Doing It with Mirrors: *New York v. United States* and Constitutional Limitations on Federal Power to Require State Legislation

By MARTIN H. REDISH*

Introduction

In her thoughtful and provocative article appearing in this issue,[1] Professor Candice Hoke argues that serious problems of constitutional federalism plague many of the current proposals for federal health care reform. These proposals, she argues, may run afoul of the limitations recognized in *New York v. United States*[2] on congressional power to conscript state legislatures into legislative action.[3]

My goal, in this brief response, is not to critique either Professor Hoke's careful and detailed examination of the specific health care proposals[4] or her equally careful exploration of the implications of the *New York* decision for those proposals.[5] My focus, rather, is on the accuracy of the *New York* decision as a construction of the Constitution's protections of federalism—an issue which, I believe, deserves considerably more attention than Professor Hoke has devoted to it. For in *New York v. United States*, the Court imposed constitutional limits on congressional power that derive from nowhere in the text of the Constitution.[6] As a result, the Court exceeded the legitimate scope of its authority as an unrepresentative and unaccountable governmental organ in a democratic society.[7]

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1. Candice Hoke, *Constitutional Impediments to National Health Reform: Tenth Amendment and Spending Clause Hurdles*, 21 HASTINGS CONST. L.Q. 489 (1994).

2. 112 S. Ct. 2408 (1992).

3. Hoke, *supra* note 1, at 493.

4. *Id.* at 496-526.

5. *Id.* at 550-73.

6. *See infra* text accompanying notes 58-60.

7. *See infra* text accompanying notes 38-40.

The basic constitutional fallacy in Justice O'Connor's majority opinion is her equation of two very different methods for determining the scope of constitutional protection of federalism. One of those methods, traditionally described as the "dual federalism"[8] or "enclave"[9] model, asks whether an action of the federal government unduly interferes with or impinges upon a defined area of state sovereignty.[10] The second method, which could be characterized as the "enumerated powers" model, recognizes no separate enclave of state sovereign power but instead inquires only whether the challenged action falls within the scope of the federal government's enumerated powers.[11] Justice O'Connor begins her analysis with the assumption that it matters not at all which of these two modes of constitutional interpretation the Court chooses to employ, because "the two inquiries are mirror images of each other."[12] This premise, however, is totally false; significant practical consequences flow from a reviewing court's choice between these two interpretive methodologies.[13] Because she blurs this fundamental point, Justice O'Connor is able to choose between the conceivable models of constitutional federalism while at the same time denying that any choice need be made.[14] In doing so, she has chosen a model unauthorized by unambiguous constitutional text.[15] Moreover, on a more practical level, Justice O'Connor's analysis may threaten the venerable practices of "interactive federalism," which allow the federal government to utilize state governments in the attainment of social goals.[16]

The fact that Justice O'Connor deserves criticism for overprotecting state sovereignty, however, does not mean that the Constitution should be construed to impose absolutely no limits on federal authority to usurp state power. To the contrary, the concept of enumerated powers was quite consciously chosen as a means of constitu-

8. *See generally* Edward Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950); *see infra* text accompanying notes 31-33.

9. *See* John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 702 (1974).

10. *See infra* text accompanying notes 31-33.

11. *See* Ely, *supra* note 9, at 700-06; *see infra* text accompanying notes 29-30.

12. New York v. United States, 112 S. Ct. 2408, 2417 (1992).

13. *See infra* text accompanying notes 39-51.

14. *New York*, 112 S.Ct. at 2417; *see infra* text accompanying notes 34-35.

15. *See infra* text accompanying note 39-40.

16. *See* Martin H. Redish, *Supreme Court Review of State Court "Federal" Decisions: A Study in Interactive Federalism*, 19 GA. L. REV. 861 (1985); *See infra* text accompanying notes 49-50.

tionally assuring the continuation of a federal system.[17] While this method provides no special protection to state governments from the imposition of federal burdens, it does assure an exclusive sphere of control for state power.[18] To be sure, the scope of that sphere has been dramatically reduced with the modern expansion of interstate travel and communications. But, by its terms, the Constitution effectively prohibits the total consumption of state authority by the assertion of federal power.[19] Modern Supreme Court doctrine, however, has all but achieved that end, in practical terms if not in name. Rather than invent otherwise non-existent constitutional protections of state governments, the Court would be better advised to devote serious attention to redefining the modern constitutional limits on the reach of federal power.

