CONTEXT AND COMPLEMENTARITY WITHIN FEDERALISM DOCTRINE

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In keeping with the title of this panel, "Federalism in Constitutional Context," I posit the following methodological claim. In certain types of cases concerning the allocation of power between the federal and state governments, a court cannot craft an optimal doctrinal rule without considering the interactive effects between it and other rules established in other federalism cases. In other words, sometimes a court may properly assess federalism doctrines in the aggregate rather than as isolated solutions to discrete controversies.

I

Courts and scholars have long debated whether it is appropriate to take a "formalist" or "functionalist" approach to resolving constitutional disputes concerning the proper allocation of power among the various constituent actors in our complicated federal system.[1] In simplified terms, a formalist seeks to derive doctrines regarding the vertical allocation of power between the federal and several state governments by reference to some combination of the Constitution's text,

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1. *See* Frank H. Easterbrook, *Formalism, Functionalism, Ignorance, Judges*, 22 HARV. J.L. & PUB. POL'Y 13; William N. Eskridge, Jr., *Relationship Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL'Y 21; Thomas W. Merrill, *Toward a More Principled Interpretation of the Commerce Clause*, 22 HARV. J.L. & PUB. POL'Y 31; Burt Neuborne, *Formalism, Functionalism and the Separation of Powers*, 22 HARV. J.L. & PUB. POL'Y 45. This methodological debate typically is more played out in discussions of separation of powers principles, *see, e.g.*, Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions–A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987), but it also surfaces in discussions of federalism, *see, e.g.*, Kathleen M. Sullivan, *Comment, Dueling Sovereignties:* U.S. Term Limits, Inc. v. Thornton, 109 HARV. L. REV. 78 (1995).

structure, and history. A functionalist seeks to develop doctrines that best serve the structural values that are purportedly secured by dividing power between the federal and state governments.

In my view, at least some, and perhaps most, of the federalism doctrines articulated by the Supreme Court in the latter half of this century cannot be defended in formalist terms. Rather, these doctrines reflect functionalist efforts to secure the varied and often competing structural values that underlie our federal regime. I am dubious, for example, of the efforts to defend on formalist grounds such cases as *National League of Cities v. Usery*,[2] *Garcia v. San Antonio Metropolitan Transit Authority*,[3] *South Dakota v. Dole*,[4] *Gregory v. Ashcroft*,[5] *New York v. United States*,[6] *United States v. Lopez*,[7] *City of Boerne v. Flores*,[8] *Printz v. United States*,[9] and *Ex parte Young*[10] and its progeny.[11] If these doctrines are justifiable at all, functionalism must provide that justification. The rules articulated in these cases are meant to strike some balance between the desire for state accountability to federal statutory norms on the one hand and state autonomy and dignity on the other.

It would be unreasonable to demand of the Supreme Court that every single doctrinal rule perfectly balance the underlying

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2. 426 U.S. 833 (1976) (holding that "areas of traditional government functions" of the states cannot be impaired by Congress).

3. 469 U.S. 528 (1985) (rejecting *National League of Cities*' judicial protection of traditional state functions).

4. 483 U.S. 203 (1987) (upholding Congress's authority pursuant to Article I, Section 8's Spending Clause to condition federal grants on a state's regulatory compliance with federal directives).

5. 501 U.S. 452 (1991) (imposing "clear statement" requirement on congressional regulation of state structures of governance).

6. 505 U.S. 144 (1992) (holding that Congress cannot commandeer a state to enact or enforce a regulatory program).

7. 514 U.S. 549 (1995) (invalidating a gun possession statute as beyond Congress's Article I, Section 8 Commerce Clause authority).

8. 117 S. Ct. 2157 (1997) (holding that the Religious Freedom Restoration Act, 42 U.S.C. §2000bb-1, exceeds Congress's enforcement power under section 5 of the Fourteenth Amendment).

9. 117 S. Ct. 2365 (1997) (holding that Congress may not require state officials to execute federal laws).

10. 209 U.S. 123 (1908) (holding that the Eleventh Amendment does not bar suits seeking prospective relief against state officers for violations of federal law).

