

# Three Federalisms

*Randy E. Barnett\**

## ABSTRACT

Debates over the importance of “federalism” are often obscured by the fact that there is not one, but three distinct versions of constitutional federalism that have arisen since the Founding: Enumerated Powers Federalism in the Founding era, Fundamental Rights Federalism in the Reconstruction era, and Affirmative State Sovereignty Federalism in the post-New Deal era. In this very short essay, my objective is to reduce confusion about federalism by defining and identifying the origin of each of these different conceptions of federalism. I also suggest that, while Fundamental Rights Federalism significantly qualified Enumerated Powers Federalism, it was not until the New Deal’s expansion of federal power that Enumerated Powers Federalism was eviscerated altogether. To preserve some semblance of state discretionary power in the post-New Deal era, the Rehnquist Court developed an ahistorical Affirmative State Sovereignty Federalism that was both under- and over-inclusive of the role of federalism that is warranted by the original meaning of the Constitution as amended.

## I. INTRODUCTION

In this essay, I will explain how there are not one, but three distinct versions of federalism that have developed since the Founding of this country. Each version of federalism developed during a different era in our constitutional history: The Founding and afterwards, Reconstruction and afterwards, and the New Deal and afterwards. One reason we do not distinguish each of these versions from the others is that we teach Constitutional Law by doctrine or topic rather than chronologically by

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\*Carmack Waterhouse Professor of Legal Theory, Georgetown University Law Center. These remarks were delivered at the *Symposium on Checks and Balances Today: The Reality of Separation of Powers*, at Loyola University Chicago School of Law on March 23, 2007. Permission to copy for classroom use is hereby granted. I thank Shelby Wolff Reitz for her research assistance on this essay.

era.<sup>1</sup> When taught chronologically, these different versions of federalism fairly leap off the page. With these versions clearly in mind, we can observe a considerable irony in how federalism is currently debated among the Justices and among law professors who, to a remarkable degree, tend to follow the lead of the Supreme Court.

## II. THE FOUNDING AND AFTER: ENUMERATED POWERS FEDERALISM

Let us begin at the beginning. Federalism at the Founding can best be described as “Enumerated Powers Federalism.” The national government was conceived as one of limited and enumerated powers. The powers of states were simply everything left over after that enumeration. This version of federalism is reflected in the words of the Tenth Amendment: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”<sup>2</sup>

It is useful to remember that, while versions of the Tenth Amendment were proposed at several state ratification conventions, James Madison, who first proposed it to the House, considered it to be superfluous and unnecessary. According to Madison, “Perhaps words which may define this more precisely, than the whole of the instrument now does, may be considered as superfluous. I admit they may be deemed unnecessary; but there can be no harm in making such a declaration. . . .”<sup>3</sup>

Contrast this attitude with Madison’s opinion about the need to add what eventually became the Ninth Amendment,<sup>4</sup> which he said guarded against “one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system,”<sup>5</sup> namely:

that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration, and it might follow by implication, that those were not singled out, were intended to be assigned into the rights which hands of the general government, and were consequently insecure.<sup>6</sup>

In the Tenth Amendment, federalism is protected solely in terms of

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1. See RANDY E. BARNETT, *CONSTITUTIONAL LAW: CASES IN CONTEXT* (forthcoming 2008).

2. U.S. CONST. amend. X.

3. 1 ANNALS OF CONG. 458–59 (Joseph Gales & William Seaton eds., 1834) (statement of Rep. Madison).

4. See U.S. CONST. amend. IX (“The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.”).

5. James Madison, *Speech in Congress Proposing Constitutional Amendments* (June 8, 1789), in JAMES MADISON, *WRITINGS* 437, 439 (Jack N. Rakove ed., 1999).

6. *Id.* at 488–89.

what remains after powers are “delegated to the United States.”<sup>7</sup> There is no affirmative statement about the scope of state powers. Indeed, the Tenth Amendment is entirely noncommittal about which of the reserved powers reside in the states and which in the People.<sup>8</sup> Presumably, the allocation of the reserved powers was to be determined by state constitutions, but I say “presumably” because the Tenth Amendment does not tell us this. That state constitutions allocate the reserved powers between the people and the states is an unenumerated theory by which to construe the Constitution.

With Enumerated Powers Federalism, the powers of states are protected by holding Congress to its delegated powers. What states do beyond this with their “police power”<sup>9</sup> is not a matter for the national government in general, or the federal courts in particular, to decide. But there are at least three exceptions to this general observation that became significant in the years following the Founding, and a fourth possible exception that could have become significant but did not.

