Federalism DIY

Federalism Do-It-Yourself: 10 Ways for States to Check and Balance Washington

By Nick Dranias, the Goldwater Institute Clarence J. and Katherine P. Duncan chair for constitutional government and director of the Goldwater Institute's Dorothy D. and Joseph A. Moller Center for Constitutional Government

GOLDWATER INSTITUTE
in defense of liberty

"The goal must be to ***restore balance***
in the relationship between the states and the federal government."

FEDERALISM DIY:

10 Ways for States to Check and Balance Washington

By Nick Dranias, the Goldwater Institute Clarence J. and Katherine P. Duncan chair for constitutional government and director of the Goldwater Institute's Dorothy D. and Joseph A. Moller Center for Constitutional Government

EXECUTIVE SUMMARY

The federal government is taking unprecedented steps to tighten its control over the 50 states and the lives of every American. Under the U.S. Constitution, however, states are supposed to be equal partners to the federal government in protecting individual rights. State sovereignty–allowing each state to determine its own affairs–is a key part of ensuring that equal partnership and is critical to protecting the form of government that Americans are guaranteed.

To keep our Founding Fathers' promises of life, liberty, and the pursuit of happiness alive, *Federalism DIY : 10 Ways for States to Check and Balance Washington* proposes that citizens and states adopt a comprehensive strategy to restore state sovereignty in our compound republic. The report identifies the proper structural role of states and analyzes key court decisions to determine how best to position states to resist federal overreach. From this analysis we can formulate a comprehensive strategy of 10 tools to revive the American system of dual sovereignty. Below are 10 way states and citizens can restore that balance of power and do what's best for the people in your state.

(1) Enact state laws that protect individual liberty and take the federal government to court to defend those laws;

(2) Establish taxpayer courts to enforce dual sovereignty based on taxpayer standing;

(3) Enact state civil rights laws;

(4) Establish constitutional defense councils;

(5) Enforce coordination rights enjoyed by state and local governments in existing federal statutes;

(6) Force the federal government to commandeer state officials in order to enforce unconstitutional federal laws;

(7) Empower the people by repealing state and local laws that the federal government tries to leverage;

(8) Challenge, limit or eliminate the power of state officials to accept conditional federal grant money;

(9) Amend the U.S. Constitution to limit the federal government; and

(10) Resist federal overreach through interstate compacts that coordinate the adoption of the foregoing tactics, define and secure individual rights, carve our entire regions from the reach of federal regulations, and redesign federal programs.

INTRODUCTION

There was a time when the federal government was outwardly focused and otherwise geared to ensuring free trade and harmony among the states. The states, in turn, were structured to focus on internal governance. That vision of our republic is obsolete.

The federal government's attention has turned obsessively inward. The Centers for Disease Control and Prevention (CDC) now prod local government to adopt obesity zoning, urging the creation of "red light districts" for fast-food restaurants.[1] A phalanx of other federal agencies concocts visions of utopian land use planning in the form of "smart growth" schemes for high-density urban living, light rail, and untouchable rural expanses.[2] Not to be outdone, beginning in 2014, the Department of Health and Human Services (HHS) will require just about every living human being to purchase medical insurance under pain of penalties enforced by the Internal Revenue Service.[3]

These are just the latest iterations of the explosion of federal micromanagement of internal governance that began in 1937. The federal government now routinely preempts, displaces, or co-opts state and local government with regard to agriculture, manufacturing, crime, commerce, property, and economic or lifestyle choices. But this is not what the Founders intended.

Interwoven throughout the Constitution is the undeniable recognition of the states and the federal government as separate and distinct governmental bodies.[4] The Founders were very clear about which powers were assigned to the federal government and the states respectively. As James Madison described in Federalist No. 45,

> *The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain to the state governments are numerous and indefinite.… The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people, and the internal order improvement, and prosperity of the State.*[5]

Nevertheless, the federal government today claims the power to displace state sovereignty virtually at will, based on the Constitution's "Supremacy Clause."

The Supremacy Clause provides that "this Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[6] As such, the federal government's reliance upon the Supremacy Clause begs the question: What authority does the Constitution give the federal government to enact laws that displace state sovereignty? We know at least this much about the answer: Notwithstanding what powers may have been delegated to Congress or what limitations may have been imposed on the states by the Constitution,[7] the letter and spirit of the Constitution guarantees the preservation of state sovereignty. This guarantee requires the maintenance of a "compound republic" that vertically separates powers between the states and the federal government.[8] Therefore, under the Supremacy Clause, the federal government was meant to be supreme only within the narrow scope of its few and enumerated powers. And despite modern interpretations of the Constitution to the contrary, the states were meant to be supreme with respect to all other powers of government. But with the federal government dictating the zoning of fast-food restaurants, designing the ideal city, and managing health care, this balance of power has been lost. The resulting constitutional disequilibrium dangerously and imprudently concentrates power in the federal government.

Federalism DIY furnishes a comprehensive strategy to restore the Founders' vision of dual sovereignty to protect individual liberty. The following discussion first identifies the proper structural role of state sovereignty in our federalist system. It does so by examining the extent of federal domination of the states, the genesis of the Constitution, and the development of current interpretations of that founding document. Then, the key court decisions both overturning and protecting state sovereignty are analyzed to determine how best to position states to resist federal overreach. This analysis reveals that significant opportunities exist to resist federal overreach through the adoption of 10 tactical tools.

WHAT'S AT STAKE: OBAMA HEALTH CARE PROGRAM CASE STUDY

> *The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny. Were the federal Constitution, therefore, really chargeable with the accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system.*
>
> **—James Madison, The Federalist No. 47**

More than turf battles between the states and the federal government are at stake. Imbalanced federal supremacy enables power to be concentrated dangerously. A case in point is the creation of the Independent Payment Advisory Board (IPAB) by the Patient Protection and Affordable Care Act, commonly known as the federal health care law or "ObamaCare."

For most of this nation's history, the regulation of both health care and insurance were recognized as powers reserved to the states.[9] Until 1944, the Supreme Court held firm to the ruling that Congress could not regulate the issuance of insurance policies under its Commerce Clause powers.[10] And the Court has not yet disowned the declaration in *Lambert v. Yellowly* that "obviously, direct control of medical practice in the states is beyond the power of the federal government."[11] Nevertheless, the federal government regularly preempts state insurance regulations under the Employee Retirement Income Security Act of 1974.[12] Federal funding and indirect federal regulation of health care has become routine since the Medicare health insurance program was established as part of the Social Security Act of 1965. It was only a matter of time before the federal government created an agency like IPAB.

IPAB's purpose is to control the spiraling health care costs incurred by the federal Medicare health insurance program. But IPAB is not just another federal agency. IPAB concentrates an unprecedented amount of power in the hands of 15 unelected officials appointed by the President.[13]

Although some commentators have asserted that IPAB's powers are limited to reducing federal spending on Medicare,[14] IPAB is actually broadly empowered to wield any power of government that is *reasonably related* to reducing expenditures on the Medicare program according to a cost containment schedule.[15] Shortly after passage of the federal health care law in April 2010, the Centers for Medicare and Medicaid Services published a comprehensive report finding that private and public health care costs are interconnected.[16] On the basis of this report, and in view of the wide berth federal courts give to administrative agency rulemaking,[17] IPAB could easily claim broad power to regulate private health care and insurance markets as being "reasonably related" to containing the costs of the Medicare program. Such power could include the wholesale administrative displacement of state sovereignty in the fields of health care and health insurance.[18] Indeed, given the interconnectedness of the economy as a whole, IPAB could claim powers that go well beyond regulating public and private health care and insurance markets as reasonably related to containing the costs of the Medicare program. And yet, the federal health care law effectively eliminates or minimizes any check or balance on IPAB's authority.

Beginning in 2014, IPAB will exercise its regulatory authority by making "detailed and specific proposals" to the President and Congress.[19] These proposals are not merely advisory; if proposed at the beginning of the legislative session, IPAB's proposals and recommendations automatically become law unless Congress amends them within eight months, or by August 15 of each successive session.[20] At the same time, Congress is hamstrung in attempting to amend any IPAB

proposal by a series of parliamentary rules limiting debate, imposing technical requirements for any amendment, and requiring supermajority votes to pass any amendment.[21]

The Federal health care law thus minimizes legislative deliberation while maximizing and leveraging the gridlock naturally produced by the legislative process to ensure that the proposals of an unelected body will be quickly ushered into law. It thereby undermines and inverts the checks and balances built into the legislative process. And just in case Congress tries to sidestep this process and attempts to disband IPAB, the Federal health care law prohibits any attempt to repeal of the laws that created IPAB until 2017, and only if a specifically worded "joint resolution" to that effect is proposed before February 1 of that year.[22] Finally, not only does the federal health care law presume to vest IPAB with vast powers free from an effective legislative check, it also bestows immunity from administrative and judicial review upon IPAB's proposals and recommendations.[23]

In practical effect, the federal health care law vests in the unelected IPAB officials not only the reserved powers of the states to regulate health care and health insurance, but also the whole executive, legislative, and judicial power related to its cost containment mandate. IPAB thus dissolves both horizontal and vertical separations of power. IPAB satisfies James Madison's definition of tyranny and almost certainly would have earned "universal reprobation" from the Founders.[24] Unfortunately, the dangerous concentration of power in IPAB is not an aberration.

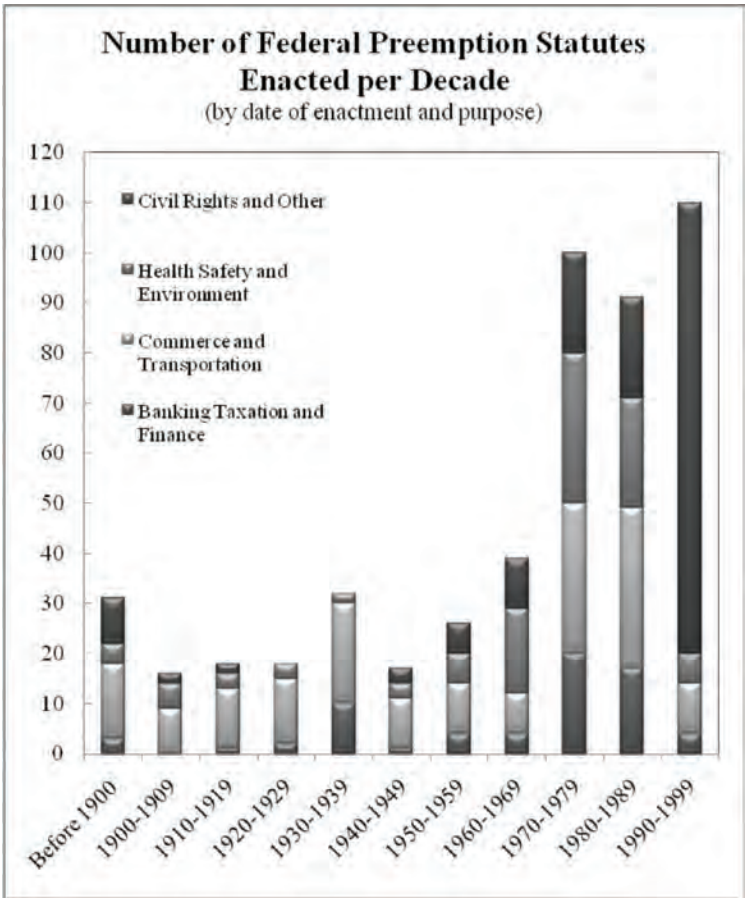
THE DANGEROUS DOMINANCE OF THE FEDERAL GOVERNMENT

The federal government exercises direct control over the states through federal laws that override (preempt) state laws under the Supremacy Clause (federal mandates), as well as through the indirect means of conditional federal grants, which impose federal requirements on state and local government as a condition of access to federal funding.[25] Even unconditional federal grants, or "block grants," influence state and local government to serve federal priorities by divorcing their policies from what would likely be politically sustainable at the state and local level.[26] Consequently, the dominance of the federal government over state and local governments should be measured both by the number of preemption laws in place and by the percentage of state and local spending that is funded by federal grants, both conditionally and unconditionally.

Dominance through Preemptive Lawmaking

A study of federal preemption laws shows that "439 significant preemption statutes have been enacted by the Congress" between 1789 and 1992.[27] Seventy-six percent of these laws (333)[28] were enacted during and after 1937.[29] The proliferation and classification of federal preemption laws between 1789 through 1999 (estimated) is depicted in Figure 1.

FIGURE 1



Source: U.S. Advisory Commission on Intergovernmental Relations (1990-99 estimated). [30]

According to the U.S. Advisory Commission on Intergovernmental Relations, the factors that have caused the proliferation of federal preemption include:

(1) the general trend of increased federal regulation;
(2) the loosening of constitutional restraints on congressional power;
(3) the Congress' constitutional obligations to protect rights nationwide;
(4) the reduced fiscal capability of the federal government, resulting in a turn to regulation to accomplish objectives;
(5) the opening of new fields of federal regulation in recent decades;
(6) the proliferation of interest groups in Washington;
(7) public concern about the nation's competitive position in the world economy;
(8) small-state concerns about the adverse impacts of big-state regulation

(9) bipartisan support for preemptions of different types; and

(10) the popularity of many preemptions, such as health, safety, and environmental protection.[31]

By 2000, federal preemption of state and local law was becoming so extensive that U.S. Senator Fred Thompson proposed a Federalism Accountability Act to prohibit committee consideration of any bill without a detailed report on its preemption potential.[32]

Of course, not every federal preemption law is necessarily inconsistent with the balance of power the Founders struck between the federal government and the states. Congress properly preempts state laws that hinder or interfere with free trade among the states, such as state taxes or local licensing and monopoly schemes that impede out-of-state competition, as well as state laws that interfere with fundamental freedoms.[33] Furthermore, when it comes to outward-looking powers vested in the federal government, such as defense, foreign relations, or immigration and naturalization powers, a strong form of federal preemption usually is consistent with a legitimate understanding of Congress' powers and an appreciation of limitations the Constitution imposes on state sovereignty.[34] Nevertheless, a review of the 469 major preemption statutes the federal government enacted between 1789 and 1992 reveals that a substantial number, nearly 30 percent (130), flout these principles and instead give the federal government the power to displace state and local policies concerning primarily or wholly local concerns.[35]

The Safe Drinking Water Act Amendments of 1986, for example, directed states to enforce a prohibition on the use of lead pipes, solder, and flux in any public water system "through state or local plumbing codes, or such other means of enforcement as the state may determine to be appropriate."[36] Other examples of local policy-focused federal preemption laws include An Act to Regulate Certain Devices on Household Refrigerators,[37] Condominium and Cooperative Conversion Protection and Abuse Relief Act,[38] Soft Drink Interbrand Competition Act,[39] Fastener Quality Act,[40] National Mobile Home Construction and Safety Standards Act,[41] Swine Health Protection Act (An Act to Regulate the Feeding of Garbage to Swine),[42] Degradable Plastic Ring Carriers Act,[43] Animal Welfare Act,[44] and the Peer Review Improvement Act.[45] The total of federal preemption laws that focus on local policymaking, however, only reveals the tip of the iceberg. Most federal preemption laws authorize rulemaking by federal agencies, and the resulting reams of administrative regulations displace state sovereignty over state and local matters well beyond the impact of 130 federal laws. Taken together, federal preemption laws have significantly concentrated power over state and local policy in the federal government.

Dominance through Unfunded Mandates

Unfunded mandates are federal preemption laws that require state and local government to perform certain tasks without providing funding for the associated costs. Unfunded mandates

lead to federal dominance over state and local policy in two ways: (1) through compliance with the mandate, and (2) through the diversion of scarce local resources to priorities set by the federal government, rather than by state and local policy preferences. The federal government aggressively uses unfunded mandates to control matters of local concern. For example, federal unfunded mandates have forced wheelchair ramps to be replaced in Asheville, North Carolina; have clashed with Miami's building codes; and have imposed street-sweeping requirements on Las Vegas.[46] Harrisburg, Pennsylvania, has even been required to dedicate a full-time employee to comply with federal standards governing national historic districts and places.[47] And recently, the Town of Winchester, Massachusetts, which has a population of only 20,810, estimated that complying with the Americans with Disabilities Act will cost $3 million.[48]

Although the Unfunded Mandate Reform Act (UMRA) was enacted in 1996, the Act does not actually prohibit unfunded mandates. It only requires a cost assessment of a bill containing a federal mandate, when the cost of the mandate is estimated to exceed a certain threshold (which is adjusted for inflation).[49] The failure to include the requisite cost assessment along with a bill blocks consideration of the bill only if 1) a point-of-order objection is made during a legislative hearing, and 2) the point of order is not overruled by the full vote of the house or the presiding officer. Many unfunded mandates navigate UMRA both because their costs are projected to be lower than the assessment threshold and because UMRA is only a procedural rule that must be invoked to be effective and, even if it is invoked, UMRA-based objections can be overruled.

Between 1996 and 2004, the United States Conference of Mayors estimated that "12% of 4,700 bills" imposed unfunded mandates but that "fewer than 10" bills imposed costs of sufficient magnitude to trigger its assessment requirement ($50 million in 1996).[50] The Congressional Budget Office (CBO) reported that, between 2005 and 2009, 92 laws were enacted that contained 150 distinct mandates, and six laws entailed costs of sufficient magnitude to trigger UMRA's cost assessment requirement ($69 million in 2009).[51] Figure 2 provides a breakdown of laws imposing unfunded mandates between 2005 and 2009.

FIGURE 2

	Intergovernmental Mandates				
	2005	**2006**	**2007**	**2008**	**2009**
Laws that contain mandates	11	30	14	19	18
Total mandates enacted	23	37	20	40	30
Mandates in which costs exceed statutory threshold	0	2	3	1	0
Mandates in which costs could not be determined	1	2	0	0	3

Source: CBO.

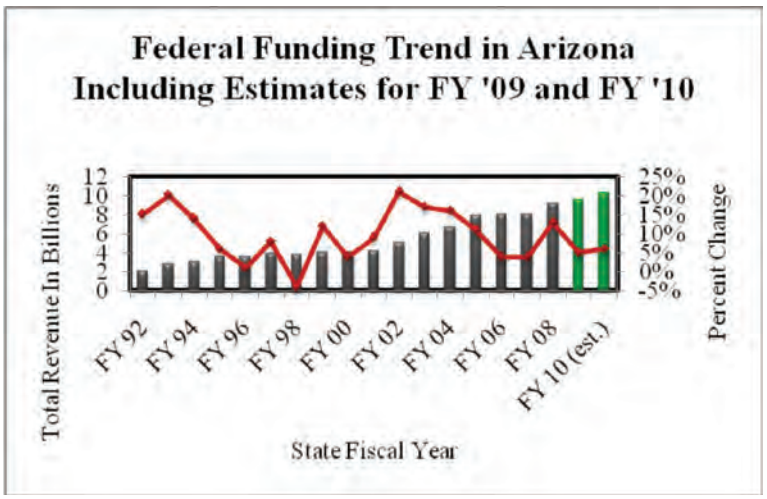
The cost to state and local government of unfunded mandates that fly above and below the UMRA radar have undoubtedly been significant.[52] The Conference of Mayors estimated in May 2005 that 59 major cities suffered or would suffer increased costs of at least $1.1 billion collectively through 2010 from unfunded mandates associated with the federal minimum wage, federal food stamp program requirements, and the Real ID program, which sought to impose uniform identification card and consolidated database requirements on state and local government in all 50 states.[53] Moreover, compliance by those same 59 cities with the Americans with Disabilities Act, Clean Air Act, Clean Water Act, Safe Drinking Water Act, Fair Labor Standards Act, and Historic Preservation Guidelines were estimated as entailing one-time costs of $845 million and recurring annual costs of $529 million.[54] The Conference of Mayors also estimated other mandates imposed by such laws as the National Environmental Policy Act, Resource Conservation and Liability Act, Endangered Species Act, and Consolidated Omnibus Budget Reconciliation Act (COBRA), as well as those enforced by the Occupational Safety and Health Administration (OSHA), to cost nearly $200 million.[55] This report of 59 cities, however, provides only a hint of the magnitude of unfunded mandates. Total public and private cost of compliance with the Clean Air Act alone is expected to reach $65 billion annually by 2020.[56] Unfunded mandates have thus thrust the federal government into the heart of local policymaking, directly restructuring state and local government to serve federal priorities. Replacing unfunded mandates with funded mandates, however, should not be expected to liberate state and local government from federal dominance.

Dominance through Grants

For fiscal year (FY) 2009, budgeted federal grants to state and local governments totaled $695 billion[57] and actual outlays were estimated at $552 billion.[58] Based on either figure, federal grants made up about 20 percent of the total amount of state and local government spending in 2009, which has been estimated at just over $3 trillion.[59] In states like Arizona, the percentage of the budget occupied by federal funding is much higher.

Federal funds typically account for about a third of the Arizona budget.[60] For FY 2009, Arizona's estimated total amount of federal funding was $9.9 billion.[61] Figure 3 shows annual amounts of federal funding and trends in the growth of such funding between 1992 and 2010.

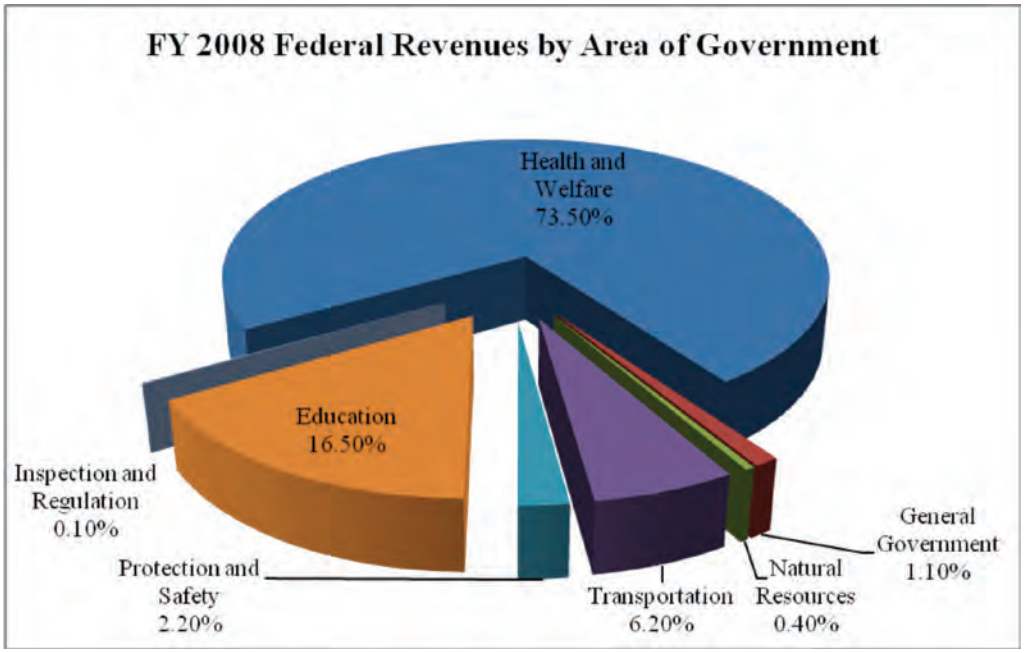
FIGURE 3



Source: Governor's Office of Strategic Planning and Budgeting.

Arizona Health Care Cost Containment System (AHCCCS) health care programs received nearly $5 billion in federal grants in 2008, or more than half of all federal funding, approaching 20 percent of Arizona's budget by itself.[62] Figure 4 illustrates that the vast majority of federal funding in Arizona is devoted to health and welfare services, with education holding a distant second place.

FIGURE 4



Source: Governor's Office of Strategic Planning and Budgeting.

The sizable federal influence on health care funding and policy in Arizona is not unusual among other states. According to the Florida Attorney General, 26 percent of Florida's budget "is presently devoted to Medicaid outlays."[63] In states like Arizona and Florida, the trends suggest that a majority share of state budgets will soon be federally funded and directly controlled through conditional grants. But federal dominance of state budgets extends even farther than the percentage of state expenditures that are federally funded. The strings attached to conditional grants ensure that the reach of the federal government extends far beyond its own funding.

THE UNIQUE THREAT TO STATE SOVEREIGNTY FROM CONDITIONAL GRANTS

As mentioned earlier, approximately 20 percent of the money spent by state and local governments comes from the federal government in the form of grants. Not surprisingly, the federal government, backed by the federal judiciary, has largely taken the position that "he who pays the piper calls the tune."[64] Strings are attached to those grants, which results in the federal government effectively driving appropriations and setting policy for state and local government well beyond the proportion of the state budget that is federally funded. This power is often abused.

As the U.S. Justice Department observed in 1988, "rather than advancing the specific purposes of the underlying program, some conditions on federal grants seek to dictate policy to the states to promote what fairly can be described as tenuously related policy objectives."[65] For example, the federal government has tied the receipt of highway funds on states agreeing to regulate billboard advertisements,[66] hiding junkyards along the road,[67] prohibiting political activity by state employees,[68] and adhering to drinking age and speed limit mandates.[69]

The most pernicious manner in which the federal government uses such conditional grants is through the device of "matching

Top Five Most Burdensome Federal Mandates

1. Medicaid/Medicare

- $143+ billion annual cost to states

2. Individuals with Disabilities Education Act

- $40+ billion annual cost to state and local governments
- Mandates free and appropriate education of disabled children regardless of cost

3. Patient Protection and Affordable Care Act

- $33.5+ billion 10-year cost to states (above Medicaid cost)
- 12+ systemic mandates
- Untold cost to private sector

4. No Child Left Behind

- $10+ billion annual cost to states
- 5+ systemic mandates

5. Clean Air Act

- $65 billion annual cost to states and private sector by 2020

Sources: Sens. Colburn & Barrasso, Grim Diagnosis: A Check Up on the Federal Health Care Law (Oct. 2010); State-Federal Relations and Standing Committees: Education Standing Committee, 2010-2011 Policies for the Jurisdiction of the Education Committee: Federal Funding for Special Education, National Conference of State Legislatures (Aug. 25, 2010); Environmental Protection Agency, The Benefits and Costs of the Clean Air Act: 1990-2020 (Aug. 2010); Edmund Haislmaier and Brian Blasé, Obamacare: Impact on States, Heritage Foundation no. 2433 (July 1, 2010); U.S. Department of Education, Office of Planning, Evaluation and Policy Development, Policy and Program Studies Service, State and Local Implementation of the No Child Left Behind Act, Volume IX—Accountability Under NCLB: Final Report (2010); Centers for Medicare & Medicaid Services, National Health Expenditures (2009); Richard N. Apling & Nancy Lee Jones, CRS Report for Congress—The Individuals with Disabilities Education Act (IDEA): Overview and Selected Issues 2, n.5 (Jan. 14, 2008); Chris Edwards, Policy Analysis 593: Federal Aid to the States: Historical Cause of Government Growth and Bureaucracy, Cato Institute (May 27, 2007); Thomas B. Parrish, Ctr. for Special Educ. Fin., National and State Overview of Special Education Funding 15 (Mar. 1, 2006); Richard N. Apling, CRS Report for Congress, Individuals with Disabilities Education Act (IDEA): Current Funding Trends 2, 4 (Feb. 11, 2005).

funds." As exemplified by Medicaid, the State Children's Health Insurance Program (SCHIP), and No Child Left Behind, in the first years of the federal program, states are given the greatest bang for their buck—spending a dollar on the federal program yields a dollar or more of federal matching grants.[70] But as the federal program grows a dependent constituency, the federal government gradually reduces the relative size of its matching grant.[71] The reduction in the relative amount of the federal grant, however, does not produce a corresponding reduction in the amount of state money diverted to the federal program because the state finds itself politically pressured by the newly created dependent constituencies to continue to fund the program.[72] Instead, because of the pressure of such constituencies, states typically increase their proportion of funding to maintain the federal program even while federal matching grants markedly diminish.[73] States become hooked first on federal matching grants and then politically bound to the federal program, resulting in the diversion of millions, if not billions, of dollars in state revenues and the restructuring of state government to serve federal priorities.[74] Not surprisingly, the states effectively lose their autonomy from the federal government as a result of the addictive relationship created by the conditional grant "bait and switch."[75]

DUAL SOVEREIGNTY, NOT STATE SUPREMACY

Considering the preceding discussion in isolation, it is easier to understand why Patrick Henry refused to attend the Constitutional Convention of 1787, declaring he "smelt a rat."[76] Just as Anti-Federalists like Patrick Henry predicted, the federal government has grown into a leviathan that routinely displaces state sovereignty. Nevertheless, to the extent that this observation might lead one to reject the Constitution's system of dual sovereignty, such a judgment would not fairly consider all of the relevant facts.

The federal government is not the source of all governmental overreach. It is unreasonable to criticize the abuses of the federal government without taking into consideration the abuses of state sovereignty, which led to the proposal and ratification of the Constitution. An examination of the history of state supremacy prior to the Constitution's ratification reveals that—even apart from the question of slavery—the states generated considerable insecurity for individual liberty long before the first conditional federal grant. This examination makes it much easier to understand why the Founders desired a stronger federal government as established by the Constitution. Simply put, examining the genesis of the Constitution will help explain why dual sovereignty, not state supremacy, is the best means of securing individual liberty.

Before the Revolution, there was no national government in America. There were simply restive colonies, which later described themselves as "free and independent states" in the Declaration of Independence.[77] In fact, four former colonies were so restive that they did not even wait for the Declaration of Independence to assert their autonomy. Between March and June 1776,

Virginia, New Hampshire, New Jersey, and South Carolina all formed new governments with constitutions distinct from their colonial governing frameworks.[78] By 1789, all of the original colonies adopted republican state constitutions, except for Rhode Island and Connecticut, which retained their colonial charters as foundational documents.

Until the ratification of the Constitution in 1789, each state functioned and was regarded as an independent nation—both before and after the ratification of the Articles of Confederation.[79] When entreating with the states to ratify the Articles of Confederation, for example, the Continental Congress acknowledged that the Continent was "divided into so many sovereign and independent communities."[80] Even after the final ratification of the Articles of Confederation and Perpetual Union in 1781, "the central organ created [by the Articles] was not so much a national 'legislature' ... as an international assembly of ambassadors."[81] The Articles were deemed by many at the time as a "perpetual union," but others, like James Madison, later compared them to a "compact between independent sovereigns."[82]

The Confederation proved unable to secure individual rights effectively.[83] The Articles' explicit guarantee of equal privileges and immunities,[84] which promised equality of treatment for in-state and out-state citizens, was largely unenforced.[85] Consequently, local protectionism arose in the form of discriminatory taxes, tariffs, duties, property laws, and commercial regulations, which protected in-state commercial interests from out-state competition.[86] Several states even threatened to print paper money to give their debtors cheap money to repay out-state creditors.[87] Such local favoritism undermined the sanctity of contract, property rights, and free trade among the citizens of the several states. It threatened jealousies that could have undermined the defensive union of the states. At the same time, even when they wanted to, states lacked sufficient power to secure contract and property rights without reinforcement from the national government, as evidenced by the need for the national government to put down Shays' Rebellion of 1786, in which thousands of indebted Massachusetts farmers and veterans revolted against state court decisions that allowed urban and foreign creditors to foreclose on their debt.

In short, the Articles of Confederation were inadequate to the task of securing liberty because it lacked a national government that could effectively counterbalance the abuse of state sovereign powers. Moreover, the states themselves were inadequate to the task of securing individual liberty from local majorities. The resulting disunity and disharmony among the states during the Revolution prompted Alexander Hamilton to write in 1780, "the fundamental defect [in the Confederation] is a want of power in Congress.... The idea of an uncontrollable sovereignty in each state, over its internal police, will defeat the other powers given to Congress, and make our union feeble and precarious."[88] Years later, James Madison wrote to Thomas Jefferson that "the evils issuing from these sources contributed more to the uneasiness which produced the [1787 constitutional] convention, and prepared the public mind for a general reform, than those which accrued to our national character and interest from the inadequacy of the Confederation to its immediate objects."[89]

The Essence of Dual Sovereignty

- **National government of limited and enumerated powers**
  - → Regulatory power limited to interstate commerce, territories, and international treaties. No general police power.
  - → Taxing and spending authority limited to supporting enumerated powers.
- **National government power checked and balanced**
  - → Separation of executive, legislative, and judicial powers into distinct departments, but with each department having a degree of control over the other.
- **Local favoritism prohibited**
  - → States barred from impairing contracts.
  - → States barred from denying the privileges and immunities of national citizenship.
  - → States barred from concurrently exercising regulatory power over interstate commerce, imports and exports, or engaging in foreign diplomacy and treaty-making.
- **Sovereign powers reserved to the states**
  - → Guarantee of republican form of government
  - → Article V constitutional amendments power
  - → Tenth Amendment confirmation of reserved powers
  - → Eleventh Amendment sovereign immunity

FEDERALISM: A DYNAMIC BALANCE OF POWER TO PRESERVE LIBERTY

> *If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself.*
>
> **—James Madison, The Federalist No. 51**

To correct "the abuses committed within the individual states ... by interested or misguided majorities,"[90] the Constitutional Convention of 1787 sought to rebalance the relationship between the states and the national government, to create a federalist system that could more effectively secure individual liberty. As a federalist system, our nation was meant to comprise both sovereign states and a sovereign national, or "federal," government. Although restraints were placed on both governments, the Constitution did not merge the states into one national government. Instead, a balance of power was struck between the two.

The Constitution's guarantee of a republican form of government to the states is a perfect illustration of the balance struck between state sovereignty and the federal government's powers. Article IV, Section 4 of the U.S. Constitution states that "the United States shall guarantee to every State in this Union a Republican form of Government." From the states' perspective, this guarantee functioned both as a sword and a shield.[91] In *The Federalist* No. 43, James Madison explained that the federal government can invoke the guarantee as a sword to prevent states from "exchang[ing] republican for an anti-republican constitution."[92] At the same time, "by guaranteeing the states a republican form of government, the language of the clause implicitly promises the states sufficient independence to maintain the responsiveness of their governments to popular will."[93] This is because the essence of republican government

is popular self-governance mediated through internal checks and balances.[94] The Guarantee Clause thus serves as a shield against federal overreach by underscoring that the Constitution was meant to preserve a strong measure of state autonomy.[95] Indeed, the understanding that the Guarantee Clause memorialized the continued autonomous existence of state sovereignty was a major sales point used to support ratification of the Constitution.

Between November 1787 and April 1788, for example, speeches at the Pennsylvania and Massachusetts ratification conventions described the guarantee as securing state sovereignty.[96] Pamphlets and newspaper articles published in Maryland, New Jersey, and Pennsylvania made the same claim.[97] At the New York ratification convention and in contemporaneous newspaper articles, even Anti-Federalists who opposed ratification conceded that the guarantee was meant to secure state sovereignty, while still criticizing the clause for failing to do so effectively.[98]

The guarantee of a republican form of government is not the only constitutional provision that preserved state sovereignty. The distinct and self-governing sovereignty of the states is further underscored by their power to initiate and ratify the process for amending the Constitution under Article V.[99] This provision gives the states shared control over the very document that defines the scope of federal power. Additionally, by expressly reserving powers to the states, the Tenth Amendment substantively reinforces the promise of state sovereignty by prohibiting any constitutional interpretation that could consolidate all governmental power in the federal government or otherwise render states political nonentities.[100] The reference to the reservation of powers to the states, after all, necessarily implies both that powers remain, which were not delegated to the federal government, and that states would continue to exist, notwithstanding what powers were delegated to the federal government.[101] The Tenth Amendment's guarantee of state sovereignty is then strongly reinforced by the Eleventh Amendment, which expressly confirms a large measure of immunity to the states from being hauled into federal court.[102] Such immunity clearly presumes the distinct existence of the states as sovereign governmental bodies because it is a clear application of the law of sovereign immunity.[103] Viewed as a whole, it is clear that the Constitution was designed to ensure that the powers reserved to the states included self-governance, as well as a distinct and autonomous existence apart from the federal government.

