

CONGRESSIONAL FEDERALISM AND THE JUDICIAL POWER: HORIZONTAL AND VERTICAL TENSION MERGE

W. WILLIAM HODES*

At a symposium on national power and state autonomy,¹ held in the beautiful chamber of a State House of Representatives, it is fitting that we have heard a lot of talk about federalism from the vantage point of the state governments and the state courts. We have had panels on the role of the Supreme Court in shaping state autonomy² and on the federal government's possible ability to commandeer not just the state bureaucracy but the state courts.³ State court judges asked questions and made comments from the floor. Our luncheon speaker was the State Attorney General,⁴ speaking in the same vein and from the same baseline.

The final panel of the symposium, however, is on federalism from the vantage point of *Congress*, featuring a presentation by Professor Ronald Rotunda of the University of Illinois College of Law,⁵ with commentary by Professor Saikrishna Prakash,⁶ visiting at the same school.

"Federalism from the vantage point of Congress" is actually a misstatement of the topic—a misstatement I made deliberately, because the process of correcting it can shed some light on the true subject of the inquiry. In my view, thinking about "congressional federalism" actually requires us to think less about what the federal *Congress* is up to, and more about what the federal *courts* are up to. This is symbolized by the very title of Professor Rotunda's paper, *The Powers of Congress Under Section 5 of the Fourteenth Amendment After City of*

* Professor of Law, Indiana University School of Law—Indianapolis. This Essay is an extension of remarks I made at the symposium that forms this issue of the *Indiana Law Review*, introducing the talk by my friend and former colleague, Ron Rotunda. I would like to thank Karen Butler Reisinger for her thoughtful and painstaking work filling in the holes that I had left in the manuscript. Without meaning to, she transformed herself from Executive Managing Editor to Research Assistant, and back again.

1. Symposium, *National Power and State Autonomy: Calibrating the New "New Federalism,"* 32 IND. L. REV. 1 (1998).

2. See John C. Yoo, *Sounds of Sovereignty: Defining Federalism in the 1990s*, 32 IND. L. REV. 10 (1998); see also Ronald J. Krotoszynski, Jr., *Listening to the "Sounds of Sovereignty" But Missing the Beat: Does the New Federalism Really Matter?*, 32 IND. L. REV. 11 (1998); S. Elizabeth Wilborn Malloy, *Whose Federalism?*, 32 IND. L. REV. 45 (1998).

3. See Martin H. Redish & Steven G. Sklaver, *Federal Power to Commandeer State Courts: Implications for the Theory of Judicial Federalism*, 32 IND. L. REV. 71 (1998); see also Vicki C. Jackson, Printz and Testa: *The Infrastructure of Federal Supremacy*, 32 IND. L. REV. 111 (1998).

4. Jeffrey A. Modisett, *Discovering the Impact of the "New Federalism" on State Policy Makers: A State Attorney General's Perspective*, 32 IND. L. REV. 141 (1998).

5. Ronald D. Rotunda, *The Powers of Congress Under Section 5 of the Fourteenth Amendment After City of Boerne v. Flores*, 32 IND. L. REV. 163 (1998).

6. Saikrishna Prakash, *A Comment on Congressional Enforcement*, 32 IND. L. REV. 193 (1998).

Boerne v. Flores.⁷ His paper is nominally about the powers of Congress, to be sure, but the inquiry concerns those powers *as governed by a recent decision of the United States Supreme Court*. And that is the essence of these introductory remarks: exercise of national government power viz-a-viz the states—federalism—cannot be divorced from the duel among the branches of the national government as to how those powers will be exercised and by whom—a question of separation of powers. The two doctrines merge and become indistinguishable.