I. Constitutional Federalism and *New York v. United States*

A. The Decision in *New York*

New York involved a challenge to the Low-Level Radioactive Waste Policy Amendments Act of 1985,[20] which imposed upon states, either alone or in regional compacts with other states, an obligation to provide for the disposal of radioactive waste generated within their borders. The Act contained three sets of so-called "incentives" to states in order to encourage compliance. The *New York* Court held one of those incentives—the "take title" provision—to be unconstitutional. That provision purported to offer the states a "choice" between either accepting ownership of nuclear waste or adopting regulations in accordance with Congress' directives.[21] Justice O'Connor reasoned that the federal government lacked authority either to transfer radioactive waste from generators to state govern-

17. *See* Martin H. Redish & Karen L. Drizin, *Constitutional Federalism and Judicial Review: The Role of Textual Analysis*, 62 N.Y.U. L. REV. 1, 12-15 (1987); *See infra* text accompanying notes 58-62.

18. *See infra* text accompanying notes 64-86.

19. *See infra* text accompanying notes 63-67.

20. 42 U.S.C. §§ 2021b-j (1993).

21. 42 U.S.C. § 2021e(d)(2)(C) states:

> If . . . a State . . . in which low-level radioactive waste is generated is unable to provide for the disposal of all such waste generated within such State . . . each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, shall be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste as soon after January 1, 1993 as the generator or owner notifies the State that the waste is available for shipment.

ments or to require states to adopt specific legislation.[22] She then concluded that "[b]ecause an instruction to state governments to take title to waste, standing alone, would be beyond the authority of Congress, . . . it follows that Congress lacks the power to offer the States a choice between the two."[23]

B. Adopting a Method of Constitutional Analysis for Federalism Issues: The Fallacy of the "Mirror Image" Approach to Constitutional Federalism

The Constitution imposes two types of limitations on federal power. The initial form of restriction is a type of "checklist" limitation: the federal government possesses only those powers given to it. An exercise of power not found to fall somewhere on that constitutional checklist is beyond the scope of federal power, and therefore unconstitutional.[24] But an exercise of governmental authority falling within that checklist is not necessarily constitutionally valid. Such an exercise of power may also run afoul of a distinct constitutional "enclave"—*i.e.*, an affirmative protection of a specified activity or area of conduct. For example, were Congress to enact a law making it a crime for anyone writing in a newspaper sold in interstate commerce to criticize the President of the United States, the "checklist" requirement would be satisfied, because—at least under modern interpretations[25]—this law would fall within Congress' enumerated power to regulate interstate commerce.[26] Such a law would nevertheless be unconstitutional, however, because it would quite clearly run afoul of the First Amendment's "enclave" protecting freedom of the press.[27]

In the area of constitutional federalism, the Supreme Court has often struggled to comprehend and apply this seemingly basic principle of constitutional interpretation. The only realistically conceivable textual grounding for a distinct enclave of state sovereignty[28] is the Tenth Amendment, which provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States,

22. *New York*, 112 S. Ct. at 2428.

23. *Id.*

24. *See* Ely, *supra* note 9, at 701-02.

25. *See, e.g.*, United States v. Darby, 312 U.S. 100 (1941) (holding that if Congress is regulating interstate commerce, the fact that it has a non-commerce motivation does not render the regulation unconstitutional).

26. U.S. CONST. art. I, § 8, cl. 3.

27. U.S. CONST. amend. I, cl. 4.

28. Another conceivable textual basis is the so-called Guarantee Clause. U.S. CONST. art. IV, § 4. However, Justice O'Connor declined to reach that issue. *New York*, 112 S. Ct. at 2432-33. *See infra* text accompanying notes 52-57.

are reserved to the States respectively, or to the people."[29] As John Hart Ely has quite correctly pointed out, "it could hardly be clearer that the question of what matters are to be left exclusively to the states is to be answered not by reference to some state enclave construct but rather by looking to see what is not on the federal checklist."[30] The point, in other words, is that, by its terms, the Tenth Amendment defines state sovereignty exclusively by reference to the scope of federal power; to decide if a particular authority belongs exclusively to the states, one must inquire whether that authority has been delegated to the federal government.[31] If—and only if—the Court finds that the authority in question has not been delegated to the federal government will it conclude that that authority is reserved for exclusive state use. This method of resolving questions of constitutional federalism is to be contrasted to the "dual federalism" model, premised on a political theory of federalism that posits mutually exclusive spheres of authority for state and federal governments.[32] Under this analysis, the Court initially inquires whether the governmental action in question has traditionally been performed by the states. If the answer is yes, then, under the logic of "dual federalism," it follows that that activity must be deemed to fall outside the scope of federal power.[33]

