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Ex Parte Young: Sovereignty, Immunity, and the Constitutional Structure of American Federalism

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EX PARTE YOUNG: SOVEREIGNTY, IMMUNITY, AND THE CONSTITUTIONAL STRUCTURE OF AMERICAN FEDERALISM

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I. INTRODUCTION

THE U.S. Supreme Court's recent state-immunity jurisprudence requires reconsideration. The call for reconsideration does not stem from an absolutist rejection of all forms of state autonomy or immunity, but rather from a fear that the Court's immunity jurisprudence is dislodged from its role in the enforcement of the federalism structure of American government. This article offers an account of the Court's seminal decision in *Ex parte Young* as a path toward the reconsideration of state immunity case law.[1] This account of *Ex parte Young* asserts that the dominant focus on *Young* in the state-immunity canon obscures its important contribution to our understanding of state immunity,

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1. This account of *Ex parte Young* is an alternative reading. It is a relational account of the Court's holding in *Young*. This account suggests that it is instructive to consider *Young* as a judicial attempt to enforce the Constitution's federalism structure by resorting to the relationships that arise from the political and institutional structures that the Constitution establishes, rather than enforcing federalism by resorting to specific allocations of power between the national government and the states. Although this article limits its discussion of relational-federalism enforcement primarily to sovereign immunity, this alternative account of federalism enforcement can provide a broader understanding of many federalisms disputes, including commandeering, the dormant commerce clause, and abstention. I examine relational federalism enforcement in these and other areas in Federalism Beyond Power: The Judicial Mediation of the National-State Relationship (2009) (unpublished manuscript, on file with author).

particularly, and the enforcement of federalism, more broadly.[2] Specifically, *Young* elucidates the larger ideas and dynamics of federalism in two ways: (1) it illustrates federalism's duality as established within the Constitution's ambivalence between nationalist supremacy and state sovereignty; and (2) it demonstrates that state sovereignty is conditioned on the legitimacy of the state's claim to the status of a political community[3] in which the people are sovereign.

Although a longer description of *Young* follows below, the facts in *Young* support the contention that it recognizes the tension between national supremacy and state sovereignty in American federalism. The issue before the Court in *Young* was a habeas appeal by the Minnesota Attorney General, who was in federal custody on contempt. Attorney General Young was being held because he had violated a federal court injunction against his effort to prosecute railroad officials for violating a Minnesota maximum-fare statute. The federal court had enjoined the state prosecution at the behest of officers from the railroad, who contended that the state's attempt to regulate fares violated the Constitution. Attorney General Young argued that the lower court's injunction violated sovereign immunity because the suit was against the state in its sovereign capacity. In a decision that fused both equity jurisprudence and state-immunity doctrine, the Court sustained the lower court's injunction, holding that the suit against a state officer for violating the Constitution was not a suit against the state, and therefore state-immunity precedents did not apply.

The dominant account of *Ex parte Young* is demonstrated in the way that it has been deployed in the immunity case law, and elsewhere, by both the defenders and critics of the Court's jurisprudence. They have variously

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2. Although discussed in more detail below, the dominant discussion of *Ex parte Young* focuses primarily on whether its central holding relies on a "legal fiction" that characterizes particular actions as state action for certain constitutional purposes and non-state action for other purposes. The focus on the "legal fiction" dimension of *Young* relates to its status as either a central component of, or departure from, general state immunity from suit. As argued below, an alternative account of *Ex parte Young* allows us to cast this debate differently in a way that might challenge the presumptions of both proponents and critics of state immunity doctrine.

3. Distinguished federalism scholars Edward Rubin and Malcolm Feeley have rejected the contention that states are political communities that garner the allegiance of their citizens to any extent that justifies respect for, or protection of the federal arrangements of the original constitution, or other historical periods. For Rubin and Feeley, federalism is purely vestigial; it is a relic of a past, whose uselessness mature constitutional thinkers must recognize. *See* Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 950 (1994) (arguing against the protection of federalism on the basis that citizens' political identities are "formed by their membership in the nation as a whole"). Rubin and Feeley seem to have in mind a much thicker conception of political community than the conception that I offer. Rubin and Feeley seem to argue that an authentic political community, one deserving of the level of autonomy that any structure worthy of the name federalism would allow, is one that has a "separate history or culture" from the central government. *Id.* at 944. They contend that there is no place in the present-day United States that qualifies as a political community in this authentic sense. *Id.* at 947. I take this to be a hopelessly high bar for the test of the legitimacy of a federal structure of government. Subunits of national governments may be deserving of the attributes of autonomy on the grounds that they are formed by the democratic will of the people and they serve as spaces for contesting what might become the inevitable hegemony of the center. For a discussion of the purposes of political contestation in a federal, democratic state, see *infra* notes 31-32.

characterized the *Young* doctrine as the linchpin of the Court's sovereign-immunity decisions, as a narrow perversion of an otherwise legitimate state immunity, and as the saving grace of an otherwise illegitimate doctrine.

The Court's sovereign-immunity majority has also attempted to defend its decisions by reference to the *Young* doctrine,[4] declaring that it plays an "essential ... part of our sovereign immunity doctrine."[5] Indeed, the Court rebutted claims that sovereign immunity neuters federal law by pointing to the availability of *Young* actions as one of "several avenues [that] remain open for ensuring state compliance with federal law."[6] Beyond refuting criticism of its sovereign-immunity doctrine, the Court's related characterization of *Young* as necessary "if the Constitution is to remain the supreme law of the land"[7] has served another purpose. The Court has exploited this characterization of *Young* to defend the legitimacy of state sovereign immunity.[8] In *Alden v. Maine*, the Court stated that the *Young* doctrine is premised on the understanding that states are immune from suit in both federal court and their own courts.[9] Therefore, *Young* establishes the historical pedigree of state immunity from suit, to the extent that it allows the vindication of federal law, and supports the legitimacy of state-immunity jurisprudence.

In contrast to the Court's portrayal of *Young* as an integral component of its sovereign-immunity jurisprudence, the Court's sovereign-immunity majority has also depicted *Young* as a perversion of the doctrine of state sovereign immunity, a perversion that must be strictly confined lest it threaten the rule to which it is a mere exception. In *Pennhurst v. Halderman*,[10] the Court described an earlier decision as having "declined to extend the fiction of *Young* to encompass retroactive relief."[11] Despite having previously described the *Young* doctrine as

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4. *Ex parte Young* stands for two crucial principles in American federalism jurisprudence. The first is that *Young* overcomes the presumption against federal courts in equity enjoining ongoing state litigation. *See* Younger v. Harris, 401 U.S. 37, 43 (1971). Second, and most important for our purposes, is *Young*'s holding that a state's constitutional immunity does not bar suits for injunctive relief for ongoing state violations of federal rights. For a fuller discussion of the circumstances surrounding *Young*, see *infra* Part IV.

5. Alden v. Maine, 527 U.S. 706, 748 (1999) (holding that states are immune from suits for violations of federal law in their own courts).

6. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72 n.16 (1996) (holding that Congress could not abrogate state immunity from suit under its Commerce Clause authority).

7. *Alden*, 527 U.S. at 747.

8. *See id.*

9. *Id.*

10. 465 U.S. 89, 105 (1984) (citing Edelman v. Jordan, 415 U.S. 651, 664 (1974), which held that the Eleventh Amendment barred retroactive payments of benefits that had been wrongly withheld, for the proposition that the *Young* doctrine could not be used to evade state immunity in federal court where the only violation was of state law).

11. As discussed in the text, both defenders and detractors of the state-immunity doctrine deploy the *Young* "fiction." I accept the incongruity between *Young*'s doctrinal articulation that strips the state actor of the State's protection for immunity purposes and the state-action requirement of the Fourteenth Amendment, which requires that there be a state actor for constitutional obligations to attach. Notwithstanding this incongruity, the *Young* doctrine reveals important truths about the basis of and limitations on state autonomy.

"necessary" and as a successful attempt to "harmonize" state sovereign immunity with the "vindication of federal rights," the Court nevertheless stated that "the need to promote the supremacy of federal law must be accommodated to the constitutional immunity of the States."[12]

Critics of the Court's sovereign-immunity jurisprudence have not allowed the Court's depiction of *Young* as the *sine qua non* of its case law to detract from their admiration for *Young*'s role in litigation to remedy state violations of federal constitutional rights.[13] As virtually all commentators assert, *Young* is one of the Court's most important decisions.[14] Many admirers of *Young* have, nevertheless, emphasized the extent to which it relies on a "legal fiction."[15] These scholars describe *Young* as a legal fiction to exemplify the incoherence of the Court's sovereign-immunity case law. Indeed, the entire doctrine of state sovereign immunity is suspect to the extent that *Young* is an absolute necessity to vindicate federal rights, and to the extent that it relies on a logically inconsistent transfer of authority from the state to a private actor to protect Fourteenth Amendment rights.[16] As much as *Young* represents a triumph, it is of the tragic sort because many interpret it as having made the most of the bad situation created by the Court's earlier mistake.[17] *Young*'s acceptance of the then-existing dominant interpretation of the Eleventh Amendment's scope tarnishes the legal community's celebration of it as a constitutional achievement.

Young stands in an almost uniquely awkward position in American jurisprudence. One camp cherishes it because its status as the means to vindicate federal rights is, in their minds, a narrow exception to an otherwise solid doctrine of state immunity from suit.[18] The opposing camp distrusts it because it represents an acceptance of state immunity as the background norm, which they reject.[19] In their various attempts to discredit the substance of the opposing position vis-à-vis sovereign immunity, each camp characterizes *Young*'s

12. *Id.* (internal citations omitted).

13. *See, e.g.*, Perez v. Ledesma, 401 U.S. 82, 106 (1971) (Brennan, J., concurring in part and dissenting in part) ("*Ex parte Young* was the culmination of efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution.").

14. Charles Alan Wright has said that "the doctrine of *Ex parte Young* seems indispensable to the establishment of constitutional government and the rule of law." CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS § 48, at 314 (6th ed. 2002).

15. *See, e.g.*, MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 155 (1980) (describing *Young* as having a "distinct air of unreality about it" because of the inconsistency between *Young* and the Fourteenth Amendment doctrine).

16. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1478-79 (1987).

17. *See* Hans v. Louisiana, 134 U.S. 1, 21 (1890). For criticism of *Hans*, see generally Edward Purcell, *The Particularly Dubious Case of* Hans v. Louisiana: *An Essay on Law, Race, History, and "Federal Courts,"* 81 N.C. L. REV. 1927 (2003).

18. *See* WRIGHT & KANE, *supra* note 14, § 48, at 314.

19. *See, e.g.*, Kenneth Culp Davis, *Suing the Government by Falsely Pretending to Sue an Officer*, 29 U. CHI. L. REV. 435, 437 (1962).

vindication as a fiction, standing for no larger principle than that clearly allowed for in the decision itself.[20]

Part II of this article lays the groundwork of an alternative account of *Ex parte Young*, sovereign-immunity jurisprudence, and the enforcement of federalism. It suggests a relational account as an alternative to the dominant conception of American federalism, which is solely an allocation of power between the national government and the states. According to the dominant model, federalism disputes are adjudicated exclusively by determining which side of the federalism divide possesses substantive authority.[21] One of the benefits of a relational account of *Young* is its emphasis on the preservation of an enduring, constitutionally inaugurated relationship between the national government and the states that is capable of generating a "duty of good faith" and constrains both parties.[22] A relational model of federalism enforcement requires that we focus on maintaining the federal system that the Constitution establishes, which involves a tension between national supremacy and state sovereignty.[23]

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20. *See, e.g.*, James Leonard, Ubi Remedium Ibi Jus, *or, Where There's a Remedy, There's a Right: A Skeptic's Critique of* Ex parte Young, 54 SYRACUSE L. REV. 215, 365 (2004).

21. *See, e.g.*, Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1486 (1994) (describing federalism as a structure that "regulates the allocation of power between state and national governments"). Kramer's discussion was primarily aimed at better understanding the role the political process plays in the distribution of substantive regulatory authority between the states and the national government, yet Kramer's exclusive conception of federalism was as a governance structure that allocated power. Most scholarly commentary on federalism has taken power allocation to be the sole dimension of federalism. Here, the dominant question has been by what process is power allocated, which has focused primarily on whether the political process ought to be the sole or primary method of distributing substantive power between the national government and the states, or whether the judiciary should impose bright-line, constitutionally based limitations on the allocation of substantive authority. *See, e.g.*, JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980); Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 796 (1996) (contending that the dominant view of federalism "is that the existence of areas of exclusive state power is a necessary condition of constitutional federalism").

22. My use of relational federalism is somewhat different than the normal conception of "relationship" in constitutional interpretation. In constitutional interpretation, the term is used as a contrast to a strict clause-bound interpretation of the Constitution, which involves deriving constitutional meaning from the structures and interactions that the Constitution creates, without regard to whether there is a specific textual clause for a specific conclusion. For the leading articulation of structural or relational constitutional interpretation, see CHARLES L. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969); PHILIP BOBBIT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 74-93 (1982). Vicki Jackson refers to relational federalism as a method of constitutional interpretation for federalism disputes involving the "judicial resolution of issues involving not the interpretation of particular constitutional texts but the deeper questions of structural relationships left unaddressed by the constitutional text." Vicki C. Jackson, *Comparative Constitutional Federalism and Transnational Judicial Discourse*, 2 INT'L J. CONST. L. 91, 114 (2004).

23. The theory of imposing constraints from the relationship that is created by the federalism structure is not wholly new. Various scholars have attempted to articulate examples of relational federalism, usually by reference to comparative models of such method of analysis in other countries' (usually Germany's) adjudication of federalism disputes. *See, e.g.*, Daniel Halberstam, *Of Power and Responsibility: The Political Morality of Federal Systems*, 90 VA. L. REV. 731, 734-35 (2004); Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative*

Part II also begins with a brief survey of the constitutional provisions that inaugurate the relationship between the states and the national government.[24] It then articulates the normative and theoretical descriptions of relational account of federalism enforcement. Finally, this part offers examples of the relational model and contrasts them with allocation models.[25] This discussion will demonstrate how courts use both allocation and relational models to resolve federalism disputes in defense of both national supremacy and state sovereignty and autonomy.

The relational model, which calls for respect for national supremacy and state sovereignty and autonomy—federalism's duality—is based on the extent to which each represents distinct legitimate political communities. Indeed, the national and state governments' legitimacy as political communities is inextricably connected to the people as sovereign authority.[26] Part III demonstrates the genealogy of a second insight gained from a relational account of *Young*, that is, state sovereignty is conditioned on the state's status as a political community within the Constitution's meaning. This section asserts that we must look back to the Court's decision in *Texas v. White* to understand the basis of federalism's duality—the states' status as legitimate political communities. This decision also articulates a conception of conditional participation in sovereignty by the state, based on the conclusion that the state is not hostile to the U.S. Constitution. Secondly, this section offers *McCulloch v.*

Constitutional Experience, 51 DUKE L.J. 223, 283-86 (2001). Each of these important discussions reference what might be termed an "ethics" of federalism, which is guided more by the fact of relationship rather than the explicit limits on the possession of substantive authority, whether such authority is the result of the political process or derived from the Constitution. The recognition that relationships are often the source of constraints apart from more formal sources of constraint have been recognized in areas that extend far beyond federalism and separation-of-powers law. *See, e.g.*, Stewart Macaulay, *Non-Contractual Relationships in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 62 (1963) (arguing that the nature and length of relationships affect the resort to formal contractual sanctions as a method of dispute resolution).

