Making Federalism Doctrine

by

Ernest A. Young *

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* Judge Benjamin Harrison Powell Professor of Law, University of Texas at Austin. B.A. Dartmouth College 1990; J.D. Harvard Law School 1993. I am grateful to participants at the Harvard and UCLA faculty colloquia, and to Lynn Baker, Jane Cohen, Doug Laycock, Ronald Mann, Dan Meltzer, Gary Rowe, Larry Sager, Patrick Woolley, and Jonathan Zasloff for helpful comments and suggestions; for the fine research assistance of Kimberly Carter, McKeever Darby, Lisa Ewart, Greg Litt, and Garrick Pursley; and for the unflagging support, patience, and good humor of Allegra Young. This is a rough draft; please do not quote, circulate, or make fun without permission. Comments may be directed to eyoung@mail.law.utexas.edu.
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The Supreme Court’s “Federalist Revival” is now a decade old. We have seen neither the revolution that partisans of states’ rights might have wished nor the deluge that many nationalists feared. What we have witnessed is the incremental expansion, across a variety of fronts, of judicially-enforced limitations on national authority. While it remains far too early to attempt a definitive assessment, we have enough decisions now to evaluate the Court’s project as a developing stream of doctrine rather than as isolated data points. We can fruitfully ask whether the Court’s federalism doctrine successfully protects what is important about federalism or, more fundamentally, what “success” would look like.

Much of the debate about federalism doctrine has centered on the text and history of the Constitution. But it seems fair to say that while those sources of law have been highly relevant to the Court’s enterprise, neither text nor history has dictated the resulting doctrines. Consider, for example, the rule that the federal government may not “commandeer” state legislatures or executive officers. Nothing in the constitutional text mandates such a rule. And while the relevant history supports the notion that the Framers intended the new national government to act directly on individuals rather than through state governmental institutions, that history is hardly so clear as to be dispositive. The more persuasive justifications for this and other rules, in my view, rest

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2 Charles Ares, for example, opined that “Chief Justice Rehnquist in Lopez has . . . opened the floodgates just by saying that there are limits on the commerce power, draping the opinion in references to things traditionally local, and then leaving it to the lower courts to begin the process of dismantling what they regard as offending intrusions on “our federalism.” Charles E. Ares, Lopez and the Future Constitutional Crisis, 38 ARIZ. L. REV. 825, 825-26 (1996). The lower courts, perhaps not surprisingly, have done no such thing. See Glenn H. Reynolds & Brandon P. Denning, Lower Court Readings of Lopez, or What if the Supreme Court Held a Constitutional Revolution and Nobody Came? 2000 WIS. L. REV. 369.


4 See Printz v. United States, 521 U.S. 898 (1997); New York, 505 U.S. at ___.

5 See Printz, 521 U.S. at 905 (acknowledging as much).

6 See id. at 918 (“The constitutional practice we have examined . . . tends to negate the existence of the congressional power asserted here, but is not conclusive.”). See generally Saikrishna Prakash, Field Office Federalism, 79 V.A. L. REV. 1957 (1993) (finding historical support for a rule barring commandeering of state legislatures, but not for one barring commandeering state officers); Evan H. Caminker, State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?, 95 COLUM. L. REV. 1001, 1042-50 (___) (concluding that the historical record suggests the Framers intended
on their functional roles in protecting state autonomy.\(^7\) In any event, the important point is that the Court has been operating in a context where text and history suggest important directions but do not mandate particular doctrinal formulations. Instead, the Court has constructed doctrine to meet the needs of the federal system as it sees them. Federalism doctrine has been made, not found.

Many of the Rehnquist majority’s critics, both on the Court and in the academy, have taken the failure of text and history to compel particular federalism doctrines as proof that the enterprise is illegitimate.\(^8\) This is a curious reaction – although perhaps not a surprising one – given that many of the same people favor judicial creativity in other contexts.\(^9\) My own view is that doctrinal creativity is essential if the Constitution’s original mandate of a federal balance is to be maintained in a world where many of the Founders’ presuppositions about the structure of society and government have profoundly changed. Text and history tell us that our Constitution established a creative tension between national and state governments. I will argue, however, that those same sources can tell us relatively little about how that tension should be maintained in today’s world. And while adaptation of the original structure to present circumstances is not exclusively, or perhaps even primarily, a task for courts, I contend that they must nonetheless play an important role.

If I am right that the Constitution both permits and requires substantial judicial creativity in enforcing federalism, then the central task becomes to develop a coherent vision of how such enforcement ought to proceed. Here, too, the Court’s critics have been many and loud. Much of this criticism seems overblown; courts sit to decide cases, not develop general theories – and certainly not to articulate them in broad dictum unnecessary to the decision. But the Court’s emerging pattern of decisions does indicate a certain vision of what is important about federalism and how it should be enforced.

There is, of course, the obvious pattern: Five justices are generally for imposing constitutional limits on federal authority in a number of different contexts, while four have consistently opposed such limits.\(^10\) Less obvious is the particular nature of the

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7 Accord H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633 (1993) (rejecting the historical arguments against commandeering, but approving New York’s rule on “prudential” grounds). I am not as skeptical of the historical justification for the rule as Professor Powell, but I agree that the functional arguments are stronger.


10 Because the current incarnation of the Rehnquist Court has served together for ___ years, the voting blocs on most federalism issues have been remarkably stable over virtually the entire period of the “federalist revival.” Five justices – Chief Justice Rehnquist and Justices O’Connor, Scalia, Kennedy, and
constraints imposed. Those constraints embody a rather narrow version of state “sovereignty,” defined here as the notion that state governments should be unaccountable for violations of federal norms. The many decisions upholding state sovereign immunity in federal lawsuits are simply the most obvious manifestation of this trend. Not all of the Court’s efforts have focused on the value of sovereignty, but it is fair to say that it has received considerably greater emphasis than other aspects of federalism. The Court’s dissenters, by contrast, have opposed these decisions with unusual vehemence and, on several occasions, urged virtually complete judicial abdication of federalism enforcement.

The broader pattern, however, is more complicated. By expanding the universe of what counts as a “federalism case” – in particular, by taking in cases about federal statutory preemption of state law – one discovers that the supposedly anti-federalism justices have their own theory of state autonomy, instead of simply favoring national power at every turn. The dissenters in cases like *Lopez* or *Seminole Tribe* have often – but not always – emphasized state “autonomy,” defined somewhat narrowly here as the ability of states to govern, as opposed to simply their immunity from accountability.

Thomas – have generally favored limits on federal power. Four – Justices Stevens, Souter, Ginsburg, and Breyer – have generally opposed such limits. Nonetheless, it is hard to know exactly what to call these two groups. Many have dubbed them “conservative” and “liberal” factions, respectively, but attaching a strong political valence to federalism issues is highly problematic. See, e.g., Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L. J. 75, ___ (2001); Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, ___ BROOKLYN L. REV. ___ (forthcoming 2004). I will occasionally use “pro-states” and “nationalist,” but one of the principal points of this essay is to say that the putatively nationalist four do, in fact, have their own important vision of state autonomy. See infra Section ___. I will also occasionally refer to the Court’s “majority” and “dissenting” factions on federalism, but it is important to understand that members of the four have sometimes been able to form majorities around their own view of federalism.

11 See, e.g., Federal Maritime Comm’n v. South Carolina St. Ports Auth., 122 S. Ct. 1864, 1889 (2002) (Breyer, J., dissenting) (“Today’s decision reaffirms the need for continued dissent - unless the consequences of the Court’s approach prove anodyne, as I hope, rather than randomly destructive, as I fear.”); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 98 (2000) (Stevens, J., dissenting) (asserting that “[t]he kind of judicial activism manifested in [the Court’s 11th Amendment cases] represents such a radical departure from the proper role of this Court that it should be opposed whenever the opportunity arises.”); see also Charles Fried, *Five to Four: Reflections on the School Voucher Case*, 116 HARV. L. REV. 163, 178 (2002) (observing that “[s]uch explicit commitments to keep dissenting until the dissent becomes the doctrine of the Court are rare”).

12 See, e.g., United States v. Morrison, 529 U.S. 598, 649 (2000) (Souter, J., dissenting) (“As with "conflicts of economic interest," so with supposed conflicts of sovereign political interests implicated by the Commerce Clause: the Constitution renews them to politics.”); *Kimel*, 528 U.S. at 96 (Stevens, J., dissenting) (“The importance of respecting the Framers' decision to assign the business of lawmaking to the Congress dictates firm resistance to the present majority's repeated substitution of its own views of federalism for those expressed in statutes enacted by the Congress and signed by the President.”).

13 Seminole Tribe of Fla. v. Fla., 517 U.S. 44 (1996) (holding that Congress may not abrogate the sovereign immunity of the states from private damages suits when it acts pursuant to its Article I powers).

14 See, e.g., Geier v. American Honda Motor Corp., 529 U.S. 861 (2000) (Stevens, J., dissenting) (complaining that by preempting state tort suits, the majority was “us[ing] federal law as a means of imposing their own ideas of tort reform on the States”); AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366,
The dissenters, for example, vote to uphold state regulatory measures against claims of federal preemption considerably more frequently than their colleagues. These cases likewise reflect a different approach to judicial review of federalism issues, relying on “softer” checks on Congress such as “clear statement” rules of statutory construction.

Comparing the two competing visions of federalism on the Rehnquist Court can, in itself, tell us a great deal about the choices involved in making federalism doctrine. I want to argue, however, that both these visions are incomplete. The majority’s view neglects concerns for state regulatory autonomy and overlooks the potential of “process” limits on federal authority. The dissenting vision, on the other hand, improperly discounts the need for some substantive constraint on federal power while missing the support in “process federalism” for more aggressive judicial doctrines. Instead, I argue for a “strong autonomy” model of federalism doctrine that combines many of the features of the other two.

The case for this model rests on two sets of arguments. The first has to do with the preference for “autonomy” over “sovereignty.” I contend that virtually all the values that federalism is supposed to promote – such as regulatory diversity, political participation, or restraints on tyranny – turn on the capacity of the states to exercise self-government, not on their institutional immunity from federal norms. This capacity for self-government also turns out to be critical for the states’ ability to maintain their own place in the federal balance without relying primarily on judicial protection.

The latter point moves toward a second set of arguments, revolving around the nature of judicial enforcement for federalism issues. Such enforcement, I argue, ought to be shaped by comparing the institutional competence of the courts with the other branches of government, as informed by the courts’ historical experience in enforcing federalism doctrine. That comparison argues for doctrines that focus on correcting defects in the political process’s own protection for federalism, as well as doctrines that avoid direct confrontations with the political branches. But because the Framers’ own theory of self-enforcement rests on enduring areas of state regulatory autonomy, judicial federalism doctrine cannot be entirely indifferent to substantive restrictions on federal power.

At least one caveat is in order. This essay will not be of much use for those who believe that legal doctrine has little or no bearing on the actual decision of cases. I have never had much sympathy for that view, but addressing it would take this essay far afield indeed. In any event, as long as doctrine has some purchase – and the extreme positions

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427 (1999) (Breyer, J., dissenting) (arguing that the Court’s decision to preempt state regulatory authority over local telephone markets “deprive[d] the States of practically significant power”).


16 See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993); see also Charles Fried, Constitutional Doctrine, 107 HARV. L. REV. 1140, 1140 (1994) (observing that the assumption “that there are rules of principles of constitutional law . . . that are capable of statement and that generally guide the decisions of courts . . . . has been controversial at least since the advent of legal realism”).
that insist doctrine is either irrelevant or the whole ballgame seem unlikely to be true – then it will make sense to inquire how to design and improve doctrinal rules.

Part I of this essay explores the use of judicial doctrine as a tool for resolving disputes about federalism. I begin with the observation that doctrine and the Constitution are not the same; hence, the use of doctrine requires justification beyond the traditional arguments about judicial authority to interpret the Constitution itself. Doctrine also presupposes that courts should have some role in federalism disputes, a question that implicates an emerging literature on comparative institutional choice. I argue, however, that courts are generally not free to ignore issues of federalism and that institutional issues are best addressed in the context of interpretive choice – that is, the enterprise of choosing particular federalism doctrines that are more or less deferential to other institutional actors.

Part II identifies three different models of federalism doctrine: the “strong sovereignty” model often followed by the Rehnquist Court majority; the “weak autonomy” model sometimes advanced by the Court’s dissenters, and a “strong autonomy” model developed and defended here. Part III turns to the role that text and history play in defining and constraining federalism doctrine in the courts. My conclusion is that these sources require us to have federalism doctrine – that is, they impose an obligation on courts to enforce the federal balance – but that they tell us relatively little about the precise balance to be struck or the forms that federalism doctrine should take.

In Part IV, I consider how the underlying values of federalism bear on the choice between “sovereignty” and “autonomy.” Those values, I contend, strongly support emphasizing the regulatory autonomy of state governments rather than shielding them from accountability for violations of federal norms. Parts V and VI then turn to the structure of doctrine protecting state autonomy. Part V treats the notion that federalism should be “self-enforcing,” advanced by Professor Herbert Wechsler’s theory of the “political safeguards of federalism” as well as James Madison’s essays in the Federalist. While both versions suggest that courts should focus on “process” failures that undermine state representation at the federal level and institutional checks on federal action, both Madison and Wechsler also – albeit in quite different ways – support a continued judicial obligation to enforce the “substance” of enumerated limits on federal action. Part VI then addresses the form that doctrinal limits should take, based on the institutional experience of the Court in enforcing federalism during prior eras. That experience preaches caution in assaying direct confrontations with Congress, avoidance of categorical subject-matter distinctions, and exploration of “softer checks” – such as “clear statement” rules of statutory interpretation – on federal authority.

Part VII, finally, offers a preliminary sketch of the doctrines that might make up a “strong autonomy” approach. The most important is a strong emphasis on limiting federal preemption of state regulatory authority. On this point, the present essay is a

17 Herbert Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543 (1954).
18 See Federalist No. 45 & 46 (Jacob E. Cooke, ed. 1961).
companion to another work which undertakes a much more comprehensive look at federal preemption. Part VII also discusses other process-forcing doctrines, such as the various “clear statement” rules, the anti-commandeering principle, and stricter enforcement of the constitutionally-prescribed procedures for making federal law. In the end, I suggest that certain more substantive doctrines – such as enforcement of commerce clause limits on federal authority – should retain a significant place in federalism doctrine, while others – such as the constitutionalization of state sovereign immunity – should not.

I. Federalism and Doctrine

Take a look at any first-year casebook in constitutional law, and you will see the importance of doctrine to the subject. The widely-used Sullivan and Gunther casebook places the Constitution itself – the text drafted at Philadelphia in 1787 and ratified in 1789, as well as its subsequent amendments – in an appendix at the end of the book, immediately following page 1537. Much of the rest is doctrine, encompassing “not only the holdings of cases, but also the analytical frameworks and tests that the Court’s cases establish.”

My subject is the creation of federalism doctrine, and that subject requires some inquiry into the nature of doctrine per se and its relationship to other components of constitutional law. I take up that inquiry in Section A of this Part. Because doctrine is created by courts moreover, the enterprise of doctrinal construction presupposes an institutional choice allocating at least some authority over federalism questions to the judiciary rather than to some other institution. Institutional choice cannot be taken for granted, however, and I discuss why courts should have at least some authority over federalism questions in Section B. The more difficult issues, however, concern the interpretive choice of particular federalism doctrines that is the subject of Section C. That Section sets out a series of issues that courts must confront in developing particular doctrines that will help maintain our federal balance.

A. Doctrine, Constitution, and Deep Structure

Doctrine is not the same as the Constitution. Sometimes it bears very little relation to the document itself, such as when the Court holds that states may not discriminate against interstate commerce or that Congress may not “commandeer” state

19 See Young, Preemption, supra note 15.
22 See, e.g., Thomas W. Merrill, Judicial Opinions as Binding Law and as Explanations for Judgments, 15 Cardozo L. Rev. 43, 62-65 (1993) (giving reasons why judicial decisions should not be read as “incorporated” in the enactments they interpret); [others].
23 Compare, e.g., U.S. Const., Art. I, § 8, cl. 3 (conferring power on Congress “to regulate Commerce ... among the several States”) with Fulton Corp. v. Faulkner, 516 U.S. 325, 330 (1996) (observing that courts
legislatures or executive officials. Other times, the doctrine elaborates upon the text, rendering its directives more specific in their application to particular cases. In considering the scope of Congress’s affirmative commerce power, for instance, the Court has held that the power extends to “channels” and “instrumentalities” of commerce, as well as to activities that “substantially affect” interstate commerce. In either case, however, the doctrine may permit or require things that the document, standing alone, might not. Any account of the courts’ power to craft federalism doctrine must begin by exploring the justifications for “supplementing” the Constitution in this way. Those justifications play an important role in determining how far federalism doctrine can go.

1. The Problem of Doctrine and Structure

We might initially define constitutional “doctrine” as the residue of interpretation that accumulates over time. Constitutional interpretation is seldom easy. Judicial interpretations of the document are often contestable and sometimes wrong. Yet we often accept those interpretations as settled and move on, taking them as given and building upon them in the resolution of future questions. Doctrine in this sense is equivalent to precedent; it represents our unwillingness to reopen interpretive questions resolved in the past.

Even taken in this comparatively narrow sense, doctrine is moderately controversial in constitutional law. Gary Lawson, for example, has argued that it is unconstitutional to subordinate the Constitution itself to what the judges have said about it in the past. The argument has a strong intuitive appeal: If a judge deciding today’s case truly thinks – using all the tools of interpretation at his disposal – that the Constitution requires rule X, then by what authority does he discount that interpretation and adhere to rule Y, simply because rule Y was adopted in a prior decision? Surely the Constitution itself trumps any authority the prior court might have enjoyed.

have long interpreted the Commerce Clause “as a limitation on state regulatory powers” that “prohibits economic protectionism”) (quoting Associated Industries of Mo. v. Lohman, 511 U.S. 641, 647 (1994)).

24 See, e.g., Printz v. United States, 521 U.S. 898, 905 (1997) (acknowledging that “there is no constitutional text speaking to this precise question” whether state executive officers may be required to implement federal law).


26 Gary Lawson, The Constitutional Case Against Precedent, 17 HARV. J. L. & PUB. POL’Y 23, 23-24 (1994); see also [Paulsen?]. A counter-current holds that it is unconstitutional not to allow courts to produce binding doctrine. See, e.g., Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000) (striking down circuit rule barring citation of unpublished opinions on the ground that the Article III “judicial power” necessarily encompasses the power to create binding precedent), vacated as moot, 235 F.3d 1054 (8th Cir. 2000) (en banc); Lindh v. Murphy, 96 F.3d 856, 887 (7th Cir. 1996) (en banc) (Ripple, J., dissenting) (arguing that 28 U.S.C. § 2254(d)(1)'s confinement of the grounds for federal habeas corpus relief to situations where state courts have violated “clearly established law, as determined by the Supreme Court of the United States” unconstitutionally denies lower courts authority to create binding precedent) (emphasis added). That debate is well beyond the scope of my discussion here.

27 One might take John Marshall’s famous statement in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, ___ (1819), out of context to say that “we must never forget that it is a constitution we are expounding” – not a set of legal precedents.
As long as we take precedent and doctrine to entail simply deference to past interpretations, however, two answers to the argument seem readily available. One is that adherence to interpretive precedent simply represents humility on the part of present interpreter – a recognition that his own interpretation may be wrong and, more fundamentally, that prior readings are in fact one of the most important “tools of interpretation” to be employed in resolving present controversies. A second answer rests on the practical – but basic – impossibility of treating all interpretive questions as open in resolving each new case. Some questions must be considered settled if we are to move forward. As Charles Fried points out, “[w]e want to avoid being like the man who cannot get to work in the morning because he must keep returning home to make quite sure that he has turned off the gas.”

Doctrine has an additional component, however. In many instances, the activity of interpretation per se may not produce closure on a choice among doctrinal options, leaving the choice to be made on other grounds. Those grounds may include independent moral principle, pragmatic concerns about the workability of particular rules, or institutional issues about the court’s legitimacy. As Richard Fallon has observed,

Frequently, a perfect correspondence could not, even in principle, exist between the meaning of constitutional norms and the doctrinal tests by which those norms are implemented. . . . [S]ome constitutional norms may be too vague to serve directly as effective rules of law. In addition, in shaping constitutional tests, the Supreme Court must take account of empirical, predictive, and institutional considerations that may vary from time to time.

Doctrine thus entails the choices that judges must make “to implement the Constitutional successfully. In service of this mission, the Court often must craft doctrine that is driven by the Constitution, but does not reflect the Constitution’s meaning precisely.”

This aspect of doctrine frankly acknowledges that it supplements the Constitution rather than simply amounting to past interpretations of the document. As such, it seems

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28 See, e.g., Michael W. McConnell, The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin’s “Moral Reading” of the Constitution, 65 FORDHAM L. REV. 1269, 1292 (1997) (“[A]n essential element of responsible judging is a respect for the opinions and judgments of others, and a willingness to suspend belief, at least provisionally, in the correctness of one’s own opinions, especially when they conflict with the decisions of others who have, no less than judges, sworn an oath to uphold and defend the Constitution.”).

29 Fried, Constitutional Doctrine, supra note 16, at 1144. See also Anthony Kronman, Precedent and Tradition, 99 YALE L. J. 1029 (1990) (making a similar, but more foundational, argument for precedent).

30 See Fried, Constitutional Doctrine, supra note 16 at 1141 (“Doctrine and precedent are related, not identical. In civil law countries, doctrine plays a great role in giving the law its substance and texture, but treatise writers and academic discourse, not the opinions nor even the decisions of courts, are the dominant organs of the growth and statement of doctrine there.”).

31 Fallon, Foreword, supra note __.at 62.

32 Id. at 57. See also Laurence H. Tribe, 1 AMERICAN CONSTITUTIONAL LAW § 1-16, at 81-82 (3d ed. 2000) (“[T]he bare words of the Constitution’s text, and the skeletal structure on which those words were hung, only begin to fill out the Constitution as a mature, ongoing system of constitutional law.”).
more vulnerable to Professor Lawson’s critique. Doctrine in this aspect is not simply privileging one court’s interpretation (the earlier one) over another; it instead amounts to the use of something not quite the same as the Constitution as a vehicle for implementing the Constitution’s provisions. That still seems relatively unproblematic where doctrine simply makes open-ended provisions more concrete, as with Lopez’s trichotomy of “channels,” “instrumentalities,” and activities “substantially affecting” commerce. In these instances, the doctrinalist can plead necessity: Courts simply cannot decide cases under the Commerce Clause – and in particular the Supreme Court cannot guide future decisions by lower courts – without specifying what “commerce among the several states” means. The implementing doctrine is necessary in such instances to ensure that like cases applying the constitutional provision in question are, in fact, treated alike.

Some doctrine, however, exists at a further remove from the implementation of particular constitutional provisions. This is particularly true of much federalism doctrine. The anti-commandeering principle, for example, does not implement any particular constitutional provision; likewise, the dormant commerce notion hardly serves to implement the Commerce Clause’s text, which quite plainly operates only to confer power on Congress. These sorts of doctrine require a more elaborate justification than the need to specify the meaning of particular constitutional text.

