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## THE CONSTITUTIONAL LEGITIMACY OF FREESTANDING FEDERALISM

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Responding to John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003 (2009).

In *Federalism and the Generality Problem in Constitutional Interpretation*, Professor John Manning takes aim at the Rehnquist Court's practice of invoking freestanding, textually unspecified principles of federalism as a basis for limiting congressional power. Manning identifies this practice at work in a number of decisions he terms "the 'new federalism' cases"<sup>1</sup> — in particular, the clear statement requirement of *Gregory v. Ashcroft*;<sup>2</sup> the anticommandeering rule of *New York v. United States*<sup>3</sup> and *Printz v. United States*;<sup>4</sup> and the protection of state sovereign immunity in state court of *Alden v. Maine*.<sup>5</sup> Despite their diverse subject matter, Manning demonstrates that a central analytic move in all these decisions is the Court's claim that the Constitution intended to preserve a system of dual sovereignty; from this general constitutional purpose the Court then infers restrictions on congressional power that are nowhere stated in the Constitution's text.

According to Manning, such invocation of abstract or freestanding federalism in constitutional interpretation is fundamentally at odds with the Court's textualist turn in statutory interpretation. There, the Court has rejected such general purposive analysis because it fails to respect legislative process and the reality of legislative compromise. Manning claims that resort to abstract federalism purposes is similarly disrespectful of the processes and compromises used to adopt and amend the Constitution. A key feature of these processes, to his mind, is their supermajoritarian character and emphasis on state equality, which allowed small states to extract concessions and force compromise on the Constitution's terms.<sup>6</sup> Manning sees evidence of the compromises wrought by these processes not only in the historical record of the Convention, but even more so in the specific terms of the Constitution's text and "the particularity with which the document speci-

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<sup>1</sup> John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2005 (2009).

<sup>2</sup> 501 U.S. 452, 460 (1991).

<sup>3</sup> 505 U.S. 144, 161–63 (1992).

<sup>4</sup> 521 U.S. 898, 918–25 (1997).

<sup>5</sup> 527 U.S. 706 (1999).

<sup>6</sup> See Manning, *supra* note 1, at 2045–46.

fies the means through which the federal system is to be established.”<sup>7</sup> Examining the constitutional text, he concludes “[i]t is . . . hard to deny that the document presented to the ratifiers embodied quite a number of careful and rather explicit decisions about the contours of a national government and its relationship to the states.”<sup>8</sup> Moreover, it was these “particular provisions prescribing varied means of allocating governmental power” that the founders agreed on, not federalism in general.<sup>9</sup> Accordingly, “[t]o abstract from the specific compromises reached by the Convention to their overall purposes would . . . devalue the right of the relevant stakeholders to invoke . . . participation rights to withhold their assent or condition it upon terms.”<sup>10</sup>

This attack on resort to general constitutional principles and insistence on greater attention to the implications of constitutional process and constitutional compromise undergirds much of Manning’s recent scholarship.<sup>11</sup> *Federalism and the Generality Problem in Constitutional Interpretation* is also typical of the Manning oeuvre in the clarity and force of its arguments. Manning carefully and methodically constructs a powerful case not just against freestanding federalism, but more broadly against the use of nontextually tethered structural inferences in all constitutional interpretation. Nonetheless, I remain unpersuaded for two central reasons: First, the fact of constitutional compromise simply cannot shoulder the analytic work that Manning assigns to it. Second, Manning’s argument is far more destabilizing to existing doctrines and long-established practices of constitutional interpretation than he acknowledges, which to my mind counts significantly against it. Yet although it does not deliver the knockout blow to freestanding federalism that he seeks, Manning’s article makes a forceful case for why courts should proceed cautiously when invoking general federalism principles, and — although Manning does not himself explore the point — for why courts may not be the venue in which consideration of freestanding federalism should primarily occur.