First, Article I, section 10 of the Constitution says: “No state shall . . . pass any . . . ex post facto law, or law impairing the obligation of contracts . . . .”<sup>10</sup> This was thought to require the Court to decide when exercises of the police power violated either or both of these express restrictions on federal power.<sup>11</sup>

Second, the Court had to decide how the police power of a state related to the power of Congress to “regulate commerce . . . among the several states.”<sup>12</sup> Because Congress enacted few, if any, laws regulating interstate commerce, the early conflict between the Commerce Power of Congress and the police power of states arose in the context of the so-called “dormant” Commerce Clause, which posed the question: Under what circumstances, and to what extent, is the police power of states limited when states regulate some internal activity that is also part of interstate commerce? In addressing this issue, the Taney Court took a

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7. U.S. CONST. amend. X.

8. See, e.g., *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 848 (1995) (Thomas, J., dissenting) (stating that the Constitution is silent on whether the qualifications clause is exclusive).

9. While scattered references to the “internal police” of a state are found in the records of the Founding, the term “police power” seems first to have appeared during the period of the Marshall Court. See Randy E. Barnett, *The Original Meaning of the Police Power*, 79 NOTRE DAME L. REV. 429, 476–78 (2004) (discussing the origins of the police power).

10. U.S. CONST. art. I, §10.

11. See Forrest McDonald, *The Constitution and Hamiltonian Capitalism*, in *HOW CAPITALISTIC IS THE CONSTITUTION* 49, 58–62 (Robert A. Goldwith & William A. Schambra eds., 1982)

12. U.S. CONST. art. I, § 8.

number of tacks, but it tended to qualify the scope of federal power over intrastate activity by assessing whether a state was properly exercising its police power over its internal affairs.<sup>13</sup> In other words, the unenumerated concept of the police power of states provided a constraint on Congress' unenumerated dormant Commerce Clause power.

The third qualification that arose after the Founding came from the infamous Fugitive Slave Clause of the Constitution.<sup>14</sup> In *Prigg v. Pennsylvania*,<sup>15</sup> the Supreme Court held that this Clause empowered Congress to enact the Fugitive Slave Act and that this power overrode the police power of individual states to protect free blacks within their borders from being wrongfully seized as slaves. Given that the powers enumerated in Article I, Section 8 did not include such a power, the Court implied it from the injunction of Article IV.<sup>16</sup> In other words, in *Prigg*, an unenumerated federal power to enforce the Fugitive Slave Clause was deemed by the Court to overpower the unenumerated police power of states. This ought to undermine the stereotypical association of "states rights" with slavery. What the abolitionists referred to as "The Slave Power" was happy to assert federal power on behalf of slavery when it had the votes in Congress and on the Court.

A fourth qualification that failed to develop, but might have, was the adoption of the abolitionist interpretation of the Privileges and Immunities Clause of Article IV, Section 1, which reads, "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."<sup>17</sup> Some abolitionists read this Clause to protect the fundamental rights of all citizens from infringement by state governments.<sup>18</sup> Instead, the Privileges and Immunities Clause was

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13. See, e.g., *Mayor of the City of New York v. Miln*, 36 U.S. 102 (1837) (defining the scope of the federal government as limited from areas where the state is properly exercising its police power).

14. U.S. CONST. art. IV, § 2 ("No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.").

15. 41 U.S. 539 (1842).

16. *Id.* at 619 ("The end being required, it has been deemed a just and necessary implication, that the means to accomplish it are given also.").

17. U.S. CONST. art. IV, § 1.

18. See Robert M. Cover, *Formal Assumptions of the Antislavery Forces*, in JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 156 (Yale University Press ed., 1975) (stating that no law under any form of government can be inconsistent with national law and man's natural rights); Chester Antieau, *Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four*, 9 WM. & MARY L. REV. 1, 5 (1967) (asserting

limited by the courts to barring discrimination against the fundamental rights of out-of-state citizens in favor of in-state citizens.<sup>19</sup> Still, the abolitionist theory of the Privileges *and* Immunities Clause contributed importantly to adoption of the Privileges *or* Immunities Clause of the Fourteenth Amendment during Reconstruction.<sup>20</sup>

### III. RECONSTRUCTION AND AFTER: FUNDAMENTAL RIGHTS FEDERALISM

The adoption of the Thirteenth and Fourteenth Amendments by the Thirty-ninth Congress constituted a significant modification of the Enumerated Rights Federalism of the Founding. Although preserving the enumeration of powers of Congress as a limit on federal power, the Reconstruction Amendments significantly altered the balance of federal power and the nature of federalism.