24. It is not novel to note that the national and state governments engage in a long-term, complex relationship constructed by the Constitution. *See* William P. Marshall & Jason S. Cowart, *State Immunity, Political Accountability, and* Alden v. Maine, 75 NOTRE DAME L. REV. 1069, 1086 (2000) ("[T]he states and the federal government have ongoing mutually interdependent relationships ...."). However, unlike some who note this fact, the argument presented here does not suggest this ongoing relationship justifies the judicial abdication of a role in enforcing federalism, see Kramer, *supra* note 21, at 1485; rather, this article argues that the relationship is generative of bilateral principles of constraint that ought to be added to the judiciary's arsenal of federalism enforcement.

25. My reliance on specific cases to serve as "ideal types" in no way suggests that a relational model of federalism enforcement appears exclusively in any federalism dispute. My categorization is best understood as highlighting particular dimensions of a particular case or set of cases, without suggesting that this is the only modality of federalism enforcement present in any case. Nevertheless, my divisions are based on an assertion about a dominant modality. In some respects, even when the Court's rhetoric sounds in allocation, its reasoning might be best characterized as relational. For a more extensive discussion of this, see Copeland, Federalism Beyond Power, *supra* note 1.

26. *See* Amar, *supra* note 16, at 1426-27 (asserting that all federalism disputes should be adjudicated by reference to their consistency with the principle of popular sovereignty).

Maryland as an example of the Court's articulation of the Constitution as establishing a national political community at whose head stand the People.

Part IV interprets *Ex parte Young* as a decision involving relational federalism in the context of state immunity. Beyond *Young*'s relational aspects, this part demonstrates *Young*'s commitment to the principle of a conditional state sovereignty. While *Young* recognizes the states' right to some participation in sovereignty, the decision rests on a mandate that states must be accountable to the citizens with whom they are in political relationship. Further, *Young* recognizes the limits on the state's relationship with its citizenry in light of its political relationship with the national government. *Young*, therefore, transformed sovereign-immunity case law by bringing it closer to convergence with the competing dimensions of American federalism in the context of political relationships and accountability.

Part V demonstrates the extent to which the Rehnquist Court's sovereign-immunity jurisprudence involved relational federalism. Part V contends that the Court's affirmation of Congress's substantive authority to enact remedial legislation can be distinguished from other federalism case law that clearly rejected Congress's substantive authority. The *Alden* Court seemed to suggest that despite possessing substantive regulatory authority, the national government's means of effectuating its authority are inconsistent with the Constitution's federal structure. Part V also demonstrates the extent to which the Rehnquist Court's immunity revolution failed to take seriously the *Young* doctrine's underpinnings, which would have required it to take the national political relationship as seriously as it took the state's political relationship in adjudicating disputes over state sovereign immunity.

II. ENFORCING FEDERALISM: ALLOCATION AND RELATIONAL MODELS

A. The Constitutional Basis of Relationship

The argument that constitutional and political structures are capable of building enduring relationships that generate duties of loyalty to constrain the states and the national government presumes that the Constitution actually creates such relationships. This section briefly describes the structures that establish the interactions that serve as the fundamental element in this argument. According to the Constitution's original design, state governments play a central role in selecting the holders of every democratically accountable institution of the national government. Even after the Seventeenth Amendment's passage, which instituted popular election of members of the U.S. Senate, the states play an important role in structuring the national government.

Article I of the Constitution establishes the national legislative body and describes the qualifications for membership in each chamber and the method by which representatives are to be chosen. The states are connected to each. The members of the House of Representatives are to be chosen "every second Year" by the "People of the several States." To qualify for service in the House of

Representatives, a member must "be an inhabitant of that State in which he shall be chosen."[27] The members of the House are distributed "among the several States," based on the state's population. Each state is guaranteed at least one representative in the House of Representatives.

Article I, Section 3 of Constitution establishes the second chamber of the national legislature, the Senate. Each state, regardless of its population, is represented by two members, each of whom is chosen by the state's legislature. Like members of the House of Representatives, to qualify to represent a State in the Senate, a member must be "an Inhabitant of that State for which he shall be chosen."[28]

As with the selection of members of Congress, the states play an indispensable role in selecting the President. Article II, Section 1 establishes the manner in which the President is elected. A state receives an elector for each of its members of the Senate and House of Representatives in Congress. Even further, the original constitution required that electors would meet in their respective states to cast votes for two candidates for President.

B. Relational Model of Federalism Enforcement Explained

It is a legitimate question to ask why the federal arrangement requires enforcement at all. That is, what purpose does federalism serve such that its demise would be detrimental to any particular national regime? Some have suggested that, at least within the American context, protections of federalism are a peculiar "neurosis" in American political culture.[29] Others have suggested that the centrifugal forces of modern American government are so strong that American federalism, far from being vestigial, has imploded.[30] Each of these positions suggests that there is nothing left of federalism to protect, either because it is useless in the modern administrative state or because it has been so battered that it is beyond protection. This article rejects both of these positions and contends that a justification remains for federalism that legitimizes efforts to protect it. In brief, this article accepts federalism as a system of governance that gives a larger polity's geographical subunits the ability to articulate alternative substantive norms than those articulated by the national polity.[31] Federalism

27. U.S. CONST. art. I, § 2, cl. 2.

28. *Id.* § 3, cl. 3.

29. *See* Rubin & Feeley, *supra* note 3, at 903.

30. *See* ROBERT NAGEL, THE IMPLOSION OF AMERICAN FEDERALISM 13 (2001).

31. This conception of federalism is consistent with various conceptions of federalism as a structure that allows particular kinds of minorities, whether ethnic, religious, or political, to exercise a certain level of decisional autonomy over some issues to join a central state. Although some conceptions of federalism are based on a "thick" conception of identity, such as race, language, or religion, federalism can also be justified on the basis of the comparatively "thinner" identity of "political loser." That is, federalism allows political losers at the national level to have access to a space to articulate alternative or competing norms of those adopted by the central government. To be clear, federalism's subunits are not allowed infinite space to articulate such norms, but federalism provides space from which losers at the national level might offer alternative norms that contest the norms of the central government. As can be seen, my disagreement with

challenges the national government's status as the unitary decider in all things, and as such, serves to open space for differentiation from and contestation with the center by those who presumably have failed in their attempts to control the national government.[32]

From the Republic's earliest days, those concerned with protecting the states' decisional autonomy from the national government's usurpation have contended that protecting America's federal structure of government is done best by allocating the powers of each government level.[33] At several points throughout American history, the courts have sought to protect the integrity of the federalism structure by allocating power based on distinctions between local

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Professors Rubin and Feeley centers on their justification of federalism as necessarily tied to political identities that are far thicker than needed. *See* Rubin & Feeley, *supra* note 3, at 942 (connecting separate or divided political identities to ethnic, linguistic, religious, or cultural differences). Further, federalism can be justified by the realization that nations continue to be composed of a variety of competing conceptions of "the good," which might be capable of accommodation under a federal structure of government. This conception of federalism is not parasitic upon being able to identify *ex ante* those who might benefit from some form of regional autonomy, because all can conceivably see themselves as potential political losers at the national level. Under this conception, federalism is a structure that prevents contestation at the national level from being a "fight for all the marbles," in which either side is incentivized to wage "total war" against a particular opponent because all is either won or lost at the national level.

32. *See* Seth F. Kreimer, *Federalism and Freedom*, ANNALS AM. ACAD. POL. & SOC. SCI., Mar. 2001, at 66. Kreimer's conception of the role that federalism plays in making political contestation possible comes close to the idea that I advance. He argued that the existence of subunits of the national government with the capacity for at least minimal articulation of "the existence of alternatives to the authority of the national government can legitimate political opposition to repression in ways that would be unattainable in the absence of a diffusion of political authority." *Id.* at 71. Further, he argued that the existence of "alternative political visions," which may be more easily fostered in a federal structure, "makes it more difficult to demonize and extirpate political dissenters ... [and may] provide the platform for efforts to oust potentially repressive leaders by political means." *Id.* at 70. While I accept much of what Kreimer said, I am uncertain that it is bolstered by the threat of an oppressive national regime. That is, even a non-repressive regime can benefit from the form of contestation that federalism makes possible. Its legitimacy need not be parasitic on the tyrannical potential of the central government.

33. The Framers responded to criticism that the Constitution would create a government that would trample over the states and make them superfluous in the governance of the new nation in part by minimizing the threat that the national government would pose to the states, and by arguing that the separation of powers between the two levels of government would protect the states. Writing in favor of the Constitution, Alexander Hamilton stated:

> It may be said that it would tend to render the government of the Union too powerful, and to enable it to absorb in itself those residuary authorities, which it might be judged proper to leave with the States for local purposes. Allowing the utmost latitude to the love of power .... I confess I am at a loss to discover what temptations the persons entrusted with the administration of the general government could ever feel to divest the States of the authorities of that description. The regulation of the mere domestic police of the States appears to hold out slender allurements to ambition. Commerce, finance, negotiation, and war seem to comprehend all the objects, which have charms for minds governed by that passion; and all the powers necessary to these objects ought in the first instance to be lodged in the national depository.

THE FEDERALIST NO. 17, at 106 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

versus non-local,[34] and economic versus non-economic activities.[35] Such divisions of power are thought to establish a zone of exclusivity for the national and state governments. The enforcement of fidelity to the federalist structure is thought to be best achieved through preventing incursions by either level on the terrain of the other level of government.[36]

A relational conception of federalism suggests that allocation is not the exclusive method to ensure national and state fidelity to the federal arrangement. Like allocational conceptions of federalism, relational conceptions of federalism are premised on enforcing the federalism arrangement against national and state "cheating." Nevertheless, relational conceptions of federalism enforcement are not wedded to the notion that allocating regulatory authority between the national and state governments, and subsequent policing of the boundaries, is the sole way of ensuring fidelity to the federal arrangement. Further, relational conceptions of federalism suggest that an incursion on substantive regulatory authority is not the only way that the federal arrangement can be undermined. The federal arrangement might be undermined even where a particular level of government is legitimately operating within its sphere of substantive regulatory authority. By relying solely on allocation to enforce fidelity to the federal arrangement, allocation does not adequately protect the federal structure of government.[37]

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34. Hammer v. Dagenhart, 247 U.S. 251, 276 (1918) (invalidating the Child Labor Act, which prohibited the interstate transportation of goods produced in factories employing underage children as exerting power over "purely local matters to which the federal authority does not extend").

35. United States v. Lopez, 514 U.S. 549, 560-61 (1995) (invalidating portions of the Gun-Free School Zones Act on the basis that the Congress's Commerce Clause authority over intrastate activity was limited to "economic activity").

36. Jenna Bednar and William Eskridge argued that maintaining federal arrangements is the goal of enforcing federalism. They contend that all parties to the federal arrangement have incentives to "cheat on the federal arrangement" in ways that will undermine it. Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447, 1473-74 (1995). Using a variation of the prisoner's dilemma, they argue that both the national government and the states are incentivized to cheat in their commitment to adhering to the requirements of a federal structure of government by, for example, the national government's "legislating aggressively and preemptively in areas traditionally left to the states," *id.* at 1473, or by a state's failure to participate in the "implementation and enforcement" of national policies with which it disagrees, or through the creation of externalities that negatively affect national policy priorities or other state governments. *Id.* at 1474.

37. Relational conceptions of federalism are similar to the anti-aggrandizement principle articulated in separation-of-power jurisprudence. For example, in *Weiss v. United States*, 510 U.S. 163 (1994), the Court upheld the constitutionality of the appointments process of military trial judges. Military trial judges were to be appointed from among the ranks of already-commissioned officers. *Id.* at 168. They had been appointed pursuant to the Appointments Clause, but did not receive a second appointment to the office of military trial judge. *Id.* at 170. The lack of a second appointment was challenged as a violation of the Appointments Clause requirements. *Id.* at 165. The Court determined that the statute providing for their appointment was not unconstitutional, in part, because it concluded that Congress had not attempted to aggrandize power to itself at the expense of the President by endowing previously appointed officers with additional duties. *Id.* at 188-91. Similarly, in *Commodity Futures Trading Commission v. Schor*, the Court upheld the constitutionality of non-Article II judges entertaining common-law suits, in part, because it

The so-called "federalism revolution,"[38] which primarily took place during the Rehnquist Court era, marked the Supreme Court's return to its role as protector of America's federal structure through the placement of constitutional limitations on national legislative authority.[39] The Court's foray into disputes between the national government and the states was marked by an increased solicitousness toward the threats that certain impositions of national-policy priorities posed for the integrity of state governments.[40] Although the early forays into judicial enforcement of federalism were primarily aimed at the process rather than the substance of federalism,[41] the Court's later federalism decisions expanded by invalidating, as unconstitutional, substantive exercises of congressional authority in both *United States v. Lopez*[42] and in *United States v. Morrison*.[43] The Court's enforcement of federalism moved to include new articulations of the constitutional protection of states from suit in federal court.

As stated above, the dominant interpretation of the federalism revolution generally, and the sovereign-immunity case law particularly, is that it has resulted in an allocation of substantive authority away from the national

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concluded that Congress was not attempting to undermine Article III courts. 478 U.S. 833, 854-55 (1986).

38. Although the concern for the integrity of states is present in earlier eras, *see, e.g.*, Younger v. Harris, 401 U.S. 37, 54 (1971) (holding that federal courts were obligated to abstain from hearing constitutional claims in cases brought plaintiffs challenging their ongoing state, criminal prosecutions), the Court's sensitivity to the states' interests increased significantly during the Rehnquist Court era, *see, e.g.*, New York v. United States, 505 U.S. 144 (1992) (invalidating provision of the Low-Level Radioactive Waste Policy Act Amendments, which required states to take title to radioactive waste in the absence of a disposal plan, as unconstitutional commandeering of the state legislative process); Gregory v. Ashcroft, 501 U.S. 452, 473 (1991) (holding that the provisions of the Age Discrimination in Employment Act did not apply to state mandatory retirement-age requirements for appointed state-court judges absent a clear statutory statement). For a discussion of these cases as calling for a new form of interaction between the national government and the states, see Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism:* New York, Printz, *and* Yeskey, 1988 S. CT. REV. 71.