It may help to begin by adding a third category of constitutional “law” alongside the text and the doctrine. That category would include fundamental structural principles,

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34 [cite Fallon] A related necessity occurs when a textual provision is relatively determinate but practically unworkable in that form. The Free Speech Clause, for instance, could hardly be more specific: “Congress shall make no law . . . abridging the freedom of speech.” U.S. CONST. amend. I. But aside from Justice Black, we have never been able to live with a right of free speech in this absolute form. The provision thus cannot be effectively implemented without doctrine specifying exceptions and qualifications, such as the “clear and present danger” test for restrictions on incitement to unlawful activity. See, e.g., Brandenburg v. Ohio, 395 U.S. 444, ___ (1969); Abrams v. United States, 250 U.S. 616, ___ (1919) (Holmes, J., dissenting).
35 Language in New York suggests that the Court believes the anti-commandeering rule to be an implicit limit on every enumerated power. See New York v. United States, 505 U.S. 144, 159 (1992) (“[J]ust as a cup may be half empty or half full, it makes no difference whether one views the question at issue in these cases as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment.”). But that limit is not necessary to implement these powers in the way, for example, that some sort of doctrinal test of equality is necessary to implement the Equal Protection Clause. One can imagine a Commerce Clause without an anti-commandeering limit; one cannot apply Equal Protection without defining what is meant by equality.
36 See U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 796 n.12 (1995) (acknowledging that “the Constitution is clearly silent on the subject of state legislation that discriminates against interstate commerce”). Similarly, the broad sovereign immunity accorded to state governments in cases like Seminole Tribe v. Florida, 517 U.S. 44 (1996), hardly implements the text of the Eleventh Amendment; on the contrary, the Court often describes the rather narrow text of that Amendment as implementing a pre-existing (and much broader) notion of sovereign immunity in a particular instance where Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), had rejected such immunity. See Alden v. Maine, 527 U.S. 706, 723 (1999). As I discuss further infra TAN ___, my own view is that current doctrine goes well beyond what is necessary to implement the most plausible account of the Founders' views on state sovereign immunity.
like “federalism” or “separation of powers.” Those words do not appear in the constitutional text, and yet they have long been understood as bedrock ideas undergirding the textual provisions in the document and tying them together into a coherent structure. Nor are these sorts of principles properly classified as “doctrine,” at least if we understand that term to encompass relatively specific rules and principles that implement the textual provisions. On the contrary, textual provisions such as the vesting clauses of Articles I, II, and III and the Tenth Amendment “implement” broader ideas of separation of powers and federalism, respectively. The text thus exists at an intermediate level of generality, implementing broader ideas and yet requiring further implementation through judicial doctrine.37

The critical question for present purposes is the relationship between these fundamental structural principles and the doctrine made by courts. Sometimes, courts will want to justify doctrine on the ground that it directly implements structural principles, even though the doctrine has little support in the text itself. The anti-commandeering doctrine is an example. Other times, courts will fashion doctrine to implement text, yet recur to the text’s underlying principles to influence the form that the implementing doctrine takes. In U.S. Term Limits, Inc. v. Thornton,38 for example, both Justice Stevens’s majority opinion and Justice Kennedy’s concurrence resorted to the Founders’ underlying theory of representation to support a doctrine that the Qualifications Clauses in Article I supply the exclusive limitations on who can be a federal representative.39 In each case, it is hard to say that the text itself is doing the work.

The power of judicial review itself is generally justified in terms of the Constitution’s written-ness; John Marshall, for instance, wrote in Marbury that the theory “that an act of the legislature, repugnant to the constitution, is void” is “essentially attached to a written constitution.”40 Compared to more traditional forms of judicial review, then, the argument that courts may formulate constitutional doctrine driven not so much by text as by fundamental structural principles cannot be as easily grounded in the judiciary’s obligation “to say what the law is.”41 I offer two justifications here for doctrine derived from structure. The first is that the Constitution should not be taken as a complete description of the federal system; that text is devoted to establishing and empowering one component of that system – the national government – rather than with comprehensively ordering the system as a whole. The second argument arises out of the

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39 See id. at ___; id. at 838, 841 (Kennedy, J., concurring); see also Young, Jurisprudence of Structure, supra note 37, at 1644-45 (discussing this aspect of Term Limits).

40 Marbury v. Madison, 5 U.S. (1 Cranch) 137, ___ (1803); see also id. at ___ (“The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.”) (emphasis added).

41 Id. at ___.

need to “translate” the text’s original strategies for maintaining the structure envisioned by its Framers into a world much changed from the one those Framers knew.

2. The Constitution’s Incompleteness on Federalism

Federalism has many meanings, but the basic one in our system is that we have two levels of government – the Nation and the States – and that power is divided between them as a matter of constitutional principle. Whether or not the States are “prior” to the Federal Government as a matter of political theory – a question that tends to center on whether the federal Constitution was ratified by the People as a whole or the People of the States – there is no dispute that the original state governments were already up and running when the Constitution was drafted in 1787. The new constitution thus had no need to constitute them, but rather simply to carve out a place for a new, stronger central government. As Chief Justice Marshall explained early on, “it was neither necessary nor proper to define the powers retained by the States. These powers proceed, not from the people of America, but from the people of the several States; and remain, after the adoption of the constitution, what they were before, except so far as they may be abridged by that instrument.”

To be sure, this carving-out addressed many of the important and contested issues of federalism. But others were left unaddressed, especially in the original, un-amended document. Most importantly, the federal Constitution did not empower state governments; rather, it left to the state constitutions the task of constituting state governments and delegating to them some portion of the popular sovereignty. The Constitution’s agnosticism on the powers delegated to state governments initially went unremarked in the text; it would later be made explicit by the Tenth Amendment’s proclamation that powers “not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” In other words, the sovereign people were free to delegate particular reserved powers to their state governments or simply not to empower their governments to act in those ways.

The original Constitution likewise did not address the question of sovereign immunity, either for the new national government or its state counterparts. Debate at Philadelphia and in the ratifying conventions focused on whether Article III would itself override the traditional immunities of state governments, with the apparent resolution that

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43 Compare, e.g., U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, ___ (1995), with id. at ___ (Thomas, J., dissenting); see also Forrest McDonald, States’ Rights and the Union: Imperium in Imperio, 1776-1876 at 7-22 (2000).

44 Indeed, some states kept operating under their pre-1789 constitutions (or even their pre-revolutionary royal charters) well into the Nineteenth Century. [cites]


46 See Term Limits, 514 U.S. at ___ (Thomas, J., dissenting).

47 U.S. CONST. amend. X (emphasis added).
it would not. 48 But whether one thinks that the states’ preexisting immunity itself had constitutional status (the position of the Rehnquist Court majority) or that it was a form of common law subject to statutory override (the view of the Court’s dissenters), the present point is simply that the constitutional text did not address the question. This was a significant omission given widespread concerns during the founding era about crippling lawsuits against state governments. 49 Sovereign immunity thus provides further evidence of the Framers’ willingness to allow major issues of federal structure to be worked out through processes – judicial development, statutory enactments, norms of practice – other than constitutional drafting. 50

Nor did the federal Constitution, for the most part, define the rights of individuals vis-à-vis their state governments. This is true despite the fact that many of the Founders in Philadelphia were strongly motivated by a perception that State governments needed to be reined in. 51 The Constitution did state that the national government would be responsible for enforcing a basic commitment to republicanism, 52 and it forbade the States to do certain things, such as to grant titles of nobility or to impair the obligation of contracts. 53 But this handful of restrictions hardly purported to be a complete description of the rights of citizens vis-à-vis their state governments, and when a more inclusive catalog of individual liberties was added in the Bill of Rights, those liberties bound only the national government. 54 The scope of individual rights enforceable against the state governments was left to rest on state constitutions. As cloudy as the meaning of the

48 See, e.g., Seminole Tribe of Fla. v. Fla., 517 U.S. 44, 142-44 (1996) (Souter, J., dissenting) (finding some disagreement on the issue, but acknowledging that “James Madison, John Marshall, and Alexander Hamilton all appear to have believed that the common-law immunity from suit would survive the ratification of Article III”); The Federalist No. 81, at 548-49 (J.E. Cooke ed. 1961) (Alexander Hamilton); but see Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) (reaching the opposite conclusion). Chisholm was of course promptly overruled by the Eleventh Amendment.

49 See Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 406 (1821) (“It is a part of our history, that, at the adoption of the constitution, all the states were greatly indebted; and the apprehension that these debts might be prosecuted in the federal courts, formed a very serious objection to that instrument.”).

50 One might think that the adoption of the Eleventh Amendment shortly after Chisholm was an attempt to move the question of sovereign immunity back into the realm of constitutional text. But the Amendment’s text could not have been intended as a complete statement on the subject: It left too many questions, like the immunity of states in federal question or admiralty cases, unresolved. (It said nothing about federal immunities, moreover.) And indeed the Amendment’s text has played a much less important role in the development of our law of state sovereign immunity than one might have expected. See Young, Jurisprudence of Structure, supra note 37, at ___.


52 See U.S. Const. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government . . . .”).


Ninth Amendment is, it seems at the least to disavow any suggestion that the federal Bill of Rights should be a complete description of a citizen’s rights against government. As Forrest McDonald has observed, “[t]he Ninth was understood as integral to a system of divided sovereignty. By refusing to nationalize unenumerated rights, the Ninth left the question of the protection of such rights to the states or to the people of the states.”

The national constitution thus did not establish a complete government. It essayed neither a comprehensive list of governmental powers nor an exhaustive list of individual rights. Sovereignty remained in the People, who gave life to their system of federalism by delegating that sovereignty to their several governments. The system can be fully appreciated only by viewing the whole, that is, the federal constitution, the state constitutions, and – most important for present purposes – the web of practices that has grown up to mediate potential conflicts between these two levels of government.

Each of our various institutions has contributed to this web. Congress, for example, has enacted statutes staking an exclusive claim to some areas, denying the existence of federal power in others, providing for cooperation in still others, and occasionally regulating the lawmaking procedures themselves by which federal law impacts the states. The President promulgates Executive Orders on federalism issues, consults with states and represents their interests in supranational organizations, and issues interpretive rulings on the preemptive effect of federal statutes.

55 See U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”).
56 McDonald, supra note 43, at 24.
58 See, e.g., Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1144(a) (providing that federal law “shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan”).
59 See, e.g., Communications Act of 1934, 47 U.S.C. § 152(b) (providing that “nothing in this chapter shall be construed to apply or to give the [Federal Communications] Commission jurisdiction with respect to . . . intrastate communication service”).
60 See, e.g., General Motors Corp. v. United States, 496 U.S. 530, 532 (1990) (observing that the Clean Air Act makes “the States and the Federal Government partners in the struggle against air pollution”).
62 See, e.g., Executive Order 13132, Federalism, 64 Fed. Reg. 43255 (Aug. 4, 1999) (“Agencies shall construe . . . a Federal statute to preempt State law only where the statute contains an express preemption provision or there is some other clear evidence that the Congress intended preemption of State law, or where the exercise of State authority conflicts with the exercise of Federal authority under the Federal statute.”).
64 See, e.g., Environmental Protection Agency, Final Rule, Air Pollution Control; Preemption of State Regulation for Nonroad Engine and Vehicle Standards, 59 Fed. Reg. 36969, 36974 (July 20, 1994) (construing the preemptive effect of federal environmental law on state standards).
governments implement some federal statutes, sixty-five lobby Congress and the Executive on structural issues, sixty-six and work together on issues of shared concern through interstate compacts, sixty-seven uniform state laws, sixty-eight and collective litigation. sixty-nine And courts, of course, have contributed their own web of doctrine. It is important to understand, however, that judicial doctrine implementing the federal system includes not only such familiar constitutional issues as the scope of the affirmative and negative Commerce Clause or the scope of state sovereign immunity, but also the whole corpus of conflict of laws, seventy judge-made abstention doctrines, seventy-one and interpretations of foundational statutes like the habeas corpus statute, seventy-two Section 1983, seventy-three or laws governing the scope of federal jurisdiction. seventy-four

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67 See, e.g., United States Steel Corp. v. Multistate Tax Comm’n, 434 U.S. 452 (1978) (upholding compact among 21 states coordinating taxation of businesses, notwithstanding failure to secure Congressional consent); see generally 1 TRIBE, supra note 32, § 6-35, at 1238-42 (discussing interstate compacts).

68 See, e.g., Uniform Commercial Code [cite]; Model Business Corporation Act [cite].


70 See, e.g., Philipps Petroleum Co. v. Shutts, 472 U.S. 797 (1985) (holding that a forum state may not constitutionally apply its own law to civil claims with which it has no significant contacts); Douglas Laycock, Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law, 92 COLUM. L. REV. 249 (1992) (discussing the relation between choice of law rules and the federal system).


72 28 U.S.C. §§ 2241-55. See, e.g., Teague v. Lane, 489 U.S. 288 (1989) (holding that federal courts generally may not grant habeas relief based on “new rules” that were announced after the petitioner’s state conviction became final); Wainwright v. Sykes, 433 U.S. 72 (1977) (restricting federal courts’ ability to grant habeas relief where the petitioner has procedurally defaulted in state court).


This web of statute, practice, and doctrine is considerably more complicated than anything the Founders could have envisioned in 1789. Their initial strategy for dividing powers through enumeration and reservation gave rise to the regime of “dual federalism,” predicated on the “maintenance of the independent integrity of federal powers and state powers through separations of national and state spheres of action.” Dual federalism seemed to promise a fairly straightforward role for courts, which could evaluate the constitutionality of both state and federal measures simply by asking whether the right government was acting in the right sphere. For most of the Nineteenth Century, this chiefly entailed limiting state power under the judge-made doctrine of the negative commerce power, later on, the Court also began to enforce the textual limits of the Commerce Clause itself as a limit on national power. As I discuss further in Part VI, policing separate state and federal spheres ultimately turned out to be a highly complex and ultimately unsustainable task. The important point for present purposes, however, is that from the beginning courts have used not just the federal constitutional text but a vision of the structure of the whole as a basis for constitutional federalism doctrine.

3. Translating Federalism

The courts have always derived doctrine from both the text of the Constitution and the underlying structure of our federal system, but the need to rely upon the latter may have increased over time. This is not surprising: The critique of written constitutions has long been that they incapable of foreseeing and adapting the future circumstances and needs of the polities they constitute. Most acknowledge that our own Constitution has accommodated this difficulty chiefly by being open to adaptation without formal amendment, through the evolving practices of the political branches and the incremental doctrinal development of courts. As Larry Lessig has explained, this

is asked to invalidate a square assertion of state or federal legislative authority, there are many more in which the allocation of control does not involve questions of ultimate power”).


76 See, e.g., Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827) (holding that a state could not require a foreign importer to be licensed by the state prior to selling imported goods).

77 See, e.g., Hammer v. Dagenhart, 246 U.S. 251 (1918) (striking down federal law restricting interstate shipment of goods made by child labor as an effort to regulate labor conditions internal to a state).

78 See infra Section VI.B.

79 I say “may” because it is not clear that any foreseeable version of the modern Supreme Court would develop structure-based doctrines to limit federal power that are comparable in aggressiveness to the negative commerce jurisprudence that developed in the Nineteenth Century and survives to this day. In other words, the most radical use of doctrine to order the federal relationship has existed without serious jurispudential challenge for over a century and a half.


81 [Levinson?]
adaptive enterprise can – and should – be a means of fidelity to the original document and structure, rather than a departure from them.\(^{82}\) The “response of fidelity” to changed circumstances, he argues, “is to articulate these previously understood conventions, and apply them today to assure that the constitutional structure original[ly] established is, so far as possible, preserved.”\(^{83}\) This effort – “to translate that original structure into the context of today” – must at least in part be a judicial effort of “implying limits on the growth of federal power.”\(^{84}\)

Translation involves changed readings of the constitutional text and structure in response to changes in the context in which the text and structure must operate. With respect to federalism, three related sets of changes are central. The first involves changes of fact – for example, the integration of the national economy, the explosion of communication and transportation among the several states, changes in the Nation’s external and internal security environment, and the advent of comparatively new problems, such as environmental pollution, that often seem to defy state-by-state solutions. These sorts of factual changes have been central to the evolution of federal power in our system. As Professor Lessig observes, “[t]he scope of the [federal] power clause is seen to turn upon facts in the world, and as these facts change, the scope of the power too is seen to change.”\(^{85}\) To focus on just one example, the notion of what counts as “commerce among the several states” cannot help but change in response to the nationalization (and globalization) of the economy.

The question is not whether constitutional doctrine should change in response to these factual changes in the world; it already has. Consider the “dormant Commerce Clause” doctrine. That doctrine started out with at least some tie to the constitutional text; it simply read Article I’s grant of power to Congress to regulate interstate commerce as exclusive, thereby forbidding state regulation of commerce “among the several States.”\(^{86}\) As the national economy became more integrated, however, it became increasingly difficult to distinguish between interstate and intrastate commerce. That made it impossible to enforce a rule that the states could not regulate in ways that impacted interstate commerce, much as it made it equally difficult to enforce a rule that Congress could not regulate intrastate activities. The dormant commerce doctrine accordingly morphed into a quite different rule that simply barred the states from discriminating against out of staters.\(^{87}\)


\(^{83}\) Id. at 127.

\(^{84}\) Id. at 127, 145.

\(^{85}\) Lessig, Translating Federalism, supra note 82, at 132.

\(^{86}\) See, e.g., Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 209 (1824).

\(^{87}\) [Cite Lessig] Vestiges of a second rule – that the states may not impose undue burdens on interstate commerce, even if they are non-discriminatory – may also survive. [cite Pike] But like the anti-discrimination rule, the *Pike* balancing test bears almost no relation to the constitutional text. In any event, the balancing test now seems all but abandoned. [cite]
This rule makes a fair amount of functional sense, and it has a formal quality that makes it relatively easy for courts to enforce. But the doctrine no longer bears any recognizable relationship to constitutional text. Once one abandons the rule that at least some Article I powers are simply exclusive, there is no longer any warrant to read the Commerce Clause as limiting state powers. Certainly the Clause says nothing about discrimination, and the presence of other constitutional provisions that do – the Privileges and Immunities and Equal Protection Clauses – suggests that textualist attention is best directed elsewhere. Better to understand modern dormant Commerce Clause as a doctrinal construction meant to facilitate the structural needs of the federal system as a whole.

A similar transition has occurred in “affirmative” Commerce Clause doctrine. Prior to 1937, the courts focused on whether an act of Congress addressed inter- or intrastate commerce. Chief Justice Marshall’s opinion in *Gibbons* had insisted that “[t]he enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State.”

*Lopez* and its progeny, however, focus simply on whether the regulated activity is “commercial” at all. The Court has said that the effects of such “commercial” activities will be aggregated across the range of similar activity occurring nationwide, thus virtually guaranteeing a finding that the activity “substantially affects” interstate commerce. This concession to the integrated national market arguably departs from the text by effectively reading “among the several states” out of Article I. The new doctrine thus represents a doctrinal compromise meant to balance the system’s need for some line of demarcation between Congress’s broadest power and the States’ reserved authority with the recognition that the old line – the textual line – simply didn’t prove coherent or workable in actual application. Current doctrine nods to the text by carrying over the

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88 [consider critiques of DCC]

89 22 U.S. (9 Wheat.) at 195. See also [cites]

90 The classic “aggregation” case is *Wickard v. Filburn*, 317 U.S. 111, ___ (1942), which held that Congress could regulate even the wheat crop of a single farmer on a substantial effects theory, because the aggregate effects of the activities of all similarly-situated farmers would affect the national economy. But *Lopez* made clear that the underlying activity must be commercial in nature to support this move:

Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not. . . . Section 922(q) is a criminal statute that by its terms has nothing to do with “commerce” or any sort of economic enterprise, however broadly one might define those terms. n3 Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.

*Lopez*, 514 U.S. at 560-61.
insistence that regulated activity be “commercial,” but Lopez’s looser standard amounts to “fidelity” only in the adaptive sense that Professor Lessig has described. \[91\]

As the examples just discussed suggest, changes in the factual context of federalism have been accompanied by changes amounting to failure of the original enforcement strategies. I have already described how the Constitution’s original strategy for allocating and balancing federal and state powers relied on enumeration of federal powers and reservation of the remainder to the States. “Dual federalism” was the most natural form for this strategy to take, and it counted heavily on the feasibility of drawing a sharp line between exclusive spheres of state and federal authority. That line-drawing effort ultimately failed, both because of changes in the factual world – the increasing integration of the economy, which blurred lines between inter- and intra-state commerce – and because the Founders may simply have underestimated the indeterminacy of Article I’s enumerative language and the doctrinal rules that courts developed to implement it. I doubt whether the factual change can wholly account for the failure; after all, it seems likely that the economy was sufficiently integrated to link inter- and intra-state markets (e.g., the price of wheat in New Jersey and the price of bread in New York) even in the Founders’ day. Rather, I suspect that the failure was in substantial part a failure of doctrine – the failure of courts to develop doctrinal tests that could command widespread acceptance and support for separating state and federal power. \[92\]

Whatever the cause, the failure of the original enforcement strategy requires either that we accept a basic alteration in the character of our federal system or that new doctrines be constructed to preserve the original norm of balance. In reality, the choice is probably between a stark version of the former and some combination of the two. No doctrinal proposal on the table today would come close to restoring the particular balance struck in 1789; an expanded federal role is simply a fact of modern life. \[93\] By balance, then, I mean simply that some meaningful measure of state autonomy is constitutionally guaranteed. Fidelity to even this more modest objective, however, will require some measure of doctrinal innovation in lieu of a strong doctrine of enumerated powers. That is not to say that a reconstructed enumerated powers doctrine – one that does not depend on defining mutually-exclusive state and federal spheres – cannot play some role. \[94\] But that sort of constraint seems likely to be relatively weak. If that is correct, then

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\[91\] More rigorous fidelity to the text would no doubt look much like Justice Thomas’s concurrence in Lopez, which recommended uprooting a much broader swath of jurisprudence and returning to a far narrower view of federal power. [cites]

\[92\] See infra TAN ___ (discussing the “Frankfurter constraint”). Whether we should even call this a “failure” is itself a question. After all, dual federalism endured for over a hundred years. It may be a mistake to expect greater permanence from any doctrinal construct. Nor was the failure necessarily unanticipated by at least some of the Founders. See RAKOVE, supra note 51, at 176-77; see also infra TAN ___ (discussing Madison’s misgivings about the enumerated powers strategy).

\[93\] [Thomas acknowledgment of precedent in Lopez]

\[94\] See, e.g., [Kramer, Understanding Federalism]: Ernest A. Young, Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception, 69 GEO. WASH. L. REV. 139, 157-61 (2001) [hereinafter Young, Dual Federalism] (arguing that post-Lopez commerce jurisprudence plays a useful role without returning to the assumptions of dual federalism).
“translation” of the federal balance will likely require doctrinal innovation that is less directly grounded in constitutional text.

A third aspect of change in the Constitution’s institutional context has to do with the maturation of the system itself. By “maturation,” I mean the tendency of successful constitutional systems to outlive the immediate set of problems that gave rise to them. Structural provisions are often drafted against a historical and institutional background in which particular problems loom large. Gordon Wood has recounted, for example, how the first wave of state constitutions after Independence were designed to compensate for the experience of unchecked executive authority under George III and his royal governors.\footnote{cite Gordon Wood} By 1787, however, the powerful state legislatures that those initial constitutions created had themselves come to be perceived as a threat to liberty – a threat with which the original documents, with their focus on cabining executive power, were ill-equipped to deal.\footnote{Id. at ___.} This sort of change presents two obvious alternative responses: The constitution can be amended again, reorienting its structural provisions against the new threat, or the constitution’s current interpreters can work to adapt the structure more incrementally. The latter option would include not only doctrinal innovation by courts but also subconstitutional changes to statutory law or institutional practice by the political branches.

Our own national constitution has moved in a number of ways beyond the original set of problems that inspired the Philadelphia drafters, and these changes have important implications for federalism. With good reason, the Founders perceived the central problem in moving from the Articles of Confederation to the Constitution as one of re-establishing and strengthening the central government.\footnote{[cites] I discuss this point further \textit{infra} in Section ___.} James Madison insisted, for example, “that the balance is much more likely to be disturbed by the preponderancy of the [State Governments] than of the [federal Government].”\footnote{Federalist No. 45, \textit{supra} note ___, at 310 [Cooke].} The original document thus includes a ringing statement of national supremacy in Article VI; the considerably more ambiguous affirmation of state sovereignty in the Tenth Amendment comes in as a response to post-Philadelphia criticism. And judicial review of federalism issues was initially conceived\footnote{See, e.g., RAKOVE, \textit{supra} note 51, at 81-82 (recounting that judicial review was endorsed early on at Philadelphia as an alternative to Madison’s proposal for a general congressional negative on state laws); \textit{[others]}.} – and implemented by the Marshall Court\footnote{The Marshall Court struck down only one federal statute – the minor provision of the 1789 Judiciary Act at issue in \textit{Marbury v. Madison}. On the other side of the ledger, it invalidated ___ state laws.} \footnote{See generally \textit{[Kramer, Politics]}.} – primarily as a tool for reining in centrifugal impulses in the States.\footnote{As late as the early Twentieth Century,}
Justice Oliver Wendell Holmes could contemplate dispensing with judicial review of Acts of Congress while insisting on the need to check state legislation.\textsuperscript{102}

The pendulum of federalism has swung far indeed since then. The Federal Government is here to stay, and its supremacy over the States is largely unquestioned. This is not to say that centrifugal forces have disappeared. The Supreme Court still sees a need to rein in state protectionism under the dormant Commerce Clause doctrine,\textsuperscript{103} and it has increasingly asserted authority to close off state forays into foreign affairs.\textsuperscript{104} The system has “matured,” however, in the sense that threats to the federal balance are at least as likely to come from the \textit{national} direction. These threats take any number of forms, including federal forays into traditional fields of state regulation like education\textsuperscript{105} or local telephone service,\textsuperscript{106} congressional imposition of unfunded mandates\textsuperscript{107} and the increasing dependence of state governments on federal funding grants,\textsuperscript{108} the federalization of crime,\textsuperscript{109} and federal efforts to quash state positions on social and moral issues that differ from the national majority view.\textsuperscript{110} The extent to which any of these developments is a bad thing is, not surprisingly, both contestable and contested; what seems clear, however, is that centralizing pressures are considerably stronger now than they were in the early Republic.

