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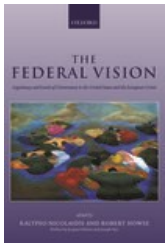
The Role of Law in the Functioning of Federal Systems

George A. Bermann
Columbia Law School, gbermann@law.columbia.edu



The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union

Kalypso Nicolaidis (ed.), Robert Howse (ed.)

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CHAPTER

7 The Role of Law in the Functioning of Federal Systems

George A. Bermann

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Abstract

Federal systems are about the distribution of legal and political power, but law is not only one of the currencies of federalism, it is also one of federalism's most important supports; this chapter considers the role that law plays in establishing and enforcing the system by which both legal and political power are distributed within the USA and the EU. Bermann explores the various ways in which the courts can, and choose to, enforce the principles of federalism beyond the classical 'political' and 'procedural' safeguards provided by the institutional structures themselves and the constraints on the deliberative process. He describes the reluctance on the part of courts on both sides to police the borders of enumerated competences, assess the 'necessity' of federal action, or carve out the 'core' of state sovereignty, all of which are ways of 'second-guessing' the political process; he then points to the recent emphasis of the USA Supreme Court on what he calls the 'relational' aspects of federalism, whereby courts can identify 'forbidden interfaces' between State and federal governments, even without specific constitutional grounds. Bermann uses the examples of sovereign immunity and of anti-commandeering to illustrate the manner in which court-enforced constraints on the manner in which different levels of government interact can protect and promote democratic accountability in the USA. In contrast, European Union law offers no protection against risks to democracy from commandeering, but more broadly relies almost exclusively on the representation of member states and sub-national units in the Council as structural political safeguards.

Keywords: anti-commandeering, commandeering, court enforcement, courts, democracy, democratic accountability, EU, federal governments, federal systems, federalism, governance, institutional structures, law, legal power, political power, sovereign immunity, state, state sovereignty, USA

Subject: US Politics, European Union

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1. Introduction

Federal systems are about the distribution of legal and political power. But law is not only one of the currencies of federalism; it is also one of federalism's most important supports. In this chapter, I consider the role that law plays in establishing and enforcing the system by which both legal and political power are distributed within the United States and the European Union.

I begin with three basic assumptions about federalism. First, I assume that federalism—by which I mean the allocation of power among different vertically-situated levels of government[1]—is strongly capable of promoting a range of values that occupy a high rank within modern liberal democracies. These values include liberty, diversity, self-determination, accountability, and the various efficiencies associated with regulatory competition.[2] I further assume that, even as the United States embarks on a widening array of cooperative international regimes in which concern over the allocation of government authority within the US has no obvious place, we nevertheless remain interested in protecting and promoting federalism principles.

Third, I assume for present purposes that the allocation of power with which federalism is concerned is essentially a subject matter rather than a functional allocation. This is a major assumption, since there are federal systems whose vertical allocations of power run along functional lines—for example, who
p. 192 legislates? who executes? who adjudicates? who taxes? ↳ who spends?—rather than subject matter lines. Focusing on subject matter allocations means essentially asking: Who gets to address what substantive issues? What general principles, if any, determine this allocation? What presumptions, if any, about the allocation may be at play? Are powers at a given level enumerated only? Do any particular rules of construction govern the exercise of power allocations? Are powers exclusively allocated to one level and one level only, or are they shared? If powers are shared, what if any principles of sharing—for example, subsidiarity[3]—govern the sharing? Under what circumstances does the exercise of authority on a given subject at one level pre-empt the prior or subsequent exercise of power at another? And so on.

2. Law and Federalism

It should be obvious that law has a role to play in drawing the allocative map to which I have referred. For all practical purposes, drawing such a map is an exercise in constitution-making, albeit on only one of the issues—division of powers—that interest constitution-makers. But law also plays a longer-term role in promoting federalism values. Certainly in both the EU and the US, it also seeks to ensure that sub-constitutional law and policy faithfully reflect the allocative map, as well as to ensure that the map is enforced by courts when sub-constitutional law and policy fail to do so. In other words, allocations of rule-making authority are determined not only by constitutional design but also by patterns of legislative implementation and judicial enforcement.

Law supports allocations of legislative authority in basically three ways. First, law may require that
p. 193 decisional authorities at the federal level be ↳ structured and composed in such a way as to ensure that the interests of sub-national communities are represented in the federal legislative process. Second, law may impose specific procedural requirements to help ensure that the interests thus represented are also actually considered in the deliberative process. Third, law may formulate certain more or less well-defined principles of federalism by which the output of the federal political process—in short, legislation or regulation—may be judged, not only politically but also legally. Each of these legal strategies has a distinctive methodology and distinctively implicates public and private institutions, including of course the courts.

Law and the Political Safeguards of Federalism

As a first means of influence, law may seek to enforce established power allocations by governing the structure and composition of the federal political—chiefly legislative—institutions, such as the US Senate or the EU Council of Ministers. The notion is that law enhances respect for federalism values by requiring that federal institutions be structured and composed in ways that specifically cause the interests of sub-national units of governments and their constituencies to be taken into account in the policy-making process. The US States and the EU Member States thus enjoy the right to be heard, and presumably have their interests taken into account, as the Senate and the Council, respectively, make their political determinations. Mandatory consultation of various committees, both in the US and the EU, afford analogous opportunities for influence in the 'federal' legislative and administrative process. Whether or not these organic norms are formally expressed in the constitution or the constitutive treaties, as the case may be, they are assumed to affect importantly whether and to what extent the established allocations of power will in fact be respected.

