Competing Constitutional Ideals in the United States' Force Majeure-Federalism Cases

Calling the Shots in Disaster Management*

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Abstract

Structure is no less important than substance in the long run. When dealing with disaster management, what is truly national and what is truly local? Disasters are the "perfect" time, if only because of the confusion they sow and/or witness, for the central government to usurp some sovereign powers of its constituent states (and sometimes vice versa). This article examines where, in the American model with its strong federalism tradition, the constitutional tipping point lies. The article conveys the practical imperatives of federalism and why ordinary citizens should care: a federalist structure to promote democratic participation and the carrying out of democratic will by splitting up authority and stopping any one layer of government from becoming too powerful or making it a dysfunctional appendage. That has special significance in the disaster context, of course, and there is no better kaleidoscope than the recent Gulf of Mexico oil spill.

Keywords: federalism, force majeure, disaster, commerce clause, necessary and proper clause.

A. Introduction

Whenever there is a conflict of laws, the two emergent questions are: who calls the shots *and* what is the shot? On federalism pertaining to disaster management, response to the second question often determines response to the first one. This paper explores if, and to what extent, the United States Government is allowed to be interventionist in the affairs of its constituent states when responding to situations of *force majeure* (including disasters and emergencies). I address

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how citizen liberty and democratic participation are best enhanced through the federalism prism, and how treaty- or legislation-drafting needs to be more precise in light of the experiences underscored herein.

B. Intersection of *Force Majeure* and Federalism in the United States

I. Why does Force Majeure Change Things?

Force majeure includes, but is not limited to, "natural disasters (earthquakes, hurricanes, floods); wars, riots or other major upheaval; performance failures of parties outside the control of the contracting party".[1] Moreover, *force majeure* happens to be a commonplace qualifier in contracts and it frees both parties from liability or obligation when an extraordinary event or circumstance beyond the control of the parties, an 'act of God' (e.g., fire, flood, earthquake, storm, hurricane or other natural disaster), war, invasion, act of foreign enemies, hostilities, civil war, rebellion, revolution, insurrection, military or usurped power or confiscation, terrorist activities, nationalization, government sanction, blockage, embargo, labor dispute, strike, lockout or interruption or failure of electricity or telephone service), makes it *impossible* for the parties to fulfill their contractual obligations.[2] This predicate changes things.

With the advent of the tsunami in southeast Asia in December 2004, Hurricane Katrina in August 2005, and the British Petroleum (BP)-Transocean-Halliburton oil spill in April 2010, the federalism issue – which layer of authority (national or state) gets the first crack and who gets the last word in resolving the problem – becomes even more critical. The problem, therefore, is quite topical. Before we proceed, it is important to clear the air.

This oil spill does not exactly fall under the heading of *force majeure* because it was not outside BP's (or the three companies' collective) control. The touchstone of *force majeure* analysis – a good-faith disclaimer of actual responsibility and attribution – is not satisfied. International tribunals, especially those dealing with retroactively deciding the law, such as the Iran-U.S. Claims Tribunal (IUCT) make

1 *See* 'Force Majeure', Digital Licensing Information, Online Library, Yale Law School, available at <www.library.yale.edu/~llicense/forcecls.shtml>, last accessed 11 June 2010.

2 Because of the elastic potential of *force majeure*, that *exception* should not be allowed to 'swallow the general rule'. *See Mohawk Industries, Inc. v. Carpenter*, 130 S. Ct. 599, 605; 558 U.S. ___, ___ (2009) (quoting *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994)); *see also* Note, '*Force Majeure*: Impossibility of Performance as a Defense', 31 *Yale L. J.* 551, 552 (1922) ("delay due to cessation of work on account of normal bad weather, a football game, or a funeral, or due to a deviation of a ship running short of coal, is not caused by *force majeure*."); *ibid.* ("So elastic is the term [*force majeure*] that it would seem to have been better social engineering for the English court to have weighed the grave likelihood of detriment to the whole community with the respondent's inconvenience and to have allowed the appellants to have protected the many to the neglect of the one."). This last let's-balance-the-equities approach is fantastically candid, if not completely Pareto-efficient.

this plain.[3] That body has cautioned against using *force majeure* as a liberal blank-check and has held that unlawful "acts of the supporters of a revolution"[4] or "acts of unorganized mobs and individuals"[5] do not permit relief – the theory of causation is strict and a case is actionable in international court only when the *force majeure* acts are "in derogation of the general principles of international law".[6] Nonetheless, for the purposes of our discussion because the spill constitutes a disaster unto nature (if not a natural disaster *per se*), it will be treated along with other *force majeure*-related disasters where federal versus state intervention is a lingering issue.

Let us shift gears to federalism. It is one of the United States' oldest legal, constitutional, and policy questions.[7] Federalism is a very difficult *imperative* to communicate to the average citizen, though it is a fairly simple *idea* that most people can wrap their minds around. It is difficult not because of the concept's basic features (essentially, the sharing of authority between the central government and its constituent parts – each of which retains its own sphere) but because ordinary citizens cannot always fathom why their constitutional courts formulate the federalism doctrines that they do and what difference that might make.

Why does it matter to me if it's Montana or if it's the federal government that fixes the treaty terms to allow Albertan or Saskatchewanian cattle to graze in

3 *See* A. Mouri, 'The International Law of Expropriation as Reflected in the Work of the Iran-U.S. Claims Tribunal' pp. 185-198; *see Alfred L.W. Short* and *The Islamic Republic of Iran*, Award No. 312-11135-3 (paras. 4, 7-8 and 11), *reprinted in* 16 Iran-U.S. CTR 76, pp. 77-78; *Kenneth P. Yeager* and *The Islamic Republic of Iran*, Award No. 324-10199-1, *reprinted in* 17 Iran-U.S. CTR 92.

4 *See Alfred L.W. Short* (para. 34), p. 85.

5 *See Jack Rankin* and *The Islamic Republic of Iran*, Award No. 326-10913-2 (para. 20), *reprinted in* 17 Iran-U.S. CTR 135, p. 141 (holding that there is no difference between an individual being forced by socio-political conditions to forfeit her rights and a situation in which the law so exacts very deliberately).

6 *See Sambiaggio* case (1903) X U.N. RIAA 500, at 521.

7 *See New York v. United States*, 505 U.S. 144, 149 (1992) ("This case implicates one of our Nation's newest problems of public policy, and perhaps our oldest question of constitutional law."); 2 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 439 (J. Elliot 2d ed. 1876) (Elliot) ("It is true, indeed, sir, although it presupposes the existence of state governments, yet this Constitution does not suppose them to be the sole power to be respected."); *The Federalist*, No. 45, J. Cooke (Ed.), 1961, p. 313, ("The powers delegated by the proposed Constitution to the Federal Government are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce... The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people and the internal order, improvement, and prosperity of the State."); *The Federalist*, No. 51, C. Rossiter (Ed.), 1961, p. 323, (J. Madison) ("In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.").

Montanan lands and *vice versa*?, Lord Denning's now-famous reasonable person[8] might ask. But it does matter. That structural separation is intended to promote democratic participation and the carrying out of democratic will by splitting up authority and stopping any one layer of government from becoming too powerful *or* making it a dysfunctional, decorative appendage. The argument could also be advanced that not only *may* Congress regulate instances of transboundary harm, once environmental or other conveyable risk is shown, but also that Congress *must* do so.

II. How We Got to This Point? Trajectory of Precedents

Federalism, under the Commerce Clause[9] of, the General Welfare Clause of,[10] and the Tenth Amendment[11] to the United States Constitution, was a value strongly preserved at the time of the original founding in 1787 and ratification in 1789. The Constitution, furthermore, is the ultimate covenant between the governors and the governed in the United States. Luckily for hapless constitutional law scholars (at least those who prefer bottom-line stability), there is a prevailing belief that the Constitution possesses some inherent flexibility to handle *force majeure*-like situations, and that it should not be cast aside in emergencies.[12] That flexibility of handling a variety of challenges often through democratic means, while simultaneously being rooted in some timeless values, makes the Constitution an enduring document.[13]

The remaining question, then, is whether Congress as the policy-making arm of the federal government has the constitutional power to deploy the administra-

8 *Roe v. Minister of Health* [1954] 2 All ER 131 (the defendant is liable in a tort action only if a reasonable person would have predicted the loss in the situation extant at the time of the alleged breach of duty).

9 The Commerce Clause, in U.S. Const., Art. I, § 8, cl. 3, gives Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes".

10 *See* U.S. Const. Art. I, §8, cl. 1.

11 *See* U.S. Const. Amdt. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

12 *See, e.g., Hamdan v. Rumsfeld*, 548 U.S. 557, 637 (2006) (Kennedy, J., concurring in part) ("Respect for laws derived from the customary operation of the Executive and Legislative Branches gives some assurance of stability in time of crisis. The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment."), *Home Building and Loan Assn. v. Blaisdell*, 290 U.S. 398, 425 (1934) ("Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. ... [The Constitution's] grants of power to the federal government and its limitations of the power of the States were determined in the light of emergency, and they are not altered by emergency.").

13 *See, e.g., Hamdan, supra*, at 636 (Breyer, J., concurring) ("Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine – through democratic means – how best to do so. The Constitution places its faith in those democratic means. Our Court today simply does the same."). A few years later, when Congress gave the Executive those 'democratic means' to suspend the *habeas corpus* rights of the detainees held at Guantanamo Bay, Cuba, the Supreme Court held that action to violate the Constitution's Suspension Clause, U.S. Const. Art. I, § 9, cl. 2. *See Boumediene v. Bush*, 553 U.S. 723 (2008).

tive apparatus of a state to deal with disasters in accordance with Congress's stipulations. The United States Supreme Court's cases on point are *National League of Cities v. Usery* (1976)[14] and *Garcia v. San Antonio Metro Transit Authority* (1985)[15] (overruling *Usery*). We use these two contradictory cases because they come closest to divining what prevailing law says; they do so by highlighting the tension between two conflicting strands of modern federalism jurisprudence in America.