11. *See, e.g.*, Idaho v. Couer d'Alene Tribe, 117 S. Ct. 2028 (1997) (holding that the Eleventh Amendment bars injunctive relief against state officials in an action concerning jurisdiction over land); Edelman v. Jordan, 415 U.S. 651 (1974) (distinguishing for Eleventh Amendment purposes between prospective and retrospective relief against state officials).

federalism values. In many–perhaps almost all–contexts, a workable doctrine does not correspond perfectly with its motivating constitutional principles. As Professor Richard Fallon has explained, "[T]he Supreme Court must sometimes frame doctrinal tests that cannot be linked directly, by ordinary interpretive means, to the meaning of the norms that those tests implement."[12] As a result, "constitutional tests frequently either overenforce or underenforce constitutional norms."[13]

Thus, when evaluating the Court's recent federalism decisions, we should not demand that particular doctrines conform precisely to the Constitution's meaning–by which I mean the optimal balance of federalism values, assuming the absence of clear guidance by text, structure, and history. Rather than a single doctrine that exactly balances the competing federalism norms, there might be a set of plausible rules, each of which strikes a somewhat different, but still acceptable, balance. Therefore, we more charitably might expect the Court to articulate a doctrine that approximates, but does not precisely secure, the optimal balance while remaining judicially manageable. In other words, we should ask the Court to provide reasonable "approximate" rules, rather than demand a perfect mapping between doctrine and meaning.

The novel question on which I wish to provoke thought today is the following: given such an evaluative perspective, might we ask not whether each doctrinal rule assessed *individually* strikes a reasonable balance of values but rather whether all of the federalism doctrines *considered in the aggregate* strike a reasonable balance? For example, if one "approximately correct" doctrine errs on the side of prioritizing state autonomy over state accountability to federal norms, then in the next case would it not be reasonable for the Court to articulate an "approximately correct" doctrine that prioritizes these competing values in precisely the opposite way?

I suggest here that the answer is "yes"–that sometimes the Court should consider pairs or perhaps even sets of doctrinal rules and should measure these rules against each other to achieve an optimal overall balance. Let me first illustrate how this approach might play out in a concrete setting, then

12. Richard H. Fallon, Jr., *The Supreme Court, 1996 Term*–Foreword: *Implementing the Constitution*, 111 HARV. L. REV. 54, 66 (1997).

13. *Id.* at 65.

anticipate some objections, and finally offer some general observations about the phenomenon I call "complementary doctrines."

Consider the following two issues that are typically described as distinct from one another: (1) whether Congress can authorize *federal* courts to entertain federal statutory claims directly against states; and (2) whether Congress can require *state* courts to entertain federal statutory claims directly against states, overriding any claim of sovereign immunity. The first issue presents a choice between the rule of *Pennsylvania v. Union Gas*,[14] which says Congress can authorize federal jurisdiction under the Commerce Clause,[15] and the rule of *Seminole Tribe v. Florida*,[16] which says Congress cannot do so.[17] The Supreme Court has not directly addressed the second, state-court issue,[18] and various scholars have read the tea leaves in divergent ways.[19] For shorthand, I shall call the two state-court doctrinal possibilities the "state-commandeering rule" and the "state-immunity rule."

A strong argument can be made that the answers to these two seemingly distinct questions about federal and state court jurisdiction are interconnected. Let us consider a hypothetical Judge Fed, who is presented with a case that requires her to choose between the rules of *Union Gas* and *Seminole*. Suppose she decides in favor of the *Union Gas* rule, so that Congress may hold states accountable for violating federal statutory norms in federal court. Then, when she later faces the question whether Congress may also mandate state courts to entertain the same claims, Judge Fed would be inclined to say no and articulate the "state-immunity rule"; given *Union Gas*, the need for such congressional authority would be weak and the affront to state dignity would be strong. In conjunction, these two

14. 491 U.S. 1 (1989)

15. *See id.* at 14-23.

16. 517 U.S. 44 (1996).

17. *See id.* at 58-73.

18. As this Essay went to press, the Supreme Court granted certiorari in *Alden v. Maine*, 715 A.2d 172 (Maine 1998) *cert. granted*, 67 U.S.L.W. 3178 (U.S. Nov. 9, 1998) (No. 98-436), which raises the question whether a state may interpose a sovereign immunity defense to a federal statutory claim adjudicated in state court.

