Federalism and Inequality

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Introduction

The conventional wisdom regarding federalism and inequality in the United States is well summarized in the title of a 1985 essay by political scientist Aaron Wildavsky: “Federalism Means Inequality.” The rationale for this view is straightforward: income and wealth differ dramatically across states. Just a few statistics serve to illustrate this point. The median household income in the Mississippi in 2015 ($40,037) was barely more than half what it is in New Hampshire ($75,675), and the poverty rate in Mississippi was more than three times higher. Alabama is home to 905,000 people living in poverty and zero billionaires; Wyoming is home to 54,000 people in poverty and nine billionaires. Thus the devolution of power to 50 unequal and quasi-sovereign states puts a limit on the possibilities for redistribution of resources because the states with the highest rates of poverty lack the ability to tax the individuals with the greatest wealth.

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1 Aaron Wildavsky, Federalism Means Inequality, 22 Society no. 2, at 42 (1985); see also Paul E. Peterson, The Price of Federalism 13-14 (1995) (suggesting that “regional inequalities” are part of the “contemporary price of federalism”).


It should come as no surprise, then, that progressives often adopt a skeptical stance toward federalism. To be sure, this was not always the case: early 20th century progressives such as Louis Brandeis embraced the opportunities for policy experimentation that federalism availed. And much more recently, Heather Gerken has called for a new “progressive federalism” that builds upon the opportunities for minorities to exercise power in a decentralized system. Yet at least at the Supreme Court over the past several decades, it has been the more progressive Justices who have been the least receptive toward federalism arguments—and the conservative Justices who have been federalism’s leading exponents.

Consider the landmark decisions of the Rehnquist Court regarding commandeering and state sovereign immunity. In Printz v. United States, the Court crystallized the rule (intimated five years earlier in New York v. United States) that Congress cannot command state legislatures to pass particular laws or require state executive officials to administer particular programs. The vote was 5-4, with the Court’s five more conservative Justices in the majority and its four more progressive members in dissent. Likewise in Seminole Tribe of Florida v. Florida and Alden v. Maine—cases close to contemporaneous with Printz—the same five-Justice majority held that Congress cannot abrogate the sovereign immunity of states outside of limited contexts. Again, the four dissenters were the Court’s more liberal members—one of whom, John Paul Stevens, has since called for constitutional amendments to override New York, Printz, Seminole Tribe, and Alden.

There are, of course, many arguments for and against the Court’s decisions in New York, Printz, Seminole Tribe, and Alden; the goal of this essay is not to relitigate those cases or to

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5 See Heather K. Gerken, A New Progressive Federalism, Democracy, Spring 2012, at 37 (“Progressives are deeply skeptical of federalism, and with good reason.”); Kathleen M. Sullivan, From States’ Rights Blues to Blue States’ Rights: Federalism After the Rehnquist Court, 75 Fordham L. Rev. 799, 800-01 (2006) (“States’ rights have been associated historically with conservative causes, while federal power has been associated with increasing egalitarianism and protection of minorities.”).
7 See Gerken, supra note 5.
15 For critical perspectives, see Daniel J. Meltzer, The Seminole Decision and State Sovereign Immunity, 1996 Sup. Ct. Rev. 1; Suzanna Sherry, States Are People Too, 75 Notre Dame L. Rev. 1121 (2000); Ernest A. Young, State Sovereign Immunity and the Future of Federalism,
suggest that anyone ought to switch his or her view. These decisions are, however, worth reexamining because they can teach us something significant about the relationship between American federalism and inequality. By “federalism,” I refer specifically to the idea that states are sovereign entities capable of refusing Congress’s commands. And by “inequality,” I refer specifically to inequalities of income and wealth. This essay seeks to show how state sovereignty interacts with income inequality in sometimes surprising ways, potentially leading to distributive results quite at odds with the conventional wisdom that Wildavsky’s title captures.

The argument proceeds as follows: I begin by explaining how the Supreme Court’s federalism decisions—particularly in the anti-commandeering and sovereign immunity contexts—vest the states with valuable entitlements protected by a “property rule” (to borrow a phrase from Guido Calabresi and Douglas Melamed). In the anti-commandeering context, the relevant entitlement is the state’s control over its own legislative process and its own administrative capabilities. In the sovereign immunity context, the relevant entitlement is the state’s control over whether it can be sued by private citizens. There are, to be sure, limits on the latter entitlement: Congress can abrogate state sovereign immunity pursuant to the Reconstruction Amendments in certain contexts, and can also do so pursuant to the Constitution’s Bankruptcy Clause. Yet in the mine-run of cases, the states—not Congress—get to decide whether states can be sued by private citizens in state and federal court.

Importantly, the entitlements allocated to the states by the anti-commandeering and sovereign immunity doctrines are tradeable entitlements: the states can sell these entitlements to Congress, though Congress cannot seize the entitlements outside of a voluntary exchange. (This is what it means for the entitlement to be protected by a property rule rather than a liability rule or an inalienability rule.) And as Aziz Huq observes, the anti-commandeering and sovereign immunity doctrines “both leave open the possibility that states can engage in mutually beneficial trading with Congress.” When members of Congress believe that the benefits of having the states enact or administer a particular program are greater than the costs to the states of enacting or administering the program, Congress can purchase the states’ entitlement for a price. Such exchanges are indeed quite common, with Congress effectively hiring the states to administer Medicaid, the SNAP/Food Stamp Program, and the Federal-State Unemployment Insurance Program (among countless others), and effectively paying the states to enact measures such as a minimum legal drinking age of 21. Likewise, when members of Congress believe that the benefits of having the states waive sovereign immunity in a particular context are greater than

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13 See, e.g., Alden, 527 U.S at 748 (“[O]ur federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation.”
the costs to the states of liability, Congress can effectively buy such waivers through conditional spending legislation.\textsuperscript{21}

And yet the possibility of bargaining between Congress and the states does not make the initial allocation of entitlements extraneous. By assigning the relevant entitlements to the states rather than the federal government, the anti-commandeering and state sovereign immunity doctrines generate significant distributive effects. Per the Coase theorem, whether a court assigns the property right over a particular plot to the farmer or the rancher will not—in the absence of transaction costs—affect whether the farmer plants crops or the cattle-raiser allows his cows to graze on the plot; the court’s allocation of the entitlement will, however, affect whether the farmer pays the rancher (or vice versa).\textsuperscript{22} So too in the intergovernmental context: The initial allocation of entitlements between Congress and the states will not necessarily determine who administers federal regulatory programs or whether states can be sued by private citizens. The allocation of entitlements will, however, very much affect the intergovernmental flow of funds.

More precisely, the allocation of entitlements to states rather than to Congress enriches the states relative to the federal government: now the states can sell the entitlement rather than potentially having to buy it. In this respect, the anti-commandeering and state sovereign immunity doctrines yield an intergovernmental distributive effect much like the interpersonal distributive effect in Coase’s classic example. The anti-commandeering doctrine does not necessarily mean that states will stop administering federal programs, nor does the state sovereign immunity doctrine mean that states will no longer be subject to suit by private citizens. These doctrines do mean, though, that the states need not relinquish these entitlements unless they get paid.

But why should the intergovernmental distributional consequences of the Supreme Court’s federalism doctrines affect the interpersonal distribution of wealth? After all, the set of individuals who pay federal taxes and benefit from federal spending largely overlaps with the set of individuals who do the same with respect to the states. The answer springs from the stark contrast between the ways that Congress and the states structure their tax systems. The federal tax system is generally progressive, with effective rates rising steadily over the income distribution. Quite the opposite is true at the state level: state taxes (and taxes imposed by local governments—instrumentalities of the state) are generally regressive over the income distribution in effective-rate terms.

