ESTUDIS

THE JUDICIAL ROLE IN THE EVOLUTION OF AMERICAN FEDERALISM*

Douglas Lee Donoho**

Summary

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* **Nota:** podeu consultar les versions en català i castellà d'aquest article a www.rcdp.cat.

** Douglas Lee Donoho, professor of Law at the Nova Southeastern University, Shepard Broad Law Center, 3305 College Avenue, Fort Lauderdale, Florida; donohod@nsu.law.nova.edu; http://www.nsulaw.nova.edu/ (954)262-6178.

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1. «Our Federalism» and the Constitutional Framework

United States Supreme Court justices often refer to the division of power between the United States' central and state governments, as «our Federalism.»[1] This description, expressed with the fondness of a guardian, seems to imply that American federalism is both unique and reflective of deep, shared common understanding. While «our» federalism is perhaps unique, the suggestion that there is some shared, well-understood conception of American federalism is, to put it mildly, exaggerated.

From the inception of the American union, fundamental disagreement and controversy have been the primary hallmarks of «our» federalism.[2] The Constitutional Convention of 1787, which produced the text of the United States Constitution, was marked by rancorous debate regarding the appropriate allocation of power between the states and the newly created federal government.[3] Despite general agreement over the need for central government, there were significant divisions among the founders over its benefits and dangers.[4] The failure of the original thirteen states to create a viable union in the 1781 Articles of Confederation demonstrated the necessity of more effective central authority.[5] Yet many founders were fiercely loyal to their states and deeply suspicious of strong centralized power. This debate continued through the subsequent ratification of the Constitution[6] and prompted the adoption of its first

1. The often repeated phrase «our federalism» appears to owe its genesis to Justice Black's opinion in *Younger v. Harris*, 401 U.S. 37, 44 (1971).

2. *See generally* A. Amar, Of Sovereignty and Federalism, 96 *Yale L. J.* 1425 (1987). *See also* S. Cornell, The Changing Historical Fortunes of the Anti-Federalist, 84 *NW U. L. Rev*. 34 (1989).

3. *See generally Miracle at Philadelphia: History of the American Constitution* (D. Farber, S. Sherry, 2005 West, 2nd Edition)

4. *See* D. Coenen, A Rhetoric For Ratification: The Argument of the Federalist and Its Impact on Constitutional Interpretation, 56 *Duke L. J.* 469, 474-76, 486-87 (2006) (describing debate over federalism that prompted the Federalist Papers).

5. *See* Coenen, *supra* note 4 at 481. The Articles of Confederation are available on-line at http://www.yale.edu/lawweb/avalon/artconf.htm. Among other problems, the Articles of Confederation did not authorize the central government to regulate trade among the states. Nor could the central government directly raise money or regulate the rights and obligations of citizens but rather could act only via the state legislatures. *See Federalist Papers* 15, 16, 21 and 22 (Hamilton) available at: http://www.yale/lawweb/avalon/federalist/fed.htp (presenting arguments regarding the weakness of the Article of Confederacy).

6. *See History of the Constitution*, *supra* note 3 at 249-255. The intensity of this debate is reflected in the many essays published in the popular press at the time, the most famous being the «Federalist Papers» penned under the pseudonym «publius» by Alexander Hamilton, James Madison and John Jay. *See History of the Constitution* at 253.

ten amendments just three years later.[7] An important consequence of such disagreement was the adoption of a Constitutional text significantly short on specifics.[8] Unresolved disagreements over federal power left the precise contours of American federalism substantially unresolved by the Constitutional text itself which allocates power in only its broadest outlines. It is hardly surprising then that the debate over central versus state power has not been settled by history but remains instead central to American political life.[9]

The actual balance of power between the central and state governments has substantially changed since the Constitution's inception.[10] Indeed, one could reasonably speculate that the founding generations would have been both alarmed and shocked to learn how dramatically power has shifted away from the states to the federal government, particularly over the last sixty years. While the founders were hardly of one mind regarding the appropriate contours of federal power, the modern manifestation of American federalism differs markedly from that which animated the original Constitutional text. [11]

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7. *See History of the Constitution*, *supra* note 3 at 317-21.

8. *See* text accompanying notes 13-15 and 26, *infra*.

9. *See, e.g.*, Monica Davey, Health Care Overhaul and Mandatory Coverage Stirs State's Rights Claims, New York Times, Sept. 28, 2009, available at http://www.nytimes.com/2009/09/29/us/29states.html?_r=1&scp=12&sq=states%20rights%20health%20care&st=cse.

10. *See, e.g.*, G. Thompson & P. Wilkinson, Set the Default to Open: Plessy's Meaning in the Twenty-First Century and How Technology Puts the Individual Back at the Center of Life, Liberty, and Government, 14 *Texas Rev. L. P*. 46, 58-64 (2009)(describing expansion of federal control and administrative state); G. Brown, Counterrevolution?: National Criminal Law After Raich, 66 *Ohio S. L. Rev*. 947, 986-89 (2005)(describing massive expansion of federal criminal law).

11. This reliance on «original intent» is a major thread of argumentation for several members of the current Supreme Court in urging restrictions on federal exercises of power. *See United States v. Lopez*, 514 U.S. 549 (1995), Thomas J., concurring. It is undoubtedly true that Constitutional text reflects the framers' discernable general preference for a relatively limited central government and preservation of state power. The central government is given a relatively short list of enumerated powers. State power over the general rights and obligations of the people ranging from family matters and criminal law to business relationships and property ownership was essentially assumed. Prior to the 17th amendment adopted in 1913, the Constitution provided that Senators were to be selected by the respective state legislatures, not by popular vote. The Bill of Rights, added by amendment to the Constitution in 1791, only protected individual liberties from central government interference and were not intended to limit the state governments. These arrangements clearly reflected the importance to the framers of preserving the prerogatives of states in the new union. This, of course, merely begs the question of whether such a general orientation provides any insight whatsoever, or is even relevant, in resolving specific modern issues of power.

How did this evolution come about? The shifting dynamics of American federalism, its history and its future, can only be understood if one appreciates the enormously important role that federal courts have played in shaping its contours. «Our» American federalism is most accurately understood in terms of an on-going, perpetual struggle over power rather than any particular agreed upon distribution.[12] It is a struggle controlled not by application of clear specific categorical allocations of jurisdiction but rather by institutional processes – processes characterized by divergent points of view over the meaning of an open-ended and vague Constitutional text, inevitable struggles over resources, economic pressures and the ever present debate over the appropriate role of centralized government. In this sense, the American model of federalism is one based more on a process oriented Constitutional structure rather than explicit, detailed textual prescriptions about the allocation of power.

Historically, it is a process the outcome of which is not so much mediated as dictated by the federal judiciary. As the cases described below illustrate, the United Supreme Court has not only decided the outcome of specific disputes over power but also set the ground rules for the debate, including those defining the judicial role. Lacking textual guidance from the Constitution itself, the Court has created malleable judicial standards that, depending upon their application, have either favored or disfavored central power. Indeed, these standards are so malleable that, when coupled with the indeterminate Constitutional text, it inevitably appears that the judicial philosophy and political orientation of the justices is the primary determinate of federal power. Thus, the scope of federal power has arguably turned more on the Court's internal debate over the proper role and function of federal judges than any other factor.