This essay considers the argument that federal power rests on solid constitutional footing when tied to the environment. If such a causally-potent connection can be made, then it should be made. Canada and many European nations follow the same model, and their experiences should inform the American analysis. Most notably, in the Canadian system the various provinces participate actively in the implementation of federal legislation and treaties, and in "...the federal systems of Switzerland, Germany, and the European Union ... all provide that constituent states, not federal bureaucracies, will themselves implement many of the laws, rules, regulations, or decrees enacted by the central 'federal' body".[16]

Because, however, the assumptions and predicates in each legal system are different, there should probably be some healthy reluctance to extrapolate concepts out of context. And especially since "of the four structural elements in the Constitution just mentioned [separation of powers, checks and balances, judicial review, and federalism], federalism was the unique contribution of the Framers to political science and political theory",[17] American federalism's stand-alone features are *lex specialis* to a large extent, and not all versions of federalism are fungible.[18] Still, there remain fundamental similarities among jurisdictions on environmental federalism. Those similarities are largely pegged to the pervasive potential of environmental damage and pollutants, all of which wield (invariably) powerful and (often) irreversible influence on commerce.

14 426 U.S. 833.

15 469 U.S. 528.

16 *See Printz v. United States*, 521 U.S. 898, 976 (1997) (Breyer, J., concurring) (citing Lenaerts, 'Constitutionalism and the Many Faces of Federalism', 38 *Am. J. Comp. L.* 205, 237 (1990)); D. Currie, *The Constitution of the Federal Republic of Germany*, Chicago, University of Chigago Press 1994, pp. 66, 84; Lord Mackenzie-Stuart, 'Foreword, Comparative Constitutional Federalism: Europe and America', *in* M. Tushnet (Ed.), *Comparative Constitutional Federalism: Europa and America*, New York, Greenwood Press 1990 p. ix; Kimber, 'A Comparison of Environmental Federalism in the United States and the European Union', (1995) 54 *Md. L. Rev.* pp. 1658, 1675-1677).

17 *See United States v. Lopez*, 514 U.S. 549, 575-6 (1995) (Kennedy, J., concurring) (citing See Friendly, *Federalism: A Foreword*, 86 Yale L. J. 1019 (1977); G. Wood, 'The Creation of the American Republic', 1776-1787, pp. 524-532, 564 (1969)).

18 While the Framers of the American Constitution were not persuaded that certain features of European federalism were well-suited to the United States, they did consider those experiences and beliefs. *See Printz*, supra, at p. 977 (Breyer, J., dissenting) (*The Federalist* No. 20, C. Rossiter (Ed.), 1961, pp. 134-138, (J. Madison & A. Hamilton) (rejecting certain aspects of European federalism). But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem - in this case the problem of reconciling central authority with the need to preserve the liberty-enhancing autonomy of a smaller constituent governmental entity. Cf. id., No. 42, at 268 (J. Madison) (looking to experiences of European countries); id., No. 43, at 275, 276 (J. Madison) (same).).

From the very outset, let us square away one point. A contrarian might argue that this congressional power (*vel non*) is no different from the constitutional authority, in Art. II, sec. 2, cl. 1,[19] of the President to 'call into actual [s]ervice' each state's national guards in the case of a national emergency. But that argument does not work. Not only is this presidential power clearly enumerated in the Constitution, but the apparatus used by the President requires minimal intrusion *into* state functions that are 'traditional' and distinct from the federal government's role. The difference between what is national and what is local is well-preserved there. In other words, when do you ever hear of the state (as opposed to the national government) quashing a rebellion? The federal-state tug of war on disasters, though, is more of a blank slate.

C. 'For Want of a Nail...the Kingdom was Lost'[20] – Is Environment the Linchpin of Federal Power? Considering the Oil Spill Example

Congress indisputably has the power to intervene in some disasters, both as a prophylactic matter and as a remedial one. And according to the *Trail Smelter* decision[21] of an arbitral panel, followed in countless cases, a competent government *must* intervene. The remaining question is whether Congress, rather than the state, is that government. *Trail Smelter* notably stated that "no State has the right to use or *permit the use* of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence".[22]

The *Trail Smelter* tribunal required compensatory damages and established this principle for the future. *Trail Smelter* is also important for the facts it represents: a tale of "how the struggle escalated from the local to the transnational level as the smelter increased production and erected taller smoke stacks, pushing the toxic plume farther down the valley".[23] This speculative progression of local to global creates logistical and thus legal doubt; and for scholars accepting the First Principles, the denouement boils down to this bifurcation.

The problem gets even stickier when we deal with Congress's authority to superintend the states who are resolving, or attempting to resolve, the effects of a

19 "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States ..."

20 B. Franklin, 'For want of a nail', *Poor Richard's Almanack* (1758).

21 'Trail Smelter Arbitral Tribunal', (1939) 33 *Am. J. Int'l L.* 182, *reprinted in* R.M. Bratspies & R.A. Miller (Eds.). *Transboundary Harm in International Law: Lessons From The Trail Smelter Arbitration*, New York, Cambridge University Press, 2006, p. 314 [*Trail Smelter I*]; *Trail Smelter Arbitral Decision (US v. Canada)* (1941) 35. *Am. J. Int'l L.* 684, reprinted in Bratspies & Miller 326 [*Trail Smelter II*].

22 *See Trail Smelter II*, at 331.

23 *See* S. Wood, Book review of 'Transboundary Harm in International Law: Lessons From The Trail Smelter Arbitration' R. M. Bratspies & R. A. Miller (Eds.), 45 *Osgoode Hall L. J.* 637, 639 (2007) (referring to J.R. Allum, '"An Outcrop of Hell": History, Environment, and the Politics of the Trail Smelter Dispute' in Bratspies & Miller, *supra* note 20, 13).

disaster that has taken place within the state. Can Congress tell the states what they may or may not do in conducting disaster management? How they may go about choosing one contractor over another? How much of the state's budget is allocated to fight a wildfire and how much is allocated for Katrina relief?

The Canadian environmental policy community has been grappling with some questions that are similar to the United States' concerns: "Is federal authority limited to control of individual [natural re]sources that can be shown to have an adverse impact on another jurisdiction? Or is the very fact that a river is interprovincial justify federal regulation of all discharges into it? If so, would federal authority extend to the entire drainage basin of which an interprovincial river is a small part, on the ground that contaminants are mobile throughout the basin?"[24] These questions serve as a good parallel to the federal-state contention over many natural resources and the local, interstate (interprovincial), global, and transnational networks which help deconstruct the debate.

What does history say? Advantage, Congress – at least to some extent. It goes in Congress's favor that disaster relief (especially for disasters whose effects cross a state's boundaries) has never been considered part of a state's police powers and 'residuary and inviolable sovereignty'.[25] It also goes to Congress's favor that the immediate or long-term impact has much to do, at the very least, with dispersing environmental damage, decline in tourism, and thus 'commerce'.[26] Even though it is not easy to determine the bare minimum relationship (required by the Commerce Clause or the General Welfare Clause) between the federal means and the commercial ends, in a case last year Justice Kennedy insightfully noted that "the

24 *See* K. Harrison, *Passing the Buck: Federalism and Canadian Environmental Policy*, Vancouver, University of British Colombia Press, 1996, p. 44.

25 *See The Federalist* No. 39, B. Wright (Ed.), 1961, p. 285, (J. Madison). This sovereignty is not inexorable though. In a system like ours, "subnational units are autonomous sovereigns for some purposes but not for others, and thus are simultaneously both independent, autonomously self-governing entities and hierarchically subordinate dependencies of the national government". *See* J. A. Gardner, 'Whose Constitution Is It? Why Federalism and Constitutional Positivism Don't Mix', 46 *Wm. M. L. Rev.* pp, 1245, 1251 (2005).

26 Strict originalists of a certain brand reject this argument, mainly because they define 'commerce' quite restrictively. *See, e.g., Kidd v. Pearson*, 128 U.S. 1, 20 (1888) ("No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufactur[e] and commerce. Manufacture is transformation - the fashioning of raw materials into a change of form for use. The functions of commerce are different."); *United States v. Lopez*, 514 U.S. 549, 586 (Thomas, J., concurring) (1995) ("As one would expect, the term 'commerce' was used in contradistinction to productive activities such as manufacturing and agriculture. Alexander Hamilton, for example, repeatedly treated commerce, agriculture, and manufacturing as three separate endeavors.") (citing, *e.g.*, *The Federalist* No. 36, at 224 (referring to 'agriculture, commerce, manufactures'); id., No. 21, at 133 (distinguishing commerce, arts, and industry); id., No. 12, at 74 (asserting that commerce and agriculture have shared interests)); *see* id., at 587 ("Moreover, interjecting a modern sense of commerce into the Constitution generates significant textual and structural problems. For example, one cannot replace 'commerce' with a different type of enterprise, such as manufacturing. When a manufacturer produces a car, assembly cannot take place 'with a foreign nation' or 'with the Indian Tribes'. Parts may come from different States or other nations and hence may have been in the flow of commerce at one time, but manufacturing takes place at a discrete site. Agriculture and manufacturing involve the production of goods; commerce encompasses traffic in such articles.").

analysis depends not on the number of links in the congressional-power chain but on the strength of the chain".[27]