From a partial equilibrium perspective, one might expect that the allocation of valuable entitlements to the states rather than the federal government would allow the states to tax less and would force the federal government to tax more. In this respect, the anti-commandeering and state sovereign immunity doctrines cause more revenue-raising to occur through the (more progressive) federal tax system. In a general equilibrium model, various aspects of the analysis potentially change. First, the progressivity of the federal and state tax systems may depend on the amount of revenue-raising that occurs through federal and state channels. Second, the redistribution of resources across levels of government may alter the composition of federal and

\textsuperscript{21} See Bennett-Nelson v. La. Bd. of Regents, 431 F.3d 448 (5th Cir. 2005) (§ 504 of the Rehabilitation Act); Litman v. George Mason Univ., 186 F.3d 544 (4th Cir. 1999) (Title IX).

state spending. Yet structural, constitutional, and political constraints limit the extent of any tax-side or spending-side adjustment in general equilibrium. These constraints give us reason to believe that the distribution of valuable entitlements to the states rather than the federal government makes the poor better off and the rich less so.

Part I provides relevant background regarding the anti-commandeering and state sovereign immunity doctrines, and explains how these doctrines allocate entitlements across levels of government. Part II presents a rudimentary model of federal and state taxing and spending, and shows how reallocations of valuable entitlements across levels of government affect individual tax burdens. Part III incorporates data on the overall progressivity of the federal tax code and the relative regressivity of state tax structures, and also explores differences in the composition of federal and state spending. Part IV considers the possibility for federal and state tax structures and budgetary allocations to adjust following a reallocation of entitlements. Part V assesses the magnitude of the possible effects on inequality. Finally, Part VI adds transaction costs to the analysis, and shows how transaction costs do (and do not) alter the conclusions above.

I. The Coase Theorem and the Rehnquist Court

A. The Anti-Commandeering Doctrine

The two landmark decisions laying out the anti-commandeering doctrine are *New York v. United States* and *Printz v. United States*. This section provides a brief overview of both decisions as well as a third case, *National Federation of Independent Business*, that elaborates on (and extends) the doctrine.

I. New York v. United States

The factual background of *New York v. United States* is, in Justice O'Connor’s words, “intricate”\(^{23}\) (and only tangentially relevant to the argument of this paper). For the purposes of this discussion, the key fact is that the statute at issue—the Low-Level Radioactive Waste Policy Amendments Act (LLRWPAA) of 1985\(^{24}\)—included a so-called “take title provision” requiring states to either (a) establish a waste disposal program consistent with congressional standards or (b) assume ownership over (and thus, liability for) waste generated in-state.\(^{25}\) Congress offered monetary incentives to states if they met certain statutory time targets for setting up their waste disposal arrangements, but it did not allow them to opt out of the LLRWPAA regime entirely.\(^{26}\)

\(^{23}\) New York, 505 U.S. at 151.


\(^{25}\) Id. § 5(d)(2)(C), 99 Stat. at 1851 (“If a State . . . is unable to provide for the disposal of all [low-level radioactive] waste generated within such State . . . by January 1, 1996, each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure to the State to take possession of the waste as soon after January 1, 1996, as the generator or owner notifies the State that the waste is available for shipment.”).

\(^{26}\) New York, 505 U.S. at 152-53.
Five years after LLRWPAA was passed, the State of New York challenged the validity of the Act on various constitutional grounds. The case took two more years to wind its way to the Supreme Court, where New York found a receptive audience. By a 6-3 margin, the Court concluded: “Whether one views the take title provision as lying outside Congress’ enumerated powers, or as infringing upon the core of state sovereignty reserved by the Tenth Amendment, the provision is inconsistent with the federal structure of our Government established by the Constitution.”

Justice O’Connor, writing for the majority, elaborated:

Because an instruction to state governments to take title to waste, standing alone, would be beyond the authority of Congress, and because a direct order to regulate, standing alone, would also be beyond the authority of Congress, it follows that Congress lacks the power to offer the States a choice between the two. . . . Either way, the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program . . . .

In Justice O’Connor’s (and the Court’s) view, congressional commandeering of state legislatures poses a threat to democratic processes. In situations “where the Federal Government directs the States to regulate,” voters may not know whether federal elected officials or state elected officials deserve the credit—or blame—for the policy. Justice O’Connor and her colleagues feared that commandeering would allow members of Congress and their state counterparts to pass the hot potato of political accountability back and forth, leaving voters uncertain as to which officials are responsible.

My focus here is not at all on Justice O’Connor’s reasoning, but rather on the consequences of the rule she sets forth. As Roderick Hills puts it, “New York provides a particular kind of entitlement to state governments that is protected by a property rule.” That is, it gives states a property right in their own legislative processes. At the same time, the New York rule does not prevent Congress from purchasing legislation from states in an “intergovernmental marketplace.” The constitutional infirmity in LLRWPAA lay in the fact that Congress had seized this entitlement from the states rather than acquiring it through voluntary exchange.

2. Printz v. United States
The story of *Printz* begins with the Brady Handgun Violence Prevention Act in 1993,\(^{35}\) which established a new system of background checks for potential purchasers of firearms.\(^{36}\) It required gun dealers to collect statements ("Brady Forms") from potential purchasers and to transmit the contents of those Brady Forms (including the potential purchaser’s name, address, and date of birth) to the chief law enforcement officer (CLEO) of the potential purchaser’s home jurisdiction. The Act also required the CLEO to make a “reasonable effort” to determine—within five business days—whether the potential purchaser was a convicted felon, an illegal alien, or otherwise prohibited from acquiring a firearm. If the background check came out clean, the CLEO had to destroy records of the Brady Form and the transaction.\(^{37}\) CLEOs would only be exempt from these requirements if their states instituted instant background-check systems.\(^{38}\)

Shortly after the Brady Act took effect, Jay Printz, the sheriff (and thus the CLEO) of Ravalli County, Montana, brought a lawsuit challenging the constitutionality of the background-check system.\(^{39}\) Printz “object[ed] to being pressed into federal service, and contend[ed] that congressional action compelling state officers to execute federal laws is unconstitutional.”\(^{40}\) Five Justices agreed. While *New York* held that Congress cannot “commandeer[] the legislative processes of the States,”\(^{41}\) *Printz* made clear that the same anti-commandeering rule applied to state administrative resources.\(^{42}\) Justice Scalia, writing for the majority, concluded that “[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.”\(^{43}\)

Importantly, *Printz* still allows state executive officials to be *contracted* into the service of Congress. Justice O’Connor’s concurrence in *Printz* makes it quite clear that “Congress is . . . free to amend the [background check] 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.”\(^{44}\) Again, the

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\(^{36}\) Arguably, the story begins much earlier—in March 1981, when White House Press Secretary James Brady was shot in the head by John Hinckley, Jr. After his near-death experience, Brady became a leading figure in the gun control, and when Congress ultimately enacted comprehensive federal gun-control legislation, it honored his efforts by titling the statute in his name.


\(^{38}\) Id. at 903. An *individual* purchaser would be exempt if she or he “possesse[d] a state handgun permit issued after a background check,” id. at 903, but unless every potential purchaser who was a resident of a jurisdiction possessed a state permit, the CLEO would still have to comply with Brady Act requirements in some circumstances.

\(^{39}\) Id. at 904 (citing *Printz* v. United States, 854 F. Supp. 1503 (D. Mont. 1994)). His case was consolidated with another action brought by the CLEO of Graham County, Arizona. *See id.* (citing *Mack* v. United States, 856 F. Supp. 1372 (D. Ariz. 1994)).

\(^{40}\) Id. at 905.

\(^{41}\) *New York*, 505 U.S. at 176 (internal quotation marks omitted).

\(^{42}\) *Printz*, 521 U.S. at 935.

\(^{43}\) Id.

\(^{44}\) *Printz*, 521 U.S. at 936.
constitutional infirmity lay in the fact that Congress had taken this entitlement from the states rather than buying it.