The exact scope of the original meaning of the Thirteenth and Fourteenth Amendments is a complex subject. Suffice it to say that the Thirteenth Amendment gave Congress and the courts the power to protect individuals from the badges and incidents of slavery. I would maintain that the Privileges *or* Immunities Clause of the Fourteenth Amendment amended the Constitution so as to adopt the abolitionist reading of the Privileges *and* Immunities Clause.<sup>21</sup>

Under this reading, Section 1 of the Fourteenth Amendment has four moving parts, the last three of which correspond roughly to the three branches of government.<sup>22</sup> After the citizenship clause, comes the Privileges *or* Immunities Clause according to which states are prohibited from enacting laws that infringe upon the fundamental rights of *any* or *all* of their citizens. In other words, the Privileges *or* Immunities Clause prohibits *legislation* that either violates fundamental

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that all citizens are to be protected from state action or inaction which would deny them their fundamental rights).

19. See *Paul v. Virginia*, 75 U.S. 168, 180 (1868) (“It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned.”).

20. See David S. Bogen, *The Privileges and Immunities Clause of Article IV*, 37 CASE W. RES. L. REV. 794, 796 (1987) (stating that conceptions of the Privileges and Immunities Clause in 1787 support propositions that all laws fall under Article IV).

21. Although I intend to do more work to establish this claim, for now see RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* 61–66, 195–96 (2004).

22. Here is how Section 1 reads with the four parts indicated in brackets: [1] “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.” [2] “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;” [3] “nor shall any state deprive any person of life, liberty, or property, without due process of law;” [4] “nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV.

rights across the board, or discriminates in their recognition and protection. In addition, the *judicial process* by which laws that satisfied the Privileges or Immunities Clause were applied to particular persons could be scrutinized under the Due Process Clause, while the Equal Protection Clause required that state *executive branch* officials enforce otherwise constitutional laws in a nondiscriminatory fashion. Consequently, under this reading of the Fourteenth Amendment, limitations on the powers of Congress recognized by Enumerated Powers Federalism of the Founding were altered to add a new federal power to protect the fundamental rights of citizens from violation by states in the creation, application, and enforcement of state laws.

Regrettably, this alteration of federalism by the Reconstruction Amendments was judicially repealed by the Supreme Court. Beginning with the infamous *Slaughter-House Cases*,<sup>23</sup> the Court effectively removed the Privileges or Immunities Clause—the operational heart of the Fourteenth Amendment under this reading—from the Constitution by restricting its scope to protecting rights of national citizenship only—such as the right to be protected while on the high seas. By this maneuver, it restored to the states complete discretion in the protection of fundamental natural rights as well as the privileges of the Bill of Rights, qualified only by a ban on racial discrimination by states that it later held could be satisfied by the so-called “separate but equal” treatment of blacks.<sup>24</sup>

With the dawn of the Progressive Era, however, the Supreme Court began to expand the Due Process Clause to occupy some of the vacuum created by its previous redaction of the Privileges or Immunities Clause. In particular, the Court extended the Due Process Clause beyond the judicial application of laws to individual persons to the reasonableness of the laws themselves when such laws restrict liberty.<sup>25</sup> Later, it extended the Equal Protection Clause beyond the equal enforcement of the law by the executive branch to barring discriminatory laws themselves.<sup>26</sup>

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23. *The Slaughter-House Cases*, 83 U.S. 36, 78 (1872).

24. *Plessy v. Ferguson*, 163 U.S. 537, 543–52 (1896).

25. *See, e.g., Chi., Burlington & Quincy R.R. Co. v. City of Chi.*, 166 U.S. 226, 241 (1897) (holding that a state court judgment authorized by a state statute allowing for private property to be taken for public use without just compensation violates the Due Process Clause of the Fourteenth Amendment); *Lochner v. New York*, 198 U.S. 45, 57 (1905) (holding that a New York law limiting the number of hours a baker could work in a week violates the Due Process Clause of the Fourteenth Amendment).

26. *See, e.g., Loving v. Virginia*, 388 U.S. 1, 9–12 (1967) (declaring Virginia’s anti-miscegenation statute unconstitutional).