Our nation did not involve a merger of the states into one national government, since, as much as they wanted a strong and vigorous national government, the Founders were even more animated by the goal of checking and balancing the power of government—state or federal. As explained by James Madison:

> *In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments and then the*

> *portion allotted to each, subdivided among distinct and separate departments. Hence a double security arises to the people. The different governments will control each other; at the same time that each will be controlled by itself.*[104]

The Founders chose to create a system providing "double security" to the people because, apart from the question of slavery, their time horizon for structuring the Constitution was not determined by what was convenient to govern the founding generation. It was based on an assessment of what was necessary to prevent tyranny as their newborn political system played out over succeeding centuries. They recognized, as George Washington reportedly said, that government was force.[105] The Founders studied European governments, both ancient and modern, and saw how the concentration of power in any person or faction, be it the majority, minority, plebeians, aristocrats, patricians, monarchs, or representatives, was the cause of the downfall of every form of government leading up to the establishment of the states and the federal government.[106] Thomas Jefferson underscored in a private letter to a friend:

> *The way to have good and safe governments is not to trust all to one, but to divide it among the many, distributing to everyone exactly the functions he is competent to. Let the national government be intrusted with the defence [sic] of the nation and its foreign and federal relations; the state governments with the civil rights, laws, police and administration of what concerns the state generally.... What has destroyed liberty and the rights of man in every government which has ever existed under the sun? The generalizing and concentrating all cares and powers into one body, no matter whether of the autocrats of Russia or of France or of the aristocrats of a Venetian Senate.*[107]

To avoid the threat to liberty posed by concentrated power over the long term, the Founders deliberately designed a system "of complete decentralization."[108]

But decentralization was not meant to be passive. The Founders intended for the people to use the levers of power provided by both state and federal governments to protect their rights against usurpations by either government. In *The Federalist* No. 31, Alexander Hamilton explained, "[A]s [the people] will hold the scales in their own hands, it is to be hoped [they] will always take care to preserve the *constitutional equilibrium* between the general and the state governments."[109] In other words, the Constitution established a dynamic decentralized system of governance that was meant to continuously and *actively* balance power against power over time, both horizontally, between the departments of the federal government, and vertically, between the states and the federal government.[110]

Taken together, the Constitution both restricts the federal government to enumerated powers and limits state sovereignty with "a strong set of federally enforceable individual rights against states."[111] Therefore, integral to the establishment of our Constitution was not only the goal of binding the states together to sufficiently to provide for the general welfare and a common

defense of all Americans in the enjoyment of their rights, but also the equally important goal of ensuring that no *one* government held all power within our nation. The idea that the states must be sufficiently powerful and autonomous to check and balance the federal government—not state supremacy—forms the backbone of this system of dual sovereignty. As discussed in the following section, that backbone needs some considerable strengthening after nearly 100 years of legally induced osteoporosis.

THE DECLINE OF THE COMPOUND REPUBLIC

> *The Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses; first, because the Framers would not have conceived that any government would conduct such activities; and second, because the Framers would not have believed that the Federal Government, rather than the States, would assume such responsibilities.*
>
> **—Justice Sandra Day O'Connor**[112]

Fidelity to first principles means that both the states and the federal government must enjoy sufficient independence from each other to function as viable and distinct governments, which can effectively hold each other in check to prevent the abuse of power over the long term. This system of dual sovereignty is in "constitutional equilibrium" when power is balanced against power and individual liberty is secure. But compromises were made that perpetuated the abuse of power and rendered liberty insecure, most obviously with regard to the Constitution's toleration of slavery. As evidenced by the nation's experience with the Civil War, the initial balance struck between the states and the federal government was not farsighted enough to provide security for individual liberty.

The history of the United States prior to the Civil War was one of tragically increasing tension between the states exacerbated by the question of slavery. Between 1841 and 1859, a running series of court battles erupted between Southern slaveholders, who sought to enforce the federal Fugitive Slave Acts, and citizens and state officials of Northern states, who sought to protect escaped slaves based on principles of state sovereignty and the anti-slavery provisions of the Northwest Ordinance of 1787,[113] which Congress enacted into law in 1789.[114] In response, the Supreme Court first struck down laws in northern states that criminalized the disorderly capture of fugitive slaves as interfering with federal supremacy.[115] Then, in *Dred Scott v. Sanford*, the Supreme Court abandoned its previous recognition of the Northwest Ordinance as a legally enforceable guarantee of individual liberty, striking it down based on the ruling that it unconstitutionally prohibited slavery.[116] And last, in 1859, the Supreme Court barred state supreme courts from using the writ of habeas corpus to question the lawfulness of detentions by the federal government under the Fugitive Slave Act.[117]

From Dual Sovereignty to Federal Dominance in Six Years

- ***NLRB v. Jones & Laughlin (1937):*** Interpreting Commerce Clause and Necessary and Proper Clause to regulate wholly intrastate activities
- ***Sonzinsky v. United States (1937):*** Permitting federal taxes to regulate matters that cannot be regulated under the federal government's enumerated powers
- ***Steward Machine Co. v. Davis/Helvering v. Davis (1937):*** Upholding taxing and spending programs to serve the general welfare
- ***United States v. Darby Lumber Co. (1941):*** Declaring state sovereignty not an independent limit on the scope of federal power
- ***Wickard v. Filburn (1942):*** Interpreting Commerce Clause and Necessary and Proper Clause to regulate wholly intrastate, noncommercial activities if the activities might have an impact on interstate commerce if aggregated

Taken together, in order to preserve the Constitution's impossible compromise on slavery, the Supreme Court systematically discarded both principles of state sovereignty and guarantees of fundamental freedom. The Constitution's compromise on slavery thereby eventually transformed the Founders' system of dual sovereignty into a pure clash of power, reconcilable only through brute force, rather than by recourse to its fundamental purpose of securing liberty. The Civil War was thereby rendered inevitable.

Fortunately, the unprincipled compromise over slavery was eventually excised from the Constitution. Along with the Nineteenth Amendment, which guaranteed women the right to vote, the Thirteenth, Fourteenth, and Fifteenth amendments made the Constitution more consistent with the fundamental goal of generating a "constitutional equilibrium" that secured individual liberty over the long term. Unfortunately, the Founders' long-term, multigenerational perspective of securing individual liberty through a dynamic balance of power gradually lost its influence as subsequent amendments and court decisions simply bolstered the federal government's power relative to that of the states without any concomitant effect of securing individual liberty.

Reflecting the progressive philosophy of the early 20th century, the Sixteenth, Seventeenth, and Eighteenth amendments bestowed upon the federal government income taxing authority, eliminated the representation of the states in the Senate, and expanded federal regulatory authority over alcohol manufacture and sales. None of these expansions of federal power advanced individual liberty. The Supreme Court completed the shift of the balance of power to the federal government by abandoning the Founders' overriding goal of preventing tyranny over the long term.

The dominant political philosophy of the New Deal era placed the highest priority on giving the federal government power to address immediate social and economic challenges rather than guarding against tyranny. Consistent with that philosophy,

beginning in 1937, the Supreme Court proceeded to vastly expand the scope of the enumerated taxing, spending, and Commerce Clause powers of the federal government *vis-à-vis* the states.

First, in *National Labor Relations Board v. Jones & Laughlin Steel Corporation*,[118] the Supreme Court extended Congress' power to regulate interstate commerce "among the states" to labor relations at a manufacturing plant within a state, declaring that totally intrastate activities that substantially affected interstate commerce could be regulated by the federal government.[119] The Court declared, "[A]lthough activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control."[120] Second, the Supreme Court effectively authorized the taxing power to be used for regulatory purposes apart from the enumerated powers. It declared in *Sonzinsky v. United States*[121] that it would not second-guess Congress in deciding whether a tax is regulatory or not.[122] Third, the Supreme Court untethered the taxing and spending power from supporting the exercise of Congress' enumerated powers. In *Steward Machine Co. v. Davis*[123] and *Helvering v. Davis*,[124] the Court allowed Congress to tax or spend money for the "general welfare," without regard to any enumerated power.

Underpinning each of these cases was the premise that state sovereignty did not significantly limit the scope of the federal government's powers, if at all. By 1941, that premise was made abundantly clear. In *United States v. Darby Lumber Co.*,[125] the Supreme Court declared that the Tenth Amendment's guarantee of reserved powers to the states was "but a truism," further declaring, "the motive and purpose of a regulation of interstate commerce are matter for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control."[126] And in 1942, just one year after *Darby*, the Supreme Court brought totally intrastate activities that have no substantial impact on interstate commerce within the ambit of the Commerce Clause via the Necessary and Proper Clause in *Wickard v. Filburn*.[127]

Wickard held that simply producing and consuming homegrown wheat could be regulated by the federal government because, in the hypothetical aggregate, such activities could have a substantial effect on interstate commerce. In essence, the Court ruled that regulating homegrown wheat was a convenient, therefore "necessary and proper," means of executing the power to regulate interstate commerce. Of course, if aggregated across hundreds of millions of people, any conceivable activity (or inactivity) could substantially affect interstate commerce. *Wickard* threatened to extend the federal government's reach to any part of the states' formerly exclusive jurisdiction.

In a mere six years, the Supreme Court expanded federal powers and weakened state sovereignty to the point where, as a matter of legal principle, the entire edifice of federalism was ready

to collapse. This may explain why 76 percent of all significant federal preemption statutes enacted through 1992 were enacted after 1937.[128] Indeed, liberated from the constraints of dual sovereignty, the federal government is now ready to obliterate state sovereignty.

In the first case upholding the federal health care law, the aggregation principle of *Wickard* led the federal government to claim power above and beyond what even a state's police power traditionally could sustain. In *Thomas More Law Center v. Obama*, the district court ruled that the decision not to purchase health insurance is an economic decision subject to regulation by the federal government under the Commerce Clause because people cannot escape the need for health care and, therefore, are born participants in the health care market, whose decisions in the aggregate necessarily have a substantial affect on interstate commerce.[129] In particular, the Court ruled:

> *The plaintiffs have not opted out of the health care services market because, as living, breathing beings, who do not oppose medical services on religious grounds, they cannot opt out of this market. As inseparable and integral members of the health care services market … [h]ow participants in the health care services market pay for such services has a documented impact on interstate commerce.*[130]

In essence, *Thomas More Law Center* holds that the federal government's power under the Commerce Clause can reach the decision to buy or not to buy any product or service, which is of the sort that one is either likely to buy at some point in one's life or, if not purchased, the cost of which is likely to be borne by others. Under this principle, the federal government's Commerce Clause power would include the power to mandate the purchase of food, shelter, clothing, and funeral planning services. Moreover, just as it asserts the power to set minimum terms and conditions for health care policies, the federal government would be empowered under this interpretation of the Commerce Clause to dictate to individuals what food they must eat, what clothes they must wear, what homes they must purchase, and what cemetery plots they must reserve. As observed by U.S. district court judge Roger Vinson, the reasoning underpinning Thomas More Law Center's holding implies that the federal government could mandate we all eat our broccoli.[131]

But even *Thomas More Law Center* does not advance the most expansive interpretation of the Commerce Clause. In *Mead v. Holder*, the district court declared that the Commerce Clause justifies federal regulation of private "mental activity," such as the mere decision to purchase or not to purchase health care, because the aggregation of such mental activity could have a substantial affect on interstate commerce.[132] This understanding of the federal government's power under the Commerce Clause and Necessary and Proper Clause leaves no room for a private sphere of action that cannot be invaded by federal regulatory authority. Despite a consensus even among modern legal theorists that the federal government was not delegated police powers, such power goes well beyond what the Founders would have understood as the "police power."

The "police power" had been traditionally limited to regulating what is "affected with a public interest," as opposed to purely private matters.[133] Implicit in the idea of the police power was a limitation of the state legislative power by fundamental principles of limited government.[134] This understanding of the police power probably would not have sustained laws compelling citizens to do whatever the government commands in regard to their purchase of food, shelter, clothing, health insurance, and funeral planning, much less their "mental activity." Thus, in reliance upon *Wickard*, the enumerated powers of the federal government have been interpreted as being so vast that they threaten to totally eclipse the traditional police powers of the states. Not surprisingly, the tendency of this centralization of power in the federal government is not freedom-neutral. Federal dominance decreases freedom because modern court decisions often give states freedom to regulate above the federal baseline, while almost uniformly preempting state regulation that is less restrictive than the federal baseline.[135] Restoring dual sovereignty is therefore essential to preserving individual liberty.

TEN TOOLS IN THE FEDERALISM DIY TOOLKIT

Because the Supremacy Clause dictates that the federal government is supreme within the scope of its power, and federal power threatens to exceed the police powers of the states, it is easy to conclude that state sovereignty is a shell of what it once was. But if properly positioned, even eggshells can resist a tremendous amount of force. The *Federalism DIY Toolkit* aims to make effective use of what remains of state sovereignty, and to position it properly to resist federal overreach and restore constitutional equilibrium.

TOOL #1

Legislation Plus Litigation

Courts still proclaim that they patrol the boundaries between state and federal sovereignties and will not automatically defer to incursions by the federal government across those boundaries.[136] Therefore, based on the lingering limits of federal power and the reserved powers of the states, states should stake out legislative tripwires for exerting their sovereignty against the federal government's intrusions. In fact, a movement has already arisen to do just that.

A number of states have enacted legislation that leverages the sovereign powers of state government to erect barriers to federal law that extends into the sphere of state and local policy. Examples include the Health Care Freedom Acts (10 states),[137] Firearms Freedom Acts (7 states),[138] and Medical Marijuana Acts (13 states).[139] The Health Care Freedom Act exerts the police powers of the states to protect freedom of choice in health care and health insurance.

Ten Tools to Restore the Balance of Power

Tool #1: Legislation Plus Litigation

States can enact laws that protect individual liberty and take the federal government to court to defend those laws.

Tool #2: Taxpayer Courts

Taxpayers can't sue the federal government for abuse of their tax dollars, but states *can* authorize taxpayers to bring lawsuits in state court to stop state and federal governments from using tax dollars to violate the Constitution.

Tool #3: Expand Civil Rights Laws

Because state sovereignty is a critical guarantee that all Americans were given by the U.S. Constitution, states can enact civil rights laws that protect that right, allowing individuals to sue state and federal governments when they disregard state sovereignty.

Tool #4: Constitutional Defense Councils

States can create independent Constitutional Defense Councils that have the authority and funding to seek protection of state sovereignty from federal overreach.

Tool #5: Coordination

Many federal agencies are governed by laws that contain "coordination" provisions. State and local governments can reduce the negative impact of new federal regulations by requiring federal agencies to coordinate with local laws, regulations, plans, and policies.

Tool #6: Reinvigorate the Reserved Powers of the States

States can pass laws that invoke their reserved powers and force the federal government into a position where it *must* illegally commandeer state officials in order to enforce federal laws that upset the balance of power between the states and Washington.

The Firearms Freedom Act protects the intrastate manufacture and sale of firearms from federal regulation by establishing a far less onerous state law regulatory system. And the various Medical Marijuana Acts essentially seek to protect intrastate production and consumption of marijuana.

The obvious challenge advocates of such legislation confront is the fact that litigation with the federal government will inevitably ensue from their legislative successes. Therefore, to be effective, the enactment of state sovereignty legislation needs to be coupled to strategic litigation. Moreover, in order to draft effective state sovereignty legislation, advocates of federalism need to be conscious of the principles that will make strategic litigation effective in an environment of mostly adverse legal precedent. In this respect, the challenge advocates of state sovereignty legislation face today is not unlike the challenge faced by the Northern states that resisted the federal government's efforts to enforce the Fugitive Slave Act during the 1830s, '40s and '50s. For that reason, the pre-Civil War case of *Prigg v. Pennsylvania*[140] provides particularly instructive lessons.

Case Study: Wielding State Sovereignty to Fight Slavery

In *Prigg*, the Supreme Court ruled unconstitutional three Pennsylvania legislative enactments that sought to protect free blacks and fugitive slaves from being forcibly removed from the state under the federal Fugitive Slave Act. In particular, the case struck down a law originally enacted on March 1, 1780, and later amended on March 29, 1788, titled "An act for the gradual abolition of slavery," which provided: "No negro or mulatto slave ... shall be removed out of this state, with the design and intention that the place of abode or residence of such slave or servant shall be thereby altered or changed."[141] The court also struck down a further law enacted by Pennsylvania on March 25, 1826, titled "An act to give effect to the provisions of the constitution of the United States relative to fugitives from labor, for the protection of free people of color, and prevent kidnapping," which stated:

If any person or persons shall, from and after the passing of this act, by force and violence, take and carry away, or cause to be taken or carried away, and shall, by fraud or false pretense, seduce, or cause to be seduced, or shall attempt so to take, carry away or seduce, any negro or mulatto, from any part or parts of this commonwealth, to any other place or places whatsoever, out of this commonwealth, with a design and intention of selling and disposing of, or of causing to be sold, or of keeping and detaining, or of causing to be kept and detained, such negro or mulatto, as a slave or servant for life, or for any term whatsoever, every such person or persons, his or their aiders or abettors, shall on conviction thereof, in any court of this commonwealth having competent jurisdiction, be deemed guilty of a felony.[142]

Significantly, Pennsylvania's laws did not absolutely prohibit the seizure of escaped slaves; instead, it allowed the retrieval of escaped slaves only after a slaveholder's agent complied with a specific court process aimed to maintain the peace and ensure due process of law.[143]

The case arose when, between February and April 1837, Edward Prigg sought to recapture a woman named Margaret Morgan, who had escaped from a Maryland slaveholder to Pennsylvania five years earlier.[144] Although Prigg initially followed the procedures set out in Pennsylvania's 1826 law, eventually a Pennsylvanian magistrate refused to proceed with his case.[145] In response, Prigg "carried off" Morgan and her freeborn children to the Maryland slaveholder he represented. Prigg was later indicted and convicted for violating Pennsylvania's 1826 act for making "an assault" on Morgan and her children "and with force and violence feloniously" removing her from the state.[146]

On Prigg's appeal from his conviction, the Supreme Court struck down Pennsylvania's laws, consigning Morgan and her freeborn children to slavery in Maryland. The Court ruled that Article IV, Section 2, Clause 2 of the Constitution required that escaped slaves be immediately "delivered up, on the claim

Ten Tools to Restore the Balance of Power
(continued)

Tool #7: Empower the People

Sometimes we don't need new laws in order to protect individual rights. Sometimes we need to repeal laws that are already on the books. Many state laws actually invite the federal government to get involved in the minutia of local affairs. One way to stop that is to repeal laws that invite the feds in and replace those laws with opportunities for citizens to protect their own rights, like through private contracts and other restrictive covenants.

Tool #8: Refuse Conditional Grants

States can limit or eliminate the power of state and local officials to accept federal grants that require the state or local government to give more control over local decision-making to Washington.

Tool #9: Amend the U.S. Constitution to Limit the Federal Government

States were given the same power as Congress to propose amendments to the U.S. Constitution. States can initiate the process by proposing amendments to the U.S. Constitution that would limit the size, scope and intrusiveness of the federal government.

Tool #10: Interstate Compacts

Interstate compacts are like contracts between two or more states. Compacts can be used to protect individual rights and state sovereignty, and they don't always need congressional approval. Interstate compacts could be used to prevent the federal government from enforcing key provisions of the federal health care bill, or from infringing on Second Amendment rights, for example.

of the party to whom such service or labor may be due" notwithstanding contrary state law; and that this requirement gave the federal government exclusive power to regulate the retrieval of fugitive slaves under the Supremacy Clause.[147]

The tragic result in *Prigg* should be instructive to advocates of state sovereignty legislation. *Prigg* undoubtedly highlights that state sovereignty legislation shares the righteous spirit of pre-Civil War efforts by the Northern states to resist the federal government's Fugitive Slave Acts.[148] Much like in modern-day state sovereignty legislation, Pennsylvania invoked the state's sovereign police powers to protect individual liberty. Moreover, much like state sovereignty legislation seeks to resist federal overreach, there is little doubt that these laws were specifically targeted to resisting federal power. But unlike most state sovereignty legislation, Pennsylvania's laws confronted a specific provision in the Constitution expressly limiting state power, specifically Article IV, Section 2, Clause 2 of the Constitution, which stated: "No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor; but shall be delivered up, on claim of the party to whom such service or labor may be due." Although Pennsylvanians rightly resisted this unjust constitutional provision, the outcome of *Prigg* nevertheless evidences that federal courts will broadly interpret constitutional limitations on state sovereignty to preserve grants of federal power. And just as the federal judiciary was committed to preserving the constitutional compromise on slavery during the 1840s and '50s, all of the evidence suggests the judiciary is equally devoted to preserving the post-1937 general rule of federal supremacy.

While civil disobedience against manifestly unjust laws is laudable, the outcome in *Prigg* demonstrates that it is essential for advocates of state sovereignty to recognize that there is a difference between civil disobedience and effective legal strategy. This difference is meaningful because the federal government is not entirely beyond the rule of law under the Constitution's original meaning. There are still significant opportunities to restore state sovereignty within the existing legal framework. Those opportunities will be undermined by premature and overly aggressive civil disobedience in the form of state sovereignty legislation that directly clashes with express limitations on state powers or the enumerated powers of the federal government. Therefore, instead of drafting legislation that has no chance of being sustained in court, such as laws that would reject birthright citizenship or authorize states to seize control over federal tax revenues,[149] drafters of state sovereignty legislation should aim to generate a product that can sustain an effective litigation strategy.[150] Of course, if these efforts fail, *Prigg*-style civil disobedience against clearly unjust or tyrannical federal laws should be reconsidered.

Principles for Drafting State Sovereignty Legislation to Generate Effective Strategic Litigation

The diminishment of the protection of state sovereignty initially followed a track parallel to the expansion of federal power. But in the mid-1970s, *National League of Cities v. Usery* beamed a faint ray of hope to advocates of the original balance of power.[151] The Supreme Court struck down an attempt by Congress to regulate the decisions of states regarding the wages and hours of state employees under the federal Fair Labor Standards Act, ruling that federal law violates the Tenth Amendment when it (1) regulates states as states, (2) addresses matters that were indisputably attributes of state sovereignty, and (3) directly impairs a state's ability to structure integral operations in areas of traditional government functions.[152] For the first time in 40 years, the Court decided that federal powers could not displace core aspects of state sovereignty because the Tenth Amendment guaranteed the preservation of a system of dual sovereignty in which state sovereignty was meant to check and balance federal power.[153] The Court declared unequivocally if federal laws "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Article 1, Section 8, Clause 3."[154]

National League of Cities, however, was seemingly short-lived. It was overturned by *Garcia v. San Antonio Metropolitan Transit Authority*[155] fewer than 10 years later. In *Garcia*, the Court rejected *National League of Cities* as unworkable because of the supposed difficulty in distinguishing between traditional and nontraditional state functions.[156] It also reasserted that the protections of the Tenth Amendment were a mere tautology made unnecessary by an examination of the powers delegated to the federal government.[157] Finally, *Garcia* declared that the defense of state sovereignty should be mounted from within the political process at the federal level—in Congress—not within the court system.[158]

The Return of Dual Sovereignty

- ***National League of Cities v. Usery (1976):*** Congress may not impair core attributes of state sovereignty.
- ***New York v. U.S. (1992):*** Congress may not "commandeer" state legislatures by requiring them to legislate.
- ***U.S. v. Lopez (1995):*** Congress may not regulate wholly intrastate noneconomic activities—gun possession—regardless of aggregation effect—striking down Gun-Free School Zones Act.
- ***Printz v. U.S. (1997)***: Congress may not evade separation of powers and "commandeer" state executive officials by ordering them to execute a federal program.
- ***City of Boerne v. Flores (1997):*** Federal civil rights law that overrules state sovereignty must be congruent and proportional means to remedying actual civil rights violations.
- ***U.S. v. Morrison (2000):*** Congress may not regulate and criminalize wholly intrastate criminal activities with no economic aspect.
- ***Alden v. Maine (2000):*** Federal law cannot force states to entertain lawsuits against themselves in state court.
- ***Gonzalez v. Oregon (2006):*** Congress may not preempt state right-to-die statutes by mere implication; intent to preempt must be unequivocal.

Fortunately, the majority opinion in *Garcia* was not the last word on whether the Court would enforce principles of state sovereignty against federal overreach. In his dissent, Justice Lewis Powell retorted:

> *The Framers believed that the separate sphere of sovereignty reserved to the States would serve as an effective "counterpoise" to the power of the Federal Government.... [F]ederal overreaching under the Commerce Clause undermines the constitutionally mandated balance of powers between the States and the Federal Government, a balance designed to protect our fundamental liberties.*[159]

This dissent captures the spirit of subsequent developments in the law between 1992 and 2000.

In *New York v. United States*, the Supreme Court held that Congress may not "commandeer" state legislatures by requiring them to legislate as directed by the federal government.[160] *United States v. Lopez* held that Congress may not regulate wholly intrastate noneconomic activities—gun possession near schools—regardless of *Wickard's* aggregation approach.[161] *Printz v. United States* held that Congress may not evade separation of powers and "commandeer" state executive officials by ordering them to conduct background checks of purchases of firearms under the Brady Bill.[162] *City of Boerne v. Flores* ruled that a remedial civil rights law that invades state sovereignty must be closely drawn to remedy actual civil rights violations—it cannot effectively manufacture new civil rights.[163] In *United States v. Morrison*, the Court held Congress may not regulate and criminalize wholly intrastate criminal activities with no economic aspect—striking down the Violence Against Women Act.[164] And in *Alden v. Maine*, the Court ruled that states could not exist as autonomous sovereign governments if the federal government could subject them to damages claims in their own courts for failing to pay overtime to their employees.[165]

Taken together, there is no question that the Supreme Court has embraced Justice Powell's dissent to *Garcia*. Nevertheless, the Court is not yet the federalism juggernaut that was once predicted. The two modern Court cases that imposed clear limits on the federal commerce power, namely *Lopez*[166] and *Morrison*,[167] have had no direct progeny. In fact, to justify a federal scheme for criminalizing the intrastate personal consumption of homegrown marijuana in *Gonzalez v. Raich*, the Court applied the aggregation theory of *Wickard*.[168] This is despite the Court's prior observation in *Morrison* that "the Constitution requires a distinction between what is truly national and what is truly local"[169] and the Court's refusal in *Lopez* "to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[170]

It appears that the Court's conservative majority is unlikely to coalesce around a challenge to the scope of the federal government's delegated powers in the absence of a direct clash with state sovereignty. Justice Scalia, for example, concurred in the outcome of *Raich* while

underscoring "neither respondents nor the dissenters suggest any violation of state sovereignty of the sort that would render this regulation 'inappropriate.'"[171] More recently, in *Comstock v. United States*, Chief Justice John Roberts, Justice Anthony Kennedy, and Justice Samuel Alito joined or concurred in a decision that applied an expansive interpretation of the Necessary and Proper Clause, in a context where the majority opinion repeatedly emphasized principles of state sovereignty were *not* at issue.[172] In view of such reticence to limit the power of the federal government, state sovereignty legislation and related strategic litigation should clearly invoke "principles of state sovereignty" to resist an overreaching federal government.[173]

Effectively Using the Powers Reserved Exclusively to the States

Invoking "principles of state sovereignty" to limit federal power necessarily begins with analysis of the reserved powers of the states. These reserved powers are not defined expressly by the Constitution, but like the principle of sovereign immunity, the existence of reserved powers "was a principle so well established that no one conceived it would be altered by the new Constitution."[174] There is little dispute that the traditional scope of state sovereignty includes policing, taxing, spending, and eminent domain powers. Of these, the police power has the widest scope, but is also the most nebulous. It involves the power to enact laws to protect public health, safety, welfare, and morals, most clearly typified by criminal law, but it also includes both the common law, which defines and protects individual rights from encroachment, and statutory law, such as health and safety regulations, and administrative law offshoots of the statutory law.[175] There is no question that the police power of the states is vast and can be argued to underpin just about anything a state does.

Consequently, when it comes to the police power, the boundary line between the states and the federal government potentially maps out a vast ground, and incursions into state sovereignty can be found—or created—just about any time a federal law is enacted. Advocates of state sovereignty should have no problem identifying ways in which a federal law encroaches on a state's police power. But resistance to federal overreaching should not be from just any exertion of the police power. The federal government, after all, was meant to have the power to overrule state police powers when it acts within its enumerated powers. Courts, therefore, generally will not be overly impressed with the assertion that the federal government is interfering with state police powers as a blanket assertion. A defense of state sovereignty is best focused on the highest ground—those specific applications of state sovereign power, police or otherwise, that are clearly reserved exclusively to the states.

Based on the Federalist Papers, notes of the Constitution Convention of 1787, and other writings contemporaneous to the framing and ratifying of the Constitution, Goldwater Institute senior fellow Robert Natelson has identified a number of specific powers that the Framers and Ratifiers of the Constitution clearly understood to be reserved exclusively to the states under the Tenth

Amendment. Those that are most relevant to the modern age include (1) the establishment and regulation of local government; (2) the regulation of real property, including regulation of land title and land transfers; (3) the regulation of personal property outside of commerce, such as firearms; (4) the regulation of domestic and family affairs, including marriage and guardianship; (5) local criminal law enforcement; (6) the administration of civil justice (between citizens of the same state and outside of bankruptcy), including personal injury torts, contracts, and nuisance laws; (7) the establishment and regulation of schooling; (8) the regulation of agriculture; (9) the regulation of nonagricultural businesses outside the immediate stream of commerce; and (10) the construction of local infrastructure outside of postal roads.[176] Additionally, subject to the limitations of the post-Civil War amendments, the powers reserved exclusively to the states also include those recognized by the Founders and Ratifiers as essential to maintaining a republican form of government, including (1) control over the voting franchise, (2) control over the structure and mechanics of state government, and (3) control over wages and qualifications of government employees who perform directly legislative, executive, or judicial tasks for the state or its subdivisions.[177] Unfortunately, since 1937, the federal judiciary has tolerated incursions into most of these exclusively reserved powers, resulting in numerous federal statutes that purport to preempt the reserved powers of the states.[178]

But the tide has begun to change. States have successfully resisted federal incursion into their reserved powers when the federal government has failed to meet technical or evidentiary thresholds, such as when Congress has not included adequate findings or clearly expressed its intent, or otherwise did not show congruence between its enforcement efforts and the problem to be remedied. *Gonzalez v. Oregon*,[179] for example, refused to recognize the federal government's claim of supremacy over a state law that would allow euthanasia because control over health care decisions fall within a traditional area of state sovereignty. The Supreme Court held that congressional intent to override state laws within such a traditional area of state sovereignty must be unequivocal, otherwise the court would not permit preemption. This ruling reflected the earlier holding in *Gregory v. Ashcroft*,[180] which rejected an effort to preempt a provision of the Missouri Constitution setting mandatory retirement ages for state judges, asserting that core state functions cannot be preempted unless the intrusion is stated in "unmistakably clear" terms. Similarly, in *City of Boerne*, the Court rejected an effort by Congress to enforce the Fourteenth Amendment by declaring that local land use decisions with a discriminatory impact on religion violate civil rights. The Court said that when it comes to overriding state sovereignty in such a traditional area as land use law, Congress cannot simply declare that it is protecting civil rights. There must be a pattern of civil rights violations justifying the enforcement measure, and the law must be closely connected to preventing or remedying that pattern. *Boerne's* principles were solidified in *Florida Prepaid v. College Savings Bank*, in which the Court embraced close scrutiny of an enforcement statute under the Fourteenth Amendment, requiring a documented pattern of state civil rights violations necessitating federal intervention.[181]

In essence, all of these cases say that as the federal government encroaches on exercises of the traditionally reserved powers of the state, courts will heighten their scrutiny of such action and require strong evidence that the federal government has a solid basis for overruling state sovereignty, even when purportedly acting pursuant to enumerated powers. In the case of federal preemption, federal laws that encroach on state laws exerting traditional sovereign powers, even if within the federal government's enumerated powers, must be shown to unequivocally displace contrary state law and policy; otherwise, state law and policy will stand and be carved out of the federal legal scheme. In the case of efforts by the federal government to "enforce" the Fourteenth or Fifteenth amendments to override state sovereignty, courts now require proof that there is an actual civil rights problem to address and that the federal law is actually closely connected to remedying that problem.

These principles are not mere formalities. They were developed by the Supreme Court with an explicit awareness of the need to preserve state sovereignty from federal overreach to protect liberty, and they serve a substantive purpose, ensuring that state sovereignty is protected against federal preemption if at all possible. As emphasized in *Gregory*:

> *Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.... In the tension between federal and state power lies the promise of liberty.*[182]

Therefore, state sovereignty legislation that is premised on defending the reserved powers of the states should succeed in pushing the federal government back if targeted to resist federal laws that do not expressly preempt state law or that are poorly supported by evidence showing a remedial purpose. Of course, while this tactic will delay federal encroachments, perhaps to allow a change in the political atmosphere, Congress could respond simply by passing a new law targeting a state law expressly for preemption or generating better evidence for remedial action under the Fourteenth Amendment. If state sovereignty is to be fully vindicated, a more permanent solution is needed. One potentially permanent solution involves crafting state sovereignty legislation and strategic litigation to resurrect the legal framework of *National League of Cities*.

Reviving *National League of Cities* to Enforce Principles of State Sovereignty

Jurists and academics have concluded that the Supreme Court has effectively overruled *Garcia* and reinstated *National League of Cities*' legal framework of limiting federal power based on principles of state sovereignty.[183] This conclusion is supported by the fact that *New York* approvingly cites to *Hodel v. Virginia Surface Mining*, which applied the three-part test of *National League of Cities* for assessing whether a federal law violates the Tenth Amendment.[184]

Additionally, like *National League of Cities*, the analyses in *New York*, *Printz*, and *Alden* all explicitly proceed from the premise that principles of state sovereignty implicitly limit the scope of expressly delegated federal powers. *Printz*, for example, specifically emphasizes:

> *Although the States surrendered many of their powers to the new Federal Government, they retained "a residuary and inviolable sovereignty." This is reflected throughout the Constitution's text, including (to mention only a few examples) the prohibition on any involuntary reduction or combination of a State's territory, Art. IV, § 3; the Judicial Power Clause, Art. III, § 2, and the Privileges and Immunities Clause, Art. IV, § 2, which speak of the "Citizens" of the States; the amendment provision, Article V, which requires the votes of three-fourths of the States to amend the Constitution; and the Guarantee Clause, Art. IV, § 4, which "presupposes the continued existence of the states and ... those means and instrumentalities which are the creation of their sovereign and reserved rights...."* [185]

Similarly, *New York* declares:

> *States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead "leaves to the several States a residuary and inviolable sovereignty...."*[186]

Finally, the Supreme Court's decision in *Alden* observes:

> *The federal system established by our Constitution preserves the sovereign status of the States in two ways. First, it reserves to them a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status. The States "form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere." Second, even as to matters within the competence of the National Government, the constitutional design secures the founding generation's rejection of "the concept of a central government that would act upon and through the States" in favor of "a system in which the State and Federal Governments would exercise concurrent authority over the people—who were, in Hamilton's words, "the only proper objects of government."*[187]

Taken together, as in *National League of Cities*, it is apparent that the Court currently circumscribes the scope of the federal government's expressly delegated power by principles of state sovereignty. The recent decision in *Massachusetts v. Sebelius* shows how strategic litigation to enforce state sovereignty legislation can succeed by mounting a defense of the reserved powers of the states from the resurrected framework of *National League of Cities*.

