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Statehood as the New Personhood: The Discovery of Fundamental "States' Rights"

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STATEHOOD AS THE NEW PERSONHOOD: THE
DISCOVERY OF FUNDAMENTAL "STATES' RIGHTS"

TIMOTHY ZICK*

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INTRODUCTION

Despite all of the attention that has been paid to federalism recently, the states themselves remain something of a constitutional enigma. The Founders did not provide any express definition of statehood.¹ The Constitution contemplates the existence of the states, indicates the Founders' expectation that states would form separate governments, and grants states certain participatory rights; but it is otherwise mostly silent as to the status of states under the constitutional plan.² Courts and commentators have invoked a variety of symbols or metaphors to represent and support statehood. States thus have been likened to such disparate things as corporations, agents, trustees, laboratories, communities, and even nations.³ Efforts to defend or justify the states and state sovereignty typically stress that states enhance competition, serve local interests, and ultimately, protect individual liberties by dividing sovereign authority.⁴

States have endured, to be sure, but their significance and utility have been sharply challenged.⁵ Federal power and supremacy long ago eclipsed state power, no matter what barometer one consults.⁶

1. See Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819, 830-38 (1999) (discussing the original meaning and early interpretations of "state").

2. See U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof...."); U.S. CONST. art. VI, cl. 3 ("The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution...."); see also U.S. CONST. amend. X (granting states residuary powers).

3. See *infra* notes 53-57, 71-72 and accompanying text.

4. See *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (describing normative bases for federalism).

5. See Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes On a National Neurosis*, 41 UCLA L. REV. 903, 919-20 (1994) (questioning whether federalism, as opposed to mere decentralization, serves any real purpose).

6. See *New York v. United States*, 505 U.S. 144, 159 (1992) ("As the Federal Government's willingness to exercise power within the confines of the Constitution has grown, the authority of the States has correspondingly diminished...."); *id.* (noting that the Supremacy Clause gives the federal government a substantial advantage in exercising

Whatever the import of the Tenth Amendment, which plainly provides for state residuary power but whose meaning nevertheless seems perpetually in flux, federal supremacy is the order of the day.

Despite this reality, or more likely because of it, "states' rights" has experienced a renaissance in our constitutional scheme and in our public discourse regarding federalism. Historically, in both constitutional and political debates, "states' rights" has been utilized mostly as a convenient shorthand for the concept that federal power is limited in scope.⁷ Secessionists, nullifiers, and segregationists, for example, argued that slavery, federal tariffs, and central control of local education, respectively, were not within the Founders' vision of Congress's enumerated powers.⁸ Beyond its constitutional meaning, "states' rights" has generally been invoked opportunistically, as a political sound-bite or rhetorical catchphrase.⁹ The current political climate is no exception, as the Republican Party, the one that touts limited federal power, is currently defending itself against charges by the Democratic Party, the one generally associated with "big government," that major Bush education reforms and Republican opposition to gay marriage violate "states' rights."¹⁰

This latter invocation of "states' rights" may be dismissed as mere political rhetoric and grandstanding. The champions of "states' rights," however, are not only politicians and other political opportunists eager for a federalist sound bite. "States' rights" has taken hold among rather more respectable sorts, namely judges, including a majority of the Justices of the Supreme Court, and some

power).

7. On the history of states' rights, see generally FORREST McDONALD, *STATES' RIGHTS AND THE UNION: IMPERIUM IN IMPERIO, 1776-1876* (2000).

8. On the connection between "states' rights" and racism, see WILLIAM H. RIKER, *FEDERALISM: ORIGIN OPERATION SIGNIFICANCE* 142-45 (1964).

9. See generally McDONALD, *supra* note 7 (discussing the history of states' rights constitutional controversies); see also David Broyles, *Federalism and Political Life*, in *SAVING THE REVOLUTION: THE FEDERALIST PAPERS AND THE AMERICAN FOUNDING* 80-82 (Charles R. Kessler ed., 1987) (discussing appropriation of states' rights arguments by political factions).

10. See Sam Dillon, *Utah House Rebukes Bush with Its Vote on School Law*, N.Y. TIMES, Feb. 11, 2004, at A16 (noting that the vote to prohibit state authorities to spend local money to comply with the No Child Left Behind Law "comes after weeks of criticism by lawmakers arguing that the federal education measure impinges on the state's right to set its own education agenda").

scholars.¹¹ The language of “states’ rights” is everywhere. Indeed, today it seems that almost any act that implicates state authority is a “states’ rights” issue. Florida’s recently upheld ban on adoption by “practicing homosexuals,” for example, was characterized by the court as a “states’ rights issue,” the implication being that the state has parental “rights” with respect to putative adoptee children within its jurisdiction.¹² Other recent court opinions have stressed that states have the “right” to, for example, structure their own court systems,¹³ provide state constitutional protections that go beyond the guarantees of the Federal Constitution,¹⁴ and provide compensation for personal injuries.¹⁵

As even these few examples demonstrate, “states’ rights” is an extraordinarily malleable and often misunderstood concept. In order to better understand the implications of “states’ rights,” we need to be much clearer about what it means for states to have rights in the *constitutional* sense. We can speak about “states’ rights” in three separate senses. The first and most common sense is something of a misnomer, for, as stated, “states’ rights” has historically connoted the fundamental constitutional principle of enumerated and limited federal powers. Within their separate spheres, this argument holds, the state and central governments

11. See, e.g., Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 664 (1999) (Stevens, J., dissenting) (noting that “this Court once again demonstrates itself to be the champion of States’ rights”); Lynn A. Baker & Ernest A. Young, Essay, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75 (2001) (arguing that courts should not subject federalism, or “states’ rights,” to a “double standard” of judicial review); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1313 (1997) (arguing that historical record does not indicate that federalism was to “receive second-class status before the courts”).

12. Lofton v. Sec’y of Dep’t of Children & Family Servs., 358 F.3d 804, 806 (11th Cir. 2004).

13. See Chair King, Inc. v. GTE Mobilnet of Houston, Inc., No. 14-00-00711-CV, 2004 WL 162938, at *6 (Tex. App. Jan. 29, 2004) (concluding that federal law “simply acknowledges the states’ rights to structure their court systems and apply neutral state-court procedural rules”).

14. See State v. Wicklund, No. 96 042987, 1997 WL 426209, at *6 n.23 (Minn. Dist. Ct. July 24, 1997) (“This is what ‘states’s rights’ properly means.”), *rev’d*, 576 N.W.2d 753 (Minn. Ct. App. 1998), *aff’d*, 589 N.W.2d 793 (Minn. 1999).

15. See Irving v. Mazda Motor Corp., 136 F.3d 764, 767 (11th Cir. 1998) (arguing that a strong presumption against preemption exists where the subject matter “has traditionally been regarded as properly within the scope of the states’ rights”).

are sovereign or supreme.¹⁶ This traditional version of "states' rights" has generally been associated with "strict" constitutional construction of federal power, an interpretive approach that reserves the widest possible sphere of sovereign authority for states.¹⁷

The term "right," however, can and regularly does connote something more significant than dual sovereign powers. With regard to individuals, rights are strong, affirmative limitations on governmental power expressly granted by the Constitution. This concept of "right" is not as common to our discussion of federalism, although that is changing. Structural arguments have tended to focus on institutional powers, not rights. We do not typically speak in terms of the *rights* of Congress, or of the President, or of the Judicial Branch. We speak in terms of their separate *powers*. What does it mean, then, to assert that a federal enactment threatens or infringes upon the "rights" of states? What, specifically, are those rights? Is there more than a semantic difference between claiming that a state possesses "power" to act and claiming that the state has a "right" to something?

To answer these questions, we need to examine specifically the two other, less common senses in which "states' rights" have been invoked. First, as a matter of constitutional structure, states possess certain basic rights that must remain inviolate if they are to be thought of as sovereigns in any meaningful sense at all. The Constitution recognizes each state's right to exist, for example. It protects the states' territorial integrity, imposes a duty on the central government to protect states from invasion and other harms, and preserves the states' authority to maintain internal peace and order.¹⁸ The Constitution also guarantees states the right

16. See Steven G. Gey, *The Myth of State Sovereignty*, 63 OHIO ST. L.J. 1601, 1618-19 (2002) (noting that pre-New Deal commerce decisions "all employed a theory of sovereignty that assigned absolute authority over certain narrowly defined activities to the federal government and equally absolute authority over everything else to the states").

17. As the Court said in *Carter v. Carter Coal Co.*, 298 U.S. 238, 295 (1936): "It is no longer open to question that the general government, unlike the states, possesses no *inherent* power in respect of the internal affairs of the states...." (citation omitted).

18. U.S. CONST. art. IV, § 3 (protecting states' territorial integrity); U.S. CONST. art. IV, § 4 (providing that the central government shall protect states against invasion and "domestic Violence").

to form their own governments, free from central dictates. States thus have the right, for example, to choose their own officials, to locate their own capitols, and to set the qualifications for voters in state and local elections.¹⁹ States possess rights, by express constitutional design, to participate in the Nation's political processes and governance. Unless they waive the right, states are granted equal suffrage in the Senate.²⁰ They are also guaranteed a pivotal role in the process of constitutional amendment.²¹ Finally, by implication, the Constitution rests in the states, where no federal right or issue is presented, the right to render definitive interpretations of their own laws and constitutions. These express constitutional rights of existence, separateness, political participation, and interpretive independence are the most basic rights of free and independent states. Without these rights, we could not legitimately speak in terms of "dual" or "joint" sovereignty at all.

There is, finally, a third sense in which constitutional "states' rights" have come to be understood. It is this iteration of "states' rights" that will be the principal focus of this Article. The Supreme Court has recently discovered a variety of what might be called *fundamental* "states' rights" lurking in constitutional structure.²² These rights typically act as affirmative limitations on federal powers that are granted in the Constitution, much as individual rights, like those in the Bill of Rights, constrain enumerated governmental powers. This distinguishes fundamental "states' rights" from the traditional sovereign sphere version of "states' rights," the latter of which is a manifestation of an argument regarding the proper scope of federal power, not a "right" in the strong sense of the term. Fundamental "states' rights," unlike the sovereign rights of existence, separateness, participation, and interpretive independence, are not contained in any constitutional bill of rights for states. They are, like individuals' fundamental rights to such things as "privacy" and "liberty," judicial extrapolations from the penumbras of these basic sovereign rights. This,

19. See *infra* notes 158-62 and accompanying text.

20. U.S. CONST. art. V (declaring that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate").

21. See *id.* (providing for state ratification of constitutional amendments).

22. See *infra* Part II.B.

among other things, distinguishes fundamental "states' rights" from both the power calculus version of "states' rights" and the idea that the Constitution itself preserves certain minimal rights of state sovereignty.

As a result of recent Court decisions, states now enjoy fundamental rights to intimate association, equality, physical autonomy, mental autonomy, and due process. States, therefore, like persons, enjoy a measure of liberty in ordering and arranging their intimate affairs.²³ With respect to immunity from lawsuits, states are entitled to be treated as more than second-class sovereigns, just as the Constitution's equality guarantees prohibit government from creating lower-status persons.²⁴ Further, like persons, states now possess certain rights to physical and mental autonomy. Congress thus cannot simply "commandeer," conscript, or thrust state organs into service.²⁵ Nor, the Court has held, can states be forced or tricked into waiving their immunity; state waivers must, like individual waivers, be knowing, intelligent, and voluntary.²⁶

As well, like persons, states must be afforded certain *procedural* rights before their property or liberty can be adversely affected. Congress's exercise of the power granted to it under Section 5 of the Fourteenth Amendment to remedy civil rights violations is now viewed as an allegation or *charge* that the states have been engaged in unlawful discrimination. This charge, like those made by governments against persons, gives rise to certain procedural protections. States are entitled to notice that Congress intends to authorize private claims to state property.²⁷ Furthermore, they are entitled, at least indirectly, to an opportunity to be heard before Congress may force them to answer in court for alleged civil rights and other constitutional violations.²⁸

23. See *infra* Part II.B.1 (discussing the fundamental state right to order internal affairs).

24. See *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 769 (2002) ("[T]he primary function of sovereign immunity is not to protect state treasuries ... but to afford the States the dignity and respect due sovereign entities."); see also U.S. CONST. amend. V (Due Process Clause); U.S. CONST. amend. XIV (Equal Protection Clause).

25. *New York v. United States*, 505 U.S. 144, 161 (1992); see *Printz v. United States*, 521 U.S. 898, 917-18 (1997).

26. See *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 666, 675-76 (1999).

27. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985).

28. See *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (holding that valid Section 5

These fundamental state "rights" comprise what are now commonly referred to as "extrinsic" limitations on Congress's powers. They are "extrinsic" because they do not arise from judicial interpretations of the scope of, for instance, the commerce power or the Eleventh Amendment's express limitation on judicial power. Like many individual fundamental rights, these fundamental "states' rights" have been discovered in penumbras and emanations; they have burst forth from things like the "plan of the convention,"²⁹ amorphous "background principle[s],"³⁰ and judicial "presupposition[s]."³¹ As the Court has turned its attention to the fundamental rights of states, it has borrowed extensively from the lexicon and methodologies usually identified with the rights of persons, specifically with the controversial doctrine of substantive due process. Constitutional text has been routinely stretched to discover new "states' rights." The same Tenth Amendment that has consistently been downgraded to the status of "truism"³² is now an "affirmative limitation" on Congress's ability to regulate the states. The Eleventh Amendment, the Court says, stands "not so much for what it says, but for the presupposition of our constitutional structure which it confirms."³³ Section 5 of the Fourteenth Amendment, a broad positive grant of congressional power, is limited by newly announced procedural rules that operate in favor of the states.³⁴

Further, in the course of announcing the fundamental rights of states, the Court has lapsed into discussion of constitutional values, like autonomy and dignity, normally associated with personhood. The Court thus has repeatedly emphasized that "the primary function of sovereign immunity is ... to afford the States the *dignity*

legislation must exhibit "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end").

29. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 68 (1996).

30. *Id.* at 72.

31. *Id.* at 54.

32. See *United States v. Darby*, 312 U.S. 100, 124 (1941) ("The amendment states but a truism that all is retained which has not been surrendered.").

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

34. See *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (stating that congressional enactments under Section 5 must have "congruence and proportionality" to the evil discovered).

and *respect* due sovereign entities.”³⁵ Several commentators have focused in particular on the Court’s seemingly misplaced reverence for state “dignity.”³⁶ Dignity, of course, is something we associate most readily with human beings, not governmental institutions.³⁷ Some commentators, therefore, have treated this language as mere rhetoric, or dismissed it as “silly.”³⁸ Others have been willing to assume that there is substance to this language, but have had some difficulty making any concrete sense of it.³⁹

Although the Court’s references to “dignity” surely express something, we ought not focus myopically on this single word. This Article hopes to broaden the scope of our understanding of the new status of statehood and, hence of “states’ rights.” It makes perfect sense to speak of state equality, dignity, autonomy, and rights to process if what is afoot is something on the order of a rights movement (“revolution” may be too strong) for statehood. It makes sense, in particular, if we compare this new “federal liberty” to the

35. Fed. Mar. Comm’n v. S.C. State Ports Auth., 535 U.S. 743, 769 (2002) (emphasis added).

36. See Ann Althouse, *On Dignity and Deference: The Supreme Court’s New Federalism*, 68 U. CIN. L. REV. 245, 246 (2000) (noting “how the theme of deference to the states has drifted from normative, structural analysis to a states’ rights approach”); Evan H. Caminker, *Judicial Solicitude for State Dignity*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 81 (2001) (discussing various “expressivist” theories for the Court’s focus on dignitary interests of states); Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921 (2003) (identifying “role dignity” in discussions of state sovereign immunity); Suzanna Sherry, *States Are People Too*, 75 NOTRE DAME L. REV. 1121, 1127 (2000) (“Not since extending the language of the Fourteenth Amendment to corporations has the Court so anthropomorphized an abstract entity.”); Peter J. Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 VA. L. REV. 1 (2003) (locating dignity language in the law of nations, specifically the law of foreign sovereign immunity).

37. For discussions of dignity and its significance to human and constitutional rights, see, for example, Alan Gewirth, *Human Dignity as the Basis of Rights*, in THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 10, 11-14 (Michael J. Meyer & William A. Parent eds., 1992); Gerald L. Neuman, *Human Dignity in United States Constitutional Law*, in ZUR AUTONOMIE DES INDIVIDUUMS 249, 250-51 (Dieter Simon & Manfred Weiss eds., 2000); see also Resnik & Suk, *supra* note 36, at 1933-41 (noting that dignity as a value underlies many of the provisions in the Bill of Rights).

38. See Caminker, *supra* note 36, at 85.

39. See Resnik & Suk, *supra* note 36, at 1926-27 (positing a causal connection between Supreme Court attention to state dignity and international norms and arguing in favor of a limited “role dignity” for institutions); see also Smith, *supra* note 36 (locating dignitary interest in foreign immunity cases, but arguing that this analogy should lead to the rejection of state sovereign immunity claims).

Constitution's protection of individual civil liberty.⁴⁰ Indeed, the Court itself has done just that on many recent occasions. It has repeatedly compared the fundamental rights of states to the personal rights granted in, and derived from, the Bill of Rights.⁴¹ We shall have occasion to consider whether this specific comparison holds; for one thing, the rights in the Bill of Rights are express, whereas the fundamental rights of states are plainly not.⁴² In any event, once discovered, "states' rights," like individual rights, are the fundamental law of the land, unalterable by mere positive enactments of Congress.⁴³

In terms of solicitude for constitutional rights, as well as values such as dignity and autonomy, statehood is the new personhood. The decades of the 1960s and 1970s were a high watermark of judicial solicitude for the rights, dignity, and autonomy of personhood. These decades were marked by the discovery of "fundamental" individual rights, such as the right to abortion, the right to use contraceptives, and other aspects of more general rights to "privacy" and "autonomy."⁴⁴ As well, the due process revolution of the 1970s produced important individual rights to due process.⁴⁵ The substantive rights among these, although unenumerated, were discovered in constitutional "penumbras" and vague constitutional text.⁴⁶ The discovery of rights to abortion and sexual autonomy was, and is, a matter of controversy. These "fundamental" rights are textually and otherwise unbounded; they raise the uncomfortable specter of unconstrained judicial subjectivity.

40. James Wilson, a participant at the Pennsylvania ratifying convention, noted that just as individuals are entitled to *civil* liberty, states are entitled to what he called "*federal liberty*." James Wilson, Address to the Pennsylvania Ratifying Convention (Nov. 26, 1787), in 2 JONATHAN ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 429 (2d ed. 1836) [hereinafter ELLIOT'S DEBATES]. Although "federal liberty" has many meanings, this Article will treat the phrase as interchangeable with what the Article calls "fundamental states' rights."

41. See *infra* Part II.B.

42. See *infra* notes 171-73 and accompanying text.

43. See *infra* Part II.B.

44. See *Roe v. Wade*, 410 U.S. 113 (1973) (finding a right to abortion); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (finding a right to use contraceptives).

45. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970) (requiring that welfare recipients receive pre-termination hearings).

46. See *infra* notes 171-73 and accompanying text.

For a time in the late 1970s, but particularly during the past decade or so, the discovery of fundamental rights has focused not on persons, who have in fact lost some recent battles on this front,⁴⁷ but on the states. Many constitutional protections that have been afforded to persons now belong to the states as well.⁴⁸ "States' rights" thus has undergone a substantial transformation of late. The Court has de-emphasized power in favor of individual-like rights for states; it has de-emphasized text in favor of the loosest sort of constitutional construction.

Part I of this Article addresses the origins of the Court's increasing tendency to anthropomorphize the states. Statehood is a malleable construct. States have been likened to, among other things, laboratories, corporations, nations, and communities.⁴⁹ It should come as no surprise, then, to find the Court treating states as rights-bearing persons with dignity and autonomy interests. Indeed, the state-as-person metaphor has deep and distinctive constitutional roots. It is a little-noted fact that the Anti-Federalists, whose theories and arguments have experienced a revival in recent federalism doctrine, argued that states should be treated as individual "moral persons" possessing both dignity and constitutional rights.⁵⁰ As we shall see, the Anti-Federalists were principally concerned with the two most common versions of "states' rights" noted previously, namely the power calculus and textual rights concepts. They feared that unlimited central power would completely *annihilate* the states. Accordingly, Anti-Federalists espoused limited central powers. Believing that they were literally fighting for states' lives, Anti-Federalists were perhaps even more adamant about the preservation of the minimal "states' rights" of existence, separateness, and political participation. When they argued in favor of a "bill of rights" for states, this is what early advocates of statehood had in mind.

Part II examines the constitutional "rights" of states. It begins by examining those minimal sovereign rights for which the Anti-

47. See *Washington v. Glucksberg*, 521 U.S. 702 (1997) (declining to recognize a "right" to assistance in committing suicide).

48. See *infra* Part II.B.

49. See *infra* notes 53-57, 71-72 and accompanying text.

50. See *infra* Parts I.B-C.

Federalists argued, namely, the rights of existence, separateness, political participation, and interpretive independence. Although they did not secure a bill of rights for the states, early supporters of statehood did manage to secure these minimal constitutional rights. Despite the inherent narrowness of these rights, and the many general and specific limitations placed upon them in the Constitution, the Court has nevertheless extrapolated a series of additional "fundamental" constitutional rights both from these sovereign rights and, as we shall see, from far less specific sources. Part II examines these fundamental state rights of internal ordering, equality, autonomy, and due process by comparing them, in substance and origin, to the fundamental rights of persons. This comparison demonstrates that statehood and personhood, for the Court, share more than the symbolic or expressive resemblance that "dignity" suggests. Federal and civil liberty are comparable in substance, protecting analogous rights. More than this, the two liberties are the product of a judicial methodology that seeks to identify rights that are "implicit in the concept of ordered liberty."⁵¹ Finally, individual rights' precedents and principles are often utilized to support the recognition and defense of new "states' rights." In all important respects, the two liberties, federal and civil, are being treated by the Court as identical.

Part III critically examines the discovery and enforcement of fundamental "states' rights." The Founders declined to treat the states generally as rights-bearing persons. They chose, instead, a concept of divided sovereignty based primarily upon structure and the separation of powers. As the fundamental rights of states pile up, the notion that federalism is the product of a distributive calculus of power continues its precipitous decline. Structure and power are being tossed aside for rights, much as rights have come to dominate constitutional thinking where individual liberty is concerned.

This trend should disturb us, for constitutional rights and powers are not, as the Court occasionally insists, simply "mirror images" of one another or flip sides of the same coin.⁵² As the arc of individual

51. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

52. *New York v. United States*, 505 U.S. 144, 156 (1992).

liberty teaches, constitutional rights, particularly "fundamental" rights, differ from constitutional powers in important respects: rights are inflexible, whereas powers ebb and flow; rights (at least *inherent* ones) are implicit and unenumerated, whereas powers are textually grounded; and rights imply an aggressive judicial role, whereas powers generally implicate judicial deference to democratic processes. Further, although the specific rights the Court has discovered, namely, the right to intimate association, equality, autonomy, and due process, are appropriately enforced in favor of individuals, they are not legitimate "rights" of states. Judicial competence and legitimacy, the political realities of statehood, and the lack of an overarching normative justification for the newly discovered fundamental rights of states, all militate against charting this path on behalf of statehood. Finally, crucial aspects of federalism, including institutional flexibility, national community, and ultimately even individual liberty, will all be casualties of this new conception of "states' rights."

This does not mean that federalism is unenforceable, that states serve no purpose, or that states should simply cease to exist. Part IV briefly addresses the future of federal liberty. The existence of states is constitutionally protected. Part IV offers some modest proposals for preserving the states not by discovering new, discrete state rights, but rather by restoring federalism to a more disciplined focus on constitutional structure and powers. Federal liberty must recognize that states are subordinate institutions, not persons with special rights.

I. THE STATE AS MORAL, RIGHTS-BEARING PERSON

Statehood, like federalism, is a malleable concept. State status has changed many times since the Founding. There have been numerous attempts to capture the essence of statehood, both in terms of function and raw prestige. To quell fears of outright state annihilation, for instance, Founders like Hamilton and Madison argued that states would be invaluable "agents" and "trustees" of the people, and would provide the principal community ties for

citizens under the new divided government.⁵³ States thus were expected to serve liberty-enhancing and communitarian functions. As well, states have been, and continue to be, characterized as laboratories of social and economic experimentation.⁵⁴ This metaphor has been invoked, most recently, in connection with the heated debate concerning gay marriage.⁵⁵

The prestige of states has also varied over time, from early metaphors likening the states to mere corporate forms to those comparing the states to sovereign nations.⁵⁶ New status symbols have cropped up in specific contexts. States thus are sometimes treated, for purposes of commerce doctrine, as if they are free and independent "market participants" rather than constrained sovereigns.⁵⁷ Statehood, in sum, has meant and continues to mean many different things. It is a polysemous construct.

In terms of constitutional rights, we are witnessing yet another metamorphosis of statehood. Today, likening a state to a corporation, for example, would be an outright insult to its "sovereignty." As well, we shall see that the implication that states are mere prefectures or political subdivisions is viewed by some as an "affront" to states' "dignity" and "esteem."⁵⁸ Today's state is, in a number of respects, more like a person than any of these other

53. See THE FEDERALIST No. 46, at 297 (James Madison) (Isaac Kramnick ed., 1987) (describing the state and federal governments as "but different agents and trustees of the people, constituted with different powers and designed for different purposes").

54. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (considering it "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"); *Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting) (objecting to the Court's invocation of the Fourteenth Amendment "to prevent the making of social experiments ... in the insulated chambers afforded by the several States").

55. See James Pinkerton, *Look at Gay Marriage as Experiment*, NEWSDAY, May 17, 2004, <http://www.newamerica.net/index.cfm?pg=article&DocID=1582>; Jonathan Rauch, *A More Perfect Union: How the Founding Fathers Would Have Handled Gay Marriage*, THE ATLANTIC MONTHLY, Apr. 2004, at 88 (invoking laboratory metaphor in favor of state handling of gay marriage issue).

56. See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 455 (opinion of Wilson, J.) (observing that states were "the inferior contrivance of man"); Smith, *supra* note 36, at 81-87 (discussing cases in which the Court has treated states, with respect to each other, as sovereign nations).

57. See, e.g., *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 804-06 (1976) (drawing a distinction between states as market participants and states as market regulators).

58. See *infra* text accompanying note 281.

things. States are deemed to need a measure of private space in which to conduct their affairs and to be self-autonomous. They are considered capable of experiencing the insult that comes with being treated by Congress as less than equally sovereign. They are deemed to be in need of procedural protections against government charges of wrongdoing. States, in sum, are considered sentient and rights-worthy.

Conceptualizing states as persons is, in certain respects, not as outlandish as it first sounds. Constitutional doctrine has routinely anthropomorphized the enigmatic states in order to situate them in the constitutional order. For example, we speak of "state action" as if the state itself, as opposed to its designated officials, has acted in some tangible or physical manner. Too, states, like persons, are deemed to have "interests" that are often weighed on the same constitutional scale as individual interests when courts engage in balancing.⁵⁹ A citizen's interest in free expression thus can, on occasion, be outweighed by a state's interest in, for instance, peace, order, and tranquility.⁶⁰

An explicit state-as-person metaphor once played a fundamental role in constitutional debates. From the earliest days of the Nation, the state-as-person metaphor has been invoked to both situate and defend statehood. Some early supporters of statehood were not prepared to argue based upon the supposed instrumental or functional benefits commonly associated with states in particular, and federalism more generally. For one thing, they lacked the data and experience to demonstrate, for example, that states fostered competition or served as effective laboratories for social or economic experimentation.

Anti-Federalists, who argued most strenuously in favor of the "rights" and status of states, thus turned perhaps instinctively to the prestige metaphor of personhood. Their early imagery of state personhood consisted of three elements. First, each state was likened to an individual corpus, one with a relationship with

59. See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 946-47 (1987) (discussing the balancing metaphor).

60. See, e.g., *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 296 (1984) (holding that the government's interest in maintaining Lafayette Park and the National Mall outweighed expressive interests of demonstrators for the homeless).

government—in this case the central government. Second, the states were likened to “moral persons,” each possessing unique characteristics and each entitled to a basic level of “dignity” and “respect.” Finally, states were said to be entitled to certain “rights.” As individuals were entitled to civil liberty, states, it was urged, were entitled to a certain degree of “federal liberty.”⁶¹ Indeed, Anti-Federalists suggested that states, like individuals, ought to have their own bill of rights.⁶²

In light of the Supreme Court’s ongoing Anti-Federalist revival, it is especially important to grasp this early comparison of state and person, and the conception of “rights” it embodied. As we shall see, the three basic elements of the Anti-Federalists’ invocation of the personhood metaphor—individuality, morality, and rights—have reappeared in recent federalism doctrine. They have, however, been invoked by the Court in a manner that the Anti-Federalists could not have imagined.

A. Individuality

Of the numerous concerns expressed by Anti-Federalists, perhaps none was more acute than the desire that the people not, as some suggested, “forget our local habits and attachments,”⁶³ or “be reduced to one faith and one government.”⁶⁴ Many Anti-Federalists feared that states would either be treated as mere corporate bodies or annihilated altogether by an expansive central authority.⁶⁵ It was imperative that the states’ right to exist be

61. James Wilson, Address to the Pennsylvania Ratifying Convention (Nov. 26, 1787), in 2 ELLIOT’S DEBATES, *supra* note 40, at 429 (emphasis omitted).

62. See *infra* notes 122-33 and accompanying text.

63. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 413 (Max Farrand ed., rev. ed. 1966) (remarks of James Wilson) [hereinafter RECORDS OF THE FEDERAL CONVENTION]

64. HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 10 (1981) (quoting Demosthenes Minor, *Gazette of the State of Georgia*, Nov. 15, 1787).

65. See, e.g., *Essays of Brutus* (No. 1), N.Y. J., Oct. 18, 1787, reprinted in 2 THE COMPLETE ANTI-FEDERALIST 367 (Herbert J. Storing ed., 1981) [hereinafter THE COMPLETE ANTI-FEDERALIST] (expressing concern that the central government would exercise its commerce power “as entirely to annihilate all the state governments, and reduce this country to one single government”); *Essays of An Old Whig* (No. 6), INDEP. GAZETTER, reprinted in 3 THE COMPLETE ANTI-FEDERALIST, *supra*, at 43 (arguing that the moment the power of taxation is given to Congress, “we ought by consent to annihilate the individual states”).

preserved. Further, if states were to be vital, vigorous, and ultimately sovereign, it was imperative that they retain their individuality.

The concept of states as separate individual units permeates Anti-Federalist writings. It begins with the imagery of the state of nature. Anti-Federalists argued that "the separation from [Great Britain] placed the 13 States in a state of nature towards each other."⁶⁶ Luther Martin thus asserted, "the States like individuals were in a state of nature equally sovereign and free."⁶⁷ The "several states," as Anti-Federalists preferred to refer to them, were thus conceptualized as persons from their inception. "[W]hen a number of States unite themselves under a federal government," Martin said, "the same principles apply to them as when a number of individual men unite themselves under a State government."⁶⁸

Like men, the states needed government to order their existence and secure their liberty; thus, they entered the social contract. As even Anti-Federalists were forced to concede, the Articles of Confederation, the first such contract, had been ineffectual. From the perspective of states' advocates, however, the proposed Constitution was not necessarily much of an improvement. Although states in general were threatened by the breadth of proposed federal powers, the position of the smaller states in particular was deemed precarious. Although the Anti-Federalists viewed the New Jersey Plan in the Convention (which provided for, among other things, equal state voting rights) as "calculated to preserve the individuality of the States," the Virginia Plan (which did not provide for equal voting rights for states), in their view, had a tendency "to destroy this individuality."⁶⁹ George Clinton argued

66. 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 63, at 324; *see also id.* at 340-41 (discussing the relative roles of the states and the federal government).