Though Justice O'Connor would have us believe that no practical consequences flow from the choice between these modes of constitutional analysis,[34] the history of Supreme Court decisions makes quite

29. U.S. CONST. amend. X.

30. Ely, *supra* note 9, at 702.

31. *See* U.S. CONST. art. I, § 8. Other provisions of the Constitution also vest power in either the federal government in general or in Congress in particular. *See, e.g.*, U.S. CONST. art. IV, § 3, cl. 2 (giving Congress power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . .").

32. *See generally* Corwin, *supra* note 8. Another commentator has described "dual federalism" as envisioning "two mutually exclusive, reciprocally limiting fields of power—that of the national government and of the States. The two authorities confront each other as equals across a precise constitutional line, defining their respective jurisdictions." ALPHEUS MASON, FEDERALISM: THE ROLE OF THE COURT, in FEDERALISM: INFINITE VARIETY IN THEORY AND PRACTICE 24-25 (V. Earle ed., 1968).

33. An illustration of the Supreme Court's reliance on the dual federalism model in constitutional analysis is Hammer v. Dagenhart, 247 U.S. 251 (1918), *overruled by* United States v. Darby, 312 U.S. 100 (1941). *See infra* note 35.

34. *See New York*, 112 S. Ct. at 2417. Justice O'Connor reasoned that "the two inquiries are mirror images of each other," because "if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." *Id.*

clear that her assumption is inaccurate.[35] Justice O'Connor began her analysis in *New York* with the assertion that "if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress."[36] While Justice O'Connor purported to adhere to the "checklist" approach of *United States v. Darby*,[37] she ultimately slipped into a distinct "enclave" mode:

> Congress exercises its conferred powers subject to the limitations contained in the Constitution. Thus, for example, under the Commerce Clause Congress . . . is constrained in the exercise of that power by the First Amendment. *The Tenth Amendment likewise restrains the power of Congress*, but this limit is not derived from the text of the Tenth Amendment itself, which . . . is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on Article I power.[38]

By expressly analogizing the Tenth Amendment to the "enclave" limit of the First Amendment, Justice O'Connor made clear her choice in favor of the "enclave" version of the Tenth Amendment. What remains shrouded in mystery, however, is how she manages to derive this construction from the text of that amendment. Her conclusion is quite puzzling, because she openly concedes that the amendment's language provides absolutely no basis for such a construction.[39] Yet she does not purport to find this constitutional enclave for state sovereignty in the vague implicit interstices of the Constitution, but rather in the Tenth Amendment itself.

By effectively embodying the "enclave" approach, Justice O'Connor's analytical model turns the text of the Tenth Amendment on its head. Instead of defining state sovereignty exclusively by reference to the scope of power given to Congress—a method that calls for traditional interpretive analysis of Congress' enumerated powers—Justice O'Connor instead would have a reviewing court decide the

35. *Compare* Hammer v. Dagenhart, 247 U.S. 251 (1918) (using inquiry that looks first to what powers are reserved to the states to find federal regulation of private activity unconstitutional) *with* United States v. Darby, 312 U.S. 100 (1941) (using approach that looks initially at scope of congressional power under Article I to find federal regulation of private activity constitutional).

36. *New York*, 112 S. Ct. at 2417.

37. *Id.* at 2418.

38. *Id.* (emphasis added).

39. *Id.*

scope of state sovereign power without reference to any guiding directive derived, even at the most primitive level, from constitutional text. More significantly, her inquiry will almost certainly impose limits on federal power that could not be derived solely from an analysis of Congress' enumerated powers. If a reviewing court first asks whether the federal action infringes some predetermined enclave of state sovereignty, it will matter not at all whether that particular action would have been found to fall within the scope of Congress' enumerated powers. If, on the other hand, the reviewing court asks only whether the challenged action falls within Congress' enumerated powers, regardless of its impact on the exercise of state authority, then the scope of permissible federal power will undoubtedly be substantially broader.

Such a result should hardly be surprising. The entire purpose of a constitutional enclave is to impose limits on governmental power over and above the limits inherent in a checklist approach. Thus, by viewing the Tenth Amendment as something more than what its text demonstrates unambiguously that it is—a reaffirmation of the limits on federal power inherent in the checklist approach[40]—a reviewing court will inevitably be imposing limits on federal power that extend far beyond those inherent in the concept of enumeration.