19. *Compare, e.g.*, Carlos Manuel Vázquez, *What is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1708-44 (1997) (discussing caselaw pointing in both directions), *with* Henry Paul Monaghan, *The Sovereign Immunity 'Exception'*, 110 HARV. L. REV. 102, 125-26 (1996) (suggesting that state courts must entertain due process claims against states).

rulings would mean that states could be held accountable for violating federal statutory norms in federal, but not state, court. For Judge Fed, this combination of *Union Gas* and the "state-immunity rule" represents an acceptable overall balance between federal norm enforcement and state dignity.

Now suppose instead that, in the original case pitting the *Union Gas* and *Seminole* rules against each other, Judge Fed favored the *Seminole* rule. Judge Fed might then prefer the "state-commandeering rule" that allows Congress to require state courts to entertain claims against the state, because this combination provides the proper counterweight to achieve a slightly different, but still acceptable, balance between federal and state power. Congress still could enforce statutory obligations against states but only in state rather than federal court.

In other words, Judge Fed might conclude that, given the balance of structural values at stake, states should enjoy immunity either (a) only in federal but not state court; or (b) only in state but not federal court. The rules of *Union Gas* and state immunity can be described as complementary, as can the rules of *Seminole* and state commandeering. In contrast, Judge Fed finds the other two pairings unacceptable, because neither appropriately balances the two competing concerns. Combining the rules of *Union Gas* and state commandeering undervalues the concerns of state dignity and autonomy; combining the rules of *Seminole* and state immunity undervalues the need for federal regulation of state misconduct.

Now consider a different plausible set of complementary doctrines involving the interactive effects of the choice between *Union Gas* and *Seminole* and the choice between the rules of *National League of Cities*[20] and *Garcia*,[21] which dictates the extent to which Congress can impose federal statutory burdens directly upon states qua states. Suppose in the first case Judge Fed selects the rule of *Union Gas*. Then, when asked to choose between the rules of *National League of Cities* and *Garcia*, she might be inclined to favor *National League of Cities*. In

20. National League of Cities v. Usery, 426 U.S. 833 (1976) (holding that "areas of traditional governmental functions" of the states cannot be impaired by Congress).

21. 469 U.S. 528 (1985) (rejecting *National League of Cities*' judicial protection of traditiona; state functions).

conjunction, these rules would mean that states could be held accountable in federal court for violating some federal norms but not where those norms regulate states qua states. For Judge Fed, the combination of *Union Gas* and *National League of Cities* represents an acceptable balance between federal and state power.

Now suppose instead that in the original case pitting the *Union Gas* and *Seminole* rules against each other, Judge Fed favored the *Seminole* rule. Judge Fed might then prefer *Garcia* over *National League of Cities*, because this prioritization provides the proper counterweight to achieve a slightly different, but still acceptable, balance between federal and state power. Congress would have broader authority to impose obligations on states, but those obligations would be enforceable only in state rather than federal court.

In other words, Justice Fed might find acceptable the complementary pairing of either *Union Gas* and *National League of Cities* or *Seminole* and *Garcia*. The other two pairings are unacceptable; *Seminole*-plus-*National League of Cities* gives Congress too little power to enforce regulations imposed on the states, and *Union Gas*-plus-*Garcia* gives Congress too much power to enforce regulations imposed on the states.

II

I believe I could provide other plausible examples of complementary doctrinal pairings, but let me instead pause here to anticipate some objections. One might challenge my opening normative premise by arguing that it is illegitimate for the Court to craft federalism doctrines based solely on a consideration and balance of structural values rather than on more formalist constitutional reasoning. If this objection is persuasive, then it would follow, *a fortiori*, that the Court could not legitimately engage in the type of multi-case balancing illustrated above.

