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ACTIVE SOVEREIGNTY

TIMOTHY ZICK*

INTRODUCTION

If there was something “revolutionary” about the recent federalism era, it was the manner in which the Court spoke of the states.¹ When they entered the Union, the states were sometimes referred to as mere corporate forms.² In recent federalism precedents, by contrast, the Rehnquist Court routinely referred to the states as “sovereign.”³ The Court bathed the states in sovereign glory, inveighing against various federal insults to the states’ “dignity,” “esteem,” and “respect.”⁴ The states are treated now more like nations or persons; they have

* Associate Professor of Law, St. John’s University School of Law. I would like to thank John Barrett, Chris Borgen, Brian Tamanaha, and Nelson Tebbe for their helpful comments. I would also like to thank the participants at the “Federalism Past, Federalism Future” symposium, and the editors and staff of *St. John’s Journal of Legal Commentary*.

¹ See Stephen G. Gey, *The Myth of State Sovereignty*, 63 OHIO ST. L.J. 1601, 1601 (2002) (asserting that we are “in the midst of a constitutional revolution”). For reasons stated later, I believe “revolution” overstates matters; this Essay will refer to the “revival” of federalism.

² See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 463-64, 477, 479 (1966) (Max Farrand ed., Yale Univ. Press 1966) (comparing states to corporations).

³ See, e.g., *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002) (“The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities.”); *Alden v. Maine*, 527 U.S. 706, 750 (1999) (noting that the Constitution recognizes “the essential sovereignty of the States”); *Printz v. United States*, 521 U.S. 898, 928 (1997) (“It is an essential attribute of the States’ retained sovereignty that they remain independent and autonomous.”); *New York v. United States*, 505 U.S. 144, 156-57 (1992) (holding that freedom from federal commandeering is “an incident of state sovereignty”).

⁴ See *Fed. Mar. Comm’n*, 535 U.S. at 760, 769 (purpose of immunity is to protect state “dignity” and “respect”); *Alden*, 527 U.S. at 758 (Congress “must accord States the esteem due them as joint participants in a federal system”); *New York*, 505 U.S. at 188 (emphasizing that states are not “mere political subdivisions of the United States” or “regional offices”); see also Judith Resnick & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921 (2003).

constitutional rights to such things as autonomy, equality, and due process.⁵

State sovereignty lies at the heart of perhaps our oldest constitutional conundrum. On the one hand, when the People fashioned the Constitution, they created a Union rather than a confederation of states. On the other, as the Court has said, the states “entered the federal system with their sovereignty intact.”⁶ In *United States Term Limits, Inc. v. Thornton*,⁷ Justice Kennedy said that the Framers had “split the atom of sovereignty” between the states and the national government.⁸ The federalism revival located state sovereignty in such things as “background principles” of sovereign immunity, as well as notions of state consent, independence, and autonomy.⁹ The states would not have ratified the Constitution, the Court seemed to suggest, if they believed this would result in offensive federal encroachments, “commandeering” of their officials, and waivers of their “sovereign immunity.”

There are those who would object to referring to the states as sovereign.¹⁰ They are not *de jure* sovereigns, in the sense of being *supreme* authorities. Under the Constitution, it is the People who are supremely sovereign.¹¹ When we refer to the states as “sovereign,” it is in a derivative and *de facto* sense: The People delegate their sovereignty to the states. They make this delegation so that states can serve critical functions on their behalf. In this respect, state sovereignty and popular sovereignty are not actually in conflict, but complimentary.

When we debate federalism, it is most often with reference to the actions of the Supreme Court or Congress. This Essay approaches federalism, and the recent federalism revival, from the perspective of the states. The states are often unthinkingly or reflexively referred to as “sovereign.” But what does that tell

⁵ See Timothy Zick, *Statehood as the New Personhood: The Discovery of Fundamental States' Rights*, 46 WM. & MARY L. REV. 215 (2004).

⁶ *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991).

⁷ 514 U.S. 779 (1995).

⁸ See *id.* at 838 (Kennedy, J., concurring).

⁹ *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72 (1996).

¹⁰ See e.g., Jack N. Rakove, *Making a Hash of Sovereignty, Part I*, 2 GREEN BAG 2d 35 (1998) [hereinafter Rakove]; Jack N. Rakove, *Making a Hash of Sovereignty, Part II*, 3 GREEN BAG 2d 51 (1999) [hereinafter Rakove II].

¹¹ U.S. CONST. pmbl.

us, and them, about statehood? What does it actually mean for a state to be “sovereign” today? Statehood itself is rather thinly defined in the Constitution. The states’ sovereignty is nowhere mentioned in the text, much less guaranteed to them. Despite this silence, resort to claims of state sovereignty are common, indeed increasingly so. The states, in particular, could benefit from an exposition of their sovereignty. If state sovereignty is to continue to be part of our constitutional language, the states must understand what makes for an effective claim to sovereignty.

The Essay begins with a few general comments on the functions state sovereignty serves in relation to federalism. Accepting that it is the People who are ultimately sovereign, there are still benefits to describing and, what is more important, treating the states as sovereign entities. Sovereignty has enormous rhetorical power. But there is more than rhetoric involved; invocations of state sovereignty have real consequences. The normative defense of sovereignty in a most general sense is that it establishes boundaries and protocols. This is true, by the way, whether the claim to sovereignty is made by a State, a nation-state, or our domestic states.¹² Sovereignty orders power. Given their relative disadvantage in terms of such things as funds and military might, not to mention the massive modern expansion of federal authority, it is no small matter for states to be regarded as “sovereign” with respect to an issue or in a policy area. Insofar as California, or Vermont, is considered to be “sovereign” – by citizens of their own and other states, and by other governments – they are more likely to be treated as deserving of respect and consideration. The idea of “dual sovereignty” helps to maintain the balance we refer to as “federalism.” Systemically speaking, then, there is value in respecting the states *as states*.

If the point of the Court’s “sovereignty talk” was to re-order the federal-state balance of power, the project failed. There is ultimately very little in the way of substantive payoff for the states in the federalism revival. The Court was, and remains,

¹² This article will refer to a nation or country as a “State.” The domestic states will be identified in the lower case.

willing to tolerate a host of federal encroachments that, from the states' perspective, are far from "dignified." This should come as little surprise. As an institution, the Court is poorly positioned to maintain something as complex and worldly as statehood or state sovereignty. It stands ready, as the revival demonstrated, to invalidate marginally encroaching federal laws. But this sort of minimalist judging cannot serve as a basis for a substantial re-ordering of power. Nor is Congress positioned to re-order the balance of power. To be sure, when political expediency dictates, legislators sometimes speak in terms of devolution of power to the states. But Congress has not pushed through any revival of its own. Indeed, its usual instinct is to preempt the states.

None of this means that state sovereignty is an ineffectual, or purely rhetorical, concept. This Essay posits that state sovereignty is a plausible source for a future federalism revival; one precipitated by the states. The problem does not lie with the concept of state sovereignty, but with the Court's flawed conception of it.

To explain how state sovereignty might result in a meaningful federalism revival, this Essay will distinguish two conceptions of state sovereignty.¹³ The first conception is the one the Court has pursued in recent federalism cases. This conception of sovereignty anthropomorphizes states. It seeks to elevate the states by raising their rank or status. It vests states, like nations or persons, with qualities like "dignity" and "esteem." It demands respect for the states *as states*. Sovereignty, and all of the corresponding constitutional rights that flow from it, are judicially conferred. I will call this concept *status sovereignty*.

The second conception of sovereignty is called *active sovereignty*.¹⁴ Active sovereignty is the product of some conceptual borrowing. It is based upon international relations treatments of sovereignty.¹⁵ This is not to suggest that states and

¹³ For a more complete elaboration of state sovereignty, see Timothy Zick, *Are the States Sovereign?*, 83 WASH. U. L.Q. 229 (2005).

¹⁴ The resemblance to Justice Breyer's articulation of "active liberty" in his recent book is purposeful. See STEPHEN BREYER, *ACTIVE LIBERTY* 4-5 (2005) (distinguishing "active liberty" from "civil liberty"). The conception of sovereignty I will be developing in this paper is of an "active" nature, rather than a defensive and negative one. In that sense, it resembles the "active liberty" Justice Breyer defends.