67. SAMUEL H. BEER, *TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM* 240 (1993).

68. Luther Martin, *The Genuine Information, Delivered to the Legislature of the State of Maryland, Relative to the Proceedings of the General Convention, Held at Philadelphia, in 1787*, reprinted in 3 RECORDS OF THE FEDERAL CONVENTION, *supra* note 63, at 183 (emphasis omitted); *see id.* at 184, 192; 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 63, at 340-41, 437-38; *see also* THE FEDERALIST NOS. 18, 20 (James Madison, with Alexander Hamilton) (discussing equal representation for states by looking to examples from the governments of other nations over the course of history).

69. BEER, *supra* note 67, at 239. The Virginia Plan was a highly-centralized proposal

that just as individuals entered a social contract to preserve their rights and liberties, "the only end for which states are induced to confederate, is mutual protection and the security of their equal rights."⁷⁰

In defending state sovereignty, Anti-Federalists stressed that it was the states who would consent to the new constitutional plan, not the nation as a whole. Dr. Johnson of Connecticut observed that the Anti-Federalists considered the states to be "so many political societies,' each with its 'individuality,'" while Federalists conceived of the states as "districts of people composing one political Society."⁷¹ Dr. John Witherspoon, along with other supporters of the compact theory of government, which held that states consented *individually* to join the Union, viewed "each state as equivalent to an individual, and thus the national government as a compact between individual states, each considered as a self-sufficient community."⁷²

The concept of state individuality played a central role in several specific debates touching on the early status of states. As mentioned, the issue of state voting rights was a point of serious contention. Anti-Federalists defended the notion of equal voting rights for states on the ground that with respect to individual *men*, the fact that one may be wiser, stronger, or wealthier does not result in unequal voting strength; the same ought to hold true, they reasoned, with respect to the individual states.⁷³ Equality was a

emphasizing population in the distribution of power. See 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 63, at 20-22 (setting forth proposals of the Virginia Plan). The New Jersey Plan, by contrast, focused on state equality and primacy. See RECORDS OF THE FEDERAL CONVENTION, *supra* note 63, at 242-45 (setting forth proposals of the New Jersey Plan).

70. George Clinton, Remarks at the New York Ratifying Convention (1788), in 6 THE COMPLETE ANTI-FEDERALIST, *supra* note 65, at 182.

71. BEER, *supra* note 67, at 239.

72. *Id.*; see Donald S. Lutz, *The Articles of Confederation as the Background to the Federal Republic*, PUBLIUS, Winter 1990, at 55, 62 (discussing Witherspoon's support of the compact theory). The debate pitting compact and nationalist theories of the Constitution against one another has continued to this day. See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (discussing nationalist and compact theories of constitutional ratification); see also BEER, *supra* note 67 (arguing for a nationalist theory of ratification).

73. Luther Martin, *The Genuine Information, Delivered To The Legislature of the State of Maryland, Relative to the Proceedings of the General Convention, Held at Philadelphia, in 1787*, reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 65, at 36.

principle often invoked on behalf of the smaller states as the Constitution was being framed. As Luther Martin explained: "[L]ike individuals, each State is considered equally free and equally independent, the one having no right to exercise authority over the other, though more strong, more wealthy, or abounding with more inhabitants."⁷⁴ As George Clinton put it: "A dwarf is as much a man as a giant; a small republic is as much a sovereign as the most powerful kingdom."⁷⁵ This notion of an equality of status was a central premise of the individual rights revolution brought on by the American Revolution.⁷⁶ The Anti-Federalists applied it with vigor to argue for the equal status of the separate states.

In sum, Anti-Federalists invoked the state-as-person metaphor to argue in favor of the states' right to exist. They further asserted that state "individuality" or separateness was vital to statehood. States thus needed to be independent of and equal to one another. State "individuality" was to be preserved against anticipated central encroachments. As George Clinton asserted, the notion that the states would cede their independence and individuality so completely as was contemplated in the proposed Constitution "is as absurd and unreasonable as it would be to suppose that a man would take a draught of poison to preserve his life."⁷⁷

B. Moral Personhood and "Dignity"

In addition to emphasizing the separateness or individuality of the states, the Anti-Federalists claimed for each state the mantle of a symbolic moral personhood. In making this claim, Anti-Federalists sought to place the states on the same moral plane as

74. *Id.* (emphasis omitted).

75. Clinton, *supra* note 70, at 182. Clinton was here paraphrasing the words of the eighteenth century theorist Emer de Vattel, who was invoking the state-as-person metaphor to argue that nations were all "equal" to one another. See EMER DE VATTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW: APPLIED TO THE CONDUCT AND TO THE AFFAIRS OF NATIONS AND OF SOVEREIGNS* 7 (Charles G. Fenwick trans., Carnegie Inst. of Wash. 1916) (1758).

76. See GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 229-43 (1992) (discussing the move toward egalitarianism and individuality in connection with the republican revolution).

77. Clinton, *supra* note 70, at 182.

persons, who were then thought to possess natural and inalienable rights.

Dr. John Witherspoon, a member of the faculty of what would later become Princeton University, thus specifically referred to the states as "moral persons."⁷⁸ George Clinton, among others, echoed and expanded upon this sentiment:

The definition given of States and their rights by authors of the first authority is, that they are equally free and independent, as the individuals of which they are composed, naturally were—that they are to be considered as *moral persons*, having a will of their own and equal rights—that these rights are freedom, sovereignty, and independence.⁷⁹

As persons left the state of nature, they ceded some, but not all, of their natural rights. They retained those rights necessary to sustain an independent existence. Similarly, states, it was argued, ceded only a portion of their freedom and independence in joining the Union.⁸⁰ Like individuals, states laid claim to certain natural and inalienable rights of freedom, sovereignty, and independence.

In part, this moral claim to "states' rights" appeared to be based upon the uniqueness, the "personality," of the individual states. To the Anti-Federalists, states were not homogenous units. Rather, the early states were, like individuals, considered diverse in many significant respects. For example, Roger Sherman of Connecticut emphasized that each state "like each individual" has "its peculiar habits[,] usages and manners."⁸¹ In Anti-Federalist writings, states exhibited such things as happiness, greed, laziness, pride, and

78. BEER, *supra* note 67, at 239.

79. Clinton, *supra* note 70, at 182 (emphasis added).

80. See 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 63, at 166-67 (remarks of James Wilson) (making Federalist argument that just as individuals had to cede some rights to the government, so too must states cede some rights to the federal government).

81. 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 63, at 343.

pique.⁸² Anthropomorphic arguments, therefore, are not exactly new to constitutional discourses regarding statehood and federalism.

States' moral status was also based upon their early position of relative frailty. Like individuals, states were believed to be susceptible to disease, weakness, and demise.⁸³ For example, although New York appeared at the time to be quite vital, "A Farmer" commented that Georgia was "all body and no head or feet, and on nearer view it has no body either."⁸⁴ Pennsylvania likewise was a "child of nature, and strong convulsions must attend her destruction."⁸⁵ From the perspective of the Anti-Federalists, the Framers appeared to be "forgetting that bodies politic, like natural bodies have their duration of manly vigor and the decline of age, prolonged and regulated by the length of years in which they have been arriving at maturity."⁸⁶ Anti-Federalists appeared to be making a claim that just as the government owed a moral duty to protect the basic existence of individuals, so too was it obliged to look after the well-being of the individual states.

The moral status of states led naturally as well to the claim that states possessed "dignity" and were entitled to respect and esteem. An overbearing central authority was considered a general offense to statehood. Indeed, it was a common, if wildly overstated, Anti-Federalist refrain that the effect of the proposed Constitution would

82. See *Essays of Brutus* (No. 1), *supra* note 65, at 370 (noting that "manners and habits" of states differed and that their "sentiments are by no means coincident"); *Letters of Agrippa* (No. 12), *MASS. GAZETTE*, Jan. 11, 1788, *reprinted in* 4 *THE COMPLETE ANTI-FEDERALIST*, *supra* note 65, at 94 (asserting that "no state can be happy, when the laws contradict the general habits of the people"); *id.* ("The idle and dissolute inhabitants of the south, require a different regimen from the sober and active people of the north.").

83. See Patrick Henry, Remarks at the Virginia Ratifying Convention (June 4, 1788), *reprinted in* 5 *THE COMPLETE ANTI-FEDERALIST*, *supra* note 65, at 211 (describing the states as "the characteristics, and the soul of a confederation").

84. *Essays by a Farmer* (No. 7), *MD. GAZETTE*, Apr. 22, 1788, *reprinted in* 5 *THE COMPLETE ANTI-FEDERALIST*, *supra* note 65, at 67. Anti-Federalists could, on occasion, get carried away in their anthropomorphic fervor, as when Oliver Ellsworth claimed: "My happiness depends as much on the existence of my state government, as a newborn-infant depends upon its mother for nourishment." 1 *RECORDS OF THE FEDERAL CONVENTION*, *supra* note 63, at 502; see BEER, *supra* note 67, at 241 (stating a similar quote by Ellsworth).

85. *Essays by a Farmer* (No. 7), *supra* note 84, at 67.

86. *Id.* at 69. Alexis De Tocqueville also used the symbolism of a human corpus to describe the early states. He likened the state to a body with a nervous system—towns, counties, and other organs of government. ALEXIS DE TOCQUEVILLE, 1 *DEMOCRACY IN AMERICA* 59-60 (Phillips Bradley ed., Vintage Books ed. 1990).

be to impose a form of *slavery* upon the states.⁸⁷ The Constitution, some suggested, would destroy the “soul” of the states.⁸⁸

Less charged versions of the appeal to state “dignity” abound in the writings of the Anti-Federalists. Luther Martin argued that the proposed Constitution was an insult to both persons and states alike. He inquired:

Could there possibly be a greater indignity and insult offered to the majesty of the free States, and the free citizens of America, than for the very men who were entrusted with powers for the preservation and security of their rights, and for the establishment of a permanent system to promote their happiness, to make use of that power to destroy both the one and the other?⁸⁹

“A Federal Republican” thought that it would be “worth our while to enquire how far the proposed constitution will tend to reduce the dignity and importance of the states.”⁹⁰ “A Countryman from Dutchess County” objected to the proposed supremacy of federal authority and federal law as a concept “humiliating to sovereign and independent states.”⁹¹ Martin considered the proposed system “incompatible with the political happiness and freedom of the States in general.”⁹²

“A Gentleman in a Neighbouring State,” striking by degrees a humbler tone, expressed thanks for the opportunity to make alterations to the Articles of Confederation in order to “effectually support the authority and dignity of the states, and public faith.”⁹³

87. See, e.g., Martin, *supra* note 68, at 186 (referring to proportionate representation as “the most complete, most abject system of slavery that the wit of man ever devised, under the pretence of forming a government for free States”).

88. See Patrick Henry, Remarks at the Virginia Ratifying Convention (June 9, 1788), reprinted in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 65, at 235.

89. Martin, *supra* note 73, at 26.

90. A FEDERAL REPUBLICAN, A REVIEW OF THE CONSTITUTION PROPOSED BY THE LATE CONVENTION (1787), reprinted in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 65, at 78.

91. Letters from A Countryman from Dutchess County (No. 4), N.Y. J., Dec. 15, 1787, reprinted in 6 THE COMPLETE ANTI-FEDERALIST, *supra* note 65, at 58. “A Countryman from Dutchess County” was making an explicit argument for sovereign dignity. He asked: “Would this junto have dared to offer such an indignity to any sovereign prince in Europe, had they been appointed by one?—I know that your answer must be in the negative. Why then thus presumptuously attempt to prostrate thirteen sovereignties?” *Id.*

92. Martin, *supra* note 73, at 78.

93. A Letter from a Gentleman in a Neighbouring State, to a Gentleman in this City,

On the other hand, the gentleman felt it a "manifest indignity" to place the power to call forth the militia in Congress.⁹⁴ Patrick Henry similarly objected to the proposed prohibition on state interference with private contracts: "So degrading an indignity—so flagrant an out-rage to the States—so vile a suspicion is humiliating to my mind, and many others."⁹⁵ George Clinton objected that the plan rendered the states no more worthy than mere corporate bodies: "They are divested of the power of commanding the services of their own Citizens and reduced to the degraded situations of public corporations by being rendered liable to suits."⁹⁶

"Agrippa" similarly lamented that the states were given no power to pay their own debts; this, he argued, placed states "in an humiliating & disgraceful situation."⁹⁷ Patrick Henry objected that the powers left to the Virginia legislature under the constitutional plan were "trivial domestic considerations, as render it unworthy the name of a Legislature."⁹⁸ He envisioned instead vigorous, independent states: "These will exhibit a bright *specimen* of real dignity, far superior to that immense devolution of power, under which the sovereignty of each state shall shrink to nothing."⁹⁹ A confederation was defended "as the only method to preserve internal freedom, together with external strength and respectability."¹⁰⁰

Finally, Anti-Federalists specifically objected to placing the central government in a position or station of *supremacy* vis-a-vis the states. To "Cincinnatus" and other Anti-Federalists, the word "supreme" "implies the highest in dignity or authority, etc."¹⁰¹ The Anti-Federalists argued, not without cause as it happens, that the expansive powers granted to the central government, coupled with

CONN. J., Oct. 17, 1787, reprinted in 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 65, at 7.

94. *Id.* at 12.

95. Henry, *supra* note 88, at 229.

96. Clinton, *supra* note 70, at 184.

97. *Letters of Agrippa* (No. 16), MASS. GAZETTE, Feb. 5, 1788, reprinted in 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 65, at 113.

98. Henry, *supra* note 88, at 238.

99. *Id.* at 187.

100. *The Fallacies of the Freeman Detected by A Farmer*, FREEMAN'S J., Apr. 1788, reprinted in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 65, at 186.

101. *Letters from a Countryman from Dutchess County* (No. 4), *supra* note 91, at 59.

the driving premise of national supremacy, would substantially degrade the powers left to the states.

Given the significant attention that has been paid to the language of "dignity" in the Court's recent sovereign immunity cases, as discussed below,¹⁰² a few additional words on this particular matter are in order. The foregoing discussion is not meant to suggest that the Anti-Federalists' conception of "dignity" was of the same character as that which we have come to associate with "personhood" since World War II and the ascendance of individual rights, particularly fundamental rights.¹⁰³ As students of "dignity" would point out, the concept of dignity during the Founding might be likened to social or governmental *rank* rather than something inherent to personhood.¹⁰⁴ Too, there is no doubt, as some have suggested, that the Founding generation was influenced in its thinking about the states by the law of nations, which also emphasized the "dignity" of sovereign nations.¹⁰⁵

It is also plausible, however, to attribute this early concern for state dignity to the state-as-person metaphor. Early international relations theorists often likened nations to persons, staking national claims to "rights" and "dignity" on this metaphor.¹⁰⁶ Moreover, the concept of dignity was evolving as the proposed

102. See *infra* Part II.B.2.

103. See Resnik & Suk, *supra* note 36, at 1926 (noting, based on research, that "the word dignity was not used in reference to personal constitutional rights in the Supreme Court's jurisprudence until the 1940s in the wake of World War II").

104. See *id.* at 1923 ("Monarchs were the sovereigns to whom dignity belonged in eras when ordinary persons were not due such respect and deference."). As Resnik and Suk note, "throughout its history, the United States Supreme Court has ascribed the harms of indignities to institutions." *Id.* at 1941.

105. See Thomas H. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 NW. U. L. REV. 1027, 1061-67 (2002) (locating modern concern with dignity in international law); Smith, *supra* note 36, at 7 (same).

106. See JOSEPH A. CAMILLERI & JIM FALK, *THE END OF SOVEREIGNTY? THE POLITICS OF A SHRINKING AND FRAGMENTING WORLD* 17 (1992) (noting that nineteenth century international relations theorists conceived of a state as "a living, articulate force, a historic individual with a personality and will of its own" (quoting KENNETH H.F. DYSON, *THE STATE TRADITION IN WESTERN EUROPE: A STUDY OF IDEA AND AN INSTITUTION* 103 (1980))). The nation-as-person metaphor can be traced to an earlier era. Emer de Vattel, who authored the most widely read treatise on international law in the eighteenth century, invoked it to argue on behalf of the equality of nation-states. See Bardo Fassbender, *Sovereignty and Constitutionalism in International Law*, in *SOVEREIGNTY IN TRANSITION* 121 (Neil Walker ed., 2003).

Constitution was being debated.¹⁰⁷ Honoring social rank for its own sake conflicted with the more general movement toward equality that began in the Revolutionary period. Indeed, the Constitution itself would ultimately ban titles of nobility.¹⁰⁸ Individual dignity outside social rank was recognized by, among others, Alexander Hamilton, who defended the Constitution to *the people* of New York as the "safest course for your liberty, your dignity, and your happiness."¹⁰⁹

In any event, the Anti-Federalists saw a certain value in comparing states not just to persons, but to *moral* persons. Part of that value inhered in the notion that the states, as special persons, possessed a strong moral claim to their individuality, to certain liberties and protections, to "happiness," and, perhaps, to the same sort of basic respect from government that individuals were then thought to enjoy.¹¹⁰ The Anti-Federalists were, after all, among the strongest advocates for a bill of rights that would enshrine a number of personal dignitary interests in the Constitution.

C. Rights

Anti-Federalists would take the state-as-person metaphor further still. They argued that states, as individuals and moral persons, possessed not only dignity but *rights*. Some of those rights, like individual rights, were thought to be inherent and natural. Broad rights to freedom, independence, and sovereignty were certainly among these.

In at least this respect, the Articles of Confederation were considered superior by Anti-Federalists to the proposed plan of government. David Howell, a delegate from Rhode Island, viewed the Articles of Confederation as "a constitution framed with the primary purpose of securing the liberties of the states."¹¹¹ Article II

107. See Michael J. Meyer, *Introduction*, in *THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES* 5-6 (Michael J. Meyer & William A. Parent eds., 1992) (sketching the evolution of the concept of dignity during the Framing period).

108. U.S. CONST. art. I, § 9, cl. 8; U.S. CONST. art. I, § 10, cl. 1.

109. *THE FEDERALIST* No. 1, at 89 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

110. See *Essays of Brutus* (No. 2), N.Y. J., Nov. 1, 1787, reprinted in 2 *THE COMPLETE ANTI-FEDERALIST*, *supra* note 65, at 373 (mentioning, for example, "the rights of conscience, the right of enjoying and defending life, etc.").

111. JACK N. RAKOVE, *THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY*

of the Articles of Confederation lent substantial credence to this interpretation. Unlike the Tenth Amendment, which refers only to state "powers," Article II of the Articles of Confederation referred expressly to state rights. It provided: "Each state retains its *sovereignty, freedom, and independence*, and every *power, jurisdiction, and right*, which is not by this confederation expressly delegated to the United States in congress assembled."¹¹² Article II thus preserved state sovereignty in two respects not adopted by the Constitution. First, it expressly reserved the inherent rights of states to sovereignty, freedom, and independence. Second, it granted to the federal government only those powers *expressly* set forth in the Articles.

To state supporters, then, the Constitution contained some glaring omissions. As many state defenders conceived it, the goal in amending the Articles of Confederation should have been "the preservation of the individual states, in their uncontrouled constitutional rights."¹¹³ Supporters of strong state sovereignty believed that they were in danger of losing the "liberties, privileges, and immunities" that were secured to states under the Articles.¹¹⁴

For supporters of state sovereignty, preservation of the rights of the individual states was a paramount consideration in designing a federal structure of government. Many Anti-Federalists subscribed to the following creed: "As the preservation of the rights of individuals is the object of civil society, so the preservation of the rights of states (not individuals) ought to be the object of federal society."¹¹⁵ Rights were necessary for state sustenance; as one Anti-Federalist put it, states "ought to be fit to keep house alone if necessary."¹¹⁶ States needed those rights that would allow for the

OF THE CONTINENTAL CONGRESS 327 (1979); see *id.* at 313-16 (discussing Howell's states' rights view of the confederation).

112. ARTICLES OF CONFEDERATION art. II (1778) (emphasis added).

113. Robert Yates & John Lansing, *Reasons of Dissent*, N.Y. J., Dec. 21, 1787, reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 65, at 17; see also, e.g., Martin, *supra* note 73, at 39 (referring to "the rights of men and the rights of States").

114. A Friend of the Republic, *Anti-Federalist No. II*, FREEMAN'S ORACLE, Feb. 8, 1788, reprinted in 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 65, at 243.

115. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR, *supra* note 64, at 11.

116. *The Fallacies of the Freeman Detected by A Farmer*, *supra* note 100, at 184.

existence of "Thirteen State governments, preserved in full force and energy."¹¹⁷

James Wilson of Pennsylvania, himself no ardent state defender, captured the essence of the early connection between individual rights and "states' rights." Civil liberty, he said, was that which persons retained when they consented to be governed—a person "retains the free and generous exercise of all the human faculties, so far as it is compatible with the public welfare."¹¹⁸ Wilson counterposed that states, when they joined the confederate republic, enjoyed a comparable "*federal liberty*."¹¹⁹ Like men, states were said to cede only so much of their independence and "political liberty" that would benefit the whole.¹²⁰ As Wilson explained: "While they resign this part of their political liberty, they retain the free and generous exercise of all their other faculties, as states, so far as it is compatible with the welfare of the general and superintending confederacy."¹²¹

These assertions, however, were only generalizations concerning the rights of states. Many Anti-Federalists were disturbed that the proposed Constitution did not contain any *explicit* reservation of state liberties.¹²² Specifically, they proposed that there be a bill of rights for the states similar to the proposals then circulating for an individual bill of rights.¹²³ Luther Martin argued that there should be a "bill of rights" that would be "a stipulation in favour of the rights both of states and of men."¹²⁴ George Mason also recommended a bill of rights for the states.¹²⁵ So did Rufus King, who argued: "As the fundamental rights of individuals are secured by

117. Martin, *supra* note 73, at 34 (emphasis omitted).

118. 2 ELLIOT'S DEBATES, *supra* note 40, at 429 (remarks of James Wilson).

119. *Id.*

120. *Id.*

121. *Id.*

122. 1 THE COMPLETE ANTI-FEDERALIST, *supra* note 65, at 35.

123. As Akhil Amar has noted, the Framers were accustomed to thinking of the Bill of Rights not simply as a list of protections for individuals, but as a means of providing structural protections for the people. See AKHIL REED AMAR, THE BILL OF RIGHTS 125-27 (1998).

124. Luther Martin, Reply to the Landholder (Mar. 19, 1788), reprinted in 3 RECORDS OF THE FEDERAL CONVENTION, *supra* note 63, at 290.

125. See George Mason, *Objections to This Constitution of Government*, reprinted in 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 63, at 640; 3 ELLIOT'S DEBATES, *supra* note 40, at 444 (containing Mason's remarks in the Virginia convention).

express provisions in the State Constitutions; why may not a like security be provided for the Rights of States in the National Constitution."¹²⁶ "An Officer of the Late Continental Army" complained that "the liberties of the states and of the people are not secured by a bill or DECLARATION OF RIGHTS."¹²⁷ "Agrippa" believed that a "declaration [of rights] ought to have come to the new constitution in favour of the legislative rights of the several states, by which their sovereignty over their own citizens within the state should be secured."¹²⁸ A declaration, he argued, would ensure that "each state reserves to itself the right of making and altering its laws."¹²⁹

There were many similar complaints of a lack of express protection for states' rights and liberties in the proposed Constitution.¹³⁰ There were, as well, some specific proposals for such state bills or declarations. Most of these pressed claims for specific statements cordoning off state powers from perceived federal aggrandizement. "Agrippa," for example, proposed the following representative amendments, among others:

126. 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 63, at 493.

127. *Letter by An Officer of the Late Continental Army*, INDEP. GAZETTEER, Nov. 6, 1787, reprinted in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 65, at 93.

128. *Letters of Agrippa* (No. 6), MASS. GAZETTE, Dec. 14, 1787, reprinted in 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 65, at 80.

129. *Letters of Agrippa* (No. 12), MASS. GAZETTE, Jan. 14, 1788, reprinted in 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 65, at 94; see also A FEDERAL REPUBLICAN, A REVIEW OF THE CONSTITUTION PROPOSED BY THE LATE CONVENTION (1787), reprinted in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 65, at 85 ("A bill of rights should either be inserted, or a declaration made, that whatever is not decreed to Congress, is reserved to the several states for their own disposal.").

130. See, e.g., *Essays by A Farmer* (No. 6), MD. GAZETTE, Apr. 1, 1788, reprinted in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 65, at 51 (noting "the omission of a declaration to ascertain the rights of the several States"); Clinton, Remarks at the New York Ratifying Convention (1788), *supra* note 70, at 182-83 (lamenting lack of security for rights of states); *Letters of Agrippa* (No. 3), MASS. GAZETTE, Nov. 30, 1787, reprinted in 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 65, at 75 ("All the defenders of this system undertake to prove that the rights of the states and of the citizens are kept safe."); *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents*, PA. PACKET & DAILY ADVERTISER, Dec. 18, 1787, reprinted in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 65, at 156 ("The new constitution, consistently with the plan of consolidation, contains no reservation of the rights and privileges of the state governments....").

1. "It shall be left to every state to make and execute its own laws, except laws impairing contracts, which shall not be made at all."
2. "Each state shall have the command of its own militia."
3. "No continental army shall come within the limits of any state, other than garrison to guard the publick stores, without the consent of such states in time of peace."
4. "Every state may emit bills of credit without making them a tender, and may coin money, of silver, gold or copper, according to the continental standard."
5. "No officer of Congress shall be free from arrest for debt by authority of the state in which the debt shall be due."¹³¹

All of these rights, and a host of others, were considered necessary both to check the central government and to "preserve the importance of the state governments."¹³² The mere guidance of the Tenth Amendment was not considered sufficient for this purpose.

James Madison recognized that critics of the proposed plan of government contended that a bill of rights "ought to be declaratory, not of the personal rights of individuals, but of the rights reserved to the States in their political capacity."¹³³ The proposals, of course, were not accepted, the Convention preferring instead to rely upon the combination of limited, enumerated federal powers, the reservation of state powers in the Tenth Amendment, and the protections against federal aggrandizement in the remaining provisions of the Bill of Rights. These, especially the dispersal of sovereign power, were ultimately considered sufficient to protect and preserve the basic "rights" of states.

In sum, the Anti-Federalists relied to a significant extent on the state-as-person metaphor.¹³⁴ The metaphor provided, among other

131. *Letters of Agrippa* (No. 16), MASS. GAZETTE, Feb. 5, 1788, reprinted in 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 65, at 112; see also 5 ELLIOT'S DEBATES, *supra* note 40, at 551-52 (rejecting Roger Sherman's attempt to include in Article V the proviso that "no state shall ... be affected in its internal police").

132. *Letters of Agrippa* (No. 16), *supra* note 131, at 113.

133. THE FEDERALIST NO. 38, at 250 (James Madison) (Isaac Kramnick ed., 1987).

134. Some were concerned with this strategy, arguing that states should not be reduced to the status of individuals. For example, "The Federal Farmer" protested that states "may complain and petition—so may individuals; the members of them, in extreme cases, may resist, on the principles of self-defence—so may the people and individuals." OBSERVATIONS LEADING TO A FAIR EXAMINATION OF THE SYSTEM OF GOVERNMENT PROPOSED BY THE LATE

things, an explanation for the states' entrance into the Union. States thus could conveniently borrow the "state of nature" theory, which explained individuals' partial surrender of liberty to government through the compact of the Constitution. More than this, however, state-as-person literally put a face to state sovereignty. Viewed as moral persons, states could not be readily ignored in drafting the constitutional plan. As we shall see, their rights to existence, separateness, political representation, and interpretive independence were ultimately preserved.

II. THE CONSTITUTIONAL RIGHTS OF STATES

As noted in the Introduction, the principal difficulty with discussions of "states' rights" is that there is considerable confusion as to what the concept actually encompasses. "States' rights" has unfortunately become confused through misuse and sometimes opportunistic abuse. Politicians and other interested parties have co-opted "states' rights" as a shorthand for localism or as a worn anti-Washington-insider slogan.¹³⁵ Others, whether at bench or bar, or in the academy, use the phrase as if it were essentially interchangeable with "federalism," thus essentially substituting one undefined construct for another.¹³⁶ Still others might view "states' rights" as more or less synonymous with state police powers.¹³⁷ This view of "states' rights" is most often associated with strict constitutional construction of federal enumerated powers.

We need to be much more precise about the meaning of "states' rights" in the constitutional sense. Indeed, one of the goals of this Article is to refine the terminology of state-federal relations in the interest of conceptual clarity. The first thing to do is to distinguish between states' claims to residual power and their claims to person-like inviolable constitutional rights. It no longer makes sense to advance claims of *exclusive* state power. Dual federalism, in which

CONVENTION; AND TO SEVERAL ESSENTIAL AND NECESSARY ALTERATIONS IN IT. IN A NUMBER OF LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN (1787), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 65, at 339.

135. See *supra* note 10.

136. See *supra* note 11 and accompanying text.

137. See *supra* note 15; see also, e.g., *United States v. Turkette*, 452 U.S. 576, 586 n.9 (1981) (holding that a federal racketeering statute does not interfere with states' rights "to exercise their police powers to the fullest constitutional extent").

state and central governments occupy exclusive spheres of power, has been gradually replaced by a more "cooperative" federalism, which is characterized by overlapping jurisdiction and powers.¹³⁸ When today we speak in terms of state powers, it is generally with reference to residual, rather than exclusive, sovereign authority. As the Tenth Amendment confirms, therefore, states retain those powers not granted to the federal government nor prohibited to them by the Constitution.¹³⁹

States have rights, however, that may not be abridged *even if* the Constitution grants Congress, for example, the power to regulate interstate commerce. There are narrow, yet critical, areas in which states can be said to possess valid claims, or rights, to be free from federal interference without regard to whether federal power has been constitutionally granted. States enjoy certain basic rights of sovereign self-preservation and independence; these include the rights to existence, separateness, political participation, and interpretive independence. It makes sense to consider these as sovereign rights, rather than as the product of some power calculus. These rights are either expressly guaranteed in the text of the Constitution or readily implied from its basic structure.

As a result of recent Court decisions, however, we must now account for another specie of state constitutional rights. The Court has discovered additional affirmative limitations, or what we might call "fundamental" rights, which shield states from federal power that is otherwise constitutionally granted. These fundamental rights reside in the penumbras and presuppositions of constitutional text and structure. In this sense certain "federal liberties" are modeled on the civil liberties of persons, particularly the individual fundamental rights associated with the doctrine of substantive due process. This Part examines, in turn, the "sovereign" and "fundamental" rights of states.

A. The Sovereign Rights of States

The Constitution grants states certain basic sovereign rights, things that the states may claim as due regardless of context,

138. See Rubin & Feeley, *supra* note 5, at 933.

139. U.S. CONST. amend. X.

circumstance, or federal claim to authority. These are the rights of states to exist, to form separate governments, to participate in the political process, and to render definitive interpretations of their own laws, at least where no federal right or issue is involved. These rights are critical to divided sovereignty and state independence. Without them, we could not speak in terms of a federal system that respects the sovereign independence of states.

