FORMALISM AND FUNCTIONALISM IN FEDERALISM ANALYSIS

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INTRODUCTION

During the 1980s, there was a flurry of Supreme Court decisions dealing with issues of separation of powers. These cases included Immigration and Naturalization Services v. Chadha,1 which invalidated the legislative veto;2 Northern Pipeline Construction Co. v. Marathon Pipe Line Co.,3 which declared the bankruptcy courts unconstitutional; and Bowsher v. Synar,4 which invalidated the Graham-Rudman Deficit Reduction Act.5 It was widely noted that these decisions were highly formalistic and did not take a functional approach to separation of powers.6 The decisions were formalistic in that they reasoned deductively from minimally justified premises and expressly eschewed consideration of what result would be best from a policy perspective.

In the 1990s, there has also been a flurry of Supreme Court decisions dealing with federalism. Indeed, of all the areas of constitutional law, federalism has been the area of greatest change during this decade. In United States v. Lopez,8 for the first time in sixty years, the Supreme Court declared unconstitutional a federal law as exceeding the scope of Congress' commerce clause authority.9 In New York v. United States,10 for only the second time in sixty years—and the earlier case had

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2. Id. at 959.
4. Id. at 87.
6. Id. at 736.
9. Id. at 1634.
been overruled\textsuperscript{11}—the Court found a federal law to violate the Tenth Amendment.\textsuperscript{12} In \textit{Seminole Tribe of Florida v. Florida},\textsuperscript{13} the Supreme Court overturned a decision that was only seven years old and adopted an unprecedented limit on the ability to hold state governments accountable in federal court.\textsuperscript{14}

In discussing these cases and the decisions that may follow them in this decade,\textsuperscript{15} I want to make three major points. First, the Supreme Court's approach to federalism in the 1990s has been formalistic, not functional. As the Court did with separation of powers in the 1980s, the federalism decisions of the 1990s have reasoned deductively from assumed major premises and have largely ignored functional considerations in allocating power between federal and state governments.

Second, a formalistic approach to federalism is misguided. The Constitution is silent about the allocation of power between federal and state governments. Nor can major premises be derived from the intent of the framers. Ultimately, the analysis must be about what is the most desirable division of authority between federal and state governments; what arrangement will best lead to effective government. This analysis, of necessity, is functional.

Finally, I want to identify the issues in a functional approach to federalism. I believe that a functional approach to federalism requires attention to the following four questions: (1) Is it desirable to limit Congress' power so as to protect state governments? (2) If such limits are to be created, do they apply differently depending on the particular power that Congress is exercising? (3) If it is desirable to create such limits, can the limits be drawn in a meaningful way that can be applied in

\textsuperscript{12} \textit{New York}, 555 U.S. at 188.
\textsuperscript{13} 116 S. Ct. 1114 (1996).
\textsuperscript{14} \textit{Id. at} 1131-32. \textit{Seminole Tribe} overruled \textit{Pennsylvania v. Union Gas Co.}, 491 U.S. 1 (1989). \textit{Id. at} 1128.
\textsuperscript{15} As this Article was going to press, the Supreme Court had before it \textit{Printz v. United States}, 66 F.3d 1025 (9th Cir. 1995), \textit{cert. granted}, 116 S. Ct. 2521 (1996). The issue in \textit{Printz} was whether Congress had the power, consistent with the Tenth Amendment, to command state-created chief law enforcement officers to search records to ascertain whether a person may lawfully purchase handguns. \textit{Printz}, 66 F.3d at 1037. On June 27, 1997, the Court decided that state agents could not be commanded to perform federally-required background checks for such purchases. \textit{See Printz v. United States}, 65 U.S.L.W. 4731 (U.S. June 27, 1997).
future cases? (4) How should the need for state accountability be balanced with the desire to protect state governments from federal court interference? I believe that the Court's analysis of these four issues has been grossly deficient and that the answers to these questions can provide the basis for a functional analysis of federalism. These are not the only questions that need to be considered, but they seem the necessary and desirable starting point.

My goal in this Article is not to answer these questions or to develop the content of a functional theory of federalism. That, of course, is a task far beyond the scope of this Article. Rather, I seek to defend the need for a functional approach to federalism and outline the issues that need to be confronted in such an analysis.

I. THE SUPREME COURT'S APPROACH TO FEDERALISM IN THE 1990s HAS BEEN FORMALISTIC

In the 1990s federalism cases, the Court has reasoned deductively, from largely unjustified major premises to conclusions, without consideration of what would be the most desirable allocation of power between the federal and state governments. In other words, each of the major federalism rulings of the 1990s has been highly formalistic and has expressly disavowed a functional analysis.