39. The Court's decision in *Garcia v. San Antonio Transit Authority*, 469 U.S. 528 (1985), marked the Court's rejection of a strong judicial presence in the enforcement of the Constitution's federal structure. There, the Court reversed its only-decade-old decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976), which was the first time since the New Deal that the Court invalidated a congressional statute on federalism grounds. In *Garcia*, the Court declared that the political process was a sufficient institutional enforcer of the Constitution's federal structure. *Garcia*, 469 U.S. at 531. *See also* Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism after* Garcia, 1985 SUP. CT. REV. 341, 341-42 (discussing the significance of *Garcia* in relation to the Court's theory of federalism).

40. *See Gregory*, 501 U.S. at 460 (describing the state's mandatory retirement system as "a decision of the most fundamental sort for a sovereign entity").

41. *See* H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 658 (1993) (describing the federalism constraints of *New York v. United States* as "one of process and not substance"); Rapaczynski, *supra* note 39, at 359-68.

42. 514 U.S. 549 (1995) (holding that Congress lacked the authority to enact portions of the Gun-Free Schools Zones Act).

43. 529 U.S. 598 (2000) (holding that Congress lacked the authority to enact portions of the Violence Against Women Act).

government (and its courts) to the states.[44] Such an interpretation traffics in the conception of federalism as exclusively a governance structure that allocates power between the national government and the states, despite evidence that the Court's federalism jurisprudence has also resorted to less absolute mechanisms of enforcing federalism than mere line drawing. Such a cramped conception of American federalism underwrites the misperception (of scholars and the Court itself) of state immunity's role in protecting federalism. The perception that the enforcement of federalism is exclusively about power allocation distorts the way state-immunity doctrine is deployed as a tool in the arsenal of federalism's enforcement. That is, if power allocation is all there is, state-immunity doctrine must be interpreted in ways that endow states with absolute vetoes to private suits. A relational conception of federalism need not reach such a conclusion, but might allow more flexibility while always sensitive to the need to protect state integrity. Understanding the *Young* doctrine's role in state-immunity jurisprudence, particularly, and federalism jurisprudence, more generally, from this perspective provides opportunities to understand it and our federal structure more fully.

The sovereign-immunity revolution[45] is a central component of the larger federalism revolution inaugurated by the Rehnquist Court.[46] The Rehnquist Court's federalism decisions are marked by a greater sympathy to state governments' independence and autonomy in the nation's constitutional framework, affirmatively limiting the scope of Congress's legislative powers.[47] The state-immunity cases, however, differ from the legislative-federalism case law, as they represent a limitation on the range of Congress's remedial choices rather than a limitation on Congress's authority to enact substantive rights

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44. *See, e.g.*, JOHN T. NOONAN, JR., NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES (2002) (describing the Supreme Court's sovereign immunity case law as ratcheting back the national government's substantive authority).

45. The sovereign-immunity revolution is marked by several cases decided during the Rehnquist Court era, which collectively held that states were immune from suit for violations of federal law in federal courts, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 68 (1996), state courts, *Alden v. Maine*, 527 U.S. 706, 757-58 (1999), and administrative agencies, *Federal Maritime Commission v. South Carolina*, 535 U.S. 743, 760 (2002).

46. *See* M. Elizabeth Magill, *The Revolution That Wasn't*, 99 NW. U. L. REV. 47, 48 (2004) ("The Rehnquist Court has worked important changes in the doctrines relating to federalism. For the first time since the post-New Deal period, the Court has invalidated some acts of Congress as beyond the scope of the commerce power, making clear in the process that there are some judicially enforceable outer limits on the scope of that power."); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 306-08 (2005) (including the Court's recent sovereign-immunity case law as consistent with the Rehnquist Court's broader normative conception of federalism cases); Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1, 3 (categorizing the Rehnquist Court's federalism jurisprudence as having a "propensity toward immunity federalism," which "protects state governments themselves from direct molestation at the hands of the federal government").

47. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 627 (2000) (invalidating provisions of the Violence Against Women Act on the ground that the statute exceeded Congress's authority under both the Commerce Clause and Section 5 of the Fourteenth Amendment); United States v. Lopez, 514 U.S. 549, 567 (1995) (invalidating the Gun-Free Schools Zone Act as beyond Congress's authority under the Commerce Clause).

guarantees.[48] To this extent, the state-immunity case law is arguably consistent with the position that Congress is the best institutional enforcer of federalism limitations on its authority.[49] At the same time, these cases hold that the availability of retroactive remedies for state violations, with some exceptions,[50] should be left to the state governments acting in their independent capacity.[51]

C. *Contrasting Allocation and Relational Models of Federalism Enforcement*

The cases discussed in this section provide examples of the contrasting modalities of federalism enforcement—the allocation and relational models, respectively. As stated above, the categorization of these cases into "types" is not meant to suggest that judges partake of one mode exclusively. Instead, it is meant to suggest that either allocation or relational dimensions of a particular case might be more dominant. Each case below involves a federalism dispute of one sort or another—either a dispute over the scope of Congress's regulatory authority under the Commerce Clause, or a dispute over the duty of state courts to entertain federal statutory cases. The cases are divided into two types: cases that defend the federal arrangement in favor of the national government (Union and Supremacy), and cases that defend the arrangement in favor of the states (Separation and Autonomy). The cases are then divided into the two enforcement modalities—allocation and relational.[52]

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48. *See* Ann Althouse, *The* Alden *Trilogy: Still Searching for a Way to Enforce Federalism*, 31 RUTGERS L.J. 631, 659 (2000) ("If Congress wants adequate enforcement [of federal rights], it is going to have to come up with the money for it and put the decision making about when and how to enforce into the hands of publicly accountable executive branch officials.").

49. The classic statement on the political safeguards of federalism enforcement is 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). *See also* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 530-31 (1985) (upholding the Fair Labor Standards Act's requirement obligating state and local governments to pay minimum wage and overtime to their employees, and overturning its earlier decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976), on the ground that states were adequately represented in the national legislature).

50. Congress can abrogate state sovereign immunity for damage suits pursuant to its authority to remedy constitutional violations under Section 5 of the Fourteenth Amendment. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976). Despite *Bitzer*'s affirmation of Congress's Section 5 authority to abrogate state sovereign immunity, the Rehnquist Court invalidated several statutes aimed at allowing private suits against states for violations of federal statutes. *See, e.g.*, Bd. of Tr. of Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001) (invalidating portions of the Americans with Disabilities Act on the ground that Congress had not abrogated state immunity under its remedial authority under Section 5 of the Fourteenth Amendment); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91 (2000) (same with respect to the Age Discrimination in Employment Act). *But see* Nevada v. Hibbs, 538 U.S. 721, 738-40 (2003) (upholding the Family Medical Leave Act's private-suit provision as a legitimate exercise of Congress's Section 5 authority).

51. Schapiro, *supra* note 46, at 308.

52. It is worth noting that the mere existence of relational reasoning in the Court's enforcement of federalism does not suggest approval of the Court's result. Where I have suggested, at a fairly high level of generality, that a case might be included as an example of relational reasoning in federalism does not *a priori* suggest that it has undertaken relational analysis to good result. Although an appropriate test of any model's utility is a measure of how helpful it is as an

1. *Union and Supremacy*

i. Power-allocation model: McCulloch v. Maryland[53]

As discussed earlier, the power-allocation model suggests that the national-state relationship is regulated exclusively by determining whether one or both levels of government possess a particular power.[54] If only one level of government possesses the power, then that level has a veto over any encroachments on the exercise of the power by the other level of government.[55] If the power is shared, then the national government's power, as supreme, trumps the state's exercise of concurrent power.[56] Scholars have described the Court's epochal decision in *McCulloch v. Maryland* as having set the framework for the expansion of congressional power because of its broad reading of the Necessary and Proper Clause.[57] This section will demonstrate, however, that the Court's articulation of Congress's power was premised, in part, on being the limit of the states' power.

In *McCulloch*, the Court addressed the question of the legitimacy of a state-imposed tax on the Bank of the United States.[58] The Court's analysis emphasized the impact that a state-imposed tax would have on the national government's ability to achieve its constitutionally authorized functions. The Court's decision, though frequently referring to the Union of the United States, emphasized the case as involving "conflicting powers."[59] The Court held that Maryland's tax violated the Constitution, primarily because of Congress's substantive authority to charter the national bank.[60] Even though the Court confessed that the explicit authority to establish a national bank was not listed in the Constitution, the Court explained that the formation of a national bank was a

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explanatory tool in deciding why cases are decided one way as against another, no model is free of the possibility that it might be employed inconsistently.

53. 17 U.S. (4 Wheat.) 316 (1819).

54. *See, e.g.*, Gardbaum, *supra* note 21, at 796-97.

55. *E.g.*, David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb*, 121 HARV. L. REV. 941, 1026 n.335 (2008) (citing JAMES HART, THE ORDINANCE MAKING POWERS OF THE PRESIDENT OF THE UNITED STATES 239-40 (1925)) (explaining the presidential veto as a means to prevent encroachment on exclusive powers).

56. U.S. CONST. art. VI ("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.").

57. Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1729 n.122 (2008) (stating that the *McCulloch* Court interpreted broad powers under the Necessary and Proper Clause).

58. The State of Maryland enacted a statute that imposed a tax on all banks or bank branches within the State of Maryland that had not been chartered by the legislature. The history of the chartering of the Bank of the United States raised constitutional questions throughout the life of the Bank. LUCAS A. POWE, JR., THE SUPREME COURT AND THE AMERICAN ELITE: 1789–2008, at 66-69 (2009).

59. *McCulloch*, 17 U.S. (4 Wheat.) at 400.

60. *Id.* at 437.

"means of executing" explicitly delegated congressional authority.[61] Thus the Court's holding flowed from its first locating constitutional authority that could be interpreted to permit Congress's establishment of a national bank. The Court declared that determining the legitimacy of the means of exercising valid substantive authority was solely within the national legislature's discretion.[62] The Court said:

> The government which has the right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.
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> ... In America, the powers of sovereignty are divided between the government of the Union, and those of the states. They are each sovereign, with respect to the objects committed to it, and neither sovereign, with respect to the objects committed to the other.[63]

The Constitution's commission of a power to one level of government seemingly adjudicates the relationship between the national government and the states in a particular dispute. According to the Court, the exclusive possession of substantive authority is sufficient to adjudicate disputes between the states and the national government.[64] Once the Court establishes the constitutionality of Congress's substantive authority, the inquiry ends.[65] The Court declared, "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional."[66]

ii. Federal-relationship model: Testa v. Katt[67]

The relational concept of federalism enforcement contends that the obligations that regulate national and state interactions go beyond the duty not to infringe on the authority of the other level of government. Rather, an emphasis on the relational dimension of federalism enforcement asserts that each level of government owes a duty to the other even when exercising legitimately

61. *Id.* at 411.

62. *Id.* at 409-10.

63. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 409-10 (1819).

64. *See id.* at 411 (explaining that the power to create a corporation is not exclusively the province of the federal government because the power is not "a great substantive and independent power").

65. *Id.* at 421.

66. *Id.*

67. *Testa II*, 330 U.S. 386 (1947).

possessed regulatory authority.[68] Under a model of relational federalism, the relationships between the two entities can also govern interactions between the states and federal government.[69] This section uses case law to demonstrate how the Court's federalism jurisprudence recognizes the relational dimension of federalism enforcement.[70] Through the Court's seminal decision in *Testa v. Katt*, this section aims to demonstrate how the Court justified certain impositions on state courts.

In *Testa*, the Court faced an appeal from the Supreme Court of Rhode Island, which had held that state courts could not entertain suits under the Emergency Price Control Act,[71] because the Act provided for treble damages against those convicted of selling goods above an established maximum price.[72] A state court held that its courts could not entertain such a case because of the Supreme Court of Rhode Island's decision holding that state courts must not enforce a foreign government's penal laws.[73] The Court responded to the state's holding by declaring:

> [W]e cannot accept the basic premise on which the Rhode Island Supreme Court held that it has no more obligation to enforce a valid penal law of the United States than it has to enforce a penal law of another state or foreign country. Such a broad assumption flies in the face of the fact that the States of the Union constitute the nation.[74]

The Court justified its holding by referencing the congressional conferral of jurisdiction on state courts to "enforce important federal civil laws," which, in

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68. *See* Schapiro, *supra* note 46, at 248-49 (advancing a polyphony model of federalism where the "dynamic interaction among states and the federal government represent independent voices of authority").

69. *See id.* at 249.

70. This article does not contend that relational conception of federalism is the exclusive form of federalism. It argues that by paying attention to the relational dimension in federalism case law, we might begin to think differently of the alternatives to the adjudication of federalism disputes.

71. Act of Jan. 30, 1942, ch. 26, 56 Stat. 23 (1942).

72. *Testa II*, 330 U.S. at 387. Section 205(e) provided:

> If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: ... Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction....

56 Stat. 32, *as amended*, 58 Stat. 632, 640 (1942).

73. Testa v. Katt *(Testa I)*, 47 A.2d 312, 313-14 (R.I. 1946).

74. *Testa II*, 330 U.S. at 389.

turn, established evidence of the relationship between the federal and state governments.[75]

Further, the Court accepted the state's authority to establish the jurisdictional boundaries of its courts. At no point does the Court seem to suggest that the state is without the substantive authority to articulate state-court jurisdictional boundaries as it chooses; the entire decision traffics in the assumption that the state is in full possession of this quantum of sovereignty. Nevertheless, the Court declared that the exercise of such authority, despite the fact that it does not invade any domain in exclusive possession of the national government, is a threat to the government's federal structure because it discriminates against federal claims simply because they are federal claims. The Court ruled that, absent a neutral procedural rule that treats both state and federal actions the same, a state is not free to dislodge itself from the duties of its relationship with the national government.[76] The relationship in this context demands that states respect their union with the national government, which prohibits treating the national government as though it were a foreign entity.[77] The Court's decision balanced the precedents recognizing state courts' substantive authority to establish and exercise their own procedural rules against the potentially contradicting dictates of the states' duty not to treat federal claims with disdain.[78]

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75. *Id.* at 390. Such a congressional conferral of a mandatory duty to state courts to entertain suits involving federal law clearly raises the suspicion that the Congress has commandeered the state-court system by obligating state courts to entertain federal suits. The Court has, however, rejected the assertion that imposing such an obligation amounts to unconstitutional commandeering based on a distinction that a state court's duty to apply federal law is dictated by the Supremacy Clause of the Constitution versus no complementary provision mandating state executive officers to administer federal law. *See* Printz v. United States, 521 U.S. 898, 929 (1997). Although the Court's later reliance on the commandeering case law to support its holding in *Alden v. Maine* that states are immune from suit in their own courts seems sufficiently narrow that *Testa*'s holding is not threatened. *See* James Pfander, *Federal Supremacy, State Court Inferiority and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 NW. U. L. REV. 191, 227 n.154 (2007) (explaining the congruence between *Alden* and *Testa*). It is significant that the Court's justification of *Testa*'s holding appears to rely on an allocation conception of federalism enforcement. This is not surprising, or even fatal to relational federalism, in light of the fact that relational federalism is but one dimension of federalism. It is not the exclusive way of considering federalism disputes, and a single case can certainly exhibit dimensions of both relation and allocation. For an alternative to the Court's Supremacy Clause justification of *Testa*'s holding, which also relies on a power-allocation model of federalism, see generally Martin H. Redish & Steven G. Sklaver, *Federal Power to Commandeer State Courts: Implications for the Theory of Judicial Federalism*, 32 IND. L. REV. 71 (1998) (offering a justification of *Testa II* on the basis of the Necessary and Proper Clause).