¹⁵ Representative treatments include JOSEPH A. CAMILLERI & JIM FALK, *THE END OF SOVEREIGNTY? THE POLITICS OF A SHRINKING AND FRAGMENTING WORLD* (1992); ABRAM

nation-states are sovereign in the same sense. Rather, international treatments can help us gain a conceptual foothold on sovereignty, a new understanding of what sovereignty means and looks like on the ground. Several observations might be made in this regard. First, claims to State sovereignty based solely on status are becoming less and less effective. For example, intrusions on internal State sovereignty occasioned by allegations of human rights violations are now commonplace.¹⁶ Second, in more general terms, sovereignty has been partitioned and compromised by conditions such as globalization and the rise of supra-national governance structures. Third, given these and other circumstances of modernity, sovereignty is now less a function of status than of States serving critical functions. Sovereignty is a *resource* States must use to earn the respect and esteem of relevant actors and institutions. Finally, then, States *are* sovereign only insofar as they are *treated* as sovereign in an area or with respect to an issue.

Sovereignty, then, is partial, behavioral, negotiated, and relative. It is *earned* in the world, not bestowed by courts. By serving functions, States (and states) prop up their own sovereignty. Their behavior strengthens future claims to sovereignty. This is the sovereignty the Framers seemed to have in mind for the states. It seems a fair inference that the drafters of the Constitution, while ensuring the states' *existence*, intended that their *sovereignty* was to be earned rather than granted. Thus, if there is to be a federalism revival, it will not occur in the Court or Congress. A revival will occur in the states and on the ground. It will be a bottom-up, rather than a top-down, phenomenon.

Given this revision of our understanding of state sovereignty, the deficiencies of status sovereignty are rather obvious. In brief,

CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1996); MICHAEL ROSS FOWLER & JULIE MARIE BUNCK, *LAW, POWER, AND THE SOVEREIGN STATE: THE EVOLUTION AND APPLICATION OF THE CONCEPT OF SOVEREIGNTY* (1995); *STATE SOVEREIGNTY AS SOCIAL CONSTRUCT* (Thomas J. Biersteker & Cynthia Weber eds., Cambridge Univ. Press 1996); CYNTHIA WEBER ET AL., *SIMULATING SOVEREIGNTY: INTERVENTION, THE STATE, AND SYMBOLIC EXCHANGE* (1994).

¹⁶ See Louis Henkin, *Human Rights and State "Sovereignty,"* 25 GA. J. INT'L & COMP. L. 31, 41-42 (1995-1996) (describing compliance and enforcement trend with regard to international human rights).

it is not merely that status sovereignty provides little in the way of substantive protection or benefit to states. The problem is much more serious. Status sovereignty is wholly defensive and negative. It provides no positive way forward for states. It does not challenge states to rethink or refashion the federal-state balance on their own terms. Status sovereignty actually imperils statehood by encouraging this sort of passivity. The lesson of active sovereignty is that states must view their sovereignty not as inherent, but as relative and always *at stake*. Sovereignty, in other words, is not a matter of *being*, but *doing*.

There is some reason for cautious optimism that a federalism revival based upon principles of active sovereignty might occur. The states are actively taking the lead on matters of critical importance to citizens, such as wage reform, environmental reform, food safety, and access to prescription drugs.¹⁷ They are aggressively taking positions on fundamental social issues like abortion and same-sex marriage. In some instances, states are pursuing an independent view of the federal-state balance of power rather than merely accepting the balance dictated to them by tradition or static conceptions of what is properly "local." States are also expanding their role as political communities by broadening opportunities for direct governance through initiative and referendum machinery. They are moving beyond traditional notions of dealing with each other, and with federal authorities, by pooling or sharing their sovereignty in unique arrangements and pacts. States are even increasingly rejecting antiquated notions of their "proper" role in the world. Within limits still largely undefined, states are acting as, and being treated as, *de facto* powers in their own right in international contexts. There is much more that states could be doing as active sovereigns. If states take hold of their sovereignty, the beneficiaries of innovation and activity will not be the states, as under status sovereignty, but the people.

¹⁷ See Pam Belluck, *The Not-So United States*, THE NEW YORK TIMES, April 23, 2006, at WK 4 (noting a number of policy areas in which states are proceeding on their own, rather than waiting for federal proposals).

I. Statehood and Sovereignty

The core notion of sovereignty traces back to the King, the ur-sovereign. Classic sovereigns were considered ultimate authorities in a territory. In the international context, States have long suffered encroachments on their internal and external authority. In the new global social and economic environment, this is now inevitable. No state may claim the right, as sovereign, to violate human rights for example.¹⁸ As the European nations have recently discovered with the advent of the European Union, sovereignty is not, if it ever truly was, an all-or-nothing proposition.¹⁹ If more evidence of this were needed, consider the long ago transfer of "sovereignty" to the Iraqi people.²⁰

Yet sovereignty has not receded into oblivion. Indeed, far from it. At home and abroad, diplomats, officials, academics, and courts make claims to and based upon sovereignty. Despite serious objections from those who find the concept troubling or even meaningless, sovereignty remains a critical aspect of the language and structure of governance.²¹

This Part briefly examines the relationship between state sovereignty and federalism. It then distinguishes between two conceptions of sovereignty. The first, "status sovereignty," is the concept the Supreme Court has relied upon in its recent federalism revival. The second, "active sovereignty," is derived from reflections on the function and operation of sovereignty in the international context. Again, I do not suggest that States and our domestic states possess identical sovereignties. Our states can, however, learn something from internationalists about how State sovereignty is effectively managed and

¹⁸ See Henkin, *supra* note 17, at 41-42 (describing compliance and enforcement trend with regard to international human rights).

¹⁹ See LIESBET HOOGHE & GARY MARKS, *MULTILEVEL GOVERNANCE AND EUROPEAN INTEGRATION* (2001).

²⁰ See S.C. Res. 1546, ¶ 3, U.N. Doc. S/RES/1546 (2004) ("Reaffirming the independence, sovereignty, unity, and territorial integrity of Iraq.").

²¹ Skeptical treatments include Rakove, *supra* note 10, Rakove II, *supra* note 10, and CAMILLERI & FALK, *supra* note 15. The debate cannot be joined here. Let it suffice to say that sovereignty seems no more or less meaningless than, say, the "rule of law," or the "social contract," or even "democracy." Each of these concepts has *changed* meaning over time, to be sure. However, each undoubtedly *has* meaning.

maintained. The Part concludes with a discussion of the many deficiencies of and objections to status sovereignty.

A. Ordering Power

The domestic states are not, of course, classically sovereign. Having ratified the Constitution, they consented to *its* supremacy. They recognized the People's will as controlling. The states were not granted the external sovereignty of States; they have no constitutional authority, for instance, to engage in diplomatic relations with foreign nations. Still, the framers referred to state sovereignty on several occasions.²² The Supreme Court has long characterized federalism as based upon the principle of "dual sovereignty." And the mantra of the federalism revival was that the states are "sovereign."

If we assume that sovereignty is not, as some skeptics contend, utterly meaningless, then what does it mean to suggest that a state in our system of governance is sovereign? How does this concept relate to federalism? One answer, of course, is that sovereignty serves as a useful rhetorical device. Skeptics have long contended that this is the primary function of sovereignty.²³ There is indeed powerful symbolism in the concept of state sovereignty. Moreover, the Court has invoked the term with only the most minimal discussion of its theoretical basis, which of course adds to the concern that its use is purely strategic or political.

But sovereignty is doing more than rhetorical work in the federalism area. It serves primarily as a shorthand expression for the idea that states cannot be ignored, mistreated, bullied, or simply run roughshod over. State sovereignty represents the idea that there are limits to what federal authorities can ask of the states as states. It guides and constrains actions within the constitutional hierarchy the Framers provided. As it does in

²² See, e.g., THE FEDERALIST No. 32, at 220 (Alexander Hamilton) (Isaac Kramnick ed., 1987) ("[T]he State governments would clearly retain all the rights of sovereignty which they before had, and which were not . . . *exclusively* delegated to the United States."); THE FEDERALIST No. 45, at 293-94 (James Madison) ("[T]he States will retain under the proposed Constitution a very extensive portion of active sovereignty.")