Case Study: *Massachusetts v. Sebelius*[188]

Massachusetts v. Sebelius involves a lawsuit brought by Massachusetts attorney general Martha Coakley against the federal government, claiming that the federal Defense of Marriage Act (DOMA) violated the exclusively reserved power of the states under the Tenth Amendment to define and regulate marriage. DOMA excluded gay marriage from the definition of marriage for purposes of federal programs and thereby required states that accepted federal funds to refrain from extending married homosexuals the same benefits in federally funded programs as married heterosexuals.[189] This resulted in gay married couples being denied benefits under MassHealth, a state-operated Medicaid program, and under a burial program for Massachusetts veterans and their spouses in cemeteries owned and operated by the Massachusetts Department of Veterans' Services. Additionally, the Commonwealth had to "pay an additional Medicare tax for the value of the health benefits provided to the same-sex spouse."[190]

The attorney general argued that the Massachusetts state constitution's equal protection clause was interpreted to prohibit such discrimination and, therefore, DOMA's effort to condition federal funding on discrimination against homosexual marriage interfered with Massachusetts' sovereign authority to define and regulate the marital status of its residents. The district court agreed, ruling that DOMA was unconstitutional because it interfered with the traditionally reserved power of the states to regulate marriage and forced Massachusetts to discriminate against its own citizens in violation of its constitution.[191] According to the district court, "the federal government, by enacting and enforcing DOMA, plainly encroaches upon the firmly entrenched province of the state, and in doing so, offends the Tenth Amendment. For that reason, the statute is invalid."[192]

The district court reached its decision, in part, based on the recognition that the commandeering cases of *New York* and *Printz* actually stood for the wider principle of protecting state sovereignty from federal interference when states act within the scope of traditionally reserved powers. Applying *Hodel v. Virginia Surface Mining*'s test, which originated from *National League of Cities*, the court reasoned that DOMA (1) regulated "states as states," (2) concerned attributes of state sovereignty, and (3) was of such a nature that compliance with it would impair a state's ability to structure integral operations in areas of traditional governmental functions.[193] The threatened denial or recapture of federal funds if the state furnished same-sex benefits and the increase in the state's Medicare tax burden were sufficient to find that DOMA regulated states as states.[194] The court also found that DOMA concerned an attribute of state sovereignty, even though DOMA only defined marriage for purposes of federal law, and even though compliance with DOMA was necessary only insofar as Massachusetts voluntarily participated in federally funded programs.[195] Finally, the court ruled that DOMA impaired Massachusetts' ability to structure integral operations because such impairment is shown when a "federal regulation

affects basic state prerogatives in such a way as would be likely to hamper the state government's ability to fulfill its role in the Union and endanger its separate and independent existence."[196] Such impairment was shown, according to the court, because DOMA forced Massachusetts to choose between honoring its state constitution and federal law, which undermined the state's "basic ability to govern itself."[197] The reasoning in *Massachusetts* parallels the reasoning that litigators should leverage to vindicate state sovereignty legislation such as the Health Care Freedom Act. When possible, advocates of state sovereignty should use these liberal precedents to advance conservative ends.

In states that amend their constitutions to establish a right to freedom of choice in health care and health plans and to prohibit compulsory participation in health plans, the federal health care law's individual mandate (1) regulates "states as states," (2) concerns attributes of state sovereignty, and (3) impairs the state's ability to structure integral operations in areas of traditional governmental functions. First, just as DOMA regulated states as states by burdening state policy decisions with threats of the denial or recapture of federal funds and the imposition of additional federal taxes, the federal health care law's individual mandate will force states to pay for increased health care coverage because it will drive more individuals, who cannot afford private insurance, to participate in state-funded Medicaid programs. Additionally, states that adopt the Health Care Freedom Act will be precluded from enforcing an otherwise valid state law. Second, like family law, there is no question that the regulation of health care has been recognized for decades as within the reserved powers of the states.[198] *Lambert v. Yellowly* even went so far as to say that, "obviously, direct control of medical practice in the states is beyond the power of the federal government."[199] By seeking to preempt the Health Care Freedom Act's guarantee of freedom of choice in health care and health plans, and thereby displacing an otherwise legitimate exercise of state sovereignty, the federal health care law unquestionably concerns attributes of state sovereignty. Third, any federal law that seeks to preempt the Health Care Freedom Act would impair a state's ability to structure its integral operations by rendering the state unable to honor its constitution, just as DOMA forced Massachusetts to choose between federal funds and honoring its state constitution.

Like DOMA's clash with Massachusetts' state constitutional equal protection guarantee, the federal health care law's individual mandate directly clashes with the Health Care Freedom Act. Just as "DOMA set the Commonwealth on a collision course with the federal government in the field of domestic relations,"[200] the federal health care law's individual mandate sets states on a collision course with the federal government in the field of health care and health insurance if they adopt the Health Care Freedom Act. Both federal laws should be similarly struck down, because allowing preemption would (1) regulate "states as states," (2) concern attributes of state sovereignty, and (3) be of such a nature that compliance with it would impair a state's ability to structure integral operations in areas of traditional governmental functions. The result reached

in *Massachusetts* thus shows that strategic litigation can vindicate state sovereignty legislation utilizing the framework of *National League of Cities*, as applied in *Hodel*.[201]

Of course, this litigation strategy presumes that the tea leaves have been correctly read—i.e., that the legal framework of *National League of Cities* is now good law when applied through *Hodel*. *Massachusetts v. Sebelius*, unfortunately, is merely a district court decision that has relatively weak precedential status. For this reason, advocates of state sovereignty should consider additional creative legal arguments to temper federal power by taming the modern court's interpretation of the Necessary and Proper Clause.[202]

Defend State Sovereignty with the "Letter and Spirit" of the Constitution

Both the majority and concurring opinions in *Raich* underscore that the major vehicle for the expansion of federal power has been the Necessary and Proper Clause, because *Wickard's* aggregation principle stems from the implied power it confirms under the Commerce Clause.[203] The Necessary and Proper Clause states, "The Congress shall have Power—To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[204] Justice John Marshall described the power confirmed by the Necessary and Proper Clause as follows: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[205] Although this interpretation was disputed by Thomas Jefferson and others, who claimed that the clause was meant to convey to the federal government only absolutely necessary implied powers, an effective legal strategy should not focus on resurrecting Jefferson's argument.

Justice Marshall was almost certainly right in ruling that the Necessary and Proper Clause does not require a showing by the federal government that a chosen means of executing an express power is absolutely necessary. The Framers knew how to use the word "absolutely necessary" when they wanted to—and, in fact, constitutionally limited the inspection powers of the states to those that were "absolutely necessary."[206] The fact that the Framers chose not to use the phrase in conjunction with Congress' enumerated powers is all but conclusive in precluding the equation of "necessary and proper" with "absolutely necessary."

In fact, the latest historical research shows that "necessary and proper" was a term of art meant to confirm that the federal government, as agent for the states and the people, had implied incidental power to implement appropriately its expressly granted powers.[207] In agency law, a grant of "authority to do whatever acts or use whatever means are reasonably *necessary and proper* to the accomplishment of the purposes for which the agency was created" means that "an

agent has implied authority to do that which *the nature of the business would demand in its due and regular course*."[208] Although such implied power is ordinarily coupled to any grant of express power to an agent, the Necessary and Proper Clause was neither needlessly redundant nor was its redundancy meant to convey a greater limitation on the implied powers of the federal government than is "necessary and proper." The Framers included the clause to "remove all uncertainty" that the Constitution would be interpreted to displace the Articles of Confederation's limitation of the delegated powers of the prior national government to those expressly delegated by the states.[209] Thus, the redundancy of the clause was an instance of prudent "belt and suspenders" drafting, not an effort to further limit the implied powers of Congress.

While the implied power delegated to Congress by the Necessary and Proper Clause is broader in scope than what "absolute necessity" would justify, it is not unlimited. Congress' implied power is still circumscribed by the agency principle that the clause authorizes only those actions that the "nature" of the political system established by the Constitution would "demand in its due and regular course." As such, the Necessary and Proper Clause entails more than a means-end test. The "proper" element of the clause demands an answer to the question, "Is the claimed implied power to enact the law in question appropriate?" And this, in turn, begs the question, "Appropriate by what standard?" Justice Marshall's answer to this question was that the "letter and spirit" of the Constitution is the standard against which the propriety of a federal law is measured.[210] Therefore, applying principles of agency law, federal laws are consistent with the "letter and spirit" of the Constitution if they are enacted to accomplish that which the "nature" of the political system established by the Constitution would "demand in its due and regular course."[211] This standard requires an assessment of the sort of federal law that the "nature" of the political system established by the Constitution would "demand in its due and regular course."

Principles of state sovereignty cannot be disregarded in an honest assessment of the "letter and spirit" of the Constitution. The Constitution undoubtedly created a "compound republic" that divided power between the states and the federal government. This system of dual sovereignty was meant to establish a "constitutional equilibrium" that would preserve liberty by (1) diffusing power and thereby preventing the abuse of concentrated power, and (2) enabling the people to leverage the sovereignty of the states or the federal government, as needed, to protect their rights and keep the other government in check. By its nature, therefore, the political system established by the Constitution *cannot* "demand in its *due and regular* course" the enactment of federal laws that (1) concentrate power in the federal government, and (2) disable the people from wielding the sovereignty of the states to protect their rights and keep the federal government in check. Any claim by the federal government to such implied authority is inconsistent with the "letter and spirit" of the Constitution and, therefore, cannot be rooted in the Necessary and Proper Clause.

This interpretation of the "letter and spirit" of the Constitution is not mere legal theory. As emphasized by Justice Antonin Scalia in *Printz:*

> *When a "Law ... for carrying into Execution" the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions we mentioned earlier [the prohibition on any involuntary reduction or combination of a State's territory, Art. IV, § 3; the Judicial Power Clause, Art. III, § 2, and the Privileges and Immunities Clause, Art. IV, § 2, which speak of the 'Citizens' of the States; the amendment provision, Article V, which requires the votes of three-fourths of the States to amend the Constitution; and the Guarantee Clause, Art. IV, § 4], it is not a "Law ... proper for carrying into Execution the Commerce Clause," and is thus, in the words of The Federalist, "merely [an] act of usurpation" which "deserves to be treated as such."*[212]

Indeed, the principles of state sovereignty applied in *Printz* and its predecessor, *New York,* directly support the contention that the federal government violates the "letter and spirit" of the Constitution by enacting laws that prevent dual sovereignty from effectively diffusing power and protecting individual liberty.

In *New York* and *Printz*, the Supreme Court emphasized that principles of dual sovereignty cannot sustain a relationship between the federal government and the states in which state legislatures and executive officials are directly commanded by the federal government. The Court's rejection of such "commandeering" was an application of wider principles of dual sovereignty that preclude the concentration of power in the federal government. *Printz*, for example, emphasized that "the power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself—the police officers of the 50 States."[213] And *New York* emphasized:

> *The Constitution does not protect the sovereignty of States for the benefit of the States or state governments 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. State sovereignty is not just an end in itself: "Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."*[214]

In short, both *New York* and *Printz* reached their rulings as applications of the functional purpose of federalism in diffusing power and securing liberty, not merely to defend jurisdictional boundaries between the states and the federal government. Therefore, the principles of state sovereignty applied in *New York* and *Printz* extend much further than simply preventing the federal government from commandeering the legislative and executive branches of a state.

They support the contention that the federal government violates the "letter and spirit" of the Constitution by enacting laws that prevent dual sovereignty from *effectively* diffusing power and protecting individual liberty. This opens the door to the argument that the federal government cannot invoke the Necessary and Proper Clause to preempt state sovereignty when states wield their reserved powers to serve the ultimate purpose of our system of federalism—securing individual liberty. As discussed below, this argument can powerfully sustain state sovereignty legislation, such as the Montana Firearms Freedom Act, against preemptive federal laws that purportedly spring from the implied power confirmed by the Necessary and Proper Clause.

Case Study: Montana Firearms Freedom Act

The Montana Firearms Freedom Act establishes a less restrictive regulatory regime than federal law for intrastate firearms manufacturing and sales. The Act facilitates the exercise of the individual right to keep and bear arms under the Second Amendment by promising to enhance the availability of firearms within the State of Montana.[215] When coupled with the foregoing Second Amendment right, the personal right to engage in firearms manufacturing and sales under the Act should be regarded as among the rights reserved to the people under the Ninth Amendment.[216] In short, Montana has exercised its sovereign police powers to facilitate the ability of individuals to exercise their enumerated constitutional rights within state boundaries. Consequently, federal preemption of the Montana Firearms Freedom Act would not merely displace state law. Such preemption would displace state sovereignty in a way that diminishes individual liberty and substantially restricts the opportunities Montanans would otherwise have to exercise and enjoy their Second and Ninth Amendment rights. In other words, federal preemption of the Act would undercut the fundamental structural purpose of preserving state sovereignty in our federalist system—protecting individual liberty from the concentration of power in the federal government. And for that very reason, the "letter and spirit" of the Constitution should prohibit preemption to the extent that it is premised on leveraging the implied power confirmed by the Necessary and Proper Clause. After all, if, as held in *Printz*, it violates the "very principle of separate state sovereignty" for Congress "to compromise the structural framework of dual sovereignty,"[217] it would be a far greater violation of that principle for Congress to prohibit state sovereignty from serving its basic structural purpose of protecting individual liberty.

Of course, one criticism of this argument might be that the principles of state sovereignty enforced in *Printz* and *New York* only apply to federal laws that regulate "states as states,"[218] and federal laws that override the Firearms Freedom Act or the Health Care Freedom Act merely regulate *people*. But this criticism is unpersuasive because "the Constitution's political structure of federalism and sovereignty is designed to protect, not defeat, the legal substance of individual rights."[219] The Framers and Ratifiers meant for state sovereignty to be *actively* exerted against

federal overreach to protect individual liberty.[220] This point is not the same as the long-rejected contention that the state has *parens patriae* standing to enforce the rights of its citizenry—i.e., that the state has the right to stand in the shoes of its citizens and enforce *their* rights. Rather, the point is that principles of state sovereignty bestow upon the state *as a state* the power to defend actively its reserved powers against federal overreach for the purpose of securing liberty. Alexander Hamilton—hardly the champion of state sovereignty—said it best in *The Federalist* No. 28:

> *In a confederacy the people, without exaggeration, may be said to be entirely the masters of their own fate. Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and those will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress.*[221]

In short, when a state deliberately enacts a law meant to protect individual liberty to resist federal overreach, it is acting fully within its nature as a *state* within the federalist system designed by the Founders. Moreover, the state certainly has a sovereign interest in enforcing its laws. Therefore, any federal law that would prevent the state from enforcing its laws and serving its appointed function in our federalist system regulates "states as states" and violates the "letter and spirit" of the Constitution."[222]

Seek Heightened Judicial Scrutiny under the Necessary and Proper Clause

Despite the foregoing analysis, most modern cases deem "necessary and proper" just about any law that Congress claims will make the exercise of an express power more convenient. As a result, courts often will not second-guess congressional determinations of what exercises of implied power are "necessary and proper." But recent developments in the law interpreting the scope of the Fourteenth Amendment's enforcement clause suggest that this could change. To restore the original balance of power between the states and the federal government, strategic litigation arising from state sovereignty legislation should urge courts to correspondingly heighten their scrutiny of exertions of the implied power confirmed by the Necessary and Proper Clause.

The Enforcement Clause of the Fourteenth Amendment provides that Congress may enforce the Amendment's guarantees of fundamental freedom against state action through appropriate legislation.[223] From its inception, the Enforcement Clause was viewed as conferring upon Congress implied power equivalent to that confirmed by the Necessary and Proper Clause.[224] As the Necessary and Proper Clause's reach grew, so did that of the Enforcement Clause. Just as the Supreme Court has allowed Congress to regulate virtually any intrastate activity as a convenient means of regulating interstate commerce, the Court eventually allowed Congress to

prophylactically override the most intimate aspects of state sovereignty in controlling elections, the size and shape of legislative districts, and education policy in order to maximize the ability of Congress to protect civil rights.[225] But during the 1990s and 2000s, the trend reversed *vis-à-vis* the Enforcement Clause.

In *City of Boerne*,[226] the Supreme Court argued that the Enforcement Clause cannot become so expansive in its reach that it effectively defines new civil rights; instead, it must be regarded as a remedial power that is incidental to protecting civil rights already protected by the government; accordingly, it rejected the argument that Congress was free to expansively override state sovereignty to protect civil rights, requiring instead a close connection between any statute overriding traditional areas of state sovereignty under the enforcement clause and an actual problem of civil rights violations, with heightened judicial scrutiny for any prophylactic measure. In *Horne v. Flores*,[227] the Court applied these principles to restrict the power of the federal judiciary to enforce an existing consent judgment. The Court specifically held that injunctions affecting "areas of core state responsibility, such as public education," should be lifted as soon as evidence of discrimination no longer exists.

If heightened judicial scrutiny is warranted for these exertions of the Enforcement Clause, it is certainly warranted for federal laws that invoke the Necessary and Proper Clause. After all, from the inception of the Fourteenth Amendment, the scope of power conferred or confirmed by the two provisions has been equated. Although the Necessary and Proper Clause is not a remedial power, it is, like the Enforcement Clause, meant to effectuate an express power. Both clauses furnish or confirm subordinate incidental or instrumental power; neither clause furnishes or confirms implied power exceeding the main power that each is meant to implement. As such, just as the Enforcement Clause should not be interpreted so broadly that it effectively creates new federal rights, deference to the claimed necessity or propriety of federal laws under the Necessary and Proper Clause should not be so great that the clause functions as a standalone power or effectively defines new enumerated powers for the federal government.[228] Accordingly, strategic litigation coupled to state sovereignty legislation should seek heightened judicial scrutiny of any federal law that is justified as an exercise of implied power confirmed by the Necessary and Proper Clause.

Case Study: Fighting the Individual Mandate with Heightened Scrutiny

Heightened scrutiny would help resist overreaching claims that a federal law is "necessary and proper." For example, the federal government claims the implied power to require individuals to purchase health insurance under the Commerce Clause and Necessary and Proper Clause.[229] Because the act of choosing not to purchase health insurance is obviously not commerce "among" the states, it is necessary for the federal government to make the claim that the Commerce

Clause and the Necessary and Proper Clause implies the power to impose the individual mandate in order to effectuate a broader regulatory scheme involving truly interstate commerce. Thus, in litigation over the federal health care law, the federal government has contended that the individual mandate is necessary and proper to implementing a comprehensive interstate regulatory scheme for controlling health care costs and providing universal access to health care.[230] With heightened scrutiny of this claim, however, defenders of the Health Care Freedom Act could respond by offering proof that the individual mandate actually defeats the purpose of the federal government's interstate regulatory scheme.

It is well established that increased participation in health insurance causes health care costs to spiral upward because individuals tend to demand more services and to be less cost conscious when a third party pays their bill.[231] Correspondingly, mandating participation in health insurance will generate excessive demand and competition for scarce medical services, increasing health care costs and diminishing access to health care from what it would otherwise be if individuals were left free to pay directly for health care or to use a combination of health care savings accounts and catastrophic coverage.[232] Such proof, if actually considered, would refute the necessity and propriety of the individual mandate by showing the mandate defeats its asserted purpose and, therefore, cannot be regarded as within the implied power that is incident to the Commerce Clause under the Necessary and Proper Clause. Thus, heightened scrutiny of federal laws under the Necessary and Proper Clause could go a long way to help state sovereignty legislation, such as the Health Care Freedom Act, resist the unjustifiable expansion of the federal government. Therefore, it is prudent to couple the enactment of state sovereignty legislation with a consciousness of the principles of strategic litigation.

TOOL #2

Taxpayer Courts

Mere taxpayers face significant hurdles enforcing the guarantee of dual sovereignty in federal court. Nearly 100 years ago, in *Frothingham v. Mellon*, the Supreme Court rejected a constitutional challenge to a conditional federal grant program, the 1921 Sheppard-Towner Act Maternity and Infancy Health program, which was brought by an ordinary citizen based solely on the fact that she paid federal taxes—what is called "taxpayer standing."[233] Ms. Frothingham argued that the conditional grant program violated the Tenth Amendment and, therefore, taxes taken from her to support the program amounted to deprivation of her property without due process of law. Even though the Court acknowledged the widespread recognition of taxpayer standing to challenge state and local appropriations, it nevertheless ruled that a taxpayer's "interest in the moneys of the Treasury—partly realized from taxation and partly from other sources—is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future

taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity."[234]

The Supreme Court's refusal to accept jurisdiction over constitutional claims based on taxpayer standing has been somewhat relaxed in cases seeking to enforce the Establishment Clause under the First Amendment,[235] but the federal courthouse doors are still largely closed to claims brought by taxpayers under the Tenth Amendment.[236] But this denial of access to justice in federal court is a blessing in disguise—it supports nearly exclusive jurisdiction over the very same claims in most state courts. States can establish "taxpayer courts" allowing citizens to sue state and federal agents for violations of the Tenth Amendment based solely on taxpayer standing, and those claims will be shielded from removal to the lower echelons of the federal court system to the very extent the federal courthouse doors remain closed to taxpayers.

State Courts Have Jurisdiction Over Federal Claims and Federal Agents

State courts do not need specific legal authority beyond the U.S. Constitution itself to entertain a lawsuit against federal agents to enforce the Constitution.[237] State courts are courts of general jurisdiction and can handle any case arising under state or federal law.[238] Indeed, even in the absence of a state law providing a remedy, state courts have jurisdiction over claims arising directly from the U.S. Constitution.[239] Such concurrent jurisdiction is in no way an affront to the vertical separation of powers between the states and the federal government. The Supremacy Clause mandates that "the judges in every state shall be bound" by the Constitution. There is a long history of Congress affirmatively granting jurisdiction to state courts to enforce federal laws.[240] In fact, except where sovereign immunity is at issue, state courts have been required to accept jurisdiction of federal claims.[241]

The sovereign immunity enjoyed by the United States does not prevent constitutional lawsuits from being brought against federal officials in state court;[242] when a federal official is alleged to act in violation of the Constitution, his or her actions are not attributed by the law *to those of the United States*.[243] In *United States v. Lee*, for example, Confederate General Robert E. Lee's family brought an "ejectment" lawsuit in state court to recover 1,100 acres held by military officers of the United States.[244] General Lee's family prevailed in Virginia state court, and, upon appeal, the Supreme Court rejected the argument that the state court lacked jurisdiction over their "ejectment" lawsuit. The Court held that so long as the question raised in state court can be ultimately determined "in courts which are the creation of the federal government," there is no concern about "hostile proceedings in state courts."[245] The Court further explained, "No man in this country is so high that he is above the law. No officer of the law may set the law at defiance with impunity. All the officers of the government from the highest to the lowest are creatures of the law and are bound to obey it."[246] *Lee* established that state courts can exercise jurisdiction over federal agents who are alleged to be acting in violation of the Constitution if

a federal court is ultimately able to review the case. Similar principles apply when state courts are asked to enjoin state officials to prevent them from violating the Constitution because state officials are regarded as acting on their own, not as the state itself.[247]

Taxpayer Standing Cases Cannot Be Removed to the Lower Federal Courts

Although *Lee* holds that a federal court must have the ultimate power to review a case filed in state court against federal agents on federal questions, there is no necessity that such review take place in a federal court other than the U.S. Supreme Court. Indeed, despite the normal rule that a constitutional claim against state or federal officials filed in state court can be removed to federal court,[248] cases filed in state court against state or federal agents on federal questions can be shielded from removal to the *lower* federal courts. Removal can be prevented simply by ensuring that any case filed in state court against state or federal agents cannot meet the requirements of original jurisdiction in federal court under Article III of the Constitution.

Unlike state courts, federal courts have limited original jurisdiction. Article III requires them to exercise original jurisdiction only over actual "cases and controversies"—i.e., "justiciable" claims.[249] This means, for example, that federal courts cannot take cases in the first instance where injury is only speculative or where the ultimate issue is of the sort assigned to the political branches for resolution.[250] When a plaintiff challenges a statute that threatens individual liberty, the Supreme Court has held that federal courts cannot exercise original jurisdiction unless the plaintiff shows that "there exists a credible threat of prosecution."[251] Circuit courts have in many cases articulated an even narrower conception of federal jurisdiction, stating that where "plaintiffs seek declaratory and injunctive relief only, there is a further requirement that they show a very significant possibility of future harm."[252] Additionally, federal courts also apply a doctrine known as the "political question doctrine" to avoid reaching constitutional issues that they claim the U.S. Constitution assigns exclusively to the political branches. This doctrine may also stem from the "case and controversy" jurisdictional requirement imposed by Article III on federal courts.[253] The refusal of the federal court system to acknowledge taxpayer standing falls under all three of these Article III doctrines.

By contrast, state courts do not necessarily face any such Article III restrictions on their jurisdiction.[254] The Ohio Supreme Court is representative of those state courts that reject the "case and controversy" restrictions imposed on federal courts by Article III:

> *"State courts need not become enmeshed in the federal complexities and technicalities involving standing and are free to reject procedural frustrations in favor of just and expeditious determination on the ultimate merits." This court has long taken the position that when the issues sought to be litigated are of great importance and interest to the public, they may be resolved in a form of action that involves no rights or obligations peculiar to named parties."*[255]

Based on similar principles, 10 states—Alabama, Colorado, Delaware, Indiana, Maine, Massachusetts, Michigan, New Hampshire, Rhode Island, and South Dakota—have empowered their courts to offer advisory opinions on constitutional matters through their common law, statutory, or constitutional provisions.[256] Eleven other states—Arizona, Arkansas, California, Connecticut, Florida, Hawaii, Illinois, Maryland, Minnesota, Mississippi, and Ohio—authorize their courts to exercise jurisdiction over lawsuits without requiring those lawsuits to meet "case and controversy" requirements similar to those of Article III.[257] Although there is case law in 10 states—namely Delaware, Iowa, Kansas, Kentucky, Montana, New Mexico, Rhode Island, Tennessee, Wisconsin, and Utah—which clearly states that the respective state embraces Article III "case and controversy" requirements as a prerequisite of state court jurisdiction,[258] even most of these states make an exception for *taxpayer standing*.

Scholars have found that "taxpayers in almost every state ... can challenge the expenditure of public funds, without any individual or particularized showing of injury," which *would* be required for taxpayer standing under Article III in federal court.[259] And the Goldwater Institute's independent research shows that only eight states—namely Idaho, Indiana, Iowa, Kansas, Massachusetts, Nevada, New Mexico, and Vermont—have taxpayer standing requirements that are clearly as restrictive as those imposed on federal courts by the "case and controversy" requirement of Article III.[260]

In short, at least 21 states explicitly allow their courts to exercise jurisdiction over cases that simply could not be heard in federal court. Broad taxpayer standing principles are arguably recognized by 42 states. The overlap between the two categories of states that recognize relaxed standing requirements leaves only six states—Idaho, Iowa, Kansas, Nevada, New Mexico, and Vermont—that fairly stridently embrace the federal court system's approach to standing. Thus, there exists authority in at least 44 states for state courts to exercise jurisdiction over constitutional claims to a greater extent than would be permissible in a federal court. But even in the remaining six states, there might be wiggle room to argue for state court jurisdiction over claims that fall short of meeting the Article III standard for matters of "great public importance."[261] These rules of procedure in state court cannot be displaced by federal law under any current precedent.[262] Moreover, there is no substantive bar to bringing a federal claim that lacks Article III standing in state court because the justiciability requirements of Article III are not regarded as an element of a federal claim.[263]

Even if a state court constitutional claim were removed to federal court despite the lack of Article III standing, the proceeding must be remanded to state court.[264] Indeed, frivolous efforts to remove state court actions to federal court, when no Article III jurisdiction exists in federal court, may trigger sanctions in the form of attorney's fees to the party defending the removal.[265] All of these rules of law should shield a federal constitutional claim brought against state and federal officials in state court from removal to federal court if the claim is based on taxpayer

standing.[266] Only the U.S. Supreme Court would have jurisdiction to review the ultimate results of the state court proceeding.[267] Therefore, ensuring that any constitutional claim filed against state or federal agents in state court is based solely on taxpayer standing would be a potent way to shield the claim from removal to the lower echelons of the federal court system (even though there is no constitutional way to avoid the U.S. Supreme Court having ultimate appellate jurisdiction over a final judgment determining questions arising under the Constitution).[268]

Taxpayer Courts Could Furnish Significant Remedies for Violations of State Sovereignty

State courts not only have the power to entertain lawsuits for violations of the Constitution, but they are also able to provide a wide range of remedies for misconduct by state and federal officials. States are free to waive their sovereign immunity in state court as needed, and to enact laws providing a full range of legal and equitable remedies for constitutional misconduct by state officials. The remedies potentially available in state court to address constitutional misconduct by federal officials are more limited, but they almost certainly include monetary damages.[269] Moreover, although the Supreme Court has held that a state court cannot seek the remedy of mandamus or the issuance of a writ of habeas corpus against federal officials, no federal case has barred a state court from issuing injunctive relief against federal officials.[270] Indeed, there is good reason to believe that state courts would be allowed to issue injunctive relief against federal officials because, as previously discussed, the Supreme Court granted the functionally similar legal remedy of ejectment in *United States v. Lee.*

Additionally, the reasoning for barring state courts from issuing the remedies of mandamus and habeas corpus cannot sustain a bar on injunctive relief. Unlike the remedy of mandamus, an injunction does not necessarily command a federal agent to take action using the machinery of the federal government; it typically requires that the defendant simply to refrain from taking any action. Indeed, to the very extent an injunction is premised on preventing the violation of constitutional law, an injunction only acts on the federal agent in an individual capacity, not as a federal agent, because it prevents the federal agent from unconstitutionally using the legal machinery created by federal law in the name of the United States.[271]

Similarly, the bar on state courts issuing writs of habeas corpus to individuals wrongly detained by the federal government should not prevent the use of injunctive relief against federal agents by state courts. This rule against writs of habeas corpus has an infamous pedigree. *Tarble's Case*,[272] which is typically cited for the rule, directly relied on the holding in *Ableman v. Booth*.[273] *Ableman*, in turn, was issued by Chief Justice Roger Taney of the *Dred Scott* decision. The case reached its holding in the context of overturning an effort by the Wisconsin Supreme Court to free a person held in prison by the federal government under the federal Fugitive Slave Act. Defendant Sherman Booth in *Ableman* allegedly aided and abetted the escape of a fugitive slave

from his master and was taken into custody by a deputy federal marshal.[274] The Wisconsin Supreme Court issued a writ of habeas corpus ordering the federal marshal to release Booth, which, in turn, prompted the marshal to appeal to the U.S. Supreme Court.[275] The Supreme Court issued a writ of error to the Wisconsin Supreme Court, which instructed its clerk to disregard.[276] The resulting standoff was short lived because the U.S. Supreme Court eventually set a hearing date "without further notice." After the hearing, the Court determined that the Supremacy Clause precluded a state court from *enforcing* a writ of habeas corpus against a federal agent because the federal government "should be supreme and strong enough to execute its own laws by its own tribunals, without interruption from a state or state authorities."[277]

Ableman's holding was then later extended by *Tarble's* Case to declare that even *issuing* a writ of habeas corpus would invade the province of the federal government and violate the Supremacy Clause. *Ableman,* however, was rendered in the context of a state supreme court that defied the U.S. Supreme Court's ultimate authority. In the absence of such defiance, i.e., in the context of a state court that acknowledged the U.S. Supreme Court's ultimate authority, *Ableman's* reasoning would make little sense because there would be no necessary clash between federal supremacy and the state court issuance of a habeas corpus writ. This is because, as discussed previously, the unconstitutional actions of a federal agent are not regarded as equivalent to the actions of the United States.[278] Therefore, ordering a federal agent who is unconstitutionally holding a prisoner in custody to release that prisoner does not entail overriding the federal government's supremacy. Only if a state court deliberately disregards the U.S. Supreme Court's ultimate appellate jurisdiction over the case does the clash between state and federal sovereignty necessarily arise, as held in *Ableman*. For this reason, so long as the Supreme Court's ultimate appellate authority is recognized by a state court, neither the reasoning of *Tarble's* Case nor that of *Ableman* should preclude recognizing the authority of a state court to issue injunctive relief against federal agents, even if injunctive relief were analogous to that of the writ of habeas corpus.[279] And the greater power to issue an injunction should also include the lesser power of furnishing purely declaratory relief—i.e., a final judgment declaring the federal agent to be acting in an unconstitutional manner.

States Should Establish a Clear Legal Framework for Taxpayer Courts

This analysis means that most states can furnish a parallel legal system that insulates constitutional claims brought by taxpayers against state and federal agents from removal to any federal district court. The practical results of establishing such as system would likely include state court decisions that protect state sovereignty. For example, in *City of Garden Grove v. Superior Court of Orange County*,[280] *County of San Diego v. San Diego NORML*,[281] and *Qualified Patients Association v. City of Anaheim*,[282] California appellate courts have repeatedly shielded the state's medical marijuana laws from preemption by seemingly conflicting federal law. Until

and unless these decisions are overturned, principles of comity—mutual respect—should effectively protect California's medical marijuana system from federal preemption. At least one Oregon appellate court has similarly protected the right to possess a concealed weapon against federal gun control laws.[283] Moreover, a state court is a viable venue for strategically prosecuting constitutional claims against state and federal agents because a final judgment issued by a state court will be binding for *res judicata* purposes.[284] Conservatives should take advantage of every legal precedent available to advance state sovereignty.

The bottom line is that cutting-edge legal theories face an uphill battle when it comes to resisting federal power. Every advantage must be seized to maximize the chances of success. And when it comes to litigation, most attorneys know that venue matters. Given a choice between state and federal courts, all other things being equal, the best venue for challenging federal power is probably not the federal court system. Moreover, since our federal court system has appellate circuits with distinct personalities when it comes to enforcing the Constitution's original meaning, constitutional litigators may find themselves in federal circuits whose track records pretty much guarantee a loss for state sovereignty. The state court system can thus be a refuge for citizens seeking to enforce the original relationship between the federal government and the states. To the very extent that the federal court uses complicated jurisdictional doctrines to deny citizens their day in federal court, state courts would be free to address the issues the federal judiciary refuses to address. Strict federal standing requirements will ironically bar removal of such cases to lower federal courts, leaving state courts free to adjudicate federal constitutional issues. Given the ability of states to provide taxpayers with their day in court to challenge the excesses of federal power, they should do so.

It is recommended that states strongly signal their receptiveness to serving as a venue for claims advanced by taxpayers to vindicate principles of state sovereignty. Statutes should expressly codify the existence of state court jurisdiction over state sovereignty-related constitutional claims against federal agents based on taxpayer standing (or any other form of relaxed standing that is adequate to invoke state court jurisdiction but inadequate to support Article III jurisdiction in federal court). Building on the technique of the "Jennings" or "Williamson" Reservation, which is used to prevent removal of federal claims that are unripe for federal jurisdiction,[285] taxpayer complaints filed in state court should also be required to explicitly disclaim Article III jurisdiction in federal court so as to deter frivolous removal litigation. In this way, state courts will be able to furnish the constitutional justice denied to taxpayers in federal courts.

TOOL #3

Expand Civil Rights Laws

To complement "taxpayer courts," state civil rights laws, modeled after federal civil rights laws, should be enacted that explicitly empower citizens to enforce state sovereignty in state court.[286] 42 U.S.C. § 1983, for example, provides for a federal "civil action for deprivation of rights," stating:

> *Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....*

Correspondingly, state law should create a civil action for taxpayers to hold state and federal officials liable for violation of principles of state sovereignty. The law should explicitly allow taxpayers to file lawsuits for redress against state and federal officials who might enforce overreaching federal laws that invade the exclusively reserved powers of the states. Just as 42 U.S.C. § 1988 allows the prevailing party to recover attorney's fees when defending civil rights against unconstitutional state statutes, taxpayers should be allowed to recover their litigation expenses and attorney's fees if they prevail in their lawsuits. This would allow private individuals not only to sue state and federal agents in state court based on taxpayer standing, but also to secure a full measure of relief for constitutional violations.

TOOL #4

Constitutional Defense Councils

Despite polls showing widespread opposition to the federal health care law, as well as concerns about its constitutionality, states like Arizona and Missouri were initially unwilling to defend their sovereignty from the federal government through their chief law enforcement officers—their attorneys general. Arizona's former attorney general also previously refused to challenge an effort by the federal judiciary to micromanage Arizona's school policies in the state's ultimately successful challenge to such federal overreach in *Horne v. Flores*.[287] This is nothing new. During the 1990s, states responded to such recalcitrance by their attorneys general by authorizing the creation of "Constitutional Defense Councils," which would have the independent power to retain legal counsel to defend state sovereignty.