This is not the place for me to meet such an objection head-on by providing a comprehensive normative defense of functionalism in the federalism context.[22] Indeed, this precise

22. I have recently illustrated my primary difficulty with a purely formalist methodology. *See generally* Evan H. Caminker, Printz, *State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199 (exposing how the *Printz* anti-commandeering decision, while cast in formalist terms, necessarily relied in large part on some

issue provoked a passionate debate among keen legal minds during the previous panel discussion.[23] Suffice it for now to say that, as an empirical matter, I find it quite difficult to ground many of the Court's recent federalism doctrines in anything more firm than a balance of underlying structural values. On occasion, the Court essentially concedes that it is crafting doctrinal lines so as to balance between competing values, one of which argues in favor of federal authority and one of which argues against it. This is true both for judicial abstention doctrines such as *Younger v. Harris*[24] and its progeny[25] and for Eleventh Amendment doctrines such as *Ex Parte Young*[26] and its progeny.[27] In both lines of cases, the Court is fairly open about seeking an accommodation between the desire for federal judicial enforcement of federal norms and the desire to afford some autonomy to state officials and courts. In other cases, like *National League of Cities* and *Dole*, it appears that the Court's doctrines are determined by underlying values simply because it is difficult to surmise how the doctrines were derived from constitutional text, structure, or history.[28] Although the story would be more complicated and subtle, I think I could defend the claim that, as a descriptive matter, functionalism plays a primary role in other federalism cases as well. Thus, one who objects to my thesis as being normatively objectionable must be prepared to reject much of the Court's reasoning underlying existing federalism case law.

I do acknowledge that some federalism doctrines might be defended on formalist grounds of constitutional text, structure, and history, such that these particular doctrines should be considered "fixed" and not be viewed merely as optional

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unarticulated non-formalist rationales).

23. *See* Frank H. Easterbrook, *Formalism, Functionalism, Ignorance, Judges*, 22 HARV. J.L. & PUB. POL'Y 13; William N. Eskridge, Jr., *Relationship Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL'Y 21; Thomas W. Merrill, *Toward a More Principled Interpretation of the Commerce Clause*, 22 HARV. J.L. & PUB. POL'Y 31; Burt Neuborne, *Formalism, Functionalism and the Separation of Powers*, 22 HARV. J.L. & PUB. POL'Y 45.

24. 401 U.S. 37 (1971) (discussing federal abstention to prevent interference with pending state enforcement actions).

25. *See, e.g.*, Hicks v. Miranda, 422 U.S. 332 (1975) (extending the scope of *Younger* abstention doctrine in state criminal proceedings); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) (holding that *Younger* applies in state civil proceedings).

26. 209 U.S. 123.

27. *See supra* notes 10 and 11.

28. *See* National League of Cities v. Usery, 426 U.S. 833 (1976); South Dakota v. Dole, 483 U.S. 203 (1987).

complements to other rules and parts of an effort to achieve some optimal balance of underlying federalism values. This concession merely narrows the scope of my thesis's application. Suppose one can convincingly demonstrate that the choice between *Union Gas* and *Seminole* can be made on formalist grounds. Although this choice should therefore be considered fixed, the choice between the rules of "state immunity" and "state commandeering," or between *National League of Cities* and *Garcia*, should still be treated as dependent on the fixed choice between *Union Gas* and *Seminole*, so long as these latter two choices are properly dictated by functionalist rather than formalist criteria.

One might advance a narrower objection to my proposal. Suppose you concede that the Court should (or at least does) engage in functionalist balancing in certain federalism cases. You might still reject the propriety of holistic balancing *across* cases, because you claim that each case implicates a unique set of federalism values, such that there is no common denominator across two or more cases for purposes of drawing an aggregate balance. Or, you might claim that certain federalism values, such as protecting states' dignitary interests, always should trump competing federalism values, in which case the concept of aggregate balancing does not make sense. These are interesting claims, but I think they would be difficult to defend as a normative matter. Moreover, as a descriptive matter, I think these claims are belied by many of the Court's recent federalism decisions. More specifically, these objections seem inapplicable to the hypothetical scenarios of Judge Fed presented above, because I think that a single set of competing values is relevant to Congress's Article I authority to regulate states qua states and its control over both federal and state court jurisdiction over claims against non-consenting states.

If one is still drawn to any of these objections, then at least my hypothetical scenarios of Judge Fed have proven to be helpful by focusing on the question of why the hypotheticals may seem troubling. This strikes me as a fruitful inquiry because, as I have suggested, even these potential objections cast serious doubt on the correctness–or at least the candor–of many of the Court's recent federalism decisions.

III

Let us now return to my original premise. If one accepts the legitimacy of crafting doctrine so as to balance underlying structural values and believes that at least some of the cases involve the same general values, such as pitting state autonomy and dignity against the importance of enforcing federal norms against states, then one should be willing to think holistically. In certain contexts, it makes sense to look at the big picture and assess the merit of a particular doctrine in light of other existing or potential doctrines that impact the same values.