In close cases, this analysis will be subjective in substantial part and will elicit dissension even among jurists who buy into a broad conception of means-ends rationality of federal power.[28] Among jurists who do not, however, showing that a federal *law* (to mean, *means adopted*) is 'necessary and proper' to a federal *power* is a tougher sell.[29] But none of the jurisdictions under review disputes that a court must defer to the National Legislature's findings of fact, and when Congress accepts the Executive's finding that the amount of oil spilling out due to the disaster 'ranges between 12,000 to 19,000 barrels *per day*'[30] (which no state could seriously challenge with a straight face) the courts must accept this. The same goes for oil production: the U.S. Energy Information Administration (EIA), a federal government actor, states that oil production from federal offshore areas accounted for 29% of total domestic oil production in 2009.[31] And some of those areas are federal waters as well as deeply connected to state waters, swamps and marshlands. Pressure on the former has effects, both direct and ripple, on the latter. In 2009, ultra-deepwater offshore drilling (*i.e.*, drilling in more than 5000 feet of water) accounted for about a third of total federal offshore oil production; moreover, ultra-deepwater production tripled from 2005 to 2009.[32]

Even more importantly, the loss of hundreds of thousands of jobs and billions of dollars[33] implicates 'commerce' and 'general welfare' in a most obvious sense. Plus, the temporary moratorium on future, short-term drilling required by

27 *See United States v. Comstock*, 176 L. Ed. 2d 878, 900 (2010) (Kennedy, J., concurring in judgment).

28 *See Sabri v. United States*, 541 U.S. 600, 605 (2004) (using term 'means-ends rationality' to describe the necessary relationship); ibid. (sustaining Congress's 'authority under the Necessary and Proper Clause' to enact a criminal law under its Spending Clause power); *see Gonzales v. Raich*, 545 U.S. 1, 22 (2005) (stating that since 'Congress had a rational basis' for concluding that a statute effectuates commerce power, that law is within federal authority to 'make all Laws which shall be necessary and proper' to 'regulate Commerce ... among the several States'); *see also United States v. Lopez*, 514 U.S. 549, 557 (1995); *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 276 (1981).

29 *See* Sabri, *supra*, at pp. 612-613 (Thomas, J., concurring in judgment) ("To show that a statute is 'plainly adapted' to a legitimate end, then, one must seemingly show more than that a particular statute is a 'rational means', to safeguard that end; rather, it would seem necessary to show some obvious, simple, and direct relation between the statute and the enumerated power.").

30 *See* 'Summary Preliminary Report from the Flow Rate Technical Group Prepared by Team Leader Marcia McNutt, U.S. Geological Survey', United States Department of the Interior, available at <www.doi.gov/deepwaterhorizon/loader.cfm?csModule=security/getfile&PageID=33972>, last accessed 13 June 2010 (emphasis added).

31 *See* 'Production, Proved Reserves and Drilling in the Ultra-Deepwater Gulf of Mexico', U.S. Energy Information Administration (EIA): Information & Statistics: 26 May 2010, available at <www.eia.doe.gov/oog/info/twip/twiparch/100526/twipprint.html>.

32 Ibid.

33 *See, e.g.*, P. Wiseman and T. Watson, 'Future Losses from BP Oil Spill Worry Gulf Coast Businesses', *USA Today*, 13 June 2010, available at <www.usatoday.com/money/economy/2010-06-09-gulfbiz09_ST_N.htm> ("A month ago, the financial firm BBVA Compass estimated the direct economic toll from the worst oil spill in U.S. history at $4.3 billion. Now, BBVA economist Nathaniel Karp says, 'We are looking at somewhere close to $11.5 billion.'")

due diligence will also exact an opportunity cost. Historical and comparative analyses bear all this out.

I make the imperfect but thought-provoking argument that one strategy for proponents of a strong national government in the United States is to link, if possible causally, some federal policy of dubious constitutional provenance to the environment. And with good reason. Environmental issues almost inexorably are subjects of interstate concern; they are commercial in nature and statistics bear this out. The 'strength of the [federal rule-commerce] chain'[34] here is very high and the number of links is few. The Gulf of Mexico oil spill is a classic example. There is the general presumption that environmental components such as air and water are omnipresent agents that can affect the economy with instant positive or negative shocks – reasonably proximately so. Without informational certainty or expertise, it is hard for courts to rule one way or another. The deference and fact-finding questions linger uncomfortably.

However, the 'imperfection' (if you will) of my argument comes from the fact that this is a sword that can cut both ways. Communities which prefer tougher environmental standards in some states (such as California, Vermont and Massachusetts at least on some issues, e.g., greenhouse-gas emissions) will have to settle for more relaxed federal standards, if courts continue to give the federal government generous latitude in the environmental area. The saving grace in those cases might be Congress's refusal, in some instances, to pre-empt state regulations,[35] but such an abdication of the will of states would leave the ball entirely in Congress's court – the federal *noblesse oblige*. The purposes governing Congress are the ultimate 'touchstone' of the preemption inquiry.[36] The caveat is that these interpretive mechanics of preemption are just cosmetic; Congress, if it wishes, could expressly preserve or wipe out state regulation in wide swathes of the law given to Congress by Article I.

34 *See* Comstock, *supra*, at p. 900.

35 United States courts have strongly developed the pre-emption doctrine in recent years, usually coming out against pre-emption *unless* Congress spoke clearly. So long as Congress has a stake in the outcome, it is Congress which calls the shots. *See, e.g., Wyeth v. Levine*, 555 U.S. ___; 129 S. Ct. 1187 (2009) (Congress's intent governs the pre-emption inquiry); *Riegel v. Medtronic* (2008) (state common-law claims pre-empted); *Columbus v. Ours Garage and Wreckerservice, Inc.*, 536 U.S. 424 (2002) (Congress has not pre-empted with a clear statement, which is the requisite standard); *Unum Life Ins. Co. of America v. Ward*, 526 U.S. 358 (1999) (state rule does not conflict with a federal statute because a contrary interpretation would be inconsistent with that statute's text). These developments are part and parcel of the Supreme Court's proclivity over the past few decades to cut down, as much as practicable, on implied causes of action. See B. Clark, 'Separation of Powers as a Safeguard of Federalism', 79 *Tex. L. Rev.* (2001) pp. 1321, 1422-1424.

36 *See* Wyeth, *supra*, at pp. 1194-1195 ("First, the purpose of Congress is the ultimate touchstone in every pre-emption case." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal quotation marks omitted); *see Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963). Second, "[i]n all pre-emption cases, and particularly in those in which Congress has 'legislated ... in a field which the States have traditionally occupied', ... we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Lohr*, 518 U.S., at 485 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).).

Justice Scalia has persuasively argued that "unlike the channels, instrumentalities, and agents of interstate commerce, activities that substantially affect interstate commerce are not themselves part of interstate commerce, and thus the power to regulate them cannot come from the Commerce Clause alone".[37] Instead, "Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause"[38] of Article I. What happens when we confront the story of federal legislation "regulating the taking of a hapless toad that, for reasons of its own, lives its entire life in California"[39] and doesn't cross the state's borders? Is that interstate commerce or does it affect interstate commerce? What if "the effect on commerce [is to] be viewed not from the taking of one animal, but from the potential commercial differential between an extinct and a recovered species"[40]?

Over the process of Commerce Clause development, the tripartite test employed has been (i) whether the federal regulation, ostensibly in directing 'commerce', "encompasses the power to regulate local activities insofar as they significantly affect interstate commerce";[41] (ii) whether this effect is taken as an aggregate, cumulative whole;[42] and (iii) whether a 'significant factual connection', construed deferentially with regard to Congress' authority, exists "between the regulated activity and interstate commerce – both because the Constitution delegates the commerce power directly to Congress and because the determination requires an empirical judgment of a kind that a legislature is more likely than a court to make with accuracy"[43] – because the determination requires an empirical, logistical judgment of a kind (a 'fact-finding' mission of sorts) that the National Legislature is more likely than a court to make with accuracy. But a line must be drawn somewhere between fact-finding abdication to Congress and a usurpation of, and incompetence or lack of expertise at, fact-finding (a task that courts just don't have the resources to do well).

The 'hapless toad' hypothetical asks but still doesn't answer – how fact-intensive is a federal court to get? How will a federal court decide if the lack of federal intervention could reasonably be expected to result in extinction or some other injury of the species? Here Justice Breyer's recitation of the *aggregation principle* comes into play – the effect on commerce shouldn't be viewed in one-actor terms;

37 *Gonzales v. Raich*, 545 U.S. 1, 34 (2005) (Scalia, J., concurring in judgment) (citing *United States v. Coombs*, 37 U.S. 72, 78 (1838); *Katzenbach v. McClung*, 379 U.S. 294, 301-302 (1964); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942); *Shreveport Rate Cases*, 234 U.S. 342, 353 (1914); *United States v. E.C. Knight Co.*, 156 U.S. 1, 39-40 (1895) (Harlan, J., dissenting)).

38 *Ibid.*

39 *See Rancho Viejo, LLC v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir., 22 July 2003) (Roberts, J., dissenting from denial of rehearing *en banc*).

40 *See Rancho Viejo, LLC v. Norton*, 2001 U.S. Dist. LEXIS 16444, *29 (2001) (quoting *Gibbs v. Babbitt*, 214 F.3d 483, 487 (2000)).

41 *See* Lopez, *supra*, at p. 615.

42 *See* Lopez, *supra*, at p. 616 (quoting *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948)) ("[I]t is enough that the individual activity when multiplied into a general practice ... contains a threat to the interstate economy that requires preventative regulation.").