3. NFIB v. Sebelius

Since New York and Printz, the Supreme Court has not heard another case directly implicating the anti-commandeering doctrine (perhaps because the New York/Printz rule is clear enough that Congress knows not to violate it). The Roberts Court’s 2012 decision in National Federation of Independent Business v. Sebelius, however, invokes the anti-commandeering cases in service of a different end. The facts will be familiar to most readers, and so I will not belabor them here. In brief: The Affordable Care Act of 2010 required states receiving Medicaid funding (which is to say, every state) to expand eligibility to all citizens whose family income is up to 133% of the federal poverty line. This was, of course, in addition to the much more prominent and also-litigated “individual mandate” requiring most Americans to maintain a minimum level of health insurance. The federal government would pay all of the costs of covering newly eligible individuals through 2016 and at least 90% thereafter. Twenty-six states challenged the individual mandate as well as the Medicaid expansion requirement. By a 5-4 vote the Court upheld the individual mandate as an exercise of Congress’s taxing power, but by a 7-2 vote, it struck down the Medicaid expansion requirement. As Chief Justice Roberts wrote, the Affordable Care Act put “a gun to the head” of state governments: expand Medicaid to new groups or else lose all federal Medicaid funding (which for most states would mean more than 10% of their budget). According to Chief Justice Roberts, the Affordable Care Act thus crossed the line from “financial inducement” to unconstitutional “coercion.”

The NFIB decision leaves the outer contours of this anti-coercion doctrine unclear (indeed, intentionally so). It is thus too early to say for sure how the anti-coercion doctrine interacts with the property rule established by New York and Printz, but one way to frame it might be as follows: The anti-commandeering doctrine vests states with control over their legislative processes and administrative capabilities, although it allows the states to transfer their entitlement to Congress in a voluntary exchange. And NFIB ensures that once Congress and the states enter into such an exchange, Congress cannot radically change the terms.

47 Id. § 1396d(y)(1).
48 NFIB, 132 S. Ct. at 2604.
49 Id. at 2604-05 (internal quotation marks omitted).
50 In the Chief Justice’s words:

The Court in Steward Machine [Co. v. Davis, 301 U.S. 548 (1937)] did not attempt to fix the outermost line where persuasion gives way to coercion. The Court found it enough for present purposes that wherever the line may be, this statute is within it. We have no need to fix a line either. It is enough for today that wherever that line may be, this statute is surely beyond it. Congress may not simply conscript state agencies into the national bureaucratic army, and that is what it is attempting to do with the Medicaid expansion.

Id. at 2606-07 (alterations, citations, and internal quotation marks omitted).
B. State Sovereign Immunity

In Pennsylvania v. Union Gas Co., a four-Judge plurality held that Congress can abrogate the sovereign immunity of states pursuant to its power under the Constitution’s Commerce Clause.\(^\text{51}\) In short order, the Supreme Court overruled that holding. In Seminole Tribe of Florida v. Florida\(^\text{52}\) and then in Alden v. Maine,\(^\text{53}\) the Court established that Commerce Clause does not empower Congress to abrogate states’ immunity from suit—either in federal court or in their own courts. This section summarizes those cases and explains the allocation of entitlements following from those decisions.

I. Seminole Tribe of Florida v. Florida

In 1988, Congress passed the Indian Gaming Regulatory Act, which provided that Indian tribes can conduct specified gaming activities only pursuant to a compact with the state in which the activities occur.\(^\text{54}\) The Act also required states to negotiate with tribes “in good faith” to enter into such a compact,\(^\text{55}\) and allowed tribes to sue states in federal court to compel states to comply with the good-faith negotiation mandate.\(^\text{56}\) In 1991, the Seminole Tribe of Florida sued the State of Florida and its governor, seeking to compel the state to negotiate a gaming compact in good faith.\(^\text{57}\) The case reached the Supreme Court and provided the Justices with an opportunity to reconsider—and potentially overrule—Union Gas.

A five-Judge majority seized that opportunity. As Chief Justice Rehnquist wrote for the Court, “Union Gas was wrongly decided and . . . should be, and now is, overruled.”\(^\text{58}\) He elaborated: “Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.”\(^\text{59}\)

Note the second-to-last word in the previous paragraph: Seminole Tribe held that Congress cannot abrogate the sovereign immunity of “unconsenting” states. It did not prohibit states from trading their sovereign immunity to the federal government as part of a voluntary exchange. In this respect, the state sovereign immunity doctrine resembles the anti-commandeering doctrine: it assigns the states an entitlement protected by a property rule, but not an inalienable entitlement. States still can sell that entitlement if Congress’s price is right. (Note as well that Seminole Tribe does not prevent Congress from abrogating state sovereign immunity pursuant to the Fourteenth

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\(^{51}\) See Pennsylvania v. Union Gas Co., 491 U.S. 1, 15 (1989) (plurality op.) (“Congress has the power to abrogate immunity when exercising its plenary authority to regulate interstate commerce.").

\(^{52}\) 517 U.S. 44 (1996).


\(^{55}\) Id. at __ (codified at § 2710(d)(3)(A)).

\(^{56}\) Id. at __ (codified at § 2710(d)(7)).

\(^{57}\) Seminole Tribe, 517 U.S. at 51.

\(^{58}\) Id. at 66.

\(^{59}\) Id. 72.
Amendment.\textsuperscript{60} The holding in \textit{Seminole Tribe} only prevents Congress from abrogating state sovereign immunity pursuant to its powers under Article I.\textsuperscript{61}

2. \textbf{Alden v. Maine}

\textit{Seminole Tribe} “made it clear that Congress lacks power under Article I to abrogate the States’ sovereign immunity from suits commenced or prosecuted in the federal courts.”\textsuperscript{62} The holding rested on the Eleventh Amendment, which by its terms does not apply to suits in state courts.\textsuperscript{63} \textit{Alden v. Maine} presented the Justices with an opportunity to decide whether Congress—pursuant to its Commerce Clause power—can abrogate state sovereign immunity in state court.

In \textit{Alden}, a group of probation officers sued their employer, the State of Maine, in state court for violating the overtime pay provisions of the federal Fair Labor Standards Act. The same five-Justice majority from \textit{Seminole Tribe} held that the probation officers could not proceed with their suit. As Justice Kennedy wrote for the slender majority: “In light of history, practice, precedent, and the structure of the Constitution, we hold that the States retain immunity from private suit in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation.”\textsuperscript{64}

\textit{Alden} was not the Court’s last word on state sovereign immunity. In \textit{Central Virginia Community College v. Katz}, the Court carved out an exception to the \textit{Seminole Tribe/Alden} rule for cases involving the federal bankruptcy laws.\textsuperscript{65} So in the bankruptcy context as well as the Fourteenth Amendment context, the power to decide whether states are immune from private citizen suits lies with Congress, not with the states.

\section*{II. A Partial Equilibrium Analysis of Federal and State Taxing and Spending}

\subsection*{A. The Zero-Transaction-Cost Assumption}

As emphasized above, the anti-commandeering and state sovereign immunity doctrines provide for only an initial allocation of entitlements; states still are free to sell these entitlements to Congress. The Coase theorem thus would lead us to believe that absent transaction costs, Congress will purchase these entitlements from the states where Congress assigns a higher value to the entitlements than the states do. That is, Congress will pay the states to administer federal

\textsuperscript{60} Id. at 59 (citing Fitzpatrick v. Bitzer, 427 U.S. 445, 452-56 (1976)).

\textsuperscript{61} See id. at 73 (“Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction”).

\textsuperscript{62} Alden, 527 U.S. at 712 (emphasis added).

\textsuperscript{63} See U.S. Const. amendment XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State”). Nor does the Eleventh Amendment by its terms apply to suits by citizens against their own states in federal court, although the Court extended the Eleventh Amendment to bar such suits long ago. See Hans v. Louisiana, 134 U.S. 1 (1890).

\textsuperscript{64} Alden, 527 U.S. at 754.

\textsuperscript{65} 546 U.S. 356, 379 (2006).
programs where the states can do so more efficiently than federal agencies can. So too, Congress will pay the states to waive their sovereign immunity when such waivers advance federal objectives more than they burden states.