The constitutional structure was created with a second problem in mind alongside the weakness of the central authority. That problem was the “tyranny of the majority,”

\begin{footnotesize}
\textsuperscript{102} See OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 295-96 (Harcourt 1920) ("I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States.").

\textsuperscript{103} [Camps Newfound; Fulton v. Faulkner]

\textsuperscript{104} See American Ins. Assn. v. Garamendi, 123 S. Ct. 2374 (2003) (invalidating California’s Holocaust Victim Insurance Relief Act on the ground it interfered with national foreign policy); Crosby v. Nat’l Foreign Trade Council, 530 U.S. 363 (2000) (finding Massachusetts’ program disadvantaging would-be state contractors that did business in Burma to be impliedly preempted by federal legislation); see generally Young, \textit{Dual Federalism, supra} note 94, at 177-85 (arguing that \textit{Crosby} was overly aggressive in squelching state policy bearing on foreign affairs).


\textsuperscript{106} [Breyer dissent in Iowa Utilities Bd.]

\textsuperscript{107} [cite on problem of mandates] The Unfunded Mandates Reform Act, [cite], was supposed to alleviate this problem, but the Act simply imposes a fairly loose procedural constraint on such mandates. \textit{[cite Harvard Law Rev recent legislation piece].} Since UMRA’s enactment, at least ___ additional mandates have been enacted. [cite] One of the most important is the No Child Left Behind Act, \textit{see supra} note 105.

\textsuperscript{108} [cites]

\textsuperscript{109} [cites]

\textsuperscript{110} [medical marijuuana in CA (Kozinski concurrence); right to die in OR (Alex Kaplan note); gay marriage in VT]
which plays a central role in the Founders’ analysis of the problem of faction. In Federalist 10, for example, Madison rather blithely states that “[i]f a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote”; the difficult problem arises “[w]hen a majority is included in a faction.” 111 This focus on majority tyranny colors some of the Founders’ most important views on federalism; in particular, it gives rise to their assumption that the national government will be less vulnerable to faction than the governments of the several states. 112

Here, too, the passage of time requires us to expand the universe of potential threats to the integrity of the system. Certainly there are areas and issues concerning which Madison’s analysis still seems to hold true, and the national government may enjoy significant advantages over state governments in protecting local minorities from local majorities. 113 But as the scope, institutions, and responsibilities of government at all levels has expanded over time, more recent political science has also produced a strong counter-current critical of Madison’s “failure to appreciate the disproportionate influence that can be wielded on a national level by certain groups that may be relatively small in numbers but that are cohesive and can avoid the problem of too many free riders.” 114 This literature suggests that “the diffusion of power among a multiplicity of governments may increase the difficulties such groups experience in realizing their objectives.” 115 Our contemporary structure must thus guard against two kinds of factions – majorities and cohesive minorities – and Madison’s assumption of national superiority at combating faction can no longer be taken for granted. 116

The third and possibly most basic way in which our institutions have “matured” involves a transformation in the range of functions and responsibilities ascribed to government. The Founders seem to have presupposed a rather minimalist vision of government responsibilities. This vision enabled them to rest much of the vertical and horizontal separation of powers on institutional mechanisms that also tended to hamstring

111 Federalist No. 10, supra note ___, at 60 [Cooke].

112 See, e.g., id. at 64 (“Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.”) (emphasis added); id. (asserting that “the same advantage, which a Republic has over a Democracy, in controlling the effects of faction, is enjoyed by a large over a small Republic – is enjoyed by the Union over the States composing it”).

113 See, e.g., DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 45 (1995); [others]

114 SHAPIRO, supra note 113, at 79; see also [others].

115 SHAPIRO, supra note 113, at 80; see also [others].

116 Madison’s argument has also been undermined by the maturation of the States themselves into large political communities by the standards of Madison’s day. The total United States population in 1790 was around 3.9 million. See TIME ALMANAC 2003, at 120. In 2000, the State of California alone boasted 33.8 million inhabitants. Id. The United States in 1790 had slightly more people than the State of Oregon (the 28th most populous state) today. Id. The largest state in 1790 – Madison’s own Virginia, with approximately three-quarters of a million people – was about the size of the city of San Francisco or Indianapolis today. See 2000 Census: US Municipalities Over 50,000: Ranked by 2000 (available at http://www.demographia.com/db-uscity98.htm) (visited Oct. 12, 2003).
governmental action. The division of the legislature through bicameralism, for example, as well as the provision for Presidential veto, makes federal statutes hard to enact. Brad Clark and others have demonstrated that the proliferation of “veto gates” throughout our national lawmaking institutions – that is, mechanisms that allow particular actors to derail or delay national action – is central not only to the separation of powers but also to federalism. A national government that can act only with difficulty, after all, will tend to leave considerable scope for state autonomy.

Over time, however, the People have demanded that government take on a wider and more activist role, and the constitutional separation of powers has come under pressure as a result. In particular, the nondelegation doctrine has slipped from being a potentially important constitutional rule assigning lawmaking authority outside the constitutionally-prescribed process to a less pervasive canon of construction limiting delegations that implicate particular constitutional values. It is now fair to say that most federal law is made not through the cumbersome method prescribed by Article I but through administrative procedures in executive agencies. The effect of this shift – and the resulting vast expansion in federal lawmaking capacity and output – on federalism has only recently become a subject of study. It is true that state governments have also become far more activist governments than their early Republic counterparts. Nonetheless, it would be surprising if the small-government mechanisms that the Founders assumed would protect state autonomy work as well in a big-government age.

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117 See Bradford R. Clark, Separation of Powers as a Safeguard of Federalism, 79 Tex. L. Rev. 1321, 1341-42 (2001) [hereinafter Clark, Separation of Powers]; see also [others?].

118 See Clark, Separation of Powers, supra note 117, at 1325 (“[E]ven when national power is quite unquestioned in a given situation, constitutionally prescribed lawmaking procedures frequently operate to screen out attempts by the federal government to exercise such authority. The states are the direct beneficiaries of this screening mechanism because the federal government’s inability to adopt ‘the supreme Law of the Land’ leaves states free to govern.”) (internal quotation marks omitted); Young, Two Cheers, supra note __, at 1361-64 (making a similar argument).

119 See Cass R. Sunstein, Nondelegation Canons, 67 U. Chi. L. Rev. 315, 316 (2000) (“Federal courts commonly vindicate not a general nondelegation doctrine, but a series of more specific and smaller, though quite important, nondelegation doctrines. Rather than invalidating federal legislation as excessively open-ended, courts hold that federal administrative agencies may not engage in certain activities unless and until Congress has expressly authorized them to do so.”). Professor Sunstein appears to view these canons as more pervasive and effective limits on the federal regulatory state than I do, but that disagreement is a subject for another article. We share the view that the delegation doctrine has not disappeared but has changed in form.

120 See, e.g., INS v. Chadha, 462 U.S. 919, 985-86 (1983) (White, J., dissenting) (“For some time, the sheer amount of law -- the substantive rules that regulate private conduct and direct the operation of government - - made by the agencies has far outnumbered the lawmaking engaged in by Congress through the traditional process.”); FTC v. Ruberoid Co., 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) (“The rise of administrative bodies probably has been the most significant legal trend of the last century. . . . They have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories . . . .”).

121 See, e.g., Clark, Separation of Powers, supra note 117; [others].

These sorts of changes, like the others I have discussed, require corresponding changes in federalism doctrine if the original commitment to balance is to survive. Indeed, one can understand a number of important doctrinal innovations as responsive to the maturing of our institutions. For example, the Federal Constitution’s Bill of Rights has evolved, through constitutional amendment and judicial interpretation, from a set of provisions narrowly directed at the national government to a charter of basic guarantees comprehensively directed at all American governments. Although this shift brought a number of important changes, one was an expansion of the sort of federalism concerns that courts must enforce. The potential of individual rights decisions to restrict the autonomy of state governments is well understood. Prior to incorporation, this was not a concern of the federal courts. While state courts might restrict the autonomy of state governments by broadly construing individual rights provisions of their own state constitutions, this raised no issue of federalism; these restrictions were imposed by the states on themselves. The autonomy of state political systems in rights situations was guaranteed by the federal structure itself, which simply did not apply federal rights provisions to state governments. There was no need for judicially created federalism doctrines to add to that safeguard.

After incorporation, however, state policies (including, perhaps most importantly, state criminal convictions) became subject to override by federal rights provisions. It is now commonplace to think of a case like Lawrence v. Texas, which recognized a right to engage in gay sex under the Due Process Clause, as raising significant issues of federalism: In effect, Lawrence nationalized a core issue of gay rights by articulating a federal right binding on the States. While the Supreme Court tended to reject federalism-based opposition to the notion of incorporation per se, it responded to the threat to state autonomy by crafting a number of doctrines that protected state autonomy in other ways. In particular, it created a number of remedial doctrines, including the abstention doctrines and judge-made limits on federal habeas corpus relief, which limit the practical impact of federal rights on state autonomy. Incorporation brought

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123 See, e.g., Duncan v. Louisiana, 391 U.S. 145, ___ (1968) (noting that nearly all the provisions of the Bill of Rights have now been incorporated into the Due Process Clause of the Fourteenth Amendment so as to bind the States).

124 [cites]; see also Baker & Young, supra note 10, at 157-59 (discussing how the Supreme Court’s recognition of a broad right of association in Boy Scouts of America v. Dale, 530 U.S. 640 (2000), constrained state autonomy to regulate discrimination).

125 [cite]

126 Whether the Court will take the further step of nationalizing the related – but far more controversial – question of gay marriage remains to be seen.

127 [cite Harlan dissents]

128 [cites]

129 [cites]

130 I do not claim that these doctrines were exclusively a response to incorporation. Some, such as Pullman abstention, originated in response to claims under provisions like the Equal Protection Clause that had always applied to the States. I do think, however, that incorporation gave substantial impetus to these sorts of doctrines by proliferating the federal rights with potential to undermine state autonomy.
the Federal Constitution close to being a complete charter of rights, with the consequence that federalism safeguards against over-expansive interpretations of rights had to be created within federal constitutional law.

Likewise, the fading of the doctrine of enumerated powers has brought the Constitution much closer to describing a comprehensive government. In such a comprehensive system, state autonomy cannot adequately be protected simply by relying on the jurisdictional limitations of federal institutions. Instead, limits on federal power must be developed within the purview of the federal constitution itself – despite the fact that that constitution could not have originally been intended as a complete description of the federal relationship. The Rehnquist Court has been struggling with this doctrinal task since 1991, when it stepped back from the brink of total judicial abdication in *Gregory v. Ashcroft*.\(^{131}\) Justifying that effort and suggesting how it ought to proceed is the principle burden of this essay.

The notion that courts should formulate doctrinal constraints on federal power in order to “translate” the Founders’ notion of a federal balance into modern circumstances seems more controversial than many other contemporary instances of translation.\(^{132}\) The controversy derives from a variety of sources, including the painful history of the Court’s effort to impose similar limits prior to 1937\(^{133}\) and the perception of many current legal academics, who came of age in the 1960s, that state governments are a retrograde force in American society.\(^{134}\) The depth of this opposition requires careful consideration of the appropriate role of courts in translating the federal balance. Section B of this Part addresses this issue as a matter of institutional choice, comparing the suitability of the judiciary to decide federalism questions with that of other institutions. Concluding that at least some judicial role is warranted, I take up in Section C the question of interpretive choice. That section sketches an approach to choosing federalism doctrines that I then flesh out in the balance of the essay.

Throughout the course of the discussion that follows, however, it is important to remember that “translating federalism” is not a proposal in a law review article – it is an activity in which courts have been engaged, with varying degrees of success, since the founding of the Republic. The relevant questions are whether they have done it adequately, and what criteria they might employ to do it better.


\(^{132}\) See, e.g., Lessig, *Translating Federalism*, supra note 82, at 132-35 (describing the evolution of Fourth Amendment doctrine to cope with technological changes that threatened individual privacy).

\(^{133}\) See, e.g., [Souter dissent in *Lopez* comparing majority opinion to *Lochner*]

\(^{134}\) See, e.g., Seth Kreimer, *Federalism and Freedom*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 66, 67 (2001) (“In my formative years as a lawyer and legal scholar, during the late 1960s and 1970s, [federalism] was regularly invoked as a bulwark against federal efforts to prevent racial oppression, political persecution, and police misconduct.”); but see Baker & Young, *supra* note 10, at 133-62 (arguing that the equation of federalism with a particular political orientation is a fundamental mistake).
B. Institutional Choice

A discussion of federalism doctrine necessarily assumes that courts should have a role in federalism disputes. For some, the very notion of “federalism” presupposes a judicial umpire to settle controversies between the center and the periphery. One oft-quoted European formulation, for example, holds that “[f]ederalism is present whenever a divided sovereign is guaranteed by a national or supranational constitution and umpired by the supreme court of the common legal order.”135 But the proper role of courts in disputes over allocation of authority in our own federal system has been deeply controversial.136 Prominent commentators – and some Supreme Court justices – have argued that courts should not “intervene” in federalism disputes; rather, those controversies should be left entirely to politics.137 The participation of courts in federalism disputes, and thus the relevance of judicial doctrine to such disputes, cannot be taken for granted.

The question is, at bottom, one of institutional choice. Federalism posits a goal – balancing national and state authority – but, as Neil Komesar has insisted, we must still ask which institutions are best positioned to pursue that goal.138 This analysis, moreover,

135 Koen Lenaerts, Constitutionalism and the Many Faces of Federalism, 38 AM. J. COMP. L. 205, 263 (1990). See also Martin Shapiro, The European Court of Justice, in THE EVOLUTION OF EU LAW 321 (Paul Craig & Gráinne de Búrca eds., 1999) (observing that most divided power systems envision a boudary-policing role for courts); PAUL JACKSON & PATRICIA LEOPOILD, O. HOOD PHILLIPS AND JACKSON: CONSTITUTIONAL AND ADMINISTRATIVE LAW 7 (8th ed. 2001) (British textbook, observing that judicial power to invalidate legislation “is comparatively rare . . . except in federal states . . . where some check is necessary to preserve the rights of the federation and its component members”).


137 See, e.g., JESSE H. C HOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT ___ (1980); [Blackmun in Garcia; Souter in Morrison]. Putting the question this way – and it usually is put this way, see, e.g., William Marshall, American Political Culture and the Failures of Process Federalism, 22 HARV. J. L. & PUB. POL’Y 139, 153 (1998) (describing the core debate as one over “judicial intervention to enforce federalism”) – is itself somewhat misleading. Consider a case like United States v. Lopez, involving the constitutionality of the federal Gun Free School Zones Act as an exercise of the Commerce Power. Refusing to “intervene” in that dispute would have meant declaring Mr. Lopez’s defense to his criminal prosecution – that the law he was charged with violating exceeded Congress’s power – nonjusticiable. While some commentators have suggested that courts should do exactly that in federalism disputes, see [Choper]; it is not what the Federal Government or the dissenters urged; rather, they asked the Court to validate the federal statute. The question in most cases is thus not whether the courts will intervene – a decision on the merits either way constitutes a (usually decisive) intervention – but rather whether the courts will second-guess the judgment of the federal political branches that the action they have taken is valid and/or supersedes state policy.

As I discuss further in Part ___, I think the justices who are often read as urging courts to stay out of federalism disputes are really making a much narrower argument.

138 See generally NEIL H. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 5 (1994) (“Goal choice and institutional choice are both essential for law and public policy. They are inextricably related.”).
must be *comparative* in nature. It is not enough to say that this or that institution is well- or ill-suited to handle a certain set of questions. Instead, the likely performance of each institution must be compared with that of the alternatives. “Issues at which an institution, in the abstract, may be good may not need that institution because one of the alternative institutions may be even better. In turn, tasks that strain the abilities of an institution may wisely be assigned to it anyway if the alternatives are even worse.”  

Comparative institutional analysis is relevant to federalism questions in at least two ways. There are what we might call “first order” questions that involve allocating decisionmaking authority between federal and state institutions. For example, should we entrust the states with primary responsibility to resolve the issues of physician-assisted suicide or gay marriage, or should those questions be resolved at the federal level? Then there are the “second order” questions, which involve choosing institutions to decide the first order questions. In other words, should the allocation of authority over physician-assisted suicide or gay marriage be settled by Congress, the Executive, or a court deciding the matter as a question of constitutional law? The first order questions are important and interesting, but my concern here is with the second order issue: Which institution should draw and police the boundary between state and federal authority?

This turns out to be a very complex question. I want to make two points about it in this section. The first is that once we start thinking about the factors involved in comparative institutional analysis, the “question” turns out be incredibly multifarious. It seems highly unlikely that all the various incarnations of the boundary-drawing question will have the same answer, or that the answer to many of them will involve a categorical choice of one institution over all the others. The second point is that comparative institutional analysis functions most comfortably at the level of institutional design. Once we shift to the perspective of participants within the legal system as it is presently constituted, opportunities to shift decisionmaking authority altogether in response to comparative institutional analysis narrow considerably. Institutional analysis is more likely to influence *how* decisions are made by the institutions involved; for courts, this means that institutional analysis may be most important in shaping doctrine rather than in determining whether courts may decide federalism issues at all.

1. One Issue, Many Questions

The debate in the federalism literature – and in judicial opinions in federalism cases – is whether courts should decide federalism issues. The same arguments are routinely imported from one doctrinal context to another. For example, Herbert Wechsler’s notion that the political process generally protects federalism better than courts was transformed by Justice Blackmun into an argument for judicial abdication in the *Garcia* case, which involved judge-made restraints on Congressional action that admittedly fell within the commerce power. Then Justice Stevens invoked it in *Kimel*, a case about state sovereign immunity from suits by private litigants. Finally, Justice

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140 See Wechsler, *supra* note 17.


Souter took up the same notion in *Morrison*, a case about whether courts should enforce the limits of the commerce power itself.\(^{143}\) We frequently treat the who-should-draw-the-boundary issue, in other words, as a unitary question.

That strikes me as a mistake. Thinking about the question from the perspective of comparative institutional analysis can help us start to see why. This perspective typically considers such factors as the distribution of stakes that various actors have in an issue, the costs of information about the issue, the costs of participating in the alternative institutions, and the expertise and scale of those institutions.\(^{144}\) But surely these factors will vary considerably depending on the particular aspect of federalism under discussion. The costs of information about issues of basic legislative power, such as the scope of the Commerce Clause, may be quite different from the costs of understanding the ins and outs of the relationships between state and federal courts. Likewise, the likelihood that state institutional actors will intervene to protect their own structural interests may be considerably greater when we are talking about suits by private actors than limits on Congress’s spending power. The point is simply that if we run the comparative institutional analysis on each of the various federalism questions currently in dispute, we have little reason to think that the results will point uniformly in one direction.

A second problem is that issues of federalism generally arise in the context of a particular policy that either the federal or a state government seeks to implement. Congress, for example, may wish to ban possession of a gun within 1000 feet of a school, thereby raising an issue whether such legislation falls within the scope of the Commerce Clause.\(^{145}\) The participation of and positions taken by various actors are likely to be driven at least as much by the particular policy at stake (How do you feel about gun control?) as by the issue of allocating authority between the Nation and the States. Even a casual observer of recent debates about federalism in Congress will recall instances in which one political party or the other has championed state autonomy depending on its views on the underlying policy issue. Republicans – the supposed party of state autonomy – have pressed for national uniformity on physician-assisted suicide and partial-birth abortions;\(^{146}\) Democrats have rediscovered the virtues of state autonomy on tort reform and regulation of Health Maintenance Organizations (HMOs).\(^{147}\)

A really sound comparative institutional analysis would have to assess the various key factors in terms of both the federalism issue and the underlying policy issue. That would likely be awfully hard to do, and the results would not be broadly applicable to all cases of the same federalism question. After all, the dynamics of institutional participation on the basic federalism question (Who decides how broad the Commerce Clause is?) might be quite different in a context involving a different underlying policy issue. All of the factors crucial to comparative institutional analysis – the distribution of


\(^{144}\) See generally *Komesar*, supra note 138, at 7-8.


\(^{146}\) [cites]

\(^{147}\) See, e.g., E.J. Dionne, Jr., *States’ Rights Isn’t the Issue*, WASH. POST, June 22, 2001, at A25.
stakes, the costs of information, etc. — are likely to vary depending on whether the question is Congress’s authority to legislate on, for instance, tort reform, abortion, or physician-assisted suicide.

There may well be an important place for comparative institutional analysis of federalism questions, but it will have to be done retail rather than wholesale. That suggests that categorical polar positions on judicial review — courts should always have the final say on federalism issues, or courts should stay away from such questions entirely — are misguided, at least from the pragmatic perspective of institutional analysis. My argument here would not answer the quite different claim that the Constitution itself mandates a categorical institutional choice. But to the extent that functional considerations guide the choice of institutions, a categorical choice of either judicial or political channels for resolution of federalism disputes seems out of place.

2. The Obligation to Decide

As Neil Komesar has observed, institutional choice “is about deciding who decides.” Institutional analysts generally seem to assume that the institutions being compared — say, courts and legislatures — are equally free to decide or not to decide the issue in question. Critics of a judicial role on federalism questions often seem to make the same assumption that courts are free not to decide when such questions are put to them. But the issue of when a court may decide not to decide an issue presented to it is itself a complicated, doctrine-intensive question, and I argue that this question severely limits the ability of courts to forego decision simply because another institution might have comparative advantages relevant to the issue. This does not make institutional choice considerations irrelevant to courts; rather, those considerations are chiefly relevant to the types of doctrines that courts should employ in particular kinds of cases, which will in turn control the extent of judicial involvement with particular sorts of issues.

Practitioners of institutional choice must distinguish between two perspectives: the perspective of institutional design, and the perspective of participants in the system that exists. Institutional analyses seem generally to proceed from the former perspective; they ask, If we were setting up a system to resolve a particular kind of issue, what sort of institutions would we choose? My primary interest here, by contrast, is in what real courts should do when confronted with real federalism cases. Comparative institutional analysis thus ought to inform their choice among the options that the legal system provides but cannot supply a basis for radical alterations in the system itself.

The most obvious instance of institutional design occurs in the drafting or amendment of the Constitution. But other opportunities exist outside the confines of explicit constitutional change. If Congress is convinced that federal courts are not well-suited to decide particular federalism questions, for example, it may be able to restrict

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148 [cites] My arguments about the political question doctrine in the next subsection are at least partially responsive to such claims. See infra TAN ___.

149 KOMESAR, supra note 138, at 3.

150 As my friend Adrian Vermeule likes to say, “Once you’ve drunk from the heady waters of institutional design, you never go back.”
their jurisdiction over such questions. Likewise, courts have some occasion to make design decisions by defining the contours of the political question doctrine, which might take certain federalism issues out of the judicial purview altogether. Neither of these approaches, however, has played a major role with respect to federalism. Congress did strip the Supreme Court’s jurisdiction to decide a case involving the constitutionality of Reconstruction – certainly a federalism issue of the first magnitude. But since that time there has been no significant effort to confine the Court’s jurisdiction over federalism questions.