In law school Constitutional Law courses, students are typically taught to think of federalism as an exercise in hydraulics. The federal government as a whole is portrayed as a large vertical piston, pressing inexorably downwards to squeeze out most state power and most state autonomy.⁸ The piston sometimes meets with resistance, of course, and sometimes the piston is pushed or drawn back up a notch or two, but we all know how the story must end. The Supremacy Clause⁹ allows Congress to preempt and displace considerable state law, so long as Congress acts properly within the scope of one of its enumerated powers, especially its power under the Commerce Clause.¹⁰ And despite a nip here and a tuck there, that scope is broad.¹¹ The same Supremacy Clause, in tandem with

7. Rotunda, *supra* note 5.

8. See JERRE S. WILLIAMS, CONSTITUTIONAL ANALYSIS IN A NUTSHELL, 145-82 (West 1979). This short treatise features a series of diagrams, mapping out possible vertical and horizontal allocations of power.

9. U.S. CONST. art. VI, cl. 2.

10. See generally *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). With respect to the Commerce Clause, see *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), and compare *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (finding that Congress has no power to prohibit interstate shipment of goods produced by child labor), with *United States v. Darby*, 312 U.S. 100 (1941) (overruling *Hammer v. Dagenhart*), and *Wickard v. Filburn*, 317 U.S. 111 (1942) (finding that Congress may regulate local economic activity that, in the aggregate, can affect interstate commerce in non-trivial ways).

11. In *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court, for the first time since the New Deal, invalidated a federal statute on the ground that Congress had exceeded its power under the Commerce Clause, U.S. CONST. art. I, § 8, cl. 2. By a 5-4 vote, the Court struck down portions of the Gun-Free School Zones Act, 18 U.S.C. § 922(q) (1994), making it a federal crime to possess a firearm within 1000 feet of a school facility (without any showing that the firearm had earlier moved in interstate commerce). *Lopez*, 514 U.S. at 551.

Lopez may have established that there is a limit to congressional power under the Commerce Clause, but that power is hardly moribund. *Lopez* did not, for example, call into question any federal statute that directly regulates interstate commerce, the interstate traffic in goods, or the sale of goods for which there is a large interstate market. Since *Lopez* was decided, there have been thousands of federal prosecutions for illegal possession—not just sale—of narcotics and firearms. Moreover, *Lopez*-based challenges to the Drug-Free School Zones Act, 21 U.S.C. § 860(a) (1994), which prohibits possession of illegal drugs within 1000 feet of a school facility have routinely been rejected. See, e.g., *United States v. Jackson*, 111 F.3d 101 (11th Cir.) (pointing out that every Circuit to face the issue has so ruled), *cert. denied*, 118 S. Ct. 200 (1997).

the Fourteenth Amendment,¹² allows the federal courts to dictate the terms upon which states will operate virtually all of their public institutions, from public schools¹³ and mental institutions¹⁴ to public employment¹⁵ to the civil and criminal justice systems themselves.¹⁶ There is also the Full Faith and Credit

The federal arson statute has routinely been applied, at least where the premises in question are business or commercial properties, and thus “affect” interstate commerce, even if only in the aggregate. *Compare* *United States v. Pappadopoulos*, 64 F.3d 522 (9th Cir. 1995) (finding that statute may not be applied to arson of a private residence, merely because it received natural gas from an out-of-state source), *cert. denied* 118 S. Ct. 1328 (1998), *with* *United States v. Gomez*, 87 F.3d 1093 (9th Cir. 1996) (finding that arson of any business property is activity substantially affecting interstate commerce). A statute that is more problematic on Commerce Clause grounds, the Violence Against Women Act, Pub. L. 103-22, 108 Stat. 1902 (1994) (codified at scattered sections of 16 U.S.C., 18 U.S.C. and 42 U.S.C.), will no doubt eventually be tested in the Supreme Court. *See* *United States v. Gluzman*, 154 F.3d 49 (1998) (upholding conviction under 18 U.S.C. § 2261(a) of a woman who crossed state lines with her lover to murder her husband); *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 132 F.3d 949 (4th Cir. 1997), (reinstating complaint under 42 U.S.C. § 13981 of a college student who was raped by other students), *reh'g en banc granted, opinion vacated* Nos. 96-1814, 96-2316 (Feb. 5, 1998).