It would be a mistake to think of these safeguards in static terms, as if, once consecrated by the constitution, they automatically have their effect. The utility of entrenched rules about the structure and composition of federal institutions depends, by the very nature of such rules, not only on their legal effectiveness but also on their political effectiveness. It is for good reason that the literature describes them as '*political* safeguards of federalism'.[4] Their effectiveness is accordingly no less a political than a legal issue, and it is in these
p. 194 terms that the theory of safeguards has been widely ↳ called into question, at least in the US.[5] In order to enhance the strength of these political safeguards of federalism, the bodies that are designed to incorporate them may need to take further steps to make them operational. In recent years we have seen scattered examples of federal institutions putting further safeguard mechanisms into motion. For example, Congress has placed legislative limitations on the use of *unfunded mandates*,[6] by which I mean requirements that State and local governments implement federal policies even when they are not given the federal funding with which to do so. For its part, the Executive Branch has imposed its own requirement of a 'federalism assessment'—including but not limited to the financial impact on State and local governments—as part of its more general federal regulatory review process.[7]

The operation of the political safeguards of federalism in the EU, on the other hand, has not been sufficiently studied. The founders may have originally structured and composed the European institutions so as to ensure respect for the autonomy and interests of the Member States, but it is open to question whether over time they have succeeded. Viewed structurally, the Commission and Parliament do not have very many natural incentives to vindicate Member State interests. The Council, being composed of Member State representatives, may be their more natural guardian. But even then, as prospects for the casting of Member State vetoes diminish with each successive intergovernmental conference and each revision of the constitutive treaties, the Council's ability to function in this way is weakened. One consequence is that the Member States have felt constrained to devise alternative treaty safeguards,[8] not only to protect their own interests but on occasion the interests of sub-national units.[9]

At the end of the day, if the problem with the political safeguards of federalism is basically more political
p. 195 than legal, then there are necessarily ↳ limits on the extent to which the law can strengthen them. To the extent that we rely on political safeguards to vindicate federalism values, we are relying first and foremost on constitution-makers, and secondarily on the drafters of the organic legislation that organizes the basic political institutions. Courts have the means to enforce such safeguard mechanisms, but no way of ensuring that they work, and regulators by and large escape the direct effect of these mechanisms altogether.[10]

Procedural Reinforcements of Federalism

If institutional law can achieve only so much by determining the way in which federal bodies are structured and composed, we have reason to explore alternative avenues of legal influence. Among the most prominent, and presumably legitimate, strategies that law may pursue is to mandate certain aspects of the deliberative process by which federal institutions reach their decisions. To this extent, the law's intervention becomes predominantly procedural.

Procedural mandates in the interest of federalism take a variety of forms. The most obvious, and I suppose time-honoured, are requirements that decision-makers consult certain public or private bodies which, by virtue of their own composition or mission, may be expected to express either the institutional interests of sub-national governments or the policy preferences that those governments, or their constituencies, are likely to harbour.[11] To the dismay of the Committee of Regions, consultation on specific legislative matters is about all that that Committee can legally demand of the political institutions at the EU level. Mandatory consultation of bodies representing sub-national interests is even less embedded in US law, perhaps the best example being the role of the US Advisory Commission on Intergovernmental Relations under the Unfunded Mandates Reform Act of 1995.[12]

Legally imposed consultation requirements proceed on the basis of a succession of assumptions: namely (1) that there are identifiable institutional interests and policy preferences of sub-national governments; (2) that the mandatorily consulted body in fact adequately reflects those interests and preferences; (3) that that body will effectively express them; and (4) that, in reaching their decisions, the political branches will give
p. 196 due attention and consideration to such expressions. These are assumptions ↳ that it may seem reasonable to make, but they are large assumptions nonetheless.

Perhaps fuelled by doubts that the political branches 'listen' meaningfully to the bodies that they are required to consult, legislatures have recently shown a fondness for requiring that the political branches themselves conduct the relevant inquiries and/or make the relevant findings. To be sure, federalism is not the only set of values that prescribed 'regulatory analyses', 'impact statements', 'requirements of reasons', or 'findings requirements' are designed to advance. Such devices may promote, for example, environmental values—as in the case of environmental impact analyses—or solicitude for small and medium-sized businesses—as in the case of small and medium-size business impact statements. But federalism does figure among the ostensibly protected values, both in the US[13] and in the EU.[14] The requirement of a federalism inquiry of one sort or another, much like a consultation requirement, is based on an assumption that conducting such exercises increases the likelihood that the relevant political considerations—in this case federalism values—will be taken into account in the deliberative process.[15] However, unlike required consultation of outside bodies, the requirement that the decision-maker itself address the federalism issues, such as they are, offers greater hope of amounting to more than a pure procedural formality.

In the EU, matters have been taken yet a step further. The European Commission in particular has been asked to account on a regular basis for its contributions as an institution to implementation of the principle of subsidiarity.[16] Through a series of annual reports, it now documents both its withdrawals of legislative
p. 197 proposals and its proposals for the with-drawal ↳ of legislation in accordance with the principle. The institution is thus compelled not only to justify in subsidiarity terms the specific proposals that it from time to time advances for adoption, but also its overall record as the EU's 'legislative engine'.

Procedural reinforcements of federalism have the merit of not depriving, or at least not appearing to deprive, the political branches of their policy-making responsibilities. Put in simple terms, the political branches can be made to take federalism considerations into account without necessarily having to favour or disfavour certain substantive outcomes and without having to assign these considerations any particular weight, much less make them outcome-determinative. But having said this, on what basis are we to suppose

that procedural mandates make any difference at all in the deliberative process, other than by ensuring that decision-makers are not wholly ignorant of a proposed measure's federalism implications? Observers have found neither the reports of the EU Commission on subsidiarity[17] nor the 'federalism analyses' by the US government[18] to be terribly convincing elements of proof that federalism considerations enter meaningfully into the deliberative rule-making process. At the end of the day, procedural reinforcements can be no more than *potentially* protective of federalism values. A court can certainly police whether the required exercises have been conducted—and possibly even whether they have been honestly and truly conducted—but, given the nature of procedural controls, it can realistically do little more.

Direct Judicial Policing of Boundaries

We have seen that a system that operates chiefly on the basis of political safeguards of federalism cannot realistically assign to the courts a major policing role; their role in this respect is to supervise structure. A system that operates chiefly on the basis of procedural safeguards of federalism may give courts a better defined role to play, but it is limited to supervising adherence to procedures. If courts wish to play a more central part in the protection of federalism values, they must look elsewhere, and they from time to time do so.

Among the most obvious means by which courts may do more is through direct review of the 'competence' question, by which I mean the question whether national or sub-national authorities, in acting as they have,
p. 198 have respected the constitutional or quasi-constitutional limits on ↳ their power. With any luck, the courts will not be the first to ask this question. In the case of federal action, the federal authorities, and all entities that these authorities are called upon to consult prior to acting, should have considered the competence question independently. But at some point, when a litigant with standing to raise the question does so, the courts will also address it, and presumably do so with some degree of independence.

