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LISTENING TO THE “SOUNDS OF SOVEREIGNTY” BUT MISSING THE BEAT: DOES THE NEW FEDERALISM REALLY MATTER?

RONALD J. KROTOSZYNSKI, JR.*

“Meet the new boss, same as the old boss.”¹

INTRODUCTION

Professor Yoo offers a compelling case for the proposition that the Supreme Court is back in the business of reviewing federal legislation for consistency with the mandates of the Tenth Amendment.² He also offers sound reasons for rejecting—or at least really distrusting—the premises that undergird the “political safeguards” theory of the Tenth Amendment, exemplified by *Garcia v. San Antonio Metropolitan Transit Authority*.³ In addition, Professor Yoo musters sound policy rationales and historical imperatives for charging the judiciary with protecting the states’ autonomy as independent political entities.⁴ Yoo’s position has much to recommend it and merits careful consideration by both judges and legal academics.

In the end, however, I am unconvinced that in practice the judicial enforcement of the Tenth Amendment will alter the balance of power between the federal and state governments. Congress retains a veritable arsenal of constitutional powers with which to corrupt even the most virtuous state government.⁵ Not unlike the serpent in the Garden of Eden,⁶ Congress routinely tempts state governments with a variety of forbidden fruits.⁷ Not unlike Adam

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1. PETE TOWNSEND, *Won't Get Fooled Again, on WHO'S NEXT* (MCA Records 1971).

2. John C. Yoo, *Sounds of Sovereignty: Defining Federalism in the 1990s*, 32 IND. L. REV. 27, 27-28 (1998); see also John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997) [hereinafter *Judicial Safeguards*].

3. 469 U.S. 528 (1985).

4. Yoo, *supra* note 2, at 42-44.

5. On the other hand, Professor Malloy suggests that the arsenal may be shrinking more rapidly than many observers realize. S. Elizabeth Wilborn Malloy, *Whose Federalism?*, 32 IND. L. REV. 45, 47-48, 49-56, 67-69 (1998).

6. *Genesis* 3.

7. *Compare* *South Dakota v. Dole*, 483 U.S. 203, 211-12 (1987) (holding that Congress may condition the receipt of federal highway funds on the “voluntary” modification of state laws defining the age at which a person may lawfully purchase, possess, and consume alcoholic beverages), *with* U.S. CONST. amend. XXI, § 2 (“The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.”). At least arguably, it would seem that the

and Eve, state governments take the bait, the consequences be damned.⁸

There is a second, perhaps more cynical, reason for concern about the Supreme Court's new federalism jurisprudence. One could reasonably argue that federalism *du jour* merely serves as a convenient shield for the policy preferences of the current members of the Supreme Court.⁹ In Professor Wechsler's terms, may we expect the current working majority to fashion and consistently apply "neutral principles" to govern the application of the new federalism?¹⁰ Only time will provide a firm answer, but I harbor some rather serious doubts on this front.

Part I of this Essay addresses whether the Supreme Court's recent efforts to reestablish federalism as a bulwark against the inexorable expansion of federal powers is likely to succeed in resetting the balance in favor of greater state autonomy. For various reasons, it seems doubtful that the Supreme Court will succeed in any meaningful sense. Although it may manage to limit somewhat the immediate means that Congress may use to impose its will on the states, Congress will not face much difficulty in continuing to implement its ends. In the final analysis, a meaningful federalism must be a federalism based on ends, not means. To date, the Supreme Court has failed to display any recognition of—much less sensitivity to—this state of affairs.

Part II offers an alternative account of the contemporary Supreme Court's efforts to breathe new life into its federalism doctrines. Given the inefficacy of the current new federalism as a means of providing meaningful checks on congressional micromanagement of the states or usurpation of traditional state authority, Part II posits that the new federalism might simply reflect a means for the Justices to implement policy preferences without having to couch those preferences in substantive law terms. Arguably, the new federalism represents nothing more than a more palatable means of *Lochnerizing*¹¹ legislation that a majority of the justices do not find congenial. Rather than deploying substantive due process as the assassin of federal health, safety, and morals legislation, the Tenth Amendment can do in stealth what the Due Process Clause once did in the open light of day.¹²

Finally, in the conclusion, I argue that Professor Yoo's call for a revitalized

Twenty-first Amendment vests the states—not the federal government—with rather basic decisional authority over the regulation of intoxicating beverages. For better or worse, the Twenty-first Amendment afforded South Dakota scant constitutional protection when matched against the awesome taxing and spending powers vested in the federal Congress.

8. See William W. Van Alstyne, "Thirty Pieces of Silver" For the Rights of Your People: Irresistible Offers Reconsidered as a Matter of State Constitutional Law, 16 HARV. J.L. & PUB. POL'Y 303 (1993).

9. See Malloy, *supra* note 5, at 45-47, 62-68.

10. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 10-20 (1959); see also JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 54-55 (1980).

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

12. See generally Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 GEO. L.J. 555, 560-67 (1997); Malloy, *supra* note 5, at 45-47.

federalism as a means of securing liberty through divided government makes a great deal of sense. For federalism to serve as the guardian of liberty, however, federalism must be principled and as much about ends as it is about means. The current means-based federalism does not serve this role and is, at least arguably, as much the enemy of individual liberty as it is its friend.