This Coasean analysis, on its own, does not give us a reason to favor one initial allocation of entitlements over the other. After all, the same logic would suggest that if the Court had allocated the relevant entitlements to Congress rather than the states, then the states would purchase the entitlements back from the federal government when the states assign a higher value to the entitlements that Congress does. That is, if Congress commandeered the states to administer a particular program but the cost to a state of administering the program exceeded the cost to the federal government, then the state would purchase the services of the appropriate federal agency. And likewise, if Congress made the states liable to lawsuits of a particular sort but the cost of liability to a state exceeded the value that Congress ascribed to state liability, then the state would purchase immunity from the federal government.

One might question whether it is realistic to expect that states would purchase services or immunity from Congress. (In other words, one might question whether the intergovernmental market is truly Coasean.) I will address this question at greater length in Part VI but for now will offer three observations.

First, one might think of *New York v. United States* as exactly such a case of states buying entitlements from the federal government. Under the LLRWPA, states either had to establish the capacity to dispose of low level radioactive waste generated within their borders by January 1, 1993 or else to forfeit certain funds to the Secretary of Energy. In effect, the LLRWPA said to the states: “Administer or pay.” Moreover, the LLRWPA decreed that states would be liable for all damages incurred by generators or owners of low level radioactive waste unless the state provided for the disposal of such waste by January 1, 1996. In other words, Congress abrogated the immunity of states from claims by waste generators/owners but then offered to sell that immunity back to the states in exchange for a particular form of consideration (here, the state taking over the disposal process).

Second, outside the LLRWPA context, it is not unheard-of for states to purchase administrative services from federal agencies. During the October 2013 federal government shutdown, several states paid the U.S. Department of the Interior to continue to operate national parks and monuments within those states. One might think of this as the states and the Department of the Interior engaging in a voluntary exchange where the value that the states ascribe to federal administration is greater than the cost to the relevant federal agency. A similar phenomenon emerges in the procurement context, with state and local governments effectively purchasing procurement services from the federal General Services Administration.

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66 See *New York*, 505 U.S. at 152-53.
67 See id. at 153-54.
Third, and perhaps most importantly, the argument in the next part does not rest on the premise that if New York and Printz had gone the other way, states would pay the federal government not to commandeer state legislative and executive functions. Nor does the argument depend on the premise that if Seminole Tribe and Alden had gone the other way, states would purchase back their immunity entitlement from Congress under certain circumstances. Rather, the argument is that the Rehnquist Court’s initial assignment of entitlements to the states causes Congress to pay the states more than it would if the initial assignment of entitlements had gone the other way. Put differently, the argument is that states’ right to refuse allows the states to extract more resources from Congress in intergovernmental bargaining. The Coase theorem serves to illustrate this, but the zero-transaction-cost assumption embedded in the Coase theorem is not a necessary component of the analysis.

B. A Toy Model of Federal and State Taxing and Spending

To recapitulate: The anti-commandeering and state sovereign immunity doctrines each assign to the states a valuable entitlement that the states can sell back to Congress on the intergovernmental market. If intergovernmental bargaining is Coasean, then the initial entitlement allocation will not determine whether the states ultimately enact and enforce federal programs or whether the states ultimately enjoy immunity from lawsuits in their own and federal courts: Congress will purchase the entitlement from the states if Congress assigns a higher value to the entitlement than states do. Yet even under Coasean conditions, the initial allocation of entitlements does have a distributive effect: it enriches the party to whom the entitlement is allocated.

A toy model will allow us to begin to explore the interpersonal distributive effects of the intergovernmental allocation of entitlements. Imagine that Congress’s entire budget is devoted to national defense, and that State’s entire budget is devoted to schools. Let’s assume, moreover, that members of Congress and the state legislature derive political benefits from additional spending and incur political costs from additional taxation. For the median lawmaker at both levels, the political benefit from spending $x$ (on defense in the congressperson’s case; on schools in the state legislator’s case) is given by $B(x) = 100x - 0.5x^2$. Likewise, the political cost of raising $x$ in taxes is given by $C(x) = 0.5x^2$. The median lawmaker at both levels chooses $x$ such that the marginal benefit from additional spending, $B'(x)$, equals the marginal political cost from additional taxation, $C'(x)$. Here, $B'(x) = 100 - x$, and $C'(x) = x$. Thus, $B'(x) = C'(x)$ when $100 - x = x$, or when $x = 50$. Congress raises 50 through taxes, which it spends on national defense, and State raises 50 through taxes, which it spends on schools.

Imagine, moreover, that society is composed of two households: the Riches and the Poors. State raises revenue through a head tax, such that the tax paid by the Riches to State, $T_S(R)$, always equals the tax paid by the Poors to State, $T_S(P)$. Congress, by contrast, raises revenue through a highly progressive tax, such that the tax paid by the Riches to the federal government, $T_F(R)$, is always four times the tax paid by the Poors to the federal government, $T_F(P)$. At the outset, $T_S(R) = T_S(P) = 25$, while $T_F(R) = 40$ and $T_F(P) = 10$.

Now imagine (borrowing from the facts of Alden) that Congress decides that it wants State to be subject to liability under the overtime provisions of the Fair Labor Standards Act. Members of Congress believe that State liability under FLSA advances their policy or political goals, and
they assign a value of 11 to the resulting benefit. State, for its part, anticipates a cost of 9 if it is subject to liability under FLSA’s overtime provisions.

First, let’s say that Congress can and does abrogate State’s sovereign immunity pursuant to its Commerce Clause powers. State now faces the following dilemma: If it raises revenue of \( x \), it can devote only \( x - 9 \) to schools (with the remaining 9 going to cover FLSA liabilities). So from the median state legislator’s perspective, \( B(x - 9) = 100(x - 9) - 0.5(x - 9)^2 \). And thus the State legislator sets the level of spending and taxation at the point where \( B'(x - 9) = C'(x) \), or \( x = 54.5 \). That is, State raises 54.5 in taxes and spends 45.5 on schools, with the remaining 9 going to cover the State’s FLSA liability. Since \( T_s(R) \) always equals \( T_s(P) \), the Riches and Poors now each pay 27.25 in taxes to State. Federal taxes (and spending) are unchanged, so the Riches pay a total of 67.25 in federal and state taxes while the Poors pay a total of 37.25.

Next, let’s imagine that the Supreme Court comes along and holds, as in *Alden v. Maine*, that Congress cannot abrogate State’s sovereign immunity under the Commerce Clause. Since Congress assigns a higher value to the relevant entitlement than State does, we might expect to see Coasean bargaining at the intergovernmental level. Congress will offer State some amount greater than 9 and less than 11 so that State voluntarily relinquishes its immunity from suit under FLSA. Let’s assume, for simplicity, that the parties bargain to the midpoint between their respective valuations: Congress agrees to pay State 10.

State is now even better off than it was originally, because the cost of FLSA liability (9) is less than the size of the intergovernmental transfer (10). With a profit of 1, State can now raise \( x \) in taxes and spend \( x + 1 \) on schools. Thus, \( B(x + 1) = 100(x + 1) - 0.5(x + 1)^2 \). The State legislator now sets the level of taxing and spending such that \( B'(x + 1) = C'(x) \), or \( x = 49.5 \). That is, State raises 49.5 in taxes and spends 50.5 on schools. The Riches and Poors each pay 24.75 in taxes to State.

The federal government, by contrast, now faces a new constraint: If it raises revenue of \( x \), it can devote only \( x - 10 \) to national defense (with the remaining 10 going to compensate the states for their sovereign immunity right). The new optimal \( x \) for the median member of

\[ B(x - 9) = 100(x - 9) - 0.5(x - 9)^2 \]
\[ B(x - 9) = 109x - 0.5x^2 - 940.5 \]
\[ B'(x - 9) = 109 - x \]
Set \( B'(x - 9) = C'(x) \)
\[ 109 - x = x \]
\[ x = 54.5 \]

To elaborate:

\[ B(x - 9) = 100(x - 9) - 0.5(x - 9)^2 \]
\[ B(x - 9) = 109x - 0.5x^2 - 940.5 \]
\[ B'(x - 9) = 109 - x \]

From the median congressmember’s perspective, \( B(x - 10) = 100(x - 10) - 0.5(x - 10)^2 \). Thus:

\[ B(x - 10) = 100x - 1000 - 0.5x^2 - 20x + 100 \]
\[ B(x - 10) = 110x - 0.5x^2 - 1050 \]
\[ B'(x - 10) = 110 - x \]
Congress is 55—i.e., Congress raises 55 in federal taxes and spends 45 on national defense. The Riches pay federal taxes of 44, and the Poors pay federal taxes of 11. Thus the Riches pay a total of 68.75 in federal plus state taxes, and the Poors pay a total of 35.75. (See Table 1.)