²³ See, e.g., Rakove, *supra* note 10.

international contexts, sovereignty marks boundaries. It creates protocols and various behavioral expectations.

In this respect, the Court is using sovereignty in a most common fashion, namely to order power. Scholars and statesmen have recognized that sovereignty serves a variety of functions related to this core purpose.²⁴ It draws attention to subsidiarity, reminding superior powers that the interests of “secondary” institutions must be accounted for, that their views and interests must be respected. Having this sort of ordering principle is critical to the domestic states, which labor under the most severe disadvantages. *Statehood* itself is only minimally addressed by the Constitution.²⁵ The states are granted constitutional permanency; they have, in other words, a fundamental right to exist. Explicit constitutional rules require that states must be preserved against attack, dissolution, and territorial violation.²⁶ States are also deemed separate governmental and political entities; they have the right, generally speaking, to arrange their own governmental institutions. States also have critical participatory rights, including the right to vote on proposed constitutional amendments.²⁷ Finally, they possess a degree of interpretive independence with respect to their own laws and constitutional provisions.

These are minimal guarantees for statehood. Sovereignty provides a further basis for state claims to legitimacy, deference, and recognition. It legitimizes and empowers states, allowing them to operate *as if* they are positioned to resist a superior federal authority, even if in reality they are not so positioned. State sovereignty provides leverage at the bargaining table. Indeed, states often negotiate to have the “final say” on critical matters like education or health policy, even in the face of federal policies that are constitutionally supreme. Finally, sovereignty

²⁴ For a discussion of the usefulness of sovereignty in this regard, see FOWLER & BUNCK, *supra* note 16.

²⁵ See Zick, *supra* note 13, at 288-92 (discussing the “constitutive rules” of statehood).

²⁶ See U.S. CONST. art. IV, § 3, cl. 1 (“[N]o new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.”); *Texas v. White*, 74 U.S. 700, 725 (1869) (the Constitution “looks to an indestructible Union, composed of indestructible States”), *overruled by* *Morgan v. United States*, 113 U.S. 476 (1885).

²⁷ See U.S. CONST. art. V.

creates positive state pride and confidence. This is no small matter. For a *sovereign* state, in contrast to a merely *decentralized* locus of authority, has powerful incentives to distinguish itself and to innovate on behalf of and provide for its own community of citizens.²⁸

Sovereignty thus retains salience in the federalism area for a variety of reasons. It is a symbol of limited federal power. State sovereignty establishes a degree of order and clarity in the largely undefined area of vertical governmental relations. It reminds that a state is not merely a permanent fixture or territory, but a power in its own right. It sometimes levels an otherwise uneven playing field. Skeptics and critics may wish its demise, but sovereignty retains vitality. Rather than dismiss it, we must endeavor to better understand sovereignty and its implications for federalism.

B. Two Sovereignties

Sovereignty, like federalism, is not self-defining. To understand the implications of the recent federalism revival, and to assess the prospects for future revivals, we must consider the nature, character, and substance of state sovereignty. Aside from setting outer boundaries, do the manifestations of the revival – principally, limitations on lawsuits against states, prohibition of federal commandeering of state officials, and protection of states from other perceived encroachments – provide a framework for refashioning the relationship among state, local, and central powers? What advantages does the sovereignty the Court has bestowed actually provide to the modern state? And if the answer, upon reflection, is “few or even none,” then how might we re-conceive sovereignty such that it does provide a stronger foundation for federalism?

1. Status Sovereignty

In a word, the most recent federalism revival has primarily brought about a change in state *status*. The tangible benefits to

²⁸ But see Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 908 (1994) (arguing that federalism serves none of the values commonly associated with it, and that states primarily serve the function of “facilitating decentralization”).

states as a result of the revival have been remarkably minor, relatively trivial in fact. The manner in which we speak of the states, on the other hand, has changed dramatically in the past decade or so. At the core of "status sovereignty" is the notion that states inherently possess characteristics like "dignity" and "esteem." States, the Court has repeatedly reminded us, are not "mere political subdivisions;" rather, they are entitled to the degree of "respect" due a co-equal governmental institution.²⁹

In a sense this is indeed revolutionary. At the founding, states, like the colonies that preceded them, were likened more or less to mere corporations. Madison identified a "gradation" of authority "from the smallest corporation, with the most limited powers, to the largest empire with the most perfect sovereignty."³⁰ "The states," Madison said, "are not in that high degree Sovereign;" "they are Corporations with the power of Bye Laws."³¹ Corporations do not possess dignity or esteem. And governments need not "respect" corporations, which are of course merely forms of their own creation.

Without status, the states lacked all but the most basic rights, privileges, or immunities—those conferred expressly in the Constitution itself. Thus, for example, the early Court held that the states did not possess any right to be immune from lawsuits by citizens of other states.³² No state dignitary interest, the Court said, could outweigh citizens' interests in obtaining remedies for state wrongs.³³

This was the once degraded status of the states. At least nominally, the states occupy a much higher rank today. Corporations lack dignity. But *nations* or *persons* have these attributes. They also have fundamental rights. Nations enjoy certain legal immunities. Persons, as a result of their inherent dignity, possess fundamental rights to equal treatment, due process, autonomy, privacy, and much more.

²⁹ See *supra* note 3 and accompanying text.

³⁰ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 463-64, 477, 479 (1966) (Max Farrand ed., Yale Univ. Press 1966).

³¹ *Id.*

³² See *Chisholm v. Georgia*, 2 U.S. 419, 447 (1793), *superseded by*, U.S. CONST. amend. XI.

³³ See *id.* at 472 (Wilson, J.) (states must yield to larger "purposes of society"); *id.* at 455 (describing a state as the "inferior contrivance of man").

The core of the federalism revival has been the transformation of states, from something akin to corporate forms to far more dignified nations or persons. Almost by sheer linguistic fiat, the Court has bestowed on states not only the inherent “dignity” of nations or persons, but a host of constitutional rights as well. Today states, like nations and persons, have “rights” to privacy, autonomy, equality, and due process.³⁴ Nothing in the Constitution itself mandated this change in status. It is the result of what the Court itself has called “background principles” and constitutional and historical suppositions. Dignity, esteem, and the new states’ rights are, the Court has said, *inherent* attributes of statehood. They follow naturally from the fact of *being* what the Constitution minimally refers to as a “state.”

These analogies – to nationhood or personhood – suffer from some rather obvious technical flaws. These are not worth pursuing here. Far more seriously, this revival has provided relatively little tangible or other gain for states. When one gets to the heart of the matter, what seems to animate the “states’ rights Justices” more than anything else is the offense, the perceived *slight*, to states that results from singling them out for what turn out to be rather minor burdens or offenses. The Court has not objected, for example, to overarching federal laws that regulate states, so long as they treat states *the same as* regulated private actors.³⁵ The commerce power has seemingly rebounded from the minor limitations announced in cases like *Lopez* and *Morrison*.³⁶ Although it has been little remarked upon in commentary regarding the federalism revival, the Court has routinely interpreted federal laws as preempting state laws.³⁷ Moreover, although the process seems less than “dignified,” the Court has not moved to put an end to the incessant dangling before the states of millions in federal monies, to “encourage” their cooperation in federal endeavors. There are, as well, plenty

³⁴ See Zick, *supra* note 5, at 250-81 (discussing newly discovered rights of states).

³⁵ See *Reno v. Condon*, 528 U.S. 141, 151 (2000).

³⁶ See *United States v. Morrison*, 529 U.S. 598 (2000) (invalidating civil action provision of Violence Against Women Act); *United States v. Lopez*, 514 U.S. 549, 559 (1995) (invalidating Gun Free School Zones Act). *But see* *Gonzales v. Raich*, 125 S. Ct. 2195, 2215 (2005) (upholding application of federal Controlled Substances Act to locally produced and used marijuana).

