COOPERATIVE FEDERALISM, THE DELEGATION OF FEDERAL POWER, AND THE CONSTITUTION

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> Suddenly, [a substantive element,] or a process, or a time sequence will turn up, and there is astonishment, frustration, and even disaster. We therefore urge you...always to read the [Constitution] first, even if [its application] is familiar to you. Visualize each step...and you will encounter no surprises. [Constitutional] language is always a sort of shorthand in which a lot of information is packed, and you will have to read carefully if you are not to miss small but important points. Then, to build up your over-all knowledge...compare the [text] mentally to others you are familiar with, and note where one [section] or technique fits into the larger picture of theme and variations.**

INTRODUCTION

Historically, Congress has relied on states to implement the goals and controls of federal policy.[1] Such "cooperative federalism" comes in many forms. Congress may: (1) use federal funds as a "carrot" to induce states to

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This Article grew from constitutional concerns raised by a paper that I presented at the conference on "Major Issues in Federalism" held at the University of Arizona College of Law, Mar. 20–21, 1996. In that paper, which I hope to publish in the future, I suggested various measures to improve the efficiency and effectiveness of state implementation of federal environmental policies. I thank my wife, Belle Belew, and Professors Charles Ares, Barbara Atwood, Lynn Baker, Katherine Franke, David Gantz, David Golove, Mona Hymel, Jane Korn, Toni Massaro, Ted Schneyer, and Deans Joel Seligman and Tom Sullivan, without whose support, friendship, and insights this work would not have been possible. Although not excluded from the above, I acknowledge the helpful suggestions and comments from Michael Hill, J.T. Smith II, and Professors Ann Althouse, Kirsten Engel, Jill Fisch, Randy Hill, Gary Libecap, David Novello, Edward Rubin, Joseph Schmitz, David Schoenbrod, and Peter Strauss. I am also grateful for the research assistance of Kevin Boyle and David Benton. When interpreting the preceding sentences, do not apply the maxim *expressio unius est exclusio alterius.*

** JULIA CHILD ET AL., 1 MASTERING THE ART OF FRENCH COOKING x (1979).

1. *See* Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1027 & n.100 (1995) (early congressional decisions to allocate concurrent or exclusive subject matter jurisdiction to state courts resulted from resource limitations and the desire to avoid creating "a vast army of...federal courts"). I focus on states because local or regional authorities are creatures of state law and because Congress has begun to treat Indian tribes as states for the implementation of federal programs. *See, e.g.*, 33 U.S.C. § 1377 (1994). Nevertheless, Indian tribes may be their own sovereigns and present different concerns for our federal system.

regulate; (2) require federal agencies to impose the "stick" of preemptive federal requirements if states do not regulate as desired; or (3) delegate federal powers to states. Without state cooperation, Congress may (4) direct states to implement federal programs.[2]

The United States Constitution clearly authorizes the first two forms of cooperative federalism. Congress clearly possesses authority under the Spending Clause[3] to direct the President and federal administrative agencies to disburse or withhold funds based on state regulatory actions that Congress itself could impose.[4] A substantial academic dispute exists, however, regarding whether Congress may condition federal spending on state regulation of conduct otherwise beyond federal legislative power. If the Spending Clause is interpreted broadly, federal power may be expanded in a manner arguably inconsistent with the Tenth Amendment, which "reserve[s] to the States, respectively, or to the people" powers that have not been "delegated to the United States by the Constitution, nor prohibited by it to the States."[5]

Congress also possesses authority to provide for backup regulation by federal agencies if state implementation proves inadequate. In *United States v. Lopez*,[6] the Supreme Court recently established limits on the scope of congressional power to regulate private conduct under the Interstate Commerce Clause.[7] But it cannot be disputed that federal regulatory power is, and will remain, extremely broad.[8] Within the scope of such power, Congress may

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2. *See* Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1148–78 (1995) (tracing the various cooperative federalism approaches that Congress historically adopted); New York v. United States, 505 U.S. 144, 167, 169–77 (1992) (discussing the forms of intergovernmental relations but applying the term "cooperative federalism" only to backup federal regulation (citing Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 289 (1981))). I use the term "delegate" broadly in the introduction to convey the sense of the transfer of power. In other sections, I distinguish among delegation, subdelegation, and various forms of approval for states to regulate. Although cooperative federalism and delegation are generic to many fields of law, I rely in this Article upon examples and literature drawn from the field of environmental law with which I am most familiar and which generates intense disputes on federalism issues.

3. U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To...provide for the...general Welfare of the United States.....").

4. *See* South Dakota v. Dole, 483 U.S. 203, 207–08 (1987) (federal spending conditions are constitutional if they: (1) are enacted for the general welfare; (2) do not violate other constitutional restrictions; (3) are unambiguous; (4) are reasonably related to the purpose of the expenditure; and (5) are not unduly coercive).

5. U.S. CONST. amend. X; *see* Lynn A. Baker, *Conditional Federal Spending After* Lopez, 95 COLUM. L. REV. 1911, 1918–20, 1962–78 (1995) (recommending that federal spending conditions be found unconstitutional only when addressing conduct beyond federal regulatory power *and* exceeding amounts that would reimburse the state for expenditures incurred in complying with the conditions). *See generally* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989); Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988).

6. 115 S. Ct. 1624 (1995).

7. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power...To regulate Commerce...among the several states"). *See* 115 S. Ct. at 1627–35 (1995) (finding substantive limits on Interstate Commerce Clause power for the first time since the New Deal).

8. *See* John P. Dwyer, *The Commerce Clause and the Limits of Congressional Authority to Regulate the Environment*, 25 Envtl. L. Rptr. (Envtl. L. Inst.) 10,421 (Aug. 1995) (arguing that *Lopez* is likely to have little effect on federal environmental legislation). Much federal legislation is enacted under Interstate Commerce Clause power, although other sources of power vested in Congress could support identical legislation. *See* Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National*

direct federal agencies to impose requirements that preempt even traditional state regulatory prerogatives under the Supremacy Clause.[9]

Until recently, the Supreme Court had not resolved whether Congress may direct state legislatures to implement federal programs enacted under the Interstate Commerce Clause.[10] In *New York v. United States*,[11] the Court held that Congress lacks such power.[12] In contrast, the Court had previously upheld congressional power to direct state courts and administrative agencies to adjudicate federal claims to enforce rights created under the Interstate Commerce Clause.[13] The Court may soon extend the holding of *New York* to preclude Congress from issuing directives to state executive officials.[14]

The Court in *New York* provided three reasons why it believed the Constitution imposed federalism limits on congressional power to direct state regulatory actions. First, the Framers of the Constitution with one hand gave power to Congress to regulate private conduct, and with the other took power

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Environmental Policy, 86 YALE L.J. 1196, 1244–46 (1977) (environmental legislation is typically grounded on Interstate Commerce Clause power, but could be based on protected liberty or property interests under the Due Process Clause of the Fifth Amendment, U.S. CONST. amend. V; on the Necessary and Proper Clause, U.S. CONST. art. I, § 8, cl. 18; or on the implementing power of the Fourteenth Amendment, U.S. CONST. amend. XIV, § 5).

9. U.S. CONST. art. VI, cl. 2 ("The Constitution, and the Laws of the United States...and all Treaties...shall be the supreme Law of the Land"). *See Hodel*, 452 U.S. at 289–92 (the only limit on preemptive federal regulation under the Interstate Commerce Clause is that the means be reasonably related to the end of regulating interstate commerce, even when regulating areas traditionally subject to state police powers).

10. *See, e.g.*, EPA v. Brown, 431 U.S. 99, 103 (1977) (following state failures to develop implementation plans sufficient to meet national ambient air quality standards as required by the Clean Air Act (codified as amended at 42 U.S.C. §§ 7401–7671q (1994)), EPA threatened to impose penalties on states; the Court found the constitutional question moot when the federal government conceded in briefs before the Supreme Court that the statute did not authorize such penalties against states).

11. 505 U.S. 144 (1992).

12. *Id.* at 174–83 (invalidating one provision of the Low Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. No. 99-240, 94 Stat. 3347 (1985) (codified at 42 U.S.C. §§ 2021b, 2021c–2021j (1994)), which the Court claimed required state legislatures to regulate).

13. *See* Testa v. Katt, 330 U.S. 386, 389–94 (1947) (holding that a state court could not decline jurisdiction to hear a claim for treble damages under a federal price ceiling statute, when the court had jurisdiction to hear similar claims under state law); FERC v. Missisippi, 456 U.S. 742, 746–71 (1982) (extending *Testa* to agencies and developing a rationale that the substantive and procedural obligations at issue imposed only a more "limited preemption" of state prerogatives in administrative adjudications than the adoption of federal minimum standards at issue in *Hodel*); *cf.* Douglas v. New York, N.H. & H.R. Co., 279 U.S. 377, 385–88 (1929) (announcing in dicta that state courts may decline to entertain federal claims when they possess a "valid excuse"); Howlett by Howlett v. Rose, 496 U.S. 356, 371 (1990) (suggesting in dicta that a valid excuse exists when state courts lack jurisdiction over similar claims under state law); CHARLES A. WRIGHT, LAW OF FEDERAL COURTS § 45, at 288–89, § 47, at 296–306 (5th ed. 1994) (the valid excuse doctrine cannot protect provisions of state jurisdiction that discriminate against federal claims and no case has yet found a valid excuse for a nondiscriminatory provision); Caminker, *supra* note 1, at 1024, 1025 & nn.94–95, 1026 (describing as "blurry" the doctrine that neutral rules of judicial administration must give way when inconsistent with federal law, but rejecting claims of prominent academics that federal law must take state courts as it finds them).

14. *See* Mack v. United States, 66 F.3d 1025, 1028–33 (9th Cir. 1995) (upholding from Tenth Amendment challenge interim provisions of the Brady Handgun Violence Protection Act (codified as amended at 18 U.S.C. §§ 921–925A (1994)), which require state law enforcement officers to enforce a federally mandated background check on prospective gun purchasers), *cert. granted sub nom.* Printz v. United States, 116 S. Ct. 2521 (1996).

away from Congress to direct states to regulate.[15] Second, the Supremacy Clause specifically authorizes the federal government to direct state judicial officials to enforce federal law.[16] By negative implication, the Supremacy Clause expresses a limit on federal power to direct state legislative officials.[17] Third, such directives would excessively interfere with state and federal legislative officials' accountability to the citizenry and thus would conflict with the Constitution's vision of federalism. "Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people. By contrast, where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished."[18]

Other commentators have ably questioned the Supreme Court's analysis of the statute, of the Framers' intentions, and of the meaning of the Constitution's text and structure.[19] Significantly, the Court appears to have confused accountability with power. Congressional directives threaten principally the power of state officials to respond to state citizens' preferences by refusing to implement unpopular regulatory measures. Directives thus will not necessarily hide from citizens the level of government responsible for imposing particular measures. Further, directives are *less* likely to hide the level of government responsible for policy than are federal spending conditions and federal preemption.[20]

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15. *See New York*, 505 U.S. at 163–66.

16. The Supremacy Clause contains the "Judges Clause," which states that "the Judges in every State shall be bound" by supreme federal law. U.S. CONST. art. VI, cl. 2. State courts thus must apply federal laws and entertain federal claims. *See supra* note 13.

17. *See New York*, 505 U.S. at 178–79.

18. *Id.* at 168; *see id.* at 181–83. *See generally* Ann Althouse, *Variations on a Theory of Normative Federalism: A Supreme Court Dialogue*, 42 DUKE L.J. 979, 1018–19 (1993) (both state and federal officials will diffuse responsibility in order to avoid blame for unpopular regulatory policies).

19. *See* Caminker, *supra* note 1, at 1058 & n.229 (noting that the legislation at issue did not actually compel states to legislate or to take any affirmative action); *id.* at 1042–50 (arguing that the historic evidence regarding the Framers' intent is ambiguous and thus does not support a prohibition on such directives); *id.* at 1037 & n.144, 1038 & nn.145, 146 (providing alternative interpretations of the Judges Clause); *id.* at 1050–60 (rejecting arguments to support the Court's opinion based on formal distinctions between lawmaking and law enforcement). *Cf.* H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 681–89 (1993) (rejecting the Court's constitutional history but accepting the result as justified by prudential considerations). *But cf.* Saikrishna B. Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 1971–88 (1993) (reviewing the constitutional history and concluding that the Framers intended to prohibit directives to state legislative officials but not to state executive officials).

20. *See* Caminker, *supra* note 1, at 1060–67 (rejecting claims that directives to states reduce the accountability of federal or state officials beyond the Constitution's limits; arguing that concerns about "blame misallocation," "liability shifting," and "cost-shifting" are illusory because: (1) citizens and state officials have sufficient incentives to identify the sources of federal policy constraints; (2) citizens will hold state officials to account when federal policy constraints do not dictate particular outcomes; and (3) federal officials will remain accountable for requiring state officials to regulate without fully constraining state policy choices). Citizens may be more able to verify that federal legislative directives compel states to implement unpopular policies than that federal requirements preempt states from imposing popular ones. Popular and media attention are more likely to be focused on the imposed costs of policies than on the foregone benefits. For the same reason, state officials are more likely to identify Congress as responsible for policy when forced to impose unpopular policies than when prevented from imposing popular policies. *Cf.* Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 631 (1996) (the "hard" variables that comprise costs dwarf the "soft" variables that

In contrast to directives, the delegation of federal power to states poses more substantial accountability concerns. Delegation itself may reflect the desire of federal legislators to avoid political responsibility for imposing specific, unpopular policies.[21] By imposing policy through state officials, Congress may avoid being held to account and simultaneously may maintain substantial control through oversight and funding mechanisms.[22] By delegating power beyond the federal government, moreover, Congress may lift structural constraints in the Constitution that assure accountability for officials' actions.[23]

By delegating power to states through federal agencies, Congress may further insulate itself from public scrutiny. Federal administrative officials are unlikely to blame Congress, on which they rely for funds, for requiring delegation to states that fail fully to implement federal policies. Conversely, such agencies are unlikely to blame state officials, because states may return previously delegated and unpopular federal programs for which federal agencies lack funds.

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comprise benefits of quantitative welfare comparisons of environmental regulatory policies). *See generally* DANIEL KAHNEMANN ET AL., JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES *passim* (1982) (discussing how individuals form their perceptions). As federal spending conditions become more coercive, state officials will be less responsible for acceding to federal demands and thus will have greater incentives to blame Congress for the policies that are imposed. Citizens will be more able to conclude that state officials were not presented with a realistic option of forgoing federal funds.

21. *See* DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 102–03 (1993) (delegation enhances the ability of legislators to be reelected by obscuring responsibility for controversial rules and by requiring action without reaching consensus on difficult issues); *id.* at 131–33 (delegation enhances legislators' abilities to expand their influence or that of concentrated interests); *id.* at 170 (most voters lack the sophistication to understand that Congress has delegated power, particularly because newspaper accounts of federal bills and laws pay more attention to substance than to procedure). *See generally* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION *passim* (1965) (the costs or benefits of legislation may be concentrated or diffused over segments of the population and legislators respond to the intensity and degree to which opposing interests are concentrated or diffused); William S. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 283–95 (1988) (describing as a "Madisonian Nightmare" the politics and results of interest group competition for legislation); Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 274–90 (1990) (describing how legislators enact legislation based on personal incentives—particularly for reelection—rather than on the expressed preferences of their constituents); MICHAEL SUK-YOUNG CHWE, THE SANTA FE INSTITUTE, STRUCTURE AND STRATEGY IN COLLECTIVE ACTION: COMMUNICATION AND COORDINATION IN SOCIAL NETWORKS *passim* (1996) (describing through mathematical modeling how social structures, i.e., communications networks, interact with individual incentives in order to predict how and among whom collective actions emerge and grow; "these integral aspects have been formalized separately, in the fields of social network theory and game theory.")

22. *Cf.* John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 ECOLOGY L.Q. 233, 288 (1990) (a continuing dialogue with agency officials occurs in legislative, oversight, and appropriations committees responsible for overseeing agency spending and implementation regarding statutory interpretation and regulatory priorities).

23. *See* Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62, 76 (1990) ("[N]o branch may be able to monitor implementation of that policy [to delegate power outside the federal government] effectively. The checks and balances applicable to legislation or the executive branch's exercise of delegated authority are simply not present. The ultimate result may be arbitrary or unreflective governance."). *Cf.* SCHOENBROD, *supra* note 21, at 105–06 (delegation allows unelected officials who are supervised by the President to establish policy; legislation requires both elected legislators and the elected President to establish policy).

States volunteer to exercise the power delegated to them by the federal government. State officials thus possess few incentives to focus public attention on their own responsibility for imposing or exceeding federal measures. Similarly, state officials may be reluctant to blame federal officials for requiring them to impose unpopular measures, because the federal officials may withdraw the delegation and thereby remove state officials' discretion.

Citizens also may be less able to identify limits on federal powers delegated to states than to identify federal preemption or compulsion through conditional spending. Delegation blurs the level of government responsible for particular policies. Citizens may lack the legal training or resources to determine whether agency criteria, often contained in unpublished documents, or particular delegations meet the standards established by Congress.[24] Similarly, delegation blurs the level of government responsible for imposing particular policies. Citizens may be unable to determine whether particular state measures exceed or are insufficient to meet the federal standards.

Congress delegates power to states, moreover, in order to satisfy preferences for state-level regulation and for state citizens' values.[25] But such delegation places policymaking discretion in the hands of state officials for whom many federal citizens do not vote.[26] State officials are unlikely to hear the political voices of out-of-state citizens when policymaking discretion is exercised. By transferring to states the powers vested in them by the Constitution, federal officials may impermissibly alter the appropriate level of government to establish policy.[27]

Given these concerns, some commentators have suggested that delegations

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24. *See, e.g.*, 42 U.S.C. § 7412(*l*)(1), (5) (1994) (authorizing delegation to states that submit for approval programs that meet specified criteria, but limiting delegation to exclude "authority to set standards less stringent than those promulgated by" federal agencies); 40 C.F.R. § 63.91(b) (1996) (describing criteria for approval to delegate federal authority to states to regulate emissions of hazardous air pollutants, pursuant to section 112(l) of the Clean Air Act, 42 U.S.C. § 7412(l) (1995), which include written findings by the State Attorney General or similar local official of adequate legal authority, enforcement resources, and a schedule for implementation); JOHN S. SEITZ, DIRECTOR, OFFICE OF AIR QUALITY PLANNING & STANDARDS, ENVIRONMENTAL PROTECTION AGENCY, STRAIGHT DELEGATIONS ISSUES CONCERNING SECTIONS 111 AND 112 REQUIREMENTS AND TITLE V, 6–7 (1993) (describing current policy requiring states to assure resource adequacy and authority to implement and enforce federal standards exactly as promulgated, but to provide interim flexibility if states "substantially meet" the criteria).

25. *See* Krent, *supra* note 23, at 106–08 (Congress delegates power to states in order to promote local participation in governance, effectively delegating power back to the people).

26. *Cf.* Krent, *supra* note 23 at 102 ("Although the federal interest in regulation may at times diverge from that of the states or Indian tribes, these sovereigns are at least accountable to their *own* constituencies.") (emphasis added).

27. Debates over the limits of federal power ultimately may be grounded in similar concerns regarding the appropriate level of government to regulate. *See* Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 280 (1981) ("[I]nadequacies in existing state laws and the need for uniform minimum nationwide standards made federal regulations imperative."); Ann Althouse, *Enforcing Federalism After* United States v. Lopez, 38 ARIZ. L. REV. 793, 816–22 (1996) (limits on Interstate Commerce Clause power should be found when national solutions are not necessary to address the problem); *cf.* Louise A. Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 817 (1989) (nothing important to federalism turns on whether statutory law is more "legitimate" than case law; federalism arguments based on deference to state prerogatives disregard "the inevitability of judicial federalization when inchoate national policy requires it....[P]olicy rather than law is 'supreme' under article VI.").

to states may be justified only by federalism values implicit in the Constitution.[28] This Article discusses why the Constitution does not express a preference for Congress to delegate federal power to states. The Supreme Court should therefore find that delegations to states of overbroad federal regulatory powers violate the Constitution as a matter of political rights[29] or to assure that officials imposing federal policies can be held accountable to all federal citizens and thus will adopt better policies.[30]

Part I of this Article describes the reasons that Congress enacts cooperative federalism statutes. Political realities often force Congress to rely upon states to implement federal policies. Alternately, federal legislators may believe that state regulation and implementation are more efficient than their federal equivalents, result in better policies or render government more accountable. These beliefs are subject to serious debate and will be true only in regard to particular states, particular state institutions, and particular regulatory subjects. Part I then describes the federalism values contained in the Constitution. The Constitution permits but does not encourage Congress to rely on states to implement federal regulatory policies.[31]

Part II of this Article discusses why the text, structure, and history of the Constitution do not resolve whether Congress may delegate its legislative powers to states. The Framers held conflicting beliefs regarding the nature of legislative power and the need to separate powers rigidly among the branches and between the levels of government. Although the Framers did not clearly intend for Congress to delegate federal power to states, they also did not adopt

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28. *See* Krent, *supra* note 23, at 83; *cf.* Ann Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485, 1509 (1987) (arguing that Supreme Court review of state court judgments should be based on federalism principles that assure intergovernmental accountability and clarify the federal and state spheres of power, instead of on principles that promote uniformity of interpretation of federal law or vindication of particular federal rights).

29. *See* Romer v. Evans, 116 S. Ct. 1620, 1628 (1996) ("Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remains open on impartial terms to all those who seek its assistance."); Krent, *supra* note 23, at 70 n.20 (discussing Fifth Amendment concerns that delegation of federal power to private individuals may deprive individuals affected by government policy of due process of law). *Cf.* Caminker, *supra* note 1, at 1053 ("'The meaning of state citizenship [identified in the State Citizenship Clause, U.S. CONST. amend. XIV, § 1] is that the constituent body of the state, not of the nation, is the ultimate source of state lawmaking authority'" (quoting David S. Bogen, Usery *Limits on National Interest*, 22 ARIZ. L. REV. 753, 756–57 (1980)) (citing Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 61 (1988))).

30. *See* Jerome M. Organ, *Limitations on State Agency Authority to Adopt Environmental Standards More Stringent Than Federal Standards: Policy Considerations and Interpretive Problems*, 54 MD. L. REV. 1373, 1387–90 (1995) (state legislatures may restrict state agency abilities to adopt more stringent requirements for numerous reasons, including a desire to promote spillovers of negative externalities rather than internalize control costs); Stewart, *supra* note 8, at 1215–16 (discussing how state regulatory policies may result in negative spillovers of physical pollution or may fail to create positive spillovers that economically or ideologically benefit other states' citizens); Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341, 2346–74 (1996) (discussing historic failures of states and the federal government to control air pollution spillovers under the federal Clean Air Act). *Cf.* Krent, *supra* note 23, at 102 (discussing the Supreme Court's belief that federal delegations to state officials are justified because the *state* electorate will provide a sufficient check on official conduct and because "delegations to [states and Indian tribes] are checked by their self-interest in regulating *themselves* effectively") (emphasis added).

31. *See infra* notes 36–92 and accompanying text.

a Constitution that clearly prohibits Congress from doing so.[32]

Part III of this Article traces the shifting contours of Supreme Court's doctrine regarding the delegation of legislative power. The Court has repeatedly stated that Congress may not delegate federal legislative power at all, much less to states. Over time, the Court has limited its conception of exclusively legislative power, allowing Congress to routinely delegate broad policymaking discretion. Recently, the Court has allowed Congress effectively to delegate legislative power to state or tribal officials in order to conserve federal legislative resources and to promote local regulatory autonomy.[33]

Part IV describes how Congress effectively delegates federal legislative power to states through federal agencies. Congress may authorize federal agencies to approve state laws on a wholesale basis or on a retail basis in federal permits. Approval converts state laws into federally enforceable laws. When Congress *requires* federal agencies to approve state laws beyond federal agency power to impose directly, Congress effectively delegates to states unlimited power to legislate the contents of federal law. When Congress only *authorizes* federal agencies to do so, Congress effectively delegates unlimited power to federal agencies to legislate the contents of federal law.[34]

Finally, Part V suggests reasons why the Supreme Court should find that the delegation or effective delegation of federal legislative power to states violates the Constitution. Under the Court's own doctrine, broad delegations of unconstrained policymaking discretion by Congress violate the Constitution. Congress does not need to delegate legislative power to states to effectuate federal policies, because Congress may delegate broad policymaking powers to federal agencies. Congress also does not need to convert state law into federally enforceable law, because Congress may require federal agencies to supplement state imposed measures. Further, the Supreme Court should require Congress and the President to more fully justify the form of and reliance on states to implement federal policies within the bounds of power clearly delimited by Congress. Because state implementation threatens executive oversight, accountability, and the political participation of out-of-state citizens, the Court should invalidate cooperative federalism statutes when Congress has not demonstrated that they will result in better, more efficient, or more accountable governance.[35]

I. WHY CONGRESS ENACTS COOPERATIVE FEDERALISM STATUTES AND WHY THE CONSTITUTION DOES NOT ENCOURAGE CONGRESS TO DO SO

A. Cooperative Federalism Statutes Are Enacted Because of Politics or Because Congress Holds Debatable Beliefs Regarding the Value of State Regulation or Implementation

Congress may enact cooperative federalism statutes for many reasons. Federal legislators elected by state citizens may feel obliged to preserve and

32. *See infra* notes 93–156 and accompanying text.
33. *See infra* notes 157–249 and accompanying text.
34. *See infra* notes 250–327 and accompanying text.
35. *See infra* notes 328–66 and accompanying text.

protect traditional state regulatory roles because state citizens prefer state regulation.[36] As a result, political obstacles may prevent Congress from raising revenue and from creating, imposing, and maintaining a national regulatory police force even if federal legislators would prefer federal regulation and a federal bureaucracy.[37]

The constitutional structure of political representation further assures that Congress will rely upon state regulation or implementation. The composition and voting rules of the United States Senate allow the representatives of a small minority of the nation's population to block federal legislation.[38] State regulation or implementation thus may be the quid pro quo for federal legislators to enact statutes that preempt state regulatory prerogatives.[39]

Federal legislators also may believe that state regulation or state implementation of federal policies provides better results than the federal equivalents. First, Congress may believe that state regulation or implementation will result in resource savings and economies of scale. State bureaucracies may already exist, allowing Congress to rely upon existing resources and regulatory expertise.[40] Similarly, state agencies may be more familiar with the regulatory problem or more able to coordinate specific regulatory policies with other activities such as zoning and planning.[41]

Second, Congress may believe that state regulation and implementation will result in better and more efficient policies that maximize social welfare. State officials may be better situated than federal bureaucrats to assess local conditions and citizen preferences. State regulation and implementation thus

36. *See* Gerald N. Neuman, *Territorial Discrimination, Equal Protection, and Self-Determination*, 135 U. PA. L. REV. 261, 346 (1987) (cooperative federalism reinforces state policies; federal legislation may provide exemptions to its preemptive effects upon the showing of compelling state interests (citing the federal Clean Air Act, 42 U.S.C. § 7543(b) (1982))).

37. *See* California v. United States, 438 U.S. 645, 668–69 (1978); Stewart, *supra* note 8, at 1240–41. *Cf.* Caminker, *supra* note 1, at 1044 (requiring state revenue collectors to execute federal taxes "would not only 'avoid any occasions of disgust to the State governments and to the people' but also would 'save expense in the collection'" (quoting THE FEDERALIST No. 36, at 221–22 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis omitted))).

38. *See* Lynn A. Baker & Samuel H. Dinkin, *The Senate: An Institution Whose Time Has Gone?*, 13 J.L. & POL. (forthcoming 1997).

39. *Cf. id.* (disproportionate blocking power provides small-population states with greater abilities to affect any federal policies that are enacted, redistributes wealth from larger to smaller population states, and discriminates against racial minorities possessing identifiably distinct interests); John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1216–19, 1224 (1995) (concluding from the history of implementing the federal Clean Air Act that state autonomy is inevitable and that "widespread dissatisfaction [at the state level]—manifested in the time-honored 'go-slow' approach—will bring EPA and even Congress to the bargaining table").

40. *See* Stewart, *supra* note 8, at 1201, 1212; Dwyer, *supra* note 39, at 1192–93; Kirsten Engel, *Reconsidering the National Market in Solid Waste: Trade-Offs in Equity, Efficiency, Environmental Protection, and State Autonomy*, 73 N.C. L. REV. 1481, 1523 & nn.174–77 (1995). *Cf.* Caminker, *supra* note 1, at 1043 ("'Both Hamilton and Madison envisioned federal use of state executives to administer the new federal laws that were to be applied to individuals.' They recognized that the new federal system might engender diseconomies to the extent that federal law enforcement efforts would substantially duplicate or overlap with existing state operations." (quoting Prakash, *supra* note 19, at 1996–97)).

41. *See* Dwyer, *supra* note 39, at 1198–1208. *Cf.* Caminker, *supra* note 1, at 1006, 1014–15 (for similar reasons, federal directives to states may be more effective and efficient than federal regulation).

may more efficiently tailor regulatory requirements.[42] Such tailoring avoids the "welfare-reducing homogenizing" effects of uniform, preemptive federal regulatory standards.[43] States also may experiment with different regulatory approaches, leading to adoption of more efficient and effective policies.[44]

Third, Congress may believe that state regulation and implementation will result in decisionmaking at a level of government that is more accountable to the citizenry.[45] State and local political processes may provide greater opportunities for citizen participation.[46] Cooperative federalism thus fosters democratic participation in governance. It also improves accountability by minimizing federal and state regulation that duplicates regulatory costs and causes confusion over the level of government responsible for policy.[47]

These beliefs, however, are highly questionable as generic or irrebuttable presumptions.[48] First, federal bureaucratic regulation may be more efficient

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42. *See* Dwyer, *supra* note 39, at 1185 & n.10; Percival, *supra* note 2, at 1175. *Cf.* George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 341–42 (1994).

43. Baker & Dinkin, *supra* note 38. *See* James E. Krier, *The Irrational National Air Quality Standards: Macro- and Micro-Mistakes*, 22 UCLA L. REV. 323, 324–35 (1974) (describing how uniform standards may be inefficient by imposing excessive costs in some areas and depleting resources needed to impose controls in other areas). *See generally* J.H. DALES, POLLUTION, PROPERTY AND PRICES 88–93 (1968) (economic theory suggests that social welfare is increased by providing locales offering citizens a choice among different living conditions, including different government policies, because mobile individuals may thereby maximize the satisfaction of their preferences).

44. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); Dwyer, *supra* note 39, at 1185 & n.10; Percival, *supra* note 2, at 1175. *Cf.* Bermann, *supra* note 42, at 341–42.

45. *See* Esty, *supra* note 20, at 609–10 (longings for direct democracy and distrust of elite decisionmaking by republican representatives fuel claims for more decentralized decisionmaking); *Cf.* KEN KOLLMAN ET AL., THE SANTA FE INSTITUTE, A COMPARISON OF POLITICAL INSTITUTIONS IN A TIEBOUT MODEL 3–5, 19 (1995) (economic models of the benefits of local governmental autonomy depend both on citizen and governmental choices; when a single jurisdiction exists, democratic referenda perform best; as the number of jurisdictions increase, democratic referenda "now yield[] the lowest aggregate utility and proportional representation now performs second best.")

46. *See* Stewart, *supra* note 8, at 1210; Dwyer, *supra* note 39, at 1185 & n.10. *Cf.* Bermann, *supra* note 42, at 340–43.

47. *See* EPA, Approval of State Programs and Delegations of Federal Authorities, Final Rule, 58 Fed. Reg. 62,262, 62,263 (1993) [hereinafter Air Toxics Delegation Rule] (addressing section 112(l) of the Clean Air Act, which provides EPA with authority to delegate the federal program to control emissions of hazardous air pollutants: "dual regulation may not always be complementary and may even be fundamentally inconsistent in instances where the Federal and State programs may require measures that are technically incompatible."); Environmental Protection Agency, Approval and Promulgation of State and Federal Implementation Plans; California—Sacramento and Ventura Ozone; South Coast Ozone and Carbon Monoxide; Sacramento Ozone Area Reclassification; Notice of Proposed Rulemaking, 59 Fed. Reg. 23,264, 23,269 (1994) ("[A]t the very least, these parallel [state and federal] planning processes are likely to create confusion for the public and regulated community."); Caminker, *supra* note 1, at 1020 (discussing the Supreme Court's belief that the electorate will better understand the level of government responsible for policy by retaining state control over policymaking). *Cf.* D. Bruce La Pierre, *Political Accountability in the National Political Process—The Alternative to Judicial Review of Federalism Issues*, 80 NW. U. L. REV. 577, 654 (1985) (by limiting federal power to issue directives to states to laws of general applicability, the public can provide political protection for state interests).