**Table 1. Toy Model of Taxing and Spending**

<table>
<thead>
<tr>
<th></th>
<th>Entitlement to Congress</th>
<th>Entitlement to States <em>(Alden)</em></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Federal</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tax Revenue</td>
<td>50</td>
<td>55</td>
</tr>
<tr>
<td>Intergovernmental Transfer</td>
<td>0</td>
<td>-10</td>
</tr>
<tr>
<td>Spending (Defense)</td>
<td>50</td>
<td>45</td>
</tr>
<tr>
<td><strong>State</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tax Revenue</td>
<td>54.5</td>
<td>49.5</td>
</tr>
<tr>
<td>Intergovernmental Transfer</td>
<td>0</td>
<td>10</td>
</tr>
<tr>
<td>Cost of FLSA Liability</td>
<td>9</td>
<td>9</td>
</tr>
<tr>
<td>Spending (Schools)</td>
<td>45.5</td>
<td>50.5</td>
</tr>
<tr>
<td><strong>Taxes</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Riches (Federal)</td>
<td>40</td>
<td>44</td>
</tr>
<tr>
<td>Riches (State)</td>
<td>27.25</td>
<td>24.75</td>
</tr>
<tr>
<td><strong>Riches (Total)</strong></td>
<td><strong>67.25</strong></td>
<td><strong>68.75</strong></td>
</tr>
<tr>
<td>Poors (Federal)</td>
<td>10</td>
<td>11</td>
</tr>
<tr>
<td>Poors (State)</td>
<td>27.25</td>
<td>24.75</td>
</tr>
<tr>
<td><strong>Poors (Total)</strong></td>
<td><strong>37.25</strong></td>
<td><strong>35.75</strong></td>
</tr>
</tbody>
</table>

The toy model directs our attention to two potential effects of decisions such as *Alden* that allocate valuable entitlements to the states rather than to the federal government. First, by making the states wealthier and Congress less so, these entitlement allocations facilitate more spending on state priorities (and less spending on federal ones). Second, by shifting more of the revenue-raising burden to the more progressive federal tax system, these entitlement allocations cause the Riches to pay more in total taxes and the Poors to spend less. On the tax side alone, the effect of *Alden* in the toy model is to transfer 1.5 from the Riches to the Poors.

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Set \( B'(x - 10) = C'(x) \)
\[ 110 - x = x \]
\[ x = 55 \]
And yet the toy model is just that—an abstraction from a much more complex reality. Note three assumptions embedded in the analysis above:

-- (1) The allocation of a valuable entitlement to the states rather than to Congress does not change the progressivity of the federal or state tax systems;

-- (2) The allocation of a valuable entitlement to the states rather than to Congress does not change the allocation of federal and state spending (i.e., the states do not start spending on national defense when they have additional resources); and

-- (3) The marginal political cost of revenue-raising for the median member of Congress depends only on the amount that the federal government has already raised in taxes, and (symmetrically) the marginal political cost of revenue-raising for the median state legislator depends only on the amount that the state government has already raised in taxes.

All three of these assumptions are (of course) contestable: I consider each at greater length in Part IV. Before doing so, however, I consider the extent to which the allocation of taxes and spending at the federal and state level matches the simplified world described above.

III. The Real World of Federal and State Taxing and Spending

The model above assumed a world in which the federal tax system is highly progressive and state tax systems are not at all redistributive. It also assumed that all discretionary federal spending went toward defense and all state-level spending went toward schools. These are, of course, counterfactual assumptions. This Part offers a more realistic picture of federal and state taxing and spending.

A. Progressivity and Regressivity in Federal and State Taxation

Despite news stories about billionaires paying nothing in federal income taxes72 (or paying a lower effective rate than their secretaries73), the fact of the matter is that the federal tax system is steeply progressive. In 2015, the average effective tax rate for families in the lowest quintile by adjusted cash income was -5.4%, rising steadily to an effective tax rate of 33.3% for families in the top one percent.74

73 See Chris Isidore, Buffett Says He’s Still Paying Lower Tax Rate Than His Secretary, CNN Money (Mar. 4, 2013), http://money.cnn.com/2013/03/04/news/economy/buffett-secretary-taxes.
The contrast with state tax systems is stark. According to a 2015 analysis by the Institute on Taxation and Economic Policy (ITEP), families in the bottom quintile of the income distribution face an effective state tax rate (including income, sales, property, corporate, and local taxes) of 10.9%, falling steadily to 5.4% for families in the top one percent. (See Figure 1)

income taxes, payroll taxes, excise and customs duties, and estate and gift taxes. With respect to corporate income taxes, the Office of Tax Analysis explains its methodology as follows:

The share of the corporate income tax that represents cash flow is assumed to have no burden in the long run; the share of the corporate income tax that represents a tax on supernormal returns is assumed to be borne by supernormal corporate capital income as held by shareholders; and the remainder of the corporate income tax, the normal return, is assumed to be borne equally by labor and positive normal capital income.

Id. n.2.

75 See Institute on Taxation & Economic Policy, Who Pays? A Distributional Analysis of the Tax Systems in All 50 States (5th ed. 2015), http://www.itep.org/pdf/whopaysreport.pdf. The state rates reported by ITEP are “post-federal offset” (i.e., they account for the fact that federal taxpayers who itemize can claim a deduction for state and local taxes, assuming that they are not subject to the alternative minimum income tax).
Even Vermont’s tax system, which ITEP ranks as the most progressive state tax system, is highly regressive in comparison to its federal counterpart. The average effective state tax rate for families in the top quintile in Vermont is still lower than the average effective state tax rate for families in the bottom quintile. The relatively flat effective-rate structure of the Vermont system still stands in stark contrast to the overall progressivity of the federal tax system. (See Figure 2.)

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76 Data drawn from U.S. Dep’t of the Treasury, Office of Tax Analysis, supra note 74, and Institute on Taxation & Economic Policy, supra note 75. The comparison is inexact: the Treasury tables use 2015 data, while the ITEP report focuses on 2012. Moreover, ITEP’s methodology for allocating the burden of the corporate tax is different from Treasury’s, though this is likely to make state tax systems look more progressive than they would if the Treasury methodology were employed. See Institute on Taxation & Economic Policy, ITEP Tax Model Methodology, http://www.itep.org/about/itep_tax_model_full.php (last visited Oct. 12, 2016). In any event, the difference between the overall progressivity of the federal tax system and the relative regressivity of state tax systems is so stark that these methodological differences are unlikely to alter the topline result.
What accounts for this contrast? One important factor is the sales tax at the state level (and the relative insignificance of sales taxes at the federal level). States derive about a third of their revenue, on average, from sales taxes,\textsuperscript{78} while federal excises and customs duties account for less than 5% of federal tax revenues.\textsuperscript{79} Sales and excise taxes scale over consumption rather than income, and consumption is likely to be a larger share of income for families lower down the income ladder (who are likely to save less). Yet this explanation is incomplete in two respects. First, four states (Delaware, Montana, Oregon, and New Hampshire) have no sales tax, and the tax systems of these states are still regressive relative to the federal system.\textsuperscript{80} Second, and more fundamentally, the sales tax explanation simply restates the question. The puzzle is why the federal tax system is so much more progressive than state tax systems. It is no answer to say that the federal tax system is more progressive because the federal government relies on progressive taxes.