76. *Testa II*, 330 U.S. at 389.

77. The Court's decision in *Testa II* is complemented by the Court's decisions holding that it will not imply a congressional withdrawal of state-court review of federal claims absent a clear statement. *See* Howlett v. Rose, 496 U.S. 356, 372-73 (1990); Tafflin v. Levitt, 493 U.S. 455, 461 (1990). *But see* Tarble's Case, 80 U.S. 397, 405-06 (1872) (denying state courts authority to entertain habeas petitions against the federal government).

78. Testa v. Katt (*Testa II*), 330 U.S. 386, 392-93 (1947).

2. *Separation and Autonomy*

i. Power-allocation model: United States v. Lopez[79]

The Court's landmark decision in *Lopez* revived the judicial enforcement of substantive limits on Congress's regulatory authority.[80] Along the continuum of judicial resolution of disputes over the exercise of national or state authority, *Lopez* is easily a case whose resolution depends almost exclusively on allocating power between the national government and the states.[81] In *Lopez*, the Court explicitly declared that the matter Congress sought to regulate—guns sold in interstate commerce within 1000 feet of a designated school zone—exceeded the scope of its substantive legislative authority under the Commerce Clause.[82] The Court's decision resolved the federalism dispute by almost exclusive reference to the nature of activities—economic versus non-economic—that Congress could regulate pursuant to the Constitution's Commerce Clause.[83] Concluding that the regulation of guns in school zones was a non-economic regulation, the Court invalidated the statute.[84]

The Court's analysis began by declaring that the national government is a government of "enumerated powers," which are "few and defined."[85] The Court continued by connecting the Framers' vision of separated powers to the goal of protecting of liberty.[86] The main objective of the Court's opinion was to define and articulate the boundaries of Congress's commerce power.[87] Though the Court conceded that post-New Deal era decisions have relaxed the overly

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79. 514 U.S. 549 (1995).

80. *National League of Cities* is usually taken to be the Court's first foray into the judicially enforced, federalism-based limits on Congress's legislative authority, but for reasons that will be described below, *National League of Cities* might be read differently, in that the Court's opinion suggests that its invalidation of the congressional statute at issue in that dispute might not have been held to have exceeded Congress's substantive authority. *See infra* note 106.

81. *See* MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER (2003). Professor Tushnet offers an alternative reading of the Court's decision in *Lopez*, which does not subscribe to an allocation conception of federalism enforcement. Rather than reading the decision as defining "some substantive area of regulatory authority reserved to the states," *id.* at 40-41, Tushnet contends that the decision might be read as a judicial response to "particularly egregious exercises of truly expansive views of national power," *id.* at 40, rather than a clear line-drawing exercise. Although Tushnet's explanation is clearly attractive—it explains the consequences of the Court's decision and its potential long-term impact—the decision's reasoning clearly relies on a presumption that some activities are beyond the scope of national regulatory authority. Admittedly, Professor Tushnet's argument is supported by the Court's indication that Congress's failure to include a "jurisdictional nexus," which would have required that gun possession giving rise to federal criminal charges be connected to interstate commerce in the text of the Gun-Free School Zones Act, impacted their invalidation of the statutory provision.

82. The statute at issue was the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(1)(A) (2000). *See Lopez*, 514 U.S. at 561.

83. *Lopez*, 514 U.S. at 561.

84. *Id.*

85. *Id.* at 552.

86. *Id.* (citing Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)).

87. *Id.* at 559.

formalist constraints on Congress's authority, it labored to establish that even those cases recognized that federalism constraints impose a limit on Congress's exercise of its authority.[88]

Having characterized Congress's authority as limitable by the dictates of federalism, the Court's analysis focused on articulating the limits of congressional authority under the Commerce Clause.[89] Its inquiry centered on determining whether the congressional regulation of handgun possession within school zones would "substantially effect" commerce and thus bring it within the scope of Congress's approved regulatory authority.[90] Answering in the negative, the Court articulated a conception of federalism that it discovered in reviewing its post-New Deal precedents.[91] The Court stated that its expansion of congressional regulatory authority under the "substantial effects" test affirmed Congress's attempt to regulate economic activity.[92] Of the statute at issue in *Lopez*, the Court said, "[The Act] is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define the term."[93] The Court drew from its precedents a clear intention to limit congressional regulation of intrastate activity substantially affecting interstate commerce to one particular subject matter—economic activity.[94] The Court rejected the government's aggregation of the myriad non-commercial effects of guns in school zones as having no limiting principle.[95]

The Court's decision in *Lopez*, drawing on constitutional structure, declared federalism as the limit on national power.[96] The opinion suggests that federalism demands that there be another allocation of power, that within the state's sole possession.[97] *Lopez* suggests that if courts do not resolve federalism disputes by resort to allocating power between the national government and the states, states will cease to exist in the form that the Constitution requires.[98] The Court's decision not only clearly demonstrates the power-allocation model, it appears to offer this model even when it becomes difficult to articulate the substantive quantum of authority exclusively possessed by the states.

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88. *See id.* at 556-57.

89. *See* United States v. Lopez, 514 U.S. 549, 556-57 (1995).

90. *Id.* at 557. *See also* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 40 (1937) (holding that Congress could regulate intrastate activity that had a "substantial effect" on interstate commerce).

91. *Lopez*, 514 U.S. at 561.

92. *Id.*

93. *Id.*

94. *See id.*

95. *Id.* at 563-64.

96. *See id.* at 561 n.3.

97. *See id.* at 564.

98. *Id.* at 563-64 (citing *Jones & Laughlin Steel Corp.*, 301 U.S. at 37).

ii. Federal-relationship model: National League of Cities v. Usery[99]

Though many characterize *National League of Cities* as a decision that narrowed the scope of Congress's substantive regulatory authority with respect to state governments,[100] this section demonstrates the ways in which it clearly sounded in relational terms. Many consider the Court's decision a classic example of power allocation because the decision seems to rest exclusively on the fact that Congress had sought to exercise its authority over states in areas that constitute "traditional government functions."[101] The search for traditional government functions seems so clearly related to a search for core areas of exclusive state authority that *National League of Cities* suggests that the resolution of the dispute between the national government and the states will be settled when such a search is complete.[102] In overruling *National League of Cities* less than a decade later, however, the Court asserted that its reversal lay, in part, in the difficulty of administering rules regarding "traditional government functions."[103]

Although it would be foolhardy to suggest that *National League of Cities* avoided all references to power allocation, a strict power-allocation reading fails to appreciate the ways in which the Court's decision demonstrates the relational dimension of federalism jurisprudence. The Court's decision began with an announcement of the "essential role of the States in our federal system of government."[104] Although the Court began to speak of the difference between congressional assertion of power over individuals versus states, suggesting that it was endowing the states with an absolute veto right against congressional impositions on states, its rationale for rebuffing Congress's imposition of minimum-wage requirements on state governments went beyond a declaration that Congress is without substantive authority.[105] The Court stated, "We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, *not because Congress may lack an affirmative legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.*"[106] While

99. 426 U.S. 833 (1976).

100. *See* ERWIN CHEMERINSKY, ENHANCING GOVERNMENT: FEDERALISM FOR THE 21ST CENTURY 23 (2008) (describing *National League of Cities* as having placed a limit on congressional power); Lawrence H. Tribe, Saenz *Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—Or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 138 (1999).

101. *Nat'l League of Cities*, 426 U.S. at 854-55.

102. *Id.* at 845.

103. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 531 (1985) ("[T]he attempt to draw boundaries of state regulatory immunity in terms of 'traditional governmental function' is not only unworkable, but also inconsistent with established principles of federalism....").

104. *Nat'l League of Cities*, 426 U.S. at 844.

105. *See id.* at 845.

106. *Id.* (emphasis added). *National League of Cities* did not endow states with an absolute veto over congressional action that might trespass on "traditional governmental functions," which is supported by the Court's declaration that its decision was consistent with its precedent in *Maryland v. Wirtz*, 392 U.S. 183 (1968). *Wirtz* upheld congressional authority to impose a temporary freeze

the Court seemed reticent to declare that Congress lacked the substantive authority to extend minimum-wage requirements to state governments, the Court did not hesitate to declare that there are limitations on congressional action, even where it is unable to make a specific power-allocation decision.[107]

As it did in *Testa*, the Court interpreted the Constitution to have given the states an essential role in the federal system.[108] The Court's opinion suggests that the relationship requires that the states retain some characteristic of a "separate and independent existence."[109] The Court rejected Congress's extension of its minimum-wage and maximum-hour legislation to state governments because such an extension threatened the independent existence of the state governments by "displac[ing] state policies regarding the manner in which [states] structure delivery of those governmental services which their citizens require."[110]

III. POLITICAL RELATIONSHIP, ACCOUNTABILITY, AND FEDERALISM'S PERPETUAL TENSION

The Constitution clearly contemplates that state governments have functioning political systems that are separate from, and not reliant on, the Constitution's structural framework.[111] The Constitution is almost completely silent regarding the structure of state governments even though various national governmental institutions' structures partially rely on a certain form of government in the states. For example, Article I assumes the existence of state legislative bodies: Section 2 sets the qualifications of the electors for members of the House of Representatives as the same as the qualifications for "Electors of the most numerous Branch of the State Legislature."[112] Likewise, membership in

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on wages of state- and local-government employees pursuant to the Economic Stabilization Act of 1970. *Wirtz*, 392 U.S. at 183. The Court stated, "The [Economic Stabilization Act] was occasioned by an extremely serious problem which endangered the well-being of all the component parts of our federal system and which only collective action by the National Government might forestall." *Nat'l League of Cities*, 426 U.S. at 853. The Court then attempted to distinguish the intrusion at issue in *Wirtz* from the intrusion in *National League of Cities*, stating that the effect of an across-the-board salary freeze did not displace the state's authority to structure government services. *Id.* Though the Court's distinction appears to be strained, it nevertheless established the Court's recognition of the legitimacy of a relational conception of federalism. The Court's approval of *Wirtz* might be read as confirming a relational obligation that states owe to the federal system in that they must sacrifice authority even where they might otherwise be sovereign for the sake of the federal system of government. In the face of a significant economic emergency, even such exclusive possession of authority might be called on to yield. This is clearly different from the conception of exclusively power-allocation federalism, which underwrote the Court's constrained readings of Congress's commerce-clause authority during the Great Depression, clearly the most severe economic experience of the twentieth century. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 297-304 (1936).

107. *Nat'l League of Cities*, 426 U.S. at 845.

108. *Id.* at 851.

109. Nat'l League of Cities v. Usery, 426 U.S. 833, 851 (1976) (citations omitted).

110. *Id.* at 847.

111. *See, e.g.*, U.S. CONST. art. I, § 2.

112. *Id.*

the U.S. Senate is based on selection by the legislatures of the several states.[113] Article I also grants state legislative bodies the authority to establish the "Times, Places and Manner of holding Elections for Senators and Representatives," although the time and manner, but not place, of elections may be revised by Congress.[114]

Apart from the role of particular state institutions in filling national political institutions, the Constitution contemplates a state government as accountable to those who constitute its political community.[115] For example, Article IV, Section 2 guarantees to a citizen of another state that she will enjoy "all Privileges and Immunities of Citizens in the several States."[116] Scholars have interpreted the Privileges and Immunities Clause to stand for the proposition of "inter-state equality," which prohibits a state from treating citizens of sister states differently than its own citizens.[117] The Clause accounts for outsiders' political vulnerability to the state's political process and thereby implicitly recognizes the importance of the relationship that inheres between a state's citizens and that state's governing apparatus.[118] The Constitution assumes that members of a political community have the ability to affect the way in which they are treated by their government and ties the state's treatment of them to the state's treatment of outsiders to establish a floor below which the state may not fall.[119]

Alongside the protections of the Privileges and Immunities Clause, the Constitution guarantees to "every State in the Union a Republican Form of Government."[120] Although the Constitution is not explicit regarding what it means by a republican form of government, supporters of the Constitution's ratification described "the distinctive characters of the republican form."[121] James Madison wrote, "[W]e may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people; and is administered by persons holding their offices during pleasure, for a limited period, or during good behaviour."[122] The Constitution's Guarantee Clause is an explicit declaration of federal protection of state governments' structure, at least to the extent that these structures are necessary to maintain the direct connection between the sovereignty of the

113. Similarly, Article II empowers state legislatures to appoint Presidential Electors for the purpose of selecting the President. *Id.* art. II, § 1, cl. 2.

114. *Id.* art. I, § 4, cl. 1.

115. *Id.*

116. *Id.* art. IV, § 2, cl. 1.

117. *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 251-54 (2005); JOHN HART ELY, DEMOCRACY AND DISTRUST 23 (1980).

118. AMAR, *supra* note 117, at 251-54; ELY, *supra* note 117, at 23-24.

119. This idea inheres from the Constitution's Guarantee Clause, which states that the United States "shall guarantee to every State in this Union a Republican Form of Government." U.S. CONST. art. 4, § 4.

120. *Id.*

121. THE FEDERALIST NO. 39, *supra* note 33, at 251 (James Madison).

122. *Id. See also* Deborah Jones Merritt, *Republican Governments and Autonomous States: A New Role for the Guarantee Clause*, 65 U. COLO. L. REV. 815, 815-19 (1994) (discussing the outer boundaries of the definition of a republican government).

people over their respective state governments.[123] Further, the Guarantee Clause stands for the Constitution's recognition that state governments are political communities, whose existence predates the Constitution's ratification.[124] But the Guarantee Clause also stands for the position that recognizing states as political communities is inextricably connected to their being controlled by a sovereign People.[125] The Civil War and Reconstruction forced the Court to address the difficult issue of legitimate state government as it had not before.

A. McCulloch v. Maryland:[126] *National Political Relationship*

The Court's decision in *McCulloch v. Maryland* affirmed the national Union's supremacy by resorting to power allocation.[127] But the legitimacy of the sovereignty and supremacy of the Constitution and the national government's other enactments, at least in their areas of constitutional competence, is derived from the political relationship that the Constitution establishes between the

123. Deborah Jones Merritt has interpreted the text of the Guarantee Clause to place explicit, though fairly narrow, limits on the kinds of impositions the national government can make on state governments. *See* Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 2 (1988).

124. *See, e.g.*, THE FEDERALIST NO. 39, *supra* note 33, at 254 (James Madison) (describing the plan for the Constitution's ratification as involving, in part, the "assent and ratification of the several States, derived from the supreme authority in each State, the authority of the people themselves").

