DUAL SOVEREIGNTY UNDER THE CONSTITUTION: How Best to Protect States Against Federal Taxation and Regulation

Richard A. Epstein*

There is little doubt that the Framers of the United States Constitution had little awareness of the immense complexities that would creep into the constitutional system that they created in 1787 in Philadelphia. Their challenges were enormous given the necessity to determine the appropriate relationship of the states, both with each other and with the federal government. It is that last question that is the focus of this article, which asks the simple question of what level of protection states have from taxation and regulation by the federal government.

The first point to note about this relationship is that the Constitution contains no specific provisions that address these critical interactions. It has long been understood that the process of interpretation in this context is not confined to the standard originalist project of finding the shared public meaning of particular constitutional texts.[1] Instead, it is the more daunting task of finding the correct answer by resorting to basic principles of "necessary implication" that stem from standard background rules of constitutional interpretation,[2] that often reflect, as was commonly understood "the great law of self-preservation."[3]

The second point to note is that the Supremacy Clause in Article VI, Clause 2, under which state law must give way to federal law,[4] has often been

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* Laurence A. Tisch Professor of Law, New York University School of Law, The Peter and Kirsten Bedford Senior Fellow, The Hoover Institution, The James Parker Hall Distinguished Service Professor of Law Emeritus, and Senior Lecturer, The University of Chicago. My thanks to Craig Fligor and Manuel Valle, University of Chicago class of 2017, and Bijan Aboutarabi and Thomas Molloy, University of Chicago class of 2018, for their usual expert research assistance.

1. For my views on this question, see RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION 45–71 (2014) (discussing rules of circumvention, defenses, and remedies); Richard A. Epstein, *Our Implied Constitution*, WILLAMETTE L. REV. (forthcoming 2018).

2. *See* Collector v. Day, 78 U.S. (11 Wall.) 113, 124, 127 (1870).

3. *Id.* at 127.

4. *See* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every

invoked in the post-New Deal era.[5] But that clause does not come into play if the asserted federal exercise of power over state governments exceeds either the explicit *or* implicit constitutional limitations on federal power. In the original constitutional design, two factors militated against the now dominant view of federal supremacy. The first is that the states were regarded as coequal sovereigns in their own right, from whom the federal government derived those powers that were "herein granted" to it, without forcing the states to eviscerate their own powers.[6] Second, that basic point is confirmed by the structure of Article I, with its definite and enumerated powers that were widely thought, at the time, to leave large classes of activities within the exclusive purview of the states. If, as had universally been held before the onset of the New Deal, activities dealing with agriculture, mining, and manufacture were all local activities subject to exclusive regulation by the states, the scope for potential conflicts would necessarily be limited to those few areas that fell within the scope of both federal and state power.[7]

The third point deals with what is *not* at stake in this discussion of sovereign immunity—namely, the immunity of the state from suits by private parties for either the taking of property, breach of contract, or the commission of a tort in relationship to any private person, whether a citizen of the state or not. In these cases, the small-government case against sovereign immunity is especially powerful because such litigation functions as an effective check on the ability of the state to go outside of its appropriate realm. The traditional principle of sovereign immunity, based on the positivist creed that no private party can have an action against the state that is the author of the relevant law, applies with full force to claims of this sort. In stating the case for sovereign immunity in this context, Justice Holmes in *Kawananakoa v. Polyblank*

State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

5. *Compare* New York v. United States, 326 U.S. 572, 581 (Frankfurter, J.) (relying on supremacy), *with id.* at 592 (Douglas, J., dissenting) (denying its role). As Justice Douglas explained:

> The Supremacy Clause, Article VI, clause 2, applies to federal laws within the powers delegated to Congress by the States. But it is antagonistic to the very implications of our federal system to say that the power of Congress to lay and collect taxes, Article I, § 8, includes the power to tax any state activity or function so long as the tax does not discriminate against the States.

Id. at 592.

6. *See* U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

7. *See, e.g.*, Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245, 250–52 (1829) (resolving a conflict between federal control over navigation and state police power).

wrote, "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."[8] Uneasiness with that rationale led to its erosion by general statutes under which the United States allowed itself to be sued in specific circumstances. States passed similar laws cutting back, often quite substantially, on sovereign immunity as well.[9] Until 1946, the right to sue the United States was hedged about with various limitations and depended on the consent of the United States to suit in individual cases. In 1946, however, Congress passed the Federal Torts Claims Act.[10] Subject to many key exceptions, that statute authorized some damages actions against the federal government to those suffering harm from what, except for the traditional immunity, would be the tortious conduct of government employees.[11]

To make matters still more complicated, it was widely understood that the creation of federal jurisdiction under Article III was not intended to strip the states of their sovereign immunity against suits by any private parties.[12] Thus, when *Chisholm v. Georgia* held in 1793 that sovereign immunity did not apply to suits against states brought in federal court under Article III of the U.S. Constitution,[13] the prompt response was the passage of the Eleventh Amendment in 1795,[14] which was drafted so as to suggest the federal courts *never* had any jurisdiction over these claims—a provision that was reinterpreted to allow a state to waive the sovereign immunity defense.[15] The

8. Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907).

9. For example, in Illinois, the Local Governmental and Governmental Employees Tort Immunity Act, 745 ILL. COMP. STAT. 10/1-101 to 10/10-101 (2017), contains ten complex sections on all aspects of this problem.

10. Federal Torts Claims Act, ch. 753, 60 Stat. 842 (1946) (codified as amended in scattered sections of 28 U.S.C.).

11. 28 U.S.C. §§ 2671–2680 (2012).

12. THE FEDERALIST No. 81, at 486–87 (Alexander Hamilton) (Clinton Rossiter ed., 2003) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual WITHOUT ITS CONSENT. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States . . . .").

13. Chisholm v. Georgia, 2 U.S. (1 Dall.) 419, 425 (1793).

14. *See* U.S. CONST. amend. XI ("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."). The word "construed" is no accident. It meant that the Eleventh Amendment is declaratory of the prior state of affairs as existed before *Chisolm*. The words "judicial power" appear to preclude any waiver by the states who normally cannot unilaterally confer jurisdictions on federal courts.

15. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 98–99 (1984).

sovereign immunity doctrine did not only apply to suits brought by citizens of one state against another state, as was the case in *Chisholm*, but also extended, by implication given that the written Constitution does not address the question at all,[16] to suits by any citizen against his or her own state.[17]

It is certainly worth noting that just this issue arose in connection with the Fair Labor Standards Act of 1938 ("FLSA"), when the Supreme Court in *Alden v. Maine* held by a 5–4 vote that private plaintiffs in an FLSA case could not, even under the expanded New Deal version of the Commerce Clause, abrogate the state's sovereign immunity defense against private damage suits in a state's own courts—again as a matter of constitutional implication.[18] That decision followed on the heels of *Seminole Tribe of Florida v. Florida*, which had previously held that the states were immune to FLSA suits in federal courts.[19] The total package of immunity from suits raises the key additional question of whether the states should be subject to direct regulation on employment regulation, when as a matter of basic economic theory, taxation, regulation, and litigation are all best understood as both complements and substitutes for each other[20]: each of the uses some form of government coercion to achieve a given result, as when automobile safety can be brought by either direct government regulation or private tort actions, both of which, ideally, should address the same set of product defects. Nonetheless, as becomes clear, the Supreme Court has, after a long and tortuous debate, held that states may be subject to direct regulation by the federal government, without justifying this differential application of sovereign immunity.