³⁷ See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 571 (2001) (holding that Massachusetts law regulating labeling of cigarettes was impliedly preempted).

of chinks in the armor of state sovereign immunity.³⁸ Finally, the actual burdens the states were spared under the “anti-commandeering” principle were minimal, indeed trivial, and in any event easily accomplished through other means.³⁹

It may be that the status revival is a predicate to a revival of more substantive dimensions. But the most recent federalism decisions suggest that the Court has already made its point and that it is more or less content having done so to hold the lines it has drawn.⁴⁰ Indeed, the decisions, taken together, suggest that the Court’s federalism revival was largely cosmetic; the Court seemed to have little appetite for radical alteration of the federal-state balance. It was prepared, in quite minimalist fashion, to identify certain outer boundaries for federal power. But the Court was not in any sense seeking to fundamentally alter “our Federalism.”⁴¹

2. Active Sovereignty

Sovereignty – like federalism, or privacy, or equality – is not a static concept. The concept of sovereignty has undergone massive changes since the Constitution was framed. The negative, exclusive, preemptive sovereignty of Austin, Bodin, and Hobbes has long been on the decline. Modern *international* theories of sovereignty have been influenced by a climate characterized by globalization, supra-national governance structures, and other modern conditions. As the European Union and other collaborative ventures demonstrate, sovereignty has as a result become partial, partitioned, and relative.⁴²

Once seemingly anomalous, *partial* or *divided* sovereignty is now a global phenomenon. Thus, as in domestic constitutional

³⁸ See Jesse H. Choper and John C. Yoo, *Who’s Afraid of the Eleventh Amendment? The Limited Impact of the Court’s Sovereign Immunity Rulings*, 106 COLUM. L. REV. 213 (2006).

³⁹ See, e.g., *Printz v. United States*, 521 U.S. 898, 935 (1997) (relieving state officials of temporary functions under federal gun control law). The federalism revival left largely untouched Congress’s commerce and spending powers.

⁴⁰ See *Raich*; see also *Nev. Dept. of Human Res. v. Hibbs*, 538 U.S. 721, 740 (2003) (upholding waiver of state immunity under Family and Medical Leave Act).

⁴¹ *Younger v. Harris*, 401 U.S. 37, 44 (1971).

⁴² See generally NICK BERNARD, *MULTILEVEL GOVERNANCE IN THE EUROPEAN UNION* (2002); GENE M. LYONS & MICHAEL MASTANDUNO, *BEYOND WESTPHALIA? STATE SOVEREIGNTY AND INTERNATIONAL INTERVENTION* (1995).

disciplines, international theorists must now strive to understand how claims to sovereignty can have meaning in a world where powers routinely and substantially interfere with one another, and where claims to supremacy and preemption are routinely challenged. There is not adequate space here to describe the various circulating theories and meanings of sovereignty in international relations and other disciplines.⁴³ But work in these areas can be used to sketch a competing vision of state sovereignty, one that differs markedly from the status sovereignty that has bestowed little more than limited defenses on the domestic states. I will call this competing conception "active sovereignty."

If one thing has become clear from recent developments with regard to international Statehood, it is that the conferral of status alone does not guarantee State independence, autonomy, equality, or any other right or privilege. Merely calling something "sovereign" simply does not generally make it so. States can now rarely, if ever, coerce, dictate to, or disregard members of their communities. In a word, modern sovereignty is *relational*.⁴⁴ A State's claim to sovereignty is only as legitimate as its effective exercise of the functions associated with Statehood, both within external regimes that order power and within States' own political communities.⁴⁵

Because it is a function of serving functions, sovereignty is increasingly viewed as principally *behavioral*, rather than *legal*.⁴⁶ As many international relations scholars have argued, sovereignty is not a given, brute fact. It is more accurately conceived as a social construct, a fact generated by collective agreement.⁴⁷ Insofar as the domestic states are concerned, this agreement depends, first, on the basic constitutive rules of statehood. As mentioned earlier, these rules entitle states to such things as preservation, separate and independent existence,

⁴³ For a brief overview, see Zick I, *supra* note 13, at 257-64.

⁴⁴ See Anne-Marie Slaughter, *In Memoriam: Abram Chayes*, 114 HARV. L. REV. 682, 685 (2001).

⁴⁵ See generally CHAYES & CHAYES, *supra* note 15.

⁴⁶ See Richard H. Steinberg, *Who Is Sovereign?*, 40 STAN. J. INT'L L. 329, 330 (2004) (distinguishing legal and behavioral sovereignty).

⁴⁷ See STATE SOVEREIGNTY AS SOCIAL CONSTRUCT, *supra* note 15 (collecting treatments of statehood and sovereignty as social constructions).

direct participation in matters of national governance, and a degree of interpretive independence with respect to local laws. These rules define a baseline for constitutional statehood. They make it possible to speak in terms of a system of “dual sovereignty.” But they do not, *a fortiori*, make states sovereign. The process of construction requires a great deal more from states than that they meet the minimal definition of “state.” Generally speaking, collective agreements with regard to state sovereignty depend upon states consistently and effectively exercising a bundle of competences. States, through their actions and the reactions to their initiatives, become associated with these functions over time. In brief, states *are* sovereign under this view insofar as those affected by state actions – other states, federal authorities, citizens, and even foreign nations – ultimately agree to *treat* states as sovereigns.

Like status sovereignty, active sovereignty relies to some extent upon symbols and linguistic devices. The *language* of statehood conveys and helps constitute the institutional fact of state sovereignty. As we have seen, status sovereignty relies upon anthropomorphisms, things like state “dignity,” “offense,” and loss of “esteem.” According to status sovereignty, the states are like inherently dignified nations, or persons. In contrast, active sovereignty’s symbols are themselves dynamic. They are also firmly embedded in judicial, political, and social discourses. To generate sovereignty and maintain it, states must earn the respect and esteem of citizens and institutions by acting as *agents, trustees, communities, and laboratories* of innovation.⁴⁸ These are the Framers’ original symbols for statehood. They recognized that states’ claims to sovereignty would depend not upon their legal status as states, but upon how they would use the resource of sovereignty in the world – to bargain, cooperate, cajole, and assert claims on their own and their citizens’ behalves.⁴⁹

⁴⁸ See THE FEDERALIST No. 46 (James Madison), at 297 (state and federal governments are “but different agents and trustees of the people, constituted with different powers, and designed for different purposes”).

⁴⁹ See THE FEDERALIST No. 45 (James Madison), at 296 (noting that state power would “extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State”).

A constructive account of active sovereignty can help explain why the states are still regarded as "sovereign" at all in a constitutional regime where superior powers are nearly always able, as a brute matter, to override their prerogatives. The key, according to this theory, lies in reaching collective agreements or shared understandings that states should be *recognized* as sovereign because they *act* and *behave* as such. In sum, a state can claim to be "sovereign" insofar as it performs essential sovereign functions and convinces relevant constituencies that it is doing so both consistently and effectively. The modern state's sovereignty is thus not inherently given, but always at stake.

In general terms, then, sovereignty is not primarily a negative, prohibitive defense. It is a positive resource governments use and maintain by actively exercising and trading upon it. Understanding that its sovereignty is always, in some sense, at stake, the active sovereign constantly innovates. Where national or supra-national solutions fail or are not forthcoming, the active sovereign steps in to fill critical gaps. It takes the lead on issues that are of fundamental importance to a community's health, morals and welfare, whether or not those issues have historically or traditionally been the province of some other actor. The active sovereign engages citizens by encouraging democratic participation in all forums of the political community, including courts of law. The active sovereign assists the collection of states in carrying out national or international prerogatives in times of emergency or other critical need. Recognizing the exigencies of the modern governance environment, the active sovereign does not always seek to stand on its own; rather, it surrenders some independence by pooling or sharing its sovereignty with other states and institutions to achieve common goals. Finally, the active sovereign refuses to be bound by traditional notions of its "proper" sphere of activity, whether this means seeking opportunities on behalf of its citizens in new geographic areas or in new regional or other governance regimes.