48. *See* Joshua D. Sarnoff, *The Continuing Imperative (but Only from a National Perspective) for Federal Environmental Regulation*, 7 DUKE ENVTL. L. & POL'Y F. passim (forthcoming 1997) (disputes over the traditional rationales for federal environmental regulation are ultimately grounded in disputes over value and the appropriate level of government to resolve

and may result in greater resource savings. The federal government may obtain economies of scale by avoiding the repetitive costs incurred by states in research, standard setting, control-measure selection, implementation, and enforcement.[49] Federal bureaucracies may be more able than states to develop or retain expertise over time.[50] They also may be more able to transfer experience from or to impose more cost-effective regulatory strategies.[51] Economies of scale also may be realized if the "network effects" of conforming to uniform federal regulations are significant.[52]

Second, federal regulation and implementation may be more likely to maximize social welfare than their state equivalents. Absent federal coercion, states may be unwilling to experiment.[53] States also may be less able than the federal government to identify problems or to share information efficiently among jurisdictions.[54] Uniform federal standards also may be efficient if the costs of tailoring requirements to local conditions or to local preferences exceed the benefits.[55]

Tailoring requirements to local preferences, moreover, will not increase social welfare if the appropriate measures of value conflict with local preferences. Economic analysis provides no basis for tailoring requirements to state citizen preferences, because such analysis rejects any source of value independent of individuals' preferences and such tailoring excludes the

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value conflicts). *Cf.* Harold J. Krent, *Delegation and Its Discontents*, 94 COLUM. L. REV. 710, 723 (1994) (the efficiency of delegating power depends on what Congress would have done if delegation were not an option).

49. *See* Stewart, *supra* note 8, at 1212; Esty, *supra* note 20, at 615 n.165 (the costs of decentralized standard setting may be particularly high for small jurisdictions, based on high technical complexity). *Cf. id.* at 619–20 (the failure to provide uniform standards may discourage beneficial capital investment in environmental technologies and services); *id.* at 614 n.162 (states may be unable to detect patterns or anomalies visible on a broader scale).

50. *See* Stewart, *supra* note 8, at 1214 & nn.73, 74 (scale economies of national decisionmaking and fiscal commons problems for states result in larger, better funded, and better staffed agencies at the federal level). *Id.* at 1217 n.83, 1219–22 (the broader sharing of burdens and the greater fiscal and administrative resources of the federal government provide insulation from backsliding when social costs are imposed and political opposition results). Similarly, federal agencies may be headquartered in desirable locations and federal jobs may be viewed as conveying higher social status, improving relative abilities to recruit and retain expertise. *Cf.* Esty, *supra* note 20, at 616 n.168 ("[F]ederal officials are [generally] better trained, work harder and longer, and have higher productivity than their state counterparts."). Federal bureaucrats also may possess higher morale when acting in the service of federal goals.

51. *Cf.* Alan T. Durning, *Department of Sprawl*, SEATTLE WEEKLY, June 5, 1996, at 7–9 (describing how urban sprawl and consequent automobile use that cause significant air pollution, traffic, and other problems have resulted principally from traditionally federal regulatory programs, such as subsidies for highway construction, tax subsidies for mortgage interest, low mortgate rates favoring out-of-town construction, and deregulation of the savings and loan industry that resulted in low-cost liquidation of out-of-town properties).

52. Esty, *supra* note 20, at 619–20.

53. *See* Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 923–26 (1994) (states and localities may be risk-averse and thus may avoid experiments); Susan Rose–Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593, 605–06, 610–11 (1980) (so long as experimentation has competitive risks, states will free-ride on the innovations of others).

54. *See* Esty, *supra* note 20, at 613, 616 & n.169.

55. *Cf.* James E. Krier, *On the Topology of Uniform Environmental Standards in a Federal System—And Why It Matters*, 54 MD. L. REV. 1226, 1230–41 (1995) (discussing how political arguments based on economies of scale and on the equal treatment of states encourage Congress to adopt preemptive uniform standards).

preferences of out-of-state citizens.[56] Under the Constitution, national political processes determine the level of government to resolve value conflicts by establishing regulatory policies.[57]

Third, the federal government may be more accountable to citizens than particular state governments.[58] The federal government is clearly more accountable than state governments to the citizens of other states, who do not vote for state officials.[59]

In sum, Congress often enacts cooperative federalism statutes based on debatable beliefs that state regulation or implementation is more efficient, results in better decisionmaking or renders government more accountable than the federal equivalents.[60] These beliefs are likely to be true, if at all, only on a retail basis.[61] Nevertheless, political factors often dictate wholesale federal legislative reliance on state regulation and implementation. Congress thus enacts and maintains cooperative federalism statutes even when theoretical justification

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56. *See* Sarnoff, *supra* note 48; JAMES M. BUCHANON & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY 92 (1962) (defining social welfare by reference to the satisfaction of individual preferences as revealed by their behavior in economic markets); COMMISSION ON RISK ASSESSMENT & RISK MANAGEMENT, RISK ASSESSMENT AND RISK MANAGEMENT IN REGULATORY DECISION-MAKING: DRAFT REPORT FOR PUBLIC REVIEW AND COMMENT 54 (draft of June 13, 1996) ("Deciding how different groups should be weighted for equity in economic analysis would be highly value-laden."); Esty, *supra* note 20, at 646 ("In sum, there exists no clear line between 'us' and 'them' in the environmental realm.").

57. *See* Rubin & Feeley, *supra* note 53, at 935 (it is empirically unlikely that states will generate more good policies than the federal government and that claim is demonstrably wrong if the measure of good policy is specified by the federal government). *Cf.* Esty, *supra* note 20, at 643 (the historic principal of national territorial domain in international law may not maximize social welfare in an economically and ecologically interdependent world).

58. *See* Stewart, *supra* note 8, at 1213–15 (concentrated interests possess greater abilities to influence policy in smaller jurisdictions; consequently states are more likely to underrepresent diffuse interests, such as concerns for environmental protection); Rubin & Feeley, *supra* note 53, at 915 (states often provide fewer opportunities for citizen participation in policymaking). *See generally* Krent, *supra* note 23, at 74–78 (states may lack institutional mechanisms such as bicameralism and presentment to assure accountability; states also may lack effective monitoring and regulatory controls similar to those over federal officers, making state policy decisions less transparent).

59. *Cf.* Peter P. Swire, *The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law*, YALE L. & POL. REV./YALE J. ON REG. 67, 98–104 (1996) (describing how externalities, concentrations of power, and strategic interactions among states or between states and regulated entities lead to the underprovision of environmental quality).

60. *Cf.* William F. Pederson, Jr., *Why the Clean Air Act Works Badly*, 129 U. PA. L. REV. 1059, 1088–1109 (1981) (describing state implementation of federal policy under the Clean Air Act and criticizing the "double-key" approach adopted by Congress to assure federal review of state implementation efforts; suggesting adoption of federal permit programs to minimize the costs associated with federal approval of state requirements); David P. Novello, *The New Clean Air Act Operating Permit Program: EPA's Final Rules*, 23 Envtl. L. Rep. (Envtl. L. Inst.) 10,080 (1993) (describing the increased costs and complexities caused by adding federal permit programs to the existing dual regulatory structure); *Second EPA Guidance for Development of Clean Air Act Part 70 Applications, Issued March 5, 1996: White Paper Number 2 for Improved Implementation of the Part 70 Operating Permits Program*, 26 Env't Rep. (BNA) 2156 (Mar. 15, 1996) (describing how dual and overlapping regulation continue to exist and how long delays in reviewing and approving of state requirements has led to greater confusion and uncertainty).

61. *See* Edward L. Rubin, *The New Legal Process, The Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1424–33 (1996) (academic theory is coalescing around comparative analyses of institutions in order to evaluate concepts of efficiency and fairness).

is lacking.

Further, Congress normally specifies the presumptive choice of federal or state regulation without serious consideration of relative institutional competence and delegates to federal agencies the task of performing comparative analyses.[62] The criteria that Congress imposes to delineate intergovernmental relations, moreover, may not match the results of such analyses.[63]

B. The Constitution Does Not Encourage Cooperative Federalism

Congress also may enact cooperative federalism statutes to promote constitutional values of federalism. In particular, cooperative federalism may be thought to advance the Constitution's preferences for local governance and for local values.[64] "Devolving" power to states thus furthers values that federal legislators are sworn to uphold.[65]

The Constitution, however, does not contain a preference for local decisionmaking or for local values. The Framers of the Constitution did not view state regulation or state implementation of policy as necessarily better or more efficient than the federal equivalents. James Madison, the principal architect of American federalism, indicated that "the evils issuing from [state governmental] sources contributed more to...the [Constitutional] Convention...than...the inadequacy of the Confederation...."[66] The Constitution thus gave Congress the power to tax, to spend, and to regulate private conduct.[67] These new powers avoided the need to rely upon states.[68] More

62. *See, e.g.*, 33 U.S.C. § 1342(b)(1), (c)(3) (1994); 42 U.S.C. § 6926(b), (e) (1994); 42 U.S.C. § 7410(a), (c) (1994); 42 U.S.C. § 7412(d)(l)(5), (6) (1994).

63. *See, e.g.*, 42 U.S.C. § 7411(c)(1) (1994) (requiring EPA to subdelegate to states authority to impose federal controls on new and modified stationary sources of air pollutants if a state submits for approval a procedure adequate to implement and enforce those controls, even if EPA believes that it would do a better job).

64. *See* Krent, *supra* note 23, at 106 ("Almost by definition, delegations to state governments and Indian tribes embody federalism principles.... Rather than decide what is best for the Indian tribes and states concerning matters of *local* interest, Congress.... [through d]elegations to states, municipal governments, and Indian tribes allow[s] citizens to have a more direct voice in shaping *federal* policies that touch their lives.") (emphasis added).

65. *See* U.S. CONST. art. VI, cl. 3 (requiring an oath to support the Constitution). *Cf.* Robert F. Nagel, *The* Term Limits *Dissent: What Nerve*, 38 ARIZ. L. REV. 843, 851 (1996) (discussing U.S. Term Limits Inc. v. Thornton, 115 S. Ct. 1842, 1855, 1871 (1995), which held that the Constitution established exclusive qualifications for federal legislative office; criticizing the majority for claiming that national representatives owe their allegiance to the nation to the exclusion of states; and arguing that the Constitution may require protection of state interests).

66. 5 THE WRITINGS OF JAMES MADISON 27 (G. Hunt ed. 1901) (letter to Thomas Jefferson). *See* Akhil R. Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 247 n.134 (1985) ("the entire Federalist enterprise of a new and stronger federal government was largely conceived of as a way to erect a strong bulwark of individual rights against overweening state governments" (citing contemporaneous sources describing the need to protect against the arbitrariness and corruption of state legislatures)).

67. *See* U.S. CONST. art. I, § 8.

68. *Cf.* Krent, *supra* note 23, at 83 nn.61–62 (the provisions of Art. I, § 10 prohibit certain unilateral and collective actions by states or require congressional consent thereto; these provisions were critical to furthering federal goals under the Articles of Confederation, when Congress lacked the power to regulate private conduct; the provisions were carried over to the Constitution without significant discussion); Caminker, *supra* note 1, at 1119–20 & n.76 (same); Prakash, *supra* note 19, at 1963–66 (same).

debatably, the Constitution gave to federal courts the power to regulate conduct by fashioning federal common law, although Congress may have deprived the federal courts of such power.[69]

Further, states lack inherent moral attributes or needs and thus may possess "rights" only to the extent created or preserved by the Constitution.[70] The Constitution rejected any broad conception of states rights by enacting the Supremacy Clause and by failing to require that the federal government treat states equally.[71] The enactment of the Eleventh Amendment[72] did not alter this design, even though it restored some measure of state sovereign immunity.[73]

Because the scope of the federalism limits in the Eleventh Amendment are ambiguous,[74] the Supreme Court's jurisprudence has ambivalently reflected

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69. *See* Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18–22 (1842) (upholding federal common lawmaking power for diversity jurisdiction conveyed by Art. III, § 2, cl. 1), *overruled by* Erie R. v. Tompkins, 304 U.S. 64, 69–80 (1938) (holding that the Rules of Decision Act, currently codified at 28 U.S.C. § 1652 (1994), deprived federal courts of such power; discussing prudential reasons why federal courts should apply state law, i.e., to avoid creating conflicting laws that would lead to forum shopping and to debilitating uncertainty for citizens attempting to conform their conduct; and stating that federal common lawmaking "invad[es] rights which in our opinion are reserved by the Constitution to the several states"). *See also* Herbert Hovenkamp, *Federalism Revised*, 34 HASTINGS L.J. 201, 205–09 (1982) (book review) (*Erie* did not directly address *Swift*'s alternative holding for the existence of federal common lawmaking power; the Rules of Decision Act intended only to require federal courts to apply state law for purely local matters; intervening cases had held that common law specified by federal courts for issues of general concern preempted conflicting state positive law (citing Watson v. Tarpley, 59 U.S. (18 How.) 517, 520–21 (1855))).

70. *See* David Golove, Democracy Among States 29–30, 31 & n.44 (1996) (unpublished manuscript, on file with the *Arizona Law Review*) (discussing the inability to apply to juridical states a "thin theory of the good"—i.e., to derive a list of basic goods that all states would desire, as was derived for free and equal natural persons in JOHN RAWLS, A THEORY OF JUSTICE 92, 396–97 (1971)—that would ground a set of principles upon which nation-states would agree under a veil of ignorance to cede their absolute sovereignty to a central government with coercive powers). Even if states possessed inherent moral attributes, moreover, those attributes would have to be balanced with other values before deciding to recognize states' rights.

71. *See* U.S. CONST. art. VI, cl. 2; Neuman, *supra* note 36, at 263–65, 320, 347–51, 356–58, 369 (the Privileges and Immunities Clause, U.S. CONST. art. IV, § 2, requires only equal treatment within each state's territory; nonuniform federal policies may be justified as "accomodations to the overlappping spheres of authority that both sovereigns inhabit in our federal system"). The Constitution also "guarantee[s] to every State in this Union a Republican Form of Government," i.e., representative democracy. U.S. CONST. art. IV, § 4. But this requirement may not be subject to judicial protection and is unlikely to supply any significant limit on preemptive federal power. *See* New York v. United States, 505 U.S. 144, 183–86 (1992) (rejecting on substantive grounds Guarantee Clause challenges to conditional federal spending and backup federal regulations; simultaneously refusing to hold that disputes under the Guarantee Clause are justiciable).

72. U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced by or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

73. Adoption of the Eleventh Amendment was triggered by the Supreme Court's decision in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793). *Chisholm* adopted a general common law of state liability, holding that the Constitution had abrogated state sovereign immunity by vesting original jurisdiction in the Supreme Court for legal claims brought against states. *See* Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1471–73 (1987).

74. The Eleventh Amendment was drafted as a jurisdictional provision. In *Chisholm*, the Court had treated state liability in assumpsit as general common law, thereby authorizing federal court jurisdiction. By denying federal courts of jurisdiction, states' rights advocates could allow manipulation of the substantive rules in *state* courts, without having to fight the broader issue of whether states themselves were subject to "general" common law standards or possessed broad

judicial solicitude for federal or state interests. Most recently, in *Seminole Tribe of Florida v. Florida*,[75] the Court overruled a seven-year old decision and held that the Eleventh Amendment restored state immunity from citizen suits brought to enforce federal rights created under the Indian and Interstate Commerce Clauses.[76]

The holding in *Seminole Tribe*, however, remains limited to laws enacted under federal powers to regulate commerce.[77] The Supreme Court did not overrule cases holding that Congress may authorize: (1) the federal government to sue states; or (2) citizens to sue state officials for violating federal rights.[78] The Court arguably limited the availability of such citizen suits under existing legislation.[79] But the Court only required Congress to speak clearly and thus did not alter the supremacy of federal legislative power.[80] Of course, states possess disproportionate power to block federal legislation and Congress is unlikely to reverse the Court's decision.[81]

Similarly, the Supreme Court's Tenth Amendment jurisprudence[82] has

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immunity from suit. As Professor Amar has noted, an amendment was also proposed to directly restore state sovereign immunity by subjecting states only to "local" law. That amendment was never adopted. *Cf.* Amar, *supra* note 73, at 1473 n.202 (arguing that a "rule of decision" Amendment was hard to draft and that denying jurisdiction avoided *federal* court manipulation of the substantive rules).

75. 116 S. Ct. 1114 (1996).

76. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power...To regulate Commerce...among the several States, and with the Indian tribes"). *See* 116 S. Ct. at 1123–32 (ruling under the Indian Commerce Clause and overruling its earlier decision under the Interstate Commerce Clause in Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989)).

77. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 451–56 (1976) (Congress may abrogate state immunity when enacting legislation under the implementing clause of the Fourteenth Amendment, U.S. CONST. amend. XIV, § 5).

78. *See* 116 S. Ct. at 1131 n.14 (reaffirming cases such as United States v. Texas, 143 U.S. 621, 644–45 (1892), which upheld suits in federal courts to enforce federal laws against states); *id.* at 1133 n.17 (expressly preserving congressional power to authorize citizen suits to enjoin state officials from violating federal law under the doctrine announced in *Ex parte* Young, 209 U.S. 123 (1908)).

79. *See* 116 S. Ct. at 1132–33 (refusing to supplement a congressional remedial scheme to enforce particular rights with judicial remedies for violations of those rights; suggesting that when Congress has provided a specific but limited remedial scheme, Congress "strongly indicates" an intent to limit the application of *Ex parte* Young). *Cf.* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 11–22 (1981) (inferring an intent to preclude implied judicial remedies from the provision of a detailed remedial scheme, notwithstanding an express savings provision); Cort v. Ash, 422 U.S. 66, 78 (1975) (courts must scrutinize legislation and legislative history to determine congressional intent to preclude or to authorize implied judicial remedies).

80. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 629–32 (1992) (interpretive presumptions and clear statement rules impose significant distributional consequences, particularly in regard to constitutional values that the Court rarely enforces through judicial review, even though ultimate power to reverse the Court lies with Congress).

81. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 68–69 (1994) (clear statement rules, even more than interpretive presumptions, signal to Congress the Court's normative preferences and make it harder for Congress to negate those preferences by raising the bar for enacting the required legislation).

82. In theory, the Tenth Amendment might pose an independent limit on the exercise of federal power. But the Supreme Court has limited Tenth Amendment analysis to whether the Constitution vested power in the federal government to take the challenged action. *See* New York v. United States, 505 U.S. 144, 156–57 (1992) (the Tenth Amendment provides only a rule of construction and "'states but a truism that all is retained which has not been surrendered.'") (quoting United States v. Darby, 312 U.S. 100, 124, (1941)); Althouse, *supra*

ambivalently reflected judicial solicitude for federal or state interests.[83] The Court in *New York* signaled that it is again willing to police the intergovernmental border to assure the accountability of federal and state government officials. The Court in *Lopez* signaled that it will deny to Congress the power to determine the level of government that should regulate particular concerns.[84] But the Court cannot claim that its decisions were compelled by the Tenth Amendment.[85]

The Framers of the Constitution, moreover, contemplated that intergovernmental competition rather than cooperation would best assure good policy. Federalism could secure and protect individual freedom and liberty only if each level of government would help to control the other.[86] Justice Kennedy,

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note 27, at 811 (same). *Cf.* Voting Rights Coalition v. Wilson, 60 F.3d 1411, 1413–15 (5th Cir. 1995) (upholding the National Voter Registration Act of 1993 (codified at 42 U.S.C. §§ 1973gg–1 to –10 (1994)), which was challenged as violating the Tenth Amendment, as a permissible exercise of federal legislative power under U.S. CONST. art. I, § 4, cl. 1, without reaching whether the act unconstitutionally impinged on state sovereignty in regard to state electoral processes).

83. *See* Maryland v. Wirtz, 392 U.S. 183 (1968), *overruled by* National League of Cities v. Usery, 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth. 469 U.S. 528 (1985). *See generally* Rubin & Feeley, *supra* note 53, at 950 ("The Court's intermittent embrace of federalist principles is best understood as a form of symbolic politics."). The Court's ambivalence is understandable, given its appointment by a President elected principally by the nation's citizens and the requirement for consent of Senators appointed by particular states' citizens. *See* U.S. CONST. art. II, § 2, cl. 2.

84. *See supra* notes 6–18 and accompanying text.

85. *Compare* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 561–62 (1994) (the Tenth Amendment requires application of the maxim *expressio unius est exclusio alterius* to lists of governmental powers and thus precludes the existence of unenumerated powers) *with* Caminker, *supra* note 1, at 1033 (interpreting the Tenth Amendment to require application of the *expressio unius* canon to lists of governmental powers is dangerous, because an alternative canon exists, implying the inclusion of unenumerated but similar items) (citing Daniel H. Lowenstein, *Are Congressional Term Limits Constitutional?*, 18 HARV. J.L. & PUB. POL'Y 1, 9–10 (1994)). The ambiguity of the Tenth Amendment cannot be resolved by resort to default interpretive presumptions, because different defaults are available and selection among them requires policy choice. For example, the Tenth Amendment was drafted primarily by federal legislators, but was ratified by state legislators. The Tenth Amendment was clearly an effort to restrict expansive interpretation of the federal powers that had been vested under the original Constitution. The Tenth Amendment thus might be construed against the federal drafters in order to achieve its apparent remedial purposes. *Cf.* KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 522–32 (1960) ("Remedial statutes are to be liberally construed and if a retroactive interpretation will promote the ends of justice, they should receive such construction."). *But cf.* Radzanower v. Touche Ross & Co., 426 U.S. 148, 154 (1976) (repeals by implication are disfavored). In contrast, the Tenth Amendment might be construed against its state ratifiers, by requiring a clear statement to protect settled expectations or to avoid dramatic and costly changes to legal relations. *Cf.* Landgraf v. USI Film Prods., 114 S. Ct. 1483, 1495–1500 (1994) (courts may not interpret legislation to apply retroactively unless Congress has clearly stated such an intent in unambiguous language; Congress may not, without providing a clear statement, override the default interpretative presumption of nonretroactivity that courts must apply); Plaut v. Spendthrift Farms, Inc., 115 S. Ct. 1447, 1461–62 (1995) (the clear statement rule required under *Landgraf* applies, notwithstanding the contrary interpretive canon that legislation should be construed broadly to effectuate remedial purposes).

86. *See* United States v. Lopez, 115 S. Ct. 1624, 1638 (1995) (Kennedy, J., concurring) (citing THE FEDERALIST No. 51 (James Madison) (Clint Rossiter ed., 1961) and Coleman v. Thompson, 501 U.S. 722, 759 (1991) (noting that only federalism among the structural features of the Constitution may not require judicial protection)); Amar, *supra* note 73, at 1444–66 (the Framers transferred their economic theories of competitive markets to government and intended for federalism to resemble the separation of powers among the branches of the federal government); *id.* at 1492–1519 (the Framers provided military, political

who appears to hold the pivotal vote in current federalism cases, clearly understands this point. To be effective, federalism must provide "two distinct and discernible lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States."[87] In turn, citizens: (1) must be "loyal" to both levels of government; (2) must not place their primary allegiance in only one of the levels; and (3) must respect both the "universalist" moral principles to which our nation is committed and the "value-pluralism" necessary to respect the integrity of states as political entities.[88]

But federal legislation may preempt state power and thus state values. Citizens routinely, albeit ambivalently, have to choose their primary loyalty. Citizens may pick the issues on which to support federal values or a plurality of values. But they cannot simultaneously support preemptive federal legislation and conflicting state values and regulatory prerogatives.

Judicial, legislative, and academic debates over federalism are thus political battles for the hearts and minds of the citizenry on questions of morality.[89] Sadly, the answers to interjurisdictional moral disputes are not self-evident.[90] For that reason, the rhetoric on both sides of the issue is intense.[91]

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and legal checks and balances to control each level of government; to be effective, federalism requires federal and state officials to cabin each others' ultra vires actions and to compete for power by soliciting the affections of the citizenry); Amar, *supra* note 66, at 237 n.112 (James Madison's political model resembled Adam Smith's economic model). *Cf.* Krent, *supra* note 23, at 65 n.11 (the Framers' imposed rigid structures separating powers in order to protect individual liberty; the structures apply even when they are cumbersome and more flexible approaches can adequately safeguard public policy).

87. United States v. Lopez, 115 S. Ct. 1624, 1638 (1995) (Kennedy, J., concurring). *See also id.* at 1638–39 (federalism serves to assign political responsibility and allowing the federal government to regulate traditional state concerns would blur the boundaries of the separate spheres of power (citing THE FEDERALIST No. 46 (James Madison); FTC v. Ticor Title Ins. Co., 504 U.S. 621, 636 (1992); and New York v. United States, 505 U.S. 140 (1992))).

88. Mark Tushnet, *What Then Is the American?*, 38 ARIZ. L. REV. 873, 878–81 (1996) (citing THE DECLARATION OF INDEPENDENCE, para. 1 and U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1872 (Kennedy, J., concurring)). *See also* Nagel, *supra* note 65, at 850–51 ("multiple sovereignties and divided loyalties can be consistent with nationhood" and are the essence of constitutional federalism); Amar, *supra* note 73, at 1449 n.92 ("federal" derives from the Latin foedus, "treaty," and its cognate, fides, "faith").

89. *Cf.* Golove, *supra* note 70, at 26–27 (liberal theory is committed to value pluralism in order for government to provide equal consideration of citizens' interests); Tushnet, *supra* note 88, at 878 (value pluralism may exist in the absence of preemptive federal law, such as state regulation that allows damage to wildlife that is not protected by national law; liberal political theory is not committed to a universal ordering of values that would preclude value-pluralism) (citing CASS SUNSTEIN, THE PARTIAL CONSTITUTION 148–49 (1993)); Nagel, *supra* note 65, at 855 (the claims of Professors Rubin and Feeley of a unitary public and national decisionmaking cannot support the decision in *U.S. Term Limits, Inc.*, because no preemptive federal majoritarian legislation exists and because the Supreme Court is often willing to overturn legislative decisions); Lynn A. Baker, *"They the People": A Comment On* U.S. Term Limits, Inc. v. Thornton, 38 ARIZ. L. REV. 859, 864–65 (1996) (the structure of representation in Congress allows federal legislation to be enacted with the support of as little as 31% of the national electorate; "In short, in the realm of federal lawmaking, We the People of this nation do not exist in any meaningful way.... For strong nationalists, the states are so frightening...because the states give us, the People, too much of a voice."); *supra* note 45 and accompanying text.

90. *See* Golove, *supra* note 70, at 67 & n.74 (imposition of the status quo legal order is not value-neutral because it is biased against change and thus does not treat individual preferences equally); *id.* at 58, 62–65 (non-liberal states, such as theocracies, will require protection of their values from central dictation and thus will not cede sovereignty).

91. *See* Nagel, *supra* note 65, at 845–47 (discussing and suggesting origins of the

Significantly, these political battles occur primarily: (1) at the margins of vested federal powers[92]; and (2) when deciding whether and how to exercise such powers. Again, the Constitution does not encourage, much less require, the federal government to negotiate in advance the terms of its voluntary surrender to the states.

II. THE CONSTITUTION DOES NOT CLEARLY PROHIBIT CONGRESS FROM DELEGATING LEGISLATIVE POWER TO STATES

When Congress and the President enact statutes delegating power to states, they may allow states to determine the contents of federal laws. Such statutes thus might be thought to threaten the integrity of constitutional provisions mandatorily vesting legislative powers in the Congress[93] and executive powers in the President.[94] In contrast, the Constitution did not mandate that Congress create lower federal courts, vested original jurisdiction in the Supreme Court for a limited set of cases or controversies, and authorized Congress to create exceptions to the Supreme Court's appellate jurisdiction.[95]

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exaggerated rhetoric, including use as a political tactic).

92. Federalism disputes occur at the margins of both legislative and judicial power. *Compare* Weinberg, *supra* note 27, at 808–12, 815, 818–19 (describing the traditional view that federal common lawmaking power is limited to a few areas where federal interests are at stake; pointing out that state courts routinely fashion federal common law; and arguing that most of our basic social arrangements are interstitial to federal statutes: "If state governance remains 'primary' in some sense, that is a circumstance of diminishing real impact on our lives.") *with* Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 NW. U. L. REV. 761, 762 n.8, 763–68, 788–89, 790 n.115, 793–97 (1989) (distinguishing gap-filling and delegation from federal common lawmaking, where the judiciary adopts rules that are outside the scope of federal legislative programs; claiming that federal common lawmaking effectively usurps federal legislative power that has not been delegated; noting that the tradition of "natural law" adjudication ended at an early stage in our nation's history; and arguing that the Rules of Decision Act therefore prohibits creation of federal common law without regard to *Erie*'s constitutional holding).

93. *See* U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States.").

94. *Compare* Calabresi & Prakash, *supra* note 85, at 544–75 (arguing that: (1) the Constitution mandatorily vests executive power exclusively in the President; (2) the Constitution unambiguously recognizes only three types of power and does not include the category of administrative power that is not subject to exclusive vesting; and (3) if any such additional power were to exist, the Tenth Amendment would reserve that power to the states or the people, and not to the federal legislature) *with* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 39–45 (1994) (arguing that: (1) the understanding of the Framers regarding legislative or executive power were pragmatic concepts rather than rigid categories, and thus that efforts to "carve up the world of government power without remainder" mistake the Framers' "undeveloped design"; (2) even if the concept of executive power had a clear categorical understanding, functions not specifically identified within that concept would not be subject to exclusive vesting in the President; and (3) the Constitution imposed requirements on the allocation of only some administrative functions, leaving Congress free to vest other administrative functions as it saw fit).

95. *See* U.S. CONST. art. III, § 2, cl. 2; CHARLES A. WRIGHT, LAW OF FEDERAL COURTS § 10, at 41 nn. 3–5 (5th ed. 1994) (the Supreme Court's original jurisdiction cannot be divested or expanded, but Congress may refuse to create inferior federal courts and may make exceptions to the Supreme Court's appellate jurisdiction (citing Marbury v. Madison, 5 U.S. 137 (1803); Ohio v. Wyandotte Chems. Corp., 401 U.S. 493 (1971); Cohens v. Virginia, 19 U.S. 264 (1821))); Amar, *supra* note 66, at 212–54 (arguing from the text, structure, and history of Article III that the Constitution precludes Congress from divesting appellate jurisdiction under the Exceptions Clause for some of the mandatorily vested judicial powers,

As a result, congressional reliance on state trial courts to enforce federal laws poses few concerns.

The Constitution does not directly address whether Congress may delegate legislative powers to states. Mandatory vesting in Congress may not require Congress to exercise exclusively legislative power, because initial vesting is not logically inconsistent with subsequent delegation.[96] In order to understand whether the Constitution prohibits the delegation of federal legislative power, it is therefore necessary to analyze the text and structure of the Constitution and the beliefs of the Framers. Because the meaning of the terms and their usage may depend on their historic context, however, it is necessary to start with the beliefs of the Framers' regarding their terminology.[97]

A. The Concept of Legislation Was in a State of Flux When the Constitution Was Ratified

The Constitution does not define its terms in general and does not define "[a]ll legislative Powers shall be vested in a Congress" in specific. The Framers created in the Constitution a representative political body to promulgate binding laws. They rejected English lawmaking practice, under which the Executive originated the laws subject to Parliamentary veto. The Framers' thus changed the meaning of terms penned by John Locke, who believed that legislatures could not delegate lawmaking power.[98]

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i.e., cases arising under federal law, cases in admiralty, and cases involving ambassadors and other ministers).

96. *See* THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 2764 (1971) (defining the first sense of the substantive "shall" as "a command, promise, or determination"); *id.* at 3619 (defining the first sense of the verb "vest" as "to place, settle, or secure...[w]ith reference to power or authority" and the second sense as "to put, place, or establish (a person) in full or legal possession or occupation of something"). *Cf. id.* at 677 (defining the second sense of the verb "delegate" as "[t]o entrust, commit or deliver (authority, a function, etc.) to another as an agent or deputy"); *id.* at 918 (defining the third sense of the adjective "exclusive" as "[n]ot admitting of the existence of (something); unable to co-exist, incompatible").

97. *See* Lessig & Sunstein, *supra* note 94, at 12–13 (modern presuppositions about the meanings of text may color interpretation more than illuminate intended meaning; interpretation of the text and structure of the Constitution must therefore begin with history). *But see* Calabresi & Prakash, *supra* note 85, at 552–53 (originalist interpretation requires consideration of, in order: (1) the plain meaning of the text read holistically; (2) widely read public statements of explanation contemporaneous with ratification, only when textual ambiguity exists; (3) private statements made prior to or concurrent with ratification; and (4) postenactment history or practice shedding light on original meaning). A valid "originalist" understanding of the Constitution "must refer to an understanding concrete enough to provide a real and constraining guidance." Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 726 (1988). *But see* Herbert E. Striner, Zones of Danger: Values, Decisionmaking and Change ch. 9, at 8 (1996) (unpublished manuscript, on file with the *Arizona Law Review*) ("All efforts to put oneself in the intellectual 'shoes' of Madison, Jefferson, Franklin, and the others can at best only come up with a personal appreciation of *their* reality...as perceived through the lenses of *my* values system.") (emphasis added and in original). As a descriptive matter, moreover, original intent is only the alpha and not the omega of the political meaning of the Constitution. *See* Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799. 911 (1995) (the point of interpretative arguments to change seminal constitutional doctrines was to "convince legalists that the constitutional tradition applauded the collective effort to correct the anachronistic formalisms of the past when modern Americans were demanding fundamental change."). As a normative matter, I prefer the interpretive hegemony of the present, so long as honestly acknowledged, to the dead hand of the past. *See infra* note 355.