While the gradual and tentative expansion of the Due Process and Equal Protection Clauses restored a bit of the Fundamental Rights Federalism of the Reconstruction Amendments, this expansion came under bitter attack from “progressives” who contended that it violated principles of federalism by which states could use their police powers to enact social legislation free of interference by federal courts. With the onset of the Great Depression, the stage was set for a new “progressive”<sup>27</sup> approach to federalism by justices nominated by the progressive Republican Herbert Hoover,<sup>28</sup> who were eventually joined by others appointed by Franklin Roosevelt.

#### IV. THE NEW DEAL AND AFTER: AFFIRMATIVE STATE SOVEREIGNTY FEDERALISM

The Fundamental Rights Federalism of the Reconstruction Era superimposed the protection of fundamental rights from infringement by states on the Enumerated Powers Federalism of the Founding Era. Preserving Enumerated Powers Federalism, which limited the powers of Congress, still protected a vast domain of state power. However, when the New Deal Supreme Court gave Congress a virtually unlimited legislative power under the Commerce and Necessary and Proper Clauses, it effectively repealed the enumerated powers scheme of Article I. By so doing it thereby destroyed the Enumerated Powers Federalism that resulted from these limits. Now Congress had *both* the power to reach virtually any private activity in the nation via the Commerce and Necessary and Proper Clauses *and* the power to restrict the powers of states via the expanded Due Process and Equal Protection Clauses of the Fourteenth Amendment.

True, the post-New Deal Court did eventually limit the scope of the Due Process Clause to protecting only what footnote four of *Carolene Products* referred to as “a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.”<sup>29</sup> But neither the Ninth nor Tenth Amendments were deemed by the Court to be among these “specific prohibitions,” and eventually the limitation of footnote four was at least partially overcome when, in *Griswold v. Connecticut*<sup>30</sup> and later cases, the Court extended the Due Process Clause to protecting

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27. See *Progressivism*, THE COLUMBIA ENCYCLOPEDIA 2306 (6th ed. 2001–05)

28. See generally JOAN HOFF-WILSON, HERBERT HOOVER: FORGOTTEN PROGRESSIVE (1975).

29. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

30. *Griswold v. Connecticut*, 381 U.S. 479, 484–86 (1965).

an unenumerated right of privacy.<sup>31</sup>

Enter the Rehnquist Court. After William Rehnquist became Chief Justice, the Court began developing what came to be known as the “New Federalism,” but which in this story could be called “Affirmative State Sovereignty Federalism.” First came its so-called Tenth Amendment cases of *New York v. United States*,<sup>32</sup> *Gregory v. Ashcroft*,<sup>33</sup> and *Printz v. United States*.<sup>34</sup> In each of these cases, the Court attempted to create a special state exemption from federal powers that would easily have reached the conduct in question if performed by a private party.<sup>35</sup>

Then came the so-called Eleventh Amendment cases of *Seminole Tribe of Florida v. Florida*<sup>36</sup> and *Alden v. Maine*<sup>37</sup> which immunize states from some lawsuits in federal court. I use the term “so-called” advisedly.<sup>38</sup> The irony of the New Federalism is that the text and original meaning of the Tenth and Eleventh Amendments had to be distorted to provide a “principle” of state sovereignty that would be used by the more textualist and conservative justices to carve out of the expansive post-New Deal federal power an affirmative exception for states.

As the preceding discussion has made clear, however, the more faithful way of protecting federalism would be to limit Congress to its enumerated powers and let states take up the slack—that is, Enumerated Powers Federalism—except where states have violated the Fourteenth Amendment or other constitutional restrictions on their power—that is, Fundamental Rights Federalism. It was this approach that the Rehnquist Court began very tentatively to adopt in *United States v.*

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31. For an extended discussion of the developments described in this paragraph, see Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. (forthcoming June 2008).

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

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

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

35. *See, e.g., id.* at 934 (holding that obligations imposed by a federal statute on a state’s law enforcement officers to run background checks on prospective handgun purchasers were unconstitutional); *New York*, 505 U.S. at 175 (holding that a “take title” provision of a federal law offering states the choice of either taking ownership of waste or regulating according to Congress’ instructions violated the Tenth Amendment); *Gregory*, 501 U.S. at 473 (holding that a provision of the Missouri Constitution requiring mandatory retirement for judges reaching age seventy does not violate equal protection law).

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

37. *Alden v. Maine*, 527 U.S. 706 (1999).