In early 1994, for example, Arizona Governor Fife Symington asked the legislature to approve a Constitutional Defense Council "in response to passage of the Clean Air Act, the Endangered Species Act, and the Brady bill, all of which required state action but didn't provide funding."[288] A New Hampshire bill requesting a Constitutional Defense Council went so far as to include an extensive list of specific regulations that the council was created to defend against, and environmental acts were the largest category of targeted acts.[289] In all, during the 1990s, seven states considered or enacted laws that created Constitutional Defense Councils. Specifically, Pennsylvania,[290] New Hampshire, Illinois,[291] and Oregon[292] introduced bills in their legislatures; Arizona, Idaho, and Utah enacted such legislation.

The purpose of these councils was to guarantee institutionally that a lawyer representing the state would protect the prerogatives of the state from federal overreach. Nevertheless, both the Arizona and Utah Constitutional Defense Councils have never become actively engaged in defending state sovereignty from federal overreach. Utah's Constitutional Defense Council was considered defunct by 2008.[293] Idaho, by contrast, played a role in fighting the Real ID Act and federal gun laws,[294] and it may become involved in the fight against national health care.[295]

The inaction by Arizona's Constitutional Defense Council can be traced to a constitutional defect resulting after Arizona's Attorney General was removed from the Constitutional Defense Council.[296] Removing the attorney general from the council removed the executive influence on the council, which raised separation-of-powers concerns.

In *Woods v. Block*,[297] the Arizona Supreme Court ruled that the Constitutional Defense Council could not represent the state as a whole, saying that the Constitutional Defense Council "violates the state constitution's separation-of-powers clause because it is a legislatively created and controlled body performing executive functions."[298] The Constitutional Defense Council Act,[299] however, still exists and was amended as recently as 2000. Utah and Arizona have a similarly strict approach to the separation of powers between the departments of state government, which may explain inaction from Utah's Constitutional Defense Council.[300] Idaho is less strict in this regard.[301] Indeed, the reasoning of *Woods v. Block* may threaten Constitutional Defense Council laws in Utah, Idaho, and elsewhere, insofar as most state judiciaries generally enforce structural limitations on state government, including separation-of-powers doctrine, under their state constitutions more vigorously than does the federal judiciary under the U.S. Constitution.[302]

The surest manner in which to avoid constitutional objections to the Constitutional Defense Council raised in *Woods v. Block* is to amend the state constitution to allow its existence as originally conceived. Notwithstanding perceived conflicts with the doctrine of separation of powers, it is not uncommon for the powers of the various departments of state government to be blended in this way, as exemplified by Arizona's line-item veto power, which gives quasi-legislative power to the governor to effectively redraft legislation. In the alternative to a constitutional amendment, navigating the separation of powers would involve ensuring that

Constitutional Defense Councils are established by statute to include a majority of executive branch appointees. Concerns about the executive branch having political reasons to refuse to approve litigation by the Constitutional Defense Council should be dealt with by making it mandatory for the council to defend state sovereignty in specific ways, and to authorize taxpayer lawsuits to compel the council to perform its legally mandated obligations.

For example, the legislation creating the Constitutional Defense Council should specify that the council must defend state sovereignty from federal incursion where necessary to protect the state's exclusive authority over intrastate crimes, intrastate health care regulation, or intrastate firearms regulation. And if politics get in the way of the Constitutional Defense Council's mission, taxpayers should have the legal right to go to court and compel the council to defend state sovereignty by retaining outside counsel who will.

TOOL #5

Coordination

Nearly 30 years ago, former assistant U.S. attorney and prosecutor Fred Kelly Grant discovered that numerous federal agencies, including the Environmental Protection Agency (EPA) and the Bureau of Land Management, were governed by laws that contained "coordination" provisions.[303] These provisions create a legal right and power for elected local governments to demand that federal agencies attempt to achieve consistency between federal and local laws, regulations, plans, and policies before a federal agency can promulgate final administrative rules, policies, or plans that would override local laws, policies, or plans. More specifically, coordination requires federal agencies to (1) keep apprised of state, local, and tribal plans; (2) ensure that consideration is given to local plans when developing a federal plan, policy, or management action; (3) provide early notification (prior to public notice) to local government of the development of any plan, policy, or action; (4) provide the opportunity for meaningful input by local government into development of the federal plan, policy, or action; and (5) make all practical efforts to resolve conflicts between federal and local policy, and to reach consistency.[304] Much like collective bargaining in union contract negotiations, the federal agency is obligated to continue the coordination process until a good-faith impasse or consistency is reached. Coordination is enforceable because federal agencies are required to follow their own rules and governing statutes.[305]

Coordination Works

Demands for coordination have succeeded in persuading a federal court to block the federal government from releasing diseased wild horses into public ranch lands in Uintah County,

Utah.[306] Moreover, the mere threat of a local government demanding coordination can deter or delay the rollout of new regulations within the objecting community because it disrupts cookie-cutter plans for implementing new regulations. Fred Kelly Grant reports that local governments have an impressive track record of moderating or even derailing the implementation of onerous regulations without litigation simply by demanding coordination or having the reputation of demanding coordination.

For example, in 2009, after 27 months of persistent demands for coordination, the invocation of state laws that required coordination between state agencies and local governments by four towns in Texas blocked the I-35 Trans-Texas Corridor from being built.[307] When Owyhee County, Idaho, demanded that the Federal Bureau of Land Management coordinate its proposals with its Natural Resources Committee, the Bureau withdrew proposals for wildlife enclosures that would have deprived ranchers of grazing rights.[308] Furthermore, an effort by federal agencies to list the "spotted frog" as an endangered species in Owyhee County, which would have triggered restrictive federal land use regulations, failed when word of the county's previous coordination litigation led federal officials to voluntarily seek the county's input.[309]

How to Coordinate

Initiating the process of coordination begins with drafting a local policy or plan that is relatively freedom-friendly when compared with anticipated new federal regulations. The policy can be as informal as a statement declaring that "public health and safety requires all roads in the abutting National Forest to remain open to vehicular access." But to ensure the strongest position in any eventual litigation, local governments should develop a formal policy statement or plan to ensure local policies will comprehensively address the same subject matter as any anticipated new federal regulation.[310] The policy should be adopted by resolution of the local government, along with a resolution granting authority to the local government's elected officials to commence coordination with the relevant federal agency. Thereafter, the local government's elected officials should send correspondence to the head of the relevant federal agencies, with copies to local representatives, advising them that the local government is invoking coordination status under the relevant statutory or regulatory coordination provisions, and scheduling a coordination meeting with a specific agenda.

The first coordination agenda should attempt to secure acknowledgement of the local government's status as a coordinating agency. Also, the local government should seek agreement on the ground rules for the coordination process, with the goal of obtaining a commitment from the participating federal agency to meet periodically and (1) to keep apprised of state, local, and tribal plans; (2) to ensure that consideration is given to local plans when developing a federal plan, policy, or management action; (3) to provide early notification (prior to public notice) to local government of the development of any plan, policy, or action; (4) to provide the

opportunity for meaningful input by local government into development of the federal plan, policy, or action; and (5) to make all practical efforts to resolve conflicts between federal and local policy, and to reach consistency.

Assuming that the federal agency complies with the process, the local government must interact with the federal agency through its elected officials exclusively, and it must hold fast at all times to the position that the process is one of coordination, not cooperation or "commentary" on rulemaking; otherwise, the agency will likely abandon coordination. Negotiations should be held with reasonable prior notice to the agency, at open meetings with clearly set agendas. The meetings should be transcribed, and points of agreement and disagreement should be thoroughly documented with memorializing correspondence.

From his nearly three decades of experience with the process, Grant reports that one of the most significant challenges is getting the coordinating agency to cooperate with the initial meeting. But such reticence has been overcome with persistence by documenting each instance of the agency's refusal to coordinate, and backing the demand for coordination with the realistic legal threat of challenging any new federal regulation that is implemented without coordination. If the relevant agency ignores a local government's demand for coordination, courts will block that agency from implementing regulations that should have been coordinated, even overturning final agency decisions and requiring the agency to return to the coordination process.[311]

However, litigation is not guaranteed to be successful. At least one recent case dismissed a coordination challenge brought by counties in Utah based on the determination that the counties did not have standing to sue based on the private interests of affected residents and before the disputed regulation had been implemented.[312] Therefore, if a coordination lawsuit is brought before the disputed regulation is actually implemented, local governments must (1) document thoroughly a federal agency's refusal to coordinate in order to show that further demands for coordination are futile, and (2) allege in their complaint specific legal rights or powers *enjoyed by the local government*, that are threatened or injured by the agency's refusal to coordinate, such as the allegation of specific harms to public property, health, welfare, and safety.

Enact Laws Requiring Coordination

The biggest challenge to the coordination tactic is that many local public officials are ignorant of or afraid to use their coordination power. Those who are afraid often do not want to risk angering the entity that provides them with funding. Such inaction fritters away opportunities to advance state sovereignty through the ironic method of invoking federal law. Therefore, states that want to defend their sovereignty through local coordination should enact model legislation approved by the American Legislative Exchange Council's (ALEC's) Energy and Natural Resource Committee.[313] This model legislation *requires* local governments to take

advantage of their rights under most federal laws and demand that federal agencies "coordinate" any new federal regulation with less restrictive local laws. By demanding coordination, local governments will be able to moderate and even derail the rollout of new federal regulations within their jurisdiction, vindicating the principles of state sovereignty.

TOOL #6

Reinvigorate the Reserved Powers of the States

> *Should an unwarrantable measure of the federal government be unpopular in particular States ... the means of opposition to it are powerful and at hand. The disquietude of the people; their repugnance and, perhaps, refusal to co-operate with the officers of the Union ... the embarrassments created by legislative devices ... would present obstructions which the federal government would hardly be willing to encounter.*
>
> **—James Madison, The Federalist No. 46**

Even today, there are certain boundaries that the federal government cannot cross. The federal government cannot legislatively commandeer the executive or legislative branches of state governments. This means, for example, that the federal government cannot pass a law that forces a county sheriff—a representative of a state's executive branch—to engage in gun sales checks. Likewise, the federal government cannot enact a law that forces a state legislature to pass a law taking title to hazardous waste. Although there is case law indicating that the federal government can direct the state judiciary to accept federal claims and to follow federal law,[314] the commandeering of the state judiciary has its limits as well.[315] As held in *Alden*, "a power to press a State's courts into federal service to coerce the other branches of the State ... is the power first to turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will and at the behest of individuals."[316] Moreover, although the federal judiciary can force state officials to implement remedies and valid legal judgments, the recent case of *Horne v. Flores* underscores that federal courts must not take control over areas traditionally within the scope of state sovereignty unless doing so serves a clear remedial purpose—i.e., that there still exists a problem and that enforcing the judgment will likely rectify that problem.

The principle underpinning all of these cases is that the state cannot function as a counterweight to the federal government, as is required by the letter and spirit of our Constitution, if the basic operational structures of state government—its executive, legislative, and judicial branches—do not enjoy autonomy from compulsion by the federal government. The Constitution's intentional preservation of a meaningful separation of powers between the federal government and the states

means that the scope of delegated powers to the federal government cannot be interpreted so broadly as to be able to obliterate the states' separate functional existence at congressional whim.

With the federal government generating far more regulation than it can possibly enforce,[317] states have a tremendous opportunity to leverage these rules of law to interdict federal power and vindicate their sovereignty.[318] If states pass a law barring or limiting state officials from cooperating with federal programs, states can often force the federal government into the position of having to choose between (1) doing nothing, (2) unconstitutionally commandeering state officials to enforce its laws, or (3) passing a new law that would even more directly invade state sovereignty by creating a parallel federal structure for enforcement purposes. This last path may prove politically impossible, if not vulnerable to state sovereignty legislation coupled to strategic litigation.

Specific examples abound of state officials interdicting federal overreach through noncooperation. The Atomic Energy Act, for example, assigned complete responsibility for the regulation of nuclear power plants to the Nuclear Regulatory Commission (formerly the Atomic Energy Commission). However, the lack of adequate resources made the commission dependent on state and local governments for emergency personnel and equipment to protect public health and safety in the event of a radioactive discharge at a nuclear generating station.[319] This gave state and local government the effective power to block federally sponsored evacuation plans by refusing to participate in them. In fact, when it became apparent that federally sponsored evacuation plans were likely to pose a threat to public health and safety, the states of Massachusetts and New York, including Suffolk County and ten towns in Massachusetts and New Hampshire, did just that.[320] They blocked federally sponsored evacuation exercises near the Seabrook and Shoreham nuclear power plants by refusing to implement them.[321]

Another example of interdiction of federal power is provided by recent efforts by the states to resist implementation of the Real ID Act. The Act would have required states to combine their citizen-information databases, which would have enabled "tracking, surveillance and profiling of the American public"[322] at a cost of $1 billion to $2 billion annually over the first five years.[323] In response, 14 states have enacted Real ID Resistance Acts.[324] These acts preclude states from implementing onerous and intrusive federal identity card requirements.

Other examples of state and local officials interdicting federal power include the refusal of the Portland, Oregon, police department to submit to the Federal Bureau of Investigation's program for interviewing young men of Middle Eastern descent after September 11, 2001, and the refusal of many states through the 1990s to implement "nonpoint source pollution" regulations under the Clean Water Act, which supposedly dealt with preventing pollution of wetlands.[325]

There are, no doubt, many other points of intersection between the states and the federal government that could furnish opportunities for similarly interdicting federal power. University of Buffalo law professor James Gardner has observed:

> *All of the largest and most costly nonmilitary domestic national programs—social security, welfare, food stamps, and so on—delegate much of the responsibility for the day-to-day operation of the programs to the states. State responsibility for running these programs may include setting eligibility requirements, determining benefit levels, or enforcing compliance with programmatic requirements ... within these boundaries, state officials often have room to bend their implementation of national policy in ways that also serve state interests, even when those interests are opposed to successful implementation of the national program.*[326]

In particular, numerous otherwise preemptive federal statutes in the field of environmental, health, and employment regulation offer to delegate "regulatory primacy" to the states, which would allow state agencies to administratively enforce federal law.[327] If the states rejected the delegation of such "regulatory primacy," this could help protect state sovereignty and individual liberty from federal overreach—especially if federal agencies expect more intensive enforcement from state agencies than federal agencies expect of their own officials. California, for example, rejected "regulatory primacy" over a portion of the Clean Water Act in 1983 "because state officials believed the EPA required more of primacy States than it did of its own regional officers."[328]

But it is not always clear that state sovereignty and individual liberty are best served by rejecting "regulatory primacy." This is because accepting regulatory primacy might afford states an opportunity to moderate the administrative enforcement of vague and ambiguous federal laws. A presumption should exist against accepting regulatory primacy because of the risk that state agencies will be co-opted into supporting overly intrusive federal laws, but there should be enough flexibility to allow the state to accept regulatory primacy where doing so is clearly advantageous to protecting state sovereignty and individual liberty. Therefore, to ensure that "regulatory primacy" is accepted only where doing so actually interdicts federal power in a manner that preserves state sovereignty and individual liberty, states should enact legislation that precludes state agencies from accepting "regulatory primacy" under federal laws, unless (1) the cost to the state of accepting "regulatory primacy" does not excessively divert resources from the state's core functions; (2) state agencies that accept "regulatory primacy" are committed by state law to enforcing only the least restrictive, burdensome, and intrusive interpretation of federal law; and (3) federal agencies are otherwise likely to enforce federal law within the state in a more restrictive, burdensome, and intrusive manner.

Many other points of leverage for interdicting federal power may only be known to those working in the bowels of state government. Therefore, states should also convene a legislative committee with the task of identifying all of the areas where the federal government relies upon

state officials and state instrumentalities to effectuate federal policies that invade the reserved exclusive powers of the state. Once those points of intersection are identified, state law should presumptively bar state officials from cooperating with federal agencies, allowing cooperation only where (1) the cost of cooperation does not excessively divert resources from the state's core functions; (2) state agencies that cooperate are committed by state law to enforcing only the least restrictive, burdensome, and intrusive interpretation of federal law; and (3) federal agencies are otherwise likely to enforce federal law within the state in a more restrictive, burdensome, and intrusive manner. Moreover, taxpayers should be empowered by law to seek judicial review to determine whether these prerequisites of cooperation between state and federal agencies are met. And in the spirit of "coordination," the states should leverage their power to interdict federal power to negotiate more reasonable policies from the federal government, such as a state legislative or gubernatorial veto over the implementation of agency law or in areas traditionally reserved to the states.[329]

TOOL #7

Empower the People

Another tactic for restraining federal overreach involves identifying federal regulatory and spending schemes that depend upon the cooperation of state and local government and then passing state laws that empower the people by depriving state and local officials of the legal authority to implement federal policies. A target-rich environment for such devolution may arise from the federal government's recent push for obesity zoning. One example is the effort by Pima County, Arizona to secure federal stimulus money.[330] To secure the money, Pima County was required to devise anti-obesity zoning, which in preliminary drafts involved a plan to prevent the siting of fast food restaurants near schools and other locations frequented by children.[331] Pima County's efforts are not isolated. In 2009, the City of Baltimore organized a task force, which has recommended Baltimore use "its zoning code to require fast food restaurants to maintain a certain distance from schools, thus limiting proximity to fast food while at school."[332] Previously, in 2008, Los Angeles imposed a one-year moratorium on the development of new fast-food restaurants in certain lower-income areas of the city.[333] And Detroit's zoning ordinance requires a minimum distance of 500 feet between certain carry-out, fast-food, and drive-in restaurants and the nearest elementary, junior high, or senior high school.[334]

Although public policy organizations support these measures,[335] these efforts had been driven, in large part, by policies advocated by the CDC,[336] and they could qualify for conditional federal grants under the Communities Putting Prevention to Work Grant.[337] As of fall 2010, more than $100 million of such conditional grants were awarded to local governments in 30 states.[338]

Additionally, counties and towns in Wisconsin are planning to use their zoning powers to impose "smart growth" land use restrictions to prevent rural farmlands from ever being developed.[339] They are supported by federal grant programs of the Department of Agriculture, Army Corps of Engineers, Environmental Protection Agency, Federal Highway Administration, Federal Transit Administration, Department of Housing and Urban Development, Department of the Interior, National Oceanic and Atmospheric Administration, and the Department of the Treasury.[340] Even in states such as Oregon, which have enacted laws to protect against the diminishment of property values through land use regulation, the argument has been made that such protections do not apply to land use restrictions tied to accepting federal grant money for smart-growth programs.[341] Advocates of federal land use planning may be hoping for a successful introduction of the twice-failed "Community Character Acts" of 2001 and 2002, which would have furnished $250 million in federal grants conditioned on state and local government complying with a smart-growth-oriented Federal Zoning Act.[342]

The federal government's drive for smart growth and obesity zoning could be challenged with targeted bans on state and local officials participating in such programs. But it would be even more beneficial to individual liberty to take out of the hands of state officials the very powers the federal government wants to leverage. That is the reason ALEC's Energy and Natural Resource Committee unanimously approved model legislation authorizing rural counties to sunset zoning restrictions and to replace legitimate zoning restrictions enforced by bureaucrats with restrictive covenants enforced by private citizens.[343] In the absence of zoning, state and local governments will have no means of implementing many federal land planning schemes, not just obesity zoning and smart-growth policies. This principle of devolving local regulation away from local officials to the people should be considered whenever the use of local regulatory authority is an integral part of overreaching federal laws and conditional grants.

TOOL #8

Refuse Conditional Grants

State officials generally cannot avoid succumbing to the temptation of accepting federal grants, even when those grants directly obligate them to exercise core attributes of state sovereignty in ways the federal government dictates. Arizona has given up much autonomy in its decision to accept the strings attached to federal funding from the federal health care law.

Case Study: Arizona Yields Appropriations Power Under the Federal Health Care Law

Like many states, during the 2010 legislative session Arizona faced a massively imbalanced budget. The state's debt limit prohibited the state from borrowing more than $350,000,[344] but the state was faced with deficits in excess of $3.2 billion.[345] To help close the deficit, legislators had no choice but to divert $2 billion from the "KidsCare" program (a health insurance program for middle-class children) and Proposition 204 (which expanded eligibility for the state's health care system to people earning up to 100 percent of the federal poverty level) back to the General Fund for FY 2010-11.[346] But a few weeks later, the federal health care law passed, and it stipulated that the failure of Arizona and other states to fully fund their preexisting health care programs would result in the loss of billions of dollars in federal aid.[347] In Arizona, the receipt of approximately $7.65 billion in federal grants was made conditional on the state restoring the money to the two state-run health care programs, even though doing so would reopen a deficit between revenue and spending that threatened to violate the Arizona Constitution's debt limit. Arizona legislators felt that they had no choice but to acquiesce because of the state's fundamental financial dependency on federal conditional grants; so at the risk of violating their own constitution, the legislators voted to restore the funding they had diverted from the two health care programs. As a result, compliance with the federal health care law was estimated to cost Arizona $1 billion annually through 2020.[348]

One of the most important attributes of state sovereignty is the legislature's autonomy over the appropriations process.[349] Moreover, there is no more important aspect of state sovereignty than the obligation to meet the requirements of the state's constitution. And yet, the Arizona legislature sacrificed both aspects of state sovereignty to maintain the flow of conditional federal grants.

Arizona is not alone in having its fiscal priorities sidelined by the federal health care law. Medicaid enrollment will be 30 percent higher for all states in 2014 than it would have been without the federal health care law.[350] Moreover, in 2017, states will pay 5 percent of additional enrollee costs, ramping to 10 percent by 2020.[351] For every $100 increase in benefits, the states will pay an estimated $2.50 more in administrative costs, summing to $12 billion in additional costs across all states from 2014 to 2020.[352] In total, the federal health care law will increase states' Medicaid costs by $33.5 billion between 2014 and 2020.[353] To prepare for this massive new financial obligation, few states can afford the luxury of independently determining their own fiscal priorities. Consequently, if dual sovereignty is to be preserved, litigation efforts must be mounted to challenge the strings attached to federal grants. Additionally, states should take legislative action to eliminate the power to accept conditional federal grants, at least on a forward-going basis.

Use a Functional Defense of State Sovereignty to Cut Strings Attached to Federal Grants

Regardless of the express power invoked, *New York v. United States* established that Congress cannot command state legislatures to enact legislation. In logic, it should follow that Congress cannot command state legislatures to appropriate money. Absent the offer of federal money, compelling a state legislature to reverse its appropriation decisions is just not something that Congress could do. Correspondingly, if one were to apply the basic constitutional principle that what the federal government cannot accomplish directly, it cannot accomplish indirectly,[354] it would be clear that the federal government lacks the power to use its spending to induce state officials to reverse appropriations in exchange for federal funds.

Of course, constitutional law is not as simple as that. The Supreme Court has declared that the "voluntary" nature of conditional grants ensures that state officials are subject to local political accountability for their decisions. This premise has led to the Court to hold that conditional grants do not violate states' political autonomy.[355] Moreover, viewing conditional grants "voluntarily" accepted by the states as analogous to contracts,[356] the Court in *South Dakota v. Dole* set only five limitations on the federal government's power to impose conditions on federal grants to states: the conditions must (1) be for the general welfare (with deference given to congressional judgment), (2) be unambiguous, (3) be related to the federal interest at issue (with deference given to congressional judgment), (4) not violate independent constitutional provisions or conditions, and (5) not be so onerous that they amount to coercion.[357] While the suggestion has been made that the vagueness of this test "might now be a strength from a federalism perspective" because it does not foreclose creative legal argument,[358] only the Fourth and Sixth Circuit Courts of Appeals have applied the test to protect state sovereignty.[359] Courts have otherwise largely continued to regard the relationship between the federal government and the states with respect to conditional federal grants as contractual in nature, and one wholly determinable by the federal government and state officials alone.[360]

But the reality is that elected state officials routinely dodge political accountability for the mandates associated with conditional federal grants by blaming them on the federal government. The federal government, in turn, is able to blame state officials for "voluntarily" accepting those mandates. There are few better ways for state and federal officials to avoid political accountability for their decisions than through the "blame game" that conditional federal grants make possible. As observed in the Cato Handbook for Policymakers, "When every government is responsible for an activity, no government is responsible."[361] Given this dynamic, the assumption that political accountability will preserve state sovereignty from conditional federal grants is false. But the greater fallacy underlying the willingness of courts to sustain conditional federal grants is the contract analogy that underpins *Dole*.

The contract analogy used to justify the strings that are attached to federal grants-in-aid is invalid because there are bargains Congress simply has no constitutional power to strike. Even *Dole* conceded:

> *[The spending] power may not be used to induce the States to engage in activities that would themselves be unconstitutional. Thus, for example, a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of the Congress' broad spending power.*[362]

But what if Congress essentially conditions federal grants on states relinquishing powers that have traditionally defined states as distinct sovereign entities within our system of federalism? An analogy to contract law should not save such a Faustian bargain from being struck down any more than it should save a federal grant "conditioned on invidiously discriminatory state action."

The law of contract, after all, voids fully consensual agreements that have an illegal objective, because neither party to the agreement has the lawful power to request, offer, or perform what is promised.[363] Likewise, it makes no sense to presume any state has the constitutional power to act as the people's representative in bargaining away the very structural protections meant, in part, to protect the people from their state. The states are not the best judge of whether Congress has overstepped the bounds of federalism because those boundaries are meant to restrain the states, too.[364] Moreover, the Supreme Court has held, "[W]here Congress exceeds its authority relative to the States ... the departure cannot be ratified by the 'consent' of state officials."[365] The states and Congress thus do not have the power to abandon state sovereignty by mutual agreement.[366] In this sense, applying the contract analogy that has largely shielded conditional federal grants should lead to the conclusion that the Constitution voids consensual, fully funded federal mandates, which purport to bargain away the attributes of state sovereignty that underpin federalism.

Indeed, the Supreme Court anticipated this argument in its caveat in *Steward Machine Co.* that the states are free to agree upon the terms of any federal program unless doing so would "impair" the "essence of their statehood."[367] Building on that caveat, advocates of state sovereignty should argue that the states are not at liberty to "impair" the "essence of their statehood" by accepting the onerous conditions the federal government places on the receipt of federal funds that invade the reserved powers of the states. To ensure that the essence of state sovereignty is unimpaired by a conditional grant, advocates of federalism should first urge courts to apply the three-part test of *National League of Cities*[368] to assess whether the conditions imposed on federal grants violate principles of state sovereignty. After surviving this threshold test, the state's voluntary acceptance of the conditional grant may be regarded as analogous to principles of contract law, which would then trigger *Dole's* Spending Clause test.

Legislatively Block Acceptance of Conditional Grants

Apart from advancing strategic litigation, another option is to enact laws or amend the state constitution to prohibit the state from accepting any conditional federal grants, or particular kinds of conditional grants that are especially absurd or pernicious, such as those associated with obesity zoning. If more flexibility is desired, then, in keeping with the Tenth Amendment's reservation of power to the people as well as the states, an alternative is to amend the state constitution to require participation in conditional grant programs to be submitted to popular referendum, with a clear and exhaustive explanation of the strings attached to the grants, so that the people protected by the Tenth Amendment at least have a voice in the bargain. Likewise, the enabling statutes of state agencies should be amended to preclude them from requesting, receiving, or expending federal dollars without referendum approval. These recommendations may seem impractical when revenues from sources other than the federal government are shrinking. But state and local governments have refused conditional grants "cold turkey," and the sky did not fall.

New Hampshire, for example, "has refused repeatedly to enact a mandatory seatbelt law, thereby forgoing [sic] a portion of its allocation of federal highway maintenance and construction funds."[369] Wisconsin similarly abandoned federal funds "by refusing to lower its statutory threshold for drunken driving convictions."[370] And Kentucky "recently abolished state vehicle emission standards, threatening its ability to meet federally mandated pollution limits, which would lead to the loss of nearly $2 billion in federal highway funds."[371]

If the gains from retaining control over state and local policies are not sufficient justification for refusing conditional federal grants, states should consider the risks of being unexpectedly forced to shoulder massively increased costs if the federal government increases the state's responsibilities for dependent constituencies, such as the federal health care law's Medicaid eligibility changes, which have forced many states to shoulder the cost of providing health care coverage for vast new populations of beneficiaries. Finally, if such considerations are not sufficiently persuasive, states should consider creative "methadone methods" of reducing the shock of eliminating or reducing conditional federal grants. For example, to allow themselves to wean off federal grants, states like Wyoming that receive significant mineral royalties should redirect those royalties to backfill the disproportionate loss of matching federal grant money as they pull back on state expenditures to support federal programs.[372] Other states that have vast tracts of public trust land, such as Arizona, should seek approval from Congress to sell land to generate revenues sufficient to diminish the pain from the loss of federal grant money.

TOOL #9

Amend the U.S. Constitution to Limit the Federal Government

Article V of the U.S. Constitution gives state legislatures ultimate authority over the federal government. It provides that Congress must call a convention for proposing amendments to the Constitution if two-thirds of state legislatures—the legislatures of 34 states—apply for one.[373] This gives a supermajority of state legislatures the ability to bypass the courts and directly rectify imbalances of power that threaten individual liberty.

As our national debt rockets past $14 trillion, just imagine if a balanced-budget amendment had been ratified 25 years ago. That almost happened. During the 1980s and '90s, more than 30 state legislatures invoked their power to apply to Congress for a convention that would have proposed a balanced-budget amendment to the Constitution.[374] By most counts, the effort fell short by just one state of the two-thirds majority needed to force Congress' hand and call the convention under Article V of the Constitution.

No doubt the process is challenging. Over the last 200 years, state legislatures have enacted several hundred resolutions applying to Congress to call an Article V amendments convention on a variety of topics.[375] None of these efforts have succeeded in having Congress actually call an amendments convention.

Why did the balanced-budget amendment effort fail? Fears about a "runaway" convention emerged,[376] as legislators worried that a convention for proposing amendments would not be limited to a specific topic and that it would spin out of control. Sadly, the drive toward a balanced-budget amendment was obstructed by a baseless fear.

Debunking the Myth of the Runaway Convention

There is no reason to worry about a "runaway" convention, because three-fourths of the states—38 states—would still have to ratify whatever amendment might be proposed.[377] Moreover, it is not a radical idea for states to initiate the Article V amendment process. James Madison, Alexander Hamilton, and George Washington all supported its use, both in the Federalist Papers and in their personal correspondence. George Washington wrote in 1788 that the "constitutional door is open for such amendments as shall be thought necessary by nine States."[378] In Federalist No. 43, James Madison wrote that Article V "equally enables the general [federal] and the State governments to originate the amendment of errors as they may be pointed out by the experience on one side or on the other."[379] And in Federalist No. 85, Alexander Hamilton declared that "we may safely rely on the disposition of the State legislatures to erect barriers against the

encroachments of the national authority" through the Article V amendment process.[380] The ability of states to invoke Article V is part and parcel of the balance of power the Founders meant to establish.

Furthermore, as argued by James Madison in Federalist No. 40,[381] it is a myth that the Constitution itself was born of a "runaway" convention meant only to amend the Articles of Confederation. The Articles authorized Congress and the states to agree upon *alterations* to it.[382] The use of the term "alteration" in the Articles had special significance during the Revolutionary era. It echoed the Declaration of Independence's contemporaneous pronouncement:

> *That whenever any form of government becomes destructive to these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness....*[383]

As such, the authorization of "alterations" to the Articles clearly contemplated the possibility of instituting a new government. Likewise, the congressional resolution calling for the Philadelphia Convention of 1787 contemplated "revising" the Articles.[384] Contemporaneous legal usage suggests that "revision" had a broader meaning than "amendment," and encompassed *both* narrow amendments and total or substantial rewrites of an original document.[385] Correspondingly, the resolution described a broad purpose for the convention—to establish "in these states a firm national government ... [and] render the federal Constitution adequate to the exigencies of Government and the preservation of the Union."[386] Equally broad language was reflected in the commissions of nearly all delegates to the convention (with the commission for New Jersey's delegates being an arguable exception).[387] Thus, in proposing the Constitution, the 1787 convention stayed well within (1) the "alteration" authority of the Articles of Confederation, (2) the congressional resolution calling for the convention, and (3) the commissions of nearly all state delegates.

Although the Articles required congressional "agreement" for alterations to it, and Congress never said in word-to-word fashion that it agreed with the Constitution, Congress' conduct clearly manifested such agreement by (1) calling the Philadelphia Convention,[388] (2) referring the Constitution to the states for ratification,[389] and (3) ultimately implementing the Constitution.[390] Although the Articles required ratification of alterations to it by every state legislature, and the Constitution only required ratification by nine states, the Constitution was only binding on those states that ratified it. Moreover, while not every state in the Confederation initially ratified the Constitution, all of them *ultimately* did.[391]

In substance, therefore, our nation was not born of lawless disregard for the authorized scope of a constitutional convention; it was born of a convention that was explicitly charged with the incredibly broad purpose of altering and revising the Articles of Confederation to establish a

more effective national government. By contrast, the Article V amendments convention process is meant to be far more limited in its scope than the convention of 1787.

Unlike the 1787 constitutional convention, an Article V amendments convention is not a foundational—plenipotentiary—convention whereby the delegates are free to substitute an entirely new constitution for our existing constitution.[392] No "strike all" amendments are possible. This is textually evident from Article V's prohibition on amendments that would take away a state's equal suffrage in the Senate without the affected state's consent.[393] If amendments cannot deprive states of their suffrage in the Senate, that implies both the states and the Senate must survive the ordinary Article V amendment process.[394] Even if a "strike all" amendment were attempted, absent unanimous consent, it would necessarily leave behind a minimalistic national political structure that would be strikingly similar to what the Articles of Confederation had originally established. In this way, the core of the Constitution's republican form of government is protected from amendment by Article V.

Additionally, the Founders explicitly considered *and rejected* language that would have enabled a foundational convention through the Article V process. The Committee of Detail at the 1787 convention considered and rejected *four times* a proposal for such a "plenipotentiary" foundational convention, or the kind of convention that could establish a new federal government.[395] In place of the foundational convention language, the delegates specifically chose the language that exists in Article V to ensure that the amendments process would work within existing constitutional limitations and ratification requirements.[396] It is, therefore, simply impossible to plausibly claim that an Article V amendments convention could lawfully result in the establishment of a completely new form of federal government.[397]

Not only is the Article V amendments convention process not a foundational convention, but there is no reason to fear that the convention will necessarily be general in its scope. State legislatures have the power to target the amendments convention to specific topics by designating those topics in their applications.[398] The delegates commissioned by the states would have an obligation, as agents, to hew to the scope of the agenda set by the state applications. And to this belt, states are free to add the suspenders of instructing their delegates in their commission to stay within the scope of the agenda.[399] Thus, delegates to an amendments convention would be legally obligated to consider only those amendments that fall within the agenda of the amendments convention and to comply with any instructions contained in their commission.[400]

Congress has no lawful role in structuring the amendments convention or specifying its agenda. Indeed, there is no evidence in the Founding history or debate that Congress was to have any substantive role in the state-initiated amendments convention process.[401] An amendments convention is a "convention of the states." Consequently, the convention agenda is set by the states' applications for the convention. Congress is to have only a ministerial role in accumulating

the applications for the convention, declaring when the threshold for calling the convention is reached, and then calling the convention.[402] The whole point of the process, after all, was to provide the states with a way to bypass the congressional amendments process. The Founders did not give Congress such control over the state-initiated amendment process that Congress could effectively determine its substance, making it redundant of Congress' existing power to amend the Constitution. The only way for Congress to have power over the structuring of the convention is via any incidental powers that may be associated with calling the convention.[403] But almost no incidental powers are coupled with the sort of ministerial powers Congress was given.[404] And Congress certainly has no incidental powers that could justify a congressional effort to structure the amendments convention in a manner that overrode and frustrated the will of the states in calling a "convention of the states."[405] The state delegates to the amendments convention, not Congress, would set the rules of the convention based on an initial vote of the states as states.