For all the reasons that have historically favoured reliance on political and procedural rather than judicial safeguards of federalism, direct federalism review by the courts may be problematic. Such review assumes that there are indeed objective standards by which the conformity of secondary legislation with federalism principles may be judged, and that the courts are capable of applying those standards without interfering with the policy judgements that, in a democracy, are the political branches' to make. It is consequently small wonder that courts approach direct judicial review of federalism with some hesitation and with a degree of experimentalism. In section 3, I turn to both some of the established and some of the newer patterns of judicial intervention.

3. Courts and Legislative Federalism

In purporting to enforce constitutional principles of federalism, courts naturally take their cues from the federalism formulae that constitutions themselves supply. A court's task, at least in the first instance, is to construe the constitutional language that describes the allocation of lawmaking authority and to determine whether the political branches have respected it.

Enforcing ‘Catalogues’ Of Competence

To the extent that allocations of authority are drawn in subject matter terms, the judicial exercise consists basically of determining whether or not an exercise of legislative power properly falls within the scope of the relevant subject matter attribution. At the extreme, one can imagine a ‘menu’ or ‘catalogue’ of enumerated competences within which an exercise of legislative authority either falls or does not fall, depending on how the court defines the competence and/or characterizes the exercise. At the other extreme, constitutions contain general formulae, in the form of statements of principle about the allocation. Subsidiarity is an example.[19]

p. 199 In truth, both the US Constitution and the EC Treaty fall well short of a catalogue of competences. The great majority of federal legislative interventions in the US are justified not on the ground that their subject matter is one that the Constitution has specifically entrusted to federal authorities, but on the ground that the problem addressed ‘implicates’ interstate commerce.[20] To a lesser extent, the same may be said of the EU, most of whose legislative activity has been predicated on general ‘harmonization’ provisions in the interest of a better functioning internal market.[21]

Even so, neither the US Supreme Court nor the European Court of Justice has traditionally shown a great deal of interest in closely examining the question whether a given exercise of legislative authority is or is not constitutionally justified by reference to the commerce clause or the EC Treaty's harmonization provisions, respectively. This has almost certainly not been due to a conviction that doing so would be constitutionally out of bounds, but rather that it would be politically dangerous. Thus, even when striking down the Gun-Free School Zone Act in the case of *United States v. Lopez*,[22] as outside the boundaries of the inter state commerce clause, the Supreme Court appeared to lay down an essentially deferential test. Under *Lopez*, Congress basically needs only to conclude—and be able plausibly to do so—that the requirements of interstate commerce justify the legislation in question.[23] On the other hand, still more recent decisions of the Court do demonstrate that even express congressional findings of an effect upon interstate commerce will not necessarily support use of the interstate commerce clause.[24]

For its part, the European Court of Justice has never taken the opportunity to define restrictively the Treaty's competence-conferring provisions, nor has it seriously questioned whether a Community law
p. 200 measure ↳ bears a sufficient connection to the internal market to justify its adoption pursuant to the Treaty's internal market harmonization provisions. The closest the Court has come to doing so is deciding, in cases where a measure has more than one plausible legal basis in the Treaty, which is the measure's ‘proper’ legal basis.[25] Even then, the inquiry is made not to determine whether the Community institutions are competent to enact the measure, but rather to determine which legislative procedure they needed to follow in doing so. In none of these legal basis cases was the measure claimed to fall outside of Community competence altogether.

‘Necessity’ For Federal Intervention

Distinct from the question whether or not a measure falls within a recognized category of subject matter competence is the question whether, assuming it does, the measure may be regarded as actually ‘necessary’ for achieving its stated objective. By this I refer to whether the objective being pursued could or could not reasonably be attained without taking the measure that is being questioned. The US Supreme Court has traditionally avoided inquiring into the necessity of federal legislation in this particular sense; arguably even when Congress uses the Constitution's ‘necessary and proper’ clause, rather than a specifically enumerated power, as the basis for legislation, necessity has not been the subject of close judicial scrutiny. It is fair to say that Congress's determination that legislation enacted under Art. I of the Constitution is required for achieving a legitimate federal objective is virtually unreviewable judicially. A fortiori, US courts have not asked the precise question that subsidiarity poses, namely, whether the States were in a position to effectively and efficiently achieve the objective underlying a piece of federal legislation.[26] This of course is different from the question whether Congress may permissibly ‘find’ that interstate commerce is implicated, a matter into which the courts evidently may now look.[27]

p. 201 By contrast, the language of the subsidiarity clause of the EC Treaty[28] would suggest that necessity is very much a legal condition for Community action, at least in areas of concurrent competence. From the point of view of language alone, the Treaty drafters could scarcely have been clearer in declaring that the Community institutions may not legally act in such areas unless the inability of the Member States adequately to address the problem at hand renders it necessary that the Community take action. The EU's political branches have repeatedly acknowledged that they are bound by this understanding of the subsidiarity doctrine, and the Member States solemnly endorsed it in the ‘Subsidiarity Protocol’ to the Amsterdam Treaty.[29]

Still, even in the presence of constitutional language of necessity, the Court of Justice has thus far shown a great reluctance to grapple with that issue. In neither of the two relevant judgments rendered thus far—*United Kingdom v. Council* [30] and *Germany v. Parliament and Council* [31]—did the Court require more than a conclusory statement of reasons by the Council—or Council and Parliament—for believing that Community-level action was required;[32] it certainly did not demand that such a finding be supported either by evidence or by detailed or elaborate reasoning. Put differently, the political institutions may need to show that they took a look at the subsidiarity question, but not necessarily that they took a ‘hard look’ at it.[33] The Court itself is clearly not taking a ‘hard look’ at that question, nor should we expect that it would. Thus, the Court has not only proceduralized the subsidiarity inquiry, but done so in terms which ensure that the Court
p. 202 will in the end be rather easily satisfied. Arguably, the Court ↳ should in the future not content itself with a purely procedural requirement of a statement of reasons, but rather also review, if only deferentially, the subsidiarity determination itself, that is, the determination whether the criteria of subsidiarity are met.[34]

To the extent that subsidiarity is proving to be at bottom a political rather than a judicial instrument, the onus necessarily shifts back to the political institutions of the Community, and their constituencies, to ensure that the capacities and interests of the Member States are duly taken into account when legislative measures come up for consideration. This in turn suggests the need for new or improved political safeguards of federalism within the EU context. These may include such measures as strengthening the participation of the national parliaments, giving a larger role to the Committee of the Regions, or indeed inventing new safeguard mechanisms altogether.[35]