In 1992, the Court, in New York v. United States,16 declared unconstitutional a federal law on federalism grounds for only the second time since 1936.17 The 1985 Low-Level Radioactive Waste Policy Amendments Act, created a statutory duty for states to provide for the safe disposal of radioactive wastes generated within their borders.18 The Act provided monetary incentives for states to comply with the law and allowed states to impose a surcharge on radioactive wastes received from other states.19 Additionally, and most controversially, to ensure effective state government action, the law provided that states would “take title” to any wastes within their borders that were

17. Id. at 188.
18. Id. at 161 (citing 42 U.S.C. § 2021c(a)(1)(A) (1988)).
19. Id. at 152.
not properly disposed of by January 1, 1996 and then would "be liable for all damages directly or indirectly incurred."20

The Supreme Court ruled that Congress, pursuant to its authority under the Commerce Clause, could regulate the disposal of radioactive wastes. However, by a six-to-three margin, the Court held that the "take title" provision of the law was unconstitutional because it gave state governments the choice between "either accepting ownership of waste or regulating according to the instructions of Congress."21 Justice O'Connor, writing for the Court, said that it was impermissible for Congress to impose either option on the states.22 Forcing states to accept ownership of radioactive wastes would impermissibly "commandeer" state governments, and requiring state compliance with federal regulatory statutes would impermissibly impose on states a requirement to implement federal legislation.23 The Court concluded that it was "clear" that because of the Tenth Amendment and limits on the scope of Congress' powers under Article I, "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program."24

The Court's explanation for why the law violated federalism was the epitome of formalistic reasoning. The decision can be summarized as a syllogism:

Major premise: Congress may not compel state governments to adopt laws or regulations.
Minor premise: The Low Level Radioactive Waste Disposal Act compels state governments to adopt laws or regulations.
Conclusion: The Low Level Radioactive Waste Disposal Act is unconstitutional.

The primary reason Justice O'Connor gave for why Congress cannot compel states to act is that it would frustrate democratic accountability because voters would not understand that the state was acting pursuant to a federal mandate.25 The Court explained that allowing Congress to commandeer state governments would undermine accountability because Congress could make a decision, but the states would take the political

20. Id. at 153-54 (quoting 42 U.S.C. § 2021a(d)(2)(C) (1988)).
21. Id. at 175.
22. Id.
23. Id.
24. Id. at 188.
25. Id. at 168-69.
heat and be held responsible for a decision that was not theirs. Justice O'Connor wrote:

[Where the federal government compels states to regulate, the accountability of both state and federal officials is diminished. . . . [W]here the federal government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not preempted by federal regulation.26]

Justice O'Connor's reasoning also can be summarized as a syllogism:

Major premise: Democratic accountability requires that voters clearly understand which level of government is responsible for actions taken.
Minor premise: Congress forcing state and local governments to enact legislation or regulation frustrates democratic accountability.
Conclusion: Congress forcing state and local governments to enact legislation or regulation interferes with democratic accountability and is thus unconstitutional.

The major premise of the syllogism was simply asserted by the Court. Justice O'Connor offered no justification as to the constitutional basis for this premise of democratic accountability.

Nor was the minor premise justified; there was no explanation as to why the voters could not understand when the state was acting pursuant to a federal mandate. People often take actions, such as paying taxes, because of federal compulsion. It is unclear why voters cannot understand when a state government is acting for the same reason.

Perhaps most importantly, Justice O'Connor's opinion for the Court expressly rejected the argument that a compelling government interest is sufficient to permit a law that otherwise would violate the Tenth Amendment.27 Justice O'Connor wrote that "[n]o matter how powerful the federal interest involved, the

26. Id.
27. See id. at 178.
Constitution simply does not give Congress the authority to require the States to regulate."\textsuperscript{28} In fact, Justice O'Connor conceded that "[t]he result may appear 'formalistic' in a given case to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity."\textsuperscript{29} The decision appears formalistic because it is formalistic: the Court reasoned deductively from premises that were minimally defended and the Court disavowed any attention to functional considerations.

In \textit{United States v. Lopez},\textsuperscript{30} by a five-to-four margin, the Supreme Court declared unconstitutional the Gun-Free School Zones Act of 1990, which made it a federal crime to have a gun within 1000 feet of a school.\textsuperscript{31} Splitting along ideological lines, the Court ruled that the relationship to interstate commerce was too tangential and uncertain to uphold the law as a valid exercise of Congress' commerce power.\textsuperscript{32} Chief Justice Rehnquist wrote the opinion of the Court and was joined by Justices O'Connor, Kennedy, Scalia, and Thomas.\textsuperscript{33} Justices Stevens, Souter, Ginsburg, and Breyer dissented.\textsuperscript{34}

The Gun-Free School Zones Act of 1990 made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."\textsuperscript{35} The law defines a school zone as "in, or on the grounds of, a public, parochial or private school\textsuperscript{36} or "within a distance of 1,000 feet from the grounds of a public, parochial or private school."\textsuperscript{37} Alphonso Lopez, a twelfth grade student in San Antonio, Texas, was convicted of violating this law and sentenced to six months imprisonment and two years of supervised release.\textsuperscript{38}

\textsuperscript{28} \textit{Id.}
\textsuperscript{29} \textit{Id.} at 187.
\textsuperscript{30} 115 S. Ct. 1624 (1995).
\textsuperscript{31} \textit{Id.} at 1626 n.1 (citing 18 U.S.C. §§ 921(a)(25), 922(q) (1994)).
\textsuperscript{32} \textit{Id.} at 1634.
\textsuperscript{33} \textit{Id.} at 1626, 1634, 1642.
\textsuperscript{34} \textit{Id.} at 1651-55. For an excellent collection of essays on Lopez and its possible implications, see Symposium, Reflections on United States v. Lopez, 94 Mich. L. Rev. 533 (1996).
\textsuperscript{35} \textit{Lopez}, 115 S. Ct. at 1626 (quoting 18 U.S.C. § 922(q)(1)(A) (1994)).
\textsuperscript{36} \textit{Id.} at 1626 n.1 (quoting 18 U.S.C. § 921(a)(25) (1994)).
\textsuperscript{37} \textit{Id.}
\textsuperscript{38} \textit{Id.} at 1626.
Lopez appealed on the ground that the Gun-Free School Zones Act of 1990 was an unconstitutional exercise of Congress' commerce power. The Court concluded that the law was unconstitutional because it was not substantially related to interstate commerce. Chief Justice Rehnquist's opinion for the Court began by emphasizing that the Constitution creates a national government of enumerated powers.