Economists Martin Feldstein and Marian Vaillant Wrobel offer an explanation that operates at a deeper level: they write that “[s]tates and other local governments cannot redistribute income if individuals can migrate among political jurisdictions.”\textsuperscript{81} This is not to say that state and local governments never try to redistribute income. But according to Feldstein and Wrobel:

\textsuperscript{77} For details, see supra note 76.
\textsuperscript{78} See Institute on Taxation & Economic Policy, supra note 75, at 1.
\textsuperscript{79} See U.S. Dep’t of the Treasury, Office of Tax Analysis, supra note 74.
Although state tax structures may appear to be redistributive, real pretax wages must adjust in the long run to make each individual’s after-tax real income (or, more precisely, utility level) the same in all jurisdictions. If the after-tax real income available to an individual were higher in one state than in another, individuals would locate in states where real net incomes were more favorable. In response to differences in the progressivity of tax rates, migration would raise pretax real incomes of high income individuals in states where such individuals were taxed more heavily and lower pretax incomes of lower income individuals in such states. In equilibrium, the real after tax incomes would be independent of the state tax structure.\footnote{Id.}

The Feldstein-Wrobel argument is not a completely satisfactory explanation for the relative regressivity observed across state tax systems. First, the Feldstein-Wrobel argument explains why progressive taxation at the state level might not be redistributive once wage adjustments are taken into account; it does not, however, explain why we see such regressivity in effective-rate terms. And second, the Feldstein-Wrobel argument relies on the claim that high-income individuals will leave states that impose steeply progressive taxes, or else that wages will adjust to cancel out the redistributive effects of any tax change. However, analysis of migration and income data by Andrew Leigh reveals “little evidence that—in aggregate—more redistributive state taxes lead to a more unequal distribution of pre-tax hourly wages,” or that more redistributive state taxes have any “substantial impact on the composition or volume of interstate migration.”\footnote{Andrew Leigh, Do Redistributive State Taxes Reduce Inequality?, 61 Nat’l Tax J. 81, 100 (2008).} More recently, Cristobal Young and collaborators find (using IRS administrative data) that “millionaire migration is indeed responsive to top [state] income tax rates,” but “the magnitude of the migration response is small and has little effect on the millionaire tax base.”\footnote{Cristobal Young et al., Millionaire Migration and Taxation of the Elite: Evidence from Administrative Data, 81 Am. Sociological Rev. 421, 423 (2016).} Young et al. estimate that for the average state, a one percentage-point increase in the tax rate on millionaires’ incomes would lead to an annual population loss of only 23 millionaire households (12 fewer in-migrations, 11 fewer out-migrations).\footnote{Id. at 434.} Young et al. also find that the optimal state tax rate on millionaires from a revenue-maximization perspective is far above the actual rate in any state,\footnote{Id. at 423.} suggesting that the constraint imposed by millionaire migration cannot completely explain the relative regressivity of state tax systems. Young et al. explain these findings by positing that “[e]lites are embedded in the regions where they achieve success,” and so “have limited interest in moving to procure tax advantages.”\footnote{Id. at 423. One might expect to see more tax-induced millionaire migration in regions such as the New York City metropolitan area, where high-income earners can move across state lines without changing their location of work. Note, though, that Connecticut, New Jersey, and New York tax income at the source (i.e., a New Jersey resident who works in New York City must pay New York state tax on his salary). See Cristobal Young & Charles Varner, Millionaire Migration and State Taxation of Top Incomes: Evidence from a Natural Experiment, 64 Nat’l Tax J. 255, 263 (2011).}
If the mobility of high-income households cannot explain the stark contrast between the progressivity of the federal income tax system and the relative regressivity of state taxes, what can?\textsuperscript{88} Institutional factors shed (some) further light on the puzzle. Seven states—Alaska, Florida, Nevada, South Dakota, Texas, Washington and Wyoming—have no income tax at all, and in most of those states the state constitution explicitly or effectively prohibits income taxation.\textsuperscript{89} The constitutions of New Hampshire and Tennessee prohibit the taxation of earned income (though not dividends and interest).\textsuperscript{90} The constitutions of six other states—Colorado, Illinois, Massachusetts, Michigan, Pennsylvania, and Utah—require that any income tax be at a flat rate,\textsuperscript{91} while the constitution of Georgia imposes a 6\% cap on the individual income tax rate.\textsuperscript{92} Sixteen states (including six of those previously mentioned) require legislative supermajorities for some or all tax increases.\textsuperscript{93} All in all, 26 states either have no general income tax, have a constitutional flat-tax requirement or rate cap, or have a legislative supermajority requirement that applies to income tax increases.\textsuperscript{94}

The institutional explanation for the relative regressivity of state taxes is still not fully satisfying, for two reasons. First, it remains the case that 24 states do have an income tax, do not have a constitutional flat-tax requirement or a rate cap, and do not have legislative supermajority requirements for tax increases. And yet of these 24 states, the one with the most progressive tax system—Vermont—still taxes its highest-income households at a lower effective rate than middle-income households. Second, the observation that more than half of the states face institutional barriers to progressive taxation does not explain why those institutional barriers exist in the first place.

\textsuperscript{88} Cf. Eric Kades, Corrective Progressivity (unpublished manuscript at 27) (suggesting that “the phenomenon of state tax regressivity does not have a simple ideological or economic explanation”).

\textsuperscript{89} See Marcus Hurn, State Constitutional Limits on New Hampshire’s Taxing Power: Historical Development and Modern State, 3 Pierce L. Rev. 251 (2008).


\textsuperscript{92} In Arkansas and Oklahoma, a three-fourths vote of the legislature is required for a tax increase (Arkansas allows an exception for increases to sales and alcohol taxes). A two-thirds requirement applies in Arizona, California, Colorado, Louisiana, Missouri, Nevada, South Dakota, and Washington. A three-fifths vote is required in Delaware, Kentucky, Mississippi, and Oregon. A three-fourths requirement applies to property tax increases in Michigan. A three-fifths requirement applies to corporate income tax increases in Florida. See Tax Policy Ctr., States with Legislative Supermajority Requirements To Increase Taxes, 2010 (Apr. 5, 2013), http://www.taxpolicycenter.org/sites/default/files/legacy/taxfacts/content/PDF/state_supermajority.pdf.

Ultimately, the relative regressivity of state taxes remains something of a puzzle. But that does not make it any less of a fact. And so long as that fact remains true, an increase in federal taxes coupled with a reduction in state taxes is likely to shift revenue-raising toward a more progressive tax structure.

**B. Differences in Federal and State Discretionary Spending**

The previous section focused on the possibility that the allocation of valuable entitlements to the states rather than the federal government will lead to a shift in taxation from the state level to the federal level. As noted in Part II, a parallel possibility is that states and the federal government respond to the anti-commandeering and state sovereign immunity doctrines through spending changes rather than tax changes. That is, it may be that if *New York* and *Printz* and *Seminole Tribe* and *Alden* all had gone the other way, states would spend less than they do today and the federal government would spend more. This, too, might yield interpersonal distributive effects because of differences in the composition of state and federal spending.

Figure 3 focuses on these differences. It shows the percentage of federal discretionary spending and state general expenditures allocated to specific areas in 2014. Unsurprisingly, national defense accounts for more than half of federal discretionary spending and no state spending. Aside from that, the share of state general spending allocated to education, social services, and health and hospitals is significantly larger than the share of federal discretionary spending allocated to those categories.
One might legitimately question whether the general expenditures-to-discretionary spending comparison is apples-to-apples. I have excluded federal mandatory spending (primarily Social Security, Medicare, and Medicaid) as well as state insurance trust expenditures (primarily pensions, unemployment compensation, and workers’ compensation); the rationale is that Congress and state legislatures have less leeway to adjust these allocations than to increase or decrease spending in other categories. These assumptions will be interrogated in Part IV. The point for now is simply that states spend very differently than the federal government does.