Protecting the ‘Core’ Of State Sovereignty

Even if the courts are not positioned to police effectively the frontiers of the ‘federal’ institutions' enumerated powers or to review the necessity of their interventions, they may nevertheless seek to protect what they regard as the vital aspects, or ‘core,’ of state sovereignty which these institutions are not permitted to invade even when making an otherwise valid use of their powers, as for instance Congress under Article I of the Constitution. This is a strategy that at one point appealed to a majority of the Supreme Court,[36] but that, with a change in the Court's composition, subsequently fell out of favour. In the case of *Garcia v. San Antonio Housing Authority*,[37] the majority, essentially subscribing to the theory of political safeguards of federalism, ruled that the states, acting through the federal political institutions—including notably Congress—should be deemed capable of protecting their essential ‘sovereign’ interests, and that the federal courts should not be asked to perform this function for them. This judgement rests at least in part on the difficulty of arriving, through notions of ‘traditional’ ↳ or ‘essential’ state functions, at the core
p. 203 of sovereignty insulated by the Tenth Amendment in the first place, not to mention determining the extent to which a legislative measure impairs them. However, given the slimness of the Supreme Court majority in *Garcia*, the subsequent changes in the Court's composition, and the Court's recent heightened sensitivity to questions of federalism, it cannot be assumed that the Court's position will not change again.

Interestingly, the European Court of Justice has not shown much inclination to carve out specific matters in which the Member States of the EU have ‘core’ sovereignty interests that deserve to be sheltered from Community governance. Perhaps the Court shares the Supreme Court's discomfort with such an approach. More likely, it operates on the assumption that if the Member States are capable of doing anything as they gather around the table at their periodic intergovernmental conferences, it is to identify what they consider to be the areas of vital national interest and to protect them through appropriate means—the most obvious examples being eliminating the Community competence altogether, subjecting Community action to unanimous voting or preserving the right to ‘opt out’. So long as the Member States do convene at intervals to reshape the constitutive treaties, as well as to decide upon the specific means by which action in various sectors may be taken at the Community level, there is little reason to suppose that they cannot adequately protect themselves. In any event, the case for judicial intervention to protect the Member States from themselves is correspondingly weaker when, by its very nature, the Treaty enables the Member States to express their sovereignty concerns and to do so in ways that will thereafter limit the freedom of action of the Community's political branches.[38]

4. Federalism as a ‘Relational’ Problem

In place of the fairly obvious strategies just canvassed—policing the borders of enumerated powers, reviewing the necessity for federal intervention, and protecting certain ‘core’ sovereign interests of the
p. 204 states—the Supreme Court has focused lately on a variety of what I call, for lack of a ↳ better term, ‘relational’ aspects of federalism. By this I mean to suggest that the Court has identified certain forbidden ‘interfaces’ between the federal and State governments. The question then arises whether these, or any other, specific interfaces could be said to fall foul of the EU constitutional system and, more particularly, the relation between the EU and the Member States.

State Immunity to Suit

On occasion, the Court finds an explicit basis for its relational claims in the constitutional text itself. Perhaps the best example is the notion of state sovereign immunity to suit in federal court. The Eleventh Amendment expressly provides that 'The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State'—a provision that has been construed by extension to protect the States from federal court suit by their own citizens as well. In recent years, the Supreme Court has ruled that Congress may not 'abrogate' Eleventh Amendment immunity by using the interstate commerce clause of Art. I to pass legislation that expressly subjects the states to litigation in the federal courts.[39] As for circumventing the Eleventh Amendment by authorizing suits against State officials, rather than against the States themselves, the Court has severely narrowed this possibility too, by confining it to suits that are brought against State officials to restrain future violations, thus barring any possibility of suing state officials for damages or other remedial relief for past violations.[40]

Still more recent decisions of the Court teach us, however, that sovereign immunity to suit is not merely a product of the Eleventh Amendment and its more or less specific language. In the case of *Alden v. Maine*, the Court ruled that Congress lacked constitutional power to subject the states to unconsented suits in State as well as federal courts, even though the Eleventh Amendment by its terms exclusively addresses suits in federal court. Rather, the notion of State sovereign immunity flows from a 'principle so well established that no one conceived it would be altered by the . . . Constitution';[41] that principle, according to the Court, protects States from unconsented suits in their own courts as well.

However robust the principle of State immunity to suit may lately have become in US Supreme Court
p. 205 doctrine, it does not hold out much promise ↳ as a limitation on Community power within the EU. Far from prohibiting actions against Member States in the Community courts, the EC Treaty specifically authorizes them, at least at the instance of the Commission or other Member States.[42] While the Treaty does not subject the Member States to suits in the Community courts brought by private parties, Court of Justice case law now requires that the Member States open the doors of their own courts to private liability actions against themselves for the damage caused by their own failures or infringements under Community law.[43] Such private liability actions in national courts have become a conventional means of enforcing Community law obligations against the Member States. The contrast with *Alden v. Maine* in the US could scarcely be more striking.

Uses and Abuses of the Fourteenth Amendment

In a highly interesting development, Eleventh Amendment jurisprudence has further led indirectly to a substantial narrowing of the scope of the Fourteenth Amendment: the amendment that essentially affords protection of due process and equal protection against the States[44] and that, through its section five, specifically authorizes Congress to enact legislation to 'enforce' the Amendment's guarantees.[45] The context of this development is the notion that Congress may choose to 'abrogate' the States' Eleventh Amendment immunity from suit by enacting appropriate legislation action on the basis of a constitutional provision, such as section five of the Fourteenth Amendment, which post-dates the Eleventh Amendment. This has opened up the possibility for courts to determine whether a given legislative use of the Fourteenth Amendment is a valid one or not.[46] For example, according to a leading decision of the Court, Congress misuses its Fourteenth Amendment power to abrogate State sovereign immunity when it enacts legislation
p. 206 whose purpose is to define the ↳ scope or meaning of the Fourteenth Amendment through primary legislation, rather than to 'enforce' it as such by means of remedial legislation.[47]

The Court's case law on the scope of Congress's enforcement power under the Fourteenth Amendment is still more far-reaching. According to the Court, even when Congress is truly enforcing the Fourteenth Amendment, it does not have free rein in deciding how to do so. Rather, any such legislative enforcement must be appropriate in the sense that 'there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end'.[48] In other words, as to each statute that is questioned, the Court considers its proportionality as a preventive or remedial measure. A thin majority of the Supreme Court has only recently struck down several pieces of federal legislation as exceeding in this respect the limits of section five of the Fourteenth Amendment.[49] The inquiry evidently to be conducted is not very different in principle from the inquiry mandated by the principle of proportionality, as set out in the EC Treaty[50] and the jurisprudence of the Court of Justice.[51] Quite clearly, by defining what it means for Congress to 'enforce' the Fourteenth Amendment by statute, and even more by reviewing the 'proportionality' of any such statute, the current Supreme Court majority is taking a rather close look at whether Congress has an adequate basis for depriving the States of their immunity from suit or otherwise using the Fourteenth Amendment.

