THE IMPACT OF JUDICIAL REVIEW ON AMERICAN FEDERALISM: PROMOTING CENTRALIZATION MORE THAN STATE AUTONOMY

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Introduction

The relative scope of federal and state power under the US Constitution has been a major bone of contention for over 200 years. Federal courts have often intervened both for and against assertions of federal authority. Judicial review has sometimes enforced substantial limits on federal authority by striking down federal laws deemed to be outside the scope of Congress’ enumerated powers under Article I of the Constitution. Quite often, though, the courts also have constrained state power by invalidating state laws as violations of constitutional rights.

While judicial review has therefore promoted both centralization and state autonomy at different times, on balance it has strengthened the former at the expense of the latter. This pattern has been especially prevalent since the 1930s, as the US Supreme Court largely abandoned earlier efforts to police limits on congressional power, while simultaneously enforcing a growing array of individual rights provisions against state and local governments.

This chapter does not consider the extent to which the federal courts’ decisions on federalism and individual rights questions have been correct; instead, it seeks to examine the impact of judicial review on American federalism without attempting a normative judgment. I briefly outline the structure of American federalism and judicial review, and then describe the

* Professor of Law, George Mason University School of Law. For helpful suggestions and comments, I would like to thank Nicholas Aroney, John Kincaid, a peer reviewer, and participants in the Forum on Federations international symposium on federalism and judicial review, held in Montreal in March 2012. I would also like to thank Ryan Facer and Matt Lafferman for their valuable work as research assistants, and Paul Haas of the George Mason University Law Library for help with research materials.
history of judicial review of structural limits on federal power. In the nineteenth and early
twentieth centuries, the Supreme Court engaged in limited, but significant efforts to constrain
congressional power. These efforts were to a large extent abandoned after the constitutional
revolution of the New Deal period in the 1930s. Beginning in the early 1990s, the Supreme Court
has attempted to revive judicial enforcement of limits on federal power. So far, however, these
efforts have had only a limited effect.

The chapter then summarizes the history of judicial review of state laws. The range of
issues on which federal courts have invalidated state laws is so broad that it is impossible to
consider it in more than a general way here. But that in itself is a strong indication of the extent
to which state policymaking authority has been curbed by the courts. Overall, the impact of these
rulings in curbing state autonomy significantly exceeds the effects of the courts’ more limited
efforts to constrain federal power.

The last part of the chapter briefly explains why the latter result was not accidental.
Because federal judges are appointed by the president and confirmed by the Senate, the chance
that they will resist the political agenda of the dominant political coalition in the federal
government is reduced. Even when federal judges would like to invalidate federal legislation,
they may hesitate to do so when the result might create a political confrontation that the courts
are likely to lose. Federal judges face fewer political risks when they strike down state
legislation.

I. The American System of Federalism

The United States is one of the world’s largest and most diverse federal systems, second
only to India’s in population size. The nation also boasts enormous ethnic and religious diversity.
As of 2010, the Census Bureau estimated the US population at about 308 million people.\textsuperscript{1} That includes about 65 percent who describe themselves as “white,” 12 percent black or African-American, and almost 16 percent Hispanic (including some black Hispanics).\textsuperscript{2} There are also many smaller minority groups, most notably Asian-Americans and Native American descendants of the aboriginal population. The United States has by far the world’s largest economy and is also among the world’s wealthiest nations in terms of per capita income.

The US federal system includes 50 state governments, all of which have legally equal standing under the Constitution, as well as six associated territories such as Puerto Rico, American Samoa and the US Virgin Islands. The District of Columbia, which includes the capital of Washington, DC, is a special territory controlled directly by the federal government. Aboriginal Native American tribal governments have a complex quasi-autonomous status that has been a focus of much controversy and is difficult to classify precisely.\textsuperscript{3}

There are also over 89,000 local governments of various types, including counties, towns, and cities.\textsuperscript{4} As far as the federal Constitution is concerned, local political entities are under the complete control of state governments; however, many of them are granted a measure of autonomy or home rule under state constitutional or statutory law.

As discussed more fully later, the power of the federal government relative to the states has greatly increased over time. The federal government has come to play a much larger role in

\textsuperscript{2} Data calculated from figures in U.S. Census Bureau, \textit{Statistical Abstract of the United States}, 10.
\textsuperscript{4} U.S. Census Bureau, 2012 Census of Governments, Table 2, Available at http://www2.census.gov/govs/cog/2012/formatted_prelim_counts_23jul2012_2.pdf
economic and social policy, and in protecting a variety of individual rights. As in many previous periods in American history, the scope of federal power is a major focus of political controversy. Generally speaking, most political liberals believe that the role of the federal government should be as great or even greater than it is today, while most conservatives and libertarians argue that it should be reduced. At the same time, neither side of the political spectrum is consistent in its attitude toward federal power; conservatives sometimes favor expansions of federal power that seem in tension with their ideology, while liberals sometimes favor state autonomy. Overall, there is no clear consensus on where the boundary between state and federal authority should lie. But few Americans want to transform the nation into a completely unitary polity.

As compared with most other federal systems, the United States is unusual in that there are almost no states where an ethnic, religious, linguistic, or racial group that is in the minority nationally is the majority within the state. In many other federal nations, the existence of national minorities that are regional majorities was one of the main justifications for the establishment of a federal system. The one partial exception to the US pattern is the state of Utah, where adherents of the Mormon religion – a minority faith that was persecuted by national and state governments in the nineteenth century – are in the majority. External possessions such as Puerto Rico and the US Virgin Islands also have majority populations that differ in ethnicity from that of the United States. But they, like Utah, have had only marginal influence on the development of American federalism as a whole.

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5 For an overview covering many such cases, see Luis Moreno and César Colino, eds., Diversity and Unity in Federal Countries (Montreal & Kingston: McGill-Queen’s University Press, 2010); see also Dawn Brancati, Peace By Design: Managing Intrastate Conflict through Decentralization (New York: Oxford University Press, 2009).
The United States emerged from a rebellion against British rule by thirteen previously separate colonies on the east coast of North America. In 1776, the colonies joined together in a Declaration of Independence, and Britain eventually recognized the new nation after an eight-year conflict that Americans commonly call the Revolutionary War.

The US Constitution was drafted in 1787 and is the oldest continuously functioning written national constitution in the world. It replaced an earlier Articles of Confederation, established in 1781, under which the powers of the federal government were significantly weaker. Many political leaders, including General George Washington, commander of the Continental Army that won the Revolutionary War, Alexander Hamilton, and James Madison, the eventual “father of the Constitution,” believed that the federal government created by Articles was too weak, and tolerated far too much abusive behavior by the states. During the 1780s, political support for the establishment of a stronger federal government gradually increased, until a new constitution was drafted in 1787 by a convention of state delegates originally called to revise the Articles of Confederation.

The new Constitution was approved by specially elected ratifying conventions within the states. Article VII of the Constitution stated that the Constitution would come into force once ratified by nine of the then thirteen states. Many prominent politicians and Revolutionary War leaders actively supported the Constitution. These included Madison, Hamilton, and John Jay, who wrote the famous Federalist Papers in an attempt to promote ratification. But others, including George Mason and Patrick Henry opposed the Constitution because they believed it concentrated too much power in the federal government.

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The Constitution establishes a system of separation of powers within the federal government, with an elected executive (the president, Article II), a bicameral legislature (Article I), and an independent judiciary (Article III). The upper house of Congress, the Senate, has two senators for every state; originally they were chosen by state legislatures, but they have been popularly elected since the enactment of the Seventeenth Amendment in 1913. The House of Representatives, the lower house, is chosen by plurality voting in single-member districts allocated to the states based on population.

Federal judges serve for life and are appointed by the president, subject to confirmation by a majority of the Senate. The judicial system is hierarchical, with a Supreme Court currently composed of nine justices at the top. Unlike in some other nations, there is no separate constitutional court. Most significant cases are decided through publicly available written opinions signed by the judge who writes them.

In addition to the Supreme Court, there are two lower levels of generalist federal judges—district court judges (who hear trials) and court of appeals judges (who hear appeals from the district courts). There are also a number of specialized courts, such as those that consider tax cases, bankruptcy cases, and cases arising in the military justice system.

Article III gives federal courts jurisdiction over all “cases” and “controversies” arising under the Constitution and other federal law. Over time, the Supreme Court has interpreted this to forbid the issuing of “advisory” opinions and to limit federal litigation to cases involving parties that can obtain “standing” by having suffered at least some form of tangible harm through violations of the law.

Each state has its own courts, including a state supreme court, which are independent of the federal courts and hear cases addressing issues of both state and federal law. Each also has
its own state constitution, many of which contain guarantees of rights that differ from or go beyond those protected by the federal constitution.\textsuperscript{8} State courts must follow federal appellate court precedent on issues involving the federal Constitution and federal law. But they exercise considerable independent authority when they interpret state constitutional law, often in ways that restricts the authority of the other branches of their state governments. Some federal judges are former state judges appointed to the federal judiciary, though most are not.