Put otherwise, the same process of implication that protects states against actions in private suits could be extended, when appropriate, to protect states against either direct taxation or regulation by the federal government,

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16. For an early explanation of the doctrine, see THE FEDERALIST No. 81, *supra* note 12. For one of many modern cases that delves into the dispute, see Alden v. Maine, 527 U.S. 706 (1999).

17. Hans v. Louisiana, 134 U.S. 1, 16–17 (1890).

18. *Alden*, 527 U.S. at 712 (1999) ("We hold that the powers delegated to Congress under Article I of the United States Constitution do not include the power [under the FLSA] to subject nonconsenting States to private suits for damages in state courts."). The dissent of Justice Souter, relied on *National League of Cities v. Usery*, 426 U.S. 833 (1976), which he argued required the contrary result. *Alden*, 527 U.S. at 806.

19. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 76 (1996).

20. *See generally* Richard A. Posner, *Regulation (Agencies) Versus Litigation (Courts): An Analytical Framework*, *in* REGULATION VS. LITIGATION: PERSPECTIVES FROM ECONOMICS AND LAW 11 (Daniel P. Kessler ed., 2010); W. Kip Viscusi, *Regulation, Taxation, and Litigation* (Vanderbilt Univ. Law Sch. Pub. Law & Legal Theory, Working Paper No. 11-12, 2011), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1783032.

especially when controversies within the state can also lead to litigation in either federal or state court. The likelihood of that kind of conflict was evident from the earliest days in connection with taxation, where the broad grant of power found in Article I, Section 8 lets Congress lay and collect taxes, without specifying what persons or property are properly subject to the tax. Again, only the process of implication allows us to determine how this broad grant intersects with the present argument that the sovereign states did not surrender their power to resist federal taxation.[21]

The argument also applies to regulation done pursuant to other provisions contained in Article I, Section 8, Clause 3, which gives the Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[22] This clause likewise carves out no exception for any commerce undertaken by the various states, whether in a proprietary or governmental status. It should be evident that this conflict could arise even under the narrow, pre-New Deal definition of commerce, as when the state wants to ship any goods that it owns through the channels of interstate commerce. It is equally clear that the magnitude of the conflict becomes far greater once the scope of the commerce power is made virtually plenary with respect to all economic and business affairs, whether or not they cross state borders.[23] Thus, a deferential attitude toward federal regulation of state activities in the post-New Deal era raises the stakes in the conflict, without explaining how it should be resolved.

In other writings, I have made it abundantly clear that I think that all of the New Deal innovations on the commerce power and in connection with property rights and freedom of contract are fundamentally misguided insofar as they promote centralized power that allows for the massive federal destruction of competitive markets, by putting into their place a wide range of monopoly structures.[24] It thus remains the case, for example, that the FLSA is as unconstitutional on this view of the world, both as a matter of individual rights and of federal power, as are the National Labor Relations Act, the Agricultural Adjustment Acts, and the numerous other New Deal statutes that put a command-and-control system in place of competitive markets, the latter which guarantee both greater individual freedom and higher levels of

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21. U.S. CONST. art. I, § 8 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States . . . .").

22. *Id.* art. I, § 8, cl. 3.

23. On the importance of this term, see *infra* note 64.

24. *See, e.g.*, Richard A. Epstein, *The Cartelization of Commerce*, 22 HARV. J.L. & PUB. POL'Y 209, 211–14 (1998).

output.[25] But in this article, I shall leave those considerations to one side, and ask the question of how best to treat different forms of regulation and taxation that generally have passed constitutional muster, in the specific context of their application against state activities for which the state has inserted a defense of sovereignty.

One question common to these cases is whether they should be resolved on the assumption that the federal government has options to regulate the states only if the states have *like* powers over the activities of the federal government within their borders. That assumption follows quite naturally from the position of coequal sovereigns, even if it would have to be rejected if the federal government has the whip hand in all intergovernmental conflicts. The earlier position has a lot to commend itself on as a matter of first principles, as well as constitutional text, because it introduces an effective constraint on federal power through a norm of reciprocity—that is, we can tax or regulate you only if you can tax or regulate us.

The next question is how this norm would play out if put into place. It turns out that there are three possible variations in the decided cases, which are relevant whether or not the reciprocity norm offers a sound first cut into the problem (as I believe, contrary to today's consensus). The first and strictest line follows closely on the view that I have already taken with respect to sovereign immunity in private damage actions. The federal government faces extensive prohibitions on what it can do, so that it may neither tax states nor regulate at least some large chunk of their activities. The second approach uses the familiar device of a nondiscrimination provision in one of two forms. In some cases, the federal government or the states may subject the other to regulation or taxation, so long as it does not single them out for especially harsh treatment. Here too this solution is appropriate for yet another large chunk of cases. In its stronger form, the provision says that any government, whether state or federal, that wants to impose the restriction on the other has to be prepared to impose a like restriction on itself. Each of these variations has its appropriate niche. And the third position, which I regard as inappropriate in all cases, is that the entire matter is left to the political branches of government to decide, chiefly on the analysis made famous by the 1954 article of Herbert Wechsler, *The Political Safeguards of Federalism*,

25. For a small sample on the Commerce Clause, see generally Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987). On takings and economic liberties, see generally RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); Richard A. Epstein, *Toward a Revitalization of the Contracts Clause*, 51 U. CHI. L. REV. 703 (1984). On both, see generally RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION (2014).

namely, that those political safeguards were all that states needed to guard their sovereignty in the broad run of cases.[26] In modern terms, this position looks very much like the rational-basis standard of review as applied to structural limitations, which is in general a bad approach to *any* review of the exercise of federal or state power.[27] As noted, there is no one who thinks that any one of these multiple approaches governs all possible permutations of federal and state regulation, but there is little doubt that the shift in the center of gravity has been away from the first position to some combination of the second and third positions.

In order to attack these issues, it is necessary to figure out how to draw the proper balance between federal power and state independence. The relevant metrics in these cases involve typically a trade-off between two relevant considerations. First, to what extent does the creation of an immunity limit the power of either the federal or state governments to discharge their own proper functions vis-à-vis its citizens? Second, to what extent does the imposition of federal power against the states, or the states against the federal government, compromise their abilities, as targets of regulation, to discharge their own respective functions?