After reviewing the history of decisions under the commerce clause, the Court identified three types of activities that Congress can regulate under this power. First, Congress can "regulate the use of the channels of interstate commerce." The Court cited Heart of Atlanta Motel, Inc. v. United States, which upheld the federal law prohibiting discrimination by hotels and restaurants, as an example of protecting the channels of interstate commerce.

Second, the Court said that Congress may legislate "to regulate and protect the instrumentalities of interstate commerce." The Court said that this includes the power to regulate persons and things in interstate commerce. The Court here cited several cases that upheld congressional power to regulate the railroads under its commerce power.

Finally, the Court said that Congress may "regulate those activities having a substantial relation to interstate commerce." Chief Justice Rehnquist said that the prior case law was uncertain as to whether an activity must "affect" or "substantially affect" interstate commerce to be regulated under this approach. Chief Justice Rehnquist concluded that the more restrictive interpretation of congressional power is preferable and that "the proper test requires an analysis of

39. Id.
40. Id. at 1642.
41. Id. at 1628.
42. Id.
43. Id.
44. 379 U.S. 241 (1964).
45. Id. at 261-62.
46. Lopez, 115 S. Ct. at 1629.
47. Id.
48. Id.; see, e.g., Shreveport Rate Cases, 234 U.S. 342 (1914).
49. Lopez, 115 S. Ct. at 1629-30 (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937)).
50. Id. at 1630.
whether the regulated activity 'substantially affects' interstate commerce.\textsuperscript{51}

The Court concluded that the presence of a gun near a school did not substantially affect interstate commerce and that therefore the federal law was unconstitutional.\textsuperscript{52} Chief Justice Rehnquist noted that nothing in the Act limited its application to instances where there was proof that the gun had been part of interstate commerce.\textsuperscript{53} The Court specifically rejected the federal government's claim that regulation was justified under the commerce clause because possession of a gun near a school may result in violent crime that can adversely affect the economy.\textsuperscript{54}

In other words, Chief Justice Rehnquist's opinion for the Court again can be summarized as a syllogism:

Major premise: Congress may use its commerce power in only three situations: to regulate the channels of interstate commerce; to regulate instrumentalities of interstate commerce or persons or things in interstate commerce; or to regulate activities that have a substantial effect on interstate commerce.

Minor premise: The Gun-Free Schools Zone Act does not fit into any of these three categories.

Conclusion: The Gun-Free Schools Zone Act is unconstitutional.

Chief Justice Rehnquist offered no justification for the major premise and why these are the only situations where Congress can regulate under its commerce clause authority. Indeed, the decision was highly reminiscent of the opinion more than a decade earlier in \textit{Northern Pipe Line Construction Co. v. Marathon Pipe Line Co.},\textsuperscript{55} in which the Court declared unconstitutional the federal bankruptcy courts.\textsuperscript{56} Justice Brennan, writing for the plurality, posited three situations where Congress could create courts where judges have life tenure and protection against salary decrease.\textsuperscript{57} No explanation or

\textsuperscript{51} Id.
\textsuperscript{52} Id. at 1634.
\textsuperscript{53} Id.
\textsuperscript{54} Id. at 1632-34.
\textsuperscript{55} 458 U.S. 60 (1982).
\textsuperscript{56} Id. at 87.
\textsuperscript{57} Id. at 64-70.
justification was provided as to why these three situations were exclusive. He then concluded that the bankruptcy courts were unconstitutional because they did not fit into these three categories.58

Moreover, the Court's opinion in *Lopez* was highly formalistic in that it gave no consideration to the functional desirability of having Congress prohibit guns near schools. Obviously, firearms near schools are bad and there is a national interest in law prohibiting this. But the Court gave this interest no weight in its decisionmaking.

The final case so far in the 1990s concerning federalism was *Seminole Tribe of Florida v. Florida*.59 The Indian Gaming Regulatory Act,60 enacted by Congress pursuant to the Indian Commerce Clause, permits Indian tribes to conduct gambling only pursuant to a compact between a state and a tribe.61 Under the Act, states have a duty to negotiate in good faith with a tribe toward the formation of a compact.62 The law specifically provided that tribes may sue states in federal court to compel performance of this duty.63

The Supreme Court, with exactly the same ideological division as in *United States v. Lopez*, declared the authorization for suits against states unconstitutional as violating the Eleventh Amendment.64 Chief Justice Rehnquist again wrote for the Court, joined by Justices O'Connor, Scalia, Kennedy, and Thomas; Justices Stevens, Souter, Ginsburg, and Breyer dissented.65

In 1989, the Supreme Court, in *Pennsylvania v. Union Gas Co.*,66 held that Congress could authorize suits against states in federal court so long as the law, in its text, was clear in authorizing such litigation.67 *Union Gas* also was a five-to-four decision, and the five Justices in the majority were Brennan, White, Marshall, Blackmun, and Stevens.68 By 1996, four of

58. *Id.* at 71-76.
61. *Id.*
62. *Id.* § 2710(d)(3)(A).
63. *Id.* § 2710(d)(7).
65. *Id.* at 1119, 1133, 1145.
67. *Id.* at 23.
68. *Id.* at 5.
these five Justices had left the high Court. In contrast, the four dissenters in *Union Gas*—Rehnquist, O'Connor, Scalia, and Kennedy—remained.\(^{69}\) They were joined by Justice Thomas to create the majority to overrule a decision which was only seven years old.\(^{70}\)

Chief Justice Rehnquist's opinion for the Court again can be summarized as a syllogism:

Major premise: Subject matter jurisdiction cannot be authorized by Congress where not permitted by the Constitution.