Active sovereignty differs from status sovereignty in fundamental ways. It is positive rather than negative, innovative rather than static or tied to traditional notions regarding the balance of power, and relational rather than

exclusionary or preemptive. It is earned in the world, not bestowed by courts.

C. Status, Function, and Federalism

For those who truly believe that power should be re-directed to the states, the goal of any revival of federalism must be to see that statehood not merely survives but thrives. This is not merely a matter of improving the states' position in the federal system, or some aesthetic makeover. A revival must *invigorate* the states. It must provide them with something substantive, such that they remain integral parts of the system of governance. Assuming that this, or something like it, is the ultimate objective, there are four primary reasons for states (and, as well, courts and legislators who favor a meaningful "federalism") to prefer active sovereignty to status sovereignty.

First, status sovereignty lacks a principled theoretical grounding. Status sovereignty is the product, the Court says, of certain "background principles," inferences, and suppositions. The Court implies that a state *is* like a nation, or a person; but we are never told *why* this is so and, if so, what implications these analogies portend for federalism. This leaves status sovereignty vulnerable to the claim that "sovereignty" is being used as a tool of power politics rather than a principled basis for a workable federalism. Improving state status does not provide states with a deeper understanding of statehood or sovereignty. It does not provide states, or anyone else for that matter, with a framework for working through the complexities of federalism – past, present, or future.

Second, status sovereignty is actually dangerous to the welfare of states. As noted, statehood itself is rather thinly elaborated in the Constitution. Little is conferred upon the states as a matter of constitutional right. The fairest inference from text and history is that everything else must be earned. Status sovereignty gives the states their "dignity," but nothing else. Because it is entirely negative and defensive, status sovereignty encourages state passivity. It requires nothing of states, other than that they meet the rudimentary definition of "state." Status sovereignty does not encourage the states to consider, as one

internationalist has put it, "a ground for a forward policy of one's own."⁵⁰ It operates merely as a proscription on the action of some other power rather than a positive source of state energy or power. A meaningful revival of federalism cannot be based on this sort of defensive, passive conception of statehood and state sovereignty.

Third, status sovereignty raises what might be called "moral" issues. It has been applied, in part, to deny citizens access to judicial processes for the purpose of holding states accountable for alleged constitutional violations. By virtue of their status, what one scholar calls "laggard" states have thus been excused from compliance with the law.⁵¹ In a sense, then, status sovereignty licenses states to misbehave. More generally, this conception of state sovereignty turns democracy on its head. It places the state, which holds the people's sovereignty in trust, above its citizens.⁵² This undermines basic federalism ideals like state agency, trusteeship, and community. The problem is graver still. In the political community of the United States, "anti-commandeering" principles leave the impression that states have some constitutional right to be let alone, that they cannot be enlisted to serve the greater good even in times of national crisis or emergency. Status sovereignty prevents the redress of constitutional violations, inverts democratic principles, and causes fissures in the notion of political community. Rather than ensure that states are active participants in the governance structure, status sovereignty actually casts states as obstructionist outliers.

Finally, history rather plainly demonstrates that status sovereignty will not sustain a workable and robust federalism. Previous revivals, similarly grounded upon formalistic conceptions, have failed the tests of time and circumstance. One revival relied upon the notion of "enclave" sovereignty, in which

⁵⁰ ALAN JAMES, SOVEREIGN STATEHOOD: THE BASIS FOR INTERNATIONAL SOCIETY 260 (1986).

⁵¹ See Ann Althouse, *Vanguard States, Laggard States: Federalism and Constitutional Rights*, 152 U. PA. L. REV. 1745 (2004).

⁵² See Evan H. Caminker, *Judicial Solicitude For State Dignity*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 81, 86 (2001) ("[T]he notion that states are organically bestowed with a dignity incident to all sovereigns rests in tension with the notion that states are mere creatures of and subservient to the truly sovereign people.").

the Court sought to carve exclusive areas of state concern from the larger federalism mosaic.⁵³ Another relied upon formalistic notions of “commerce.”⁵⁴ But the lesson of these so-called “revivals” is that federalism operates on the ground, in the world. It is too complex to be ordered with reference to such simple legalisms.

Improving the status of states will order power to some small degree. It will establish outer boundaries. There is, however, no escaping the fact that states must tolerate a variety of interferences with their internal sovereignty. The Court’s most recent precedents, which balk at extending sovereign immunity and envision commerce and spending powers of considerable breadth, signal tacit recognition of this unavoidable reality. In the end, status sovereignty provides some short-term benefits to state treasuries. It may make the states “feel” better. But it provides no foundation for a real revival of statehood or federalism.

II. The Active Sovereign: Federalism Revival?

Let us consider, then, the implications of active sovereignty for the future of our federalism. States will perform many functions regardless of whether they are labeled “sovereign.” State officials will work on behalf of their citizens because they were elected or appointed to do just that. The active sovereign does more than this bare minimum, however. It does more than merely subsist. It extends itself, knowing that its sovereignty is in some sense always at stake.

Federalism has long been thought to dictate that certain matters are “local” and others “national.” The active sovereign seeks to remake federalism on its own terms, rather than on the terms dictated to it by tradition or some more powerful sovereign. To remake federalism on their own terms, or at least attempt this, states must understand how valid claims to sovereignty are actively made and sustained over time. This Part will review some of the on-the-ground activities that might serve as a

⁵³ See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (abandoning efforts to identify exclusive enclaves of state power).

⁵⁴ See e.g., *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895).

foundation for a federalism revival in and by the states. There is much, by way of innovation and energy, for other states to imitate, and to expand upon, in the examples described below. The basic lesson for states in what follows is that the revival must come from *within*.

A. Taking the Lead: State Innovations

The Framers believed that the states would serve the people in several functional capacities. They perceived states as agents and trustees of the people, and as places where innovative policymaking would occur.⁵⁵ States would earn their sovereignty, the Framers believed, by providing critical services to and connections for local populations. But federalism is obviously far more complex today than it was at the framing. States, as the examples below illustrate, are no longer confining themselves to what might traditionally have been considered “local” matters. They are engaged in efforts to alter the federal-state balance on their own terms, either by branching into areas of “national” concern or taking back what they view as issues rightfully theirs in the first place.

Indeed, states have increasingly been active with respect to critical policy matters that Washington cannot, or will not, address. After a recent period of dormancy, owing no doubt in part to state budgetary shortfalls, states during the past decade have taken a leading position on a number of critical issues. So much attention is regularly focused on Congress, and on the battle over federalism waged in the Supreme Court, that this activity tends to receive inadequate attention. But states are beginning to get noticed again. They are beginning to aggressively push back against coercive federal laws. They are filling substantial gaps where federal legislation has stalled. News items noting that the states have “taken the lead” are becoming much more common.

Although many recent state innovations might be listed, I will briefly highlight just a few. For example, states have been leading the way in adopting innovative policies relating to critical

⁵⁵ See Althouse, *supra* note 51, at 1750-76 (elaborating on “laboratory” metaphor).

energy and environmental issues.⁵⁶ As federal clean air laws have been watered down and riddled with exemptions, states have been forced to act creatively to enforce air quality standards. For example, the North Carolina Attorney General recently sued the Tennessee Valley Authority to prevent out-of-state power plants from sending air pollution into the state on the ground that the pollution constitutes a nuisance.⁵⁷

Health matters have been a special area of recent state innovation. The nation is experiencing a health care crisis. Recent state activity in this area has been a matter of emergency and necessity. For example, several states recently intervened when the newly revised Medicare prescription drug program left many low-income citizens without adequate coverage.⁵⁸ California took emergency action to assist nearly one million citizens in filling their prescriptions. Several other states were forced to take similar action during the drug program's troubled transition period. Massachusetts recently enacted landmark health care legislation, providing health care for virtually all of its citizens.⁵⁹

Pharmaceutical costs in general have been an increasing area of national concern. Congress has done little to solve the problem of rising drug prices. But states from Maine to Florida have offered their own unique solutions.⁶⁰ Maine developed a purchasing pool to give the state more leverage when purchasing from drug firms. Florida and Michigan provided by law that if drug companies want access to their markets, they must offer deep discounts on drugs. Massachusetts and other states employed comparison shopping to lower their citizens' costs. The states have acted in a host of other health-related areas, including medical malpractice reform, food safety, and restrictions on tobacco use, where federal authorities have

⁵⁶ See, e.g., Rebecca Smith, *States Take Lead in Widening Use of Green Energy*, WALL ST. J., Sept. 22, 2004, at A8.