125. The argument regarding political community articulated in this essay relies on the Guarantee Clause as a an operational principle in federalism's constitutional structure. The primary obstacle to an argument based on the Guarantee Clause is the Court's holding that the Clause is nonjusticiable. *See* Luther v. Borden, 48 U.S. 1, 46-47 (1949) (holding that the political-question doctrine prevented federal courts from entertaining suits seeking to enforce the Constitution's Guarantee Clause). In *New York v. United States*, 505 U.S. 144 (1992), the State of New York challenged the constitutional validity of the Low-Level Radioactive Waste Policy Act's requirement that state governments enact specific legislation to address the problem of radioactive-waste disposal as inconsistent with the Guarantee Clause. *Id.* at 149. Although the Court did not resolve the dispute on Guarantee Clause grounds, it admitted that it had not always been consistent in holding that claims fell under the Guarantee Clause. *Id.* at 183. *See also* Merritt, *supra* note 122, at 822-27. This analysis accepts Professor Merritt's contention that the Guarantee Clause that a per se bar on the justiciability of claims brought pursuant to the Clause is unwarranted. The argument offered in this article diverges from Merritt's arguments to the extent that they seem to accept allocation of authority between the states and national government as the exclusive mechanism of federalism enforcement. The relational model of federalism enforcement is perhaps more consistent with a justiciable Guarantee Clause used as the basis for a principle that would guide the judicial mediation of national-state federalism disputes. To the extent that the Guarantee Clause does not allocate a specific set of powers to either the state or national government, it might best be read as articulating a principle to guide the judiciary's examination of congressional activities that might substantially affect the republican character of state governments. This is different from using the Guarantee Clause as embodying a specific set of powers and authorities possessed by either the national government or the states. For a fuller discussion of these issues, particularly as they relate to rethinking the judicial role in federalism enforcement, see Copeland, *supra* note 1.

126. 17 U.S. (4 Wheat.) 316 (1819).

127. *See id.* at 403-05.

national government and U.S. citizens.[128] "National sovereignty" has little meaning apart from its status both as the product of the people's affirmative will in ratifying the Constitution and as the continuous representative of the People in its national institutions.[129]

The clearest statement supporting the legitimacy of the national government's supremacy is *McCulloch*'s rejection of Maryland's assertion that the Constitution does not emanate from the people, but from the states, and consequently, its power "must be exercised in subordination to the states, who alone possess supreme dominion."[130] In rejecting Maryland's argument, the Court said:

> The Convention which framed the constitution was indeed elected by the State legislatures. But the instrument, when it came from their hands, was a mere proposal .... It was reported to the then existing Congress of the United States, with a request that it might "be submitted to a Convention of Delegates, chosen in each State by the people thereof ...." This mode of proceeding was adopted; and by the Convention, by Congress, and by the State Legislatures, the instrument was submitted to the *people*.... No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass.... But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the State governments.
>
> From these conventions, the constitution derives its whole authority. The government proceeds directly from the people; is "ordained and established" in the name of the people ....[131]

Having rejected Maryland's misplaced state authority, the Court established that the people are the heirs to the legitimacy that popular sovereignty bestows.[132] The states cannot direct the Union as though it were a dependent ward of the state governments.[133] The national government is in full possession of a quantum of sovereignty derived from the people.[134]

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128. *Id.* at 402.

129. For a discussion of the national legislature's status as the continuous repository of the will of the people, see *infra* Part V.B.

130. *McCulloch*, 17 U.S. (4 Wheat.) at 402.

131. *Id.* at 403 (emphasis added).

132. *Id.* at 404-05.

133. *Id.* at 405.

134. *Id.* The claim that *McCulloch* affirms the Constitution's creation of a national political community is not meant to suggest that the issue of national versus state citizenship was resolved prior to the enactment of the Fourteenth Amendment. Before the Amendment's ratification, the conception of national citizenship was much contested. At the time of the ratification, "the idea of a preeminent national citizenship was a radical repudiation of the state sovereignty theory ... [which maintained] that Americans were state citizens first, and only secondarily citizens of the Union." GARRETT EPPS, DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA 234-35 (2006). The first section of the Fourteenth Amendment affirmed the idea of a national citizenship as against "federalist citizenship." The post-Civil War era taught the Republicans in Congress the need to clarify the relationship at which

The Court then turned to the basis of the Constitution's claim for supremacy.[135] Justifying the Court's independent claim to sovereignty required that the Court articulate the political relationship between the people and the national government through their popular ratification of the document.[136] To establish the supremacy of the national government, however, the Court had to recognize the states' role in ratifying the Constitution.[137] The Court did this by emphasizing the role of the states "in their sovereign capacity" who, by implication, assented to the document by calling conventions and submitting the document for ratification by the people.[138] The Court concluded, "The constitution, when thus adopted, was a complete obligation, and bound the state sovereigns."[139]

The Court's decision in *McCulloch* established the commitment of constitutional authority to the national government's independent-sovereign status, against the threats of state authorities.[140] The political relationship between the national government and the people establishes the national government's status—that "the government of the Union ... is, emphatically and truly, a government of the people."[141] Accordingly, the legitimacy of the national government's claim to supremacy rests on assent from both the people and the states.

B. Texas v. White:[142] *The Recognition of States as Political Communities*

In *Texas v. White*, the Court faced a suit filed in the Supreme Court by the State of Texas seeking an injunction against the holders of federal bonds payable to the State of Texas, which they acquired in 1851 as a settlement of certain boundary claims. Texas argued that the bonds had been illegally transferred to third parties by the Confederate government after Texas seceded from the Union in 1861. Texas sought to prevent the bearers from receiving payment from the

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the Privileges and Immunities Clause of Article IV gestured—i.e., the existence of a direct relationship between national citizens and the national government. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 278 (1998).

135. *See id.* at 404-05.

136. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819).

137. *See id.* at 404.

138. *Id.*

139. *Id.* The Court employed its inclusion of the "people in their conventions and their respective states" again in its decision articulating the Supreme Court's authority to hear appeals of state criminal convictions based on interpretations of federal law. *See* Virginia v. Cohens, 19 U.S. (6 Wheat.) 264, 380-81 (1821).

140. *See McCulloch*, 17 U.S. (4 Wheat.) at 404.

141. *Id.*

142. 74 U.S. (1 Wall.) 700 (1868). Although *Texas v. White* has been hailed as the Court's "most definitive statement of the relationship between the states and the Union," it receives very little attention in major constitutional-law casebooks. *See* PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS (2006); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW (2005); CHARLES A. SHANOR, AMERICAN CONSTITUTIONAL LAW: STRUCTURE AND RECONSTRUCTION (2003); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW (2005); KATHLEEN SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW (2007).

United States Treasury and demanded the bonds' return to the State. The defendants challenged the Court's jurisdiction to entertain the suit pursuant to its original jurisdiction. They maintained that the Court could not hear Texas's action because Texas's secession from the Union had disrupted its status as a state within the meaning of Article III's jurisdictional grant.[143] The Court's attempt to address this fundamental challenge to its jurisdictional authority, which went to the very heart of the post-Civil War constitutional crisis, provides central insights into the nature of American federalism, the state as a political community, and the supremacy of the Constitution.

Before the Court determined whether Texas is a state within the meaning of the Constitution, it first attempted to ascertain the nature of the state in abstract terms. The Court's discussion is important because the Court offered a theory of the nature of the state that has implications for limitations on legitimate state authority. The Court declared that the term "state" has various meanings, including "a people or community ... in political relations"; "a territorial region"; "the government under which the people live"; or a combination of "people, territory and government."[144] The Court concluded, however, that in all these definitions, "the primary conception [of the state] is that of a people or community."[145] The Court continued, "The people, in whatever territory dwelling ... and whether organized under a regular government, or united by looser and less definite relations, constitute the state."[146]

The Court moved from the abstract conception of the state to the more concrete conception of the state within the meaning of the Constitution, concluding that "state," as used in the Constitution, "expresses the combined idea ... of the people, territory, and government. A state, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed."[147] Although the Court had asserted that the term is a combination of conceptions of people, territory and government, the Court declared that the "principal sense" of

143. *See White*, 74 U.S. (1 Wall.) at 718-19. This question went to the very heart of the Reconstruction logic of the radical Republicans. They argued that the former Confederate states could not be seated in the Congress because their secession from the Union robbed them of their status as states, thereby robbing them of their representation in the Congress. This argument was completely opposite of the contention of Unionists both before and after secession, which rested on the proposition that the Union was perpetual and inviolable, and there could be no such thing as a constitutional right to secede. Unsurprisingly, the former Confederate states argued a position directly opposite the one they argued before and during the Civil War. After their defeat, they challenged the constitutionality of Reconstruction (including their exclusion from Congress) on the ground that they remained a part of the Union, despite secession and formation of a separate government. *See* MICHAEL LES BENEDICT, PRESERVING THE CONSTITUTION: ESSAYS ON POLITICS AND THE CONSTITUTION IN THE RECONSTRUCTION ERA 147-48 (2006); Herman Belz, *Deep-Conviction Jurisprudence and* Texas v. White*: A Comment on G. Edward White's Historicist Interpretation of Chief Justice Chase*, 21 N. KY. L. REV. 117, 124-25 (1993)

144. *White*, 74 U.S. at 720.

145. *Id.*

146. *Id.*

147. *Id.* at 721.

the term is that of "a people or political community, as distinguished from a government."[148] The Court supported its conclusion that the Constitution distinguished between the state and the government by pointing to the Guarantee Clause of Article IV. The Court stated that the Constitution's guarantee that every state should have a republican form of government expressed a "distinction between a State and the government of a State."[149]

The Court's recognition of a distinction between the state's people, as a political community, and the state government lays the foundation for the Court's articulation of limits on the state government. Taking the Court's earlier declaration, discussed above, of the Constitution as the representation of the will of the people and the people's articulation of their fundamental law, the Constitution stands in for the people, who are distinguishable from the government. To the extent that the Constitution represents the highest will of the people as their articulated fundamental law, any government that does not accord with the Constitution does not accord with the people, and does not represent a political community within the meaning of the Constitution.[150]

Having begun at a high level of abstraction, the Court was then faced with the conundrum of determining whether Texas's secession from the Union resulted in its relinquishment of its status as a state of the Union. The issue was fraught with controversy because to declare that Texas is not a state would mean accepting that Texas could have constitutionally seceded from the Union, a position that Unionists rejected.[151] Conversely, to declare that Texas's status as a

148. *Id.*

149. *Id.*

150. It is not surprising that the Court would conceive of the state as separate from the governing structure of the state, given the recent experience of the Civil War period. But just as significant for the Court's conception of the state as separate from the government of the state was the experience of the post-Civil War South. Before the ratification of the Fourteenth Amendment, the Republicans in Congress grappled with what they saw as the takeover of the state governments by "unrepentant Confederates" in the states reconstructed by President Andrew Johnson. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 260 (1988). The debate surrounding the Fourteenth Amendment's drafting included much controversy regarding the decision to interfere directly with the politics of the former Confederate states. Foner noted that Republicans in Congress sought to "conjure into being a new political leadership that would respect the principle of equality before the law" by prohibiting from any office any Confederate who had taken an oath of office before the war. *Id.* at 259. Foner noted that although Section 3 of the Fourteenth Amendment did not seem to radically affect the representation of the former Confederate states in Congress, it "made virtually the entire political leadership of the South ineligible for office." *Id.* Although the Republicans maintained some commitment to the federalism structure of the Constitution's original design, Republican leaders did not see this as inconsistent. *Id.*

151. The Court's opinion represents an acceptance of Lincoln's rejection of secession, as articulated in his First Inaugural Address. Lincoln declared, "I hold, that in contemplation of universal law, and of the Constitution, the Union of these States is perpetual. Perpetuity is implied, if not expressed, in the fundamental law of all national governments.... Descending from these general principles, we find the proposition that, in legal contemplation, the Union is perpetual, confirmed by the history of the Union itself." *See* First Inaugural Address (Mar. 4, 1861), *in* LINCOLN: SELECTED SPEECHES AND WRITINGS 289 (1992). *See also* DANIEL FARBER, LINCOLN'S CONSTITUTION 79 (2003); Belz, *supra* note 143, at 125.

state was unaffected by its act of rebellion against the Union, and therefore remained a state without qualification, would undermine the constitutionality of the Reconstruction program, which prohibited representatives of the former Confederate states from participation in the House and Senate until they had been deemed reconstructed by the Republican-controlled Congress. It is here that the Court's earlier distinction between the state and the state government becomes important in the Court's declaration of the conditional status of a state's sovereign authority under the Constitution.

The Court rejected the proposition that Texas's secession could deprive it of its status as a state, and the Court declared the indissoluble nature of the "perpetual Union."[152] The Court went into great detail describing state officials' actions after secession in rending the state's relationship with the United States, and establishing a new relationship with the Confederate States of America. The Court described conventions, legislative acts, and the adoption of ordinances and resolutions. The Court explained the completeness of the State's withdrawal from the Union: "In all respects, so far as could be accomplished by ordinances of the convention, by acts of the legislature, and by votes of the citizens, the relations of Texas to the Union were broken up, and new relations to a new government were established for them."[153] The Court continued by pointing out that there were no Texas state officers who recognized the national government's authority.

What did the Court make of all of these seemingly official state acts to perfect an intent to secede from the Union? Keeping with its earlier conclusion that the Union is perpetual and indissoluble, the Court deemed the acts as "transactions *under* the Constitution."[154] The Court found "the ordinance of secession, adopted by the convention and ratified by a majority of the citizens of Texas, and all the acts of her legislature intended to give effect to that ordinance ... absolutely null." This conclusion has two central points for our purposes. First, the conclusion asserts the consequence of the Union's perpetual nature. The Court's declaration that Texas's admission to the Union was "more than a compact," but rather an adoption into a "political body." The finality of such inclusion left Texas and the other states constituting the Confederacy "no place for reconsideration, or revocation, except through revolution, or through the consent of the States."[155]

Secondly, the Court's conclusion has larger ramifications for the potential unconstitutionality of state official acts. Again, the Constitution represents the People's highest expression of will. It stands as the fundamental law, ready to chasten even when the People act in ways that are inconsistent with its dictates. The Court's explicit detailing of the procedural formalities through which the secession and subsequent activities passed did not accord, or the description of the officialdom involved in these decisions does not endow them with the

152. *White*, 74 U.S. (1 Wall.) at 725.

153. Texas v. White, 74 U.S. (1 Wall.) 700, 724 (1868).

154. *Id.* at 726 (emphasis added).