38. *See* Randy E. Barnett, *The People or The State?: Chisholm v. Georgia and Popular Sovereignty*, 93 VA. L. REV. 1729 (2007).

*Lopez*<sup>39</sup> and *United States v. Morrison*.<sup>40</sup>

Notice that by striking down the Gun Free School Zone Act in *Lopez* as beyond the power of Congress to enact, the Court protected the right of the people to keep and bear arms without having to apply the specific prohibition of the Second Amendment.<sup>41</sup> Likewise, it also served to protect the reserved powers of states without having to appeal to any unenumerated principle underlying the Tenth or Eleventh Amendments. After the Court's decision in *Gonzales v. Raich*,<sup>42</sup> however, it remains to be seen how much of this version of the New Federalism is still alive. I have explained elsewhere how *Raich* can be limited if enough justices so desire,<sup>43</sup> but we will have to await a case that does not involve marijuana to see if there is still a judicial will to restore any semblance of Enumerated Powers Federalism.

## V. CONCLUSION

At the Founding, federalism was a by-product of the enumerated powers scheme of Article I. After Reconstruction, while this version of federalism was preserved, it was importantly modified by superimposing a new federal check on the police power of states. By contrast, the New Deal Court completely transformed the nature of federalism by effectively repealing the enumerated powers scheme of Article I. So long as this view of federal power holds sway, preserving the discretionary powers of states has required an affirmative protection of state sovereignty that is “carved out” of federal power—in the same way that the Court feels it must affirmatively recognize a particular individual liberty as a “fundamental right” before it may protect it.<sup>44</sup> Otherwise, constitutional federalism would be altogether extinguished. In this way, the Rehnquist Court's Affirmative State Sovereignty Federalism preserved some role for federalism while largely remaining within the post-New Deal paradigm of unlimited federal power that is qualified by specific prohibitions.

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39. *United States v. Lopez*, 514 U.S. 549, 561 (1995) (invalidating the Gun Free School Zones Act).

40. *United States v. Morrison*, 529 U.S. 598, 619 (2000) (invalidating a portion of the Violence Against Women Act).

41. U.S. CONST. amend. II.

42. *Gonzales v. Raich*, 545 U.S. 1, 22–32 (2005) (upholding the constitutionality of the prohibition imposed by the Controlled Substances Act as applied to medical marijuana in states in which its use is authorized and regulated by state law).

43. See Randy E. Barnett, *Foreword: Limiting Raich*, 9 LEWIS & CLARK L. REV. 743, 743–44 (2005) (noting that in the future cogent dissenters may carry the day).

44. See *e.g.*, *Washington v. Glucksberg*, 521 U.S. 702 (1997); see also, Barnett, *supra* note 30.

Ironically, by ignoring the original meaning of particular clauses, the Court has moved constitutional law in the direction of the original meaning of the Constitution in its entirety. Expanding the scope of the Due Process and Equal Protection Clauses beyond their original meaning has partially compensated for the redacted Privileges or Immunities Clause, moving the Fourteenth Amendment, as a whole, closer to its original meaning. Similarly, expanding the scope of the Tenth and Eleventh Amendments beyond their original meanings prevents the complete absorption of the states by federal power, and restores some semblance of the balance formerly achieved by holding Congress to its now-eviscerated enumerated powers.

In my view, however, much is distorted by both back-door maneuvers. First, expanding clauses beyond their original meaning to compensate for previous misinterpretations is both under- and over-inclusive in ways too numerous and complex to identify here. Second, the perceived need to expand the meaning of clauses to reach what are perceived to be the right results has delegitimated the idea of hewing to the original meaning of the Constitution. Third, by depriving justices of the ability to base their decisions on a textual meaning that precedes and is independent of their own preferences, judicial review has been delegitimated as well.

Finally, when liberated from the original meaning of the Constitution, both left and right became free to use the courts both to pursue their political agendas and to obstruct the political agendas of their opponents. This, in turn, has led to the politicization of the judicial selection process that we are experiencing today. When judges are no longer constrained by a written constitution, you'd best see that *your* judges get on the courts and that your opponent's nominees are blocked wherever possible.

All these consequences, and many more, are the prices to be paid for abandoning the original meaning of the Constitution as amended—the whole Constitution—each and every clause of it. And these costs are incurred when the Court is protecting “federalism” without recourse to the original meaning of the constitutional provisions that were designed to define and protect it.