98. *See* JOHN LOCKE, THE SECOND TREATISE OF GOVERMENT 79 (1986) (1689)

The Framers' revolutionary politics had carried over into their organization of government. Clearly defined historic referents thus did not exist for the terms "legislative Powers" or "Congress." The concepts and terminology of the time were in a state of flux. The Framers did not have time to reach a settled equilibrium from which clear meanings for their new ideas might result.[99]

The most basic premise of the Constitution, however, was that the federal government would lack any inherent or vested power, except that delegated to it by the people in the Constitution.[100] The terms "herein granted" as applied to the vesting of legislative power makes this implied limitation on the source of federal power clear. Congress possesses only the subsequently enumerated legislative powers.[101]

B. The Constitutional Text and Structure Do Not Resolve Whether Congress May Delegate Legislative Power to the States

1. The Text of the Constitution Does Not Clearly Prohibit Congress from Delegating Federal Legislative Power

Because federal power was understood as limited, the plural terminology

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("[T]he legislative cannot transfer the power of making laws to any other hands."); Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 12 & n.45, 13–20 (1993) (discussing the development of the concepts of legislative, executive, and judicial power from pre-revolutionary English understandings through adoption of the Constitution); THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY, *supra* note 96, at 1600 (defining the second sense of the adjective "legislative" as "[o]f or pertaining to legislation or the making of laws."). *Cf. id.* (defining the first sense of the substantive "legislation" as "[t]he action of making or giving laws; the enactment or laws, lawgiving; an instance of this"); *id.* at 1581 (defining the first and second senses of the substantive "law" as "[t]he body of rules, whether proceeding from formal enactment or from custom, which a particular state or community recognizes as binding on its members or subjects.... One of the individual rules which constitute the law (sense 1) of a state or polity."); *id.* at 2599 (defining the first, fourth, and fifth senses of the substantive "rule" as "1. A principle, regulation, or maxim governing individual conduct.... 4. *Law.* A. An order made by a judge or court, the application of which is limited to the case in connection with which it is granted.... B. A formal order or regulation governing the procedure or decisions of a court of law; an enunciation or doctrine forming part of the common law, or having the force of law.... 5. A regulation framed or adopted by a corporate body, public or private, for governing its conduct and that of its members.").

99. *See* Amar, *supra* note 73, at 1437 ("Old words took on new meanings, as patriots struggled to build an intellectual framework that would order their thinking...and make sense of the ideological spinning—the ideological revolution—around them.").

100. *See* THE DECLARATION OF INDEPENDENCE, para. 1 ("Governments are instituted among Men, deriving their just powers from the consent of the governed"); United States v. Lopez, 115 S. Ct. 1624, 1626 (1995) ("The Constitution creates a Federal Government of enumerated powers." (citing THE FEDERALIST No. 45, at 292–93 (James Madison) (Clinton Rossiter ed., 1961))); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 2 (2d ed. 1988) ("That all lawful power derives from the people and must be held in check to preserve their freedom is the oldest and most central tenet of American constitutionalism."); Amar, *supra* note 73, at 1435, 1445–47, 1455–62 (the United States rejected the English concept of Parliamentary sovereignty; American legislative sovereignty was more closely analogous to corporate charters and was subject to the understanding that government was "bounded by the terms of the delegation" of power derived from the consent of the governed; such consent was provided through "meta-legal" conventions of a unitary national public that reorganized the agencies of government).

101. *See* Lessig & Sunstein, *supra* note 94, at 47 (reading the "herein granted" terminology to imply exclusion of "residual" legislative power).

of the legislative vesting clause[102] does not imply the possibility of unenumerated federal legislative powers. Such powers, if inherent in the Congress or vested in it from other sources, might not be subject to any implied limits imposed by mandatory vesting.[103]

With a few exceptions, the original Constitution did not articulate substantive limits on the exercise of the vested federal legislative powers.[104] Instead, the Constitution recites procedures that make clear when legislation has been enacted.[105] The articulation of detailed procedures for enacting legislation might suggest a prohibition against Congress delegating its legislative powers, because recipients of those powers could create new laws without conforming to the procedures. This concern cannot be avoided by resort to the inherent rulemaking powers of the Congress that are vested by the Constitution, because those powers might not authorize Congress to enact rules having the effect of laws binding upon private conduct.[106]

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102. The term "all" is a plural, and the words "herein granted" suggest the potential for additional referents beyond those enumerated.

103. Although subject to implied limits from vesting, the Necessary and Proper Clause should not be understood to convey unlimited, unenumerated powers. *See* U.S. CONST. art. I, § 8, cl. 18 ("The Congress shall have Power...To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution."). The text requires drawing a line somewhere between what effectuates other enumerated powers and what goes beyond them. An expansive interpretation may be rejected on the view that the Framers intended a federal government of limited legislative powers or that the Tenth Amendment requires a default interpretive presumption to narrowly construe ambiguity. *See* Calabresi & Prakash, *supra* note 85, at 561 n.69. But before the presumption can operate, the boundary between what is clearly necessary and proper and what is ambiguously so must be located. Interpretative disputes over the scope of the Necessary and Proper Clause thus are more likely to reflect political arguments than inherent meanings. *Cf. supra* notes 85, 97.

104. *See* U.S. CONST. art. I, § 9 (prohibiting suspension of the writ of habeas corpus unless public safety requires it; precluding bills of attainder and ex post facto laws; prohibiting taxes and duties on articles exported from the states; prohibiting preferences for particular states' commercial ports; etc.). The Constitution also imposes few substantive obligations on the federal government. *See* U.S. CONST. art. IV, § 4 (requiring the United States to guarantee to states a republican form of government and to protect states against invasion and domestic violence); U.S. CONST. art. VI, cls. 1, 3 (requiring the federal government to honor its prior debts and federal officials to take an oath to support the Constitution).

105. *See* U.S. CONST. art. I, § 5, cl. 3 (requiring the keeping of a journal); U.S. CONST. art. I, § 7, cl. 1 (requiring that revenue bills originate in the House of Representatives); U.S. CONST. art. I, § 7, cl. 2 (requiring bills to pass both houses and be presented to the President for signature or veto; specifying procedures for reconsideration and for the "pocket veto"); U.S. CONST. art. I, § 7, cl. 3 (specifying the requirements for concurrent resolutions). *Cf.* THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY, *supra* note 96, at 216 (defining the third and fourth senses of the third substantive form of "bill" as "3. The draft of an Act of Parliament submitted to the legislature for discussion and adoption as an 'Act.' Historically, this has passed through the senses of a. A petition to the Sovereign, in in sense 2; b. A petition, containing the draft of the act or statute prayed for; c. The draft act without the petitionary form,... 4. *Law.* A written statement of a case; a pleading of a plaintiff or defendent"); *id.* at 2510 (defining the eleventh sense of the substantive "resolution" as "A statement upon some matter; a decision or verdict on some point. Now *rare* or *obsolete*.... b. A formal decision, determination, or expression of opinion, on the part of a deliberative assembly or other meeting; a proposal of this nature submitted to an assembly or meeting.").

106. U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings"). *See* Buckley v. Valeo, 424 U.S. 1, 128, 133, 140 (1976) (rejecting arguments that the Clerk of the House of Representatives and other congressional officials are "officers" whom the President must appoint, because "the internal rules of each House" provide authority to appoint them without need for presentment of a bill to the President; Congress may transfer to such delegates "predominantly quasi-judicial and quasi-legislative" rather than executive powers); INS v. Chadha, 462 U.S. 919, 944–59 (1983) (invalidating the one-house legislative

Nevertheless, the Constitution: (1) applies the specified procedures only to bills or concurrent resolutions that are to become laws; (2) employs different terms to refer to the substantive powers that Congress may exercise, without specifying whether they are to be created only by bill or concurrent resolution; and (3) clearly contemplates the existence of other sources of "law."[107] Formal compliance with the Constitution's procedures may thus be achieved through initial enactment of bills delegating the various legislative powers. The legal rules adopted under such delegated powers could then be considered "Laws of the United States," triggering Article III federal judicial power.[108]

In contrast to the original Constitution, the Bill of Rights imposed numerous substantive limitations on the exercise of legislative power by the Congress.[109] But none of the Amendments, with the possible exceptions of the

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veto as an unconstitutional exercise of legislative power not subject to bicameralism and presentment constraints); Humphrey's Ex'r v. United States, 295 U.S. 602, 627 (1935) (Congress may appoint legislative officials and may delegate investigatory and fact-gathering activities that are not "at all related to either the legislative or judicial power"); Bowsher v. Synar, 478 U.S. 714, 732–34 (1986) (Congress may not entrust executive powers to legislative officials over whom it exercises sole authority to remove from office; if Congress wishes to control the execution of law, it must enact new legislation). *But cf.* McGrain v. Daugherty, 273 U.S. 135, 152–82 (1927) (Congress may subpoena witnesses and may punish noncomplying witnesses for contempt, thereby altering legal rights without enacting laws).

107. *See* U.S. CONST. art. I, § 7, cl. 2 (describing the procedures for a "Bill" to become a "Law"); U.S. CONST. art. I, § 8, cl. 1 (describing power to levy and collect "Taxes, Duties, Imposts, and Excises"); U.S. CONST. art. I, § 8, cl. 8 (describing "the exclusive Right" to "Writings and Discoveries"); U.S. CONST. art. I, § 8, cl. 10 (referring to the "Law of Nations"); U.S. CONST. art. I, § 8, cl. 11 (describing power to make "Rules concerning Captures on Land and Water"); U.S. CONST. art. I, § 8, cl. 14 (describing power to make "Rules for the Government and Regulation of the land and naval Forces"); U.S. CONST. art. I, § 8, cl. 17 (describing authority to exercise "exclusive Legislation in all Cases whatsoever" for the District of Columbia); U.S. CONST. art. I, § 8, cl. 18 (describing power to make "all Laws"); U.S. CONST. art. II, § 2, cl. 2 (the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties"); U.S. CONST. art. III, § 2, cl. 1 ("the judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made"); E. Donald Elliott, INS v. Chadha: *The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125, 131–44 (rejecting application of the *expressio unius* interpretive canon to the enactment procedures; "but not every exercise of Article I legislative power comes within these categories [of bills and concurrent resolutions], as the Court concedes"). *Cf.* Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 385, 390–91 (1989) ("The tendency of legal scholars to regard the kinds of rules that courts enforce as the essence of the law, therefore, has led them to treat transitivity as a defining characteristic of legislation.... [The] effort to equate rule making with the legislative power springs from a premodern, judicially oriented attitude toward legislation. It assumes that all legislation must be external and transitive, since only such legislation can dispense with rule-making discretion by the implementation mechanism.").

108. U.S. CONST. art. III, § 2, cl. 1. Even for revenue legislation, formal compliance could be achieved by delegatory legislation that is initiated in the House of Representatives. *See* U.S. CONST. art. I, § 7, cl. 1. *But cf.* Rubin, *supra* note 107, at 389 n.67 (the Constitution assigns a number of specific tasks to Congress, which Congress can delegate by assigning to administrative agencies; in contrast, the Constitution implies that Congress must enact appropriation bills, which suggests that that power is not delegable). The judicial power, moreover, extends to *all* sources of law at issue in particular "Cases" or "Controversies." *See* United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). *Cf.* George D. Brown, *Beyond* Pennhurst*—Protective Jurisdiction, the Eleventh Amendment, and the Power of Congress to Enlarge Federal Jurisdiction in Response to the Burger Court*, 71 VA. L. REV. 343, 357 (1985) (rejecting fairness challenges to the assertion of pendent jurisdiction because defendants are "already validly in court").

109. *See generally* Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991).

Fifth and Ninth, suggest a limitation on the delegation of legislative power.[110] The Fifth and Ninth Amendments, however, add little to the historic analysis.[111] Instead, they provide a constitutional hook on which to hang arguments regarding modern conceptions of political rights that may limit delegations, which I address in Part V. In sum, the text of the Constitution does not provide a clear answer to whether Congress may delegate its legislative power.

2. *The Structure of the Constitution Does Not Clearly Prohibit Congress from Delegating Federal Legislative Power*

Although the text of the Legislative Vesting Clause does not clearly prohibit Congress from delegating its legislative powers, analogy to other vesting clauses might provide limits by negative implication. But to determine whether such analogies are apt, it is necessary to determine the relationships among legislative, executive, and judicial powers.

Executive power may be understood either as administrative enforcement of the law (including the quasi-legislative and quasi-judicial functions of rulemaking and of administrative adjudication) or as the exercise of peculiarly executive functions.[112] The exercise of executive power thus may be

110. *See* U.S. CONST. amend. V ("No person shall...be deprived of life, liberty, or property without due process of law."); U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."). The Ninth Amendment addresses unenumerated political rights of individuals. If delegation violates political rights by reducing accountability of government officials, the Ninth Amendment might by itself limit the delegation of federal legislative power to states. *Cf.* Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) (the Constitution provides an implied cause of action for monetary relief for violations of constitutional rights by federal officials). To date, Ninth Amendment rights have been limited to protection through other provisions of the Constitution. *See* Griswold v. Connecticut, 381 U.S. 479, 486–93 (1965) (Goldberg, J., concurring) (the Ninth Amendment recognizes the existence of unenumerated rights in addition to the rights enumerated in the First through Eighth Amendments; if unenumerated rights are fundamental they may be protected as liberty interests within the meaning of the Fifth and Fourteenth Amendment Due Process Clauses); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 34–38 (1980) (because the Tenth Amendment protects against the Constitution being interpreted broadly to expand enumerated federal powers, the Ninth Amendment must be understood as "intended to signal the existence of federal constitutional rights beyond those specifically enumerated in the Constitution"); Raoul Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1, 2–20 (1980) (the Ninth Amendment addresses the rights of individuals, not the powers of government; the Constitution does not provide the federal government with the power to enforce Ninth Amendment rights). As a result, "nonfundamental" political rights receive no constitutional protection, violating the traditional tort maxim *ubi jus ibi remidium*. *See* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 374–75 (1982) (federal courts, following a common law tradition, regard the denial of a remedy as the exception rather than the rule); Texas & Pac. R. Co. v. Rigsby, 241 U.S. 33, 39–40 (1916) (where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy for the wrong contrary to law (citing 3 WILLIAM BLACKSTONE, COMMENTARIES *51, *53)); Amar, *supra* note 73, at 1505, 1516 (federalism was intended to vindicate rights).

111. *Cf.* Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 709, 716 (1975) (the written Constitution could not codify the entire mass of unwritten "higher" law, which the Ninth Amendment expressly recognized); Thomas B. McAffee, *A Critical Guide to the Ninth Amendment*, 69 TEMP. L.Q. 61, 91–92 (1996) (early American cases rely on unwritten fundamental law (citing Calder v. Bull, 3 U.S. 386 (1798)); Ninth Amendment debates not only address the possibility of justifying rights limitations on the government but how to define the foundations of our constitutional order).

112. *See* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 575 n.11 (1984) (arguing that a distinction between executive (or political) and administrative power exists (citing Marbury v. Madison, 5

structurally similar to administration, but is understood to have an inherent source of policymaking power, i.e. the power to decide when, with whom, how and what to negotiate with regard to rules of international conduct, and when, with whom, how and what to attack when such rules break down. Executive power and administrative power may be difficult to distinguish from legislative power precisely because officials provided with such powers may exercise policymaking discretion. Legislative rulemaking is hard to distinguish from legislating rules.

Both legislative power and executive power may be contrasted with judicial power. Judicial power may be understood as the interpretation and application of law to specific disputes. Some have argued that legislation may be distinguished from adjudication based on the temporal direction in which legal rules are specified.[113] But the Constitution does not clearly limit courts from adjudicating prospectively or Congress from legislating retrospectively.[114]

Similarly, legislative power might be distinguished from executive or judicial power based on the level of generality at which Congress sets policy or enacts binding obligations.[115] But the Constitution also does not clearly limit Congress from enacting specific rules for private conduct.[116] Nor does it

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U.S. (1 Cranch) 137, 170 (1803)); noting that the foreign affairs and war powers represented the bulk of executive authority as understood at the time the Constitution was adopted).

113. *See* BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 4.2, at 164–65 & n.8 (3d ed. 1991) ("A rule prescribes *future* patterns of conduct; a decision determines liabilities upon the basis of *present* or *past* facts.... [The temporal] element of applicability has been emphasized by others as the key in differentiating legislative from judicial functions.").

114. *See* Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. (forthcoming Mar. 1997) (describing the similarity of and lack of principled limits on retroactive legislation and prospective adjudication when evaluating challenges under the Due Process Clause, Contracts Clause, Takings Clause, and Equal Protection Clauses of the Fifth Amendment); Rubin, *supra* note 107, at 403, 404 & nn.117–118 (the Ex Post Facto Law Clause imposes prohibitions on retrospective legislation but has been interpreted to apply only to criminal statutes and to substantive changes; non-retroactivity should thus be understood as a specialized rule of criminal law rather than as a general constraint on legislation). *Cf.* Althouse, *supra* note 28, at 1486–87 (noting that the Supreme Court's constitutional and statutory interpretions also establish the rules that limit federal court jurisdiction); Caminker, *supra* note 1, at 1050–53 (rejecting in the context of directives to state legislatures formal arguments to distinguish judicial from legislative or executive officials, i.e., that only courts apply "extrasovereign" laws and that courts' subject matter jurisdiction is set by other branches). *But cf.* Monaghan, *supra* note 97, at 757–62 (judicially fashioned rules or interpretations are not the equivalent of legislative acts, because stare decisis creates only a binding obligation not to change the law without good reason). Although the Supreme Court has recently prevented Congress from reopening judgments by legislating retroactively, the Court expressly reserved congressional power to specify by law the conditions on which judicial decisions can become final. *See* Plaut v. Spendthrift Farm, Inc., 115 U.S. 1447, 1454–59 (1995). *Cf.* Martin Redish, *Constitutional Limitations on Congressional Power to Control Federal Court Jurisdiction: A Response to Professer Sager*, 77 N.W. U. L. REV. 143, 148–50 (1982) (by creating ex ante limits on finality of judgments, Congress may deny judicial review of legislation).

115. *See* M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 139 (1967) (describing the different branches, including the legislative, to which "belongs the right to make and alter the general rules of society; that is to say the laws;" the executive, which is "entrusted the execution of these general rules;" and the judicial, which is charged with "the interpretation and application of the laws to controverted cases" (quoting the Pennsylvania Constitution of 1776)); SCHWARTZ, *supra* note 113, at § 1.6, at 10–11 ("[A]ny power delegated by the legislature is necessarily a subordinate power, limited by the terms of the delegating statute.... The dividing line is not so clear-cut between agencies and courts.... [T]he legislature may assign to agencies functions historically performed by judges; agencies have long exercised adjudicatory authority analytically similar to that exercised by courts.").

116. *See* U.S. CONST. art. I, § 9, cl. 3, amend. XIV, § 1; David Schoenbrod, *The*

clearly prohibit Congress from transferring broad rulemaking powers to agencies.[117] The Constitution does not even clearly prohibit Congress from delegating the power "to enact and repeal a broad range, or perhaps all, of the statutes that lie within the legislature's jurisdiction,"[118] even if Congress would never do so. As with temporality, the level of generality does not provide principled line-drawing at the borders.

Because the concepts of legislation, administration, and adjudication may be indistinct, it may not be possible to generate dispositive negative implications from the executive or judicial vesting clauses. The terms of the vesting clauses, moreover, overlap and conflict.[119] The Constitution thus does not suggest to which other power legislative vesting is more analogous, just as it does not specify whether the separation of these powers is to be flexible or rigid.[120]

Delegation Doctrine: Could the Court Give It Substance?, 83 MICH. L. REV. 1223, 1224 n.3 (1985) (The Equal Protection Clause, and the Bill of Attainder and Ex Post Facto Law Clauses do not provide sufficient protection against overly great legislative specificity); Rubin, *supra* note 107, at 403 & n.116, 407–08 (limits on generality of law are derived from the Due Process Clause and require only that the imposition of force be subject to due process; "[r]eal protection from administrative arbitrariness is to be found in the due process clause and perhaps the equal protection clause, not in any set of constraints on legislative style"); Roderick M. Hills, Jr., *Is Amendment 2* Really *A Bill of Attainder? Some Questions About Professor Amar's Analysis of* Romer, 95 MICH. L. REV. 236, 238–42 (1996) (describing the prohibition of the Bill of Attainder Clause as limited to "closed classes" of individuals and thus as not preventing highly specific legislation imposing disfavorable treatment). *But cf.* Akhil R. Amar, *Attainder and Amendment 2:* Romer*'s Rightness*, 95 MICH. L. REV. 203, 208–21 (1996) (the Bill of Attainder Clause is a predecessor of the Equal Protection Clause, rooted in adjudicative due process and basic principles of separation of powers; discussing hypotheticals designed to show that the Bill of Attainder Clause can protect against specific and general legislation that "names" for disfavored treatment classes of individuals based on their status).

117. *See* Rubin, *supra* note 107, at 388, 389 & n.66 (the very nature of "legislative power" is to direct action and thus the legislative power authorizes Congress to direct rulemaking by agencies; in contrast, an agency would delegate its power by authorizing others to make rules, because the nature of the power transferred to it is one of rulemaking (citing *inter alia* J. STORY, COMMENTARIES ON THE LAW OF AGENCY § 14 (3d ed. 1846)). *But see* SCHOENBROD, *supra* note 21, at 157 (although the Framers tempered separation of powers for practical reasons, they did so to protect liberty; the rigid allocation of duties reflected in structural constraints on enacting legislation should not be rearranged by the officials against whom the constraints were designed to protect).

118. Rubin, *supra* note 107, at 389 & n.66.

119. *Compare* Calabresi & Prakash, *supra* note 85, at 571 n. 111, 573–76 (the absence of the "herein granted" language of the legislative vesting clause in the executive vesting clause suggests the absence of limitation to subsequently enumerated powers; analogy to the judicial vesting clause and the possibility that subsequently enumerated powers are exemplary supports this inference) *with* Lessig & Sunstein, *supra* note 94, at 47–49 (the executive vesting clause was not intended to vest more than enumerated powers, as it does not itself define what executive power is; comparison to the subsequent enumerations of legislative and judicial power in Articles I and III also suggest executive limitations; the "herein granted" language in Article I was added by the Committee on Style, which was not supposed to change substantive meanings). *See also* SCHOENBROD, *supra* note 21, at 157 (rejecting arguments that the authorization for unelected judges to create common law implies that the Framers' did not intend to prohibit delegation, because common lawmaking has supermajoritarian support like legislation and because "judges are insulated from day-to-day politics," preventing narrow interests from dictating policies).

120. *Compare* Morrison v. Olson, 487 U.S. 654, 671–79 (1988) (upholding delegation of the power to appoint a special counsel to an Article I court so long as there was no "incongruity" of the executive functions vested, because the Appointments Clause of art. II, § 2, cl. 2 is a "source of authority for judicial action that is independent of Article III") *and* Strauss, *supra* note 112, at 578 ("[F]or any consideration of the structure given law-administration below the very apex of the governmental structure, the rigid separation-of-powers compartmentalization

3. The Structure of the Constitution Does Not Clearly Prohibit Congress from Delegating Federal Legislative Power to States

Analogy to the sources of power for the vesting clauses also might be thought to suggest limits to the delegation of federal legislative power in general and to states in specific. Vested legislative power originates from and may be withdrawn by the people through a constitutional convention called by Congress.[121] But the Constitution does not address whether legislative power may be voluntarily delegated back to the people, directly or through the states.

The Constitution does not appear to vest any enumerated legislative powers in states.[122] But the Constitution also does not clearly prohibit Congress from doing so. In contrast, the Constitution: (1) authorizes Congress to divest states of their own legislative powers and of all federal adjudicative powers; and (2) arguably vests or authorizes Congress to vest some federal administrative powers in states.[123]

Analogy to the powers vested in other branches by Articles II and III, moreover, may be wholly inapt when considering delegations to states. The first three Articles of the Constitution are not addressed to the interplay among federal and state governments. Articles I through III are principally concerned with the operation of the branches of the federal government.[124] In contrast,

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of governmental functions should be abandoned in favor of analysis in terms of separation of functions and checks and balances.") *with* Buckley v. Valeo, 424 U.S. 1, 137–41 (1976) (Congress can empower only the executive, not itself, to enforce the laws; "A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts" enforcement.) *and* SCHOENBROD, *supra* note 21, at 157 & n.6 (rejecting arguments by Professor Strauss that the Constitution leaves open the allocation of power to subordinate officials).

121. *See* U.S. CONST. art. V. *Cf.* Baker & Dinkin, *supra* note 38 (discussing the art. V amendment requirements and other barriers to constitutional amendment by various means, including popular revolt); Amar, *supra* note 73, at 1464 & nn. 166–67 (noting that the Constitution has been amended by the popular will of the citizenry, notwithstanding the limitations of Article V) (citing Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1056–69 (1984)).

122. By limiting federal legislative power to enumerated vested powers, however, the Constitution may be understood to allocate sovereign legislative power among the different levels of government. *Cf.* Caminker, *supra* note 1, at 1019 n.73 (noting that Supreme Court refers to the sovereignty of the government but should refer to the sovereign people (citing Amar, *supra* note 73, at 1448–51)).

123. *See* U.S. CONST. art. III, § 1 ("The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); U.S. CONST. art. I, § 8, cl. 15 (authorizing Congress to call out the state militias, including to execute federal laws); U.S. CONST. art. I, § 8, cl. 16 (reserving power to states to select officers when state militias are placed in the service of federal power); U.S. CONST. art. II, § 1, cl. 2 (requiring states to participate in selecting electors to appoint the president); U.S. CONST. art. IV, § 2, cls. 2, 3 (authorizing Congress to require Governors to deliver fugitives); Caminker, *supra* note 1, at 1032 & nn. 117–21 (discussing the Fugitive and Militia Clauses). *Cf.* U.S. CONST. art. II, § 2, cl. 1 (providing the President with the power over state militias when Congress has called them into service); Amar, *supra* note 66, at 224 (noting that where the Constitution has imposed limits requiring the exercise of vested power in a particular manner, Congress cannot alter that result through legislation). Nevertheless, the administrative powers vested by the Constitution are directed only at the creation of the federal executive and the compelling of state actions. Arguably, states receiving directives from Congress to apply federal law do not exercise federal administrative power. *Cf. id.* at 246 & n.132 (allowing state courts to adjudicate federal law does not vest federal judicial power in such courts). *But cf. infra* notes 167, 251–56 and accompanying text.

124. Even the "dormant" preemptive Interstate Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, and the consent provisions of U.S. CONST. art. I, § 10, cls. 2, 3 may be understood as

Articles IV and VI address intergovernmental power relations. But those Articles are not principally concerned with the vesting or apportioning of federal powers.[125] Structural arguments based on negative implications from the executive or judicial vesting clauses thus do not resolve whether Congress may delegate legislative power to states.[126]

Finally, specific legislative powers may suggest helpful analogies to the delegation of legislative power to states. Although the exercise of a particular legislative power by Congress cannot by itself suggest that Congress may delegate that power in specific or legislative power in general, it may help to clarify the intergovernmental relations contemplated by the Framers.[127] An apt analogy to delegation of legislative power may be found in the provisions requiring congressional consent for various state actions.[128]

Legislation adopted under the consent provisions triggers consequences that may resemble (or may differ) from the delegation of federal legislative power. If federal consent adopts state law as federal law, then state law claims will "arise under" federal law and trigger federal courts' federal question

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highly transitive directives to the "federal" courts. Facial challenges under these provisions to state laws, moreover, would have arisen as federal questions within the original jurisdiction of the Supreme Court, had it not been amended by the Eleventh Amendment. *See* U.S. CONST. art., III, § 2, cls. 1, 2; U.S. CONST. amend. XI.

125. The various provisions of Article IV specify the interplay among state governments in a federal system, define the powers of the federal government regarding non-state lands, guarantee states a republican form of goverment, and obligate the federal government to protect states from invasion and (upon request) from domestic violence. *See* U.S. CONST. art. IV, § 1 (Full Faith and Credit Clause), § 2 (Privileges and Immunities and Fugitives Clauses), § 3, cl. 1 (State Admission Clause), § 3, cl. 2 (Federal Property Clause), and § 4 (Guarantee and Protection Clause). The three clauses of Article VI address the preservation of federal debts, the supremacy of federal law, and the obligations of federal and state officials to support the Constitution. U.S. CONST. art. VI, cls. 1–3. None of the provisions suggest a limit on the delegation of federal legislative power to states.

126. Such analyses may nevertheless provide useful insights for related constitutional questions. *See* Caminker, *supra* note 1, at 1007 n.15, 1045 n.177 (rejecting the effort by Calabresi & Prakash, *supra* note 85, at 639–42, to square a unitary executive thesis with the Framer's understanding that Congress or the President might direct state executive officials; noting that there is no evidence that the Framers intended for state officials to be subject to presidential control when directed by Congress and indicating that a unitary executive thesis might be consistent with presidential control only of federal officials, which would imply very different federalism concerns).

127. The variety of legislative powers described by the Constitution, however, may also suggest that no single conception of legislation was contemplated. *Cf.* Rubin, *supra* note 107, at 391–97 (noting the wide range of statutes that vary in their degree of transitivity and that Congress may control agencies and be held to account without requiring limits on the rulemaking).

128. *See* U.S. CONST. art. I, § 10, cls. 2, 3. The consent provisions preempt state laws for which congressional consent is required and has not been obtained. *See* Virginia v. Tennessee, 148 U.S. 503, 518–19 (1893) (compacts affecting the sovereignty of federal power must be approved by Congress). Consent also may be required for states to impose discriminatory or burdensome regulations affecting interstate commerce, even in the absence of preemptive federal legislation. *See* U.S. CONST. art. I, § 8, cl. 3; City of Philadelphia v. New Jersey, 437 U.S. 617 (1978); Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93 (1994); Pike v. Bruce Church Inc., 397 U.S. 137 (1970). Congress may heal the constitutional infirmity of such state laws by exercising power under the Interstate Commerce Clause. *See* White v. Mass. Council of Constr. Employers, 460 U.S. 204 (1983). *See generally* Engel, *supra* note 40, at 1546–60 (discussing competing federal environmental policies tied to congressional approval for states to regulate nonhazardous municipal and industrial wastes in ways currently preempted; recommending that Congress preapprove interstate compacts to address such issues).

jurisdiction.[129] Consent might then be considered analogous to a substantive delegation of federal legislative power to states, because consent legislation expands the power of federal courts to entertain claims based on state policies beyond their jurisdiction in diversity or under other Article III, Section 2 grants.[130]

If consent legislation does not adopt state law as federal law, however, consent will not trigger federal question jurisdiction and thus will not resemble delegation. But it will also expand federal judicial power to entertain and apply state law. By hypothesis, absent consent state law claims would be preempted by the Constitution, which could supply a claim or be raised as a defense in any action initiated in state or federal court.[131] Consent thus restores federal court power to entertain state law claims within diversity jurisdiction and other Article III, Section 2 grants.

The Constitution does not clearly indicate, however, which of these competing interpretations of the consent provisions must be adopted or whether Congress may choose between them. Further, congressional consent that adopts state law as federal law may be static or dynamic, retrospective or prospective.

If static and retrospective, consent will not resemble the delegation of legislative power. Instead, consent will simply adopt non-uniform, state-specific federal standards in a particular form, the incorporation by reference of state laws in existence at a particular time. Adopting state laws as federal laws will expand federal court jurisdiction by providing new "federal" claims and defenses.[132] But such consent should then preempt under the Supremacy Clause state power to impose new and conflicting laws. Further, additional consent will be necessary for any subsequent modification of state law and, by hypothesis, such consent will be lacking.[133]

If dynamic and prospective, consent will require courts to determine the conditions for which consent should be found. But such consent will avoid

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129. *See* U.S. CONST. art. III, § 2 ("the Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution..."); 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

130. *Cf.* Weinberg, *supra* note 27, at 848 (rejecting arguments that federal common law when based on federal claims is more intrusive of state sovereignty than when based on federal defenses: "Federal claims are typically supplementary.... But a new federal defense necessarily supersedes state law.").

131. Federal spending conditions are similar, but not identical, to such consent. Spending conditions may induce states to regulate in ways that Congress may not and may thereby expand federal court jurisdiction to entertain state law claims in diversity and under other Article III, section 2 jurisdictional grants. But federal spending conditions need not remove any preemption of state law and thus may not provide to states any power that states do not already possess. Consequently, federal spending conditions pose narrower accountability concerns than delegation or consent.