12. U.S. CONST. amend. XIV.

13. *See, e.g., Plyler v. Doe*, 457 U.S. 202 (1982) (finding that denial of free public education to children of “undocumented” illegal aliens violates the Fourteenth Amendment); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (holding that de jure segregation of public school children by race violates the Fourteenth Amendment). *But see* *Missouri v. Jenkins*, 515 U.S. 70 (1995) (finding that federal court has no authority under Fourteenth Amendment to order funding of enrichment programs designed to raise black student achievement levels to national norms, absent showing that existing achievement levels were attributable to prior de jure segregation).

14. *See, e.g., Youngberg v. Romeo*, 457 U.S. 307 (1982) (holding that the Fourteenth Amendment requires state to provide minimally adequate care to involuntarily committed retarded persons to ensure their safety and freedom from undue restraint, but professional employees have considerable discretion in judging proper course of care); *Addington v. Texas*, 441 U.S. 418 (1979) (holding that Fourteenth Amendment requires proof by clear and convincing evidence before state may involuntarily commit persons with mental disorders).

15. *Compare* *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985) (finding that the Fourteenth Amendment requires that state employees subject to termination only for cause must be given “some kind of hearing,” including a pretermination hearing that need not be elaborate), *and* *Perry v. Sindermann*, 408 U.S. 593 (finding the policies and practices of a public university may create a property interest in reemployment that is entitled to protection under the Fourteenth Amendment), *with* *Board of Regents v. Roth*, 408 U.S. 564 (1972) (finding that the Fourteenth Amendment creates right to “some kind of hearing” to protect property rights, but nontenured teacher ordinarily does not have a property interest in reemployment).

16. There are too many areas of the law—let alone cases—for meaningful citation. Every case on personal jurisdiction, for example, from *Pennoyer v. Neff*, 95 U.S. 714 (1877), forward could be cited, as could every case involving either the death penalty or the procedural rights of criminal suspects or defendants generally.

Clause,¹⁷ which allows both the Congress and the Supreme Court to dictate to the state courts on matters of interstate preclusion.¹⁸

But all is not lost for the states, because there is some upward pressure on the piston as well, as I already mentioned. The federal government is a government of broad but nonetheless limited powers, and the Tenth Amendment¹⁹ at a minimum reserves to the states the powers not granted to the central government and prevents the national government from “commandeering” the resources and processes of the state governments.²⁰ And the doctrine of sovereign immunity, whatever its true source,²¹ ensures that in many situations the states of the United States are safe from being sued in federal court against their will.

Because federalism evokes the images of a hierarchy and of a piston pressing downward or being pushed back up, the whole area is often referred to as one of “vertical tension,” as Professor Torke mentioned in his overall introduction to the symposium.²² But that is only part of the story. Law students are also told about “horizontal tension” as well, namely separation of powers and checks and balances disputes between and among the three branches of the federal government. For example, the President—whether he be Richard Nixon or William Jefferson Clinton—must learn the extent of his amenability to suit and to subpoena *from the courts*.²³ The Congress and the President must wait until

17. U.S. Const. art. IV, § 1.

18. See, e.g. *Estin v. Estin*, 334 U.S. 541, 545-46 (1948) (stating that the Full Faith and Credit Clause is a constitutional command that replaces earlier principles of comity; as a consequence, states are no longer independent sovereigns in the same sense as before adoption of the Constitution); *Williams v. North Carolina*, 317 U.S. 287, 301-02 (1942) (ruling that North Carolina must recognize validity of Nevada divorces of two North Carolina citizens who took up residence in Nevada, and may not declare their subsequent remarriage to each other bigamous).

See also 28 U.S.C. § 1738 (1994).

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Id.

19. U.S. CONST. amend. X.

20. See *Printz v. United States*, 117 S. Ct. 2365 (1997); *New York v. United States*, 505 U.S. 144 (1992).

21. Compare *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (opinion of Rehnquist, C.J.), with *id.* at 76 (Stevens, J., dissenting), and *id.* at 99 (Souter, J., dissenting). See also *Hans v. Louisiana*, 134 U.S. 1 (1890); THE FEDERALIST NO. 81, at 414 (Alexander Hamilton) (Garry Wills ed., Bantam 1982) (stating that a State’s immunity from suit “is the general sense and the general practice of mankind”).