I. ON MEANS, ENDS, AND RECOGNIZING THE DIFFERENCE

Professor Yoo posits, quite persuasively, the unmourned death of *Garcia*.¹³ Much like the mad wife burned alive in Charlotte Brontë's *Jane Eyre*,¹⁴ *Garcia* appears to have died a horrible, but suitably inconspicuous, death. That the Supreme Court has not bothered to provide a requiem or decent interment of the decision is of no moment. It seems reasonably clear that a current working majority of the Supreme Court will no longer rely on the good graces of Congress to enforce the principles of federalism. The "political safeguards" theory of the Tenth Amendment has been unceremoniously tossed upon the ash heap of constitutional law history.¹⁵

Moreover, this marks a milestone in the modern Supreme Court's federalism jurisprudence. For the first time since the New Deal revolution,¹⁶ the Supreme Court has signaled that Congress' nationalizing powers might be finite. That said, one cannot help but wonder whether these decisions really represent a meaningful commitment to a new, revitalized federalism.

The Supreme Court certainly has established some limits on the ability of Congress to order state officers about directly. *Printz*,¹⁷ *Boerne*,¹⁸ *Lopez*,¹⁹ and, indeed, even earlier cases like *New York v. United States*²⁰ and *Gregory v. Ashcroft*²¹ plainly indicate that state officials are not at the *direct* beck and call of the federal government.

13. Yoo, *supra* note 2, at 27-28, 41-42.

14. CHARLOTTE BRONTË, *JANE EYRE* (Octopus Books Ltd. 1980) (1847).

15. This would appear to be an entirely appropriate fate for *Garcia*, at least from Professor Yoo's perspective. Yoo, *supra* note 2, at 27-28, 42-43; see also *Judicial Safeguards*, *supra* note 2, at 1334.

16. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 108-30 (1991).

17. *Printz v. United States*, 117 S. Ct. 2365, 2383 (1997) (declaring unconstitutional the Brady Act's requirement that state officials conduct "background checks" before permitting the sale of firearms).

18. *City of Boerne v. Flores*, 117 S. Ct. 2157, 2172 (1997) (holding the Religious Freedom Restoration Act of 1993 unconstitutional on federalism grounds).

19. *United States v. Lopez*, 514 U.S. 549, 551 (1995) (holding that the Gun-Free School Zones Act of 1990 exceeded Congress' Commerce Clause authority).

20. 505 U.S. 144, 174-76 (1992) (holding unconstitutional a provision of the Low-Level Radioactive Waste Policy Act, which required states to "take title" to waste not disposed of according to federal standards).

21. 501 U.S. 452, 470 (1991) (holding that the mandatory retirement age for Missouri state judges was exempt from Federal Age Discrimination Employment Act).

The question remains, however, whether these decisions demarcate a meaningful limiting principle. At least arguably, the Supreme Court largely has failed to articulate a coherent theory of federalism that explains the discrete results reached in particular cases and that would facilitate reasonably accurate predictions regarding the probable results in future cases. Indeed, the Supreme Court has failed not only to articulate a meaningful vision for federalism; its scattershot efforts to reestablish sound principles of federalism do not represent either a coherent or an effective bulwark against the centralizing machinations of the federal government.

A hypothetical will help to illustrate these concerns. Suppose that Congress decided to seek the “voluntary” assistance of state officials in achieving a particular federal objective. Suppose further that the federal objective lies (at best) in the twilight of the enumerated Article I powers—that Congress itself has deep misgivings about its constitutional authority to establish a uniform federal rule regarding the matter in question. For the sake of argument, let us suppose that Congress deems it undesirable for state highway commissioners to be elected, rather than appointed, on the theory that requiring highway commissioners to seek election opens the door to all forms of corruption, cronyism, and related mischief.

The Supreme Court’s most recent Commerce Clause and Tenth Amendment cases suggest that Congress probably would not succeed in directly imposing its preference on the states. A congressional directive to reorder the basic political structure of a state would be beyond the constitutional pale or, perhaps more accurately, at least five sitting Justices are likely to so view the matter.²² Moreover, the hypothetical plainly contemplates a direct congressional order demanding compliance from a number of state officials, including the governor and state legislature, and perhaps the state supreme court.²³ Under the authority of *City of Boerne*²⁴ and *New York v. United States*,²⁵ this scheme would almost certainly fail.²⁶

Let us now modify the hypothetical. Suppose that instead of directly

22. See, e.g., *New York v. United States*, 505 U.S. 144, 161-62, 175-77 (1992) (rejecting the proposition that Congress may directly command state personnel to implement a federal legislative command); *South Dakota v. Dole*, 483 U.S. 203, 215-16 (1987) (O’Connor, J., dissenting) (rejecting as preposterous the proposition that Congress could deploy the taxing and spending power to induce a state government to relocate its state capital).

23. Some state constitutions both establish certain state offices and authorize or require the election of these state officers, which presumably could include state highway commissioners. See, e.g., LA. CONST. art. 4, § 21; MO. CONST. art. IV, § 29. In other states, statutes might require the election of state highway commissioners. See, e.g., MISS. CODE ANN. § 65-1-3 (Supp. 1998). See also N.H. REV. STAT. ANN. §§ 231:62, 669:15 (Supp. 1997) (providing for the election of local “Highway Agents” in every town within the state).