43 *See* Lopez, *supra*, at pp. 616-617.

rather the correct test is to ask whether there would be a substantial effect on interstate commerce if *all actors in that class* underwent (actively or passively) the particular phenomenon at issue.[44]

Now we get to the constitutional nub of it all, where the activity cannot be classified as 'commerce'. What happens in a close case where it's disputed whether some federal law is 'necessary' (we assume the law's 'propriety') to the achievement of some Article I congressional prerogative? How much deference is to be given the judgment of Congress? Must federal appellate courts and the Supreme Court review these factual findings by the District Court *de novo*? Is it legitimate for Congress by prescribe through the Exceptions Clause[45] which test or standard is to be applied by whatever layer of the Federal Judiciary to assess this key ingredient of the constitutionality of some Act of Congress itself?

To note a comparative reference, it's relevant that the Appellate Body in charge of interpreting the General Agreement on Tariffs and Trade (GATT), effective since 1994, has read restrictively the "necessary to protect human, animal or plant life or health" test of Article XX(b) or the "relating to the exhaustion of natural resources" test of Article XX(g): those welfare policies are to be sustained only if no 'less GATT-consistent' means can be undertaken.[46] These are described as "[m]easures which are indispensable or of absolute necessity or inevitable to secure compliance certainly fulfil the *requirements*"[47] of another GATT provision, Article XX(d). Importantly, the burden falls not on the claimant but on the government seeking to justify the measure. The Appellate Body in the *Korea – Beef*

44 *United States v. Lopez*, 514 U.S. 549, 616 (1995) (Breyer, J., dissenting).

45 U.S. Const. Art. III, § 2 ("In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."). For more analysis regarding the Exceptions Clause, *see* A. Glashausser, *A Return to Form for the Exceptions Clause*, 51 B. C. L. Rev. 1383, 1409 (2010) (arguing that there is "no doubt that [the Exceptions Clause] contemplated the legislative power as transformative rather than confiscatory", *i.e.*, the Exceptions Clause allows Congress the power to reorganize and expedite cases but not to totally strip the courts' jurisdiction over them).

46 *See* D.C. Esty, 'Greening the GATT: Trade, Environment, and the Future', 48, Vol. 1994, Part 2 (Peterson Institute, 1994); *see also* note 15 (noting that the test could work "as an efficiency precept, forcing attention to the means chosen to pursue environmental goals", Esty then states that GATT jurisprudence has ignored this balance, thus 'eviscerating Article XX'); P.F.J. Macrory, A.E. Appleton & M.G. Plummer, 3 *The World Trade Organization: Legal, Economic and Political Analysis*, New York, Springer 2005, pp. 844-845.

47 Report of the Appellate Body, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS135/AB/R (2001), 161 (emphasis added). I have italicized the word 'requirements' because it underscores what Article XX(d) is about and thus (somewhat) undermines arguments for analogizing the GATT 'necessity' analysis with the U.S. federalism-environment situation. Article XX(d) expressly carves out exceptions "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of [certain kinds of] monopolies operated ..., the protection of patents, trademarks and copyrights, and the prevention of deceptive practices". Does the inclusion of certain exceptions exclude others? Not necessarily – especially not when the text itself uses the word 'including' (keeping options open).

case[48] was candid in admitting: "At one end of this continuum lies 'necessary' understood as 'indispensable'; at the other end, is 'necessary' taken to mean as 'making a contribution to'". Over the years the Appellate Body has slackened the 'necessity' test. In the *EC – Asbestos* case,[49] the Body interpreted 'necessity' to mean *less trade-restrictive*, not *least trade-restrictive*. The Appellate Body has maintained that there is no route to get away from a proportionality-based, *ad-hoc*, case-by-case analysis balancing many factors. This whole comparison, of course, is not perfect; it is merely advisory and registers some good analytical points.[50]

What in the meantime has been happening to American federalism? What about commerce and what about necessity? Especially in environmental issues, as early as 1976 (in *Usery*), the federal government's commerce power was authoritatively understood to encompass "environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential".[51] And despite a 1976-1985 hiatus in most other areas affected by federalism, Congress never was besieged by any constitutional doubt about its trump card over the sweepingly large category of environmental law. It was all commerce and it was all necessary, though certainly (to some beholders) it didn't *have* to be.

This is extraordinary because in most other (if not almost all other) areas federal authority took a hit during this period. *Usery* stated that certain 'traditional governmental functions',[52] of a state such as rules concerning maximum hours-minimum wages of state employees – activities "typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services"[53] – are beyond federal interference.

The Supreme Court in *Usery* was quite concerned that federal intervention may "significantly alter or displace the States' abilities to structure employer-employee relationships in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation".[54] Although "[t]he Constitution created a Federal Government of limited powers",[55] the mobile, contagious and transferable character of environmental damage (of any sort) was categorically deemed to affect commerce – and *interstate* commerce at that. An argument could be made that this is about not only the physical mobility of pollutants but also the economic mobility of polluters.

48 *Ibid.*

49 Report of the Appellate Body, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (2001).

50 I do not mean to downplay the differences in drafting between the U.S. Constitution and the GATT (or other trade treaties) or indeed the differences between a Constitution for a Nation and a trade agreement binding several Nations. But because the 'necessity' test is not the heart of the prescription itself but rather represents the reach of the prescription, the U.S. Constitution-GATT comparison should be given further thought.

51 426 U.S. 833, 856 (1976) (Blackmun, J., concurring, and providing the decisive vote).

52 *See* Usery, *supra*, at 852.

53 *Ibid.*, at 851.

54 *Ibid.*

55 *See Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991); *The Federalist* No. 45, J. Cooke (Ed.), 1961, p. 313, (federal government's powers were 'few and defined').

Thus subsidiary jurisdictions which "must compete for investment by polluting industries [might be] incapable of unilaterally protecting the environment within their borders".[56] Still, the case might be weaker when issues like cap-and-trade and electric utilities[57] come up, for these questions provide ample room for non-federal decentralized decision-making eschewing the one-size-fits-all model.[58] This is structurally similar to federal banking legislation where states play an important role in administering the programs within their borders.[59] *A fortiori*, then, that *Usery* exemption must apply to larger and quicker-to-spread disasters as well. The recent oil spill, along with Hurricane Katrina, should be classed that way. The interstate commercial damage caused by these disasters (and addressed earlier) is staggering, and has already had significant economic impact on the environment, tourism, small and big business, and other commercial factors.

Usery retained *stare decisis* effect until 1985 when the Supreme Court turned 180 degrees in *Garcia* and converted this federal exemption into a general rule, now overruling *Usery's* 'traditional governmental functions' rule. In *Garcia*, the Court concluded that *Usery's* "attempt to draw the boundaries of state regulatory immunity in terms of 'traditional governmental function' is not only unworkable but is also inconsistent with established principles of federalism".[60]*Garcia* acknowledged that *Usery* had provided this non-exhaustive laundry list of traditional government functions of a state (basically, police powers) where the federal

56 *See* Harrison, *supra*, at 45.

57 *See, e.g.*, American Clean Energy and Security Act of 2009, H.R. 2454 ("To create clean energy jobs, achieve energy independence, reduce global warming pollution and transition to a clean energy economy."); *see* especially § 131-132 (establishing State Energy and Environment Development Accounts, thus delegating responsibilities to States, and supporting State Renewable Energy and Energy Efficiency Programs).

58 *See, e.g.*, A. Kaswan, 'A Cooperative Federalism Proposal for Climate Legislation: The Value of State Autonomy in a Federal System', (2008) 85 *Den. U. L. Rev.*, p. 791; A. Kaswan, 'The Domestic Response to Global Climate Change: What Role for Federal, State, and Litigation Initiatives?', (2007) 42 *U. San Fran. L. Rev*, p. 39; A. Kaswan, 'Reconciling Justice and Efficiency: Integrating Environmental Justice into Domestic Cap-and-Trade Programs for Controlling Greenhouse Gases', *in* A. Denis (Ed.), *Ethics and Global Climate Change* (Cambridge University Press, forthcoming 2010); W.J. Cantrell, ' Cleaning up the Mess: United Haulers, the Dormant Commerce Clause, and Transaction Cost Economics', 34 *Col. J. Env. L.* 149 (2009); A.E. Carlson, 'Federalism, Preemption, and Greenhouse Gas Emissions', 37 *U.C. Davis L. Rev.* (2003) pp. 281, 288; R.H. Cowart & S.K. Fairfax, 'Public Lands *Federalism*: Judicial Theory and Administrative Reality', (1988) 15 *Ecology L.Q.*, pp. 375, 385-386.

59 Before the reader comes back with the riposte that this example reveals for everybody that federal power is not so 'necessary' after all, that impression must be rebutted. Federal *power* (to mean, Congress's authority to delegate the responsibility to states) needs to stay in control and on message as a supreme, paramount actor in the economic schema; *how* the Legislature uses that power is a different thing. In other words, in the specific case Congress might decide that it's better for the states to adjust the processes within federal guidelines which is different from Congress lacking the power to legislate in the area. And of course in commercial examples we do not even need a Necessary and Proper Clause in order to assert congressional power; the Commerce Clause suffices.