⁵⁷ See Editorial, *New Strategy on Clean Air*, N.Y. TIMES, Mar. 4, 2006, at A12.

⁵⁸ See Robert Pear, *States Intervene After Drug Plan Hits Early Snags*, N.Y. TIMES, Jan. 8, 2006, at A1.

⁵⁹ See Pam Belluck & Katie Zezima, *Massachusetts Legislation on Insurance Becomes Law*, N.Y. TIMES, April 13, 2006.

⁶⁰ See Abraham McLaughlin, *States Take Lead on Drug Costs Cuts*, THE CHRISTIAN SCI. MONITOR, Aug. 16, 2002, at 1.

experienced decades-long stalemates or have done little or nothing owing to industry pressure and influence.

Living wage issues have become another area of acute concern. Congress remains gridlocked on these issues too. But states, as agents and trustees, have recently stepped in to fill this critical void. Maryland, for example, enacted a law that would require large businesses to cover a set percentage of employee health costs.⁶¹ States have also taken the lead on raising the minimum wage.⁶² Despite a decade-long freeze in the federal minimum wage, nearly half of the civilian labor force now lives in states where the rate is higher than the federal minimum. This has resulted in a shift of lobbying attention, as labor officials see more meaningful prospects for reform in the states.

Active sovereignty also entails states making claims to sovereignty with respect to fundamental social issues as well. Many states are already doing so. They have made strong claims to sovereignty in enacting laws and constitutional amendments regarding abortion, the death penalty, and same-sex marriage.⁶³ Thus, active sovereignty, like federalism itself, does not automatically lead to "liberal" policies. It favors neither "liberal" nor "conservative" causes. Active sovereignty encourages sovereign states to determine fundamental social policies and to innovate even with respect to issues of national concern.

These examples could be multiplied many times over. The point is that states must recognize that fewer and fewer issues are matters *solely* for federal action. An active sovereign does not wait for federal action that may never come. It does not assume that any issue is necessarily outside its competence. As the Medicare episode demonstrates, that sort of passivity can be physically harmful, even deadly, for a state's citizens. When states perform emergency functions competently, they maintain and reinforce their sovereignty. When they fail, however, as many believe they did in the days and weeks following Hurricane

⁶¹ See Michael Barbaro, *Maryland Sets a Health Cost for Wal-Mart*, N.Y. TIMES, Jan. 13, 2006, at A1.

⁶² See John M. Broder, *States Take Lead In Push To Raise Minimum Wages*, N.Y. TIMES, Jan. 2, 2006, at A1.

⁶³ See Pam Belluck, *Massachusetts Court Limits Same-Sex Marriages*, N.Y. TIMES, March 30, 2006; Belluck, *supra* note 17 (noting recent South Dakota law prohibiting abortions except where the mother's life is in danger).

Katrina, for example, the states undermine their – and perhaps other states’ – claims to sovereignty. Insofar as the states’ first reaction in times of turmoil is to look to federal officials for relief, they place their sovereignty at stake.⁶⁴ As they earn respect and sovereignty, so too can states lose it by failing to provide positive solutions. Mississippi officials seemed to realize this; Louisiana officials unfortunately did not. The next disaster, which may not be far off, will be handled in light of successes and failures previously demonstrated at the local level. Proposals to federalize emergency response efforts are already on the table. Passive and incompetent states invite this sort of federal intervention. This will likely be one of Katrina’s enduring lessons.

Although active sovereignty generally focuses on prescribing a program of positive self-help for states, there are some lessons for the judiciary as well. One of the ironies of the Rehnquist Court’s federalism revival was the extent to which the Court was willing to interpret broadly the doctrine of implied preemption. This may have two systemic effects. The first, and most obvious, is that federal law displaces the very state innovations we have been examining. Whatever minor gains flowed from the states’ status revival can be erased several-fold by the preemption of state health and safety programs. The second effect may be that states, concerned that their efforts will be for naught, will act more passively and timidly. Rather than pursue their own way forward, states will await federal action that may not be forthcoming. Courts committed to federalism and state sovereignty should approach preemption and other doctrines that undermine state action with far greater concern for these effects.

Active sovereignty obviously requires far greater energy and innovation than status sovereignty does. It requires that states begin to fundamentally and independently rethink the federal-state balance. As Professor Amar has suggested, “federalism cuts both ways.”⁶⁵ States “can gain political goodwill” by protecting their citizens from federal shortcomings.⁶⁶ By acting

⁶⁴ See Editorial, *Out to Lunch*, AUSTIN AMERICAN-STATESMAN, Oct. 21, 2005, at A14.

⁶⁵ Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1428 (1987).

⁶⁶ See *id.* at 1428-29.

in an innovative fashion, states can use their sovereignty not as a defensive shield but as a "tool[] to right government wrongs."⁶⁷

B. Democracy and Community

The framers created the states not only to be agents, trustees, and laboratories of innovation, but also as distinct communities. An active sovereign strives for distinction. Indeed, despite many similarities, states are unique in important respects. Even such seemingly minor things as state slogans ought to be viewed as demonstrative of state sovereignty. "Don't Mess With Texas," "Live Free or Die," and the recently coined "New Jersey: Come See for Yourself" are all expressions of separateness and distinction. They express something about their political communities and citizenries, whether it is swagger, or libertarianism, or self-deprecation. These are, of course, minor symbolic matters. They must be considered along with state governance institutions, policies, geography, common industry, and other things that comprise a state community.

The states are *political* communities. One of the most critical functions states serve as political communities is to provide local opportunities for citizens to exercise self-governance. Today there is abundant talk of popular constitutionalism.⁶⁸ However, the fact remains that the Constitution contains no distinct mechanism whereby "the People" can participate *directly* in day-to-day governance. But the states, as derivative sovereigns, can provide such opportunities. To the extent they do so, active states further strengthen their claims to sovereignty by strengthening their ties to the citizenry.

Some of the innovations described above resulted from direct democracy mechanisms like state initiatives and referenda. Roughly half the states currently allow for citizen initiatives. Policies determined in this direct fashion run the gamut, from affirmative action to stem cell research to redistricting to same-sex marriage. More states should provide for direct governance of this sort, and states should continue to expand the subjects

⁶⁷ See *id.*

⁶⁸ See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

that can be addressed in this fashion. These measures can come substantially to define a community. By initiative, California has sought to establish itself as the “Silicon Valley” for stem cell research. Oregon, as a result of its high-profile battle over assisted suicide, is now indelibly associated with the fundamental right to choose how one’s life ends. Through these governance mechanisms, states can stake out an identity based upon tax policies, individual rights, or any other characteristic that can be put to the people at the ballot.

Although many states are showing vital progress in encouraging political participation, there are many “laggard” states too. The duty to provide opportunities for political participation extends beyond the initiative and referendum. An active sovereign does not, as many states currently do, prohibit any class of citizen from exercising the franchise. Measures that prevent felons, or parolees, or probationers, from voting undermine state claims to sovereignty by severing a critical tie with whole classes of citizens.⁶⁹ These measures devalue the notion of political community. So do claims to “sovereign immunity.” Courts are part of the political community. And open courts are a critical aspect of self-governance. The active sovereign does not seek judicial immunities when faced with allegations of wrongdoing. Rather, the sovereign state voluntarily waives its immunity. States must recognize that waivers of immunity are *exercises* of state sovereignty, not *derogations* of it.