#### I. THE LIMITED INFERENCES FROM CONSTITUTIONAL COMPROMISE

Manning forthrightly acknowledges that his argument presumes that the same assumptions governing statutory interpretation apply in the constitutional context and that the task for constitutional interpre-

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<sup>7</sup> *Id.* at 2048.

<sup>8</sup> *Id.* at 2044–45.

<sup>9</sup> *Id.* at 2052.

<sup>10</sup> *Id.* at 44.

<sup>11</sup> See, e.g., John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L. J. 1663 (2004) [hereinafter Manning, *The Eleventh Amendment*]; John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP CT. REV. 223.

tation “is to try, where possible, to recover or reconstruct a historically situated understanding of the document adopted pursuant to Articles V and VII.”<sup>12</sup> I accept these presumptions here, as well as Manning’s claim that the framers reached and the ratifiers endorsed a number of compromises on specific means of achieving a federal union. Evidence from the Constitution’s text and the historical record make the latter fact of constitutional compromise indisputable. The critical question, however, is the scope of that compromise and, more specifically, whether the framers and ratifiers intended constitutional provisions addressing particular aspects of the federal-state relationship to be exclusive. If not, then neither constitutional processes fostering compromise nor evidence of actual compromises suffices to discredit recourse to general federalism principles to resolve federalism disputes to which the text of the Constitution does not clearly speak.

Manning’s argument on this crucial question of exclusivity boils down to a claim akin to the maxim that the specific trumps the general — though for Manning, the general ends up wholly obliterated. He underscores the variety of well-known ways in which the Constitution addresses particular federalism concerns, ranging from enumeration and specific limits on both federal and state governments to mechanisms for selecting federal officials and making federal laws that are structured to protect the states. Manning emphasizes the detailed and specific character of many of these federalism measures, which he argues makes it “difficult not to conclude that the founders came to terms upon a number of particular provisions prescribing varied means of allocating governmental power, rather than adopting federalism in the abstract.”<sup>13</sup>

I am not convinced that the Constitution’s numerous and particular textual references to federalism are best read to carry such an implication of exclusivity. To some extent, the Constitution’s detail reflects simply the heightened salience of certain issues at the time the document was adopted or amended; other provisions, for example on foreign affairs, were uncontroversial carry-overs from the Articles of Confederation.<sup>14</sup> That many of these provisions provoked little discussion at the constitutional or ratification conventions militates

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<sup>12</sup> Manning, *supra* note 1, at 2038.

<sup>13</sup> *Id.* at 2052; see also Manning, *The Eleventh Amendment*, *supra* note 11, at 1733–39 (analogizing to the maxim in arguing that the Eleventh Amendment’s precise text contains a negative implication against state sovereign immunity being extended to other contexts).

<sup>14</sup> See, e.g., THORNTON ANDERSON, *CREATING THE CONSTITUTION: THE CONVENTION OF 1787 AND THE FIRST CONGRESS* 81–82, 101–15 (1993) (describing limited discussion of provisions in Article I, Section 10 and economic concerns that underlay their adoption); James E. Pfander, *History and State Suability: An “Explanatory” Account of the Eleventh Amendment*, 83 *CORNELL L. REV.* 1269, 1323–52 (1998) (arguing that the Eleventh Amendment’s phrasing resulted from a particular concern to shield states from suit on Revolutionary War debt).

against reading too much into their detailed character. This is all the more true given the extent to which federalism and the relationship between the federal government and the states was a central point of division at the conventions. A separate problem, which Manning acknowledges, is that several of the Constitution's most central provisions addressing federalism are actually quite broad and ambiguous.<sup>15</sup> He insists that despite their breadth and ambiguity, none of these provisions itself embodies a freestanding federalism norm. Perhaps so, but the real question is what the inclusion of such provisions signals about how the compromises contained in the Constitution were understood. To my mind, inclusion of broad and ambiguous provisions makes it unlikely that the founders intended to preclude all reference to general federalism purposes and norms. Supporting my skepticism is the fact that state-centered federalism was the dominant norm at the time of the Constitution's adoption, and it remained so well into the nineteenth century.<sup>16</sup> Although the Constitution plainly altered that norm in many significant ways, given this background we might expect to see clearer statement that general principles of state autonomy were displaced, even as tools of construction, if that indeed represented the founders' agreement. The early battles between Federalists and Anti-Federalists over how strictly to construe the Constitution's grant of federal power and incursions on the states suggest that in fact no compromise may have been reached on this point at all.<sup>17</sup>