22. James W. Torke, *Enumerated and Reserved Powers: The Perpetually Arising Question*, 32 IND. L. REV. 3, 3 (1998).

23. See *Clinton v. Jones*, 117 S. Ct. 1636 (1997) (finding a sitting President amenable to suit by private citizen in federal court for pre-election conduct); *United States v. Nixon*, 418 U.S. 683 (1974) (finding that executive privilege is constitutionally based, but is outweighed by the need for

the Supreme Court speaks, to learn whether the Legislative Veto or the Line Item Veto procedure will stand or fall.²⁴ And of course if the courts—even the Supreme Court—misinterpret a federal civil rights law, the Congress and the President may pass new legislation that makes the courts' rulings obsolete.²⁵

The final topic of the symposium presents a graphic illustration of another outstanding feature of Constitutional Law that is also often taught in law schools, but that is even more clearly evident in practice. The grandest constitutional struggles and puzzles are the ones in which horizontal tension merges with vertical tension. In other words, the national players are never so seriously engaged in combat with each other, or at least in earnest dialog, as when they are discussing how the states will be dealt with, *and which branch of the federal government will do the dealing*.

I will give three quick examples of this merging of horizontal and vertical constitutional tension, and then launch Professor Rotunda to discuss what is perhaps the most dramatic and significant example of all—the duel between Court and Congress over the power of Congress to take unfriendly action against the states pursuant to Section 5 of the Fourteenth Amendment.²⁶

As a first example, consider *Erie Railroad Co. v. Tompkins*.²⁷ At first glance, it appears to be a classic case of “pure” federalism, involving vertical tension only. There is and can be no *federal* law governing the duty owed to pedestrians trespassing upon a railroad's right of way, the Supreme Court seemed to be saying, whether that law is embodied in a federal statute or in common law doctrine developed by the federal courts. There is no horizontal tension, because there is nothing for Congress and the federal courts to fight about; they are equally impotent with respect to such inherently local regulations. But later observers saw more layers of complexity.²⁸

“everyman's evidence” in an ongoing criminal case).

24. Both fell. The first in *INS v. Chada*, 462 U.S. 919 (1983), the other after the symposium, in *Clinton v. City of New York*, 118 S. Ct. 2091 (1998).

25. See, e.g., Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified at scattered sections of 29 U.S.C. and 42 U.S.C.), *superseding* *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Lorance v. A.T. & T. Techs., Inc.*, 490 U.S. 900 (1989); *Martin v. Wilks*, 490 U.S. 755 (1989); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

26. U.S. CONST. amend. XIV, § 5. See Rotunda, *supra* note 5.

27. 304 U.S. 64 (1938).

28. One of the most satisfying exchanges in all of legal scholarship was led off by Professor John Hart Ely, who had served as law clerk to Chief Justice Earl Warren during the Term that Warren had written the opinion for the Court in *Hanna v. Plumer*, 380 U.S. 460 (1964). In order, the pieces are: John H. Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974) [hereinafter *Myth of Erie*]; Abram Chayes, *The Bead Game*, 87 HARV. L. REV. 741 (1974); John H. Ely, *The Necklace*, 87 HARV. L. REV. 743 (1974); Paul J. Mishkin, *Some Further Last Words on Erie—The Thread*, 87 HARV. L. REV. 1682 (1974).

In the first article in this series; Professor Ely noted (as had the opinion in *Hanna*) the fact that in addition to the Rules of Decision Act, 28 U.S.C. § 1652 (1994), that was center stage in *Erie*,

For one thing, there *was* a federal statute in play, the Rules of Decision Act,²⁹ which *directed* the federal courts to apply *state* law. Perhaps, then, *Erie* was simply the Supreme Court chastising itself for many years of wrongful violation of a valid federal statute—a statute *explicitly* addressing which of the federal branches would control relations with the states after all! If so, horizontal tension has not only re-entered the picture, but threatens to dominate the conversation.³⁰ Or perhaps the interplay between vertical and horizontal tension was even more complex than that. *Erie* involved an *interstate* railroad, it should be remembered, and there is little doubt that today Congress could regulate safety and just about every other aspect of its operation, including liability to trespassing pedestrians. Does *Erie* thus really mean to say that there are certain areas in which Congress can replace state law, *but the federal courts cannot?!?* If so, *Erie* has almost become a pure separation of powers case rather than a pure federalism case. Or, at a minimum, it has become a case in which the vertical *merges* with the horizontal.