Minor premise: The Eleventh Amendment is a bar to subject matter jurisdiction for suits against state governments even when brought by their own citizens.

Conclusion: Congress cannot authorize subject matter jurisdiction for suits against state governments where barred by the Eleventh Amendment.

Although the major premise is an axiom of American law, the minor premise is far more controversial because the text of the Eleventh Amendment speaks only of suits against states brought by citizens of other states and citizens of foreign countries. Moreover, impressive historical research suggests that the Eleventh Amendment was intended only as a restriction on suits against states that were based solely on diversity jurisdiction.\(^{71}\)

The Court completely ignored functional considerations, such as the need to hold state governments accountable through actions in federal court. Chief Justice Rehnquist concluded his opinion in *Seminole Tribe* for the Court by declaring:

In overruling *Union Gas* today, we reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal government. Even when the Constitution vests in Congress complete law-making

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69. *Id.* at 29.
authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting states. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.\textsuperscript{72}

No weight whatsoever was given to the functional need to ensure state compliance with federal laws. The Court, however, recognized that Congress could authorize suits against states when acting pursuant to its powers under section five of the Fourteenth Amendment.\textsuperscript{73} Yet, this, too, seemed based entirely on formalistic considerations: the Fourteenth Amendment was adopted after the Eleventh Amendment, not like the commerce power which preceded the Eleventh Amendment. Chief Justice Rehnquist wrote:

\textit{Fitzpatrick} [which held that Congress could authorize suits against states when acting pursuant to section five of the Fourteenth Amendment] was based upon a rationale wholly inapplicable to the Interstate Commerce Clause, viz., that the Fourteenth Amendment, adopted well after the Eleventh Amendment and the ratification of the Constitution, operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment.\textsuperscript{74}

Thus, the federalism decisions of the 1990s, like the separation of powers rulings of the 1980s, have been formalistic in the classic sense of that term. The Court has emphasized deductive reasoning from asserted premises and has refused to give weight to functional considerations, whether based on public policy needs, such as cleaning up nuclear wastes or keeping guns away from schools, or constitutional values, such as ensuring state compliance with federal law.

II. A FORMALISTIC APPROACH TO FEDERALISM IS MISGUIDED; ANALYSIS MUST BE FUNCTIONAL

Much earlier in this century, the legal realists exposed the fatal flaws in formalistic analysis.\textsuperscript{75} Their criticisms of

\textsuperscript{72} Seminole Tribe, 116 S. Ct. at 1131-32.
\textsuperscript{73} Id. at 1128.
\textsuperscript{74} Id.
\textsuperscript{75} See Morton J. Horwitz, The Transformation of American Law 1870-1960:
formalism are just as cogent today and applicable to the Supreme Court's modern use of formalism in the area of federalism. Benjamin Cardozo said that “the demon of formalism tempts the intellect with the lure of scientific order” and said that when judges “are called upon to say how far existing rules are to be extended or restricted, they must let the welfare of society fix the path, its direction and its distance.” The formalism of the 1990s likewise appears to offer “scientific order” in the form of the certainty of deductive reasoning and ignores considerations of the “welfare of society.”

In part, the flaw of formalism in the area of federalism is the impossibility of any clear premises for reasoning. The text of the Constitution says virtually nothing about the allocation of powers between the federal and state governments. The framers were largely silent about this issue and their views are of limited relevance in dealing with a government so vastly different from what they envisioned. There has been no consistent tradition in Supreme Court decisions dealing with federalism; quite the contrary, the decisions have been remarkably inconsistent.

The Constitution provides little guidance as to federalism, although several constitutional provisions concern federalism. Most importantly, Articles I, II, and III of the Constitution create a national government with broad powers. There is no dispute that the central difference between the Constitution and its predecessor, the Articles of Confederation, was in the establishment of the federal government. Article VI of the Constitution is crucial in understanding federalism because it provides that the Constitution, and laws and treaties made pursuant to it, are the supreme law of the land.

No provision of the Constitution speaks directly to the allocation of power between the national and state governments. Sometimes, both in political rhetoric and in court decisions, the Tenth Amendment is invoked as protecting state governments from federal encroachments. The text of the Tenth Amendment, however, simply does not say this. The Tenth Amendment states: “The powers not delegated to the United States by the

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76. Id. at 190 (quoting BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 65-67 (1921)).
77. U.S. CONST. art. VI.
Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.²⁷

In other words, the Tenth Amendment states that Congress may act only if the power to do so is granted to it by the Constitution. States, in contrast, may act unless the Constitution prohibits the conduct. Phrased slightly differently, the Tenth Amendment is an important reminder that states possess the police power—the ability to do anything not forbidden by the Constitution; Congress does not—Congress may act only when empowered by the Constitution. The text of the Tenth Amendment simply does not say that legislation within Congress’ Article I authority is invalid if it interferes with state prerogatives. Nothing in the language of the Tenth Amendment provides a basis for declaring federal laws unconstitutional if they are adopted within the scope of powers given Congress by the Constitution.