1. *The Right to Exist*

The most important right one can possess is the right to live and to attend to one's self-preservation.¹⁴⁰ This right was of particular concern to Anti-Federalists as they fought against what they feared would be the states' utter annihilation under the proposed Constitution.¹⁴¹ The compact theory, which was based in part upon the state of nature analogy, held that the separate states had joined the Union in part to preserve their very existence.¹⁴² Toward that end, states, like individuals, delegated limited and, ultimately, revocable power to the central government.

With all of the substantial confusion that has attended federalism, the Court has managed to retain clarity about at least this one thing: "[N]either government may destroy the other...."¹⁴³ The post-Civil War Court, for rather obvious reasons, repeatedly stressed the *necessity* of the states. The Constitution, the Court declared in *Texas v. White*, "looks to an indestructible Union, composed of indestructible States."¹⁴⁴

The Constitution in various provisions contemplates the states' existence by providing for various roles states are to play. As the Court noted in *Lane County v. Oregon*,¹⁴⁵ "in many articles of the Constitution the necessary existence of the States, and, within their

140. The Constitution, of course, protects, even sanctifies, the personal interest in "life." Life cannot be taken arbitrarily, without process, or by methods that are "cruel and unusual." U.S. CONST. amend. VIII; U.S. CONST. amend. XIV (stating the prohibition on taking "life, liberty, or property" without "due process of law"). In addition, numerous procedural and substantive rights in the Constitution protect personhood in this core sense.

141. See *supra* notes 63-65 and accompanying text.

142. See *supra* notes 66-72 and accompanying text.

143. *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 523 (1926).

144. 74 U.S. (7 Wall.) 700, 725 (1869).

145. 74 U.S. (7 Wall.) 71 (1869).

proper spheres, the independent authority of the States, is distinctly recognized."¹⁴⁶ The Constitution protects, for example, the *territorial* integrity of the states.¹⁴⁷ State citizenship, as well, is expressly recognized and carries with it certain privileges.¹⁴⁸ The Constitution cannot be amended without the participation of the states.¹⁴⁹ Finally, the Guarantee Clause¹⁵⁰ "presupposes the continued existence of the states ... [a]nd ... those means and instrumentalities which are the creation of their sovereign and reserved rights."¹⁵¹ These and other constitutional provisions establish that the states enjoy a sovereign right to exist.

In order to protect their right to exist, states also enjoy the right of self-preservation. They are entitled to defend themselves against internal threats to integrity, peace, and tranquility. States thus may prosecute criminals in order to preserve their existence, as well as their internal "peace and dignity."¹⁵² "Each [state] has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses...."¹⁵³ Although one hopes it does not come to pass, states may also resist efforts by internal or external forces to extinguish or annihilate them altogether. The Second Amendment, whose meaning with regard to who retains the "right" to bear arms has yet to be definitively resolved, contemplates the existence in all free states of a "well regulated Militia."¹⁵⁴

As part of the social contract, states may also expect that central governmental power will be used to protect their existence should

146. *Id.* at 76; see Brannon P. Denning & Glenn Harlan Reynolds, Essay, *Comfortably Penumbra*, 77 B.U. L. REV. 1089 (1997) (noting the Court's embrace in federalism areas of the sort of penumbral reasoning common to substantive due process precedents).

147. U.S. CONST. art. IV, § 3 ("[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.").

148. See U.S. CONST. art. III, § 2; U.S. CONST. art. IV, § 2.

149. U.S. CONST. art. V.

150. U.S. CONST. art. IV, § 4.

151. *Helvering v. Gerhardt*, 304 U.S. 405, 414-15 (1938).

152. *United States v. Lanza*, 260 U.S. 377, 382 (1922); see also *Heath v. Alabama*, 474 U.S. 82, 90 (1985) (noting that under the "dual sovereignty" principle, a state can prosecute a person for a crime even if another state has also prosecuted the person for the same offense).

153. *United States v. Wheeler*, 435 U.S. 313, 320 (1978).

154. U.S. CONST. amend. II.

it be threatened. The Constitution expressly provides that the United States "shall protect each [state] ... against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."¹⁵⁵ Provisions such as these are the result of the Anti-Federalists' moral arguments on behalf of the "frail" states.¹⁵⁶

The expectation of the states' existence does not, of course, speak to the robustness and vigor of state "life." Just as an individual's right to life does not guarantee any baseline of economic or other sustenance, the states' right to exist does not tell us what, if any, other "rights" the states are to enjoy. Nor does it mean that the federal government has any specific obligation, moral or otherwise, to *support* states beyond, that is, protecting them from invasion and violence, and preventing their annihilation. At a minimum, however, the Constitution recognizes the states' sovereign right to exist.

2. *The Right To Separateness*

It would make little sense to speak of "dual sovereignty" if one sovereign could dictate to another the most basic terms concerning the formation of its own government. State independence and sovereignty could not exist if the central government could effectively dictate who may serve in state governments or where they may serve. States thus retain a basic right to separateness or, as the Anti-Federalists argued, "individuality."¹⁵⁷

Indeed, the Court has recognized that the states enjoy a limited sphere of liberty and independence with respect to their internal governance. In *Coyle v. Oklahoma*,¹⁵⁸ for example, the Court held that the "power to locate its own seat of government and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers."¹⁵⁹ The Constitution

155. U.S. CONST. art. IV, § 4.

156. See *supra* notes 83-86 and accompanying text.

157. See *supra* text accompanying note 71.

158. 221 U.S. 559 (1911).

159. *Id.* at 565; see also *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if

contemplates that state governments will be composed of legislative, judicial, and executive branches.¹⁶⁰ Beyond locating and funding these institutions, states also have the right to choose their own officials, and to prescribe at least their basic qualifications.¹⁶¹ Each state must also be allowed to determine the *manner* in which these officials will be chosen.¹⁶² Only the states, for example, may establish voter qualifications for state and local elections.

Although the Court refers to such things as residing within a sphere of state "power," it makes more sense to consider them as elements of the states' inviolable *right* to separateness. Such matters must necessarily remain impervious to federal power, whatever the context, if the states are to remain free and sovereign in even the most limited sense. Even if, for example, Congress is regulating interstate commerce within what the Court has determined is the proper scope of that enumerated power, it may not do so if the effect is to displace basic state prerogatives with regard to internal governance. In this sense, separateness is a right states possess, rather than a residual constitutional power they exercise. It is not based in the Tenth Amendment, which speaks only to state power, but rather resides elsewhere in the Constitution or can be readily implied as essential to the recognition of dual sovereignty.

If sovereignty is to remain truly divided in character, states must have the right to decide where the situs of government will be, who may serve in their governmental chambers, and what officials' basic qualifications must be. For states, these are "functions essential to separate and independent existence."¹⁶³

3. *Rights to Political Participation*

States are also granted sovereign rights to participate in the governance of the Nation. The Constitution grants these political participation rights in express terms. It provides that states shall

not always, a question for the state itself.").

160. See U.S. CONST. art. VI, cl. 3 ("Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution....").

161. *Taylor & Marshall v. Beckham* (No. 1), 178 U.S. 548, 570-71 (1900).

162. *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 161 (1892).

163. *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1869).

possess and enjoy political rights writ small, and political rights writ large.

Article V absolutely and unequivocally guarantees to each state equal suffrage in the Senate.¹⁶⁴ The right to equal suffrage is political process writ small. This was one of the critical sovereign rights identified by the Anti-Federalists.¹⁶⁵ It guarantees that each state will have an equal vote in all matters of national governance. It requires that all states be granted an equal opportunity to be heard on legislative proposals. Unlike states' representation in the House of Representatives, which varies because it is based upon population, the right to equal suffrage in the Senate is a constant and an absolute. Unless a state consents to its waiver, this right cannot be diluted or abridged.¹⁶⁶

Article V also grants states the sovereign right to participate in the constitutional amendment process.¹⁶⁷ This is political process writ large. It guarantees the sovereign states a substantial voice in all fundamental proposals to alter the basic charter of government. This right, too, is subject to neither abridgement nor denial.

4. *The (Limited) Right to Interpretive Independence*

Article III of the Constitution sets forth the jurisdiction of the federal courts.¹⁶⁸ As the Supreme Court has emphasized, the "judicial power of the United States" does not generally extend to matters relating solely to the constitutions or laws of the states.¹⁶⁹

164. U.S. CONST. art. V ("[N]o State, without its Consent, shall be deprived of its equal suffrage in the Senate....").

165. See *supra* notes 73-76 and accompanying text.

166. U.S. CONST. art. V.

167. See *id.* (providing that proposed amendments may be ratified by the legislatures of three-fourths of the states, or by conventions in three-fourths of the states).

168. See U.S. CONST. art. III, § 2 ("The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority").

169. See, e.g., *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) (noting that the Court generally defers to state courts on the interpretation of state law); *Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 557 (1940) ("It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions."). There are, of course, exceptions to this rule. The most famous exception in recent years is *Bush v. Gore*, 531 U.S. 98 (2000). In that case, the Court refused to defer to the Florida Supreme Court's interpretation of Florida election law. See *id.* at 115 ("To attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has actually departed from the statutory

By clear negative implication, and as an incident of federalism, the Constitution provides that the states should generally be free to interpret their own laws and constitutions.¹⁷⁰ So long as no federal constitutional right or power is implicated, the states possess interpretive independence.

These, then, are the principal and critical sovereign rights of states. They arise from the structural plan of the Constitution. The rights to exist, to form separate governments, to participate in the political process, and to interpret state laws and constitutions are recognized so that states may retain a basic degree of independence and freedom. It is in this rather narrow, but nevertheless critical, sense that the Anti-Federalists fought for "states' rights." For them, this was the critical import of the state-as-person metaphor.

B. The "Fundamental" Rights of States

The Anti-Federalists' concern with moral personhood and rights was aimed principally at providing for the very survival of statehood. This is, of course, no longer a pressing concern. Although states' powers have waned considerably, their essential sovereign rights remain intact. Personhood, however, has come to be associated with an elaborate and impressive panoply of constitutional rights. These are both set forth in the Bill of Rights and arise as a matter of judicial extrapolation from constitutional text. The Court has extended the rights of states in a similar fashion, far beyond the narrow "sovereign" rights of existence, separateness, participation, and interpretation. From the "penumbras" and emanations of these rights, as well as other sources, the Court has aggressively discovered and enforced a number of "fundamental" rights on behalf of states. As of this writing, the states have been granted person-like "fundamental" rights to intimate association, equality, physical autonomy, mental autonomy, and due process.

meaning, would be to abdicate our responsibility to enforce the explicit requirements of Article II.").

170. See *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974) (recognizing that the Supreme Court acts as an "outside[r]" lacking the common exposure to local law which comes from sitting in the jurisdiction" and that deference to state courts "helps build a cooperative judicial federalism").

The pattern of constitutional rights extension noted here is quite familiar. This Part examines the fundamental rights of states by expressly comparing them to the fundamental constitutional rights of persons. There are three basic similarities between these rights: substance, methodology, and vitality. For each newly discovered fundamental state right there is a fundamental personal right analogous in its core or basic substance. Further, state and personal fundamental rights have been generated or discovered by means of a similar judicial methodology. Although the Court often compares the fundamental rights of states to the express individual rights that are set forth in the Bill of Rights, fundamental "states' rights" more closely resemble the constitutional rights associated with the Court's "substantive due process" doctrine.¹⁷¹ Like those rights, the newly discovered "states' rights" have no specific textual support; they arise from constitutional "penumbras," background principles, and structural presuppositions.¹⁷² The Court often discovers these negative state liberties as it discovers fundamental personal liberties, namely by asking such things as whether they are "deeply rooted in this Nation's history and tradition."¹⁷³ Finally, both types of fundamental rights—those of persons and those of states—are vital or strong; they occasion, at the least, heightened judicial scrutiny. Indeed, the new "states' rights" tend to be stronger still. They have a tendency to be *absolute* in character.

Commentators have noted, with some puzzlement, the anthropomorphization of states, particularly the Court's repeated references to state "dignity,"¹⁷⁴ discussed below in connection with the states' right to sovereign immunity.¹⁷⁵ The discussion that follows takes us beyond this single term and demonstrates the extent to which statehood has in fact become the new personhood. During the 1960s and 1970s, the heyday of substantive and

171. See *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (explaining the Court's substantive due process analysis).

172. See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (opining that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance").

173. See *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality) ("[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition....").

174. See *supra* notes 35-39 and accompanying text.

175. See *infra* Part II.B.2.

procedural due process, the Court aggressively protected values like personal dignity and autonomy, and forged new constitutional protections, both substantive and procedural, in the name of personhood.¹⁷⁶ The Court has grown wary of extending the doctrine of substantive due process where individual rights are concerned, and procedural protections for individuals have substantially waned.¹⁷⁷ During the past few decades, however, states have experienced a surge in substantive and procedural rights. State dignity and autonomy have risen to the forefront of the Court's constitutional rights agenda. The result has been the discovery and enforcement of new state substantive and procedural rights comparable in many ways, though surely different in others, to the individual rights discovered in the 1960s and 1970s.

1. The Right to Order Intimate Affairs

There is an essential core to personhood that cannot be disturbed by government, save under the most extraordinary circumstances. The First Amendment protects our right to believe as we wish, and to order our private thoughts.¹⁷⁸ Individuals also have an implied fundamental right to order their intimate associations—to choose, for example, where and with whom to live and how to raise and educate their children.¹⁷⁹ The right to arrange or order intimate

176. See Resnik & Suk, *supra* note 36, at 1926 (describing judicial protection of individual "dignity").

177. See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992) (reaffirming constitutional protection for personal decisions "involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy"). The Court has refused, on recent occasions, to recognize new fundamental rights. See *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) (refusing to recognize a right to assisted suicide). The procedural due process revolution was launched in *Goldberg v. Kelly*, 397 U.S. 254 (1970), which required that welfare recipients receive pre-termination hearings. *Goldberg* was a high watermark for procedural due process, which has since been narrowed both with respect to the interests it protects and the process that is due. See *Paul v. Davis*, 424 U.S. 693 (1976) (interpreting "liberty" narrowly); *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands...." (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972))).

178. U.S. CONST. amend I.

179. See *Moore v. City of East Cleveland*, 431 U.S. 494, 518-19 (1977) (Stevens, J., concurring in judgment) (choice of internal ordering of family relationships); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925) (liberty of parents to direct upbringing and education of children); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (parental control over education

affairs—where and with whom to live or associate, and what vocations and interests to pursue—is part of the zone of “privacy” the Court has developed under principles of substantive due process. These intimate internal affairs, the Court has held, are not properly the subject of governmental regulation, but are considered core aspects of personhood. As the Court recently stated in *Lawrence v. Texas*:¹⁸⁰ “[T]here is a realm of personal liberty which the government may not enter.”¹⁸¹

As discussed, the states enjoy a limited sovereign right to form separate governments.¹⁸² This includes the right to choose their own officials and to locate their own capitols. The Court has sought to expand this sovereign right to a fuller, more robust state right to order all of the state’s intimate affairs. Beyond locating capitols and choosing state officers, however, the Court has encountered methodological, legitimacy, and other problems in staking out the scope of this right to internal association and ordering. This, then, should be an instructive example in terms of the Court’s present drive to recognize other fundamental “states’ rights.”

The Court began to extend the scope of the states’ right to intimate ordering around the same time it was discovering individual constitutional rights to sexual intimacy and constructing what would become the fundamental right to “privacy.” Shortly after the Court decided *Griswold v. Connecticut*¹⁸³ and *Roe v. Wade*,¹⁸⁴ at a time when those decisions were still considered novel experiments in substantive due process, the Court decided *National League of Cities v. Usery*.¹⁸⁵ As *Griswold* marked the beginning of the modern fundamental rights movement for persons, *National League of Cities* initiated the modern fundamental “states’ rights” movement.

In *National League of Cities*, the Court held that the minimum wage and maximum hours provisions of the federal Fair Labor Standards Act could not be applied to the public employees of states

of children).

180. 539 U.S. 558 (2003).

181. *Id.* at 578 (quoting *Planned Parenthood*, 505 U.S. at 847).

182. *See supra* Part II.A.2.

183. 381 U.S. 479 (1965).

184. 410 U.S. 113 (1973).

185. 426 U.S. 833 (1976).

and their political subdivisions.¹⁸⁶ The holding was based upon the premise that states have the power to order their internal relations with employees and officials, and, in addition, to decide on the best means of delivering services to their citizens. The Court declared:

One undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime.¹⁸⁷

Congress could not be permitted, the Court stated, to force states to relinquish some crucial services or to "displace[] state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require."¹⁸⁸ The Court concluded that federal law threatened "fundamental employment decisions" in core state and local areas such as fire prevention, police protection, and public health.¹⁸⁹

The *National League of Cities* Court did not claim that Congress had acted outside its admittedly "plenary" power to regulate interstate commerce. The Court held, rather, that Congress had violated the Tenth Amendment, a provision that the Court characterized as an "affirmative limitation" on Congress's power.¹⁹⁰ This "affirmative limitation," the Court said, was "akin to other commerce power affirmative limitations contained in the Constitution," such as "the right to trial by jury contained in the Sixth Amendment, or the Due Process Clause of the Fifth Amendment."¹⁹¹ Of course, the rights to a jury trial and due process are *expressly* guaranteed in the Bill of Rights. The Court insisted, however, that the Tenth Amendment contains an "express declaration of this limitation."¹⁹² As the Court, therefore, was just beginning to mine the Due Process Clause for clues regarding fundamental rights to

186. *See id.* at 851-52.

187. *Id.* at 845.

188. *Id.* at 847.

189. *Id.* at 851.

190. *Id.* at 841.

191. *Id.* (citations omitted).

192. *Id.* at 842.

personal privacy, liberty, and autonomy, the Court was at the same time interpreting the Tenth Amendment as an affirmative limitation on Congress's power to affect the states' "integrity"—their ability to perform basic functions.¹⁹³

Having announced that there was some core of statehood arising from constitutional text that was vague at best, the Court confronted the same problem it was then facing in *Griswold* and its progeny: how to identify the scope of the liberty the Constitution purportedly granted. There were, according to the Court, "attributes of sovereignty attaching to every state government which may not be impaired by Congress."¹⁹⁴ States were, the Court said, entitled to make "essential" decisions free from federal interference.¹⁹⁵ The following questions, however, remained: Which "attributes" and which "decisions"?

National League of Cities identified only a few core aspects of statehood, including the aforementioned sovereign rights of states to locate their own seats of government and the power implicated in the case itself—to determine the wages and hours of its own employees.¹⁹⁶ Faced with substantive uncertainty, the Court turned for future refinement, as it would later in the individual fundamental rights context, to *tradition* as the purportedly objective indicator of the fundamental right of states to order their internal affairs.¹⁹⁷ The minimum wage and maximum hours provisions of the Fair Labor Standards Act interfered, said the Court, with "traditional aspects of state sovereignty."¹⁹⁸ The federal provisions thus "may substantially restructure traditional ways in which the local governments have arranged their affairs."¹⁹⁹

193. See *id.*; see also *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975) ("Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system.").

194. *Nat'l League of Cities*, 426 U.S. at 845.

195. See *id.* at 850; see also *New York v. United States*, 326 U.S. 572, 587-88 (1946) (asserting that although states may, like individuals, own real property, it does not follow that a federal tax can be constitutionally applied to state property).

196. *Nat'l League of Cities*, 426 U.S. at 845; see *Coyle v. Oklahoma*, 221 U.S. 559, 565 (1911) (noting that a state holds the right to determine the location of its seat of government).

197. See *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (relying on tradition to define fundamental rights under the Due Process Clause).

198. *Nat'l League of Cities*, 426 U.S. at 849.

199. *Id.*

The attempt to further define a core state right to internal ordering, by tradition or otherwise, was short-lived. The Court overruled *National League of Cities* less than a decade later in *Garcia v. San Antonio Metropolitan Transit Authority*.²⁰⁰ The *Garcia* Court found it impossible to determine, under the "traditional state function" test, whether municipal ownership and operation of a mass transit system was a "fundamental attribute" of state sovereignty.²⁰¹ The Court abandoned the "traditional governmental function" approach as "not only unworkable but ... also inconsistent with established principles of federalism."²⁰²

The Court found it "difficult, if not impossible, to identify an organizing principle" that could distinguish essential from non-essential attributes of statehood.²⁰³ It rejected a case-by-case approach, which the Court candidly observed had proven to be an abject failure in other areas, noting particularly precedents involving intergovernmental tax immunity.²⁰⁴ The Court criticized its own reliance upon history and tradition to define internal state autonomy, stating that its promised objectivity was "illusory,"²⁰⁵ it "prevents a court from accommodating changes in the historical functions of States,"²⁰⁶ and it "results in line-drawing of the most arbitrary sort."²⁰⁷ The Court also noted "a more fundamental problem at work here."²⁰⁸ Identification of fundamental "states' rights," it stated, "inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes."²⁰⁹

As the Court saw it, therefore, there were only two choices when it came to identifying constitutional limits on Congress's commerce authority. The first was a judicially managed substantive federal

200. 469 U.S. 528 (1985).

201. *Id.* at 537-47; see *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 287-88 (1981) (setting forth a four-part test for state governmental immunity).

202. *Garcia*, 469 U.S. at 531.

203. *Id.* at 539.

204. See *id.* at 540-41.

205. *Id.* at 544.

206. *Id.* at 543.

207. *Id.* at 544; see *id.* (noting that "courts would have to decide by fiat precisely how longstanding a pattern of state involvement had to be for federal regulatory authority to be defeated").

208. *Id.* at 548.

209. *Id.* at 546.

liberty, an effort "to single out particular features of a State's internal governance that are deemed to be intrinsic parts of state sovereignty."²¹⁰ The Court rejected this approach based upon "the elusiveness of objective criteria for 'fundamental' elements of state sovereignty."²¹¹ The second approach, and the one the Court purported to choose in *Garcia*, was to rely upon constitutional structure and the political process to police the limits of congressional power.²¹² After *Garcia*, therefore, the states were to derive their fundamental protections not from *a priori* judicial definitions of state sovereignty, but rather from such things as limitations on Congress's enumerated powers and the states' role in the selection of the executive and legislative branches.²¹³

The *Garcia* majority stressed that the Court had "no license to employ freestanding conceptions of state sovereignty when measuring congressional authority under the Commerce Clause."²¹⁴ On the other hand, the dissenters complained of an "emasculat[i]on of the powers of the States."²¹⁵ Justices Rehnquist and O'Connor specifically predicted that the states' fundamental right to internal ordering was "a principle that will, I am confident, in time again command the support of a majority of this Court."²¹⁶

This prediction has proven to be substantially accurate. For the present, however, the Court continues to rely upon procedural safeguards to protect states' essential internal operations. In *Gregory v. Ashcroft*,²¹⁷ the Court held that the federal Age Discrimination in Employment Act's (ADEA) mandatory retirement provisions did not apply to Missouri judges.²¹⁸ The Court reasoned that the choice of qualifications for judges "goes beyond an area traditionally regulated by the States; it is a decision of the most fundamental sort for a sovereign entity."²¹⁹ Rather than return to

210. *Id.* at 548.

211. *Id.*

212. *See id.* at 550 ("[T]he principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself....").

213. *See id.* at 552-53 (describing political safeguards).

214. *Id.* at 550.

215. *Id.* at 572 (Powell, J., dissenting).

216. *Id.* at 580 (Rehnquist, J., dissenting).

217. 501 U.S. 452 (1991).

218. *See id.* at 470.

219. *Id.* at 460.

a full-blown fundamental rights approach, as in *National League of Cities*, the *Gregory* Court chose a procedural mechanism for protecting this right to internal ordering. It required that Congress provide a "clear statement" of legislative intent whenever it purports to upset the "state-federal balance."²²⁰ Finding the legislative intent with respect to the ADEA ambiguous in this respect, the Court held that the statute could not be applied to prohibit the mandatory retirement of state judges pursuant to the state constitution.²²¹

The "clear statement" rule is one of a panoply of recently discovered quasi-constitutional process limitations on congressional power.²²² Whether this sort of protection is *merely* procedural is open to question. There is certainly a sense in which such procedural rules protect substantive state interests, including their sovereign right to form their own governments. Indeed, the *Gregory* Court stated that "the authority of the people of the States to determine the qualifications of their government officials may be inviolate."²²³ The Court compared the state's right to choose its officials to a state's power, pursuant to equal protection doctrine, to prohibit aliens from certain public employments.²²⁴ Just as such a right "inheres in the State"²²⁵ and is "intimately related to the process of democratic self-government,"²²⁶ the Court reasoned, the states must be permitted to define their internal makeup and structure.²²⁷

There is, thus, substantial bite to *Gregory*'s clear statement rule, at least insofar as Congress seeks to affect the qualifications of state officials. The characterization of the right as "procedural" should not obscure the Court's conviction that states should retain

220. *Id.* at 464.

221. *Id.* at 470.

222. See William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 598 (1992) (arguing that "super-strong clear statement rules" essentially "amount to a 'backdoor' version of the constitutional activism that most Justices on the current Court have publicly denounced"). State process-based rights are discussed *infra* at Part II.B.4.

223. *Gregory*, 501 U.S. at 464 (emphasis added).

224. See *id.* at 461 (discussing *Sugarman v. Dougall*, 413 U.S. 634 (1973)).

225. *Sugarman*, 413 U.S. at 647.

226. *Bernal v. Fainter*, 467 U.S. 216, 220 (1984).

227. See *Gregory*, 501 U.S. at 463 (stating that it lies within "the authority of the people of the States to determine the qualifications of their most important government officials").

a fundamental right to order their internal affairs. As the Court said: "Through the structure of its government, and the character of those who exercise government authority, a State *defines itself* as a sovereign."²²⁸ This language rather closely resembles some of the most sweeping language in recent fundamental rights cases. As the Court has said with regard to fundamental individual rights: "At the heart of liberty is the right to *define one's own concept of existence*, of meaning, of the universe, and of the mystery of human life."²²⁹

What, then, is the status of the states' fundamental right to internal ordering? States, of course, retain their sovereign rights to locate capitols and choose government officials. *Garcia* claimed to abandon the project of defining "essential attributes" of statehood by reference to tradition. Other interferences with the internal ordering of states may, under *Gregory*, require at least a very clear statement of congressional intent. There is, indeed, some ambivalence on the Court as to whether some such internal matters may be considered "inviolable."

2. *The Right to Equality—Freedom from Second-Class Sovereignty*

After *Garcia* and *Gregory*, observers would have been excused for believing that the Court had abandoned the effort to define the substantive constitutional rights of states, and that henceforth states would be left to defend themselves in the political arena. As others have noted, however, recent federalism cases indicate that *Garcia* has been overruled *sub silentio*.²³⁰ As in individual rights cases, the Court has refused to rely solely on constitutional processes and structures to protect states. The Court has, as we shall see, aggressively discovered a number of additional fundamental state rights. These rights have extended well beyond the narrowly cabined sovereign rights to self-preservation and self-determination that were discussed previously.

228. *Gregory*, 501 U.S. at 460 (emphasis added).

229. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992) (emphasis added).

230. See Yoo, *supra* note 11, at 1334-57 (arguing that *Garcia* has effectively been overruled).

The Court has been particularly aggressive in terms of protecting the states from federal waivers of their sovereign immunity from private lawsuits. The history of state sovereign immunity is complex.²³¹ At least insofar as the constitutional text is concerned, however, state sovereign immunity was originally conceived quite narrowly. The Eleventh Amendment limits the judiciary's power to entertain only one type of private lawsuit against states: federal diversity suits brought against a state by citizens of another state.²³² The amendment was proposed and ratified for a narrow purpose—to overrule *Chisholm v. Georgia*,²³³ which had allowed such suits in part because the states were then considered mere corporate forms lacking dignitary or other interests that outweighed citizens' right to seek redress.²³⁴

Recently, however, the Court has steadily expanded the scope of the states' "right" not to be subjected by Congress to private

231. For a discussion of the original intent of the Eleventh Amendment, see Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342, 1356-71 (1989).

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

233. 2 U.S. (2 Dall.) 419 (1793).

234. As Justice Cushing stated:

[T]he obvious dictates of justice, and the purposes of [s]ociety [demand that] ... in certain cases one citizen may sue forty thousand; for where a corporation is sued, all the members of it are actually sued, though not personally, sued.... Will it be said, that the fifty odd thousand citizens in Delaware being associated ... under their charter, that although it may become the latter to meet an individual on an equal footing in a Court of Justice, yet that such a procedure would not comport with the dignity of the former?

Id. at 472 (emphasis omitted). As a corporate form, the state had no more "dignity" than a bank or a railroad. Like those forms, the state had to yield to individual justice and *personal* dignity. Indeed, although an insult to statehood at present, the concept of the state as corporation would be relied upon by Congress in enacting important civil rights legislation, including the Civil Rights Act of 1781, the precursor to 42 U.S.C. § 1983. Some sponsors and supporters of the enactment expressed the view that states would be covered by its proscriptions, which extended to all "persons." According to the Dictionary Act of 1780, which purported to provide definitions in aid of statutory construction, "person" included corporations and bodies politic. See *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 70 n.8 (1989) (setting forth the Dictionary Act). Based upon the Dictionary Act, there was at least some indication that states would be covered by the Civil Rights Act. See CONG. GLOBE, 42d Cong., 1st Sess. 661 (1871) (Sen. Vickers) ("What is a State? Is it not a body politic and corporate?"); *id.* at 696 (Sen. Edmunds) ("A State is a corporation.").

lawsuits. In prohibiting these lawsuits, the Court has repeatedly emphasized states' "dignitary" interests. It has held, for example, that Congress cannot use its authority under the Commerce Clause to abrogate state immunity from private suits in *state* courts pursuant to federal causes of action,²³⁵ or even to subject states to adjudicatory proceedings before federal *agencies*.²³⁶ In recent cases, the Court has literally blanketed the states in sovereign immunity from lawsuits.²³⁷

The source of this broadened, extra-textual right to immunity has been something of a moving target. It was at one point located, like the limited right to internal ordering discussed above, in the Tenth Amendment.²³⁸ Despite its narrow text, a broad state right to immunity has also been said to be inherent in the Eleventh Amendment.²³⁹ In truth, as its immunity doctrine has developed, the Court has essentially conceded that the right to immunity is not rooted in any constitutional text at all. As a result, neither the Eleventh Amendment nor, by some method of importation, the Tenth Amendment, gives rise to it.²⁴⁰ As the Court has explained, the Eleventh Amendment stands "not so much for what it says, but for the presupposition ... which it confirms."²⁴¹ This version of states' rights, unlike its predecessors, obviously does not rely upon principles of "strict construction."

The basic "presupposition" for state immunity, the Court explained in *Seminole Tribe of Florida v. Florida*,²⁴² is the principle of divided sovereignty, which carries with it the "inherent" right of states "not to be amenable to the suit of an individual *without its*

235. See *Alden v. Maine*, 527 U.S. 716 (1999).

236. See *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002).

237. There are, however, indications that the Court may be balking at the logical implications of its expansion of state sovereign immunity. See *Tennessee v. Lane*, 124 S. Ct. 1978 (2004) (holding that Congress validly abrogated states' immunity from lawsuits under Title II of the Americans with Disabilities Act).