One may legitimately question this recent Fourteenth Amendment jurisprudence. First, section five of the amendment authorizes Congress 'to enforce' the Fourteenth Amendment's guarantees, without specific reference to any requirement that the legislation be necessary, useful or proportional. Second, if the Court is
p. 207 not prepared to scrutinize the necessity ↳ for federal legislation enacted pursuant to the interstate commerce clause of Art. I—I assume this to be a fair reading of the *Lopez* case[52]—then it is not apparent, except for the fact that the Fourteenth Amendment targets State action, why the Court should scrutinize the necessity for legislation enacted pursuant to section five of the Fourteenth Amendment. Legislative exercises under both constitutional bases can importantly compromise the States' freedom of action. If the Court persists in this line of decision, the judiciary stands to perform, with respect to Congress's use of its legislative authority under the Fourteenth Amendment, precisely the kind of second-guessing that the Court seemingly sought to avoid in *Lopez* regarding Congress's interstate commerce powers.

The 'Anti-Commandeering' Principle

The relational principle for which the Court has, in my view, had the greatest difficulty finding a specific textual basis in the Constitution is the principle according to which Congress may not compel the States to assist in the furtherance of federal policies. As articulated in the decisions in *New York v. United States* [53] and *Printz v. United States*,[54] the 'anticommandeering' principle protects States from having to enact legislation or administer policies to which they are opposed. Thus, while Congress has broad authority to legislate under the interstate commerce clause, it may not 'conscript' State legislatures or administrative officers into the business of implementing that legislation or its underlying policies if the relevant State authorities refuse to do so. From a practical point of view, unless Congress can prevail on a State to lend its support to the achievement of a federal policy—for example, by offering it federal funds or other adequate incentives—Congress has no choice, if it wants the policies to be effective within that state, but to make federal legislative or administrative resources—for example, personnel, materiel, or funds—available in its place.

Although commandeering of scarce state resources has been described as a virtual 'way of life' within the
p. 208 European Union,[55] the anti-commandeering ↳ principle does have a basis in democratic theory. By protecting a State from having to devote its resources to objectives dictated by the federal government, the principle helps ensure that those resources will not be spent in ways that lack the support of that State's population or that otherwise fail to reflect its political priorities. At the same time, it also allows the State's electorate to hold State officials democratically accountable in policy and performance terms. For its part, the federal government ends up bearing not only the administrative and financial costs of the policy regimes that it prescribes, but also the political costs, including the political responsibility. The contrast with the EU is striking. EU Member State authorities are required to devote the necessary personnel and

resources to the enforcement of EU law, regardless of the political preferences of a Member State's population. At the same time, they effectively bear political responsibility for policies that have basically been determined in Brussels.

The Supreme Court's anti-commandeering jurisprudence exemplifies its readiness to construct federalism principles unsupported by constitutional text.[56] While the Court ultimately invoked the Tenth Amendment in support of this jurisprudence, the language of the Amendment expresses at most the principle of enumerated powers and its corollary, a principle of reserved powers:[57] principles whose meaning and effectiveness do not logically require that the States enjoy freedom from commandeering. Although the full import of the anti-commandeering jurisprudence remains to be seen, it has great potential for ensuring that, in the face of State opposition, the federal government will have to bear the full financial and political costs of its policies, and that the States will consequently have more ample opportunity to pursue their own policies if they are truly determined to do so.

What is the potential role of relational principles in the EU? The question arises because the EU's traditional safeguard mechanisms—for example, defining the structure and composition of the Council and other EU bodies, requiring the conduct of subsidiarity analyses—may prove to be inadequate, and at the same time traditional judicial approaches, such as policing competences, reviewing necessity, and identifying 'core' aspects of state sovereignty, may prove unattractive. It is not simply a question of translating relational
p. 209 rules from the US to Europe, or between ↳ any two federal or federal-type systems. By their very nature, such rules reflect basic assumptions about the relationship between levels of government and about the importance of various aspects of that relationship, like being commandeered or being sued, in overall calculations of power and influence: assumptions in respect of which systems in fact differ widely. For example, in contrast to the US, the EU system extends a broad invitation to commandeering of the Member States, through directives or otherwise. Any relational rules devised by the Court of Justice would have to be appropriate to the EU's own particular historical and political environment.

The truth is that, even in federal or federal-type systems, courts have other, and arguably more compelling, things to do than to enforce allocative maps. This is particularly apparent in polities that have a programmatic mission, which is what the EU has historically had, in the form of commitment to a fully integrated internal market. A court that feels called upon to champion certain fundamental policies—whether market integration, human rights, or anything else—may act in ways that profoundly affect the polity's allocations of power. Arguably, the Fourteenth Amendment has had a far greater effect on federalism in the US than the amendment—the Tenth—that ostensibly addresses the allocation question, and the same may be said of the EC Treaty's provisions on harmonization in furtherance of the internal market. Similarly, a determination to pursue transatlantic regulatory cooperation—or any form of international regulatory cooperation, for that matter—inevitably has strong federalism implications for the nations that participate.[58] If we fix our attention too closely on federalism decisions of the courts as such, we risk missing the collateral federalism effects of other decisions, political and judicial alike.

5. Conclusion

Although at the end of the day politics, more than anything else, determines the real allocative map of power in vertically-divided systems, the law has found ways to shape and enforce that map. Law—more precisely, constitutional law—lays down the fundamentals, in the form of principles intended to guide both the political institutions in their exercises of power and the courts in reviewing the legality of those
p. 210 exercises. No matter what ↳ the favoured strategy of legal control happens to be, these principles serve as the primary points of constitutional reference.