132. Federal constitutional claims may already exist, however, to prevent application of the incorporated state standards. *See* Neuman, *supra* note 36, at 314–32 (state choice of law rules applied in a non-discriminatory fashion to in-state conduct or applied in a discriminatory fashion to out-of-state conduct may create claims under the Privileges and Immunities and Equal Protection Clauses of the Constitution, U.S. CONST. art. IV, § 2, cl. 1 and U.S. CONST. amend. XIV, § 1). It is unclear whether Congress could "immunize" state law by incorporation.

133. *Cf.* Carole E. Goldberg–Ambrose, *The Protective Jurisdiction of the Federal Courts*, 30 UCLA L. REV. 542, 550 & n.46 (1983) (federal laws that incorporate state laws statically provide federal content if and when state law subsequently changes, but until such time, the federal laws do not alter substantive legal relationships and thus create "protective jurisdiction").

preempting future state laws if those conditions are met. Modified state laws will automatically be adopted as federal law, eliminating even the remote possibility of conflicts.[134]

By adopting state law as federal law, consent thus may be thought either to delegate federal legislative power or to preemptively limit states from adopting policies. Both consequences can be avoided by treating consent as adopting state law solely as a procedural matter. This allows federal courts to enforce state laws in cases beyond diversity and other Article III jurisdictional grants. Such consent is analogous to protective jurisdiction,[135] under which Congress provides a federal court forum to enforce state laws.[136] But this only multiplies the constitutional questions. The Supreme Court has yet to authorize protective jurisdiction and a substantial academic debate exists over its propriety.[137]

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134. Consent may also be dynamic and retrospective or static and prospective. If dynamic and retrospective, consent authorizes states to reenact preexisting state laws. Such consent does not differ in significant respects from static and retrospective consent. Conversely, if courts are allowed to interpret from such consent generally applicable conditions under which consent may be provided in the future, such consent should be recharacterized as dynamic and prospective consent. If consent is static and prospective, it will function like static and retrospective consent once the state fulfills any specified conditions of the consent. Until that time, it will function like dynamic and prospective consent, authorizing the state to adopt any law that meets the conditions imposed by the consent.

135. *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 472–73 (1957) (Frankfurter, J., dissenting) (posing but refusing to answer the question whether protective jurisdiction might be found constitutional when Congress adopts legislation that prospectively conforms federal laws to state laws). *Cf.* Goldberg–Ambrose, *supra* note 133, at 564 ("Protective jurisdiction also seems necessary in some actions brought under federal-state environmental protection programs such as the Clean Air Act.... Since federal law does not appear to create such pre-existing state law claims, in whole or in part, an exercise of protective jurisdiction seems necessary to support any federal lawsuit seeking to enforce a pre-existing, stricter state established standard.").

136. *See* Brown, *supra* note 108, at 368–9 & n.152, 377–81 (describing broad protective jurisdiction as a textual "bootstrap" of Article III, section 2 "arising under" jurisdiction) (citing David P. Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1, 14–15 (1968)); Goldberg–Ambrose, *supra* note 133, at 546–47 (defining protective jurisdiction and noting that protective jurisdiction is designed to promote various federal interests). Protective jurisdiction extends significantly the expansive interpretation of "arising under" federal law adopted by Chief Justice John Marshall in Osborn v. Bank of the United States, 22 U.S. 738 (1824) (upholding "arising under" jurisdiction for all cases affecting the federally chartered bank).

137. *See* Verlinden B.V., v. Central Bank, 461 U.S. 480, 492–93 (1983) (finding that the challenged federal law adopted federal substantive requirements, avoiding resolution of whether "*Osborne* might be read as permitting 'assertion of original federal jurisdiction on the remote possibility of presentation of a federal question'" (quoting *Textile Workers Union*, 353 U.S. at 482 (Frankfurter, J., dissenting))); *Textile Workers Union*, 353 U.S. at 455 ("the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike. Viewed in this light, the legislation does more than confer jurisdiction in the federal courts over labor organizations."). *Cf.* Robertson v. Wegmann, 436 U.S. 584, 589 n.5, 593 & n.11 (1978) (upholding the constitutionality of 42 U.S.C. § 1988, which requires federal courts that entertain federal claims to supply state positive law or state common law in the absence of dispositive federal positive law; noting that § 1988 does not require uniformity but that "common law" as used in that section might have referred to the "general common law" of Swift v. Tyson, 41 U.S. 1 (1842)); National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949) (Jackson, J., plurality opinion) (Congress may create federal court jurisdiction under Article I); Brown, *supra* note 108, at 372 (*Tidewater* suggests that "Congress could provide a forum only, with the law to be derived from a nonfederal source."); Goldberg–Ambrose, *supra* note 133, at 584–86, 612 (posing the question why the Framers would describe Article III jurisdiction in detail if Congress could exercise Article I power to create non-Article III courts and thereby

In summary, the structure of the Constitution does not resolve whether Congress may delegate legislative power in general or to states in specific. Analyses of the vesting and consent provisions ultimately pose more questions than they answer. Nevertheless, the prior analysis helps to explain in Part III how the Supreme Court has avoided finding that federal legislation unconstitutionally delegates federal legislative power to states.

B. The Framers of the Constitution Did Not Clearly Intend to Prohibit Congress from Delegating Legislative Power to States

The Framers of the Constitution left little evidence of their beliefs on the precise questions at issue here, i.e., whether Congress may delegate legislative power and when Congress may be recognized as doing so.[138] The paucity of evidence is understandable. The Framers gave Congress power to regulate that it had lacked under the Articles of Confederation and needed for a more perfect Union. They would not have thought that Congress would promptly give that power back to the states. Congress had possessed power to *direct* states to act and states had been unwilling respondents of federal directives.[139]

Similarly, any such power delegated by Congress might be viewed as executive, similar to delegation to the President.[140] Consequently, the Framers might not have thought that Congress would delegate its legislative power by authorizing states to impose legal rules.

The few statements in the drafting and ratification records, moreover, are inconclusive. The principal evidence is that the participants in the Federal Convention drafting the Constitution rejected James Madison's proposal expressly to prohibit the delegation of federal legislative powers. But the participants may have thought the proposal unnecessary, leaving no record of the actual basis on which the proposal was rejected.[141] The specific evidence is

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divest or make concurrent state court jurisdiction; describing an "appropriate" resolution of Article I protective jurisdiction limits by negative implication from Article III, § 2 judicial powers; claiming that the strength of the federal interests in establishing protective jurisdiction will vary with the reason for rejecting a greater federal role; arguing that the most compelling reason for protective jurisdiction is the prudential concern in Erie R. v. Tomkins, 304 U.S. 64 (1938), that state citizens not be subject to conflicting laws).

138. *See* Monaghan, *supra* note 98, at 15–17 & n.71 (noting that most of the evidence is the "silence" regarding the issue and the provision to the President of "legislative veto" power).

139. *Cf.* Caminker, *supra* note 1, at 1047 n.185 (because legislative power is self-defining, there would have been little need for Congress to commandeer state legislatures).

140. *Cf. id.*, at 1047 n.189 (administrative enforcement of the law is a plausible characterization of what state legislatures do when commandeered to refine and implement congressional objectives).

141. *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 63–67 (Max Farrand ed., rev. ed. 1966); Monaghan, *supra* note 98, at 15–17 (arguing that Madison's proposal was rejected "apparently because it was perceived to be unnecessary; under the Constitution, no 'improper' powers could be delegated"); SCHOENBROD, *supra* note 21, at 156 & n.2 (same); *id.* (also quoting arguments of James Madison at the Constitutional Convention that by specifying Article I procedures for enacting legislation the drafters had impliedly excluded the possibility that "the whole power of legislation might be transferred by the legislature from itself" (citing 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 560 (Jonathan Elliot ed., 2d ed. 1888))); *id.* (discussing Congress' rejection without explanation of Madison's draft of the Bill of Rights, which contained language to clarify that each branch was precluded from exercising the powers of the others (citing LOUIS FISHER, PRESIDENT & CONGRESS: POWER AND POLICY 24–26 (1972))). Although it is possible that many or most of the Framers agreed with Madison's views, it is also possible that many disagreed and rejected the clarification to assure that the

thus susceptible of conflicting interpretations. Unfortunately, more general understandings of the Framers also do not answer the question.

1. Early Revolutionary Period Conceptions of Clear and Separated Powers

Early in the Revolutionary period, many Framers believed in rigidly separating legislation from administration and adjudication. They also believed that the power to specify policy was exclusive to the legislature.[142] Each branch of the federal government would thus receive only the powers distinctive to its functions. For example, Thomas Jefferson proposed to define executive power for Virginia as "those powers only, which are necessary to execute the laws (and administer the government), and which are not in their nature either legislative or judiciary."[143] By delegating its legislative powers, Congress would impermissibly vest policymaking in branches disqualified from exercising any significant discretion to specify the applicable values.[144]

The executive and judiciary thus were to apply values specified by the legislature to particular factual circumstances.[145] Limiting the executive and the

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alternative interpretation would remain permissible.

142. Each branch had its own domain of authority that was carefully circumscribed and policymaking was reserved to the legislature. *See* Monaghan, *supra* note 98, at 15 ("Whatever other uncertainties may exist about the founding generation's vision of the American presidency, no reasonable doubt existed on one point: the President possessed no independent law-making power."); Carlos E. Gonzalez, *Reinterpreting Statutory Interpretation*, 74 N.C. L. REV. 585, 633–58, 672 (1996) (describing revolutionary era beliefs that adjudication was limited to discerning legislative policies and that judicial decisionmaking was not policy formation) (citing, *inter alia*, an anonymous pamphlet, *The People the Best Governors (1776), reprinted in* 2 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, 1760–1805, at 390–93 (Charles S. Hyneman & Donald S. Lutz eds., 1983)).

143. *See* Thomas Jefferson's Proposed Constitution for the State of Virginia, *reprinted in* 3 THE WRITINGS OF THOMAS JEFFERSON 155–56, 320 (Paul L. Ford ed., 1894); Monaghan, *supra* note 98, at 15–17 (arguing that the Founders' silence was consistent with these views).

144. *See* Schoenbrod, *supra* note 116, at 1250–60 (suggesting a test for determining when legislative power is delegated by reference to whether legislation specifies rules directly applicable to private conduct; if legislation only specifies general goals, it must constrain the administrator's or adjudicator's choice among competing policies in the subsequent creation of subsidiary rules) (citing, inter alia, FRIEDRICH HAYEK, LAW, LEGISLATION AND LIBERTY (3 vols., 1973, 1976, 1979), H.L.A. HART, THE CONCEPT OF LAW (1961), and Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975)). *But see* Rubin, *supra* note 107, at 387 (arguing that "doctrinal constraints...were bequeathed to us by the pre-administrative era and largely reflect a nostalgia for governmental relationships that we have long outgrown"). Metaphysical contingency and epistemological or procedural limits on the ability to anticipate future events require Congress to convey some policymaking discretion for subsequent administration and adjudication. *Cf.* R. George Wright, *Should the Law Reflect the World? Lessons for Legal Theory from Quantum Mechanics*, 18 FLA. ST. U. L. REV. 855, 859 & nn.26–27 (1991) (discussing "inherent indeterminacy" models of physical reality) (citing WERNER HEISENBERG, PHILOSOPHICAL PROBLEMS OF QUANTUM PHYSICS 46 (F. Hayes trans., 1979) (on a small scale, the responses of physical systems may be indeterminate, without regard to whether human observation will alter physical conditions) and ILYA PRIGOGINE & ISABELLE STENGERS, ORDER OUT OF CHAOS: MAN'S NEW DIALOG WITH NATURE 224 (1984) (on a large scale, physical systems may respond chaotically to small perturbations and humans may be unable fully to characterize initial conditions)). Disputes over legislative delegation thus are matters of degree and not of kind.

145. *See* Monaghan, *supra* note 98, at 2–3 ("'The Executive...has no power to bind private conduct in areas not specifically committed to his control by Constitution or statute; such a perception of "[t]he Executive power" may be familiar to other legal systems, but is alien to our own.'") (quoting James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring)).

judiciary to factual application of policy would assure legislative supremacy and thus popular sovereignty.[146] The distinction between values and facts was to the Framers clear and cogent, as it corresponded to contemporaneous religious and natural law beliefs.[147]

Similarly, many Framers believed in clearly separating policies into general and local concerns, although they may have disputed on which side of the border particular concerns resided.[148] If the issue was general, it warranted federal not state policymaking. By clearly delineating federal and state concerns, these Framers would not have contemplated that Congress would delegate policymaking discretion to states. The Articles of Confederation thus allowed Congress to direct states to act.

2. Pre-Constitutional Conceptions of Indistinct and Shared Powers

The Constitution responded to growing dissatisfaction with the legislative supremacy that had existed under the Articles of Confederation. The Congress had not devoted sufficient attention to details, had failed to respond to conditions that had changed in unforeseeable ways, and had responded to a popular will that was often arbitrary, capricious, and abusive.[149] Many Framers thus came to believe that an independent executive and judiciary were needed, possessing policymaking discretion in order to check the legislature and to assure the effective functioning of government.

The Framers thus began to break down the clear categories to which they had earlier subscribed. They began to view indistinct and shared powers as necessary conditions to the preservation of liberty.[150] They required the

146. *See* Amar, *supra* note 66, at 232 n.92 (discussing congressional power to appoint highly dependent executive and judicial officials under the Articles of Confederation).

147. *See* KAREN ARMSTRONG, A HISTORY OF GOD: THE 4,000 YEAR QUEST OF JUDAISM, CHRISTIANITY AND ISLAM 293–326 (1993) (describing the development of Enlightenment Christian religious beliefs, in which the increasing specialization and technological development of society led to the idea that humans could rationally discern the mind of God and apply the values God created); *id.* at 343 ("The God of Newton, and indeed of many conventional Christians...was supposed to be literally responsible for everything that happens."); THOMAS AQUINAS, SUMMA THEOLOGICA Qu. 90, art. 1, conclusion ("*The Nature of Law.* Law is a rule or measure of action in virtue of which one is led to perform certain actions and restrained from the performance of others."); *id.* at [art. 3, conclusion] ("*Who has the right to promulgate Law.* Law, strictly understood, has as its first and principle object the ordering of the common good."); I WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND § 2, at 43–44 (University of Chicago Press revised ed. 1979) (1765) ("If man were to live in a state of nature, unconnected with other individuals, there would be no occasion for any other laws, than the law of nature, and the law of God.... Hence arises a third kind of law to regulate this mutual intercourse, called 'the law of nations;' which...depends entirely upon the rules of natural law, or upon mutual compacts, treaties, leagues, and agreements...municipal or civil law; that is, the rule by which particular districts, communities, or nations are governed.... [T]hus understood, is properly defined to be 'a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong.'").

148. *See supra* notes 70, 73–74; Weinberg, *supra* note 27, at 807 n.15 (discussing The Genessee Chief v. Fitzhugh, 53 U.S. 443 (1851), which overturned the Court's earlier holding in The Thomas Jefferson, 23 U.S. 428 (1825), that federal maritime power was limited to interstate waters).

149. *See* Strauss, *supra* note 112, at 603; Gonzalez, *supra* note 142, at 647–52. *Cf. id.* at 685 (quoting remarks by Alexander Hamilton, *reprinted in* GORDON S. WOOD, CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 467 (1969), that courts must keep legislatures "within the limits assigned to their authority").

150. *See* Loving v. United States, 116 S. Ct. 1737, 1743 (1996) ("the Framers understood that a 'hermetic sealing off of the three branches of Government from one another

executive and judiciary to specify policy, because the legislature and popular majorities could no longer be trusted to impose natural or moral law.[151]

These latter-day Framers did not clearly distinguish among legislation, administration, and adjudication.[152] They allowed all of the branches to specify policies having the force of law.[153] As a result, Congress would delegate its legislative power rather than exercise it only when administrators and adjudicators were provided by legislation with excessively general policy discretion or powers wholly unsuited to their use.[154]

As discussed above, many Framers simultaneously developed a vision of federalism in which the levels of government would compete for sovereign powers and for the affections of the citizenry, thereby protecting liberty. Thus, they would not have expected for Congress to delegate its legislative powers to the states. They also would not have trusted Congress to avoid giving away the store, particularly given their concern regarding the corrosive influence of state legislatures in the Continental Congress.[155] At a minimum, they did not confine legislative and other powers within rigid categories and expressly contemplated that Congress would rely on states to implement some federal legislative policies.[156]

In summary, many of the Framers' intentions were changing prior to adoption of the Constitution. There is no way to determine from the historical record whether most of the drafters or ratifiers of the Constitution believed that: (1) they had prohibited Congress from delegating legislative power to the states; or (2) only the legislature could specify rules having the force of law binding private conduct. Ultimately, the text, structure, and history provide no

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would preclude the establishment of Nation capable of governing itself effectively.'" (quoting Buckley v. Valeo, 424 U.S. 1, 121 (1976))); Strauss, *supra* note 112, at 604 (describing the imprecision inherent in the definition and separation of the three governmental powers as contributing to protection from government through the creation of checks and balances; "How sharp the definition of bounds had to be (the delegation question as we now know it) or how far removed from the President the function of executing a given law could be placed were open questions."); Gonzalez, *supra* note 142, at 680 & n362, 681 & n.365, 682 (quoting VILE, *supra* note 115, at 153–54) (citing THE FEDERALIST No. 47, at 301–02 (James Madison) (Clinton Rossiter ed., 1961)).

151. *Cf.* Amar, *supra* note 66, at 225, 226 & n.81, 227–28 (discussing the need for the ex post facto and bill of attainder provisions; noting that the federal Congress and state courts were not in 1789 sufficiently independent of state legislatures for the Framers to rely upon those institutions to cabin state legislative excesses) (citing THE FEDERALIST No. 78, at 524 (Alexander Hamilton) (J. Cooke ed., 1961)).

152. The Framers did not make a final institutional choice separating legislative from other powers, but rather created "'a government of separated institutions sharing powers.'" Strauss, *supra* note 112, at 604 (quoting RICHARD NEUSTADT, PRESIDENTIAL POWER—THE POLITICS OF LEADERSHIP FROM FDR TO CARTER 26 (1980)).

153. *See* Gonzalez, *supra* note 142, at 690 ("American constitution builders of the late 1780s came to believe that courts ought to be afforded discretion in shaping law, even statutory law.") (citing THE FEDERALIST No. 78 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

154. *See supra* notes 115–18 and accompanying text.

155. *See supra* notes 86–88 and accompanying text; Amar, *supra* note 66, at 223 & n.69, 233–38 (discussing the Framers' perceptions that federal courts needed to be structurally insulated from a Congress that had been controlled by state legislatures, and discussing rejection in the Constitutional Convention of both the "Congressional negative" and the "executive negative" approaches in favor of judicial review, in order to assure the supremacy of federal over state laws); Caminker, *supra* note 1, at 1036–37, 1038 & n.146 (noting that the language of the Judges Clause may be understood as assuring that state courts would not be reluctant to overturn the popular will of state legislatures).

156. *See supra* notes 95, 123 and accompanying text.

dispositive answers to the question of whether and when Congress may delegate legislative power.

III. SUPREME COURT DICTA PROHIBIT CONGRESS FROM DELEGATING LEGISLATIVE POWER, BUT OVER TIME THE COURT HAS LIMITED ITS DOCTRINAL CONSTRAINTS AND HAS ALLOWED CONGRESS EFFECTIVELY TO DELEGATE LEGISLATIVE POWER TO STATES

Notwithstanding the ambiguity of the text, structure, and history of the Constitution, the Supreme Court has repeatedly and categorically stated that Congress may not delegate federal legislative power.[157] As a result, the Court has been obliged to develop a doctrine to assess whether Congress has impermissibly delegated or has permissibly exercised its vested legislative powers.

Originally, the Court suggested that Congress might delegate factfinding power and procedural or ancillary policymaking powers that were substantially less general than the legislative power exercised by Congress itself. Over time, the Court expanded its view of the degree of the policymaking discretion that Congress may delegate, in order to avoid finding legislation unconstitutional. Nevertheless, at the beginning of the New Deal, the Court invalidated two essentially unlimited delegations of policymaking power to the President.

The Court now routinely allows Congress to delegate extremely broad substantive policymaking powers to federal agencies. Further, the Court has allowed Congress effectively to delegate its legislative power to states. The Court has done so to conserve federal legislative resources and to promote local regulation, on the belief that states will be held to account when exercising federal power.

A. Originally, the Supreme Court Limited Congress from Delegating More Than Factfinding and Procedural or Ancillary Policymaking Discretion

The Court first addressed a delegation question in *The Cargo of the Brig Aurora v. United States*.[158] Exercising its powers in admiralty, Congress had enacted the Nonintercourse Act of March 1, 1809, which prohibited goods imported from Great Britain and France until a certain date, and authorized federal courts to seize prohibited imports. After the Nonintercourse Act had expired, Congress enacted the Act of May 1, 1810, which authorized revival of the Nonintercourse Act beginning three months after the President would issue a proclamation. If the proclamation found that these countries had removed their discriminatory commercial policies against the United States, the Nonintercourse Act would not revive. The President subsequently proclaimed that France, but not Great Britain, had removed the discriminatory policies. A ship with goods sailed from Great Britain after the proclamation was issued and

157. *See, e.g.*, Touby v. United States, 500 U.S. 160, 165 (1991) ("Congress may not constitutionally delegate its legislative power to another branch of Government."); United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 85 (1932) ("That the legislative power of Congress cannot be delegated is, of course, clear.").

158. 11 U.S. 382 (1813).

arrived after the three months had expired. A libel action on the ship was then commenced in federal district court under federal admiralty jurisdiction.[159]

The Supreme Court: (1) upheld the provision in the Act of May 1, 1810 authorizing the President to remove the import prohibition; (2) found that the Nonintercourse Act had revived before the ship arrived; and (3) upheld the consequent seizure.[160] The appellant argued that Congress had impermissibly delegated legislative power to the President, because the President's actions led to the imposition of the law.[161] But the Court rejected the claim and held that Congress may prospectively condition legislation on presidential factfinding.[162] Legislatures must be able to delegate factfinding powers in order to determine whether a law should be applied.

The Court was unconcerned that factfinding was delegated to the President and not to the courts. The Court apparently agreed with arguments that the President did not legislate because Congress did not delegate authority to alter or amend the conditional substantive policies.[163] Nevertheless, there is a difference in generality of application between a factual determination of whether a law applies and a factual determination that causes a law to have effect. In the former case, discretion in characterizing the facts will affect only the case at bar. In the latter case, such discretion will affect all conduct to which the law is subject.[164]

Following the *Brig Aurora*, the Supreme Court decided *Wayman v. Southard*.[165] *Wayman* addressed the Judiciary and Process Acts of 1789, in which Congress had authorized federal courts to issue writs to execute their judgments. In particular, Congress had adopted state common law writs in existence in 1789 and had authorized federal courts to modify those writs or to adopt additional writs by promulgating court rules. Kentucky had enacted a statute after 1789, which limited the common law writs available for executing judgments within the state. A federal magistrate had executed on property without conforming to the subsequent statute. *Wayman* thus was concerned both with statutory interpretation, to determine whether the courts were required by Congress to apply state law prospectively, and with the power of Congress to delegate rulemaking authority to federal courts.[166]

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159. *See id.* at 382–85; U.S. CONST. art. III, § 2.

160. *See* 11 U.S. at 388.

161. *See id.* at 386 ("Congress could not transfer the legislative power to the President. To make the revival of a law depend upon the President's proclamation, is to give to that proclamation the force of a law. Congress meant to reserve to themselves the power of ascertaining when the condition should have been performed.").

162. *See id.* at 388 ("[W]e can see no sufficient reason why the legislature should not exercise its discretion in reviving the act...either expressly or conditionally, as their judgment should direct.").

163. *Cf. id.* at 387 (The appellee had responded that the "legislature did not transfer any power of legislation to the President. They only prescribed the evidence which should be admitted of a fact, upon which the law should go into effect.").

164. *See supra* notes 113–18 and accompanying text.

165. 23 U.S. 1 (1825).

166. *See id.* at 22–23 (holding that execution is not a separate action but within the scope of jurisdiction of the original claim providing the substantive right to relief and holding that section 14 of the Judiciary Act of Sept. 24, 1789, ch. 20, 1 Stat. 73, provided authority for federal courts to issue post-judgment writs and for federal magistrates to effectuate them); *id.* at 23–24 (holding that the Rules of Decision Act, section 34 of the Judiciary Act of 1789, prospectively applied state common law to *trials* and thus applied only to substantive rights for

First, the Court held that the Judiciary and Process Acts of 1789 adopted state law statically and retrospectively.[167] The Court thus avoided any question regarding the delegation of legislative power to states. The Court then upheld the delegation of power to the federal courts under the Necessary and Proper Clause, which provided Congress authority to convey power to the Judiciary.[168] Specifically, the Court held that: (1) Congress must limit the generality of legislation, thereby cabining subsidiary policymaking discretion; and (2) the power delegated in the case was sufficiently limited.

> It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself....
>
> The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details....
>
> ...That the legislature may transfer this discretion [for magistrates to specify notice and dispose of property when executing judgments] to the Courts, and enable them to make rules for its regulation, will not, we presume, be questioned.... The power given to the Court to vary the mode of proceeding in this particular, is a power to vary minor regulations, which are within the great outlines marked out by the legislature in directing the execution.[169]

Significantly, the Court's decision addressed either procedural rules (even if such rules may determine practical consequences) or rules ancillary to the necessary functioning of the courts. Consequently, Congress may have

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which decisions would be rendered); *id.* at 24–26 (holding that other sections of the Judiciary Act of 1789 also were not addressed to post-decision, out-of-court processes but confirmed that authority had been provided in section 14); *id.* at 27–32 (holding that the narrow jurisdictional language of section 2 of the Process Act of Sept. 29, 1789, ch. 21, 1 Stat. 93—which required federal district and circuit courts to adopt state law *forms* of writs then in use in states, was not limited to in-court processes for suits at common law—was not meant as a limitation, which was confirmed by clearer language in section 2 of the Process Act of May 8, 1792, ch. 36, 1 Stat. 275, which (1) made the Process Act of 1789 permanent; (2) allowed for federal courts to alter the state forms; and (3) followed the Process Act of May 26, 1790, which had continued the Act of 1789.). *But cf.* Redish, *supra* note 92, at 787 n.103 (it is reasonable to construe the terms "rules of decision" in the Rules of Decision Act as procedural).

167. *See* 23 U.S. at 21–23 (holding that section 14 of the Judiciary Act of 1789 adopted state law in existence as of 1789 and authorized federal courts to modify the state law writs by fashioning new federal rules); *id.* at 30–32, 41 (holding that section 2 of the Process Acts of 1789 and 1792 adopted state law in existence as of 1789 and authorized federal courts to modify the state law writs by fashioning new federal rules); *id.* at 35–39 (distinguishing the Act for Relief of Persons Imprisoned for Debt of 1800, which prospectively applied state prison rules to federal convicts, because the prisons were run pursuant to compact by state officials to whom the Process Acts might not apply). In the Act of 1800, Congress thus consented to the operation of state law to assure that federal convicts would benefit from state penal reforms. Further, the Court implied the propriety of the compact under Article I, II or III. *Cf. id.* at 40 (noting that the laws of the United States permit state implementation of federal policies but do not clearly authorize Congress to compel it).

168. *See id.* at 14 (rejecting on the basis of the Necessary and Proper Clause arguments that state legislatures rather than Congress "retain complete authority over" the federal courts); *id.* at 46 ("[T]he maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily.").

169. *Id.* at 42–45. *See supra* notes 115–18 and accompanying text.

delegated through the Necessary and Proper Clause only powers that the courts might already have possessed as a result of the vesting of judicial power under Article III.[170]

Following *Wayman*, the Supreme Court decided *Marshall Field & Co. v. Clark*.[171] *Field* also addressed restrictions on imported goods. Congress had authorized the President to suspend provisions of federal law allowing the free introduction of sugar and other foodstuffs.[172] The Court upheld the legislation, which imposed consequences upon the condition subsequent of presidential factfinding. But the Court also withdrew from the broad statements it made in *Wayman*, suggesting that Congress may not delegate to the President the power to adopt rules binding on private conduct. In contrast, Congress may delegate factfinding power only because the application of law requires it.

> That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution..... The legislature cannot delegate a power to make law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government.[173]

That the factfinding was dependent on the President and not the courts again was unremarkable.

B. The Supreme Court Has Upheld Dynamic and Prospective Consent to State Law, Except When the Constitution Requires Uniformity

One year before *Field*, the Supreme Court decided In re *Rahrer*.[174] Congress had restored the effectiveness of certain state laws that prohibited imports of liquor.[175] The Court expressly recognized that, absent the federal legislation, the state law in question was preempted under the Interstate Commerce Clause.[176] The Court rejected as inconsistent with federal supremacy arguments that states could determine when materials were to be considered articles in commerce. The Court thus distinguished the "quarantine" cases—which had upheld state police powers from Interstate Commerce Clause preemption—based on the inherently noncommercial nature of the infectious materials.[177]

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170. *Cf.* 23 U.S. at 46 ("But, in the mode of obeying the mandate of a writ issuing from a Court, so much of that which may be done by the judiciary, under the authority of the legislature, seems to be blended with that for which the legislature must expressly and directly provide, that there is some difficulty in discerning the exact limits within which the legislature may avail itself of the agency of its Courts.").

171. 143 U.S. 649 (1892).

172. Tariff Act of Oct. 1, 1890, 26 Stat. 567, ch. 1244, § 1.

173. 143 U.S. at 692–94. Although the President exercises vested power to negotiate treaties and to conduct foreign affairs powers, Congress had not attempted to delegate administrative rulemaking power to the President. *See* U.S. CONST. art. II, § 2, cls. 1–2. The case did not address delegated powers that might overlap with powers vested in the President.

174. 140 U.S. 545 (1891).

175. The Act of Aug. 8, 1890, ch. 728, 26 Stat. 313, specified that upon arrival in a state or territory, intoxicating liquors would be subject to the laws of the state or territory. *See* 140 U.S. at 545.

176. *See* 140 U.S. at 564.

177. *See id.* at 550–51 (citing Mugler v. Kansas, 123 U.S. 623 (1887) and Bowman v.

Next, the Court stated categorically that Congress could not delegate federal legislative power to states.[178] But the Court then held that Congress had not adopted state law as federal law and thus had not delegated substantive regulatory power to the states.[179] The Court characterized the federal legislation as voluntarily withdrawing to the state's borders federal power to regulate and thus as restoring to the state its ability to impose regulations under traditional police powers.[180] The Court thus suggested that the state possessed sufficient power to regulate and that Congress did not convey any power to the state by restoring the operation of state law.

> [Holding the state laws preempted] was far from holding that the statutes in question were absolutely void, in whole or in part, and as if they had never been enacted.... Congress did not use terms of permission to the State to act, but simply removed an impediment to the enforcement of the state laws.... It imparted no power to the State not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction.[181]

The analysis in *Rahrer* is untenable, even if the holding is correct based on congressional intent. Absent congressional consent, the state law claim could be enjoined in state or federal courts as the Constitution provided a complete defense to claims based on that law. Thus, even if Congress did not adopt state law as federal law, it "imparted [a] power to the State not then possessed," i.e., the judicial power to apply and enforce state law.[182] The Court's localism could not be justified at the time, much less at the present time.[183]

The Supreme Court held that Congress had not delegated legislative power, moreover, because Congress had itself legislated "uniformly" to restore the operation of plenary state police powers.[184] Because the Court held that Congress had not adopted state law as federal law, consent did not create federal claims triggering federal question jurisdiction to apply whatever law the state supplied.[185] The Court's holding that Congress had not delegated legislative power was thus correct, even though the federal legislation was the

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Railway Co., 125 U.S. 465 (1888)).

178. *See id.* at 560 ("It does not admit of argument that Congress can neither delegate its own powers nor enlarge those of a State.").

179. *See id.* at 561 ("In [consenting to state law] Congress has not attempted to delegate the power to regulate commerce, or to exercise any power reserved to the States, or to grant a power not possessed by the States, or to adopt state laws.").

180. *See id.* at 548–50.

181. *Id.* at 563–64.

182. *Id.*

183. *See* Caminker, *supra* note 1, at 1028 & n.102, 1029 & n.108, 1030 (the Supremacy Clause makes federal law "supreme in-state law" that state officials must recognize and effectuate; it does not merely supersede state law or impose federal requirements). *Cf.* Weinberg, *supra* note 27, at 867 (eighteenth century understandings are too remote to have modern meaning regarding the nature of the common law and "post-*Erie* positivism" has "cleansed American courts of law lacking an identifiable sovereign source," thereby assuring the supremacy of federal case law).

184. *See* 140 U.S. at 561 (Congress "has taken its own course and made its own regulation, applying to these subjects of interstate commerce one common rule, whose uniformity is not affected by variations in state laws in dealing with such property."). The Court, however, might have meant to refer to variations among the states, and not within a state.