This conclusion is confirmed by examining Justice O'Connor's application of the state sovereignty enclave in *New York*. There, she concluded, "While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress's instructions."[41] Despite the fact that such a conclusion may well flow from use of an enclave model (though, once again, we cannot be sure because of the total absence of any textual guidance),[42] it is by no means clear that it would follow solely from an examination of the scope of the congressional powers contained in Article I. Nothing in that enumeration automatically excludes from federal power the option of requiring states to implement federal policy choices by the adoption of legislation.

If one were actually to employ the "checklist" model in order to decide whether the exercise of such an authority falls within the scope of Congress' enumerated powers, one would necessarily have to in-

40. *See* discussion *supra* at notes 24-31 and accompanying text.
41. *New York*, 112 S. Ct. at 2421.
42. *See* discussion *supra* at notes 25-31 and accompanying text.

quire whether Congress' commerce power,[43] combined with its ancillary authority provided in the Necessary and Proper Clause,[44] authorizes Congress to require states to implement legislation to accomplish congressional goals concerning the regulation of nuclear waste. If only as a doctrinal matter, it today appears clear that Congress' ability to invoke auxiliary authority under the Necessary and Proper Clause is broad indeed[45]—quite probably too broad. Giving Congress unlimited discretion to conclude that particular actions are "necessary and proper" to aid in the attainment of a regulatory goal that falls within one of its enumerated powers—as Chief Justice Marshall appeared to do in *McCulloch v. Maryland*,[46] and as the modern day Commerce Clause cases involving regulation of private activity have all but uniformly done[47]—effectively repeals the enumerated powers concept as a limit on federal power, replacing it with a blank check of federal power, in direct contravention of the concept of enumerated powers. However, even if a reviewing court were to deem itself competent, in an extreme case, to question a congressional judgment that a particular action constitutes a reasonable means of facilitating the exercise of an enumerated power, it is not unreasonable, in a democratic system, to provide Congress broad leeway in deciding how best to attain its permissible regulatory goals.

Viewed from this "checklist" perspective, it is by no means clear that the "take-title" provision invalidated in *New York* falls outside Congress' authority. Apparently no one questioned that Congress possesses the authority, under the commerce power, to regulate or require the disposal of nuclear waste, even to the point of total preemption of any state regulatory power.[48] Hence, Congress could reason that while its ultimate goal was to safely and efficiently dispose of nuclear waste, different areas of the country may require different ap-

43. U.S. CONST. art. I, § 8, cl. 3.

44. U.S. CONST. art. I, § 8, cl. 18 (empowering Congress "[to] make all laws which shall be necessary and proper for carrying into execution the foregoing powers . . . .").

45. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942).

46. 17 U.S. (4 Wheat.) 316, 423 (1819) ("[W]here the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground.").

47. *See, e.g.*, Perez v. United States, 402 U.S. 146 (1971), *infra* at notes 76-86 and accompanying text.

48. *See New York*, 112 S. Ct. at 2419-20 ("Petitioners do not contend that Congress lacks the power to regulate the disposal of low level radioactive waste . . . . Regulation of the . . . interstate market [in the sale of space in radioactive waste disposal sites] is . . . well within Congress' authority under the Commerce Clause.").

proaches to the effective attainment of that goal.[49] As a practical matter, Congress itself cannot be expected to devise all of those individualized solutions. That fact, however, does not alter either Congress' ultimate goal of having the problem dealt with legislatively throughout the nation, or its constitutional power to establish that goal.

Hence, Congress could conclude that while the problem of nuclear waste must be resolved, it should be up to each state to determine the best method for disposing of that waste. The initial judgment of whether government will assume the obligation of disposing of nuclear waste, however, had already been made by Congress. Thus the state legislatures had been denied the opportunity to conclude that the problem did not require governmental resolution; they were, however, delegated the discretion (or responsibility, if one prefers) to develop the optimum method for doing so in their respective states. Effectively coercing such state legislation could well constitute a very logical method of resolving the congressional dilemma. Viewed from this perspective, then, the "take-title" provision appears to fall within the scope of Congress' "checklist" of powers.