As a second example, consider the “dormant,” or “negative,” Commerce Clause. From the beginning, and without any prompting by Congress, the Supreme Court has consistently read into the Clause a negative implication restricting the states’ freedom of action, thus pushing the piston downward a few notches.³¹ The structure of the Constitution itself, the Court often said, prohibits

federal courts are bound to apply valid rules of procedure that have been promulgated according to the protocol set forth in the Rules Enabling Act, 28 U.S.C. § 2072 (1994). *Myth of Erie, supra*, at 698. Thus, when state law is accorded more (or less) deference in the federal courts, it is in large part *congressional* deference. In the last article, Professor Mishkin argued that federal courts generally lack the power to create federal common law (absent congressional authorization) because of ordinary separation of powers concerns. Mishkin, *supra*, at 1682. See also Henry Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U.L. REV. 383 (1964).

29. 28 U.S.C. § 1652 (1994) (“The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.”).

30. For a spirited debate about the separation of powers issues (or lack thereof) in *Erie*, see Peter Westen & Jeffrey S. Lehman, *Is There Life for Erie After the Death of Diversity*, 78 MICH. L. REV. 311 (1980); Martin H. Redish, *Continuing the Erie Debate: A Response to Westen & Lehman*, 78 MICH. L. REV. 959 (1980); Peter Westen, *After “Life for Erie”—A Reply*, 78 MICH. L. REV. 971 (1980). Similarly, compare Martin H. Redish, *Federal Common Law Political Legitimacy and the Interpretive Process: An Institutional Perspective*, 83 NW. U. L. REV. 761 (1989), with Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805 (1989), and Martin H. Redish, *Federal Common Law and American Political Theory: A Response to Professor Weinberg*, 83 NW. U. L. REV. 853 (1989), with Louise Weinberg, *The Curious Notion That the Rules of Decision Act Blocks Supreme Federal Common Law*, 83 NW. U. L. REV. 860 (1989). See also George D. Brown, *Federal Common Law and the Role of the Federal Courts in Private Law Adjudication—A (New) Erie Problem?*, 12 PACE L. REV. 229 (1992).

31. See, e.g., *Wyoming v. Oklahoma*, 502 U.S. 437, 454-59 (1992) (finding that Oklahoma statute requiring electric utilities in the state to burn a coal mixture containing at least 10% Oklahoma-mined coal violates the dormant Commerce Clause); *Kassel v. Consolidated Freightways*

states from raising trade barriers within the United States, and from discriminating against out-of-state commercial actors.³²

But starting around the turn of the Century, and gathering speed after the New Deal, Congress began to “authorize” or “ratify” interstate discrimination by the States that the Court, acting according to its own dormant Commerce Clause precedents, would have struck down.³³ How is this possible? If it is “unconstitutional” for a state to raise a tariff against out-of-state goods, or to impose an embargo on local goods, how can a mere statute—even a federal statute—change this result? Has *Marbury v. Madison*,³⁴ that preeminent case resolving horizontal tension in favor the courts, suddenly been overruled or nullified?

The answer that is now generally accepted³⁵ is that state action that is

Corp., 450 U.S. 662, 671 (1981) (finding that Iowa law prohibiting use of long trucks commonly used in adjoining states is a burden on interstate commerce and violates the dormant Commerce Clause); *Dean Milk Co. v. Madison*, 340 U.S. 349, 353 (1951) (finding that a local Wisconsin ordinance imposing conditions on sale of milk produced more than five miles from city violates the dormant Commerce Clause).