155. For a qualified rejection of this statement, see MARK E. BRANDON, FREE IN THE WORLD: AMERICAN SLAVERY AND CONSTITUTIONAL FAILURE 167-99 (1998).

imprimatur of constitutionality if they violate the meaning of the Constitution.[156] The Court explicitly stated that the relations between the state and the national government will vary depending on the whether the state adheres to its constitutionally imposed obligation. The Court explained, "[T]he relations which subsist while these [constitutional] obligations are performed [] are essentially different from those which arise when they are disregarded and set at nought." It is in recognition of such "new relations" that the Court identified as having "imposed new duties on the United States" that the Court seems to affirm the constitutionality of the Reconstruction Acts.

The Court's acceptance of the dramatic new powers of the national government to reconstruct the former Confederate states is, however, articulated in a way that emphasizes the states' status as political communities.[157] The Court reasoned that the national government was empowered to reconstruct the states based on the Constitution's imposition of a duty on the national government to "guarantee to every State in the Union a republican form of government."[158] The Court declared that the newly reconstituted State of Texas was "entitled to the benefit of the constitutional guaranty."[159] This entitlement suggests a recognition of the states—even the former Confederate states—as possessing attributes of sovereignty. The Court suggested that the state's achievement of a republican form of government rests, in part, on the principle of inclusion of the whole people into the apparatus of the state, including freed slaves.[160]

Having recognized the states as political communities, the Court further reoriented the conception of American federalism, even in the aftermath of a more powerful post-Civil War national government. Alongside earlier Supreme Court case law that declared that preserving the national government's supremacy was the Constitution's central principle, *White* established the preservation of the states as an equivalent constitutional value.[161] The perpetuity notwithstanding, the Court announced:

> [T]he perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence, or of the right of self-government by the States. Under the Articles of Confederation each State retained its sovereignty, freedom,

156. One need not agree that the Court has interpreted the Constitution correctly regarding the right of secession. What is important for the argument's purposes is that the Court declared that inconsistency with the Constitution's dictates transforms official acts into acts done without authority.

157. *White*, 74 U.S. (1 Wall.) at 722.

158. U.S. CONST. art. IV, § 4.

159. *White*, 74 U.S. (1 Wall.) at 729.

160. *See id.*

161. It is significant that Chief Justice Salmon Chase, the author of *Texas v. White*, is credited with crafting a states' rights defense: the right of non-slave states to refuse to enforce the Fugitive Slave Law. Chase rejected the authority of the central government to impose the obligation to protect slave interests on "free" states. The Court rejected arguments in *Prigg v. Pennsylvania*, 41 U.S. 539 (1842), upholding Congress's authority to enact the Fugitive Slave Act. *See* WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848, at 218-22 (1977); Michael Les Benedict, *Salmon P. Chase and Constitutional Politics*, 22 LAW & SOC. INQUIRY 459, 466-67 (1997).

> and independence, and every power, jurisdiction, and right not expressly delegated to the United States.... Not only therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but *it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government.*[162]

The Court emphasized the duality of American federalism structure as one that takes seriously both the national Union and the preservation of the states in an enduring relationship. *White* articulated the dual nature of American federalism, perhaps most prominently displayed in its declaration that "the Constitution in all its provisions, looks to an indestructible Union, composed of indestructible States."[163] While indestructible, the states' governments, including those with appropriate governance procedures, are subordinate to the dictates of the Constitution. The sovereignty in which the states participate is conditioned on acting in accord with the Constitution; when the state's actions are inconsistent with constitutional dictates, the Constitution requires that the government's actions be brought in line with the Constitution's mandates.

3. *The Tension of Supremacy and Sovereignty in the Federal Relationship*

The Constitution commits to an independent national government that has both sovereignty and supremacy. Simultaneously, the Constitution commits to distinct state governments that also have sovereignty. Thus, the Constitution commits to the existence of both the Union and the states in a form that preserves the legitimacy of their claims for supremacy and sovereignty/autonomy. The allocation of power does not always resolve the tension between the Constitution's dual commitments.[164] Once it is clear that state courts have the authority to determine the cases that they may hear in their courts, an anti-discrimination norm prohibiting state courts from refusing to hear federal claims can neither be understood as an allocation of authority nor a denial of residual authority in the state courts.

IV. SUPREMACY, SOVEREIGNTY, AND ACCOUNTABILITY IN *EX PARTE YOUNG*

Having presented the model of relational federalism enforcement, what follows is a reading of *Ex parte Young* through its lens. This reading focuses on the way in which the *Ex parte Young*'s resolution issues of state sovereignty, Constitutional supremacy and political accountability to elucidate conceptions of the duality of American federalism.[165] *Young* teaches us that the resolution of

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162. *White*, 74 U.S. (1 Wall.) at 729 (emphasis added).

163. Texas v. White, 74 U.S. (1 Wall.) 700, 725 (1868).

164. *See supra* text accompanying notes 27-111.

165. To be certain there are other ways of understanding *Ex parte Young*, each of which might illuminate important aspects of various doctrines for which *Young* serves as an intersection point.

federalism disputes always requires recognizing the tensions of the federal structure of government, which respects the status of both the national and state governments as distinct political communities. Even in the context of national supremacy, *Young* teaches us that federalism disputes must take this fact into consideration. *Young*'s relational dimensions are seen in the Court's fusing of principles of equity and federalism to determine whether a federal court can enjoin a state criminal proceeding. The joining of these principles suggests a concern for the integrity of state court systems as capable of resolving constitutional disputes. The Constitution's supremacy is recognized simultaneously with the preservation of the state courts' constitutional role as enforcers of constitutional guarantees. The Court's analysis suggests that circumventing the state courts as forums for the protection of constitutional rights establishes the inadequacy of state forums.[166]

This discussion demonstrates the connections between *Ex parte Young* and *Texas v. White*. As in *Texas*, the Court in *Young* was faced with the issue of constitutionally compelled respect for the states' special status within America's federalism structure, while also needing to respect the Constitution's status as the supreme law of the land from which no state government can separate itself. Such an interpretation of the *Young* doctrine is significant because it suggests that it is possible to resolve sovereign-immunity disputes without the need to articulate absolute rights or vetoes possessed by either the national government or the states.[167]

Further, this part demonstrates the ways in which *Young*'s relational conception of federalism is informed by *Texas v. White* to the extent that *Young*

See, e.g., John Harrison, Ex parte Young, 60 STAN. L. REV. 989, 1014-15 (2008) (rejecting the contention that *Young* stands as an exception to the principles of sovereign immunity and reading *Young* as a traditional tool of equity jurisprudence); Sina Kian, Note, *Pleading Sovereign Immunity: The Doctrinal Underpinnings of* Hans v. Louisiana *and* Ex parte Young, 61 STAN. L. REV. 1233, 1235 (2009) (providing a reading of *Young* that emphasizes the central importance of the common law pleading system on the decision, which affect conclusions that are reached regarding its status as a sovereign immunity decision).

166. This is not to deny the fact that the Reconstruction Congress clearly thought state forums inadequate to vindicate constitutional rights in certain contexts. *See* Mitchum v. Foster, 407 U.S. 225 (1972) (upholding that suits brought under Section 1983 were not barred by anti-injunction statutes). *See also* Aviam Soifer & H.C. Macgill, *The* Younger *Doctrine: Reconstructing Reconstruction*, 55 TEX. L. REV. 1141 (1977) (discussing the suspicion of state courts during the Reconstruction era).

167. Judicial recognition of state immunity does not create an absolute veto in all circumstances. The Court has recognized, and continues to affirm, the proposition that Section 5 of the Fourteenth Amendment provides Congress with the authority to abrogate state sovereign immunity. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 454-55 (1976). The Court's recent sovereign-immunity case law has perhaps restricted Congress's use of its Section 5 authority through its imposition of a congruence and proportionality requirement before Congress can abrogate state immunity via Section 5. *See, e.g.*, Bd. of Trs. Univ. of Alabama v. Garrett, 531 U.S. 356, 372-74 (2001) (invalidating Title I of the Americans With Disabilities Act because it found that Congress had not met the congruence and proportionality requirement). The congruence and proportionality requirement might be likened to the equitable analysis undertaken in *Young*, which began with a rebuttable presumption that the states will act consistent with the Constitution, thereby limiting the extent of the national government's interference with its affairs, unless proven otherwise.

accepts a bilateral obligation: the national government must respect the status of the states in the federal system, and the states must respect the status of the national government. Respect for the perpetual nature of the federal relationship obligates the states to remain committed to their connection with the national government. Similarly, national respect for the states requires that the national government recognizes state independence, whose legitimacy is derived from the states' status as separate political communities in the federal system, even as constitutional obligations remain binding on state and national actors alike. Finally, the *Young* doctrine's analysis of the limits of state authority rests on the conception of the state as a political community, the authority of which is measured by its accountability to the people.

A. Relational Elements of the Ex parte Young *Doctrine*

The Court's decision in *Young* begins with an analysis of the constitutional challenge to the Minnesota statute, which collapses into an equitable analysis for purposes of establishing whether injunctive relief is owed to plaintiffs. Shareholders of a railroad company initially sought a federal-court injunction against a threatened prosecution by the Minnesota Attorney General. The district court enjoined the Attorney General from prosecuting the railroads under the statute, but the Attorney General moved forward with the prosecutions and consequently he was taken into federal custody on contempt charges. Attorney General Young brought a habeas petition challenging his detention to the Court.

The Court's analysis of the facial challenge to the Minnesota statute was similar to the one regarding the appropriateness of injunctive relief. The Court began by describing the penalty that attached for violating the fare statute, which made the sale of each ticket above the statutory maximum fare a separate violation, and which carried the possibility of imprisonment for ninety days and a fine of up to $5,000. The penalty attached to officers, directors, agents, and employees, in addition to the company itself. The Court concluded that the statutorily proposed penalties did not provide an adequate remedy for the plaintiffs to challenge the constitutionality of the statute. The Court held that the statute's imposition of such extraordinary fines upon parties "is in effect to close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates as provided by the acts are not too low, and therefore invalid."[168]

The Court addressed the objection that the federal courts had no jurisdiction to enjoin state criminal proceedings, by accepting the proposition's truth, but declaring that the rule had exceptions. The Court stated that when a state criminal proceeding "is brought to enforce an alleged unconstitutional statute, which is the subject-matter of inquiry in a suit already pending in a Federal court, the latter court," the federal court need not cede its jurisdiction and can exercise its jurisdiction "to the exclusion of all other courts, until its duty is fully

168. *Ex parte* Young, 209 U.S. 123, 148 (1908).

performed."[169] Further, the Court accepted the argument that where there is an adequate remedy in the state courts, the federal court is prohibited from exercising its equity jurisdiction. Relying on the same analysis that led to its conclusion that the statute is facially invalid, the Court declared that there is no adequate remedy at law to allow the railroads to challenge the statute's constitutionality. The Court rejected the State's assertion that the defendants could challenge the statute's constitutionality as a part of their defense during prosecution.[170]

The Court's analysis of whether the federal courts could appropriately exercise jurisdiction in this instance decided the issue in favor of the authority of the federal courts. The Court's analysis did, however, clearly take seriously the state courts' role as protectors of constitutional rights. As stated above, the analysis is meant to establish the inadequacy of state forums as a precondition of the federal court's enjoining state-court proceedings. A plaintiff must first affirmatively prove the state court is unable to provide an adequate legal remedy for the vindication of the party's constitutional rights.

Simultaneously, the Court emphasized the vindication of constitutional-rights guarantees as a central responsibility of both state and federal courts. Separate from the inadequacy of the state forum is the constitutional invalidity of the Minnesota statute. The Court clearly established that the Constitution binds the state against violations of its citizens' constitutional rights. The Court's analysis presumes the supremacy of the Constitution—binding on both national and state actors. The Constitution establishes the law for the state, from which it cannot be ejected, and from which it cannot free itself. The state's acts must be answerable to the Constitution, whether they are adjudicated in the federal courts or the state courts.[171]

The national government's supremacy does not undermine the fact that the states are integral to the constitutional scheme of government. This is further exemplified by the Court's acknowledgment of the potential conflict between the Eleventh and Fourteenth Amendments. Rather than attempting to resolve the conflict by determining that one provided either the states or the national government with unlimited authority as against the other in the instant dispute, the Court understood the Amendments as standing for two competing visions of

169. *Id.* at 161-62.

170. The Court's analysis of the state forum's adequacy also focused on the difficulty the defendants would have in establishing that the passenger rates were too low. The Court concluded that the defendants' defense "would require a long and difficult examination of quite complicated facts ... [which] would be almost impossible to make before a jury." *Id.* at 164.

171. Professor Fallon described *Young* as having "inaugurated the modern era of dialectical doctrinal development between the Nationalist and the Federalist extremes." Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1196 (1988). Fallon argued that *Young* "lived, moved, and had its being in the assumptions and values of the Nationalist model" of judicial federalism. *Id.* at 1197. While I accept Fallon's description of *Young* as perhaps standing closer to the Nationalist pole than the Federalist pole in the axis of federal-courts ideologies, this article's central contentions are that *Young* recognizes, perhaps to a greater extent than modern revisers of federal-courts jurisprudence, the existence of opposition between two elements of our federalism, and that *Young* rests on the recognition of the legitimacy of this tension, as is argued in more detail below.

the structure of American government, neither of which could have meaning without some recognition of the other.[172]

B. *The* Young *Doctrine's Recognition and Balance of Political Community*

The *Young* doctrine rests on a theory that state governments are political communities that have a unique relationship with their citizens.[173] *Young* also recognized that the Fourteenth Amendment inaugurated a new relationship between citizens and their state governments.[174] A state's violation of its citizens' constitutional rights compromises the legitimacy of its claim to respect as a political community, which must always be the context in which the state participates in sovereignty.[175] To this extent, *Young* represents a culmination of the central founding-era commitment to the sovereignty of the people at every level of government, articulated in the statements of the supporters of the Constitution and in the Constitution's Guarantee Clause.[176] A reading of *Young* that restores its connection to the founding-era principles of popular sovereignty and conceptions of political accountability in state governments that *Texas v. White* affirmed[177] clearly rebuts the idea that the *Young* doctrine is an easily dismissed fiction that can be ignored when inconsistent with other jurisprudential objectives.

Young resolved the challenge to states' immunity from suit by their own citizens, as promulgated in *Hans*, by stripping the state of the ability to endow its actors with immunity.[178] The Court declared that "the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without ... authority of and one which does not affect the state in its sovereign or governmental capacity."[179] Although many have criticized such stripping as a fiction insofar as it fails to comport with the Court's Fourteenth Amendment doctrine, which applies the Amendment only to acts attributable to state actors,[180] *Young* represents an obligation of the amended Constitution's

172. *See Young*, 209 U.S. at 157-58.

173. The idea that the states form a distinct political community from the national political community clearly precedes the Constitution, as the states' status as political communities precedes the national government. The *Federalist* clearly assumed that there would be a distinct relationship between the states and their citizens from that which would exist between the national government and its citizens. *See* THE FEDERALIST NO. 46 (James Madison). *See also* Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1868) ("The people of the United States constitute one nation, ... one government.... On the other hand, the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence.").

174. *See Young*, 209 U.S. at 149.