The United States is a common law nation with a legal culture heavily influenced by its British origins.\textsuperscript{9} In interpreting the Constitution, federal judges have resorted to a wide range of methodologies, including textualism, originalism, reliance on precedent, and a variety of “living constitution” theories that allow for changing interpretation in response to economic and social developments. Both within and outside the judiciary, there is an active debate between supporters of different theories of interpretation – particularly between originalists and living constitution advocates - with no definitive resolution in sight.

One issue that has often been the focus of conflict between interpreters of the Constitution over the last two centuries is the question of whether the Constitution was established by the people of the United States as a whole, or is instead a compact created by state governments.\textsuperscript{10} Advocates on both sides have usually assumed that the former theory implies a narrower scope for federal authority than the former. This is not necessarily true. Even if an undifferentiated people created the Constitution, they could still have chosen to put strict limits on federal power. Conversely, even if the Constitution was established by the states, they could


\textsuperscript{9} The one exception to this generalization is Louisiana, which maintains a civil law system inherited from its days as a French and Spanish colony prior to its transfer to the United States in 1803.

\textsuperscript{10} For good statements of the arguments on each side with citations to various historical sources and earlier debates on the issue, see the majority and dissenting opinions in *US Term Limits v. Thornton*, 514 U.S. 779 (1995).
have chosen to delegate very broad authority to the federal government. Even so, the issue continues to be the subject of considerable debate.

At least until recently, judicial decisions on federalism issues have not been much influenced by international treaties and international law. Over the last fifteen years, a few Supreme Court decisions have cited such sources, and some scholars advocate greater reliance on them. But the practice remains rare and controversial.

Article I, Section 8 of the Constitution gives Congress a variety of powers, most notably the power to declare war, raise and support armies, coin money, impose taxes, and regulate interstate and foreign commerce. There is also a Necessary and Proper Clause (Article I, Section 8, Clause 18), which gives Congress the power to adopt legislation that is “necessary and proper” for “carrying into execution” the other powers granted to the federal government in the Constitution. The Constitution also grants a number of powers to the president, most notably the power to command the armed forces, make treaties subject to ratification by two-thirds of the Senate, and veto legislation adopted by Congress, subject to override by two-thirds majorities in each house. The Supremacy Clause of Article VI of the Constitution specifies that the Constitution, international treaties signed and ratified by the United States, and federal statutory law are all “the supreme Law of the Land” and trump state law when they conflict with it. The extent to which federal statutes “preempt” state laws that do not directly violate federal law but may go against it indirectly, has long been a focus of extensive debate.11

The Constitution does not contain a specified list of state powers. The implicit assumption is that states retain all powers not granted to the federal government or explicitly prohibited to the states by the Constitution. There are only a few examples of the latter, such as

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the prohibition on states’ issuing their own currency, or signing treaties with foreign powers (Article I, Section 10, Clause 1). States can also legislate on many matters on which the federal government can also enact laws, so long as state laws do not conflict with federal ones. This has meant that states retain broad authority to legislate on a wide range of issues even as the scope of federal power has expanded, especially since the 1930s. Still, state policies are increasingly subject to overriding or modification by federal legislation.

A wide range of individual rights provisions constrain both federal and state power, including provisions protecting freedom of speech and religion, property rights, and the rights of criminal defendants. All of the former are part of the Bill of Rights, the first ten amendments to the US Constitution enacted simultaneously in 1791. The Thirteenth, Fourteenth, and Fifteenth Amendments, enacted in the late 1860s shortly after the Civil War, forbid slavery and restrict racial and ethnic discrimination by state governments. Provisions of the Fourteenth Amendment have long been interpreted to protect other individual rights as well.

As discussed more fully below, the federal courts have often taken an active role in enforcing constitutional limits on both federal and state authority. Issues related to the proper scope of state and federal power have always been among the most important on the federal courts’ agenda. At the same time, Congress, the president, public opinion, and a variety of political and economic factors have had major effects as well. Judicial review has influenced the development of American federalism; but it has never been the only influence and rarely the most important.

Article V of the Constitution sets out multiple mechanisms for enacting constitutional amendments. The only one that has ever been used in practice requires the support of a two-thirds majority in both houses of Congress, followed by ratification by three-quarters of the state
legislatures. This amendment process is one of the most difficult in the world, and only 27 amendments have been adopted in the 225 year history of the Constitution, including just seventeen since the adoption of the Bill of Rights in 1791. In practice, constitutional change has more often arisen through changing interpretations of the constitutional text than through formal amendment. Many state constitutions are much easier to amend, and some have been amended numerous times.

II. Judicial Enforcement of Limits on Federal Government Power

The Early Republic and Antebellum Eras

Efforts at judicial enforcement of limits on federal power date back to the early republic. Their successes and failures have waxed and waned at different times in American history. Many of the Founding Fathers envisioned the judiciary as an adjudicator of the boundary between federal and state power. In the Federalist Papers, James Madison wrote that the Supreme Court would decide “controversies relating to the boundary between the two jurisdictions.”

In the 1790s, the rival parties debated the constitutionality of federal legislation such as the federally chartered Bank of the United States, a federal government-created corporation that sought to attract private depositors and make it easier for the federal government to obtain credit. Critics of the bank in the nascent Democratic-Republican Party, including future presidents Thomas Jefferson and James Madison, argued that its creation exceeded Congress’ enumerated powers under Article I of the Constitution. Federalist Party defenders of the bank, led by Secretary of the Treasury Alexander Hamilton, contended that the Necessary and Proper Clause

was broad enough to justify the bank. The parties also clashed over the constitutionality of other elements of Hamilton’s economic policy program, such as the assumption of state debts by the federal government.

The First Bank of the United States’ charter was allowed to expire after Thomas Jefferson won the presidency in 1800 and his party took control of Congress. But in 1819 the Supreme Court decided the crucial case of *McCulloch v. Maryland*, which involved a challenge to the constitutionality of a Maryland tax imposed on the second Bank of the United States, which had been created in 1816. In the process of addressing the constitutionality of the Maryland tax, the Court also had to consider Maryland’s argument that the Bank of the United States itself was unconstitutional. In a landmark opinion written by Chief Justice John Marshall, himself a Federalist, the Court not only upheld the constitutionality of the bank, but also endorsed Hamilton’s argument that the word “necessary” in the Necessary and Proper Clause could be interpreted to allow Congress to enact any legislation that was merely “useful” or “convenient” as a tool for executing one of Congress’ other enumerated powers.

While the Court interpreted the word “necessary” very broadly, it did not give Congress a blank check to enact virtually any legislation. Marshall’s opinion indicated that the clause only authorizes legislation with a “legitimate” purpose that is “within the scope of the constitution,” and uses “means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution.” This passage suggests four constraints on the scope of congressional power authorized by the clause: (1) the “end” pursued

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17 Ibid., 413-15.

18 Ibid., 421.
must be “legitimate” and “within the scope of the constitution”; (2) the means must be “appropriate” and “plainly adapted to that end”; (3) the means must “not [be] prohibited” elsewhere in the Constitution; and (4) the means must be “consist[ent] with the letter and spirit of the Constitution.” Marshall also emphasized that “should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the Government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.”

Despite these caveats, *McCulloch* has long been viewed as an endorsement of broad federal authority under the Necessary and Proper Clause.

In *Gibbons v. Ogden* (1824), Chief Justice Marshall issued the Court’s first major opinion addressing the scope of congressional authority to regulate “commerce … among the several States.” *Gibbons* upheld the constitutionality of a federal law granting navigation licenses to ships engaged in “the coasting trade,” and barred the State of New York from granting a monopoly of navigation on the Hudson River, the lower part of which runs between New Jersey and New York.

Marshall defined “commerce” relatively broadly as “intercourse.” But he also emphasized that the commerce power has significant limits, listing “[i]nspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries,” as part of the great “mass” of issues that federal power under the Commerce Clause does not cover. Unlike modern Commerce Clause

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19 Ibid., 423.
21 U.S. Constitution, Art. I, § 8, cl. 3.
23 *Gibbons*, 22 U.S. at 189.
24 Ibid, 203.
jurisprudence, Marshall’s theory of the clause specifically did not include everything that “may have a remote and considerable influence on commerce.”  

Although relatively supportive of federal power, the pre-Civil War Supreme Court did issue two major opinions constraining it: *Marbury v. Madison* and *Dred Scott v. Sandford*. The former is famous for its role in establishing the power of judicial review. But its actual impact in constraining federal power was extremely limited because it invalidated only a minor provision of the Judiciary Act of 1789.

*Dred Scott* was far more consequential. For decades, one of the biggest issues in nineteenth-century American politics was the question of whether slavery would be permitted in the nation’s extensive western territories. Under the Constitution, these territories were under the control of the federal government until they could be formed into states. In legislating for them, Congress was not limited by the enumerated powers constraints that applied in established states. Southern supporters of slavery sought to ensure that as much territory as possible would be open to slaveowners; most northerners preferred that slavery be banned in the federal territories. Both sides knew that a territory where slavery was legal would likely eventually become a slave state, while a free territory would probably be a free state, thereby affecting the balance of power in Congress.