How to Use the Article V Process

Among the tactics discussed in this *Federalism DIY Toolkit*, the state-initiated Article V process holds the greatest potential for restraining federal overreach. It would enable a range of reforms that include requiring approval from a majority of state legislatures for any increase in the federal debt,[406] limiting federal spending to a function of population and inflation growth,[407] requiring a popular referendum to approve new taxes,[408] restricting federal legislation to a single subject,[409] and empowering states to veto federal legislation. But it should not be forgotten that making the "sale" with 34 state legislatures and then closing the deal with 38 states must be central to any effort. When developing a resolution to apply for an amendments convention, a pragmatic balance will still have to be struck between power, marketability, simplicity, and vulnerability to legal challenge.

When it comes to judging the power of an amendment, one must keep in mind the fact that the federal judiciary has strayed substantially from the original meaning of the Constitution, and that it will likely behave similarly in the future. For this reason, the most powerful amendments may be those that depend least on the courts for enforcement. Ideally, one should advance an amendment concept that cannot be misconstrued, or that effectively enforces itself.

One example of a powerful *self-enforcing* amendment concept would be to require a majority of the legislatures of the states to approve any increase in the federal debt.[410] Such an amendment would be self-enforcing because financial markets would significantly discount the value of any federal bond issuance that lacked state approval, due to the increased risk of default.[411] Thus, even without court intervention, the federal government would have a strong financial incentive to comply with the amendment.

Of course, there may only be a handful of amendment concepts that can be enforced independently of the court system in this way, and they may not have the desired potency. The risk of courts balking at enforcement is one risk to be weighed against the rewards of any particular amendment. And whatever the substance of any particular amendment idea, there are general principles that should be applied to any amendments convention application.

Article V advocates should work carefully with legislative counsel to ensure that the right category of resolution is used so that the application has legal effect. Each resolution should be substantially identical and presented to Congress contemporaneously to minimize the chances that Congress will ignore necessary resolutions in tallying up the number to trigger the convention call. Toward that end, model resolution language should be kept as simple as possible, because it will be almost impossible to prevent modifications to that language when it is introduced in dozens of state legislatures. The simpler the resolution language is, the less likely that the inevitable modification will be construed as substantively changing the meaning of the resolution.

The state-based effort to amend the Constitution to require U.S. Senators to be popularly elected should be the prime model for advocates of the amendments convention process—it provoked Congress to utilize its own amendment power to preempt the drive for an amendments convention among state legislatures.[412] In that effort, many of the resolutions applying for the amendments convention specified simply that the purpose of the convention was to propose an amendment allowing for direct popular election of senators; they did not otherwise attempt to dictate a particular amendment text.[413]

Advocates should look to capitalize on ideas that simultaneously appeal to state legislators and grassroots activists, keeping in mind that some degree of policy neutrality is necessary to secure ratification from 38 states. Also, despite the meritless nature of concerns about a runaway convention, it might be necessary to allay such fears in the drafting of the model application. One safe drafting tactic to address such fears would involve expressly stating in the resolution that the scope of the convention is limited to a specific subject matter. Another option to consider is the addition of a contingency in the resolution that would cause the application to be automatically rescinded in the event that Congress attempted to call a convention to address a different or general subject matter. Goldwater Institute senior fellow Robert Natelson warns, however, that the amendments convention was meant to be a deliberative body, which is responsible for drafting the amendment that is proposed for ratification. Going so far as to specify in the resolution applying for an amendments convention that there must be an up or down vote on specific amendment text is vulnerable to legal challenge.

With careful drafting, states have nothing to lose from initiating the Article V process. The process is not radical, it will not runaway, and it can be targeted to the fundamental reforms

that are needed to protect our country's future. By contrast, no matter who controls Washington, D.C., the status quo is a runaway federal government.

TOOL #10

Interstate Compacts

Short of applying for an amendments convention, the states have one last ace in the hole. They can organize collectively to push back on the federal government through interstate compacts.[414] But this effort would be more than a protest movement; it offers a cornucopia of options to protect individual rights limited by little more than the imagination.

Through interstate compacts, all of the previous tools can be integrated into a single comprehensive check-and-balance strategy stretching across multiple states. Even apart from coordinating collective action, the interstate compact holds the potential for game-changing resistance to federal overreach. Existing legal authority could support state efforts to define and secure individual rights against federal legislation by criminalizing encroachment of those rights by federal authorities. An aggressive interpretation of the law could support carving out entire regions from the reach of federal regulations that invade state sovereignty. If pushed to their limits, interstate compacts could even empower states to completely redesign federal programs that intrude upon their reserved powers.

The Essence of Interstate Compacts

An interstate compact is a contractual agreement among states, typically evidenced by an enabling act authorizing state officials to reach the agreement, a statute that memorializes the agreement and its terms, and a confirmatory writing manifesting the consent of signatory states to the agreement.[415] Like a contract, a compact must involve an offer, acceptance, and consideration in the form of mutual obligations or a

THE BOTTOM LINE ON
Interstate Compact Law

- States can reach compacts with respect to the exercise of any sovereign power: police power, taxing power, spending power.
- Interstate compacts with congressional consent by two houses (no presidential involvement) arguably become substantive federal law that can trump prior federal law.
- Interstate compacts can create vested rights that are protected from prior and subsequent federal law.
- A blanket congressional consent statute can give automatic approval to criminal law enforcement compacts.

bargained-for exchange. Additionally, the subject matter of a compact must also be one over which states have the capacity to contract.[416] The subject matter of compacts between the states may involve the invocation of any sovereign power, including the police power. Compacts thus far have been "classified as follows: boundary-jurisdictional, boundary-administrative, regional-administrative, administrative-exploratory-recommendatory, and administrative-regulatory."[417] One of the earliest interstate compacts, for example, reciprocally guaranteed the continued protection of existing property and contract rights from "any law which rendered those rights less valid and secure."[418]

Congressional Consent Is Not Mandatory

Although the Constitution provides that states may not enter into compacts without the "consent" of Congress, the Supreme Court ruled in *U.S. Steel v. Multistate Tax Commission* that congressional consent is only required for an interstate compact that attempts to enhance "states power quoad [relative to] the federal government."[419] This means that congressional consent is not required for compacts that merely exercise the sovereign powers of the states without purporting to augment those powers relative to those of the federal government.[420] This relaxed rule has opened the door to the formation of numerous interstate compacts, with or without congressional consent. Although "states approved only thirty-six compacts between 1783 and 1920,"[421] today there are approximately 200 interstate compacts in effect, including water allocation and conservation compacts (37), energy and low-level radioactive waste disposal (15), criminal law enforcement (18), and education and child welfare compacts (13).[422] The average state is a party to 25 interstate compacts.[423] Perhaps the most aggressive effort to coordinate multi-state regulatory power is the Regional Greenhouse Gas Initiative, in which 10 states have agreed to apply "cap and trade" carbon regulations to themselves.[424]

Interstate Compacts Can Powerfully Coordinate Collective State Action

As their proliferation suggests, interstate compacts are a powerful tool for exerting state sovereignty. Each state to a compact has the power to enforce the compact through the remedy of specific performance because the enforceability of compacts is guaranteed under the Contracts Clause and an exception to the rule that one legislature cannot bind future legislatures.[425] Thus, the coordinated action that interstate compacts make possible could exponentially increase the effectiveness of all the tools discussed previously by enabling a unified front among the states and by helping overcome collective action problems.

Compacts, for example, could require states to ensure that their political subdivisions use their coordination powers to jointly resist the rollout of new federal laws, to coordinate litigation efforts by Constitutional Defense Councils, and to require state officials to refuse to cooperate

with federal agents or agencies—rejecting "regulatory primacy" en masse to ensure that federal resources cannot be targeted to punish specific states. Compacts could be used for collectively resisting conditional federal grants—to minimize the fear of the unequal loss of federal funds, states could devise an interstate compact that would preclude all states from taking any conditional federal money only after a certain threshold number of states enter into the agreement. Similarly, the problem of securing a commitment by each state to identical language for Article V amendments applications (and securing contemporaneous passage) could be solved through interstate compacts committing an ombudsman in each state to introduce resolutions containing the same application language when the requisite 34-state threshold is met. Under *U.S. Steel*, interstate compacts like these would be binding on the states with or without congressional consent because they would only exercise the state's inherent sovereign powers without attempting to increase those powers relative to those of the federal government.

The Power of Congressionally Approved Interstate Compacts to Trump Federal Law

Significantly, *U.S. Steel's* requirement that congressional consent must be obtained for interstate compacts that increase the sovereign powers of the states relative to those of the federal government implies that *congressionally approved* interstate compacts can increase the powers of the states relative to those of the federal government. Indeed, well over 100 years ago, Joseph Story's *Commentaries on the Constitution of the United States* emphasized that "the consent of Congress may be properly required in order to check any infringement on the rights of the national government."[426] In fact, if congressional consent is secured, an interstate compact can be a vastly more powerful tool for protecting state sovereignty.

The power of congressionally approved interstate compacts is best illustrated by a review of the fine print, authorizing statutes, and history of interstate compacts. An examination of a wide range of congressionally approved compacts reveals a common feature: provisions that prevent the compact from altering the rights, obligations, or powers of the federal government. For example, the Colorado River Compact of 1922 provides, "Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes."[427] Likewise, looking to federal laws that have given pre-approval and subsequent approval to interstate compacts, one repeatedly discovers artful efforts to impose variants of the following caveat to congressional approval: "Nothing contained in this Act or in the compact consented to hereby shall be construed to affect the jurisdiction on, powers, or prerogatives of any department, agency, or officer of the United States Government."[428] Even the Weeks Act of 1911, which otherwise gives blanket consent to states entering into compacts for the purpose of forest protection, provided that the compact must not conflict with any law of the United States.[429] Such caveats evidence an awareness of the risk that interstate compacts could expand

the power of the compacting states in such a way that federal supremacy is challenged. Indeed, Congress has long been aware of the potential for compacts to expand the powers of the states relative to the federal government. Such awareness is evidenced, for example, by the act giving congressional consent to the Gulf States Marine Fisheries Compact of 1951, which states nothing contained in the agreement should be construed to limit "or add to" the powers of the states over fisheries.[430]

Digging deeper into our nation's history, one discovers a series of clashes over interstate compacts during the 1930s and '40s, triggered by state-based efforts to displace federal jurisdiction and regulatory authority. When the four states of the Connecticut and Merrimac valleys tried to enter into flood control agreements, for example, the Federal Power Commission saw the possibility of interference with its jurisdiction over hydroelectric power generation and objected to Congress in a memorandum, stating:

> *The signatory states will have a veto power over national policy with respect to the power so developed since the terms and conditions under which any such signatory state shall make available the rights of power development herein reserved shall be determined by separate agreement or arrangement between such State and the United States. Under this provision, for example, the Federal Government would not be free as it is now, to give the preference to municipalities and public power districts in the disposition of these water power resources which it has been the Congressional policy since 1920 (Federal Water Power Act) to provide.*[431]

Based on this objection, President Roosevelt threatened to veto the compact, which prevented the compact from receiving approval.[432] Later, Roosevelt found it necessary to act on his veto threats.

Fearing displacement of federal jurisdiction and regulatory authority, President Roosevelt later vetoed a statute giving open congressional consent in advance to fishing compacts for states bordering on the Atlantic Ocean.[433] Likewise, in 1943, Roosevelt vetoed the Republican River Compact, which explicitly precluded the United States from exercising "such power or right ... that would interfere with the full beneficial and consumptive use" of waters from the Republican River Basin,[434] stating:

> *It is unfortunate that the compact also seeks to withdraw the jurisdiction of the United States over the waters of the Republican Basin for purposes of navigation and that it appears to restrict the authority of the United States to construct irrigation works and to appropriate water for irrigation purposes in the basin. The provisions having that effect, if approved without qualification, would ... unduly limit the exercise of the established national interest....*[435]

All of these seemingly disparate facts evidence that "during periods of national government activism, interstate compacts have been seen as ways to safeguard state authority in the face

of potential federal preemption."[436] Among federal officials, in particular, there is a profound awareness that interstate compacts can increase the power of the states relative to the federal government. And there is also the concomitant recognition that interstate compacts could impact, alter, or even displace federal law and the power of federal agencies. Indeed, as President Roosevelt anticipated (and those who drafted the boilerplate caveats found in most interstate compacts and their authorizing statutes), congressionally approved interstate compacts are now clearly recognized as equivalent to federal law under the Supremacy Clause and as a potential source of vested rights that are protected against federal regulatory action.[437] This is despite the longstanding competing theory that an interstate compact is not equivalent to a federal statute, but merely an agreement between states that becomes an enforceable contract with congressional consent.[438]

The road to the current state of the law has been circuitous. In 1851, for example, the Supreme Court held that a "compact, by the sanction of Congress, has become a law of the Union."[439] Nearly a century later, however, the Court in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*[440] ruled that a compact was not the equivalent of a federal statute. But only two years later, the Court in *Delaware River Joint Toll Bridge Commission v. Colburn*[441] held that an interstate compact created a federal right and privilege. This led one commentator to declare in 1965 that "it seems abundantly clear that the doctrinal basis chosen by the Court for the *Coburn* rule was that a compact, by sanction of Congress, has become a law of the Union."[442]

As predicted, modern precedent now holds that a congressionally approved interstate compact is indeed a "law of the United States."[443] In 1981, *Cuyler v. Adams* explained how the Supreme Court arrived at this conclusion:

> *Although the law-of-the-Union doctrine was questioned ... any doubts as to its continued vitality were put to rest in Delaware River Joint Toll Bridge Comm'n v. Colburn ... where the Court stated: "... [W]e now conclude that the construction of such a compact sanctioned by Congress by virtue of Article I, § 10, Clause 3 of the Constitution, involves a federal 'title, right, privilege or immunity'".... This holding reaffirmed the law-of-the-Union doctrine and the underlying principle that congressional consent can transform interstate compacts into federal law. The requirement of congressional consent is at the heart of the Compact Clause. By vesting in Congress the power to grant or withhold consent, or to condition consent on the States' compliance with specified conditions, the Framers sought to ensure that Congress would maintain ultimate supervisory power over cooperative state action that might otherwise interfere with the full and free exercise of federal authority.*[444]

It is now so well established that congressionally approved interstate compacts constitute federal law that the regulatory bodies some interstate compacts create have even sought certification as federal agencies.[445] Lawsuits brought against agencies created by interstate compacts under state

law have been dismissed based on the determination that any state law that conflicts with the authority conferred by an interstate compact "is preempted under the Supremacy Clause of the United States Constitution."[446] In fact, congressionally approved interstate compacts not only displace state law under the Supremacy Clause but have been held to supersede prior federal law as well. For example, the Circuit Court of Appeals for the District of Columbia held that the liability provisions of the previously enacted Federal Employee Liability Act were displaced by the contrary provisions of the Washington Metropolitan Area Transit Authority (WMATA) interstate compact.[447] Additionally, it is reasonable to expect that the rights, guarantees, and obligations congressionally approved interstate compacts create are likely protected from deprivation by the federal government as vested rights under the Fifth Amendment's Due Process Clause.[448] For example, water rights protected by the Colorado River Compact have been protected against a federal agency's efforts to undermine those rights by enforcing an inconsistent federal law.[449] In short, states can leverage congressionally approved interstate compacts to supersede prior federal laws and to protect themselves and their residents against the reach of future federal laws through the creation of vested rights protected by interstate compact. Moreover, by incorporating state laws that might otherwise conflict with the Supremacy Clause into a congressionally-approved interstate compact before they are struck down in court, Congress can effectively waive any such conflict.[450]

Congressional Consent Does Not Require Presidential Approval

Given that congressionally approved interstate compacts have the force of federal law, the next question is: How should states secure the requisite approval? The Constitution speaks only of securing the "Consent of Congress."[451] If granting the consent of Congress were regarded as an exercise of Congress' normal lawmaking process, then each house would be required to pass a resolution consenting to the compact, whereupon the joint resolution would be sent to the President for his approval or veto.[452] But if granting the consent of Congress were regarded as the exercise of a power conferred exclusively upon Congress, such as Congress' power to propose constitutional amendments,[453] then each house would need only to approve an interstate compact by passing a concurrent joint resolution, which does not require presidential presentment.[454]

No case holds that congressional consent to an interstate compact requires presidential approval.[455] Scholars are divided on whether the requisite congressional consent requires presidential presentment, even though there is a history of vetoes and threatened vetoes of interstate compacts during President Roosevelt's term in office, as well as a custom of presenting interstate compacts to the President for approval.[456] But it is clear that granting consent of Congress to an interstate compact is *not* an exercise of Congress' normal lawmaking process. This is because the Supreme Court has long held congressional consent to interstate compacts can be *implied* both before and after the underlying agreement is reached.[457] This rule of law

treats the consent of Congress very differently from the normal lawmaking process, insofar as laws obviously cannot be enacted by mere implication. It also compels the conclusion that presidential presentment is unnecessary to garner the requisite consent of Congress for an interstate compact. After all, if an actual vote on specific legislation approving a specific interstate compact is not necessary to secure the requisite consent of Congress, it follows that presidential presentment is not necessary. Prevailing precedent thus justifies concluding that the Compact Clause confers an exclusive power upon Congress to approve interstate compacts that can be exercised without presidential presentment. This conclusion is also consistent with the original meaning of the Constitution.

From an originalist perspective, the text of the Compact Clause is the starting point for analysis. The fact that Congress has long had a means of manifesting its consent without presidential presentment—the concurrent joint resolution—precludes the claim that the meaning of the phrase "Consent of Congress" *necessarily* implies the requirement of presidential presentment. And while it has been argued that the Compact Clause was not meant to provide an alternative means of legislation,[458] the substantive power of an interstate compact could be alternatively sustained under the doctrine of estoppel by acquiescence, or "quasi estoppel," which would bar the federal government from changing its position on an interstate compact.[459] In other words, by consenting to an interstate compact, Congress is not necessarily enacting a new federal law; it is affirmatively yielding to the lawmaking power of the compacting states with respect to the compact's subject matter and thereby waiving any possible conflict between the Supremacy Clause and the exertion of state sovereignty in question.

Significantly, those who claim that presidential presentment is necessary have never made the case that the original meaning of the phrase "Consent of Congress" entails the requirement of presidential presentment. Instead, they have declared, "whatever the original meaning of the consent requirement may have been with regard to compacts, settled usage now has definitely established the President's power to participate in the consent process."[460] But the claim that presidential presentment is "settled usage" disregards the longstanding court-sanctioned phenomenon of "implied consent" to interstate compacts. This phenomenon alone disproves the assertion that "settled usage" requires presidential presentment for effective congressional consent to interstate compacts.

It is not unusual and perhaps even "settled usage" for the exercise of conferred powers under the Constitution to have the effect of law *without* following the ordinary lawmaking process. Treaties, for example, create federal law under the Supremacy Clause despite conferring treaty powers only upon the Senate and the President.[461] It is natural to similarly regard congressional consent to an interstate compact as excepted from the normal lawmaking process, given that the Compact Clause mirrors the treaties clause of the Articles of Confederation,[462] and may be regarded as aimed at a similar purpose.[463] Moreover, where the Constitution specifically confers

a power upon a named legislative assembly, as it does in the Compacts Clause, action by that assembly, without presentment to the executive branch, has been repeatedly sustained.[464] The theory underpinning this rule is that the exercise of a specifically conferred power, such as the power to consent to an interstate compact, is not an exercise of the lawmaking apparatus; instead, the exercise of a conferred power is the exercise of a power that was meant to be exercised exclusively by the designated body.

Binding precedent, original meaning, and "settled usage" thus justify the conclusion that presidential presentment is unnecessary to securing effective congressional consent to an interstate compact. Moreover, the structure and purpose of the Constitution simply does not require the President to have the power to veto congressional consent for interstate compacts. This is because the President's role in presentment is to defend the executive branch from incursions by the *federal* legislative branch and to act as the representative of *all* of the people of the nation.[465] Fulfilling this role does not require the President to have the power to veto interstate compacts, which directly affect only the compacting states—especially in view of the Founders' robust conception of state sovereignty and strong preference for decentralized government.

Without a presentment requirement, states would be able to form viable interstate compacts that displace federal power within their jurisdiction without having to grapple with an antagonist in the executive branch. For example, an agreement between two or more states to allow insurance companies reciprocal access to intrastate markets, to allow for the portability of existing medical insurance coverage, or to protect the right to pay directly for health care services in either state could serve as a vehicle for superseding conflicting federal laws regulating insurance companies or precluding free choice among medical providers and insurance issuers—such as the federal health care law. A compact among the states to protect, recognize, and mutually enforce the rights created by the Firearms Freedom Acts or the Health Care Freedom Acts could establish vested rights protected against prior or subsequent federal law.

To test the boundaries of the extent to which congressionally approved interstate compacts supersede contrary federal law, states could devise interstate compacts that (1) directly displace contrary federal laws that affect the reserved powers of the states, (2) redefine compliance with the terms of conditional federal grants to prevent recapture of federal funds that are appropriated to serve state and local priorities, and (3) redirect federal tax revenues to custodial accounts and shield taxpayers from federal tax liability.

Interstate Compacts Advance Consent Statute

Even if presidential presentment were required for effective congressional approval of an interstate compact, at least one blanket "consent-in-advance" statute has been on the books

since 1934; specifically, 4 U.S.C. § 112.[466] This statute gives blanket consent "to any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies, and to establish such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts."[467] The foregoing statute contains no caveat and no stipulation that the consent it offers is conditional on the interstate compact being consistent with federal law. Moreover, its legislative history shows that the statute was, in fact, meant to avoid the restrictions placed by the Federal Constitution on viable interstate compacts.[468] Such blanket congressional consent contrasts with all other modern "consent-in-advance" statutes, which specifically disclaim any grant of power to the compacting states to displace federal law.[469] In view of the absence of any express caveats precluding displacement of federal law, one must conclude that 4 U.S.C. § 112 was intended by Congress to authorize even interstate compacts that might displace existing federal law.

Simply put, Congress was free to decide, under the Supremacy Clause, that a congressionally-approved compact would displace conflicting federal law. Indeed, this was not a novel notion when 4 U.S.C. § 112 was enacted in 1934. President Roosevelt was contemporaneously engaged in repeated political battles over interstate compacts that attempted to displace federal power at the time.[470] It would be ahistorical to declare, against this historical backdrop, that 4 U.S.C. § 112 should *not* be interpreted to authorize compacts that could displace federal law. States should be able to rely on the effectiveness of this consent-in-advance statute because such statutes have been enforced from the earliest days of the Republic.[471]

The foregoing "consent-in-advance" statute thus provides the legal basis for states to attempt to resist nearly any federal regulatory law by criminalizing related enforcement efforts, reaching agreement with other states on enforcing such criminal laws and establishing "such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts." The Health Care Freedom Act, for example, guarantees the right to free choice among medical providers and insurance issuers. The Firearms Freedom Act establishes a less restrictive regulatory regime for instate manufacturing, possession and sales of firearms. So long as states defer to binding federal court precedent, states enacting these laws are free to criminalize the violation of the rights protected by the Health Care Freedom and Firearms Freedom Acts. States could then enter into an interstate compact mutually guaranteeing to protect the enjoyment of the rights guaranteed by the Health Care Freedom Act or the Firearms Freedom Act under the protections of their respective criminal laws. Such a compact could then be lodged with Congress under the authority of 4 U.S.C. § 112, whereupon the provisions of the compact would arguably become the functional equivalent of federal law, displacing prior inconsistent federal law.[472]

In principle, states would be able to exert their police powers to define and protect many other types of individual rights from unconstitutional federal encroachment using the foregoing "consent-in-advance" statute. The possible ways in which interstate compacts can be used to resist federal power under the foregoing consent-in-advance statute are nearly limitless. Not surprisingly, state legislators have already wielded 4 U.S.C. § 112 to check and balance the federal government. During the 2011 legislative session, bills were filed in Arizona and in North Dakota to create a congressionally preapproved "Interstate Health Care Freedom Compact," and Arizona legislators look poised to enact an "Interstate Firearms Freedom Compact" under the authority of 4 U.S.C. § 112.[473] It is up to the states to push the boundaries to determine what is possible. There is no time to lose.

CONCLUSION

Under the Supremacy Clause, the powers that were delegated to the federal government trump state sovereignty. The key question is, "What is the nature and scope of the powers that were delegated?" The design of the Constitution tells us that we cannot answer that question without considering state sovereignty. The maintenance of dual sovereignty was a clear goal of the Constitution. Therefore, sufficient autonomy must exist in the states to preserve a viable vertical separation of powers. Moreover, given that the division of power between the states and the federal government is ultimately aimed at protecting individual liberty, hard questions regarding the boundary lines between the states and federal government should be resolved in favor of the division of power that diffuses, rather than concentrates, power and sustains individual liberty.

But state sovereignty was never meant to be free from a federal counterweight. Therefore, efforts to enforce state sovereignty consistently with the Constitution should not be confused with efforts to nullify the federal government's role in our compound republic. Rather, the goal must be to restore balance in the relationship between the states and the federal government, to the extent necessary for the states to operate as an effective and autonomous check on the federal government—and vice versa. The *Federalism DIY Toolkit* gives prudent patriots the tools to enforce these principles of dual sovereignty systematically to preserve and protect our compound republic.

[1] Phil Villarreal, *The Federal Government Is Sending $16 Million in Stimulus Funds to Pima County to Combat Obesity*, Arizona Daily Star (Mar. 13, 2010) ("The Centers for Disease Control and Prevention is giving the county the grant, titled Communities Putting Prevention to Work—Obesity, Nutrition & Physical Activity. It was appropriated by the American Recovery and Reinvestment Act."), *available at* http://azstarnet.com/news/science/health-med-fit/article_1f8d7ee8-a678-5e4f-90cd-93fe74e5ac88.html?mode=story (last visited Dec. 13, 2010).

[2] Smart Growth Gateway, "Financing Smart Growth," http://www.smartgrowthgateway.org/finance_federal.shtml (last visited Dec. 4, 2010).

[3] H.R. 3590 § 1501(b) (I.R.C. § 5000A (a) and (b)) (2010).

[4] *Alden v. Maine*, 527 U.S. 706, 713 (2000) ("the founding document 'specifically recognizes states as sovereign entities' ... [v]arious textual provisions of the constitution assume the state's continued existence").

[5] *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (quoting The Federalist No. 45).

[6] U.S. Const. art. VI.

[7] U.S. Const. art. I, § 8 (enumerating congressional powers); *id.* art. I, § 10 (limiting powers of the states).

[8] *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 751 (2002) ("dual sovereignty is a defining feature of our Nation's constitutional blueprint"); *Printz v. United States*, 521 U.S. 898, 921-23 (1997) (citing The Federalist No. 51); *United States v. Lopez*, 514 U.S. 549, 552 (1995); *New York v. United States*, 505 U.S. 144, 187-88 (1992) ("The Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day"); *Gregory*, 501 U.S. at 457-59 ("[a]s every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal government").

[9] *Lambert v. Yellowly*, 272 U.S. 581, 589 (1926) ("It is important also to bear in mind that 'direct control of medical practice in the States is beyond the power of the Federal Government'.... Congress, therefore, cannot directly restrict the professional judgment of the physician or interfere with its free exercise in the treatment of disease. Whatever power exists in that respect belongs to the states exclusively."); *Linder v. United States*, 268 U.S. 5, 18 (1925); *compare Paul v. Virginia*, 75 U.S. 168, 182 (1869) *with United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 552-53 (1944).

[10] *Compare South-Eastern Underwriters Association*, 322 U.S. at 552-53, *with Paul*, 75 U.S. at 182.

[11] 272 U.S. at 589.

[12] M. Patricia Smith, *ERISA Preemption and State Insurance Regulation of Healthcare Arrangements*, American Bar Association (1999) (discussing preemption doctrine under 29 U.S.C. § 1001 et seq.), *available at* http://www.bna.com/bnabooks/ababna/annual/99/annual37.pdf (last visited Dec. 13, 2010).

[13] H.R. 3590 (as modified by H.R. 4872), 111th Cong. § 3403(g)(1)(A)(i), (ii) (2010).

[14] Michael H. Cook, *Independent Payment Advisory Board: Part of the Solution for Bending the Cost Curve?* 4 J. Health & Life Sci. L. 102 (Oct. 2010).

[15] H.R. 3590 (as modified by H.R. 4872), 111th Cong. § 3403(c)(1)(A), (2)(C) (2010).

[16] Michael Chernew, Katherine Baicker, & Carina Martin, *Spillovers in Health Care Markets: Implications for Current Law Projections*, Centers for Medicare and Medicaid Services 16 (April 16, 2010) (finding that "[t]he literature provides strong evidence of the interconnectedness of health care markets. These spillovers likely occur through several mechanisms (including changes in quantity and changes in price) and across several sectors (including between commercial and public sectors and between managed care and non-managed care sectors)"), *available at* https://www.cms.gov/ReportsTrustFunds/Downloads/SpilloverEffects.pdf (last visited Dec. 4, 2010).

[17] *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984).

[18] *See, e.g., Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 154 (1982) (holding that regulations promulgated by federal administrative agency can preempt state law even in absence of express Congressional preemption authority); *but see Cipollone v. Liggett Group*, 505 U.S. 504, 518 (1992) (adopting a presumption against preemption of state regulations promulgated under police powers); *Hillsborough County, Fla. v. Automated Medical Labs., Inc.*, 471 U.S. 707, 715-16 (1985) (holding that the "historic police powers of the States" are not preempted without an expression of Congress' clear intent).

[19] H.R. 3590 (as modified by H.R. 4872), 111th Cong. § 3403(c)(1)(A), (2)(A)(i) (2010).

[20] H.R. 3590 (as modified by H.R. 4872), 111th Cong. § 3403(e)(1) (2010).

[21] H.R. 3590 (as modified by H.R. 4872), 111th Cong. § 3403(d)(1), (d)(2), (d)(3)(B), (C), (D), (E), (d)(4)(B),(C), (D), (E), (F) (2010).

[22] H.R. 3590 (as modified by H.R. 4872), 111th Cong. § 3403(f) (2010).

[23] H.R. 3590 (as modified by H.R. 4872), 111th Cong. § 3403(e)(5).

[24] *Chadha v. Immigration & Naturalization Service*, 634 F.2d 408, 421 n.12 (9th Cir. 1980) (quoting *The Federalist* No. 47 (J. Madison)).

[25] Nicholas C. Dranias, *Breaking the Grip of Funded Federal Mandates: Why Wyoming Should Just Say No to Federal Grants-in-Aid*, Wyoming Liberty Group 4-6 (2008) (citing Benjamin Barr, *Arizona's Struggle for Sovereignty: The Consequences of Federal Mandates*, Goldwater Institute PR-224, 4-5 (June 3, 2008)), *available at* http://www.wyliberty.org/images/research/breakingthegrip.pdf (last visited Dec. 4, 2010).

[26] *Id.* at 4-6.

[27] U.S. Advisory Commission on Intergovernmental Relations, *Federal Statutory Preemption of State and Local Authority: History Inventory, and Issues*, Executive Summary (Sept. 1992).

[28] *Id.* at Appendix (author's review and calculations).

[29] *Id.* at Executive Summary.

[30] *Id.* at 7, 8.

[31] *Id.* at Executive Summary.

[32] S. 1214, 106th Cong. (2000), *available at* http://hsgac.senate.gov/s1214-main.htm (last visited Oct. 17, 2010).

[33] *See generally* U.S. Advisory Commission on Intergovernmental Relations, *supra* note 27, at 12.

[34] *Id.* at 12.

[35] *Id.* at Appendix (author's analysis of listed statutes).

[36] *Id.* at 19 (citing Joseph E. Zimmerman, "Federal Preemption of State and Local Government Activities," paper presented before the 1986 Annual Meeting of the American Political Science Association, Washington, DC, at 16-20; Joseph E. Zimmerman, *Regulating Atomic Energy in a Federal System*, Publius: The Journal of Federalism 18 (Summer 1988); Water Quality Act of 1965, 79 Stat. 903, 33 U.S.C. § 1151, *et seq.*).

[37] 70 Stat. 953 (1956).

[38] 94 Stat. 1672 (1980).

[39] 94 Stat. 939 (1980).

[40] 104 Stat. 2943 (1990).

[41] 88 Stat. 700 (1974).

[42] 94 Stat. 2229 (1980).

[43] 102 Stat. 2779 (1988).

[44] 84 Stat. 1560 (1970).

[45] 96 Stat. 381 (1982); *see also* Agricultural Fair Practices Act of 1968, 82 Stat. 93 (1968); Real Estate Settlement Procedures Act of 1974, 88 Stat. 1724 (1974); Housing and Urban-Rural Recovery Act of 1983, 97 Stat. 1155 (1983); Supplemental Appropriations Act of 1984, Title V, 97 Stat. 1153 (1984); Poultry Producers Financial Protection Act of 1987, 101 Stat. 917 (1987); Housing and Community Development Act of 1974, Title VI, 88 Stat. 6331 (1974); Surface Mining Control and Reclamation Act of 1977, 91 Stat. 445 (1977); Agricultural Marketing Agreement Act of 1937, 50 Stat. 246 (1937); Wool Products Labeling Act of 1939, 54 Stat. 1128 (1939); Fur Products Labeling Act of 1951, 65 Stat. 175 (1951); Flammable Fabrics Act of 1953, 67 Stat. 111 (1953); Pesticide Chemical Residue Act of 1954 (1954); Poultry Products Inspection Act of 1957, 71 Stat. 441 (1957); Textile Fiber Products Identification Act of 1958, 72 Stat. 1717 (1958); Food Additives Amendment of 1958, 72 Stat. 1784 (1958); Federal Hazardous Substances Labeling Act of 1960, 61 Stat. 163 (1960); Fair Packaging and Labeling Act of 1966, 80 Stat. 1296

(1966); United States Grain Standards Act of 1968, 82 Stat. 761 (1968); Magnuson-Moss Warranty-Federal Trade Commission, Improvement Act of 1975, 88 Stat. 2183 (1975); Consumer Goods Pricing Act of 1975, 89 Stat. 801 (1975); Consumer Product Safety Improvement Act of 1970, 104 Stat. 3110 (1970); Flammable Fabrics Act of 1967, 81 Stat. 568 (1967); Wholesome Meat Act of 1967, 81 Stat. 584 (1967); Occupational Safety and Health Act of 1970, 84 Stat. 1590 (1970); Egg Products Inspection Act of 1970, 84 Stat. 1620 (1970); Poison Prevention Packaging Act of 1970, 84 Stat. 1670 (1970); Noise Control Act of 1972, 86 Stat. 1234 (1972); Lead-Based Paint Poisoning Prevention Act Amendments of 1973, 87 Stat. 565 (1973); Federal Mine Safety and Health Act of 1977, 91 Stat. 1290 (1977); Quiet Communities Act of 1978, 92 Stat. 3079 (1978); Alcoholic Beverage Labeling Act of 1988, 102 Stat. 4517 (1988); Anti-Drug Abuse Act of 1988, Title VIII, 102 Stat. 41811; Used Oil Recycling Act of 1980, 94 Stat. 2055 (1980).

[46] United States Conference of Mayors, *A Preliminary Report on Costs in 59 Cities*, 12-13 (June 2005).

[47] *Id.* at 12-13.

[48] Brad Petrishen, *ADA: Busting "Barriers" Could Cost Winchester $3 Million*, Winchester Star (June 2010).

[49] United States Conference of Mayors, *supra* note 46, at 1, 2.

[50] *Id.* at 2.

[51] Congress of the United States, Congressional Budget Office, *A Review of CBO's Activities in 2009 under the Unfunded Mandates Reform Act*, No. 4108, at 4, 5 (Mar. 2010).

[52] The National Conference of State Legislatures provides a list of all federal intergovernmental mandates. It can be accessed at http://www.ncsl.org/default.aspx?tabid=19060 (last visited Dec. 4, 2010).