Manning is doubtful that the history predating the Constitution's adoption is of much use in limning its federalist meaning, because "American federalism seems to lack a clear preconstitutional antecedent capable of supplying a default position for understanding the division of governmental powers."<sup>18</sup> True, no perfect analogue existed, but it does not follow that the framers wrote on a blank slate. As

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<sup>15</sup> Manning primarily notes the Commerce Clause, the Necessary and Proper Clause, the Guarantee Clause, *see* Manning, *supra* note 1, at 2008, as well as the Tenth Amendment in this regard, *see id.* at 2063–65. Another obvious contender is the Spending Clause. *See* *United States v. Butler*, 297 U.S. 1, 65–66 (1936) (noting early debate between Madison and Hamilton about the scope of the spending power and its relationship to the enumerated powers outlined in Article I, Section 8).

<sup>16</sup> *See* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 162–68, 201–202 (1996); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 731–32 (1988). Indeed, state-centered federalism clearly limited the possibilities of change even after the Civil War. *See* BERNARD BAILYN ET AL., THE GREAT REPUBLIC 735–41 (1977).

<sup>17</sup> *See* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 931–35 (1985) (discussing the Anti-Federalist view that "the Constitution [sh]ould be read against the background of eighteenth century notions about sovereignty and the behavior of sovereign entities, *id.* at 931); *see also* RAKOVE, *supra* note 16, at 181–201 (describing the very different meanings of federalism voiced in the ratifying conventions).

<sup>18</sup> Manning, *supra* note 1, at 2059.

Manning notes, they had prior experience with two federal systems: the centralized model of the British Empire and the more state-centered governance pursued under the Articles of Confederation. That the framers opted for a new approach in which they “split the atom of sovereignty”<sup>19</sup> does not mean these experiences were irrelevant. The Constitution did not emerge in a vacuum; instead, it was drafted and adopted to address repeated failures of government under the Articles. An awareness of what these failures were is thus helpful in understanding not only what the framers sought to change, but also the potential limits of their constitutional compromises. Against the historical background of the Constitution — both the broader context of its adoption and the ongoing disputes over federalism at its drafting and ratification — Manning’s inference of exclusivity seems implausible. More likely is the view that the founders did not understand themselves to have reached agreement on constitutional federalism’s full contours, but instead expected that the details of constitutional federalism would be worked out over time.<sup>20</sup> In the words of *The Federalist No. 82*: “‘Tis time only that can mature and perfect so compound a system, can liquidate the meaning of all the parts, and can adjust them to each other in a harmonious and consistent WHOLE.”<sup>21</sup>

Similarly problematic for Manning’s inference of exclusivity is the fact that from early on the Supreme Court invoked general principles in elucidating the Constitution’s meaning on matters of federalism. The most famous example is of course *McCulloch v. Maryland*’s<sup>22</sup> derivation of federal immunity from state taxes, relying not on any specific textual provision but instead on the general principle of federal supremacy and the representative differences between federal and state governments.<sup>23</sup> But invocation of general structural principles is evident even as early as *Chisholm v. Georgia*,<sup>24</sup> where several justices invoked constitutional purposes and general arguments about the nature of state sovereignty in the federal system to draw conclusions about whether state sovereign immunity survived the enactment of Article III.<sup>25</sup> In this regard, Manning’s denomination of the freestanding federalism analysis he targets as the “new federalism” is somewhat unfortunate, as it obscures the lengthy pedigree of this approach. Such

<sup>19</sup> U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

<sup>20</sup> See Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1796 (2005).