In two major political bargains--the Missouri Compromise of 1820 and the Compromise of 1850--northerners and southerners agreed to ban slavery in some western territories, while allowing it in others. In *Dred Scott*, the Supreme Court upended this delicate balancing act by

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25 Ibid.
26 5 U.S. (1 Cranch) 137 (1803).
ruling that Congress lacked the power to ban slavery in the federal territories, thereby invalidating key parts of the two grand bargains. The 7-2 decision, written by proslavery Chief Justice Roger B. Taney, was legally dubious and politically explosive.

The resulting political furor undermined northern moderates who sought to compromise with the South, and helped lead to the election of Abraham Lincoln to the presidency in 1860 on a platform that took a hard line against the expansion of slavery. That, in turn, precipitated the secession of the southern states and the bloody Civil War of 1861-65 that ultimately led to the abolition of slavery by the enactment of the Thirteenth Amendment in 1865.

The Post-Civil War Period

After the Civil War, the Supreme Court entered a 70-year period during which it enforced significant limits on federal powers and issued a number of notable decisions constraining congressional authority under the Commerce Clause and other parts of the Constitution. In Paul v. Virginia (1869), the Court ruled that the commerce power did not cover regulation of insurance contracts because the latter were not “articles in commerce.” In United States v. E.C. Knight (1895), the Court invalidated the application of federal antitrust laws to a manufacturing firm as beyond the commerce power because there is a distinction between interstate commerce and manufacturing that takes place within the boundaries of a single state.

The late nineteenth-century Court also limited Congress’ powers under Section 5 of the Fourteenth Amendment, which gave Congress the authority to adopt “appropriate” legislation

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30 For a good summary of the legal weaknesses in Taney’s opinion, see David Currie, The Constitution in the Supreme Court: The First Hundred Years, 1789-1888 (Chicago University of Chicago Press, 1985), 264-73.
31 75 U.S. (8 Wall.) 168, 183 (1869).
32 156 U.S. 1 (1895). The distinction between commerce and manufacturing echoed Chief Justice Marshall’s distinction between commerce and activities that merely “have a remote and considerable influence on commerce.” Gibbons, 22 U.S. at 203.
enforcing that Amendment’s various provisions protecting the rights of recently freed slaves and others against state governments. In the Civil Rights Cases of 1883, \(^{33}\) the Court struck down the Civil Rights Act of 1875, which banned racial discrimination by private businesses operating places of public accommodation; the Court ruled that Congress could not use Section 5 in this way because the Amendment prohibits only discrimination by state governments, not private entities.

The Court’s most widely reviled decision limiting federal power was *Hammer v. Dagenhart* (1918), which struck down a law that banned the interstate transportation of manufactured goods produced by children under the age of 16. \(^{34}\) Over time, this ruling came to symbolize the supposed excesses of the pre-New Deal Court. \(^{35}\)

The Court also issued a controversial decision limiting Congress’ power to impose taxes, holding that an income tax qualified as a “direct tax” that must be apportioned among the states in proportion to population, as required by the Constitution’s Direct Tax Clause. \(^{36}\) This decision was negated by ratification of the Sixteenth Amendment in 1913, which gave Congress the power to adopt income taxes without apportionment.

While the pre-New Deal Court enforced some significant limits on the powers of the federal government, it also often upheld federal economic regulations against potentially plausible challenges. These included laws banning the transportation of lottery tickets across state lines, \(^{37}\) federal regulation of railroad rates on lines that do not cross state borders, \(^{38}\) the “White Slave Act” forbidding interstate transportation of women for prostitution or other

\(^{33}\) 109 U.S. 3 (1883).
\(^{34}\) 247 U.S. 251 (1918).
\(^{36}\) *Pollock v. Farmers’ Loan & Trust Company*, 157 U.S. 429 (1895).
\(^{38}\) *Shreveport Rates Case*, 234 U.S. 342 (1914).
“immoral” purposes,\textsuperscript{39} and the Pure Food and Drug Act forbidding interstate transportation of “adulterated” food.\textsuperscript{40}

In two consolidated 1923 decisions addressing the scope of Congress’ power to spend for the “General Welfare,” the Court made it very difficult for states to challenge the constitutionality of conditions attached to federal spending grants to state and local governments and almost impossible for most individual citizens to do so.\textsuperscript{41}

Even when the pre-New Deal Supreme Court imposed significant limits on federal power, it did so supported by a broad political consensus in favor of constitutional constraints on federal government power. The pre-New Deal Supreme Court sometimes bucked majority public opinion, most notably in \textit{Hammer v. Dagenhart}. But although nineteenth and early twentieth century public and elite opinion was characterized by extensive disagreement about the scope of federal authority, there was broad agreement that there should be some strong constitutional limits.\textsuperscript{42} Longstanding regional rivalries between the North and the South also helped limit federal power by making it more difficult to build a consensus in favor of broad new federal legislation. These ideological and political foundations for limits on federal power deteriorated only slowly during the early twentieth century.

\textit{The New Deal Transformation}

Although many on the political left had criticized the Supreme Court’s decisions limiting federal power – especially over economic issues - for years, these attacks gained added

\textsuperscript{39} \textit{Hoke v. United States}, 227 U. S. 308 (1913).
\textsuperscript{40} \textit{Hipolite Egg Co. v. United States}, 220 U. S. 45 (1911).
momentum from the Great Depression that began in 1929. The federal government, led after 1933 by President Franklin D. Roosevelt, began to enact a wide range of “New Deal” interventionist policies intended to alleviate the crisis and, more generally, regulate the economy in various unprecedented ways.

At first, the Supreme Court resisted many of the new policies. Most of the justices on the Court in the mid-1930s had been appointed by pre-New Deal presidents, and they supported judicial enforcement of limits on federal power. Between 1935 and 1937, the Court invalidated several major New Deal policies, including the National Recovery Act (NRA) of 1933, the centerpiece of Roosevelt’s First New Deal, and arguably the most sweeping regulatory legislation in American history. The NRA established a system of wage and price controls and cartels that encompassed nearly the entire nonagricultural economy. The unanimous decision striking down the law was joined by progressive justices such as Louis Brandeis and Benjamin Cardozo, as well as the Court’s conservatives. This lineup indicates both the NRA’s radical nature and the extent to which judicial enforcement of limits on federal power commanded widespread support among pre-New Deal jurists.

The Court also invalidated other important New Deal laws, such as laws restricting agricultural production in order to raise prices, regulating wages, prices and production of coal, and constraining the sale of oil produced in excess of quotas established by the federal

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43 For discussions of constitutional change during this period, see, e.g., Barry Cushman, Rethinking the New Deal Court: The Structure of a Constitutional Revolution (New York: Oxford University Press, 1998) and William Leuchtenburg, The Supreme Court Reborn (New York: Oxford University Press, 1995).
44 For a survey of the different New Deal interventions, see Higgs, Crisis and Leviathan, 159-95. Many New Deal policies actually had their origins in the initiatives of the previous administration of Herbert Hoover, who was a convinced interventionist, not an advocate of laissez-faire. See Joan Hoff Wilson, Herbert Hoover: Forgotten Progressive (Boston: Little Brown, 1975).
government. But even during the early New Deal period, the Court did not strike down all major new regulatory legislation.

In 1937, the Court largely stopped resisting the expansion of Congress’ powers. The shift in the Court’s position coincided with President Roosevelt’s effort to “pack” the Court by enacting a law that would allow him to add a new justice for every current justice over the age of 70 who chose not to resign. Since many of the justices who voted to strike down New Deal laws were over age 70, the effect would have been to allow him to create a new majority more amenable to his preferences. Controversy still rages over whether the Court’s change of course was a “switch in time that saved nine” motivated by a desire to forestall the court-packing plan, which was eventually defeated in Congress. Whatever the reason, the majority of the Court gradually gave up its resistance to New Deal legislation. In United States v. Jones & Laughlin Steel (1937) and United States v. Darby (1941), the Court repudiated most of the pre-New Deal restrictions on Congress’ Commerce Clause authority.