[53] Congressional Budget Office, *supra* note 51, at 2.

[54] *Id.* at 6-9.

[55] *Id.* at 10-11.

[56] Environmental Protection Agency, *The Benefits and Costs of the Clean Air Act: 1990 to 2020—Executive Summary* at 2, 17-18 (Aug. 2010), *available at* http://www.epa.gov/air/sect812/aug10/summaryreport.pdf (last visited Dec. 13, 2010). The EPA's report admits that these costs vastly outweigh direct monetary benefits from the Clean Air Act, but nevertheless claims benefits will exceed $1 trillion by assigning monetary value to estimates of changes in mortality and morbidity rates, pain and suffering, as well as visibility enhancements. Notably, the EPA does not assign a countervailing dollar value to the physiological and psychological harms the Clean Air Act will likely cause by depressing growth in gross domestic product by 0.5 percent annually.

[57] U.S. Census Bureau, Federal Grants to State and Local Governments—Budget Authority and Outlays, Table 17-2.

[58] U.S. Census Bureau, *Federal Aid to States for Fiscal Year 2009* (Aug. 2010), *available at* http://www.census.gov/prod/www/abs/fas.html (last visited Dec. 4, 2010).

[59] *See* http://www.usgovernmentspending.com (last visited Dec. 4, 2010).

[60] Arizona Center for Public Policy, *Policy Brief: The Battle Over the Control of Federal Funds in the Arizona State Budget* 2, no. 5 (July 2004).

[61] Governor's Office of Strategic Planning and Budgeting, *Statement of Federal Funds*, 3 Fiscal Years 2008-2010 (Mar. 2010).

[62] *Id.* at 32.

[63] Florida v. United States, 3:10-cv-00091, ECF. __, p. 51 (N.D. Fl. 2010).

[64] Pietro S. Nivola, *Policy Brief #1: Last Rights for States Rights* (Brookings Institution 2000).

[65] Report to the Attorney General, *The Constitution in the Year 2000: Choices Ahead* 133 (Oct. 11, 1988).

[66] 23 U.S.C. § 131.

[67] 23 U.S.C. § 136.

[68] 5 U.S.C. §§ 1501-08.

[69] 23 U.S.C. §§ 158, 159.

[70] Dranias, *Breaking the Grip*, *supra* note 25, at 4-27.

[71] *Id.* at 4-27.

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] Nivola, *supra* note 64.

[76] Max Farrand, *The Framing of the Constitution* 15 (1913).

[77] *The Declaration of Independence* para. 32 (U.S. 1776).

[78] Joseph Story, *Commentaries on the Constitution of the United States, Vol. I*, 148-49 (Little, Brown & Co. 1878). Notably, Joseph Story suggests that the original states were never sovereign and independent. He claims that their acts prior to the Revolution were subject to the crown and their subsequent acts were subject to the Second Continental Congress, which acted as a unified national government and to which the states were subordinate. *Id.* at 140-46. But Joseph Story's account is contradicted by all of the evidence discussed above.

[79] Eric M. Freedman, *Why Constitutional Lawyers and Historians Should Take a Fresh Look at the Emergence of the Constitution from the Confederation Period: The Case of the Drafting of the Articles of Confederation*, 60 Tenn. L. Rev. 783, 797-801, 810-12 (1993).

[80] *Id.* at 159 (quoting Secret Journals 1776, 304 (1821)).

[81] Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L. J. 1425, 1446-47 (1987).

[82] *Id.* at 1448 (quoting *The Federalist* No. 43).

[83] *Id.* at 1447-48 (observing that "various states refused to honor requisitions, flouted official judgments in the very limited category of controversies committed to central courts, enacted laws repudiating earlier treaties entered into by Congress, waged unauthorized local wars against Indian tribes, conducted negotiations with foreign nations independently of Congress; and maintained standing armies without congressional permission—all in clear contravention of the Articles [of Confederation]").

[84] Art. Conf. art. IV (1781) ("The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State, of which the owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any State, on the property of the United States, or either of them").

[85] Brannon P. Denning, *Confederation-Era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine*, 94 Ky. L.J. 37, 38-69 (2005).

[86] *Id.* at 65-69 (reporting that "[a]fter reviewing the available commercial legislation for all thirteen states from 1781 to 1787, it seems that several states engaged in discrimination against interstate commerce, of one sort or another, during the Confederation era"); *see also The Federalist* Nos. 6, 7, 11, 22 (Alexander Hamilton) (Gideon ed., 1818), *available at* http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php%3Ftitle=788&Itemid=27 (last visited Dec. 13, 2010); *The Federalist* No. 42 (James Madison) (Gideon ed., 1818), *available at* http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php%3Ftitle=788&Itemid=27 (last visited Dec. 13, 2010); 2 *The Records of the Federal Convention of 1787*, at 441 (M. Farrand rev. ed., 1937); C. Warren, *The Making of the Constitution* 567-68 & n.1 (1937); Larry D. Kramer, *Madison's Audience*, 112 Harv. L. Rev. 611, 627 (1999) (reporting that Madison expressing concern about "rival and spiteful measures" that states inflicted upon each other's trade) (quoting Letter from James Madison to George Washington (Apr. 16, 1787)); Letter from James Madison to Thomas Jefferson (Dec. 10, 1783), in 7 *The Papers of James Madison* 59 (William T. Hutchinson et al. eds., 1967) (writing that the merchants of Philadelphia and Baltimore imposed taxes on Virginia products that amounted to "a tribute which if paid into the treasury of [Virginia] would yield a surplus above all its wants"); Letter from James Madison to Thomas Jefferson (Aug. 12, 1786), in 9 *The Papers of James Madison* 59 (William T. Hutchinson et al. eds., 1967); Letter from Tench Coxe to the Virginia Commissioners at Annapolis (Sept. 13, 1786), in *id*. (reporting that Pennsylvania law "exempt intirely

[*sic*] from impost all Goods Wares or Merchandise of the growth, product or Manufacture of the United States," while other states imposed duties on out-of-state traders "greater than [those] imposed on Vessels belonging to the Citizens of the State enacting the law"); R. Wright, *Hawkers and Walkers in Early America* 89-91 (1965) (laws banning hawkers and peddlers were common among the states prior to 1789); *see, e.g.*, *Fishing at the Cape Cod*, in *The Book of the General Laws of the Inhabitants of the Jurisdiction of New Plymouth*, reprinted in *The Laws of the Pilgrims* 38-39 (1977) (recounting that Plymouth Colony charged nonresidents twice the fishing tax it charged residents); *An Act for the Preserving of Oysters*, in *The Laws and Acts of the General Assembly of His Majesties' Province of New Jersey, reprinted in Earliest Printed Laws of New Jersey: 1703-1722*, 112-13 (1978) (prohibiting nonresidents from collecting oysters); *An Act to Prevent Foreigners or Aliens Purchasing or Holding Lands in This State, Acts and Laws Passed by the General Assembly of Connecticut*, reprinted in *First Laws of the State of Connecticut* 84 (1784); *An Act for Establishing a Land Office* (1778), *A Collection of All Such Public Acts of the General Assembly and Ordinances of the Conventions of Virginia* (1783), reprinted in *The First Laws of Virginia* 94-98 (1982) (requiring landowners to become citizens of the state within 18 months).

[87] Letter from James Madison to Charles Carroll, *The Vices of the Political System of the U. States* (Apr. 1787), in 2 *The Writings of James Madison* 236-38 (G. Hunt ed. 1900) ("These are alarming symptoms, and may be daily apprehended as we are admonished by daily experience. See the law of Virginia restricting foreign vessels to certain ports—of Maryland in favor of vessels belonging to her own citizens—of N. York in favor of the same—Paper money, instalments [*sic*] of debts, occlusion of Courts, making property a legal tender, may likewise be deemed aggressions on the rights of other States. As the Citizens of every State aggregately taken stand more or less in the relation of Creditors or debtors, to the Citizens of every other State, Acts of the debtor State in favor of debtors, affect the Creditor State, in the same manner as they do its own citizens who are relatively creditors towards other citizens. This remark may be extended to foreign nations. If the exclusive regulation of the value and alloy of coin was properly delegated to the federal authority, the policy of it equally requires a controul [*sic*] on the States in the cases above mentioned. It must have been meant 1. to preserve uniformity in the circulating medium throughout the nation. 2. to prevent those frauds on the citizens of other States, and the subjects of foreign powers, which might disturb the tranquillity [*sic*] at home, or involve the Union in foreign contests. The practice of many States in restricting the commercial intercourse with other States, and putting their productions and manufactures on the same footing with those of foreign nations, though not contrary to the federal articles, is certainly adverse to the spirit of the Union, and tends to beget retaliating regulations, not less expensive and vexatious in themselves than they are destructive of the general harmony"), *available at* http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=1933&Itemid=27 (last visited Dec. 13, 2010).

[88] Letter from Alexander Hamilton to James Duane (Sept. 3, 1780), in 2 *The Papers of Alexander Hamilton* 401-02 (Harold C. Syrett et al. eds., 1961-68).

[89] Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 5 *The Writings of James Madison* 23 (G. Hunt ed. 1904), available at http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=1933&Itemid=27 (last visited Nov. 3, 2010).

[90] Letter from James Madison to unknown party, in 4 *Letters and Other Writings of James Madison* 328 (1865).

[91] Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 25-26 (1988).

[92] *Id.* at 26-29 (quoting *The Federalist* No. 43 (James Madison)). This "sword" may or may not be enforceable against the states. *Compare Coyle v. Smith*, 221 U.S. 559, 568 (1911), *with Baker v. Carr*, 369 U.S. 186, 226 n.53 (1962) (finding the Guarantee Clause nonjusticiable, but emphasizing that "the implication of the Guaranty Clause ... does not always preclude judicial action) and *Green v. McKeon*, 468 F.2d 883, 885-86 (6th Cir. 1972) (O'Sullivan, Jr., dissenting); *see generally South Carolina v. Katzenbach*, 383 U.S. 301, 359 (1966) (Black, J., concurring in part and dissenting in part); *Collector v. Day*, 78 U.S. 113 (1870).

[93] Merritt, *supra* note 91, at 29.

[94] *Compare* Carl J. Richard, *The Founders and the Classics: Greece, Rome and the American Enlightenment* 130-41 (Harvard 1994) *with* Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule and the Denominator Problem*, 65 U. Colo. L. Rev. 749, 749 (1994), and Merritt, *supra* note 91 at 22-23.

[95] Merritt, *supra* note 91, at 26-29 (citing *Clinton-Garcia v. Romero Barcelo*, 671 F.2d 1, 5 (1st Cir. 1982); *Brown v. EPA*, 521 F.2d 827, 838, 840 (9th Cir. 1975); *U.S. v. Downey*, 195 F. Supp. 581, 585 (S.D. Ill. 1961).

[96] *Id.* at 32-36.

[97] *Id.*

[98] *Id.*

[99] U.S. Const. art. V.

[100] *Printz*, 521 U.S. at 923-24 (citing Federalist No. 33; Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L. J. 267, 297-326, 330-333 (1993)).

[101] *The Federalist* No. 14 (James Madison) (Gideon ed., 1818) (stating that "it is to be remembered that the general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects"), *available at* http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php%3Ftitle=788&Itemid=27 (last visited Dec. 13, 2010).

[102] U.S. Const. amend. XI (making states immune to suit in federal court).

[103] *Alden*, 527 U.S. at 713. Given the Constitution's recognition of the distinct existence of the states as self-governing bodies, it is not surprising that the Supreme Court has ruled that the Eleventh Amendment does little more than instantiate one aspect of the sovereign immunity enjoyed by states, an instantiation made necessary to overturn an erroneous prior Supreme Court decision that refused to recognize such immunity.

[104] *The Federalist* No. 51 (James Madison) (Gideon ed., 1818), *available at* http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php%3Ftitle=788&Itemid=27 (last visited Dec. 13, 2010).

[105] W.M., *Liberty and Government*, The Christian Science Journal 465 (Nov. 1902).

[106] *See, e.g.*, Richard, *supra* note 94, at 130-41; 1 John Adams, *A Defence of the Constitutions of Government of the United States of America* 100-04, 141, 146-47, 153-88, 210-25, 334-64 (London 1794); 3 John Adams, *A Defence of the Constitutions of Government of the United States of America* 251-54 (London 1794).

[107] Letter from Thomas Jefferson to Joseph C. Cabell (May 1816), in *The Jeffersonian Cyclopedia* 131 (J. Foley 1900).

[108] Story, *supra* note 78, at 189, 195-97 (quoting Thomas Cooley, *Constitutional Limitations*).

[109] *The Federalist* No. 31 (Alexander Hamilton) (Gideon ed., 1818), *available at* http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php%3Ftitle=788&Itemid=27 (last visited Dec. 13, 2010). Notably, so serious were the Founders about maintaining a balance of powers, they made sure that states retained military power in the form of organized militias.

[110] Emphasis added. The fact that the federal government was not meant to have exclusive legislative authority within the jurisdiction of the states is underscored by U.S. Const. art. 1, sec. 8, which provides: "to exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings." The fact that this grant of exclusive legislative authority was limited to specific jurisdictions within the nation implies that exclusive legislative authority did not obtain elsewhere.

[111] Amar, *supra* note 81, at 1440.

[112] *New York*, 505 U.S. at 157-58.

[113] *See, e.g.*, *Strader v. Graham*, 51 U.S. 82 (1850) (refusing to enforce Northwest Ordinance to free fugitive slaves, stating, "It is undoubtedly true, that most of the material provisions and principles of these six articles, not inconsistent with the Constitution of the United States, have been the established law within this territory ever since the Ordinance was passed; and hence the Ordinance itself is sometimes spoken of as still in force. But these provisions owed their legal validity and force, after the Constitution was adopted and while the territorial government continued, to the act of Congress of August 7, 1789, which adopted and continued the Ordinance of 1787, and carried its provisions into execution, with some modifications, which were necessary to adapt its form of government to the new Constitution. And in the States since formed in the territory, these provisions, so far as they have been preserved, own their validity and authority to the Constitution of the United States, and the constitutions and laws of the respective States, and not to the authority of the Ordinance of the old Confederation. As we have already said, it ceased to be in force upon the adoption of the Constitution, and cannot now be the source of jurisdiction of any description in this court"); *Jones v. Van Zandt*, 46 U.S. 215, 230 (1847) (refusing to enforce Northwest Ordinance to overturn the Fugitive Slave Act based on *Permoli v. Municipality No. 1 of City of New Orleans*, 44 U.S. 589 (1845), which held "what the force of the ordinance is north of the Ohio, we do not pretend to say, as it is unnecessary for the purposes of this case. But as regards the state of Louisiana, it had no further force, after the adoption of the state constitution, than other

acts of Congress organizing, in part, the territorial government of Orleans, and standing in connection with the ordinance of 1787. So far as they conferred political rights, and secured civil and religious liberties, (which are political rights,) the laws of Congress were all superseded by the state constitution; nor is any part of them in force, unless they were adopted by the constitution of Louisiana, as laws of the state. It is not possible to maintain that the United States hold in trust, by force of the ordinance, for the people of Louisiana, all the great elemental principles, or any one of them, contained in the ordinance, and secured to the people of the Orleans territory, during its existence. It follows, no repugnance could arise between the ordinance of 1787 and an act of the legislature of Louisiana, or a city regulation founded on such act").

[114] "An Act to Provide for the Government of the Territory Northwest of the River Ohio," Stat. I, Chap. VIII (Aug. 7, 1789).

[115] *Prigg v. Pennsylvania*, 41 U.S. 539 (1842).

[116] *Compare Dred Scott v. Sandford*, 60 U.S. 393, 452, 464 (1857) (referring to the Northwest Ordinance and holding that "the act of Congress which prohibited a citizen from holding and owning property of this kind [i.e., slaves] in the" Northwest Territory "is not warranted by the Constitution, and is therefore void; and that neither Dred Scott himself, nor any of his family, were made free by being carried into this territory; *even if they had been carried there by the owner, with the intention of becoming a permanent resident*") (emphasis added) *with Groves v. Slaughter*, 40 U.S. 449, 476 (1841) ("in Ohio, a*nd those states to which the ordinance of 1787 applies*, or in those where slaves are not property, not subjects of dealing or traffic among its own citizens, they cannot become so when brought from other states; *their condition is the same as those persons of the same colour already in the state*") (emphasis added), *Pollard's Heirs v. Kibbe*, 39 U.S. 353, 417 (1840) (Baldwin, J., concurring) (holding that "a higher power confers inviolable sanctity on the right of the inhabitants, and proprietors of land in the disputed territory, which this Court will never question. The ordinance of 1787 is declared to be a compact between the original states and the people and states in the said territory, and 'shall forever remain inviolable, unless by common consent.'... 'The inhabitants of the said territory shall always be entitled to the benefits of,' ... 'and of judicial proceedings, according to the course of the common law. No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land;' and if the public emergency requires any person's property to be taken, full compensation shall be made for the same ... *this ordinance, the most solemn of all engagements, has become a part of the Constitution, and is valid to protect and forever secure the rights of property and judicial proceedings to the inhabitants of every territory to which it applies*.... This ordinance, then, is ... impenetrable to any assault which can be made upon them by any subordinate power") (emphasis added), and *Bank of Hamilton v. Lessee of Dudley*, 27 U.S. 492, 508 (1829) (considering Ohio statute and stating that "[i]f any part of the act be unconstitutional, *the provisions of that part may be disregarded while full effect will be given to such as are not repugnant to* the constitution of the United States or of the state or to *the ordinance of 1787*") (emphasis added); *see generally Spooner v. McConnell*, 22 F.Cas. 939, 951-52 (D. Ohio. 1838) ("a compact [the Northwest Ordinance] declared on its face to be 'unalterable, unless by common consent,' cannot be abrogated by mere implication.... All the departments of her government have recognized the sacred and inviolable character of that part of the ordinance of 1787, which is now under review").

[117] *Ableman v. Booth*, 62 U.S. 506 (1859).

[118] 301 U.S. 1 (1937).

[119] *Jones & Laughlin* did not expressly overrule, but nevertheless conflicts with *A.L.A. Schechter Poultry Corp. v. U.S.*, 295 U.S. 495, 521 (1935), which held that the Commerce Clause could not reach enterprises and activities that only had an indirect effect on interstate commerce.

[120] *Jones & Laughlin*, 301 U.S. at 37.

[121] 300 U.S. 506, 513 (1937).

[122] *Sonzinsky* built on the dicta in *U.S. v. Butler*, 297 U.S. 1 (1936), that Congress could spend for the "general welfare" independently of any enumerated power, but effectively overruled the portion of *Butler* that struck down certain provisions of the Agricultural Adjustment Act of 1933, which imposed a tax on processors of farm products to pay farmers who would reduce their area and crops, stating, "The act invades the reserved rights of the states. It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government. The tax, the appropriation of the funds raised, and the direction for their disbursement, are but parts of the plan. They are but means to an unconstitutional end."

[123] 301 U.S. 548, 587 (1937).

[124] 301 U.S. 619, 640 (1937).

[125] 312 U.S. 100 (1941).

[126] *Darby*, 312 U.S. at 113.

[127] 317 U.S. 111, 119, 121 (1942).

[128] *See supra* note 28.

[129] 2010 U.S. Dist. LEXIS 107416, *25-27 (E.D. Mich. 2010).

[130] *Id.* at *27.

[131] *Florida v. United States HHS*, 2011 U.S. Dist. LEXIS 22464 *11, & *11 n.2 (D. Fla. 2010).

[132] *Mead v. Holder*, 2011 U.S. Dist. LEXIS 18592 *55-56 (D.C.C. 2011),

[133] Robert Moffit, *Revitalizing Federalism: The High Road Back to Health Care Independence*, Heritage Foundation Backgrounder no. 2432, 3 (June 30, 2010) (observing that "[i]n the classical sense, a republic means limited government; it underscores a sharp distinction between res publica (public affairs) and res privata (private affairs)"); Nick Dranias, *Reconsidering McDonald v. Chicago: How the 14th Amendment Obliges States to Protect the Fundamental Right to Bear Arms*, Goldwater Institute Policy Brief no. 10-01, 6-7 (February 2, 2010) (citing *Hertz Drivurself Stations v. Siggins*, 58 A.2d 464, 470 (Pa. 1948) (numerous citations omitted); *Munn v. People of State of Illinois*, 94 U.S. 113, 139-40 (1876) (Field, J., dissenting) (observing, "When Sir Matthew Hale, and the sages of the law in his day, spoke of property as affected by a public interest, and ceasing from that cause to be juris privati solely, that is, ceasing to be held merely in private right, they referred to property dedicated by the owner to public.... Unless the property was thus dedicated, or some right bestowed by the government was held with the property, either by specific grant or by prescription of so long a time as to imply a grant originally, the property was not affected by any public interest so as to be taken out of the category of property held in private right").

[134] Dranias, *Reconsidering McDonald*, *supra* note 133, at 6-7 (citing *Wilkinson v. Leland*, 27 U.S. 627, 657–58 (1829) (stating, "In a government professing to regard the great rights of personal liberty and of property, and which is required to legislate in subordination to the general laws of England, it would not lightly be presumed that the great principles of Magna Charta were to be disregarded, or that the estates of its subjects were liable to be taken away without trial, without notice, and without offence. Even if such authority could be deemed to have been confided by the charter to the general assembly of Rhode Island, as an exercise of transcendental sovereignty before the revolution, it can scarcely be imagined that that great event could have left the people of that state subjected to its uncontrolled and arbitrary exercise. That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred ... a different doctrine is utterly inconsistent with the great and fundamental principle of a republican government, and with the right of the citizens to the free enjoyment of their property lawfully acquired.... We are not prepared therefore to admit that the people of Rhode Island have ever delegated to their legislature the power to divest the vested rights of property, and transfer them without the assent of the parties"); *Bank of Columbia v. Okely*, 17 U.S. 235, 244 (1819) (discussing the meaning of "law of the land" provision in Maryland Constitution and observing, "to the words from Magna Charta, incorporated into the constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice"); *Calder v. Bull*, 3 U.S. 386, 387-89 (1798) (observing, "I cannot subscribe to the omnipotence of a State Legislature, or that it is absolute and without control; although its authority should not be expressly restrained by the Constitution, or fundamental law, of the State. The people of the United States erected their Constitutions, or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty; and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it: The nature, and ends of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free Republican governments, that no man should be compelled to do what the laws do not require; nor to refrain from acts which the laws permit. There are acts which the Federal, or State, Legislature cannot do, without exceeding their authority. There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof of the government was established. An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law in governments established on express compact, and on republican principles, must be determined by the nature of the power, on which it is founded. A few instances will suffice to explain what I mean.

A law that punished a citizen for an innocent action, or, in other words, for an act, which, when done, was in violation of no existing law; a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a Judge in his own cause; or a law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it. The genius, the nature, and the spirit, of our State Governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them. The Legislature may enjoin, permit, forbid, and punish; they may declare new crimes; and establish rules of conduct for all its citizens in future cases; they may command what is right, and prohibit what is wrong; but they cannot change innocence into guilt; or punish innocence as a crime; or violate the right of an antecedent lawful private contract; or the right of private property. To maintain that our Federal, or State, Legislature possesses such powers, if they had not been expressly restrained; would, in my opinion, be a political heresy, altogether inadmissible in our free republican governments"); *Ho Ah Kow v. Nunan*, 12 F. Cas. 252, 254 & n.2 (C.C. Cal. 1879); *Cohen v. Wright*, 22 Cal. 293, 318 (1863) (stating, "The terms 'due process of law' have a distinct legal signification, clearly securing to every person whether a citizen or not, without distinction of sex or race, a judicial trial, according to the established rules of law, before he can be deprived of life, liberty, or property. These essential rights cannot be taken away by any mere declaration of legislative will, for the very object and purpose of this provision was to prohibit the Legislature from passing laws of that character. Any other construction would render this clause utterly nugatory"); *Wynehamer v. People*, 13 N.Y. 378, 392-93 (1856) (stating, "To say, as has been suggested, that the law of the land, or 'due process of law,' may mean the very act of legislation which deprives the citizen of his rights, privileges, or property, leads to a simple absurdity. The constitution would then mean, that no person shall be deprived of his property or rights, unless the legislature shall pass a law to effectuate the wrong, and this would be throwing the restraint entirely away"); *see generally The Selected Writings and Speeches of Sir Edward Coke*, vol. I, 264, 265 n.3, 267 n.7, 279–80, 390–96, 399, 401, 404 n.28 (Steve Sheppard ed., Liberty Fund 2003) (reprinting *Dr. Bonham's Case*, 7 James 1. (Hilary Term, 1610); *The Case of the Tailors of Habits &c. of Ipswich*, 12 James 1 (Michaelmas Term, 1614); *The Case of Monopolies*, 44 Elizabeth I (in the Court of King's Bench, Trinity Term, 1602)).

[135] Richard A. Epstein & Michael S. Greve, *Federal Preemption: Principles and Politics*, American Enterprise Institute for Public Policy Research no. 25, 3 (June 2007) (observing that "[u]nder the earlier constitutional arrangements, the principle of state autonomy forced states to compete in the areas that then lay beyond federal control, from employment relations in manufacturing and retail to land-use law. The presumption against preemption creates precisely the opposite institutional dynamic. When Congress legislates in areas once reserved to the states, the new federal "floor" puts an end to state competition. Simultaneously, the presumption against preemption facilitates additional state regulation on top of that floor. So conceived, concurrent powers cut in only one direction: stricter regulation. That problem is rendered more acute because many large firms do business in all states, which gives aggressive regulators in one state leverage outside the state's boundaries. That extraterritorial power is further strengthened by the expansive reach of personal jurisdiction and malleable rules governing choice of law. Under those conditions, large individual states like California can often rival the federal government in their capability to influence the course of regulation on both national and global bases. Nationwide firms must comply with each of fifty-one different regulatory regimes, which again implies that the strictest regulator will dominate. Thus, while the ancien régime achieved some rough balance between regulatory incentives and political discipline at the state level, the modern regime creates a strong, ineluctable pro-regulatory bias").

[136] *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 169 F.3d 820, 895-97 (4th Cir. 1999), *affirmed by United States v. Morrison*, 529 U.S. 598 (2000) (observing that "[t]he judiciary rightly resolves structural disputes").

[137] ALEC, "ALEC's Freedom of Choice in Health Care Act," http://www.alec.org/AM/Template.cfm?Section=ALEC_s_Freedom_of_Choice_in_Health_Care_Act1&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=29&ContentID=13558 (last visited Dec. 13, 2010).

[138] "The Firearms Freedom Act (FFA) Is Sweeping the Nation," http://firearmsfreedomact.com/ (last visited Dec. 13, 2010).

[139] The Tenth Amendment Center, "State Marijuana Legislation," http://www.tenthamendmentcenter.com/nullification/marijuana/ (last visited Dec. 13, 2010).

[140] 41 U.S. 539, 1842 U.S. LEXIS 387 (1842).

[141] *Prigg*, 41 U.S. at ___, 1842 U.S. LEXIS 387 at ***3-31.

[142] *Id.*

[143] *Id.*

[144] 41 U.S. at 608.

[145] 41 U.S. at __, 1842 U.S. LEXIS 387 at ***32.

[146] 41 U.S. at __, 1842 U.S. LEXIS 387 at ***29-31.

[147] 41 U.S. at 626.

[148] *See supra* notes 113-17 and accompanying text.

[149] *See*, e.g., The Tenth Amendment Center, "State Sovereignty and Federal Tax Funds Act," http://www.tenthamendmentcenter.com/nullification/federal-tax-funds-act/ (last visited Dec. 13, 2010). Unfortunately, states cannot simply seize federal funds to collect debts they may be owed by the federal government. *Buchanan v. Alexander*, 45 U.S. 20, 21 (1845).

[150] *See generally* James A. Gardner, *Interpreting State Constitutions: A Jurisprudence of Function in a Federal System* 120 (Univ. Chicago Press 2005).

[151] 426 U.S. 833, 845, 852-54 (1976).

[152] *Id.* A fourth element may also be suggested by *Nat'l League of Cities*, which may justify preempting state sovereignty—namely, state submission to the federal law is required when essential to effectuate a delegated power of the federal government.

[153] *Id.*

[154] 426 U.S. at 852.

[155] 469 U.S. 528 (1985).

[156] *Id.* at 531, 546-47.

[157] *Id.* at 550-53.

[158] *Id.* at 554.

[159] *Id.* at 571-72 (Powell, J., dissenting) (emphasis added).

[160] 505 U.S. 144 (1992).

[161] 514 U.S. 549 (1995).

[162] 521 U.S. 898 (1997).

[163] 521 U.S. 507 (1997).

[164] 529 U.S. 598 (2000).

[165] *Alden*, 527 U.S. at 713.

[166] *Lopez*, 514 U.S. at 567-68 (citations omitted). In *Lopez*, the Supreme Court struck down Congress' effort to criminalize the possession of firearms in school zones under the Gun-Free School Zones Act of 1990. The Court held that firearms possession was not an economic activity and speculation about the interstate effects of noneconomic intrastate activities was insufficient to sustain federal regulation under the Commerce Clause. In reaching this ruling, the Court emphasized that the "few and defined" powers of the national government were meant to "ensure protection of our fundamental liberties," and that the purpose of a "healthy balance of power between the States and the Federal Government" is to "reduce the risk of tyranny and abuse from either front." 514 U.S. at 552; *see generally* Clint Bolick, *Grassroots Tyranny and the Limits of Federalism* (Cato Institute, 1993); Clint Bolick, *Leviathan: The Growth of Local Government and the Erosion of Liberty* (Hoover Institution Press, 2004).

[167] 529 U.S. at 599, 607-08. In *Morrison*, the Supreme Court then struck down a federal effort to criminalize and regulate gender-motivated violence. It clarified and expanded *Lopez* by explicitly rejecting "the argument that Congress may regulate noneconomic violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." It further ruled that noneconomic conduct cannot be regulated by Congress without a plausible connection to interstate commerce, which is explicitly identified by Congress in its legislation.

[168] *Gonzalez v. Raich*, 545 U.S. 1, 17-20 (2005).

[169] *Morrison*, 529 U.S. at 617-18.

[170] *Lopez*, 514 U.S. at 643.

[171] *Raich*, 545 U.S. at 41 (Scalia, J., concurring).

[172] *United States v. Comstock*, 130 S. Ct. 1949, 1962-63 (2010); *id.* at 1968 (Kennedy, J., Alito, J., concurring).

[173] Of course, as recognized by Justice O'Connor in *New York*, 505 U.S. at 159, "In the end, just as a cup may be half empty or half full, it makes no difference whether one views the question at issue in these cases as one of ascertaining the limits of the power delegated to the Federal government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment."

[174] *Quoting Alden*, 527 U.S. at 713.

[175] *See generally Barsky v. Bd. of Regents*, 347 U.S. 442, 449 (1954) ("It is elemental that a state has a broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there. It is a vital part of a state's police power").

[176] Robert G. Natelson, *The Enumerated Powers of the States*, 3 Nev. L.J. 469, 483-88 (Spring 2003).

[177] Merritt, *supra* note 91, at 36-58, 60-70.

[178] *See supra* note 33-37 and accompanying text.

[179] 546 U.S. 243 (2006).

[180] 501 U.S. 452 (1991).

[181] 527 U.S. 627, 639 (1999).

[182] *Gregory*, 501 U.S. at 458-459.

[183] Erwin Chemerinsky, *The Hypocrisy of Alden v. Maine: Judicial Review Sovereign Immunity and the Rehnquist Court*, 33 Loyola L.A. L. Rev. 1299, 1283 (June 2000) ("*Alden* effectively overrules *Garcia* and reinstates *National League of Cities*"); Nivola, *supra* note 64 (observing that the rule against federal commandeering directly clashes with the outcome in Garcia, which upheld a federal law that compelled a state agency to pay a certain wage to its employees); *Massachusetts v. Sebelius*, 698 F. Supp. 2d 234, 249 n. 142, 252 n. 154 (D. Mass 2010) (citing *United States v. Bongiorno*, 106 F.3d 1027, 1033 (1st Cir. 1997); *Z.B. v. Ammonoosuc Cmty. Health Servs*., 2004 U.S. Dist. LEXIS 13058, at *15 (D. Me. July 13, 2004)).

[184] 505 U.S. at 161-66; *see Hodel v. Virginia Surface Mining & Recl. Assn*., 452 U.S. 264, 287-88 (1981).

[185] *Printz*, 521 U.S. at 918-19 (citing The Federalist No. 39; *Lane County v. Oregon*, 74 U.S. 71 (1869); *Texas v. White*, 74 U.S. 700 (1869); *Helvering v. Gerhardt*, 304 U.S. 405, 414-415 (1938)) (citations omitted).

[186] 505 U.S. at 186 (quoting *The Federalist* No. 39),

[187] 527 U.S. at 714 (citations omitted).

[188] *Sebelius*, 698 F.Supp.2d at 235-36.

[189] *Id.* at 236-39.

[190] *Id.* at 244.

[191] *Id.* at 236-43.

[192] *Id.* at 253.

[193] *Id.* at 249-50

[194] *Id.*

[195] *Id.* at 251-53.

[196] Sebelius, 698 F. Supp. 2d at 252-53.

[197] *Id.* at 253.

[198] *Lambert*, 272 U.S. at 589 ("It is important also to bear in mind that 'direct control of medical practice in the States is beyond the power of the Federal Government.... Congress, therefore, cannot directly restrict the professional judgment of the physician or interfere with its free exercise in the treatment of disease. Whatever power exists in that respect belongs to the states exclusively"); *Linder*, 268 U.S. at 18.

[199] *Lambert*, 272 U.S. at 589.

[200] *Sebelius*, 698 F.Supp.2d at 248-53.

[201] In the event that statutes provoking direct clashes between the federal government and the states are not upheld, states should adopt the fallback position of simply legalizing (i.e., refusing to criminalize and regulate) activities through affirmative legislation also precluding any state official from assisting the federal government in regulating the subject matter. Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States Overlooked Power to Legalize Federal Crime*, 62 Van. L. Rev. 104,126-29 (2009). The withdrawal of state power over activities deemed illegal will prevent federal preemption doctrine from displacing state law, and the federal government will have no power to compel state officials to assist it in enforcing federal law under the anti-commandeering holdings of *Printz* and *New York*.

[202] Robert G. Natelson, *Tempering the Commerce Power*, 68 Mont. L. Rev. 95, 99-102 (Winter 2007); *Kinsella v. United States*, 361 U.S. 234, 247 (1960).

[203] *Raich*, 545 U.S. at 5, 22 ("The question presented in this case is whether the power vested in Congress ... 'to make all laws which shall be necessary and proper for carrying into execution' its authority 'to regulate commerce ... among the several states'" encompasses the power to regulate intrastate personal production and consumption of marijuana); *id.* at 34-35, 38-39 (Scalia, J., concurring).

[204] U.S. Const. art. I, sec. 8, clause 18.

[205] *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819).

[206] U.S. Const. art. I, sec. 10.

[207] Natelson, *Tempering*, *supra* note 202, at 99-102.

[208] *Quoting Merrell v. Joe Bullard Oldsmobile, Inc.*, 529 So.2d 943, 947-48 (Ala. 1988) (emphasis added).

[209] James Madison's Report on the Resolutions (Feb.7, 1799), in 6 *The Writings of James Madison* 211 (G. Hunt ed. 1906), *available at* http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=1933&Itemid=27 (last visited Dec. 13, 2010).

[210] *See* Brief Amicus Curiae of Americans for Free Choice in Medicine and Pacific Legal Foundation in Support of Plaintiff Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II, 3:10cv188, ECF _____, at 8 (2010) (citing *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3167 (2010) (Breyer, J., dissenting) (arguing, "To satisfy the Necessary and Proper Clause, a regulation must be both necessary—i.e., required by—the accomplishment of an enumerated power, and a "proper" means of serving that power—i.e., consistent with broader constitutional principles and other provisions of the Constitution")), *available at* http://community.pacificlegal.org/Document.Doc?id=473 (last visited Dec. 13, 2010).