This still leaves us with the question: Who benefits from more spending on education and social services, and who bears the cost of less spending on national defense? Edward Wolff and Ajit Zacharias find that education spending benefits lower-income households much more—in percentage-of-income terms—than higher-income households; in this respect, public spending on education has an inequality-reducing effect even if funded by a flat or modestly regressive tax. The distribution of benefits from national defense spending is harder to determine: one might

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allocate benefits across households proportionately to income (in which case national defense spending would not be inequality-reducing) or on a per-capita basis (in which case it would be). 97

One common approach is to treat all spending as lump-sum redistribution allocated on a per-capita basis; 98 on this view, shifts from federal to state spending would have no effect on interpersonal distribution beyond the effects from corresponding tax-burden shifts. An alternative approach would be to try to determine who benefits from federal spending and who benefits from state spending; and yet such an exercise—fraught in its own right—tells us very little about who benefits from the marginal dollar of federal/state spending. 99 I will not seek to resolve that question here, except to note that spending-side changes potentially magnify and potentially moderate the inequality-reducing effects of New York, Printz, Seminole Tribe, and Alden. If the marginal $1 of state spending is more likely than the marginal $1 of federal spending to flow to the have-lesses, then spending-side adjustments magnify the distributional consequences of state-to-federal tax burden shifts. If the opposite, then spending-side adjustments offset some of the distributional effects of federalism-induced tax changes.

IV. From Partial Equilibrium to General Equilibrium

The analysis so far has assumed that the reallocation of valuable entitlements from the federal government to the states will affect only the amount—and not the composition—of (1) federal and (2) state taxation. As for the first assumption, one might think that the amount of revenue raised would affect the progressivity of the federal tax system—and the same for the states. In other words, if Congress has to raise taxes, it might allocate the additional burden differently than the existing burden. There is some cause to think this the case, though also grounds to doubt that it will alter the analysis. Notably, the largest federal tax increases in percentage-of-GDP terms over the past four decades have coincided with increases in the share of the tax burden borne by the top quintile and the top percentile. 100 While it is hazardous to draw broad conclusions from a small number of cases, there is little reason to believe that more federal revenue-raising systemically leads to less progressivity in the federal tax system. Meanwhile, more

than half of all states face considerable constraints—detailed above—101—that prevent them from changing the structure of their own tax systems. It is, to be sure, conceivable that other states might choose to distribute the additional tax burden in a highly progressive fashion if the Court had allocated the commandeering and immunity entitlements to Congress instead of to the states. It is also conceivable that states with constitutional constraints on progressive taxation might lift those constraints if revenue needs rise. Yet there is also very strong reason to believe that who taxes affects who is taxed, even after allowing for the possibility of adjustments: that is, more revenue raising through the federal system will lead to more revenue drawn from higher-income taxpayers.

A second assumption embedded in the toy model is that the allocation of valuable entitlements between the federal and state governments does not alter the composition of federal and state spending. This is admittedly unrealistic. In the toy model, all federal spending is on national defense (an area where the states are unlikely to intervene), while all state spending is on schools (an area in which the federal government’s fiscal role remains relatively minor).102 As illustrated by Figure 3, however, areas of federal and state spending substantially overlap. It is therefore possible—indeed, plausible—that a transfer from the federal government to the states will lead the states to increase spending and Congress to pull back from some of the same areas.

Note, though, that even if this is true, it does not change the main conclusion of the argument above. To see why, imagine tweaking the toy model such that the additional 5 in state spending following the shift to an Alden regime flows to national defense rather than schools. The tax result remains the same: taxes paid by the Riches rise by 1.5, and taxes paid by the Poors fall by the same amount. Changes in the composition of state spending counteract the egalitarian effect of federalism only if state governments begin to spend on programs that do less to reduce inequality than the federal programs from which those funds have been diverted.

A third assumption in the model above is that the marginal political cost of revenue-raising for the median state legislator is independent of the amount that Congress raises through federal taxation. There is some reason to doubt that this is the case. Section 164 of the federal Internal Revenue Code allows an itemized deduction for state and local taxes.103 A consequence is that for itemizers, the after-tax cost of an additional $1 of state taxes is reduced by that taxpayer’s marginal federal income tax rate. Assuming that the marginal political cost of revenue-raising for a state lawmaker is correlated with the marginal monetary cost to voters, then a shock that leads Congress to tax more might also lead the states to tax more.104

If this is the case, then it only magnifies the egalitarian effect of allocating valuable entitlements to the states. While in the toy model the state’s head tax system accomplishes no

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101 See supra text accompanying notes __-__.
redistribution, in reality even a tax structure with mildly regressive rates can be redistributive if the resulting revenues are used to fund a public good valued uniformly across households.\textsuperscript{105} If the allocation of valuable entitlements to states rather than the federal government leads to higher federal tax rates, then the consequent increase in the size of state government likely has an inequality-reducing effect.

\section*{V. Magnitudes}

Even assuming that the allocation of valuable entitlements to the states rather than Congress has an inequality-reducing effect, one might doubt whether the effect is of the first order. Monetary transfers from Congress to the states occurred long before \textit{New York}, \textit{Printz}, \textit{Seminole Tribe}, and \textit{Alden}—all in short succession—established that Congress could not commandeer the states or abrogate their sovereign immunity without their consent. Moreover, isolating the effects of these decisions on the magnitude of federal-to-state transfers is impossible. Arguably, the rule announced in \textit{New York} and \textit{Printz} was implicit in the Court's case law prior to either case; Justice Scalia said in his opinion for the majority in \textit{Printz} that decisions dating back to the early 1980s “have made clear that the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs,” adding that the result in \textit{New York} “should have come as no surprise.”\textsuperscript{106} One might trace the anti-commandeering doctrine far further back than that. Justice Story wrote in the 1842 case \textit{Prigg v. Pennsylvania} that “it might well be deemed an unconstitutional exercise of the power of interpretation, to insist that the states are bound to provide means to carry into effect the duties of the national government.”\textsuperscript{107} Chief Justice Taney, two decades later, said much the same thing in even stronger terms: “[T]he Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it.”\textsuperscript{108}

For this reason, comparing net federal-to-state transfers pre-\textit{New York} to post-\textit{Alden} is a problematic way to assess the effects of the anti-commandeering and state sovereign immunity doctrines on the intergovernmental flow of funds. Such a comparison might understated the effect because it fails to capture the pre-\textit{New York} influence of at least the anti-commandeering rule, and because it fails to control for other factors that might have shaped federal and state public finance. And yet such a comparison may be suggestive (though not more than that). For what it’s worth, in nominal terms, federal-to-state transfers increased from $135.3 billion in fiscal year 1990 (before \textit{New York}) to $285.9 billion in fiscal year 2000 (after \textit{Alden}), and to an estimated $628.2 billion in fiscal year 2015. In percentage-of-GDP terms, the increase is from 2.3% in 1990 to 2.8% in 2000 to 3.5% in 2015.\textsuperscript{109}

\textsuperscript{107} 41 U.S. 539, 616 (1842).
All in all, transfers from the federal government to the states totaled $536 billion in fiscal year 2014.\footnote{See U.S. Census Bureau, State Government Finances: 2014, https://www.census.gov/govs/state (release date June 7, 2016).} Meanwhile, families in the top percentile earned approximately 17.7% of all cash income while paying 28.7% of all federal taxes.\footnote{U.S. Dep’t of the Treasury, Office of Tax Analysis, Distribution Table: 2015 001—Distribution of Families, Cash Income, and Federal Taxes Under 2015 Current Law (July 24, 2015), https://www.treasury.gov/resource-center/tax-policy/tax-analysis/Documents/Distribution-of-Tax-Burden-Current-Law-2015-Revised.pdf.} If that $536 billion is raised through a tax structure that is flat across income, then families in the top 1% can expect to bear approximately $95 billion of the burden. If the same amount is raised through a tax structure mirroring the federal status quo, then the top 1% can expect to bear approximately $154 billion of the burden. The $49 billion difference is substantial by any measure, amounting to approximately 2.0% of pre-tax income for families in the top percentile.\footnote{See id. (showing cash income of $2.465 trillion for families in the top 1%).} Even if spending-side changes wipe out half of this effect, the fact that an additional $536 billion is raised each year through the progressive federal tax system rather than flat-rate state systems would still result in a transfer from the top percentile to lower-bracket taxpayers equal to 1.0% of the former group’s pre-tax income.