In Steward Machine Co. v. Davis (1937) and Helvering v. Davis, the Supreme Court upheld the constitutionality of the Social Security Act, which created federal and cooperative intergovernmental programs for unemployment insurance, retirement pensions, and welfare for single mothers. Davis and the Court’s earlier decision in Butler also endorsed the theory that

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49 Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).
50 For example, in 1935, the Court narrowly upheld the constitutionality of sweeping new federal regulations requiring private individuals to turn in all gold coins and gold bullion they owned to the government. See United States v. Bankers Trust Co., 294 U.S. 240 (1935); Nortz v. United States, 294 U.S. 317 (1935); Perry v. United States, 294 U.S. 330 (1935).
51 For recent accounts, see e.g., Burt Solomon, FDR v. the Constitution: The Court-Packing Fight and the Triumph of Democracy (New York: Walker & Co. 2009) and Jeff Shesol, Supreme Power: Franklin Roosevelt vs. the Supreme Court (New York: Norton, 2010). For an influential account suggesting that the Court’s shift was not motivated by political considerations, see Cushman, Rethinking the New Deal Court, 20-32.
52 301 U.S. 1 (1937).
53 312 U.S. 100 (1941).
54 301 U.S. 548 (1937).
55 301 U.S. 619 (1937).
Congress’ power to spend money for the “General Welfare” allowed it to spend for nearly any purpose it might choose.\(^56\)

The Supreme Court’s broadest New Deal-era interpretation of federal power came in *Wickard v. Filburn* (1942).\(^57\) The Court ruled that the Commerce Clause authorized a provision of the 1938 Agricultural Adjustment Act that required a wheat farmer to limit his production of wheat, even though none of that wheat was ever sold in interstate commerce or crossed state lines. This decision went beyond previous cases such as *Darby*, which had all involved regulation of commercial employment relationships or the production of goods for sale in the market. It suggested that Congress had the power to regulate almost any activity that, in the aggregate, has a significant effect on commerce. In the modern world, that could mean almost any activity of any kind.

By 1942, all but one of the nine Supreme Court justices had been appointed by Roosevelt. Even if the swing voter justices on the old Court had remained firm, they could not have continued to resist for long. The president, backed by a Democratic majority in the Senate, could eventually get what he wanted by appointing justices willing to uphold it. This was a nearly inevitable result of the Democratic Party’s long string of electoral victories in the 1930s and early 1940s, which allowed it to dominate both Congress and the presidency.

*The Partial Revival of Judicial Enforcement of Limits on Federal Power*

After the New Deal transformation of constitutional law, few structural limits on federal power remained. Between 1937 and 1995, the Supreme Court did not invalidate a single federal law as beyond Congress’ Commerce Clause authority. The Court issued noteworthy unanimous decisions holding that the Clause authorized Title II of the Civil Rights Act of 1964, which

\(^56\) Ibid, 640-41; *Butler*, 297 U.S. at 65. *Butler* had nonetheless invalidated part of the Agricultural Adjustment Act on other grounds.

\(^57\) 317 U.S. 111 (1942).
banned racial discrimination in places of public accommodation, such as hotels and restaurants.\textsuperscript{58} One of them justified the application of the law to a local restaurant that served almost exclusively in-state residents.\textsuperscript{59} The Court concluded that the Clause authorized congressional regulation of any activity that Congress had a “rational basis” for believing might have an effect on interstate commerce.\textsuperscript{60} A 1971 decision reinforced the point by upholding a federal law banning loan-sharking, even though it applied mostly to small-time local loansharks.\textsuperscript{61} In dissent, Justice Potter Stewart lamented that “under the statute before us, a man can be convicted without any proof of interstate movement, of the use of the facilities of interstate commerce, or of facts showing that his conduct affected interstate commerce.”\textsuperscript{62} The Warren Court of the 1960s, led by liberal Chief Justice Earl Warren, also took a permissive approach to the scope of Congress’ enforcement powers under Section 5 of the Fourteenth Amendment, largely deferring to congressional judgments of what qualified as “appropriate” enforcement legislation.\textsuperscript{63}

In \textit{National League of Cities v. Usery} (1976),\textsuperscript{64} the Court offered a ray of hope to advocates of judicial limits on federal power when it struck down a federal law requiring state governments to comply with the federal Fair Labor Standards Act in their dealings with their own employees. The Court ruled that, although Congress had broad power to regulate private economic activity under the Commerce Clause, the Tenth Amendment restricts such regulation when applied against state governments. The Amendment states that “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”; in the majority’s judgment, this language limited direct federal

\textsuperscript{59} McClung, 379 U.S. at 300-304.
\textsuperscript{60} Id. at 304.
\textsuperscript{61} Perez v. United States, 402 U.S. 146 (1971).
\textsuperscript{62} Ibid., 157, (Stewart, J., dissenting).
\textsuperscript{64} 426 U.S. 833 (1976).
control of “the states as states.”65 National League of Cities contrasts with the New Deal Court’s dismissal of the Tenth Amendment as “but a truism” that imposes little if any constraint on the scope of Congress’ authority.66

National League of Cities was, however, overruled in 1985.67 The majority came close to endorsing the notion that the constitutional division of authority between the federal and state governments should be determined entirely by the political process because state governments can effectively look after their own interests without assistance from the courts.68

By the 1970s, the dominant view among legal elites was that judicial review would not and should not significantly constrain the scope of federal power. This belief was buttressed both by the idea that broad federal power is necessary to deal with the complexity of the modern economy and by the association between federalism and racism that had arisen thanks to southern state governments’ attempts to use “states’ rights” to oppose federal intervention against state racial discrimination.

Beginning in the early 1990s, however, judicial enforcement of limits on federal power was partially revived under Chief Justice William Rehnquist, appointed to that position by President Ronald Reagan in 1986. The Rehnquist revival had several causes. In the 1980s and 1990s, the resurgent Republican Party claimed that federal power had grown too great and advocated allowing the states greater autonomy. Reagan and his successor President George H.W. Bush appointed several Supreme Court justices committed to reinvigorating judicial

65 Ibid., 837.
66 Darby, 312 U.S. at 124.
68 The idea that federalism issues should be left to the political process enjoyed wide support among legal academics during this period. For leading statements of that view, see, e.g., Jesse H. Choper, Judicial Review and the National Political Process (Chicago: University of Chicago Press, 1980) and Herbert J. Wechsler, “The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the Federal Government,” Columbia Law Review 54 (1954): 543-64.
enforcement of federalism, including Sandra Day O’Connor, Antonin Scalia, and Clarence Thomas.

Just as the earlier collapse of judicial review of federalism had its roots in the triumph of the New Deal coalition that dominated American politics for several decades, so the Rehnquist revival would not have been possible without the rise of more conservative political forces in the 1980s. In addition, a new generation of conservative and libertarian legal scholars began to challenge the previous intellectual consensus against judicial review of federalism. Finally, as time passed since the Civil Rights revolution of the 1960s, the association of federalism with racism diminished in the public mind.

The 1990s revival of judicial review of federalism proceeded along several fronts. In United States v. Lopez (1995), the Court issued its first decision constraining congressional power under the Commerce Clause since the 1930s. Five years later, the Court invalidated another law as beyond the commerce power in United States v. Morrison.

In interpreting the scope of Section 5 of the Fourteenth Amendment, the Rehnquist Court was less deferential than its predecessors in the 1960s. It ruled that Section 5 legislation must be “congruent and proportional” to the unconstitutional state action it sought to remedy and could not forbid too much state activity that was not unconstitutional in and of itself. In its very recent ruling in Shelby County v. Holder, the Roberts Court similarly limited the scope of

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69 For a well-known work defending the theory that judicial review generally follows the dictates of dominant political coalitions at the federal level, see Jack M. Balkin and Sanford Levinson, “Understanding the Constitutional Revolution,” Virginia Law Review 87 (2001): 1045-1109.
72 529 U.S. 598 (2000).
73 See City of Boerne v. Flores, 521 U.S. 507 (1997). Morrison also applied this principle in ruling that a provision of the Violence Against Women Act was not narrowly enough targeted against actual state government discrimination against women.
74 133 S.Ct. 2612 (2013).
Congress’ powers under Section 2 of the Fifteenth Amendment, which authorizes it to pass “appropriate” legislation to implement the Amendment’s ban on racial discrimination in voting.

In response to massive longstanding discrimination against African-American voters in the southern states, Congress enacted the Voting Rights Act of 1965, which included a provision requiring many state and local government in the South (and a few elsewhere) to “preclear” any changes to their voting laws with the federal Justice Department. While few today doubt that this sweeping measure was “appropriate” in 1965, the issue confronting the Court in *Shelby County* was whether the application of preclearance to these same jurisdictions is still appropriate after nearly fifty years of extensive political change during which minority participation in elections has greatly increased, to the point where it is often no worse in the covered jurisdictions than elsewhere.

Because “things have changed [so] dramatically,” a narrow 5-4 majority ruled that Congress’ 2006 reauthorization of the list of jurisdictions subject to preclearance was unconstitutional, as there is no longer a close enough fit between the list of covered jurisdictions and the prevalence of discrimination against minority voters. Both the justices and outside commentators were sharply divided between those (mostly on the right) who believed that the Court’s decision was a justifiable response to changing historical circumstances, and those (mostly on the left) who argued that it showed insufficient deference to Congress and opened the door to future racial discrimination in election law.