185. *See supra* notes 129–37 and accompanying text. *Cf.* 140 U.S. at 545–48 (the case arose on a habeas corpus petition to release Rahrer from the Kansas jails where he had been incarcerated upon a warrant for his arrest, to be tried in state court under Kansas law).

proximate cause of the legal rule triggering the substantive claim.[186]

In contrast to *Rahrer*, the Supreme Court in *Knickerbocker Ice Co. v. Stewart*[187] invalidated federal legislation that consented to preempted states laws providing compensation for maritime injuries.[188] The Court predictably stated that Congress could not delegate its legislative power to the states.[189] But the Court also held that: (1) the Constitution vested power exclusively in the federal courts and Congress to legislate maritime rules; (2) the greater power of Congress to regulate maritime commerce did not imply the lesser power to authorize states to do so; and (3) delegation to states was inconsistent with the uniformity of maritime law required by the Constitution.[190]

> [Given] their characteristic features and essential international and interstate relations, [preemptive federal maritime rules] may not be repealed, amended or changed except by legislation which embodies both the will and deliberate judgment of Congress. The subject was intrusted to it to be dealt with according to its discretion—not for delegation to others. To say that because Congress could have enacted a compensation act applicable to maritime injuries, it could authorize States to do so as they might desire, is false reasoning. Moreover, such authorization would inevitably destroy the harmony and uniformity which the Constitution not only contemplated but actually established—it would defeat the very purpose of the grant.[191]

The holding in *Knickerbocker* is undeniably correct, but is limited to the unique context of assuring maritime uniformity. The Constitution imposed on the states preemptive requirements that Congress could not remove. The Court expressly noted that such uniformity concerns were not applicable to legislative power exercised under the Interstate Commerce Clause.[192]

C. In the Twentieth Century, the Supreme Court Expanded Congressional Power to Delegate Broad Policymaking Discretion to the President and to the States

In the early twentieth century, the Supreme Court expanded from factfinding to policymaking the dicta of *Field* that delegation is necessary for effective governance. In *Buttfield v. Stranahan*,[193] the Court addressed legislation authorizing the Secretary of the Treasury to "fix and establish uniform standards of purity, quality, and fitness" for teas, and thus to prohibit inferior quality imports.[194] The Court expressly upheld the statute in order to

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186. *See* 140 U.S. at 565 ("[W]e perceive no adequate ground for adjudging that a reenactment of the state law was required before it could have the effect upon imported which it had always had upon domestic property.").

187. 253 U.S. 149 (1920).

188. An Act to Amend Sections Twenty-four and Two Hundred Fifty-six of the Judicial Code Relating to the Jurisdiction of the District Courts, so as to Save to Claimants the Rights and Remedies Under the Workmen's Compensation Law of Any State, Act of Oct. 6, 1917, 40 Stat. 395, ch. 97. The Court had earlier found such laws preempted by the Article III grant of federal common law maritime jurisdiction, which required uniform common law rules. *See* 253 U.S. at 155–57 (citing Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917)).

189. *See* 253 U.S. at 164 (citing *Rahrer*, 140 U.S. at 560).

190. *See id.* (arguing that the uniform common law rules required under Article III applied by extension through the Necessary and Proper Clause to legislative policies).

191. *Id.*

192. *See id.* at 161.

193. 192 U.S. 470 (1904).

194. Tea Importation Act of Mar. 2, 1897, 29 Stat. 604, ch. 358. *See* 192 U.S. at 494.

further legislative efficiency. "Congress legislated on the subject as far as was reasonably practicable.... To deny the power of Congress to delegate such a duty would, in effect, amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted."[195] The Court thereby included policymaking discretion as well as factfinding within the scope of the powers that must be delegated for effective governance.

The Supreme Court next determined that Congress may effectively delegate policymaking discretion to states. In *Clark Distilling Co. v. Western Maryland Railway Co.*,[196] the Court again addressed legislation that preserved state alcohol prohibition laws from preemption.[197] The delegation concern was more squarely presented, however, because the President had vetoed the legislation on this basis and the Attorney General had opined that the law was unconstitutional.[198]

First, the Court noted that its decision in *Rahrer* was wholly dispositive of the issue, because no relevant distinction could be made between the challenged laws.[199] As in *Rahrer*, the Court based its holding on the belief that Congress had treated all state laws equally[200] and on the need to preserve the powers of the federal and state governments to "their respective spheres of authority."[201] Unlike in *Rahrer*, however, the Court relied upon the quarantine cases. The Court suggested that liquor was "exceptional" in order to reject arguments that allowing states to limit preemptive federal control of interstate commerce would destroy the Union.[202]

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195. 192 U.S. at 496 (citing Marshall Field & Co. v. Clark, 143 U.S. 649 (1892)).

196. 242 U.S. 311 (1917).

197. Congress had authorized states to prohibit the *export* of liquor to other states. *See id.* at 331.

198. *See id.*; 49 CONG. REC. 4291 (1913); 30 Ops. Atty Gen. 88 (1913).

199. *See* 242 U.S. at 330 (also citing Leisy v. Hardin, 135 U.S. 100 (1890) ("As the power to regulate which was manifested in the Wilson Act [Act of Aug. 8, 1890, ch. 728, 26 Stat. 313] and that which was exerted in enacting the Webb–Kenyon Law [Act of Mar. 1, 1913, 37 Stat. 699] are essentially identical, the one being but a larger degree of exertion of the identical power which was brought into play in the other, we are unable to understand upon what principle we could hold that the one was not a regulation without holding that the other had the same infirmity" leading to serious disruption by "overthrow[ing] the many adjudications of this court sustaining the Wilson Act.")).

200. *See id.* at 330.

201. *Id.* at 331. The separate spheres metaphor is endemic to the rhetoric of federalism, but is fundamentally misguided and reflects a mistaken understanding of states as either the agents of the federal government or as wholly separate therefrom. *See* Caminker, *supra* note 1, at 1008, 1015–22 (discussing "delegated power" and "autonomy" models of federalism). *Cf. supra* notes 28, 87. It draws its power from long-since abandoned conceptions of Copernican solar systems and Newtonian physics. *Cf.* Amar, *supra* note 73, at 1449 (describing the Framers' understandings by reference to Newtonian concepts). *See generally* Edward L. Rubin, *The Structure of Modern Government* (1995) (unpublished manuscript, on file with the *Arizona Law Review*) (conceptual devices, not rational discourse, provide the concepts by which we understand complex phenomena; "[u]nless we explore the metaphorical structure of our thought processes, we are likely to fall back into familiar patterns, ignore or misinterpret phenomena that lie outside those patterns, and devise solutions that replicate the problems that they were designed to solve."). Spatial reasoning would clearly demonstrate the error of the metaphor, because solid spheres cannot overlap within the same three-dimensional space. *See generally* Jon Barwise & John Etchemendy, *Visual Information and Valid Reasoning*, *in* 19 MATH ASS'N OF AMERICA NOTES 9–24 (1991); HOWARD GARDNER, FRAMES OF MIND: THE THEORY OF MULTIPLE INTELLIGENCES (1983). The supremacy of federal law excludes the possibility of overlapping state power to the extent that state power conflicts with federal law.

202. *See* 242 U.S. at 332.

The Court then suggested a novel but equally untenable argument why Congress had not vested in states powers that the states did not already possess. The Court noted that the state law operated only as the result of federal law and thus could not be effective to the extent it was broader than the scope of power restored by Congress.[203] The Court thus suggested that Congress was the proximate source of the applicable legal rule. Although the Court was undoubtedly correct that the state could exercise power only because Congress had imposed its law, Congress nonetheless had provided to the state a power that the state otherwise lacked, i.e., the ability to enforce state policies. To be charitable, the Court's language could be construed to suggest that Congress had adopted state law as federal law and had limited the breadth of the state statutes that were preserved from preemption.

The Court had stated that there was no basis to distinguish the statute at issue in *Rahrer* from the one before it. But the Court also suggested that Congress had adopted state law dynamically and prospectively. The Court argued that the greater federal power to enact legislation wholly prohibiting commerce in certain articles implied the lesser power to prohibit such articles to the extent specified by state legislatures.[204] If the Court meant to interpret congressional intent in this way, the Court did not explain how Congress could legislate a legal standard that was not subject to any meaningful constraint on policymaking discretion nor why a dynamic and prospective adoption of state law was not the delegation of federal legislative power.

In *J.W. Hampton, Jr. & Co. v. United States*,[205] the Court upheld a statute that arguably conveyed policymaking discretion to the President to adjust tariffs to equalize the marginal production costs of imported and domestic goods. The Court interpreted the standard, however, to require only factual determinations by the President.[206] Unremarkably, the Court upheld the statute. *Hampton* is significant because the Court articulated the modern doctrinal standard for Congress to delegate power, based on specifying *some* recognizable limit on generality that constrains subsidiary policymaking discretion.[207] "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [act]...is directed to conform, such legislative action is not a forbidden delegation of legislative power."[208]

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203. *See id.* at 326 ("The argument as to delegation to the States rests upon a mere misconception.... [T]he will which causes the prohibitions to be applicable is that of Congress, since the application of state prohibitions would cease the instant the act of Congress ceased to apply.... [T]he contention previously made, that the prohibitions of the state law were not applicable to the extent that they were broader than the [federal law] is in direct conflict with the proposition as to delegation now made.").

204. *See id.* at 331.

205. 276 U.S. 394 (1928).

206. *See* Tariff Act of Sept. 21, 1922, 42 Stat. 858, ch. 356, Title III, § 315 ("Whenever the President upon investigation of the differences in costs of production of articles...shall find it thereby shown that the duties fixed in this Act do not equalize the said differences in costs of production...he shall...ascertain said differences and determine and proclaim the changes in classifications or increases or decreases in any rate of duty...to equalize the same."); 276 U.S. at 410–11 ("[N]othing involving the expediency or just operation of such legislation was left to the determination of the President; that the legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was merely in execution of the act of Congress. It was not the making of law.").

207. *See* 276 U.S. at 407.

208. *Id.* at 409. *See also id.* at 410 (citing Marshall Field & Co. v. Clark, 143 U.S. 649,

Curiously, the Court went out of its way to state that Congress may delegate power to states, in order to:

> leave the determination [of whether a law should apply]...to a popular vote of the residents of a district to be effected by the legislation. While in one sense one may say that such residents are exercising legislative power, it is not an exact statement, because the power has already been exercised legislatively by the body vested with that power under the Constitution, the condition of its legislation going into effect being made dependent by the legislature on the expression of the voters of a certain district.[209]

These dicta were clearly limited to the principle at issue in the *Brig Aurora* and *Field, i.e.*, that a Congress may delegate to states only "legislative" power to trigger the application of policies that Congress has fully specified. The delegated discretion was therefore limited to triggering an intelligible principle conditioned upon the *fact* of local policy choice.

In *Panama Refining Co. v. Ryan*,[210] however, the Supreme Court held that Congress had impermissibly delegated legislative power to the President and suggested that state laws regulating a substantive area do not specify an intelligible principle. The Court addressed section 9(c) of the National Industrial Recovery Act of June 16, 1933, which authorized the President to issue rules prohibiting interstate transport of petroleum in excess of state law production quotas.[211] To implement that authority, the Secretary of the Interior issued regulations, after receiving delegated authority from the President through an Executive Order.[212]

The Court first recited the modern intelligible principle delegation standard.[213] The Court then suggested that state production quotas did not specify an intelligible principle, but that even if they did Congress had not limited the President's discretion to the application of state law.

> Section 9(c)...does not seek to lay down rules for the guidance of state legislatures or state officers. It leaves to the States and to their constituted authorities the determination of what production shall be permitted. It does not qualify the President's authority by reference to the basis, or extent, of the State's limitation of production. Section 9(c) does not state whether, or in what circumstances or under what conditions, the President is to prohibit the transportation of the amount of petroleum or petroleum products produced in excess of the State's permission. It establishes no criterion to govern the President's course.... The Congress in § 9(c) thus declares no policy as to the transportation of the excess production. So far as this section is concerned, it gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit. And

680 (1892)).

209. *Id.* at 407. Again, the expression of voters may reflect policy choices rather than factual determinations.

210. 293 U.S. 388 (1935).

211. 48 Stat. 195, 200 ("The President is authorized to prohibit the transportation in interstate and foreign commerce of petroleum...in excess of the amount permitted to be produced or withdrawn from storage by any State law.").

212. *See* 293 U.S. at 406–10.

213. *See id.* at 415 ("[W]hether the Congress has declared a policy with respect to the subject; whether the Congress has set up a standard for the President's action; whether the Congress has required any finding by the President in the exercise of the authority to enact the prohibition.").

disobedience to his order is made a crime...."[214]

The Court also rejected suggestions that the President's goodwill in acting for the public's benefit provided an intelligible principle that limited discretion.[215] The Court thus invalidated the legislation even though it noted that it would not deny "to the Congress the necessary resources of flexibility and practicality."[216]

Because the delegation of power to the President clearly created federal substantive law and was not limited to state law, the Court could not rely upon the rationales developed in *Rahrer* and *Clark Distilling*.[217] Nevertheless, the Court suggested that it "[i]f the Congress can make a grant of legislative authority [to the President of this scope]...nothing in the Constitution...restricts the Congress to the selection of the President as grantee."[218]

The same term, in *A.L.A. Schechter Poultry Corp. v. United States*,[219] the Court invalidated section 3 of the National Industrial Recovery Act, which authorized the President to specify "codes of fair competition."[220] The Act authorized the President to adopt codes developed by trade or industry associations if those groups "impose[d] no inequitable restrictions on admission to membership...and...[we]re not designed to promote monopolies...."[221] The President had adopted by Executive Order the "Live Poultry Code" developed in New York City. Defendants were convicted, among other things, of selling infected chickens in violation of the code, which the Executive Order caused to trigger penalties under the act.[222]

Defendants challenged the act for delegating standardless authority to the President. The Court again reiterated its desire to be flexible and to accommodate congressional desires to delegate power.[223] But the Court nonetheless found that the terms "unfair competition" and the other identified

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214. *Id.*

215. *See id.* at 420.

216. *Id.* at 421. *Cf.* International Union, United Auto., Aerospace & Agric. Implement Workers of America, UAW v. Occupational Safety & Health Admin., 938 F.2d 1310, 1313, 1318, 1321 (D.C. Cir. 1991) (rejecting OSHA's interpretation of an admittedly ambiguous statute—by finding that the statute did not authorize the use of cost-benefit analysis—in order to avoid an unconstitutional delegation of legislative power; "we find that the interpretation...is, in light of nondelegation principles, so broad as to be unreasonable."). *Cf.* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) (if a statute is ambiguous, courts *must* defer to any reasonable interpretation made by an agency charged with administering the ambiguous provision). *See generally* Bradford C. Mank, *Is a Textualist Approach to Statutory Interpretation Pro-Environmentalist? Why Pragmatic Agency Decisionmaking Is Better Than Judicial Literalism*, 53 WASH. & LEE L. REV. 1231, 1232–42 (1996) (describing how both textualist approaches to interpretation of statutes and the *Chevron* doctrine determinations of ambiguity have been manipulated).

217. *See* 293 U.S. at 430 (citing Marshall Field & Co. v. Clark, 143 U.S. 649 (1892), for the proposition that Congress may direct the President to execute the acts of Congress).

218. *See id.* at 420.

219. 295 U.S. 495 (1935).

220. Act of June 16, 1933, ch. 90, 48 Stat. 195, 196, as amended and modified by Act of June 14, 1935, ch. 246, 49 Stat. 375.

221. 295 U.S. at 521 n.3.

222. *See id.* at 519–28.

223. *See id.* at 530 ("[The] Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply.").

restrictions did not impose an intelligible limit on policymaking discretion.[224]

> Section 3 of the Recovery Act is without precedent.... It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, § 3 sets up no standards.... In view of the scope of that broad declaration...the discretion of the President...is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power.[225]

The Court thus struck down the legislation.

The Court in *Schechter Poultry* did not address a delegation beyond the President. Congress had only empowered the President (with too much discretion) to adopt as federal law the standards of fair competition suggested by others.[226] Since *Panama Refining* and *Schechter Poultry*, the Court has not invalidated any legislation on nondelegation grounds.[227]

D. The Supreme Court Has Allowed Congress Effectively to Delegate Legislative Power to States to Conserve Legislative Resources and Has Suggested That Delegations to States Are Not Subject to the Intelligible Principle Standard

Although the Court now routinely allows Congress to delegate broad policymaking discretion to the President, the Court maintains that Congress does not thereby delegate legislative power. In contrast, the Court has allowed Congress to effectively delegate policymaking discretion that is not constrained by an intelligible principle, allowing states to create the substantive contents of federal law. The Court has claimed that such delegation of federal legislative power to states is not prohibited by the Constitution.

In *United States v. Sharpnack*,[228] the Court upheld the Assimilative Crimes Act.[229] The Assimilative Crimes Act dynamically and prospectively adopts state criminal laws as federal criminal laws on federal enclaves, some of which are subject to the exclusive regulatory jurisdiction of Congress under the

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224. *See id.* at 531–36, 538–39.

225. *Id.* at 541–42.

226. *See id.* at 537 (holding in dicta that Congress could not simply delegate power to industry representatives to determine the laws they believed would be "wise and beneficent"; "[s]uch a delegation of legislative power is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress.").

227. *Cf.* United States v. Darby, 312 U.S. 100, 125–26 (1941) (rejecting efforts to find substantive limitations on "indefinite" legislation under the Due Process Clause of the Fifth Amendment); Ackerman & Golove, *supra* note 97, at 909–13 (discussing how the Supreme Court prudently chose to acquiesce in the New Deal regulatory programs expanding federal power by adopting expansive interpretations of Interstate Commerce Clause power, rather than force President Roosevelt to increase the Court's membership until the desired majority of the Court were formed). *But cf.* Industrial Union Dep't, AFL–CIO v. American Petroleum Inst., 448 U.S. 607, 672–76, 685–86 (1980) (Rehnquist, J., concurring) (arguing that the legislation at issue, if construed broadly, would constitute an unconstitutional delegation of legislative power; summarizing the functions of the delegation doctrine as: (1) assuring that important social policy choices are made by the branch of government most responsive to the citzenry; (2) providing an "intelligible prinicple" to guide decisionmaking; and (3) providing a basis for judicial review).

228. 355 U.S. 286 (1958).

229. 18 U.S.C. § 13 (1994). *See* 355 U.S. at 286.

Property Clause of Article IV.[230] By prospectively adopting state law as federal law, Congress limits the need to enact laws and conforms the applicable law on federal enclaves to those of the state in which they are located. Because the sole source of the substantive legal rules within exclusively federal enclaves must be the federal government, however, the Assimilative Crimes Act must be understood effectively to delegate to states federal substantive legislative power to enact criminal laws.[231] By enacting criminal legislation, state legislatures supply the proscribed conduct and penalties of federal criminal law to be enforced in federal courts, without any intervening determinations of the Congress or the President.

The Supreme Court nonetheless disclaimed that Congress had delegated legislative power and upheld the Assimilative Crimes Act. The Court's holding and dicta are clearly pragmatic and not doctrinal. The Court simply allowed Congress to enact the statute in order to conserve federal legislative resources and to promote state regulatory authority over lands within state borders.

> As a practical matter, [Congress] has to proceed largely on a wholesale basis. Its reason for adopting local laws is not so much because Congress has examined them individually as it is because the laws are already in force throughout the State in which the enclave is situated....
>
> Having the power to assimilate the state laws, Congress obviously has [the] power to renew such assimilation annually or daily in order to keep the laws in the enclaves current with those in the States. That being so, we conclude that Congress is within its constitutional powers and legislative discretion when, after 123 years of experience with the policy of conformity, it enacts that policy in its most complete and accurate form. Rather than being a delegation by Congress of its legislative authority to the States, it is a deliberate continuing adoption by Congress.... This procedure is a *practical accommodation* of the mechanics of the legislative functions of State and Nation in the field of police power where it is *especially appropriate to make the federal regulation of local conduct conform to that already established by the State*.[232]

The Supreme Court did not distinguish between legislation that prospectively adopts state law as federal law when enacted under Article IV and under Article I. The Court's reluctance to rest on unique Article IV powers is understandable, however, because criminal regulation of private conduct differs substantially from land management.[233] But the Court's distinction between a

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230. U.S. CONST. art. IV, § 3, cl. 2. *See* Goldberg–Ambrose, *supra* note 133, at 554–55 (discussing four types of federal enclaves; for at least one type, the Constitution excludes all state and local regulation, triggering the need for the Assimilative Crimes Act).

231. *Cf.* Goldberg–Ambrose, *supra* note 133, at 555 ("serious questions of protective jurisdiction" would be raised were another federal statute—16 U.S.C. § 457 (1994), which provides for assimilation of state wrongful death claims on exclusively federal enclaves—expanded to nonexclusive federal enclaves, because the extension would provide an additional forum for pre-existing state law claims without establishing new federal rights or obligations). The Assimilative Crimes Act, however, does not incorporate state laws in regard to conduct for which a federal criminal provision already exists. *See* 18 U.S.C. § 13 (1994).

232. 355 U.S. at 293–94 (emphasis added).

233. *See* Schoenbrod, *supra* note 116, at 1265–69 (arguing that management of public property is not lawmaking and that Article IV permits extremely broad delegations of policymaking discretion to the President that "'do not declare general rules with reference to rights of persons and property'" (quoting United States v. Grimaud, 220 U.S. 506, 516 (1911); citing Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) for drawing the line between property management and regulating private conduct)); Butte City Water Co. v. Baker, 196 U.S. 119,

deliberate continuing adoption and effective delegation is untenable. The Court assumed that Congress foresaw all the policy choices that states might subsequently make and thus intended for any and all state policies to apply. This assumption was clearly erroneous, if only because the Court cannot infer from historic consistency that national values will always remain stable.[234]

The Supreme Court was thus faced with a pragmatic dilemma. If it denied Congress the ability to delegate authority to states, the Court could allow Congress to impose state law-based criminal law prohibitions only by detailed and repetitive legislation. A longstanding premise of American jurisprudence prohibited Congress from delegating beyond the legislature the power to promulgate criminal penalties.[235] Although Congress might legislate the criminal penalties and allow federal agencies to specify the conduct to which those penalties would attach, Congress also might have been required to provide Article III courts possessing independent authority to interpret assimilated law in order to impose those penalties.[236] The Court thus resolved the dilemma by refusing to acknowledge the existence of a delegation of federal legislative power. Although the Court's holding is limited to a case where the Constitution compels an exclusive choice of federal substantive law, it differs substantially from cases where Congress had legislated under exclusive authority by delegating to entities lacking sovereign status but located within the

126 (1905) (upholding legislation conforming federal land mining requirements to local and state laws, because related to the disposition of property; "It is not of a legislative character in the highest sense of the term, and as an owner may delegate to his principle agent the right to employ subordinates, giving to them a limited discretion, so it would seem that Congress might rightfully entrust to the local legislature the determination of minor matters respecting the disposal of these lands.").

234. *See supra* note 144. *Cf.* SCHOENBROD, *supra* note 21, at 131–33 (public choice analyses of legislative decisionmaking wrongly assume that congressional values are not stable and thus wrongly suggest that delegation is necessary to achieve rational policies); Loving v. United States, 116 S. Ct. 1737, 1751 (1996) (noting that once Congress had already delegated power to the President to intervene in courts-martial, it would be "contradictory" to prevent the President from exercising rulemaking authority to develop a more principled and uniform sentencing regime that "provides greater opportunities for Congressional oversight and revision."). The Court did not claim that the prospective adoption was limited because Congress retained the power to enact future laws withdrawing the assimilation.

235. *See* SCHWARTZ, *supra* note 113, at 91 ("The power to prescribe penalties by rule may not be conferred upon an administrative officials; any penalties for disobedience of rules and regulations must be fixed by the legislature itself. This principle dates back to Stuart times and the objection to penalties imposed by the Crown."); *Loving*, 116 S. Ct. at 1748 ("There is no absolute rule, furthermore of Congress' delegation of authority to define criminal punishments...so long as *Congress* makes the violations of regulations a criminal offense and fixes the punishment....") (emphasis added).

236. *See Grimaud*, 220 U.S. at 522 (Congress may define criminal penalties and delegate to agencies the power to enact rules to which the penalties attach); Yakus v. United States, 321 U.S. 414, 444 (1944) (same); Crowell v. Benson, 285 U.S. 22, 45–52 (1932) (rejecting due process and separation of powers challenges to adjudication by federal administrative agencies subject to de novo Article III judicial review on questions of law); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 63–76 (1982) (Brennan, J., plurality opinion) (Congress may authorize adjudication by Article I courts for cases: (1) arising within the District of Columbia and the Territories; (2) in military courts martial; and (3) addressing public rights, such as statutory rights rather than common law contract or tort claims); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 856 (1986) (upholding Article I court power to adjudicate private rights as counterclaims to public rights adjudication, because the Commission could not enforce its own orders but was required to file an action in an Article III court); Thomas v. Union Carbide Prods. Co., 473 U.S. 568, 583 (1985) (upholding legislation authorizing administrative arbitration of factual disputes without providing for Article III judicial review).

jurisdiction.[237]

Finally, in *United States v. Mazurie*,[238] the Supreme Court expanded the dicta in *Hampton* to allow Congress to delegate legislative powers to sovereign entities exercising independent powers to regulate within a jurisdiction. Specifically, the Court upheld legislation authorizing Indian tribes to establish local prohibition ordinances on alcohol.[239] The Court first looked to its delegation doctrine then looked away, holding that delegation to states is *not* limited to an intelligible principle.

> This Court has recognized limits on the authority of Congress to delegate its legislative power. *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). Those limitations are, however, less stringent in cases where the entity exercising delegated authority itself possesses independent authority over the subject matter. *United States v. Curtiss–Wright Export Corp.*, 299 U.S. 304, 319–322 (1936). Thus it is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory....
>
> ...Indian tribes within "Indian country" are a good deal more than "private voluntary organizations".... *It is necessary only to state that the independent tribal authority is quite sufficient to protect Congress' decision to vest in tribal councils this portion of its own authority....*
>
> *The fact that the Mazuries could not become members of the tribe, and therefore could not participate in the tribal government, does not alter our conclusion....*
>
> *..."He was on the Reservation and the transaction with an Indian took place there.... If this power is to be taken away from [tribes,] it is for Congress to do it."*[240]

Mazurie is remarkable both for what it says and for what it doesn't say. First, unlike in *Rahrer* and *Clark Distilling*, the Court treated legislation that dynamically and prospectively consents to tribal (or state) law as a delegation of federal legislative power.[241] Second, the Court clearly held that Congress may

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237. *See* Palmore v. United States, 411 U.S. 389, 400–04 (1973) (the Constitution does not clearly prohibit Congress from creating Article I courts to hear criminal cases within the District of Columbia; noting similarities to cases under the Property Clause and under Article I, § 8, cl. 14 power to "make Rules for the Government and Regulation of the land and naval Forces"); *id.* at 408 ("the requirements of Article III, which are applicable where laws of national applicability and affairs of national concern are at stake, must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particular needs and warranting distinctive treatment"); Neuman, *supra* note 36, at 354–56 (the Supreme Court has distinguished for the District of Columbia among Congress' plenary power of local self-governance, its unique federal interests in the control of the Capitol, and the general Article I legislative powers; local self-governance power extends federal power on a nonuniform geographic basis in ways that should not dictate heightened rational basis scrutiny under the Equal Protection Clause; such power may be delegable in ways that general Article I powers are not (citing District of Columbia v. Thompson, 346 U.S. 100, 106–09 (1953))).

238. 419 U.S. 544 (1975).

239. *Id.* at 557.

240. *Id.* at 556–58 (quoting Williams v. Lee, 358 U.S. 217, 223 (1959)) (emphasis added).

241. Significantly, Congress required the Secretary of the Interior to approve the tribal ordinance unless it conflicted with state laws. *See id.* at 547. Arguably, the Secretary's approval created federal substantive law triggering federal question jurisdiction. Even if the Secretary's approval did not create federal law, the ability of tribal courts to enforce such tribal laws also might have derived from delegated federal legislative power. Most tribal courts either were

delegate legislative power to a tribal (and presumably to a state) government when the only limit on the power delegated is the subject matter to be addressed.[242] Third, the Court implied that the basis for finding such delegations constitutional is the ability of citizens to hold tribal (or state) officials to account for the policies that they impose, even if those citizens are wholly excluded from the tribal (or state) political processes.[243]

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created by the Bureau of Indian Affairs in 1882 or were established by Congress pursuant to the Indian Reorganization Act of 1934. *See* PETER C. MAXFIELD ET AL., NATURAL RESOURCES LAW ON AMERICAN INDIAN LANDS 8 (1977). Further, federal courts have exclusive jurisdiction over crimes against non-Indians under the Assimilative Crimes Act, except where such jurisdiction is given to states under the Act of Aug. 15, 1953, Pub. L. No. 280, ch. 505, § 7, 67 Stat. 590 (codified as amended at 28 U.S.C. § 1360 (1993)), and in almost all cases, tribal court jurisdiction does not apply to crimes against non-Indians. *See* MAXFIELD ET AL., *supra*, at 8–9. Nevertheless, the Court quoted *Williams* at length and suggested that inherent tribal judicial power extends over non-Indians unless Congress *removes* that power. Consequently, the Court *could have* relied upon the reasoning of *Rahrer* or *Clark Distilling* to avoid finding a delegation of federal power.

242. The Secretary could not approve and the tribe might not be able to enforce laws conflicting with state law. But that limitation provides no intelligible standard for two reasons. The Court's jurisprudence on tribal versus state sovereignty suggests a political rather than a rational boundary line, which has changed dramatically over time. *See, e.g.*, Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); United States v. McBratney, 104 U.S. 621 (1881); Williams v. Lee, 358 U.S. 217 (1959); McLanahan v. State Tax Comm'n, 411 U.S. 164 (1973); Montana v. United States, 450 U.S. 544 (1981); California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987); Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989); South Dakota v. Bourland, 508 U.S. 679 (1993); Oklahoma Tax Comm'n v. Chickasaw Nation, 115 S. Ct. 2214 (1995). *See generally* FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (1982). Similarly, even if the Supreme Court's test were clear, states may choose not to exert authority, thereby preventing conflicts and permitting tribes to regulate.

243. The Court did not deny that the Mazuries were unable to participate in the political processes of the Tribe. Instead, the Court held that they voluntarily subjected themselves to the harm imposed by tribal regulatory actions by physically entering the jurisdiction. Where citizens do not voluntarily enter a jurisdiction, however, such consent to judicial jurisdiction cannot be inferred from their implied consent to be bound by the Constitution. Although the Court in the twentieth century has allowed states to exert judicial jurisdiction beyond state territorial lines, the Constitution does not imply consent from residency elsewhere in the United States. *See* International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (the Due Process Clause of the Fourteenth Amendment, rather than territorial interests, limits the in personam extraterritorial judicial jurisdiction of states, based on "'traditional notions of fair play and substantial justice'") (quoting Milliken v. Meyers, 311 U.S. 457, 463 (1940)); World–Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (a defendant must "'purposefully avail[] itself of the privilege of conducting activities within the forum State'" for judicial jurisdiction to be fair) (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)); Kulko v. Superior Court, 436 U.S. 84, 92–101 (1978) (rejecting a "center-of-gravity" choice of law approach to judicial jurisdiction and holding that the presence of family and other interests in another state do not support in personam jurisdiction); Shaffer v. Heitner, 433 U.S. 186, 207–17 (1977) (extending the *International Shoe* standard to in rem jurisdiction and rejecting jurisdiction based solely on the transient presence of a debtor within the jurisdiction). Consent of out-of-state citizens also should not be inferred from participation in national political processes that result in delegations, because: (1) such citizens have no reasonable alternative to not participating; and (2) delegation may be designed to avoid accountability and thus Congress or federal agencies may not adequately supervise the delegated power to assure that out-of-state citizens' interests are protected. *See supra* notes 29–30 and accompanying text. *But cf. Mazurie*, 419 U.S. at 558 n.12 (equal protection "is to some extent assured by § 1161's requirement that delegated authority be...approved by the Secretary of the Interior"); Nance v. EPA, 645 F.2d 701, 714–15 (9th Cir. 1981) (upholding a delegation to an Indian Tribe to reclassify its land and thus to trigger additional federal requirements in other jurisdictions to protect tribal air quality; noting that the delegation challenges were similar to due process claims; failing to note that the Tribe possessed sovereignty to trigger the federal requirements only because of the delegation; and

But the Supreme Court failed to discuss whether the tribal prohibition ordinances, like the state laws at issue in *Rahrer* and *Clark Distilling*, were preempted by the Indian Commerce Clause absent congressional authorization. If so, the Mazuries did not voluntarily subject themselves to tribal power and were subject to regulation only because Congress had delegated its power to the Tribe.[244] Of greater importance, the Court did not discuss why Congress could delegate unconstrained legislative power to the tribe or why tribal autonomy interests outweighed delegation concerns. The opinion was authored by Justice Rehnquist, who clearly takes the delegation doctrine seriously.[245]

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basing its holding on the fact that EPA "maintains certain checks on the exercise of that authority").