24. *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997).

25. 505 U.S. 144 (1992).

26. See *supra* text accompanying notes 18-20; see also *Judicial Safeguards*, *supra* note 2, at 1334-57.

commanding the result that it desires, i.e., the appointment of all state highway commissioners, Congress instead conditions receipt of federal highway funds on such an arrangement, by simply inserting a suitable rider in the next Intermodal Surface Transportation Efficiency Act ("ISTEA").²⁷ If a state wishes to retain an elected state highway commission, it is certainly free to do so. Such a decision, however, would have the unfortunate repercussion of precluding the state from receiving any federal highway funds.²⁸

The contemporary Supreme Court has made absolutely no effort to reconcile its Commerce Clause or Tenth Amendment holdings with the "blank check" approach it has established regarding limitations on Congress' taxing and spending powers. Indeed, Chief Justice Rehnquist, one of the principal authors of the Supreme Court's new federalism decisions,²⁹ wrote the opinion of the Court in *South Dakota v. Dole*,³⁰ a decision that vests Congress with virtually unfettered discretion to spend federal monies on projects it deems worthwhile and, moreover, to condition such spending as it thinks best.³¹ Significantly, in *Dole* "a perceived Tenth Amendment limitation on congressional regulation of state affairs did not concomitantly limit the range of conditions legitimately

27. Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, 105 Stat. 1914 (1991) (codified as amended at scattered sections of titles 3-6, 16, 23 U.S.C.). Congress passed the most recent such legislation on May 29, 1998, providing "more than \$200 billion in transportation money in the next six years." Vicki Hyman, *Sagging Airport Runway Slated for Asphalt Job*, TIMES-PICAYUNE, June 1, 1998, at A1, A6; see also *What Congress Missed When It Hit the Highway (Bill)*, WASH. POST, June 14, 1998, at C5; Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 107 (1998). Congress could easily condition the receipt of such funds on maintaining an acceptable form of state oversight for the use and distribution of the funds.

28. Cf. *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127, 142-43 (1947) (holding that Congress could condition receipt of federal highway funds on prohibition against appointed state highway commissioners engaging in partisan political activities).

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

30. 483 U.S. 203 (1987).

31. *Id.* at 206-12. According to Chief Justice Rehnquist, "objectives not thought to be within Article I's 'enumerated legislative fields,' may nevertheless be attained through the use of the spending power and the conditional grant of federal funds." *Id.* at 207. The spending power is not unlimited—congressional appropriations must in some fashion promote "the general welfare," i.e., they must "serve general public purposes." *Id.* This limitation is in practice quite meaningless: "[C]ourts should defer substantially to the judgment of Congress" and the federal judiciary's "level of deference to the congressional decision is such that the Court has more recently questioned whether 'general welfare' is a judicially enforceable restriction at all." *Id.* at 207 & n.2. Conditional federal spending must meet three additional requirements: (1) a conditional offer must be plainly identified to the states as such, (2) the condition placed upon the grant must be in some fashion "related" to a federal interest in "particular national projects or programs," and (3) the condition may not require the states to transgress an otherwise applicable constitutional limitation. See *id.* at 207-08. In the case of the national minimum drinking age, the Supreme Court found that Congress had satisfied all four conditions. See *id.* at 208-12.

placed on federal grants.”³²

To paraphrase Professor Rosenthal, now that the “front door” of plenary regulatory power pursuant to the Commerce Clause appears to be swinging shut, it is now necessary to consider whether the Supreme Court will also move to close and bar the “back door” represented by the federal spending power.³³ Professor Baker has aptly noted that even in an era of contracting federal commerce powers, “if the Spending Clause is simultaneously interpreted to permit Congress to seek otherwise forbidden regulatory aims indirectly through a conditional offer of federal funds to the states, the notion of a ‘federal government of enumerated powers’ will have no meaning.”³⁴ Professor Yoo acknowledges, at least in passing, the potential threat that an unlimited conditional spending power poses to federalism.³⁵

The dimension of the problem is large, at least if one is committed to maintaining a meaningful form of federalism, a federalism in which the states are to retain some measure of self-determination. Nevertheless, “[t]he Court’s decisions in cases challenging conditions on federal funds offered the states, unlike its resolution of challenges to conditions on benefits that the government offers individuals, are strikingly consistent: the Court has never invalidated such an enactment.”³⁶

Chief Justice Rehnquist’s opinion in *Dole* reflects a consistent theme in his constitutional jurisprudence: the idea that government may condition the grant of a boon on the surrender of a constitutional right or privilege. In the Chief Justice’s world, one always must be prepared to “take the bitter with the sweet.”³⁷

To date, the Supreme Court has shown no inclination to revisit its holding in *South Dakota v. Dole*.³⁸ On the contrary, Justice O’Connor sustained a similar arrangement in her opinion in *New York v. United States*.³⁹ In *New York*, the Supreme Court upheld against a federalism-based challenge the creation of financial incentives to encourage states to meet certain federal targets regarding

32. *Id.* at 210. For critiques of this approach to the federal spending power, see Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1935 (1995); Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism’s Trojan Horse*, 1988 SUP. CT. REV. 85; Van Alstyne, *supra* note 8, at 314-15; Note, *Federalism, Political Accountability, and the Spending Clause*, 107 HARV. L. REV. 1419, 1435-36 (1994).

33. Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1131 (1987) (“If the front door of the commerce power is open, it may not be worth worrying whether to keep the back door of the spending power tightly closed.”).

34. Baker, *supra* note 32, at 1920.

35. Yoo, *supra* note 2, at 41-42.

36. Baker, *supra* note 32, at 1924; *see also id.* at 1922 n.43.

37. *Arnett v. Kennedy*, 416 U.S. 134, 153-54 (1974); *see also Rust v. Sullivan*, 500 U.S. 173, 194 (1991); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 559-63 (1985) (Rehnquist, J., dissenting). *Cf.* William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1439-42 (1968).

38. 483 U.S. 203 (1987).

39. 505 U.S. 144, 166-69, 171-73 (1992); *cf.* McCoy & Friedman, *supra* note 32, at 108-13.

the transport, treatment, and storage of low level radioactive waste.⁴⁰ Congress also required states to adopt regulations or face preemption of state regulatory authority over radioactive waste.⁴¹ In fact, only the third provision of the Low Level Radioactive Waste Policy Amendments Act of 1985⁴² fell on federalism grounds. The Supreme Court invalidated certain “take title” provisions that would have required states failing to meet Congress’ goals to assume the ownership of low level radioactive waste.⁴³

The Supreme Court’s reasoning and results in *New York v. United States* might be defended on the theory that Congress could have preempted state laws governing low level radioactive waste transport and storage incident to its commerce powers.⁴⁴ The greater power of complete preemption of state regulation, at least arguably, should also include the lesser power of adopting a “regulate or else” stance vis-a-vis the states. Because Congress possessed the constitutional authority to accomplish directly that which it was attempting to coerce the states into doing “voluntarily,”⁴⁵ the financial incentive and access provisions did no real violence to federalism principles. *Dole*, however, imposes no such limitation, nor did Justice O’Connor suggest that any such limitation existed in her opinion in *New York*. Accordingly, the Supreme Court’s decision in *New York* simply reaffirms Congress’ virtually plenary power to tax and spend the state governments into complete submission.⁴⁶

In sum, even in this brave new world of post-post New Deal federalism, there is really no doubt that *South Dakota v. Dole*⁴⁷ permits Congress to use the spending power to accomplish indirectly that which it may not accomplish directly.⁴⁸ Throughout the contemporary Supreme Court’s “new federalism”

40. *New York*, 505 U.S. at 152-53, 171-73.

41. *See id.* at 167-68, 173-74.

42. Pub. L. No. 99-240, title I, 99 Stat. 1842 (1986).

43. *New York*, 505 U.S. at 153-54, 174-83; *see also* *Judicial Safeguards*, *supra* note 2, at 1340-42.

44. *See, e.g.*, *Chas. C. Steward Machine Co. v. Davis*, 301 U.S. 548, 574-78, 586-91 (1937) (finding the Social Security Act, which preempted state law, a valid exercise of Congress’ power to regulate commerce).

45. *See* McCoy & Friedman, *supra* note 32, at 117-25.

46. *See* *Manuel v. State*, 692 So.2d 320, 330-33 (La. 1996) (holding that Louisiana’s state constitution establishes 18 to be the age of majority and finding that the right to obtain, possess, and consume alcoholic beverages is constitutionally a function of attaining the age of majority). *But see id.* at 338 (reversing on rehearing an earlier decision regarding unconstitutionality of state statute establishing 21 years of age as the minimum drinking age in order to avoid jeopardizing receipt of federal highway funds).

47. 483 U.S. 203 (1987).

48. *See* Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813, 871-91 (1998); *see also* *Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252, 270-71 (1990) (endorsing *Dole* test for conditional spending); *id.* at 283-85 (White, J., dissenting) (also endorsing *Dole*).

jurisprudence, there has not been even a hint that a working majority of the Court has come to question the continuing validity of *Dole*. Indeed, given that Chief Justice Rehnquist authored the opinion in *Dole* and is also the principal exponent of the “new federalism,” the prospects for this incongruity being addressed any time soon seem at best rather dim.⁴⁹

Congress, even under Republican leadership ostensibly committed to maintaining sound principles of federalism, has not hesitated to use its spending authority to purchase that which it cannot command. For example, President Clinton recently has endorsed a national standard for determining when the operator of a motor vehicle is driving under the influence of alcohol (“DUI”).⁵⁰ Generally, given the existence of the Twenty-first Amendment⁵¹ and the rule that the Constitution vests the police powers (encompassing regulations designed to preserve the health, safety, or morals of the citizenry) with the states, it is doubtful whether Congress could directly impose a uniform DUI standard on the states.⁵²