The Rehnquist Court also issued a series of decisions ruling that the Tenth Amendment bars federal “commandeering” of state officials for the purpose of using them to enforce federal

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75 Ibid. at 2625-31.
76 For the latter view, see ibid., at 2636-51 (Ginsburg, J., dissenting)
law. In the very recent case of *Windsor v. United States*, the present Roberts Court built on the Rehnquist Court’s emphasis on respect for state prerogatives by striking down Section 3 of the Federal Defense of Marriage Act, which denied federal marriage benefits to same-sex couples who had entered into marriages in states that permit gay marriage under their state law. The Court invalidated the law in part because it intruded into a field normally left to the states.

Finally, the Court began to enforce more vigorously the theory that the Eleventh Amendment, which bars suits against nonconsenting state governments “by Citizens of another State, or by Citizens or Subjects of any Foreign State,” also implicitly forbids the federal government from authorizing private lawsuits against states even by their own citizens.

The Rehnquist “federalism revolution” was an important jurisprudential development. But its real-world impact on the scope of federal power has so far been limited. In the Commerce Clause field, the Court struck down only relatively minor laws in *Lopez* and *Morrison*: the Gun Free School Zones Act barring gun possession near a school zone, and a provision of the Violence Against Women Act giving victims of gender-motivated violence the right to sue their alleged assailants in federal court. Both were invalidated because they did not regulate any kind of “economic activity,” and were not an “essential” part of any broader economic regulatory scheme. This leaves plenty of room for Congress to continue to regulate economic transactions and even any “noneconomic” activities that it seeks to control as part of a broader system of economic regulation. Moreover, any restrictive impact that *Lopez* and *Morrison* might have had

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79 Because of its significant implications for individual rights, this case is discussed in greater detail in Part III of this chapter.
80 U.S. Constitution, Amendment XI.
82 *Lopez*, 514 U.S. at 558-64; *Morrison*, 529 U.S. at 610-14.
was seriously undermined by the Court’s next Commerce Clause decision, *Gonzales v. Raich* (2005).\(^8^3\)

The 6-3 majority in *Raich* ruled that the Commerce Clause allowed Congress to ban the possession and production of medical marijuana even when the drug in question had never crossed state lines or been sold in any market. Unlike the farmer in *Wickard*, who used his wheat to feed his own cows as part of a commercial farming operation,\(^8^4\) Angel Raich’s marijuana production was not part of any commercial enterprise. The Court nonetheless ruled that Congress’ power extended to this case because Raich’s actions qualified as “economic activity,” which it defined broadly as any activity that involves “the production, distribution, and consumption of commodities,”\(^8^5\) and also because it was “rationally” connected to a broader regulatory effort to suppress the national market in marijuana. By defining “economic activity” so broadly and taking a deferential stance on the issue of whether even noneconomic activity could be regulated, *Raich* diminished the likelihood that *Lopez* and *Morrison* would lead to significant constraints on federal power.\(^8^6\) Importantly, the *Raich* majority included key conservative justices Anthony Kennedy and Antonin Scalia, who had voted to limit federal authority in *Lopez* and *Morrison*.

Similar, though less severe, constraints limit the impact of the Court’s other recent decisions restraining federal power. The commandeering cases can to a large extent be circumvented by tying mandates imposed on state governments to federal grants as conditions that the recipients must meet. Conditional grants can also be used to get around the Court’s Eleventh Amendment jurisprudence. States can be induced to consent to allow themselves to be

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\(^{8^3}\) 545 U.S. 1 (2005).
\(^{8^4}\) *Wickard*, 317 U.S. at 114
\(^{8^5}\) *Raich*, 545 U.S. at 25-26.
sued as a condition of receiving federal funds. In addition, the Court has ruled that the Eleventh Amendment does not bar lawsuits authorized by Congress’ enforcement powers under the Fourteenth Amendment, which the Court still sometimes defines broadly. 87

Finally, until very recently, the Court made no effort to limit Congress’ powers under the Spending Clause. The 1987 case of *South Dakota v. Dole* reiterated the rule that Congress’ power to spend money for the General Welfare encompasses almost any objective the legislature might choose, and also gives it broad power to make conditional grants to state governments. 88

It is too early to fully assess the potential effects of *NFIB v. Sebelius*, 89 the Court’s blockbuster 2012 ruling on constitutional challenges to the Affordable Care Act, President Barack Obama’s 2010 health-care law. 90 In *NFIB*, 26 state governments and various private parties challenged the constitutionality of a central provision of the ACA, the mandate requiring most Americans to purchase government-approved health insurance by 2014. The challengers argued that the mandate was different from previous federal regulations approved under the Commerce Clause because it did not regulate any preexisting economic activity, even under the broad definition of such endorsed by the Court in *Raich*. Instead, it forced people to buy insurance even if they had been inactive.

A 5-4 majority accepted this argument, concluding, as Chief Justice John Roberts put it, that Congress does not have the power to “regulate individuals precisely because they are doing

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87 See, e.g. *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), which upheld the application of the US Family and Medical Leave Act to state governments, despite the relative weakness of evidence that the absence of mandated family leave in some states was a result of unconstitutional sex discrimination.
nothing.” 91 A majority of the Court also ruled that the mandate is not authorized by the Necessary and Proper Clause, holding that the mandate is not “proper” even if it is necessary. 92

However, Chief Justice Roberts broke with the Court’s other four conservatives and upheld the mandate on the basis that it could be interpreted as a tax authorized by Congress’ power to impose taxes. 93 He claimed that the mandate might be considered a tax because an individual’s failure to purchase insurance (a) triggered a relatively small monetary fine collected by the Internal Revenue Service, (b) does not qualify as a crime if the fine is paid, and (c) does not require a showing of criminal intent. 94 Thus, he avoided striking down what would have been the most important federal law invalidated by the Court as beyond the scope of federal power since the 1930s.

The 26 state governments challenging the ACA also argued that its requirement that states greatly expand the scope of their Medicaid programs (i.e., health insurance for the poor), or else lose all of their federal Medicaid money, was unconstitutional. Surprisingly, they prevailed. Chief Justice Roberts and six other justices voted to partially strike down the Medicaid expansion because it was unconstitutionally “coercive,” acting as a “gun to the head” of the states, which stood to lose federal Medicaid subsidies equal to as much as 10 to 16 percent or more of their total state budgets, unless they accepted the expansion. 95 While previous decisions had noted that “coercive” grants were unconstitutional, this was the first use of the spending power that the Supreme Court invalidated as unconstitutional since the 1930s.

91 NFIB, 132 S.Ct. at 2587 (Roberts, C.J.).
92 Ibid., 2591-93.
93 Ibid., 2594-2600.
94 Ibid.
95 Ibid. 2601-2607. The court did, however, allow the federal government to offer the states new subsidies in exchange for expanding Medicaid, even though it eliminated the threat to cut the states’ massive preexisting Medicaid grants. Ibid.
Whether NFIB has any major impact on future cases remains to be seen. The ruling that the Commerce Clause and Necessary and Proper Clause do not authorize federal regulation of people who are “doing nothing” might limit future federal mandates. But such mandates could potentially be structured to fit Roberts’ definition of a tax, though the penalties for violation would have to be limited to monetary fines similar to those embedded in the ACA.

The Spending Clause ruling could potentially limit future conditions attached to federal grants to state governments. But it is hard to say whether any such conditions will be deemed by courts to be so coercive as to amount to a “gun to the head.”

Shelby County v. Holder, discussed above, may also turn out to be a decision with significant real world effects. The preclearance system invalidated by the Court had a major effect on politics in the covered states. However, the long-term effects of the ruling are difficult to predict. Congress remains free to design new criteria for selecting jurisdictions for preclearance, and the Voting Rights Act also includes other tools for combating racial discrimination in voting.

It is important to emphasize that most of the recent decisions striking down federal laws as beyond the scope of congressional power were 5-4 rulings pitting the Court’s five conservatives against its four liberals. Most liberal judges and legal scholars continue to oppose anything more than minimal judicial enforcement of limits on federal power. As evidenced by the Raich case, conservative jurists have not been completely consistent in their support of limits on federal power. But many of them do favor enforcement of at least some substantial

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96 Some contend that this ruling is not part of the Court’s holding, since it was not necessary to reach the ultimate result that the mandate is constitutional. In a section of his opinion joined by the four liberal justices who also voted to uphold the mandate, the Court specifically states that the Commerce Clause ruling is part of the holding. Ibid., 2593. Whether lower courts and future Supreme Court decisions accept this characterization of the holding remains to be seen.

97 NFIB was a rare exception, in that two liberal justices joined the five conservatives in striking down part of the law’s expansion of Medicaid.
constraints. Whether the federalism revival of the last twenty years has any long-term staying power is likely to depend on which party makes future Supreme Court appointments, and also on whether advocates of judicial enforcement of federalism are able to attract liberal support.

III. Judicial Enforcement of Limits on State Power

In contrast to the Supreme Court’s equivocal record of enforcing limits on federal power, it has historically enforced a variety of limits on state power. Even as judicial enforcement of the former waned after the 1930s, the exercise of judicial power against state governments greatly expanded and shows few signs of abating. The federal courts’ restrictions on state laws have been so many and varied that it is impossible to give more than a general summary. There has never been a prolonged period when the federal courts did not use judicial review to impose substantial restrictions on state governments.