Because formulae, however, are not self-enforcing, both the US and EU are also engaged in the process of devising mechanisms of enforcement. Curiously, not only the youthful EU but also the centuries-old American Republic finds itself in an essentially experimental mode regarding the design and operation of such mechanisms. A traditional way of enforcing the prescribed allocation of authority is to structure and compose federal institutions so as to bring the voice of sub-national communities into the federal legislative process. Taking this strategy a step further, the law may require decision-makers actually to conduct certain inquiries and analyses, or to make certain findings, about matters such as the necessity for federal-level intervention or the impact of such intervention on the interests of State and local governments. In other words, federalism may be made a procedural part of the deliberative process.

Strategies based on structural or procedural safeguards have inherent limitations flowing from the fact that they are based on questionable assumptions about how institutions work and about how structures and procedures affect outcomes. Consequently, consideration inevitably turns to the further possibility of examining the output of the federal political process more directly, by measuring its conformity with whatever principles of federalism are expressed or implied in the constitutive documents. The political actors may, and hopefully will, ask the relevant questions; indeed the structural and procedural strategies that I have discussed presume that they will. But courts can also be expected to have something to say.

The most obvious way for courts to intervene—apart, of course, from enforcing the structural and procedural requirements to which I have alluded—is to enforce directly the limitations of competence—subject matter or otherwise—that are provided for by the constitutive documents, by invalidating any measures that exceed them. Doing so necessarily entails construing the relevant constitutional provisions and then determining how much deference the political branches are owed in their application. A somewhat less obvious way for courts to intervene is to review the question whether the measures at issue are truly 'necessary' for achieving a legitimate objective—with special reference, perhaps, to the constituent States' capacity to achieve that objective through their own action. Doing so likewise entails construing a legal notion—'necessity'—and again determining the deference owed to the political branches in applying this criterion. Under a third approach, the courts might seek to identify independently what attributes constitute
p. 211 the vital 'core' of state sovereignty and then to ensure that those attributes are safeguarded. Here, ↳ too, there arises the question whether the courts owe deference to Congress's assessment of the States' sovereignty claims, or of the extent of damage that particular federal interventions do to them.

For the reasons I have stated, each of these strategies in its own way places the courts in the position of second-guessing the political branches on what are essentially political judgements. This is manifestly the case when courts take it upon themselves to review the 'necessity' for action at a certain level of government. But it also arises when courts substitute their definition of a constitutional competence for that of the political branches, or purport to elevate certain matters to the level of 'core' sovereign interests, even though the political branches have in fact failed to accord them that particular status.

It is perhaps because these three strategies—policing the borders of enumerated powers, reviewing the necessity for federal intervention, and protecting certain core sovereign interests of the States—are so potentially problematic that the Supreme Court has lately shown a preference for seemingly more objective principles which I describe as 'relational' in nature. These are principles which identify certain forbidden 'interfaces' between levels of government. The clearest example is the 'anti-commandeering' principle, a principle whose basic purpose is to entitle the States to determine freely the political priorities to which their human, administrative, and financial resources will be devoted. Immunity from unconsented suit in federal court—and, since *Alden v. Maine*, in State court as well—can also be understood in this light. Unfortunately, the Supreme Court's very recent jurisprudence examining whether Congress has validly 'abrogated' this immunity by enacting a particular piece of legislation under the Fourteenth Amendment—and making the result depend on a court's assessment of the legislation's proportionality—takes the courts off this path and back in the direction of second-guessing political judgements by the political branches.

Assuming the Court maintains its preference for relational rules, as exemplified by sovereign immunity and the anti-commandeering principle, the preference is an intriguing one. While relational rules are rarely 'bright-line' in nature, they arguably also lend themselves to easier application than do rules of a more plainly political character. On the one hand, such rules do look more objective in the sense that their application avoids the appearance of second-guessing determinations on matters of policy that the political
p. 212 branches have presumably already made.[59] To the extent ↳ that relational rules raise questions that the political branches have not themselves raised, they also avert the delicate matter of determining the degree of deference, if any, that the courts owe to the political branches upon the occasion of judicial review. All of this makes relational rules distinctly advantageous from the Court's point of view.

On the other hand, the relationship between relational rules and the constitutional text can be quite tenuous. Indeed the very foundation of such rules in constitutional thought may be open to serious doubt, as shown by the 5–4 division within the opinions of the Court that have announced them. Though, in operation, they may be highly effective tools of federalism, relational rules generate fundamental questions about their own legitimacy: questions that the thinness of their margin of support in the Supreme Court strongly echoes. The creativity shown by the Court in crafting instruments of federalism and the legitimacy of the reasoning by which it crafts them do not necessarily go hand in hand.

While there are accordingly risks present in all judicial strategies for enforcing federalism principles, the European Court of Justice has thus far shown a preference for largely structural and procedural approaches to judicial review. By contrast, direct judicial review of the Community's determinations of legislative competence are thought to raise real risks of second-guessing, risks illustrated by the US Supreme Court's recent Fourteenth Amendment jurisprudence. As for 'relational' approaches to federalism, the specific choices that the Supreme Court has made—sovereign immunity, anti-commandeering—are not ones that the European Court of Justice is likely to embrace. Liability of Member States for infringement of EU law on the one hand, and enlistment of national administrative and judicial machinery for the enforcement of EU law on the other, have become central to the EU system. This does not mean, however, that there are no relational principles that would be suitable to the EU system and that would support an appropriate balance between national and European authority. Given the EU's great potential for effective political safeguards of federalism, efforts would seem best directed at strengthening them and then enlisting the Court of Justice in their support.

Notes

1 On a basic ambiguity in the term 'federalism', and the fact that, as currently used, the term sometimes denotes centralization and sometimes decentralization, see William Safire, 'Federalism: The Political Word that Means its Opposite', *New York Times Magazine*, 30 January (2000), 20.

2 George A. Bermann, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States', *Columbia Law Review*, 94 (1994), 331, 339–43 10.2307/1123200 .