On the other hand, conditioning the receipt of federal highway funds on “voluntary” modifications of a state’s DUI standard is another matter entirely. Given *Dole*, there is no reason to suppose that President Clinton’s proposal suffers from any constitutional infirmities. When one couples Congress’ ability to tax state citizens with its virtually limitless power to spend on a conditional basis, federalism ceases to enjoy any meaningful substance—indeed, the ghost of Hamlet’s dead father enjoyed arguably greater corporeal existence.⁵³

This state of affairs has not gone unnoticed. Professors McCoy and Friedman denounced *Dole* immediately after the Supreme Court issued the

49. Cf. Baker, *supra* note 32, at 1918-20, 1935-54.

50. See Terry M. Neal, *Bill Seeks Uniform DWI Level*, WASH. POST, Mar. 4, 1998, at A19; Eric Pianin, *Senate Ties Crackdown on Drunk Drivers to State Highway Aid*, WASH. POST, Mar. 5, 1998, at A12; see also *Deadly Driver Reduction and Barton H. Greene Memorial Act*, H.R. Res. 982, 105th Cong., 1st Sess. (introduced March 6, 1997); *Deadly Driver and Matthew P. Hammell Memorial Act*, S. 708, 105th Cong., 1st Sess. (introduced May 6, 1997).

51. The Twenty-first Amendment repealed the Eighteenth Amendment, an amendment that gave concurrent jurisdiction to the federal and state governments to enforce prohibition. U.S. CONST. amends. XXI, § 1; XVIII, § 2. The Twenty-first Amendment also states, “The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.” U.S. CONST. amend. XXI, § 2.

52. Of course, Congress could simply include a “jurisdictional element” and use its commerce power to reach at least some segment of the driving public, i.e., those drivers whose travels take them across state lines. See *United States v. Lopez*, 514 U.S. 549, 580 (1995) (Kennedy, J., concurring) (noting that the presence of a jurisdictional element might have saved the Gun-Free School Act of 1990); *Champion v. Ames*, 188 U.S. 321 (1903) (sustaining a federal statute prohibiting lottery tickets from being transported across state lines).

53. WILLIAM SHAKESPEARE, *THE TRAGEDY OF HAMLET, PRINCE OF DENMARK*, act I, sc. I (H. Jenkins ed., Routledge 1982).

opinion.⁵⁴ Over the course of the last ten years, additional constitutional law scholars have joined their voices to the anti-*Dole* chorus.⁵⁵ Nevertheless, the prospects for reform in this area of constitutional law seem bleak.

Without a doubt, Congress and the President recognize the potential federalizing power of *Dole*. In the immediate aftermath of *Lopez*, President Clinton promised to seek the enactment of legislation that would “encourage” states to ban voluntarily the possession of firearms near schools.⁵⁶ Professor Lynn Baker has noted the perspicacity of the President’s proposal, for “with *Dole*, the Court offered Congress a seemingly easy end run around any restrictions the Constitution might impose on its ability to regulate the states.”⁵⁷ Professor Baker goes on to argue persuasively that both “liberals and conservatives alike should fear the power granted Congress by the Court’s decision in *Dole*.”⁵⁸

Essentially, Chief Justice Rehnquist does not view the states’ “voluntary” acceptance of conditional federal funds as presenting a serious federalism issue. Unless and until the Supreme Court revises its views on this proposition, tinkering with limits on the commerce power will provide little effective protection of state sovereignty. Such efforts may be “full of sound and fury,” but ultimately amount to very little, perhaps even “signifying nothing.”⁵⁹

Admittedly, it might be somewhat unfair to charge Professor Yoo with a project that he has not, at least to date, elected to undertake. On the other hand, if one takes seriously his arguments about the importance of federalism, it seems more than fair to inquire about the apparently unlimited power of Congress to use its spending authority to undermine the concept of federalism.

Given that under “[p]revailing Spending Clause doctrine,” Congress may “use conditional offers of federal funds in order to circumvent seemingly any restrictions the Constitution might be found to impose on its authority to regulate the states directly,”⁶⁰ this project seems essential to any attempt at fashioning a meaningful vision of the new federalism. Simply put, the Supreme Court must harmonize its Spending Clause jurisprudence with its Commerce Clause jurisprudence; if it fails to do so, the latter’s significance will be effectively nullified by the former.

In light of the fungible nature of the federal spending power, one wonders

54. McCoy & Friedman, *supra* note 32, at 117-27.

55. See, e.g., Baker, *supra* note 32; Thomas E. Baker, *A View to the Future of Judicial Federalism: “Neither Far Out Nor In Deep,”* 45 CASE W. RES. L. REV. 705, 722-23 (1995); McCoy & Friedman, *supra* note 32; Rosenthal, *supra* note 33; cf. Hills, *supra* note 48, at 857-91; Note, *supra* note 32.

56. See Todd S. Purdum, *Clinton Seeks Way to Retain Gun Ban in School Zones*, N.Y. TIMES, Apr. 30, 1995, at A1.

57. Baker, *supra* note 32, at 1914.

58. *Id.* at 1917; see *id.* at 1935-54.