<sup>21</sup> THE FEDERALIST NO. 82, at 490 (Alexander Hamilton) (Clinton Rossiter ed., 1999); see also THE FEDERALIST NO. 37 (James Madison), *supra*, at 225.

<sup>22</sup> 17 U.S. (4 Wheat.) 316 (1819).

<sup>23</sup> *Id.* at 425–37 (1819); see also *Collector v. Day*, 78 U.S. (11 Wall.) 113 (1871).

<sup>24</sup> 2 U.S. (2 Dall.) 419 (1793).

<sup>25</sup> Manning himself describes the general and broad tenor of the arguments in *Chisholm* in a previous article. See Manning, *The Eleventh Amendment*, *supra* note 11, at 1674–80.

early judicial practice — also manifested in the political branches<sup>26</sup> — is hard to square with the claim that the framers and ratifiers intended their compromises on specific aspects of the federal-state relationship to preclude reference to more abstract precepts in federalism disputes.

Despite his insistence to the contrary, it is not clear that Manning ultimately rests his argument for exclusivity on how the framers actually understood the scope of their compromises. Instead, his argument seems fundamentally to rest on a functional assessment that a default rule of exclusivity is more likely to preserve compromises than an interpretive approach that allows shifting in levels of generality. As Manning revealingly says, “constitutionmakers, like other lawmakers, necessarily make judgments, *whether conscious or not*, about the level of generality at which they wish to frame their policies.”<sup>27</sup> He also emphasizes that shifting to general purposes ignores that legislators often bargain about means as well as ends and may have multiple, conflicting purposes.<sup>28</sup> There is of course an irony here, in that such general presumptions about legislative and constitutional processes seem very close to the type of abstract presuppositions that Manning himself is attacking. In any event, however, such a functional argument is incomplete. A default rule or presumption against shifting levels of generality will inevitably err on the side of overprotecting textual compromises, just as a presumption of nonexclusivity will have the opposite effect. What is needed, therefore, is an account of why the systemic benefits of respecting compromise justify the costs of overprotection. Moreover, it is at this juncture that the analogy between constitutional and statutory interpretation is weakest. Several features of the constitutional context — the greater difficulty of amendment, greater risk of dead-hand governance, and greater need for flexibility in fundamental arrangements — may yield a different calculus of costs and benefits than that which applies to statutory interpretation.

## II. STRUCTURAL INFERENCE IN CONSTITUTIONAL LAW

This brings me to my second point, the destabilizing implications of Manning’s article for constitutional doctrine and our established practices of constitutional interpretation. As Manning notes, the Court justifies its invocation of general federalism principles as a form of struc-

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<sup>26</sup> Both Hamilton and Jefferson invoked general nontextual principles as well as specific constitutional provisions in their reports on the constitutionality of a national bank. See Alexander Hamilton, Opinion on the Constitutionality of an Act To Establish a Bank (Feb. 23, 1791), in 8 THE PAPERS OF ALEXANDER 97, 111 (Harold C. Syrett ed. 1965); Thomas Jefferson, Opinion on the Constitutionality of a National Bank (Feb. 15, 1791), in 5 THE WRITINGS OF THOMAS JEFFERSON 284, 289 (Paul Leicester Ford ed. 1895).

<sup>27</sup> Manning, *supra* note 1, at 2045 (emphasis added).

<sup>28</sup> *Id.* at 2016–17, 2039–40.

tural reasoning, wherein (as famously described by Charles Black) inferences about constitutional meaning are drawn not directly from specific constitutional text but from the structures and relationships the Constitution creates.<sup>29</sup> Manning's criticism of resort to atextual purposes and generality shifting would seem to call the legitimacy of this basic form of constitutional interpretation into question across the board.