Nor has the political question doctrine played a significant role in federalism disputes, at least since the Court declared a Guaranty Clause claim non-justiciable in 1849. Prior to Baker v. Carr, the Court might have chosen to make the political  

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151 The issue of constitutional limitations on Congress’s power to restrict federal jurisdiction is one of the most famously murky issues in constitutional law. See, e.g., Henry M. Hart, Jr., The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 HARV. L. REV. 1362 (1953); Lawrence G. Sager, Foreword: Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of the federal Courts, 95 HARV. L. REV. 17 (1981). The most important practical limit is that wherever Congress seeks to use federal courts to enforce federal law, see, e.g., United States v. Lopez, 514 U.S. 549 (1995) (federal criminal prosecution in federal court), the federal courts necessarily will have the opportunity to consider the defense that the federal law in question falls outside Congress’s power.

152 See, e.g., Luther v. Borden, 48 U.S. (7 How.) 1 (1849) (rejecting as nonjusticiable a request to settle the locus of state governmental authority under the Guarantee Clause).

153 See Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1869) (upholding Congress’s action as valid under the Exceptions Clause of Article III); but see Ex parte Yerger, 75 U.S. (8 Wall.) 85 (1868) (reading Congress’s action very narrowly to permit Supreme Court review of a similar case).

154 The only clear instance of jurisdiction-stripping since Reconstruction did bear some relation to federalism concerns, but its practical significance seems relatively minor. One provision in the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2244(b)(3)(E), barred Supreme Court review of federal court of appeals decisions granting or denying leave to state prisoners to file a second or successive petition for a federal writ of habeas corpus. See generally Felker v. Turpin, 518 U.S. 651 (1996) (rejecting a constitutional challenge to this provision). Restricting Supreme Court jurisdiction in habeas cases effectively denies the Court the opportunity itself to decide the proper allocation of authority between federal and state courts in state criminal litigation; in that sense, the 1996 Act raised an institutional design issue of the sort I have been discussing. But the 1996 Act restricted only the Supreme Court’s jurisdiction (not the jurisdiction of the federal judiciary as a whole) over a small set of court of appeals decisions concerning a small subset of federal habeas petitions – appellate “gatekeeper” decisions denying the right to file a successive habeas petition. AEDPA thus seems the exception proving the rule that jurisdiction-stripping has not been a favored vehicle for Congress to redesign the Constitution’s allocation of institutional authority to decide federalism disputes.

Issues of federalism also helped prompt one of the major institutional re-design proposals of the last century: President Franklin Delano Roosevelt’s court-packing plan. See WILLIAM E. LEUCHTENBERG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 133 (1995) (describing how the Old Court’s federalism and economic substantive due process cases together moved FDR to try and change the structure of the Court). Interestingly, however, that plan did not seek to reallocate authority to decide federalism issues; instead, it simply sought to change the result in such cases by appointing justices friendly to the President’s broad view of federal legislative authority.

155 See Luther, 48 U.S. (7 How.) 1, ___ (“Under this article of the Constitution it rests with Congress to decide what government is the established one in a State.”).
question doctrine into a general vehicle for comparative institutional analysis. But *Baker* began a process of transforming a general prudential inquiry into a basically rule-bound, narrow exception to a general principle of judicial review. The Court’s most recent pronouncement, in *Nixon v. United States*, makes clear that non-justiciability turns on two of the factors identified in *Baker*: a textual commitment of the issue in question to the political branches, and a lack of judicially manageable standards for deciding the issue. Neither of these factors fit comfortably with the notion that courts may decline to decide federalism issues if, based on a comparative institutional analysis, they find some other institution better suited to the task. The first factor – textual commitment – obviously substitutes a text-based inquiry for institutional analysis. The second – judicially manageable standards – does seem more consonant with an inquiry into judicial competence. It is, however, single-institutional in that so long as courts have manageable standards to decide, we do not ask whether some other institution could decide even better. More important, it makes institutional analysis subservient to doctrine; only if doctrinal tools are wholly lacking can a court choose some other institution to decide.

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156 369 U.S. 186 (1962) (holding that equal protection claims for equal apportionment of state legislative districts are justiciable).

157 [cites] A more prudential and broadly applicable version of the political question doctrine may survive in foreign affairs cases, [cites] although the Supreme Court has not definitively ruled on such a case in several decades. But even here, the most recent decisions tend to get rid of foreign affairs issues on other grounds, such as standing or ripeness. *See*, e.g., *Doe v. Bush*, 323 F.3d 133 (1st Cir. 2003) (dismissing claim that war in Iraq was unconstitutional primarily on ripeness grounds; second ground suggested simple absence of a constitutional question on the merits). My own view is that Louis Henkin was largely correct to suggest that there is no such thing as a political question doctrine. *See generally* Louis Henkin, *Is There a Political Question Doctrine?* 85 YALE L.J. 597 (1976) (arguing that all political question cases amount to either the Court’s decision to “accept decisions by the political branches [as being] within their constitutional authority” or to “refuse some (or all) remedies for reasons of equity”).


159 *Id.* at 228-33.

160 *Id.* at 228 (observing that under the first prong, “the courts must, in the first instance, interpret the text in question and determine whether and to what extent the issue is textually committed”); *Powell v. McCormack*, 395 U.S. 486, 518-48 (1969) (conducting a detailed inquiry into the original understanding of the Qualifications Clauses of Article I, in order to determine whether those clauses were a “textual commitment” of qualifications controversies to Congress).

161 *See*, e.g., *United States v. Munoz-Flores*, 495 U.S. 385, 395-96 (1990) (undertaking a limited inquiry into the judiciary’s institutional competence in rejecting argument for nonjusticiability under this prong).

162 Moreover, I am not aware of any cases in which the Supreme Court has held an issue nonjusticiable based solely on a lack of judicially manageable standards, without also relying on a textual commitment of the issue to a coordinate branch. That is certainly understandable: As I note infra note ___, one sees claims that doctrinal standards are incoherent and unmanageable in virtually every area of constitutional law. If that were itself a basis for declaring the cases non-justiciable, we could do away with much constitutional law altogether. *See* *Baker & Young*, supra note 10, at 104-05. Moreover, courts generally decide whether a particular sort of case raises a non-justiciable political question at the point in time that courts are first asked to venture into that area. It will often be hard to predict at that stage whether the courts will prove able to formulate workable doctrine. The manageable standards prong thus may itself be
I am unaware of any serious argument that the text of the Constitution commits federalism issues generally to Congress, and few even seem to argue more narrowly that particular federalism questions can meet the high standard for non-justiciability set out in *Baker* and *Nixon*.\(^{163}\) Jesse Choper has called for courts to hold federalism issues non-justiciable, but he relies on a prudential notion of non-justiciability that has little connection to the political question doctrine in its present form.\(^{164}\) The problem with that proposal, however, is that the political question doctrine exhausts the set of circumstances in which federal courts may refuse to decide a constitutional issue based on the characteristics of the issue itself. Courts may decline decision on grounds of standing or ripeness or abstention, for example, but these principles turn on the characteristics of the parties, the timing of the claim, or the equitable nature of the relief requested.\(^{165}\) There is no general “out” for courts on the ground that some other institution may do a better job.\(^{166}\)

From the perspective of institutional design, of course, we might choose to have a broader political question doctrine.\(^{167}\) At the level of ordinary practice, however, courts will generally be bound by John Marshall’s insistence that “[w]e have no more right to decline the exercise of a jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution.”\(^{168}\) That is emphatically not to say, however, that comparative institutional questions are irrelevant to issues of federalism. Rather, they remain highly relevant— even central— to the decisions that particular institutions make as to how to handle these issues. Institutions frequently decide, after all, to defer to other institutions in the decision of particular questions.

unmanageable. It seems likely that textual commitment is a necessary— although probably not sufficient— condition for nonjusticiability under current law.

\(^{163}\) John Yoo notes, for example, that the majority opinion in *Garcia*— generally regarded as the high water mark of the notion that courts should not decide federalism issues— “did not resort to the political question doctrine.” John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1332 (1997) [hereinafter Yoo, *Judicial Safeguards*].

\(^{164}\) See Choper, supra note 137, at 193.

\(^{165}\) [cites]

\(^{166}\) To be sure, a fair amount of such comparative institutional analysis goes on in shaping justiciability doctrine. Justice Scalia, for instance, has argued that the aspect of standing doctrine barring adjudication of “generalized grievances” stems from a judgment that widely-shared harms are best addressed through the political process, while focused injuries are better suited for courts. See Antonin Scalia, *The Doctrine of Standing as an Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 891 (1983). The important point, though, is that the institutional analysis is *internal* to standing doctrine and must be accommodated to other, non-institutional aspects of standing doctrine. One does not do comparative institutional analysis in its pure form in that context.

\(^{167}\) A broad doctrine that held constitutional issues non-justiciable whenever comparative institutional analysis suggested that some other institution might perform better would, of course, throw much of constitutional law open to question. That does not make the possibility uninteresting, of course, but I have no occasion to pursue it here.

\(^{168}\) Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821). This rule has exceptions, but they are rarely wholly prudential. See, e.g., *Quackenbush* (holding that federal courts’ ability to dismiss claims on abstention grounds generally depends on whether the plaintiff seeks only equitable relief).
Congress, for example, ordinarily has the power to draw some boundaries between state and federal authority by deciding when to preempt state law. It may decide, however, that an executive agency could perform this task better in certain circumstances and delegate its preemptive power to the agency.\textsuperscript{169} Likewise, courts may adopt highly deferential federalism doctrine based on the comparative institutional judgment that the boundary between state and national authority ought ordinarily to be drawn by the political process.

The argument that courts should not enforce federalism principles has generally been part and parcel of the “double standard” in constitutional law that grew up after the Supreme Court’s “switch in time” in 1937.\textsuperscript{170} Just as the courts have generally been unwilling to enforce notions of economic substantive due process after 1937, so too they have been reluctant to enforce principles of federalism, such as limits on the national commerce power.\textsuperscript{171} This notion of a “double standard” has been criticized in general\textsuperscript{172} and with particular regard to federalism.\textsuperscript{173} The important point for present purposes, however, is that the double standard has not generally taken the form of a categorical rule that courts may not decide economic substantive due process or federalism cases.\textsuperscript{174} Rather, the courts have simply fashioned doctrines on the merits that defer in most cases to judgments by political actors.

We might term these sorts of decisions “second order” institutional choices because the delegations in question are subject to recall by the delegating institution; Congress, for example, can always reassert its control over preemption decisions

\textsuperscript{169} See, e.g., Symens v. Smithkline Beecham Corp., 152 F.3d 1050, 1053-54 (8th Cir. 1998) (finding that Congress implicitly delegated authority to the Department of Agriculture to preempt state laws on cattle vaccines).

\textsuperscript{170} See, e.g., Henry J. Abraham, Freedom and the Court: Civil Rights and Liberties in the United States 10 (4th ed. 1982) (describing “a double standard of judicial attitude of judicial attitude, whereby governmental economic experimentation is accorded all but carte blanche by the courts, but alleged violations of individual civil rights are given meticulous judicial attention”).

\textsuperscript{171} See Baker & Young, supra note 10, at 75-76 (noting that federalism principles have been linked with economic substantive due process in constitutional “exile” after 1937).

\textsuperscript{172} See, e.g., Laycock, supra note 70, at 267 (“[W]e should take the whole Constitution seriously. We cannot legitimately pick and choose the clauses we want enforced.”).

\textsuperscript{173} See, e.g., A.E. Dick Howard, Garcia and the Values of Federalism: On the Need for a Recurrence to Fundamental Principles, 19 Ga. L. Rev. 789, 797 (1985) (“It is no less legitimate and proper for the Supreme Court to concern itself with assuring the health of federalism as it is for the Court to uphold individual liberties as such. In neither case is abdication of the Court’s proper role consistent with the principles inhering in the Constitution.”); Baker & Young, supra note 10, passim (arguing that none of the plausible rationales for a “double standard” justify a refusal to enforce federalism principles).

\textsuperscript{174} One possible exception is Ferguson v. Skrupa, 372 U.S. 726 (1963), in which Justice Black’s majority opinion asserted that the Court had abandoned entirely “the use of the ‘vague contours’ of the Due Process Clause to nullify laws which a majority of the Court believed to be economically unwise”; such arguments should be “addressed to the legislature, not to us.” Id. at ___. But Justice Harlan’s separate concurrence, which simply stated that “this state measure bears a rational relation to a constitutionally permissible objective,” id. at ___, probably better states the governing law. The Court has continued to suggest that it is willing to assess economic regulation under the rational basis test [see Coal Act case; slot machine case], although it never strikes such legislation down.
notwithstanding its prior delegation to an executive agency. That, however, hardly makes these choices unimportant. The balance of this essay is concerned with the sorts of doctrine that courts should employ when called upon to draw lines between state and federal authority. The institutional capacities of courts and other actors in the system are critical to that issue. Institutional choice thus folds into the interpretive choices required in making federalism doctrine.

C. Interpretive Choice

If we can establish that courts must play at least some role in the enforcement of federalism, then how do courts choose doctrine to fulfill that role? The problem is one of interpretive choice, and I explore it in the remainder of this essay. This Section simply introduces the problem and proposes some criteria which are then defended in succeeding pages.

Adrian Vermeule has explained that interpretive choice typically involves “the selection of one interpretive doctrine, from a group of candidate doctrines, in the service of a goal specified by a higher-level theory of interpretation.” 175 For present purposes, however, that description must be qualified in three ways. First, choosing federalism doctrine does not truly involve “a choice among possible means to attain stipulated ends.” 176 We may agree on a very general end – preservation of some notion of balance between national and state authority – and yet have very different notions of what elements of that balance are actually important. Part II distinguishes between state “sovereignty,” defined as the unaccountability of state governmental institutions to federal actors and to their citizens, and state “autonomy,” by which I mean the state government’s right to make certain decisions and perform certain functions for its citizens. These concepts overlap to some extent but differ widely in emphasis, and the choice of which sort of federalism “end” to pursue has important implications for doctrine. I argue in Part III that we ought to consider state autonomy more important, but the primary point for present purposes is that the ends of federalism doctrine are contested.

The second qualification is that we are not choosing “one interpretive doctrine” for federalism questions. As I have already discussed, issues of federalism arise in a vast array of different contexts, and it would be highly surprising if one interpretive doctrine could address them all. My aim is rather to propose a set of more general doctrinal strategies to help guide the development of doctrine in particular contexts. Part VII provides some examples of the sorts of doctrines that these strategies would favor, but it is far from an exhaustive list.

Finally, the exercise of interpretive choice generally presupposes that the institutional choice questions are settled. As Professor Vermeule points out, “[i]nterpretive choice is the intra-institutional parallel to Komesar’s conception of the allocation of responsibilities among institutions.” 177 But the institutional question is not

176 Id. (emphasis added).
177 Vermeule, supra note 175, at 91.
settled here; rather, I have argued that outside the setting of *ex ante* institutional design, courts must generally address institutional issues in the context of choosing particular doctrines that are more or less deferential to other institutional actors. As Larry Kramer has noted, “there is no single doctrine of judicial review . . . [C]onstitutional law is filled with doctrines that require the Justices to defer in varying degrees to other decisionmakers acting in the realm of ordinary politics.” Even though I have ruled out wholesale judicial abdication of federalism issues to the political process, the comparative advantages and disadvantages of courts vis-à-vis other actors plays an important role in shaping federalism doctrine.

The use of institutional factors as tools to shape doctrine both enhances and constrains ordinary institutional analysis. The remainder of this section considers two senses in which this is true. The first is that since we are no longer making a binary choice between institutions, judicial doctrine may be used to reinforce rather than supplant the political branches’ own institutional mechanisms for handling federalism issues. The second point is that while institutional analysts typically seem to assume that different institutions approaching the same problem will ask basically the same questions, judicial decision-making is actually quite different from action by the political branches. In particular, courts’ obligation to decide cases according to *law* imposes important burdens of coherence on judicial action. Those burdens have played – and will continue to play – an important role in shaping federalism doctrine.

1. **Collaborative Enforcement**

Institutional analysis of the allocation of authority over federalism questions sometimes seems to proceed as if one institution or another will have sole authority over a particular sort of question. Either the courts are to “establish areas of state control that are to remain immune from federal regulation” or those questions must be “remit[ted] . . . to politics.” Other applications of comparative institutional analysis often qualify this binary model, of course, but the qualifications often seem to assume that we are still simply allocating particular aspects of an issue to one institution or the other. I am suggesting here, however, that institutional analysis should primarily shape judicial doctrine, and doctrine is sufficiently flexible to open up a third possibility – that is, that one institution’s activity on a particular question might be tailored primarily to helping another institution decide that question in an optimal way.

What I have in mind is the notion, prominent in the constitutional theory of our Founders, that structural constraints on federal political actors ought generally to be *self*-enforcing. As I have observed elsewhere, Madison’s famous account of separation of

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179 Yoo, *Judicial Safeguards*, supra note 163, at 1312.
181 Professor Komesar’s discussion of tort reform, for example, often seems to take this tack by suggesting that judicial decisionmaking should predominate on issues with a particular distribution of information and decision costs, while political institutions should control on other issues. See generally KOMESAR, supra note 138, at 171-95. But he also occasionally qualifies that categorical view by noting techniques of shared responsibility, such as judicial narrowing constructions of legislative enactments. See *id.* at 193.
powers and federalism in Federalist 51 does not mention judicial review as an enforcement mechanism; rather, it depends primarily on the ambitions of the multifarious state and federal institutional actors to keep one another in check. Subsequent experience has shown, however, that these institutional mechanisms often function imperfectly. That, in turn, suggests an intermediate role for courts – not as alternative decision-makers, but as collaborators who sit to ensure that the essential checks and balances within the political branches remain in place.

This is the basic idea of “process federalism.” As will become clear, I doubt that process-based doctrine is a complete answer to the problem of enforcing federalism. I do believe, however, that critics of the process approach have missed the vast potential that this sort of collaborative enforcement has for redressing some of the current imbalances in the system. If that potential is largely unrealized at present, it may be in part because the notion of process-based doctrine has not yet adequately been explored. Part V of this essay tries to go some distance toward that goal by probing the prerequisites for a self-enforcing federalism and identifying the ways in which judicial doctrine can promote that goal.

2. Judicial Decision-making and the Frankfurter Constraint

A second problem with institutional analysis is that it often seems to assume that the basic character of the decision to be made, once we choose the right institution to make it, does not vary according to which institution is chosen. But courts, legislatures, executive officials, and markets decide questions quite differently due to the constraints imposed by their institutional roles. To assume that when we commit a given problem to a court rather than a legislature, the court will nevertheless ask the same question that the legislature would ask, is to disregard many of the rich differences between institutions that lie at the heart of institutional choice. Choosing who decides often fundamentally affects what question will be decided.

182 See Ernest A. Young, Two Cheers for Process Federalism, 46 VILL. L. REV. 1349, ___ (2001) [hereinafter Young, Two Cheers]; Federalist No. 51 [cite]. This does not mean that judicial enforcement is inappropriate; as Federalist 78 makes clear, the Framers expected some judicial role in boundary-enforcement. See Federalist No. 78, supra note ___, at 524-25. But it does suggest that courts were not envisioned as the primary line of defense.

183 See infra Section ___.


185 See infra text accompanying notes 225-235.

186 See, e.g., Timothy D. Lytton, Lawsuits Against the Gun Industry: A Comparative Institutional Analysis, 32 CONN. L. REV. 1247, 1266 (2000) (“Judges have the power to make policy by ruling in ways that determine the outcome of litigation. Judges in lawsuits against the gun industry have frequently exercised this power by granting defense motions to dismiss and motions for summary judgment, thereby rejecting plaintiffs' policy proposals. Judges could, in future cases, rule in favor of plaintiffs, thereby supporting their policy proposals.”). This assumption is somewhat more defensible – although still questionable – in contexts like tort law, the subject of the example cited, where judges have independent common lawmaking powers.
The crucial thing about judicial decisionmaking – as opposed to executive or legislative action – is that courts must make decisions according to law. We all know that courts make policy and value choices, but for most it is crucial that courts do not have the same right to forthrightly choose policy and value as a legislature might. Rather, the value and policy choices that courts make arise from the inevitable indeterminacies in the law that courts must apply. Ideally those choices are themselves grounded in the applicable legal materials, broadly construed. Failing that, they are at least constrained in scope by those legal materials. One can, of course, argue endlessly about the nature of the difference between judicial and legislative decisions. But most would agree that courts are more constrained in the sorts of choices they can make than legislative or executive actors.

The nature of judicial decision-making imposes two strong constraints on interpretive choice. The first is to privilege constitutional text and, to a lesser extent, history over other more functional or consequentialist sources of doctrine. I argue in Part III that neither text nor history can provide many determinate answers to federalism questions. Nonetheless, sometimes they do provide clear answers: The text clearly guarantees, for example, each state the right to elect two senators absent some fundamental change in the structure. Few theories of constitutional interpretation allow departures when the text speaks clearly, and most also consider the historical understanding of that text to be relevant in some way. There will thus be some

187 [Hart, Concept of Law]

188 See, e.g., Ronald Dworkin, Hard Cases, 88 Harv. L. Rev. 1057, ___ (1975) (arguing that where the directly applicable legal materials fail to determine an answer, judges should recur to the more basic principles and policies of the law).

189 See, e.g., HANS Kelsen, The Pure Theory of Law 351-52 (Max Knight, trans., Univ. of Cal. Press 1978) (1960) (arguing that “the law to be applied constitutes only a frame within which several applications are possible” and “there is no [legal] criterion by which one possibility within the frame is preferable to another”).

190 They may be less constrained in other respects. Individual legislators, of course, are highly constrained by the need to convince a majority of their colleagues and the procedural hurdles to lawmaking; in this respect, they can only envy the splendid isolation and broad remedial flexibility accorded to the single federal trial judge.

191 See U.S. Const. art. I, § 3 (“The Senate . . . shall be composed of two Senators from each State. . . .”); art. V (“[N]o State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”). I set to one side the more difficult question whether the requisite change would require something other than an ordinary amendment. See Bruce Ackerman, We the People: Foundations ___ (1991) (discussing this issue).

192 See, e.g., Richard H. Fallon, Jr., A Constructivist Coherence Theory of Constitutional Interpretation, 100 Harv. L. Rev. 1189, 1195 (1987) [hereinafter Fallon, Constructivist Coherence] (“Arguments from text play a universally accepted role in constitutional debate. . . . Where the text speaks clearly and unambiguously . . . its plain meaning is dispositive.”).

193 See, e.g., Randy E. Barnett, An Originalism for Nonoriginalists, 45 Loy. L. Rev. 611, 614-20 (1999) (arguing that some version of originalism has become widely-accepted throughout the community of constitutional lawyers); Jack N. Rakove, Fidelity Through History (or to it), 65 Fordham L. Rev. 1587, 1592 n.14 (1997) (“[I]n truth, the turn to originalism seems so general that citation is almost beside the point.”).
instances in which clear text and/or history dictate particular doctrinal outcomes regardless of institutional factors.

The second and probably more important constraint is that judicial decision-making must be coherent in a way that decisions by the political branches need not always be. Larry Lessig has observed that “[w]hatever else defines a successful judicial system, one dimension of its success is its ability to deliver consistent rulings in cases that appear to be the same.” Consistency is central to the legitimacy of the judicial role; as Professor Lessig explains,

To the extent that results of a particular rule appear consistent, it is easier for the legal culture to view this rule as properly judicial, and its results as properly judicial . . . . To the extent, however, that the results appear inconsistent, this pedigree gets questioned; it becomes easier for observers to view these results as determined, or influenced, by factors external to the rule—in particular, factors considered political.

This phenomenon gives rise to what Lessig calls “the Frankfurter constraint”: “[A] rule is an inferior rule if, in its application, it appears to be political, in the sense of appearing to allow extra-legal factors to control its application.” Because we can expect the Court to try and minimize the political costs that arise when its results are perceived to be political, the Court will – and should – move away from rules that are not susceptible of determinate application.

The “Frankfurter constraint” derives its name from Felix Frankfurter’s analysis of Commerce Clause decisions in the first part of the Nineteenth Century, which emphasized the Court’s desire to avoid the appearance of “judicial policy-making.” This constraint plays a crucial role with respect to contemporary doctrine. Both the majority opinion in Garcia and Justice Souter’s dissents in Lopez and Morrison, for example, claimed that the Court should defer to the political branches on federalism questions because such questions cannot be resolved in a sufficiently determinate, law-like way. Justice Souter has warned of “the portent of incoherence” hanging over any

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194 Lessig, Translating Federalism, supra note 82, at 170-71; cf. Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1, 15 (1959) (“[T]he main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved.”).