244. By enacting the legislation at issue, Congress at least raised the issue whether the tribal ordinances were preempted as the result of legislative inaction and the dormant Indian Commerce Clause or as the result of prior legislative action and the Supremacy Clause. Existing judicial doctrine does not recognize tribal sovereignty to be free from federal constitutional or legislative preemption. *See* Vine Deloria, Jr., *Reserving to Themselves: Treaties and the Powers of Indian Tribes*, 38 ARIZ. L. REV. 963, 969, 972–74 (1996) (citing Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903); Worcester v. Georgia, 31 U.S. 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Native American Church v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959)). *Cf. Montana*, 450 U.S. at 556–58 (tribal jurisdiction derives either from treaty rights or inherent sovereignty); Lower Brule Sioux Tribe v. South Dakota, 1997 WL 6101, at *3–*4 (8th Cir. Jan. 9, 1997) ("After the General Indian Allotment Act, the Tribe no longer retains the exclusive use and benefit of the land, and Congress did not expressly delegate authority to the Tribe to regulate nonmember conduct on nonmember-owned fee lands. Therefore, whatever regulatory power the Tribe has under the treaty no longer extends to lands held in fee by nonmembers.... A tribe's inherent sovereignty...is divested to the extent that it is inconsistent with the tribe's dependent status, that is, 'to the extent it involves a tribe's "external relations."'" (quoting *Brendale*, 492 U.S. at 425–26)); *id.* ("'A tribe may regulate...the activities of nonmembers who enter *consensual* relationships with the tribe or its members through...contracts...or other arrangements....' Second, a tribe may regulate conduct that 'threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.'" (quoting *Montana*, 450 U.S. at 565–66)); *id.* (upholding the district court's decision that tribal sovereignty was not sufficiently threatened and thus that the State could exercise jurisdiction over nonmembers on fee lands and waters, in part to avoid "checkerboard" regulation caused by *federal* homesteading and flood control laws); *id.* (holding that the Flood Control Act of 1944 did not preempt *state* law).

245. *See supra* note 226. *See also* Schoenbrod, *supra* note 116, at 1234–37 (describing how various Justices on the Court have given serious consideration to delegation concerns following *Panama Refining*). Moreover, United States v. Curtiss–Wright Export Corp., 299 U.S. 304 (1936), related to concerns regarding the allocation of power among the *federal* branches. The President had exercised authority pursuant to a joint resolution of Congress, not an enacted bill or concurrent resolution. *See supra* notes 107–08 and accompanying text. The Court in *Curtiss–Wright* refused to answer "[w]hether if the Joint Resolution had related solely to internal affairs it would be open to the challenge that it [was] an unlawful delegation of legislative [authority] to the Executive." 299 U.S. at 315. Given the Court's holdings on the lack of tribal sovereignty to be free from federal preemption, the Court was not addressing a dispute over foreign relations and thus the analogy to inherent regulatory powers of the President was inapt. *See supra* note 244; Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (invalidating the President's peacetime regulation of industry by executive order as interfering with legislative powers exclusively vested in the Congress); Calabresi & Prakash, *supra* note 85, at 575 n.129 (noting the lack of a constitutional "hook" for a general "foreign affairs power" of the President). *Cf.* Ackerman & Golove, *supra* note 97, at 815–907 (recounting the historic expansion of the President's foreign affairs powers under executive agreements and pursuant to legislation). But even if the President possessed inherent regulatory authority over private conduct on tribal lands, that fact would not suggest that Congress could delegate the President's authority *to tribes* under the Necessary and Proper Clause. *Cf.* Loving v. United States, 116 S. Ct. 1737, 1750–51 (1996) ("The delegated duty, then, is interlinked with *duties assigned to the President by express terms of the Constitution*, and the same limitations on delegation do not apply where the entity exercising the delegated authority itself possesses independent

Although it is possible to limit the Court's delegation holding to legislative power under the Indian Commerce Clause, current federal Indian law doctrine precludes such a limitation.[246] Further, the Court's decision did not address the potentially unconstitutional delegation of federal legislative power *to the Secretary of the Interior.* The Secretary was required to prohibit tribal regulation based solely on the operation of state laws. The Court had suggested in *Panama Refining* that unconstrained state law does not comprise an intelligible principle limiting the exercise of delegated power.[247]

Nevertheless, the decision in *Mazurie* may be understood as calculated to promote tribal or state regulatory power and prerogatives. Congress had rearranged existing power relations to favor tribal or state power over federal power.[248] Congress also had conserved its legislative resources by relying on tribal legislation and on the Secretary's approval. But Congress could have delegated the additional regulatory authority to the Secretary instead of to the

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authority.... We need not decide whether the President would have inherent power as commander in chief to prescribe [the rules].") (emphasis added). The Court thus may have decided only that it wished to avoid resolving intergovernmental power disputes more than it wished to police congressional delegations of power. Unlike in its earlier decisions, the Court's opinion does not recite arguments based on the inherent need of the Congress to delegate its powers.

246. *See supra* note 244; Seminole Tribe of Florida v. Florida, 116 S. Ct. 114, 1123–32 (the Eleventh Amendment applies without distinction to limit federal power over commerce with tribes or among states). Indian tribes may possess a greater degree of inherent autonomy from federal regulation than states, because the treaties into which they entered may not have ceded sovereignty to the United States. *See* Deloria, *supra* note 244, at 966–76 (also citing *Mazurie* for failing to distinguish between delegated and inherent powers); Robert Williams, *The People of the States Where They Are Found Are Often Their Deadliest Enemies: The Indian Side of the Story of Indian Rights and Federalism,* 38 ARIZ. L. REV. 981, 984–97 (1996). If retained sovereignty is recognized, delegation may avoid power disputes (at the expense of accountability). But the Court's doctrine has not generally recognized such retained sovereignty.

247. *See supra* notes 213–14 and accompanying text; State of South Dakota v. U.S. Dep't of the Interior, 69 F.3d 878, 881–85 (8th Cir. 1995) (invalidating section 5 of the Indian Reorganization Act, 25 U.S.C. § 465, as an unconstitutional delegation of legislative power because it authorized the Secretary of the Interior to acquire lands in trust for Indian tribes without providing any law to apply; the Act triggered the "power to acquire land by condemnation for a public purpose...an inherent aspect of sovereignty" without defining the public use guiding acquisition decisions; noting that under the Secretary's construction of the statutory language, the Act delegated unrestricted power to acquire land for Indians, although the legislative history would have provided limiting standards; holding that the Act immunized the Secretary's exercise of delegated power from judicial review by committing decisionmaking entirely to agency discretion). *But see id.* at 886–91 (Murphy, J., dissenting) (arguing that the legislative history provided discernible standards for judicial review; noting that it was unclear whether the Quiet Title Act, 28 U.S.C. § 2409a, impliedly limited the Administrative Procedure Act's waiver of federal sovereign immunity in suits based on improper agency actions rather than based on property rights, because precluding establishment of trust relations—and thereby altering the status of *state* sovereignty over lands—interferes less with federal decisions than challenging property rights under trust relations already established).

248. The Secretary's interpretation of whether the tribal ordinance conflicted with state law would likely receive substantial deference on judicial review, even if judicial review standards predated the *Chevron* doctrine. *See supra* note 216. If the Secretary properly concluded that the ordinance did not conflict with state law, the tribe would gain power relative to the federal government. If the Secretary erroneously concluded that the ordinance did not conflict with state law, and if a state's legal challenge to the Secretary's approval was unsuccessful, the state would lose power that would be transferred to the tribe and not to the federal government. In contrast, if the Secretary erroneously concluded that state law conflicted with tribal law, and if a tribe's legal challenge was unsuccessful, the state would gain power and the tribe would lose only a power that already might have been preempted.

Indian tribe.[249] By upholding the delegation, the Court ratified the decision of Congress that tribal implementation would be better, more efficient, or more accountable than federal bureaucratic governance.

IV. COOPERATIVE FEDERALISM STATUTES MAY EFFECTIVELY DELEGATE FEDERAL LEGISLATIVE POWER TO STATES OR TO FEDERAL ADMINISTRATIVE AGENCIES

Congress does not normally delegate legislative power directly to states. Instead, Congress routinely requires or authorizes federal administrative agencies to "approve" state laws. Congress also routinely requires or authorizes federal agencies to subdelegate power to states. By approving state laws or by subdelegating federal power, federal agencies may trigger governmental or citizen enforcement claims brought under Article III, section 2 "arising under" jurisdiction.[250]

Congress may not, however, specify an intelligible principle to limit (1) state discretion to supply laws that federal agencies must approve or (2) federal agency discretion to approve or disapprove of state laws. Under the Supreme Court's doctrine, Congress should be understood to delegate legislative power to states or to federal agencies by enacting such statutes. Congress will transfer unconstrained policymaking discretion to states or to federal agencies to create rules binding upon private conduct and enforceable in federal courts. If federal agency approval does not preempt state laws, however, Congress should be understood to create protective jurisdiction.

These concerns should not exist when Congress requires or authorizes federal administrative agencies to subdelegate substantive federal power to states. Subdelegated power, *by definition*, is limited to the intelligible principle specified by Congress for federal agencies. By subdelegating power to states, Congress and the President raise only "unitary executive" concerns. By vesting administrative powers in states or by subdelegating power to them, Congress or the President may bypass structural constraints in the Constitution intended to assure accountable governance.[251] In particular, Congress may prevent the President—or a federal official subject to plenary removal from office by the President—from formally appointing mid-level or high-level officials, from being able to order written opinions from high-level officials on matters of concern, and from removing (in)subordinate officials from their offices in order to "take Care that the Laws be faithfully executed."[252] These structural

249. Congress would have been required only to specify criminal penalties for violating requirements that the Secretary could establish, impose, and enforce in federal courts. *See supra* notes 233–37 and accompanying text.

250. *See, e.g.*, 33 U.S.C. §§ 1319, 1365 (1994); 42 U.S.C. §§ 6928, 6972, 7413, 7604 (1994).

251. *See* Freytag v. Commissioner, 501 U.S. 868, 884 (1991) ("by limiting the appointment power, [the Framers] could ensure that those who wielded it were accountable to political force and the will of the people"). *But cf.* Mistretta v. United States, 488 U.S. 361, 372 (1989) ("Congress simply cannot do its job absent an ability to delegate power under broad general directives."); Andrade v. Regnery, 824 F.2d 1253, 1257 (D.C. Cir. 1987) (upholding federal agency subdelegation of power to "acting" federal officials; "Our government in fact depends on such delegation of responsibility.").

252. U.S. Const. art II, § 2, cl. 3.*See* U.S. CONST. art. II, § 2, cls. 1–2. The Appointments Clause allows Congress to authorize the President, "Heads of Departments" and "Courts of Law" to appoint "inferior Officers," but requires the President, with the advice and

separation-of-powers concerns are very similar to the concerns at issue when Congress fails to impose a legal standard for agency action pursuant to delegated power, thereby precluding judicial review designed to assure that federal officials or the President faithfully execute the law.[253]

The Constitution, however, does not clearly prohibit Congress from vesting administrative powers in states or subdelegating such powers to them.[254]

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consent of the Senate, to appoint principal "Officers of the United States." U.S. CONST. art. II, § 2, cl. 2. In contrast, the Opinions-in-Writing Clause places authority in the President to require opinions from "the principal Officer in each of the executive Departments." U.S. CONST. art. II, § 2, cl. 1. Although many cases have found that vesting powers beyond the President may comport with the Appointments Clause, the cases do not normally address the other "unitary executive" restrictions. *Cf. Freytag*, 501 U.S. at 880–91 (Congress may authorize tax courts to appoint special trial courts who are lower federal officials subject to the Appointments Clause, because the tax courts: (1) exercise "quintessentially judicial" functions rather than executive functions; (2) are subject to judicial review standards similar to Article III federal district courts; and (3) are Courts of Law within the Appointments Clause—because treated as courts rather than as part of the executive, the independence from the President was a virtue and not a vice); Train v. New York, 420 U.S. 35, 48 (1975) (interpreting the Federal Water Pollution Control Act to require the Administrator of the EPA to allot all appropriated and obligated funds; "there is nothing in the legislative history of the Act indicating that such discretion arguably granted was to be exercised at the allotment stage rather than or in addition to the obligation phase of the process.").

253. *See supra* note 247; Heckler v. Chaney, 470 U.S. 821, 829–31 (1985) (upholding discretionary decisions of the FDA not to determine whether drugs used for lethal prison injections were "safe and effective" for that purpose; Congress had provided "no law to apply," precluding judicial review under the Administrative Procedure Act, 5 U.S.C. §701(a)(2) (1994)—as a result, judicial review was a vice and not a virtue); Citizens to Save Spencer County v. EPA, 600 F.2d 844, 856, 859–60 (D.C. Cir. 1979) (EPA created by regulation a date for certain air pollution-emitting facilities to be subject to pre-construction reviews to prevent significant deterioration of ambient air quality; EPA's date was midway between dates provided in conflicting statutory provisions and thus may have had "retroactive effects"); *id.* at 874 (noting that Congress may create a program that requires "'the making of rules to fill any gap left, implicitly or explicitly, by Congress'" (quoting Morton v. Ruiz, 415 U.S. 199 (1974))); *id.* at 873–74 (holding that Congress had delegated sufficient power by providing general rulemaking authority); *id.* at 876, 877 (distinguishing interpretive rules, which "have no effect beyond that of the statute," and thus finding that EPA's date was an exercise of legislative rulemaking power); *id.* at 879–81 (characterizing the retroactive effects as procedural rather than substantive); *id.* at 888–90 (justifying failure to impose either statutory date as legitimate interpretive rules, given the statutory conflict); *id.* at 890 (upholding EPA's date as "a relatively happy picture of an agency's attempt to bring harmony and efficiency to a regulatory scheme that in its original statutory conception was badly flawed"). *Cf. supra* note 234. *But cf.* Environmental Defense Fund v. Gorsuch, 713 F.2d 802, 808–09, 812–17 (D.C. Cir. 1983) (EPA suspended regulations issued under the Resource Conservation and Recovery Act (RCRA) in order to establish priorities for its permitting program; "the fact that [the statute] does not charge EPA with a 'duty' to act to give effect to its regulations as promulgated within the meaning of RCRA's citizen suit provision does not mean the agency may alter or suspend the effective date of its regulations with impunity"; rejecting arguments that EPA had only issued a "general policy statement" exempt from notice and comment rulemaking procedures without reaching whether EPA could suspend its rules under the statute if it first proposed to do so); *Citizens to Save Spencer County*, 600 F.2d at 892 (Robinson, III, J., dissenting) ("Congress...did not delegate responsibility for specifying an entirely different date.... When Congress in a statute indisputably says "A" or "B" but does not make clear which, interpretation must, in my view, be utterly *impracticable* before the agency responsible for administering the law can say "C") (emphasis added); Adams v. Richardson, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (finding "law to apply" from cases specifying criteria for federal agencies to prohibit disbursement of federal funds to state educational institutions violating civil rights laws; the federal agency "has conscientiously and expressly adopted a general policy which is in effect an abdication of its statutory duty" (distinguishing cases based on prosecutorial discretion)).

254. *See supra* notes 94, 123–126. *Cf.* Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 718–32 (1989) (The

Further, although statutes vesting or subdelegating administrative powers beyond the federal government do not "formally" comply with structural constraints in the Constitution, *discretionary* subdelegation may "functionally" do so.[255] As a result, discretionary subdelegation of power to states should not pose serious unitary executive concerns.[256] But subdelegation decisions may nonetheless pose serious concerns regarding whether Congress has established an intelligible principle regarding subdelegation and withdrawal decisions.

A. Wholesale Delegation of Federal Legislative Power to States or to EPA by Approving State Programs

In *Union Electric Co. v. EPA*,[257] the Court addressed requirements under the Clean Air Act mandating that EPA *statically* and *retrospectively* approve state implementation plans (SIPs) to achieve nationally specified levels of ambient air quality for certain "criteria" pollutants. The Court upheld EPA's interpretation that Congress had required EPA to approve a SIP if the SIP met

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Administrative Procedure Act can be used to balance the justifications for agency nonacquiescence with the perceived constitutional concerns over separation of powers; administrative agencies are not district courts and are charged by Congress with substantial policymaking discretion that is not subject to de novo review by the federal courts; distinguishing intracircuit nonacquiescence by agencies from noncompliance with Supreme Court interpretations based on congressional creation of courts of appeals); Joshua I. Schwartz, *Nonacquiescence,* Crowell v. Benson, *and Administrative Adjudication*, 77 GEO. L.J. 1815, 1836–60 (1989) (nonacquiescence is unconstitutional when it prevents the exercise of Article III power to assure faithful interpretation of the law). States acting pursuant to federal directives may not generate federal law within the scope of the Supreme Court's Article III judicial review powers. Such vesting or delegation may therefore remove from federal courts the ability to supervise interpretation and application of federal law, posing serious separation-of-powers concerns. *Cf. supra* note 236; Cooper v. Aaron, 354 U.S. 1, 18–20 (1958) (decisions of the Supreme Court interpreting the Constitution are the Supreme Law of the Land).

255. Subdelegation is analogous to appointment because the state receives power through the President or a high-level federal official to establish federal law within Article III, § 2 "arising under" jurisdicition. *See* Buckley v. Valeo, 424 U.S. 1, 133, 140 (1976) (presidential appointment was required for federal election officials who exercise lawmaking powers); Seattle Master Builders Ass'n v. Pacific Northwest Elec. Power & Conservation Planning Council, 786 F.2d 1359, 1364–65 (9th Cir. 1986) (because state compact officials did not serve pursuant to federal law and did not create federal substantive law by their actions, they were not subject to the Appointments Clause). *Cf.* The Confederated Tribes of Siletz Indians of Oregon v. United States, 841 F. Supp. 1479, 1488–89 (D. Or. 1994) (Congress directly vested substantive federal lawmaking powers in states by authorizing them to veto determinations of the Secretary of the Interior, violating the Appointments Clause and interfering with the President's ability to execute the law). Subdelegation is analogous to removal if the President may withdraw the subdelegation at will. *See supra* note 106; Morrison v. Olson, 487 U.S. 654, 671, 676–79 (1988) (an independent counsel's policymaking authority is limited to the case before her and she can be removed from office by the Attorney General). *Cf. Mistretta*, 488 U.S. at 368–70, 408–10, 411 & n.35 (Congress may create a commission to issue sentencing guidelines composed in part of Article III judges, because the President's "intrabranch removal authority under these limited circumstances poses no threat to the balance of power among the Branches."). If Congress requires the President to subdelegate upon specified conditions or if the President cannot withdraw the subdelegation upon the existence of such conditions, Congress will interfere with the President's appointment and removal powers and raise serious separation-of-powers concerns. *Cf. supra* note 63 and accompanying text. If Congress links approval and subdelegation, moreover, serious conceptual confusion may result. *See infra* notes 268–82 and accompanying text.

256. Nevertheless, discretionary subdelegation may hide from the citizenry the level of government responsible for policy and thus may pose serious constitutional concerns regarding accountable governance and political exclusion. These concerns are addressed in Part V below.

257. 427 U.S. 246 (1976).

the conditions specified by Congress, i.e., if the SIP was "more stringent" than necessary to achieve national ambient standards.[258] The Court thus allowed EPA to prevent itself from exercising any discretion to choose whether to approve state regulatory programs and requirements.

> [An alternative interpretation] would not only require the Administrator to expend considerable time and energy determining whether a state plan was precisely tailored to meet the federal standards, but would simultaneously require States desiring stricter standards to enact and enforce two sets of emission standards, one federally approved plan and one stricter state plan. We find no basis in the Amendments for visiting such wasteful burdens upon the States and the Administrator....
>
> ...[I]f a State makes the *legislative* determination that it desires a particular [more stringent] air quality...such a determination is fully consistent with the [Act]....
>
> Allowing such claims to be raised...would frustrate congressional intent.... And it would permit the Administrator or a federal court to reject a State's *legislative* choices in regulating air pollution, even though Congress plainly left with the States...the power to determine which sources would be burdened by regulation and to what extent.[259]

The Court thus construed the statute to avoid any potential for an unconstitutional *exercise* of legislative power delegated to EPA.[260] The Court's holding was not necessary to preserve state *power* to enforce more stringent requirements, however, because Congress had elsewhere in the statute saved more stringent state requirements from federal preemption.[261] But the Court's decision preserved EPA and state resources that would have been required—without substantial evidentiary support, in advance of enforcement, and in response to the substantial intergovernmental friction that would result during administrative reviews—to determine the level of government actually requiring imposition of particular controls. By upholding EPA's interpretation,

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258. Notably, the language of the statute does not state that EPA must approve a SIP meeting the statutory conditions. *See* 42 U.S.C. § 7410(a)(1) (1994) ("Each State shall...adopt and submit to the Administrator...a plan which provides for implementation, maintenance, and enforcement" of [the standards]....); *id.* § 7410(a)(2) ("Each such plan shall" provide requirements to meet various conditions); *id.* § 7410(c)(1) ("The Administrator shall promulgate a Federal implementation plan...after the Administrator...(B) disapproves a State implementation plan submission in whole or in part, unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan.").

259. *Union Elec. Co.*, 427 U.S. at 264–65, 268–69 (emphasis added) (footnote omitted). Although the Court characterized the state's policymaking authority as "legislative," the Court never hinted at delegation doctrine concerns. The Court's pragmatism was understandable, given the difficulty of conducting technical projections to determine if state requirements would achieve no better ambient quality than what the federal standards required. The Court thus refused to reach whether EPA's authority to issue a federal implementation plan was limited by considerations of economic or technical feasibility, as such considerations were prohibited by EPA's interpretation. *See id.* at 261 n.7, 262 n.9.

260. Although the decision antedated the Court's *Chevron* doctrine, the Court nevertheless provided "great deference" to EPA's interpretation of the statute. *Id.* at 256. *Cf. supra* notes 213–17, 247 and accompanying text.

261. *See* 42 U.S.C. § 7416; 427 U.S. at 264 n.11. *Cf.* ENSCO, Inc. v. Dumas, 807 F.2d 743, 745 (8th Cir. 1986) (preempting under the Supremacy Clause a state ban on treatment and disposal of acutely hazardous waste, notwithstanding an express savings provision for more stringent state regulations and provision for state laws to displace federal laws under the Solid Waste Disposal Act, Pub. L. No. 94–580, 90 Stat. 2795 (1994) (codified as amended at 42 U.S.C. §§ 6926(b), 6929 (1994)).

the Court allowed EPA to convert state policies—beyond its own power to impose—into federally enforceable laws, thereby hiding the level of government responsible for imposing policies.

The Court was clearly aware that EPA's approval made the state laws contained in the SIP enforceable in federal courts through federal and citizen suit causes of action.[262] By requiring or authorizing EPA to approve SIPs, Congress had either: (1) delegated to states through EPA federal substantive law that was not limited by an intelligible principle;[263] or (2) authorized EPA to create in its discretion federal claims to enforce approved more stringent state laws.[264] But the Court never addressed the consequences of approval for enforcement. The Court thus elided the question of whether Congress had effectively delegated federal legislative power to states or to EPA.[265]

Fourteen years later, in *General Motors Co. v. United States*,[266] the Court resolved that EPA approval of a SIP creates federal law. The Court again based its holding on statutory interpretation without discussing the underlying constitutional questions. After rejecting arguments that EPA was required to approve revisions to SIPs within four months, the Court stated:

> The language of the Clean Air Act plainly states that EPA may bring an action for penalties or injunctive relief whenever a person is in violation of any requirement of an "applicable implementation plan...." There can be little or no doubt that the existing SIP remains the "applicable implementation plan" even after the State has submitted a proposed revision....
>
> There is nothing *in the statute* that limits EPA's authority to enforce the "applicable implementation plan" solely to those cases where EPA has not unreasonably delayed action on a proposed SIP

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262. *See* 427 U.S. at 271 n.2 (Powell, J., concurring) (noting that civil and criminal penalties might be imposed by the federal government or in federal citizen suits); 42 U.S.C. § 7413(a)(1), (2), (b) (federal agency authority to issue orders for violations of "requirement or prohibition of an applicable implementation plan" or to seek injunctions and penalties in federal district court for violating such orders or "any requirement or prohibition of an applicable implementation plan"); *id.* § 7604(a)(1), (f) (citizen suits for violations of "emissions standard or limitation," which are defined to include "condition[s] or requirement[s] under an applicable implementation plan"); *id.* § 7602(q) (defining "applicable implementation plan" as the approved provisions of a SIP or the provisions of a federally promulgated implementation plan).

263. Although the statute provided an "intelligible principle" for judicial review of preempted (*less* stringent) state law, it did not provide an "intelligible principle" to restrict states from adopting substantive policies within their nonpreempted (*more* stringent) powers, which would then be approved by EPA. *See* 42 U.S.C. § 7416; *supra* notes 213–16, 260 and accompanying text. *Cf.* International Union, UAW v. OSHA, 37 F.3d 665, 668–70 (D.C.Cir. 1994) (upholding OSHA's interpretation on remand of section 3(8) of the Occupational Safety and Health Act, 29 U.S.C. § 652(8), which requires "reasonably necessary or appropriate" regulations by inferring an intelligible principle of "a high degree of employee protection" from other provisions; OSHA's interpretation requiring a threshold finding of a significant risk, economic and technological feasibility, and cost effectiveness "does very little...to narrow the agency's discretion to choose among levels of safety.")

264. Because federal enforcement was limited to the applicable implementation plan, EPA's approval did not prospectively adopt state law. If approval did not create federal substantive law, it nevertheless created "static" protective jurisdiction by triggering Article III, § 2 "arising under" jurisdiction to enforce the state laws. *See supra* note 135 and accompanying text.

265. The circuit court in *Union Electric v. EPA* also failed to address the constitutional questions, although it also noted the enforcement consequences of EPA approval. 515 F.2d 206, 211 & nn.16, 17 (8th Cir. 1975).

266. 496 U.S. 530 (1990).

revision.[267]

The SIP provisions thus were "federalized" by EPA approval and subsequent state amendment of its implementation plan did not alter the substantive *federal* requirements unless and until EPA approved those amendments.[268] Congress effectively provided states or EPA with unlimited policymaking discretion to supply the contents of federal law to be enforced by federal agencies and in federal courts.

In *Louisiana Environmental Action Network v. Browner*,[269] the federal courts again elided resolving whether Congress had delegated legislative power to EPA or to the states. The case involved subdelegation by EPA to states of federal authority to regulate emissions of hazardous air pollutants, or "air toxics." The federal standards promulgated by EPA could be enforced directly by the federal government or by citizens in federal courts.[270] Congress had used terms of permission, authorizing but not requiring EPA: (1) to approve state air toxics programs; and (2) to subdelegate implementation and enforcement of federal air toxics standards to states.[271]

EPA had construed the statute to allow EPA to "enforce an approved state [air toxics] program 'in place of' the otherwise applicable federal regulations."[272] Congress had preserved EPA's authority to enforce federal air

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267. 496 U.S. at 540–41 (emphasis added). The Court also noted that Congress had provided for a bar to enforcement for certain other provisions and had provided for citizen suits to compel EPA to process the state's revision. *See id.* at 541 & n.4; *see also* Train v. Natural Resources Defense Council, 421 U.S. 60, 92 & n.27 (1975).

268. The Court noted that some states preferred to preserve EPA authority to enforce previously approved standards. *See* 496 U.S. at 541 n.5. But the Act expressly preempted states from *adopting* "emission standards or limitations" less stringent than those in an applicable implementation plan. 42 U.S.C. § 7416 (1995). Thus, the statute created a "one-way ratchet" precluding states from adopting less-stringent but approvable modifications to their plans. This provision may now be unconstitutional in light of the decision in New York v. United States, 505 U.S. 144 (1992). The Court and states appeared to be wholly unaware of this collateral consequence of the interpretation adopted. It is possible, however, that state officials—particularly unelected bureaucrats—might have wished for such a result but were politically unable to avoid lowering their standards. Support for EPA's retained enforcement authority thus would avoid political accountability for the imposition of standards more stringent than their constituents desired.

269. 87 F.3d 1379 (D.C. Cir. 1996).

270. *See* 42 U.S.C. § 7413(a)(3), (b)(2) (1994) (authorizing federal administrative orders and judicial actions for violations of "any other requirement or prohibition of this title including...a requirement or prohibition of any rule, plan, order, waiver, or permit...approved under those provisions or subchapters"); 42 U.S.C. § 7604(a)(1) (1994) (authorizing civil actions against any person violating "an emission standard or limitation under this chapter"). *Cf.* 40 C.F.R. § 70.7(f)(1) (1996) (providing that EPA or an approved state agency issuing an operating permit "may" include a condition limiting enforcement to the terms and conditions of a permit upon specified conditions; failing to establish a standard for case-by-case administrative discretion to issue such "permit shields"; transferring discretion to *states* to impose permit shields under subdelegated EPA authority; and limiting challenges to such discretion to the context of individual permit appeals).

271. *See* 42 U.S.C. § 7412(*l*)(1) (1994) ("Each State *may* develop and submit to the Administrator for approval a program.... A program submitted by a State under this subsection *may* provide for partial or complete delegation of the Administrator's authorities...but shall not include authority to set standards less stringent than those promulgated by the Administrator under this chapter.") (emphasis added). *See also* 42 U.S.C. § 7412(*l*)(5) (employing the mandatory "shall" to require EPA to approve *or* disapprove state programs).

272. 87 F.3d at 1381 (quoting 40 C.F.R. § 63.90 (1996)). EPA had left ambiguous, however, whether approval created federal law or only federally enforceable state law. *See* Air Toxics Delegation Rule, *supra* note 47, 58 Fed. Reg. at 62,262–62,263 ("State rules and

toxics standards when EPA had subdelegated its authority and had required EPA to withdraw approval of state air toxics programs whenever EPA made a determination of inadequacy, which would then imply the need to withdraw subdelegated authority.[273] Unlike for SIP approval, however, Congress had not clearly specified whether approved state air toxics program requirements met the terms of the enforcement provisions.

EPA thus claimed that congressional intent was ambiguous, allowing EPA to conclude that federal approval of state air toxics programs creates federal law or federally enforceable law for more stringent state laws. But EPA simultaneously conflated approval with delegation and argued the non sequitur that a statutory provision ambiguously *providing unconstrained discretion* somehow creates an "intelligible principle" to *limit agency discretion.* Congress thus had effectively delegated legislative power to EPA (or if Congress had *required* EPA to approve more stringent laws, contrary to EPA's interpretation that the statute was ambiguous to states through EPA).[274] The federal enforceability of state standards did not result from approval of state permit programs and thus from issuance of state and federal permits. EPA had interpreted the statute to allow enforcement of standards notwithstanding

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applicable part 70 operating permit conditions resulting from approved State programs would be federally enforceable and would *substitute for* the otherwise applicable Federal requirements within a State or local jurisdiction.") (emphasis added).

273. *See* 42 U.S.C. § 7412(*l*)(6) (EPA "shall withdraw approval" "[w]henever the Administrator determines" that the state is not "administering or enforcing" a program consistent with EPA guidance and the statutory requirements.). The withdrawal provision may be ambiguous regarding when, and thus whether, EPA must make a determination triggering the mandatory duty to withdraw a subdelegation. *Cf.* National Wildlife Fed'n v. EPA, 980 F.2d 765, 768–74 (D.C. Cir. 1992) (invalidating in part EPA regulations regarding withdrawal of state regulatory "primacy" under the Safe Drinking Water Act, 42 U.S.C. §300 g–2(b) (1994), which requires EPA to specify regulations to decide "the manner in which the [EPA] may determine that the requirements are no longer met"; holding that EPA does not possess discretion to avoid withdrawing primacy once it has determined that the state's program no longer meets the requirements; simultaneously confirming that EPA possesses extremely broad discretion to determine the circumstances and timing of making such determinations (citing *National Wildlife Fed'n*, 925 F.2d at 470 (upholding an EPA decision to provide a two-year extension for states to adopt standards before withdrawing primacy, during which period more stringent federal standards would not be enforceable))). Congress thus may have provided a clear substantive standard for withdrawal decisions but may have failed to provide for judicial review to protect against self-interested actions of federal officials, who may refuse to exercise withdrawal authority in order to avoid resource burdens, conflicts with states, and accountability for having to impose federal policies.