175. *See id.* at 155-56.

176. U.S. CONST. art. IV, § 4. For discussion of the justiciability of the Guarantee Clause, see *supra* note 125.

177. Texas v. White, 74 U.S. (1 Wall.) 700, 720 (1868).

178. *Ex parte* Young, 209 U.S. 123, 155-56 (1908).

179. *Id.* at 159-60.

180. For a critique of constitutional law's obsession with doctrine, see generally Akhil Amar, *The Supreme Court, 1999 Term Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26 (2000).

commitment to popular sovereignty and government accountability. The *Young* Court did not simply fashion an expedient compromise in stripping the state actor of the sovereign-immunity shield. Instead, it stripped the state's shield of immunity where the state violates its own citizens' constitutional rights as an abdication of the state's claim to sovereignty, because state sovereignty stems from the legitimacy of its relationship with its citizens.[181] Thus, the state actor in *Young* was "stripped of his official or representative character."[182] The state and its officials possess legitimacy, pursuant to the Constitution, only to the extent that it is a republican form of government that represents the people as sovereign. This connection between *Young* and *White*—based on *White*'s contention that the people *are* the state[183]—suggests that injunctive suits are, like the Reconstruction Acts, meant to reestablish a legitimate political relationship in the states.[184] *Young* need not be interpreted as invoking an exception to a preexisting state immunity, but rather as confirming the basis of states' legitimacy as political communities and the context in which any claims of sovereignty or autonomy have any meaning at all.

The Court distinguished its decision from earlier decisions, which it contended compromise state sovereignty more than the issuance of a federal-court injunction against unconstitutional state action. The *Young* Court asserted that the mere issuance of an injunction against a state denying it the authority to engage in unconstitutional conduct does not undermine the state's sovereignty, even as a suit that seeks both injunctive relief and specific performance by the state to remedy its constitutional violation might interfere with such sovereignty.[185] What is worthy of emphasis in the Court's reasoning is that the decision upholds the states' claims to sovereignty as conditioned upon their continued status as legitimate regimes, a status that is forfeited as long as there exists a continuing violation of the Constitution's mandates.

Finally, *Young* moved beyond *White* in at least one respect: among *Young*'s conditions for a legitimate political community is the state's recognition of its citizens' simultaneous political relationship with the national government.[186] *White*'s justification for the legitimacy of congressional authority during the Reconstruction Era was the collapse of effectively functioning state governments. In *Young*, the Court premised the legitimacy of the federal court's injunction against allegedly unconstitutional state actions not on the absence of all political authority, but rather on the state's compromise of its authority by performing acts inconsistent with the Constitution.[187] Although the Court characterized the state's actions as fomenting a conflict with the Constitution's superior authority, the Constitution's supreme authority rests on its status as the legitimate

181. *See Young*, 209 U.S. at 155-56.

182. *Id.* at 160.

183. *White*, 74 U.S. (1 Wall.) at 721.

184. *Id.*

185. *Young*, 209 U.S. at 187-88 (describing *In re* Ayers, 123 U.S. 443 (1887), as a suit against the state in its sovereign capacity).

186. *See id.* at 159-60.

187. *See id.*

repository of the People's will.[188] Clearly, this is textually codified in the Supremacy Clause, but it is confirmed by the process by which the Constitution was enacted, and reaffirmed in the Fourteenth Amendment.[189]

V. THE SOVEREIGN-IMMUNITY REVOLUTION

The Court's sovereign-immunity debate has revolved primarily around the fundamental meaning of the Eleventh Amendment.[190] The majority of the Rehnquist Court not only affirmed the broad reading of the Eleventh Amendment from *Hans v. Louisiana*,[191] but extended its interpretation of the Amendment to include a constitutional limitation on federal-court jurisdiction.[192] The Court interpreted the Eleventh Amendment's language as a symbol of a larger constitutional limitation on the subject-matter jurisdiction of the federal courts when faced with suits against state governments.[193] The dissenters from the Court's sovereign-immunity case law rejected this interpretation in favor of a narrower interpretation of the Eleventh Amendment—reading the text as limiting the federal courts' jurisdiction only where such jurisdiction is based on diversity.[194]

Much of the scholarly discussion around state immunity has largely mirrored the Court's debate.[195] One scholar described the debate over the

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188. *See Ex parte* Young, 209 U.S. 123, 155-56 (1908).

189. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 404 (1819).

190. *E.g.*, Alden v. Maine, 527 U.S. 706, 712-13 (1999); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1996); *Young*, 209 U.S. at 149-51.

191. 134 U.S. 1, 13 (1890) (holding states to be immune to suits brought by either citizens of other states or foreign countries, or its own citizens).

192. *See Seminole Tribe of Fla.*, 517 U.S. at 65 (holding that Article I does not give Congress the authority to enlarge the jurisdiction of the federal courts under Article III, which had been limited by the Eleventh Amendment).

193. *Id.* at 66.

194. *Id.* at 82 (Stevens, J., dissenting); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 301 (1985) (Brennan, J., dissenting).

195. Many scholars have reiterated support for the "diversity theory" of the Eleventh Amendment. *See* William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261, 1263 (1989); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1035 (1983); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1890-91 (1983); Vicki C. Jackson, *One Hundred Years of Folly: The Eleventh Amendment and the 1988 Term*, 64 S. CAL. L. REV. 51, 58 (1990). *But see* Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342, 1342-43 (1989) (stating that the diversity theory is "thoroughly unfaithful to the essentially unambiguous dictates of the amendment's language"); William P. Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 HARV. L. REV. 1372, 1375 (1989) ("[D]iversity theorists have not adequately supported their contention that a proper historical understanding establishes that states should not be immune from federal question suits for monetary relief in federal court. The ninety-nine years of jurisprudence built upon *Hans* creates a presumption in favor of the current interpretation of state immunity. Review of the historical evidence and arguments, in turn, establishes that the diversity theorists have not overcome the presumption.").

Eleventh Amendment's meaning as one that is essentially about the question of "how state sovereignty should be weighed against federal supremacy."[196] This debate, however, does not explicitly discuss the nature of the national-state relationship at issue in sovereign-immunity case law. Other scholars have addressed the relationship between the nation and the states as expressed in sovereign-immunity case law, and it is primarily into this conversation that this article intervenes.[197]

The Rehnquist Court has defended its sovereign-immunity case law as central to the protection of state sovereignty, which the Court declared was a central element of the Constitution's original design.[198] In *Alden*, the Court affirmed that the "federal system established by our Constitution preserves the sovereign status of the States."[199] Further, the Court stated that the Framers "considered immunity from suits central to sovereign dignity."[200] The Court supported its conclusion that immunity from suit was central to the states' status within the constitutional framework by reference to the Eleventh Amendment as evidence that "Congress acted not to change but to restore the original constitutional design."[201] The Court stated: "[T]he Constitution was understood, in light of its history and structure, to preserve the States' traditional immunity from private suits. As the Amendment clarified the only provisions of the Constitution that anyone suggested might support a contrary understanding, there was no reason to draft with a broader brush."[202]

The Court has declared its sovereign-immunity jurisprudence to be congruent with both the Constitution's original design and structure.[203] The Court stated, "[O]ur federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation."[204] According to the Court, sovereign immunity is consistent with the states' structural role in the federal system.[205] The "essential principles of federalism" are undermined if a state may be "thrust, by federal fiat and against its will, into the disfavored status of a debtor, subject to the power of private citizens to levy on its treasury or perhaps even government

196. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 409 (2003).

197. For scholarship discussing such a relationship, see, for example, Althouse, *supra* note 48, at 631; Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 NOTRE DAME L. REV. 953 (2000); Vicki C. Jackson, *Seductions of Coherence, State Immunity, and the Denationalization of Federal Law*, 31 RUTGERS L.J. 691 (2000); Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011, 1027-47 (2000); Ernest A. Young, *State Sovereignty Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1.

198. *Alden*, 527 U.S. at 756-58.

199. *Id.* at 714.

200. Alden v. Maine, 527 U.S. 706, 715 (1999).

201. *Id.* at 722.

202. *Id.* at 724.

203. *Id.* at 748.

204. *Id.*

205. *Id.* at 749.

buildings or property which the State administers on the public's behalf."[206] The Court has further justified its grant of immunity protection to states on the basis of its conclusion that "suits for money damages ... may threaten the financial integrity of the States."[207] The recognition of Congress's power to enact remedies that allow damages actions against states would "giv[e] Congress a power and leverage over the States that is not contemplated by our constitutional design."[208] Therefore, according to the Court, state sovereign immunity is a protection against the effective destruction of states, which might occur if they were subject to damage payouts in private suits.[209]

The Court's basic premise in its sovereign-immunity case law is the Constitution's commitment to a federal structure, which demands that state governments are respected as distinct political communities, is threatened by congressional approval of private-damage suits.[210] Although the Court's sovereign-immunity decisions have seemingly employed the same line-drawing and power allocation as in *Lopez*, this part demonstrates the important relational dimension of these decisions. Highlighting the relational elements of the Court's sovereign-immunity jurisprudence assists in better understanding the Court's decisions within the context of American federalism. To the extent that relational federalism is aimed at policing the ways in which government exercises otherwise legitimate substantive power, relational federalism seems inconsistent with the articulation of clear rights-like vetoes over one level of government's exercise of authority as against another. By appreciating the relational dimension of the Court's case law, this analysis supports a critique of the Court's establishment of states' seemingly absolute rights to veto federal action, at least under the Commerce Clause.

Secondarily, this part demonstrates the role that the state's accountability to its political community plays in the Court's immunity jurisprudence. The Court's jurisprudence has emphasized the ways in which private suits for damages undermine state accountability for the priorities favored by state citizens. Because states' status as political communities is central to relational conceptions of federalism, this is unsurprising. What is surprising is the Court's failure to account for the status of the national government as a distinct political

206. *Id.*

207. *Id.* at 750.

208. *Id.* Scholars have challenged the Court's defense of its sovereign-immunity decisions on financial-integrity grounds because they suggest that state governments are obligated to bear the expense of complying with federal law, despite Congress's inability to delegate a right of action to private parties. *See, e.g.*, Meltzer, *supra* note 197, at 1031-33.

209. As explained above, the Court's state-protecting federalism jurisprudence has consistently maintained that the Constitution commits to the protection of the separate and independent existence of states, in part because the division of power and authority checks the tendency toward tyrannical governments. Again, this reasoning for the Court's federalism jurisprudence has not gone uncontested. *See, e.g.*, Powell, *supra* note 41, at 659-64.

210. Alden v. Maine, 527 U.S. 706, 750 (1999). *See generally* William P. Marshall & Jason S. Cowart, *State Immunity, Political Accountability, and* Alden v. Maine, 75 NOTRE DAME L. REV. 1069 (2000) (explaining, and questioning, the role of the political-accountability argument in the Court's sovereign-immunity case law).

community, whose substantive policy priorities deserve similar recognition in the policing of the national-state relationship. The Court's recognition of the state communities is juxtaposed against its seeming neglect of the Constitution's commitment to a corresponding national political community.[211] The Court's neglect leads to its inadequate recognition of the competing tension of the national political community in its state immunity case law.

Finally, this part suggests the role that the above reading of *Ex parte Young* might play in refining the Court's federalism equation. The *Young* doctrine's consideration of federalism relationship ought to disabuse the Court and commentators of the possibility of a simple resolution of federalism disputes. The proper consideration of the competing claims, and the context of political accountability in which they exist, may point the way forward in refining state-immunity jurisprudence in the twenty-first century.

A. State Immunity as Relational Federalism

The Court's decision in *Alden* might be considered something of a victory for supporters of *Garcia*'s decision upholding the constitutionality of Congress's expansion of the Fair Labor Standards Act (FLSA) to regulate state employment.[212] *Alden* clearly affirmed Congress's substantive power to impose the FLSA's obligations on states.[213] At first glance, this is significantly different from the Court's holdings in *Lopez* and *Morrison*, in which the Court invalidated congressional authority to legislate in certain areas.[214] Specifically, the Court's holdings in these cases left Congress with less substantive authority under the Commerce Clause and Section 5 of the Fourteenth Amendment than it had when it enacted the legislation at issue in each case.[215] Beyond upholding congressional authority to regulate state employment relationships pursuant to the FLSA, *Alden* appeared to affirm the federal government's authority to vindicate violations of federal rights by allowing the U.S. Government to bring damages actions against states for violating the FLSA.[216]

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211. For criticism of the Court's state-immunity case law along these lines, see Vicki C. Jackson, *Seductions of Coherence, State Sovereign Immunity, and the Denationalization of Federal Law*, 31 RUTGERS L.J. 691 (2000) (arguing that the Court's decisions evidence a distrust of the political branches of the national government).

212. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 555-56 (1985). Professor Meltzer has reached this conclusion as well. *See* Meltzer, *supra* note 197, at 1032.

213. *See Alden*, 527 U.S. at 759.

214. *See* United States v. Morrison, 529 U.S. 598, 627 (2000); United States v. Lopez, 514 U.S. 549, 567-68 (1995).

215. *Morrison*, 529 U.S. at 627; *Lopez*, 514 U.S. at 567-68.

216. In *Seminole Tribe*, the majority emphasized the fact that one of the alternatives to private suits against states for the vindication of federal rights was suits by the national government pursuant to *United States v. Texas*. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 71 n.14 (1996). In *United States v. Texas*, the Court stated:

> We cannot assume that that the framers of the Constitution, while extending the judicial power of the United States to controversies between two or more States of the Union, and between a State of the Union and foreign States, intended to exempt a State altogether from

How is *Alden* to be understood if the decision affirms such a significant component of Congress's substantive authority? *Alden* narrows the range of remedial options available to the national government in vindicating federal rights.[217] Such a regulation of the means of effectuating a legitimately held authority seems clearly based on something other than an allocation of power. The Court's immunity case law suggests that the means by which Congress effectuates its substantive norm is inconsistent with states' status in the constitutional framework to the extent that it threatens to eradicate the states' distinct status to which the federal system commits.[218] *Alden* appears to suggest that the national government's duty to respect and care for the federal system is a sufficient basis for curtailing its exercise of authority in a particular manner if it would risk the federal system's survival.

B. State Sovereign Immunity and the Resolution of Relationship

The Court's fear that congressionally authorized damage actions will harm the states stems from its contention that private-litigation damage awards infringe on states' fiscal decision-making.[219] The recognition of states as distinct political communities with distinct obligations to their citizens has a long lineage in the Court's sovereign-immunity case law. In its 1883 decision in *Louisiana v. Jumel*, the Court held that sovereign immunity barred suit against a state in an action seeking recovery for the state's default on bonds.[220] The Court's holding was based, in part, on its conclusion that forcing the state to pay the debt at issue would "require the court to assume all the executive authority of the State ... until the bonds, principal and interest were paid in full .... It needs no argument to show that the political power cannot be thus ousted of its jurisdiction and the judiciary set in its place."[221] *Jumel*'s emphasis on the state executive as the embodiment of legitimate state political power, a power threatened by damage

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suit by the General Government. They could not have overlooked the possibility that controversies, capable of judicial solution, might arise between the United States and some of the States, and that the permanence of the Union might be endangered if to some tribunal was not entrusted the power to determine them according to the recognized principles of law.

