; the Convention instead adopted the arrangement now embodied in the Supremacy Clause, U.S. CONST. art. VI, § 2. In an insightful article on Madison's proposal and its rejection, Larry Kramer has argued that the delegates never grasped Madison's point about factions. Kramer, *supra* note 185. That may be so. Notably, however, the Convention explicitly adopted Madison's negative for obvious forms of interstate aggression—those that are now enjoined under Art. I, § 10 of the Constitution. The delegates did not disagree on the need to curb interstate aggression, only about its probable causes and the means necessary to arrest it at the borders.

189. *See* Kramer, *supra* note 185, at 612-13.

190. On the grave empirical and theoretical deficiencies of "race to the bottom" theories, see Richard L. Revesz, *Rehabilitating Interstate Commerce: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U.L. REV. 1210 (1992).

191. *Two Cheers*, *supra* note 109, at 1368.

192. *Id.* at 1369.

193. *Id.* at 1352.

to make a system of political safeguards work."[194] Young does not acknowledge that state governments might procure mostly redistribution rather than public goods. Nor does he contemplate state governments' powerful incentive to procure public goods for their own citizens with money from out of state.[195] One doubts that Young—or for that matter, any credible states' rights defender—would deny seriously that states' rights require protection against sister state aggression. But so long as state governments are viewed as authentic agents of the people, federalism's horizontal dimension does not come into view.

In the end, the weight that one accords to horizontal federalism norms has to do not with the logic of states' rights but with background expectations about the nature of state politics. As a purely theoretical matter, Madisonian skepticism about interest group politics seems more plausible than the heroic assumptions that are implicit in a states' rights view. That debate, however, is best left to the academic sphere. As a matter of empirical fact, the demise of horizontal federalism norms has produced alarming forms of rank interstate exploitation. That false federalism, not the federal preemption of public goods provision, is modern federalism's central problem.

IX. STATES AND CITIZENS

The analysis just sketched implies that horizontal federalism norms must be protected and rehabilitated without the states—and quite frequently against the explicit, and perhaps unanimous, position of the states. The states "as states," in their political capacity, will always favor a federalism that facilitates intergovernmental conspiracies against citizens. State unanimity does not signal a victory for federalism or an absence of exploitation; it simply signals that the conspiracy has succeeded. One could celebrate the states' unanimous consent to the tobacco agreement as a proud victory of federalism. But one would be wrong so to celebrate.

It follows that on questions of horizontal federalism, the Supreme Court cannot view the states' litigating positions as authentic expressions of federalism. Nor can the Court rebuild

194. *Id.* at 1384 (emphasis added).

195. State attorneys general certainly have grasped the loyalty-enhancing effects of that strategy.

plausible horizontal federalism doctrines based on the states' "true" interests, in derogation of the interests that they actually articulate. The Court is a court, not a Leninist vanguard; and mutual exploitation *is* the true interest of the states *as states*. Instead, the Court must recognize that federalism is for citizens, not states.

In its finest federalism moments, the Rehnquist Court has recognized that principle. It has contemplated the prospect of intergovernmental conspiracies against citizens, and has held that federalism rules must provide protection against such designs.[196] All too often, though, the Court has retreated from that insight into a kind of neo-Confederate romanticism.

At some level, that hesitation is understandable. As noted earlier, the Rehnquist Court had to rehabilitate federalism within the confines of the New Deal's constitutional order.[197] A states' rights agenda is entirely consistent with that order and, moreover, enjoys the support of state governments—a ready-made, bipartisan constituency. An emphasis on citizens' interests, in contrast, will threaten the constitutional order of the New Deal, because it will seriously constrain interest group politics. That is why horizontal federalism norms are dormant and the false federalists are having a field day.

X. CONCLUSION

One might say that the Rehnquist Court acquired its federalism as Britain acquired her empire—not through absentmindedness, but certainly without sober reflection on where the enterprise might lead and what it might ultimately require. The acquisition of states' rights was the easy part: nobody really minded, and the local chieftains welcomed the support. Sometime soon, however, the Supreme Court will have to figure out how the pieces fit together, and how the empire can be sustained by something other than the local tyrants' collective interest in exploiting each other's subjects. If the Court cannot explain to us Natives what is in it for us, and if it surrenders federalism's frontier, it should surrender its empire.

196. For a further discussion, see *supra* note 23. *See also, e.g.*, Printz v. United States, 521 U.S. 898, 930 (1997).

197. *See supra* notes 92-95 and accompanying text.