Nor do the Supreme Court’s decisions concerning the Tenth Amendment provide much guidance as to the appropriate content of federalism analysis. Over the course of American history, the Supreme Court has shifted back and forth between two different interpretations of the Tenth Amendment. One is that the Tenth Amendment is a reminder that Congress may act only if it has express or implied authority. By this view, no law within Congress’ powers is to be invalidated for interfering with states’ rights. The other view is that the Tenth Amendment reserves a zone of activities to the states and that Congress may not intrude into this zone even when it is exercising power under Article I of the Constitution.

From the earliest days of the nation until the late 19th century, the first view prevailed. Indeed, in Gibbons v. Ogden, Chief Justice John Marshall explained that when Congress has the authority to act, such as under the commerce power, it may legislate as if there are no state governments.²⁹ Beginning in the late nineteenth century and continuing until 1937, the Supreme Court aggressively used federalism and the Tenth Amendment to limit the scope of Congress’ authority and to declare many federal laws unconstitutional. The Court said that regulation of production, including mining and manufacture, was

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²⁷ U.S. Const. amend. X.
²⁹ 22 U.S. 1, 196-97 (1824).
reserved to the states. To protect state sovereignty the Court narrowly defined the scope of Congress' powers under provisions such as the commerce clause and also held that federal laws attempting to control aspects of production violate the Tenth Amendment. For example, under this approach, the Court declared unconstitutional a federal law prohibiting the shipment in interstate commerce of goods made by child labor, and a federal law requiring employers to pay a minimum wage.

In 1937, the Court abandoned this view of the Tenth Amendment and shifted back to the earlier position that the Tenth Amendment is simply a reminder that Congress may act only if there is express or implied authority. In United States v. Darby, the Court declared: "The amendment states but a truism that all is retained which has not been surrendered." From 1937 until 1976, not a single federal law was declared unconstitutional as violating the Tenth Amendment.

In 1976, the Court again held that a federal law may violate the Tenth Amendment even though it is within the lawful scope of Congress' authority. In National League of Cities v. Usery, the Court declared unconstitutional a federal law requiring state and local governments to pay their employees the minimum wage. For almost a decade after National League of Cities, the Supreme Court and lower federal courts struggled to define the content of the Tenth Amendment as a limit on Congressional power. In Garcia v. San Antonio Metropolitan Transit Authority, the Supreme Court expressly overruled National League of Cities. The Court declared that the Tenth Amendment would not be used as a basis for invalidating federal legislation. The Court explained that it had proven impossible to define a zone of activities reserved to the states and, in addition, the interests of states were adequately protected in the

82. Carter, 298 U.S. at 238.
83. 312 U.S. 100 (1941).
84. Id. at 124.
86. Id. at 855-56.
88. Id. at 531.
89. See id. at 556-57.
national political process. But less than a decade later, as described above, in *New York v. United States*, the Court again used the Tenth Amendment as a basis for declaring a federal law unconstitutional.

The point of this brief summary of federalism decisions is that it is not possible to find premises about federalism in the text, the framers' intent, or 200 years of Supreme Court decisions about federalism. The premises in *New York v. United States*, *United States v. Lopez*, and *Seminole Tribe of Florida v. Florida* were assertions with little, if any, support. In *New York v. United States*, the Court offered no explanation as to why Congress cannot compel states to implement federal regulatory programs except for the assertion that such conscription violates state sovereignty and a claim about government accountability that never was justified as a constitutionally based principle. In *United States v. Lopez*, the Court offered no explanation for why Congress could regulate in three, and only three, circumstances. In *Seminole Tribe*, the Court relied on the highly dubious premise that the Eleventh Amendment is a constitutional bar on subject matter jurisdiction, even for suits against a state by its own citizens—a premise that is inconsistent with the very text of the Amendment.

Even more importantly, analysis must be functional because ultimately the issue of federalism is what allocation of power provides the best governance with the least chances of abuse. Federalism is about how power should be allocated between federal and state governments, and this must be based on functional analysis of what provides for best governance in each context.

Federalism itself is based on certain values. However, many Supreme Court decisions protecting federalism say relatively little about the underlying values that are being served. When the Court does speak of the values of federalism, usually the

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90. See id. at 550-57.
92. Id. at 188.
93. Id. at 144.
96. For an excellent argument that the on-going debate over federalism is really an argument about decentralization, see Edward L. Rubin & Malcolm Feeley, Federalism: Some Notes on a National Neurosis, 41 UCLA L. Rev. 903 (1994).
following three benefits of protecting state governments are identified: decreasing the likelihood of federal tyranny, enhancing democratic rule by providing government that is closer to the people, and allowing states to be laboratories for new ideas. Yet, as I have argued elsewhere, these values have little relationship to the Supreme Court’s decisions in the area of federalism.

In New York v. United States, for example, there is no apparent relationship between the ruling and the underlying values served by federalism. It seems far-fetched to see federal requirements for safe state disposal of nuclear wastes as putting the country more at risk to federal tyranny. Surely people in the State of New York want safe disposal of the nuclear wastes in their midst. If New York was responsive to the people’s wishes and assured safe disposal, the federal law is redundant of what would occur anyway and thus minimally intrusive upon state autonomy. But if New York is unresponsive to its citizens—perhaps because of a desire to avoid clean-up costs or because of pressure from particular industries—federal regulation increases responsiveness. Little seems to be gained by experimenting with not cleaning up the wastes. Under the federal law, states had the ability to experiment with techniques and mechanisms for the clean-up. The one thing that states could not do is experiment by providing inadequate clean-ups. The federal law hardly seems an intrusion upon desirable and reasonable state experimentation.