In dealing with this cluster of potential conflicts, it is critical to be agnostic about the scope of government functions on both sides of the ledger. Thus, it should not matter for these purposes whether the federal claims relate to traditional night-watchman functions of the federal government, the operations of various government offices pertaining to patents and

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26. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954), which does not address the issue of sovereign immunity directly. But the message is nonetheless clear:

> Federal intervention as against the states is thus primarily a matter for congressional determination in our system as it stands. So too, moreover, is the question whether state enactments shall be stricken down as an infringement on the national authority. For while the Court has an important function in this area, as I have noted, the crucial point is that its judgments here are subject to reversal by Congress, which can consent to action by the states that otherwise would be invalidated. The familiar illustrations in commerce and in state taxation of federal instrumentalities do not by any means exhaust the field. The Court makes the decisive judgment only when—and to the extent that—Congress has not laid down the resolving rule.
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> To perceive that it is Congress rather than the Court that on the whole is vested with the ultimate authority for managing our federalism is not, of course, to depreciate the role played by the Court, subordinate though it may be.

Id. at 559–60.

27. Richard A. Epstein, *Rational Basis Review of FDA Regulation: Why the Two Do Not Mix*, 14 GEO. J.L. & PUB. POL'Y 417, 418–19 (2016).

copyrights, or the activities of the Department of Health and Human Services in the administration of its various welfare and transfer programs. Each side is always allowed under its own constitution to define the set of its own permissible activities, so long as they do not run afoul of explicit constitutional prohibitions. There are so many different functions that lie on a continuum that it is pointless to try to classify different situations on opposite sides of some elusive line, and no apparent reason to do so. The same approach should apply to the states, whether they take on traditional laissez-faire functions, run the programs of social support and income transfer that are part and parcel of the modern social welfare state, or do anything in between. Thus, neither the federal government nor the states should try to limit the range of functions available to the other co-equal sovereign by artificially singling out "private" functions of a government for regulation and taxation, while exempting "sovereign" or "public" functions of the government. It follows therefore that broad pronouncements are correct to the extent that they claim that it is "unimportant to say whether the state conducts its railroad [or any other activity] in its 'sovereign' or in its 'private' capacity," in deciding whether it should be subject to state taxation.[28] So-called private activities when undertaken by government have as much protection as the traditional sovereign ones.

In dealing with the larger issue, my thesis is that today's center of gravity seriously misstates the correct balance, and that the proper approach involves much more a mixture of the first two approaches in preference to the third anything-goes approach. In undertaking this examination, I shall look first at the tax cases, and then in greater detail to cases that arise in connection with the Fair Labor Standards Act, which, as should be evident by the references to both *Seminole Tribe* and *Alden*, has been at the storm center for much of the modern controversy. In those cases, unlike the taxation cases, I think that full immunity from federal regulation is the appropriate response, just as it is when sovereign immunity provides an absolute barrier to individual damage actions in both federal and state courts. Indeed, the case for sovereign immunity in this context is even stronger because resisting enforcement actions under the FLSA does not compromise any rights—by taking private property, by escaping tort liability, or by evading contractual breaches—that form the heart of a common law system. Yet when it comes to taxes, the reverse view is correct. The nondiscrimination principle in that context is usually sufficient to protect either level of government, while allowing each government to satisfy its revenue needs from individuals who derive the same benefits from their government as everyone else.

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28. United States v. California, 297 U.S. 175, 183 (1936).

In order to defend this thesis, I shall begin with the taxing cases and then move on to the regulation cases, with special emphasis on the FLSA, which lies at the heart of so many of these disputes.

I. INTERGOVERNMENTAL TAXATION

The first major case on the taxation question is of course *McCulloch v. Maryland* from 1819, which involved efforts by the state of Maryland to impose a tax on all various transactions by the Second Bank of the United States ("SBUS").[29] The most famous holding of that decision, namely, that the creation of SBUS was authorized under the necessary-and-proper clause, is for these purposes taken as a given,[30] in order to focus on the second portion of the opinion, which held that the Supremacy Clause necessarily invalidated the tax imposed on the bank.[31] The *only* bank to which this tax applied was the SBUS, because no foreign state bank did business inside Maryland. Hence a nondiscrimination approach that treats all outsiders as the relevant class would be of no use in this particular context for a rule that applies to only one bank. But the situation would be somewhat different if in fact Maryland imposed the same tax on transactions of its in-state banks, at least as long as it did not separately rebate the tax to them alone.[32] At that point, Maryland would have to pay a real political price for imposing the same tax on local banks. As direct competitors of the SBUS, they would gain no competitive advantage if subjected to the same tax as the SBUS, which is exactly how a nondiscrimination provision is supposed to work.

Nonetheless, Chief Justice Marshall circumvented this argument by insisting that the Supremacy Clause was the proper ground to invalidate any state tax on the national bank, which in effect adopts not the nondiscrimination position, but instead the total immunity from taxation. Marshall insisted that if the states could tax these U.S. bank notes then the parade of horribles would follow: "They may tax the mail; they may tax the mint; they may tax patent-rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed

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29. McCulloch v. Maryland, 17 U.S. (1 Wheat.) 316, 317–22 (1819).

30. Perhaps incorrectly. *See* Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 305–06 (1993); Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 CASE W. RES. L. REV. 243, 315–17 (2004).

31. *See McCulloch*, 17 U.S. at 436–37.

32. *See* W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 197 (1994) (striking down a general tax on raw milk made by domestic and foreign producers and rebating the entire proceeds to Massachusetts farmers).

by the government, to an excess which would defeat all the ends of government."[33]

But this parade of dire consequences falls short. For example, suppose that the federal government passed a law that purported to insulate the SBUS from all state taxation. Surely that law should be subject to a high degree of scrutiny because it represents a unilateral action of the federal government to promote its own constitutional position relative to that of the states. All this is not to say that the tax should be regarded as constitutionally inappropriate given its size, which raises awkward questions of degree. But the better ground rests on the notion that the states as sovereigns cannot do anything to impede the operation of the federal government. That position should be decisive against a tax that singles out the federal government for special treatment, and it should, with only little imagination, carry over to the common situation where the tax on paper is broader than its operation in practice. On this view, there is no need to opt for the absolute immunity from taxation in either direction. The parity principle could allow for limited taxation on both sides. This taxation is unlikely to happen as to the direct operations of either government, such as a real estate or revenues of a municipal corporation. Such an attempt to tax a municipal corporation was in fact struck down years later in *United States v. Railroad Co*., on the theory that a municipal corporation is part of the sovereign power of a state.[34]

A converse situation arose in *Collector v. Day*, in which the question was whether the federal government could impose a tax on the salaries of state officials, but not on the income of the state government itself.[35] The background assumption was that the Supreme Court's earlier decision in *Dobbins v. Commissioners of Erie County*[36] held—again by necessary implication—that the states were not in a position to levy a tax on the "salary or emoluments of an officer of the government of the United States."[37] The stated concern in *Dobbins* was that Congress would have to increase its salaries to offset any reduction offered by the tax, in ways that would lead necessarily to a lack of uniformity in federal compensation across state lines.[38]

That argument is sufficient to establish that a parity of approaches is correct on matters of intergovernmental taxation. But it hardly suggests that