It is, of course, overly simplistic to assign sole responsibility for changes in American federalism to the federal judiciary. Without legislative initiative and popular support, a shift in power towards the central government never would have taken place nor would it last. Legislative and political processes are the ultimate impetus toward or away from central power – federal courts, after all, do not create the legislation that they review. Rather, the boundaries of federal power are ultimately pushed through legislative initiatives that assert such au-

12. B. Friedman, Reconstructing Reconstruction: Some Problems for Originalists (And Everyone Else Too), 11 *U. Pa. J. Const. L.* 1201 (2009) (describing how views of federalism have «seesawed» through American history).

thority within the halls of Congress. History demonstrates, however, that the United States Supreme Court has not simply deferred to the outcome of such political processes. To the contrary, as illustrated by the cases described below, the Court has historically taken a preeminent role in resolving questions of power – alternatively constraining and expanding federal authority and frequently disrupting the outcome of legislative compromise. In this fashion, the federal judiciary has played an essential, if not dominant, role in the evolution of modern American Federalism.

2. The Judicial Role in Shaping American Federalism: Interpreting the Indeterminate Text

The genesis of the judiciary's critical role in shaping American federalism lies primarily with two critical factors – the indeterminacy of the Constitutional text and the federal courts' well known power of judicial review. From a modern perspective it might be natural to assume that important allocations of power between state and federal governments would be specifically detailed in the Constitutional text. The Constitution would be the appropriate place to resolve issues of government authority and to spell out the specific competencies of the central and state governments. This is, however, only partly true in the United States Constitution. While the Constitution provides the basic structure of the central government and a general outline of its authority, the framers chose to address allocations of power in the broadest possible terms. Rather than detail the federal government's authority and powers with specificity, the founders instead merely provided a list of 18 general subjects within federal competency, such as the power «to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.»[13] In this fashion, the Constitution addresses issues of federalism solely by providing broad, vaguely defined jurisdictional categories leaving almost all specific questions regarding scope and application unaddressed.[14] Thus, the Constitution itself provides very few clear answers regarding practical allocations of power.

13. United States Constitution, available at http://www.usconstitution.net/const.html, Article I, Section 8, Cl. 3.

14. The vagueness of the Constitutional text was not the function of poor drafting but by necessity born of compromise and, in the view of many, prudent design. Justice John Marshall was perhaps the first to clearly articulate the long term benefits of a Constitutional text that relied on broad

In light of the Constitution's lack of textual guidance, the potential importance of the federal judiciary is obvious given the Court's self-appointed power of judicial review. The power of judicial review, famously established in *Marbury v. Madison*, means that the federal courts have the authority to declare any act of government, state or federal, void for inconsistency with the Constitution.[15] When coupled with an indeterminate Constitutional text and the divergent intentions of those who crafted it, judicial review has provided the framework through which American federalism has been shaped and reshaped throughout its history. Since the federal judiciary possesses ultimate authority over interpretation of the textually indeterminate Constitution, it is the judiciary that has ultimately decided the balance of power between the state and federal governments.

The judicial role and authority to resolve such disputes in the absence of clear textual direction is ultimately the critical issue. To what degree is the Court a «gatekeeper» or «guardian» whose functions include protecting state authority or checking federal assertions of power? Or, in contrast, is the Court's proper role one of general deference to the political processes that determine specific divisions of power through democratic compromise? As will be seen, the answer to such critical questions is also left unresolved by the Constitutional text which makes no mention of judicial review. Over the Court's history different answers to these questions have held sway on the Court. As a result, the outcome of disputes over federal power often appear to depend substantially on each justice's own judicial temperament, philosophy and view of the Court's role in a democracy – rather than the Constitutional text.

Before examining some illustrations of this point, it is important to describe the essential premises upon which the Court has approached this task. These

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outlines of power. In *McCulloch v. Maryland*, 17 U.S. (4 Wheaton) 316 (1819), Marshall famously asserted that «we must never forget that it is a Constitution we are expounding.» He observed, as a contemporary of the founders, that: «A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would, probably, never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves.» 17 U.S. (4 Wheat.) at 407.

15. 5 U.S. (1Cranch) 137 (1803). In *Martin v Hunter's Lessee*, 14 (1Wheat) 304 (1816), the Supreme Court confirmed that its authority extended over state officials, including state judiciaries. *See also Cooper v. Aaron*, 358 U.S. 1 (1958). The parallel between these decisions and the role assumed by the European Court of Justice in interpreting EU law is hard to ignore.

premises are best exemplified by the enormously important case *McCulloch v. Maryland*, again authored by Justice John Marshall. [16] In *McCulloch*, the Supreme Court was asked to decide whether the recently formed central government had exceeded its authority by creating a national bank. Although this power was not explicitly provided for by the text, the Court held that forming a national bank was implicitly authorized as a means reasonably related to the achievement of those powers explicitly enumerated in Article I. Upholding the power of the central government to form a national bank based on powers *implied* from Article I, Marshall announced several guiding principles that have since served as fundamental premises in the judicial construction of American federalism.

The federal government, in contrast to the states, has no power to pursue the «general welfare» but rather is limited to those tasks specifically assigned to it by the Constitution. By negative implication, all subjects not designated as federal are left within the authority of the states.[17] The Constitution expressly declares, however, that federal law is superior to the law of the states thereby justifying Justice Marshall's now well-worn assertion that the central government «though limited in its powers, is supreme within its sphere of action.»[18]

Second, although limited, the federal government has not only those powers explicitly designated but also those implicitly useful to accomplishment of the tasks assigned it. Thus, the federal government is entitled to use any means that reasonably relate to achievement of its legitimate and constitutionally authorized ends.[19] This principle of implied powers, established very early in American history, itself greatly enhanced potential federal authority. It also reflects, however, an important perspective on the judicial role in defining this federal authority.

Marshall asserts in *McCulloch* that Constitutional allocations of power were purposefully stated only in broad outlines to allow legislative flexibility

16. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

17. The 10th amendment, adopted only 3 years after the Constitution, explicitly confirmed this basic premise by declaring that «The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.»

18. 17 U.S. (4 Wheat.) at 405.

19. It may, therefore, create a national bank even though this was not within those powers explicitly given to the federal government because a bank is a reasonable means by which to exercise the explicit authority to spend money and control the national currency. 17 (4 Wheat.) at 421-25.

necessary to meet future contingencies.[20] More importantly, such compromises are entitled to substantial deference by the federal courts: «But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. 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…are constitutional.»[21] Ultimately, as Marshall declared in a later case, it is not the courts but elections and the legislators' «identity with the people» which are the «sole restraints» on federal authority provided by the constitution.[22]

These principles have successfully served as the interactive base upon which the federal judiciary has alternatively constructed, reconstructed, contracted and expanded federal governmental power for the last two hundred years. The specific allocation of authority and power between the national and state governments has, since *McCulloch*, been resolved primarily by defining the powers of the central government. By defining federal power – a power that is limited but supreme – the Court correspondingly defines the power of states. [23] Thus, historically, the critical question has proven to be one of discerning the breadth and limits of federal power – a task left to the judiciary under *Marbury*. Critically, it is a task given with precious little explicit textual guidance from the Constitution itself. This lack of guidance, correspondingly, means that the court's vision of its own authority – to intervene or defer – has been a critical determinant in the process of defining federal power. A brief historical account of the Court's interpretation of federal power since *Marbury* and *McColluch* clearly demonstrates these points.