The Nineteenth and Early Twentieth Centuries

The period before the Civil War of 1861-65 and the enactment of the Fourteenth Amendment in 1868 is sometimes seen as a time when the judiciary did little to constrain the states. During this period, the Court did not apply the Bill of Rights – the individual rights protected by the first ten Amendments of the US Constitution – to state governments. Even after enactment of the Fourteenth Amendment, the Court did not apply the Bill of Rights to the states for many years. Nonetheless, pre-Civil War federal courts restricted state governments in other ways.

Several important early Supreme Court decisions overturned state laws that set aside contractual obligations, as violating the Contract Clause of the Constitution, which forbids states

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98 In 1833, the Court ruled that the Bill of Rights only applied against the federal government. See Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833).
from impairing the obligation of contracts. The nineteenth-century federal courts also enforced the “Dormant Commerce Clause” against the states, interpreting the Commerce Clause’s grant of power to regulate interstate commerce as an implicit prohibition on state legislation that restricted interstate trade and commercial enterprise even in the absence of contrary federal legislation. Gibbons v. Ogden and McCulloch v. Maryland both invalidated state laws interfering with interstate commercial enterprises, as well as upholding federal laws. The Supreme Court also acted to curb some northern states’ efforts to protect free blacks and escaped slaves from the onerous federal Fugitive Slave Acts.

After the Civil War, the Court applied the newly enacted Thirteenth, Fourteenth, and Fifteenth Amendments which abolished slavery and protected a variety of individual rights against infringement by state governments. In the Court’s first major case involving the Fourteenth Amendment, the Slaughterhouse Cases (1873), it took a narrow view of the amendment’s Privileges or Immunities Clause, which bars states from infringing on the “Privileges or Immunities” of American citizens. The Court interpreted the Clause as primarily a protection for existing federal rights, rather than one that protected a variety of economic and personal liberties. This decision largely gutted what many of the framers of the Amendment had considered to be its most important provision.

99 See, e.g., Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).
100 For a review of these cases and their impact, see Michael S. Greve, The Upside-Down Constitution (Cambridge: Harvard University Press, 2012), ch. 4.
101 See discussion of these cases in Part II.
102 See, e.g., Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842) which ruled that the act and the Fugitive Slave Clause of the Constitution negated Pennsylvania’s “personal liberty law,” which sought to protect blacks against “self-help” kidnapping by slavecatchers. See also Ableman v. Booth, 62 U.S. (21 How.) 506 (1859), which overruled Wisconsin’s efforts to free an abolitionist imprisoned for trying to help blacks resist the Fugitive Slave Act.
103 83 U.S. (16 Wall.) 36 (1873).
The late nineteenth century Court did, however, make some efforts to enforce the Amendment’s protections against racial discrimination, most notably in *Strauder v. West Virginia*, which struck down a state law banning African-Americans from juries.\(^{105}\) In *Yick Wo v. Hopkins* (1886),\(^{106}\) the Court established the important principle that even a law that does not discriminate on its face might be struck down if strong evidence suggests that it was enacted for the purpose of disadvantaging a racial minority.

These decisions, however, had only a limited impact. As Reconstruction ended in the late 1870s and early 1880s, and northern whites became less interested in protecting the rights of African-Americans in the South, the Court’s efforts to protect those rights waned. In 1896, the Court decided *Plessy v. Ferguson*,\(^{107}\) a ruling that upheld the constitutionality of a state law mandating segregation in railroad cars and generally gave states wide latitude to adopt racially discriminatory legislation. *Plessy* became one of the most reviled decisions in Supreme Court history. It inaugurated an era where the courts tolerated extensive racial discrimination against blacks and other minorities. Some scholars argue that, so long as public and elite opinion was largely supportive or at least indifferent to such discrimination, the courts did little or nothing to protect minorities against it.\(^{108}\)

But even during the height of Jim Crow segregation, the Supreme Court issued important decisions ameliorating the plight of African-Americans – most notably the peonage cases,\(^{109}\)

\(^{105}\) 100 U.S. 303 (1880).
\(^{106}\) 118 U.S. 356 (1886).
\(^{108}\) For the most thorough defense of this position, see Michael Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (New York: Oxford University Press, 2004); see also Gerald N. Rosenberg, *The Hollow Hope* (Chicago: University of Chicago Press, Rev. ed. 2008).
which struck down state laws limiting the ability of black workers to leave their jobs, and *Buchanan v. Warley*, a 1917 decision striking down residential segregation laws.  

Judicial review of state laws in the nineteenth and early twentieth centuries is perhaps best-known for the so-called *Lochner* era of invalidation of state economic regulations, named after *Lochner v. New York*, a 1905 case striking down a New York law imposing maximum hours for bakers under the Due Process Clause of the Fourteenth Amendment, which forbids states from depriving people of life, liberty, or property without “due process of law.” Like *Plessy*, *Lochner* has become one of the Court’s most denounced rulings, reviled as “judicial activism” intended to benefit the wealthy at the expense of the poor. Many critics have also attacked what they consider to be *Lochner’s* oxymoronic use of “substantive due process.” By definition, they argue, “due process” cannot include any protection for substantive rights.

Revisionist scholars have pointed out that the *Lochner* era Supreme Court upheld far more state regulatory laws than it struck down – only invalidating those that seemed clearly driven by interest-group lobbying rather than genuine efforts to protect public health or safety. Revisionists also contend that judicial review of economic regulations had greater basis in precedent and original meaning than conventional wisdom suggests. Nonetheless, the early twentieth-century Court did impose some meaningful constraints on state economic regulation.

*Lochner*-era Due Process Clause review of state laws protected what we would today call civil liberties, as well as economic freedoms. For example, it led the Court to strike down state

\footnotesize{\textsuperscript{10}} 245 U.S. 60 (1917). For a detailed discussion of the important real-world effects of these cases, see David E. Bernstein and Ilya Somin, “Judicial Power and Civil Rights Reconsidered,” *Yale Law Journal* 114 (2004): 593-657.

\footnotesize{\textsuperscript{11}} 198 U.S. 45 (1905).

\footnotesize{\textsuperscript{12}} For a modern defense of this conventional wisdom, see Paul Kens, *Lochner v. New York: Economic Regulation on Trial* (Lawrence: University of Kansas Press, 1998).


\footnotesize{\textsuperscript{14}} For other notable cases striking down economic regulations, see, e.g. *Adkins v. Children's Hospital*, 261 U.S. 525 (1923) (striking down a minimum wage law for women); and *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).}
laws forbidding foreign language instruction for students\textsuperscript{115} and mandating that children attend public schools instead of private religious schools.\textsuperscript{116} “Substantive” due process also contributed to the Court’s crucial decision striking down residential segregation laws in \textit{Buchanan v. Warley}.\textsuperscript{117} Although \textit{Buchanan} did not end residential segregation, it played an important role in enabling African-Americans to move into many areas otherwise barred to them.\textsuperscript{118}

\textit{The Modern “Rights Revolution”}

The New Deal transformation of the 1930s that undermined judicial review of federalism issues also led to the reversal of \textit{Lochner} and other cases that used the Due Process Clause to protect economic liberty against state governments.\textsuperscript{119} By 1955, the Court ruled that “economic” regulations could only be invalidated if there was no conceivable “rational basis” for them, even one that the state legislature did not consider when it adopted the law.\textsuperscript{120} The New Deal-era Court also undermined previously strong judicial enforcement of contractual rights under the Contracts Clause, thereby increasing state autonomy.\textsuperscript{121} As with the decline of judicial enforcement of federalism, declining judicial protection of economic liberties was in large part caused by changing public and elite opinion, and the appointment of new Supreme Court justices in line with prevailing sentiment.

But the post-New Deal Court continued and greatly expanded judicial review of state laws infringing a variety of noneconomic rights. The post-World War II period witnessed a

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\begin{itemize}
\item \textsuperscript{115} Meyer v. Nebraska, 262 U.S. 390 (1923).
\item \textsuperscript{116} Pierce v. Society of Sisters, 268 U.S. 510 (1925). For the connection between Meyer and Pierce and Lochner, see Bernstein, \textit{Rehabilitating Lochner}, 93-96.
\item \textsuperscript{117} Bernstein, \textit{Rehabilitating Lochner}, 78-86.
\item \textsuperscript{118} For a detailed discussion of \textit{Buchanan}’s effects, see Bernstein and Somin, “Judicial Power and Civil Rights Reconsidered,” 631-40.
\item \textsuperscript{119} See, e.g., \textit{West Coast Hotel v. Parrish}, 300 U.S. 379 (1937).
\item \textsuperscript{120} Williamson v. Lee Optical Co., 348 U.S. 483 (1955).
\item \textsuperscript{121} Home Bldg. & Loan Association \textit{v. Blaisdell}, 290 U.S. 398 (1934).
\end{itemize}
“rights revolution” that led to the growth of judicial enforcement of numerous rights provisions against state governments.  