195 Lessig, Translating Federalism, supra note 82, at 174.

196 Id.

197 Id. at 174-75.

198 See Felix Frankfurter, The Commerce Clause Under Marshall, Taney and Waite 54 (1937); see also Lessig, Translating Federalism, supra note 82, at 174 n. 142 (invoking Frankfurter’s analysis).

199 See Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985) (complaining that prior doctrine, which tried to protect ‘traditional state functions’ “inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes”); [Lopez dissent]; United States v. Morrison, 529 U.S. 598, ___ (Souter, J., dissenting); see also id. at 656 (Breyer, J., dissenting) (emphasizing “the difficulty of finding a workable judicial Commerce Clause touchstone—a set of comprehensible interpretive rules that courts might use to impose some meaningful limit, but not too great a limit, upon the scope of the legislative authority that the Commerce Clause delegates to Congress”).
attempt to develop doctrinal limits on the commerce power\textsuperscript{200} and explicitly invoked the Court’s painful institutional memories of the \textit{Lochner} period.\textsuperscript{201}

These concerns are serious. They do not, in my view, justify total judicial withdrawal from the field, but they do suggest that the Frankfurter constraint should have a powerful influence on the shape of doctrine. Part VI of this essay is thus centrally concerned with uncovering the characteristics of federalism doctrine in the pre-1937 period that caused that doctrine to fail the Frankfurter test. That experience in turn suggests directions that contemporary doctrine might pursue in order to avoid similar problems in the future.

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Choosing federalism doctrine requires consideration of a wide variety of disparate questions. We do not begin in a vacuum, however. Various factions on the Supreme Court have developed their own models of federalism doctrine – models that combine a particular view of the “ends” of such doctrine with a theory of the best means to get there. It will help to start with these competing models before I try to develop my own.

\textbf{II. Competing Visions}

It is customary to start by saying that the Supreme Court has failed to develop a coherent theory of federalism.\textsuperscript{202} Although the point is generally put forward as a telling

\textsuperscript{200} \textit{Morrison}, 529 U.S. at 647 (Souter, J., dissenting).

\textsuperscript{201} \textit{See Lopez}, 514 U.S. at 611 (Souter, J., dissenting) (“And here once again history raises its objections that the Court's previous essays in overriding congressional policy choices under the Commerce Clause were ultimately seen to suffer two fatal weaknesses: when dealing with Acts of Congress . . . nothing in the Clause compelled the judicial activism, and nothing about the judiciary as an institution made it a superior source of policy on the subject Congress dealt with. There is no reason to expect the lesson would be different another time.”). Academics have been equally quick to cry “\textit{Lochner}!” \textit{See, e.g.}, Sylvia A. Law, \textit{In the Name of Federalism: The Supreme Court’s Assault on Democracy and Civil Rights}, 70 U. Cin. L. Rev. 367, 369-70 (2002) (“The assumption that \textit{Lochner} was wrong—that courts should not quash state or federal legislative judgments about social and economic regulation—was bedrock in our legal and political culture from 1937 to 1995. Since 1995, the Supreme Court has rejected that assumption. In effect, a bare majority of the Supreme Court seeks to reverse six decades of settled federalism jurisprudence.”).

\textsuperscript{202} The tone of much academic criticism faults the Court for not being more, well, \textit{academic}. \textit{See, e.g.}, Jenna Bednar & William N. Eskridge, Jr., \textit{Steadying the Court's “Unsteady Path”: A Theory of Judicial Enforcement of Federalism}, 68 S. Cal. L. Rev. 1447, 1447 (1995) (“[T]he Supreme Court's . . . federalism jurisprudence might, uncharitably, be described as "a mess." . . . The decisions are inconsistent with constitutional text and with one another, and they lack a persuasive normative theory to justify the first inconsistency or to resolve the second.”); Todd E. Pettys, \textit{Competing for the People’s Affection: Federalism’s Forgotten Marketplace}, 56 Vand. L. Rev. 329, 330 (2003) (complaining that the Court has “failed to articulate an overarching vision of federal-state relations”); Ronald Krotoszynski, Jr., \textit{Listening to the “Sounds of Sovereignty” but Missing the Beat: Does the New Federalism Really Matter?}, 52 Ind. L. Rev. 11, 14 (1998) (accusing the court of having “failed to articulate a coherent theory of federalism that explains the discrete results reached in particular cases and that would facilitate reasonably accurate predictions regarding the probable results in future cases”). I have argued elsewhere that this sort of criticism is neither fair nor realistic. \textit{See Young}, \textit{State Sovereign Immunity}, supra note 184, at 35-38. Unfortunately, it seems to be an occupational hazard of law-professoring; one is hard pressed to find an area of constitutional law where one does not observe legal academics pronouncing the prevailing doctrine “incoherent.” \textit{See, e.g.}, E. Donald Elliot, \textit{Why Our Separation of Powers Jurisprudence is So Abysmal}, 57
criticism, articulating general theories is only tangentially related to the Court’s job description. The Court sits to decide cases. In order to decide like cases alike – more precisely, in order to tell which cases are “like” and which aren’t – it must develop doctrine. But doctrine and theory are not the same thing. Doctrine is the mechanism that translates legal theories into results, but doctrine can often capture theory only imperfectly. That problem is compounded by the imperative to ground doctrine, where possible, in constitutional texts that themselves often represent political compromises among competing structural visions. The fact that doctrine yields results that are often inconsistent with the dictates of theory should surprise no one.

The Court decides cases, moreover, under conditions that are hardly congenial to “coherent” theory. The Court has quite limited control over its agenda, and cannot choose to develop its doctrine in an orderly progression; it must wait for cases to come to it. And it must do so while deciding many other cases on other issues in other fields, each raising their own imperatives to construct a coherent theory. Years may pass before it can return to a particular issue to elaborate on what it said before. Worst of all, the writing justice – charged with articulating a coherent theory – must achieve consensus among at least five of his colleagues, and preferably more, all the while knowing that he or she may not have the opinion when the next twist on the same issue comes before the Court. How many legal academics regularly try to write with at least four co-authors?

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GEO. WASH. L. REV. 506 (1989) (title says it all); Robert Post, Recuperating First Amendment Doctrine, 47 STAN. L. REV., 1249, 1249-50 (1995) (“Although the pattern of the Court's recent First Amendment decisions may well be (roughly) defensible, contemporary First Amendment doctrine is nevertheless striking chiefly for its superficiality, its internal incoherence, its distressing failure to facilitate constructive judicial engagement with significant contemporary social issues connected with freedom of speech.”); Pamela S. Karlan, Our Separatism? Voting Rights as an American Nationalities Policy, 1995 U. CHI. LEGAL F. 83, 91(observing that the Court’s race-based redistricting cases “the cases betoken a jurisprudence that is both incoherent and doctrinally unstable”). The malady, moreover, is hardly confined to constitutional law. See, e.g., Philip P. Frickey, Adjudication and its Discontents: Coherence and Conciliation in Federal Indian Law, 110 HARV. L. REV. 1754, 1754 (1997) (“More than any other field of public law, federal Indian law is characterized by doctrinal incoherence and doleful incidents.”). Surely the fact that legal academics always say this ought to inspire some skepticism about the claim in each instance.

203 Two famously-confusing cases about the scope of federal question jurisdiction under 28 U.S.C. § 1331 illustrate the problem posed by case order. Franchise Tax Board of California v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983), came to the Court three years before Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804 (1986), even though from a purely intellectual standpoint, it makes more sense to consider the Merrell Dow question first. (The Hart & Wechsler casebook inverts the order for pedagogical purposes. See RICHARD H. FALLON, DANIEL J. MELTZER, & DAVID L. SHAPIRO, HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 915-46 (4th ed. 1996)). The Court might have had a better chance of developing a more coherent theory of § 1331 if the cases had arisen in a more convenient order.

204 On the issue of Congress’s power to abrogate state sovereign immunity, for instance, thirteen years passed between the Court’s decision on abrogation under Section Five of the Fourteenth Amendment, see Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), and its parallel decision on abrogation under the Commerce Power, see Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989).
As Adrian Vermeule and I have argued elsewhere, the Constitution resists grand unified theories. For good or ill, much judicial doctrine evolves in an incremental, common law fashion. This is particularly true in an area like constitutional federalism, where the constitutional text provides relatively light constraint and judicial doctrine must respond to the actions of other governmental institutions that are themselves evolving in response to particular circumstances. Nonetheless, more general theories surely influence the decision of individual cases, and theory can help lawyers and judges decide where to focus when they argue and decide cases about federalism. As Richard Fallon has observed, “questions of constitutional theory are not optional; they cannot be put off as merely academic pre-occupations, which have no necessary role in the work of judges and lawyers.” Academics can provide a valuable office here in divining the theory implicit in doctrine, identifying and criticizing inconsistencies, or proposing alternative visions. We should remember, however, that much of this value-added derives from the fact that academics have very different jobs from judges.

The Supreme Court does have a theory of federalism – in fact, it has several. Much of this Part is concerned with identifying the different theoretical perspectives already extant in current doctrine, while proposing some important alterations in emphasis. I want to organize my discussion here around three different variables. The first has to do with the ends of federalism doctrine – here, the aspect of federalism to be promoted. The second two factors are about means – that is, the role of judicial review in promoting federalism. Section A of this Part develops these variables. With respect to the first, I want to focus on the tension between state “sovereignty,” which I define as the inviolability of state institutions, and state “autonomy,” defined as the ability of the states to govern themselves. The second and third factors concern, respectively, the focus of judicial review on issues of substance or process and the rigidity of the doctrinal rules proposed vis a vis efforts by other branches of government to override them.

Section B considers the doctrinal approach of the five justices that have formed the pro-states majority in the Rehnquist Court’s most prominent federalism cases. While the Court has actually pursued a number of different approaches on different occasions, I argue that the general drift is toward a strong role for courts, involving “hard” constitutional rules focused on substance, and directed toward promoting state “sovereignty” rather than autonomy. This approach manifests not only in the high-profile cases that have limited national power, such as Seminole Tribe or Lopez, but also in the less widely-marked preemption cases that have declined to protect state regulatory autonomy.


206 See, e.g., Young, Jurisprudence of Structure, supra note 37 at 1638 -51 (discussing the role of political theory in Lopez, Term Limits, New York, and Alden).

I discuss a quite different vision in Section C. That vision stresses state “autonomy” over “sovereignty,” and it stresses soft, process-based doctrines over hard, substantive constitutional limits on federal power. Such an approach accords with the position taken—in some cases, but not all—by those justices who have generally dissented from the Rehnquist Court’s federalism rulings. Although the pattern is sketchy, the evidence suggests that the dissenters do acknowledge the importance of federalism and the Court’s role in protecting it. Their vision of federalism is different from the majority, but it is not the simple dismissal of federalism’s importance that one often sees in the academy.\footnote{For an example of the latter, see, e.g., [Rubin & Feeley].}

The dissenters’ notion of federalism is important, and current debates would be more edifying if they paid it greater attention. But I doubt that it provides a complete answer to the problem of balance in our system. I therefore sketch a somewhat different model in Section D. That model—which I have labeled an “autonomy” model in opposition to the Rehnquist Court majority’s “sovereignty” model—shares many elements of the dissenting vision, but couples that vision with some concern for “hard” constitutional restraints on federal power and a somewhat more aggressive view of “process”-based protections. The remainder of this essay develops and defends that model in substantially greater depth.

A. The Ends and Structure of Judicial Review

We might describe different models of federalism doctrine in any number of different ways, but for present purposes I think it best to focus on three dimensions in particular: the aspect of federalism to be promoted, the focus of judicial review on issues of substance or process, and the rigidity of judicial review in terms of the ease with which other actors may override its results. Choices along each of these dimensions combine in different ways to produce quite different models of federalism doctrine. We rarely see the pure form of these models, of course, in the real world. Individual justices and particular factions in the courts are likely to pursue a mix of these different approaches. Nonetheless, the models can help us identify and assess what real judges are doing and what effect proposed doctrines are likely to have.

1. Sovereignty vs. Autonomy

The first dimension involves a tension between state “sovereignty” and state “autonomy.” These terms are often used interchangeably, and, in truth, there is considerable overlap in their definitions. They also, however, have somewhat different connotations and, by focusing on the divergence, I want to adopt them as terms of art signifying a broader divide in federalism values. If my usage here seems idiosyncratic, it nonetheless serves the purpose of putting names to tendencies that are usually identified much less precisely.

The Oxford English Dictionary defines “sovereignty” as “[s]upremacy in respect of power, domination or rank; supreme dominion, authority, or rule.”\footnote{OXFORD ENGLISH DICTIONARY ONLINE (2003) (available at http://dictionary.oed.com/cgi/display/00231800?keytype=ref&ijkey=eAYgYT3cDbz9I) (visited July 12, 2003).} This notion of
supreme power harkens back to the classical conception of unitary sovereignty, which held that “there must reside somewhere in every political unit a single, undivided, final power, higher in legal authority than any other power, subject to no law, a law unto itself.”

Although our Framers “split the atom of sovereignty,”

shattering the notion that political authority must remain undivided, this notion of unaccountability – that the sovereign is “subject to no law” – remains central. Hence, the most common usage of the term in legal circles is sovereign immunity, that is, the legal unaccountability of governmental entities for their violations of the law.

“Autonomy,” on the other hand, bears a different emphasis on the positive usage of governmental authority, rather than the unaccountability of the government itself. The OED defines “autonomy” as “[t]he right of self-government, of making [a state’s] own laws and administering its own affairs.”

This suggests a government doing things – making policy and carrying it out, for the benefit of its citizens – not simply shielding itself from threats. An autonomy-based federalism doctrine would be concerned, for example, with the States’ ability to make its own choices about protecting the environment, ensuring health coverage for citizens, or whether to have capital punishment.

As I have said, the two terms overlap. Sovereignty’s notion of supreme power readily suggests the efficacy of rule, that is, the ability to do things with power, not just to be unaccountable for what has been done. Thomas Hobbes, for instance, included in the rights of “sovereignty” not only the notion that “[w]hat soever the Soveraigne doth, is unpunishable by the Subject” but also that “[t]he Soveraigne is judge of what is necessary for the Peace and Defence of his Subjects.” And autonomy can mean “[t]he condition of being controlled only by its own laws, and not subject to any higher one.”

One would hardly do violence to the English language if, for example, one identified sovereign immunity as an aspect of state autonomy.

For that reason, one cannot simply assume that references to “sovereignty” or “autonomy” in the Court’s decisions (much less in the academic literature) indicate the narrow meanings I have assigned them here. Nevertheless, I find a significant analytic payoff to distinguishing between a state’s ability to take positive governmental action – enacting laws and regulations, providing benefits to its citizens – and the same state’s

210 BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 198 (2d ed. 1992). See also WILLIAM BLACKSTONE, COMMENTARIES, (“[T]here is and must be in all [governments] a supreme, irresistible, absolute, uncontrolled authority, in which the jura summi imperii, or the rights of sovereignty, reside.”). [find quote – try vol. 1, 49, 160-62 (Cooper ed. 1803)]


215 OXFORD ENGLISH DICTIONARY ONLINE, supra note 213. [cite Resnik?]
unaccountability for illegal or unpopular actions. As I argue in Part III, notions of sovereignty and autonomy – as I define them narrowly here – stand in quite different relation to federalism’s underlying values; the remainder of the present Part, moreover, suggests that the choice to emphasize one or the other can have strikingly different doctrinal implications.

Having said all this, however, one must acknowledge that sovereignty and autonomy also overlap in a second, non- definitional sense. Many actions that affect state “sovereignty” will also impinge on state “autonomy.” Even the classic example of sovereignty jurisprudence – the Court’s constitutionalization of state sovereign immunity in cases like Seminole Tribe 216 and Alden 217 – purports to benefit state autonomy by preserving the States’ control over their internal budgetary policies. 218 But I am not arguing that sovereignty and autonomy are unrelated. I simply hope to demonstrate in the remainder of this Part that differences in emphasis have sufficiently important implications to make the distinction worth drawing.

2. Substance vs. Process

The remaining dimensions concentrate on the focus and shape of judicial review in federalism cases. One is best captured by the notoriously vague distinction between “process” and “substance.” The decision in Morrison, for example, invalidated the civil suit provision of the Violence Against Women Act based on the substantive character of the federal regulation – in particular, the non-commercial nature of the regulated activity – and largely without regard to the process of the law’s formation or the effect of that law on the broader political dynamic of federalism. The majority was unimpressed, for example, by the fact that Congress had conducted extensive hearings of its own on the effects of violence against women on interstate commerce. 219 A different strand of federalism jurisprudence, by contrast, insists that “the fundamental limitation that the constitutional scheme imposes on the Commerce Clause” – and, by extension, all federal power – “is one of process rather than result.”220 Rules of “process federalism” thus derive their force and structure from the need to prevent malfunctions in the political and institutional mechanisms that ordinarily act to preserve the federal balance in the absence of judicial intervention.

216 Seminole Tribe of Fla. v. Fla., 517 U.S. 44 (1996) (holding that Congress may not abrogate the states’ sovereign immunity from suits by private individuals when it acts pursuant to its Article I powers).


218 See id. at 750-51.

219 See United States v. Morrison, 529 U.S. 598 (2000). The Court’s decision in Lopez, by contrast, appeared to have both substantive and process-based components. The Court noted that not only was the Gun Free School Zones Act aimed at non-commercial activity (substantive), but also that Congress had neither made findings of a substantial effect on interstate commerce nor included a jurisdictional element requiring such findings to be made in individual trials. See 514 U.S. 549, ___ (1995). Morrison, however, rather firmly closed off these process-oriented lines of potential development in favor of a strong substantive emphasis on the character of the regulated activity. See 529 U.S. at ___.

Many have confused process-oriented doctrine with a purely nationalist model of judicial abdication. The confusion is understandable, since many scholars have used Herbert Wechsler’s notion of “political safeguards” for federalism as a basis for just such abdication. Larry Kramer’s influential attempt to revive Wechsler’s theory, for example, moves very quickly from a rejection of substantive limits to a rejection of judicial review altogether. “Inflexible divisions between what is national and what is local,” he observes, “ceased long ago to make sense, a product of profound cultural, economic, and technological changes.”

Professor Kramer also finds, however, that political mechanisms such as organized political parties and linkages among state and federal administrative bureaucracies have shorn up the institutional safeguards for state autonomy that Wechsler identified a half-century ago. From this, Kramer concludes that federalism questions should be remitted entirely to politics. “For the Founders,” he says, “such arguments were to be addressed to the people, through politics. And the wisdom of their judgment in this respect has been ratified in practice throughout more than two centuries of American history - leaving as the real puzzle here just why these judges feel compelled to countermand that decision and substitute their own.”

Proponents of substantive limits on federal power have likewise equated any shift in emphasis away from these sorts of limits with the abdication of judicial review in federalism cases. Saikrishna Prakash and John Yoo, for example, have attacked Brad Clark’s argument that separation of powers doctrines can protect state autonomy, calling it an “effort to prop up the deeply flawed political-safeguards theory” and “rather akin to reinforcing the walls of a sand castle as the tide returns.” These scholars seem generally optimistic that the relatively modest substantive limits on Congress’s authority imposed in decisions like *Lopez* and *Morrison* can be extended far enough to meaningfully protect the states from federal encroachments. Given that expectation, they have little patience for the seemingly more modest guarantees offered by process doctrine.

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221 See infra Section II.A.5.

222 Kramer, *Politics*, supra note 136, at 234-52. Professor Kramer concedes that “theoretically” the Court might fashion more flexible substantive limits, but appears to discount this possibility in practice. See text quoted in note 750, infra.

223 See id. at ___.

224 Id. at 293. Like most proponents of judicial abdication, however, Kramer does not urge the courts to hold these cases non-justiciable. Rather, he simply proposes a very deferential standard of review. See id. at ___ [quote].


227 See also Viet Dinh, *Reassessing the Law of Preemption*, 88 GEO. L. J. 2085, 2117 (2000) (“Redefining the proper balance of legislative powers between Congress and the states is better accomplished directly, through an insistence on the limits of Congress’s enumerated and limited powers under Article I, rather than circuitously and ineffectually through some vague and ill-conceived presumption against preemption under the Supremacy Clause.”). As I discuss further in Part VII, the “presumption against preemption” is probably the most important of the process-oriented doctrines. See infra Section ___.

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Other scholars, however, have long argued that “process federalism” has significant potential for limiting federal power. Vicki Jackson and Stephen Gardbaum have both proposed the courts should review the process by which Congress makes laws to make sure that Congress has itself considered the constitutional limits of its authority before acting. Brad Clark’s work on the “procedural” safeguards of federalism suggests that courts may serve state autonomy best by enforcing separation of powers requirements built into the federal lawmaking process. And the Court itself has been quite active in developing process-oriented checks on federal power. The anti-commandeering doctrines are the most prominent example: They require Congress to internalize the financial and political costs of its actions by prohibiting it from requiring state institutions to enforce federal law. The Court’s less flashy clear statement rules may be an even more important set of examples. Those rules enhance the political and procedural checks on federal lawmaking in a number of sensitive areas, including regulation of traditional state functions, abrogation of state sovereign immunity, imposition of conditions on federal funding, and preemption of state law.

As with the sovereignty-autonomy divide, however, one would not want to draw the distinction between process and substance too sharply. In particular, I will argue later on that the “political safeguards of federalism” lying at the heart of process federalism cannot be expected to work if the state governments have too few substantive responsibilities to be viable governments. Nonetheless, it would be a mistake to underestimate the independent constraining force of process doctrine. To see why, we might compare process federalism with its cousin in the realm of individual rights, John Hart Ely’s notion of representation reinforcement. Dean Ely’s theory has been criticized on a number of grounds, but no one claims that it amounts to judicial surrender; it was constructed, after all, to explain and justify the work of the Warren

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228 See, e.g., Rapaczynski, supra note 184 (making such an argument shortly after the Court’s decision in Garcia).
230 See Clark, Separation of Powers, supra note 117. [find a quote]
231 [cites]: Young, Two Cheers, supra note ___, at 1360-61.
236 See infra TAN ___.
237 See generally JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).
So, too, a “Democracy and Distrust” for federalism doctrine would offer a different focus for judicial review but not necessarily a decrease in rigor or efficacy.

3. **Hard vs. Soft**

A third dimension focuses on the relationship between the rules formulated by courts and the actions of the federal political branches. Judicial doctrines may be “hard” in the sense that they impose categorical restrictions on other actors that may be overridden only by constitutional amendments (or judicial overruling), or they may be “soft” to the extent that they can be overcome by less extreme measures. Congress may have to re-enact a statute to clarify its intent, for example, or it may have to take a particular action itself rather than delegating it to others. The important point is that “soft” limits return the ball to Congress’s court rather than trying to fix the boundary between state and federal power at a particular point.

Two criminal law examples will help illustrate the distinction. *United States v. Lopez* held that Congress simply lacked power under the Commerce Clause to regulate guns in local schools. Despite some initial speculation to the contrary, it now seems clear that Congress can do nothing to supply this deficit of power. *United States v. Jones,* on the other hand, illustrates a less categorical approach to a similar problem. The question in *Jones* was whether the federal arson statute could reach arson of a private residence. Suggesting that the question was a difficult one, the Court construed the statute not to press the outer limits of the Commerce Power—that is, not to apply to private residences—absent a clear statement of Congress’s intent to do so. This approach left open the possibility that Congress might clarify its broad intent in a subsequent enactment, but avoided a more direct confrontation in the case before the Court.

*Jones* was an instance of the familiar canon that courts will construe statutes to avoid constitutional doubts. I have argued elsewhere, however, that the avoidance

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239 [cite]


242 Congress re-enacted the Gun Free School Zones Act shortly after *Lopez* with explicit findings that gun possession in schools has a substantial effect on interstate commerce. [cite] These findings responded to language in the *Lopez* opinion suggesting that the lack of such findings might be important to the statute’s constitutionality. See 514 U.S. at ___. But the Court’s subsequent decision in *Morrison* makes clear that the presence of such findings cannot save a statute that does not regulate commercial activity. See 529 U.S. 598, ___ (2000). Congress could possibly achieve the same result through conditional spending, see Lynn A. Baker, *Conditional Federal Spending After Lopez*, [cite], but that would involved a different power altogether, not “fixing” the Commerce Clause problem.