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20. Note 14, *supra*.

21. 17 (4 Wheat.) at 421.

22. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

23. Despite its tautological language, the 10th Amendment has at times, played a significant role in defining federal power. As described below, the Supreme Court has periodically relied upon the 10th Amendment to find implicit limits on federal powers in favor of state governments –sometimes only to overrule itself later. *See, e.g.*, *Hammer v. Dagenhart*, 247 U.S. 251 (1918), *overruled* in *United States v. Darby*, 312 U.S. 100 (1941); *National League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled* in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985); *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *Printz v. United States*, 521 U.S. 898 (1997).

Generally speaking, the Constitutional text commits three kinds of subjects to national authority. The first involves subjects practically associated with attributes of national identity and sovereignty such as national defense, foreign affairs, treaty making, currency, and national citizenship. Although not explicitly stated in the text, the Court has found that for functional reasons, each of these subjects falls within the exclusive competency of the national government. While the scope of such powers is not without controversy, these subjects only rarely touch directly upon federalism concerns.[24]

The second category of national authority relates to national economic issues and the preservation of the common market that the union was designed to create.[25] These include the vitally important power to regulate interstate commerce. The third major category of national competency was created after the American Civil War by the adoption of the 13th, 14th and 15th amendments to the Constitution. Each amendment authorizes the federal Congress to «enforce» the individual rights they establish against state government interference.

The most important provisions relating to federalism are those that allocate authority over these last two categories, at least in part because they tend to involve subjects that could reasonably be shared or involve potential overlaps between central or local authority. For example, Congressional regulation of interstate commerce frequently involves issues that implicate competing state authority over general public health and safety. Similarly, enforcement of individual rights against the states necessarily presumes federal intervention into a wide range of subjects that have traditionally fallen within state prerogative and potentially include suits in federal courts against state government officials.

To illustrate the judicial role in defining American federalism our discussion here will focus on the Courts' interpretation of the interstate commerce clause and Congress' power to enforce rights guaranteed by the Civil War

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24. *But see Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000) (state ban on business with Myanmar unconstitutionally interferes with foreign affairs).

25. It is commonly recognized that the central government was foremost designed to regulate the common economic market created by the union. *See, e.g.*, *H.P. Hood & Sons, Inc v. Du Mond*, 336 U.S. 525 (1949) («the sole purpose for which Virginia initiated the movement which ultimately produced the Constitution was 'to take into consideration the trade of the United States'.…The desire of the Forefathers to federalize regulation of foreign and interstate commerce stands in sharp contrast to their jealous preservation of power over their internal affairs.»)

Amendments. The critical cases in each area also depend heavily on interpretations of the 10th amendment's admonition that all powers not delegated to the national government are retained by the states, and 11th amendment restrictions on federal court jurisdiction over claims against state governments.

The purpose of this discussion is not to describe the specific allocations of power that currently prevail under these provisions but rather to illustrate a more general and fundamental point. Historically and today, it is the Supreme Court's on-going and shifting interpretation of these textually open-ended provisions that determines what American federalism means in practice.

2.1. Federalism and Evolution of Congressional Power Over Interstate Commerce

The most important illustration of the Court's role in shaping American federalism is probably its interpretation of Congress' power to regulate interstate commerce. The most important authority given the new, limited federal government at the founding was undoubtedly responsibility for preserving a central feature of the union – a common market among the states premised on free trade.[26] Thus, Article I, section 8 provides that the federal congress has the power to «regulate commerce…among the several states…» This simple text provides no guidance whatsoever to many obvious and basic questions. What does commerce include? Is this power to regulate commerce «among …states» strictly limited to controlling goods and services that are actually bought and sold across state lines or does it extend to any activity, even local, that affects the national common market? Does it include the manufacture of goods intended for interstate sale or only the sale itself? Despite, or perhaps because of, this spare, indeterminate text, the Supreme Court has given various answers to such ques-

26. In *Federalist* 22, Alexander Hamilton identified the lack of central authority over commerce among the major defects of the Articles of Confederation «…rendering it altogether unfit for the administration of the affairs of the Union. The want of a power to regulate commerce is by all parties allowed to be of the number.» Similarly, in *Federalist* 42, James Madison emphasized the «necessity of a superintending authority over the reciprocal trade of the various States.» *See Gonzalez v. Raich*, 545 U.S. 1, 16 (2005) (describing commerce power as central to purposes of creating a new constitution). Corresponding to this central government control over the common market, the Constitution expressly forbids states from imposing tariffs or entering into compacts or treaties. In turn the federal government was expressly forbidden from discrimination among the various states' ports (or imposing taxes in export). *See also* note 21, *supra*.

tions over time eventually transforming the commerce clause, through judicial interpretation, into the single most important provision in the Constitution.

This history of judicial development of federal power over interstate commerce has not progressed steadfastly with a consistent, stable understanding of its scope and limits. Rather, in a fashion reflecting the dominant role of the judiciary in shaping federal and state power allocations, the Supreme Court has alternatively created, rejected, modified and ignored a variety of legal doctrines that have in turn expanded or contracted federal commerce power during different periods of American history. These historical fluctuations in federal power, primarily driven by judicial decisions, have, in turn, directly reflected the Court's varying views of its own institutional role and its members' particular visions of federalism. Although there are many examples, the cases *Gibbons v. Ogden*,[27] *Hammer v. Dagenhart*,[28] *Wickard v. Filburn*[29] and *United States v. Lopez*,[30] are good illustrations of this point. Each case, described briefly below, corresponds to historical periods that reflect distinct judicial approaches to federalism.