To his credit, Manning acknowledges this implication, and his response is to distinguish among different forms of structural reasoning. In particular, he contends that what differentiates the "new federalism" cases is not just their invocation of general principles at best immanent in constitutional text, but rather that they "tease out a general purpose (federalism) from multiple discrete provisions that implement that background purpose in relatively precise ways. This approach, which [could be] characterized as multiclausal holism, inevitably shifts the level of generality at which those provisions express their purpose."<sup>30</sup> Manning contrasts this approach, when "the overall structure takes on a life of its own,"<sup>31</sup> to instances in which reference to other constitutional text is used to illuminate the meaning of a particular clause or structural provision.<sup>32</sup>

Unfortunately, Manning's argument succeeds neither in vindicating the technique of structural inference nor in distinguishing these federalism decisions from other structural precedent. What the technique of structural inference uniquely offers is the ability to take a more holistic view and situate a particular dispute against an overall structural framework. Manning's uniclausal approach saves the technique by removing exactly this feature and reducing structural inference to a loose form of textualism. Moreover, I disagree with Manning's claim that many of the major constitutional decisions engaging in structural reasoning have the uniclausal character he desires. In *Marbury v. Madison*,<sup>33</sup> for example, Chief Justice Marshall derived the power of judicial review from general understandings of the judicial function and the nature of a written constitution, along the way referencing the Supremacy, Arising Under, and Oath Clauses.<sup>34</sup> The opinions in the *Steel Seizure Case*<sup>35</sup> invoke provisions of Article I as well as Article II, and their prime analytic thrust comes from broad conceptions of the

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<sup>29</sup> CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 7 (1969).

<sup>30</sup> *Id.* at 2068.

<sup>31</sup> *Id.*

<sup>32</sup> *See id.* at 2067-68.

<sup>33</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>34</sup> *Id.* at 178-80.

<sup>35</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

relationship of the executive and legislative branches.<sup>36</sup> Other major presidential power decisions similarly turn on general separation of powers principles that are not rooted in particular clauses.<sup>37</sup> Even decisions that do appear more uniclausal, such as *INS v. Chadha*<sup>38</sup> with its focus on the Bicameralism and Presentment Clause, are fundamentally animated by general visions of the meaning of constitutional separation of powers.<sup>39</sup> Federalism is the other main constitutional context in which structural reasoning predominates, and as noted above, the Court has a longstanding practice of invoking freestanding federalism in resolving disputes about the scope of federal and state powers or immunities.<sup>40</sup>

Although I share Manning's concerns that broad structural inference raises real dangers of indeterminacy and untethered judicial discretion, I believe that it can also yield helpful insights about the nature of our constitutional order.<sup>41</sup> Regardless, to the extent that Manning's argument would foreclose this well-established method of constitutional reasoning, to my mind the costs associated with such a disruption to settled practice and precedent outweigh the asserted benefits of respecting constitutional processes and compromise. Manning's failure to fully address and justify these costs is a significant weakness in his argument.

### III. THE VENUE FOR FREESTANDING FEDERALISM

In my view, Manning's most potent critique of freestanding federalism is his emphasis on the fact that our constitutional federal structure is animated by two cross-cutting purposes. The Constitution aimed

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<sup>36</sup> See, e.g., *id.* at 587–88; *id.* at 635–38 (Jackson, J., concurring).

<sup>37</sup> See, e.g., *Clinton v. Jones*, 520 U.S. 681, 697–706 (1997) (discussing the role of the President and the relationship between the President and the judicial branch in the course of rejecting a categorical rule that would require all private actions be stayed until the President leaves office); *United States v. Nixon*, 418 U.S. 683, 707 (1974) (concluding that absolute executive privilege against subpoenas “would upset the constitutional balance of ‘a workable government’ and gravely impair the role of the courts under Art. III”); see also *Morrison v. Olson*, 487 U.S. 654, 685–96 (1988) (analyzing not simply whether the independent counsel provisions of the Ethics in Government Act of 1978 violated the Appointments Clause and Article III, but in addition whether it was “invalid under the constitutional principle of separation of powers,” *id.* at 685).