238. See *Alden*, 527 U.S. at 713-14.

239. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996).

240. See *Fed. Mar. Comm'n*, 535 U.S. at 767-68 n.18. As the Court explained with respect to the Eleventh Amendment: "[T]he Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but one particular exemplification of that immunity." *Id.* at 753.

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

242. 517 U.S. 44 (1996).

consent.²⁴³ Pursuant to this presupposition, the scope of the right to immunity is demarcated not by constitutional text, but rather by "fundamental postulates implicit in the constitutional design."²⁴⁴ Like individual fundamental rights, particularly those associated with the doctrine of substantive due process, this right is less a matter of text than of "history and experience and the established order of things."²⁴⁵ It is, as Justice Stevens has described it, "the second Eleventh Amendment, which has its source in judge-made common law, rather than constitutional text."²⁴⁶

According to the Court, the fundamental right to immunity is based upon a "background principle," which confirms that immunity is an inherent attribute of sovereignty.²⁴⁷ This "background principle," the Court has explained, "is not so ephemeral as to dissipate when the subject of the suit is an area ... that is under the exclusive control of the Federal Government."²⁴⁸ Immunity prevails in the face of even plenary congressional power, the Court says, because it is a "fundamental aspect" of sovereignty.²⁴⁹ It "inheres in the system of federalism established by the Constitution,"²⁵⁰ apparently just as certain individual rights inhere in the concept of ordered liberty.

Because the right to immunity is fundamental, the Court has indicated that Congress can alter or abrogate state immunity "only if there is compelling evidence that the States were required to surrender this power to Congress pursuant to the constitutional design."²⁵¹ Proceedings that Congress purports to authorize against states, but which were "anomalous and unheard of ... when the Constitution was adopted,"²⁵² are treated as presumptively unconstitutional.²⁵³ The Court has applied the presumption

243. *Hans v. Louisiana*, 134 U.S. 1, 12-13 (1890) (quoting THE FEDERALIST NO. 81, at 487 (Alexander Hamilton) (C. Rossiter ed., 1961)); see *Seminole Tribe*, 517 U.S. at 54.

244. *Alden v. Maine*, 527 U.S. 716, 729 (1999).

245. *Hans*, 134 U.S. at 14.

246. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 741 (2003) (Stevens, J., concurring).

247. *Seminole Tribe*, 517 U.S. at 72.

248. *Id.*

249. *Alden*, 527 U.S. at 713.

250. *Id.* at 730.

251. *Id.* at 731.

252. *Hans v. Louisiana*, 134 U.S. 1, 18 (1890).

253. *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 755 (2002).

assiduously; it has yet to discover the "compelling evidence" required to subject states to suit.

The right to immunity is, by the Court's own admission, based in the common law. Yet notwithstanding its common law lineage, the Court has held that the right to immunity is not defeasible by Congress. As the Court recently explained, once again drawing an explicit analogy to individual fundamental rights, the right to immunity is comparable to the right to a jury trial and the prohibition on unreasonable searches and seizures, both of which are based upon the common law; "[t]hey are," the Court explains, "constitutional rights, and form the fundamental law of the land."²⁵⁴ There is yet another sense in which the fundamental right to immunity mirrors individual constitutional rights. Individual rights often serve functional purposes, but there is no requirement that they do so in order to be judicially enforced. The First Amendment is said, for example, to serve a truth-seeking function by protecting a robust "marketplace of ideas."²⁵⁵ First Amendment protection, however, does not hinge on the ability of speech to serve this or any other interest; even low-level speech like pornography receives some protection.²⁵⁶

The right to immunity likewise does not rest upon instrumental reasons. It does not, for example, arise so that state treasuries will be protected from litigation.²⁵⁷ The interests served by state sovereign immunity are far more symbolic than this. As the Court has repeatedly emphasized, the states' right to immunity rests squarely upon the "dignity" and "esteem" of the states. The Court has made this much patently clear: "The *preeminent purpose* of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities."²⁵⁸ Forcing states to answer private lawsuits at Congress's behest, the Court has explained, is an "offense" to a state's "standing in the Union."²⁵⁹

254. *Alden*, 527 U.S. at 733.

255. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

256. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 252 (1990).

257. *Fed. Mar. Comm'n*, 535 U.S. at 769.

258. *Id.* at 760 (emphasis added); *see also Alden*, 527 U.S. at 748 (stating that "our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation").

259. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 282 (1997).

With this background, we are now in a position to appreciate the significance of the state-as-person metaphor in this context and to identify the individual rights analog for this fundamental right to sovereign immunity. Invoking the notion of "dual" or "joint sovereignty" and the value of state "dignity," the Court, according to one view, has implied that states are figurative nation-states not subject to involuntary waivers of immunity.²⁶⁰ This metaphor can work, however, only if the Court is willing to insist that states are *fully* sovereign nations within the meaning of international law.²⁶¹ As others have noted, this assertion would run counter to the significant constitutional divestiture of state sovereignty in matters of foreign affairs, as well as the post-ratification understanding of state sovereign authority.²⁶² More importantly, the metaphor would run counter to the law of nations itself. Under that body of law, Congress is entitled to subject *foreign nations* to suit in our courts.²⁶³ The state-as-nation metaphor, therefore, "clearly should lead to the conclusion that Congress can subject the states to suit in federal court."²⁶⁴ This is, of course, precisely the opposite conclusion the Court has reached over and over again in recent sovereign immunity cases.²⁶⁵

There must, then, be some other explanation for the Court's enhanced solicitude for state "dignity" and status. The language the Court has adopted when speaking of state sovereign immunity, and the substance of the right that has been recognized, bear a striking resemblance to the individual right to *equality*. Immunity, like

260. See Smith, *supra* note 36, at 7 (arguing that recent sovereign immunity precedents treat states as nations); see also Lee, *supra* note 105, at 1061-67 (arguing that the Framers of the Eleventh Amendment relied upon principles of international law in conceptualizing the states).

261. See Smith, *supra* note 36, at 88 ("[T]he Court's implicit suggestion in relying on the states' dignity is that the states are analogous to independent sovereigns within the meaning of customary international law.").

262. See *id.* at 92 (noting that the Constitution "specifically divested the states" of powers of foreign diplomacy and commerce).

263. See *id.* at 36-50 (discussing limits of foreign sovereign immunity).

264. *Id.* at 99.

265. The Court has emphasized the equality and dignity of the states vis-à-vis *each other* principally in interstate border disputes, the doctrine of personal jurisdiction, and cases of interstate immunity. States are said in these contexts to be "equal" to each other in the same sense in which foreign nations enjoy equal rights and equal powers of sovereignty. See *id.* at 81-87 (discussing cases).

equality, is being enforced as a *status-based* right. Indeed, it is being protected on that basis and no other. Like other status-based rights, the right to immunity is explicitly comparative. As the Court has noted, the *federal* government retains immunity from suits in state and federal courts. The Court thus has reasoned: "In light of our constitutional system recognizing the essential sovereignty of the States, we are reluctant to conclude that the States are not entitled to a *reciprocal* privilege."²⁶⁶ This is what the Court means when it states that immunity's central purpose is to "accord[] the States the respect owed them as' members of the federation."²⁶⁷

Cast in this light, plenary federal control of state institutions—including state courts that are essentially conscripted into entertaining private suits against states—"denigrates the separate sovereignty of the States."²⁶⁸ The denigration consists of an interference with an essential attribute of statehood. Permitting such interference would send, to Congress, the states, and private litigants, the message that a state is somehow less than a "full" state, in the same sense that a law that deprives one of an essential right, while granting it to others no more deserving, sends the message that a person is not quite fully human.²⁶⁹ The Court thus has emphasized that states "are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty."²⁷⁰ Congress "may not treat these sovereign entities as mere prefectures or corporations," but

266. *Alden v. Maine*, 527 U.S. 716, 749-50 (1999) (emphasis added).

267. *Id.* at 748-49 (quoting *P.R. Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)); see also *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 268 (1997) (recognizing "the dignity and respect afforded a State, which the immunity is designed to protect"); *P.R. Aqueduct*, 506 U.S. at 146 (stating that the Eleventh Amendment serves to avoid "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties" (quoting *In re Ayers*, 123 U.S. 443, 505 (1887))).

268. *Alden*, 527 U.S. at 749.

269. See, e.g., *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 142 (1994) (plurality opinion) (striking jurors based upon gender "denigrates the dignity of the excluded juror"); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) ("[P]ersonal rights' to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking"); *Plessy v. Ferguson*, 163 U.S. 537, 555 (1896) (Harlan, J., dissenting) (stating that the Fourteenth Amendment "added greatly to the dignity and glory of American citizenship, and to the security of personal liberty").

270. *Alden*, 527 U.S. at 715.

"must accord States the esteem due to them as joint participants in a federal system."²⁷¹

In sum, then, the Court's primary concern is that states not be treated by Congress, with respect to their immunity from private lawsuits, as second-class sovereigns. The dignitary concern with second-class status is quite similar to the individual constitutional right to equality.²⁷² Whatever the equality guarantees of the Fourteenth and Fifth Amendments entail, these provisions mean at least that governments are prohibited from treating certain groups or persons as if they occupy a second-class status. Congressional abrogation of state immunity, which permits private litigants to hail states into court without the states' express and voluntary consent, has been treated by the Court as problematic for similar reasons. The Court apparently believes that compelling states to respond in court at the behest of citizens signifies that states occupy a lower sovereign status than they should.

Sovereign immunity thus is not treated, as the Eleventh Amendment suggests, as a narrow limitation on the judicial power to entertain lawsuits against states. Rather, it is treated as a fundamental right of statehood. The substance of the right is equal or reciprocal treatment. Its source, unlike the individual right to equality, is not textual; immunity arises from judicially determined "presuppositions" and "background principles." It is a vital right, one that requires "compelling" evidence to sustain a congressional waiver, even in an area of plenary federal power. Finally, this right

271. *Id.* at 758.

272. See *Plyler v. Doe*, 457 U.S. 202, 213 (1982) ("The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation."); see also Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257, 271-72 (1996) (discussing stigmatic harms associated with caste treatment); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2429 (1994) (urging courts to consider whether legislation creates "second-class citizenship, or lower-caste status" for a group). The Court looks with disfavor upon denigrated status and esteem in other individual rights contexts as well. The Establishment Clause is one example. In a much-quoted passage from *Lynch v. Donnelly*, 465 U.S. 668 (1984), Justice O'Connor stated: "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message." *Id.* at 688 (O'Connor, J., concurring). See Caminker, *supra* note 36, at 85 (suggesting that the right to immunity seems to mirror the Court's recognition of dignitary interests of persons in equality and establishment contexts).

is grounded primarily in the states' dignitary interests. The right to immunity has, as Justice Souter has commented, all of the hallmarks of a "natural" right—"a universally applicable proposition discoverable by reason."²⁷³ Whatever its true source, we can place immunity from suit among the new fundamental rights of states.

3. The Right to Autonomy—Freedom from "Physical" and "Mental" Coercion

Individuals possess and enjoy basic fundamental rights to physical and mental autonomy. Some of these rights are explicitly protected in provisions of the Bill of Rights. The Fourth Amendment, for example, prohibits the government from arbitrarily taking hold of or seizing our persons.²⁷⁴ The Eighth Amendment limits the nature and character of punishments to which we can be constitutionally subjected.²⁷⁵ Procedural protections like the right to trial by jury and the right against self-incrimination are designed, in part, to limit the conditions under which physical autonomy, our most basic freedom, can be affected by government. In addition, as a matter of substantive due process, the Court has on many occasions recognized an individual's fundamental right to control how her body is treated.²⁷⁶ These dignitary and autonomy interests are at the very core of personhood.

The Constitution also protects persons from certain forms of mental coercion. As previously noted, the First Amendment broadly guarantees that individuals are free to think and believe as they see fit.²⁷⁷ In addition, constitutional safeguards like the Fifth Amend-

273. *Alden*, 527 U.S. at 763 (Souter, J., dissenting).

274. U.S. CONST. amend. IV (prohibiting unreasonable seizures).

275. See U.S. CONST. amend. VIII (prohibiting "cruel and unusual" punishments).

276. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (noting that the right "to bodily integrity" is part of the "liberty" guarantee in the Due Process Clause); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 847-49 (1992) (listing substantive due process rights, including the right to bodily integrity); *Cruzan v. Dir. Mo. Dep't of Health*, 497 U.S. 261, 270 (1990) (recognizing a limited right to refuse life-sustaining treatment); *Washington v. Harper*, 494 U.S. 210, 221-22 (1990) (recognizing "a significant liberty interest in avoiding the unwanted administration of anti-psychotic drugs"); *Winston v. Lee*, 470 U.S. 753, 766 (1985) (supporting the right to refuse a surgical procedure).

277. See *supra* text accompanying note 178.

ment's protection against self-incrimination and the Sixth Amendment's right to counsel exist in part to ensure that persons will not be mentally or physically coerced into waiving other fundamental rights.²⁷⁸ Coerced confessions and intimidation of suspects, the Court has recognized, are "destructive of human dignity."²⁷⁹

States possess and enjoy analogous rights to both physical and mental autonomy. The type and character of the coercive governmental conduct at issue is obviously dissimilar. The principles, however, are analogous. There are constitutional limits on the extent to which the government may physically or mentally interfere with fundamental autonomy interests, whether of persons or of states.

a. State "Physical" Autonomy

To assist the metaphor, we can imagine that the state corpus is composed of essential organs, as is the human body. It has legislative, executive, and judicial appendages that conduct the essential business of government. In addition, states make critical decisions with regard to the exercise of their powers and the enjoyment of their liberties. They do so, generally speaking, through their governmental agencies and officials, their figurative central nervous systems.

State autonomy, like personal autonomy, is a broad concept. We have already seen how the Court has protected the states' ability to order certain intimate internal affairs.²⁸⁰ This may be described as an autonomy interest of sorts. States, in choosing the locus of government as well as whom they please to govern, are exercising a form of sovereign liberty or autonomy.

States also have the right to maintain some level of control over their corporal or bodily integrity once their governments have been formed. The rights of states overlap, as do the rights of persons. In addition to its concern for state equality and reciprocity, therefore,

278. See, e.g., *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (stating that waiver of counsel must be voluntary, knowing, and intelligent).

279. *Miranda v. Arizona*, 384 U.S. 436, 457 (1966); see also *Rochin v. California*, 342 U.S. 165, 172, 174 (1952) (individuals have a right to be free from physical methods "so brutal and so offensive to human dignity" that they "shock the conscience").

280. See *supra* Part II.B.1.

the right to sovereign immunity also protects state physical autonomy to some extent. In *Alden v. Maine*, the Court considered it an affront to a state's "dignity" and "esteem" to force it to "face the prospect of being thrust, by federal fiat and against its will, into the disfavored status of a debtor, subject to the power of private citizens to levy on its treasury or perhaps even government buildings or property that the State administers on the public's behalf."²⁸¹ This language rather vividly conjures the image of a person being physically thrust or forced, against her will, into some coercive governmental process. In *Alden*, the Court rejected what it perceived as an effort literally to "turn the State against itself" by "press[ing] a State's own courts into federal service to coerce the other branches of the State."²⁸² This, the Court said, was akin to "commandeer[ing] the entire political machinery of the State against its will and at the behest of individuals."²⁸³

This "anti-commandeering" principle has been a familiar refrain in the renaissance of "states' rights." The Court has held that states have an *absolute* right to be free from all federal "commandeering" of their legislative and executive organs. In *New York v. United States*,²⁸⁴ the Court held that Congress could not directly compel the states to take title to radioactive waste generated within their borders, or directly order states to regulate such waste pursuant to federal instructions.²⁸⁵ Although Congress was permitted to encourage or motivate the states to comply, it was not permitted to put states to the choice of either regulating waste or taking title to it.²⁸⁶ This, the Court said, would effectively "commandeer" state governments into the service of federal regulatory purposes.²⁸⁷ According to the Court, Congress cannot, regardless of circumstances, command, instruct, or compel state legislatures in this manner.²⁸⁸

281. 527 U.S. 716, 749 (1999); see *id.* at 758.

282. *Id.*

283. *Id.*

284. 505 U.S. 144 (1992).

285. *Id.* at 176.

286. *Id.* at 175-76.

287. *Id.*; see also *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981) (holding that the Act "commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program").

288. *New York*, 505 U.S. at 176.

There are three notable aspects of this new limitation on federal power. First, contrary to *Garcia's* apparent plan, this right to autonomy was discovered by the Court rather than fabricated from within the political process. Indeed, there was no evidence at all that the political process had failed; quite to the contrary, the states were able to come to an agreement on their own through the available political machinery.²⁸⁹ New York did not like the hand it had been dealt, and it sued. Second, according to the *New York* Court, the purported source of the anti-commandeering limitation is the Tenth Amendment, which protects state physical autonomy as "an incident of state sovereignty" or one of its fundamental "attributes."²⁹⁰ Third, the right is absolute; regardless of the source or scope of congressional power, or the national interest at stake, Congress cannot compel the states to enact federal law or policies. As the Court said in *New York*: "No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate."²⁹¹ Congress may still regulate directly and preempt state enactments, but "it may not conscript state governments as its agents."²⁹² The Court specifically emphasized that states are not "mere political subdivisions of the United States," "regional offices," or "administrative agencies of the Federal Government."²⁹³ As free and autonomous sovereigns, states cannot be directly compelled to enact federal programs.

This fundamental right to physical autonomy extends as well to state and local executive organs. Just as Congress cannot conscript or "commandeer" state legislatures, it cannot interfere with a state's "bodily" integrity by commanding state executive officials to enforce federal enactments. The Court so held in *Printz v. United States*,²⁹⁴ which invalidated provisions of the Brady Handgun Violence Prevention Act. The Brady Act imposed minimal, temporary obligations on local law enforcement officers to conduct interim

289. See *id.* at 151 (noting that the Low-Level Radioactive Waste Policy Amendment Act of 1985 "embodie[d] a compromise among the sited and unsited States").

290. *Id.* at 156-57.

291. *Id.* at 178.

292. *Id.*

293. *Id.* at 188.

294. 521 U.S. 898 (1997).

background checks on prospective firearms purchasers.²⁹⁵ Although state executive officers might consent voluntarily to participate, the Court held that they could not be “pressed into federal service” or compelled to enforce federal laws.²⁹⁶ The Court held that the “forced participation of the States’ executive in the actual administration of a federal program” violated the states’ right to physical autonomy.²⁹⁷ States cannot, the Court said, be “dragooned” into enforcing and administering federal law.²⁹⁸

The purported source for this fundamental constitutional right is elaborated in somewhat greater detail in *Printz* than in *New York*, where the Court discovered it as an affirmative limitation inherent in the Tenth Amendment.²⁹⁹ As it does under substantive due process, the *Printz* Court looked closely at history and tradition, finding little historical or customary support for federal commandeering of executive officials.³⁰⁰

This still left the question of whether there was a textual source for the states’ right to physical autonomy. The Court asserted that the right to autonomy was part of the essential and “inviolable” core of statehood.³⁰¹ The Court extrapolated the anti-commandeering principle from the incidents of the sovereign rights to exist and to participate in the political process. The right to physical autonomy thus was derived from a variety of constitutional provisions, including Article V, which provides that three-fourths of the states must vote to amend the Constitution, and Article IV, Section 3, which provides for the protection of the states’ physical integrity.³⁰² The states’ right to physical autonomy was also, the Court said, implicit in the grant of “only discrete, enumerated” powers to Congress, and the reservation of residuary power to the states.³⁰³ The Court’s methodology moved Justice Stevens, before reading his

295. *See id.* at 903-04 (describing requirements).

296. *Id.* at 905.

297. *Id.* at 918.

298. *Id.* at 928 (quoting *Mack v. United States*, 66 F.3d 1025, 1035 (9th Cir. 1995) (Fernandez, J., concurring in part and dissenting in part)).

299. *See New York v. United States*, 505 U.S. 144, 188 (1992).

300. *See Printz*, 521 U.S. at 905-18.

301. *Id.* at 919 (quoting THE FEDERALIST NO. 39, at 245 (James Madison)).

302. *See id.* at 919 (citing, *inter alia*, U.S. CONST. art. III, § 2; U.S. CONST. art. IV, § 2; U.S. CONST. art. IV, § 3; and U.S. CONST. art. V).

303. *Id.*

dissent in *Printz* from the bench, to "remark[] spontaneously that Justice Scalia's opinion for the Court reminded him of Justice Douglas's opinion in the *Griswold* contraceptives case of 1965, which extrapolated a right to privacy from the Constitution's 'penumbras' and 'emanations.'"³⁰⁴

This right to autonomy is, as the Court stated in *New York*, absolute in character.³⁰⁵ Justice Scalia, writing for the majority in *Printz*, stated that commandeering "compromise[s] the structural framework of dual sovereignty ... [so] a 'balancing' analysis is inappropriate."³⁰⁶ "It is the very *principle* of separate state sovereignty that such a law offends," the Court stated, "and no comparative assessment of the various interests can overcome that fundamental defect."³⁰⁷

In sum, state physical autonomy is a fundamental right of statehood. As the Court stated in *Printz*: "It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous...."³⁰⁸ Although the Tenth Amendment is mentioned as one source for the right to autonomy, the Court ultimately reasoned penumbally, extrapolating this right from various constitutional provisions that provide for the physical integrity and existence of the states. Finally, the Court held that the "essential attribute" of state physical autonomy cannot be compromised, even where the federal interest is weighty or compelling.³⁰⁹ This state right thus is of an even stronger character than its individual rights analogs, which can be comprised, at least theoretically, by compelling governmental interests.

b. State "Mental" Autonomy

One of the most significant safeguards individual rights-holders are afforded is protection against unwitting or unknowing waiver of their fundamental rights. The Constitution invalidates waivers

304. Jeffrey Rosen, *Dual Sovereigns*, NEW REPUBLIC, July 28, 1997, at 16, 17.

305. See *Printz*, 521 U.S. at 935.

306. *Id.* at 932.

307. *Id.*

308. *Id.* at 928.

309. See *id.* at 932.

of rights that result from governmental coercion, trickery, or the withholding of relevant information.³¹⁰

The Court has not historically shown much concern for what might be described as the "mental" autonomy of the states. Congress is generally free to coerce states by, for example, attaching conditions to federal subsidies or threatening to preempt state legislation.³¹¹ To date, the Court has placed few limits on Congress's resort to fiscally administered coercion.

There are signs, nevertheless, that the current Court may be solicitous of at least some state claims to "mental" autonomy. Protection of this kind was recently afforded the states in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*.³¹² The basic issue in *Florida Prepaid* was whether the state, or more accurately an arm of the state, could be sued under the Lanham Act for unfair competition.³¹³ *Seminole Tribe* and its progeny had held that Congress has no authority to waive state immunity under its Article I powers.³¹⁴ Nor, the Court held, did Congress in this instance have the power to abrogate state immunity pursuant to the power granted to Congress in Section 5 of the Fourteenth Amendment to enforce the due process guarantee.³¹⁵

This left only the possibility that the state had *voluntarily* waived its immunity from suit. The Court has always maintained that state sovereign immunity is, like any right, "a personal privilege which [a state] may waive at pleasure."³¹⁶ In order to protect this state fundamental constitutional right, however, the Court has insisted on a clear statement by a state that it intends to consent to federal court jurisdiction.³¹⁷ *Florida Prepaid* had not, however,

310. See, e.g., *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (stating that waiver of counsel must be voluntary, knowing, and intelligent).

311. See *South Dakota v. Dole*, 483 U.S. 203 (1987) (holding that Congress could condition federal highway funding on states' adoption of a minimum drinking age).

312. 527 U.S. 666 (1999).

313. See *id.* at 668-69.

314. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72-73 (1996).

315. See *Fla. Prepaid*, 527 U.S. at 674-75 (finding no deprivation of a cognizable property interest to be remedied). Section 5 of the Fourteenth Amendment provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

316. *Clark v. Barnard*, 108 U.S. 436, 447 (1883).

317. *Fla. Prepaid*, 527 U.S. at 675-76.

expressly consented to suit. The argument nevertheless was advanced that it had "impliedly" or "constructively" waived its right to immunity by voluntarily engaging in "nonessential" activities,³¹⁸ which Congress had indicated would subject "any person" to suit.³¹⁹

The Court rejected this "constructive waiver" theory, overruling a precedent that had in fact approved the concept of implied state consent.³²⁰ The reasons the Court gave for rejecting the theory of constructive waiver were expressly grounded upon well-established principles relating to waiver of individual rights. First, merely placing the state on *notice* that it might be waiving its right to immunity was fundamentally different, the Court reasoned, from ascertaining whether the state had knowingly and intelligently consented to suit.³²¹ "The whole point of requiring a 'clear declaration' by the State of its waiver," the Court said, "[was] to be certain that the State in fact consents to suit."³²² Voluntariness, therefore, means essentially the same thing with respect to states as it does with respect to individuals—it must be indicated clearly and expressly. Congress cannot rely upon the possibility of the states misunderstanding the circumstances that will give rise to waiver.

Second, the Court noted that constructive waivers "are simply unheard of in the context of *other* constitutionally protected privileges."³²³ Indeed, the Court noted that there is a presumption against waivers of fundamental personal constitutional rights.³²⁴ It stated: "State sovereign immunity, no less than the right to trial by jury in criminal cases, is constitutionally protected."³²⁵

Third, there were, in addition, equality values underlying the Court's decision. After all, the Court noted, *federal* sovereign immunity cannot be impliedly waived.³²⁶ The Court saw no reason why state immunity should be treated any differently.³²⁷ Further-

318. *Id.* at 676, 680.

319. *See id.* at 670 (setting forth pertinent language of the Lanham Act).

320. *See id.* at 680 (expressly overruling *Parden v. Terminal Ry. of Ala. Docks Dep't*, 377 U.S. 184 (1964)).

321. *Id.* at 681.

322. *Id.* at 680.

323. *Id.* at 681.

324. *Id.* at 682.

325. *Id.*

326. *United States v. King*, 395 U.S. 1, 4 (1969).

327. *Fla. Prepaid*, 527 U.S. at 682.

more, states should not, the Court noted in response to the dissenters, be *role-typed* such that they are penalized whenever they “step out of their proper economic role” to engage in commercial activities.³²⁸ The Court has similarly prohibited the government from utilizing inappropriate role-typing in its equal protection doctrine relating to gender classifications.³²⁹

Finally, and perhaps most importantly, the Court was concerned about the prospect of “forced waivers” affecting the states. There is a point at which psychological coercion undermines the voluntariness of a person’s consent or waiver of constitutional rights.³³⁰ In a similar fashion, the Court held that Congress can effectively coerce states by certain forms of compulsion. According to the Court, “the point of coercion is automatically passed—and the voluntariness of waiver destroyed—when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity.”³³¹ If Congress could exact such “forced waiver[s]” on the theory of constructive consent, the Court feared that it could effect an end-run around *Seminole Tribe* and its progeny.³³²

States thus have at least the beginnings of a right to be free from some forms of “mental” coercion. The right is based upon waiver principles that have been consciously imported from individual rights jurisprudence, and upon an analogous personal right to be free of overreaching and coercion. The underlying state right is the right to sovereign immunity. There is, however, no logical reason that the prohibition on coercion should be limited to this right alone. If other fundamental “states’ rights” are similarly implicated, one might expect the Court to scrutinize the voluntariness of the states’ waivers.

328. *Id.* at 691.

329. *See generally* United States v. Virginia, 518 U.S. 515 (1996) (invalidating single-sex military education); Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982) (holding that a state university could not limit enrollment in nursing program to women).

330. *See, e.g.,* Brewer v. Williams, 430 U.S. 387, 404-05 (1977) (holding that a suspect had not voluntarily waived his right to counsel by responding to an officer’s “Christian burial speech” while being transported in police car); *see also id.* at 412 (“[T]he entire setting was conducive to the psychological coercion that was successfully exploited.”) (Powell, J., concurring).

331. *Fla. Prepaid*, 527 U.S. at 687.

332. *See id.* at 683.

In sum, states have fundamental rights both to a measure of physical and mental autonomy. Federal commandeering of state and local institutions of government offends principles of state autonomy and independence. State waivers of constitutional rights, like individual waivers, must be knowing, intelligent, and voluntary to be effective. Federal statutes that condition participation in economic activity upon a waiver of sovereign immunity are deemed impermissibly coercive, a violation of the right to be free of mental or psychological coercion, as well as a violation of the right to be free from impermissible role-typing.

4. The Right to Due Process—Notice and an Opportunity to Be Heard

In addition to its substantive component, the Due Process Clause provides certain procedural protections for individual life, liberty, and property interests. Individuals who relate in a variety of ways with government, including as recipients of benefits, sometimes are entitled to protections like notice and pre-termination hearings.³³³ Whether they are so entitled depends upon the nature of the interest at stake—whether, for example, there is a constitutionally cognizable “liberty” or “property” right at issue.³³⁴ The particular process that is due is generally determined based upon a balancing of private and governmental interests, and an assessment of the likelihood of error.³³⁵

Recently, states too have been granted a number of procedural protections for their fundamental liberty interests in such things as internal ordering and sovereign equality. *Gregory*’s “clear statement” rule is one such procedural protection.³³⁶ Process federalism similarly requires that Congress make plain its intent to subject states to private lawsuits.³³⁷ States, therefore, are generally entitled

333. See *Bd. of Regents v. Roth*, 408 U.S. 564 (1972) (holding that respondent had no property interest sufficient to trigger his right to a pre-termination hearing); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding that due process required a welfare recipient to be afforded an evidentiary hearing prior to termination of benefits).

334. See *Roth*, 408 U.S. at 571.

335. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

336. See *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991) (holding that ADEA was ambiguous with regard to intent to include state officials among those regulated).

337. See, e.g., *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). The clear or

to notice where Congress intends to affect their interests in "life," liberty, or property.³³⁸

There is, in addition, a strong recent trend to provide states with additional procedural rights where certain congressional powers are concerned. The Constitution grants Congress the power to remedy and prevent civil rights violations.³³⁹ Specifically, under Section 5 of the Fourteenth Amendment, Congress has the power to enforce the guarantees of the Fourteenth Amendment, including those of due process and equal protection, by "appropriate legislation."³⁴⁰ Section 5 thus is a positive grant of congressional power. Although this power has traditionally been construed liberally,³⁴¹ the current Court has imposed substantial limits upon it.

One of the enforcement mechanisms Congress has relied upon in enforcing the guarantees of the Reconstruction Amendments is subjecting the states to private lawsuits. In a series of recent decisions, the Court has shielded states from remedial and prophylactic congressional abrogation of their immunity from private lawsuits seeking money damages.³⁴² The results in these cases are

plain statement rule applies as well in the preemption area. See, e.g., *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (stating that Congress should make clear its intent to preempt state legislation).

338. In addition to requiring clear statements, the Court has focused in recent commerce cases on drafting deficiencies in federal laws. For example, in doubtful cases, Congress must plainly provide that an item of commerce has moved interstate. See *United States v. Lopez*, 514 U.S. 549, 562 (noting that the statute in question had no jurisdictional element and that Congress made no findings concerning effects of gun possession on interstate commerce). The *Lopez* Court also intimated that congressional findings might be necessary where Congress legislates at the margins of its authority. See *id.* at 563 (noting that "findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye").