60 *See* Garcia, *supra*, at p. 531.

government's interventionist power was at its very nadir – "fire prevention, police protection, sanitation, public health, and parks and recreation".[61]

Garcia found it difficult to delineate on a principled basis which areas of state functions were thus exempt from federal control and which were not.[62] The expansion has been remarkable and in some ways evidence of the development of constitutional doctrine that keeps pace with an integrated national (and international) economy. Fifty-one rules for fifty states might just be unworkable in some contexts. And the progressive-conservative table is strikingly turned (at least in the United States) when we come upon pre-emption. Here, business and particularly interstate business would strongly prefer *one* uniform, easily predictable, and easy-to-follow federal rule than fifty or more local rules. This population tends to be conservative in its political and economic outlook as far as capital gains and regulation are concerned. Federalism complicates things and makes for unusual bedfellows, many of whom are willing to bite the bullet and accept some immediately unhappy *result* in the instant case in exchange for a greater *principle* which could prove quite fruitful down the line. In the course of things, this trade-off could ensure that the doctrinal entrepreneurs like the outcomes in the long-run. This is helped by the fact that, in the common law regime, the work of lawyers and judges is somewhat predictable (at least that is the presumption and, in some cases, the aspiration).

The economic context present in *NLRB v. Jones & Laughlin Steel Corp.* (1937),[63] and *United States v. Darby* (1941),[64] helped establish that Congress can regulate intrastate activities that have an impact on interstate commerce. Then the civil rights battles brought on *Heart of Atlanta Motel, Inc. v. United States*, (1964),[65] which established that Congress needs only a rational basis to make that intrastate-activity-affects-interstate-commerce inference. Then *Fry v. United States* (1975),[66] and *Perez v. United States* (1971),[67] stood for the proposition that even if a single activity does not affect interstate commerce, if that activity falls within a class of activity that affects interstate commerce then this activity and that class can be regulated by Congress.

Justice Powell's *Garcia* dissent, apart from expressing respect for the sovereignty of the states and their accompanying police powers, mentioned state

61 *See id.*, at p. 575.

62 Drawing this line has been a difficult endeavour over the years. Courts and scholars have struggled with the project. *See, e.g., EEOC v. Wyoming*, 460 U.S. 226, 236 (1983) ("[t]he principle of immunity articulated in *National League of Cities* is a functional doctrine ... whose ultimate purpose is not to create a sacred province of state autonomy, but to ensure that the unique benefits of a federal system ... not be lost through undue federal interference in certain core state functions.") (citing to *Hodel v. Virginia Surface Mining & Recl. Assn.*, 452 U.S. 264 (1981)).

63 301 U.S. 1.

64 312 U.S. 100.

65 379 U.S. 241, 258.

66 421 U.S. 542.

67 402 U.S. 146.

responsiveness to local conditions as a controlling factor.[68] Justice Powell went so far as to state that "the commerce to be regulated [federally] was that which the States themselves lacked the practical capability to regulate".[69] It is not clear if Justice Powell would have applied that exact view or a close variant to *Garcia*. That view, irrespective of historical correctness, would overrule decades of Commerce Clause jurisprudence in areas where it is the national government that preempts state regulations, not the other way around. Justice O'Connor made a similar effort to Justice Powell's in defining what is federal vis-à-vis what is local but she too did not get much further.[70]

Could the same claims be made for states's rights in the disaster context – not in the broad orientation of what responses to take but as far as specific implementation decisions are concerned? For instance, assume an Arkansas official knows that one local technology contractor (whose work and professional standards the state official is familiar with) will be better and cheaper than another contractor (strongly favored by the federal government) in retaining and updating the inventory of a function just tangential to a larger federal effort in conjunction with the Arkansas officialdom. For something *that* ministerial. Should the federal government be able to tell the state, in the event of a stalemate, whom the state should hire with its budget? Is it 'necessary and proper' to a legitimate federal purpose?

The answer is unclear because while the transboundary issues certainly are of federal importance, over-broad generalizations could make all issues even remotely national by a long causal chain instantly 'federal'. That imprimatur

68 Garcia, *supra*, at 576-7. The Powell dissent states: "the administration and enforcement of federal laws and regulations necessarily are largely in the hands of staff and civil service employees. These employees may have little or no knowledge of the States and localities that will be affected by the statutes and regulations for which they are responsible. In any case, they hardly are as accessible and responsive as those who occupy analogous positions in state and local governments. ... My point is simply that members of the immense federal bureaucracy are not elected, know less about the services traditionally rendered by States and localities, and are inevitably less responsive to recipients of such services, than are state legislatures, city councils, boards of supervisors, and state and local commissions, boards, and agencies."

69 Garcia, *supra*, at p. 572.

70 *See* Garcia, *supra*, at p. 571-572 (O'Connor, J., dissenting) ("Like Hamilton, Madison saw the States' involvement in the everyday concerns of the people as the source of their citizens' loyalty.") citing *The Federalist* No. 17, J. Cooke (Ed.), 1961, p. 107, (States "regulat[e] all those personal interests and familiar concerns to which the sensibility of individuals is more immediately awake. . . ."); ibid. (States are "the immediate and visible guardian of life and property", which "contributes more than any other circumstance to impressing upon the minds of the people affection, esteem and reverence towards the government".); ibid. (arguing that "the people will be more familiarly and minutely conversant" with what states do, and "with the members of these, will a greater proportion of the people have the ties of personal acquaintance and friendship, and of family and party attachments ...").

would, of course, be constitutionally supreme over a state's will.[71] That would shut the state out of the process quickly. Professor David Barron candidly acknowledges – more candidly than courts have – that this federal-state distinction is a difficult one to draw. No subsidiary jurisdiction within the United States

> ...is an island jurisdiction. The ability of each locality to make effective decisions on its own is inevitably shaped by its relation to other cities and states, by its relation to broader, private market forces, and, most importantly, by the way the central power structures these relations, even when central governmental power appears to be dormant. Because the local sphere is part and parcel of a larger coordinated system of local jurisdictions that is structured by less visible background central-law rules, central power is often deeply (if not visibly) implicated in what we understand local autonomy to mean.[72]

To suggest that federal power or conditions created by federal power do not affect the reality of choices facing states is a chimera. This is tantamount to saying that the two-way osmosis of private and public law, too, is really a daydream.[73] Using Canada's 'Peace, Order, and good Government' clause,[74] Canadian courts have struck down provincial legislation that interfered with the national concern doctrine: if the overall broad subject (say, air pollution or coastal water pollution) is federal in nature, then the provinces should stay out of it. That is the central holding of *R. v. Crown Zellerbach Canada Ltd.* (1988),[75] a sequel to *Interprovincial*

71 *See* Supremacy Clause in U.S. Const., Art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."); *Younger v. Harris*, 301 U.S. 37, 44 (1971) (explaining the American "system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavours to do so in ways that will not unduly interfere with the legitimate activities of the States".).

72 *See* D. J. Barron, 'A Localist Critique of New Federalism', (2001) 51 *Duke L. J.*, pp. 377-379. Some scholars go so far as to claim that federalism actually undermines localism and local citizen participation. *See, e.g.*, F.B. Cross, 'The Folly of Federalism', (2002) 24 *Cardozo L. Rev.*, p. 1; E. Rubin & M.L. Feeley, 'Federalism: Some Notes on a National Neurosis', (1994) 41 *UCLA L. Rev.*, pp. 903, 915-917. Some, such as Wallace E. Oates, even argue as part of the 'decentralization theorem' that the financing of local public services ought to be decentralized to the smallest jurisdiction that can capture the costs and benefits of the relevant service. *See* W.E. Oates, *Fiscal Federalism*, New York, Harcourt Brace Jovanovich, 1972, pp. 54-63. Kathryn Harrison thoughtfully remarks: "Attempts to address global warming, for example, could entail policy responses that touch on most aspects of life in industrialized societies, many of which now fall within provincial jurisdiction." *See* Harrison, *supra*, at 44.

73 *See, e.g.*, D.J. Levinson, 'Rights Essentialism and Remedial Equilibration', (1999) 99 *Colum. L. Rev.*, pp. 857.

74 Section 91 of the Constitution Act (or the British North America Act (BNA Act)): Parliament has the authority to "make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces".

75 1 S.C.R. 401.

Cooperatives v. The Queen (1976).[76] This is extraordinary since Section 92(A) of the Constitution Act expressly gives provinces more power over non-renewable natural resources, into which Canadian courts have inserted the caveat that this is true *so long as that control does not adversely interfere with interests of national concern.* Put another way, Ottawa could show that some subject has been covered in a treaty with a foreign government, and this might be enough to wrest the issue away from provincial control. But that would make it too easy for the national government. Must a province then yield? Is all that is required a clear statement from Parliament that the province has no business in that area of public life?

This approach is not without its mechanical problems because some issues can be classed both as federal and as local. Who wins there? What analysis should we follow? Who bears the burden of proof over the other? Canada has been ahead of the United States in the federal criminal power arena. Canadian courts have upheld such federal legislation, deferring to Ottawa on public health issues (though in the United States, the starting position of this topic would be a regulatory question and a state police power, around which the federal government would need to tiptoe very cautiously).

This is partially informed by the 'cooperative federalism' case of *New York v. United States* (1992).[77] There the Supreme Court struck down (as invasive of a state's sovereignty) a radioactive waste 'take title' provision specifying "that a State or regional compact that fails to provide for the disposal of all internally generated waste by a particular date must, upon the request of the waste's generator or owner, take title to and possession of the waste and become liable for all damages suffered by the generator or owner as a result of the State's failure to promptly take possession".[78]

The energy-commerce-general welfare link did not suffice in *New York.* But *New York* is fundamentally a different creature than our scenario. There "Congress ha[d] crossed the line distinguishing encouragement from coercion".[79] However, federal *intrusion* has been approved in other cases. And in many European jurisdictions the subsidiary governments implement and enforce the federal command as a matter of course, not as a matter of special delegation – believing that this system interferes less with the sovereignty of that constituent part.[80]

Washington, D.C.'s intrusion into the affairs of American states could be incentive-driven or direct. While Congress cannot always directly coerce a state's hands through unfunded mandates, it can condition the receipt of federal funds

76 1 S.C.R. 477.