59. WILLIAM SHAKESPEARE, *THE TRAGEDY OF MACBETH*, act V, sc. V, lines 26-28 (N. Brooke ed., Oxford Press 1990).

60. Baker, *supra* note 32, at 1988.

why legal academics have focused relatively little attention on the pernicious effects of *Dole*. Legal scholars have spilled much ink on the minutiae of the Commerce Clause, while the spending power remains a relatively untouristed, although not completely undiscovered, country.⁶¹ This state of affairs cannot continue to persist if federalism is to survive as something more than a mere catch phrase. If the United States is to maintain a meaningful federalism—and by this I mean a federalism of *ends* rather than merely a federalism of *means*—the seemingly infinite federal spending power must be made finite. This irresistible force must be matched with its immovable object.

Scholarly consideration of the proper scope of the commerce powers, and the judiciary's role in delimiting those powers, is certainly a helpful exercise. It will not, however, prove to be a sufficient check on the continuing centralization of the police powers. For those who truly believe that federalism is an essential bulwark in protecting individual liberty, the problems associated with *Dole's* gloss on the federal spending power require greater attention, not only from the legal academy but also from the Supreme Court.⁶²

It is important, of course, to keep in mind precisely *how* federalism promotes liberty. Federalism, by itself, does not directly promote or advance particular rights or liberties. Professor Yoo correctly notes that “the framers believed that the chief role states would play in their relationship with the federal government would be the protection of people’s liberty.”⁶³ Professor Yoo is emphasizing that the structural division of power would tend to serve as a check on the arbitrary exercise of power by the federal government, i.e., “federalism brought advantages by diffusing power.”⁶⁴ In addition, Professor Yoo suggests that under the framers’ system of federalism the state governments and the federal government would vie for the loyalties and affections of the citizenry “through the competition between federal and state governments to provide rights to their citizens.”⁶⁵ Although I agree with both propositions, it seems to me that the case

61. *See supra* text accompanying notes 54-55.

62. I have defined a problem without offering up any concrete solutions. Although I have not given the matter the kind of systematic consideration it both deserves and requires, I think that there is much to recommend in Professor Lynn Baker’s proposed reformulation of *Dole's* “germaneness” test. *See Baker, supra* note 32, at 1962-67. Essentially, Professor Baker would presume invalid conditional federal spending that attempts to regulate states in a fashion that Congress could not directly command. *See id.* at 1962-63. Conditional spending might still survive judicial review, however, if the federal government can demonstrate that the spending is “reimbursement spending” as opposed to “regulatory spending.” *Id.* at 1963. “Reimbursement spending” simply reimburses states for voluntarily undertaking particular tasks that Congress deems desirable, even if Congress could not directly command the states to perform the task at issue. *Id.* at 1963-64. “Regulatory spending,” in contrast, involves an attempt to bribe or coerce states into performing a particular task by offering the states who agree to perform the designated task a bounty unrelated to the direct costs of performance. *Id.* at 1964-66.

63. Yoo, *supra* note 2, at 43.

64. *Id.*

65. *Id.*; *see also id.* at 31-32, 36-37; *Judicial Safeguards, supra* note 2, at 1392-1404.

for federalism as a liberty enhancing mechanism is perhaps more subtle than Professor Yoo suggests.

By stipulation, “federalism” is not an argument that liberty cannot be restrained or abridged by either the state governments or the federal government. In general, federalism is about *who* can do the restraining. Thus, for many years, the Bill of Rights operated as a check only against the federal government, but imposed no limitations on the conduct of state governments.⁶⁶ If federalism is to promote liberty, it is through a diversity of opinion among the states regarding the desirability of particular courses of legislative action. As Justice Brandeis explained, federalism permits the state governments to serve as laboratories of experimentation.⁶⁷

A federal government vested with unlimited regulatory powers, whether through the commerce powers or the taxing and spending powers, has the ability to disrupt this process of experimentation. Thus, if South Dakota believes that citizens should be permitted to drink upon reaching the legal age of majority, South Dakota should be free to implement this view through appropriate state legislation, and without interference from the central government.⁶⁸ Similarly, states on the Eastern seaboard may believe that speed limits in excess of fifty-five miles per hour are too dangerous to be countenanced, while the hardy souls in Montana prefer instead to charge local drivers with maintaining a “reasonable and proper” speed.⁶⁹ In sum, pluralism is conducive to liberty because it facilitates choice, which in turn leads to diverse laws reflecting the sensibilities of local communities.

Professor Yoo’s arguments in favor of federalism as a liberty enhancing device certainly acknowledge this point.⁷⁰ Unfortunately, however, the Supreme Court’s most recent federalism cases generally do not or, perhaps more accurately, have failed to articulate an overall analytical framework incorporating these concerns. Moreover, the majority opinion in *Dole* makes no effort to square its holding with the historical and policy based rationales that support

66. See *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 250-51 (1833) (holding that the provisions of the Bill of Rights operate only against the federal government); cf. *Duncan v. Louisiana*, 391 U.S. 145, 147-50 (1968) (stating that substantive due process incorporates many provisions of the Bill of Rights against the states and applying a “fundamental rights” analysis to determine whether a particular provision of the Bill of Rights should be deemed incorporated).

67. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

68. Cf. *South Dakota v. Dole*, 483 U.S. 203, 211-12 (1987) (permitting Congress to establish a national drinking age through the exercise of its spending powers).