Perhaps the most important expansion of judicial review during this period was the Court’s effort to curb racial discrimination by state governments. *Brown v. Board of Education* (1954), which struck down racial segregation in public schools, is probably the most iconic decision in Supreme Court history. Although *Brown* built on earlier precedents, including some from before the New Deal, it would not have been possible in the absence of outside political changes, including liberalization of northern white opinion on racial issues, the increasing political power of African-Americans in the North, and the slowly rising social and economic status of nonwhites.

Nonetheless, *Brown* represented a major judicial effort to curb racial discrimination by state governments at a time when the president and Congress were not yet ready to act on the issue in a significant way. Over the next twenty years, the Supreme Court and lower courts issued many decisions following up on *Brown* and also striking down other types of state discrimination against racial minorities.

The conventional wisdom holds that these decisions played a key role in revolutionizing American race relations and ensuring greater equality for racial minorities. Revisionist scholars, however, argue that they had little effect until Congress and the president began their own efforts to enforce black civil rights in the mid-1960s. It is true that there was little school...
desegregation in most of the South until Congress intervened. But Brown and its progeny played a key role in promoting desegregation in other ways, including by raising the political and economic cost of maintaining Jim Crow policies for state governments.  

The fight against racial discrimination also stimulated efforts by various social movements to persuade the judiciary to interpret the Equal Protection Clause to constrain discrimination against other groups. Beginning in the 1970s, the Supreme Court issued a series of decisions imposing heightened “intermediate” scrutiny of laws that discriminate based on gender.  

Starting in the 1990s, the Court began to limit laws discriminating against gays and lesbians. In its June 2013 ruling in United States v. Windsor, the Supreme Court struck down Section 3 of the Defense of Marriage Act (DOMA), a federal law that denied federal marriage benefits to people who have entered into same-sex marriages in the twelve states that permitted them at the time. The decision was partly based on federalism considerations. Because of “DOMA’s unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage,” Section 3 was subject to a higher level of judicial scrutiny than would otherwise have applied. But the Court also emphasized that DOMA’s discrimination against same-sex marriage was unconstitutional because the law was based on “animus” against gays and lesbians and intended to “have the purpose and effect” of signaling “disapproval” of same-

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128 For a critique of the revisionist literature, see Bernstein and Somin, “Judicial Power and Civil Rights Reconsidered,” pp. 645-56.

129 See Craig v. Boren, 429 U.S. 190 (1976), the decision which first adopted that standard; and United States v. Virginia, 518 U.S. 515 (1996), a key case restricting single-sex education at state universities.


sex couples. For this reason, the Court concluded that DOMA “violates basic due process and equal protection principles applicable to the federal government.” Indeed, federalism considerations were relevant precisely because Congress’ intrusion into an area usually left to the states created a “discrimination of an unusual character” that required added judicial scrutiny to determine if it was adopted for an illicit purpose. Obviously, the “due process and equal protection principles” applicable to the federal government also apply to the states, due to the Fourteenth Amendment. This suggests that Windsor might eventually lead to a Supreme Court decision striking down state laws banning gay marriage, though such a result cannot be predicted with any certainty at this time.

On the same day that it decided Windsor, the Court also dismissed on procedural grounds a case challenging California’s ban on gay marriage. The plaintiffs had argued that such laws discriminate against gays and lesbians in ways banned by the Fourteenth Amendment. In the wake of Windsor, the issue will continue to be litigated in the lower courts, and may well eventually return to the Supreme Court. As this chapter goes to press in July 2013, new lawsuits challenging laws banning same-sex marriage are likely to soon be filed in several states.

Over the last sixty years, the Supreme Court has gradually adopted the theory that the Fourteenth Amendment “incorporates” all or most of the US Bill of Rights against state governments through the Due Process Clause. After the Court’s 2010 decision incorporating

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133 Windsor, 133 S.Ct. at 2693.
134 Ibid.
135 Ibid.
138 The prevailing legal standard is that these rights will be incorporated if they are considered “fundamental” and “deeply rooted in American history and tradition. See, e.g., Duncan v. Louisiana, 391 U.S. 145 (1968). For arguments that incorporation is consistent with the original meaning of the Fourteenth Amendment, see, e.g, Akhil
the Second Amendment right to “keep and bear arms,” only the Third Amendment right not to have troops quartered in private homes, the Fifth Amendment right to an indictment by a grand jury in criminal cases, and the Seventh Amendment guarantee of a jury trial in civil cases remain unincorporated.

The cumulative impact of these incorporation decisions has been extremely broad, forcing states to adhere to unitary national standards in a wide range of areas. The incorporation of the First Amendment’s Free Speech Clause has resulted in stringent limits on censorship of most types of speech and also on tight restrictions on state regulation of pornography and obscenity. Application of the First Amendment’s ban against the establishment of religion has led to strict limits on the ability of government to endorse religions, require prayer in public schools, and display religious symbols on public property. These decisions remain profoundly controversial, especially in socially conservative areas of the country where local public opinion prefers greater integration of religion into public education and civic life. Since education policy in the United States has historically been largely controlled by local governments, there is sometimes considerable resentment over federal court intervention in this field.

Incorporation of the First Amendment’s Free Exercise of religion clause has prevented states from targeting unpopular religious minorities. The incorporation of the Eighth Amendment’s ban on “cruel and unusual punishment” has resulted in numerous court decisions

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143 E.g., *Allegheny County v. ACLU*, 492 U.S. 573 (1989)

144 See, e.g., *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), an important Supreme Court decision protecting practitioners of Vodun, popularly known as “Voodoo” from laws banning their animal sacrifices.
regulating the treatment of prisoners, and several decisions restricting applications of the death penalty.

One of the most extensive effects of incorporation has been in the field of criminal procedure, where the incorporation of rights such as the Sixth Amendment right to counsel and to a jury trial, the Fourth Amendment protection against unreasonable searches and seizures, including the “exclusionary rule” requiring exclusion of illegally seized evidence from trials, and the Fifth Amendment’s right against self-incrimination have led to a profound transformation in state criminal procedure, as well as in police and court practices. This is so large a topic that covering it would require an article of its own. But it is worth noting that the famous *Miranda* warning familiar to television and movie audiences around the world is a requirement imposed on states by a 1966 Supreme Court decision. Because of its widespread and highly visible effects, this form of judicial intervention against the states has probably had a greater impact on popular consciousness than almost any other.

The end of economic “substantive due process” after the demise of *Lochner* emphatically did not put an end to the use of the Due Process Clause to protect other “noneconomic” rights. The scope of such judicially enforced rights has expanded over the last fifty years. In addition to the incorporation of most of the Bill of Rights, “substantive due process” has also been used to protect a wide range of unenumerated rights.

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The most controversial of the new Due Process Clause rights protected by the Court in this way are those considered to be part of the right to “privacy.” The Court first explicitly addressed privacy in *Griswold v. Connecticut* (1965), a decision that struck down the only remaining state law banning possession of contraceptives even by married people.\(^{151}\) From this modest beginning, the right to privacy expanded to cover other issues,\(^{152}\) most notably in *Roe v. Wade* (1973),\(^{153}\) the Supreme Court’s controversial decision establishing a right to abortion. Even forty years later, *Roe* remains a focus of bitter political conflict, especially in conservative states that would like to establish significantly tighter restrictions on abortion than the Court’s jurisprudence allows.

During the 1960s and 1970s, judicial protection of rights against state governments was seen as a largely liberal cause. Conservatives routinely denounced the Court for its “activism.” As the Court’s composition has become more conservative over the last thirty years, however, conservatives and libertarians have also sought to use judicial review to protect rights they value. The Court’s recent incorporation of the Second Amendment right to keep and bear arms is the culmination of a longstanding effort by advocates of gun rights.

Conservative opponents of preferences for racial minorities have persuaded the Court to rule that its earlier precedents banning racial discrimination by state governments also require “strict scrutiny” of preferences intended to benefit historically disadvantaged minorities.\(^{154}\) Conservatives and libertarians have also sought – with mixed success – to persuade the courts to provide stronger protection for property rights under the Fifth Amendment’s Takings Clause.


\(^{153}\) 410 U.S. 113 (1973).

\(^{154}\) See, e.g., *City of Richmond v. Croson*, 88 U.S. 469 (1989), the case which first applied strict scrutiny to affirmative action programs.