339. See U.S. CONST. amend. XIII, § 2 (granting Congress the power to enforce the prohibition on slavery and involuntary servitude); U.S. CONST. amend. XIV, § 5 (granting Congress the power to enforce the guarantees in Section 1 of the Fourteenth Amendment); U.S. CONST. amend. XV, § 2 (granting Congress the power to enforce the prohibition on racial discrimination in voting).

340. U.S. CONST. amend. XIV, § 5. For discussions of Congress's Section 5 authority, see generally Timothy Zick, *Constitutional Empiricism: Quasi-Neutral Principles and Constitutional Truths*, 82 N.C. L. REV. 115 (2003); Timothy Zick, *Marbury Ascendant: The Rehnquist Court and the Power to "Say What the Law Is,"* 59 WASH. & LEE L. REV. 839 (2002) [hereinafter Zick, *Marbury Ascendant*].

341. See *Katzenbach v. Morgan*, 384 U.S. 641, 652-58 (1966) (asking only whether Congress's conclusions were reasonable).

342. See *United States v. Morrison*, 529 U.S. 598, 627 (2000) (invalidating VAWA under Section 5 in part because the record failed to indicate that discrimination against victims of

only partially driven by federalism concerns. The Court is jealously (some might say possessively) guarding its own power to construe the Constitution, which it feels is threatened whenever Congress interprets constitutional guarantees in the course of providing civil rights remedies.³⁴³ States nevertheless benefit directly from the procedural rules the Court has developed in this area. The Section 5 cases are rooted, at least partially, in the "states' rights" renaissance.

Recent precedents require that Congress satisfy two procedural requirements before it may subject states to private lawsuits in the civil rights area. First, Congress must compile and present a thorough legislative record that contains evidence of "a history and pattern" of specific unconstitutional state conduct.³⁴⁴ This requirement, in effect, mandates that Congress conduct hearings on its own predicates for Section 5 enactments. As Justice Kennedy recently stated: "The *charge* that a State has engaged in a pattern of unconstitutional discrimination against its citizens is a most serious one. It must be supported by more than conjecture."³⁴⁵ The Court has been particularly aggressive in its enforcement of this state-friendly burden of proof, rarely finding that Congress has adduced sufficient proof to support its enactments.³⁴⁶

gender-motivated crimes existed in all, or even most, states); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 89 (2000) (invalidating provision of Age Discrimination in Employment Act of 1967 authorizing federal damage suits by state employees against the states as sovereigns as "an unwarranted response to a perhaps inconsequential problem"); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 645 (1999) (invalidating an attempt by Congress to abrogate state Eleventh Amendment immunity to enforce the Patent and Plant Variety Protection Remedy Clarification Act, finding little proof of "widespread and persisting" patent violations and almost no evidence that Congress even considered the issue of state remedies (quoting *City of Boerne v. Flores*, 521 U.S. 507, 526 (1997))). *But see Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 740 (2004) (upholding provisions of Family and Medical Leave Act of 1993); *Tennessee v. Lane*, 124 S. Ct. 1978, 1994 (2004) (upholding provisions of Title II of Americans with Disabilities Act).

343. For a discussion of the interpretive issues, see generally Zick, *Marbury Ascendant*, *supra* note 340.

344. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 368 (2001); see *Kimel*, 528 U.S. at 89 ("Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation."); *Fla. Prepaid*, 527 U.S. at 640 ("It is this conduct then—unremedied patent infringement by the States—that must give rise to the Fourteenth Amendment violation that Congress sought to redress in the Patent Remedy Act.").

345. *Hibbs*, 538 U.S. at 748 (Kennedy, J., dissenting) (emphasis added).

346. See cases cited *supra* note 342.

Second, Congress must demonstrate that its enactment is narrowly tailored to the specific evil it has identified. Section 5 legislation, the Court has held, must exhibit "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."³⁴⁷ This narrow tailoring requirement has been interpreted to mean that enactments might have to be limited to those areas of the Nation in which Congress has demonstrated the requisite history and pattern of discrimination. These procedural rights overlap to some extent with the substantive fundamental rights of states. One of the purposes of the tailoring requirement, for example, is to scrutinize broad congressional schemes carefully, thereby protecting the states' right to order their internal affairs.³⁴⁸

The upshot is that before any Section 5 enactment can take effect, the states, as a group, are entitled to the equivalent of an evidentiary hearing at which the government must prove that the states, or at least most of them, were involved in a pattern of unconstitutional behavior. Although Congress is under no obligation to provide the states an opportunity to be heard, the reality is that the states possess most of the evidence that Congress is seeking. In many cases, therefore, states will be asked to provide documentary and other evidence in the course of congressional hearings. The hearings that are conducted concerning congressional "charges" of state discrimination operate in effect as pre-waiver hearings on "charges" of state misconduct.

In assessing Congress's showing subsequent to these hearings, the Court does not defer to Congress or take institutional limitations and competencies into account. Rather, the Court conducts an admittedly "close review" of the legislative materials.³⁴⁹ Most enactments fail to satisfy this heightened scrutiny.³⁵⁰ Even if the record indicates a pattern of unconstitutional state activity, the Court also engages in a detailed examination of the rights and remedies afforded under the statute in order to assess "congruence

347. *City of Boerne*, 521 U.S. at 520.

348. *See Hibbs*, 538 U.S. at 755 (Kennedy, J., dissenting) (arguing that Congress's family and medical leave scheme "does not respect the States' autonomous power to design their own social benefits regime").

349. *Garrett*, 531 U.S. at 370.

350. *See supra* note 342.

and proportionality.”³⁵¹ These requirements, in particular the special burden of proof Congress must bear to demonstrate a pattern of unconstitutional state action, in effect require strict judicial scrutiny of Section 5 measures.³⁵²

At least one member of the Court is not satisfied with even these significant procedural safeguards. In *Nevada Department of Human Resources v. Hibbs*,³⁵³ Justice Scalia argued in dissent that *each state* should have the individual right to contest the application of any Section 5 enactment against it. He rejected treating “the States” as a body for purposes of determining whether federal legislation is supported by the requisite record of a pattern of unconstitutional conduct.³⁵⁴ If New York, for example, is to be subjected to suit, Justice Scalia reasoned, then Congress must demonstrate a pattern of unconstitutional conduct by New York’s officials. As he explained: “There is no guilt by association, enabling the sovereignty of one State to be abridged under § 5 of the Fourteenth Amendment because of violations by another State, or by most other States, or even by 49 other States.”³⁵⁵ This proposition was self-evident to Justice Scalia, because “[w]hen a litigant claims that legislation has denied him individual rights secured by the Constitution, the court ordinarily asks first whether the legislation is constitutional *as applied to him*.”³⁵⁶ Even if a statute thus survives a facial challenge, according to Justice Scalia, each state has the same constitutional right any individual would have: to challenge the statute as applied.

As Justice Scalia’s approach suggests, the procedural safeguards of federalism are still in the developmental stage. At this juncture, there are two primary procedural protections. First, there are clear or plain statement rules that, at a minimum, require that Congress consider the federal-state balance when legislating and make plain when it intends to “upset” that balance. Second, and far more

351. See *Garrett*, 531 U.S. at 372 (holding that the ADA failed to meet the congruence and proportionality standard).

352. See Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 477 (2000) (stating that Section 5 review approaches the strict scrutiny standard).

353. 538 U.S. 721 (2003).

354. *Id.* at 742-43 (Scalia, J., dissenting).

355. *Id.* at 741-42.

356. *Id.* at 743.

significantly in terms of substantive effects, the states have in effect been granted a right to an evidentiary hearing before Congress. Before it can legislate an abrogation of state sovereign immunity, Congress must demonstrate a history and pattern of unconstitutional state action and further demonstrate that its remedy is "congruent and proportional" to the evil identified.

To review, the states have steadily amassed a variety of rights akin to fundamental individual rights. The substance of these rights, the manner in which they have been discovered, and their strength all parallel fundamental, inherent individual rights. The rights to intimate ordering, equality, autonomy, and due process extend the basic rights of sovereignty to new areas and new heights. In this respect, as well, they resemble their broad individual rights counterparts. This is a new conception of federal liberty and federalism, one that puts power to one side in favor of the expansion of "states' rights." Viewed from this perspective, we can now approach "states' rights" with a measure of clarity. The Anti-Federalist trifecta—individuality, morality, and rights—has gradually produced the beginnings of an extra-textual bill of rights for states. This bill, however, is beyond the minimal aspirations of the Anti-Federalists, who were concerned chiefly with the preservation of the states and their most essential sovereign rights. States have essentially become "moral persons" in the strongest sense. They are treated as sentient, fundamental rights-bearing persons.

III. STATES ARE NOT PEOPLE: THE FALLACY OF THE NEW FEDERAL LIBERTY

We now have a better understanding of the various senses in which states can be said to possess constitutional "rights." Although the *sovereign* rights of states must remain inviolable, this Part criticizes the Court's recent discovery of *fundamental* "states' rights." The thesis is that federal liberty and civil liberty are not properly viewed as constitutional analogs. This Part begins with an argument that constitutional powers and constitutional rights are not interchangeable constructs. Specifically, it is false to suggest, as the Court has, that the discovery of fundamental "states' rights," or inherent "attributes" of statehood, is simply the "mirror image" of a determination that Congress lacks the constitutional power to

act.³⁵⁷ "States' rights" are not merely the flip side of the powers coin; they are, in fact, fundamentally different currencies. Powers and rights invite fundamentally different inquiries, and they encourage fundamentally different institutional roles and attitudes. The "fundamental rights" strand of the current federalism doctrine is historically and jurisprudentially anomalous. Its closest relative is a discredited version of "states' rights" that was vanquished in the constitutional revolution associated with the New Deal.³⁵⁸

This Part next demonstrates, in more specific terms, that civil liberty is not an appropriate model for federal liberty. States were not broadly conceived as rights-bearing persons, but rather as power-sharing entities. Accordingly, states' constitutional rights, unlike the rights of persons, are narrow and expressly circumscribed. Moreover, issues of judicial competency and legitimacy, as well as the lack of any necessity for aggressive judicial involvement in the discovery of fundamental "states' rights," all militate in favor of a judicial double standard that enforces fundamental individual rights while refusing to recognize unenumerated, fundamental "states' rights." Finally, more elemental reasons for rejecting civil liberty as a model for federal liberty are advanced, including the absence of any sound theoretical or normative foundation for fundamental "states' rights" and the negative effects that will inevitably flow from the enforcement of a variety of negative state liberties.

A. Protecting State Sovereignty: State Powers Versus "States' Rights"

There are three basic options insofar as the protection of state sovereignty is concerned. As *Garcia* suggested, the first option is simply to leave states to defend themselves in the political process.³⁵⁹ The Court itself seems to have abandoned this option.³⁶⁰ This Article does not support it, at least insofar as the approach counsels wholesale judicial abandonment of federalism. The second

357. See *New York v. United States*, 505 U.S. 144, 156 (1992).

358. Compare *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (invalidating Child Labor Act), with *United States v. Darby*, 312 U.S. 100 (1941) (overruling *Hammer*).

359. See *supra* notes 200-13 and accompanying text.

360. See *supra* note 230 and accompanying text.

option is for courts to fashion appropriate limitations on federal enumerated powers. This option would leave ample space for the states' exercise of "sovereign" authority, while at the same time providing the widest protection, among the available options, for individual liberty. The Court, in recent commerce cases, has demonstrated some affinity for this option, which does not focus narrowly on the states *as states* but rather more generally on the scope of federal power.³⁶¹ The Court has been reluctant to follow this option in other areas, however, including the spending power, which it continues to interpret as essentially without limits.³⁶² The third option, and the one the Court is now, as this Article points out, vigorously pursuing, is to treat the states as special "persons" and to discover, by implication and extrapolation, fundamental state constitutional rights. These fundamental rights, as noted above, protect the states as states from federal regulation and control.

These last two options are not cut from the same cloth. The fundamental "rights" that states have been granted under the Court's new conception of federal liberty are plainly not based upon a distributive calculus of sovereign power. There is no question, for example, that Congress has the power, under the Court's commerce precedents, to regulate the solid waste that was at issue in *New York*. The same is most likely true, at least if one follows the Court's expansive interpretation of the commerce power, of the sale of handguns in *Printz*. Similarly, the text of the Eleventh Amendment limits the *judicial* power in only the narrowest respects. It does not grant states the blanket liberty the Court has found to emanate from it and other sources. Finally, the Court has consistently acknowledged that Section 5 is a broad, "positive grant of legislative power."³⁶³ Indeed, the Court has repeatedly said that

361. See *United States v. Morrison*, 529 U.S. 598, 627 (2000) (concluding that local gender-motivated violence was beyond Congress's commerce power); *United States v. Lopez*, 514 U.S. 549, 567 (1995) (concluding that possession of a handgun in a local school zone was not economic activity).

362. See *Sabri v. United States*, 124 S. Ct. 1941, 1945-46 (2004) (rejecting the argument that Congress must, when exercising the spending power, require a connection between forbidden conduct and federal funds); *South Dakota v. Dole*, 483 U.S. 203, 208-09 (1987) (upholding conditional spending of highway funds based upon the state's adoption of a minimum drinking age).

363. *City of Boerne v. Flores*, 521 U.S. 507, 517 (1997) (quoting *Katzenbach v. Morgan*, 384

Congress is to be chiefly responsible for enforcing the guarantees of the Fourteenth Amendment.³⁶⁴ Yet today substantial procedural limits trump even this "plenary" power.

One way to diminish the significance of the recent shift in focus from distributive power to inherent, fundamental "states' rights" in all of these contexts is simply to contend that there is no difference between a federalism based upon distributive principles and one based upon "states' rights." To put the matter differently, one might contend that powers and rights are essentially flip sides of the same coin. This was the position taken by Justice O'Connor on behalf of the Court in *New York*, where she insisted that there is no meaningful difference between discovering "states' rights," or what the Court referred to as "attributes" or "incident[s]" of state sovereignty,³⁶⁵ and concluding that states possess residual powers.³⁶⁶ Indeed, at least where Congress is regulating the states directly, Justice O'Connor described these inquiries as "mirror images of each other."³⁶⁷ Turning to yet another metaphor, she elaborated:

In the end, just as a cup may be half empty or half full, it *makes no difference* whether one views the question at issue ... as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment.³⁶⁸

The Court has expressed a similar attitude with respect to the Eleventh Amendment and Section 5 of the Fourteenth Amendment. In other words, it "makes no difference" whether one considers

U.S. 641, 651 (1966)).

364. See *id.* at 536 ("It is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference." (quoting *Katzenbach*, 384 U.S. at 651)). Indeed, the Court was willing to go so far as to reaffirm that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional." *Id.* at 518.

365. See *New York v. United States*, 505 U.S. 144, 156, 157 (1992).

366. *Id.* at 157.

367. *Id.* at 156. For another critique of the "mirror image" claim, see Yoo, *supra* note 11, at 1347-48 (arguing that the specific holding in *New York*, which permits Congress to subject states to generally applicable laws but not to single states out for regulation, undermines the "mirror image" argument).

368. *New York*, 505 U.S. at 159 (emphasis added).

congressional enactments that implicate these amendments as falling outside the power granted therein, as violating "background principles" and "presuppositions" relating to state sovereignty, or, in the case of Section 5 enactments, as failing to meet newly devised procedural limitations.³⁶⁹ In any case, Congress is denied the authority it has claimed.

The only respect in which it "makes no difference" whether courts base decisions on powers or rights concerns the ultimate result. Whether one views the question in *New York* as one of power or rights, the Court's bottom line is that Congress's enactment is invalid. It does, however, make a world of difference in terms of how courts enforce federalism. It is not merely semantics to distinguish powers from rights in this regard. Indeed, we have no trouble seeing this important distinction when *individual* rights are at stake. Everyone can tell the difference between a holding that Congress lacks the power to regulate an item of commerce, for example, and one that concludes that *even if* Congress possesses such power, an affirmative limitation in the Bill of Rights, or elsewhere, precludes federal regulation.

There are, indeed, several important distinctions between traditional "distributive federalism" and the new "sovereignty federalism,"³⁷⁰ or what this Article has referred to as "federal liberty." This Part begins by highlighting two of these differences, leaving others to be addressed as the argument progresses. First, a rights-based federal liberty affects institutional roles in a manner and to an extent that are foreign to distributive federalism. Second, the discovery of discrete *constitutional* "rights" or "affirmative limitations" in favor of the states is an historical and jurisprudential anomaly. The Court itself has twice confirmed this, once

369. See *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991) (stating that the Eleventh Amendment stands "not so much for what it says, but for the presupposition ... which it confirms"); *City of Boerne*, 521 U.S. at 519-20 (setting forth the "congruence" and "proportionality" requirements).

370. See Martin S. Flaherty, *Are We To Be A Nation?: Federal Power vs. "States' Rights" In Foreign Affairs*, 70 U. COLO. L. REV. 1277, 1282-84 (1999) (distinguishing between "distributive federalism" and "sovereignty federalism").

during the 1937 New Deal constitutional revolution³⁷¹ and more recently in *Garcia*.

1. *Rights, Powers, and Institutions*

Rights and powers adjudications portend fundamentally different judicial roles. Courts review powers with considerable deference. They tend to defer substantially to other institutions, whether because they are more democratic or have more expertise, or perhaps both. In terms of constitutional powers, therefore, courts speak mostly in terms of the rationality and reasonableness of institutional choices and prerogatives.

Fundamental constitutional rights, on the other hand, occasion the most aggressive judicial scrutiny. When courts deal with fundamental rights, whether personal or sovereign, they apply strict scrutiny; the implication of such constitutional rights demands at least compelling governmental interests and narrowly-tailored responses.³⁷² When rights are at stake, courts leave the realm of the merely rational or reasonable and demand much more. The language and methodology of heightened scrutiny, such as we see in the immunity and Section 5 cases, for example, are wholly anomalous to considerations of constitutional power. These things are familiar only to the protection of constitutional rights. The rights of internal ordering, equality, autonomy, and due process thus operate precisely as their individual rights counterparts do, namely as trumps to federal power that is otherwise granted, expressly or as a result of judicial interpretation, by the Constitution. This is the version of "states' rights" the Court is

371. See *United States v. Darby*, 312 U.S. 100, 123-24 (1941) (stating that the Tenth Amendment "states but a truism that all is retained which has not been surrendered"); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (abandoning earlier efforts to enforce exclusive enclaves of state authority).

372. Restriction on speech content, for example, are subject to strict judicial scrutiny. See, e.g., *Texas v. Johnson*, 491 U.S. 397 (1989) (invalidating a statute prohibiting the defacement of a United States flag). In terms of state fundamental rights, the Court has sometimes been unwilling even to consider the nature of the government's interest. See *New York*, 505 U.S. at 178 ("No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate."). Other times the Court applied elements of strict scrutiny, like record review and narrow tailoring. See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 370-71 (2001) (conducting a "close review" of legislative record).

championing.³⁷³ It looks nothing like the lenient distributive calculus of traditional federalism.

Given these fundamental differences in judicial perspective and role, it is hard to understand how it “makes no difference” whether courts enforce federalism by cabining federal powers or by discovering unenumerated fundamental “states’ rights.” There is no such ambivalence where individual rights are concerned. Congress surely would have had the *power*, in a case like *Griswold*, to regulate interstate traffic in contraceptives or, to take another example, to regulate the interstate shipment of pornography. Any such regulations, however, would potentially conflict with the *right* to privacy, in the one case, or the *right* to free speech, in the other. In this sense, rights and powers are not “flip sides” of a coin or “mirror images” of one another.

Although they ultimately may lead to the same result, rights and powers remain conceptually and constitutionally distinct; they require distinctive inquiries. We can readily distinguish between an individual rights regime in which courts define governmental limitations with reference to the scope of enumerated powers, as ours did at least for its first century, and one in which courts enforce, and in some cases discover, “fundamental” rights. As the examples involving contraceptives and pornography demonstrate, these regimes ask different things of courts. The question in a rights regime is not whether the regulations of contraceptives and pornography are “commerce,” for instance, or whether they fall within the judiciary’s interpretation of the scope of the commerce power (they surely are, and surely do), but rather whether the regulation of contraceptives invades an unenumerated fundamental right to “privacy,” or whether the regulation of pornography violates the right to free expression as the Court has interpreted that liberty. The latter sorts of questions are distinct in terms of interpretive focus, not to mention in terms of the sorts of values

373. Laurence Tribe distinguishes between “extrinsic” and “internal” limits on federal authority. Extrinsic limits are “those that override, or trump, power affirmatively delegated by the Constitution to Congress.” Laurence Tribe, 1 *AMERICAN CONSTITUTIONAL LAW* 913 n.1 (2000). “Internal limits” are “those that restrict the affirmative reach of congressional power from the outset.” *Id.* Federal liberty is based upon extrinsic limits, both textual (like the Tenth and Eleventh Amendments) and those based upon “background principles.” See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72 (1996).

that must be considered, from those that are routinely asked under a traditional distributive paradigm.

The same distinctions are present where fundamental "states' rights" are concerned. Rather than ask questions that at least arguably have a textual basis, such as "Is this commerce?" or "Does the regulated activity have a substantial effect on commerce?," courts must instead ask a-textual and extra-textual questions like "Is this a fundamental attribute of state sovereignty?". Rather than contemplate the limitation on judicial power set forth in the Eleventh Amendment's text, courts must instead consult "background principles" and "presuppositions" in order to determine whether "states' rights" have been abridged. Under Section 5, the question is not whether Congress's enactment is "appropriate," but whether, *even if* Congress has acted rationally, and, hence, appropriately, states have not been provided fair notice, or something like a fair hearing on the "charge" of discrimination Congress has made. Again, this is a distinct sort of interpretation, one that relies upon different sources, precepts, evidence, and rationales than a distributive and structural calculus. Under Section 5, for example, this requires a laborious review of the legislative record and attention to whether the law is narrowly tailored to the legislative end. Neither of these elements of heightened judicial scrutiny is present where the question is solely one of the scope of federal power.

The doctrine of fundamental "states' rights" thus produces transformations of both judicial perspective and role. The judiciary, however, is not the only institution that is appreciably affected. Congress too must be concerned that its powers are not necessarily what they seem. Whereas it has had some time to get used to individual rights trumps, which are at this point fairly well settled even if Congress often fails to take them into account, Congress is at sea in determining when a "states' rights" trump might surface. Surely Congress could not have suspected that it was acting beyond its *enumerated* powers in cases like *New York* and *Printz*. No state right to be free from federal "commandeering" had yet been discovered. Congress, furthermore, had been regulating states in a similar fashion for many years. Similarly, Section 5 had been a plenary power until *City of Boerne* was decided. There was no way to anticipate "congruence and proportionality," much less height-

ened record review.³⁷⁴ "States' rights" thus upsets settled expectations and makes regulation far less predictable, at least in the short term when rights are being newly discovered, than a distributive regime.³⁷⁵

Of course, these are not the only ways in which it "makes a difference" how courts enforce federalism. Rights tend to be far less flexible in nature, for example, than powers, which have the capacity to ebb and flow in a system characterized by structural nuances. Further, rights tend to distract attention from things like community and encourage states to think of themselves as wholly separate units.³⁷⁶ Rights, particularly as our courts interpret them, tend to be all-or-nothing propositions.

These and several other distinctions will be discussed below, when we consider the effects a fundamental rights-based federal liberty is likely to have on federalism. For now it is necessary only to establish that there are important differences between a federalism based upon powers and one based upon fundamental "states' rights."

2. The Historical and Jurisprudential Anomaly of Fundamental "States' Rights"

Judging from the tone and substance of the Court's opinion in *New York*, Justice O'Connor apparently wishes us to believe that there is nothing unusual about the notion that states possess unenumerated fundamental rights. Neither history nor the Court's own jurisprudential tradition lend support to that assertion.

374. See Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 85 (2001) (referring to this phenomenon under Section 5 as a "crystal ball" problem).

375. To be sure, new or novel interpretations of constitutional powers can have a similar effect. A determination, such as was made in *Lopez*, that Congress failed to regulate an item of "commerce," however, affects only that case and no other, whereas newly announced "states' rights" are of the winner-take-all variety. Rights discovery and enforcement, unlike limitations on federal power, tends not to be an iterative, incremental process. In that sense, the discovery of fundamental "states' rights" has a greater effect on institutional operations and roles than does a distributive power calculus.

376. See generally MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991) (critiquing the focus in political and other discourse on "rights talk" as it concerns individual rights).

Arguments on behalf of "states' rights" have, of course, been advanced since the Founding. These arguments, however, did not press the case for discovery of discrete, fundamental "states' rights" that would act as trumps to federal power in the same sense that individual rights function. Even the Anti-Federalists, who first advanced the metaphor of moral personhood, did not seem to take it as literally as the modern Court does. They worried mostly that the proposed central power would be so broad as to *annihilate* the states entirely.³⁷⁷ The "moral person" metaphor was, for Anti-Federalists, a rather desperate plea to the Framers to leave *something* in terms of local sovereignty for the states. In other words, they were concerned primarily with the scope of Congress's enumerated powers and federal supremacy. Anti-Federalists feared, most of all, state annihilation, and they argued most strenuously for the states' sovereign rights, which were ultimately recognized. Even their proposed "bill of rights" for states was designed to carve out a sphere of powers for states, rather than to prescribe a set of "affirmative limitations" on Congress.³⁷⁸ Moreover, no one at the time contemplated an aggressive role for the courts in discovering "inherent" state rights.

Similarly, whether it was the assumption of states' Revolutionary War debts by the United States or the proposal for a Bank of the United States, the early "states' rights" debates focused on the concept of limited national power, not the discovery of discrete fundamental "states' rights." Under Patrick Henry's leadership, for example, the Virginia general assembly adopted resolutions disparaging assumption of state debts as "repugnant to the Constitution of the United States, as it goes to the exercise of a power not expressly granted to the General Government."³⁷⁹ Similarly, the great debate over the chartering of a Bank of the United States was waged in terms of federal enumerated powers, not inherent state rights.³⁸⁰ The doctrine of nullification, which along with secession ranks as one of the great embarrassments for federalism, was similarly premised upon the argument that

377. See *supra* notes 63-65 and accompanying text.

378. See *supra* Part I.C.

379. McDONALD, *supra* note 7, at 30.

380. See *id.* at 31 (describing the debate over the first Bank of the United States).

Congress had exceeded its enumerated powers in enacting tariffs.³⁸¹ Even the highly politicized "states' rights" controversies of the 1950s and 1960s, despite their incendiary rights rhetoric, were premised ultimately upon the notion of limited federal power, not the discovery of rights trumps that operated to nullify otherwise legitimate exercises of federal power.

This is not the place for a more lengthy historical review of "states' rights." It suffices to note that "states' righters" have consistently framed their arguments in terms of distributive power, not literal constitutional rights, and certainly not unenumerated fundamental rights of the sort that have recently been discovered to exist. Of course, early state supporters did not have a doctrine of substantive due process upon which to draw. They did not have the theoretical or doctrinal analogs to argue that states, like persons, should have fundamental rights when none were textually granted. Nor did they have a sense of what judicial power would become. Only now are such arguments being vigorously advanced, and only now, as a result of judicial interpretation, are they yielding constitutional doctrine. As courts have largely forsaken structure and power in terms of individual liberties, so too have they moved precipitously to a rights regime for states.

Jurisprudentially and doctrinally, as well, the discovery of fundamental "states' rights" is a discredited approach to enforcing the federal-state balance. The Court, in a series of decisions now counted among its greatest embarrassments, once sought to protect state sovereignty by discovering inherent state constitutional rights in the text of the Constitution. It did so, in cases like *Hammer v. Dagenhart*³⁸² and *United States v. Butler*,³⁸³ essentially by butchering the text of the Tenth Amendment. In *Butler*, for example, the Court held that the Agricultural Adjustment Act "invade[d] the reserved rights of the states" because the authority for its passage was not "expressly granted" to Congress.³⁸⁴ The idea that Congress has only those powers that are *expressly* granted was, of course,

381. See *id.* at 104-06 (discussing the doctrine of nullification).

382. 247 U.S. 251 (1918).

383. 297 U.S. 1 (1936).

384. *Id.* at 68 (emphasis added).

taken directly from Article II of the Articles of Confederation.³⁸⁵ The Tenth Amendment itself says no such thing.³⁸⁶

Not even the modern Court is willing to tack so far backwards in interpreting the Tenth Amendment's import with respect to the balance of sovereign power. Indeed, until recently, the Court has seemingly accepted Justice Stone's interpretation of the Tenth Amendment: "The amendment states but a truism that all is retained which has not been surrendered."³⁸⁷ More recently, however, there has been a creeping return to the notion that the Tenth Amendment exhibits far more than a "truism." The new federal liberty elevates the Tenth Amendment to the status of a rights guarantee, an *affirmative limitation* on federal power rather than an interpretive guide to constitutional power. Indeed, in *New York*, Justice O'Connor flatly asserted that the Tenth Amendment was every bit the affirmative limitation on congressional power that the First Amendment was on governmental power to abridge individual speech rights.³⁸⁸ Simply to read the text of these two amendments is to recognize the deficiency of this argument. The First Amendment is, by its terms, an affirmative limitation ("Congress shall make no law...."),³⁸⁹ the Tenth Amendment is just as plainly not an affirmative limitation at all, but rather an interpretive guide for distributing sovereign authority ("The powers not delegated to the United States by the Constitution....").³⁹⁰

The precedents Justice O'Connor relied upon in *New York* to support the "mirror image" proposition are themselves quite telling. She cited only two cases—*Lane*, in which the Court essentially reiterated that the Constitution grants states the sovereign right to exist,³⁹¹ and *Garcia*, which expressly *rejected* a judicial search for essential or inherent rights of statehood as "not only unworkable but ... also inconsistent with established principles of federalism."³⁹²

385. See *supra* text accompanying note 112.

386. See U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

387. *United States v. Darby*, 312 U.S. 100, 124 (1941).

388. See *New York v. United States*, 505 U.S. 144, 156-57 (1992).

389. U.S. CONST. amend. I.

390. U.S. CONST. amend. X.

391. See *Lane County v. Oregon*, 74 U.S. 71 (1868).

392. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985).

The dearth of examples itself proves the anomaly of the fundamental rights approach. So do the cases Justice O'Connor cites as examples of the more traditional distributive power model,³⁹³ including *McCulloch v. Maryland*,³⁹⁴ which has been the anchor for that model since 1819.

Indeed, for most of the past two hundred years, the Court has protected the states by directly narrowing federal powers rather than discovering fundamental "states' rights."³⁹⁵ One would be hard pressed to locate, in the judicial annals of federalism, the sort of express comparisons the current Court routinely makes between individual rights and the fundamental rights of states. The basic premise of federalism, as the Tenth Amendment confirms, has been the existence of a central government with broad, although not unlimited, powers and state governments that exercise the remaining powers not granted to Congress or prohibited to the states. With the exception of the rather narrow grant of basic sovereign rights, state sovereignty is, by purposeful constitutional design, residual and derivative; its scope depends on the reach of national power and is by express terms tied to it.³⁹⁶ Moreover, certain federal powers, such as those granted in the Reconstruction Amendments, including Section 5 of the Fourteenth Amendment, were expressly *intended* to alter the balance of power between the federal government and the states. Until very recently, the exercise of these powers was not treated as analogous to a federal charging mechanism subject to procedural constraints.

The fundamental "states' rights" movement thus signals an important shift for federalism. We have become accustomed to

393. *New York*, 505 U.S. at 155.