[211] *Merrell*, 529 So.2d at 421; *see generally Buckley v. Valeo*, 424 U.S. 1, 135 (1975).

[212] 521 U.S. at 924 (citing *The Federalist* No. 33); Lawson & Granger, *The "Proper" Scope of Federal Power* (emphasis added).

[213] *Id* at 922.

[214] *New York*, 505 U.S. at 181, 187-88 (observing that the Constitution "divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day"). Moreover, the Court underscored that the most fundamental purpose of our federalist structure is to protect individual liberty. *Id.* at 181-82 (citing *The Federalist* No. 51; *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting); *Gregory*, 501 U.S. at 458.

[215] *See generally District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

[216] *Compare Massachusetts v. Upton*, 466 U.S. 727, 737 (1984) (Stephens, J., concurring) (observing that the Ninth Amendment protects rights created by state law); *Acme, Inc. v. Besson*, 10 F. Supp. 1, 6 (D. N.J. 1935) (indicating that the "local, intimate, and close relationships of persons and property which arise in the processes of manufacture" are protected by the Ninth Amendment); *Magill v. Brown*, 16 F. Cas. 408, 428 (E.D. Pa. 1833) (observing "personal rights are protected by ... the 9th amendment") *with Slaby v. Fairbridge*, 3 F. Supp. 2d 22, 30 (D.D.C. 1998) (observing that "[t]he Ninth Amendment is not a source of substantive rights, unless it is coupled with the denial of other fundamental rights") (emphasis added) (citing United States v. Vital Health Products, Ltd., 786 F. Supp. 761, 777 (E.D. Wis. 1992), *aff'd United States v. LeBeau*, 985 F.2d 563 (7th Cir. 1992)).

[217] 521 U.S. at 932.

[218] *New York*, 505 U.S. at 165-66.

[219] Amar, *supra* note 81, at 1426.

[220] *Id.* at 1494; *see generally U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) (observing that the Constitution's great innovation is that "citizens ... have two political capacities, one state and one federal, each protected from incursion by the other...." It is a "legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it").

[221] *The Federalist* No. 28 (Alexander Hamilton) (Gideon ed., 1818), *available at* http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php%3Ftitle=788&Itemid=27 (last visited Dec. 13, 2010).

[222] If this argument proves unpersuasive, advocates of federalism should consider challenging the notion that only federal laws that regulate "states as states" can violate principles of state sovereignty. After all, one reason principles of federalism preclude regulating states directly is to prevent the immense concentration of power that would necessarily accrue to the federal government, which would frustrate the purpose of federalism in balancing power against power. *See Printz*, 521 U.S. at 922. But the ultimate purpose of dividing power is to leave people free. So the distinction between regulating states directly and regulating people directly makes little sense if the federal government could invade the entire jurisdiction of the state and deprive the same amount of freedom through direct regulation. To put it bluntly, from the perspective of federalism's ultimate purpose of securing liberty, simply prohibiting the federal government from commandeering the states while allowing it to accomplish the same objects by regulating people directly does not effectively secure liberty, nor does it really divide power. The argument that the federal government's total occupation of the state's jurisdiction is justifiable because federal officials can be held politically accountable when they act directly on the people hardly explains the vision of federalism entailed by *The Federalist* No. 28's description of the people throwing their weight into the scale of one government or another. It seems clear that the Founders did not want the ballot box to provide the sole means of resisting federal usurpation of state sovereignty; rather, they anticipated that the people would resist federal usurpation of state sovereignty through exerting state sovereignty to resist the federal government. That simply cannot happen if the federal government has total power to bypass state sovereignty, occupy the state's entire jurisdiction, and regulate the people directly. Therefore, to the extent that the functional purpose of federalism—effectively dividing power and protecting liberty—defines the exclusive scope of state sovereignty, there must also be a rule against federal occupation of so much of the state's jurisdiction that the people are left unable to use state sovereignty to effectively resist encroachments into their liberty by the federal government.

[223] U.S. Const. amend. XIV, sec. 5.

[224] *Ex parte Virginia*, 100 U.S. 339, 345-46 (1880) (analogizing Section 5 of the 14th Amendment to the Necessary and Proper Clause and stating, "Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power"); *Katzenbach v. Morgan*, 383 U.S. 301, 324, 326 (1966) (observing by including Section 5 of the 14th Amendment, "the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause") (citing *id.*; *Strauder v. West Virginia*, 100 U.S. 303, 311 (1880); *Virginia v. Rives*, 100 U.S. 313, 318 (1880)); *see also* U.S. Department of Justice, Office of Legal Policy, *Guidelines on Constitutional Litigation* 58-59 (Feb. 19, 1988). Notably, the author attempted to determine the current status of the interpretative policies set out in the previous Department of Justice publication by asking for every "document generated, published or otherwise disseminated by the Department of Justice, Office of Legal Policy, during the Obama Administration" addressing the publication on December 22, 2009 (under request number: OLP/10-R0358, CLM:VRB:VAV). The Freedom of Information Act request was denied on April 15, 2010, by Carmen L. Mallon, Chief of Staff, Office of Information Policy.

[225] *See, e.g., Katzenbach v. Morgan*, 384 U.S. 641 (1966).

[226] 521 U.S 507 (1997).

[227] 557 U.S. _____, 129 S.Ct. 2579 (2009).

[228] Natelson, *Tempering*, *supra* note 202, at 95, 97-99, 102 (citing Joseph Story, 3 *Commentaries on the Constitution of the United States* § 1239 (1833)).

[229] *See* Motion to Dismiss, *State of Florida v. U.S. Dept. of Health and Human Services*, no. 3:10 CV 00091 (in the U.S. District Court of Florida, June 16, 2010).

[230] *Thomas More Law Ctr.*, 2010 U.S. Dist. LEXIS at *25-27.

[231] Byron Schlomach, *Michigan Health Care Ruling Fails Economics Test*, Goldwater Institute Daily Email (Oct. 21, 2010); Byron Schlomach, *Removing the Middleman: What States Can Do to Make Health Care More Responsive to Patients*, Goldwater Institute Policy Report no. 230 (Jan. 13, 2009).

[232] Interview with Dr. Byron Schlomach, Director, Center for Economic Prosperity, Goldwater Institute (Nov. 2, 2010).

[233] 262 U.S. 447, 485-86 (1923).

[234] *Id.* at 487.

[235] *Flast v. Cohen*, 392 U.S. 83 (1968); *but see Arizona Christian School Tuition Organization v. Winn*, 563 U.S. _____ (2011).

[236] *See, e.g., Bartley v. United States*, 123 F.3d 466, 470 (7th Cir. 1997); *Lamm v. Volpe*, 449 F.2d 1202 (10th Cir. 1971); *Troutman v. Shriver*, 417 F.2d 171 (1969).

[237] *Howlett v. Rose*, 496 U.S. 356, 367 (1990) ("Federal law is enforceable in state courts ... because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature").

[238] *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-78 (1981) ("[S]tate court may assume subject matter jurisdiction ... absent provision by Congress to the contrary or disabling incompatibility between federal claim and state court adjudication").

[239] *Stalnaker v. Boeing Co.*, 186 Cal. App. 3d 1291, 1303-05 (Ct. App. 1986) (allowing state court to entertain lawsuit based on *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 397 (1971)); Gene R. Nichol, *Bivens, Chilicky and Constitutional Damages Claims*, 75 Va. L. Rev. 1117, 1131 (1989) ("[O]ne assumes if a state court were presented with a Fourth Amendment claim against a federal official, and if the defendant refused to exercise removal rights, the state tribunal would be bound, under Bivens itself, to entertain the suit").

[240] Harold J. Krent, *Article: A Symposium on Morrison v. Olson: Addressing the Constitutionality of the Independent Counsel Statute: Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 Am. U. L. Rev. 275 (1989).

[241] *Testa v. Katt*, 330 U.S. 386, 394 (1947).

[242] *United States v. Lee*, 106 U.S. 196 (1882).

[243] *Leedom v. Kyne*, 358 U.S. 184, 188 (1958); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690 (1949) (holding that "the conduct against which specific relief is sought is beyond the officer's power and is, therefore, not the conduct of the sovereign"); *Clinton v. Babbitt*, 180 F.3d 1081, 1087 (9th Cir. 1999); *Kelley v. United States*, 69 F.3d 1503, 1507 (10th Cir. 1995) (holding that sovereign immunity is inapplicable "in declaratory and/or injunctive relief suits against federal entities or officials seeking to enjoin the enforcement of an unconstitutional statute"); *State of Alaska v. Babbitt*, 38 F.3d 1068, 1076 (9th Cir. 1994); *Kozero v. Spirito*, 723 F.2d 1003, 1008 (1st Cir. 1983).

[244] *Lee*, 106 U.S. at 197.

[245] *Lee*, 106 U.S. at 220-23.

[246] *Id.*

[247] *Cooke v. Iverson*, 122 N.W. 251, 253 (1909) (holding, "If a statute be unconstitutional it is as if it never had been. Rights cannot be built up under it, and, if an executive officer attempts to enforce it, his act is his individual and not his official act, and he is subject to the control of the courts as would be a private individual") (citing Thomas Cooley, *Constitutional Limitations* 250 (1868); *Ex Parte Young*, 209 U.S. 123 (1908)).

[248] 28 U.S.C. § 1442 (2000) (establishing that a civil action against a federal officer commenced in state court may be removed to federal court); 28 U.S.C. 1442(a)(1) (stating that civil action commenced in state court against "any officer (or any person acting under that officer) of the United States or of any agency thereof" may be removed by them to United States district court).

[249] *Lujan v Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Honig v. Doe*, 484 U.S. 305, 317 (1988).

[250] Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 Harv. L. Rev. 1833, 1883-84 (2001).

[251] *Babbitt v. United Farm Works Nat'l Union*, 442 U.S. 289, 298 (1979).

[252] *San Diego County Gun Rights v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996).

[253] *Compare INS v. Chadha*, 462 U.S. 919, 939-43 (1983) (distinguishing "case or controversy" analysis from "political question" analysis), *Baker v. Carr*, 369 U.S. 186, 198-99 (1962) (distinguishing political question doctrine as one of "nonjusticiability" from "a lack of federal jurisdiction" under the "case or controversy" requirement of Article III), *Rescue Army v. Municipal Court*, 331 U.S.

549, 570 (1947) (distinguishing "the case and controversy limitation ... and the policy against entertaining political questions"), *with Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974) ("The concept of justiciability, which expresses the jurisdictional limitations imposed upon federal courts by the 'case or controversy' requirement of Art. III, embodies both the standing and political question doctrines...."), *Neely v. Benefits Review Bd.*, 139 F.3d 276, 279 (1st Cir. 1998) ("The 'case or controversy' label is used to embrace ... the requirement of a concrete dispute between adversaries, standing, ripeness, mootness and limitations relating to political questions"), *Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum*, 577 F.2d 1196, 1203 (5th Cir. 1978) ("Political questions have been held to be nonjusticiable and therefore not a 'case or controversy' as defined by Article III"), *Adams v. Vance*, 570 F.2d 950, 954 n.7 (D.C. Cir. 1978) ("an allegation of nonjusticiability [under the political question doctrine] calls into question our jurisdiction under Article III"); *see also* Laura A. Smith, *Justiciability and Judicial Discretion: Standing at the Forefront of Judicial Abdication*, 61 Geo. Wash. L. Rev. 1548, 1559 (1993) ("the political question doctrine ... is derived from the 'case or controversy' requirement of Article III").

[254] Hershkoff, *supra* note 250, at 1843-44.

[255] *Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1081-82 (Ohio 1999) (quoting 59 Am. Jur. 2d Parties 30 (1987).

[256] Colo. Const. art. VI, 3; Fla. Const. art. V, 3(b)(10); Me. Const. art. VI, 3; Mass. Const. pt. II, ch. III, art. III; Mich. Const. art. III, 1.III(8); N.H. Const. pt. II, art. LXXIV; R.I. Const. art. X, 3; S.D. Const. art. V, 5; Ala. Code 12-2-10 (1975); Del. Code Ann. tit. 10, 141 (1999); *Opinion of the Justices*, 624 So. 2d 107, 110 (Ala. 1993); *Mosley v. State*, 908 N.E.2d 599, 603 (Ind. 2009).

[257] *Ingram v. Shumway*, 164 Ariz. 514, 516 (Ariz. 1990); *Swearengen v. Johns*, 194 S.W.2d 445 (Ark. 1946); *Jasmine Networks v. The Superior Ct Santa Clara County*, 180 Cal. App. 4th 980, 990 (Ct. App. 2009); *City of Hartford v. Freedom of Info. Commission*, C.V. 93-533024, at 10 (Superior Ct. Conn. 1994); *Sheldon v. Powell*, 128 So. 258, 262 (Fla. 1930); *Life of the Land v. Land Use Comm'n*, 623 P.2d 431, 438 (Haw. 1981); *People v. $1,124,905 US Currency and One 1988 Chevy Astro Van*, 685 N.E.2d 1370, 1377 (Ill. 1997); *Reyes v. Prince George's County,* 380 A.2d 12, 14-17 (Md. 1977); *Hince v. O'Keefe*, 632 N.W.2d 577, 585 (Minn. 2001) (holding that "claims were filed based on the Minnesota Declaratory Judgment Act, Minn. Stat. § 555.01 ... [u]nder the Act, claims are justiciable where there is any reasonable uncertainty and insecurity in the exercise of one's legal rights"); *Green v. Cleary Water, Sewer & Fire Dist.*, 17 So.3d 559, 568 (Miss. 2009); *Ohio Acad. of Trial Lawyers*, 715 N.E.2d at 1081-82.

[258] *Certain Underwriters at Lloyd's v. Nat'l Installment Ins. Servs.*, C.A. No. 19804-VCP, at 22 (Ct. of Chancery of DE 2007); *Godfrey v. State*, 752 N.W.2d 413, 864 (Ia. 2008); *Morrison v. Sebelius*, 179 P.3d 366, 380 (Kan. 2008); *Garriga v. Sanitation Dist. No. 1*, No. 2001-CA-002593-MR, at 18 (KY Ct. App. 2001); *Plan Helena v. Helena Regional Airport Authority Board*, 226 P.3d 567, 569 (Mont. 2010); *ACLU v. City of Albuquerque*, 188 P.3d 1222, 1226 (NM 2008); *Conservation Law Foundation v. Gray*, C.A. No. PC 05-1958, at 6 (Sup. Ct. RI 2006); *Norma Faye Pyles Lynch Family Purpose v. Putnam County*, 301 S.W.3d 196, 202-03 (TN 2009); *Chenequa Land Conservancy v. Village of Hartland*, 685 N.W.2d 573, 579 (WI Ct. App 2004); *Brown v. Div. of Water Rights of Dept. of Natural Resources*, 228 P.3d 747 (UT 2010).

[259] Hershkoff, *supra* note 250, at 1853-54.

[260] Goldwater Institute, "Some Stars Are Brighter Than Others," http://goldwaterinstitute.org/brightstars/ (last visited Dec. 13, 2010) (adjusting weighting to only show ranking based on taxpayer standing).

[261] *See State v. Johnson*, 990 P.2d 1277, 1284 (N.M. 1999) (recognizing a "great public importance" exception to Article III-like standing requirements in cases alleging "clear threats to the essential nature of state government guaranteed to New Mexico citizens under their Constitution," but still refusing to waive standing in a case that challenged the constitutionality of legislation authorizing Indian gaming in New Mexico).

[262] *Johnson v. Fankell*, 520 U.S. 911, 922 (1997) (observing that the importance of federalism "is at its apex when we confront a claim that federal law requires a state to undertake something as fundamental as restructuring the operation of its courts ... it is a matter for each state to decide how to structure its judicial system").

[263] *Asarco Inc. v. Kadish*, 490 U.S. 605, 617 (1989) (holding that "the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law").

[264] *Int'l Primate Prof. League v. Admin. Of Tulane Educ. Fund*, 500 U.S. 72, 89 (1991); *Mesa v. California*, 489 U.S. 121, 136-37 (1989) (refusing removal of criminal case against federal officers under 28 U.S.C. § 1442 where no federal defense present, stating that "the federal character of the litigant should not alone confer jurisdiction upon a federal court"). Notably, merely asserting that a state law conflicts with the Constitution does not sustain federal question jurisdiction under 28 U.S.C. § 1441(a). *Tenn. v. Union & Planter's Bank*, 152 U.S. 454, 464 (1894).

[265] 28 U.S.C. § 1447(c); *Lapides v. Bd. of Regents*, 535 U.S. 612, 619-27 (2002); Christopher R. McFadden, *Removal, Remand and Reimbursement under 28 U.S.C. § 1447(c)*, 87 Marq. L. Rev. 123, 139 (2003).

[266] 28 U.S.C. § 1442(a) authorizes removal of cases in which federal officials are named and when they assert a colorable federal defense. *Venable v. Richards*, 105 U.S. 636 (1882); *Tennessee v. Davis*, 100 U.S. 257, 261 (1880); *The Mayor v. Cooper*, 6 Wall. 247 (1868). The existence of a colorable federal defense, however, must be specifically pled by the federal agent in giving notice of removal; otherwise removal will be refused. *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 808 (1986); *Maryland v. Soper*, 270 U.S. 9, 34 (1926). But even if a federal official specifically alleges a colorable federal defense, that fact does not necessarily furnish federal courts with Article III jurisdiction over the case. Simply put, a colorable federal defense to an otherwise nonjusticiable claim does not give a federal court jurisdiction over the case under Article III, because if the federal court lacks jurisdiction over the claim, it has no power to reach any defense to that claim.

[267] *Martin v. Hunter's Lessee*, 14 U.S. 304, 337-61 (1816).

[268] U.S. Const. art. III, sec. 1.

[269] *Scranton v. Wheeler*, 179 U.S. 141 (1900); *Teal v. Felton*, 53 U.S. 284 (1851).

[270] *Tarble's Case*, 80 U.S. 397, 412 (1871) (prohibiting issuance of writ of habeas corpus by state court to federal official); *McClung v. Silliman*, 19 U.S. 598, 604 (1821) (holding mandamus unavailable against federal officials in state court because Congress has not enacted law allowing mandamus against federal officials in federal court); *but see Perez v. Rhiddlehoover*, 247 F. Supp. 65, 68 n. 8 (E.D. La. 1965) (observing that McClung is no longer binding because Congress now authorizes the remedy of mandamus against federal officials in federal court).

[271] *Kindell v. United States*, 37 U.S. 524, 624 (1838) (allowing mandamus against postmaster general).

[272] 80 U.S. at 402-11.

[273] 62 U.S. 506 (1859).

[274] *Id.* at 507.

[275] *Id*. at 514.

[276] *Id.*

[277] *Id*. at 523.

[278] *Larson v. Domestic & Foreign Commerce Corp*., 337 U.S. 682, 701-02 (1949) (jurisdiction to enjoin federal official requires allegation that the official's action is outside of his statutory authority).

[279] *See generally* 1 Moore's Federal Practice 247 (2nd ed. 1966).

[280] 68 Cal. Rptr. 3d. 656 (Cal. Ct. App. 2007).

[281] *County of San Diego v. San Diego NORML*, 165 Cal. App. 4th 798 (Cal. Ct. App. 2008).

[282] *Qualified Patients' Association v. City of Anaheim*, no. 07CC09524 (Cal. Ct. App. Aug. 18, 2010).

[283] *Cynthia Townsley Willis v. Michael Winters*, no. A139875 (Ore. Ct. App. June 16, 2010).

[284] *Harmon Indus. v. Browner*, 191 F.3d 894, 902 (8th Cir. 1999) (holding "[p]rinciples of res judicata embodied in the Full Faith and Credit Act, 28 U.S.C. § 1738 (1982) … see also U.S. Const. art. 4, § 1, require federal courts to give preclusive effect to the judgments of state courts whenever the state court from which the judgment emerged would give such an effect").

[285] *Backnight v. Monroe County*, 446 F.3d 1327, 1332 (11th Cir. 2006).

[286] Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L. J. 1425, 1513 (1987) (arguing converse-1983 statute would be permissible because the federal government would not be challenged by the resulting litigation, only "illegitimate, ultra vires conduct that lacks constitutional sanction").

[287] *Horne*, 557 U.S. at _____, 129 S.Ct 2579.

[288] Associated Press, *Search Is on for Test Case of States' Rights, Deseret News* A3 (May 20, 1994).

[289] New Hampshire H.B. 0619, ch. 17-P, 8 (Apr. 1995), *available at* http://www.gencourt.state.nh.us/legislation/1995/HB0619.html (last visited Dec. 14, 2010).

[290] Pennsylvania H.B. 3058 (Oct. 4, 1994), *available at* http://www.legis.state.pa.us/cfdocs/legis/PN/public/BtCheck.cfm?txtType=HTM&sessYr=1993&sessInd=0&billBody=H&billTyp=B&billNbr=3058&pn=4284l (last visited Sept. 21, 2010).

[291] Illinois SB 0142 (Jan. 11, 1995), *available at* http://libsysdigi.library.uiuc.edu/ilharvest/ILLegislative/v01995i00002/finallegislativev01995i00002_ocr.txt (last visited Dec. 14, 2010).

[292] Oregon SB 1061, 68th Sess. (1995).

[293] Patty Henetz, *Utah Guv Stakes a Claim on Roads,* Salt Lake Tribune (Jan. 28, 2008).

[294] Dustin Hurst, *Harwood Wants a Gun Fight with Feds, Idaho Reporter (Feb. 18, 2010), available at* http://www.idahoreporter.com/2010/harwood-wants-a-gun-fight-with-feds/ (last visited Dec. 14, 2010).

[295] Marty Trillhaase, *If Anybody Can Out-Utah Utah, Idaho Can, Magicvalley.com (Twin Falls, Idaho) (April 4, 2010), available at* http://www.magicvalley.com/news/opinion/editorial/article_b00ec6d0-06fe-5b55-91e9-718f8c19aa0e.html (last visited Dec. 14, 2010).

[296] *Panel Votes to Bar Woods from Fight vs. U.S,* Arizona Daily Star (Mar. 8, 1995).

[297] 942 P.2d 428 (Ariz. 1997).

[298] Associated Press, *States' Rights Council Ruled Unconstitutional,* Kingman Daily Miner (July 16, 1997).

[299] A.R.S. § 41-401.

[300] *Compare* Ariz. Const. art. 3, *with* Utah Const. art. 5, § 1.

[301] *See* Idaho Const. art. 4, § 20.

[302] Goldwater Institute, Some Stars Are Brighter Than Others, http://goldwaterinstitute.org/brightstars/ (setting "structural limitations" weighting to maximum and all other weighting to minimum).

[303] 43 U.S.C. § 1712(c)(9) (Federal Land Policy and Management Act); 40 C.F.R. § 1610.3-1 (regulations implementing Federal Land Policy and Management Act); 42 U.S.C. §§ 7402(a) and 7421 (Clean Air Act); 42 U.S.C. § 4331(b)(1) (National Environmental Policy Act); 40 C.F.R. § 1506.2(c) (regulations implementing National Environmental Policy Act); 33 U.S.C. §§ 1251(g) and 1252(a) (Clean Water Act); 16 U.S.C. § 1604(a) (National Forest Management Act); 16 U.S.C. § 1533(b)(1)(A) (Endangered Species Act); 16 U.S.C. §§ 1271(c) and 1282(b)(1) (Wild and Scenic River Act); 16 U.S.C. § 2003(b) (Soil and Water Resources Conservation Act); 36 C.F.R. 212.53 (National Forest System); 6 U.S.C.A. § 112(c) (Homeland Security Act).

[304] 43 U.S.C. § 1712(c)(9) ("to the extent consistent with the laws governing the administration of the public lands, coordinate the land use inventory, planning, and management activities of or for such lands with the land use planning and management programs of other Federal departments and agencies and of the States and local governments within which the lands are located, including, but not limited to, the statewide outdoor recreation plans developed under the Act of September 3, 1964 (78 Stat. 897), as amended, and of or for Indian tribes by, among other things, considering the policies of approved State and tribal land resource management programs. In implementing this directive, the Secretary shall, to the extent he finds practical, keep apprised of State, local, and tribal land use plans; assure that consideration is given to those State, local, and tribal plans that are germane in the development of land use plans for public lands; assist in resolving, to the extent practical, inconsistencies between Federal and non-Federal Government plans, and shall provide for meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use programs, land use regulations, and land use decisions for public lands, including early public notice of proposed decisions which may have a significant impact on non-Federal lands. Such officials in each State are authorized to furnish advice to the Secretary with respect to the development and revision of land use plans, land use guidelines, land use rules, and land use regulations for the public lands within such State and with respect to such other land use matters as may be referred to them by him. Land use plans of the Secretary under this section shall be consistent with State and local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act").

[305] *Bar MK Ranches v. Yuetter*, 994 F.3d 735, 738 (10th Cir. 1993) (citing *United States v. Nixon*, 418 U.S. 693, 694-95 (1974)).

[306] *Uintah County v. Gale Norton*, Civil No. 2:00-cv-0482, ECF docs. 63, 71 (Utah D.C. 2001) (on file with author); *see generally N.M. ex rel. Richardson v. Bureau of Land Management*, 565 F.3d 683, 719 (10th Cir. 2009) ("FLPMA [the Federal Land Policy and Management Act] requires BLM to coordinate its land use planning with state governments. 43 U.S.C. § 1712(c)(9) (providing that BLM shall "coordinate the land use inventory, planning, and management [of federal lands] with the land use planning and management programs ... of the States and local governments within which the lands are located"). Governors must have

the opportunity to advise the Bureau of Land Management (BLM) of their positions on draft land use plans, and the BLM must consider this input and ensure that "land use plans ... [are] consistent with State and local plans to the maximum extent ... [the Secretary of the Interior] finds consistent with Federal law").

[307] Fred Kelly Grant, *Coordination Workbook: A Strategy for Local Control* 85-93 (Stewards of Liberty 2009).

[308] Nick Dranias, *The Local Liberty Charter: Restoring Grassroots Liberty to Restrain Cities Gone Wild*, 3 Phoenix L. Rev. 113, 195-96 (2010) (citing Fred Kelly Grant, *Successes of the County Planning Process in Owyhee County*, http://www.stewards.us/CoordinatingCounties/cc-owyheesuccess.html (last visited Apr. 6, 2010)).

[309] *Id.*

[310] *See, e.g.*, *California Resources Agency v. U.S. Department of Agriculture*, 2009 U.S. Dist. LEXIS 89991 at *38-40 (N.D. Cal. 2009) (observing, "California argues that the Forest Service ignored the State's policy on roadless areas; however, the letters submitted into evidence by California do not reveal a clear policy regarding the treatment of roadless areas in the forest plans. The letters Secretary Chrisman sent to federal officials contained broad slogans, e.g., 'truly roadless areas [should] remain roadless,' but list only four substantive, albeit quite general, points. Moreover, the letters and the subsequent agreement by the Forest Service to follow Chrisman's four points do not specify that the concerns or agreement pertain to the forest plans themselves rather than to specific activities under the interim roadless rule then in place. California has failed to point to any policy more specific than the four points articulated in Chrisman's January 2005 letter to the Regional Forester. California did ultimately articulate specific policy recommendations regarding roadless areas, timber harvesting and other issues, which the State submitted with its July 12, 2006, petition to the U.S. Secretary of Agriculture; however, the FEIS [Final Environmental Impact Statement] had already been reissued by that time. *The absence of a clearly articulated policy at the time the forest plans and FEIS were issued undermines California's contention that the Forest Service ignored such policy*") (emphasis added).

[311] *Id. Uintah County*, *supra* note 306, ECF doc. 71, at 3 (holding "the BLM issued the decision [to release the wild horses] without complying with the procedural requirements of 43 U.S.C. §1712(c)(9) and 43 C.F.R. §§ 1610.1, 1610.2 (2000), thereby violating the County's and Tribe's rights to consultation, coordination and consistency review"); *American Motorcyclist Assoc. v. Watt*, 534 F. Supp. 923, 935-36 (C.D. Calf. 1981) (refusing preliminary injunction for failure to coordinate but observing "Plaintiff Inyo County also claims that the BLM has violated § 202(c)(9) of FLPMA, 43 U.S.C. § 1712(c)(9), and 43 C.F.R. § 1601.4, which provide for the coordination of BLM resource management plans with the management plans of state and local governments. BLM State Directors and District Managers are required to keep apprised of state and local plans, to assure that consideration is given to them and to assist in resolving inconsistencies between BLM plans and such plans to the extent practical. Defendants claim to have taken state and local land use plans into account in developing the Plan and to have resolved inconsistencies to the extent required by § 1601.4.... Since this procedure was not followed in that defendants have not presented adequate evidence of their response to Inyo County's list of inconsistencies, I conclude that it is likely that Inyo County will be able to prove violations of 43 U.S.C. § 1712(c)(9) and 43 C.F.R. § 1601.4 at trial"); *California Native Plant Society v. City of Rancho Cordova*, 172 Cal. App. 4th 603, 614 (Ct. App. 2009) ("Although the City suggests 'coordination' is synonymous with 'consultation'—and therefore the City satisfied its 'coordination' obligation under the general plan at the same time it satisfied its 'consultation' obligation under the plan—that is not true. While the City could 'consult' with the Service by soliciting and considering the Service's comments on the draft EIR [Environmental Impact Report], the City could not 'coordinate' with the Service by simply doing those things. The City may be correct in asserting that '[c]onsultation is not a synonym for "agreement,"' but Action NR.1.7.1 required more than 'consultation' with the Service; it required 'coordination,' and by definition 'coordination' implies some measure of cooperation that is not achieved merely by asking for and considering input or trying to work together. Had the City intended the obligation under Action NR.1.7.1 to be one of mere 'consultation,' it could have used that word, as it did in Action NR.1.1.3. The fact that it did not do so supports the conclusion that the City intended 'coordination' to have a different meaning than 'consultation,' consistent with the dictionary definitions of those words"); *cf. Pueblo of Sandia v. United States*, 50 F.3d 856, 862 (10th Cir. 1995) (requiring good faith effort by agency in mandatory "consultations"); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1404 (9th Cir. 1995) (delisting snail from endangered species list because of failure to give notice of decision to county commission); *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 714 (8th Cir. 1979) ("We also agree that the Bureau's action was procedurally defective in that it was not made in accordance with the Bureau's own procedure requiring prior consultation with the Tribe"); *S. Utah Wilderness Alliance v. Norton*, 237 F. Supp. 2d 48, 52-54 (D.D.C. 2002) (holding that in environmentalist challenge to adequacy of consultations and coordination among federal agencies in examining alternatives to the proposed action, "an agency's consideration ... must be more than a pro formal ritual").

[312] *Kane County v. Kempthorne*, 495 F. Supp. 2d 1143, 1161 (D. Utah 2007).

[313] ALEC, "State Sovereignty through Local Coordination Act," available at http://www.alec.org/AM/Template.

cfm?Section=Natural_Resources&Template=/MembersOnly.cfm&ContentID=14641&FusePreview=False (last visited November 5, 2010).

[314] *Mondou v. New York*, 223 U.S. 1 (1912).

[315] Richard H. Seamon, *The Sovereign Immunity of States in Their Own Courts*, 37 Brandeis L.J. 319, 357-74 (1998).

[316] *Alden*, 527 U.S. at 749.

[317] Mikos, *supra* note 201 (observing that, despite federal laws against marijuana possession, "[o]nly one percent of the roughly 800,000 marijuana cases generated every year are handled by federal authorities").

[318] Gardner, *supra* note 150, at 92.

[319] U.S. Advisory Commission on Intergovernmental Relations, *supra* note 27, at 19 (citing Joseph E. Zimmerman, "Federal Preemption of State and Local Government Activities," paper presented before the 1986 Annual Meeting of the American Political Science Association, Washington, D.C., at 16-20; Joseph E. Zimmerman, *Regulating Atomic Energy in a Federal System*, Publius: The Journal of Federalism 18 (Summer 1988); Water Quality Act of 1965, 79 Stat. 903, 33 U.S.C. § 1151, *et seq.*).

[320] James H. Johnson, Jr. & Donald Zeigler, 20 *Nuclear Protection Action Advisories: A Policy Analysis and Evaluation*, Growth and Change 51, 53-54 (Fall 1989).

[321] U.S. Advisory Commission on Intergovernmental Relations, *supra* note 27, at 19.

[322] Electronic Privacy Information Center, *REAL ID Implementation Review: Few Benefits, Staggering Costs* (May 2008), *available at* http://epic.org/privacy/id-cards/epic_realid_0508.pdf (last visited December 12, 2010).

[323] National Governors Association, National Conference of State Legislatures, & American Association of Motor Vehicle Administrators, *REAL ID Act: National Impact Analysis* (Sept. 2006), *available at* http://www.nga.org/Files/pdf/0609REALID.pdf (last visited Sept. 21, 2010); Department of Homeland Security, *Regulatory Evaluation: Final Rulemaking, 6 CFR Part 37* (Jan. 17, 2008), *available at* http://www.regulations.gov/fdmspublic/ContentViewer?objectId=0900006480538c1b&disposition=attachment&contentType=pdf (last visited Dec. 12, 2010).

[324] American Civil Liberties Union, Anti-Real ID Legislation in the States, http://www.realnightmare.org/news/105/ (last visited Dec. 12, 2010).

[325] Joseph Zimmerman, *Contemporary American Federalism: The Growth of National Power* 65-67 (2nd ed., State University of New York Press 2008) (citing the Clean Water Act, Clean Air Act, Safe Drinking Water Act, Surface Mining Control and Reclamation Act, Occupational Safety and Health Act, Wholesome Meat Act, and Environmental Pesticide Control Act).

[326] Gardner, *supra* note 150, at 92-98.

[327] *Id.* at 96.

[328] *Id.* at 66.

[329] *Cf.* Department of Transportation and Related Agencies Appropriation Act of 1986, 99 Stat. 1288 (1986) (stipulating that the Secretary of Transportation is authorized to remove toll limitations on the petition of the governor); Nuclear Waste Policy Act of 1982, 96 Stat. 2217 (1982) (construction site selected by Secretary of Energy for high-level radioactive waste facility may be vetoed by the governor or the state legislature subject to congressional override); *see generally* Department of Transportation and Related Agencies Appropriations Act, 106 Stat. 1520 (1992) (allowing the state to reject conditions placed on receipt of federal highway funds through gubernatorial objection and legislative resolution).

[330] Villarreal, *The Federal Government is Sending $16 Million in Stimulus Funds to Pima County to Combat Obesity*, Arizona Daily Star (March 13, 2010) ("The Centers for Disease Control and Prevention is giving the county the grant, titled Communities Putting Prevention to Work—Obesity, Nutrition & Physical Activity. It was appropriated by the American Recovery and Reinvestment Act"), *available at* http://azstarnet.com/news/science/health-med-fit/article_1f8d7ee8-a678-5e4f-90cd-93fe74e5ac88.html?mode=story (last visited October 30, 2010).

[331] Pima County, Community Action Plan Reference Sheet: Communities Putting Prevention to Work, Outcome Objectives 1 through 3 (Mar. 2010) (on file with author).

[332] Maryam Abdul-Kareem & David Thornton, Harrison Institute for Public Law, Georgetown University Law Center, *Using Zoning to Create Healthy Food Environments in Baltimore City*, Report to Baltimore City Food Policy Task Force (Dec. 2009) (on file with author).

[333] Los Angeles, Cal., Ordinance 180103 (Jul. 29, 2008), *available at* http://clkrep.lacity.org/onlinedocs/2007/07-1658_ord_180103.pdf (last visited Dec. 12, 2010).

[334] Julie Samia Mair, Matthew W. Pierce, & Stephen P. Teret, *The Use of Zoning to Restrict Fast Food Outlets: A Potential Strategy to Combat Obesity*, Center for Law and the Public's Health at Johns Hopkins & Georgetown Universities 52 (Oct. 2005) (on file with author); *see also* Detroit Code, Chapter 61: Zoning Ordinance, § 61-12-91, *available at* http://www.detroitmi.gov/legislative/BoardsCommissions/CityPlanningCommission/docs%20for%20posting/Ch%2061%20November%201,%202008%20update.pdf (last visited Oct. 30, 2010).