In fact, the absence of a functional analysis can lead to Supreme Court decisions that are counter-productive in terms of the goals sought to be achieved. For instance, in New York v. United States the Court’s express purpose is protecting state governments. Yet, the Court’s ruling actually could have exactly opposite the effect. The Court in New York v. United States said that Congress could set out detailed standards for how nuclear wastes are to be handled and could require that states comply with them. New York, however, said that what Congress could not do is force states to devise means for dealing with the

97. For an excellent exploration of these values, see David L. Shapiro, Federalism: A Dialogue (1995).
99. New York, 505 U.S. at 188.
problem. In other words, it is impermissible for Congress to let the states decide for themselves how to handle the wastes, but it is permissible for Congress to force the states to do so in a particular manner. Yet, the latter would allow the states more discretion and choices and thus be more protective of state sovereignty than the approach that the Court was willing to allow.

Moreover, the Court's formalism with regard to federalism obscures consideration of competing values. Perhaps most importantly there is the constitutional value of ensuring the supremacy of federal law. The Constitution's most explicit, and most significant, provision concerning federalism is the supremacy clause in Article VI, which declares that the Constitution, and laws and treaties made pursuant to it, are the supreme law of the land. Yet, consideration of this constitutional value is absent in the recent federalism decisions. This is most apparent in *Seminole Tribe of Florida v. Florida*.

In *Seminole Tribe*, the Court does not question that Congress has the authority to require that states negotiate with Indian tribes in good faith to allow gambling on Indian reservations. The question, then, is how Congress can ensure the supremacy of federal law and secure state compliance with this mandate. The Court declared unconstitutional the primary enforcement mechanism, the ability to sue states in federal court for alleged noncompliance. The Court also ruled that state officers could not be sued in federal court to enforce the law because it had comprehensive enforcement mechanisms.

Traditionally, suits against state officers have been a key way of enforcing the Eleventh Amendment and ensuring state compliance with federal law. Ever since *Ex parte Young* it has been the law that state officers may be sued in federal court, even though the state government was immune from suit. Suits against state officers have been indispensable in holding state governments accountable and providing for the supremacy of federal law. Indeed, Professor Charles Alan Wright observed that

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100. *Id.*
101. U.S. CONST. art. VI, cl. 2.
102. An argument could be made based on *New York v. United States* that such compulsion of states violates the Tenth Amendment.
104. *Id.* at 1132-33.
“the doctrine of Ex parte Young seems indispensable to the establishment of constitutional government and the rule of law.”106 Seminole Tribe, though, carves an unprecedented exception to Ex parte Young: state officers cannot be sued in federal court to enforce federal laws that have comprehensive enforcement mechanisms.107 Chief Justice Rehnquist’s opinion provides no definition of what would constitute such a mechanism.108

The key question after Seminole Tribe is: How can the federal Indian Gaming Act, or other similar laws, be enforced? There is no doubt that Congress had the constitutional authority to enact the law pursuant to its Article I power to regulate commerce with Indian tribes. If Congress can legislate, surely it must also have the power to ensure the enforcement of its statutes. Yet, after Seminole Tribe, enforcement of this law seems an impossibility. The Supreme Court expressly held that neither the state government nor state officers can be sued to enforce the statute.109 Chief Justice Rehnquist’s opinion for the Court said that suits against state officials were barred because of the comprehensive enforcement mechanisms in the law.110 But the only real enforcement mechanism was the ability to sue state governments to accomplish compliance; the very provision declared unconstitutional in the first part of the opinion.

Nor is this federal statute unique. If suits against both the state and the state officer are precluded, there will be no way for the federal courts to ensure state compliance with federal law.

108. One approach here would be for the Court to use a doctrine that it developed in the context of § 1983 litigation. The Court has held that suits may be brought under § 1983 to enforce federal laws, Maine v. Thiboutot, 448 U.S. 1 (1980), but has created an exception for statutes that explicitly or implicitly preclude § 1983 litigation. In Middlesex County Sewage Auth. v. National Sea Clammers Ass’n, 453 U.S. 1, 20 (1981), the Court found that the “comprehensive enforcement mechanisms” in statutes demonstrated “congressional intent to preclude the remedy of suits under § 1983.” In Wright v. City of Roanoke Redevelopment and Housing Auth., 479 U.S. 418, 423 (1987), the Court clarified this and emphasized that preclusion of § 1983 suits required that there be “express provision or other specific evidence from the statute that Congress intended to foreclose [§ 1983 litigation].” The Court could import this analysis into the Eleventh Amendment context in deciding what is a comprehensive enforcement mechanism for purposes of precluding a suit against state officers under Seminole Tribe.
110. Id.
The constitutional value of federal supremacy is sacrificed to the value of state immunity.

Ultimately, the greatest failing of formalism is that it treats the structure of government as an end in itself, rather than as a means to the end of effective governance. Analysis must be functional. What situations must be handled or are best dealt with by the federal government and which by the states? There is no substitute for facing these questions directly in Congress or in the courts.