33. *McCulloch*, 17 U.S. at 432.
34. 84 U.S. 322, 333 (1872).
35. Collector v. Day, 78 U.S. (11 Wall.) 113, 122 (1870).
36. 41 U.S. (16 Pet.) 435, 450 (1842).
37. *Day*, 78 U.S. at 124.
38. *See Dobbins*, 41 U.S. (16 Pet.) at 448.

the absolute double immunity from taxation for individual employees is the correct arrangement, rather than the nondiscrimination principle championed by Justice Bradley in his dissent in *Day*.[39] His concern was that the general exemption from taxation could extend far beyond salaries to any other instrumentality that the state uses, directly or indirectly, to discharge its public functions.[40] This instinct is indeed correct when taken in reference to the general theory of taxation. The state has to supply its various protective services to all of its citizens, whether they work for the federal government or not. The decision to insulate these federal public officials from the taxation by the second tier of government means that they necessarily receive a cross-subsidy from their fellow citizens, which in turn distorts the state's expenditures on its own public goods, which at the time were more narrowly defined, as nonexclusive goods, thereby excluding all explicit transfer payments among different groups of citizens.[41] Under the nondiscrimination principle, these public officials could not be subject to any greater tax than their fellow citizens.

In this instance, the attractiveness of that principle is great because the inclusion of all working individuals in the tax base has no tendency to lead to any inefficient form of over- or under-taxation now that the political risk of singling out one group of individuals has been effectively countered. So the correct way to put the question is this: which of the following two ways helps both levels of government function better, first, a total exemption from taxation for its employees on condition that it grant a like exemption from the other branch of government or, second, a principle of uniform nondiscriminatory taxation for all? In my judgment, the latter outcome is preferable as a matter of first principle to a total immunity from income taxation. Hence, even if we rightly think that the power of taxation is necessary for state self-preservation, cutting down on the size of both tax bases is hardly the way to proceed. The situation is quite different from the taxation of the revenues or real estate of a municipal government, which is much more likely to vary widely, thus creating odd and unanticipated burdens. In those contexts, absolute immunity, both ways, seems to be the preferable approach.

Nonetheless, the immunity principle announced in *Day* was truncated in *South Carolina v. United States*[42] so that it applied only to functions "of a

39. 78 U.S. at 128 (Bradley, J., dissenting).

40. *See id.* at 129.

41. I trace this development in RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT 194–98 (2014).

42. 199 U.S. 437 (1905).

strictly governmental character,"[43] without explaining why both opinions in *Day* were wrong in finding that the basic principle covered all activities. Instead, Justice Brewer, duly cited *Dred Scott v. Sandford*, in order to uphold a liquor license tax closely bound to the general police power prohibitions against the use of alcohol. That tax thus falls within the class of "sin taxes" that are quite different from the standard revenue raising tax measures involved in *Day*.[44] The forceful dissent of Justice White took the position that, as Congress could not prohibit the sale of alcohol within the state, it was powerless under the doctrine of intergovernmental immunity to "impose a license exaction on the agents of the state" whenever it allowed for the sale of alcohol inside the state.[45] The parity between powers to tax and regulate is as appropriate here as in other cases, so that *South Carolina* seems incorrect as a matter of principle, and, accordingly, should be confined to the complex situation surrounding the taxation and regulation of alcohol, which at the time was singled out for special constitutional treatment under the police power, extending as it does to morals regulation.[46]

Unfortunately, cases like *South Carolina* set the table in dealing with the very different class of tax cases that arise during the immediate post-World War II period. In those years, one key question before the courts was the consolidation of public and administrative law in the wake of the 1937 revolution. That effort included such matters as federal preemption of state law,[47] and the passage of the Administrative Procedure Act, as an effort to organize the federal system after its enormous expansion in scope and importance.[48] The same forces of strong centralization at work during that consolidation period also carried over to intergovernmental immunities. Thus the 1946 case of *New York v. United States*[49] raised the simple question of whether a standard federal tax on mineral waters could be assessed against New York State for mineral waters that it sold commercially from Sarasota Springs. New York's defense immediately got off on the wrong foot when it claimed that the tax could not be imposed because the sale of mineral waters was "in the exercise of a usual, traditional and essential governmental

43. *Id.* at 461.
44. *Id.* at 449 (citing Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 426 (1857)).
45. *Id.* at 465 (White, J., dissenting).
46. *See, e.g.*, Leisy v. Hardin, 135 U.S. 100, 124–25 (1890) (noting that the states did not have the power to prohibit the sale of alcohol within the state so long as it was in its original package).
47. *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230–31 (1947).
48. Administrative Procedure Act of 1946, Pub. L. No. 79-404, 60 Stat. 237 (codified as amended at 5 U.S.C. §§ 500–596 (2012).
49. 326 U.S. 572, 573 (1946).

function," which is of course wrong at the very least on the third adjective, and perhaps the other two as well.[50] But the point should be irrelevant as a matter of first principle, given that each state should be able to define the scope of its own activities under its own constitution. The case is just as strong for nonusual, nontraditional, and nonessential government public functions, which are of course the standard fare of the federal government as well. If there is, therefore, any ground of distinction from *Railroad*, it is on the ground that a tax on a particular commodity is part of the ordinary flow of business that does not vary with the size and complexity of the government entity.

All of these subtleties were lost on Justice Frankfurter, who belittled the tradition of reciprocal immunities from taxation "at a time when social complexities did not so clearly reveal as now the practical limitations of a rhetorical absolute," without bothering to explain what new conditions for this routine tax required an upsetting of the traditional reciprocity norm on intergovernmental taxation.[51] Contrary to his views, the correct approach in this setting is to apply the nondiscrimination norm to both governments. Accordingly, this tax could be sustained on principles that were as salient after the consolidation of the New Deal as before, which Frankfurter did in relying on Justice Bradley's dissent in *Day*.[52] Unfortunately, the Frankfurter opinion went badly astray when it took the further step of insisting that the one-way imposition of the tax was warranted under the Supremacy Clause, without once asking whether it allowed Congress to displace a body of intergovernmental immunity that was based on powerful antecedent constitutional principles that went back to the Founding Period. Instead, he drew the wrong inference from the state's decision to become a trader, when he insisted that this activity alone subjected the states to federal taxation, without imposing a parallel obligation on the federal government when it undertakes that same role. It was wrong for him to conclude that "[t]he problem cannot escape issues that do not lend themselves to judgment by criteria and methods of reasoning that are within the professional training and special competence of judges."[53] Ironically, it is to just this problem to which the parity *and* nondiscrimination principles together supply a correct answer—one whose value is not diminished by the passage of time or any

50. *Id.* at 574.
51. *See id.* at 576.
52. *Id.* at 577.
53. *See id.* at 581.

claim of changed circumstances.[54] It is of course an instructive challenge to decide whether the federal government can impose

> a general non-discriminatory real estate tax (apportioned), or an income tax laid upon citizens and States alike could be constitutionally applied to the State's capitol, its State-house, its public school houses, public parks, or its revenues from taxes or school lands, even though all real property and all income of the citizen is taxed.[55]

In these cases of strong core government functions, the strong autonomy rule displaces the nondiscrimination principle on the ground that it is the best estimate of the joint sentiment of both sides, which could be waived (as it never is) for a rule of mutual reciprocal taxation.