During the first 100 years of the Union, the Court's approach to federal commerce power was to define the power in broad terms and generally defer to the legislative process. The *Gibbons* case, authored by Chief Justice John Marshall in 1824, exemplifies this approach. In *Gibbons*, the Supreme Court considered a claim by the owner of a federal ferry license challenging New York State's grant of a monopoly over such trade to a competitor. Since the state's exclusion of competition from another state was inimical to the American economic union and common market, and involved navigation through national waters, the Supreme Court found the subject well within congressional authority. In so ruling, Justice Marshall declared that the terms «commerce» and «among the states», while not covering internal activities occurring solely within state boundaries, necessarily extended to those internal activities that «affected» other states and interstate commerce.[31] In other words, the federal government's

27. *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1 (1824)

28. *Hammer v. Dagenhart*, 247 U.S. 251 (1918)

29. *Wickard v. Filburn,* 317 U.S. 111 (1942)

30. *United States v. Lopez,* 514 U.S. 549 (1995)

31. *Gibbons*, 22 U.S. at 194.

power to regulate interstate commerce implicitly included the power to control non-interstate activities that affect that commerce. Perhaps more importantly, Justice Marshall directly discounted the judicial role in determining the boundaries of this «plenary» federal authority: «The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances…the sole restraints on which they have relied, to secure them from abuse.»[32]

As the industrialization increased after the Civil War, practical necessity prompted Congress to increasingly deploy federal regulatory authority.[33] During the period from about 1890 through 1937, this expanded exercise of federal powers was largely thwarted by a Supreme Court whose members displayed substantial hostility to any government interference with the free market, particularly by central authority.[34] In essence, the Court very narrowly construed federal legislative power over commerce by creating a variety of non-textually based legal distinctions that, in turn, preserved power for state governments. The Court also relied heavily in this era on a later discredited, non-textual interpretation of the 10th Amendment which states: «all powers not delegated to the United States by the Constitution… are reserved to the States respectively, or to the people.» The Court interpreted this language as imposing substantive limits of federal regulatory authority over specific subjects even though its literal terms fail to specify any such limits at all. Since states traditionally exercised power of general health and welfare (the police power) the Court viewed the 10th Amendment as *implicitly* forbidding any federal regulation that might interfere with such traditional state competencies. Such implicit limits were defined by the Court itself based on its members' particular understanding of American federalism. In other words, the justices essentially made it up, animating their own perspectives about the appropriate contours of federal power.

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32. *Gibbons*, 22 U.S. at 197.

33. *See, e.g.*, *Wickard v. Filburn*, 317 U.S. 111 (1942) «It was not until 1887, with the enactment of the Interstate Commerce Act, that the interstate commerce power began to exert positive influence in American law and life. This first important federal resort to the commerce power was followed in 1890 by the Sherman Anti-Trust Act and, thereafter, mainly after 1903, by many others. These statutes ushered in new phases of adjudication, which required the Court to approach the interpretation of the Commerce Clause in the light of an actual exercise by Congress of its power thereunder.»

34. *See generally* Erwin Chemerinsky, *Constitutional Law, Principles and Policies* (3rd Edition, 2006, Aspen) 247-48.

An excellent illustration of how the Court utilized these judicially created distinctions to narrowly construe federal power is the 1918 case of *Hammer v Dagenhart*. *Hammer* involved a challenge to federal legislation which prohibited the shipment of goods across state lines, when manufactured by child labor. The federal government argued in defense of the legislation that child labor was a commercial subject of national importance which directly affected economic relations among the states by, among other things, disrupting competitive conditions. Moreover, it would seem self-evident that the power to regulate interstate commerce, at minimum, would include the power to control the sale and distribution of goods between states. Yet, the Court struck down the legislation finding that it exceeded Congress' commerce authority.

In contrast to *Gibbons*, the Court viewed the power over interstate commerce as an extremely narrow one. Production of goods itself, the Court held, was a local matter outside of federal authority even if such goods were intended for the national market. Similarly, since states traditionally held authority over local production and the health and safety of children, the 10th amendment implicitly forbade federal interference.

Apart from narrowly defining commerce, however, the Court went even further in restricting federal authority in a fashion distaining even the pretence of judicial deference to the legislature.

The federal statute challenged in *Hammer* undeniably fell well within even the narrowest view of interstate commerce by literally forbidding the movement of certain goods across state lines. The Court reasoned, in spite of the Constitutional text, that this prohibition on interstate sales was beyond federal power because Congress' true intentions were to affect the production process taking place within state boundaries. This, the Court declared, was an unjustifiable interference with traditional state authority over such matters and therefore unconstitutional. In sharp contrast to *Gibbons*, the Court assumed for itself the role of guardian of state power with no hint of deference to politically based, legislative decisions regarding the exercise of power. *Hammer*, which was later overruled,[35]

35. The Court overruled *Hammer v. Dagenhart* in 1937, holding that the federal government could not only prohibit the shipment of goods across state lines for any reason it deemed appropriate, it could also force employers within state boundaries to adhere directly to federal labor standards. *United States v. Darby*, 312 U.S. 100, 117 (1941).

reflects the enormous power of the Court to determine the specific allocation of power between the national and state governments through judicial interpretation of the Constitution's indeterminate text. Since the commerce clause does not say very much, it essentially means whatever the Court says – particularly when the Court refuses to defer to the political process.

The dominance of the judicial role in defining federalism is also confirmed by the Court's subsequent reinterpretation of federal commerce power, overruling cases like *Hammer*, that took place towards the end of the Great Depression. Indeed, it is the Court's reversal in approach to the commerce clause in 1937-38 that has led to the pervasive authority that the federal government seemingly enjoys today. In a series of cases exemplified by decisions like *United States v. Darby*,[36] the Supreme Court essentially abandoned its self-assumed role as the caretaker of state power against federal encroachment by declaring itself institutionally incompetent to examine Congressional motives. At the same time, the Court reanimated the basic principles of federal commerce power described by Justice Marshall in *Gibbons* more than 100 years earlier. Abruptly altering course, the Court essentially abandoned earlier non-textual and formalistic distinctions between production and commerce and adopted an extremely deferential approach to federal assertions of commerce power. In a similar vein, the Court simultaneously renounced all reliance upon the 10th Amendment, declaring that its text provided no discernable substantive limits to the commerce power but rather merely stated a «truism.»[37]

The 1942 case of *Wickard v. Filburn* illustrates how dramatically the Court's new approach to federalism questions altered the actual distribution of power. In *Wickard*, an Ohio farmer challenged the constitutionality of a federal regulation that controlled local production of wheat. The regulations had been applied to punish the farmer for producing 239 excess bushels of wheat beyond the federally set quota. The farmer's wheat was neither sold nor intended for sale in the market but rather retained for consumption in his own household. Even though this activity was manifestly local and itself inconsequential to the national market, the Court upheld the federal regulation. The test for federal commerce power, the Court declared, depends simply upon whether *Congress* had a

36. *United States v. Darby,* 312 U.S. 100 (1941).

37. *United States v. Darby,* 312 U.S. at 124.

rational basis for finding that the activity regulated has a substantial, aggregate effect on interstate commerce.[38]

This approach departed from cases in the prior era in two critical ways. First, the Court declared that essentially any subject or activity is within federal commerce authority so long as it substantially affects interstate commerce, no matter how local and regardless of traditional state authority over the subject. Second, and perhaps more importantly, the Court adopted a position of deference in reviewing federal assertions of commerce authority which limited its own role in determining the precise outcome of federalism issues. In a sharp departure from the approach of its recent predecessors (but consistent with *Gibbons*), the Court declared that it was first and foremost up to Congress to decide whether internal state-based activities had a sufficient affect on interstate commerce to qualify for federal control.[39] Thus, Congressional reliance on its commerce clause authority could only be invalidated if the Court was unable to discern any rational basis for finding a substantial effect on interstate commerce.[40] By essentially abandoning its previous position as the guardian of state authority, the Court instead suggested that practical distributions of power should largely be left up to political not judicial processes.[41]

As a result of this deference, not a single federal assertion of commerce power was overturned by the Supreme Court between 1937 and 1990. Perhaps not surprisingly, federal authority immensely expanded during this period as the commerce power was utilized to regulate an enormous range of subjects

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38. *Wickard v. Filburn,* 317 U.S. at 125-29.