States communities do not exist in isolation. The domestic states are part of a community of United States. The active sovereign accepts that its internal sovereignty can be invaded for a variety of legitimate reasons relating to community interests. Many States have had to come to terms with this fact in the international context. Just as most European States must now bargain within the community of the Union, states have always had to bargain and perform in collective regimes. This means that they must cooperate, compromise, and sometimes settle. Bargains once made, such as the bargain on radioactive waste at

⁶⁹ See Editorial, *Voting Rights Under Siege*, N.Y. TIMES, Feb. 10, 2006, at A24 (noting that felon voting bans denied the franchise to some five million people in the most recent federal elections).

issue in *New York v. United States*,⁷⁰ must be honored by sovereign states. Otherwise, its future claims to sovereignty will likely be compromised. Because state sovereignty is *relational*, collective needs may outweigh a state's own interests. State sovereignty sometimes entails a claim to autonomy. But there are times when sovereignty lies in effective cooperation rather than isolation. States do not necessarily advance their sovereignty by attacking federal measures as intrusive acts of "commandeering." Sovereignty, recall, is relational. Thus, the active sovereign can generally be counted on to assist the larger community of states in times of need.

Active sovereignty requires that states, as political communities, provide the sorts of direct governance opportunities that the federal Constitution omits. The initiative and referendum will likely play a substantial role in any future federalism revival. Active sovereignty requires that states broaden the franchise, open courts to citizen complaints, and accept collective responsibilities.

C. "Pooled Sovereignty"

States acting as agents, trustees, laboratories, and political communities in the circumstances above are still acting according to traditional federalism norms. Although they are seeking to expand their sovereignty by recasting the federal-state balance and opening new opportunities for political participation, states are still performing traditional functions. The active sovereign must do more. It must look beyond traditional functions, forms, and arrangements.

As noted, sovereignty has been recast in certain international contexts as partial and relational. The "new sovereignty" of States is considered a *resource* rather than an absolute, proscriptive defense.⁷¹ When states act in the collective, rather than making their own way, this is sometimes referred to as an

⁷⁰ 505 U.S. 144 (1992).

⁷¹ See CHAYES & CHAYES, *supra* note 15, at 27 ("The only way most states can realize and express their sovereignty is through participation in the various regimes that regulate and order the international system.").

exercise of “pooled” or “shared” sovereignty.⁷² States are increasingly banding together to accomplish goals that no single State could achieve on its own.

The old notion of domestic state sovereignty was one of exclusion and isolation. State sovereignty entitled a state to exclude other states, and sometimes federal authorities, from its internal affairs. Increasingly, however, the American states, like European States, have been pooling their sovereignties in innovative ways, combining with other states in pacts, reciprocity agreements, and other arrangements. To advance claims to sovereignty in national regimes like Congress and federal agencies, states are exercising their sovereignties not individually and proscriptively, but rather *relationally and positively*, in combination with other sovereigns.

For example, seven Northeast states recently joined a regional pact that would limit carbon dioxide emissions linked to global climate change.⁷³ Greenhouse gas emission is an issue that federal regulators have, for a variety of reasons, failed to address. Under the states’ agreement, the first collective effort in the United States to adopt mandatory controls for greenhouse gases, states joining the pact would reduce emissions by 2020. Each state would set its own cap on emissions. The pact relies on innovative market principles. For example, states can accumulate unused excess allowances and then sell or trade them in an open market. Supporters of the pact insist that it will not only provide a sound regional solution, but will also encourage participating states to support clean energy alternatives, thereby creating local business opportunities and enhancing competition with European countries.

West Coast governors have pursued another pooling strategy for addressing the global warming issue. They recently agreed to use their combined purchasing power to buy fuel-efficient

⁷² See William Wallace, *The Sharing of Sovereignty: The European Paradox*, 47 POL. STUD. 503, 519 (1999) (sovereignty is increasingly “*held in common*,” “*pooled* among governments, *negotiated* by thousands of officials . . . *compromised* through acceptance of regulations and court judgments”).

⁷³ See Anthony DePalma, *Greenhouse Gas Pact is in Disarray*, N.Y. TIMES, Dec. 16, 2005, at B3. The states are Delaware, Connecticut, Maine, New Hampshire, New Jersey, New York, and Vermont. Massachusetts and Rhode Island backed out of the agreement, but may decide later to re-join the pact.

vehicles for official use, develop uniform appliance-efficiency standards, collaborate to measure and report greenhouse gas emissions, and reduce the use of diesel generators on ships in California, Washington, and Oregon ports.⁷⁴ The governors' informal agreement allowed states to achieve a common goal without ceding any internal sovereignty over energy or environmental policies.

States have pooled their sovereignties in other ways to address significant policy issues. A single state that decides to sue the federal government is in a decidedly weaker position than a state that joins with two, or ten, additional states. Collective lawsuits by states are trending upward. Many of these lawsuits are positive, shared exercises of state sovereignty. Twelve states recently sued the federal Environmental Protection Agency to force it to regulate greenhouse gas emissions.⁷⁵ Similarly, coalitions of states have recently sued the federal government in challenges to the No Child Left Behind Act, Medicare reimbursements, energy standards, and prescription drugs.⁷⁶ These claims face substantial burdens in the courts. But the lawsuits, as exercises of state sovereignty, are not solely aimed at achieving legal success. The apparent hope is that they may ultimately convince federal officials to alter policies relating to these critical issues.

As noted, active sovereignty perceives sovereignty as a bargaining resource that states can rely upon in the course of participating in national institutions of governance. Concerned that smaller states were obtaining more than an equitable share of federal aid in Congress, the governors of the nation's four most populous states recently joined together to lobby Congress. The so-called "Big Four" – Arnold Schwarzenegger of California, George Pataki of New York, Rick Perry of Texas, and Jeb Bush of

⁷⁴ See Brad Knickerbocker, *States Take the Lead on Global Warming*, THE CHRISTIAN SCI. MONITOR, Oct. 10, 2003, at 1.

⁷⁵ See Press Release, Eliot Spitzer, New York State Attorney General, Office of New York State Attorney General, *States, Cities Environmental Groups Sue Bush Administration on Global Warming, Challenge EPA's Refusal to Reduce Greenhouse Gas Pollution* (Oct. 23, 2003), available at http://www.oag.state.ny.us/press/2003/oct/oct23a_03.html.

⁷⁶ See Evan Halper, *State to Sue U.S. Over Medicare*, LOS ANGELES TIMES, Feb. 2, 2006, at B3; Juliet Williams, *California to Sue Over Federal Prescription Drug Plan*, THE SACRAMENTO UNION, Feb. 2, 2006.

Florida – have pooled their states' sovereignties to lobby on issues ranging from federal aid to energy to labor displacement.⁷⁷ The effort may be unprecedented; political scientists, strategists, and historians are hard pressed to recall any similar formal agreements among governors.

Pacts, collective suits, and lobbying partnerships do not exhaust the recent trend toward pooled state sovereignty. Common markets are another example. The Academic Common Market, for example, is a reciprocity agreement among sixteen southern states that allows undergraduate and graduate students to enroll at a university in another state while paying in-state tuition.⁷⁸ Through this pact, states can avoid maintaining costly programs of study with insufficient demand; students of course can save tuition dollars. These reciprocity agreements have grown in popularity over the past decade.⁷⁹ By pooling sovereignty in this innovative manner, states have managed to partly solve *internal* education concerns.

Interstate cooperation is, of course, not a new development.⁸⁰ But the states are increasingly conceptualizing and formalizing arrangements to address perceived *national*, as opposed to purely local or regional, issues of critical importance. A revitalized federalism will depend, to some extent, on activity that leverages individual state sovereignties in this fashion. These innovative exercises of shared or pooled sovereignty should be encouraged, studied, and perhaps replicated. But there is still much we need to know about these pooling arrangements. We need to know the conditions under which they work successfully, and under which they fail. How are individual state concerns within the cooperative addressed? How do internal state politics affect these pooling arrangements? What effect, if any, do these sorts of agreements have on internal state sovereignty? Under what

⁷⁷ See Raymond Hernandez & Al Baker, *Governors Join As 'Big Four' To Pool Clout*, N.Y. TIMES, July 20, 2004, at B1.

⁷⁸ See Divya Watal, *Think Globally, Pay Locally*, U.S. NEWS & WORLD REPORT, Sept. 5, 2005, at 55.