It is true, of course, that Congress' choice is not free of practical or theoretical difficulties. Initially, it is undoubtedly true that, as a result of the federal statute, state legislatures are coerced into taking legislative action that they might otherwise not have chosen to take. But this fact rises to the level of constitutional concern *only* if one initially assumes the existence of a distinct enclave of state governmental integrity that is to be insulated from federal imposition.[50] As

49. On this subject the Court wrote,

> Faced with the possibility that the Nation would be left with no disposal sites for low level radioactive waste, Congress responded by enacting [in 1980] the Low-Level Radioactive Waste Policy Act . . . . Congress declared a federal policy of holding each State "responsible for providing for the availability of capacity either within or outside the State for the disposal of low-level radioactive waste generated within its borders," *and found that such waste could be disposed of most efficiently . . . on a regional basis.*

Id. at 2415 (emphasis added) (citations omitted).

50. It has recently been argued that the term "proper" in the Necessary and Proper Clause should be construed to incorporate concerns about such matters as state sovereignty. *See* Gary Lawson & Patricia Granger, *The "Proper" Scope of Federal Power: A Jurisdiction Interpretation of the Sweeping Clause*, 43 DUKE L.J.267, 267, 271-72 (1993). If this argument were accepted, something approaching Justice O'Connor's "enclave" analysis could be employed solely under an examination of the scope of congressional power. However, the term has never been given such a construction judicially. Moreover, such a construction seems counterintuitive, given the fact that the clause's context in Article I underscores its role as a facilitator of the exercise of governmental power. Perhaps a more reasonable construction of the word "proper" would be one that makes clear that the

already noted,[51] by its terms the Tenth Amendment unambiguously fails to provide such constitutional protection.

Interpretation of the one constitutional provision that could conceivably be construed to provide some sort of protection of state governmental integrity against federal incursion, the Guarantee Clause,[52] expressly avoided by Justice O'Connor.[53] While the Clause's interpretation could probably have been avoided in any event under the "political question" doctrine,[54] were one willing to peer beyond the screen erected by the political question doctrine and examine the clause's wording, one might argue that by imposing upon the federal government a burden to guarantee the continuation of a republican form of government in the states, *a fortiori* the clause requires that the federal government itself not so burden the state governments as to effectively destroy their republican character. At most, however, this reasoning would prevent the federal government from all but destroying the state governments. Conscription of state legislatures in the manner contemplated in the Low-Level Radioactive Waste Policy Amendments Act could hardly be deemed to rise to that level.

One might argue that by requiring a state legislature to enact legislation that it would not otherwise enact, Congress is subverting the representative and accountability processes that are central to the concept of republican government.[55] But when one recalls that Congress unquestionably has constitutional power to preempt *all* state regulation (or non-regulation) of nuclear waste, regardless of the contrary will of particular state legislatures,[56] the "non-republican" aspect of the "take-title" provision appears less damning. Ultimately, the primary regulatory policy choice is made by Congress and the Presidency, which are both representative and accountable. In the tradition of "interactive" federalism,[57] state legislatures are "conscripted" to enact implementing legislation, and to the extent they have free-

clause is not intended to authorize Congress to breach express textual limits on congressional power.

51. *See supra* text accompanying notes 39-40.

52. U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a republican form of government. . . .").

53. *New York*, 112 S. Ct. at 2433.

54. *See, e.g.*, Luther v. Borden, 48 U.S. (7 How.) 1 (1849) (holding Guarantee Clause claims non-justiciable). I have previously criticized this doctrine. *See* MARTIN H. REDISH, THE FEDERAL COURTS IN THE POLITICAL ORDER: JUDICIAL JURISDICTION AND AMERICAN POLITICAL THEORY 111-36 (1991). Justice O'Connor left the "political question" issue unresolved in *New York*. 112 S. Ct. at 2433.

55. *See New York*, 112 S. Ct. at 2421-23.

56. *See* discussion *supra* text accompanying note 48.

57. *See generally* Redish, *supra* note 16.

dom to shape the method of achieving that federal policy choice to the specific needs of their states they, too, are acting in a representative and accountable manner.

C. Constitutional Text and Original Intent

Justice O'Connor justified her conclusion that the federal government could not require state legislation in part based on her finding that the Framers consciously chose not to authorize such a practice.[58] At least to a certain extent, however, she appears to have turned history on its head. By Justice O'Connor's acknowledgement,[59] the history to which she points concerns primarily the Framers' decision to depart from prior practice under the Articles of Confederation, which required Congress to act through state legislatures.[60] There is, of course, all the difference in the world between *requiring* Congress to act only through state legislatures on the one hand and *permitting* Congress to do so.