274. EPA argued in briefs that Congress in 1990 had amended the federal governmental enforcement provision to include "approved" requirements in order to eliminate the prior limitation to federally issued air toxics standards. *See* Brief for Respondents at 28–31, LEAN v. Browner, 87 F.3d 1373 (D.C. Cir. 1996) (No. 94–1042). Congress had not made a similar change in the citizen suit provision, however. EPA further argued that the scope of section 112(*l*) *subdelegation* authority was ambiguous and that it was therefore entitled to *Chevron* deference for determining that federal *approval* included more stringent state laws. *See id.* at 20–28. Given negative implications from the SIP context, where Congress had clearly defined the applicable implementation plan for federal enforcement to include approved state laws, EPA was correct that the statute *at best* was ambigious regarding enforceability of approved state standards. But then Congress (presumably cognizant of the *Chevron* doctrine) had delegated to EPA either interpretive or legislative rulemaking discretion to approve and make federally enforceable the *more stringent* state standards. Under EPA's own interpretation it would not suggest a limit on EPA's policy discretion to approve *some* more stringent state standards or to approve *all* such standards. If EPA had interpreted the statute to limit its discretion, rather than legislated that result, Congress had not provided a standard to limit state power to trigger EPA approval for whatever more stringent standards the state might adopt. *See supra* note 253.

issuance of permits and had provided for enforcement of the air toxics conditions of an approved state-issued permit only if EPA (1) had delegated power to impose the condition or (2) had created federally enforceable law by approving the state standard.[275]

EPA thus adopted regulations *requiring* approval of state hazardous air pollutant authorities that: (1) adjusted federal requirements, so long as they met a specified list of pre-determined equivalency criteria; (2) "substituted" for federal authorities and were no less stringent than equivalent federal provisions; or (3) adopted a program that replaced all or part of the federal standards, if the state committed to imposing controls no less stringent than federal standards that would be developed in the future.[276] EPA's rules created both static and retrospective approvals and dynamic and prospective approvals.

EPA claimed that the statute was ambiguous and that legislative goals supported making more stringent state standards federally enforceable through approval. EPA clearly desired to avoid the resource burdens and political conflicts that would result from repetitive reviews of state law standards.[277] Although EPA's rules did not indicate whether the approved state standards or programs were to be considered federal law or federally enforceable state law,

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275. *See* 42 U.S.C. § 7661a(d)(1) (1994) (states "shall" submit permit programs and EPA "shall approve *or* dispprove such program, in whole or in part...."; EPA may approve the program if it meets the criteria, and if EPA disapproves it "shall" notify the Governor of what revisions are "necessary to obtain approval"); 42 U.S.C. § 7661c(a) (requiring federal permits and state permits issued pursuant to federally approved state permit programs to contain "enforceable emission limitations and standards"); 40 C.F.R. § 70.6(b)(2) (1996) (requiring segregation of state-only permit conditions); *supra* note 270. *Cf.* 42 U.S.C. § 7412(g)(2), (j)(5)&(6) (1994) (requiring source-specific limitations in federal and approved state-issued permits if EPA failed to issue national standards in a timely fashion). These provisions pose additional interpretive questions regarding whether permit program approval is permissive or mandatory and whether EPA is to: (1) simply evaluate state law before deciding to delegate; (2) determine whether state law is preempted; or (3) federalize state law for enforcement.)

276. *See* 40 C.F.R. §§ 63.90(d), 63.91(a), (b)(3), 63.92(b), 63.93(b)(2), 63.94(b)(2)(ii)(B) (1996).

277. *See* Air Toxics Delegation Rule, supra note 47, at 62,268 (noting the ambiguity of § 112(*l*) in regard to partial or complete *delegation* as ambiguous regarding enforceability of *approved* state standards; and focusing on the legislative policy in § 101, 42 U.S.C. § 7401(a), that air pollution contron is the primary responsibility of state and localities). Further, EPA stated that its

> final rule seeks to achieve the goal of allowing the EPA and the States to work together to minimize potential program redundancies and inconsistencies and to reduce the costs and time involved in permit review and issuance.... If the EPA approves the State program [under the third option], the EPA would then promulgate a rule amending part 63 to incorporate the State program....[S]ection 112(l) places no restrictions on the stringency of approvable State standards... nor does section 112(l) require consideration of any particular factors in development of an approvable state standard.

Id. at 62,264, 62,265, 62,267. EPA's language is ambiguous regarding prospective approvals, but suggests that state programs become federally enforceable once *initially* codified as federal regulations, even if the state subsequently modifies its rules. EPA did not suggest that it would make a future *approval* determinations to assure that the state's program remained consistent with the statutory and regulatory criteria. Thus, EPA avoided committing resources and engendering future disputes regarding subdelegated authority except in the context of discretionary withdrawal provisions. *See supra* note 273. Again, EPA's brief made clear that Congress had provided "interpretive" discretion and thus that Congress did not *mandate* that EPA prospectively approve more stringent state standards. Congress thus did not subdelegate legislative power through EPA to states, but may have authorized EPA to do so. *See supra* note 253.

EPA's interpretation suggests the latter and thus dynamic protective jurisdiction.[278]

An environmental group challenged EPA's regulations as authorizing approval of less stringent state standards or programs, which the statute treats as preempted.[279] Conversely, regulated entities claimed that EPA had improperly interpreted the statute to require approval of more stringent state standards or, in the alternative, that Congress had unconstitutionally delegated legislative power to EPA.[280] The Court ducked the dispute by articulating new principles for constitutional standing and prudential ripeness.[281]

At some point, the Court will be obliged to answer: (1) what Congress

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278. If approval created federal law, the state standards should then have qualified for federal enforcement under both the governmental and citizen suit provisions of the pre-1990 Act. Further, approved state law would then fall within the terms of the preemption provision, precluding the state from modifying its law to become less stringent than before. But if the preemption provision is unconstitutional, Congress may have created prospective jurisdiction. *See supra* note 268. EPA's regulations do not suggest that EPA would ever disapprove as preempted state standards that are at least as stringent as federal standards, but less stringent than previously approved state law..

279. *See* 87 F.3d 1379, 1381 (D.C. Cir. 1996); 42 U.S.C. § 7416 (1995). The statute required EPA to determine whether the state programs were sufficient to "assure compliance by all sources within the State" with federal standards. 42 U.S.C. § 7412(*l*)(5). The environmental group was concerned that the regulations would allow EPA to approve particular state standards or programs that were not fully equivalent to the federal standards and thus should be found preempted. The group was particularly concerned that a state might not honor its promises to maintain program equivalency in the future. *See* Brief for Petitioners at 18–26, 35–42, LEAN v. Browner, 87 F.3d 1373 (D.C.Cir. 1996) (No.94–1042) (also arguing that the substituted program standards may not be subject to federal judicial review). The group would then be unable to challenge EPA's approval as no longer valid or to force EPA to withdraw its approval and delegation. A better interpretation of subsection (5) would characterize the required approval as an administrative adjudication to determine whether state law is preempted, based on the particular competence and expertise of the federal agency. *Cf.* 49 U.S.C. § 5125(a), (b) & (d) (1994) (preempting state and tribal regulations over transportation of hazardous materials, unless exempted by rule by the Secretary of Transportation; and authorizing citizen petitions for administrative adjudication to determine whether particular state laws are preempted). This would keep approval and subdelegation distinct and would clearly authorize federal enforcement only for limited subdelegated federal powers. If state law were preempted, the state would then be ineligible for subdelegation, which is why Congress linked approval to subdelegation in subsection (1). If state law were not preempted, EPA could then decide (apparently in its discretion before EPA limited that discretion by rule) whether to subdelegate the federal program. In that case, the legislation authorizing subdelegation functionally conformed to unitary executive constraints.

280. *See* 87 F.3d. at 1381–82. Although not mentioned in the Court's opinion, the regulated entities relied upon *Panama Refining*, *Field*, and *Mistretta*. They also raised unitary executive challenges, relying upon *Buckley* and and other Appointments Clause cases. *See* Brief for Petitioners at 18–28, LEAN v. Browner, 87 F.3d 1373 (D.C.Cir. 1996) (No. 94–1042); Reply Brief of Petitioners at 8–15, LEAN v. Browner, 87 F.3d 1373 (D.C.Cir. 1995) (No. 94–1042). They likely did not argue that Congress had vested legislative rather than interpretive powers in EPA, because under the *Chevron* doctrine they would have thereby conceded statutory authority for EPA to construe the statute to allow approval of more stringent state requirements. *See supra* notes 253, 274.

281. *See* 87 F.3d at 1382–83. The Court admitted that one group of petitioners had presented "a galaxy of likely circumstances in which its members could be trapped in the intolerable position of being unable to comply with new state standards that receive EPA approval under § 7412 shortly before some compliance deadline, thus leaving insufficient time for [its] members to respond accordingly." *Id.* at 1384. However, the Court found such claims lacked prudential ripeness and indicated that subsequent challenges to *specific* approval and delegation decisions would not be precluded by the statutory 60-day bar to challenges to rulemaking. *See* 87 F.3d at 1384–85; 42 U.S.C. § 7607(b)(1) (1994).

meant by approval; (2) whether approval creates federal law or federally enforceable law; (3) if approval does so, whether approval is limited to the scope of powers delegated to EPA; and (4) if not so limited, whether Congress has impermissibly delegated legislative power to EPA, impermissibly delegated legislative power to states through EPA, or has created static and dynamic protective jurisdiction triggered by EPA's retrospective and prospective approval decisions. By deferring decisions until specific approvals and delegations, the Court allowed EPA to avoid conflicts with state regulatory prerogatives at the *most general* level in the absence of facts to evaluate relative stringency. If EPA ever approves a prospective delegation, however, the Court will have to evaluate relative stringency based on promises of political action, not on factual comparison. When EPA makes retrospective decisions, the Court will likely find the concerns over approval of more stringent state law issues unripe until a concrete case arises attempting to enforce a more stringent state standard in federal court. The Court will again avoid requiring EPA and states to facially announce the level of government that can enforce specific regulations.

B. Retail Delegation of Federal Legislative Power to States or to EPA by Issuing Permits

In *Arkansas v. Oklahoma*,[282] the Supreme Court addressed permitting provisions of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act (CWA). Section 402(a) requires EPA to develop and to implement a program issuing National Pollution Discharge Elimination System (NPDES) permits to discharges of pollutants into navigable waters from a point source, i.e., a discernible, confined, and discrete conveyance such as a pipe, ditch or container.[283] The federal NPDES permits must impose the "same terms, conditions, and requirements" as would a state permit program approved under section 402(b), which specifies various conditions for such plans and *requires* EPA to approve state plans meeting the conditions.[284]

Permits issued under an approved state pollution discharge elimination system program must "apply and insure compliance with any applicable requirements of section[] [301]" and other sections.[285] Section 301(b)(1)(C) of the CWA requires state or federal permits to specify limits on pollutants in discharged effluent that are necessary to comply with: (1) a state water quality standard that EPA is *required* to approve under section 303(c) if it "meets the requirements" of the CWA; and (2) other relevant state water quality related standards more stringent than federal technology-based effluent limitations applicable by category to the relevant sources.[286] The more stringent state

282. 503 U.S. 91 (1992).

283. *See* 33 U.S.C. § 1342(a), 1362(12)&(14) (1994).

284. 33 U.S.C. § 1342(a)(3). *See* 33 U.S.C. § 1342(b) ("The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist" to meet nine specified conditions.).

285. 33 U.S.C. § 1342(b)(1)(A).

286. *See* 33 U.S.C. §1311(b)(1)(C) (1994) (requiring to be achieved "any more stringent limitation, including those necessary to meet water quality standards...established pusuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter"); 33 U.S.C. § 1313(c)(1) (1994) ("The Governor of a State...shall...hold public hearings for the purpose of reviewing applicable water quality

standards are expressly saved from preemption by section 510.[287]

Prior to *Arkansas*, the Supreme Court had decided *International Paper Co. v. Ouellette*.[288] In *Ouellette*, the Court held that downstream state common law nuisance actions were preempted by the CWA—notwithstanding the earlier preservation of state common law in *Milwaukee v. Illinois*[289]—because section 510 indicated that the act should not be construed to impair state authority to regulate only "with respect to the waters (including boundary waters) of such States."[290] This prevented downstream states from imposing liability upon sources in upstream states, because such liability would conflict with the federal and state permit programs in upstream states and because such transboundary pollution was subject to fully preemptive federal common law prior to enactment of the CWA.[291] *Ouellette* thus stated that the "affected [downstream] States occupy a subordinate position to source States in the federal regulatory program," even if more stringent *in-state* water pollution regulation was preserved under section 510.[292]

In *Arkansas*, the Court addressed section 401(a) of the CWA, which required federally issued permits and licenses to obtain a certification from the state that any discharges to navigable waters under the permit will comply with the "applicable" provisions of sections 301 and 303 of the Act.[293] Under section 401(d), the permit or license must recite the applicable limitations under section 301 and any other "appropriate" requirements of state law set forth in a certification. The recitations thereby become conditions of the permit (or license) enforceable in federal courts by EPA (or other agencies) or by citizens.[294] Under section 401(a)(2), if the federal permit or license will affect water quality in any other state, the "downstream" state must be notified, may object to the permit or license, and may request a hearing. The federal agency is then required to condition the permit or license to assure compliance with "applicable water quality requirements" of the downstream state.[295]

In *Arkansas*, EPA had issued a NPDES permit after finding that the permitted discharges would not cause a violation of Oklahoma's water quality standards, which prohibited any degradation of water quality in the upper

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standards"); 33 U.S.C. § 1313(c)(2)(A) (Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator"); 33 U.S.C. § 1313(c)(3) ("If the Administrator...determines that such standard meets the requirements of this chapter, such standard shall thereafter be the water quality standard for the applicable waters of that State. If the Administrator determines that any such...standard is not consistent with the applicable requirements of this chapter, he shall...specify the changes to meet such requirements. If such changes are not adopted by the State...the Administrator shall promulgate such standard").

287. *See* 33 U.S.C. § 1370 (1986).

288. 479 U.S. 481 (1987).

289. 451 U.S. 304 (1981).

290. 33 U.S.C. § 1370(2). In contrast, section 510(1) contained language equivalent to the Clean Air Act, preempting state authority to adopt or enforce effluent limitations or standards less stringent than federal standards. *See* 33 U.S.C. § 1370(1).

291. *See* 479 U.S. at 490–96.

292. *Id.* at 491.

293. *See* 33 U.S.C. § 1341(a)(1) (1994).

294. *See* 33 U.S.C. § 1341(d); 33 U.S.C. § 1319(a)(3) (authorizing enforcement of "violation of any permit condition or limitation implementing" among other provisions 33 U.S.C. § 1311(b)(1)(C)); 33 U.S.C. § 1365(a)(1) (authorizing citizen suits for violations of "an effluent standard or limitation under this chapter").

295. *See* 33 U.S.C. § 1341(a)(2). *See generally* Randolph L. Hill, *State Water Quality Certifications of Federal NPDES Permits*, 9 TUL. ENVTL. L.J. 11 (1995).

Illinois River. The Court upheld *EPA's* interpretation that section 401(a)(2) *must* apply when issuing section 402(a) NPDES permits and thus that EPA *must* impose downstream states' identified water quality standards to the extent such standards are applicable.[296] The Court rejected arguments that *Ouellette* had preempted application of downstream state water quality standards, because the Court was addressing *federal* authority delegated to EPA. The Court thus held that even if section 510 preserved state authority only as applied to waters of the regulating state, "that section only concerns *state* authority and does not constrain the EPA's authority to promulgate reasonable regulations requiring point sources in one State to comply with water quality standards in downstream States."[297]

The Court in *Arkansas* thus held that EPA's incorporation of the downstream state water quality standard in *the federal permit* was to be treated as *federal* substantive law, deriving from federal legislative power that had preempted constitutional common law.[298] But the Court expressly refused to address whether EPA was *required* to impose downstream state water quality standards in federal permits.[299] The Court thus did not resolve whether Congress: (1) had effectively delegated legislative power to states through EPA by requiring EPA to impose any and all downstream state water quality standards; or (2) had delegated legislative power to EPA to discretionarily impose such requirements. If Congress had provided EPA with "interpretive" discretion, EPA had "legislated" to avoid having to make more visible, case-by-case decisions to impose the state standards.[300]

Although the Court did not address the issue, EPA's regulations do not treat approval of state water quality standards as "federalizing" state law. A state's revised water quality standards will be in effect—even if disapproved by EPA—until the state revises the standard or EPA promulgates a rule superseding it.[301] But even if approval of state water quality standards had

296. *See* 503 U.S. 91, 105, 108 (1992) (citing 33 U.S.C. § 1342(a)(2), which authorizes EPA to impose other requirements deemed appropriate, and noting that 33 U.S.C. § 1311(b)(1)(C) expresses congressional intent for achievement of state water quality standards); 40 C.F.R. § 122.4(d) (1996) (prohibiting issuance of permits when imposed conditions cannot ensure compliance with applicable water quality requirements of all affected states).

297. 503 U.S. at 106–07. Unlike in *General Motors*, the Court correctly construed the relevant statutory savings provision. Section 510(1) preserved "any standard or limitation respecting discharges of pollutants" or "any requirement respecting control or abatement of pollution," except "any effluent limitation, or other limitation, effluent standard," etc. "less stringent than" equivalent federal limitations. Section 510(2) also preserved "right[s] or jurisdiction" regarding waters of such States. 33 U.S.C. § 1370. Congress thus allowed the state to impose more stringent state water quality standards and to *adopt* less stringent standards, even though the Supremacy Clause might bar their application and enforcement. The Court expressly noted that EPA had erroneously applied later-enacted state water quality standards, but held that those standards did not materially vary from the earlier approved standards. *See* 503 U.S. at 108 & n.13. *Ouellette* thus had suggested only an additional preemptive limitation on judicial jurisdiction to enforce state standards in an interstate context.

298. *See* 503 U.S. at 107–11. Because 33 U.S.C. § 1311(b)(1)(C) prohibited discharges that did not comply with state water quality standards, these provisions of the federal permit were federally enforceable without regard to whether the state water quality standards had been approved by EPA.

299. *See* 503 U.S. at 104 ("it is neither necessary nor prudent for us to resolve" whether EPA was required to impose state standards).

300. *See supra* notes 253, 275 and accompanying text.

301. 40 C.F.R. § 131.21(c) (1996). *Cf.* 40 C.F.R. § 131.5(b) (1996) (requiring EPA to approve or disapprove of state water quality standards).

created federal law, section 401(a)(2) arguably would have required EPA—upon objection from the downstream state—to assure compliance with "applicable water quality requirements," which would include more stringent, unreviewed state water quality standards.[302] EPA would thus have been required either: (1) to impose unapproved state law requirements and make them federally enforceable in NPDES permits; or (2) to dynamically and prospectively approve state law water quality standards for federal enforcement in such permits, subject to later disapproval determinations.

In *City of Albuquerque v. Browner*,[303] the court extended to Indian Tribes—pursuant to section 518 which authorizes EPA to treat Tribes as states—the ability to impose water quality standards more stringent than those recommended by EPA under section 303(b) and (c) as sufficient to meet the federal statutory standards for water quality.[304] Congress had failed to include the savings provision of section 510 in section 518.[305] The Court held that the omission of section 510 did not imply an intent to limit tribal authority. Section 510 applied only to states and thus Indian Tribes retained inherent sovereignty over waters on tribal lands that was not preempted by the 1972 Clean Water Act.[306] The Court then held that EPA may impose the more stringent tribal water quality standards in federal NPDES permits in upstream states, as was made clear in *Arkansas*.[307]

But the court in *Albuquerque* also suggested that EPA may approve upstream state water quality standards without determining whether they are more stringent than necessary to comply with federal law.

> If the proposed standards are more stringent than necessary to comply with the Clean Water Act's requirements, the EPA may approve the standards without reviewing the scientific support for the standards. Whether the more stringent standard is attainable is a matter for the EPA *to consider in its discretion*; sections 1341 and 1342 of the Clean Water Act permit the EPA and states to force technological advancement to attain higher water quality.[308]

EPA's regulations require it to approve such more-stringent state water quality standards.[309] The Court thus suggested that EPA possesses statutory "interpretive" discretion *not* to approve the more stringent tribal standards, but has "legislatively" exercised that discretion to avoid case-by-case determinations.[310] But unlike in *Union Electric* and *LEAN*, EPA's decisions would have no enforceable consequences until the federal permits were issued.[311] The court in *Albuquerque* thus avoided deciding whether EPA

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302. 33 U.S.C. § 1341(a)(2). *Cf. supra* notes 274–78 and accompanying text.
303. 97 F.3d 415 (10th Cir. 1996).
304. *See* 33 U.S.C. §§ 1313(b), (c), 1377.
305. *See id.* §§ 1370, 1377.
306. 97 F.3d at 423.
307. 97 F.3d at 423–24.
308. 97 F.3d at 426 (emphasis added).
309. *See* 40 C.F.R. §§ 131.5, 131.11(a) (1996); 56 Fed. Reg. 64,886 (1991).
310. *See supra* note 300 and accompanying text.
311. State water quality standards are not directly enforceable in federal courts, but require translation into a permit before they may be enforced. *See* 33 U.S.C. §§ 1319(a)(1), (a)(3), (b), 1365(a)(1) (1986). If EPA's approval determination were understood as an administrative preemption provision, however, the approval determinations might affect *state* abilities to impose the requirements in state permits. *See supra* note 279.

approval of state water quality standards creates federal law.[312]

In *PUD No. 1 v. Washington Department of Ecology*,[313] the Supreme Court expressly reserved judgment regarding whether section 401(d) *requires* EPA to impose "appropriate requirements of State law" more stringent than the approved or unapproved state water quality standards.[314] If section 401(d) required EPA to impose unapproved water quality standards in NPDES permits, those permit conditions might not be federally enforceable. Congress may have provided EPA with interpretive discretion to determine whether unapproved state water quality standards encompassed "any more stringent limitation" pursuant to section 301(b)(1)(C), to which federal governmental enforcement was limited.[315]

Shortly after deciding *Arkansas*, moreover, the Court decided *U.S. Department of Energy v. Ohio*.[316] Ohio had sued a federal uranium processing facility—which possessed a NPDES permit issued by EPA—under the citizen suit provision of the CWA, alleging violations of state and federal law. The Court rejected Ohio's contention that the waiver of federal sovereign immunity contained in the CWA also extended to liability for retrospective fines. The waiver provision authorized liability for "those civil penalties arising under federal law or imposed by a State or local court to enforce an order or the process of such court."[317] Under existing judicial doctrine, waivers of sovereign immunity must be clearly expressed.[318] The court found the CWA waiver was unclear as applied to fines, because the "arising under" language could mean either the narrow standard adopted for federal question jurisdiction[319] or the broader constitutional standard of Article III, section 2.[320] Although the Court recognized the constitutional dimensions of its inquiries, it did not need to and thus did not resolve whether EPA approval of state standards or state permit programs created federal law or only authorized federal agencies and citizens to sue in federal court.

The legislative history of the Clean Water Act suggests that Congress did not intend for EPA approval of state permit programs to delegate federal power to states. As a result, state-issued permits should not be considered federal permits but rather federally enforceable permits providing static

312. The court also determined that EPA's process for resolving disputes over state and tribal water quality standards was reasonable. *See* 97 F.3d at 427. But because EPA's process involved non-binding arbitration, it could not alter or preempt the state or tribal nature of the disputed standards even if EPA's interpretations were entitled to substantial deference. *See id. Cf. supra* note 248 and accompanying text.

313. 114 S. Ct. 1900 (1994).

314. *See* 33 U.S.C. § 1341(d); 114 S. Ct. at 1909; Hill, *supra* note 295, at 18–23.

315. *See* 33 U.S.C. §§ 1311(b)(1)(C), 1319(a)(1). Nevertheless, the conditions of federal licenses issued pursuant to other federal statutory authorities might be enforceable in federal courts.

316. 503 U.S. 607 (1992).

317. 33 U.S.C. § 1323(a); *See* 503 U.S. at 612–13 & nn.2–5 (also noting that the federal facilities provision waived sovereign immunity for "EPA-approved state law regulation and enforcement programs" but that the citizen suit provision of § 1365(a) waived immunity only from federal-law penalties).

318. *Seen e.g.*, United States v. Mitchell, 445 U.S. 535, 538–39 (1980).

319. 28 U.S.C. § 1331 (1994).

320. *See* 503 U.S. at 624–26 & n.16 (citing Gully v. First Nat'l Bank in Meridian, 299 U.S. 109 (1936)); *supra* notes 135–37 and accompanying text.

protective jurisdiction.[321] Federal courts of appeals have routinely held that Congress did not intend to delegate federal lawmaking powers to states by requiring EPA to approve of state permit programs.[322]

Finally, Congress provided EPA with authority to object to and thus to "veto" the issuance of state permits.[323] Although Congress may have provided an intelligible principle to limit EPA's ability to veto permits, Congress apparently vested plenary discretion in EPA *not* to veto permits. The cases hold that Congress delegated unconstrained discretion to EPA; there is "no law to apply."[324]

Although the Supreme Court has routinely upheld the "no law to apply" line of cases,[325] those cases did not directly address considerations regarding federal preemption or federal-state enforcement relations. In the permit veto context, lower federal courts have upheld application of the "no law to apply" doctrine in order to preserve the cooperative, federal-state "partnership"—even though Congress provided in effect for case-by-case administrative preemption

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321. The Conference Report for the 1972 amendments clarified that approval was not to be construed as delegation and contained language clarifying that the state program was to act "in lieu of" the federal program. *See* H.R. CONF. REP. NO. 830, 95th Cong., 1st Sess. 104 (1977). Other provisions of the CWA are congruent with this understanding. *See* 33 U.S.C. § 1342(i) (1994) (preserving federal enforcement authority despite suspension of federal permitting upon EPA approval of state permit program, which would be unnecessary were a delegation of federal power to have occurred); Mianus River Preservation Comm. v. EPA, 541 F.2d 899, 905 (1976) ("Those references [to delegation,] apparently made in passing, however, do not measure up well to more specific statements to the contrary made later in the House Report accompanying its amendments to the Senate Bill."). The "in lieu of" language was subsequently adopted for the Resource Conservation and Recovery Act (RCRA), codified at 42 U.S.C. § 6926(b) (1994), to assure that approval of state hazardous waste permit programs would not create federal law. The CWA never received a conforming amendment. Comparison to the language in RCRA thus should not be interpreted to suggest that the CWA creates federal substantive law, whereas RCRA does not.

322. *See, e.g.*, Washington v. EPA, 573 F.2d 583, 586 (9th Cir. 1978) (state's action in issuing or denying a permit cannot be deemed action of EPA because the CWA provides independent authority to EPA to veto state issued permits (citing 33 U.S.C. § 1342(d)(2))); *Mianus River*, 541 F.2d at 902–06 (recounting the legislative history and finding that approval does not delegate but simply allows states to operate permit programs under state law).

323. *See* 33 U.S.C. § 1342(d)(2) ("No permit shall issue (A) if the Administrator...[after notification of interstate effects] objects in writing to the issuance of such permit, or (B) if the Administrator...[after notification of the proposed permit] objects in writing to the issuance of such permit as being outside the guidelines and requirements of this chapter."); *id.* § 1342(d)(3) ("The administrator may, as to any permit application, waive paragraph (2) of this subsection."); *id.* § 1342(e), (f) (authorizing the Administrator to waive notice and veto rights by regulation for particular classes of point sources).

324. *See Mianus River*, 541 F.2d at 907 (finding that 33 U.S.C. § 1369(b)(1)(F) does not provide jurisdiction over the failure to veto; "The review power, as taken from the words of the statute, seems to be entirely discretionary."); District of Columbia v. Schramm, 631 F.2d 854, 861 (D.C. Cir. 1980) ("This legislative history compels the conclusion that the Agency's decision not to review or to veto a state's action on an NPDES permit application is 'committed to agency discretion by law.' 5 U.S.C. § 701(a)(2) (1976). Although section 701(a)(2) has a narrow scope, see Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402...(1971) it applies here, where 'the statutes are drawn in such broad terms that...there is no law to apply.'"); Save The Bay, Inc. v. EPA, 556 F.2d 1282, 1294 (5th Cir. 1977) (discussing the legislative history and the jurisdictional review provision; "the legislative history makes very clear that Congress intended EPA to retain discretion to decline to veto a permit even after the agency found some violation of applicable guidelines.... While the use of permissive language is of little persuasive effect itself, the shift from the original Senate version does suggest that not every permit out of compliance with the guidelines need be vetoed.").

325. *See supra* notes 253, 324.

of state regulatory powers.[326] But this misses the point. The question is not whether standards exist to determine when EPA should act but when the state-issued permit was preempted, and thus EPA's failure to veto was an "error of law." Admittedly, the outer scope of the CWA may be hard to determine, but the Court's delegation doctrine requires the Court to consider those boundaries susceptible to judicial and administrative construction when EPA *does* veto permits. Further, once the legislative standard for preemption has been specified, the Supremacy Clause rather than administrative "enforcement" causes the preemption of state law to occur.[327]

Whether Congress intended for the judiciary to compel agency action says very little about whether the state's application of law in a permit was or was not preempted. If the failure to veto a permit is construed to remove the preemption to which the permit was subject, the failure to veto rearranges federal and state supremacy. Federal administrative agency inaction thus has serious consequences that are hidden from the public and the veto power delegated by Congress is not subject to any intelligible principle. Worse yet, by adopting the "no law to apply" doctrine, the courts also participate in hiding the level and branch of government actually responsible for failing to impose federal statutory minimum requirements. At least when prosecutorial discretion is exercised, no one doubts that federal law applies and preempts conflicting state law. The result is thus a conspiracy in restraint of accountability, contrary to the Framers' federalist vision of the competition for power between the levels of government.

V. WHY THE SUPREME COURT SHOULD INVALIDATE COOPERATIVE FEDERALISM STATUTES THAT EFFECTIVELY DELEGATE LEGISLATIVE POWER TO STATES AND WHY THE COURT SHOULD REQUIRE CONGRESS TO JUSTIFY RELYING ON STATES TO IMPLEMENT FEDERAL POLICIES

A. The Supreme Court Should Prohibit Congress from Delegating Legislative Power to States

The previous analysis demonstrated how the Constitution does not clearly prohibit Congress from delegating its legislative power to states. Although the

326. *See Save the Bay*, 556 F.2d at 1282 ("While these guidelines and regulations could provide 'law to apply' in reviewing a decision not to veto a permit, the legislative history makes very clear that Congress intended EPA to retain discretion to decline to veto a permit even after the agency found some violations of applicable guidelines.... [W]e conclude that Congress intended to allow the administrator to consider the significance of any guideline violations.... To conclude otherwise would *contravene the spirit of the federal-state partnership* created by the Amendments *and establish an undue incentive for the EPA to waive review* of proposed permits." (emphasis added)).

327. *See supra* notes 183, 297 and accompanying text. *But cf. Save the Bay*, 556 F.2d at 1290 ("Finally, we must express some skepticism whether a state authority's unsatisfactory handling of a single permit would ever warrant EPA revocation of NPDES authority, much less judicial reversal of a decision not to revoke. Certainly only the most egregious flouting of federal requirements in the context of an individual permit could justify that sanction. A complaint relating to the treatment of a single permit application therefore seems more appropriately addressed to EPA's veto power over individual permits.").

Supreme Court's doctrine would nominally prohibit legislative delegations to states, the Supreme Court has upheld effective legislative delegations to states in order to conserve legislative resources and to promote local regulatory autonomy. Similarly, the Court has effectively allowed Congress to delegate legislative power to or through federal agencies in order to conserve federal administrative resources and to promote cooperative state and federal administrative relations.

The Court should not allow Congress and the President to cooperate with states in this fashion for three reasons. First, imposing limits on delegation of unconstrained policymaking discretion is more consistent with the Framer's intentions. Second, Congress does not need to delegate legislative power to states in order to conserve legislative resources. Third, by delegating legislative power to states, Congress avoids being held to account for specifying the limits of policies that may be enforced by states and imposed through federal judicial power.[328]

Legislative delegation generally and legislative delegation to states in particular may be thought to dishonor the constitutional vision of the Framers. Many of the Framers understood legislation as the specification of values, a task from which administrators and adjudicators were disqualified. But even for those who did not intend clearly separated powers, all of the Framers (as well as the early Justices of the Supreme Court) contemplated that the legislative, executive, and judicial powers were distinct at the *most* general level of policy specification.[329]

Nevertheless, in order to return to the historic conception of *more clearly* distinct and separated powers, the Supreme Court could not uphold the modern administrative state or modern federalism relations. Other commentators have persuasively argued that: (1) delegation is a practical necessity in our modern technological world;[330] or (2) Congress may be held to

328. *See* Schoenbrod, *supra* note 116, at 1238 & nn.87–88 (arguing that judicial invalidation of delegated policymaking discretion furthers legislative accountability and improves the quality of judicial review) (citing Arizona v. California, 373 U.S. 546, 626 (1963)); *id.* at 1229–48, 1283–89 (discussing how the Supreme Court has analyzed more stringently delegations that affect "fundamental" liberty rights than those that affect economic property rights; arguing that there is no principled basis to apply a more stringent standard of delegation to liberty than to property interests since both are "personal"); *id.* at 1287 (extending to the delegation context suggestions in United States v. Carolene Prods. Co, 304 U.S. 144, 152 n.4 (1938), for more substantial "rational basis" scrutiny of legislation that violates a specific prohibition of the Constitution, impedes the accountability of federal legislators or disfavors groups isolated from the political process).