III. **What is the Content of a Functional Analysis of Federalism?**

I obviously do not mean to detail a full functional theory of federalism. That would be a task far beyond the scope of a single article. Rather, I want to identify the questions that can provide the basis for a functional analysis. Four questions seem most important.

1. **Is It Desirable to Limit Congress' Power so as to Protect State Governments?**

A central question is whether the Court should uphold Congress' actions so long as they are rationally related to an enumerated power or whether the Court should enforce more rigid limits on Congress' power and reserve a zone of activities to the states? This is the key issue that underlies *Lopez* and *New York v. United States*. Yet, the traditional values of federalism provide no basis for answering this question, either in general or in the specific cases. Considerations such as the need to protect states so as to minimize the chances of federal tyranny, or because states are closer to the people, or because states are laboratories for experimentation, are useless in explaining *Lopez* or *New York v. United States* and generally of little value in answering this issue.

Indeed, what is striking in this area is the lack of useful analysis on either side of the question as to whether there should be a judicially-protected zone of activities reserved to the states. Those who favor such a zone rely on apocalyptic rhetoric about

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111. For a discussion of the issue of whether state immunity is a constitutional right and state autonomy is a constitutional principle, see H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 Va. L. Rev. 633 (1993).
how Congress could eviscerate all state authority without such a zone or on slogans about the value of federalism which, as discussed above, have no relationship to the issues. Earlier in this century, in the era of dual federalism, the Court justified protecting a zone of activities for exclusive state control in exactly this way. In *Hammer v. Dagenhart*, 113 in declaring unconstitutional a federal law that prohibited the shipment in interstate commerce of goods made by child labor, the Court declared:

The far reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and thus our system of government be practically destroyed.113

Although the rhetoric of the 1990s is not so extreme, the Court has done no more than earlier in the century to explain why there needs to be a zone of activities immune from Congressional control.

On the other side of the debate, the argument against judicial protection has been based in large part on Professor Herbert Wechsler's landmark article, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*.114 Wechsler argued that the interests of the states are represented in the national political process and that the nature of that process provides sufficient protection of state sovereignty, thus making it unnecessary for the courts to enforce federalism as a limit on Congress.115 For example, Justice Blackmun, writing for the majority in *Garcia v. San Antonio Metropolitan Transportation Authority*, expressly relied on Professor Wechsler's article and

112. 247 U.S. 251 (1918).
113. *Id.* at 276.
concluded that the national political process provided sufficient safeguards to protect state government interests. Justice Blackmun wrote:

Of course, we continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress’ authority under the Commerce Clause must reflect that position. But the principal and 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. The political process ensures that the laws that unduly burden the States will not be promulgated.

But the assumption that states’ interests are adequately represented in the national political process seems highly questionable. At the time the Constitution was written, states chose Senators and thus were directly represented in Congress. But now, with popular election of Senators, why believe that the states’ interests as states are adequately protected in Congress? The assumption must be that the voters, in choosing representatives and Senators, weigh heavily the extent to which the individual legislator votes in a manner that serves the interests of the state as an entity. Yet, simple observation of Congressional elections shows that the issues are usually basic ones about the economy, health care, and the personalities of the candidates. The interests of the voters are the focus of attention, not the institutional interests of state and local governments. Indeed, it may well be that the “primary constituencies of the national representatives may . . . be precisely those that advocate an extension of the federal power to the disadvantage of the states.”

117. Id. at 556.
118. In a recent article, Professor Larry Kramer makes a strong argument that the interests of the states are protected through mechanisms such as administrative bureaucracies and political parties. Larry Kramer, Understanding Federalism, 47 VAND. L. REV. 1485, 1490-94 (1994). These are not the traditional types of political safeguards, but rather offer a much more subtle account of the way in which the interests of the states are protected in the political process.
120. Id.
My point is that neither side of the federalism debate has provided a useful basis for answering the question as to whether there should be a judicially protected zone of activities reserved to the states. Yet, this obviously is a crucial question in a functional analysis of federalism.

2. *If Such Limits Are to Be Created, Do They Apply Differently Depending on the Particular Power That Congress Is Exercising?*

A key issue for the future is whether the same limits apply to Congress regardless of what power it is exercising or whether the limits apply differently depending on the constitutional basis for the action. For example, in the Eleventh Amendment context, the Court in *Seminole Tribe* said that Congress can authorize suits against state governments when acting under section five of the Fourteenth Amendment, but not under the commerce power.\(^{121}\) Likewise, in *New York v. United States*, the Court said that Congress was not powerless to insist that states clean up nuclear wastes.\(^{122}\) The Court said that Congress may set standards that state and local governments must meet and thereby preempt state and local actions.\(^{123}\) Also, Congress may attach strings on grants to state and local governments and through these conditions induce state and local actions that it cannot directly compel.\(^{124}\) In other words, Congress can essentially force states to act by putting strings on grants, but not by direct legislation.\(^{125}\)

I question whether these distinctions make any sense. First, if the focus is the effect on state sovereignty, it should not matter which constitutional provision Congress uses to adopt a particular law. The impact on state sovereignty is the same whether the law is adopted under the commerce power or the spending power or section five of the Fourteenth Amendment. The Court argues that the spending power is different because states have the choice as to whether to accept federal funds. In

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123. *Id.* at 167.
124. *Id.* at 166-67.
reality, of course, conditions on grants are just as coercive as laws forcing state actions. States simply cannot afford to forego large federal grants.