⁷⁹ For example, the Midwest Student Exchange Program is a similar consortium of six Midwestern states: Kansas, Michigan, Minnesota, Missouri, Nebraska, and North Dakota. See *id.*

⁸⁰ See JOSEPH F. ZIMMERMAN, *INTERSTATE COOPERATION: COMPACTS AND ADMINISTRATIVE AGREEMENTS* (2002) (noting relative lack of scholarly interest in interstate agreements).

conditions have they actually altered national policies? States should be examining these arrangements, sharing information and resources with other states, and joining collective efforts where joint action is appropriate.

THE STATES AS "DEMI-SOVEREIGNS": FOREIGN RELATIONS

All of the foregoing examples implicate active *internal* sovereignty – control over matters of mostly local concern. One of the principal obstacles to viewing the domestic states as sovereign has been the (mostly) implied prohibition on their exercising authority in matters touching on foreign affairs.⁸¹ The states do not possess *external* sovereignty, in the sense of being authorized to deal directly with foreign nations. As a result of the dormant foreign affairs power and the dormant foreign commerce power, courts have effectively precluded the states from affecting matters as to which it is said the United States must “speak with one voice.”⁸²

The active sovereign refuses to accept antiquated notions of its “proper” place not only within the federal system, but also in the world. Although technically constrained by dormant foreign affairs doctrines, some scholars have noted that states have heightened their international profile.⁸³ Indeed, one scholar suggests that the states have recently been treated as “demi-sovereigns” – *de facto* powers in their own right – in foreign relations.⁸⁴ Conditions of modernity, in particular advances in communications technology and globalization, have caused “a marked blurring of the distinction between foreign and domestic affairs.”⁸⁵ State and local governments have been more conspicuous players on the international scene, particularly with

⁸¹ There are of course some textual limitations on states in this regard. *See, e.g.*, U.S. CONST. art. I, § 10, cl. 3 (prohibiting states from entering agreements or compacts with foreign powers).

⁸² *See, e.g.*, *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 (1979); Sarah H. Cleveland, *Crosby and the “One-Voice” Myth in U.S. Foreign Relations*, 46 VILL. L. REV. 975, 979-88 (2001) (describing and criticizing the “one voice” doctrine).

⁸³ *See, e.g.* Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1275 (1999).

⁸⁴ *See id.* at 1225.

⁸⁵ *See id.* at 1247.

regard to matters of trade and investment, but also with respect to human rights issues.⁸⁶ On the ground, states maintain trade offices abroad, enter trade agreements with foreign countries, and routinely send out foreign trade missions.⁸⁷

Thus, state claims to a measure of *external* sovereignty have begun to arise from efforts to influence economic and other policies in international regimes. Here, again, is an indication of the importance of looking for the federalism revival on the ground and in the world. It has long been the case that states play a far more active role in foreign affairs than federalism doctrine would suggest they should.⁸⁸ Today, the states are positioned to act separately from the federal government in many areas of foreign affairs, to pursue their own and their political communities' interests abroad. State activity has created the conditions under which "a new doctrine of subnational responsibility" is taking hold.⁸⁹ Increasingly, foreign governments *perceive* states as separate sovereigns. In constructive terms, collective agreements are beginning to form regarding states' sovereignty in external matters. Foreign nations sometimes deal directly with the states on matters such as tax policy, immigrants' rights, and the death penalty.⁹⁰ This means that California, or Texas, are individually subject to discipline, or "targeted retaliation," for their actions.⁹¹ This is one indication that state claims to *de facto* sovereignty are gaining some traction abroad.

Within still largely undefined limits, states have unique opportunities to make claims to sovereignty on a global stage. As active sovereigns, states should be eager to take advantage of

⁸⁶ See *id.* ("The magnitude of state and local international activity has grown dramatically in recent years.") See generally EARL H. FRY, *THE EXPANDING ROLE OF STATE AND LOCAL GOVERNMENTS IN U.S. FOREIGN AFFAIRS* (1998) (describing rising influence of states in foreign affairs).

⁸⁷ See FRY, *supra* note 86, at 84-88 (describing state and local trade missions).

⁸⁸ See Cleveland, *supra* note 82, at 991 ("Despite the apparent clarity of the constitutional text, actual relations between the states and the national government over foreign relations have been significantly more nuanced, and the boundaries of state authority remain unclear.").

⁸⁹ Spiro, *supra* note 83, at 1261.

⁹⁰ See *id.* at 1261-70; see also Carla Fried, *How States Are Aiming to Keep Dollars Out of Sudan*, N.Y. TIMES, Feb. 19, 2006, C5 (describing state laws barring public pension funds from investing in companies with ties to Sudan, a country accused of extensive human rights violations).

⁹¹ Spiro, *supra* note 83, at 1261.

opportunities to act as agent, trustee, community, and innovator in a vast new global environment. States can use their spending and other powers to express moral claims, direct the expenditure of substantial funds, procure business opportunities for citizens back home, control their borders, and encourage policy changes at the national and international levels.

To be sure, substantial constitutional and political checks still constrain the states' foreign affairs activity. This is as it must be. There are instances in which the country still must speak with one voice. National security is an obvious example, and there is no doubting that federal authorities will remain committed to having "one voice" on such matters. But federal authorities should hesitate to interfere with most state prerogatives overseas, especially those dealing with trade and investment. Congress will naturally hesitate to intervene, often for political reasons. But there are *constitutional* reasons for permitting state activity in these areas. Like any other structural principle, federalism must be flexible. It must be able to respond to and accommodate globalization and other conditions of modernity. More to the point, our federalism must recognize the on-the-ground reality that states are now global actors.⁹² Their sovereignty can no longer be confined within our borders.⁹³

An expansion of state sovereignty does not entail political actors and courts sitting idly by while states cause major disruptions in foreign affairs and visit substantial harm on the Union. It merely suggests that "the rule of federal exclusivity no longer presents an imperative the way it once arguably did."⁹⁴ When this principle ought to apply, and which institution is best situated to enforce it, would be fruitful paths for future academic research. In the meantime, the best advice for states is to continue practicing active state sovereignty in foreign arenas. A

⁹² See Cleveland, *supra* note 82, at 995 (noting historical tolerance by federal government of local activity touching foreign affairs).

⁹³ Courts seeking to encourage a more vibrant federalism should not aggressively graft "dormant" limitations on foreign affairs and commerce powers. Nor should they, as they have in the domestic context, use a broad interpretation of implied preemption to negate state actions overseas. See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (invalidating, on preemption grounds, a Massachusetts law barring state entities from doing business with companies operating in Burma).

⁹⁴ Spiro, *supra* note 83, at 1259.

federalism revival must extend beyond narrow notions of “local” concern.

CONCLUSION

The Court’s “federalism revival” did not produce any substantive alteration of the federal-state ordering of power. Minimalist opinions marking off outer bounds of congressional power did not revive federalism in any significant way. Emphasizing the status, dignity, and esteem of states might make states “feel” better. Ultimately, however, a judicially imposed status sovereignty cannot sustain a robust and vital federalism.

If there is to be a federalism revival, it must be based upon states *doing*, not merely *being*. It must be a bottom-up, rather than a top-down, phenomenon. States must engage their own sovereignty, treating it as something that is not given to them, but always at stake and ultimately earned in the world. The concept of active sovereignty recognizes that states become sovereign only to the extent that they exercise sovereign functions and are, as a result, *treated* as sovereign. The active sovereign must be innovative. It must take the lead on critical matters and in emergencies, create vibrant political communities, establish and use new arrangements of power, and stake claims to sovereignty in arenas not traditionally associated with statehood.

Active sovereignty demonstrates that state sovereignty does not conflict with, but actually enhances and supports, popular sovereignty. A citizen without safe food to eat, clean air to breathe, a job, a living wage, and the means to participate directly in governance is herself a diminished sovereign. The active state sovereign is not concerned with ego or status. It is concerned, rather, with providing the conditions for popular sovereignty. The principal beneficiaries of active sovereignty will not be the states, as has been the result in the Court’s status sovereignty rulings, but the people themselves.