39. «This record leaves us in no doubt that Congress *may properly have considered* that wheat consumed on the farm where grown if wholly outside the scheme of regulation would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices.» *Id* at 129 (emphasis added).

40. Later cases confirmed the broad deference to Congress announced in *Wickard* and *Darby* by creating a presumption of both validity and a factual basis for finding a substantial effect on interstate commerce. *See, e.g.*, *Hodel v. Indiana*, 452 U.S. 314, 323-24 (1981): «It is established beyond peradventure that 'legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality ..... A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends.»

41. The Court has adopted a similar line of reasoning with regard to so-called «states' rights» issues concluding that the applicability of federal law to state government actors is strictly a political not judicial decision. *See Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

ranging from racial discrimination[42] to loan sharking.[43] This era of complete deference, however, arguably came to an unexpected end in 1995 when, in *United States v. Lopez*,[44] the Court struck down a federal law criminalizing possession of a handgun within 1000 feet of a school.

The Court in *Lopez* rejected the federal government's argument that guns and crime were thwarting both education and national economic productivity. The Court's reasoning clearly reflected both frustration with the expansion of federal power and a shift in the Court's approach to federalism issues: «[U]nder the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents in support of [the act], it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.»[45]

The Court's new, apparently less than deferential approach was soon confirmed in *Morrison v. United States*, which involved a challenge to the federal Violence Against Women Act.[46] In sharp contrast to *Lopez*, Congress passed this statute in explicit reliance upon 4 years of evidentiary hearings that estimated an annual economic and productivity cost of approximately 3 billion dollars from gender motivated violence. It is probably beyond reasonable dispute that the legislation would have been found well within federal power under the Court's pre-1995 precedents.[47] Yet, as in *Lopez*, the Court struck down the statute reasoning that the national economic consequences cited by Congress, no matter how substantial, were only indirectly related to the «non-economic» local activity of gen-

42. *Katzenbach v. McClung*, 379 U.S. 94 (1964) (upholding law preventing racial discrimination in a local restaurant under the commerce clause based on the presumed detrimental effect such discrimination had on interstate commerce).

43. *Perez v. United States*, 402 U.S. 146, (1971) (uphold federal law criminalizing extortionist lending under the commerce clause power).

44. *United States v. Lopez*, 514 U.S. 549 (1995).

45. *Lopez*, 514 U.S. at 564-65.

46. *United States v. Morrison*,529 U.S. 598 (2000)

47. *See Morrison*, 529 at 637 (Souter, J., *dissenting*).

der motivated violence. In essence, the Court rejected Congress' express legislative finding that such violence has a substantial aggregate effect on interstate commerce.[48] By refusing to defer to the outcome of the political process regarding the proper scope of federal authority the Court once again resumed the previously discredited role of a caretaker of state authority. The truth of this observation is witnessed by dissenting Justice Souter's lament that the Court was returning to an era of judicial activism by relying on formalistic categories that Congress could not regulate: «Why is the majority tempted to reject the lesson so painfully learned in 1937?....The answer is that in the minds of the majority there is a new animating theory that makes categorical formalism seem useful again. Just as the old formalism had value in the service of an economic conception, the new one is useful in serving a conception of federalism.»[49]

2.2. Federalism and Enforcement of the Civil War Amendments

A second important illustration of the judicial role in shaping American Federalism involves Congressional enforcement of the rights declared in the Civil War Amendments.[50] These Amendments are particularly important to American federalism for two reasons. First, the Civil War Amendments made certain fundamental individual rights applicable against state governments for the first time under the Constitution. As originally adopted, the individual rights secured by the Constitution's «bill of rights» only limited federal government action and were inapplicable to the states.[51] These Amendments altered the legal landscape by, for the first time, subjecting state governments to the individual rights enshrined in the Constitution and enforceable by the central government.

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48. 529 U.S. at 614-16. The Court also relied upon a distinction first raised in Lopez that the activity itself was not commercial in nature. 529 U.S. at 610-11. The Court also declared, however, that this was not a «categorical» requirement for federal commerce clause regulation. Id. In a subsequent case, the Court upheld Congressional regulation of the non-commercial activity of *using* home-grown medical marijuana that was neither bought nor sold in the market. *See Gonzalez v. Raich*, 545 U.S. 1 (2005).

49. *Morrison*, 529 U.S. at 643-44 (Souter, J., *dissenting*).

50. These Amendments, the 13th, 14th and 15th, are commonly referred to as the Civil War Amendments because they were adopted after and in response to slavery and the events precipitating the American Civil War.

51. In *Barron v. Mayor and City Counsel of Baltimore*, 32 (7 Pet.) 243 (1833), the Supreme Court, in an opinion written by Justice Marshall, held that the first 10 Amendments did not apply to state governments.

The amendments expressly prohibited, for the first time, state conduct involving denials of «equal protection» and «due process of law» and placed enforcement of such rights against states in the hands of the central government.[52]

Second, the amendments eventually also indirectly expanded the list of rights applicable to states through a judicial doctrine called «incorporation.»[53] Via the process of incorporation the Supreme Court has dictated that 14th amendment due process of law requires state adherence to most of the rights established in the bill of rights – rights that had previously only applied to the federal government.[54] The Civil War Amendment thereby now subject states, indirectly, to most individual federal constitutional rights.

Standing alone, incorporation, which is entirely a judicial creation without any specific textual direction,[55] illustrates the fundamental importance of the Court in determining the shape of federalism. After all, through pure judicial fiat states were eventually subjected to federally based individual rights. Its importance goes well beyond this, however. Each of the Civil War Amendments also explicitly allocates to Congress the power to enforce the rights declared

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52. By giving Congress the authority to enforce rights against state governments, the Civil War Amendments created a significant shift in power favoring the central government with regard to individual rights. *See generally* R. Kaczorowski, Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction, 61 *NYU L. Rev*. 863 (1986). *See also* E. Wydra, The Fourteenth Amendment's Due Process Clause and Caperton: Placing the Federalism Debate in Historical Context, 60 *Syracuse L. Rev*. 239 (2010).

53. The notion of incorporation was originally rejected by the Supreme Court on federalism grounds in the so-called «*Slaughterhouse Cases*.» 83 (16 Wall.) 36 (1872). Although the 14th Amendment declares that no state «shall abridge the privileges or immunities of citizens of the United States», the Court refused to include other constitutional rights among those interests protected because it would «transfer the security and protection of all the civil rights…from the States to the Federal government…» 83 U.S. (16 Wall.) at 74-76.