Though it has recently been argued that Justice O'Connor's understanding of the Framers' intent is largely accurate,[61] even if true this fact is largely beside the point. Unless the Framers actually embodied their goal in constitutional text, that goal has no constitutional status because it has not been subjected to the ratification process; only the text has received such treatment. At most,[62] original intent can play a role in interpreting ambiguous *constitutional text.* In the case of congressional power to require state legislation, even if Justice O'Connor's conclusion as to the Framers' intent were correct, no provision of constitutional text can even arguably be thought to embody the Framers' goal. If the Framers had in fact decided that Congress could not require state legislation, one would think that they would have included an explicit prohibition on such a power in the text. At the very least, they could reasonably have been expected to insert some special protection of state sovereignty, framed in general terms. With the possible exception of the Guarantee Clause, they did neither. Indeed, when, in the Tenth Amendment, the Constitution's drafters

58. *New York*, 112 S. Ct. at 2423.

59. *Id.* at 2421-23.

60. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1447 (1987).

61. *See* Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957 (1993).

62. It has been argued that Framers' intent should not control modern textual interpretation, because it is impossible to know how that intent might have changed in light of subsequent developments. *See* Robert W. Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445 (1984).

finally did make some reference to protection of the states, it was only to reaffirm the concept of enumerated federal powers. Thus, the history to which Justice O'Connor points—even if it were not as questionable as it appears—cannot support a finding of a prohibition on federal power to require state legislation.

II. Revising the Focus of Constitutional Federalism

The fact that Congress may conscript state governments in an effort to attain social policy goals within the scope of its constitutionally defined authority does not mean that the Constitution and the Court are to play no role in preserving the values of federalism. By its unambiguous textual structure, the Constitution manifests its goal of preserving the basic notion of federalism. It does so, not by erecting an enclave to shield state governments from federal imposition, but by limiting the reach of federal power to control private activity. Article I, section 8 enumerates particular congressional powers,[63] and, as Chief Justice Marshall wisely pointed out, the concept of enumeration necessarily implies something not enumerated.[64]

To be sure, the Necessary and Proper Clause[65] provides Congress with a significant degree of flexibility in the invocation of those enumerated powers.[66] But this provision cannot be read to convert Article I's enumeration into a blank check of authority issued to the federal government, without ignoring the inescapable implications of that provision's text. Equally important, it cannot do so without, at the very least, threatening (if not directly undermining) the political and social values traditionally thought to be fostered by use of a federal system: the diffusion of power and the resultant reduction in the danger of tyranny, the promotion of social diversity, and the attainment of the benefits of governmental experimentation.[67]

A. The Scope of the Commerce Clause

One might reasonably wonder whether one can reconcile the maintenance of a sphere of private activity that is constitutionally deemed beyond the reach of federal power with the obvious fact of modern life that the scope of that power must expand as interstate

63. U.S. CONST. art. I, § 8.
64. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 195 (1824).
65. U.S. CONST. art. I, § 8, cl. 18.
66. *See supra* notes 43-47 and accompanying text.
67. I discuss these values in more detail in MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE (Oxford University Press) (forthcoming 1994).

technology, communication, and travel expand. The answer to that question may be derived from a critical examination of modern Commerce Clause jurisprudence.

Because of the Necessary and Proper Clause, the Supreme Court has long held—quite correctly—that the mere fact that congressional regulation is not itself directly concerned with interstate commerce is not constitutionally fatal, as long as the regulation will ultimately have a non-trivial impact upon interstate commerce.[68] Problems arise, however, in determining whether, in fact, this is the case.

I have discussed one of these problems, specifically, the appropriate level of judicial scrutiny where Congress concludes that regulation of activity not falling within interstate commerce will actually have a measurable impact on interstate commerce, in previous writing.[69] An additional problem is created by what could be described as the "class of activities" doctrine, first articulated in *United States v. Darby*.[70] There the Court construed certain provisions of the Fair Labor Standards Act of 1938[71] to apply to "an employer engaged . . . in the manufacture and shipment of goods in filling orders of extrastate customers, [who] manufactures his product with the intent or expectation that according to the normal course of his business all or some part of it will be selected for shipment to those customers,"[72] even if ultimately the product was shipped only intrastate.