77 505 U.S. 144.

78 *Ibid.*

79 *Ibid.*, at p. 175.

80 *See* Council of European Communities, *European Council in Edinburgh, 11-12 Dec. 1992, Conclusions of the Presidency* 20-21 (1993); D. Currie, *The Constitution of the Federal Republic of Germany*, Chicago, University of Chicago Press, 1994, at pp. 68, 81-84, 100-101; J.A. Frowein, 'Integration and the Federal Experience in Germany and Switzerland', *in* 1, M. Cappelletti, M. Seccombe & J. Weiler (Eds.) *Integration through Law - European and the American Federal Experience*, Berlin/New York, Walter de Gruyter 1986, pp. 573, 586-587.

on given actions. The Constitution confers upon Congress the power to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States".[81] The Supreme Court's decision in *South Dakota v. Dole* (1987)[82] illustrates that Congress may condition federal funds to states upon the fulfillment of certain mandates.

In *Dole*, the Court articulated that the laws enacted by Congress under its Spending Clause authority must seek to promote (1) "the general welfare"; (2) "must [be enacted] unambiguously ... enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation"; and (3) must be related "to the federal interest in particular national projects or programs".[83] This is a comparably low, checkbox-like threshold for any federal statute to satisfy. Just like in the pre-emption cases, Congress will almost surely have 'the general welfare' in mind; it can just speak clearly; and it will manifest specific federal objectives and endeavors. So the reasons that led to *Printz v. United States's* (1997)[84] nullification, in part, of the congressionally-enacted Brady Handgun Violence Prevention Act (especially the provision requiring state officials to enforce a federal mandate without the state's consent) do not necessarily apply here.

The catastrophe scenario changes the dynamic of what a 'general welfare' power in that scenario (take the oil spill, for instance) looks like, the consequences that could result if Congress fails to act, and the uniformity of law needed in governmental responses.[85]

D. What is Truly National and What is Truly Local in a Disaster Situation?[86]

We need to recount the history of federalism in the United States. Federalism has been described centrally as posing the following question: "whether any realm is left open to the States by the Constitution – whether any area remains in which a

81 *See* U.S. Const. Art. I, § 8, cl. 1.

82 483 U.S. 203, 207.

83 *Ibid.*

84 521 U.S. 898.

85 *See ibid.*, at p. 936 (O'Connor, J., concurring) ("Congress is also free to amend the interim program to provide for its continuance on a contractual basis with the States if it wishes, as it does with a number of other federal programs."). Justice O'Connor pointed out that the federal government might enter into an interstate agreement with consenting, contracting states to achieve the same ends.

86 Paraphrased from *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) ("Undoubtedly, the scope of this [commerce] power must be considered in the light of our dual system of government, and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government"). This term of art ('what is national and what is local') was invoked once again in *United States v. Morrison*, 529 U.S. 598, 608, n. 3 (2000). This section is adopted almost verbatim from the author's earlier article, *Conflict of Constitutional Proportions: Treaty Power in Constitutional Law, and American Federalism versus NAFTA Chapter Eleven*, 3 Int'l J. Pvt. L. 221 (2010).

State may act free of federal interference."[87] This balance was struck by the Constitution after the operational deficiencies in the Articles of Confederation became clear.

The Articles had rendered a *national* government too subservient to the wills and whims of the constituent states.[88] It is through the sharing of power between the states and the national government (federalism), as well as checks and balances within the national government (separation of powers), that '[t]he Framers split the atom of sovereignty'.[89] The duality between Congress-state powers engenders a 'legal uncertainty', and was noted in two of the earliest path-marking decisions in the United States Supreme Court's Commerce Clause jurisprudence as an inevitable consequence of American federalism.[90] Federalism, after all, is a *process*, and "a device for realizing the concepts of decency and fairness which are

87 *See* Garcia, *supra*, at 581 (1985) (O'Connor, J., dissenting).

88 *See, e.g.*, V. Kesavan, 'When Did the Articles of Confederation Cease to be Law?', (2002) 78 *Notre Dame L. Rev*, pp.. 35, 42 ("The national government could not pass laws, make treaties, or appoint officers until the Congress and the President were, both formally and functioning ally, in office ...") (quoting G. Lawson & G. Seidman, 'When Did the Constitution Become Law?', (2001) 77 *Notre Dame L. Rev.*, pp. 1, 9); *see, e.g.*, 1 *The Records of the Federal Convention of 1787*, at pp. 18-19, 24-27, M. Farrand (Ed.), rev. ed. 1966 (1832) (remarks by Governor Edmund Randolph enumerating 'the defects of the confederation'); Letter from James Madison (1832), *in* 3 id. at 520 ("In expounding the Constitution and deducing the intention of the framers, it should never be forgotten, that the great object of the Convention was to provide, by a new Constitution, a remedy for the defects of the existing one ... ."). *See also The Federalist* Nos. 15 & 16 (arguing against a government by states), 21 (pointing out the current federal government's deficiencies under the Articles of Confederation), 22 (deficiencies in commerce power), 24-27 (defense), and 30 (taxation).

89 *See Saenz v. Roe*, 526 U.S. 489, 504, n. 17 (1999) (citing *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)). *See also The Federalist* No. 47, C. Rossiter (Ed.), 1961, p. 301, ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands ... may justly be pronounced the very definition of tyranny."); E.A. Young, 'Historical Practice and the Contemporary Debate over Customary International Law', (2009) 109 *Colum. L. Rev. Sidebar*, p. 31, <www.columbialawreview.org/Sidebar/volume/109/31_Young.pdf> (quoting B. R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex. L. Rev. 1321, 1328 (2001)) ("[T]he political and procedural limitations on national legislation – embodied in Article I's prescription of a difficult lawmaking process in which states are represented – take on particular importance with the expansion of federal legislation.").

90 *See* Lopez, *supra*, at 566 ("[S]o long as Congress' authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the Commerce Clause always will engender 'legal uncertainty.'"); *Gibbons v. Ogden*, 9 Wheat. 1, 189-190, 195 (1824) ("The enumeration presupposes something not enumerated."); *McCulloch v. Maryland*, 4 Wheat. 316, 405 (1819) ("The principle, that [the federal government] can exercise only the powers granted to it ... is now universally admitted. But the question respecting the extent of the powers actually granted ... will probably continue to arise, as long as our system shall exist.").

among the fundamental principles of liberty and justice lying at the base of all our civil and political institutions".[91]

Scholars and indeed eras of jurisprudence have received federalism both as an impediment to progress, as outdated relic of states' rights unfit for the twenty-first century, and as a requisite safety-valve to prevent the national government from becoming a Leviathan with untrammeled supervisory powers.[92] Even though "the United States, Canada, and Switzerland out-score all but four of their unitary rivals in terms of local capacity to define tax rates and base",[93] this means very little by way of democratic participation through state means.

And the ordinarily exalted recourse – democratic decentralization rather than much-criticized bureaucratic government – does not really render itself amenable to problem-solving in the immediate aftermath of a disaster.[94] Time is of the essence there and there is not enough of it to go back to the drawing board. What government actors need most is legal certainty in that sort of a situation. Bureaucracies are sometimes efficient and they get the job done. They have the expertise, the funding and the labor power. Democracy and the casting of so many votes lead to gradual directional shifts, not cataclysmic problem-solving.

The question has engendered such debate because, depending on how it is construed, it has the potential to remake society by divesting Congress of certain

91 *See* W. Brennan, 'Federal Habeas Corpus and State Prisoners: An Exercise in Federalism', (1961) 7 *Utah L. Rev.*, pp. 423, 442; *see also* A.R. Amar, 'Of Sovereignty and Federalism', (1987) 96 *Yale L.J.*, pp. 1425, 1428 ("[F]ederalism and sovereignty need not stand as cruel bars to full redress for unconstitutional conduct. Rather, they were originally understood to be, often have been, and can become once again, the very tools to right government wrongs. If federalism and sovereignty seem perverse today, it is only because our jurisprudence has perverted them, clumsily attempting to hammer legal devices for abused citizens into doctrinal defenses for abusive governments.").

92 For a comprehensive representation of these views, *see* R.F. Nagel, 'Federalism as a Fundamental Value: National League of Cities', in: (1981)*Perspective, Sup. Ct. Rev.* 81; M. Tushnet, 'Living in a Constitutional Moment?: Lopez and Constitutional Theory', (1996) 46 *Case W. Res. L. Rev.*, p. 845; J.C. Yoo, 'The Judicial Safeguards of Federalism', (1997) 70 *S. Cal. L. Rev.*, p. 1311. Interestingly, Professor Marci Hamilton rejects the contention that the 'invisible hand of politics' is sufficient to protect federalism both as a matter of constitutional history and as a matter of empirical knowledge. *See* M. A. Hamilton, 'The Elusive Safeguards of Federalism', (2001) 574 *Am. Acad. Of Pol. and Soc. Sc.*, pp. 93, 94 (disputing the "trust in the indivisible hand of politics" placed by Professors Herbert Weschler, Jesse Choper, and Larry Kramer) (in H. Wechsler, 'The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government', (1954) 54 *Colum. L. Rev.*, pp. 543, 558; L.D. Kramer, 'Putting the Politics Back into the Political Safeguards of Federalism', (2000) 100 *Colum. L. Rev.*, p. 215.

93 *See* R.M. Hills, Jr., 'Is Federalism Good for Localism? The Localist Case for Federal Regimes', 221 *J. L. & Pol.*, pp. 187, 203 (referring to Dan Stegarescu, Public Sector Decentralization: Measurement Concepts and Recent International Trends 1, 18 (Discussion Paper No. 04-74, Centre for European Economic Research), available at <ftp://ftp.zew.de/pub/zew-docs/dp/dp0474.pdf>).