54. The process of incorporation took place later over many years as the Court determined which of the rights declared in the bill of rights were so fundamental that they were applicable against the states as a part of due process of law. A good example of these cases, which also presents an explanation of the process, is *Duncan v. Louisiana*, 391 U.S. 145 (1968) (the 6th Amendment right to jury trial in criminal cases is applicable against the states as a part of due process of law under the 14th Amendment). The Court is currently considering whether the right to bear arms declared in the 2nd Amendment is applicable to the states via due process. *See McDonald v. City of Chicago*, (Case 08-1521)

55. Oddly enough, the privileges and immunities clause, construed very narrowly in the Slaughterhouse Cases to avoid application of federal rights to the states, provides a much more plausible textual justification for incorporating rights against the states than the due process clause. *See Duncan*, 391 U.S. at 166, Black J., *concurring*, (I can say only that the words «no state shall abridge the privileges and immunities of citizens of the United States» seem to me an eminently reasonable way of expressing the idea that henceforth the Bill of Rights shall apply to the States.)

through legislation. By vastly expanding those rights which applied to the states, the Court both significantly expanded the subjects over which Congress has primary control and extended that control over the states themselves as actors. In essence, the Court dramatically expanded federal power without a shred of explicit direction in the Constitution itself.

Much like it has regarding the commerce clause, the Court's interpretation of Congress' power to enforce the Civil War Amendments has served as a critical modern battleground over federalism.[56] Once again, it has been the judicial, not legislative, process that has mattered most. And, just as with the commerce clause, the Court's approach to Congress' enforcement power has varied over time reflecting varying judicial visions about the proper scope of federal power and the Court's own role in controlling it.

Among the many significant cases in this area, the contrast between *Kazenbach v. Morgan & Morgan*,[57] and *City of Boerne v. Flores*,[58] perhaps best demonstrates this observation. In both cases the Supreme Court was asked to determine whether Congress had exceeded it power to enforce individual rights against the states. In *Kazenbach*, the Court considered the constitutionality of a federal law that prevented states from denying the right to vote to certain Puerto Ricans because of an inability to read or write in English. The Court sustained the statute as a proper enforcement of the 14th amendment even though it had previously ruled that English literacy requirements for voting did not violate the 14th amendment. In other words, the Court allowed Congressional prohibition of state conduct that itself did not violate the amendment. The Court reasoned that «enforcement» includes taking protective or preventative measures such that Congress could prohibit a «wider swath» of state conduct than would actually violate the rights being enforced. Most importantly, the Court declared that its role in defining the enforcement power was one of deference to the legislature. Relying on *McCulloch v. Maryland*, the Court declared that Congressional action to enforce the 14th amendment in this fashion was constitutional so long as it was «plainly adapted to that end.» Thus, «[i]t was for Congress, as the branch that made this judgment, to assess and weigh the vari-

56. *See generally* E. Caminker, Appropriate «Means-Ends» Constraints on Section 5 Powers, 53 *Stanford L. Rev.* 1127 (2001).

57. *Katzenbach v. Morgan & Morgan*, 384 U.S. 641 (1966).

58. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

ous conflicting factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did….it is enough that we perceive a basis upon which Congress might predicate a judgment that the [state law violated]…the Equal Protection Clause.»[59]

Eleven years later, however, with a different set of justices, the Supreme Court substantially abandoned this position of deference to legislative judgment and once again assumed the role of guardian of state power. In *City of Boerne*, the Court considered whether a federal law protecting the exercise of religion under the 1st amendment fell within Congress' 14th amendment enforcement power.[60] The Court concluded that it did not because Congress had prohibited substantially more state conduct than the 1st amendment actually protected. More significantly, however, in reaching this decision the Court substantially abandoned the deferential posture assumed in Kazenbach. The test, the Court declared, was whether Congress could demonstrate «congruence and proportionality between the injury to be prevented …and the means adapted to that end.»[61] Subsequent cases make it clear that in order to meet this burden, Congress must essentially demonstrate that the measure taken was justified by «the evil to be prevented» as reflected in a «pattern» of state violations.[62] Ironically, the Court undertakes this evaluation based upon the federal statute's conformity to definitions of implicit rights that the Court itself generates with virtually no textual guidance.[63]

Whatever the merits of these decisions, they clearly reflect yet another shift in judicial approach regarding the degree of deference allowed to legislative

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59. *Katzenbach v. Morgan*, 384 U.S. at 650-51.

60. Although the exercise of religion is protected under the 1st amendment which only applies against the federal government, the protection was made applicable to the states via the 14th amendment in the incorporation cases described above. *See* note 51-55 and accompanying text, *supra*.

61. *City of Boerne*, 521 U.S. at 520, 534.

62. *See, e.g.*, *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000) (striking down application of the federal Age Discrimination in Employment Act to state government employees because «Congress never identified any pattern of age discrimination by the States»); *Board of Trustees, University of Alabama v. Garrett*, 531 U.S. 356 (2001) (failure by Congress to «identify a history and pattern of unconstitutional employment discrimination by the States against the disabled»).

63. For example, the right not to be discriminated against because of one's age is defined as only preventing arbitrary, irrational distinctions based on age. *See Kimel*, 528 U.S. at 82-85. The relevant constitutional text, the equal protection clause, doesn't actually say anything whatsoever about age discrimination.

judgments about the scope of federal power. They also, once again, illustrate how the federal courts determine the substantive allocation of power between the states and federal governments without even a hint of express textual guidance in the Constitution itself. Rather, both the *Kazenbach v. Morgan* and *City of Boerne* decisions appear driven directly by the justices' own particular view of federalism and the Court's role. As the Court changes, so does federalism. This was aptly put by Justice Stevens when he complained that the Court had elevated its own non-textual notions of state sovereignty as a «free standing limit on congressional authority, a limit necessary to protect States' 'dignity and respect' from impairment by the National Government.» Continuing this lament, Stevens then observed: «The framers did not, however, select the Judicial Branch as the constitutional guardian of those state interests.»[64]

3. New Federalism and the Autonomy of State Governments: The Supreme Court as Guardian of State Power

Whether by design or default, the Constitution provides only very general descriptions of the subjects falling within federal power, leaving the specifics to be resolved by unspecified future processes. Although one could reasonably doubt whether the framers intended that this process would involve the federal judiciary as the primary authority over federal power,[65] each of the examples described above demonstrate that the Court has, historically, been the dominate force in shaping and reshaping American federalism. These cases also reveal that the most critical component of this judicial process and best explanation of its outcomes, involves the long-standing debate on the Court about its own role. In other words, one of the prime determinates of how the Court has interpreted the limits of federal power has been the justices' own perspectives on the judicial function. To what degree should judges affirmatively intervene to safeguard a certain vision of state power rather than defer to legislative and political processes? To what extent is it appropriate in a democracy for unelected, and essentially unaccountable,

64. *Kimel*, 528 U.S. at 93, Stevens, J., *dissenting*.

65. There is no mention of such power in Article III and there was very limited discussion and no agreement over such a role for courts during the Constitutional Convention. *See* D. Tyler, Clarifying Departmentalism: How the Framers' Vision of Judicial and Presidential Review Makes the Case for Deductive Judicial Supremacy, 50 *William & Mary L. Rev.* 2215 (2009). One obvious reason for this is that the power of judicial review was not widely recognized at the time nor was it a part of the English legal traditions upon which American law was derived.

justices to substitute their own interpretations of text, history and tradition for that of the legislature? Such questions, especially acute, given the Constitution's indeterminate text, have predominated the Court's federalism jurisprudence.