3 Article 5 [ex Art. 3b] of the EC Treaty provides that 'In areas which do not fall within its exclusive competence, the Community shall take action . . . only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community'. As worded, subsidiarity is not so much a principle of power allocation as a principle that prescribes when powers, once allocated, should or should not be exercised. The protocol on the application of the principles of subsidiarity and proportionality, attached to the Treaty of Amsterdam, clarifies (in para. 4) that subsidiarity has two aspects. In order for Community action to be justified, subsidiarity requires both that the Member States cannot sufficiently achieve the objectives at hand and that the Community can better achieve them. Put simply, Member State alternatives must be both 'ineffective' and 'inefficient'. The protocol builds upon previous instruments, notably the European Council's 'Guidelines for Application of the Subsidiarity Principle', 25 E.C. Bull. No. 12 (1992), 15, and the 'Interinstitutional Agreement on Democracy, Transparency and Subsidiarity', O.J. C. 32/132 (6 December 1993). For the text of the protocol, see O.J. C 340/92 (10 November 1997).

4 See Herbert Wechsler, 'The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government', *Columbia Law Review*, 54 (1954), 543 10.2307/1119547 .

5 See Carol F. Lee, 'The Political Safeguards of Federalism? Congressional Responses to Supreme Court Decisions on State and Local Liability', *Urban Lawyer*, 20 (1988), 301, 333; Lewis B. Kaden, 'Politics, Money and State Sovereignty', *Columbia Law Review*, 79 (1979), 847 10.2307/1121910 , 897; Andrzej Rapaczynski, 'From Sovereignty to Process: The Jurisprudence of Federalism after *Garcia*', *Supreme Court Review*, 1985 (1985), 341, 419.

6 The Unfunded Mandates Reform Act of 1995, Pub. L. 104-4, 109 Stat. 48, 2 U.S.C. sec. 658d et seq.

7 Executive Order 12612, 3 CFR, sec. 252, 52 Fed. Reg. 41685, replaced by Executive Order 12875, 3 CFR sec. 669, 58 Fed. Reg. 58093, reprinted in 5 U.S.C. Sec. 601. See the chapter by David Lazer and Viktor Mayer-Schoenberger in this volume.

8 Examples include creation of the Committee of the Regions in EC Treaty art. 263 [ex art. 198a], and attachment to the Treaty of Amsterdam of a protocol on the role of national parliaments in the European Union (establishing a Conference of European Affairs Committees, or COSAC). O.J. C 340/113 (10 November 1997).

9 See, for example, Art. 23 of the German Basic Law—*Grundgesetz*—vesting certain of Germany's decision-making rights in the Council of the European Union in the hands of the German *Länder*.

10 See the chapter by Giandomenico Majone in this volume.

11 Paragraph 6 of the Subsidiarity Protocol to the Amsterdam Treaty (see note 3 above) instructs the Commission to 'consult widely' and 'publish [its] consultation documents' on the subsidiarity aspects of its proposals.

12 See note 6 above.

13 For examples, see George A. Bermann, *Regulatory Federalism: European Union and United States*, The Hague Academy of International Law Recueil des cours, 263 (The Hague: Martinus Nijhoff, 1997), 94–6.

14 The Subsidiarity Protocol to the Amsterdam Treaty (see note 3 above) is most explicit (in para. 4) about the Commission's role: 'For any proposed Community legislation, the reasons on which it is based shall be stated with a view to justifying that it complies with the principle of subsidiarity. These reasons must be substantiated by qualitative and, wherever possible, quantitative indications.' As for the Council and Parliament, the Protocol (paras 11, 12) enjoins them specifically to consider the question of a measure's compliance with the principle of subsidiarity. The Council is further required to inform the Parliament of its position and the reasons for it.

15 See the chapter by David Lazer and Viktor Mayer-Schoenberger in this volume.

16 Paragraph 9 of the Subsidiarity Protocol (see note 3 above) calls upon the Commission in effect to give an 'accounting' of its subsidiarity efforts, in the form of an annual report setting out both the proposals for legislation that are being withdrawn on account of subsidiarity and the existing measures whose legislative repeal is being proposed on that account. This device operates in part on a principle of 'embarrassment'. Were the Commission's annual report devoid of any content, the Commission would have some explaining to do.

17 To a very large extent, the Commission's annual reports describe a simplification and consolidation of existing legislation in the interest of better order, rather than a significant curtailment of it in the interest of subsidiarity. See Bermann, 'Regulatory Federalism', 81.

18 See Bermann, 'Taking Subsidiarity Seriously', 442–5.

19 See note 3 above.

20 'The Congress shall have the power to . . . regulate commerce with foreign nations, and among the several states.' US Constitution, Art. I, sec. 8.

21 'The Council shall . . . adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.' EC Treaty, art. 95 [ex 100a].

22 514 U.S. 549 (1995).

23 See also *Reno v. Condon*, ___ U.S. ___, 120 S. Ct. 666 (2000). On the other hand, for reasons explored below, the Supreme Court has recently taken a considerably harder look at the justification, in terms of 'proportionality', for legislation that Congress enacts on the basis of section five—the enforcement clause—of the Fourteenth Amendment. See notes 48–52 below and accompanying text.

24 See *United States v. Morrison*, ___U.S.___, 120 S. Ct. 1740 (2000). There, the Court, in a 5-4 opinion, ruled that the inter-State commerce clause could not support enactment of the federal Violence Against Women Act of 1994, since Congress may not regulate non-economic violent criminal conduct merely on the basis of the conduct's aggregate effect on inter-State commerce.

25 See George A. Bermann, Roger J. Goebel, William J. Davey, and Eleanor M. Fox, *Cases and Materials on European Community Law* (St Paul, MN: West Publishing, 1993) and cases cited therein, along with the 1998 Supplement.

26 Reviewing Congress's determination that action at the State level would be ineffective in achieving a federal objective, or that action at the federal level would be more efficient, would be considered illegitimate 'second-guessing' on policy matters that the courts lack the political legitimacy to decide and that are properly left to the political branches.

27 See *United States v. Morrison*, note 24 above. Moreover, a majority of the Court has recently shown a willingness to review the 'proportionality' of federal legislation enacted pursuant to section five—the enforcement clause—of the Fourteenth Amendment. See notes 48–52 below and accompanying text.