Judicial review has also had a substantial effect on state political processes. The Court’s 1964 decision in \textit{Reynolds v. Sims} interpreted the Fourteenth Amendment as requiring states to have election districts of equal population size for their state legislatures, ending the widespread practice of giving “extra” representation to rural districts and others.\footnote{377 U.S. 533 (1964).} A 1995 decision invalidated state laws limiting the number of terms to which members of Congress can be elected.\footnote{\textit{US Term Limits v. Thornton}, 514 U.S. 779 (1995). Unlike \textit{Reynolds}, this ruling invalidated a state election law because the majority concluded that it violated the Constitution’s implicit requirement that states cannot limit the range of people eligible to run for federal offices, rather than because it violated individual rights.}

Some of the Court’s decisions enforcing individual constitutional rights restrict the federal government as well as states, and a few have invalidated significant federal laws.\footnote{See e.g., \textit{Bolling v. Sharpe}, 347 U.S. 497 (1954) (ruling that the Fourteenth Amendment’s restrictions on racial discrimination apply to the federal government); \textit{Citizens United v. Federal Election Commission}, 558 U.S. 50 (2010) (striking down a significant federal campaign finance law as violating the First Amendment).} But, historically, the federal courts have invalidated many fewer federal laws than state laws. And even when they do strike down federal laws, the result does not necessarily promote state autonomy because the relevant legal norm is still defined and enforced by a federal institution.

In sum, the Court has a long history of enforcing a wide range of constraints on state governments, a trend that shows little sign of abating. By establishing and enforcing uniform national standards for a wide range of individual rights, the federal judiciary has been a powerful force constraining state autonomy.
IV. Why Judicial Review Promotes Unitarism More than Federalism

Although judicial review has limited both federal and state power at different times in American history, it has constrained the states far more. Especially since the late 1930s, federal courts have imposed only modest constraints on the federal government, even as they enforce far greater restrictions on state government autonomy. Today, the courts enforce an extraordinarily wide range of rights against state governments, all of them tending to force the states to adhere to uniform, federally imposed standards.

This pattern is not accidental. Judicial action against federal laws is hampered by several important structural constraints. Most importantly, federal judges are appointed by the president and confirmed by the Senate, limiting the extent to which there is likely to be a Supreme Court majority that diverges greatly from the preferences of the federal government’s political branches. When the Court substantially deviates from the latter’s views, it is often brought into line by new judicial appointments. Historically, presidents have usually sought to appoint judges supportive of their party’s agenda, which often coincides with that of the majority public opinion.

Even when justices wish to restrict federal power, they are careful not to offend majority public opinion and the national political branches too much, since they depend on the latter to enforce their decisions. Congress also has the power to limit the courts’ appellate jurisdiction, increase (but not decrease) judicial pay, and create new judicial positions to be filled by appointees potentially more amenable to the wishes of the dominant political coalition in the federal government.
Flouting national public opinion can create a damaging political backlash that leads to the Court’s defeat.¹⁵⁹ In the most dramatic such case, the Court’s efforts to protect slavery in Dred Scott backfired so completely that it helped bring on the early abolition of the institution Chief Justice Taney hoped to defend. While both state and federal officials usually comply with judicial rulings, and the institution of judicial review enjoys broad public support,¹⁶⁰ the justices know that both compliance and support could erode if they make too many unpopular decisions.

In some federal systems, efforts to limit federal power are buttressed by the reality that subnational governments are bulwarks for national ethnic minorities that are majorities within a particular region.¹⁶¹ In the United States, however, the most important national minorities are also minorities within the states. As a result, minority groups usually do not view state governments as their protectors, and American federalism has been historically tainted by its association with racial discrimination against African-Americans.¹⁶²

Even state governments often have an interest in promoting expanded federal power because they want more federal subsidies and often also support federal laws that limit economic

¹⁵⁹ For the argument that the courts have been increasingly attentive to majority opinion over time, see Barry Friedman, The Will of the People: How Public Opinion has Influenced the Supreme Court and Shaped the Meaning of the Constitution, (New York: Farrar, Straus & Giroux, 2009)
¹⁶⁰ The Supreme Court typically enjoys much higher public approval ratings than the other branches of government. Even when public approval of the Court was unusually low in early 2013, 52% of Americans still approved of its performance, compared to only 31% who disapproved. See Pew Research Foundation, “Supreme Court’s Favorable Rating Still at Historic Low,” Mar. 25, 2013, available at http://www.people-press.org/2013/03/25/supreme-courts-favorable-rating-still-at-historic-low/. Since 1985, the Court’s approval rating has usually ranged from 60 to 75 percent. Ibid.
¹⁶¹ See works cited in note 4 above.
¹⁶² This may be changing in recent years, as minority groups have gained greater power in state and local governments and in some cases have achieved greater influence over them than over the federal government. For an argument along these lines, see Heather K. Gerken, “A New Progressive Federalism,” Democracy (Spring 2012), available at http://www.democracyjournal.org/24/a-new-progressive-federalism.php?page=1.
competition between state governments.\textsuperscript{163} \textit{NFIB v. Sebelius} was thus an unusual case because 28 state governments had filed lawsuits against a major new federal program.\textsuperscript{164}

Courts face much weaker constraints when they strike down state legislation, especially state laws that are disapproved by national political majorities. In such situations, dissenting states can do little to retaliate against the judges. The federal government and sympathetic state governments elsewhere in the country may even support such judicial intervention.

This is not to suggest that the courts can never impose significant limits on federal power. The Supreme Court often enforced such limits during the country’s first 150 years. Also, judicial enforcement of limits on federal power has experienced a modest revival over the last twenty years. In both instances, however, judicial intervention was effective in part because external political forces backed it.

The fact that federal judges serve until they die, resign, or are impeached and removed from office also creates some opportunities for the judiciary to check the other branches of government. In some cases, the incumbent justices were appointed by previous presidents whose ideological orientation may be very different from those of their newer colleagues. Democrats Franklin Roosevelt in the 1930s and Barack Obama since 2009 both had to cope with ideologically inimical justices appointed by their predecessors. Republican presidents such as Richard Nixon sometimes face similar problems. Judicial autonomy is also reinforced by widespread political ignorance, which ensures that most voters are often unaware of all but the


\textsuperscript{164} In addition to the 26 states involved in the case that reached the Supreme Court, two other states, Virginia and Oklahoma, filed separate lawsuits challenging the law.
most controversial Supreme Court decisions.\textsuperscript{165} This sometimes enables the courts to strike down even relatively popular laws without suffering a major political backlash.

**Conclusion**

Overall, American judicial review has done far more to promote centralization than to limit the power of the federal government. This pattern is unlikely to change in the foreseeable future. However, the extent to which the courts are willing and able to limit federal power has varied widely over the course of American history.

Currently, there is sharp conflict between those who want much more aggressive judicial enforcement of limits on federal power and those who believe that this type of judicial review should be cut back or even abolished. The deep disagreement over *NFIB v. Sebelius* (2012) and *Shelby County v. Holder* (2013) reflects this division. It is not clear which side will ultimately prevail. It may be that neither will for a long time to come.

In recent decades, the debate over federalism and judicial interview has become connected to debates over interpretive methodology. Many conservative jurists, such as Justices Antonin Scalia and Clarence Thomas, argue that the Constitution should be interpreted in accordance with its original meaning, which they argue justifies stronger judicial enforcement of limits on federal power.\textsuperscript{166} Liberal jurists such as Justice Stephen Breyer tend to support “living Constitution” theories of interpretation that justify reinterpreting the text in light of contemporary needs, which they contend require broad federal power.\textsuperscript{167} The overlap between conflicts over


\textsuperscript{166} See, e.g., Thomas’ concurring opinions in *Lopez* and *Morrison* and the joint dissenting opinion authored by four conservative justices in *NFIB v. Sebelius*.

federalism and debates over interpretive methodology makes consensus in this field even more difficult to achieve.\textsuperscript{168}

Some conservatives still criticize the federal courts for what they regard as excessive limits on state-government powers in the name of enforcing individual rights. At the same time, many liberals and libertarians argue that the courts should enforce a broader menu of individual rights against the states. While federal judicial enforcement of individual rights against state governments is often associated with political liberals, in recent decades conservatives also have advocated increased judicial intervention to protect some rights, particularly property rights and the rights of gun owners. It seems unlikely that we will see a major rollback of the use of judicial review to protect individual rights against state governments. But it is difficult to say how many additional constraints courts will impose on the states in the future.

In contrast to widespread criticism of the federal courts’ role in interpreting the Constitution, there has been much less in the way of recent efforts to restructure the federal system by altering the Constitution. Some scholars have argued for significantly restructuring the Constitution in various ways.\textsuperscript{169} But such ideas have gained little political traction. In 1995, Congress came close to passing an amendment requiring the federal government to balance its budget. But it is doubtful that it would have been ratified by the necessary three-quarters of the states, even if it had passed Congress. Various other federalism-related amendment proposals have had even less success. The extraordinary difficulty of amending the Constitution has likely reduced the attractiveness of this strategy for change.

\textsuperscript{168} It should be noted that recently, some liberal constitutional law scholars have embraced originalism and argued that it justifies an expansive interpretation of federal power. See, e.g., Jack Balkin, \textit{Living Originalism} (Cambridge: Harvard University Press, 2011).

The federal courts play a complex dual role in the federal system, protecting the states in some ways while restricting their power in others. The courts are always likely to impose substantial constraints on state governments, especially those that diverge greatly from the views of national political majorities. In the right circumstances, however, they can also impose meaningful restraints on Washington.