Illustrations of this point appear throughout the cases described above. For example, in the commerce clause cases the critical difference between the various periods of expansive versus restrictive federal authority is the degree of deference given by the Court to Congress. During the most restrictive period the Court declined, in cases like *Hammer*, to give deference to Congressional judgments about the effects of state activity on interstate commerce and even questioned the underlying motives of the legislature. In the era between 1937 and 1995, the Court instead steadfastly declined to examine Congressional judgments in cases like *Wickard*, upholding any regulation of activity that might conceivably have affected interstate commerce. In contrast, the Court in *Morrison*, overtly concerned with preserving state authority from perceived federal encroachment, rejected consideration of voluminous Congressional evidence that violence against women was a substantial drag on national economic activity. In the words of Justice O'Conner: «We enforce the 'outer limits' of Congress' Commerce Clause authority not for their own sake, but to protect historic spheres of state sovereignty from excessive federal encroachment and thereby to maintain the distribution of power fundamental to our federalist system of government.»[66]

The seemingly inconsistent outcomes of these cases did not result from differences in text or circumstance – each relies on precisely the same spare Constitutional language authorizing Congress to «regulate commerce… among the several states.» Rather, the different outcomes are best explained by the how the justices comprising the court at various points in time collectively viewed their own role in determining federal power. Perhaps the best illustration of this is the contrasting approaches taken by different members of the Court in modern cases finding implicit limits on federal power derived from the 10th and 11th amendments and the autonomy of state governments.[67]

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66. *Gonzalez v. Raich*, 545 U.S. at 42, O'Conner, J., *dissenting.*

67. Taken collectively such cases have sometimes been labeled, perhaps derisively, as the Court's «new federalism.» *See, e.g.*, Manning, Federalism and the Generality Problem in Constitutional Interpretation, 122 *Harvard L. Rev*. 2003 (2009); S. Fruehwald, The Principled and Unprincipled Grounds of the New Federalism: A Call for Detachment in the Constitutional Adjudication of Federalism, 53 *Mercer L. Rev*. 811 (2002).

The first of these cases involve the question of when Congress can subject state governments to generally applicable federal standards. In *National League of Cities v. Usery*,[68] the Court considered the constitutionality of amendments to the Fair Labor Standards Act that made the federal minimum wage applicable to state government employees. Although the Court conceded that regulation of wages was well within Congress' commerce clause authority, it held that application of such regulations to state governments «impermissibly interfere[s] with the integral government functions of these bodies.» Overruling a contrary decision made a few years earlier,[69] the Court reasoned that this federal interference with state decisions about wages was contrary to the 10th amendment and thus also the commerce clause. The 10th amendment, of course, doesn't actually say anything about state integrity or preservation of any particular state power but only declares that «powers not delegated to the United States…are reserved to the States, or to the people.» The majority nevertheless found that the 10th amendment *implicitly* prohibits exercises of federal power[70] that «impairs the states' integrity or their ability to function effectively in a federal system» or interferes with «functions essential to separate and independent existence.»[71]

Justice Brennan's dissent in National League concisely articulates the underlying debate over the judicial role in shaping federalism: «My Brethren do not successfully obscure today's patent usurpation of the role reserved for the political process by their purported discovery in the Constitution of a restraint derived from sovereignty of the States….[M]anufactur[ing] an abstraction without substance, founded neither in the words of the Constitution nor on precedent….[M]y Brethrens' ill-conceived abstraction can only be regarded as a transparent cover for invalidating a congressional judgment with which they disagree.»[72] Paraphrasing Justice Marshall in *McColluch v. Maryland*, Justice Brennan then identified the political process as the primary constraint on fed-

68. *National League of Cities v. Usery*, 426 U.S. 833 (1976) *overruled* in *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528 (1985).

69. *Maryland v. Wirtz*, 392 U.S. 183 (1968) *overruled* in *National League of Cities v. Usery*, 426 U.S. at 854.

70. Oddly, Justice Rehnquist writes in this opinion that the amendment «expressly declares» that Congress may not act to «impair[] state integrity» 426 U.S. at 842. However, unless the justices have a secret copy of an alternative Constitutional text, this is plainly not true.

71. 426 U.S. at 851-52.

72. *Id*. at 857-58, 867, Brennan, J., *dissenting.*

eral power: «the Constitution contemplates that restraints upon exercise by Congress of its plenary commerce power lie in the political process and not in the judicial process.»[73]

Less than 10 years later the Court would overrule *National League of Cities* for precisely the reasons articulated by Justice Brennan. In *Garcia v. San Antonio Metropolitan Transit Authority*,[74] a different majority of the Court declared that «[a]ny rule of state immunity that looks to the 'traditional' 'integral' or 'necessary' nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes.» [75] Expressing doubts about reliance upon «a priori definitions of state sovereignty» as a means to arrive at principled limits on federal commerce power, the Court discounted the judicial role in preserving state power: «[T]he principle means chosen by the framers to ensure the role of the States in the federal system lies in the structure of the Federal government itself…[which] was designed in large part to protect the States from overreaching by Congress.»[76] The judiciary is not the guardian of state power but rather the «basic limit on the federal commerce power is that inherent in all congressional action – the built-in restraints that our system provides through state participation in federal governmental action.»[77]

The importance of the justices' perspectives on the limits of their role is similarly illustrated by cases involving the 11th amendment and state government immunity from federal court jurisdiction. Although the 11th amendment by its terms simply prohibits federal court jurisdiction over claims brought against a state by individuals from another state,[78] the Supreme Court has frequently viewed the amendment as reflecting broader principles of state immun-

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73. *Id*. at 876.

74. *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528 (1985).

75. Id. at 546.

76. Id. at 550.

77 . Id. at 556.

78. The amendment states: «The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any foreign state.» The amendment was adopted by the states in response to a decision of the Supreme Court that, consistent with the original text of Article III, allowed a citizen of [Georgia] to sue the state of Georgia in federal court for money damages. *See Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).

ity–an immunity that confirms a particular, non-textual, view of federalism.[79] For example, the 11th amendment immunity applies even when an individual is attempting to vindicate rights or benefits secured under federal law. Thus, while Congress has the power to create laws regulating commerce and to make those laws applicable to state governments, it does not have the power to authorize individuals to sue state governments for violations of those laws in federal courts.[80]

The Court's perceived role as guardian of state power perhaps reached its zenith in *Alden v. Maine*.[81] Even after the Court declared that Congress could not enforce federal law by authorizing suits for money damages in federal courts against the states, most observers assumed that state violations of federal law could be vindicated by bringing individual claims in the state's own courts. State courts are, after all, expressly required by Article VI to uphold and apply federal law. In *Alden*, however, the Court held otherwise ruling that state governments may not be sued for violations of federal law even when the claims are brought in the state's own courts.[82] Neither the original Constitutional text nor the 11th amendment say anything whatsoever about state immunity from federal claims in state courts. Nevertheless, the Court reasoned, such suits against state governments were inconsistent with American federalism because they would «denigrate [] the separate sovereignty of the States….» This rationale, not directly based upon any Constitutional text, reflects a judicial activism seemingly

79. *See* Manning, *supra* note 67. Thus, in direct contradiction to the 11th amendment's text, the Court has ruled that the amendment bars suits for money damages against the state in federal court by a state's *own* citizens. *Han v Louisiana*, 134 U.S. 1 (1890).