Now, let me conclude with some general observations about the phenomenon of complementary doctrines I have described.

A

The phenomenon highlights a novel way in which related decisions can be path-dependent. Scholars have previously explained and illustrated that, in various contexts, the ordering of judicial decisions can matter because the first case decided will influence through *stare decisis* the second related case.[29]

But the phenomenon of doctrinal complements offers a new twist in the federalism context. Usually, the first case establishes a rule based on an underlying principle or a priority among principles, and then the doctrine of *stare decisis* demands that the same priority of principles governs the second case as well. In other words, Case Two is supposed to be consistent with the prioritization of principles underlying the decision in Case One.

Here, the relationship of the second case to the first is not one of consistency, but rather of compensation. In other words, when deciding Case Two, Judge Fed would prioritize the relevant federalism principles in the *opposite* manner as in Case One, so as to achieve an overall balance of values through the two cases considered together. For example, if in Case One Judge Fed prioritizes state autonomy over federal norm enforcement and hence chooses the rule of *Seminole* rather than *Union Gas*, she would reverse the priority in Case Two and

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29. *See, e.g.*, Lewis A. Kornhauser, *Modeling Collegial Courts I: Path-Dependence*, 12 INT'L REV. L. & ECON. 169, 180-84 (1992) (discussing path dependency in the development of legal doctrine on collegial courts).

choose the federal norm-enforcing rules of "state commandeering" and *Garcia* over "state immunity" and *National League of Cities*. It is through an apparent *inconsistency* in her prioritization of the competing federalism principles that the Judge actually secures, from a consequentialist perspective, a better doctrinal landscape.

B

Let us now add one further complication. Assume that Judge Fed is merely one member of a multi-member court. She would still vote for her preferred rule in the first case that comes before the court. Let us say she votes for *Union Gas* over *Seminole* and assumes that, in a later case, she will vote for *Union Gas*'s complementary rule, "state immunity," over "state commandeering." But, in that first case she may find herself dissenting; the majority establishes *Seminole* as the law. When the second issue is presented to her court, Judge Fed will now favor the complement to *Seminole*, meaning "state commandeering" over "state immunity." In essence, she will vote for *Garcia* to *compensate* for what she feels was the court's erroneous choice of *Seminole* over *Union Gas*. So, unlike the more typical examples of path-dependence, where a judge may have to extend a decision she thinks was erroneously announced, here the judge may intentionally compensate for a decision she thinks was erroneous.

C

The phenomenon of doctrinal complements can be extended beyond the federalism context. Thus far I have posited that, in certain contexts, a court legitimately may treat the desirability of two or more federalism doctrines as interconnected decisions. There might also be circumstances in which it would be equally appropriate for a court to treat a federalism doctrine as complementary to a separation of powers doctrine. For example, when deciding whether Congress has the authority to strip the federal courts of their jurisdiction over certain federal claims, the Court might take into account a complementary question whether state courts would necessarily be entitled, or even mandated, to entertain those same claims and, if so, whether prior Supreme Court decisions would remain binding

on those state courts.[30] As Professor Rick Hills has suggested, the Court also might define the scope of the President's removal authority over federal officials in light of Congress's authority to circumvent the President and encourage state officers to administer federal programs.[31]

IV

Whether the principle of doctrinal complements I have described here applies to many, a few, or no cases in the federalism context turns on the extent to which these cases should or do reflect an effort by the Court to balance the various competing, and generally amorphous, structural values underlying our federalist system. Given the difficulty of explaining at least some of the Court's cases in purely formalist terms, I do think that the concept of doctrinal complements has some relevance. At the very least, it should encourage further thinking about the potential interaction between two or more doctrinal pronouncements beyond the narrow principle of consistency dictated by *stare decisis*.

30. *See* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?* 46 STAN. L. REV. 817, 867-69 (1994) (analyzing the question of whether lower courts must continue to obey Supreme Court precedents after Congress divests the Supreme Court of appellate jurisdiction over such claims).

31. *See* Roderick (Rick) M. Hills, Jr., *Federalism in Constitutional Context*, 22 HARV. J.L. & PUB. POL'Y 181, 186-90 (1998).