94 *See* Hills, *supra*, at pp. 205-217; *see ibid.*, at p. 218 ("In most unitary regimes, the national government has relied heavily on appointed agency experts to supervise local governments – regional offices of the finance ministry (in Spain), department prefects or the regional courts of accounts (in France), county governors (in Sweden). In some of these regimes, like France, the agency experts have been given authority pervasively to supervise the activities of democratically elected officials. In other unitary states, the national bureaucracy rules with a much lighter hand.").

powers and negotiating them away to states, and *vice versa*. Imagine a society where it is Congress and not the states which had the supremacy to decide questions of family law, including divorce law and adoption law, creating a one-size-fits-all standard. Similarly, vigorously tinkering with federalism in the opposite direction might free the states (Congress's legislation notwithstanding) to provide no recourse to persons discriminated on account of race, age, sex, or sexual orientation when invoking a service over which the state has monopoly.

The view of states as sovereign entities, rather than merely as constituent parts of a national whole, experienced a renewal in the United States in the mid-1990s. At its core is the historic fact that originally the states were antecedent to the Union's formation. This renewal, mostly judicial in nature,[95] was validated by the Supreme Court as the dominant word on the subject, after six decades in the judicial wilderness since the New Deal's expansion of national power by curbing the regulatory authority of the states in the 1930s.

As the early-twentieth century economy enlarged and the link between intrastate commerce and interstate commerce began showing a strong enough causal connection, the Supreme Court attributed federal supremacy to four provisions of the Constitution: the Commerce Clause, the Necessary and Proper Clause,[96] the Supremacy Clause,[97] and the Fourteenth Amendment's Enforcement Clause.[98] Whereas the first three provisions were part of the original Constitution of 1787, ratified by the states in 1789, the last provision, landscape-altering for several reasons, was adopted in 1868.[99] Moreover, whereas the Commerce Clause, the Necessary and Proper Clause, and the Enforcement Clause are 'lateral' provisions empowering the national government, the Supremacy Clause is best characterized as a 'vertical' provision that places the laws and policies of the national government above those of the states.[100]

95 Congress continued to pass expansive federal laws, and it was the Supreme Court – in decisions such as *Lopez*, *Printz*, and *Morrison* – that reined in Congress. Federalism, more than any other area of constitutional law, will likely be judged the enduring legacy of the second-half of the Supreme Court under Chief Justice William H. Rehnquist's stewardship.

96 *See* U.S. Const. Art. I, § 8, cl. 18 ("The Congress shall have Power - To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.")

97 *See* U.S. Const. Art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land.").

98 *See* U.S. Const. Amdt. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

99 *See, e.g.*, R.L. Aynes, 'On Misreading John Bingham and the Fourteenth Amendment', (1993) 103 *Yale L. J.*, p. 57; A.R. Amar, 'The Bill of Rights and the Fourteenth Amendment', (1992) 101 *Yale L. J.*, p. 1193.

100 Indeed, the importance of the Supremacy Clause should not be underestimated. James Madison had spiritedly urged that *sans* a clause privileging national power over the rights of states, any Constitution "would ... b[e] evidently and radically defective". *See The Federalist* No. 44, C. Rossiter (Ed.), 1961, p. 286. Madison had expressed similar sentiments in *The Federalist* No. 44, arguing that without the requisite elasticity of the Necessary and Proper Clause the Constitution would be a 'dead letter'. *See* id. Over Patrick Henry's objections at the Virginia ratifying convention, the Constitution, containing the Necessary and Proper Clause, was adopted.

This provision is also the reason that, in the commercial or economic field, federal law is understood to 'pre-empt' state law, unless Congress expressly has carved out an exemption in which state law may operate.[101] In the 1930s the arrival of the Great Depression helped point out the ever-important role of the federal government, as more than just a confluence of states, in economic and financial matters.[102] Even though President Franklin D. Roosevelt's Court-packing plan endured a spectacular disaster in the hands of Congress and the public, the President succeeded in appointing new Supreme Court Justices who shared his view of broad federal power.[103]

Wickard v. Filburn (1942)[104] served as a watershed case in American constitutional law when, in an about-face from decades of eroding federal power (in promoting the rights of states) and the 'liberty of contract' (in promoting the rights

101 *See, e.g., Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) ("[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."); *United States v. California*, 297 U.S. 175, 185 (1936) ("[W]e look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce"); *Lake Shore & Michigan Southern R. Co. v. Ohio*, 173 U.S. 285, 297-298 (1899) ("When Congress acts with reference to a matter confided to it by the Constitution, then its statutes displace all conflicting local regulations touching that matter, although such regulations may have been established in pursuance of a power not surrendered by the States to the General Government").

102 *See* J. Choper, 'Taming Congress's Power Under the Commerce Clause: What Does the Near Future Portend?', (2003) 55 *Ark. L. Rev.*, pp. 731, 756; K. Sullivan & G. Gunther, *Constitutional Law*, New York, Foundation Prress 2001, pp. 119-20 (14th ed. 2001).

103 *See, e.g.*, L. Kalman, 'The Constitution, the Supreme Court, and the New Deal', (2005) 110 *Am. Hist. Rev.*, p. 1052; W. E. Leuchtenberg, *The Origins of Franklin D. Roosevelt's 'Court-Packing Plan'*, 1966 Sup. Ct. 347. Due in large part to the solicitous judicial orientation of the first few Roosevelt appointees towards federal power, the Court reworked the scrutiny it would provide economic (entitled to rational basis scrutiny under the Constitution) vis-à-vis social and criminal regulations (subject to strict scrutiny). This duality was best summed up by Footnote Four in *United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1938) (n. 4) (there was a "presumption of constitutionality" unless "legislation appears on its face to be within a specific prohibition of the Constitution"; a "correspondingly more searching judicial inquiry" when the challenged policy works to advance "prejudice against discrete and insular minorities" for such groups often cannot avail themselves of the "operation of those political processes" open to others). Professor Peter Linzer has accorded Footnote Four the curious distinction of being the "most famous footnote in constitutional law". *See* P. Linzer, 'The Carolene Products Footnote and the Preferred Position of Individual Rights: Louis Lusky and John Hart Ely vs. Harlan Fiske Stone', (1995) 12 *Const. Comment.* 277.

104 317 U.S. 111.

of potent private entities against the regulatory power),[105] the Supreme Court upheld a federal regulation of *intrastate* wheat production as consonant with the Commerce Clause authority of Congress.

The Court has used the Necessary and Proper Clause, giving Congress the authority of all reasonable and legitimate means to achieve its federal objectives. We have already talked about this Clause. This particular exercise of Congress' commerce power did not actively displace any state regulation, but that never was the point anyway. Since Congress was a creature of the states as antecedent to the federal experiment, it was incumbent upon Congress, some argued, to act within the narrow constitutional parameters given by the particular phraseology of the commerce power. But, as Justice Stevens stated in his dissent in *United States v. Lopez* (1995),[106] "...whether or not the national interest in [regulating a certain] market would have justified federal legislation [under the Commerce Clause] in 1789, it surely does today". It is also fair to say that the "commerce connection [must be viewed] not as a 'technical legal conception', but as 'a practical one'."[107]

The United States Supreme Court in the late 1930s and early 1940s converted its own pre-New Deal jurisprudence's reflexive and automatic nullification of congressional interference in remotely economic matters into a test of rationality; a showing of reasonable connections between the local activity and the federal regulation would immunize the federal measure. As earlier explained, though, there is great tension whether that is a correct test. Because the intricacies of federal bureaucracy work in a patchwork structure over which Congress rather than the courts retain expertise, judicial restraint is especially pertinent here. When courts review whether a federal measure exceeds Congress's enumerated powers, the distinction between congressional *will* and congressional *expertise* is especially important.

Deploying this test, the Supreme Court had upheld a whole range of federal provisions from civil rights (securing the freedom from discrimination of African

105 The issue is whether the right to liberty protected by the Due Process Clauses of the Fifth and Fourteenth Amendments take offense from a law regulating the working conditions of laborers and other employees by interfering with their transactional interests and capacities concerning their employers. In one line of cases, the Supreme Court had answered in the affirmative. *See, e.g., Adair v. United States*, 208 U.S. 161 (1908); *Lochner v. New York*, 198 U.S. 45 (1905); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897). But *see West Coast Hotel v. Parrish*, 300 U.S. 379, 392 (1937) (quoting *Chicago, B. & Q. R. Co. v. McGuire*, 219 U.S. 549, 567) (1911) ("[F]reedom of contract is a qualified, and not an absolute, right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.").

106 514 U.S. 549, 603 (Stevens, J., dissenting). *See also* B. Cardozo, *The Nature of the Judicial Process*, New Haven, University Press 1921, pp. 82-83.

107 *See United States v. Lopez*, 514 U.S. 549, 618-619 (1995) (Breyer, J., dissenting) (quoting *Swift & Co. v. United States*, 196 U.S. 375, 398 (1905)).

Americans)[108] to regulating the unfair labor practices of corporations.[109] These provisions make Congress more than a government of 'limited and enumerated powers'.[110] In 1995, though, in a series of decisions starting with *Lopez* and continued via *Printz* and *United States v. Morrison* (2000),[111] the Court limited the commerce power authority of Congress. The Court now sought a closer 'nexus' between the regulated activity and the federal commerce power.