244 See id. at 859 (concluding that “§ 844(i) is not soundly read to make virtually every arson in the country a federal offense”).

245 See Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (“When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction
canon is best understood as a means of enforcing – not avoiding the enforcement of – the underlying constitutional norms that create the doubt in the first place. One might read Jones, for example, as a response to the difficulty of defining limits on Congress’s Commerce Power in a principled and workable way. Given this difficulty, a court might despair of enforcing hard limits that constrain Congress within any but the broadest bounds; at the same time, it might seek to vindicate a more limiting vision of enumerated powers by effectively remanding statutes that press the outer boundary to Congress for a second look.

The Jones principle – that Congress must speak clearly if it wishes to press the limits of its Commerce Clause authority – fits comfortably into a class of constitutional rules that I have dubbed “resistance norms.” These are “norms that may be more or less yielding to governmental action, depending on the strength of the government’s interest, the degree of institutional support for the challenged action, or the clarity of purpose that the legislature has expressed.” Federalism doctrine is rife with other “clear statement” rules covering any number of intrusions on state sovereignty or autonomy, including subjecting states to liability, imposing conditions on grants of federal funds, regulating traditional state government functions, and preempting state law. But other quite different federalism rules – such as the Pike balancing test requiring a substantial state interest to support regulation burdening interstate commerce – are also “soft” in that the structural principle will give way under certain circumstances.

of the statute is fairly possible by which the question may be avoided.”); Jones, 529 U.S. at 857-58 (invoking the avoidance canon).


247 See Young, Constitutional Avoidance, supra note 246, at 1603-09 (arguing that use of canons of construction in this way is most appropriate in areas plagued by these sorts of line-drawing problems).

248 Id. at 1552.

249 Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989) (Congress must speak clearly if it wishes to include state governments in the class of persons liable in suits under federal statutes); Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765 (2000) (Congress must speak clearly in order to authorize qui tam suits by private plaintiffs against state governments); Atascadero St. Hosp. v. Scanlon, 473 U.S. 234, ___ (1985) (Congress must speak clearly to abrogate state sovereign immunity when it legislates under Section Five of the Fourteenth Amendment).


“Soft” limits have some obvious advantages from the courts’ standpoint. They avoid direct confrontations with Congress, and they encourage the political branches to take part in a dialogue about the proper balance of federalism.\textsuperscript{254} Less obviously, they may ease line-drawing difficulties and permit courts to impose some restraint in areas where constitutional norms would otherwise be “under-enforced.”\textsuperscript{255} On the other hand, such doctrines carry a pronounced risk: National political actors may choose simply to override the constraints that the courts erect, leaving the federal balance potentially at risk. It is, for example, difficult to predict reliably the ways in which Congress will respond to statutory interpretation decisions such as those involving “clear statement” rules.\textsuperscript{256} As a result, it is hard to know exactly how much faith to put in these “soft” constraints.

\textbf{4. Combining Dimensions}

Combining the dimensions I have discussed in various ways produces quite different models of federalism doctrine. I discuss the leading models later in this Part; the present subsection is meant to clear up a few points related to the ways in which the various dimensions fit together.

The first point is that the dimensions are not unrelated to one another. It may be easier, for instance, to have strong, categorical rules protecting state sovereignty than to build similar fences around state autonomy. The reason would be that sovereignty rules generally protect only the institutions of state governments themselves and need not interfere directly with the primary federal regulatory project of policing private conduct. The \textit{National League of Cities} doctrine,\textsuperscript{257} for example, did not interfere with the Fair Labor Standards Act’s ability to govern employment conditions in the overwhelming majority of the economy.\textsuperscript{258} Likewise, the Court’s decisions holding state governments immune from suit under various federal statutes like the Americans with Disabilities Act or the Patent Act affect only a very small proportion of litigation under those statutes.\textsuperscript{259} It may thus be easier for the system to tolerate categorical sovereignty protections than, say, equally categorical efforts to protect state regulatory autonomy by holding significant sections of American life off limits to federal legislation.


\textsuperscript{256} See, e.g., Vermeule, \textit{Interpretive Choice}, supra note 175, at ___ (detailing the many empirical uncertainties plaguing this effort).

\textsuperscript{257} [cite]

\textsuperscript{258} Critics of that doctrine have pointed out that state governments actually have a significant economic impact in their own right. [cites] But it is all a matter of comparative degree.

\textsuperscript{259} See, e.g., Mitchell N. Berman, R. Anthony Reese, & Ernest A. Young, \textit{State Accountability for Violations of Intellectual Property Rights: How to “Fix” Florida Prepaid (And How Not To)}, 79 Tex. L. Rev. 1037, 1077-79 (2001) (reporting only sporadic instances of copyright or patent litigation involving state governments); [cite on ADA]
There is also an obvious affinity between process-based federalism doctrine and “soft” limits on federal power, particularly the “clear statement” canons of statutory construction. Rules requiring that Congress speak clearly when it intrudes on state prerogatives help to enhance the political and institutional checks on such intrusions in at least two ways: First, they give notice to the states’ federal representatives that an intrusion is afoot, and may thus serve to help rally opposition. Second, they increase the costs of drafting and securing support for federalism-threatening measures, simply by adding another hurdle through which such measures must jump. “Process federalism” thus often signifies not only an orientation for judicial review – to correct malfunctions of the political and institutional checks that are supposed to make federalism self-enforcing – but also a technique of constructing doctrines in such a way as to enhance those political and institutional checks. Any model emphasizing process doctrine is thus likely to feature “soft” rules of this kind.

Nonetheless, the variables are independent enough to warrant separate conceptual treatment. Simply because “soft” rules have certain process-oriented advantages, for example, does not mean that we never see “soft” rules targeting substance or “hard” rules oriented toward process. If we organize these two variables in a matrix, we can identify examples of doctrinal approaches fitting each of the squares:

<table>
<thead>
<tr>
<th>Judicial Review</th>
<th>Substance</th>
<th>Process</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Hard Limits</strong></td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Subject-matter limit on Commerce Clause (<em>Lopez</em>).</td>
<td>Absolute anti-commandeering rule based on concerns about political accountability (<em>Printz</em>).</td>
<td></td>
</tr>
<tr>
<td>Absolute rule against abrogation of state sovereign immunity (<em>Seminole Tribe</em>).</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Soft Limits</th>
<th>3</th>
<th>4</th>
</tr>
</thead>
<tbody>
<tr>
<td>Clear statement rule against broad use of Commerce Power (<em>Jones</em>).</td>
<td>Clear statement rule for conditions on federal funds, based on need for states to know what they’ve agreed to (<em>Pennhurst</em>).</td>
<td></td>
</tr>
<tr>
<td>Clear statement rule against abrogation of state sovereign immunity (<em>Union Gas</em>).</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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260 See Young, *Two Cheers*, supra note ___, at 1359.

261 See James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?* 93 MICH. L. REV. 1, 30 (1994) (noting that anytime drafters must add “details to text increases the possibility for delay and obstruction even though the details themselves would command overwhelming support”); Young, *Constitutional Avoidance*, supra note 246, at 1596-98.
Box 2 indicates that although process federalism is often associated with weak or even non-existent judicial checks on Congress, for instance, the anti-commandeering rule represents a categorical restriction on congressional power most persuasively grounded in process justifications, e.g., the need to force Congress to internalize the monetary and political costs of its programs.262 Likewise, Box 3 recognizes that the Court has often chosen to enforce substance-based limits on congressional power through non-absolute techniques, such as clear statement requirements, notwithstanding conventional wisdom identifying substantive restrictions with more unyielding rules.263 I do not mean to argue at this point in the discussion that any particular combination is preferable to any other, only that the two variables are logically – and empirically – independent.

The same is true of the relationship described above between the sovereignty'autonomy variable and substance/process variables. Some pairings may be more natural than others, but all appear at least occasionally in current doctrine:

<table>
<thead>
<tr>
<th>Sovereignty</th>
<th>Substance</th>
<th>Process</th>
</tr>
</thead>
<tbody>
<tr>
<td>State sovereign immunity broadly prohibits private lawsuits threatening state dignitary or budgetary interests (Ports Authority).</td>
<td>1</td>
<td>Congress must speak clearly in order to abrogate state sovereign immunity under § 5 of the 14th Amendment (Atascadero).</td>
</tr>
<tr>
<td>Congress may not impose regulation on state governments that it is unwilling to impose on private actors as well (Cf. Condon).</td>
<td>2</td>
<td>Congress may not delegate authority to sue states on behalf</td>
</tr>
</tbody>
</table>

262 See Printz v. United States, 527 U.S. 898, 930 (1997); New York v. United States, 505 U.S. 144, 168-69 (1992); see also Young, Two Cheers, supra note ___, at ___ (discussing the process justifications for the anti-commandeering rule).

263 See generally Eskridge & Frickey, supra note 252, at ___; Young, Constitutional Avoidance, supra note 246, at 1596-98 (discussing use of clear statement rules to protect Article III values associated with judicial review).

264 The Condon Court reserved the question whether Congress may impose regulatory burdens on states alone for decision in a future case. See Reno v. Condon, 528 U.S. 141, 151 (2000).

265 The Court held in Stevens that Congress had not clearly subjected the states to liability under the False Claims Act and thus had no occasion to decide whether Congress could delegate the United States’ interest in such suits to private qui tam litigants. See Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765, 787 (2000).
<table>
<thead>
<tr>
<th>Autonomy</th>
<th>3</th>
<th>4</th>
</tr>
</thead>
<tbody>
<tr>
<td>Congress may not regulate non-commercial activities, leaving those activities open to state regulation without fear of preemption (<em>Lopez; Morrison</em>).</td>
<td>Congress must speak clearly in order to preempt state law (<em>Rice</em>).</td>
<td></td>
</tr>
</tbody>
</table>
To complete the set, we can do a similar matrix comparing the sovereignty/autonomy and hard/soft variables:

<table>
<thead>
<tr>
<th>Sovereignty</th>
<th>Hard Limits</th>
<th>Soft Limits</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1. No abrogation of state sovereignty under Art. I powers (Seminole Tribe).</td>
<td>2. Congress may abrogate under Section 5 of the 14th Amendment, but must state its intent very clearly (Atascadero).</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Autonomy</th>
<th>3. Congress may not regulate non-commercial activities, leaving those activities open to state regulation without fear of preemption (Lopez; Morrison).</th>
<th>4. Congress must speak clearly in order to press the limits of its commerce power (Jones) and may not delegate that decision to others (Solid Waste).</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Presumption against preemption in statutory construction (Rice).</td>
<td></td>
</tr>
</tbody>
</table>

Again, all the possibilities are present in current law. This matrix also helps illustrate a somewhat different point, which is that “soft” limits are not necessarily less constraining, on balance, than “hard” ones. For instance, a broadly applicable soft rule like the presumption against preemption, which at least in theory applies in every preemption case, probably protects state autonomy to a greater degree than the very narrow “hard” prohibition articulated in Lopez and Morrison.²⁶⁶

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²⁶⁶ See Young, Two Cheers, supra note ___, at 1384-86 (demonstrating that much more state autonomy has been at stake in recent preemption cases than in Commerce Clause litigation).
The variables I have discussed – sovereignty/autonomy, substance/process, strong/weak rules – do not exhaust the choices to be made in formulating federalism doctrine. There is, for example, the familiar dichotomy between rules and standards. We might plot that dichotomy against the substance/process variable, for instance, to yield the following examples:

<table>
<thead>
<tr>
<th>Substance</th>
<th>Rule</th>
<th>Standards</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Congress may regulate only commercial activity under the Commerce Clause (Morrison).</td>
<td>2</td>
</tr>
<tr>
<td>2</td>
<td>Congress must observe principle of subsidiarity – that is, it may regulate only those issues that cannot be better addressed at the state or local level (EU law).</td>
<td></td>
</tr>
<tr>
<td>Process</td>
<td>3</td>
<td>Super-strong clear statement rule for abrogating state sovereign immunity under Section 5 of the 14th Amendment (Atascadero).</td>
</tr>
<tr>
<td>4</td>
<td>Presumption against preemption in statutory construction (Rice).</td>
<td></td>
</tr>
</tbody>
</table>

This particular matrix prompts several observations. One is that in order to fill Box 2 we have to look to another federal constitutional system altogether – that is, to the principle of subsidiarity included in the Maastricht Treaty on European Union. The *National League of Cities* doctrine was a standard – it incorporated several mushy factors and provided for balancing of the federal government’s interest in regulating against the state’s interest in sovereignty over the function at issue – but that doctrine is no longer

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269 See Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 287-88 & n.29 (1981) (directing courts to consider whether the law in question (1) regulated the “states as States,” (2) dealt with issues that are “indisputably attributes of state sovereignty,” and (3) impaired states’ ability “to structure integral operations in areas of traditional governmental function,” as well as (4) whether “the nature of the federal interest advanced [is] such that it justifies state submission”). The sheer fuzziness of this test may well explain why the Rehnquist Court’s current pro-states majority has never tried to revive *National League of Cities*. Justice Scalia, for one, has been an extremely vocal critic of this sort of mushy standard. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).
with us. I argue in Section ___ that this is largely as it should be, that is, that substantive federalism doctrines are probably best cast as formal (but narrow) rules.\textsuperscript{270}

The second observation is that the rules/standards dichotomy can be applied to canons of statutory construction, like the clear statement rules in Boxes 3 and 4, as well as to more familiar forms of constitutional doctrine. Here, a canon is standard-like to the extent that it allows the interpreter to consider a wide variety of sources of statutory meaning, such as legislative history, underlying policies, pragmatic concerns about implementing the statute, and the like. A canon is rule-like, on the other hand, to the extent that it tends to narrow the range of considerations down toward a focus on the text alone. The Eleventh Amendment clear statement rules, which insist on a clear statement of Congress’s intent to abrogate state sovereign immunity in the text of the statute itself,\textsuperscript{271} fit this latter description. The presumption against preemption, on the other hand, exemplifies the more common form of clear statement standard that simply urges courts to err on the side of state autonomy while still considering all potentially relevant sources of statutory meaning.\textsuperscript{272}

The rules/standards choice will remain important whichever model of federalism doctrine one chooses. But the three variables upon which I have focused here -- sovereignty/autonomy, substance/process, and strong/weak doctrine -- seem to represent the defining choices that actually separate the models actually in play in our current debates about federalism. Other choices, such as whether doctrines should be rule-like or standard-like, will remain important within these models. For a similar reason, I do not try to define and explore a different model reflecting every permutation of the three variables that I have emphasized. Rather, I use those variables to discuss the three models that emerge most naturally from the Court’s actual decisions and the criteria for interpretive and institutional choice that I have already identified.

5. \textit{The Nationalist Alternative}

Before discussing the models of federalism doctrine reflected in the Court’s decision, however, I should note that all of these models presume something that is in fact quite controversial: That courts will construct doctrine to enforce principles of federalism. I have already argued that courts generally cannot abstain from deciding the cases, and in fact no judges and relatively few commentators argue that federalism cases should be non-justiciable.\textsuperscript{273} But one could also argue for a doctrinal model that would be so deferential to political actors as to simply not show up on the dimensions I have sketched. There would, for example, be no choice between sovereignty and autonomy

\textsuperscript{270} See infra TAN ___.

\textsuperscript{271} See, e.g., Dellmuth v. Muth, 491 U.S. 223, 230 (1989) (“Legislative history generally will be irrelevant to a judicial inquiry into whether Congress intended to abrogate the Eleventh Amendment. If Congress’ intention is ‘unmistakably clear in the language of the statute,’ recourse to legislative history will be unnecessary; if Congress’ intention is not unmistakably clear, recourse to legislative history will be futile, because by definition the [clear statement] rule . . . will not be met.”).

\textsuperscript{272} Eskridge & Frickey?

\textsuperscript{273} See supra TAN ___. 

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because neither aspect of federalism would be protected; likewise, courts would impose neither “hard” nor “soft” limits on federal power.

Applied even-handedly, we might call this simply a “non-interventionist” model. But proponents of judicial non-intervention rarely argue for junking the dormant Commerce Clause limit on state legislation or various other doctrines of dormant preemption.\(^{274}\) And judges who occasionally suggest that courts should not adjudicate “conflicts of sovereign political interests implicated by the Commerce Clause” because “the Constitution remits them to politics”\(^{275}\) generally do not mean the dormant Commerce Clause.\(^{276}\) Rather, the argument is that courts should not protect states from federal encroachments. The model is thus more appropriately termed “nationalist”; it holds that courts should defer to federal political actors but not states.

Nationalists are basically uninterested in the distinction between state sovereignty and state autonomy, tending to see both as pernicious and outdated. To the extent that this model sees any federalism requirement at all in the Constitution, it tends to take the form of a minimalist vision of sovereignty entailing the “separate and independent existence” of the States. The example customarily cited is Coyle v. Oklahoma,\(^{277}\) which held that Congress may not tell a state where to put its capitol. Beyond this, the nationalist model views state autonomy – that is, the degree to which the states are allowed to exercise meaningful responsibilities – as purely a policy choice.\(^{278}\)

While this model is popular among academics, one of my most important descriptive claims is that no justice on the present Supreme Court actually takes this “pure nationalist” position. The remaining sections of this Part consider the models that are in play, as well as a somewhat different alternative of my own.

**B. The Strong Sovereignty Model**

By and large, the five justices making up the Rehnquist Court’s usual majority on federalism issues – the Chief Justice and Justices O’Connor, Kennedy, Scalia, and Thomas – have tended to opt for federalism doctrines that aggressively protect state sovereignty. At the same time, they have displayed relatively little sympathy for state autonomy, particularly in cases involving the preemption of state regulatory authority. These justices have also tended to opt for strong, substantive doctrines over rules that

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\(^{274}\) See, e.g., Zschernig v. Miller, 389 U.S. 429 (1968) (holding that the federal foreign affairs power impliedly preempts state laws that affect foreign affairs).


\(^{276}\) See, e.g., Fulton Corp. v. Faulkner, 516 U.S. 325 (1996) (Souter, J.); Camps Newfound/Owatonna v. Town of Harrison, 520 U.S. 564, 571-72 (1997) (rejecting call to reconsider dormant Commerce Clause doctrine) (Stevens, J., for majority including Souter and Breyer). On the other side of the divide, some of the justices most intent on developing doctrines to limit national authority have called for junking the Court’s negative commerce jurisprudence. See id. at 610-20 (Thomas, J., dissenting, joined by Rehnquist and Scalia). But the justices who hold the balance in federalism cases – Justices O’Connor and Kennedy – have been willing to limit both state and federal power.

\(^{277}\) 221 U.S. 559 (1911).

focus on process or leave open a dialog with Congress. The Court’s preferences on the judicial review variables are less pronounced, however, and one can find numerous counter-examples.

1. Sovereignty over Autonomy

The Court’s preference for sovereignty over autonomy is the most obvious hallmark of the “federalist revival.” In other work, I have grouped the pro-sovereignty cases under the heading of “immunity federalism” because they all “involve protecting the states from being held accountable, in their own activities, to federal norms.” All share, as a common theme, the assumption that the Court can best help the States by getting the Federal Government to leave them alone.

One can discern the intellectual roots of this approach in National League of Cities v. Usery, which shows up the distinction between sovereignty-based and autonomy-based federalism doctrines particularly well. *National League of Cities* was one of a series of cases involving the constitutionality of federal wage and hour regulation under the Fair Labor Standards Act. Congress’s ability to regulate the wages and hours of *private* employers – and therefore to preempt contrary state regulation of the same subject – was established in the morning after the New Deal “revolution” in *United States v. Darby*. Two subsequent decisions involved the additional question whether such regulation could be extended to state governments themselves in their capacity as public employers. *Maryland v. Wirtz* held that it could in 1968, but a new majority overruled that holding eight years later in *National League of Cities*.

Then-Justice Rehnquist’s opinion for the Court in the latter case viewed these two questions – whether Congress may supersede state regulation of private entities (*Darby*), and whether Congress may regulate the states themselves (*Wirtz*, *National League of Cities*) – as sharply different. The Secretary of Labor pointed out that the Court had already “upheld sweeping exercises of authority by Congress, even though those exercises pre-empted state regulation of the private sector.” The Court, however, rejected the suggestion that such foreclosure of state regulation of third parties “curtailed the sovereignty of the States quite as much” as the challenged FLSA provisions, which regulated state institutions themselves. “It is one thing,” Justice Rehnquist wrote, “to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside. It is quite another to uphold a similar exercise of congressional authority directed, not to private citizens, but to the States as States.”

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279 Young, *State Sovereign Immunity*, supra note 184, at 29.
281 312 U.S. 100 (1941).
283 426 U.S. at 855.
284 Id. at 844-45.
285 Id.
286 Id.
Court insisted that “there are attributes of sovereignty attaching to every state government which may not be impaired by Congress,” those attributes conspicuously did not include the right to regulate within the States’ own jurisdiction free of federal interference. Rather, they were limited to the right to be free of federal regulation of state institutions themselves.

The Court overruled National League of Cities just nine years later, and the justices driving the Federalist Revival have not chosen to revive this particular aspect of state sovereignty. Nonetheless, a similar concern for state sovereignty over state regulatory autonomy pervades the Court’s recent decisions on state sovereign immunity. These cases represent neither the opening moves in the Federalist Revival nor its most dramatic departures from prior precedent. But they surpass all other areas of federalism doctrine in both number – there are simply more decisions – and in the Court’s willingness to push to the pro-states extreme on a continuum of doctrinal possibility. The Eleventh Amendment (and its background “postulates which limit and control,” which actually seem to drive most of the recent cases) has become the poster child of federalism doctrine under the Rehnquist Court.

Like the National League of Cities doctrine, state sovereign immunity limits Congress’s ability to bring federal law to bear on state institutions themselves. This effort constantly invokes the rhetoric of state sovereignty. Justice Thomas began his analysis in the Ports Authority case, for example, by noting that the States “entered the union ‘with their sovereignty intact,’” and that the States’ immunity from private suits is


288 See, e.g., Alden v. Maine, 527 U.S. 706 (1999); Seminole Tribe of Fla. v. Florida, 516 U.S. 44 (1996). Although the Court’s state sovereign immunity jurisprudence has had relatively few academic defenders, but see [Hill; Nelson; Hills], the earlier notion of protecting core state governmental functions from direct federal regulation has had more support. See Deborah Jones Merritt, for instance, has urged that the Guarantee Clause be interpreted to prevent federal interference with state governmental functions. See Deborah Jones Merritt, The Guarantee Clause and State Autonomy: Federalism for a Third Century, 88 COLUM. L. REV. 1 (1988). Likewise, William Van Alstyne thought that the Court’s abandonment of such protection in Garcia represented the “second death” of federalism. See William W. Van Alstyne, The Second Death of Federalism, 83 MICH. L. REV. 1709 (1985).

289 See supra note 1.

290 See Young, Sky Falling, supra note __, at ___ (demonstrating that the Rehnquist Court’s state sovereign immunity jurisprudence, while probably wrongheaded, is largely consistent with prior case law).


292 See Principality of Monaco v. Mississippi, 292 U.S. 313, 322-23 (1934) (“[W]e cannot . . . assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States. Behind the words of the constitutional provisions are postulates which limit and control.”); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1996) (“[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms.”) (quoting Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991)).

“[a]n integral component of that ‘residuary and inviolable sovereignty.’” 294 Likewise, Justice Kennedy’s more extended discussion of the Framers’ original understanding focused on “the close and necessary relationship understood to exist between sovereignty and immunity from suit.” 295

There is an important shift in emphasis from National League of Cities to the sovereign immunity cases, however. Under the former doctrine, the Court stressed the need to relieve state governments from federal regulation so that they might better serve their own constituents. Justice Rehnquist stressed that “[o]ne undoubted attribute of state sovereignty is the States’ power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime.” 296 In one example of the FLSA’s impact, California “reported that it had thus been forced to reduce its [highway patrol] academy training program from 2,080 hours to only 960 hours, a compromise undoubtedly of substantial importance to those whose safety and welfare may depend upon the preparedness of the California Highway Patrol.” 297 Although the National League of Cities doctrine was couched in terms of sovereignty and operated by foreclosing federal regulation of state institutions themselves, then, the key to the doctrine was the degradation of the state’s ability to govern resulting from loss of control over its own governmental functions. 298 In this sense, National League of Cities shared many of the basic concerns of the autonomy model. 299

The Court’s state sovereign immunity opinions, on the other hand, seem typically to invoke the notion of sovereignty for its own sake. The Court has said that “[t]he preeminent purpose of state sovereign immunity is to accord States the dignity that is

294 Id. at 751-52 (quoting Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991), and The Federalist No. 39, at 245 (C. Rossiter ed. 1961) (James Madison)).