The shift from pre- to post-New Deal should not in principle change the basic framework of analysis for intergovernmental-immunity cases. Nonetheless, historically, just that transformation in federal/state relations has been wrought through the expansion of the Commerce Clause. Analytically, however, there was nothing obsolete about the earlier framework, which had two basic components. No basic federal regulation of local activities is needed because here interstate competition disciplines local firms. On the other side, an extensive federal presence is needed to keep the lines of interstate commerce open so as to create a national market free of internal barriers. That model too is as sensible with modern telecommunications as it was with the telegraph, with airplanes as with stagecoaches. If there was any weakness in the initial model, it was twofold: first, that there was insufficient federal protection of the rights of state citizens against their state governments, which the Fourteenth Amendment substantially modified by design through its explicit limitations on state power; and second, that the federal government could use its power over commerce to throttle the free movement of goods and services across state lines—the very risk against which *Hammer v. Dagenhart*[56] and the *Child Labor Tax Case*[57] were intended to control before they were swept aside. But as a general rule the two Frankfurter arguments that always should be rejected are: (1) changed circumstances require different responses and (2) judges cannot make the requisite institutional choices.

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54. On this point, see *id.* at 592–93 (Douglas, J., dissenting).
55. *Id.* at 588–89 (Stone, J., concurring).
56. 247 U.S. 251 (1918).
57. Bailey v. Drexel Furniture Co. (*Child Labor Tax Case*), 259 U.S. 20 (1922).

II. REGULATION

The second part of this article is directed to the complementary question of how the general principle of intergovernmental immunities applies not to taxation, but to regulation. In this connection, it is apparent in many cases that regulation and taxation are more or less substitutes for one another and also for litigation, at which point it becomes critical to articulate a single theoretical framework that applies to all three simultaneously. A priori, it is hard to decide whether litigation or taxation is more intrusive, for much depends on the design of the tax on the one hand and the total expected burden of litigation on the other, which could easily vary depending on the size and uncertainty of the potential recovery. At this point, however, the key inquiry is the interconnection of taxation and regulation, where it is instructive again to return to the parallel between *Hammer v. Dagenhart* and the *Child Labor Tax Case*. Once Congress could not, under the commerce power, prohibit the shipment of goods made by firms that used child labor in interstate commerce, it could not subject them to a special tax directed toward the same end. In this context, there was no need to insist that all regulations and all taxes necessarily fall outside the government's commerce or taxing power. It is only to maintain the same parity principle that I have argued for here.

At this point, the challenge is how to apply the common framework in ways that allow for principled distinctions to be made between regulation and taxation. Once these are done, it becomes clear that while many forms of federal regulation of some state activities are permissible, the efforts of the federal government to impose direct regulation on the employment relationship that a state has with its employees and independent contractors should be presumptively prohibited given that, in this context, the nondiscrimination principle offers insufficient protection. This conclusion is especially strong in those cases where the parity principle has been abandoned, as with cases under the FLSA, so that the federal government is always immune from state regulation while states are subject to ever more stringent federal regulation.

To see how the system plays out, it is useful to start with an instance in which immunity from federal regulation should not be allowed. Thus, in *United States v. California*[58] the question was whether a state-owned railroad was exempt from the Federal Safety Appliance Act[59] when it operated as a common carrier in interstate commerce. The Supreme Court held that it was,

58. 297 U.S. 175 (1936).

59. Act of Mar. 2, 1893, ch. 196, § 2, 27 Stat. 531 (repealed 1994); Act of Apr. 1, 1896, ch. 87, 29 Stat. 85 (repealed 1994).

because it was engaged in the activities of a common carrier in interstate commerce and was subject to regulation, so that it was "unimportant to say whether the state conducts its railroad in its 'sovereign' or in its 'private' capacity."[60] There would be a credible case, however, for such an exemption if the railroad operated only within the state of California, even though by 1936 the Commerce Clause had been read broadly (if incorrectly) to cover all purely intrastate traffic on the theory that all railroads form part of a single grid that calls for comprehensive rate regulation over tracks used by both local and interstate railroads.[61] Remember that all the safety effects are confined within one state, and there is no a priori reason to believe that state regulation of local railroads will be inferior to that of the federal government. Nonetheless, the Supreme Court relied on the rate regulation case to dispose of the safety issue on this ground: "The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution."[62] The Court then explicitly distinguished the taxation cases on the ground that the reciprocal immunities from the taxing power "is equally a restriction on taxation by either of the instrumentalities of the other."[63] It held, however, that there is "no such limitation upon the plenary power to regulate commerce."[64]

A sound approach, however, to this problem does not create a broad gulf between the exercise of the taxation and regulation powers. That alternative approach is to insist that no state should be able to assert a claim of state sovereignty for operations by its entities outside its own territory, both for sovereign and proprietary functions. Both types of activities are subordinate to the sovereign in charge of the territory, which in the case of railroads on interstate routes is surely the federal government. Of course, state safety regulation of interstate commerce may be challenged on the ground that it imposes an excessive burden on interstate traffic.[65] But in this instance, it is best to be wary of the Court's insistence that Congress's "plenary power to

60. *California*, 297 U.S. at 183.

61. Railroad Comm'n of Wis. v. Chi., Burlington & Quincy R.R. Co., 257 U.S. 563 (1922).

62. *California*, 297 U.S. at 184.

63. *Id.*

64. *Id.* at 185.

65. It is worth noting that Justice Harlan Fiske Stone, who wrote *California*, also wrote *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945), which rejected an Arizona law that required railroads to break and recombine interstate railroad trains at both ends of the state on ostensible safety grounds. The terrain in Arizona was no different from anywhere else so this was regarded as a protectionist device unlike the similar statute which Justice Stone had previously sustained in *South Carolina State Highway Department v. Barnwell Bros.*, 303 U.S. 177 (1938), where winding mountainous terrain justified the use of shorter trucks.

regulate commerce"[66] allows the federal government to regulate all railroad traffic. The invocation of the term "plenary" confuses two propositions in the aftermath of *Gibbons v. Ogden*, which used the term plenary just once in this sentence:

> If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States.[67]

In this passage from *Gibbons*, it is conceded that the commerce power is limited only to specified objects—only then is it described as plenary and only with respect to those objects. That is a far cry from the alternative proposition that the power extends to just about everything and is thus plenary over all domains of human activity. It is this intellectual confusion that sowed the vast expansion of federal power that comes with the proposition that the wage and hour provision of the FLSA applies to government employees. Quite simply, railroad lines operating solely within one state should be governed by the total prohibition against federal regulation, not a general nondiscrimination rule.