[335] The Institute of Medicine Committee on Childhood Obesity Prevention Actions for Local Governments, *Local Government Actions to Prevent Childhood Obesity*, Report Brief (Sep. 2009) at 5, available at http://www.iom.edu/en/Reports/2009/ChildhoodObesityPreventionLocalGovernments.aspx (recommending (1) land use and zoning policies that restrict fast food establishments near school grounds and public playgrounds; and (2) local ordinances that restrict mobile vending of calorie dense, nutrient-poor foods near schools and public playgrounds); Mair, Pierce, & Teret, *supra* note 334, at 73 (recommending that "the objective of addressing obesity should be included in all levels of land use regulation including enabling legislation, comprehensive plans, municipal codes, and zoning ordinances. For example, often state or local law requires that a zoning ordinance conform to the 'comprehensive plan'").

[336] CDC, Zoning, http://www.cdc.gov/healthyplaces/healthtopics/healthyfood/zoning.htm (last visited Dec. 12, 2010).

[337] HHS, HHS.gov/Recovery: "Communities Putting Prevention to Work Grant Information," http://www.hhs.gov/recovery/programs/cppw/grantees.html (last visited Dec. 12, 2010).

[338] HHS, HHS.gov/Recovery: "Communities Putting Prevention to Work Grantees by State," http://www.hhs.gov/recovery/programs/cppw/granteesbystate.html (last visited Dec. 12, 2010).

[339] Southeastern Wisconsin Regional Planning Commission, Agricultural and Rural Land Preservation, http://www.sewrpc.org/SEWRPC/LandUse/AgriculturalandRuralLandPreservation.htm (last visited Dec. 12, 2010); *see generally* Wisconsin Smart Growth News, available at http://www.smartgrowth.org/news/bystate.asp?state=WI&res=1280 (last visited Nov. 6, 2010).

[340] Smart Growth Gateway, Financing Smart Growth Projects, Federal Government Funding, http://www.smartgrowthgateway.org/finance_federal.shtml (last visited Dec. 12, 2010); Edward T. Canuel, *Supporting Smart Growth Legislation and Audits: An Analysis of U.S. and Canadian Land Planning Theories and Tools*, 13 Mich. St. J. Int'l L. 309, 331 n. 128 (2005) (observing that "several U.S. federal programs subsidize or support smart growth-styled programs, such as: (a) The Transportation Equity Act, which allows federal funding for transit infrastructure, providing incentives for commuters using public transit; (b) brownfield redevelopment programs through incentives from the Environmental Protection Agency and the Department of Housing and Urban Development; (c) the issuance of state and local bonds, where investors receive tax credits instead of interest, and the proceeds of which are used by state or local governments to create farmland or wetlands and parks; and (d) creating empowerment zones eligible for tax exemptions and federal grants, in addition to school improvement and job creation programs. Funding issues present a real problem for planners. The lack of provincial tax dollars (as compared to U.S. federal subsidization of Smart Growth programs) also strips and undermines support to municipalities").

[341] *See, e.g.*, Rebecca L. Puskas, *Measure 37's Federal Law Exception: A Critical Protection for Oregon's Federally Approved Land Use Laws*, 48 B.C. L. Rev. 1301, 1336-39 (2007).

[342] Pat Taylor, *Congress Ponders "Federal Zoning Act": Critics of the Community Character Act Say Its Passage Would Lead to Federal Infringement on the Rights of State and Local Governments to Manage Growth on Their Own,* Insight on the News (July 29, 2002), *available at* http://findarticles.com/p/articles/mi_m1571/is_27_18/ai_90114134/ (last visited Dec. 12, 2010); Patricia E. Salkin, *Zoning and Land Use Planning: Congress Misses Twice with the Community Character Act: Will Three Times Be a Charm?* 31 Real Est. L.J. 167, 168 (2002).

[343] ALEC Model Legislation *available at* http://www.alec.org/AM/Template.cfm?Section=Natural_Resources&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=10&ContentID=5670 (last visited Dec. 12, 2010).

[344] Ariz. Const. art. 9, §§ 3, 5.

[345] *Arizona, the Legislature, and the $3.2 Billion Budget Deficit*, Sedona Times (Feb. 3, 2010), *available at* http://sedonaeye.com/2010-arizona-the-legislature-and-the-3-2-billion-deficit/ (last viewed Dec. 12, 2010).

[346] Casey Newton, *End of KidsCare Could Cost State Billions from Feds*, Arizona Republic (Mar. 23, 2010), available at http://www.azcentral.com/arizonarepublic/news/articles/2010/03/23/20100323kids-care-cost-arizona-billions.html (last viewed Dec. 12,

2010).

[347] *Id*.

[348] Jeremy Duda, *Health Care Bill to Cost AZ More Than $1B per Year*, Arizona Capital Times (Mar. 25, 2010), *available at* http://azcapitoltimes.com/news/2010/03/25/ahcccs-health-care-bill-to-cost-az-more-than-1b-per-year/ (last visited Dec. 14, 2010).

[349] *Cf. Horne*, 557 U.S. _____, 129 S.Ct. at 2594 (observing that "federalism concerns are heightened when ... a federal court decree has the effect of dictating state or local budget priorities").

[350] Edmund Haislmaier and Brian Blasé, *The Obama Health Care Program : Impact on States*, Heritage Foundation Backgrounder no. 2433 (July 1, 2010).

[351] *Id.*

[352] *Id.*

[353] *Id.*

[354] *See generally Rutan v. Republican Party of Illinois*, 497 U.S. 62, 78 (1990).

[355] *New York*, 505 U.S. at 168 (asserting in dicta that "[i]f a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant. If state residents would prefer their government to devote its attention and resources to problems other than those deemed important by Congress, they may choose to have the Federal Government rather than the State bear the expense of a federally mandated regulatory program, and they may continue to supplement that program to the extent state law is not pre-empted. Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people").

[356] *Pennhurst State School v. Halderman*, 451 U.S. 1, 17 (1981) ("Turning to Congress' power to legislate pursuant to the spending power, our cases have long recognized that Congress may fix the terms on which it shall disburse federal money to the States. Unlike legislation enacted under 5, however, legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation") (citations omitted).

[357] *South Dakota v. Dole*, 483 U.S. 203, 207-12 (1987) (citing *Steward Machine Co.*, 301 U.S. at 589-90); *see generally* MCI *Telcoms. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 343-44 (7th Cir. 2000) (holding that "with Spending Clause waivers the states effectively enter into a 'contract' with Congress—in exchange for the federal funding, the state agrees to the terms offered by Congress.... In *Dole*, the gratuity was money; the condition was a higher drinking age").

[358] Celestine Ricard McConville, *Federal Funding Conditions: Bursting Through the Dole Loopholes*, 4 Chap. L. Rev. 163, 170 (2001).

[359] *Virginia Dept. of Ed. v. Riley*, 106 F.3d 559, 556-72 (4th Cir. 1997) (holding that a federal spending condition ambiguous and coercive); *School District of the City of Pontiac v. Secretary of the United States Department of Education*, 584 F.3d 253, 277 (6th 2009) (finding certain conditional grant mandates for No Child Left Behind too ambiguous to enforce); *see generally West Virginia v. U.S. Dept. of Health & Human Services*, 289 F.3d 281, 290 (4th Cir. 2002).

[360] *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006); *Barnes v. Gorman*, 536 U.S. 181, 186-87 (2002) ("Just as a valid contract requires offer and acceptance of its terms, 'the legitimacy of Congress' power to legislate under the spending power ... rests on whether the [recipient] voluntarily and knowingly accepts the terms of the 'contract.'... Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.' Although we have been careful not to imply that all contract-law rules apply to Spending Clause legislation, we have regularly applied the contract-law analogy in cases defining the scope of conduct for which funding recipients may be held liable for money damages") (citations omitted).

[361] *Cato Handbook for Policymakers* 69 (7th ed. 2009) (observing that "[p]oliticians have become skilled at pointing fingers of blame at other levels of government, as was evident in the aftermath of Hurricane Katrina").

[362] *Dole*, 483 U.S. at 210-11.

[363] Dranias, Breaking the Grip, *supra* note 25, at 24-26 (citing *Development Fin. Corp. v. Alpha Hous. & Health Care, Inc.*, 54 F.3d

156, 163 (3d Cir. 1995) ("An illegal contract can never provide the basis for a cause of action: 'The law when appealed to will have nothing to do with it, but will leave the parties just in the condition in which it finds them'") (citations omitted); *In re Loretto Winery Ltd*., 898 F.2d 715, 723 (9th Cir. 1990) (holding that "[c]ontracts for transactions that violate the law are illegal and void under California law"); *Stone v. Freeman*, 82 N.E.2d 571, 572 (N.Y. 1948) (holding "no court should be required to serve as paymaster of the wages of crime, or referee between thieves"); *Crichfield v. Bermudez Asphalt Paving Co.*, 51 N.E. 552, 556 (Ill. 1898) (observing that if performance "has an evil tendency, or furnishes a temptation to use improper means, the contract is illegal").

[364] *Id.* (citing *The Federalist* No. 51; *Gregory*, 501 U.S. at 458-459).

[365] *New York*, 505 U.S. at 182; *Nat'l League of Cities*, 426 U.S. at 852.

[366] *Pollard v. Hagan*, 44 U.S. 212, 223 (1845) (observing that "[w]hen Alabama was admitted into the union, on an equal footing with the original states, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession.... And, if an express stipulation had been inserted in the agreement, granting the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been void and inoperative: because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a state or elsewhere, except in the cases in which it is expressly granted").

[367] 301 U.S. at 597 ("The states are at liberty, upon obtaining the consent of Congress, to make agreements with one another. We find no room for doubt that they may do the like with Congress if the essence of their statehood is maintained without impairment") (citations omitted).

[368] *See supra* notes 146-55 and accompanying text.

[369] Gardner, *supra* note 150, at 98.

[370] *Id.* at 98.

[371] *Id.* at 98.

[372] Dranias, *Breaking the Grip*, *supra* note 25, at 23-24.

[373] U.S. Const. art. V.

[374] Robert G. Natelson, *Amending the Constitution by Convention: A Complete View of the Founders' Plan*, Goldwater Institute Policy Report no. 241, 3 (Sept. 16, 2010).

[375] *Id.* at 2.

[376] Kenneth Silber, *States, Activists Promote Constitutional Convention*, Insight on the News (June 26, 1995), *available at* http://findarticles.com/p/articles/mi_m1571/is_n25_v11/ai_17067486/ (last visited Dec. 14, 2010).

[377] Natelson, *Amending*, *supra* note 374, at 19; *see The Federalist* No. 43 (James Madison) (Gideon ed., 1818), available at http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php%3Ftitle=788&Itemid=27 (last visited Dec. 13, 2010). Claims that James Madison opposed states using the Article V convention process are refuted by his statement in the Report On The Virginia Resolutions, House of Delegates (1799-1800), at 501-02 (stating "two thirds of themselves (states), if such had been their opinion, might, by an application to Congress, have obtained a convention for the same object"), *available at* http://files.libertyfund.org/files/1908/Elliot_1314-04_EBk_v5.pdf (last visited April 7, 2011), and by Madison's Letter on Nullification (1830), *available at* http://www.constitution.org/rf/jm_18300801.htm, in which he urges "the final resort within the purview of the Constitution [to protect state sovereignty], lies in an amendment of the Constitution, according to a process applicable by the states."

[378]Natelson, *Amending*, *supra* note 374, at 5.

[379] Letter from George Washington to John Armstrong, April 25, 1788, available at http://gwpapers.virginia.edu/documents/constitution/1788/armstrong.html (last visited Dec. 14, 2010).

[380] *Id.* at 20; *see The Federalist* No. 85 (Alexander Hamilton) (Gideon ed., 1818), *available at* http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php%3Ftitle=788&Itemid=27 (last visited Dec. 13, 2010).

[381] *The Federalist* No. 40 (James Madison) (Gideon ed., 1818), *available at* http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php%3Ftitle=788&Itemid=27 (last visited Dec. 13, 2010).

[382] U.S. Art. Conf. art. XIII.

[383] *The Declaration of Independence* para. 2 (1776) (emphasis added).

[384] Resolution of Feb. 21, 1787, 32 *J. Continental Cong. 1774-1789*, at 74 (Roscoe R. Hill ed., reprint ed. 1968).

[385] 3 *Records of the Federal Convention of 1787* 706-36 (M. Farrand ed., 1911), *available at* http://oll.libertyfund.org/title/1787 (last visited Dec. 14, 2010).

[386] *Cases of Judges of Court of Appeals*, 1788 Va. LEXIS 3, *27 (1788) (using "revisal" to describe total rewrite of state laws); *Respublica v. Dallas*, 1801 Pa. LEXIS 56, **18 (Pa. 1801) (referring to a committee creating new state constitution as charged with "revising" the old constitution); *Waters v. Stewart*, 1 Cai. Cas. 47, 65-72 (N.Y. 1805) (using "revision" in the context of describing a total rewrite of state statutes); *Commonwealth v. Daniel Messenger*, 4 Mass. 462, 467, 469-70 (1808) (describing statutes as a "revision" of prior provincial laws and "revised" statute as replacing "former statute"); *Lessee of Ludlow's Heirs v. Culbertson Park*, 1829 Ohio LEXIS 36, **24-26 (Ohio 1829) (using "revision" to describe total rewrite and consolidation into one act all prior statutes); *see generally Strauss v. Horton*, 207 P.3d 48, 59 (Cal. 2009) (holding that "[w]hile both constitutional amendments and revisions require a majority of voters approval, a revision—which substantially alters the entire Constitution, the basic framework of the governmental structure or the powers held by one or more governmental branches—requires prior approval of two-thirds of each house of the California State Legislature") (citing Calf. Const. art. X (1849) ("Mode of Amending and Revising the Constitution"); Browne, Rep. of the Debates in Convention of Cal. on Formation of State Const. 354-61 (1850); *Livermore v. Waite*, 102 Cal. 113 (1894); Dodd, *The Revision and Amendment of State Constitutions* 118–120 (1910); Jameson, *A Treatise on Constitutional Conventions: Their History, Powers, and Modes of Proceeding* §§ 530–532, 550–552 (4th ed. 1887)). .

[387] Resolution of Feb. 21, 1787, 32 *J. Continental Cong. 1774-1789*, *available at* http://avalon.law.yale.edu/18th_century/const04.asp (last visited Dec. 14, 2010).

[388] Resolution of Feb. 21, 1787, 32 *J. Continental Cong. 1774-1789*, *available at* http://avalon.law.yale.edu/18th_century/const04.asp (last visited Dec. 14, 2010).

[389] Resolution of Sept. 28, 1787, 32 *J. Continental Cong. 1774-1789*, *available at* http://memory.loc.gov/cgi-bin/ampage?collId=bdsdcc&fileName=22801//bdsdcc22801.db&recNum=0&itemLink=r?ammem/bdsbib:@field(NUMBER+@od1(bdsdcc+22801))&linkText=0&presId=bdsbib (last visited Dec. 14, 2010).

[390] Resolution of Sept. 13, 1788, 32 *J. Continental Cong. 1774-1789*, available at http://memory.loc.gov/cgi-bin/ampage?collId=bdsdcc&fileName=2410h//bdsdcc2410h.db&recNum=0&itemLink=r?ammem/bdsbib:@field(NUMBER+@od1(bdsdcc+2410h))&linkText=0 (last visited Dec. 14, 2010).

[391] Until every state ratified it, the Constitution was functionally equivalent to a congressionally-approved treaty among the signing states, which the Articles of Confederation specifically authorized. *See* U.S. Art. Conf. art. VI.

[392] Natelson, *Amending*, *supra* note 374, at 8.

[393] James Wilson, Speech of October 28, 1787, reprinted in 1 *Online Library of Liberty: Collected Works of James Wilson* 166 (2007) (observing that "in this second branch of the legislature, each state, without regard to its importance, is entitled to an equal vote. And in the articles respecting amendments of this Constitution, it is provided 'That no state, without its consent, shall be deprived of its equal suffrage in the Senate.' Does it appear, then, that provision for the continuance of the state governments was neglected, in framing this Constitution? On the contrary, it was a favorite object in the Convention to secure them"), *available at* http://oll.libertyfund.org/title/2072 (last visited Dec. 14, 2010).

[394] U.S. Const. art. V.

[395] Natelson, *Amending*, *supra* note 374, at 25-26; *see also* Report of Proceedings on September 15, 1787 in Elliot's Debates (1905), at 356-58, *available at* http://files.libertyfund.org/files/1905/Elliot_1314-01_EBk_v5.pdf (last visited April 7, 2011).

[396] *Id.* at 15-17.

[397] *Id.* at 26.

[398] *Id.* at 15.

[399] *Id.*

[400] *Id.* at 26.

[401] *Id.* at 16.

[402] *Id.*

[403] *Id.*

[404] *Id.* at 2.

[405] *Id.* at 26.

[406] Natelson, *Amending*, *supra* note 374, at 2.

[407] *See* "Model Legislation," available at http://www.restoringfreedom.org (last visited November 6, 2010).

[408] *See* "Model Legislation," available at http://www.voteontaxes.org (last visited November 6, 2010).

[409] *See* "Model Legislation," available at http://www.10amendments.org/ (last visited November 6, 2010).

[410] *See* "Model Legislation," available at http://www.restoringfreedom.org (last visited November 6, 2010).

[411] Interview with Dr. Byron Schlomach, Director, Center for Economic Prosperity, Goldwater Institute (Nov. 5, 2010).

[412] Robert G. Natelson, *Learning from Experience: How the States Used Article V Applications in America's First Century*, Goldwater Institute Policy Report no. 10-06, 14-21 (Nov. 4, 2010).

[413] *Id.* at 14-21.

[414] U.S. Const. art. I, § 19 cl. 3.

[415] Frederick L. Zimmerman & Mitchell Wendell, *The Interstate Compact Since 1925*, 88-89 (1951).

[416] Caroline N. Broun, Michael L. Buenger, Michael H. McCabe, & Richard L. Masters, *The Evolving Use and the Changing Role of Interstate Compacts, A Practitioner's Guide* 18 (American Bar Association 2006).

[417] Zimmerman & Wendell, *supra* note 415, at 8.

[418] *Green v. Biddle*, 21 U.S. 1, 39-40 (1823)

[419] *U.S. Steel v. Multistate Tax Comm'n*, 434 U.S. 452, 459 (1978) (holding that only those interstate agreements that "enhance state power quoad the national government" are ineffective without the approval of Congress).

[420] *Id.* at 472.

[421] Patrick McGuinn, *E Pluribus Unum in Education? Governance Models for National Standards and Assessments: Looking Beyond the World of K-12 Schooling* 10 (Thomas B. Fordham Institute June 2010).

[422] Matthew Pincus, *When Should Interstate Compacts Require Congressional Consent*, 42 Col. J. Law & Social Prob. 511, 519 (2009) (citing William Kevin Voit, Nancy J. Vickers, and Thomas L. Gavenonis, *Council of State Governments, Interstate Compacts and Agencies 2003* (2003), *available at* http://www.csg.org/pubs/documents/2003_compacts_directory.pdf (last visited Dec. 12, 2010)).

[423] McGuinn, *supra* note 421, at 10.

[424] *Id.* at 13-20; *see also* Regional Greenhouse Gas Initiative, "Key Documents," http://www.rggi.org/states (last visited Dec. 12, 2010).

[425] *Dyer v. Sims*, 341 U.S. 22, 28 (1951) ("It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified, or given final meaning by an organ of one of the contracting States"); *Kentucky v. Indiana*, 281 U.S. 163, 178 (1930); *Green*, 21 U.S. at 92.

[426] *Virginia v. Tennessee*, 148 U.S. 503, 519-20 (1893) (citing Joseph Story, *Commentaries on the Constitution of the United States* (1st ed. 1833))

[427] *Colorado River Compact of 1922* (Aug. 18, 1921).

[428] An Act Granting the Consent of Congress to a Great Lakes Basin Compact, S. 660 (PL 90-419) (1968); *see, e.g.,* An Act to grant the consent of the Congress to the Tahoe Regional Planning Compact, 94 Stat. 3233, § 5 (1980) ("Nothing contained in this Act or in the compact consented to shall in any way affect the powers, rights, or obligations of the United States, or the applicability of any law or regulation of the United States in, over or to the region or waters which are the subject of the compact, or in any way affect rights owned or held by or for Indians or Indian tribes subject to the jurisdiction of the United

States").

[429] 36 Stat. 961, 16 U.S.C. § 552 (1911).

[430] Zimmerman & Wendell, *supra* note 415, at 41 n. 174 (citing P.L. 721, 81st Cong, 2nd Sess.).

[431] *Id.* at 16 & n. 78, 38 & n.162 (quoting Federal Power Commission, Memorandum to the Commerce Committee of the U.S. Senate on S.J. Res. 177, H.J. 430, H.J. 435, and H.J. 436).

[432] *Id.* (citing Franklin D. Roosevelt letter to Governor Cross, in *Connecticut Annual Report Connecticut Society of Civil Engineers* 61 (1938)).

[433] Zimmerman & Wendell, *supra* note 415, at 38 & n.162 (citing August 11, 1939 memorandum of disapproval).

[434] *Id.* (citing Art. XI, Republican River Compact; Republican River Compact, 86 Stat. 86 (1943)).

[435] *Id.* (citing Document No. 690, H.R. 77th Congress 2nd Session (Apr. 2, 1942)).

[436] McGuinn, *supra* note 421, at 10.

[437] *New Jersey v. New York*, 523 U.S. 767, 811 (1988) (holding that congressional approval "transforms an interstate compact within [the Compact Clause] into a law of the United States").

[438] David E. Engdahl, *Construction of Interstate Compacts: A Questionable Federal Question*, 51 Va. L. Rev. 987, 999-1002 (1965).

[439] *Pennsylvania v. Wheeling & Belmont Bridge Co*., 54 U.S. 518, 565-66 (1851).

[440] 304 U.S. 92, 109-10 (1938).

[441] *Delaware River Joint Toll Bridge Commission v. Colburn*, 310 U.S. 419 (1940).

[442] Engdahl, *supra* note 438, at 1004-12.

[443] *New York*, 523 U.S. at 811 (quoting *Cuyler v. Adams*, 449 U.S. 433, 438 (1981)).

[444] *Cuyler*, 449 U.S. at 439-40 (citing *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S., at 278; *United States ex rel. Esola v. Groomes*, 520 F.2d 830, 841 (3rd Cir. 1975) (Garth, J., concurring); *League to Save Lake Tahoe v. Tahoe Regional Planning Agency*, 507 F.2d 517 (9th Cir. 1974), *cert. denied*, 420 U.S. 974 (1975); Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale L.J. 685, 694-95, 735-48 (1925)).

[445] McGuinn, *supra* note 421, at 14 (referencing "the Interstate Insurance Receivership Compact, Northeast Interstate Dairy Compact, and the Interstate Compact for Adult Offender Supervision"); *see, e.g., Elcon Enterprises, Inc. v. Washington Metro Area Transit Authority*, 977 F.2d 1472 (D.C. Cir. 1992) (noting intra-circuit split and assuming without deciding that WMATA is a quasi-federal agency); *Coalition for Safe Transit, Inc. v. Bi-State Development Agency*, 778 F. Supp. 464 (E.D. Mo. 1991) (Bi-State quasi-federal agency subject to section 702 of federal APA).

[446] *Parkridge 6 LLC v. U.S. Department of Transportation*, 2010 U.S. Dist. LEXIS 34182 * 17-18 (E.D. Va. 2010).

[447] *McKenna v. Washington Metropolitan Area Transit Authority*, 829 F.2d 186 (D.C. Cir. 1987).

[448] Joseph Zimmerman, *Accounting Today: Regulation of Professions by Interstate Compact*, The CPA Journal (March 15-April 4, 2004) (observing, "What effect would a new congressional statute with conflicting provisions have on an interstate compact previously granted consent by Congress? The conflicting provisions in the consent would be repealed, with the exception of any vested rights protected by the Fifth Amendment to the U.S. Constitution"); *see generally Delaware River Joint Toll Bridge Com.*, 310 U.S. at 427.

[449] *Bryant v. Yellen*, 447 U.S. 352, 369 (1980) (holding that "nothing ... excuses the Secretary from recognizing his obligation to satisfy present perfected rights in Imperial Valley that were provided for by Art. VIII of the Compact").

[450] This is because current case law holds that an unconstitutional state law is voidable, not void, until the state law is actually challenged and struck down (so long as the state law is otherwise within the inherent sovereign power of the state to enact it). *Cf. Massachusetts v. Oakes*, 491 U.S. 576, 584 (1989) ("An overbroad statute is not void ab initio, but rather voidable, subject to invalidation"). Just as a voidable contract can be made effective through ratification, congressional approval of an interstate compact that incorporates a voidable state law should give the state law the status of federal law. And if the only defect in the state law were that it clashed with the Supremacy Clause, that defect would thus be waived by virtue of the state law acquiring the status of federal law through incorporation into a congressionally-approved interstate compact.

[451] U.S. Const. art. I, § 10.

[452] U.S. Const. art. I, § 7, para. 2.

[453] *Hollingsworth v. Virginia*, 3 U.S. 378 (1798); *Consumer Energy Council of Am. v. FERC*, 673 F.2d 425, 460 (D.C. Cir. 1982) ("By not mentioning presidential participation, Article V, which sets forth the procedure for amending the Constitution, makes clear that proposals for constitutional amendments are congressional actions to which the presentation requirement does not apply"); Special Constitutional Convention Study Committee, American Bar Association, *Amendment of the Constitution by the Convention Method under Article V* 25 (1974) ("There is no indication from the text of Article V that the President is assigned a role in the amending process").

[454] Zimmerman & Wendell, *supra* note 415, at 94 (1951) ("On the face of the Constitution, it would seem that the concurrent resolution, over which the President has no control, also should be available as a means of giving consent to compacts").

[455] Author's research on www.lexis.com.

[456] *Compare* Zimmerman & Wendell, *supra* note 415, at 93 & n. 334, 94 ("Virtually without exception, consent to compacts has been given by act of Congress or by joint resolution. It follows that presidential signature or the overriding of a veto has been a necessary part of the consent process ... whatever the original meaning of the consent requirement may have been with regard to compacts, settled usage now has definitely established the President's power to participate in the consent process"); *with* Michael Greve, *Compacts Cartels and Congressional Consent*, 68 Mo. L. Rev. 285, 319 n. 138 (Spring 2003) ("Whereas affirmative federal legislation is of course subject to presentment and presidential veto, the state activities listed in Article I, Section 10 are subject only to the consent of the Congress, thus rendering approval of compacts somewhat easier to obtain than ordinary legislation"); Seth Barrett Tillman, *A Textualist Defense of Article I, Section 7, Clause 3: Why* Hollingsworth v. Virginia *Was Rightly Decided, and Why* INS v. Chadha *Was Wrongly Reasoned*, 83 Tex. L. Rev. 1265, 1349 n.183 (2005) ("A Congress that acts pursuant to a provision demanding 'consent' of both houses may very well have met the minimum requirement of the clause. However, by bypassing the President, the Congress might thereby have excluded the federal courts from enforcing its edict"); Adam Schleifer, *Interstate Agreement for Electoral Reform*, 40 Akron L. Rev. 717, 742 (2007) ("The new rule would then be that every time Congress consents to an interstate agreement, the agreement becomes federal law. This seems an eminently reasonable and possible holding. As discussed previously, it is unclear what this concept adds to the regime anyway. The subject matter of the compact itself only seems relevant under a theory of delegation whereby Congress is simply delegating its lawmaking authority to the states. But such a theory would seemingly violate the Presentment Clause in that the President is excluded from the process"); David Engdahl, *The Contract Thesis of the Federal Spending Power*, 52 S.D. L. Rev. 496, 499 n. 19 (2007) ("Among the powers constitutionally vested in Congress that seem non-legislative in character (even if performed in conventional parliamentary form—i.e., by bill or resolution, and even if with presentment) are those conferred by, e.g., U.S. Const. art. I, § 10, cl. 3 (consent to state 'Agreements or Compacts,' tonnage duties, or state troops or ships, or state engagement in war); U.S. Const. art. IV, § 3, cl. 2 (admission of new states and management and disposal of United States property); U.S. Const. art. V (proposing, or calling conventions for proposing, constitutional amendments); U.S. Const. amend. XXV (determining presidential inability or ability to discharge duties of office). From time to time, some of these have been mistakenly regarded by courts (even by the Supreme Court, and even within the past few decades) as legislative powers; but the historical mainline of the case law, and the principled common sense of the provisions in context, is to the contrary")).

[457] *Virginia v. Tennessee*, 148 U.S. 503, 521 (1893) ("The Constitution does not state when the consent of Congress shall be given, whether it shall precede or may follow the compact made, or whether it shall be express or may be implied. In many cases the consent will usually precede the compact or agreement, as where it is to lay a duty of tonnage, to keep troops or ships of war in time of peace, or to engage in war. But where the agreement relates to a matter which could not well be considered until its nature is fully developed, it is not perceived why the consent may not be subsequently given. Story says that the consent may be [an] implied act of Congress, admitting such State into the Union, is an implied consent to the terms of the compact"); *see also Cuyler*, 449 U.S. at 441; *Wharton v. Wise*, 153 U.S. 155 (1894); *Green*, 21 U.S. at 39-40.

[458] *See, e.g.*, Engdahl, *supra* note 438, at 1024.

[459] *Simmons v. Burlington, Cedar Rapids & Northern Ry. Co.*, 159 U.S. 278, 290 (1895); *Ritter v. Ulman*, 78 F. 222, 224 (4th Cir. 1897) (holding that "[i]n order to constitute estoppel, or quasi estoppel, by acquiescence, the party, with full knowledge or notice of his rights, must freely do what amounts to a recognition of the transaction, or must act in a manner inconsistent with its repudiation, or must lie by for a considerable time, and knowingly permit the other party to deal with the subject matter under the belief that the transaction has been recognized, or must abstain for a considerable time from impeaching it, so that the other party may reasonably suppose that it is recognized").

[460] Zimmerman & Wendell, *supra* note 415, at 94.

[461] *Cf. The Head Money Cases*, 112 U.S. 580, 599 (1884).

[462] Art. Conf. art. VI. (stating that "[n]o two or more states shall enter into any treaty, confederation or alliance whatever between them without the consent of the United States in Congress assembled").

[463] Zimmerman & Wendell, *supra* note 415, at 31 ("It is sometimes said that an interstate compact is a treaty between states. In a number of respects this categorization is apt"); *cf. Hinderlider*, 304 U.S. at 104 (discussing how compact clause "adopts to our Union of sovereign States the age-old treaty-making power of independent sovereign nations").

[464] *Hollingsworth*, 3 U.S. 378; *United States v. Sprague*, 282 U.S. 716 (1931) (bestowal of power on Congress); *Hawke v. Smith*, 253 U.S. 221 (1920) (bestowal of power on state legislature).

[465] *Ins v. Chadha*, 462 U.S. 919, 951 (1983) ("President's participation in the legislative process was to protect the Executive Branch from Congress and to protect the whole people from improvident laws"); *Myers v. United States*, 272 U.S. 52, 123 (1926) ("The President is a representative of the people just as the members of the Senate and of the House are, and it may be, at some times, on some subjects, that the President elected by all the people is rather more representative of them all than are the members of either body of the Legislature whose constituencies are local and not countrywide..."); *The Federalist* No. 73 (Alexander Hamilton) (Gideon ed., 1818), available at http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php%3Ftitle=788&Itemid=27 (last visited Dec. 12, 2010).

[466] Zimmerman & Wendell, *supra* note 416, at 6 n. 25 (citing the Flood Control Act of 1936, 49 Stat. 1591, 33 U.S.C.A. Sec. 701; Tobacco Control Act of 1936, 49 Stat. 1240, 7 U.S.C.A. Sec. 515, Crime Compact Act of 1934, 48 Stat. 909; Weeks Forest Act of 1911, 36 Stat. 961)).

[467] 4 U.S.C. § 112.

[468] See S. Rep. No. 1007, 73d Cong., 2d Sess., 1 (1934); H. R. Rep. No. 1137, 73d Cong., 2d Sess., 1-2 (1934) ("This bill seeks to remove the obstruction imposed by the Federal Constitution and allow the States cooperatively and by mutual agreement to work out their problems of law enforcement").

[469] See 15 U.S.C. § 1358; 15 U.S.C. § 8201; 16 U.S.C. § 824p; 23 U.S.C. § 129; 23 U.S.C. § 401; 23 U.S.C. § 601; 29 U.S.C. § 2941; 33 U.S.C. § 1253; 42 U.S.C. § 2021d; 42 U.S.C. § 4727; 42 U.S.C. § 7402; 49 U.S.C. § 5303; 49 U.S.C. § 5304.

[470] Zimmerman & Wendell, supra note 415, at 16 & n. 78, 38 & n.162.

[471] Green, 21 U.S. at 39-40 (congressional consent given in 1791 to support compact entered into in 1797).

[472] It is important to emphasize that invoking congressional approval under 4 U.S.C. § 112 for the Interstate Health Care Freedom Compact does not concede that the federal government has the power to regulate intrastate health care. The compact itself does not regulate health care; it regulates the interstate criminal enforcement of state laws that will protect the right to health care freedom. Even if it were conceded that the federal government has the power to regulate interstate agreements criminalizing interference with health care freedom, there is no inconsistency between that proposition and the claim that the feds lack the power to mandate the purchase of health care under the commerce clause. Moreover, Congress' power to consent to interstate compacts can be used to effectuate enumerated powers and it can also be used simply to get out of the way of, and give federal sanction to, dealings between the states that are otherwise within their sovereign powers. In the latter usage, invoked by the Interstate Health Care Freedom Compact, Congress is not making law per se, it is yielding to state sovereignty and waiving any possible conflict with federal law on the same subject.

[473] See, e.g., Arizona State Legislature, Fiftieth Legislature, First Regular Session (2011), SB1391 (Interstate Firearms Freedom Compact), available at http://www.azleg.gov/DocumentsForBill.asp?Bill_Number=SB1391&Session_Id=102&image.x=8&image.y=7 (last visited April 7, 2011); Arizona State Legislature, Fiftieth Legislature, First Regular Session (2011), SB1214 (Interstate Healthcare Freedom Compact), available at http://www.azleg.gov/DocumentsForBill.asp?Bill_Number=SB1214&Session_Id=102&image.x=8&image.y=9 (last visited April 7, 2011); see also North Dakota State Legislature, 62nd Assembly (2011), HB1291 (Interstate Health Care Freedom Compact), available at http://www.legis.nd.gov/assembly/62-2011/documents/11-0385-02000.pdf (last visited April 7, 2011)

Notes

Notes

Notes

The Goldwater Institute

The Goldwater Institute was established in 1988 as an independent, non-partisan public policy research organization. Through policy studies and community outreach, the Goldwater Institute broadens public policy discussions to allow consideration of policies consistent with the founding principles Senator Barry Goldwater championed—limited government, economic freedom, and individual responsibility. Consistent with a belief in limited government, the Goldwater Institute is supported entirely by the generosity of its members.

Guaranteed Research

The Goldwater Institute is committed to accurate research. The Institute guarantees that all original factual data are true and correct to the best of our knowledge and that information attributed to other sources is accurately represented. If the accuracy of any material fact or reference to an independent source is questioned and brought to the Institute's attention with supporting evidence, the Institute will respond in writing. If an error exists, it will be noted on the Goldwater Institute website and in all subsequent distribution of the publication, which constitutes the complete and final remedy under this guarantee.

GOLDWATER
INSTITUTE
in defense of liberty

500 East Coronado Rd., Phoenix, AZ 85004 | Phone (602) 462-5000 | Fax (602) 256-7045 | www.goldwaterinstitute.org