<sup>38</sup> 462 U.S. 919 (1983).

<sup>39</sup> See *id.* at 951 (emphasizing the Constitution's division of powers into three distinct branches and the role of the President as a check on Congress in holding that the legislative veto violated the Bicameralism and Presentment Clause of Article I, § 7).

<sup>40</sup> Manning's approach would also destabilize such nonconstitutional federalism-driven doctrines as the presumption against preemption and abstention. Indeed, the presumption against preemption may be the most prominent invocation of freestanding federalism today. For a recent dispute over its use, compare *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 544 (2008), with *id.* at 555–59 (Thomas, J., dissenting).

<sup>41</sup> See, e.g., Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1476 (2007).



not only to preserve a meaningful autonomous role for the states, but also to significantly expand national power. The need to harmonize two such central and opposed purposes poses particular challenges for freestanding federalism analysis. It is hard to see how general federalism principles are likely to do any real work in resolving federalism disputes unless they are invoked in a form that is partial and therefore inadequate — as in the new federalism cases Manning analyzes, in which prime attention is paid to the way the Constitution preserves state autonomy and the nationalist side of the equation gets short shrift.

Manning concludes that freestanding federalism simply does not exist as a meaningful constitutional concept: “[M]ediation of the tension between the pro-federalism and nationalizing impulses must be found in the particulars through which the balance was struck.”<sup>42</sup> This view resonates with scholarship arguing that the best role for federal courts in the federalism context may be to ensure that national institutions — administrative agencies as well as Congress — give adequate consideration to state autonomy concerns, rather than to directly devise the appropriate balance between national and state interests.<sup>43</sup> Such an account highlights an interesting distinction between *Gregory* and the other new federalism cases on which Manning focuses. Although all invoke freestanding federalism, *Gregory* does so to justify the imposition of process requirements on Congress to ensure that Congress intended to burden state autonomy, whereas the others do so to justify imposing more categorical prohibitions on Congress.<sup>44</sup>

To be sure, enforcing federalism through such judicial policing of national decisionmaking practices does not wholly avoid the indeterminacy Manning identifies in freestanding federalism. Even if responsibility for balancing national and state interests in concrete contexts lies now with the political branches, it is still necessary to explain how federalism principles yield such judicially enforced process requirements, particularly given the separation of powers concerns that such requirements risk excessive judicial interference in the internal workings of other branches. The reason to pursue this route, rather than

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<sup>42</sup> Manning, *supra* note 1, at 2057.

<sup>43</sup> See, e.g., Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2063–69, 2104–07 (2008) (advocating subjecting federal agency decisions that impose substantial burdens on the states to more searching hard look review and noting this approach in recent decisions); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 123–54 (2004) (advocating greater attention to process constraints on Congress as a means of advancing federalism concerns).

<sup>44</sup> I do not want to exaggerate this point; clear statement requirements of the *Gregory* variety can be potent obstacles to congressional action, whereas conditional spending offers a mechanism by which Congress can avoid the limitations of *New York*, *Printz*, and *Alden*. But whether or not it is manifested in practice, this is an analytic distinction worth noting.

follow Manning's path and rest content with simply enforcing the particular national-state arrangements evident in the Constitution, is that those arrangements have been overtaken by events. The world we live in today is one characterized by not just a national economy but a global one, and an ever-expanding federal administrative state. To conclude, as Manning does, that general federalism principles have no constitutional bearing that necessitates adaptations to this reality is to take the courts largely out of the federalism business. Perhaps that would be the best approach; certainly, it has had its advocates over the years.<sup>45</sup> But we should be under no illusions that we can cast aside freestanding federalism analysis and retain meaningful judicial enforcement of federalism today.

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<sup>45</sup> See, e.g., JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 171-259 (1980).