The key case for these purposes is, of course, *National League of Cities v. Usery*,[68] in which the League challenged the application of the minimum wage law and overtime law as applied to cover virtually all state and local employees in 1974.[69] That move followed two earlier expansions of the FLSA: the 1961 Amendments extended the coverage of the FLSA to those persons who worked in "enterprises" that were analogous to people who worked in the private sector,[70] and the 1966 Amendments extended coverage to employees of state hospitals, institutions, and schools.[71] Using the lax rational-basis test, the Supreme Court sustained the amendments in *Maryland*

66. *California*, 297 U.S. at 185.

67. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197 (1824).

68. 426 U.S. 833 (1976).

69. *Id.* at 836–37. The Fair Labor Standards Act of 1974, Pub. L. No. 93-258, sec. 6(a)(1), § 3(d), 88 Stat. 54, 58 (codified at 29 U.S.C. § 203 (2012)), modified the term "employer" to "include[] a public agency." *Nat'l League*, 426 U.S. at 838.

70. Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, 75 Stat. 65 (1961); *Nat'l League*, 426 U.S. at 837.

71. *Nat'l League*, 426 U.S. at 837–38; *see* Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, sec. 102(b), § 3(d), 80 Stat. 830, 831 (codified as amended at 29 U.S.C. § 203(d) (2012)).

v. Wirtz[72] against the charge that they fell outside of Congress's reach under the Commerce Clause. In dissent, Justices Douglas and Stewart argued that these activities were immune from federal regulation because they were undertaken by the state in its sovereign capacity.[73]

After *Wirtz*, the law veered sharply in the other direction in *National League*. There, Justice Rehnquist conceded that the federal government had the power to regulate private employers under the Commerce Clause, but drew the line at the regulation of "the States as States."[74] Thereafter, his opinion embraced the view that the FLSA did not apply to the states "in areas of traditional governmental functions."[75] At this point, Justice Rehnquist opened up the gratuitous line-drawing problem needed to decide which "sovereign" activities were exempt from the FLSA and which "proprietary" or "nontraditional" ones were subject to its commands.

Rehnquist led with his chin. The sounder approach would have been to exempt all state activities on the grounds that federal micromanagement under any wage and hour law is vastly more intrusive than any general tax, no matter what particular activities the federal government regulates. Of course, that regulation is far more intrusive than any litigation over damages, no matter what their size. (Size need not matter because fines and damage awards could be set equally in expectation.) The only dislocation that anyone could observe from the tax is a possible compensating wage increase. But the minimum wage and overtime laws can, depending how those numbers are set, have a massive effect on who is hired, retained, promoted, and fired. It also skews the operations of any office whether it discharges nontraditional or traditional functions.

Rehnquist's conceptual concession in *National League* made it easy for Justice Blackmun, who had meekly concurred in *National League*, to switch sides in *Garcia v. San Antonio Metropolitan Transit Authority*.[76] His view was that a long line of inconsistent case law decisions demonstrated the courts' inability to make the distinction between traditional/nontraditional activities work. That was surely evident with mass transit, which historically has been undertaken by both private and government actors.[77] But if that distinction is unworkable, by all means extend the prohibition against federal regulation to *all* state functions, which was how matters stood before the 1974

72. 392 U.S. 183, 190 (1968).
73. *See id.* at 201 (Douglas, J., dissenting).
74. *Nat'l League*, 426 U.S. at 845.
75. *Id.* at 852.
76. 469 U.S. 528, 530–31 (1985).
77. *Id.* at 535–36.

extension of the original 1938 version of the FLSA. In paving the way for this result, Justice Brennan's *National League* dissent drew heavily on Chief Justice Stone's opinion in *California* to insist that exercises of plenary federal power under the Commerce Clause were exempt from the constitutional limitations applicable to the taxing power.[78] Yet Brennan gave no explanation as to why this distinction matters when, if anything, it cuts in the opposite direction given that regulation is always more intrusive than taxation. Brennan was, as Rehnquist insisted, "simply wrong."[79] *National League* did not involve safety issues that could cause harm to persons outside the jurisdiction, as in *California*. It only involved how the local governments organized their own business, where the federal interest in overriding state discretion is at its low ebb, given that state law can supply its own workplace rules—think workers' compensation—to these workers as they did before the 1974 amendment.

Once the point is recognized, it is easy to document the gratuitous level of federal interference that comes to both essential and proprietary functions. Here are four examples that show how the game plays out, once the federal government is unleashed.

In *Auer v. Robbins*, the key question was how to interpret the FLSA statutory provision that exempts "bona fide executive, administrative, or professional" employees from overtime pay requirements.[80] The obvious sense of the provision is that senior officials should not have to work on the clock or otherwise receive overtime protections. The position surely is consistent with common business practice where these upper-level employees invariably receive weekly, monthly, or annual salaries that are not linked to their hourly outputs. In a market situation, no government agency must decree which workers fall into what category. Each firm can adopt its own rules for its own purposes, and keep its management options open and its costs under control. But once the classification is required by statute, someone must set these rules for firms in the myriad number of cases where there are layers of managerial hierarchy that do not fit easily into the two-tier wage/salary dichotomy imposed under the FLSA.

In *Auer*, the point of application was whether police sergeants and police lieutenants were entitled to the same overtime protection as ordinary patrol officers.[81] A quick look at their job descriptions makes it clear that police sergeants prepare daily work assignments for, and supervise the activities of,

78. *Nat'l League*, 426 U.S. at 865–67, 869 (Brennan, J., dissenting).
79. *Id.* at 854 & n.18, 855 & n.19.
80. Auer v. Robbins, 519 U.S. 454 (1997).
81. *See id.* at 455.

various patrol officers.[82] The police lieutenant supervises sergeants and patrol officers to act as commanding officers when their superiors are unavailable.[83] Neither of these definitions was prepared with an eye to the FLSA, and both dictate the conclusion that they are exempt salaried workers. In spite of the easiness of the statutory question, Justice Scalia punted by giving extensive deference to a federal agency in construing its own regulations—permitting such blatant abuses.[84] Needless to say, since the federal government can call the tune, Congress could impose these overtime rules on high-level police officials even if *Auer* had come out the other way. The manifest dislocations seem clear.

Nonetheless, the law can take strange turns on the interpretive questions. Thus, the administrative demand for judicial deference was rejected in *Christensen v. Harris County*,[85] on the question of whether FLSA overtime regulations applicable to Harris County allowed the sheriff's department to insist that its workers take "comp time"—i.e., time off for prior overtime—

82. *See* CITY OF CERES, POLICE SERGEANT JOB DESCRIPTION (2017), http://www.ci.ceres.ca.us/jobdescriptions/PoliceSergeant.pdf ("SUMMARY DESCRIPTION: Under direction, plans, directs, supervises, assigns, reviews, and participates in the work of law enforcement staff involved in traffic and field patrol, investigations, crime prevention, community relations, and related services and activities; serves as watch commander on an assigned shift; oversees and participates in all work activities; assumes responsibility for assigned special programs, projects, or department-wide functions or activities; coordinates activities with other agencies; and performs a variety of administrative and technical tasks relative to assigned area of responsibility.").