69. MONT. CODE ANN. § 61-8-303 (1997); see Ronald J. Krotoszynski, Jr., *Building Bridges and Overcoming Barricades: Exploring the Limits of Law as an Agent of Transformational Social Change*, 47 CASE W. RES. L. REV. 423, 424 n.3 (1996).

70. Yoo, *supra* note 2, at 28, 31-32, 36-37, 43-44; *Judicial Safeguards*, *supra* note 2, at 1403-05.

imposing principled limits on the enumerated powers of the federal government, including both the spending and commerce powers. Developing a coherent theory of federalism that would allow lawyers, judges, and academics to predict accurately the probable results in particular cases is beyond the scope of my current project. Nevertheless, one can and should fault the contemporary Supreme Court for failing to address itself in a consistent and principled fashion to these considerations.

II. FEDERALISM LITE AND THE DISCRETION PROJECT

I have argued that a viable federalism must be a federalism of ends and not just means. This is a necessary, but hardly sufficient, condition for the maintenance of a federalism that is both meaningful and sustainable. A second condition precedent exists for federalism to work: it must be principled.

Professor Yoo argues effectively that the Supreme Court's turn toward a new federalism reflects a renewed commitment to protecting the states from the centralizing might of the national government.⁷¹ As he puts it, "[f]ederalism is back, with a vengeance."⁷² Rather than simply leaving the states at the mercy of such "political safeguards" as might exist to stay Congress' regulatory hand, Professor Yoo argues persuasively that federalism requires more active judicial enforcement efforts.⁷³ Because federal legislators no longer conceive of themselves as representatives of state governments, but rather view themselves as accountable to particular constituencies that happen to exist within a given state or congressional district,⁷⁴ reliance on the traditional "political safeguards" represents a false hope.

Implicit, if not explicit, in Professor Yoo's position is the notion that federalism has some value that justifies judicial efforts to protect its continued existence as a feature of our system of governance.⁷⁵ Even if one assumes that federalism will not survive if left to the kindnesses of the "political safeguards," one might still ask whether judicially-enforced federalism is a game worth the candle.

Professor Yoo presents a number of benefits associated with federalism, most notably including its checking function, which should both increase and serve to protect individual liberty.⁷⁶ Implicit in his argument, however, is the notion that this new form of judicially-enforced federalism will prove to be principled, i.e., that it will not serve as a device for permitting activist (conservative) judges to impose their policy preferences from the bench. Yet, the Supreme Court to date has failed to define federalism and state sovereignty in a fully coherent,

71. Yoo, *supra* note 2, at 27-28, 43-44; see also *Judicial Safeguards*, *supra* note 2, at 1334-57.

72. Yoo, *supra* note 2, at 27.

73. *Id.* at 35-36, 41-44.

74. See *id.* at 39-41; see also *Judicial Safeguards*, *supra* note 2, at 1399-1400.

75. Yoo, *supra* note 2, at 27-28, 31-32, 37, 43-44.

76. *Id.* at 32; see also *Judicial Safeguards*, *supra* note 2, at 1402-05.

satisfying manner. The Court has not explained precisely what the new federalism is, much less *why* the new federalism represents an improvement over the post New Deal conception of federalism. Whatever the precise reasons, the Court has failed to explain convincingly why state autonomy is a normative good of constitutional proportions.

Perhaps the Supreme Court prefers a fuzzy, "I know it when I see it"⁷⁷ federalism to a principled federalism because it tends to increase the Court's discretion. One cannot help but wonder if this omission is intentional. Indeed, Professor Malloy's essay raises this problem directly and cogently.⁷⁸ No useful purpose would be served by attempting to duplicate her arguments. She raises serious questions about the Supreme Court's real commitment to federalism as a core principle of constitutionalism as opposed to a convenient device for limiting federal civil rights, civil liberties, labor laws and environmental regulations.⁷⁹ Her thesis supports my broader point that an effective federalism must be principled. Put differently, the results in cases involving questions of federalism should reflect honest and professional application of doctrine rather than an effort to reach a particular result.⁸⁰

It is probably too early to determine whether a majority of the Supreme Court is committed to federalism as an end in itself rather than as a means of thwarting particular congressional attempts at labor and environmental regulation. It does not require much imagination, however, to hypothesize facts that would demonstrate whether the new federalism represents a principled doctrine or a fig leaf for judicial activism.

Consider, for example, a federal law that requires the states to legalize partial birth abortions, i.e., a law that, consistent with Congress' Section 5 powers under the Fourteenth Amendment, mandates the availability of late-term, partial birth abortions.⁸¹ Suppose further that the law mandates that the states fund such procedures from their general treasuries and, moreover, requires publicly-owned hospitals to offer such services to their patients. Given the present majority's attitude toward abortion, such a law would make an excellent candidate for the application of the new federalism. Chief Justice Rehnquist might easily draft a sonorous opinion outlining the traditional police powers of the states regarding the regulation of abortion, note the absence of any explicit delegation of authority to the federal government over this matter, and invoke general principles of

77. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

78. Malloy, *supra* note 5, at 45-47.

79. *Id.* at 45-48, 49-56, 69-70.