143 U.S. 621, 644-45 (1892). The *Alden* dissent notes that section 216(c) of the FLSA authorizes the Secretary of Labor to bring suit seeking damages against states that violate the Act. *Alden*, 527 U.S. at 810 (Souter, J., dissenting).

217. *Alden*, 527 U.S. at 758-60.

218. *See Morrison*, 529 U.S. at 627; *Lopez*, 514 U.S. at 567-68.

219. It is not altogether clear why damage actions awarded as a result of suits brought by the national government are not similarly compromising for the Court. Scholars have argued that injunctive relief commanding the state government to perform certain functions or refrain from certain actions is no less of an infringement on state authority. *See* Roderick M. Hills, *The Eleventh Amendment as Curb on Bureaucratic Power*, 53 STAN. L. REV. 1225, 1249 (2001) (arguing that state political actors are placed at a disadvantage as against state bureaucratic actors in suits involving damage awards, and offering a justification for the allowance of injunctive suits instead of damage actions on the ground that injunctive suits are less disruptive of the accountability of state legislative actors).

220. 107 U.S. 711 (1883).

221. *Id.* at 727-28.

awards that force the redeployment of state priorities, is a repeating theme in the Court's justification of its sovereign-immunity jurisprudence.[222]

The Court's most explicit statement of the relationship between its immunity case law and its conception of protecting states as legitimate political communities, whose accountability to citizens must be defended against government intrusion, is *Alden*'s justification for state sovereign immunity.[223] There, the Court stated that congressional authorization of damage awards "would place an unwarranted strain on the States' ability to govern in accordance with the will of their citizens."[224] The Court continued:

> [T]he allocation of scarce resources among competing needs and interests lies at the heart of the political process. While the judgment creditor of a State may have a legitimate claim for compensation, other important needs and worthwhile ends compete for access to the public fisc. Since all cannot be satisfied in full, it is inevitable that difficult decisions involving the most sensitive and political of judgments must be made. If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen....
>
> ... When the national government asserts authority over the State's most fundamental political processes, it strikes at the heart of the political accountability essential to our liberty and republic form of government.[225]

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222. The Court has also deployed the protection of state accountability in its anti-commandeering case law, which has rebuffed congressional attempts to use state legislative and executive bodies to achieve otherwise legitimate, regulatory goals. *See* Printz v. United States, 521 U.S. 898, 935 (1997) (invalidating provisions of the Brady Handgun Act, which required state agencies to temporarily perform background checks); New York v. United States, 505 U.S. 144, 185-86 (1992) (invalidating the Take Title provision of the Low-Level Radioactive Waste Policy Act because it required state legislatures to enact statutes taking title to low-level radioactive waste, including liability for injuries caused by the waste, in the event of their failure to find alternative ways to dispose of such waste). However, it should be noted that holding governments accountable for damages may aid in protecting governmental accountability. Specifically, to the extent that government actors might engage in violations without bearing a financial burden, their constituents might not be fully affected by the consequences of their actions. If the full financial costs of violations were imposed on the tax-paying public, they would be moved to remove such violators from office. *See* ROBERT D. COOTER, THE STRATEGIC CONSTITUTION 157-58 (2000) (arguing that the imposition of liability upon governments serves as a deterrent to government actions that harm the public).

223. Alden v. Maine, 527 U.S. 706, 750-51 (1999).

224. *Id.*

225. *Id.* at 751. The Court's attempt to construct a "political accountability"—understood as both budgetary accountability and enforcement accountability—rationale as an independent justification for its sovereign-immunity doctrine in *Alden* has been deemed a failure because it is inconsistent with the current state of state-immunity doctrine. Marshall and Cowart argue that the budgetary accountability is inconsistent with the fact that the doctrine continues to allow damage suits to be brought against states by the national government, as these suits also have negative effects on state government's budgetary priorities. Marshall & Cowart, *supra* note 25, at 1079-83. They also argue that state budgets are affected by the availability of injunctive relief for private

Representative state government, that is, republican government, is constitutionally guaranteed to the states.[226] If this guarantee means anything, the Court reasoned, it means that the national government will not undermine a state government's ability to effectively respond to the will of its citizens regarding the use of public resources.[227] Demands for compensation for violations of federal law are seen as undemocratic impositions on the state, which avoid the public deliberative process as the result of litigation overseen by unaccountable judges.[228] The protection of state governments' representative character underlies the Court's denial of congressional ability to authorize private damage suits for violations of federal statutes.[229]

Alongside the Court's depiction of states as political communities, however, the Court characterized the federal statutes protecting myriad individual rights as "judicial decree[s] mandated by the Federal Government and invoked by the private citizen."[230] Against the depiction of a state government whose collective decisions are reached after "deliberation" and "the balanc[ing] between competing interests," federal rights and the government that enacts them appear to be foreign entities with no authentic connection to the people to whom the state is ultimately accountable.[231] The Court's recognition of the states as political communities does not seem to carry over to its depiction of the national government.[232] The Court seems almost ignorant of the fact that the national government's statutory enactments are often the result of similar deliberation and

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plaintiffs. *Id.* Regarding enforcement accountability—the idea that suits by the national government is better than delegation of such authority to private litigants—Marshall and Cowart argue that it is inconsistent with the retroactive-prospective divide in the current state-immunity doctrine. *Id.* at 1084-87. Marshall and Cowart's arguments would appear to deal a significant blow to the argument that *Young*'s recognition of these accountability rationales plays a role in sustaining this article's contention that *Young* takes the duality of federalism seriously. However, the central argument of this essay is that *Young* involves multiple federalism values, one of which is the protection of states as political accountable units of government. To the extent that Marshall and Cowart's project is aimed at finding a single underlying justification for the Court's current state-immunity doctrine, it is inconsistent with this article's more multi-faceted approach to the Court's federalism enforcement, including state immunity. Even from the single perspective of state accountability, there might be justification for the Court's immunity doctrines that is not limited to conceptions of accountability that Marshall and Cowart offer, but extend to accountability for state elected officials versus state bureaucratic officials. Roderick Hills has offered a justification of the Court's state immunity doctrine as protecting "elected nonfederal policy generalists" versus "state agency specialists." Hills, *supra* note 219, at 1227. Hills's argument makes sense of the damages-injunctive relief divide by explaining that injunctive relief produces a mandate that may fall on the state agency obligated to obey the mandate versus damage relief that would have costs on the entire state budget.

226. U.S. CONST. art. IV, § 4.

227. *Alden*, 527 U.S. at 748-50.

228. To the extent that *Alden* is a case about state courts, whose judges are often elected, the majority's juxtaposition of the unaccountable judiciary and the deliberative, democratically accountable legislature is somewhat disingenuous.

229. *See id.* at 750.

230. *Id.* at 751.

231. *Id.*

232. *See id.* at 750-51.

interest-balancing that the Court lauded as the very epitome of representative government when they take place in the states.

The Court's silence with respect to the nature of federal statutes suggests a diminishment of the national legislature as a body representing the whole of the American people. This depiction is at odds with its decision in *U.S. Term Limits, Inc. v. Thornton*, in which the Court invalidated an Arkansas constitutional amendment that imposed term limits on the state's congressional representatives.[233] The Court held that states are without authority to expand the qualifications for eligibility of either house of Congress, despite their authority to regulate the times, places, and manner of elections.[234] The Court invalidated Arkansas's amendment based on the Constitution's grant of congressional authority to modify state-established election regulations, and based on its holding in *Powell v. McCormack* that the Constitution is the sole source of qualifications for eligibility for Congress.[235]

Though the Court primarily relied on textual and precedential authority to support its decision, the Court also interpreted the Framers' intent to establish a national government that would be accountable to the people of the United States as a whole, rather than the people of a collection of separate states.[236] According to the Court:

> In adopting [the Constitution], the Framers envisioned a uniform national system, rejecting the notion that the Nation was a collection of States, and instead creating a direct link between the National Government and the people of the United States. In that National Government, representatives owe primary allegiance not to the people of a State, but to the people of the Nation.... [E]ach Member of Congress is "an officer of the union, deriving his powers and qualifications from the constitution, and neither created by, dependent upon, or controlled by, the states.... Those officers owe their existence and functions to the united voice of the whole, not of a portion, of the people."[237]

Though the Court relied on the above statement to deny a state the authority to set the qualifications of the national legislature's members, the Court's statement implies a larger principle—the Constitution established a national government clearly accountable to, and established by, *the people of the United States*. Read in this light, the Court's silence about the political relationship, and corresponding accountability, between the people and their national government mars the Court's immunity case law.

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233. 514 U.S. 779, 837-38 (1995). Arkansas voters approved an amendment to the state's constitution prohibiting any person who had served three or more terms in the U.S. House of Representatives from having his or her name on the ballot for election to that chamber. *Id.* at 783-84. The amendment also prohibited the name of anyone who had served two or more terms in the U.S. Senate from appearing on the ballot for election to that body. *Id.* at 784.

234. *Id.* at 837-38.

235. *Id.* at 795-98 (citing Powell v. McCormack, 395 U.S. 486, 550 (1969)).

236. *Id.*

237. *Id.* at 803 (quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 627, at 462 (Little, Brown & Co. 5th ed. 1891) (1833)) (internal citations omitted).

The national government's commitment to the propositions that workers should be paid a minimum wage, no matter who their employer, and workers should be able to vindicate this right in their individual capacity is not merely the result of a judicial decree.[238] Rather, it is the commitment of the national legislature made on behalf of the people of the Union. Surely no less deliberation and balancing of competing interests went into the enactment of the amendments to the FLSA than would go into the legislative activities of the state legislatures.

The Court's declaration of an absolute veto right against all but a few private damage actions is made easier by the value that the Court places on the states' status as political communities versus its (lack of) consideration for the national government's similar status. The Court's ability to declare that "the need to promote the supremacy of federal law must be accommodated to the constitutional immunity of the States,"[239] rather than a mutual accommodation of national supremacy and state sovereignty, undermines the Court's effort to enlist immunity doctrine to protect the federal structure of government. That state sovereignty must be effectuated by the veto power of absolute immunity is not justified by claims of faithfulness to the federal structure of government, which resists the resolution of federalism disputes without cognition of how they will affect the functioning of the overall federal structure, including the status of the unit in the federalism equation.

C. Ex parte Young*'s Avoidance of the Tyranny of Resolution*

The *Young* doctrine avoids reaching a resolution to the dilemma that sovereign immunity poses for national supremacy and the vindication of federal rights. *Young* addresses the dilemma as moving in both directions—national supremacy *and* state sovereignty.[240] It does not, like the Court's modern immunity case law, pay lip service to federalism's duality while denying the legitimacy of the national government's claim to a political relationship with the people to whom it must remain accountable. The *Young* doctrine's articulation of a sovereignty conditioned on the state's maintenance of a legitimate political relationship with the people, and its assumption that the state forfeits its representative character when it violates its citizens' federally guaranteed rights, undermines claims that it assumes the state's possession of an absolute veto against private damage suits authorized by Congress.

The *Young* doctrine showcases a clear respect for the rightful vindication of federal rights. *Young* also clearly appreciates the need to protect state governments, as distinct political communities, against threats that undermine their viability. The threat that damage awards may deplete a state's treasury and thus undermine the state's ability to provide services essential to its political

238. On the role of Congress's role in protecting, among others, the rights of workers and racial minorities better than the courts, see REBECCA E. ZIETLOW, ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION, AND THE PROTECTION OF INDIVIDUAL RIGHTS (2006).

239. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 105 (1984).

240. *See Ex parte* Young, 209 U.S. 123, 167-68 (1908).

relationship with its citizens has long roots in our nation's history. Nevertheless, these dangers call for something far less blunt than endowing states with an absolute veto against private damage suits. A relational model of federalism, as against a power-allocation model, might justify a return to the judicial imposition of clear-statement rules on Congress's attempt to statutorily authorize private damage suits against state governments.[241] One might imagine judicial imposition of caps on damages—either in absolute dollars or as a percentage of state general-fund reserves—that would insulate essential state services from the threat of potentially crippling damage awards.[242] Further, a relational conception might borrow from other federalism enforcement mechanisms, such as official immunity doctrines, to require plaintiffs to make particular showings before a court will impose damage awards against state governments, or allowing for good-faith exceptions where states have not flagrantly violated the Constitution's rights guarantees. This is all to suggest that relational conceptions of federalism enforcement might provide additional ways for protecting the integrity of state governments without endowing states with vetoes that threaten to allow them to free themselves from the dictates of accountable governance.

VI. CONCLUSION

This article has aimed to recast the reading of the Court's seminal decision in *Ex parte Young* in light of its connection to the struggle over judicial enforcement of the Constitution's dual commitment to national supremacy and state sovereignty and autonomy. *Young* simultaneously recognized the supremacy of national law and the importance of the continued protection of the integrity of the legitimate political communities that states represent, resulting in a decision that takes the relational dimension of American federalism seriously. National supremacy can never allow a solution that completely obliterates state government, and state autonomy can never allow states to flout the dictates of their constitutional obligations to their citizens. This dimension resists the notion that federalism, or its judicial review, is exclusively about the allocation of power. The relational model requires taking the enduring relationship between the national government and the states seriously, even where substantive regulatory power is uncontested. This recasting of *Young* allows us to see that its embodiment of the Constitution's commitment to national supremacy and state

241. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 247 (1985) (holding that statutes would be interpreted to have authorized private damage actions against states only if there was a clear congressional statement). *See also* Gregory v. Ashcroft, 501 U.S. 452, 469-70 (1991) (applying a "plain statement rule" of statutory construction to federal legislation that "intrudes upon traditional state authority"); Dellmuth v. Muth, 491 U.S. 223, 232 (1989) (requiring an "unequivocal declaration" of congressional intent to exercise its power to abrogate state immunity).

242. *See generally* James Leonard, Ex parte Young *and Hard Times*, 40 U. TOL. L. REV. 889 (2009) (arguing that during hard economic times, Congress should provide a monetary cap on courts' application of the *Ex parte Young* doctrine). Courts might, for example, engage in analyses of a state's ability to pay using statements that state officials have made in non-litigations contexts, such as statements made to credit-rating agencies or investment banks responsible for taking the states to the public bond market.

sovereignty recognizes both entities' status as distinct *political communities* accountable to their respective citizenries. This understanding allows us to see how *Young* need not be interpreted as merely "accommodating" national supremacy, but as a vindication of such supremacy, and its mutual accommodation of it and state sovereignty. I hope this understanding demonstrates the extent to which the Court's current state-immunity case law departs from *Young*'s dual commitments. Satisfying these commitments need not bind us to a resolution that endows state governments with an absolute veto against congressionally authorized private damages actions.