> Congress was not unaware that most manufacturing businesses shipping their product in interstate commerce make it in their shops without reference to its ultimate destination and then after manufacture select some of it for shipment interstate and some intrastate according to the daily demands of their business, and that it would be practically impossible, without disrupting manufacturing businesses, to restrict the prohibited kind of production to the particular pieces of lumber, cloth, furniture or the like which later move in interstate rather than intrastate Commerce.[73]

In so holding, the Court relied on the decision in the so-called *Shreveport Case*[74] for the proposition that Congress may regulate "intrastate transactions which are so commingled with or related to interstate

68. *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294 (1964); Wickard v. Filburn, 317 U.S. 111 (1942).

69. *See* Redish & Drizin, *supra* note 17, at 41-49, discussing the proper scope of the Court's "rational basis" test.

70. 312 U.S. 100 (1941).

71. 29 U.S.C. §§ 201-19 (1993).

72. *Darby*, 312 U.S. at 117.

73. *Id.* at 117-18.

74. Houston & Texas Ry. v. United States, 234 U.S. 342 (1914).

commerce that all must be regulated if the interstate commerce is to be effectively controlled."[75]

Such a conclusion appears to represent a reasonable construction of the Necessary and Proper Clause, as applied to Congress' Commerce Power. When it is impractical for Congress to separate those members of the regulated class who are in interstate commerce from those who are not, Congress' power to regulate interstate commerce could not be effectively exercised unless Congress is allowed also to regulate those members of the class who do not affect interstate commerce.

It should not follow, however, that Congress may rely on this logic when the two elements of the class are not so intermingled as to render regulation of only the interstate element impractical. The danger in the use of the "class of activities" doctrine, then, is that Congress will rely on it to regulate all elements of a subject class, including those that are not in interstate commerce, even when the drawing of a regulatory distinction would not be truly impractical.

A possible illustration of such unacceptable bootstrapping is *Perez v. United States*.[76] There the defendant had been convicted of "loan sharking" activities in violation of the Consumer Credit Protection Act.[77] The defendant argued that Congress could not reach his activities under the Commerce Clause, because all of his activities had been conducted intrastate. The Court, relying heavily on *Darby*, upheld the conviction because the defendant "is clearly *a member of the class* which engages in 'extortionate credit transactions' as defined by Congress . . . ."[78] The Court concluded, "Where the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class."[79] The question, however, is why does the Court not have the *obligation* to "excise" such activities, unless Congress can establish that separation would be impractical? After all, unless the members of the class are thus intermingled, the entire rationale for congressional regulation of the members not themselves in interstate commerce disappears.

75. *Darby*, 312 U.S. at 121.

76. 402 U.S. 146 (1971).

77. 18 U.S.C. §§ 891-96 (1993).

78. *Perez*, 402 U.S. at 153 (emphasis in original) (footnote omitted).

79. *Id.* at 154 (emphasis in original) (footnote omitted).

B. An Alternative Method for Ascertaining Impracticality

While finding "impracticality" may present some doctrinal problems, a relatively simple method of determining impracticality would be to inquire first whether federal enforcement of Congress' regulation required an individualized adjudicatory process, and second whether *all* of the subject's regulated activities were intrastate. Where Congress either has chosen or is constitutionally required to provide such an individualized process, as in the case of criminal prosecutions such as *Perez*, and the defendant can establish that his own activities were *entirely* intrastate (rather than intermingled with interstate activities), it surely is not impracticable to separate the members of the class who can be constitutionally regulated from those who cannot.

While making such a defense available to a subject of regulation will no doubt increase the federal regulatory burden somewhat, it will do so only minimally, especially if the burden of proof is placed on the subject of regulation to establish that his activities were entirely intrastate. Though it would of course be more *convenient*, for purposes of federal regulation, to allow wholesale grouping of similar activities, whether or not they all constitute interstate commerce, such convenience would be gained at the price of the concept of limited federal power. The standard for application of the "class of activities" doctrine should be as restrictive as in its first articulation in the *Shreveport Case*: the doctrine should be invoked only where "the interstate and intrastate transactions . . . are so related that the government of one involves the control of the other . . . ."[80] As Justice Stewart, dissenting in *Perez*, persuasively argued:

> [U]nder the statute before us a man can be convicted without any proof of interstate movement, of the use of the facilities of interstate commerce, or of facts showing that his conduct affected interstate commerce. I think the Framers of the Constitution never intended that the National Government might define as a crime and prosecute such wholly local activity through the enactment of federal criminal laws.[81]

The *Perez* Court also found that "[e]xtortionate credit transactions, though purely intrastate, may in the judgment of Congress affect interstate commerce," because Congress had found that loan sharking was "the second largest source of revenue for organized crime . . . and is one way by which the underworld obtains control of

80. *Houston & Texas Ry.*, 234 U.S. at 351.