32. The best and the best known justification for the Supreme Court’s assertion of its own power to police the dormant Commerce Clause is found in Justice Jackson’s opinion for the Court in *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 534-35, 539 (1949):

While the Constitution vest in Congress the power to regulate commerce among the states, it does not say what the states may or may not do in the absence of congressional action. . . . [T]his Court has advanced the solidarity and prosperity of this Nation by the meaning it has given to these great silences of the Constitution. . . .

Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by customs, duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

33. Compare *Leisy v. Hardin*, 135 U.S. 100 (1890) (Iowa statute prohibiting the sale of beer unconstitutional as applied to beer brewed in Illinois and sold in Iowa in its original kegs), with *In re Rahrer*, 140 U.S. 545 (1891) (Congress has power to pass the Wilson Act making liquor subject to local laws even if sold in original packages; resulting prosecution under Kansas law did not violate dormant Commerce Clause). See also *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 654-55 (1981) (relying on *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946), and holding that in the McCarran Act, Congress had validly authorized discriminatory state taxes that would otherwise have been unconstitutional under the dormant Commerce Clause):

34. 5 U.S. (1 Cranch) 137 (1803).

35. In this little corner of constitutional law, the best explanations are to be found in the scholarly literature, not in the opinions of the Supreme Court. See William Cohen, *Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Dilemma*, 35 STAN. L. REV. 387 (1983) (relying in part on Noel T. Dowling, *Interstate Commerce and State Power—Revised Version*, 47 COLUM. L. REV. 547 (1947), and Noel T. Dowling, *Interstate*

“unconstitutional” under the dormant Commerce Clause is only presumptively unconstitutional, in the absence of congressional authorization. The power of Congress under the Clause is capacious enough to include the power to grant such authorization. The details of the argument are not important, of course, for present purposes. What is important is that the focus has shifted suddenly, from a vertical duel between the federal and state governments about economic discrimination across state lines, to a duel between two branches of the federal government, *about the status and power of the states*.

Third, consider a feature of state sovereign immunity that Professor Rotunda will touch upon in his talk.³⁶ The Supreme Court has long held that although state government immunity from suit in the federal courts is at least in part dictated by *constitutional* concerns, Congress may in some circumstances “strip” the states of that defense. For a time—ending only a few years ago—the Court told Congress that it had to be unusually explicit in announcing that it indeed wished to subject the states to suit in federal court. It had to make what the Court called a “clear statement” to that effect, with the emphasis on clarity.³⁷ Today, Congress cannot strip the states of sovereign immunity if acting under the Commerce Clause, no matter how clear its statement of intent to do so³⁸—its “stripping” operation is limited to situations invoking the federalizing power of the Fourteenth Amendment.³⁹ But the point is already made: Congress may still take certain actions *viz-a-viz* the states, *but only upon terms dictated by the Supreme Court*.

A fourth and most outstanding example of the merger between horizontal and vertical tension in Constitutional Law is the subject of Professor Rotunda’s talk—congressional action regulating the states pursuant to Section 5 of the Fourteenth Amendment. The theme is the same: Congress has broad power to press the piston down on the states or to ease up, but Congress must go about its work under the supervision of the federal courts. The vertical merges with the horizontal yet again.

In listening to Professor Rotunda’s presentation, in reading his article, or in considering this kind of constitutional puzzle generally, be alert for phrases such as “the Constitution prohibits Congress from doing X or Y to the states.” When you encounter such phrases, fasten your seatbelts, because of course “the Constitution” cannot actually prohibit anything. The Court is the one doing the prohibiting, claiming to speak in the name of the Constitution.

Commerce and State Power, 27 VA. L. REV. 1 (1940)); see also Laurence Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 IND. L.J. 515 (1982).

36. Rotunda, *supra* note 5, at 169.

37. See *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7 (1989), *overruled by Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55 (1996); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985).

38. See *Seminole Tribe*, 517 U.S. at 62-73.

39. See *id.* at 65; *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984); *Quern v. Jordan*, 440 U.S. 332, 342-44 (1979); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).