394. 17 U.S. (4 Wheat.) 316 (1819). Justice Story likewise viewed the Tenth Amendment as an interpretive guide rather than an affirmative limitation on congressional power. See JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1901 (Da Capo Press 1970) (1833) ("It is plain ... that it could not have been the intention of the framers of this amendment to give it effect, as an abridgment of any of the powers granted under the constitution, whether they are express or implied, direct or incidental.").

395. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824) ("No direct general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation.").

396. This assumes, of course, that either the states or federal government have power with regard to the subject. This is not always the case. See, e.g., *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (invalidating state term limits measure for members of Congress).

defining *personal* liberty and autonomy in terms of rights trumps, rather than in terms of structure and limited powers.³⁹⁷ The turn from powers to rights is a significant transformation of the concept of limited government, however, insofar as states are concerned. There is no bill of rights for states in the Constitution. Protection for the states was intended to be, and until recently has been, largely structural in character, a product generally of enforced limitations on federal powers. To be sure, the Court has generally been unwilling to make substantial inroads on federal power, but this path remains open to the Court should it wish to take it.

The notion that states have enforceable unenumerated rights alters the relationship states have with the central government by providing, in essence, a second line of defense against federal intervention in the lives and livelihoods of the states. This means, symbolically, that states are indeed more than mere corporate bodies, political subdivisions, federal appendages, or puppets of central authority. They are, in fact as well as in law, more like persons. It means, substantively, that even if Congress or the judiciary acts pursuant to an enumerated power, states, like persons, may yet enjoy a liberty or freedom from regulation. Federalism has turned from considerations of power and at least nominal fidelity to text toward a symbol or image of state-as-person that does not depend upon either of these. This is in no respect merely the flip side of a distributive calculus.

B. Sovereigns, Persons, and Constitutional Rights

Despite differences in method and the lessons of history, it appears as if the Court will continue to enforce federalism in this manner, by treating states as rights-bearing persons. So let us compare the status of states and persons insofar as constitutional

397. As Michael Sandel has commented:

Nor, in the first century of its existence, did the Bill of Rights play an important role in protecting individual liberties against federal infringement. Liberty in the early republic had less to do with individual guarantees against government action than with the dispersion of power among branches and levels of government.

MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 38 (1996).

rights are concerned. What does the Constitution indicate with regard to the "rights" of each?

Sovereign constitutional rights and individual constitutional rights are obviously not of similar number or character. Although the Constitution contains a panoply of individual rights, including those in the Bill of Rights, it provides for literal "states' rights" or affirmative limitations on federal power only in the most limited sense. This makes sense, as the overriding purpose of the Constitution, the thing that animates the document from top to bottom, is the preservation and protection of individual liberty. The two principal means of ensuring the liberties of the people are the Bill of Rights, which constrains governmental power with respect to certain spheres of personal autonomy, and the doctrine of enumerated powers, which generally limits the reach of federal power. Neither the Bill of Rights nor the doctrine of enumerated powers is concerned with the status of states as states.

As noted, the Constitution recognizes the states' sovereign rights to exist, to form separate governments, to participate in political processes, and to interpret state law.³⁹⁸ That the Constitution recognizes these very limited sovereign rights does not mean, however, that states are constitutional rights-bearers in *every* significant respect, or that the principles and doctrines that protect "moral persons" apply with equal force to the states. The mere fact that the Constitution recognizes divided sovereignty as a principle does not automatically give rise to a federal liberty that is as vital and encompassing as is constitutional civil liberty.

Indeed, the Constitution itself strongly suggests otherwise. It attests that divided sovereignty and structural constraints exist for the benefit of individuals and their liberty and dignity, not the states and their liberty and dignity. This is apparent from the character of the sovereign rights of states themselves. Whereas individual liberties are broadly granted in the Constitution, leaving substantial interpretive gaps to be filled in, the constitutional rights of states are of a much narrower character. States' political rights, for example, are expressed in narrow terms admitting of no doubt as to their scope. The states' rights to political participation and

398. See *supra* Part II.A.

political influence are spelled out in express terms.³⁹⁹ The Constitution thus expressly indicates that states possess equal suffrage and have a right to pass on constitutional amendments. This is quite unlike, say, the First Amendment's preservation of individual rights "peaceably to assemble" and to "petition the government for a redress of grievances."⁴⁰⁰ The fear, of course, in drafting a Bill of Rights was that the mere failure to list a right would be counted as evidence of its non-existence. No such fear animated the provision of state sovereign rights, since their protection was not to be found in individual guarantees but in structural safeguards.

The Constitution contains far more limitations with respect to states than it does explicit rights guarantees. There are, in fact, express limits even on the most critical of "states' rights." The Constitution may grant states the sovereign right to exist, but there can be no mistaking, as the Supremacy Clause provides, that the Constitution and federal laws are "the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."⁴⁰¹ This provision substantially limits the states' prerogatives and initiatives, what we might consider their constitutional "quality of life." It constrains states in a fashion flatly at odds with the scope of personal liberty that the Constitution recognizes.

Further, the Constitution contains several express limits on states. They may not, for example, enter treaties, coin money, enter into agreements or compacts with other states, or themselves wage war except in extraordinary circumstances.⁴⁰² Similarly, state judiciaries exist, but they cannot announce authoritative decisions on matters of federal law.⁴⁰³ The powers expressly and impliedly granted to Congress also necessarily diminish state sovereignty.⁴⁰⁴ So does the Bill of Rights, which now constrains states in nearly all respects.

Further, although a state has the right to organize its own government, that right is limited substantially by the requirement that the state not deviate from "a Republican Form of Govern-

399. See *supra* Part II.A.3.

400. U.S. CONST. amend. I.

401. U.S. CONST. art. VI, cl. 2.

402. U.S. CONST. art. I, § 10.

403. U.S. CONST. art. III; see *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

404. See U.S. CONST. art. I, § 8; U.S. CONST. art. VI, cl. 2.

ment.”⁴⁰⁵ States may have a sovereign right to choose their own officials, but those officials are expected to serve in pre-determined chambers, as the Constitution expressly mentions state legislative, judicial, and executive branches.⁴⁰⁶ It grants the states the right to participate in the amendment process, but it vests in *Congress* the ultimate choice with respect to the mode of ratification.⁴⁰⁷

The very tenor of the Constitution suggests that states are subordinate institutions with limited authority, not dignified, rights-bearing persons. Aside from providing for minimal state rights of sovereign preservation and self-determination, the Constitution contains no other express or implied rights guarantees for states. It certainly nowhere expressly provides for preemption of federal power in the name of statehood or unenumerated “attribute[s] of state sovereignty.”⁴⁰⁸ In fact, the general rule, as specifically expressed most forcefully in the Supremacy Clause,⁴⁰⁹ is federal preemption of state authority. This formula of federal supremacy is manifested elsewhere as well, in numerous specific constitutional provisions. For example, states have the *power* to decide upon the times, places, and manner for holding elections, but Congress “may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.”⁴¹⁰ The constitutional “trumps” thus all run in one direction.

With the limited exceptions of the aforementioned sovereign rights, the Constitution speaks only to sovereign *power*, which states are sometimes expressly denied and sometimes granted, as in the Tenth Amendment’s reservation of state residual power.⁴¹¹ These powers, however, are not granted to benefit the states *as states*. When powers are granted, they are intended to permit states to pursue not their own interests, but the interests of their respective citizens. States, after all, exist only by the grace of the consent of those whom they govern, and draw their powers from them. States represent the people and exist to support and protect

405. U.S. CONST. art. IV, § 4.

406. See U.S. CONST. art. VI, cl. 3 (contemplating three-branch state governments).

407. See U.S. CONST. art. V.

408. *New York v. United States*, 505 U.S. 144, 156 (1992).

409. U.S. CONST. art. VI, cl. 2.

410. U.S. CONST. art. I, § 4, cl. 1.

411. See U.S. CONST. art. I, § 10 (setting forth limits on state power).

*the people's rights.*⁴¹² Indeed, the very idea of "states' rights" beyond the notion of limited sovereign rights strikes a discordant note. An accused, for example, has a *right* to judgment in his favor if found innocent by a judge or jury. A state, by contrast, has no *right* to a conviction, *even if* the accused is guilty.⁴¹³

The Constitution, both expressly and by implication, manifests the basic understanding that states, like other governmental institutions, are generally power-sharers, not rights-bearers. Every new law student learns that constitutionally prescribed institutions exercise *powers*. The Court measures, calibrates, and distributes these powers in various contexts, including the doctrine commonly referred to as "separation of powers." The President shares some powers, such as lawmaking, with Congress, and is granted other institutional powers, such as the right to nominate judges, exclusively.⁴¹⁴ Even with respect to these "exclusive" powers, there are substantial checks; thus, the President cannot simply *appoint* federal officers and judges, but must seek the advice and consent of the Senate.⁴¹⁵ Moreover, even the most exclusive presidential power represents an *institutional* faculty, not a matter of personal right. As Watergate most vividly demonstrated, the President must do what is best for the office and for the Nation, not what suits his own self-interest. Similarly, Congress does not possess anything we might plausibly refer to as "rights." It too has only enumerated, shared, and substantially checked institutional powers. In sum, we do not speak of the "rights" of Congress, or of the President, but of the powers of their respective institutions, and of discerning the appropriate balance among them.⁴¹⁶ Why, then, does the Court continue to speak in the broadest terms of the constitutional "rights" of states?

412. See Caminker, *supra* note 36, at 86 ("[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.").

413. The example is from RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 100 (1977).

414. See, e.g., *INS v. Chadha*, 462 U.S. 919 (1983) (invalidating one-House veto legislation).

415. U.S. CONST. art. II, § 2, cl. 2.

416. See, e.g., *Mistretta v. United States*, 488 U.S. 361 (1989) (upholding constitutionality of U.S. Sentencing Commission); *Morrison v. Olson*, 487 U.S. 654 (1988) (upholding independent counsel provisions of Ethics in Government Act of 1978).

It is, thus, a fallacy to treat the Tenth Amendment as a reservation of fundamental "states' rights" in the same fashion that the Ninth Amendment has sometimes been interpreted to reserve unenumerated rights for the people.⁴¹⁷ The Ninth Amendment speaks expressly of "rights"; the Tenth Amendment does not. This was a conscious choice. The Articles of Confederation, in Article II, purported to reserve certain broad, essential *rights* of statehood, like independence.⁴¹⁸ The Constitution grants states the basic sovereign right to exist and a limited right to frame and administer their own governments. Beyond this, the Tenth Amendment refers only to residual *powers* reserved by the states. It does not provide for any affirmative limitations. The Eleventh Amendment similarly speaks in terms of limiting the "Judicial power."⁴¹⁹ It is, like the Tenth Amendment, an interpretive guide, in this instance for the scope of the judicial power. Section 5 of the Fourteenth Amendment also is an extensive grant of power to Congress to enact "appropriate" legislation.⁴²⁰ By their terms, these constitutional provisions invite an examination of governmental power, not the discovery and enforcement of sovereign rights.

It is only with regard to *persons* that the Constitution contemplates the robust protection of rights. The first eight amendments in the Bill of Rights expressly protect a range of individual rights. The Ninth Amendment reserves other, unenumerated rights to "the people."⁴²¹ Still other individual rights are scattered throughout the Constitution.⁴²² It thus makes sense to speak of the constitutional

417. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

418. See CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED 69 (1997) ("It has to be interesting that neither the word 'federal' nor any of its derivatives and cognates occur in the Constitution.").

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

420. See U.S. CONST. amend. XIV, § 5.

421. U.S. CONST. amend. IX.

422. See, e.g., U.S. CONST. art. III, § 3, cl. 1 ("No Person shall be convicted of Treason unless on the testimony of two Witnesses to the same overt Act, or on Confession in open Court."); U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

rights and liberties of persons. Conversely, although it makes sense to speak of the very limited sovereign "rights" of states, it does not follow that states possess fundamental constitutional rights.

C. In Defense of a Double Standard for Judicial Enforcement of "Fundamental" Constitutional Rights

Despite all of this, it has again become fashionable to argue on behalf of "states' rights." Lynn Baker and Ernest Young have presented perhaps the most comprehensive recent defense of what they refer to as "states' rights."⁴²³ The version of "states' rights" these scholars defend, however, is that which focuses on enumerated powers, not the fundamental rights version that is the focus of this Article. Baker and Young's thesis is that "federalism," specifically the enforcement of substantive limitations on Congress's commerce power, has been wrongfully placed in "exile," while fundamental individual liberties have flourished as a result of heightened judicial scrutiny and protection.⁴²⁴ They criticize this "double standard" of judicial review and argue that "federalism" is every bit as deserving of judicial review as individual rights.⁴²⁵

This Article does not disagree with Baker and Young's thesis that federalism should not be treated by the courts as if it were non-justiciable. Nor does it disagree with their contention that the Court is capable of devising enforceable limits for Congress's enumerated powers, a point to which the Article returns in Part IV. The more pressing question, for present purposes, is whether states' sovereign rights to existence and autonomy ought to be enforced as individual rights are, and, specifically, whether a fundamental rights regime is appropriately applied on behalf of statehood. Neither Baker and Young, nor others, have systematically addressed this specific enforcement question. Many of the arguments made in favor of judicial review of "federalism" issues nevertheless implicate arguments that the Court, and its defenders, would likely advance in favor of the fundamental rights strand of federalism.

423. See generally Baker & Young, *supra* note 11.

424. See *id.* at 75-76 (arguing that federalism has been "banished" along with the economic substantive due process doctrine).

425. *Id.* at 77.

Baker and Young advance three reasons for judicial and scholarly reticence to treat federalism, like individual rights, as worthy of judicial scrutiny: institutional competence, necessity, and normative choices.⁴²⁶ They assert that none of these reasons suffices to place federalism on the “do not enforce” side of the line.⁴²⁷ This may be correct, but these same concerns, and others, do support a different double standard, one that refuses to enforce federal liberty in the same manner, and with the same vigor, as civil liberty. This Part argues that there are sound reasons for a double standard where fundamental constitutional rights are concerned.

1. Institutional Competence and Legitimacy

As the discussion in Part II demonstrated, the Court has struggled to define the source of state fundamental constitutional rights to internal association, equality, autonomy, and due process. This should come as little surprise. As discussed above, the Constitution does not generally treat the states as rights-bearers. As a result, the Court has been forced to create “states’ rights” by: twisting the Tenth Amendment into an affirmative limitation on power; identifying essential “incident[s]” or “attribute[s]” of state sovereignty;⁴²⁸ consulting the “plan of the convention,” “presupposition[s],”⁴²⁹ and “background principle[s]”⁴³⁰ of federalism; and inventing procedural standards, like heightened record review and “congruence and proportionality,”⁴³¹ which operate to trump broad congressional powers to enact “appropriate” legislation.⁴³²

As Baker and Young point out in the course of arguing for substantive limits on the commerce power, “judges face similar difficulties in all areas where the constitutional text provides little precise guidance.”⁴³³ They posit that the real issue is whether the

426. *Id.* at 78.

427. *Id.*

428. *See* *New York v. United States*, 505 U.S. 144, 156-57 (1992).

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

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

431. *See* *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

432. *See, e.g.*, U.S. CONST. amend XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).

433. Baker & Young, *supra* note 11, at 79.

Court is capable of "fashioning new rules that would constrain Congress while at the same time constraining the courts."⁴³⁴ Baker and Young see no reason why the Court is any less capable of this task than it is of defining fundamental rights under the doctrine of substantive due process.⁴³⁵ "There is no reason to think," Baker and Young argue, "that judges are less competent to develop workable doctrinal rules of federalism than they are with respect to, say, the right to privacy."⁴³⁶ This argument invites two distinct inquiries. The first is whether courts are able to fashion *any* workable doctrinal rules where federalism is concerned. The second inquiry invites the comparison at the heart of this Article's thesis, namely, whether federal liberty and civil liberty ought to be enforced in constitutional parity.

With respect to the first question, it may well be that courts are able to develop constitutional doctrine that supports statehood by curbing enumerated powers. In fact, this Article suggests, in Part IV, that the distributive strand of federalism, rather than the fundamental "states' rights" strand, represents the legitimate future of federal liberty. It must be acknowledged that the distributive approach to federalism raises interpretive difficulties. At least under the distributive approach, however, the courts can and often do focus on specific constitutional text, study and learn from historical and jurisprudential patterns of power distribution, draw upon a tradition of flexible distributive principles, and generally take broad context into account.

These are all substantial advantages associated with policing powers rather than relying upon the *ad hoc* judicial discovery of fundamental "states' rights." This same range of tools and methods is not available to courts intent on searching for "states' rights" in the penumbras and emanations of the Constitution. Constitutional text must be ignored or twisted beyond recognition in order to discover new rights. Moreover, there is generally no jurisprudence or institutional expertise to consult, as all of the fundamental "states' rights" are new judicial creations. Nor is there room for error or reconsideration, because the products of a rights-based

434. *Id.* at 88.

435. *See id.* at 88-89 (noting that similar charges of institutional incompetence have been made against substantive due process, which survives today).

436. *Id.* at 78.

federal liberty are either inflexible proscriptions or absolute prohibitions on federal power. Context, as the Court has repeatedly made clear, simply does not matter where the fundamental rights of states are concerned. Judicial competency concerns thus are graver in the case of the fundamental rights strand of federalism than they are in the case of its distributive strand.

With respect to the second question, namely whether federal liberty, like individual liberty, ought to be enforced as a matter of rights rather than powers, there are sound reasons for adopting a double standard of judicial review. Baker and Young are correct that "[t]he textual basis for principles of federalism in the Constitution is surely stronger than the textual basis for substantive due process."⁴³⁷ By "principles of federalism," Baker and Young are referring to the various constitutional provisions that recognize the states' basic sovereign rights, as well as the Tenth Amendment's reservation of state residual powers. These constitutional sources support the broad constructs of divided sovereignty and limited federal power. They are, as noted, the textual basis for the basic sovereign rights of states.

These "principles of federalism" indicate, at least, that courts may have to step in to preserve state sovereignty. Courts might be called upon to enforce state sovereign rights like existence, separateness, and political participation. The rather bare "principles of federalism" set forth in the Constitution do not, however, provide a basis for extrapolating a series of broad, fundamental "states' rights." This Article will not offer a defense of substantive due process, which admittedly poses its own indeterminacy problems. It does, however, contend that the template for substantive due process is far more developed than the relatively blank slate upon which the Court has drafted the burgeoning doctrine of fundamental "states' rights." As a matter of judicial competency, substantive due process has advantages over a rights-based federal liberty.

As mentioned, there is no historical, textual, or interpretive tradition for the fundamental rights strand of federalism. There is no test or standard to guide the discovery of fundamental "states' rights." There are no checks, save the inclinations of five members

437. *Id.* at 94.

of the Court, to stem the growth of states' fundamental rights. As the status of states grows, so too, it seems, does the states' list of fundamental rights.

Further, the "principles of federalism" lack the substantive depth and thickness required for inferring broader fundamental rights. We cannot plausibly compare the limited sovereign rights of states, or the other scattered recognitions of federalism found in the Constitution, to the sweeping guarantees found in the Bill of Rights. The sovereign rights of states are not the sort from which judges can plausibly extrapolate further implied and inherent rights. These rights are, as explained, quite narrow by design. Sovereign state rights to exist, form separate governments, and participate in the Nation's political decisions, for example, are not full of ellipses; they do not readily admit of penumbras and emanations. Sovereign state rights function to *preserve* the states, not to clothe them with autonomy, privacy, procedural safeguards, or equality.

There is, in fact, quite a bit more judicial stretching, both conceptually and mechanically, that is required to discover fundamental "states' rights" than even the admittedly pliable doctrine of substantive due process demands on behalf of fundamental individual rights. Deriving a guarantee of sexual or intimate "privacy" from the Fourth Amendment's guarantee against unreasonable searches of the home and person, for example, hits far closer to the mark than deriving the anti-commandeering autonomy "right" from the purported "affirmative limitation" of the Tenth Amendment, from the states' expected participation in the constitutional amendment process, or, more distantly still, from the citizenship clauses in Article III, Section 2 and Article IV, Section 2. The difference is one between *wholly* manufacturing rights and *partially* manufacturing them, although, in the latter instance, at least it is done from quite similar raw materials. Mining fundamental individual rights from structure is certainly not unheard of; discovering inherent "states' rights" in this sort of material is another matter entirely.

The Constitution provides an abundance of personal rights from which courts might infer broader individual rights such as "liberty" and "privacy." These rights take the form of various express denials of state and federal power, as well as guarantees of liberty and

autonomy in various provisions of the Bill of Rights. Rights to free speech, free exercise, and free association, to take only those in the First Amendment, set a theme of personal liberty and autonomy that is nowhere sounded on behalf of states. The Reconstruction Amendments furthered this tradition by broadly guaranteeing such rights as "equality" and "due process" against state interference. These and other rights guarantees are at least a plausible basis for some broader conception of individual liberty that extends beyond the bare terms of the text. Whether or not these guarantees expressly *invite* judicial extrapolation, the fact is that they often necessitate interpretation of amorphous constructs like expression, association, equality, and due process. The same cannot be said of sovereign state rights, whose phrasing and themes come nowhere near this sort of expansive vision of freedom and autonomy. By design, states were to gain any additional liberty and autonomy not from implicit *rights*, but rather from their participation in governance and distributive principles.

In addition to the textual and thematic divergences, there are no yardsticks by which to measure the reasonableness or legitimacy of newly discovered fundamental "states' rights." The purportedly objective history upon which the new "states' rights" have been predicated has been repeatedly and effectively called into doubt by other scholars.⁴³⁸ Further, there are no other rights to consult for direction as to how far sovereign "equality" or "autonomy" or rights to process should be stretched. There are, instead, only things like "presuppositions" and "background principles."⁴³⁹ Nor can the courts rely, as they now do under substantive due process, on other seemingly objective sources, such as state or federal laws, to determine whether a right is or remains "deeply rooted in history and tradition."⁴⁴⁰ Nothing like a societal or legislative consensus exists to constrain the fundamental rights of states. Indeed, the establishment of a state right effectively *precludes* just this sort of checking. Once the anti-commandeering ban is announced, for example, *every* subsequent federal law that implicates the ban is a

438. See, e.g., Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle*, 111 HARV. L. REV. 2180, 2183-92 (1998) (questioning the historical basis of the "anti-commandeering" rule).

439. See *supra* note 172 and accompanying text.

440. See *supra* note 172 and accompanying text.

constitutional violation. Once the expansive right to sovereign immunity is discovered, there is no objective source upon which one can rely to demonstrate a change in the constitutional climate. Fundamental "states' rights," in sum, are a far more ossified lot than fundamental individual rights, which can, as recent cases demonstrate, both evolve over time and be effectively constrained.

To reiterate, issues of judicial competency loom larger with regard to rights-based federal liberty than with regard to the doctrine of substantive due process. There are far fewer relevant textual analogs from which to extrapolate. There are no extant benchmarks for judicial "presuppositions" and the like. The cost of erroneous decisions is higher as well for federal liberty, as there appears to be no way to revisit or reconsider rights once they have been discovered. Indeed, *Garcia* was an express concession that courts have no particular competence or expertise with respect to discovering fundamental "states' rights."⁴⁴¹ *Garcia* was correct in this respect when it was decided, and it remains so.

Let us suppose, however, for the sake of argument, that substantive due process and the fundamental "states' rights" strand of federalism occupy essentially the same textual vacuum. The question remains whether there is an interpretive method within judicial competence that will prevent the over-enforcement of "states' rights" and curb judicial subjectivity. This is necessarily a tall order. Again arguing in favor of substantive limits on the commerce power, rather than for the fundamental "states' rights" challenged in this Article, Baker and Young suggest that Justice Souter's approach to substantive due process, which he articulated in *Washington v. Glucksberg*, might serve as an appropriate model for the enforcement of federalism.⁴⁴² Again, as Part IV suggests, this may in fact be a workable model where direct limits on the commerce or other enumerated powers are concerned. The question

441. It is also true, however, as Baker and Young suggest, that federalism, like substantive due process, has never been "repudiated" by the Court. Baker & Young, *supra* note 11, at 92. Again, however, this depends on what one means by "federalism." The fundamental "states' rights" approach *was* expressly repudiated in *Garcia* in favor of political safeguards and structural checks. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552 (1985). As controversial as it has been, substantive due process has never been jettisoned by the Court in such a seemingly definitive fashion.

442. See Baker & Young, *supra* note 11, at 89-90 (discussing Justice Souter's approach to substantive due process).

here is whether this model might be used to constrain the scope of the new rights-based federal liberty.

Justice Souter's approach to fundamental rights is influenced by the views of Justice Harlan, who believed that judges have an obligation to review legislation that appears to infringe individual rights for conformity with the Constitution, even if the text of the Constitution does not expressly negate governmental power.⁴⁴³ Justice Harlan believed that this is precisely the sort of "reasoned judgment" judges are often asked to make; Justice Souter agrees that there is no escape from making these difficult decisions, even in the murky context of substantive due process.⁴⁴⁴ His preferred method for discovering and enforcing fundamental individual rights is the common law method, which proceeds carefully, incrementally, and, above all, flexibly.⁴⁴⁵

This is precisely what is so troubling about the new federal liberty. The Court treats states as holders of strong, *absolute* constitutional rights. Considered as a group, the federalism cases of the past decade do not proceed in the tradition of the common law approach at all. As Justice Souter stated in *Glucksberg*, the common law approach is "suspicious of the all-or-nothing analysis that tends to produce legal petrification instead of an evolving boundary between the domains of old principles."⁴⁴⁶ All-or-nothing rules are precisely what have been announced in cases like *Printz*, which wholly prohibits "commandeering,"⁴⁴⁷ and *Alden*, which raises immunity from suit as an impregnable barrier to private litigants.⁴⁴⁸ The newly announced state rights to "autonomy" and "equality" leave no room for future developments or contingencies. Indeed, there is a notable lack of flexibility in all of the "states' rights" cases, including those regarding state procedural rights.⁴⁴⁹ Context is simply irrelevant insofar as these "states' rights" are concerned.

443. See *Washington v. Glucksberg*, 521 U.S. 702, 763 (1997) (Souter, J., concurring).

444. *Id.* at 769.

445. See *id.* at 767.

446. *Id.* at 770.

447. See *supra* text accompanying notes 294-98.

448. See *supra* text accompanying note 235.

449. See *supra* notes 339-56 and accompanying text (discussing the rigidity of the Court's Section 5 analysis).

Where, as well, is the "reasoned judgment" in cases like *Printz* and *Alden*? *Printz*'s conclusion, for example, that "[i]t is the very principle of separate state sovereignty that such a law offends" is a judgment, to be sure, but not a particularly well-reasoned one.⁴⁵⁰ There is, in fact, a mounting record that strongly suggests that the Court is not capable, at least in terms of "states' rights," of "fashioning new rules that would constrain Congress while at the same time constraining the courts."⁴⁵¹

Baker and Young point as well to *tradition* to counter questions of institutional competence with regard to the enforcement of their version of federalism. They posit that the "tradition of judicial enforcement of federalism, like that of substantive due process recounted in *Glucksberg*, is longstanding and persistent."⁴⁵²

Again, this demonstrates the necessity of being clear about the nature and character of the federalism or "states' rights" one is advancing. It is of course true that the courts have always claimed the authority to define the limits of Congress's enumerated powers, and in that sense to "enforce" federalism. An overarching view of the states as rights holders, however, coupled with a method of enforcing federalism that relies upon discovering and enforcing *inherent* and *fundamental* "states' rights," are, as argued earlier, quite anomalous. In the modern era, only *National League of Cities* really comes close to this fundamental rights-based approach, and it did not survive long enough for courts, or states, to develop any real attachment to or reliance upon either its approach or its underlying principles.⁴⁵³ It runs directly *counter* to the tradition of federalism, which protects states by ensuring that federal power is reasonably and appropriately limited.

Finally, in terms of institutional legitimacy, the Court has offered no normative or other justification for now abandoning *Garcia* in favor of the aggressive discovery and enforcement of fundamental "states' rights." The functional, political, and institutional reasons the Court gave in *Garcia* for abandoning the "states' rights" approach are just as applicable today as they were then. What, if anything, has changed? One is left to speculate concerning the

450. *Printz v. United States*, 521 U.S. 898, 932 (1997).

451. *Baker & Young*, *supra* note 11, at 88.

452. *Id.* at 94.

453. *See supra* notes 200-02 and accompanying text.

reasons for all of the inconsistency and upheaval. It took nearly sixty years for commerce doctrine to manage one appreciable doctrinal shift,⁴⁵⁴ whereas in just over two decades states have experienced three seismic shifts with respect to their fundamental "rights"—they have been granted fundamental rights, then left apparently to fend for themselves in the political process, and now once again enjoy a growing list of fundamental rights. As rocky as the shoals of substantive due process have been, the principle that individuals enjoy fundamental human rights has remained a constant. The same simply cannot be said on behalf of fundamental "states' rights."

In sum, there are substantial competency and legitimacy concerns with a rights-based federal liberty. In the abstract, judicial discovery of fundamental "states' rights" seems to share precisely the same difficulties that plague substantive due process, including textual indeterminacy and judicial subjectivity. On closer inspection, however, the discovery of fundamental "states' rights" suffers from greater defects than the judicial discovery of individual fundamental rights. The fundamental rights of states are not readily derive from the sovereign rights of states. They exist, if at all, by virtue of a warping of the tautological Tenth Amendment, vague judicial impressions and outright re-interpretations of the original "plan" of government, and other amorphous and unconstrained "background principles." From these interpretations have arisen inflexible, purportedly inherent, and often absolute fundamental rights of statehood. Both in terms of judicial competency and legitimacy, it is a mistake to enforce federal liberty in constitutional parity with civil liberty.

2. *Necessity—Political Safeguards*

Baker and Young identify the source for the judicial double standard they oppose, the one that aggressively enforces individual rights but not federalism, as footnote four in *United States v. Carolene Products Co.*⁴⁵⁵ The footnote generally provides for a

454. Compare *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), with *United States v. Lopez*, 514 U.S. 549 (1995).

455. 304 U.S. 144 (1938).

presumption of constitutionality for economic enactments, while intimating that heightened judicial review may be appropriate for legislation that appears to violate a specific guarantee of the Bill of Rights, restricts the political process, or evinces prejudice against "discrete and insular" minorities.⁴⁵⁶ Because the plight of states in federalism cases appears to raise none of these special concerns, courts historically have not applied especially rigorous scrutiny to federalism claims.⁴⁵⁷

Indeed, some commentators, most notably Professors Choper and Wechsler, have suggested that courts should not review federalism claims at all, but should relegate federal-state relations largely to the political process.⁴⁵⁸ *Garcia*, which cited Professor Wechsler, purported to adopt this approach insofar as the states were being regulated as states.⁴⁵⁹ In light of subsequent events, however, it seems that no one, least of all a current majority on the Court, subscribes to the theory that federalism ought to be treated as *nonjusticiable*. This Article will not revisit the extensive arguments presented in favor of and against Wechsler's "political safeguards" theory. The Article accepts that courts should play some role where federalism is concerned. The question is what that role should be in

456. See *id.* at 153 n.4; Baker & Young, *supra* note 11, at 80-81.

457. As Baker and Young point out, the approach set forth in the *Carolene* footnote has not always been followed consistently. The Court has, for example, exercised "aggressive judicial review on behalf of interests that are well represented within contemporary political processes." Baker & Young, *supra* note 11, at 83. They cite sexual and reproductive liberty cases like *Griswold* and *Roe* to make their point. *Id.* Nor, they contend, can the enforcement double standard be defended on the ground that economic interests have generally received less judicial solicitude than non-economic ones; after all, the dormant Commerce Clause is rather vigorously enforced, as are limitations on commercial speech. *Id.* at 84. Regardless of the confusion regarding the purported definition or parameters of the double standard, Baker and Young contend that courts, and commentators, continue to apply it unthinkingly. See *id.* at 85.