83. *See, e.g.*, Kristine Tucker, *What Does a Lieutenant Do in a Police Department?*, HOUS. CHRON., http://work.chron.com/lieutenant-police-department-26016.html (last visited Oct. 11, 2017) ("Lieutenants are ranking police officials who have leadership responsibilities in police departments. Their credentials enable them to supervise entire precincts when higher-ranking officials, such as captains and colonels, are unavailable. Lieutenants have many of the same responsibilities as lower-ranking police officers, but also plan work schedules, oversee departmental cases, book and process criminals, assist with detective work, conduct internal investigations, and help officers with situations that require seniority or expertise in the field.").

84. *Auer*, 519 U.S. at 457–58. Justice Scalia's reasoning was dreadful—analogizing these officers to assembly line workers subject to pay reductions for "variations in the quality or quantity of the work performed." *See id.* at 455 (quoting 29 C.F.R. § 541.118(a) (1996)). These pay reductions make sense for line workers paid on a piecework basis, but not for senior officials, including the captain, who are always subject to general disciplinary rules for dereliction in office, a set of procedures that is wholly different from quality or quantity rules.

85. 529 U.S. 576, 588 (2000).

instead of receiving extra cash payments.[86] The motivation for this decision was obviously fiscal in part, but it also played into management work assignment issues. No one disputed the extensive FLSA involvement in the area.[87] Nonetheless, the sheriffs claimed that the provisions of the FLSA blocked the County's proposal, which was backed by a letter drafted in the Federal Department of Labor's Wage and Hour Division that appeared to give its blessing to the proposed arrangement. Ultimately, the Court held, correctly, that the FLSA unambiguously "imposes a restriction upon an employer's efforts to *prohibit* the use of compensatory time when employees request to do so; that provision says nothing about restricting an employer's efforts to *require* employees to use compensatory time."[88] Hence the practice was legitimate. But to reach that conclusion, the Court had to decide that *Chevron* deference did not apply to the informal interpretation of the Wage and Hour Division. The contrast with *Auer* shows the plasticity of modern interpretive rules under administrative law.

Yet it should be understood that both *Auer* and *Christensen* are only two skirmishes in a far larger war, all of which are fought on somewhat different terrain. First, Congress at any time may amend the FLSA to do what the Wage and Hour Division thought it had. Nor does the decision put an end to the extreme deference afforded to federal officials under *Auer*, given how it is easy for determined judges to import ambiguity into even the clearest statutes. Indeed, in many cases, the greatest danger lurks from administrative decisions that do not involve matters of statutory construction, and hence fall outside the traditional categories of administrative review. Most notable in this regard is the final rule that the Wage and Hour Division of the United States Department of Labor ("DOL") issued in May 2016 that reduced the exemption of certain executive, administrative, and professional employees from the minimum wage and overtime protections under the Fair Labor

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86. The FLSA provision in question was Pub. L. No. 99-150, § 2(a)(5), 99 Stat. 787, 788 (1994) (codified as amended at 29 U.S.C. § 207(o)(5) (2012)):

> (5) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency—
>
> (A) who has accrued compensatory time off authorized to be provided under paragraph (1), and
>
> (B) who has requested the use of such compensatory time, shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

87. *See Christensen*, 529 U.S. at 578–80 (discussing the FLSA amendments and its regulation of overtime compensation for State employees).

88. *Id.* at 585.

Standards Act of 1938, by changing the dollar amount that separates salaried from hourly workers.[89] After its own internal review, DOL raised the threshold from $23,660 to $47,476 per year. This is a big deal. The new regulation, which was to go into effect December 2016, would have had a major effect on the behavior of employees in private, nonprofit, and state and local government, forcing salary adjustments, job reclassification, layoffs, and budgetary shortfalls, dealing with millions of public employees.[90] But the decision was enjoined in *Nevada v. U.S. Department of Labor*.[91] And so far the decision has not been appealed by the Trump administration, so that the matter is dead, at least for the moment. This shows again how the general rule of deference leads to major flips in administrative approach, which is itself a major indictment of the entire FLSA enterprise.

As this issue is likely to occur, it is important to see how the application of the FLSA fits into the general approach taken here. In dealing with legality of these wage orders, the FLSA could apply a nondiscrimination approach to state and local governments. After all, the state and local government units are not singled out, but are only subject to the same regulations as private employers, who face similar dislocations. But in this case the nondiscrimination principle offers no safe refuge for the proposed exaction. The logic behind the nondiscrimination rule is that its effectiveness depends on its operation as an indirect constraint on government discretion, which it surely does on tax matters, at least in the common situation where the tax that one wishes to impose on one's opponents has to be imposed on one's own interest group. That tie-in slows down the enactment of new rules because of the built-in opposition by a wide range of independent and organized groups. But in this context, there is no real political blowback against the DOL for imposing the rules on the states. The only time that there could have been political retribution was by having the DOL impose that same rule on Congress and the various branches of the federal government. That tied arrangement would make the agency think long and hard on how it deals with others. It is just this principle for example that works so well in the context of the dormant Commerce Clause, where local governments can only tax

89. 29 C.F.R. §§ 541.600–.607 (2017); *see also* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 81 Fed. Reg. 32,391, 32,392–94 (May 23, 2016) (executive summary to final rule).

90. *See, e.g.*, Letter from John H. Coatsworth, Provost, Columbia Univ., to Deans, Exec. Vice President for Arts & Scis., Exec. Vice President for Health & Biomedical Scis., Exec. Vice President for Research & Dir., Lamont-Doherty Earth Observatory, Columbia Univ. (Aug. 26, 2016), http://www.columbia.edu/cu/vpaa/docs/MS_CUMC_ressal16.html (explaining how FLSA guidelines affect Columbia's research operations).

91. 218 F. Supp. 3d 520, 534 (E.D. Tex. 2016).

foreign, i.e., out of state, commerce if they are prepared to tax their home-based competitors.[92]

Decidedly, that is not what is going on here. The nondiscrimination is only between state and local employers and all private employers. There is no reason why DOL officials should find themselves constrained by this tied arrangement if they are quite happy to impose the same restrictions on both groups of outsiders in a single burst of administrative enthusiasm. The acid test is whether the DOL is willing to force federal agencies to abide by the same massive shift in dealing with its own employees. The answer is an emphatic no. The FLSA does cover federal employees, but only under a different program, run by the U.S. Office of Public Management ("OPM"), which sets its rules for federal employees independently of the Wage and Hour Division. To date, OPM has refused to apply the same restrictions on federal employers, which is strong evidence of their disruptive capacity.