This is not to suggest that the tax burden borne by the top 1% would rise by $49 billion (or half that) if New York, Printz, Seminole Tribe, and Alden were all overruled. For one thing, the safeguards of federalism (and of state fiscs) are not limited to constitutional law. As Herbert Wechsler observed in 1954, congressional respect for state prerogatives is part and parcel of the American political tradition.\footnote{See Herbert Wechsler, The Political Safeguards of Federalism: The Rôle of the States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543 (1954).} Perhaps the most important of these is party politics: members of Congress and state lawmakers from the same party are playing for the same team, so to speak, and even if the anti-commandeering and state sovereign immunity doctrines were eliminated, it seems unlikely that the $500 billion-plus in federal-to-state transfers each year would grind to a halt.\footnote{See Larry D. Kramer, Putting the Politics Back into the Political Safeguards of Federalism, 100 Colum. L. Rev. 215 (2000).}

These observations do not alter the conclusions above except insofar as they alter the focus—away from the Supreme Court’s federalism doctrines, and toward the federalism norms emanating from sources other than the Court that cause Congress to compensate rather than commandeer the states. Moreover, insofar as the political safeguards of federalism arise from party structure, the declining power of political parties in the United States today suggests that the constitutional law anti-commandeering and state sovereign immunity doctrines may be doing more work as time goes on.\footnote{Cf. Ezra Klein, Donald Trump’s Success Reveals a Frightening Weakness in American Democracy, Vox (Nov. 7, 2016), http://www.vox.com/policy-and-politics/2016/11/7/13532178/donald-trump-american-democracy-weakness (noting that the rise of Donald Trump as “decisively wrecked” the idea that party establishments control electoral outcomes).} I leave it to others to debate whether the massive federal-to-state...
transfers we see each year are a function of (a) Court-imposed constraints, (b) federalism norms arising from non-judicial sources, or—as is most likely—(c) both. The central argument here is that federal-to-state transfers, whatever their cause, have distributive effects that are not only intergovernmental but also interpersonal.

**VI. Accounting for Transaction Costs**

So far, the analysis in this paper has proceeded on the assumption that bargaining between Congress and the states is Coasean. That assumption is obviously counterfactual (or, at the very least, implausible). Insofar as the transfer of entitlements requires legislation at either level, drafting costs and logrolling may get in the way of mutually beneficial exchanges. And even if state and federal agencies can negotiate the necessary transfer, such exchanges will inevitably involve transaction costs as well: no complex organization operates friction-free, and certainly not a state or federal bureaucracy.

Do transaction costs alter the analysis above? No and yes. The answer is “no” in the sense that even in the presence of transaction costs, the allocation of a valuable entitlement will have distributive effects. Even if in some cases Congress cannot purchase the relevant entitlement from states because transaction costs get in the way, it is still almost certainly true that total federal-to-state transfers will be greater with these doctrines than without. To put the same point slightly differently, the fact that Congress sometimes cannot buy the relevant entitlement from the states does not mean that Congress never buys the entitlement. And if Congress started out with the relevant entitlement, presumably it would not pay to buy what it already had.

The answer is “yes” in a different sense. The anti-commandeering and state sovereign immunity doctrines allocate an entitlement to states protected by a property rule rather than a liability rule.\(^{117}\) An entitlement is protected by a “property rule,” as Guido Calabresi and Douglas Melamed write in a canonical article, when “someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller.”\(^{118}\) An entitlement is protected by a “liability rule” when “someone may destroy the initial entitlement if he is willing to pay an objectively determined value for it,” even if the original entitlement holder refuses to sell for that price.\(^{119}\) The analysis above has shown why the allocation of entitlements to the states rather than federal government plausibly has a progressive distributive effect. Yet this effect does not depend on whether the entitlement is protected by a property rule or a liability rule.

The argument for liability rule protection rather than property rule protection becomes stronger in the presence of transaction costs.\(^{120}\) If states can administer a particular program more efficiently than the federal government but transaction costs stand in the way of a federal-state exchange, then property rule protection potentially prevents the program from being carried out by the least cost administrator. If the benefits of the program (as perceived by

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\(^{117}\) See Huq, supra note 19, at 1635.


\(^{119}\) Id.

\(^{120}\) See id. at 1119.
members of Congress) are greater than the costs of state administration but less than the costs of federal administration, then a property rule in the presence of transaction costs may prevent the program from being enacted at all. So too for sovereign immunity: Even where state liability might contribute more to the advancement of a congressional objective than it would cost the states, transaction costs may prevent Congress from acquiring the entitlement from the states.

One can imagine a liability rule in this context taking the following form: States have an entitlement to their own legislative and executive processes, and to immunity from suit by private citizens in state and federal court. Congress cannot take that entitlement away from states without paying. But Congress can exercise a power of eminent domain over the states and seize the relevant entitlement for itself, provided that it pays just compensation. And if state and federal officials cannot settle the matter themselves, courts will adjudicate the question of how much compensation is just.

On this view, the federal government could have required states to expand Medicaid to all citizens with incomes up to 133% of the poverty line, and could have required states to establish health insurance exchanges under the Affordable Care Act. If a state failed to reach an agreement with the federal government regarding funding, then the state would have the right to sue the federal government for just compensation. A court (presumably a federal court) would then determine how much the federal government must transfer to the state in order to compensate the state fully for the cost of administering the relevant program. The court’s role would be much the same as the Court of Federal Claims in the federal eminent domain context.

For progressives who care about valuable entitlements being allocated to states rather than the federal government because of the interpersonal distributive consequences, there is no obvious reason why the liability rule is any less desirable than the property rule of the status quo. The distributional consequences of federalism doctrines arise from the entitlement allocation, not from the fact that the entitlement is protected by a property rule. If anything, a liability rule might be more attractive, because it reduces the risk that reticent state governors will stand in the way of the expansion of redistributive federal programs.

Yet familiar arguments for property rule protection apply here as well. Courts are not omniscient, and so might not assign accurate values to entitlements seized from the states by Congress. And insofar as these cases are adjudicated in federal court, one might worry about courts showing favoritism toward Congress (upon whom the judges depend for their budgets and salaries). In the event that federal courts tend toward overvaluation, the costs are limited: Congress and the states still can bargain at a lower price. If, however, federal courts tend toward undervaluation, then the choice between a property rule and a liability rule will have distinct distributive effects, leaving the states poorer (and the federal government richer) than under the property rule alternative. And again, these intergovernmental distributive effects are likely to have interpersonal consequences.

**Conclusion**

The central argument of this essay is that federalism doctrines that allocate valuable entitlements to the states rather than the federal government generate interpersonal as well as intergovernmental effects. Specifically, the allocation of valuable entitlements to states rather
than to the federal government is likely to result in more revenue-raising through the federal tax system rather than the state tax systems. Since the federal tax system is quite a bit more progressive than even the most progressive state tax systems, the likely net result of these entitlement allocations is to shift resources from the have-mores to the have-lessnesses.

This is not to say that progressives who support greater redistribution of income from the have-mores to the have-lessnesses ought to embrace *New York, Printz, Seminole Tribe*, and *Alden* wholeheartedly. For one thing, the redistributive effect of these cases arises from the entitlement allocation, not from the fact that the entitlement is protected by a property rule. For another, distribution is not (of course) the only consideration relevant to constitutional law. But all of this is to say that in the anti-commandeering and sovereign immunity contexts, “progressive federalism” might not be oxymoronic in the least. On this view, federalism does not “mean[] inequality,”121 but arguably leads to inequality-reducing consequences.

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121 See Wildavsky, supra note 1.