80. For example, in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the Court decided that Congress did not have the power under the commerce clause to subject states to suits by American Indian Tribes in federal court to enforce federal law enacted to protect those tribes. In *Florida Pre-Paid Post-Secondary Education Expense Board v. College Saving Bank & United States*, 527 U.S. 627 (1999) the Court extended this ruling to explicitly cover all Article I powers including Congress' exclusive Article I powers over intellectual property rights such as the enforcement of patents. In reaching this conclusion, the Court overruled a contrary decision made just 7 years earlier by a different set of justices, four of whom had retired in the interim. *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989) overruled in *Florida Pre-Paid Post-Secondary Education Expense Board v. College Saving Bank & United States*, 527 U.S. 627 (1999).

81. *Alden v. Maine,* 527 U.S. 706 (1999).

82. The petitioners in Alden had originally sued in federal court on their claims that Maine had violated the federal Fair Labor Standards Act's overtime provisions. These claims were, however, dismissed after the Court's decision in *Seminole Tribe* denying federal court jurisdiction under the 11th amendment. *See* note 80, *supra*. The same claims were then brought in the state courts of Maine.

motivated once again by a perceived need to protect states from assertions of federal power.[83]

4. Conclusion: Evaluating the Judicial Role in Shaping Federalism

Examination of the American judiciaries' historical role in defining the meaning of federalism teaches that the combination of an indeterminate text and strong judicial review leads to significant variations in how power is distributed over time. Because the balance of local and national authority under the American system is not significantly constrained by the Constitutional text, judges' personal viewpoints regarding federalism and their own role in the system have played a prominent role in the actual allocations of power. The pivotal question, unanswered by the Constitution, is whether the judiciary should act as a guardian of state interests against federal encroachment or more properly defer to the outcome of normal political processes. The result has been that the American judiciary continues to play a prominent, if not dominate, role in shaping American federalism. Whether this is this a good or bad thing may depend upon the degree of trust one places in the judicial process but undeniably it is an approach significantly divorced from the democratic political process. American federal judges are, after all, neither elected nor otherwise accountable to the voting populace.

The obvious upside to an alternative approach –one heavily tilted toward political compromise and judicial deference– is that the resulting allocations of power are both accountable to the electorate and open to continual modification in light of exigencies. These positives are arguably counterbalanced to some degree by the potential that dominate political forces can more easily alter the system to gain short term advantage. The American model's best virtue is perhaps its reliance on an independent institution that is arguably above the tug and pull of temporary politics.

This advantage, if it be one, is significantly tempered by the fact that the Constitutional text provides very little meaningful textual guidance for the judi-

83. See Manning, note 67, *supra* at 2004-2009, 2020-2025 (discussing how the Court has created «free standing» non-textual limitations on federal power favoring «unenumerated state's rights» derived from perceived general purposes of federalism).

ciary. Without significant textual constraint, the Court's interpretation of federalism over time appears inconsistent and arguably more the product of judicial attitude, personal preferences and political orientation than adherence to principle. In other political systems, however, the disadvantages of utilizing independent judicial decision makers to mediate political disputes over federalism might be tempered if the justices were given more limited terms of service and constrained by judicial doctrines of deference as well as more definite and specific texts.

ABSTRACT

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Douglas Lee Donoho, professor of Law at the Nova Southeastern University

en The Judicial Role in the Evolution of American Federalism
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Federalist systems inevitably require processes through which disputes over the allocation of power between the national and regional governments can be resolved. The choice that a country makes regarding institutional authority for resolving such disputes is critical. In the context of American federalism, history demonstrates that such disputes have primarily been resolved by the judicial branch. Significantly, the Constitutional text itself often provides only slim guidance for resolving whether particular assertions of power, typically by the central government, are consistent with the constitutional structure. Since, under the power of judicial review, the federal courts have the final say regarding the meaning of the Constitution this indeterminacy has given the court tremendous power and discretion in shaping the contours of American federalism. As a consequence, federal power has substantially fluctuated throughout American history depending in major part on the judicial attitudes, personal preferences and political orientation of the justices.

Key words: American federalism; judicial review; Constitution; commerce clause; regional autonomy.

RESUM

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Douglas Lee Donoho, catedràtic de dret a la Nova Southeastern University

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ca El paper del poder judicial en l'evolució del federalisme nord-americà
p. 245-276

Inevitablement, els sistemes federalistes necessiten processos a través dels quals es puguin resoldre les discussions sobre l'assignació de poder entre els governs nacionals i regionals. L'elecció que un país fa pel que fa a l'autoritat institucional que ha de resoldre tals discussions és crítica. En el context del federalisme americà, la història demostra que tals discussions s'han resolt principalment per mitjà de la via judicial. De manera significativa, el text constitucional mateix sovint disposa només d'una mínima orientació per resoldre si les afirmacions concretes de poder, normalment per part del Govern central, són conseqüents amb l'estructura constitucional. Atès que, de conformitat amb el poder de revisió judicial, els tribunals federals tenen l'última paraula amb relació al significat de la Constitució, aquesta indeterminació ha atorgat al Tribunal un gran poder i discreció a l'hora de donar forma als contorns del federalisme americà. Com a conseqüència, el poder federal ha fluctuat substancialment a través de la història americana i ha depès en gran part de les actituds judicials, les preferències personals i l'orientació política dels jutges.

Paraules clau: federalisme nord-americà; revisió judicial; Constitució; clàusula de comerç; autonomia regional.

RESUMEN

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Douglas Lee Donoho, catedrático de derecho en la Nova Southeastern University

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es El papel del poder judicial en la evolución del federalismo norteamericano
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Inevitablemente, los sistemas federalistas necesitan procesos a través de los cuales se puedan resolver las discusiones sobre la asignación de poder entre los gobiernos nacionales y regionales. La elección que un país hace con respecto a la autoridad institucional que debe resolver tales discusiones es crítica. En el contexto del federalismo americano, la historia demuestra que tales discusiones se han resuelto principalmente por medio de la vía judicial. De manera significativa, el texto constitucional mismo a menudo dispone sólo de una mínima orientación para resolver si las afirmaciones concretas de poder, normalmente por parte del Gobierno central, son consecuentes con la estructura constitucional. Dado que de conformidad con el poder de revisión judicial, los tribunales federales tienen la última palabra con relación al significado de la Constitución, esta indeterminación ha otorgado al Tribunal un gran poder y discreción a la hora de dar forma a los contornos del federalismo americano. Como consecuencia, el poder federal ha fluctuado sustancialmente a través de la historia americana y ha dependido en gran parte de las actitudes judiciales, las preferencias personales y la orientación política de los jueces.

Palabras clave: federalismo norteamericano; revisión judicial; Constitución; cláusula de comercio; autonomía regional.