As a matter of first principle, this increase targeted against the states should fail on the correct view that states and local governments should be in principle absolutely immune from all wage and hour regulations. It is also the case that it should be exempt from these regulations under an accurate application, in this context, of the nondiscrimination principle. And, finally, the utter lack of any parity principle means that the entire notion of equal and independent sovereigns has been wholly abandoned by reading the FLSA in an expansive fashion. At this point, the only framework that lets the DOL have its way against the states is the Wechsler position that the states have enough clout in the legislative arena to protect themselves through the political process.[93] That position is analogous to the similar view under the Takings Clause, advanced most notably by Professor Saul Levmore, that insists that well-positioned local interests should not receive any compensation in the case of disproportionate land use regulations, as they are able to protect themselves in the political process.[94] Only the individual or firm that is "singled out" for special treatment should be entitled to some constitutional protection.

I think that the Levmore view is misguided in the takings context, and that the proof of the pudding lies in the eating.[95] It is certainly permissible to guess from the ex ante position that these well-positioned and organized groups might do well in most political conflicts that threaten their interests. One

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92. Dean Milk Co. v. Madison, 340 U.S. 349, 354 (1951).

93. *See* Wechsler, *supra* note 26, at 546.

94. Saul Levmore, *Takings, Torts, and Special Interests*, 77 VA. L. REV. 1333, 1344–45 (1991).

95. For a further discussion, see Richard A. Epstein, *The Unfinished Business of* Horne v. Department of Agriculture, 10 N.Y.U. J.L. & LIBERTY 734, 746–50 (2017).

could speculate, for example, that these protected interests could easily rebuff ninety percent of the political attacks on their position. But so what? There are still the other ten percent of the cases, and in these, it can often be that these groups go down to defeat. At this point, in the ex post state of the world, the strong negative skew *observed* in the outcome offers powerful evidence that the process did not work as it should in those cases—assuming, of course, these groups were right in the particular case. That question, however, can only be answered by solving the substantive Takings Clause issue that this hands-off approach seeks to avoid. To answer that question, it becomes necessary to decide whether the organized group has lost an undeserved privilege, as in the form of a tax subsidy, or whether it is subject to a disability, e.g., the loss of air rights in *Penn Central Transportation Co. v. City of New York*,[96] to a coalition that is stronger than its own. This appeal to political process offers no short-cut from the full-scale takings analysis. The extra deference has the same unacceptable consequences on matters of state immunity from federal regulation.

Indeed, it would be a mistake to think that the only reason to prevent these impositions on any targeted group is Wechsler's political-process view. The purpose of any systematic inquiry is not to defend this or that group, but to develop an optimal set of political institutions, which increases the likelihood of net social gain from each invocation of the Takings Clause, or for that matter any doctrine of intergovernmental immunity. Those objectives cannot be achieved if any group, whether or not established, is forced to expend enormous resources to repel confiscatory attacks. The legal system should be vigilant to make sure that no coalition is put in a position where it is able to seize the levers of the political process to redistribute wealth and opportunities in its own direction at the expense of the rest of the population. The only way that can be done is to look at the situation ex post in discrete contexts in order to reject outcomes that demonstrate that a massive and explicit shift on wealth has occurred. No ex ante guesses can substitute for the ex post inquiry that has the benefit of seeing how the political process has revealed itself in a particular case.

The simple truth here is that all these predictions of interest group outcomes are highly contingent, in that small changes in initial conditions could lead to radically different outcomes. The active players may well be multiple coalitions with complex alliances, so that it is hard to know in advance which groups will line up with each other. Even the strongest groups have divided interests or complex motives which makes it hard for them to operate as a unified body on a wide range of issues. In some settings, small

96. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 138 (1978).

but cohesive interest groups can dominate a larger but more indifferent group in order to obtain needed building permits. But in other cases, indignant voters can impose onerous zoning ordinances on those same developers. So rather than predict in the ex ante state of the world, the law should develop a set of rules that seeks to stop the rent seeking by including in the safeguards a look at the distributional consequences in the ex post state of the world, where the needed information is now available.

In the context of the FLSA, the interest-group politics are intense. It is also clear that when the Obama administration was in power, labor unions wielded a disproportionate influence over the operation of all government agencies. State and local governments and their allies came out second best, by issuing rules that, if they had been allowed to stand, would have done much to cripple the effectiveness of state and local governments. This administrative adventurism paves the way for increased federal control in a wide number of areas. The basic principle of necessary implication cries out against Wechsler's view that political safeguards do the job when all too often they don't. The right approach is to overturn *Garcia* by expanding *National League* to *all* activities of state and local governments. It is the only way to restore the initial constitutional balance that has been thrown off kilter by the ill-advised innovations of the Supreme Court in its post-New Deal jurisprudence.

CONCLUSION

In this article I have sought to trace the evolution of the doctrines of intergovernmental immunity. Some such doctrine is necessarily required to make sense of a Constitution that does not devote a single word to any of the three manifestations of the problem: tort, taxation, and regulation. It is therefore necessary to track down the appropriate principles by a process of necessary implication from the structure of the text, which in turn requires an appreciation of the underlying assumptions of constitutional design. Finding that correct balance necessarily requires a return to matters of first principle about the nature of our constitutional government. On this issue, the fundamental transformation in American life has been the judicial transformation of what was in its origins a classical liberal constitution to a modern progressive one. The former system—with notable exceptions for slavery, for example—sought to implement a system of limited government with strong contractual and property rights. This was no mystery because in one sense the intellectual context for the drafting of the Federal Constitution was similar to those principles used in establishing the state constitutions of the prior decade.[97] The modern system tends to radically expand the scope of both federal and state power where they do not conflict, and to champion federal power where they do conflict. The result has been a constitution with extensive federal powers and weak protection of property and contract rights.

That transformation is also evident in the treatment of intergovernmental immunity. The earlier system stressed the coequal sovereign status of state and federal government, and thus accepted a principle of parity, such that the regulation, taxation, or liability of the states by the federal government was judged by the same principles as the regulation, taxation, or liability of the federal government by the states. In some cases, chiefly in the domain of regulation, the principle of parity points to a rule in which each level of government is wholly immune from control by the other. In the realm of taxation, the general rule of absolute immunity applies to the instrumentalities of both state and federal government, but a nondiscrimination rule applies to the revenue of state and federal employees. No tort action for damages of any sort was applied for the ordinary operations of government.

This system proved stable for a long period of time, but with the ascent of federal power under the Commerce Clause during the New Deal, the balance was shifted, and shifted in an unwise fashion. Now the Supremacy Clause is said to fuel federal dominance of states on both matters of regulation and taxation, which leads to federal activities that are highly intrusive on the way in which states can conduct their own government affairs. The unfortunate efforts of the Obama-era Department of Labor to extend the reach of the FLSA over state agencies shows the limitless nature of the power, subject only to political restraints that often prove highly ineffective. The correct response is a return to the earlier constitutional principles, which worked well when in place. A constitution is intended to be an enduring document based on first principles of government. The older rules on intergovernmental immunity were honest efforts to reach the proper legal equilibrium. The recent rejection of these rules represents a major decline in the wisdom and effectiveness of modern American constitutionalism under its flawed progressive model.

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97. *See, e.g.*, MASS. CONST. pmbl.