81. 402 U.S. at 157 (Stewart, J., dissenting).

legitimate businesses."[82] But it is in such situations that the Court must ask itself whether its logic proves too much—in other words, whether such reasoning would authorize the federalization of *all* activity.[83] If so, then the Court's reasoning would effectively allow Congress' commerce power, read in conjunction with the Necessary and Proper Clause, to consume the textually dictated and politically sound principle of limited federal power.[84] As Justice Stewart noted:

> [I]t is not enough to say that loan sharking is a national problem for all crime is a national problem. It is not enough to say that some loan sharking has interstate characteristics, for any crime may have an interstate setting. And the circumstance that loan sharking has an adverse impact on interstate business is not a distinguishing attribute, for interstate business suffers from almost all criminal activity, be it shoplifting or violence in the streets.[85]

Justice Stewart correctly asserted that "[i]n order to sustain this law we would . . . have to be able at the least to say that Congress could rationally have concluded that loan sharking is an activity with interstate attributes that distinguish it in some substantial respect from other local crime."[86]

Conclusion

There can be little doubt that even under a much more disciplined "class-of-activities" doctrine, Congress would still retain broad regulatory authority, as it should. But the constitutional values of federalism that were textually protected by the concept of enumerated powers still retain importance, and should therefore not be abandoned by the Court.

Professor Hoke has performed a truly masterful job of analyzing potential constitutional problems, under Justice O'Connor's decision in *New York*, to which the various health care proposals give rise. She has, however, neglected to provide Justice O'Connor's opinion the stinging criticism it so richly deserves. By resorting to an analytical game of mirrors, Justice O'Connor has managed first to blur and ultimately to ignore the significant practical consequences that flow from the choice between the "checklist" and "enclave" approaches to constitutional federalism. As a result, she has managed to erect a consti-

82. 402 U.S. at 154-55 (footnote omitted).
83. *See supra* text accompanying notes 66-67.
84. *See supra* text accompanying notes 66-67.
85. *Perez*, 402 U.S. at 157-58 (Stewart, J., dissenting).
86. *Id.* at 157 (Stewart, J., dissenting).

tutional protection of state governments that simultaneously ignores the unambiguous message of constitutional text and threatens our long-established traditions of interactive federalism. As a result, it is an approach that should play no role in a proper construction of constitutional federalism.

The implications for health care reform of my suggested revision in the focus of constitutional federalism are relatively clear, at least on a general level. The first question to be asked is whether health care is a problem that implicates Congress' power to regulate interstate commerce. Though the answer to this question should turn on something more than the cursory inquiry usually provided by the Supreme Court, it is likely that even under more careful scrutiny Congress could demonstrate that health care, for the most part, is an industry involved in interstate commerce, and that it would be impracticable to require Congress to separate out whatever portion of the industry is actually intrastate. Hence, pursuant to the "class of activities" doctrine, Congress may regulate the entire activity.

The question of whether or not Congress, in regulating national health care, may require enactment of implementing state legislation gives rise to a different set of constitutional issues. Under my suggested revision, the sole constitutional question would be whether the congressional imposition of such a requirement fits within Congress' auxiliary power created by the Necessary and Proper Clause. The answer to that question, in turn, would be heavily influenced by the level of deference that the reviewing court employs. If the court were to give Congress virtual carte blanche in deciding how to exercise one of its enumerated powers, then a finding of unconstitutionality is all but unthinkable. If, however, the court demands that Congress make at least some showing of the need for implementing state legislation, then the issue of constitutionality may be in more doubt. Even under this more probing standard of review, however, it is unlikely that the congressional judgment would be overturned. If democratic government is to function, Congress must be allowed to exercise a wide range of discretion in deciding how to employ its powers most effectively.

I leave to others who are considerably more expert than I am in such matters the determination of how these constitutional standards apply to the various health care proposals that have been made to date.[87] The key point to keep in mind in making such an inquiry

87. *See generally* Hoke, *supra* note 1.

under my revised approach, however, is that any resulting invasion of state sovereignty should be deemed irrelevant to the constitutional analysis. This is not because such considerations should necessarily be deemed irrelevant as a matter of social or political policy, or because one could not construct a constitutional federal system that provided special protections for state sovereignty, but rather because for all practical purposes nothing in the text of our Constitution supports such a principle.