28 See note 3 above.

29 See note 3 above.

30 Case C-94/94 (Working Time Directive), [1996] ECR I-793. In this case, the UK challenged the Council's use of the EC Treaty article, then 118a, on social policy, rather than articles that would have required unanimity in the Council, in adopting a directive regulating hours of employment. The Court ruled that the Council could reasonably conclude that improving the health and safety of workers required harmonization of national law, and that harmonization in turn necessitated Community-wide action.

31 Case C-233/94 (Deposit Guarantee Schemes), [1997] ECR I–2405. Here, Germany challenged a directive requiring the Member States to establish a system for guaranteeing bank deposits. Germany faulted the Parliament and Council for failing to support the directive with a statement of reasons that demonstrated the measure's compatibility with the principle of subsidiarity. The Court found the institutions' statements in this regard to be sufficient.

32 The Subsidiarity Protocol to the Amsterdam Treaty—see note 3 above—does not require that the Council, or Council and Parliament, give any statement of reasons as such. To this extent, the Court's judgements go procedurally further.

33 In the *Working Time Directive* case, the Court implied that once the institutions find that harmonization of national laws is necessary, action at the Community level automatically becomes necessary. This makes the requirement of a statement of reasons quite easy to satisfy. In the *Deposit Guarantee Scheme* case, the Court seemingly accepted at face value the official statement of reasons that Community-level action was necessary.

34 This may be the import of para. 13 of the Subsidiarity Protocol to the Amsterdam Treaty—see note 3 above. If such 'substantive' review, like the procedural review, is destined to be deferential, the question naturally arises whether it is worth conducting. I conclude that it is.

35 See notes 8 and 9 above and accompanying text.

36 *National League of Cities v. Usery*, 426 U.S. 833 (1976). In *National League of Cities*, the Court upheld a challenge to the application of federal minimum wage standards to State and local public officials on the ground that State employment policies are matters that have 'traditionally' been left to the States, and that lay beyond the proper scope of Congress's powers under the Tenth Amendment, because federalizing them would hamper the States in the performance of their essential functions.

37 469 U.S. 528 (1985).

38 The case law of the Court of Justice on 'the correct legal basis' of legislation—see note 25 above and accompanying text—rests on the premise that when Member States consider sovereignty concerns important enough, they include appropriate voting formula language in the relevant treaty articles. On this reasoning, it is enough for the Court to enforce the requirement that for each Community law measure the 'correct' treaty basis must be used and to ensure that the procedures and voting formulae associated with that legal basis are actually followed.

39 Seminole Tribe of Florida, 517 U.S. 44 (1996).

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

41 527 U.S. 706 (1999).

42 EC Treaty, Arts. 226, 227 [ex Arts. 169, 170].

43 Brasserie du Pecheur SA v. Germany, and The Queen v. Secretary of State for Transport ex parte Factortame Ltd., Joined Cases C-46, 48, [1996] ECR I-1029; Francovich v. Italy, Cases C-6, 9/90, [1991] ECR 5357.

44 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'

45 'The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.'

46 Thus, limits on Congress' use of the Fourteenth Amendment are relevant not only to the enactment of legislation abrogating Eleventh Amendment immunity, but also more broadly to the enactment of legislation establishing a remedy against private persons. See *United States v. Morrison*, note 24 above.

47 *City of Boerne v. Flores*, 521 U.S. 507 (1997). In *City of Boerne*, the Supreme Court declared that Congress exceeded the bounds of section five of the Fourteenth Amendment in enacting the Religious Freedom Restoration Act (RFRA) of 1993, which sought to prohibit any unnecessary burdening of freedom of religion by requiring the States, whenever burdening it, to prove both a compelling State interest in doing so and the unavailability of a less restrictive alternative. The Court ruled that enforcing the Fourteenth Amendment's guarantees means essentially acting to remedy past violations or to prevent future ones. According to the Court, the RFRA did not do either of these things, but instead impermissibly sought to define what the Fourteenth Amendment means.

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

49 *United States v. Morrison*, note 24 above; *Kimel v. Florida Bd. of Regents*, ___ U.S. ___, 120 S. Ct. 631 (2000); *College Savings Bank v. Florida Prepaid Post-Secondary Educ. Expense Bd*., 527 U.S. 666 (1999); *Florida Prepaid Post-Secondary Educ. Expense Bd. v. College Savings Bank and United States*, 527 U.S. 627 (1999).

50 EC Treaty, Art. 5 [ex Art. 3b]: 'Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.'

51 See, for example, Case 11/70, *Internationale Handelsgesellschaft GmbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, [1970] ECR 1125.

52 See notes 22 and 23 above and accompanying text. But see note 25 above and accompanying text, referring to the Court's recent opinion in *United States v. Morrison*.

53 505 U.S. 144 (1992). In *New York*, the Court ruled that Congress could not compel the States to enact legislation that either provided for disposal of all radioactive waste by a certain date or subjected the States to all liability for that waste as its owner.

54 521 U.S. 98 (1997). In *Printz*, the Court ruled that Congress could not compel local sheriffs to conduct background checks on purchasers of handguns as a feature of federal gun control policy.

55 George A. Bermann, 'Judicial Enforcement of Federalism Principles', in Michael Kloepfer and Ingolf Poernice (eds), *Entwicklungsperspektiven der europaischen Verfassung im Lichte des Vertrags von Amsterdam* (Baden-Baden: Nomos Verlagsgesellachaft, 1999), 64, 74.

56 See, for example, Saikrishna Prakash, 'Field Office Federalism', *Virginia Law Review*, 79 (1993), 1957 10.2307/1073477 ; Richard Levy, 'New York v. United States: An Essay on the Uses and Misuses of Precedent, History and Policy in Determining the Scope of Federal Power', *Kansas Law Review*, 41 (1993), 493. Congress can, of course, make its own legislative contribution to the anti-commandeering effort. Consider the Unfunded Mandates Act of 1995, note 6 above.

57 '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.'

58 George A. Bermann, 'International Regulatory Cooperation and US Federalism', in G. Bermann, M. Herdegen, P. Lindseth (eds), *Transatlantic Regulatory Cooperation* (Oxford: Oxford University Press, 2000), 373–84.

59 It should be easier for federal courts to recognize 'commandeering' or 'conscription', when they see it, than to determine whether a piece of federal legislation genuinely implicates inter-State commerce, whether an activity represents a sufficiently 'traditional' or 'essential' attribute of State sovereignty to insulate it from federal regulation, or whether the federal intervention is 'necessary' or 'proportionate.'