329. *See supra* notes 147–48, 155, 168–69, 173, 222 and accompanying text. *Cf.* Loving v. United States, 116 S. Ct. 1737, 1743 (1996) ("Although the separation power 'd[oes] not mean that these departments ought to have no partial agency in, or no control over the acts of each other,'...it remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another." (quoting THE FEDERALIST NO. 47, at 325–26 (James Madison) (J. Cooke ed., 1961)) (emphasis added)).

330. *See* Rubin, *supra* note 107, at 395–96 ("At present, however, drafting precise legislation would be a sheer impossibility, given the vast size of the modern state and the highly technical nature of its operations. No legislature could possibly have time to enact more than a fraction of the statutes that it favored if it were required to draft the rules that were ultimately to be applied. Those who demand such rules are really registering their dislike of the administrative state and of the legislative processes that has spawned it."); *Loving*, 116 S. Ct. at 1744 ("To burden Congress with all federal rulemaking would divert that branch from more pressing issues, and defeat the Framers' design of a workable National Government.").

adequate account for adopting highly general policies.[331] For that reason, I do not advocate wholesale abandonment of the Court's intelligible principle standard, only a stringent and consistent application of the standard.

Once we have agreed that the Court may permit Congress to provide broad authority to federal agencies to specify policies, however, the functional imperative for delegating "legislative" power beyond the President and federal administrative agencies goes away. Congress may enact the laws and their sanctions within the broadest possible parameters and may authorize federal agencies to supply the rules and federal courts to enforce them.[332] Delegation of legislative power to states beyond those broad confines thus can be justified only on the debatable normative claim that state regulation is better, more efficient, or more accountable than federal regulation. For reasons discussed below, these normative claims cannot support the tremendous breadth of the delegation of power achieved and the consequent decrease in accountability and exclusion of citizen interests that results.

Whether or not the normative claims advanced for delegation to states are valid, the Supreme Court should police the border precisely because doing so assures that the normative issues are resolved by federal legislative officials and not by federal administrative officials, state officials, and federal courts. By preventing Congress from delegating legislative power to states, the Court requires Congress to put up or shut up. Either the concern is serious enough to warrant federal regulation—and thus to be held accountable for imposing policy—or it is not.[333] If not, Congress can simply assure that state law is not preempted and stand aside.

By enforcing limits on the delegation of legislative power, the Supreme Court places political decisions regarding value and the appropriate level of government to regulate back into the legislative arena. The Court thus avoids concern that the unaccountable, antimajoritarian judicial branch is dictating policy that can only be overcome by a constitutional amendment, against which the deck already is stacked.[334] By enforcing limits on delegation to states, the

331. *See* Rubin, *supra* note 107, at 394 (requiring Congress to fully specify the rules is counterproductive, because Congress may better control discretion through standards addressed to implementing agencies; Congress may be more able to control agency political decisionmaking than its own politics, and may better avoid engendering political battles); *id.* at 395 (full specification of policies is not cricital to assuring political accountability of legislators, because the public can vote based on general alignments). *Cf.* Dwyer, *supra* note 22, at 282–83 (federal agencies may be more able than Congress rationally to resolve highly polarized policy disputes). *But see supra* note 234. Conversely, by requiring Congress to provide greater legislative specificity, the Court may counterproductively prevent Congress from altering policies to respond to unforeseen factual developments and prevent administrative agencies from tailoring requirements to specific contexts. *See* Rubin, *supra* note 107, at 414 & n.144, 415. *See generally* Colin Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983).

332. *See supra* notes 233–37 and accompanying text.

333. *See supra* notes 48, 57 and accompanying text. *Cf.* Weinberg, *supra* note 27, at 844–45 ("The traditional view is that it is the courts that protect minority, or unpopular, interests from excesses of majority will. The antimajoritarian feature of courts is part of their reason for being. I would argue further that courts also advance the current majority will against the will of vanished majorities or against the will of narrow, passionate, well funded minorities. Courts sit, in part, to make legislation less arbitrary, unfair, or partial.... The inaction of Congress in the face of so much proposed legislation says very little about national policy, save that powerful minorities are likely to be aligned on each side.").

334. *See supra* notes 79–80, 121 and accompanying text. *Cf. supra* note 90. Of course, the decision to enforce delegation limits also is political, but at least the Court can require

Court enhances the accountability of federal legislators who shirk from being forced to acknowledge to which level of government they are truly loyal.[335]

B. The Supreme Court Should Prohibit Congress from Effectively Delegating Legislative Power to States Through Federal Agencies or to Federal Agencies

Effective delegation occurs because Congress requires or allows federal agencies to tie federal approval of more stringent state laws to federal enforcement. Whether or not federal enforcement of state policies that federal agencies themselves could impose is a good idea, by definition, Congress has expressed no intelligible limit on state or federal agency policymaking discretion in regard to more stringent state laws. The only reason that Congress makes more stringent state laws federally enforceable is that Congress does not trust the states adequately to enforce their own laws and is unwilling or unable itself to impose those laws. If Congress trusted the states to enforce approved programs that met the federal minimum standards, there would be no need to create federal causes of action to enforce *any* state law requirements.

The best thing that can be said about federal approval of more stringent state laws is that Congress avoids forcing federal administrators and states to resolve interjurisdictional political conflicts, at least in advance of enforcement. As a result, both levels of government minimize the governmental and social costs of dual regulation and of dual permitting.[336] But this is precisely the reason why such approval should be found unconstitutional. By failing to resolve in advance the political disputes over relative stringency, federal legislators, federal administrators, federal judges, and state officials avoid having to identify who is responsible for *imposing* standards or controls. Even if the costs of such determinations are ultimately paid during enforcement, those judgments will be limited to the particular facts and will not tell other citizens which level of government is responsible for forcing *them* to comply. Such citizens thus face "debilitating" normative uncertainty when deciding

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Congress—which initiates the interbranch constitutional dispute—to explain why the delegation is consistent with the Framers' intent or, if not, why the normative considerations warrant the delegation. *Cf. supra* note 97 and accompanying text.

335. *See supra* notes 21, 88–89 and accompanying text.

336. Similarly, by making withdrawal of state programs discretionary, Congress avoids inefficient shifting of federal and state regulatory programs when states fail fully to implement federal minimum requirements. But these costs can be further limited by avoiding federal regulation entirely or by wholly preempting state regulation. *See supra* notes 47, 60, 327 and accompanying text. Further, the failure to resolve the stringency concerns also may inefficiently breed litigation regarding whether the federal government of citizens may avail themselves of federal causes of action to enforce the more stringent state laws. *Cf.* Dague v. City of Burlington, 935 F.2d 1343, 1352–53 (2d Cir. 1991) (federal approval of state hazardous waste programs does not create federal law and thus the citizen suit provision of 42 U.S.C. § 6942 is not available to enforce approved state requirements). *See* Atlantic States Legal Found. v. Eastman Kodak, 12 F.3d 353 (2d Cir. 1993) (finding "broader state schemes...unenforceable" under the federal Clean Water Act's citizen suit provisions, avoiding the need to resolve whether an approved state's permit contained a more stringent limitation than required by federal law); United States v. Recticel Foam Corp., 858 F. Supp. 726, 742–43 (1993) (refusing to decide whether the federal government may enforce the more-stringent requirements of approved state hazardous waste programs). *Cf.* WILLIAM A. SULLIVAN, EPA ENFORCEMENT COUNSEL, EPA ENFORCEMENT OF AUTHORIZED STATE HAZARDOUS WASTE LAWS AND REGULATIONS (March 15, 1982) (distinguishing "more-stringent" from "broader-in-scope" regulations; EPA claims it may enforce the former).

which officials may enforce laws and whom to lobby to change them.[337]

The conspiracy of federal and state officials to avoid the structural accountability constraints in the Constitution is abhorrent to the Framers' vision of federalism. It would also be inconsistent with the Supreme Court's doctrine but for judicial solicitude for state regulatory prerogatives.[338] But in the context of interstate externalities, the Court has been willing: (1) to prevent the citizens of different states from imposing their values on each other; and (2) to allow federal officials to impose the values of the citizens of particular states on other states without exercising state-specific policymaking discretion.[339] If the Court were truly concerned about protecting states' rights, it would at least require: (1) Congress to articulate causal standards for rearranging effective jurisdictional boundaries; and (2) the President and federal administrative officials to justify discretionary judgments having that effect. The Court would thus hold federal officials to political account for the rules that they impose to preempt state sovereignty.[340]

Further, Congress can minimize the political conflicts over relative stringency by its default choice of the form of state implementation.[341] By delegating power to federal agencies and authorizing (but not requiring) subdelegation, Congress *by definition* limits state power to trigger federal enforcement to the intelligible principle articulated. Federal agencies are then required to develop standards for implementation, which provide more specific benchmarks to determine whether state standards are more stringent than necessary or are insufficient to implement federal policies. The President then becomes more accountable for the discretionary judgments to rely upon states to faithfully execute the laws.[342] By authorizing but not requiring subdelegation, Congress assures *functional* fidelity to the unitary executive constraints that the Framers imposed.[343] But Congress can only do so by depriving states initially of their traditional regulatory prerogatives. As a result, it is necessary to return to the normative arguments for vesting administrative power in states.

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337. *Cf. supra* note 69.

338. *See supra* notes 241–327 and accompanying text.

339. *See supra* notes 288–92, 297 and accompanying text.

340. *See supra* note 30 and accompanying text. *Cf.* Daniel P. Selmi, *Conformity, Cooperation, and Clean Air: Implementation Theory and Its Lessons for Air Quality Regulation*, 1 ANN. SURV. AM. L. 149, 165, 166 & n.85, 173, 183 (1990) (describing costly intergovernmental bargaining that undermines achievement of federal goals; noting that the nature of statutory commands is the most significant factor for assuring attainment of those goals; and recommending various measures to improve shared implementation of federal policy).

341. *See supra* notes 62–63 and accompanying text.

342. *Compare supra* notes 257–68 and accompanying text *with supra* notes 269–81 and accompanying text. Further, the subdelegation decisions will: (1) be less coercive of states, because federal funds will be tied to the scope of federal substantive requirements; (2) be based on determinations coextensive with the evaluations of relative competency; and (3) provide citizens with greater abilities to determine when Congress has failed to obligate sufficient funds or has otherwised prevented full implementation of its policies. *See supra* notes 3–5, 22, 37, 61–62 and accompanying text.

343. *See supra* notes 251–56 and accompanying text.

C. The Supreme Court Should Require Congress and the President to More Fully Justify Relying upon States To Implement Federal Policies

The Supreme Court has allowed Congress to delegate broad administrative policymaking powers to federal agencies only by abandoning the Framers' conception that *some* powers are exclusively legislative. Thus, the Court cannot claim that the Constitution *requires* it to allow Congress to delegate to states the unconstrained power to supply federally enforceable laws. If the Court intends to reject history, it should at least acknowledge that fact and adopt *good* normative reasons for its policy decisions.[344]

Congressional reliance on state implementation, moreover, is justified only on the debatable belief that state regulation or implementation is better, more efficient, or more accountable than regulation by the federal bureaucracy.[345] Because these normative claims will occasionally be justified, Congress should sometimes be allowed to authorize states to implement federal policies. By allowing Congress to rely on states when Congress has carefully articulated the normative justifications, the Supreme Court will promote better political decisionmaking.[346]

But when Congress relies on states to implement federal policies, Congress avoids political accountability for the policies proximately imposed and enforced by state officials. Out-of-state citizens do not vote for those officials. State implementation of federal policies thus reduces accountability and arguably violates rights of federal citizens to participate in the policymaking processes that create and enforce the rules that affect them.

Last year, in a case of seminal importance, the Supreme Court decided that the right to have policy proximately specified by officials who may be held to account either is a fundamental political right or is a nonfundamental right that is entitled to protection under the Constitution.[347] In *Romer v. Evans*,[348]

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344. *See supra* note 97.

345. *See supra* notes 36–60 and accompanying text. *Cf.* Goldberg–Ambrose, *supra* note 132, at 614 (to the extent that the objection to protective jurisdiction is that it makes state officials accountable for federally mandated results, it should be less objectionable as the federal responsibility becomes more apparent).

346. *See supra* notes 61, 328 and accompanying text.

347. It makes little difference now whether the rights are recognized only by the Ninth Amendment, because the Fifth Amendment Due Process Clause will now afford "rational basis" protection for "nonfundamental" equal protection violations. *See supra* notes 110–11 and accompanying text; Bolling v. Sharpe, 347 U.S. 497 (1954) (applying to the federal government through the Fifth Amendment the Fourteenth Amendment Equal Protection protections established in Brown v. Board of Educ., 347 U.S. 483 (1984)). *Cf.* Duncan v. Louisiana, 391 U.S. 145, 147 (1968) (the Bill of Rights generally applies to the states through the Fourteenth Amendment Due Process Clause); Charles L. Black, Jr., *"One Nation Indivisible": Unnamed Human Rights In the States*, 65 ST. JOHN'S L. REV. 17, 25–26 (1992) (the Ninth Amendment commits the federal judiciary to protect human rights and the Declaration of Independence was the "obvious precursor" to the Ninth Amendment); Norman G. Redlich, *Are There "Certain Rights...Retained by the People"?*, 37 N.Y.U. L. REV. 787, 787–95 (1962) (the point of resort to the Ninth Amendment is to provide a more defensible, textual warrant for open-ended provision of rights); Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1, 3 (1988) (Reluctance to use the Ninth Amendment results from "certain views of constitutional structure and a deep-seated fear of letting judges base their decisions on unenumerated rights—a fear that stems in large part from a modern philosophical skepticism about rights."). *But cf.* McAffee, *supra* note 111, at 89 n.134 (if fundamental rights are hard to justify under substantive due process, then it should not make it easier to supply such rights

the dissent had argued that citizens may be excluded from seeking political recognition of their interests in "subordinate" governmental processes, as a result of preemptive substantive rules established by "superior" legislative processes in which citizens exercise the right to vote.[349] The dissent further argued that citizens were not denied the right to vote simply because a preemptive substantive policy was established, whether or not the right to vote is now considered fundamental.[350] A majority of the Court, however, rejected these arguments and required that the breadth of any *effective* exclusion from political processes be justified by the normative grounds for exclusion.[351]

Thus, the Constitution now protects citizens' rights not to be wholly excluded from political processes that proximately specify the legal rules for conduct. As applied to delegations to states, Congress must provide substantial normative justifications for *effectively* excluding out-of-state citizens from federal policy formation and implementation.[352] Absent delegatory legislation, moreover, out-of-state citizens possess rights to have the federal officials protect their interests from in-state political processes.[353] Unlike the

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under the Ninth Amendment).

348. 116 S. Ct. 1620 (1996). *Romer* addressed a state constitutional amendment limiting *all* state political bodies from adopting anti-discrimination laws of *specific* application to the class of individuals of homosexual or bisexual "orientation," imprecisely defined on the basis of status. *See id.* at 1623–25; Amar, *supra* note 116, at 204–07.

349. *See* 116 S. Ct. at 1631–32 (Scalia, J., dissenting) (characterizing the majority's holding as "electoral-procedural discrimination"; arguing that "a law that is valid in its substance is automatically valid in its level of enactment"; and adopting a greater includes the lesser approach to justify that claim: "If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely disfavoring homosexual conduct.... And *a fortiori* it is constitutionally permissible for a state to adopt a provision *not even* disfavoring...conduct, but merely prohibiting *all levels of state government* from bestowing *special protections* upon...conduct.") (emphasis in original and added).

350. *See id.* at 1630, 1635, 1636 & n.3 (Scalia, J., dissenting) (noting that the right to vote was not considered fundamental and that the right to vote has been denied to polygamists and to felons, but claiming that even if it were fundamental, this case did not deprive anyone of the right to vote (citing Davis v. Beason, 133 U.S. 333 (1890); Richardson v. Ramirez, 418 U.S. 24 (1974); and Dunn v. Blumstein, 405 U.S. 330 (1972))).

351. *See id.* at 1625–1627 ("Sweeping and comprehensive is the change in legal status effected by this law.... Homosexuals are forbidden the safeguards [of legal rules] that others enjoy or may seek without constraint.... This is so no matter how local or discrete the harm, no matter how public and widespread the injury.... [I]ts sheer breadth is so discontinuous with the reasons offerred for it that the amendment seems inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests."). *See also* Hills, *supra* note 116, at 250–54 (*Romer* identified as the fundamental requirement of equal protection justification of the breadth of legislation imposing disfavored treatment).

352. *Cf.* 116 S. Ct. at 1626 ("[The Amendment at issue] applies to policies as well as ordinary legislation.... At some point in the systematic administration of these laws, an official must determine whether homosexuality is an arbitrary and thus forbidden basis for decision. Yet a decision to that effect would itself amount to a policy prohibiting discrimination.... If this consequence follows...it would compound the constitutional difficulties the law creates.").

353. Congress may leave policymaking to state political processes that exclude out-of-state citizens when Congress fails to enact legislation. But in that case, state political processes will not trigger *federal judicial power* to enforce state policies, except in diversity and other circumstances where the Constitution already protects out-of-state citizens from arbitrary or hostile state *exercises* of judicial power. *Cf.* Weinberg, *supra* note 27, at 829 ("As Justice Black made clear in *Pope & Talbot, Inc. v. Hawn*, [346 U.S. 406, 411 (1953),] *Erie* cannot be used 'to bring about the same kind of unfairness it was designed to end. Once again, the substantial rights of the parties would depend on which courthouse...a lawyer might guess to be in the best interests of his client.'"). Further, absent such legislation, the Supreme Court may protect out-of-state citizens interests from state imposed harms when the harms become significant at a

amendment at issue in *Romer*, which excluded only political recognition of a group of citizen's interests, delegation excludes the citizens themselves from effectively exercising their "right" to vote.

The history of constitutional amendment, moreover, demonstrates that this political right is emerging as protectable or fundamental. In the beginning, the Constitution was at war with itself. Notwithstanding its pretentions to representing "We the People,"[354] the Constitution was based on the political exclusion of most of the citizenry. The first structural exclusion was based on the status of the individual.[355] The second was based on the location of residence.[356] The status exclusions were based on overt prejudice and have

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general level. *See supra* note 128. *Cf.* Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907) (the Supreme Court possess original jurisdiction to determine equitable rules for transboundary pollution; states have a constitutional entitlement to an injunction to protect their territorial environments based on their "quasi-sovereign" interests and as the quid pro quo for abandoning warfare by entering the Union; "it is a fair and reasonable demand on the part of a *sovereign* that the air over its territory should not be polluted on a *great* scale") (emphasis added); Revesz, *supra* note 30, at 2409 (analyzing the policies of the Supreme Court's interstate commerce clause jurisprudence in order to suggest legislative rules to govern externalities; noting that some of the Court's decisions would prohibit externalities based on discrimination against upwind states without regard to marginal costs and that other decisions would "go even further by granting the injunction even if the tax levied on units of environmental degradation was higher for upwind sources than for downwind sources"). Delegating to states, moreover, *effectively* prevents out-of-state citizens from forcing federal legislative and administrative officials to protect their interests in *specific* cases, because the Eleventh Amendment now prevents such citizens from suing states for violating federal legislative rights. *See supra* notes 72–81 and accompanying text. *Cf. Georgia*, 206 U.S. at 240 (Harlan, J., concurring) ("Georgia is entitled to the relief sought, not because it is a state, but because it is a *party* which has estblished its right to such relief by proof. The opinion...proceeds largely upon the ground that this court...[in] equity, owes some special duty to Georgia as a state...while, under the same facts, it would not owe any such duty to the plaintiff if an individual."); Sarnoff, *supra* note 48 (the significance threshold for federal court protection of out-of-state citizens' interests is based on liberal political commitments to value pluralism and theoretically justified only based on political beliefs).

354. U.S. CONST. preamble.

355. The original Constitution contained the "Great Compromise," providing for proportionate popular representation in the House of Representatives by excluding from the count of "free people" and indentured servants—then understood to exclude many identifiable classes of people, including all women—"Indians not taxed [and] three fifths of all other Persons." U.S. CONST. art. I, § 2, cl. 3 (prior to repeal by amend. XIV, § 2). *See* Amar, *supra* note 73, at 1463 nn. 63–66 ("Many persons found themselves excluded from 'the People' by a definitional fact that seriously eroded the moral force of the Federalist vision of popular sovereignty.") These same classes of *state* citizens were excluded from state political processes, which may not be subject to regulation by Congress. *See* U.S. CONST. art. I, § 4, cl. 1; *supra* note 82. They therefore did not participate in the conventions that created the Constitution and in the amendment processes that protected their political rights, which process is controlled by federal legislators and by states. *See* U.S. CONST. art. V ("The Congress...shall propose Amendments...or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which [shall become operative] when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress"). Given the political exclusion of most of the citizenry and the supermajoritarian barriers to amendment, what normative principle is advanced by resort to the Framers' intentions to govern interpretation? *See supra* notes 90, 97.

356. *See* U.S. CONST. art. I, § 2, cl. 1; § 3, cl. 2 (specifying the rules for selecting Representatives and Senators, and limiting to citizens of states the ability to elect federal legislators); Samuel B. Johnson, *The District of Columbia and the Republican Form of Government Guarantee*, 37 HOW. L.J. 333, 335 & n.10, 347–51 (1994) (discussing residents of the District of Columbia and federal territories, who are subject to exclusive federal power under U.S. CONST. art. I, § 8, cl. 17 and art. IV, § 3, cl. 2; noting that these federal citizens are

largely been removed by constitutional amendment.[357] In contrast, the locational exclusion was the unintended byproduct of deliberate and careful compromise that has yet to be altered.[358] Even if normative justifications might be advanced to continue to exclude the political voices of citizens of *no* state from national political processes,[359] federal legislators should nonetheless be loyal to state citizens who are their constituents and thus owe a duty to protect them *from the citizens of other states* when determining the level of government to regulate.

To the extent that prejudice animated historic exclusion of individuals from political processes, the Equal Protection Clause will no longer countenance such exclusion.[360] To the extent that delegation to states is based on hostility to legally recognizing out-of-state citizens' ideological values or on the overt intent to harm those citizens,[361] the Equal Protection Clause may now be

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excluded from federal legislative processes, even though the Guarantee Clause, U.S. CONST. art. IV, § 4, requiring a "Republican Form of Government" has been inconsistently applied to them (citing Texas v. White, 74 U.S. (7 Wall.) 700 (1869))).

357. *See* U.S. CONST. amends. XV, XIX, XIV, XXVI.

358. The composition and election of federal legislators was the product of careful compromise addressed to the balance of power between states and the federal government. *Cf.* Amar, *supra* note 66, at 250 n.146 ("Under the Constitution as originally adopted, state legislatures would directly elect the Senate and indirectly elect the President by choosing electors."). At the time the Constitution was adopted, there were no federal lands and the District of Columbia was an uninhabited swamp. Only by land acquisition, migration, and colonization of Indian tribal lands were federal citizens excluded from federal political processes on the basis of geography.

359. *See* Neuman, *supra* note 36, at 355–56 (the text of the Constitution denies special Equal Protection status for laws treating the District of Columbia differently from the rest of the country; normative values of federalism are protected by such non-uniform federal policies: "in most situations, congressional discrimination against the District is justified because of its contribution to self-government in the states"). *Cf.* Amar, *supra* note 73, at 1457 & n.137 (proportionate popular representation was required in the House of Representatives, because the Constitution gave Congress the power to tax and to regulate private conduct). *But see* Johnson, *supra* note 356, at 337 & n.17 ("no taxation without representation" was not required for all federal citizens (citing Heald v. District of Columbia, 259 U.S. 114 (1922))). The federal judiciary could expand the equal protection doctrine, particularly since the Fifth Amendment was enacted after representation was initially established and the subsequent amendments did not clearly intend to impliedly repeal application of the Fifth Amendment to citizens or to legislative processes that were not the focus of Amendments to expand representation. *Cf.* Baker & Dinkin, *supra* note 38 (discussing how the Court should interpret various Amendments to restructure the Senate to provide for majoritarian representation).

360. *See Romer*, 116 S. Ct. at 1628 ("'[I]f the constitutional conception of equal protection of the laws' means anything, it must at the very least mean that a bare...desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.' Department of Agric. v. Moreno, 413 U.S. 528, 534 (1973). Even laws enacted for broad and ambitious purposes often can be explained by reference to legitimate public policies which justify the *incidental* disadvantages they impose on certain persons." (emphasis added)). *Cf. id.* (arguing that the exclusion of felons from voting "is not implicated by our decision and is unexceptionable"). *But see id.* at 1633, 1637 (Scalia, J., dissenting) ("No principle set forth in the Constitution, nor even imagined by this Court in the past 200 years, prohibits what Colorado has done.... I had thought that one could consider certain conduct reprehensible.... Surely that is the only sort of "animus" at issue here: moral disapproval of...conduct.... I would not myself indulge in such official praise for [alternative conduct] because I think it no business of the courts (as opposed to the political branches) to take sides in this cultural war."). *See generally* Toni M. Massaro, *Gay Rights, Thick and Thin*, 47 STAN. L. REV. 45, 48–108 (1996) (tracing "thick" and "thin" doctrinal treatment of gay rights and suggesting that thin "calls to reason" and "calls to empathy" receive greater judicial recognition).

361. *See supra* note 30 and accompanying text; Esty, *supra* note 20, at 597 ("[I]n environmental policymaking, the sphere of affected interests may expand or contract depending

understood to prohibit such hostility and intent from receiving legal sanction, absent independent justifications coextensive with the "incidental" breadth of political exclusion.

Of course, whether the judiciary enforces or refuses to enforce this political right, it necessarily takes a stand on political issues of seminal concern regarding the power relations of our federal system.[362] But if the Court remands to the Congress for better justification of state implementation, the Court at least allows Congress either to withdraw federal regulation or to demonstrate compelling reasons for relying on states.[363]

To begin with, the Court could preserve its legitimacy by invalidating legislation that is *clearly* unjustified in light of the importance of the out-of-state interests that are excluded. Thus, when Congress regulates to protect discernibly federal interests, like visibility in the Grand Canyon, the justifications that will need to be advanced by Congress or the President to authorize administrative delegations or subdelegations of administrative powers to states could be substantial.[364] Conversely, the Court should provide Congress or the President with greater flexibility to rely upon states when regulating to assure that minimum national moral or environmental standards are attained within a jurisdiction, at least to the extent that *significant* interstate positive or negative externalities are not the cause of concern.[365] The choice of a threshold

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on an evolving definition of community.... In attempting to maximize environmental social welfare, we should be careful not to conclude too hastily that we know the precise boundaries of the appropriate community and thus whose costs and benefits should 'count.'"); *id.* at 591 (at the international level, cooperation may require that external harm occur in rough proportion; otherwise, the "tendency of the strong to advance its own self interest may override its commitment to other norms such as the control of transboundary environmental harms.").

362. *See* Weinberg, *supra* note 27, at 839 ("[I]t is not possible for a court to adjudicate legal controversies without taking a position. When a court refuses to interpret...the court can generate only disrespect for statutory law.... When a court refuses to rule...the court does not always avoid striking a policy balance. It may instead create a rule of decision, striking the very policy balance it sought to evade.").

363. *Cf. id.* at 840 ("There is a similar dysfunction when the Supreme Court holds that federal legislation has pre-empted federal, but not state, common law, as it has done in the case of interstate pollution. As Justice Blackmun pointed out, dissenting in *Milwaukee v. Illinois*, it comports ill with our positivism to hold that Congress intends the state—but not the nation—to vindicate a policy concern *we know is a national one precisely because Congress has dealt with it.* We may see additional dysfunction when, at a second stage of analysis, state law is chosen to deal with a federal question on the ground that state law better advances national policy.").

364. *See* Esty, *supra* note 20 at 595, 639 (the Grand Canyon is typically cited as an example of a resource for which positive externalities are significant and thus where external preferences should be recognized); 42 U.S.C. 7491A(a)(1), (4) (1994) (declaring a national goal to protect and remove impairment of visibility in national parks and requiring EPA to promulgate regulations to assure "reasonable further progress" toward achieving this goal). *But see* 42 U.S.C. § 7461 (1994) (relying initially on states through implementation plans to effectuate this and other goals to prevent significant deterioriation of air quality).

365. *See supra* note 353. *Cf.* Esty, *supra* note 20, at 578 ("[E]ach separate regulatory problem presents a unique set of technical and analytical challenges, potential 'structural' or jurisdictional mismatches, questions of political identity, and public choice concerns."). To the extent that federal legislation directly addresses externalities, however, reliance on state implementation may be less appropriate. *See* 42 U.S.C. §§ 7410(a)(2)(D), (k)(5), 7506A(b) (1994) (presumptively relying upon states to control interstate externalities in state implementation plans; providing for EPA to "call" plans to implement approved recommendations by a federally established interstate pollution transport commission, without specifying whether the decisions of the commissions, absent consent, creates federal law); EPA, *Interstate Pollution Abatement: Proposed Determination*, 49 Fed. Reg. 34,851–34,859 (1984) (out-of-state sources are considered responsible for in-state pollution levels exceeding national

and the decision that the threshold has been crossed will remain political judgments by the Court. Only if the nation's citizenry itself shares the underlying social values will the Court avoid having to confront a choice to be loyal to one or the other level of government.[366]

CONCLUSION

The debates over the nature of legislative power and whether federal powers may be delegated to states run right through our constitutional history and doctrine. Dismantling delegations to states will unravel the skein of policies at the core of our jurisprudence. The normative arguments for the Supreme Court to do so remain salient, at least when the breadth of power delegated to states exceeds the justifications for reliance on states. For the doctrinal and normative reasons developed in this Article, the Court should begin to police the intergovernmental border to better protect citizen liberty from delegations to states.

By clearly demarking the limits of federal and state policymaking discretion, the Court will better assure accountable governance. The Court is already committed to the greater effort of marking the borders of federal and state power.[367] The work required to police delegations—the exercise of the powers the Court has found to exist—would seem the less overtly political task. The Court itself seems poised to reinvigorate the delegation doctrine.[368] The unconstrained policymaking discretion conveyed by cooperative federalism statutes is the logical place to start.[369]

Nonetheless, the Court is unlikely to take the lead in what are ultimately political disputes over values and the best way to secure good policies.[370] But

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minimum standards only when such pollution is a "significant contribution" to the exceedance, i.e., a non-de minimis contribution; listing factors that EPA will consider to find significance). *But cf.* Revesz, *supra* note 30, at 2362–74 (discussing EPA's failures to implement the externality provisions).

366. *See* Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1825–87 (1995) (noting that the federalism concerns in *Lopez* are and should be tied to developing conceptions of personhood, family, and community citizenship).

367. *See supra* notes 6–11, 74–88 and accompanying text.

368. The Court has recently suggested that it will police overbroad delegations if the delegate does not possess independent regulatory authority vested by the Constitution and that it will protect the integrity of the core functions of the branches. *See* Loving v. United States, 116 S. Ct. 1737, 1750 (1996) ("Had the delegation here called for the exercise of judgment or discretion that lies beyond the traditional authority of the President, Loving's last argument that Congress failed to provide guiding principles to the President might have more weight."); *id.* at 1751 (Stevens, J., concurring) ("As a consequence of my conclusion that the 'service connection requirement has been satisfied here [and thus that the President exercised independent constitutional authority], I join...in the Court's analysis of the delegation issue."); *id.* at 1752 (Scalia, J., concurring) ("Legislative power is nondelegable. Congress can no more 'delegate' some of its Article I power to the Executive than it could 'delegate' some to one of its committees."); *id.* at 1753 (Thomas, J., concurring) ("I take no position with respect to Congress' power to delegate authority or otherwise alter the separation of powers outside the military context.").

369. All it takes is for the Court to put the pieces together by recognizing that the Constitution does not place in *states* any power to specify *federal* (as distinct from sovereign citizen) legislative or executive policies.

370. *See* Eskridge & Frickey, *supra* note 81, at 77 ("[T]he Court is too timid in reviewing national policies on constitutional grounds, especially where core values of feedom and citizenship are involved and the political branches have not adequately addressed or balanced these values.").

even if the Court is unwilling to decrease its institutional capital by routinely invalidating delegations of federal power to states, the Court could play an important "representation reinforcing" role by adopting a "state-delegation doctrine" that explicitly ties the degree of exclusion to the degree of justification.[371] Until the Court returns to its constitutional role of consistently protecting liberty from tyranny, however, it will remain the job of the nation's citizenry to elect federal officials who will adopt better policies in order to protect their constituents from the citizens of other states and who will appoint a more responsive Supreme Court if the current one is unwilling to do the job.

371. *See* ELY, *supra* note 110, at 87, 116–25; Peter L. Strauss, *Legislative Theory and the Rule of Law: Some Comments on Rubin*, 89 COLUM. L. REV. 427, 443 (1989) ("Even if we must acknowledge at the outset that the agency will often succeed in justifying its conduct [as within delegated power]...the stance won—that the agency must be prepared to justify its behavior to outside assessors in accordance with principles of regularity and legality—is no trivial matter. The very fact of confidence in the possibility of supervision, and the winning of behavior from government that acknowledges its appropriateness and inevitability, lies at the heart of a commitment to the rule of law.").