296 National League of Cities v. Usery, 426 U.S. 833, 845 (1976); see also id. at 847 (“Quite apart from the substantial costs imposed upon the States and their political subdivisions, the Act displaces state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require.”).

297 Id. at 847.

298 Likewise, Justice Douglas’s dissent in Maryland v. Wirtz – which took a similar position to that adopted by a majority in National League of Cities – focused on the extent to which “the 1966 amendments to the Fair Labor Standards Act disrupt the fiscal policy of the States and threaten their autonomy in the regulation of health and education.” 392 U.S. 183, 203 (1968) (Douglas, J., dissenting). Justice Douglas was willing to permit some federal regulation of state governments; he drew the line, however, when such regulation threatened the States’ ability to make autonomous policy choices. “It is one thing,” he insisted, “to force a State to purchase safety equipment for its railroad and another to force it either to spend several million more dollars on hospitals and schools or substantially reduce services in these areas.” Id.

299 See id. at 851 (“[I]t is functions such as these [e.g., police and fire protection] which governments are created to provide, services such as these which the States have traditionally afforded their citizens. If Congress may withdraw from the States the authority to make those fundamental employment decisions upon which their systems for performance of these functions must rest, we think there would be little left of the States’ ‘separate and independent existence.’”) (quoting Coyle v. Oklahoma, 221 U.S. 559, 580 (1911)).
consistent with their status as sovereign entities.”  Dignity may have some relationship to state governance; indeed, the general level of respect for state institutions seems likely to affect the degree of participation in state political processes and the states’ ability to attract good people for public service. It seems unlikely, however, that the sort of dignity enhanced by state sovereign immunity helps on these fronts. If anything, one would expect that haughty refusals by the State to compensate those injured when the State violates federal laws would engender resentment toward state institutions. Of course, all of these effects – both positive and negative – would be hard to measure rigorously. But at best the case for promoting viable state governance through a sovereign immunity jurisprudence based on state dignitary interests is far from proven.

State sovereign immunity serves other values besides dignity, and some are much more closely related to a state’s ability to govern. Occasionally, the Court has invoked the potential of damages liability to disrupt a state’s financial decisionmaking processes as a reason for expanding immunity from suit. In Alden, for instance, Justice Kennedy noted that “[t]he principle of immunity from litigation assures the states and the nation from unanticipated intervention in the processes of government.” “A general federal power to authorize private suits for money damages,” by contrast, “would place unwarranted strain on the States' ability to govern in accordance with the will of their citizens.” Aside from this passage in Alden, however, this concern for the degradation of state governance arising from damages liability hardly ever crops up in the Court’s analysis. Rather, most opinions have tended to focus either on more abstract notions of sovereignty or state dignitary interests. Indeed, the Ports Authority decision explicitly

300 Ports Authority, 535 U.S. at 760.
301 Anyone who has tried to get students at a “national” law school interested in state court clerkships or state government lawyering will be familiar with this phenomenon.
302 527 U.S. at 750 (quoting Great Northern Life Ins. Co. v. Read, 322 U.S. 47, 53 (1944)).
303 Id. at 750. Justice Kennedy explained:

Today, as at the time of the founding, the allocation of scarce resources among competing needs and interests lies at the heart of the political process. While the judgment creditor of the State may have a legitimate claim for compensation, other important needs and worthwhile ends compete for access to the public fisc. Since all cannot be satisfied in full, it is inevitable that difficult decisions involving the most sensitive and political of judgments must be made. If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen.

Id. at 750-51.
304 See, e.g., Alden, 527 U.S. at 748 (discussing dignitary concerns); Idaho v. Coeur d’Alene Tribe, 521 U.S. 261, 277 (1997) (“The course of our case law indicates the wisdom and necessity of considering, when determining the applicability of the Eleventh Amendment, the real affront to a State of allowing a suit to proceed.”) (plurality opinion); Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993) (noting that the Eleventh Amendment “accords the States the respect owed them as members of the federation” and stressing “the importance of ensuring that the States' dignitary interests can be fully vindicated”); In re Ayers, 123 U.S. 443, 505 (1887) (“The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.”).
rejected an argument that the States should not be immune where autonomy-related concerns about state finances are not present: “While state sovereign immunity serves the important function of shielding state treasuries and thus preserving ‘the States’ ability to govern in accordance with the will of their citizens,’ the doctrine’s central purpose is to ‘accord the States the respect owed them as’ joint sovereigns.”  

The Court has made clear that, despite its benefits for state financial integrity, state sovereign immunity is not meant to increase state governments’ freedom of action by allowing them to make their own policies at variance with federal law. In Alden, for example, Justice Kennedy insisted that “[t]he constitutional privilege of a State to assert its sovereign immunity in its own courts does not confer upon the State a concomitant right to disregard the Constitution or valid federal law.” 306 Indeed, the Court plainly expects that state governments will generally continue to comply with federal law notwithstanding their immunity from suit. 307 In any event, a broad range of private remedies against state entities remain, and Congress retains an impressive array of legislative instruments to ensure state compliance with federal law. 308 That does not mean that the state sovereign immunity decisions are unimportant; as Dan Meltzer has observed, the remedial architecture is a critical, if often overlooked, aspect of constitutional law. 309 My point is simply that restrictions on particular remedies against state governments are likely to have a considerably more attenuated impact on the ability of states to govern themselves than restrictions on Congress’s ability to regulate states per se.

The Court’s focus on sovereignty is not restricted to the old National League of Cities doctrine and state sovereign immunity. Federalism concerns also stand at the center of the Court’s habeas corpus jurisprudence, 310 and recent doctrinal developments in that area also have the effect of constricting state accountability for violations of

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305 Ports Authority, 535 U.S. at 765. Justice Thomas thought that the Solicitor General’s argument in defense of the statute revealed “a fundamental misunderstanding of the purposes of sovereign immunity.” Id. at 765. He explained that “[s]overeign immunity does not merely constitute a defense to monetary liability or even to all types of liability. Rather, it provides an immunity from suit. The statutory scheme, as interpreted by the United States, is thus no more permissible than if Congress had allowed private parties to sue States in federal court for violations of the Shipping Act but precluded a court from awarding them any relief.” Id. at 766. For a general discussion of the Court’s reliance on state dignitary interests in sovereign immunity cases, see Peter J. Smith, States as Nations: Dignity in Cross-Doctrinal Perspective, 89 Va. L. Rev. 1 (2003).


307 See id. at 755 (“We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States.”).


309 See Meltzer, Overcoming Immunity, supra note 308, at 1333.

310 See, e.g., Coleman v. Thompson, 501 U.S. 722, 726 (1991) (“This is a case about federalism. It concerns the respect that federal courts owe the States and the States’ procedural rules when reviewing the claims of state prisoners in federal habeas corpus.”).
federal rules. 311 The doctrine of procedural default, for example, holds that federal constitutional errors committed at a state court trial ordinarily cannot be remedied on habeas review if the petitioner failed to comply with state procedural rules. 312 As with state sovereign immunity, the effect is not to absolve state courts from their obligation to comply with federal constitutional rules – states cannot, for instance, choose not to follow Miranda’s rules on custodial interrogation – but rather to restrict the availability of federal remedies when such violations occur. And the central concern is to prevent federal interference with the internal workings of state institutions. 313

The habeas case law, like sovereign immunity and the National League of Cities, defies any attempt to draw too bright a line between sovereignty and autonomy concerns. The Court has reined in habeas remedies largely out of a general concern for the States’ ability to punish violations of their criminal laws – surely a core concern of state governance. 314 And a rule like the procedural default doctrine is designed to protect the States’ ability to manage their criminal justice system by establishing rules of criminal procedure; if state procedural defaults are ignored on federal habeas review, the Court has argued, then no one will have any incentive to comply with state procedural rules. 315 Although one occasionally sees references to state dignitary interests in habeas opinions, they tend to take a back seat to the practical costs that federal habeas review imposes on state law enforcement. 316 Nonetheless, the autonomy concerns present in habeas cases are at one further remove from those at issue when the Court decides whether or not to impose federal constitutional rules on the states in the first place. 317

311 But see Wiggins v. Smith, 123 S. Ct. 2527 (2003) (invalidating state court death sentence on grounds of ineffective assistance of counsel); Williams v. Taylor, 529 U.S. 362 (2000) (same). Because of the key role that ineffective assistance plays in habeas cases, and because Wiggins and Williams are the first cases in many, many years in which the Court has vindicated an ineffective assistance claim, these decisions may represent an important loosening of the constraints on habeas relief.


313 See, e.g., Coleman, 501 U.S. at 748 (observing that “federal intrusions into state criminal trials frustrate both the States’ sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.”) (quoting Sykes, 433 U.S. at 128).


316 See, e.g., Coleman, 501 U.S. at 738-39 (“State courts presumably have a dignitary interest in seeing that their state law decisions are not ignored by a federal habeas court, but most of the price paid for federal review of state prisoner claims is paid by the State. When a federal habeas court considers the federal claims of a prisoner in state custody for independent and adequate state law reasons, it is the State that must respond. It is the State that pays the price in terms of the uncertainty and delay added to the enforcement of its criminal laws.”).

317 Compare, e.g., Wolf v. Colorado, 338 U.S. 25 (1949) (holding that state courts are not bound by the federal exclusionary rule under the Fourth Amendment), with Mapp v. Ohio, 367 U.S. 643 (1961) (holding that state courts are bound by the exclusionary rule); see also id. at 681 (Harlan, J., dissenting) (“In my view this Court should continue to forbear from fettering the States with an adamant rule which may embarrass them in coping with their own peculiar problems in criminal law enforcement.”).
Given that most federalism doctrines will serve both sovereignty and autonomy to some degree, the evidence so far hardly demonstrates a clear commitment to the former over the latter. But the case for such a commitment becomes much clearer, in my view, when we turn to the cases in which the Rehnquist Court’s pro-states majority has failed to protect state autonomy. The most important cases here involve preemption of state laws by federal statutes, administrative agency action, and judge-made federal common law. A number of commentators – including this one – have observed that the Court’s putatively pro-states majority often votes against the States in preemption cases. The strong tendency of the Rehnquist Court is to find state law preempted more often than not, and the five Justices who made up the pro-states majority in cases like Lopez, Printz, and Seminole Tribe are the most likely to favor preemption. As Calvin Massey has observed, “[i]t is hard to understand why Justices who are so aware of the values of federalism in Lopez, Morrison, or Garrett exhibit such blindness to those values when presented with a preemption case.”

I have canvassed the Rehnquist Court’s preemption jurisprudence in wearisome detail in a companion article, so I will provide only a few examples here. Lorillard Tobacco Co. v. Reilly is perhaps the most striking. There, the Court held that federal law requiring warning labels on cigarette packages preempted a Massachusetts law forbidding sign and poster advertising near schools. In dissent, Justice Stevens pointed out that “[t]he Court’s holding that federal law precludes States and localities from protecting children from dangerous products within 1,000 feet of a school is particularly ironic given the Court’s conclusion [in Lopez] that the Federal Government lacks the constitutional authority to impose a similarly-motivated ban.” Even more ironic was the line-up, which featured exactly the same five-four split as in Lopez, except that the putatively pro-states “conservatives” voted to strike down the state law.

318 See Daniel J. Meltzer, The Supreme Court’s Judicial Passivity, 2002 SUP. CT. REV. 343, 362-78 [hereinafter Meltzer, Judicial Passivity]; Fallon, Conservative Paths, supra note 291, at ___; Calvin Massey, Federalism and the Rehnquist Court, 53 HASTINGS L.J. 431, 502-12 (2002); Young, Two Cheers, supra note ___, at ___.

319 See Fallon, Conservative Paths, supra note 291, at 462 (noting that the Court found preemption in nearly two-thirds of the thirty-five preemption cases decided since Justice Thomas joined the Court).

320 See Meltzer, Judicial Passivity, supra note 318, at 369-70 (observing that “of eight non-unanimous preemption decisions in the 1999, 2000, and 2001 Terms, Justice Scalia voted to preempt in all eight, the Chief Justice and Justices O’Connor and Kennedy in seven each, and Justice Thomas in six. By contrast . . . in those same eight cases, Justices Souter, Ginsburg, and Breyer each voted to preempt only twice and Justice Stevens never voted to preempt”).

321 Massey, supra note 318, at 508.

322 See Young, Preemption, supra note 19.


324 Id. at 598 n.8. Of course, Congress could not doubt ban advertising within 1000 feet of a school, since advertising presumably is a commercial activity. But Justice Stevens’ basic point – that Lorillard involved exactly the same sort of basic police-power regulation that Lopez took to be at the heart of federalism – stands nonetheless. One might also reverse the irony and ask why, if Justice Stevens was so solicitous of local control in Lorillard, he voted the other way in Lopez.
Lorillard is suggestive because of its facts, but it pales in importance beside a case like AT&T Corp. v. Iowa Utilities Board, decided in 1999. The federalism issue in that case concerned whether the new rules implementing competition in the local telephone market under the 1996 Telecommunications Act would be written by the Federal Communications Commission or the state regulatory agencies. Local telephone regulation had expressly belonged to the States under the 1934 Communications Act, and nothing in the new statute clearly purported to shift implementation responsibility to Washington. Nonetheless, Justice Scalia’s majority opinion found the dissenters’ invocation of federalism “most peculiar”; to him, the case was a straight up question of federal administrative law with no vertical structural implications. But Iowa Utilities Board obliterated more state regulatory “turf” at one fell swoop than any other decision in recent memory.

As I discuss in more detail in Section D, preemption cases are the quintessential “autonomy” cases. They concern whether the states will continue to have the authority to regulate third parties within their own jurisdiction, pursuant to their own view of the public interest, or whether that authority will be displaced by federal control. The Rehnquist Court majority’s failure to see central federalism concerns at issue in preemption cases thus provides the best evidence that, for them, the central values of federalism lie elsewhere – not in state regulatory autonomy, but in the sovereign prerogative of state institutions themselves to be exempt from federal intrusion or control. To be sure, elements of the Court’s jurisprudence – most importantly, the Court’s limited revival of the doctrine of enumerated powers in cases like Lopez and Morrison – seem directed to autonomy-type concerns. These departures serve as reminders of the difference between theoretical models and the inevitably more messy judicial performance that the models help us to evaluate. I do think it is fair to conclude, however, that the Rehnquist Court’s strong tendency has been to promote a vision of state sovereignty that bears only an attenuated link to the viability of state governance.

The reasons for this choice of emphasis are not obvious, and I do not pretend to offer a complete explanation here. As Richard Fallon has demonstrated, much of the Court’s emphasis on sovereign immunity may be path dependent: “Significant obstacles impede aggressive steps to protect federalism along other paths,” he points out. “By contrast, the Court has learned how to deploy sovereign immunity to symbolize and

325 525 U.S. 366 (1999). I have discussed Iowa Utilities Board in greater detail in an earlier work. See Young, State Sovereign Immunity, supra note 184, at 39-42 (arguing that Iowa Utilities Board was far more important to federalism that the sovereign immunity decisions in the same Term, including Alden and the Florida Prepaid cases).


327 Justice Breyer tellingly compared the impact of Iowa Utilities Board with Printz, in which Justice Scalia had waxed eloquent about in the intrusion on state sovereignty arising from a federal requirement that state law enforcement officials conduct background checks for gun sales. “Today's decision,” he said, “does deprive the States of practically significant power, a camel compared with Printz's gnat.” Iowa Utils. Bd., 525 U.S. at 427 (Breyer, J., dissenting).

328 See infra TAN ___.

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protect federalism.” 329 Path dependence may also explain the Court’s efforts to protect state sovereignty in habeas cases: Courts have traditionally taken a strong role in shaping habeas relief, and for much of the past decade Congress has been supportive of the Court’s effort to narrow the availability of the writ. 330 Finally, both the immunity cases and the habeas cases dovetail with politically conservative suspicions of civil plaintiffs and criminal defendants. 331

Nonetheless, these explanations seem unlikely to capture the whole picture. After all, many of the Court’s critics – people who would overrule the precedents that the Court has built upon, and who generally do not share the political predilections that some of the cases may vindicate – seem to accept the states’ rightsers’ assumption about the central importance of doctrines like National League of Cities or state sovereign immunity in determining the balance of power between the States and the Nation. How else could one argue, for example, that the Court’s state sovereign immunity decisions have truly “narrowed the nation’s power” and altered our federal balance in favor of the States? 332 A wide range of people on both sides of the federalism debate seem to agree that sovereignty is just what federalism is about.

2. Judicial Review

So much for the first dimension of federalism doctrine – the choice of sovereignty over autonomy. What about the other two variables, which are concerned with the focus and structure of judicial review? Many commentators have seen the Court as plainly committed to a strong judicial role focused on drawing substantive lines between state and federal authority. In one important article, for instance, John Yoo observed that the Rehnquist Court’s recent decisions “have reasserted the applicability of judicial review to questions concerning state sovereignty and the proper balance between the national and state governments.” 333 That meant, for Professor Yoo, that the Court would “establish

329 See Fallon, Conservative Paths, supra note 291, at 482.

330 [cites]

331 Any political explanation must be tempered, however, by the relatively apolitical or politically mixed nature of some of the major immunity cases. See, e.g., Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) (invalidating certain enforcement provisions of the not-exactly-ideologically-charged Indian Gaming Regulatory Act); Florida Prepaid Postsecondary Education Expense Bd. v. College Savings Bank, 527 U.S. 627 (1999) (invalidating the state liability portion of the Patent Act – a statute under which large businesses often sue as plaintiffs). Likewise, the habeas picture is complicated by the fact that the Rehnquist Court has issued a number of pro-defendant landmarks lately, see, e.g., Atkins v. Virginia, 122 S. Ct. 2242 (2002) (holding that the Eighth Amendment bars execution of the mentally retarded); Ring v. Arizona, 122 S. Ct. 2428 (2002) (holding that aggravating factors in capital sentencing must be found by a jury, not a judge); supra note 311 (cases upholding claims of ineffective assistance of counsel), and has often found itself in the role of narrowing and moderating harsher limits on habeas enacted by Congress, see, e.g., [cites].


333 Yoo, Judicial Safeguards, supra note 163, at 1312.
areas of state control that are to remain immune from federal regulation.”

Although Professor Yoo acknowledged that “the Court has and will continue to debate where the line is to be drawn between federal enumerated powers and state sovereignty,” he nonetheless concluded that “there seems to be little dispute on the Court over its institutional obligation to draw that line.”

Professor Yoo’s assessment is most obviously applicable to the Commerce Clause cases, *Lopez* and *Morrison*. Although *Lopez* contained language suggestive of a process focus, *Morrison* makes clear that the doctrine turns on substance: Congress may only regulate commercial activity under the Commerce Clause. The Court’s other line of enumerated powers cases – construing the limits of Congress’s power to enforce the Reconstruction Amendments – is similar. One can make a case for process orientation here as well by focusing on the Court’s language concerning the legislative record compiled by Congress in enacting the law. But I and others have argued elsewhere that a more plausible reading of the cases focuses on the nature of the activity prohibited by Congress and the proportion of that activity that is actually unconstitutional under the constitutional provision that Congress is enforcing. That would put these cases firmly on the *substance* side of the relevant divide.

The immunity cases also generally fit this preference for substance over process. One occasionally sees a process argument in the opinions: The Court has suggested, for instance, that we should worry about the U.S. government delegating to private persons its right to sue the states notwithstanding immunity, because private suits are not subject to the same political checks as suits by federal governmental actors. But by and large these cases are about the substance of federal legislation – the imposition of liability on state institutions – rather than defects in the federal lawmaking process that produces the

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334 *Id.*

335 *Id.* Professor Yoo’s assertion that there is “little dispute on the Court over its institutional obligation” is true to the extent that the dissenters in cases like *Lopez* and *Morrison* have not argued that the legal questions are non-justiciable. But surely there is considerable dispute as to whether the judicial job description includes the task of enforcing meaningful limits on federal enumerated powers. I discuss that dispute in Section C, infra.

336 *See supra* note 219 (discussing the mention of congressional findings and jurisdictional elements in the *Lopez* opinion).

337 *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507 (1997) (striking down the Religious Freedom Restoration Act on the ground that it was not designed to prevent or remedy an actual constitutional violation).

338 *See, e.g.*, NOONAN, *supra* note ___, at 6; [others].

339 *See Young, Sky Falling, supra* note ___, at 1577-80; Berman, Reese, & Young, *supra* note 259, at 1072-74. As my colleague Doug Laycock has explained, “[t]he proportionality part of [the City of Boerne] standard seems to require an empirical judgment: Congressional enforcement legislation is valid only if violations of the Constitution, as interpreted by the Court, appear in a sufficiently large proportion of all cases presenting violations of the statute.” Douglas Laycock, *Conceptual Gulfs in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 743, 746 (1998). Findings in the record are important to assist the Court in making this empirical judgment, not to determining whether the law in question was enacted by an appropriate process.

340 *Alden*
challenged statutes. And the rules produced – that Congress may not abrogate the sovereign immunity of the states – are not designed to enhance the States’ representation in Congress or shore up their political position more generally. If anything, the Court’s notion of immunity may be counterproductive to that purpose.  

These two areas of the Court’s jurisprudence – the Commerce Clause and immunity cases – have also generally featured “hard” doctrinal rules. Although Congress has treated *Lopez* as a remand for more legislative findings, 342 that effort seems unlikely to save the statute should it be challenged again. It seems better to read *Lopez* and especially *Morrison* as categorical statements that non-commercial activities are simply outside the scope of Congress’s commerce power. So, too, with the immunity cases. There, the Court has substituted a hard rule (Congress simply may not abrogate state immunities when it acts pursuant to its Article I powers 343 ) for the pre-existing soft one (Congress may abrogate only by making a very, very clear statement of its intent 344 ). Indeed, to the extent that the soft rule remains operative in Section Five abrogation cases, 345 the Court has watered it down by no longer requiring painfully explicit abrogation language in the text of the statute itself. 346 That move strongly suggests that the Court has placed its faith in hard rules as the primary guarantors of state sovereignty.

As with the choice between sovereignty and autonomy, the Court’s preference for hard, substantive rules may be best illustrated by the cases in which the justices in the usual pro-states majority have not sided with the States. Again, the preemption cases are the best example. The basic presumption against preemption in statutory construction 347 is substantive in the sense that it would turn upon the substantive effect of the federal statute in question rather than defects in the lawmaking process that gave rise to the statute. 348 But we might rely on process-oriented justifications for such a rule. One might argue, for instance, that the sort of concentrated interest groups that often seek preemption of state regulation have certain organizational advantages at the federal level that offset state representation. 349 More fundamentally, one might emphasize the extent

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341 See Young, *State Sovereign Immunity*, supra note 184, at ___ (arguing that immunity rules may lead Congress to impose more draconian alternatives and to eschew devolution of authority to States); [Karlan?].

342 [cite]


344 [cite]

345 See *Seminole Tribe*, 517 U.S. at ___ (affirming that Congress retains the power to abrogate under Section Five of the Fourteenth Amendment).

346 Compare [Garrett w/Dellmuth]


348 Other anti-preemption rules might be more obviously process-oriented. For example, a rule restricting the preemptive powers of federal actors other than Congress – such as federal administrative agencies – would be triggered by the fact that the statute originated from a part of the federal government in which the states are not represented. See Young, *Two Cheers*, supra note ___, at ___ (discussing the preemptive powers of federal agencies); infra TAN ___.

349 [cite]
to which widespread preemption threatens the state autonomy necessary to maintain a viable system of political checks on central power.\textsuperscript{350} Consistent with its focus on the substantive scope of federal power, the Rehnquist Court has been relatively uninterested in these sorts of arguments.