80. See Wechsler, *supra* note 10, at 10-20; cf. ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1986) (arguing that Professor Wechsler's quest for a jurisprudence built upon neutral principles is a quixotic task because judging is essentially an exercise in interest group politics); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 818-21 (1983) (arguing that the judicial decisional techniques endorsed by adherents of legal process theory "are so broad that in any interesting case any reasonably skilled lawyer can reach whatever result he or she wants").

81. See generally *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997).

federalism as a barrier to the adoption and enforcement of such a law.

Let us now imagine the mirror image of the hypothetical law—a federal statute that criminalizes partial birth abortion, the laws of any particular state notwithstanding. Assume that the ban extends to public hospitals that receive any form of federal assistance (i.e., Medicare or Medicaid funding). Congress could probably enact such a law, if not incident to its commerce powers, then certainly incident to its taxing and spending powers.⁸² Unlike its twin, this piece of statutory craftsmanship stands a good chance of surviving judicial review.⁸³ This is because the Supreme Court probably would not apply neutral federalism principles if the federal government attempted to prohibit or severely discourage particular kinds of abortion services (even if public hospitals owned and operated by a state government wish to provide such services consistent with a mandate to do so from the state legislature).⁸⁴ Instead, the case would likely be decided on the abortion axis and will reflect the subjective views of the individual justices on the substantive question of whether partial birth abortions are immoral. In a word, the fate of either law will hang not on principles of federalism, but rather on scruples about abortion.

Nothing would please me more than to learn that I am quite mistaken in thinking that the results in the two hypothetical cases would turn on factors unrelated to whether Congress possesses constitutional authority to regulate abortion in order to protect the health, safety, or morals of the citizenry. As things stand today, the Supreme Court's case law does not yet provide a clear answer as to whether the new federalism is principled or merely instrumentalist. An unprincipled federalism is no more likely to survive over time than an unprincipled faith in the ability of the "political safeguards" of federalism to keep the national legislature from overflowing its constitutional banks.

The countermajoritarian problem presents itself most acutely when the Supreme Court strikes down legislation passed by the federal Congress.⁸⁵ The "new federalism" has resulted in at least four federal laws biting the dust. If the Court continues in this fashion, Congress and perhaps even the American public will surely demand an accounting, asking the federal judiciary precisely why federalism principles preclude Congress from restricting gun sales to felons or from protecting school children from guns. In my view, the profoundly countermajoritarian character of the Supreme Court's new federalism decisions exacerbates the need for neutral principles that serve both to justify and explain the Court's actions. Professor Yoo appears to agree that the Supreme Court must provide an overarching theory of federalism that puts its recent decisions into

82. See Baker, *supra* note 32, at 1918-32.

83. Cf. *Rust v. Sullivan*, 500 U.S. 173 (1991) (holding that the federal government may suppress truthful medical information about abortion services, in the context of a patient-doctor relationship, if it so chooses).

84. Cf. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981).

85. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-33 (1962); ELY, *supra* note 10, at 43-72, 101-04.

some larger doctrinal framework.⁸⁶ This seems an essential task that deserves attention sooner rather than later. To the extent that the Supreme Court fails to articulate neutral principles that will govern its new “new federalism,” commentators like Professor Malloy are quite correct to challenge the Supreme Court’s motives for deploying federalism selectively to strike down seemingly desirable health, safety, and anti-discrimination legislation.⁸⁷

CONCLUSION: GETTING FROM HERE TO THERE

The Supreme Court’s apparent willingness to limit Congress’ addiction to centralizing the police powers at the national level of government should lead to greater personal freedom, as various states adopt differing views as to the merits or demerits of a particular approach to a given problem or issue.⁸⁸ Professor Yoo offers some important reasons why these efforts should matter—reasons that suggest why we should deem the Supreme Court’s emerging Tenth Amendment jurisprudence to be an important and constitutionally salutary development.⁸⁹ I regret that I cannot yet share his enthusiasm regarding the importance of the project or its prospects for ultimate success.

Congress remains free to buy that which it cannot directly command. So long as this remains the case, federalism does not present a meaningful check against congressional schemes to nationalize traditional police power regulation. Moreover, even if the Supreme Court reestablishes meaningful limitations on the federal spending power, it must also demonstrate that its decisions about whether the Constitution vests legislative authority over a particular problem at the state or federal level reflect something more than the subjective policy preferences of a majority of the justices. In the end, I find myself listening carefully to the sounds of sovereignty, but I just cannot seem to pick up the beat.

86. Yoo, *supra* note 2, at 27-28, 42-44; *see also* *Judicial Safeguards*, *supra* note 2, at 1348-49, 1352-53, 1356-57.

87. Malloy, *supra* note 5, at 45-47, 68-70.

88. *See* Yoo, *supra* note 2, at 35-36, 43-44; *see also* Baker, *supra* note 32, at 1935-54; William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Hans A. Linde, *Are State Constitutions Common Law?*, 34 ARIZ. L. REV. 215 (1992); Hans A. Linde, *E Pluribus: Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984); *see also* *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *Lochner v. New York*, 198 U.S. 45, 65 (1905) (Holmes, J., dissenting).

89. Yoo, *supra* note 2, at 27-28, 32, 36-38, 42-44.