Second, drawing distinctions based on the constitutional provision used ultimately would just lead Congress to be more careful in invoking a specific clause as authority for its action. In other words, Congress would simply make sure that the legislative history and the preamble to the law stated the acceptable constitutional grounds for action. Nothing substantively would change; Congress would just need to be clear that it used the right magic words. It is difficult to see, from any perspective, what is gained by such a formalistic exercise.

Third, and most importantly, ultimately, in a functional analysis of federalism, the focus must be on what tasks are best done at the federal level and which at the state level; nothing should depend on Congress' ability to convince the Court that the legislative action is under one power as opposed to another. For example, in the area of the Eleventh Amendment, it is hardly an answer to say that Congress has more power to override state sovereignty under the Fourteenth Amendment than under the commerce power because the former was adopted after Article III. Nor is it a sufficient answer to say that the Fourteenth Amendment was meant as a limit on state power because the commerce power also was intended and has operated as a constraint on the states. The issue always should be functional, and the results of a functional analysis should not vary depending on the clause invoked by Congress.

3. If It Is Desirable to Create Such Limits, Can the Limits Be Drawn in a Meaningful Way That Can Be Applied in Future Cases?

A key problem with formalistic limits based on federalism has been their arbitrariness and the inability of the Court to identify principles that could be applied in future cases. This was true in the first third of this century when the Court employed arbitrary distinctions between production and commerce and between direct and indirect effects on commerce.126 The complete

126. See, e.g., A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 550-51 (1935) (drawing distinction between direct and indirect effects on commerce); United States v. E.C. Knight Co., 156 U.S. 1, 18-17 (1895) (drawing distinction between
overruling of the pre-1937 doctrines, in part, was a result of the unsatisfactory line-drawing employed in that earlier era.

This arbitrariness in line-drawing also was evident in National League of Cities v. Usery, which relied on defining traditional and integral government functions. The Court found that requiring states to pay their employees the minimum wage violated the Tenth Amendment because the law "operate[s] to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions." 128

After National League of Cities, the Supreme Court struggled for a decade with how to define "integral" and "traditional" state government functions. In Garcia, the Court overruled National League of Cities, in part, because it had proven impossible to formulate a useful standard. Justice Blackmun writing for the Court in Garcia said that the National League of Cities approach had proven unworkable. He wrote: "We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular government function is 'integral' or 'traditional.'" 129 Justice Blackmun argued for judicial restraint in enforcing the Tenth Amendment in terms usually associated with the more conservative Justices: "Any 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." 130

The issue is whether the distinctions drawn in the federalism decisions of the 1990s are any more defensible than those used and rejected in earlier eras. Lopez, for example, draws a distinction between commercial and non-commercial activities. Yet, this distinction seems inherently arbitrary. Even non-commercial activities, such as possessing a gun, may have direct commercial effects in the ways in which the firearm was acquired and used. Moreover, the distinction drawn in Lopez

production and commerce and only allowing Congress to regulate the latter).
128. Id. at 852.
130. Id.
131. Id. at 546-47.
132. Id. at 546.
between activities traditionally regulated by the states and those generally controlled at a national level seems identical to National League of Cities' use of the traditional/nontraditional distinction.

Line-drawing, of course, is inevitable in all of constitutional law. My objection, though, is not to the need to draw lines, but to whether meaningful lines can be drawn at all. If there is to be a zone of activities reserved to the states, its boundaries must be drawn clearly to give guidance to Congress, lower courts, state legislatures, and government and private actors. It is unclear whether such lines can be drawn.

4. How Should the Need for State Accountability Be Balanced with the Desire to Protect State Governments from Federal Court Interference?

Ultimately, the issue for Eleventh Amendment analysis must be a functional one, balancing the need for state accountability with the desire to protect state governments from federal court interference. Eleventh Amendment doctrines ultimately are about how to balance the desire for state immunity as against the desire for state accountability.

The Supreme Court has clearly chosen the former, seeing state sovereign immunity as constitutionally protected. The Court has declared that the Eleventh Amendment "affirm[s] that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art[icle] III."134 The view is that the Eleventh Amendment reflects a "broad constitutional principle of sovereign immunity."135

At the very least, the Supreme Court's Eleventh Amendment decisions can be criticized for failing to explain why state immunity is more important than state accountability. The choice cannot be made based on the text or the intent of the Eleventh Amendment's framers; so it must be founded on a careful weighing of the competing constitutional considerations. Yet, there is no acknowledgement of this in the Court's many Eleventh Amendment decisions.

Furthermore, I believe that the Court's rulings give insufficient weight to ensuring the supremacy of federal law as a crucial constitutional value. If suits in federal court are not available to ensure state compliance with federal law, what means can be used? A functional analysis of federalism must make sure that adequate mechanisms exist to assure the supremacy of federal law.

CONCLUSION

Formalism always has a great allure. If the premises are accepted in deductive reasoning, the conclusion always follows. The results seem almost preordained, not the product of uncertain balancing or of the Justices' own value preferences. Unfortunately, as has been demonstrated time and again, formalism is a highly undesirable form of legal reasoning. Premises that are disputed are often assumed; crucial competing policy considerations are ignored.

The Supreme Court's recent federalism decisions suffer from exactly the flaws that are characteristic of formalistic reasoning. Federalism is ultimately about a basic policy question: how is power best divided between the national and state governments? The analysis, now and always, must be functional.