That diminution of federal enforcement powers, especially regarding hate crimes, enhances state power.[112] This is especially so in areas where federal and state powers cannot be concurrent and federal powers retain supremacy. That some state regulations 'significantly affect[t]' federal commerce is bedeviled by malleability, thus carrying the potential to root out federalism completely from the national scene.

Wickard's inclusion of intrastate commerce within the space of interstate commercial effects became crystal clear when the Court decided *Gonzales v. Raich* (2005).[113] Upholding the Controlled Substances Act (CSA)'s[114] preemption of state drug policies, the *Raich* Court cited *Wickard* for the proposition that "even if [the] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce".[115] Moreover, *Raich* distinguished the matter of

108 *See Katzenbach v. McClung*, 379 U.S. 294 (1964).

109 *See, e.g., NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). *See also* R.L. Stern, 'The Commerce Clause and the National Economy, 1933-1946', (1946) 59 *Harv. L. Rev.*, pp. 645, 674-682; A.E. Sutherland, *Constitutionalism in America: Origin and Evolution of its Fundamental Ideas*, Blaisdell Pub. Co. 1965, pp. 495-497, 499; S.M. McJohn, 'The Impact of United States v. Lopez: The New Hybrid Commerce Clause', (1995) 34 *Duq. L. Rev.*, pp. 1, 5. An extremely strict definition of *commerce* might even put federal regulation of labor activity outside the province of Congress to regulate. While that would be unfortunate, it should not be surprising given a natural outgrowth of the Court's decisions if Justice Thomas' views were to prevail.

110 But *see* Lopez, *supra*, at 592 (Thomas, J., concurring). *See also The Federalist* No. 45, C. Rossiter (Ed.), 1961, pp. 292-293. ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."); *Chisholm v. Georgia*, 2 Dall. 419, 435 (1793) (Iredell, J.) ("Each State in the Union is sovereign as to all the powers reserved. It must necessarily be so, because the United States have no claim to any authority but such as the States have surrendered to them") (emphasis deleted).

111 529 U.S. 598.

112 *See, e.g.*, A. E. Varona, 'Anchoring Justice: The Constitutionality of the Local Law Enforcement Enhancement Act in United States v. Morrison's Shifting Seas', (2001) 12 *Stan. L. and Pol'y Rev*, pp. 9, 10-12.

113 545 U.S. 1.

114 84 Stat. 1242, 21 U.S.C. § 801 et seq.

115 *See* Raich, *supra*, at 17 (quoting *Wickard v. Filburn*, 317 U. S. 111, 128-129 (1942)); *see also* C.E. Schneider, 'A Government of Limited Powers', (2005) 35 *The Hastings Ctr. Rep.*, p. 11 ("The principle of *stare decisis* obliges American courts to decide similar cases similarly. *Raich* virtually was *Wickard*. 'Like the farmer in *Wickard*, respondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market. Just as the [Agricultural Adjustment Act (AAA)] controlled the amount of wheat in interstate and foreign commerce, a primary purpose of the CSA is to control the supply and demand of controlled substances in both lawful and unlawful drug markets'.").

drug policy at issue there ("regulates the production, distribution, and consumption of [illegal drugs] for which there is an established, and lucrative, interstate market"[116]) with the extremely violent but basically non-economic crimes at issue in *Morrison* and *Lopez*. The cultivation and production of intrastate illegal drugs exhibited a proximately causal relationship to the interstate market, justifying congressional power.

This analysis is not seamlessly consistent. Time and again, there have been efforts to distinguish an earlier case from the result the contemporary Supreme Court thought was appropriate in the immediate case. The history and the doctrine has been beclouded but this constitutional analysis has come to include two basic components: (1) Congress has the authority to intervene in certain enumerated areas of national life, such as interstate or foreign commerce, money, war declarations, military services, uniform bankruptcy laws, etc.; and (2) there is a broad and unlisted category of powers that Congress also retains, powers that are 'necessary and proper' to act as a central authority. Government and private groups have sparred over this ambiguous phrase.

Our history has unfolded to show tensions between the national government and corporations, first with respect to navigable trade (early nineteenth century cases such as *Gibbons v. Ogden* (1824)[117]), then with competitive intrastate rates in land transportation and Securities and Exchange Commission (SEC) jurisdiction (establishing the *Shreveport* doctrine in *Houston East and West Texas Railway Co. v. United States* (1914)[118]), and finally today with disasters. In an era where everything has the potential to turn into Y2K malfunctions, the federal powers underlying commerce and welfare must address that.

In each case, citizens, corporations or private groups have sought a determination that the federal power in regulating a particular aspect of our affairs goes beyond the realm of 'commerce' and interferes with issues of state control. There is a vast difference between Congress's coming to some sort of conclusion in Situation A (some federal policy, whose interstate commerce implications are not necessarily so clear, does affect interstate commerce in some fundamental ways) and Situation B (some federal policy is just unconstitutionally orientated because it lords over states in some area where the federal government's wings are just clipped).[119]

116 Raich, *supra*, at 26.

117 9 Wheat. 1.

118 234 U.S. 342, 350-1 (citing *Gibbons v. Ogden*, 9 Wheat. 1, 196, 224; *Brown v. Maryland*, 12 Wheat. 419, 446; *County of Mobile v. Kimball*, 102 U.S. 691, 696, 697; *Smith v. Alabama*, 124 U.S. 45, 473; *Second Employers' Liability Cases*, 223 U.S. 1, 47, 53, 54; *Minnesota Rate Cases*, 230 U.S. 352, 398, 399 for the proposition that "[b]y virtue of the comprehensive terms of the grant, the authority of Congress is at all times adequate to meet the varying exigencies that arise and to protect the national interest by securing the freedom of interstate commercial intercourse from local control").

119 *See The Federalist* No. 82, C. Rossiter (Ed.), 1961, p. 491 (A. Hamilton) ("The erection of a new government, whatever care or wisdom may distinguish the work, cannot fail to originate questions of intricacy and nicety; and these may, in a particular manner, be expected to flow from the establishment of a constitution founded upon the total or partial incorporation of a number of distinct sovereignties.").

E. Conclusion: Federal Power is Broader *Because* it is a Disaster but that Power is Not Unlimited

This is perhaps the Goldilocks standard: not too limited, nor too expansive. In short, it is the federal balance. I would not go so far as Justice Brennan's dissent in *Usery*,[120] and do think that the Court was correct in that congressional powers over states are not boundless.[121] Nonetheless the courts must give Congress a wide berth of deference when the latter exercises its expertise, which is separate from its will. It remains interesting what the courts will do here. What Congress may do is that it must speak clearly and must write severable provisions into law. Courts will not presume Congress has tinkered with state sovereignty unless Congress speaks clearly;[122] and if courts find that Congress's intrusion is out of bounds, they will strike down the whole statute unless the good apples can be separated from the bad ones.[123]

The case for supervening federal power is stronger than ever in a catastrophe where commerce and welfare are implicated, but that power must not usurp state functions that are only tangential to the federal effort. To return to the old example, does the federal team really benefit a whole lot, and does the constitutional scheme benefit at all, by overriding the state official's knowledge about which contractor to hire for a purely ministerial task? The *Dole* test, inquiring whether there exists a substantial federal interest and tying the federal rule neatly to that interest, is the superior formulation. This federal power is both prophylactic *and* remedial. It is not essential for Congress to await a pervasive, detrimental problem before crafting a systemic statutory remedy. In a fact-intensive case, the District Court must review the facts with deference to the Legislature's findings unless those findings are clearly erroneous.

No one has arrived at a formula about the way this analysis, which must essentially be ad-hoc and fact-specific, will work out. Still, the common denominator across the United States, Canada and Europe is the focus on citizen liberty. That structural safeguards such as the separation of powers and federalism defend this all-encompassing objective is exhibited by Justice LeBel's view that "a new unwritten principle of respect for human rights should inform the future jurisprudence of the [Canadian] Supreme Court".[124] Justice Lebel's emphasis on

120 Usery, *supra*, at 858 (stating that "effective restraints on [congressional power] exercise must proceed from political rather than from judicial processes" and that "there is no restraint based on state sovereignty requiring or permitting judicial enforcement anywhere expressed in the Constitution").

121 Id., at 841.

122 *See, e.g., Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 73 (2000).

123 *See, e.g., United States v. Booker*, 543 U.S. 220, 245 (2005) (opinion of the Court by Breyer, J.).

124 *See* V. Krishnamurthy, 'Colonial Cousins: Explaining India and Canada's Unwritten Constitutional Principles', (2006), 31 *Yale J. Intl. L.*, pp. 207, 218; *see also* L.E. Weinrib, 'The Postwar Paradigm and American Exceptionalism', in S. Choudhry (Ed.), *The Migration of Constitutional Ideas*, New York, Cambridge University Press 2006, pp. 89-91.

constitutional structure and organization to protect human rights is especially refreshing for its candor.[125]

Speaking to the human rights concern should be the new frontier. That concern is not always about some Individual-Government conflict; rather, by assuring a fair balance between the state-federal authorities. That boundary patrol may well be where the next frontier of biodiversity, environmental protection, and climate change is decided. Sadly, in American legal discourse we seem to get lost in the structural and dry issues attending federalism. Those issues *are* of paramount importance but there is still more to the equation. We address very little of the human rights dimension. That should change, and empirical experiences in other jurisdictions sharing our basic human rights values can be helpful. The U.S. Supreme Court has made itself open to that approach, and we should take the cue.

125 *See R v. Demers*, [2004] 2 S.C.R. 489, 535, 537 ("Structural analysis ... is not new and is often implicit in our federalism jurisprudence ...In order to determine what result in a particular case is dictated by the Constitution, structural analysis looks to the relationships created by the Constitution among various levels and branches of government, and also between the state and the individual.").