Federal–State Jurisdiction IV:
A Plea for Constitutional Literacy

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At issue was the Supremacy Clause, not the 10th Amendment. Addressing Arizona's immigration statute, the Court struck three provisions as preempted by federal law. The fourth provision? The Court did not decide its validity, because "[t]here is a basic uncertainty about what [it] means and how it will be enforced." (Reversing the lower court's injunction, the Court allowed the provision to take effect—which is different from finding it constitutional.) The Court thus did not affirmatively find *any* provision constitutional. (Hard to believe, given the headlines and press releases? Read the decision here.)

What does Arizona immigration have to do with utility regulation? Federal–state jurisdictional issues (like, but not limited to, the Supremacy Clause) pervade the electric, gas, and telecommunications industries. A century ago, states granted hundreds of utilities the right to serve, often as state-protected monopolies. Accompanying that privilege were obligations to perform: reliably, safely, nondiscriminatorily, at prices set justly and reasonably. But state regulation alone proved insufficient. The utilities' interstate features, and their linchpin role in a growing nation's infrastructure, led Congress in the 1930s to design a distinct federal regulatory presence.

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perform: reliably, safely, nondiscriminatorily, at prices set justly and reasonably. But state regulation alone proved insufficient. The utilities' interstate features, and their linchpin role in a growing nation's infrastructure, led Congress in the 1930s to design a distinct federal regulatory presence. Our dual regulatory structure has lasted almost 80 years, depending for its success on clear legal boundaries, and on regulators who cooperate with common purpose and consistent policies.

It's been a bumpy ride. Federal–state jurisdictional disputes permeate at the agency policymaking level; plenty end up in court. Nuclear power, universal service, unbundled network element pricing, transmission siting, multistate cost allocation, corporate structure limits, environmental values: This is a short list of jurisdictional jams that judges had to sort out because regulators could not. (FERC's recent Order 1000 on regional transmission planning is headed to court as we speak.) The bigger the costs, the bumpier the ride.

It is well worth the time to examine and debate, continuously, whether a 1930s jurisdictional relationship is sensible in a 2012 world. Co-regulation requires shared purposes, fact-based flexibility, allocation of regulatory responsibility based on comparative competences, and respect for the legitimate but different needs of Main Street and Wall Street, of local business and international capital. All these factors change over time. Smart, dedicated people can come to different answers. Arguing is unavoidable; and it helps sharpen thinking.

What is avoidable, and doesn't help, is rhetoric rooted in constitutional illiteracy. "States' rights," "Tenth Amendment," "sovereignty," "encroachment": These terms often have oratorical resonance disproportionate to their constitutional relevance. Most federal–state questions boil down to one or more of four questions. The first two address limits on federal powers; the second two deal with limits on state powers.

1. Has Congress exceeded its interstate commerce powers? The Constitution's Commerce Clause grants Congress the power to regulate interstate commerce. Federal–state preemption is possible only if Congress is acting within its powers. Remember, though, that if in-state activity affects interstate commerce, even indirectly, it's still interstate commerce. (Just ask the Ohioan Roscoe Filburn, a farmer who just wanted to grow extra wheat for his family; and the Alabaman Ollie McClung, who thought Congress had no business ordering his Ollie's Barbecue to serve all races.) (*Wickard v. Filburn* (1942) and *Katzenbach v. McClung* (1964) are the cases every law student learns in this area. Filburn and McClung lost.)

2. Does the federal statute interfere with reserved state powers? The Tenth Amendment provides that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States." This is a mirror image of the Commerce Clause. If Congress is acting on a matter that is not interstate commerce, yet purporting to preempt states, it is interfering with powers reserved to them. The Tenth Amendment also prevents Congress from "commandeering" state legislative machinery to carry out federal aims.

3. Does the state regulatory program violate, discriminate against, or unduly burden, interstate commerce? Congress's Commerce Clause power reflects the Framers' vision of a nation unified by commerce. Implicit in that vision, made explicit by the courts, is a "dormant

Commerce Clause" with two features. First, it prohibits provincialism. A state may not erect trade barriers, discriminate against sellers or buyers from other states (unless the state itself is a "market participant"), or hoard its natural resources for its own citizens. Second, a state may burden commerce with regulation, but the regulation must bear a reasonable relationship to the in-state benefits.

4. Did Congress intend to preempt the state law? As the Court said in its Arizona immigration decision, "from the existence of two sovereigns follows the possibility that laws can be in conflict or at cross-purposes." Provided Congress acts within its constitutional powers, the Supremacy Clause allows it to preempt state laws. On the spectrum from national uniformity to state experimentation, Congress's elected members get to pick the point. Preemption can be express or implicit, but it always flows from Congressional intent. There is no reader of this essay, no United States citizen, who has not benefitted from national consistency, due to Congress's power to preempt.

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These are the four ways to think about federal–state legal relationships. Within each category, decisionmakers balance values, none of which is absolute. A century of utility regulation has produced cases in all four categories. That gives us a body of law—literature even—that can discipline our dialogue, soften the hard edges of dispute, and avoid the absolutist positions that delay compromise.

The Constitution is—pardon the oxymoron—sacred political language. Literacy prevents demagoguery. The winner is democracy.