458. See JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 380-81 (1980) (arguing that the Court should preserve political capital by deciding individual rights claims and leaving structural claims to the political process); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 545 (1954) (arguing that political checks should be relied upon to police federalism). There have been efforts to revive and update these sorts of arguments. See, e.g., Larry D. Kramer, *Putting the Politics Back Into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000) (updating Wechsler's arguments).

459. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550-51 & n.11 (1985).

light of the fact that states and persons are not similarly situated constitutionally.

John Hart Ely articulated a comprehensive and most persuasive interpretation of the *Carolene Products* "double standard."⁴⁶⁰ As Ely explained in detail, the principal concern, in terms of constitutional process, is that minorities, whether political, racial, or other, not be essentially denied representation.⁴⁶¹ To avoid this, the Constitution in various provisions protects the "paradigmatically" and "politically powerless," such as out-of-state residents, who are unrepresented in local politics, and racial minorities, which tend to be generally unrepresented or at least underrepresented.⁴⁶² More broadly, the Constitution protects both the "literally voteless" and those who find themselves "in a state of persistent inability to protect themselves from pervasive forms of discriminatory treatment."⁴⁶³ Finally, Ely argued, the Constitution "imposes a judicially enforceable duty of virtual representation," one that requires that representatives consider, and sometimes act upon, the interests of their minority charges.⁴⁶⁴ When they fail to do so, it may be necessary for courts to aggressively enforce this important duty.

Political safeguards such as, for example, the role states play in choosing United States Senators and the President obviously cannot protect states from *all* federal overreaching. Courts are needed, as Baker and Young persuasively posit, to police the boundaries of the commerce and other federal powers, if only to let Congress know there are limits to its authority. To conclude from this, however, that courts must intervene to protect federal liberty as vigorously as, or in the same manner as, civil liberty would blink distinctions of both substance and degree.

First, let us be clear about the nature of the "political malfunction" that might be said to require the discovery of fundamental "states' rights" and the application of heightened judicial scrutiny. We are not talking, in terms of federalism, about any state being

460. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

461. See *id.* at 82 (noting that the Constitution's theory of representation "cannot mean that groups that constitute minorities of the population can never be treated less favorably than the rest, but it does preclude a refusal to *represent* them").

462. *Id.* at 83.

463. *Id.* at 84.

464. *Id.* at 86.

denied an opportunity to vote or participate in the political process.⁴⁶⁵ This sovereign right is not, nor can it be, denied.⁴⁶⁶ Nor are we concerned with laws that interfere with or burden the basic opportunity to participate in the political process and to cast a vote. No state's right to vote is being diluted in any of the state fundamental rights cases; the rule of "one state, one vote" is being honored.⁴⁶⁷ With respect, then, to these particulars, fundamental rights discovery and heightened judicial scrutiny are not implicated for federalism.

To be sure, there will be times when a "minority" of states loses a political battle to a determined majority. Certain regional coalitions, for example, may band together to the detriment of a geographic "minority." In opposing the "political safeguards" argument and urging the enforcement of substantive limits on the commerce power and, perhaps, a substantial judicial role in that enforcement, Baker and Young seem most concerned with this sort of "horizontal aggrandizement" of power, as distinguished from the "vertical aggrandizement" that results from bare federal encroachments on states.⁴⁶⁸ As Baker and Young put it, a congressional majority "may take action that encroaches on the autonomy of a minority of dissenting states."⁴⁶⁹ This is a "states' rights" version of the "tyranny of the majority" concern upon which the *Carolene Products* footnote is partially grounded.

Even accepting that "horizontal aggrandizement" is a matter of substantial concern, this does not justify a fundamental rights regime for states. Indeed, the fact that the sort of state politicking that sometimes results in majority dominance on one or more issues might be considered a *malfunction* of the political process, rather than an inevitable consequence of its proper functioning, is a testament to how far "states' rights," in the fundamental and most literal sense, has advanced as a philosophy of federalism.

465. Compare in this regard the "fundamental rights" strand of equal protection as it concerns the right of individuals to vote. See *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966) (holding that a state cannot condition the right to vote in state elections on payment of a poll tax).

466. See *supra* Part II.A.3.

467. See *Reynolds v. Sims*, 377 U.S. 533 (1964) (establishing the constitutional requirement of "one person, one vote").

468. Baker & Young, *supra* note 11, at 126-27.

469. *Id.* at 118.

Under what *systematic* disadvantage do so-called "minority" states labor? What evidence is there of a *persistent* and entrenched hostility to their interests? It seems more than a little farfetched to suggest that states can be so marginalized or politically downtrodden as to be entitled to heightened judicial solicitude. There is no such thing as a perpetual state underclass. States thus are differently situated from political and other minorities whose beliefs and practices have been commonly, historically, and traditionally infringed upon or disfavored by the majority. Even the most beleaguered state, which finds itself in the minority with respect to some policy or another, thus cannot be compared to individuals who express unpopular opinions, practice controversial religions, belong to historically marginalized racial, ethnic, or other groups, or engage in acts that have historically been morally and legally condemned by society.⁴⁷⁰ Without fundamental human rights and the heightened scrutiny they entail, these persons truly would have no meaningful opportunity to participate in politics or, more broadly, society.

This sort of strong case for aggressive judicial review simply cannot be made on behalf of the states. When it comes to political opportunity and political power, states and persons simply are not comparably situated. By terms of their equal suffrage in the Senate, among other things, states enjoy a seat at the table to which most individuals cannot aspire. States, in addition to the traditionally recognized structural safeguards, also are protected by a variety of

470. Baker and Young point out that the Court has often exercised "aggressive judicial review on behalf of interests that are well represented within contemporary political processes." *Id.* at 83. The use of the word "contemporary" is critical. When *Griswold* and *Roe*, cases Baker and Young point to, were decided, it is doubtful there was widespread political acceptance of the right to use contraceptives and to abort a pregnancy. After all, advocates ultimately relied upon courts to make their case against what they saw as repressive legislative agendas. See generally DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* (1994) (providing a detailed description of the legislative and judicial battles over the right to sexual and reproductive freedoms). At present, it seems to be reliance upon the rights developed in such cases, more than any need to police the political process, that keeps the Court involved in the area of sexual freedom. See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 856 (1992) (noting that "for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail").

organic procedural safeguards that operate within the federal legislative process.⁴⁷¹ Further, states, through their representatives, can barter and build coalitions. Today's state losers may well be tomorrow's legislative winners.

Heightened judicial scrutiny of the kind the Court has applied in its recent spate of fundamental "states' rights" cases is intended principally to protect the *marginalized*. "Minority" states, unlike minority groups and marginalized persons, do not need the support of fundamental "rights" or heightened judicial scrutiny to obtain a meaningful opportunity to participate and be counted. Ely's argument was that the *primary* role of the courts should be to keep the channels of the political process open and functioning so that all have at least an *opportunity* to participate.⁴⁷² The states' sovereign political rights protect that very interest, which cannot be denied.

As unfortunate as it may sometimes be that some states lose out in the political process, this circumstance does not call for judicial scrutiny in the same manner, or to the same degree, as the repeated and invidious overriding of minority preferences in, for example, cases of race or gender discrimination or invasions of intimate privacy interests. The concern for "marginalized" states, whatever that may mean, simply does not rise to the level of concern courts should and do have for marginalized groups and individuals. Indeed, as Baker and Young concede, some horizontal aggrandizements, although courts cannot know for certain which ones, may actually turn out to be *beneficial*.⁴⁷³ The same can hardly be said for restrictions on the participation of *individuals* in the political process. There are few, if any, such restrictions that we could reasonably label as beneficial.

Finally, consider Ely's argument that courts are needed to enforce a duty of "virtual representation" with regard to

471. See Baker & Young, *supra* note 11, at 127; see also Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1339 (2001) (arguing that procedural restraints constitute a "supermajority requirement" which protects state freedom).

472. See *supra* notes 460-64 and accompanying text.

473. See Baker & Young, *supra* note 11, at 124-26 (citing, *inter alia*, northern efforts to end slavery in southern states). Heightened judicial review of aggrandizements would be complicated, to say the least. Baker and Young concede: "Telling the difference between good horizontal encroachments and bad ones will not always be an easy task." *Id.* at 126.

marginalized individuals and groups.⁴⁷⁴ What is the basis for imposing, and judicially enforcing, such a duty on states with regard to one another? States are not representatives of other states. To be sure, they are part of a national body and should keep the national community and national interests in mind. That is not the same, however, as insisting that states owe a general duty to one another akin to the duty that elected representatives owe to their constituents. States assembled in Congress do not *represent* one another. They primarily represent the interests of their citizens, and if *their* citizens are not satisfied, if they believe that *their* interests are not being appropriately considered, then of course they may seek to remove their representatives by exercising the franchise. Further, with regard to marginalized minority personal interests, courts are available to enforce the duty of virtual representation. Among the states, however, there is no representative system for the courts to police.

In sum, there is nothing in either the *Carolene Products* rationale or an Ely-based theory of judicial review that recommends or supports fundamental rights enforcement or an aggressive judicial posture in favor of the states. States, even minority ones, are not systematically or persistently disadvantaged. Of course, the mere existence of opportunity for states to affect legislative outcomes does not mean that courts are not needed, as Baker and Young suggest, "to remind Congress of its own obligation to restrain itself and to catch any particularly egregious examples of federal overreaching that slip through the system's political and procedural checks."⁴⁷⁵ This suggests, at most, a limited and deferential judicial role, however, not the aggressive discovery and enforcement of fundamental "states' rights" that currently characterize federal liberty.

3. Normative Choices

Perhaps it was not institutional incompetence or necessity that led the *Garcia* Court to purport to leave the federalism area, and that has led the Court more generally to avoid, at least until

474. See *supra* text accompanying note 464.

475. Baker & Young, *supra* note 11, at 128 (citation omitted).

recently, an expansive rights regime for states. Perhaps, as Baker and Young contend, individual rights like abortion and sexual privacy are simply "normatively more attractive than states' rights."⁴⁷⁶ After all, the phrase "states' rights," for many, conjures a host of negative associations, including, for some, virulent racism. It is possible, therefore, that the Court, and many scholars as well, have been "read[ing] particular values out of the Constitution simply because popular opinion at a given point in history finds them normatively unattractive."⁴⁷⁷

This proposition cannot, of course, be tested empirically. There may indeed have been some residual judicial ill will toward "states' rights" due to its association with bad actors, both public and private, in our nation's past. It seems unlikely, however, that in 1985, when *Garcia* was decided, the Court rested its decision to curtail fundamental "states' rights" federalism on these sorts of negative associations. It probably gives too little credit to the Court, and to scholars, to suggest that modes of judicial enforcement or scholarly support are based primarily upon "changing normative preferences" or mere popularity.⁴⁷⁸ Even if one is not willing to give judges and scholars such credit, it is surely a stretch to paint the "states' rights" of *National League of Cities* with the same brush as the old "states' rights" of segregationists. The "states' rights" of what might be considered the modern era—freedom from federal wages and hours regulations, for example—are hardly the sort that invoke segregationist ghosts.

There is, in fact, little reason to doubt the Court's word that, after some experience, it simply found the "traditional state functions" test specifically, and fundamental "states' rights" more generally, to be both an unworkable and illegitimate doctrinal shift. This determination was a function of judicial competence and necessity, not normative considerations.⁴⁷⁹ In the next Part, however, this Article addresses the normative question *Garcia* did not reach. It suggests that the *Garcia* Court was correct to reject a rights-based federal liberty, not because fundamental individual rights are normatively preferable to the rights of states, but because civil

476. *Id.* at 133.

477. *Id.*

478. *Id.*

479. See *supra* notes 203-13 and accompanying text.

liberty rests upon a constitutional foundation that is absent where federal liberty is concerned.

D. Civil Liberty, Federal Liberty, and "Fundamental" Rights

It seems implausible that the *Garcia* Court was oblivious to the fact that the strong indictment it leveled against federal liberty—essentially that it was amorphous, unworkable, and illegitimate—was applicable as well to the much-maligned doctrine of substantive due process. The Court was not, of course, then interested in comparing and contrasting the constitutional protections provided to persons and states. It may have been principally concerned with avoiding, or at least not propagating, the confusion and controversy substantive due process has engendered. Just because the Court *can* compound such problems on behalf of "states' rights" does not mean that it must do so. Perhaps the Court was, as Dean Choper has suggested, preserving its institutional "political capital."⁴⁸⁰ If there were underlying, deeper motivations for the apparent abandonment of "states' rights" in *Garcia*, the Court did not share them.

We must then consider whether broad constitutional rights to intimate association, equality, autonomy, and process, so critical to individual liberty, are appropriately enforced on behalf of the states as well. We must determine not whether these state rights are "popular," but rather whether they are, like fundamental individual rights, well-grounded and essential to the well-being of their possessors. If states are going to be treated as if they are persons with inherent, fundamental rights, it is fair to ask whether the *reasons*, or at least the figuratively comparable reasons, courts tweak text and make substantive stretches on behalf of human rights apply as well to "states' rights." It would seem that if federal liberty is to become part of our federalism, it is incumbent upon its supporters to offer some underlying theory for it.⁴⁸¹

480. See CHOPER, *supra* note 458, at 258 (arguing that the Court should preserve its "precious capital for those cases in which it is really needed—where individual, usually poorly represented and unpopular, rights are at stake").

481. Although I agree that those who would deprive "states' rights" of any judicial review whatsoever bear the burden of demonstrating why this should be so, it seems equally clear that those who wish to argue that states have "fundamental" rights should bear the burden

1. *Traditional Foundations of Federalism*

The obvious place to begin this inquiry is with the generally touted normative bases for federalism. As the Court stated in *Gregory*, the separate existence and independence of states "assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; ... and it makes government more responsive by putting the States in competition for a mobile citizenry."⁴⁸² Indeed, it is difficult to defend federalism without resorting to these sorts of arguments. As even strong defenders of a robust federalism concede, "states' rights have no *independent* value; their worth derives entirely from their utility in enhancing the freedom and welfare of individuals."⁴⁸³

It is difficult to see how the fundamental "states' rights" of internal ordering, equality, autonomy, and due process can be defended on these terms. To be sure, the states' continued *existence* may further each of these goals. States' existence, however, is not in doubt; it is preserved as a sovereign right. The *sovereign* rights of states directly serve the traditional interests of federalism. By ensuring that states exist, form their own governments, participate in the political process, and have an opportunity to interpret their own laws, the Constitution itself advances the principal interests of federalism. The Tenth Amendment adds a potentially significant further layer of protection for these sorts of interests. It encourages careful attention to the enumeration of federal power, thereby preserving state sovereign authority.⁴⁸⁴

It is increasingly difficult to see how granting states broad immunity rights, protecting them from "commandeering" regardless of circumstance, or granting them strong procedural safeguards, will substantially serve any of the commonly invoked interests of federalism. Indeed, insofar as the new "states' rights" implicate the

of demonstrating why this should be so. See Baker & Young, *supra* note 11, at 99 (arguing that "critics of the Rehnquist Court's new federalism cases have a serious obligation to explain why so many of them are willing to tolerate similar or even greater degrees of judicial adventurism in the area of substantive due process").

482. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

483. Baker & Young, *supra* note 11, at 135 (emphasis added).

484. See U.S. CONST. amend. X.

traditional benefits of federalism, particularly the protection of individual liberty, they appear to be largely counter-productive. In the most general sense, it may be that prohibiting Congress to waive state immunity, commandeer state officials, or fashion broad remedies for state civil rights transgressions, serves the overarching cause of individual liberty by stifling congressional exercises of power. This does not necessarily ensure, however, that individual liberty will be enhanced in either the short or the long term. For one thing, each of the fundamental "rights" of states is actually *in conflict with* the claims and liberties of individuals, sometimes citizens of the very state that benefits from the newly discovered fundamental right.⁴⁸⁵ For example, the fundamental rights of states to "due process" often prevent Congress from addressing national problems of discrimination under Section 5 or from otherwise abrogating the states' right to immunity from private lawsuits, thus again placing states' interests ahead of private claims of liberty and justice. In this sense, federal liberty is expressly anti-utilitarian, even selfish in nature. It posits that states' interests prevail not only over national interests, but in some cases even over the interests of state citizens themselves.

Further, although it is not at this moment possible to demonstrate empirically that the discovery of fundamental "states' rights" will actually lead to a net *diminution* of personal liberties, logic supports such a claim. Indeed, in a federal system in which Congress cannot enlist state officials to assist in enforcing its policies, the most natural result is an expansion of the federal bureaucracy and the federal legal regime. It is difficult, therefore, to understand how forcing Congress to expand the federal bureaucracy in order to enforce federal statutes will ultimately *protect* either state or individual liberties. States will labor under the preemptive power of federal laws, and they and their citizens will face an expanding federal bureaucracy. The continual discovery of fundamental "states' rights" will, in the long term, work directly against the liberty interests federalism is said to support: it will diminish cooperation, wrest potential enforcement actions from

485. See Erwin Chemerinsky, *Does Federalism Advance Liberty?*, 47 WAYNE L. REV. 911, 913-14 (2001) (arguing that federalism decisions of the past decade have been "rights regressive").

state and local officials, and lead to an ever larger federal presence. In sum, the lines being drawn on behalf of "states' rights" today are far *less* likely to result in increased citizen freedom tomorrow.

Most of the fundamental "states' rights" that the Court has recently discovered—particularly the rights to equality, autonomy, and process—are not generally grounded upon advancing individual liberty, but rather upon enhancing the stature of states. Enhancing state stature does not necessarily lead to the advancement of individual liberty. Indeed, as it discovers and enforces fundamental "states' rights," the Court invokes traditional federalism justifications less and less; it relies instead more and more on dignitary and other status-type interests as justifications for "states' rights."⁴⁸⁶ As a result, the Court leaves the impression that it is "pointlessly favoring the states with exemptions from the rule of law."⁴⁸⁷ Federal liberty, as the Court is enforcing it, sends the message that states are somehow more worthy than individuals who, for example, have no choice but to answer lawsuits against them. It thus generally supports the notion that states "acquire a life and interests independent of those conferred upon them by the people" and "rests in tension with the notion that states are mere creatures of and subservient to the truly sovereign people."⁴⁸⁸

In sum, fundamental "states' rights" federalism does not tend to advance the usual foundational principles of federalism. Indeed, the discovery of these new, absolute rights would appear to do little to either add to the diversity of statehood or to enhance individual liberties. The positioning of states as uber-persons appears to have more to do with enhancing states *as states* than with enhancing individual liberties.

486. See Althouse, *supra* note 36, at 246 (noting "how the theme of deference to the states has drifted from normative, structural analysis to a states' rights approach"); see also Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 501 (1995) (noting "the absence of discussion in the Supreme Court's federalism cases about the underlying values of federalism").

487. Althouse, *supra* note 36, at 246.

488. Caminker, *supra* note 36, at 86.

2. *Morality and Fundamental Rights*

The rights of states ultimately must stand, then, on their own bottom. They must be defended, like fundamental individual rights are defended, as worthy of protection against federal encroachment *come what may*. As Ronald Dworkin states: "The nerve of a claim of right ... is that an individual is entitled to protection against the majority even at the cost of the general interest."⁴⁸⁹ What would such a justification, however, even look like where states are concerned? To inform this inquiry, let us consult some justifications commonly advanced on behalf of fundamental individual rights, namely, *morality* and *individuality*.

One of the most prominent theoretical underpinnings for fundamental personal rights is morality. As Dworkin has argued, fundamental human rights derive from the concept of the moral person.⁴⁹⁰ Dworkin posits that the Framers assumed that the personal rights granted by the Bill of Rights "could be justified by appeal to moral rights that individuals possess against the majority, and which the constitutional provisions, both 'vague' and precise, might be said to recognize and protect."⁴⁹¹ The same observation might be made with respect to the fundamental rights persons are said to enjoy under the Due Process Clause, the Privileges and Immunities Clause of the Fourteenth Amendment, or other "vague" constitutional provisions. As Dworkin stated: "Our constitutional system rests on a particular moral theory, namely that men have moral rights against the state."⁴⁹² "A claim of right," he posited, "presupposes a moral argument and can be established in no other way."⁴⁹³

This sets disputes about individual rights apart from other political disputes, including those relating to federalism. To be sure, largely as a result of Anti-Federalist advocacy on behalf of the states as "moral persons," states can stake something like a moral

489. DWORKIN, *supra* note 413, at 146; *see id.* at 139 (explaining that "a man has a moral right against the state if for some reason the state would do wrong to treat him in a certain way, even though it would be in the general interest to do so").

490. *See id.* at 10-11 (describing the moral basis for legal rules).

491. *Id.* at 133.

492. *Id.* at 147.

493. *Id.*

claim to their preservation, separateness, and political rights. When they parted with aspects of their sovereignty upon joining the Union, the states expected in return some degree of physical security and independence. This is a far cry, however, from positioning states as full "moral persons." The contract of federation cannot be stretched so far as to claim that states can *demand*, with moral force, the fundamental rights of equality, autonomy, or due process. States, as states, lack not only morality, but anything of similar gravity that might bestow upon them claims to such strong, preemptive rights. States are constructs; their worth derives from their utility and function, not their status or morality.

This is why the states cannot lay claim, in any meaningful sense, to such essentially human characteristics as "dignity" and "esteem." It is precisely because individuals are moral persons that government must "treat its citizens with the respect and dignity that adult members of the community claim from each other."⁴⁹⁴ Each person has a claim to "equal respect as an individual."⁴⁹⁵ These are fundamental values where human rights are concerned. Again, as Dworkin has explained:

It makes sense to say that a man has a fundamental right against the Government, in the strong sense, like free speech, if that right is necessary to protect his dignity, or his standing as equally entitled to concern and respect, or some other personal value of like consequence. It does not make sense otherwise.⁴⁹⁶

Things like dignity and respect lie at the core of personhood; they buttress our claims to the most basic human rights. Moral philosophers like Kant have explained that "there are ways of treating a man that are inconsistent with recognizing him as a full member of the human community."⁴⁹⁷ This is one of the most powerful reasons for recognizing such fundamental human rights as privacy, equality, liberty, and autonomy.

494. *Id.* at 11.

495. *Id.* at 13.

496. *Id.* at 199.

497. *See id.* at 198 (discussing the "powerful idea of human dignity," an idea associated with Kant).

What does any of this, however, have to do with the fundamental rights of states? Can it really be contended that subjecting a state to private lawsuits before administrative agencies,⁴⁹⁸ or enlisting the aid of its executive officials for the briefest of time in the service of important national ends,⁴⁹⁹ is profoundly or gravely unjust? Disrespect for states' sovereign status is, one must concede, rather trivial in comparison to disrespect or disregard for a person's status as fully human. Besides, states' inferior sovereignty does not stem from any assaultive federal act. States are, by conscious *constitutional design*, inferior sovereigns with residual powers. Our Constitution does not presently recognize the notion that any *individual* is morally or otherwise "inferior." Indeed, it expressly preserves, in the strongest of terms, individuals' equality under the law.⁵⁰⁰ By contrast, the Constitution not only recognizes the inferior sovereignty of states, but also expressly *enshrines* it in the Supremacy Clause.⁵⁰¹ The upshot, then, is this: insofar as the Constitution is concerned, not all sovereignties are equal, or of equal concern. Concepts like state "dignity" and "esteem" are merely judicial constructs designed to artificially inflate statehood.

3. Individuality, Normalization, and Supremacy

Alternatively, we might consider the Court's approach to fundamental "states' rights," beginning with *National League of Cities*, as an attempt to define the core aspects or attributes of statehood in a manner similar to judicial efforts to define the core aspects of personhood. As Jed Rubenfeld has pointed out, however, focusing on "core," "essential," or "inherent" attributes is not a very fruitful way to conceptualize fundamental rights.⁵⁰² This leads inevitably to charges of judicial subjectivity, which have been answered only incompletely, whether one speaks in terms of the

498. See, e.g., *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002) (stating that abrogation of state immunity from proceedings before a federal regulatory agency violates state "dignity").

499. See *Printz v. United States*, 521 U.S. 898, 914 (1997) (asserting that state executive officials cannot be "commandeer[ed]" to enforce federal law).

500. See U.S. CONST. amend. XIV.

501. U.S. CONST. art. VI, cl. 2.

502. See Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989) (examining the "positive aspect" of privacy).

rights of persons or the rights of states, by the Court's reliance upon history and tradition. The *Garcia* Court forcefully expressed this concern with regard to the "inherent" rights of states.⁵⁰³

Perhaps it is more meaningful to ask, as Professor Rubenfeld has, what it is about the government's efforts to regulate that leads the Court to announce that a right is "fundamental."⁵⁰⁴ Put differently, what is the government seeking to *produce* by compliance with the law?⁵⁰⁵ Professor Rubenfeld posits that there are two characteristics stemming from governmental regulations that cause some rights to be defined as fundamental. The first is the extent to which the regulation occupies the lives of the persons regulated. Anti-abortion,⁵⁰⁶ anti-miscegenation,⁵⁰⁷ and compulsory education⁵⁰⁸ laws, therefore, "tend to *take over* the lives of the persons involved: they occupy and preoccupy."⁵⁰⁹ Moreover, "[t]hese laws do not simply proscribe one act or remove one liberty; they inform the totality of a person's life."⁵¹⁰ The second characteristic shared by such laws is that they attempt, often through such near-total occupation, to *standardize* individuals. These laws "all involve the forcing of lives into well-defined and highly confined institutional layers."⁵¹¹

Supposed federal encroachments on "fundamental" attributes of state sovereignty do not implicate these sorts of concerns. They are, if anything, trivial in comparison to the all-encompassing nature of laws that have been invalidated as violating individual rights like privacy or liberty. The specific Brady Act provisions at issue in *Printz*, for example, had little more than symbolic significance in terms of the states' continued existence. The Act would have effected only a ministerial, and temporary, use of state law

503. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 543-44 (1995).

504. See Rubenfeld, *supra* note 502, at 751.

505. See *id.*

506. See *Roe v. Wade*, 410 U.S. 113 (1973).

507. See *Loving v. Virginia*, 388 U.S. 1 (1967).

508. See *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

509. Rubenfeld, *supra* note 502, at 784.

510. *Id.*; see also *id.* at 787 ("Privacy takes its stand at the outer boundaries of the legitimate exercise of state power. It is to be invoked only where the government threatens to take over or occupy our lives—to exert its power in some way over the totality of our lives.").

511. *Id.* at 784.

enforcement officials.⁵¹² Laws abrogating state immunity from private suits, although certainly an inconvenience for states, also fail to approach total or near-total occupation of state functions. The fundamental rights of states are not the sort of defense against "creeping totalitarianism" or "unarmed *occupation*" that has animated, if not justified, judicial discovery of controversial rights to privacy and autonomy for individuals.⁵¹³ State existence and independence have not been truly threatened by any of the federal laws the Court has invalidated as contrary to the fundamental rights of states.

The concern over normalization or standardization does not resonate here either. Fundamental human rights are vitally important to individual self-development. As John Stuart Mill, who wrote most eloquently about the freedom of speech, stated, "the free development of *individuality* is one of the leading essentials of well-being."⁵¹⁴ We want human beings to have "vigour" and to be "energetic" in the exercise of their rights so that they may reach their full potential, what Mill called their "originality."⁵¹⁵ We want persons to be free to make important choices about their own lives, interests, and beliefs. In sum, we believe in personal uniqueness and see value in preserving it.

It might be argued that granting states fundamental rights will permit them, like persons, to have individuality and diversity. As noted above, however, the fundamental rights of states that have been recognized thus far are not designed to further these sorts of interests. Shielding states from lawsuits and "commandeering," or providing them with substantial procedural guarantees in connection with a federal "charge" of discrimination, may enhance state freedom in a general sense. The fundamental right to equality certainly provides states with, for example, a choice as to whether

512. See *Printz v. United States*, 521 U.S. 898, 904-05 (1997).

513. Rubenfeld, *supra* note 502, at 785.

514. JOHN STUART MILL, ON LIBERTY 57 (Stefan Collini ed., Cambridge Univ. Press 1989) (1859) (emphasis added).

515. *Id.* at 58, 61. Of course, utilitarian arguments are sometimes made in defense of human rights. With respect to the right to freedom of speech, for example, exposure to a marketplace of ideas will at least theoretically benefit us all by, among other things, bringing us closer to truth. Rights are not, however, only, or even principally, about the benefit they provide to others.

to submit to citizen lawsuits in a particular forum. In other words, it frees states from the burden of regulation.

This right, like rights to internal ordering, autonomy, and due process, however, does very little to advance state originality or individuality. State "fundamental rights" are not designed to free states, for example, to come up with novel policies or social experiments. They do not somehow bring local government closer to the people. In addition, it is safe to say that no one will choose to live in a state based upon whether the state is immune from damage actions. State fundamental rights thus have nothing whatsoever to do with enhancing state uniqueness or individuality. Again, the rights of states seem designed to enhance state dignity and esteem for their *own* sake, without regard to any larger interest or purpose.⁵¹⁶

States are not individuals with free will and rights expectations whose originality must be protected, even at the expense of local citizens' rights or broad national interests. One would not know this from reading the recent "states' rights" precedents. For example, in *Florida Prepaid*, the Court emphasized that Congress cannot *stereotype* states by making waiver of their right to immunity contingent upon certain activity, such as non-traditional market participation.⁵¹⁷ The Court suggested, in reasoning reminiscent of

516. There is a rudimentary sense in which the very notion of "individuality," as critical as it may be with regard to persons, does not comport with the most basic concept of statehood. States, unlike persons and unlike other entities, such as corporations, which have been granted certain constitutional rights, are not mere participants in marketplaces, whether of products or ideas. Although states certainly can act in this capacity, such behavior is an exception to the usual sovereign capacity in which states act. *See, e.g.,* *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976) (drawing a distinction between states as market participants and states as market regulators); *see also* Mark P. Gergen, *The Selfish State and the Market*, 66 TEX. L. REV. 1097, 1106-07 (1988) (discussing the distinction between state as sovereign and state as market participant). Nor are states separate units of free will with a variety of rights expectations. They are sovereigns with limited powers and limited rights. States owe their very existence to the governed. They exist principally to serve, not to pursue originality and self-fulfillment. States' self-development is no more a constitutionally protected interest than is the self-fulfillment of the President or individual members of Congress. In sum, the states, no less than Congress and the President, are not empowered to selfishly pursue their own interests and individuality. States, *as states*, can make no personal constitutional claim to originality and individuality. They can make a claim only to diversity and individuality insofar as these things enhance individual liberties.

517. *See Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 666, 691 (1999).

its doctrine of gender equality, that this would force states into stereotypical roles or functions.⁵¹⁸ Justice Scalia has also objected to Congress treating the states as a homogenous group under Section 5, a practice he labels, again in an express reference to individual rights, “guilt by association.”⁵¹⁹ This sort of reasoning treats states as prideful rights-bearers, fully capable of feeling affronted, repressed, and stigmatized.

This sort of mocked-up sensitivity in the name of state “individuality” and “states’ rights” is unprecedented. It is also contrary to the “constitutional plan” the Court now routinely invokes on behalf of fundamental “states’ rights.” The constitutional difference between civil liberty and federal liberty with regard to interests in “individuality” is patently clear: Congress is expressly *empowered* by the Supremacy Clause in particular, and by the structure of government in general, including the provision of express powers like those granted in the Commerce Clause⁵²⁰ and Section 5,⁵²¹ to normalize and standardize the states. It may preempt their laws in whole or in part; it may consent to some or all state laws that might otherwise violate the Constitution; and it may encourage and cajole the states to accept federal goals and policies by promises of substantial funding. Congress, in short, is expressly authorized to pursue unity and standardization with respect to the states. By virtue of its special relationship with the states, it may extend its reach well beyond the boundaries that govern the relationship between government and citizen.

In sum, there exist a number of sound reasons for rejecting a rights regime for states that have nothing to do with mere value preferences or prejudices against “states’ rights” *per se*. The fundamental rights of states fail to serve traditional interests of federalism, such as enhancement of individual liberty. Further, states, unlike persons, have no valid moral claims to fundamental rights. By constitutional design, states possess basic sovereign rights. As constructs, they do not have “natural” rights. States have not in any way been threatened with the sort of occupation or dominance that has given rise to various individual fundamental

518. *See id.*

519. *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 741 (2003) (Scalia, J., dissenting).

520. U.S. CONST. art. I, § 13, cl. 3.

521. U.S. CONST. amend. XIV, § 5.

rights. Finally, as inferior sovereigns, states' interests must often yield to federal and constitutional interests in standardization. The Constitution manifests this reality in plain terms.⁵²²

E. The Negative Implications of Negative State Liberties

The fundamental "states' rights" the Court has recently discovered obviously improve the status of statehood. These rights elevate states from inferior sovereigns with inferior powers to proud and respected bearers of constitutional rights. This puffing of statehood will not, of course, tear the Nation asunder or lead us toward a civil war. It is not as dangerous in that respect as certain prior "states' rights" movements. There is no call, for example, for secession or nullification of federal laws.

The negative implications of these various negative state liberties are substantial nevertheless. There are three principal negative effects that will flow from a fundamental rights-based federal liberty. The first, and perhaps most troubling, is a loss of critical institutional flexibility. As the Court alters its principal focus from sovereign power to fundamental "states' rights," legislative and judicial institutional flexibility inevitably will be lost or diminished. A broad commerce power, for instance, permits Congress to fashion remedies for national problems. It allows for a flexible response to changing circumstances. Policing the margins of such power likely will have a minimal effect on legislative flexibility, particularly if that policing takes the form of incremental common law enforcement. Additionally, it will leave the courts free to make adjustments in future enforcement contexts.

By contrast, once a fundamental right has been discovered and established, it is exceedingly difficult to narrow or jettison. Witness in this regard the fundamental right to "privacy," or the fundamental right to "liberty" in matters of sexual intimacy. As the abortion controversy demonstrates, courts have a devil of a time backtracking on fundamental rights. Individuals' reliance on these rights forms quickly, and it tends to be passionate. Further, the recognition of one fundamental right can have a ripple effect on other

522. U.S. CONST. art. VI, cl. 2.

rights. As the Court noted in *Casey*, where arguments to abandon the right to abortion were expressly advanced:

[F]or two decades ... people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.⁵²³

Fundamental “states’ rights” similarly constrain legislative and judicial flexibility. In fact, many of these rights are even stronger than individual fundamental rights. They tend to be *absolute* in character. Unlike individual fundamental rights, the state rights of immunity and autonomy appear to admit of no limitations or exceptions.⁵²⁴ Regardless of the interests of the national community, these rights cannot be encroached upon by Congress.⁵²⁵ Most of the new “states’ rights” are of this winner-takes-all variety, rather than the products of political compromise and dialogue.⁵²⁶ There is no room for future constriction, despite whatever may occur. The only way for the Court to reverse course is to overrule the “states’ rights” precedents, a course not inconceivable (recall *National League of Cities* and *Garcia*) but nevertheless highly unlikely with the passage of time and the expansion of already-recognized rights.

Institutional flexibility is critical to state-federal relations. Civil liberty and federal liberty differ in the effect each is likely to have on this aspect of federalism. An expansive ruling with respect to the rights of individuals is not likely to affect, in any substantial manner, the operations of government. The right to engage in homosexual intimacy, for example, simply means that the govern-

523. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 856 (1992).

524. These rights may even trump powers exercised in the area of foreign affairs. See Flaherty, *supra* note 370, at 1280 (disagreeing with other scholars and arguing that “federal foreign affairs authority does and should trump the prohibition against the national government enlisting state officials”).

525. See GLENDON, *supra* note 376, at 12 (asserting that rights “tend to be presented as absolute, individual, and independent of any necessary relation to responsibilities”).

526. See *id.* at 9 (“[I]n its simple American form, the language of rights is the language of no compromise. The winner takes all and the loser has to get out of town. The conversation is over.”).

ment cannot spend its resources prosecuting individuals for consensual sexual activity that takes place within their homes. By itself, this is a relatively narrow contraction of governmental power. Interpreting "states' rights" broadly, or absolutely as the Court has preferred, has a far more substantial effect on legislative efficiency and flexibility. Where Congress cannot "commandeer" state officials or subject states to suits by private parties, it must necessarily resort to the federal bureaucracy and federal agencies to pursue its objectives. The practical consequences of such absolute limitations are less flexibility, a larger federal bureaucracy, and, most likely, less overall enforcement than would be possible if states and private parties could be enlisted to assist.

As Justice Breyer stated in his dissent in *Federal Maritime Commission*: "An overly restrictive judicial interpretation of the Constitution's structural constraints (unlike its protections of certain basic liberties) will undermine the Constitution's own efforts to achieve its far more basic structural aim, the creation of a representative form of government capable of translating the people's will into effective public action."⁵²⁷ History supports this premise. If the arc of the commerce power teaches anything, it is that judicial formalism is unworkable in the area of federalism.

Surely, one might respond, the relatively few substantive "rights" that the states currently enjoy will have little overall effect on governmental flexibility. We are, in any event, only at the *beginning* of the modern "states' rights" movement. There is no indication that the Court is prepared to end this experiment with the discovery of "rights" to intimate ordering, equality, autonomy, and process. Not being bound by text, but rather only by such things as "background principles," the Court may well discover other new rights. Just over a decade ago, after all, few would have imagined the discovery of a fundamental state right to physical autonomy.

What other fundamental rights might be awaiting discovery? It is, for example, a matter of some dispute at this moment whether the states enjoy a right to free speech.⁵²⁸ If in fact it is determined

527. *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 787 (2002) (Breyer, J., dissenting).

528. Some courts have held that state entities do not enjoy free speech rights. *See, e.g.*, *Student Gov't Ass'n v. Bd. of Trs. of Univ. of Mass.*, 868 F.2d 473, 481 (1st Cir. 1989) (noting that "a state entity ... itself has no First Amendment rights"). *But cf. Am. Meat Inst. v. Ball*,

that they do, then we can expect arguments on behalf of states that federal regulations of various sorts infringe their First Amendment expressive rights. If they have speech rights, then perhaps states also will come to enjoy a species of the right to "free association" that permits them to discriminate against neighboring states in ways currently proscribed. Perhaps, in fact, states will ultimately enjoy a right to choose with whom they shall associate, suggesting that, like persons, they are "connected to others only by choice."⁵²⁹ To take one final example, there is no question that the states have at least a limited right not to be "mentally" coerced by federal laws.⁵³⁰ If that is so, the Court may be poised to rethink Congress's coercive power under the Spending Clause as well, which thus far has been treated as "plenary."⁵³¹

Of course, recognition of these rights would require a significant rethinking of current doctrine, particularly the principles of the dormant Commerce and Spending Clauses. This seems to be no deterrent. The Court has demonstrated its willingness to remake federalism in radical ways over the course of the past two decades, even in contexts in which federal power was once deemed "plenary."⁵³² Perhaps all of these rights will be recognized; perhaps none of them will. Without meaningful limits, we shall have to wait and see. With each new right, however, Congress's authority and flexibility in dealing with the states will be appreciably diminished, as will the courts' own ability to act flexibly.

The second principal negative effect that will be associated with the discovery of federal liberties is both symbolically and substantively important. As the reference to possible additional "states' rights" suggests, federal liberty as a trend implies the ascendance of a creeping compact theory of government. We tend to think of rights as *individualized* possessions. The states, by contrast, are usually regarded as a unit, at least insofar as Congress relates to them. It would be difficult for Congress to relate to states other-

424 F. Supp. 758, 770 (W.D. Mich. 1976) (assuming, without deciding, that states may assert free speech rights to resist federal regulations).

529. GLENDON, *supra* note 376, at 48.

530. See *supra* Part II.B.3.b (discussing "coerced" waivers of state immunity).

531. See *South Dakota v. Dole*, 483 U.S. 203, 208 (1987) (upholding a spending condition premised upon adoption of a minimum drinking age).

532. See *supra* Part II.B (discussing new "states' rights" limiting Congress's commerce and Section 5 powers).

wise, given its overarching obligation to fashion national solutions. As "rights talk" increases with regard to states, however, we begin to see arguments that stress the inherent *separateness* of states. We hear in these arguments echoes of the Anti-Federalists' compact theory of the Constitution—that "the Nation [is] a collection of States" rather than a cohesive national unit.⁵³³

Consider, for example, Justice Scalia's argument in *Hibbs* that states cannot be subjected to lawsuits based upon "guilt by association," but are entitled, like persons, to contest Congress's remedial enactments individually.⁵³⁴ This would mean, in the civil rights context, that federal legislation enacted to remedy or prevent a widespread evil would be subject to invalidation by any individual state with respect to which Congress has not satisfied the burden of proving a pattern of discriminatory conduct. The most likely result, assuming Congress does not, or cannot, alter its standard procedures for the enactment of federal legislation, may well be that the law goes largely unenforced. Federal liberty thus would likely constrain Congress from legislating with the broad brush necessary to confront national evils like discrimination.⁵³⁵ The more states are considered to be rights-bearers, the more common these sorts of arguments are likely to become. The more common they become, the more Congress must begin to consider states as individual units, and deal with them in this capacity. That is a fundamentally altered dynamic for federalism, one that Congress does not appear to be prepared to accept or accommodate.

In this sense, at least, the new "states' rights" is much like its predecessors. It presents a possible schism or fault-line with states arrayed against national interests, only this time armed with an

533. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 803 (1995).

534. *See Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 741-42 (2003) (Scalia, J., dissenting).

535. Section 5 legislation does not assign guilt or liability to individual states. Congress passes Section 5 legislation based upon *general* rules of conduct and findings of *national* interests and evils of the sort it typically makes. It has historically been granted substantial deference as to its findings, as well as its chosen remedies. *See South Carolina v. Katzenbach*, 383 U.S. 301, 330 (1966) ("Congress is clearly not bound by the rules relating to statutory presumptions in criminal cases when it prescribes civil remedies against other organs of government under § 2 of the Fifteenth Amendment."). Casting states as *individual* wrongdoers thus misinterprets the institutional function of Congress under Section 5 and similar grants of power.

expanding array of strong rights trumps. The Court has on many occasions, and in myriad contexts, encouraged an attitude of national unity rather than selfish state concern. Dormant Commerce Clause doctrine, for example, is based upon the central premise that the states "sink or swim together."⁵³⁶ The new federal liberty ignores that fundamental admonition.

This leads to the third, and final, principal negative effect of federal liberty, one that is only now beginning to materialize. As noted in the Introduction, "states' rights" has been as much a political rallying cry or ideological sound bite as a coherent constitutional doctrine. We can, in terms of doctrine, safely ignore politically expedient uses of the phrase. As "states' rights" gains a *constitutional* foothold, however, it gains a certain legitimacy that signals something to state officials, as well as to courts. Where state power affects individual rights, for example, it suggests that the strongest defense to a claim of individual right is not a claim to sovereign power, but a claim of a countervailing state "right." This creates a clash of rights rather than a situation in which a state power has potentially invaded a fundamental individual right.

Consider in this respect the recent decision of the Eleventh Circuit in *Lofton v. Secretary of the Department of Children and Family Services*.⁵³⁷ In *Lofton*, the court upheld a state statute that prohibits "practicing homosexuals" from adopting children.⁵³⁸ Despite any lack of federal involvement whatsoever, the court described this as a "states' rights issue."⁵³⁹ What the court apparently meant was that the state, with respect to the adoption decision, essentially acted *as a parent* with regard to all of the putative adoptee children within its control. State-as-parent implies that the state is vested with all of the fundamental rights and privileges associated with parenthood.⁵⁴⁰ In exercising those "rights," the court indicated that the state was entitled to make distinctions it otherwise would not be permitted to make under its

536. See *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935) ("The Constitution ... was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.").

537. 358 F.3d 804 (11th Cir. 2004).

538. *Id.* at 806.

539. *Id.*

540. See *id.* at 809-11.

traditional police power, including, as the court held, distinctions based solely upon sexual orientation.⁵⁴¹ Merely characterizing the state's adoption regime as implicating a "states' rights issue" thus had the effect of nullifying an individual right to be free from discrimination. As federal liberty takes hold, we are quite likely to see many more examples of this sort of invocation of "states' rights." The lesson of federal liberty, after all, is that rights are a powerful substitute for ever-waning state power.

In sum, there are substantial negative effects that result from the discovery and enforcement of negative state liberties. Federal liberty undermines the structural flexibility needed in federal-state relations. The ultimate extent to which "states' rights" will diminish institutional flexibility remains to be seen. As Justice Breyer warns, however, federal liberty has no "logical stopping point."⁵⁴² Further, as federal liberty becomes stronger, we speak less in terms of community and nation, and states will be considered and dealt with more as rights-bearing units. The compact theory thus retains a vital foothold in the federalism debate. Finally, as it gains acceptance and resonates in the states and in the courts, the malleable concept of "states' rights" will be utilized in creative ways to nullify individual rights in a variety of contexts. As federal liberty gains strength and momentum, therefore, individual rights are likely to be compromised still further.

IV. THE FUTURE OF FEDERAL LIBERTY

As noted, courts are faced with three principal paths when it comes to federalism. First, they might, as *Garcia* suggests, essentially abandon the area.⁵⁴³ They might, instead, concentrate on defining limits on federal enumerated powers. Finally, courts might, as the Supreme Court has done, discover and enforce fundamental "states' rights."

This Article has argued that the fundamental "states' rights" approach to federal liberty is seriously flawed. The movement

541. See *id.* at 817 (holding that *Lawrence* did not create a fundamental right to adopt for homosexual persons).

542. Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 788 (2002) (Breyer, J., dissenting).

543. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 545-46 (1995).

toward fundamental "states' rights," which began with *National League of Cities*, suffers from substantial methodological, theoretical, and other infirmities. It should, once again, be abandoned.

Despite the difficulties with a fundamental rights-based federalism, there are sufficient concerns with regard to the exercise of an ever-burgeoning federal power that suggest that states' interests should not be entrusted *solely* or *exclusively* to the vagaries of the political process. States, because of their diminishing relative power, are not able to defend themselves against some federal encroachments with which courts should be concerned. This Article thus would not support the first path above, namely, judicial abandonment of federalism.

Heightened and aggressive judicial scrutiny would be appropriate insofar as any federal action were to deny or substantially abridge the sovereign rights of states to existence, separateness, or political participation. "[C]ongressional abolition of state legislatures (or, possibly, preemption of all state law enforcement)," therefore, would plainly be prohibited.⁵⁴⁴ The Constitution guarantees at least this much to states.

The question is not, however, how to deal with these and other most unlikely federal encroachments on state sovereignty. The issue is how to approach the far more common encroachments that result from the exercise of plenary federal powers. Whenever an institution as powerful as Congress acts, substantial intrusions are a real possibility. Beyond taking care to protect the core sovereign rights of states, there is valuable symbolic significance to maintaining some judicial vigilance insofar as federalism is concerned. As Vicki Jackson has argued, informing Congress and others that states will not be wholly abandoned is a powerful symbolic statement about the basic structure of our Constitution.⁵⁴⁵ Moreover, as Professor Jackson also suggests, declaring federalism to be wholly unenforceable does not sit well with our conception of the rule of law.⁵⁴⁶ In a government of limited powers, Congress, just like

544. Jackson, *supra* note 438, at 2255.

545. See *id.* at 2183 (arguing that by protecting the states' right to exist, courts would prevent states from having to resort to physical force to defend themselves).

546. *Id.* at 2224.

everyone and everything else, must be told that it has some limits.⁵⁴⁷

If we are to abandon the methods and philosophy of fundamental "states' rights," however, what shall we use in its place? In substantial measure, the answer is that we should utilize the tools that pre-existed the ascendance of a literal, preemptive "states' rights" federalism. We seem to have drifted far from some basic principles where federal power is concerned. Specifically, one of the casualties of the fundamental "states' rights" movement has been the longstanding presumption of constitutionality afforded federal enactments. There is a "strong presumption of constitutionality due to an Act of Congress, especially when it turns on what is 'reasonable.'"⁵⁴⁸ In the current climate, it is all too easy to forget that in most instances, when courts interpret Congress's enumerated powers, reasonableness is all that is required. This does not call for aggressive, strict judicial review. Nor, as argued below, does it lead inevitably to judicial abandonment of the states. Restoring the presumption, and the deferential attitude that has traditionally accompanied it, is only a modest first step. This must be part of a broader turning of the ship of federalism back toward a dynamic that measures and distributes *powers* rather than boldly discovers state *rights*. It is too late in the day for this approach to be adopted insofar as individual liberty is concerned. It is not, however, too late for the Court to turn its back on a rights-based federal liberty.

As noted, even the old "states' rights" proponents recognized that the principal paradigm of federalism is one that looks to the scope of Congress's enumerated powers when seeking to determine whether the federal-state balance has been improperly upset.⁵⁴⁹ This distributive paradigm treats state power as the Constitution intends, namely as *residual* and *derivative*. The scope of enumerated federal powers thus should be the focus of inquiry in federal-state clashes that do not implicate the core sovereign rights of states. The fact that it is a state that has been regulated, or "affronted," ought to make no constitutional difference. If the courts

547. *Id.* at 2228 ("To make the political safeguards of federalism work, some sense of enforceable lines must linger.").

548. *United States v. Di Re*, 332 U.S. 581, 585 (1948).

549. *See supra* Part III.A.2 (discussing historical anomaly of current "states' rights" approach).

want to limit Congress, then let them do so by constraining the scope of its commerce and other enumerated powers, not by discovering an ever-expanding list of fundamental "states' rights."

The distributive approach should govern whether the power at issue is the regulation of commerce, or bankruptcy, or relates to patents or spending. If the Court wishes to rein in federal authority, whether to protect citizens or states, or both, it should do so by enforcing real limits on these powers. Such limits would be far more likely to enhance overall individual liberty than would the continued discovery of inherent "states' rights." They would do so in a manner that does not raise the specter of judicial favoritism of states *as states*.

The focus on power has been increasingly diminished by the discovery of fundamental "states' rights." It is all too easy to forget that the Eleventh Amendment speaks to judicial *power*.⁵⁵⁰ It is not a general placeholder for unenumerated "states' rights." If a federal enactment does not impermissibly add to the judicial power by authorizing a suit outside its terms, then it ought to be permitted. If there is a need for broader protection for the states' right to sovereign equality, then let the Constitution be amended to provide for it.

Similarly, nothing in the text of Section 5 of the Fourteenth Amendment so much as hints at any procedural limitation on the powers granted therein.⁵⁵¹ So long as Congress appropriately seeks to enforce the Reconstruction Amendments, it is permitted to act. Now, it is surely proper for the Court to ensure that Congress does not seek to overrule specific Court precedents expressly through exercise of this power.⁵⁵² That sort of challenge to *judicial* power must necessarily be answered. It is not, however, appropriate to strictly scrutinize congressional power in all cases by enforcing a state-friendly burden of proof and requiring that laws be narrowly tailored. These are conventions associated with a rights regime, not a distribution of constitutional powers.

550. See U.S. CONST. amend XI.

551. See U.S. CONST. amend XIV, § 5.

552. See *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) ("[T]he design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States.").

This focus on power might strike many as far too lenient with regard to central authority. If this is so, it is largely because we have become accustomed to the Court's discovery of "extrinsic" constitutional limits on Congress. The distributive model was, in fact, the method used to enforce federalism before states became persons, and prior to the constitutional recognition of such things as state "dignity" and "autonomy" as constitutionally significant interests.

As other scholars have pointed out, and as this Article discussed in Part III, resort to the traditional distributive paradigm does not leave courts at sea in enforcing federalism.⁵⁵³ Although courts cannot legitimately discover separate state enclaves, fundamental rights, or inherent attributes of statehood, this Article agrees that "[i]t is possible to identify greater and lesser degrees of connection between enumerated powers and regulated conduct."⁵⁵⁴

The path of the commerce power demonstrates that if courts are expert at anything at all in the area of federalism, it is the calibration of power based upon express rather than loosely defined, unenumerated implied constitutional limitations. The Court's much-discussed recent commerce clause decisions—*United States v. Lopez*⁵⁵⁵ and *United States v. Morrison*⁵⁵⁶—hold out the possibility that federalism might be enforced incrementally and flexibly rather than through the discovery of absolute "states' rights." Depending on how they are ultimately interpreted by the courts, *Lopez* and *Morrison* may be cause for some optimism that the common law method can produce legitimate and meaningful substantive limits on the commerce power.⁵⁵⁷

In those cases, the Court relied in part on a determination of whether the activity that Congress sought to regulate was "commercial" or "non-commercial" in nature.⁵⁵⁸ Neither activity—gun

553. See, e.g., Baker & Young, *supra* note 11, at 97 (arguing that courts can and should use the distributive model).

554. Jackson, *supra* note 438, at 2233.

555. 514 U.S. 549 (1995).

556. 529 U.S. 598 (2000).

557. See Baker & Young, *supra* note 11, at 99 (arguing that Justice Souter's *Glucksberg* concurrence "points the way toward how courts can overcome" the institutional liabilities in both substantive due process and substantive federalism areas).

558. See *id.* at 97-98 (discussing *Lopez* and *Morrison*); see also *Lopez*, 514 U.S. at 565-67 (setting forth the commercial/non-commercial standard). There may, however, be less fluidity

possession in *Lopez* nor gender-motivated violence in *Morrison*—was considered to be the sort of commercial concern traditionally within the ambit of the commerce power. Significantly, the Court set forth no specific rules or definitions for future cases, seemingly permitting the commercial/non-commercial standard to be enforced incrementally, as future contexts warrant. This standard, therefore, is a potentially promising example of a flexible, incremental approach to limiting federal power. It seems to suggest, in the common law tradition, “an incremental process of inclusion and exclusion.”⁵⁵⁹

Lopez and *Morrison* might optimistically be interpreted as utilizing flexible and incremental standards to enforce limits on Congress’s enumerated power to regulate interstate commerce. The commercial/non-commercial standard announced in *Lopez* is one way to police Congress’s power without culling rigid “states’ rights” from structural penumbras. Where a regulated activity does not appear to be of the type the commerce power has traditionally encompassed, then there is reason for some skepticism regardless of who or what is being regulated. This approach at least permits an incrementalism that “states’ rights” federalism refuses to accommodate. Through this standard, the Court has essentially informed Congress that there are margins at which it must justify to some greater degree, although certainly not under strict judicial scrutiny, the exercise of its power. In such cases the usual presumption of constitutionality is not necessarily appropriate.

Application of this sort of standard is not as troubling from a judicial competence standpoint as discovering some state “right” that trumps federal power. This is so for two principal reasons. First, this is the very sort of question that the text of the Commerce Clause invites: Is the thing regulated even in the nature of a commercial activity? Is it “commerce”? Second, as discussed previously, the Court has much to draw upon in answering this sort

here than meets the eye. *Lopez* and *Morrison* may portend nothing more than a warning to Congress to restrain its appetite for power. Or the cases may signal that there are meaningful, judicially enforceable limits on the commerce power. There is, however, a third possibility: these cases may signal an intention on the part of the Court to define state enclaves of internal ordering rigidly by cordoning off “traditional” areas of state regulation. See *Lopez*, 514 U.S. at 564 (making reference to traditional areas like education and criminal law).

559. Baker & Young, *supra* note 11, at 97.

of question, and in presenting the reasoned judgment that the common law requires. It may draw upon the whole commerce power tradition, as it did in *Lopez* itself.⁵⁶⁰

There are, as well, interpretive aids other than the Tenth Amendment for courts to rely upon in distributing sovereign power. One interpretive guide that has long been neglected is the Necessary and Proper Clause.⁵⁶¹ Commentators have increasingly turned to this clause of late as a possible source of limitations on Congress's enumerated powers.⁵⁶² Of course, basing a decision on what is "necessary" or "proper" might fall prey to the same criticism as "states' rights," namely, that it is insufficiently determinate. That is a fair criticism, but at least the "necessary" and "proper" standards point courts toward the right questions; for example, "how the measure is connected to a federal power and whether some necessity for federal regulation (above and beyond what the states can do or are doing) has been identified."⁵⁶³

Importantly, this focus on power has the advantage of inviting a consideration of context, specifically the federal and state interests that are treated as relevant under a rights-based federalism. It permits a flexibility that a rights-based approach to federalism cannot tolerate because of its very nature. In so-called "commandeering" cases, for instance, the Necessary and Proper standard might focus, as Professor Jackson has suggested, "both on the reasons for the federal action and the degree of interference with the performance of duties under state law."⁵⁶⁴ Courts might consider such things as "the size of the burden or amount of state time and resources needed to perform the federally mandated tasks."⁵⁶⁵ Not all federal directives thus would be deemed automatically invalid; minor interferences, for example, could be distin-

560. See *Lopez*, 514 U.S. at 552-59 (reviewing commerce clause doctrine).

561. U.S. CONST. art. I, § 8, cl. 18.

562. See, e.g., Jackson, *supra* note 438, at 2243; see also Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795 (1996) (arguing that Congress's power to preempt state law, as well as its authority to regulate local activity that affects interstate commerce, is limited by the Necessary and Proper Clause).

563. Jackson, *supra* note 438, at 2245.

564. *Id.* at 2253.

565. *Id.*

guished from more substantial ones, which might require a second look.⁵⁶⁶

In this regard, at least, *National League of Cities* was not the mistake it is often thought to be. The mistake of *National League* was its formalism, the idea that the courts could identify the "traditional state functions" that were off limits to federal authority. The Court did not, however, ultimately adopt an absolute rights approach. In fact, the Court was quite careful to point out that even *essential* state functions might be regulated if an important national interest demanded it.⁵⁶⁷ That is just the sort of flexible response the new fundamental "states' rights" approach would not permit.

The *National League of Cities* Court was correct to eschew formalism, for as Professor Jackson states, "the demands of federalism do not lend themselves to decontextualized, formalist rulemaking by courts."⁵⁶⁸ Yet today, neither the substantialness of federal interests nor the actual burden on states make any difference under *New York, Printz, Alden*, or *Federal Maritime Commission*. Congress cannot commandeer, and it cannot abrogate under its commerce power—period. Similarly, states' procedural "rights," especially the requirement that Congress compile a substantial legislative record of state violations under Section 5, have generally been inflexibly applied. It is the rare federal enactment that will satisfy the new due process trifecta of heightened record review, congruence, and proportionality.

Congress's enumerated powers call for a great deal more flexibility than this approach allows. With regard to the right to immunity, for example, even if courts refuse to limit the scope of immunity to the terms set forth in the Eleventh Amendment, it should not be enough to assert that a state is "affronted" by having to defend itself in proceedings brought by individuals before an administrative tribunal. There are other rights and powers to consider in such cases, and there are consequences associated with a right or principle that insists upon a bloated federal bureaucracy

566. See *id.* at 2253-54.

567. See *Nat'l League of Cities v. Usery*, 426 U.S. 833, 853 (1976) ("The limits imposed upon the commerce power when Congress seeks to apply it to the States are not so inflexible as to preclude temporary enactments tailored to combat a national emergency.").

568. Jackson, *supra* note 438, at 2254.

for enforcement. Dignity, esteem, and respect are simply being asked to do too much in the immunity doctrine, to the exclusion of considerations of regulatory burden, efficiency, and other interests.

This is not the place for a detailed re-examination of all of the recent federalism cases using a more flexible, power-driven distributive approach. It suffices to state that extremes do not work well where federalism is concerned. The goal, always elusive, is to have courts take into consideration as many circumstances as possible. "To be successful, federalism must be pragmatic and it must be dynamic."⁵⁶⁹ This obviously rules out fundamental "states' rights" federalism. This Article, if only preliminarily and tentatively, suggests some possible alternatives. There is no need for bold proposals, as we already had a working paradigm for state and federal power. It is time we considered returning to it.

CONCLUSION

States remain a constitutional enigma. Although their existence is constitutionally recognized and protected, little beyond this is certain. In part due to its indeterminacy, state sovereignty has captured an enormous amount of judicial and scholarly attention of late. In the courts, the ascension of states, from residuary beneficiaries of the scraps produced by the tautological Tenth Amendment to joint sovereigns possessing constitutionally cognizable "dignity" and "esteem," has been truly remarkable.

The phrase "states' rights" is often bandied about carelessly or invoked as political expediency dictates. This Article has attempted to clarify the *constitutional* meaning of "states' rights." It posits that states currently enjoy two types of constitutional rights. States possess certain core sovereign constitutional rights. Under the Court's recent federalism doctrine, states have also amassed a variety of *fundamental* constitutional rights. For each of these, there is a fundamental individual rights analog. These "states' rights"—of intimate ordering, equality, autonomy, and due process—have risen from the purported penumbras and emanations of federalism, as fundamental individual rights were found to exist pursuant to what came to be known as "substantive due process."

569. *Id.* at 2228.

Civil liberty and "federal liberty" are thus, as a descriptive matter, cut from the same cloth. The Article argues, however, that these two liberties differ in substantial respects. Sovereigns and persons are not similarly situated insofar as constitutional rights are concerned. The constitutional rights of sovereigns are few and narrow; they essentially preserve a minimal level of state independence and autonomy. By contrast, the rights of individuals are many and broad in character. States simply were not intended to be the beneficiaries of rights trumps. They exercise power, and their sovereign rights were to be preserved by attending to the distribution of sovereign authority. Fundamental "states' rights" is a misguided attempt, therefore, to treat states as "moral persons." This Article has examined the methodological, theoretical, and foundational distinctions that critically undermine a conception of federalism based upon fundamental "states' rights." It has also identified various negative effects that stem from the discovery and enforcement of negative state liberties, not the least of which is the loss of an institutional flexibility that had served federalism well. For all of these reasons, the Article argues for prompt abandonment of a federal liberty based upon the fundamental rights of states.

We need not search long or far for possible replacements. Distributive federalism, which focuses more plausibly on the calibration of power rather than the discovery of unenumerated "states' rights," offers a far more legitimate and familiar methodology than the Court's new version of "states' rights." It offers, among other things, a path back to a federalism that values text, exhibits flexibility, and respects institutional competencies. This is not a comprehensive solution, but it is a tested way back to what federalism once was, and what it could be again.