The presumption against preemption is also the quintessential “soft” limit on federal power. When the courts rule that a federal statute does not preempt state law, Congress can always amend the act to clarify its intent to preempt more broadly. The unwillingness of many usually pro-states justices to apply the anti-preemption canon rigorously may reflect a general lack of faith in soft rules and a preference for the harder limits offered in cases like \textit{Lopez} or \textit{Seminole Tribe}. That preference is explicit in the writings of several scholars sympathetic to the general aims of the Federalist Revival but critical of the presumption against preemption.\textsuperscript{351}

There may be any number of explanations for the pro-states justices’ distaste for the presumption against preemption. It may reflect the fact that federal preemption generally displaces more rigorous state regulation, so that political conservatives generally hostile to government regulation may be sympathetic to preemption arguments.\textsuperscript{352} Several of the ordinarily pro-states justices, like Justice Scalia, tend to believe that statutes have a readily discernible “plain meaning”; for that reason, they may be relatively uninterested in “clear statement” rules whose application is predicated on statutory ambiguity.\textsuperscript{353} I explore this question of motivation further in a companion article.\textsuperscript{354} The important point for present purposes, however, is simply that the five justices ordinarily constituting the Rehnquist Court’s pro-states majority have tended to de-emphasize the most important form of “soft” limit on federal power.

But just as the Rehnquist Court has not single-mindedly pursued sovereignty over autonomy, so, too, it has taken different directions at different times on the focus and structure of judicial review. Under the Commerce Clause, for instance, \textit{Lopez} and \textit{Morrison} exist side-by-side with \textit{Jones v. United States}\textsuperscript{355} and \textit{Solid Waste Association v. U.S. Army Corps of Engineers},\textsuperscript{356} both of which employed “soft” clear statement rules to avoid decision whether the statutes in question fell within or without the outer reaches of the Commerce Clause. \textit{Jones} used a soft rule that turned on the substance of the regulated activity (arson of a non-commercial building).\textsuperscript{357} \textit{Solid Waste}, on the other

\begin{footnotes}
\item[350] I discuss this argument \textit{infra} TAN ___.
\item[352] \textit{Cf.} Antonin Scalia, \textit{Judicial Deference to Administrative Interpretations of Law}, 1989 Duke L. J. 511, 521 (“One who finds \textit{more} often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds \textit{less} often that the triggering requirement [of statutory ambiguity] for \textit{Chevron} deference exists.”).
\item[353] \textit{See} Young, \textit{Preemption}, \textit{supra} note ___, at ___.
\item[354] 529 U.S. 848 (2000)
\item[356] \textit{See} 529 U.S. at ___.
\end{footnotes}
hand, combined its soft rule with a process-based concern about delegation of power to administrative agencies. In essence, Solid Waste held that administrative agencies (which in corporate no mechanism for representing state interests) may not push the limits of the Commerce Clause unless Congress (where the states are represented) clearly authorizes them to do so.

The anti-commandeering doctrine of Printz and New York offers a more dramatic instance of process federalism. While that doctrine is not concerned with the process that led to enactment of a law like the Brady Act, it does focus on the ways in which commandeering can undermine the political safeguards that ordinarily operate to protect states. Hence, the Court has emphasized the ways in which commandeering distorts the ordinary operation of the political process by shifting the costs of regulation and obscuring which level of government is responsible for unpopular policies. Justice Scalia explained in Printz that

By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for "solving" problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects.

Put another way, the anti-commandeering doctrine helps shore up the political safeguards of federalism by forcing the national government to internalize the costs – both fiscal and political – of its actions.

Printz and New York establish the anti-commandeering principle as a hard limit on national power: Congress cannot, for instance, overcome that principle by clearly stating its intent to do so. But much of that firmness disappears when we take into account the Court’s refusal to place any meaningful limits on Congress’s power to

358 See Clark, Separation of Powers, supra note 117, at ___ (explaining how delegation of lawmaking authority to administrative agencies raises process federalism concerns); Young, Two Cheers, supra note ___, at ___ (same).

359 See Solid Waste, ___ U.S. at ___ [quote]

360 It is somewhat harder to place anti-commandeering on the continuum between sovereignty and autonomy. Some have identified the anti-commandeering cases with a “sovereignty” model of federalism, see, e.g., Werhun, supra note ___, at 1273-74, and it is true that the very term “commandeering” may connote some sovereignty-based concern about state dignity; the Court sometimes seems to suggest that ordering state officials about is simply inconsistent with the respect that a coordinate sovereign government deserves. [cite] But the Court has balanced that strand of the anti-commandeering argument with another suggesting that conscripting state institutions to pursue federal policies trades off with those institutions’ autonomy to pursue their own goals. [cites] At the end of the day, the doctrine seems relatively well-adapted to pursue both sovereignty and autonomy ends. That in itself is an important point, as it demonstrates that these goals need not always trade off with one another.

361 [cites]


363 See Young, Two Cheers, supra note ___, at ___.

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condition federal funding on state compliance with federal directives. Absent such limits, Congress may generally purchase state implementation of federal policies through conditions on the grant of federal funds. Hardly renders the anti-commandeering doctrine meaningless; as Roderick Hills has demonstrated, there are good reasons to prefer a regime under which Congress must purchase state implementation rather than simply mandate it. In particular, the purchase price undermines Congress’s ability to use commandeering to externalize the costs of its regulation. The conditional spending option does, however, largely transform the anti-commandeering rule into a “soft” doctrine that Congress can generally overcome through further action.

These examples again demonstrate that while particular models of judicial review may help to analyze trends in the jurisprudence of actual courts, we rarely see such models in their pure form. It seems fair to say that the vision of federalism embraced by the five justices of the Rehnquist Court’s usually pro-states majority leans strongly toward this “strong sovereignty” model, choosing sovereignty over autonomy, substance over process-oriented rules, and hard doctrines rather than soft ones. To say the jurisprudence “leans” in this direction is to admit that not all cases fit the pattern. But the model is useful, I hope, in comparing the majority’s approach both to other positions on the Court and to the somewhat different model I will be pressing here.

C. Weak Autonomy
If state sovereignty has prospered under the Rehnquist Court, state autonomy has had a considerably tougher time of it. That might initially seem like a strange judgment; after all, many still see Lopez v. United States as well as its follow-up in United States v. Morrison – as the paradigm cases of the Federalist Revival. The Commerce Clause cases do address state autonomy relatively directly by holding that some areas are off-limits to federal legislation. If Congress were to attempt to supplant state autonomy to make regulatory decisions over physician-assisted suicide or gay marriage, for example, Lopez and Morrison would likely offer the most promising basis for challenging such legislation.

365 See, e.g., New York [cite] (noting that Congress retains this option and upholding a portion of the law in question as a valid instance of conditional federal spending).
367 One might say the same thing of any hard rule, and in fact conditional spending is proposed as a response to judicial decisions under the Commerce Clause and Eleventh Amendment as well. Nonetheless, conditional spending (and its cousin, conditional preemption) seem more prevalent in the commandeering context than in these other areas. [cites]
368 This is true even though the particular statutes at issue in Lopez and Morrison were not preemptive – that is, they did not forbid parallel state legislation on the same subjects.
369 See, e.g., Stephanie Hendricks, Note, Pain Relief, Death with Dignity, and Commerce: The Constitutionality of Congressional Attempts to Regulate Physician-Assisted Suicide in Oregon via the Commerce Clause after Lopez and Morrison, 37 WILLAMETTE L. REV. 691 (2001); Grant S. Nelson & Robert J. Pushaw, Jr., Rethinking the Commerce Clause: Applying First Principles to Uphold Federal
The emphasis on *Lopez* and *Morrison* is understandable. *Lopez* was the most dramatic of all the recent cases in its departure from prior trends, invalidating a federal statute under the Commerce Clause for the first time in nearly 60 years. The Commerce Clause cases are also the easiest to teach in the first-year course in Constitutional Law, which is often the only exposure to constitutional federalism that attorneys receive in law school. The more significant cases concerning state sovereign immunity, for instance, are typically held for more advanced courses in federal jurisdiction.  

Nonetheless, *Lopez* and *Morrison* are likely to have only limited practical significance. They seem thus far to have had little impact on the lower courts. And even if lower court judges could be persuaded to follow, it is unclear how far the Supreme Court is willing to lead. *Lopez* and *Morrison* were both extreme cases; if the Court had upheld either the Gun Free School Zones Act or the Violence Against Women Act, it would have been very difficult to say there was any limit at all on the commerce power. To say that such a limit exists, however, is not to say that it is very constraining. Most important, the Court has conceded that the national economy has become integrated to the extent that there is no meaningful distinction between intra- and inter-state commerce; rather, there is just “commerce.” The Court has also eschewed any effort to compartmentalize the various forms of economic activity, as it once sought to distinguish between “commerce” and “manufacturing” or “agriculture.” Now all of these things are “commerce”; that term, the Court has made clear, commercial regulations but preserve state control over social issues, 85 IOWA L. REV. 1, 170-72 (1999) (discussing same-sex marriage).

370 I once tried to teach a reasonably detailed unit on the Eleventh Amendment to first-years in Con Law I. One would hope that my students must have forgiven me by now, but I’m not confident.

371 See generally Reynolds & Denning, supra note 2. Professors Reynolds and Denning concluded in 2000 that lower courts had generally been exceptionally reluctant to follow *Lopez* and find other federal statutes to be outside the commerce power. See id. at ___. They updated their research in 2003, almost three years after the Court’s *Morrison* decision confirming the new course charted in *Lopez*. Reynolds and Denning found that

Contrary to the fears of numerous critics of *Lopez* and *Morrison*, the decisions have not loosened a flood of opinions holding congressional statutes unconstitutional. In fact, in nearly two years following Morrison, only one statute has been held unconstitutional on its face, and that decision did not survive en banc review. Courts have, however, been marginally more comfortable sustaining as applied challenges to legislation containing commands that activity be "in interstate commerce," "affect interstate commerce," and the like.

*Id.* at 1256. Interestingly, Reynolds and Denning reach the “unsettling” conclusion that “there is more at work here than mere judicial self-restraint. . . . The more strenuously the courts resist the implementation of *Lopez* and its progeny, the more it begins to look as if the courts simply disagree with the results.” *Id.*

372 See *Morrison*, 529 U.S. at 615-16; *Lopez*, 514 U.S. at 567 (“To uphold the Government’s contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.”).


374 [cite Hammer; others]
comprehends all “economic activity.” These concessions belie Erwin Chemerinsky’s assertion that “there has been a revolution with regard to the structure of the American government because of the Supreme Court decisions in the last few years regarding federalism.”

Despite such breathless assessments, these decisions seem important mostly for what they symbolize, not what they actually do. They may also (perhaps) remind the Congress to consider the limits of its powers when it acts. We must look elsewhere, however, for meaningful protection for state autonomy. Fortunately, there is an elsewhere, and it crops up in an unusual quarter. The same justices who have formed a monolithic dissenting bloc in cases like Lopez, Printz, and Seminole Tribe have also, in a different class of opinions dealing with the preemption of state law, developed their own theory of federalism enforcement. This theory forms the heart of the “weak autonomy” model of federalism doctrine.

I have already canvassed some of the Court’s recent preemption cases in my treatment of the strong sovereignty model. As I discussed, cases like Lorillard Tobacco Co. v. Reilly are striking because they reverse the ordinary voting alignments: Ordinarily pro-states justices forget about federalism in preemption cases, and generally nationalist justices suddenly remember. Nor are Lorillard or Iowa Utilities Board flukes. As Dan Meltzer has shown, the Lopez majority is consistently pro-preemption and the Lopez dissenters consistently oppose it.

The significance of the preemption cases goes beyond the voting alignments, however. Equally important are the rationales that the putatively nationalist give for reaching the results that they do. All these cases concern the central problem of how to treat federal statutes that are ambiguous on the subject of their preemptive effect on state law. There are a variety of sub-issues: How does the presence of an express preemption

375 See United States v. Morrison, 529 U.S. 598, 611 (2000) (“[I]n those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor.”).

376 Erwin Chemerinsky, The Federalism Revolution, 31 N.M. L. REV. 7, 7 (2001). To be fair, Professor Chemerinsky seems to have had in mind the anti-commandeering cases and the state sovereign immunity cases as well. But neither of those doctrinal lines has worked a “revolution with regard to the structure of the American government” either. The anti-commandeering cases involved minor statutes, and most commandeering is voluntary. See Young, Two Cheers, supra note ___, at ___; [Hills?]. And the state sovereign immunity cases, while much more important, leave many avenues for relief against states and are relatively continuous with prior precedent. They are thus “revolutionary” in neither a practical nor a doctrinal sense. See Young, Sky Falling, supra note ___, at ___.

377 See, e.g., PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 191-95 (1982) (discussing the “cuing function” of the National League of Cities doctrine); Bednar & Eskridge, supra note 202, at 1484 (arguing that Lopez may serve the same function).

378 That would be Justices Stevens, Souter, Ginsburg, and Breyer. These are sometimes called the “Fab Four” to match the “Federalist Five.”

379 See Meltzer, Judicial Passivity, supra note ___, at ___; see also Fallon, Conservative Paths, supra note ___, at ___.

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clause change the analysis for issues outside the scope of that clause? How much deference should the views of the enforcing agency get on the preemption question? Does it matter if Congress is regulating within a field of “traditional state concern”? But at bottom these are generally cases about how strongly to apply a longstanding rule of statutory construction that Congress should generally make itself clear before a court should find preemption of state law. On this question, the Lopez dissenters have generally demanded considerably more evidence to defeat this “presumption against preemption” than have the members of the Lopez majority.

Justice Stevens’ dissent in Geier v. American Honda Motor Co. provides a good window into the weak autonomy model of federalism doctrine. Geier was one of five major preemption cases decided in the 1999 Term. All of them went against the States, at the same time that the Court was working hard to promote state sovereignty in cases like Kimel v. Florida Board of Regents and the Alden trilogy. Geier itself was a products liability suit by an injured motorist who claimed that her car was defectively

380 Compare, e.g., Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517 (1992) (suggesting that presence of an express preemption clause creates a strong presumption that state measures not covered by that clause are not preempted) with id. at 545-48 (Scalia, J., concurring in the judgment in part and dissenting in part) (rejecting this view).

381 Compare, e.g., Medtronic, inc. v. Lohr, 518 U.S. 470, 505-07 (1996) (Breyer, J., concurring in part and in the judgment) (suggesting some degree of deference to agency interpretations of Congress’s preemptive intent) with id. at 511-12 (O’Connor, J., concurring and dissenting in part) (arguing against such deference to the agency).

382 Compare, e.g., United States v. Locke, 529 U.S. 89, 108 (2000) (suggesting that the presumption against preemption “is not triggered when the State regulates in an area where there has been a history of significant federal presence”) with Medtronic, 470 U.S. at 485 (majority opinion) (suggesting that the presumption applies “[i]n all pre-emption cases”).


384 See generally Young, Ordinary Diet, supra note ___, at ___. For an example, compare Gade v. Nat’l Solid Wastes Mgt. Assn., 505 U.S. 88, 96-104 (1992) (plurality opinion of O’Connor, J.) (finding that federal OSHA regulations impliedly preempted any state standard on a subject where a federal standard existed) with id. at 116-17 (Souter, J., dissenting) (insisting that “[i]f the statute’s terms can be read sensibly not to have a pre-emptive effect, the presumption controls and no pre-emption may be inferred”).


387 [cite]

designed because it lacked an airbag. Honda defended on the ground that Department of Transportation standards promulgated under the National Traffic and Motor Vehicle Safety Act did not require airbags for Ms. Geier’s model year, and that this federal policy judgment preempted the state tort suit. A majority of the Court agreed, finding that while the Act itself did not expressly preempt Ms. Geier’s suit, the suit did conflict with the policy embodied in the DOT’s regulations promulgated under the Act.

Justice Stevens began his analysis in dissent by noting that “'[t]his is a case about federalism,'” raising “important questions concerning the way in which the Federal Government may exercise its undoubted power to oust state courts of their traditional jurisdiction over common-law tort actions.” He emphasized the impact of federal preemption on the state’s autonomy to make basic policy choices for itself, insisting that “'the Supremacy Clause does not give unelected federal judges carte blanche to use federal law as a means of imposing their own ideas of tort reform on the States.'” Justice Stevens also highlighted the process concerns implicated by doctrines of implied preemption like the conflict theory employed by the Geier majority. “Congress neither enacted any such rule itself [that state courts may not entertain airbag suits] nor authorized the Secretary of Transportation to do so.” In such cases, the presumption against preemption should control:

The signal virtues of this presumption are its placement of the power of pre-emption squarely in the hands of Congress, which is far more suited than the Judiciary to strike the appropriate state/federal balance (particularly in areas of traditional state regulation) . . . . In this way, the structural safeguards inherent in the normal operation of the legislative process operate to defend state interests from undue infringement.

389 Geier, 529 U.S. at ___.
390 Id. at ___.
391 529 U.S. at 887 (Stevens, J., dissenting) (quoting Coleman v. Thompson, 501 U.S. 722, 726 (1991)). Coleman was a habeas case that strongly emphasized the respect that federal courts owe to state tribunals. By quoting that language, Justice Stevens both tweaked his more conservative colleagues in the majority (Stevens had dissented in Coleman) and made the more important point that preemption cases raise the same sorts of basic federalism concerns that are more commonly acknowledged in other kinds of cases.
392 Id. at 894.
393 Id. at 887.
394 Id. at 907. Likewise, Justice Stevens identified even more serious process concerns where, as in Geier, “the preemptive effect of an administrative regulation is at issue.” Id. at 908. He explained:

Unlike Congress, administrative agencies are clearly not designed to represent the interests of States, yet with relative ease they can promulgate comprehensive and detailed regulations that have broad pre-emption ramifications for state law. We have addressed the heightened federalism and nondelegation concerns that agency pre-emption raises by using the presumption [against preemption to build a procedural bridge across the political accountability gap between States and administrative agencies. Thus, even in cases where implied regulatory pre-emption is at issue, we generally “expect an administrative regulation to declare any intention to pre-empt state law with some specificity.” . . . This expectation . . . serves to ensure that States will be able to have a dialog with agencies regarding pre-emption decisions ex ante through the normal notice-and-comment procedures of the Administrative Procedure Act.
Finally, Justice Stevens stressed the dialogic nature of the “soft” presumption against preemption; rejecting the preemption argument in the case before the Court, he noted, would still leave to the political branches the option of clarifying their preemptive intent later on.395

The presumption against preemption that Justice Stevens argued for in *Geier* is, of course, a rule of statutory construction. For that reason, many seem to treat preemption cases as hardly raising any constitutional issues at all.396 But the presumption against preemption – along with the other pro-federalism “clear statement” rules – are in fact a form of constitutional review. Clear statement rules matter only when they cause a court to pick an interpretation of a statute other than the one it would have picked in the absence of the rule.397 That requires us to ask, What justifies a court in departing from what would otherwise be its best interpretation of what the enacting Congress intended? I argue in Part VII that the best answer to that question in the federalism context – perhaps the only plausible answer – is that principles of federalism derived from the constitutional structure require the departure. The clear statement rules must be defended on the same sorts of grounds as, say, the anti-commandeering doctrine: Both doctrines are judge-made rules, not clearly grounded in constitutional text, but functionally promising as means to enforce federalism under contemporary conditions.398

When a court applies a judge-made rule of statutory construction for the purpose of protecting state autonomy, in other words, it is enforcing the Constitution. Such a decision neither ignores federalism concerns nor, as Justice Souter suggested in his *Morrison* dissent, “rems them to politics.”399 The preemption cases thus make clear that when these justices speak of “political safeguards” in the Commerce Clause and state sovereign immunity cases, they are willing to formulate and apply doctrine to try to ensure that those safeguards have some bite.

Several qualifications are in order. First, the various justices’ positions in preemption cases are not nearly as consistent as their positions on the Commerce Clause or the Eleventh Amendment. Justice Breyer wrote the pro-preemption majority opinion

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395 Id. at 980-09 (quoting California Coastal Comm’n v. Granite Rock Co., 480 U.S. 572, 583 (1987)).

396 See id. at 912 (“Requiring the Secretary to put his pre-emptive position through formal notice-and-comment rulemaking -- whether contemporaneously with the promulgation of the allegedly pre-emptive regulation or at any later time that the need for pre-emption becomes apparent -- respects both the federalism and nondelegation principles that underlie the presumption against pre-emption in the regulatory context and the APA’s requirement of new rulemaking when an agency substantially modifies its interpretation of a regulation.”).

397 See, e.g., Gardbaum, *Preemption*, supra note 383, at 768 (observing that “preemption has largely been ignored by constitutional law scholars,” despite the fact that “it is almost certainly the most frequently used doctrine of constitutional law in practice”). There is, of course, the point that state laws conflicting with federal laws are unconstitutional under the Supremacy Clause, but the anterior question of how to interpret the scope of the federal law is generally thought to raise no constitutional concern.

398 See Schauer, *Ashwander Revisited*, supra note ___, at ___ (making this point in the particular context of the canon favoring construing statutes to avoid constitutional questions).

399 See infra Section VII.___.

in *Geier*, for example, and Justice Thomas dissented in *Iowa Utilities Board*. Over the run of cases, the four *Lopez* dissenters are pretty consistently “better” for the States in preemption cases, but these cases are not uniformly five-to-four, many are unanimous, and most justices are likely to vote for preemption in some cases and others. This should not be surprising, since preemption cases will always turn at least in part on what the particular statute in question actually says.

The second caveat is that while the dissenters have promoted a vision of process-based, soft limits on federal power in the preemption cases, they have often been unwilling to follow that model in similar sorts of cases arising in other contexts. Although the record is mixed, these justices have often been skeptical of pro-federalism clear statement rules outside the context of preemption. Justice Stevens, who often seems the intellectual leader of the bloc in terms of developing an alternative positive vision of state autonomy, nonetheless dissented from the seminal clear statement decision in *Gregory v. Ashcroft*. Both Justices Stevens and Souter have been skeptical of clear statement rules protecting state governments from statutory liability, and none of the *Lopez* dissenters were willing to accept a clear statement requirement for federal legislation delegating authority to federal administrative agencies seeking to push the limits of the commerce power.

Even more important, the “weak autonomy” justices have been unwilling to extend their notion of process federalism to embrace “hard” rules predicated on political malfunctions. All four joined Justice Stevens’s strong dissent in *Printz*, which rejected “hard” limits in favor of “political safeguards” for state authority. This rejection of the process-based anti-commandeering doctrine, taken together with their reticence on clear statement rules outside the preemption context, suggests that the *Lopez* dissenters have not yet followed through on *Garcia*’s invitation to develop a full-blown “Democracy and Distrust” model of federalism doctrine.

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400 See generally Young, *Preemption*, supra note ___, at ___ (describing the voting patterns in preemption cases in more detail).

401 *Jones v. United States*, 529 U.S. 848 (2000), is the most important exception to this skepticism. *Jones* was unanimous, and Justice Ginsburg wrote the majority opinion. *Jones* was joined by Justice Ginsburg, Justice Breyer, and Justice Souter.


Notwithstanding these limitations, it is important to recognize that the Lopez dissenters do have a theory of federalism. It is not judicial abdication, and it highlights a value – state autonomy – that the Court’s putatively pro-states majority has often ignored. The dissenters’ theory may be incomplete, as I argue in the next section, but it deserves to be taken seriously.

D. Strong Autonomy

The weak autonomy model of federalism doctrine has much to recommend it, but I doubt it describes in itself an adequate judicial role in enforcing the federal balance. Its unwillingness to draw any firm substantive boundaries for federal power seems likely to send a dangerous message to Congress – that is, that it may behave as if no such boundaries exist. And it likely underestimates the extent to which some problems with the process by which states are supposedly represented in Congress may require stronger medicine than clear statement rules. In this Section, I sketch the outlines of a model that borrows much from weak autonomy but is, in general, somewhat more willing to look to substance and to employ hard doctrinal rules. For want of a better term, I call this model “strong autonomy.”

The approach I propose differs from the “weak autonomy” model in at least three important respects. First, it would employ a wider variety of soft, clear statement-type rules than the Lopez dissenters have been willing to accept. While the dissenters have been relatively strong supporters of the presumption against preemption, they have been far more reluctant to accept other clear statement rules, such as the requirement that Congress generally may not delegate authority to push the limits of its Commerce Clause authority to an administrative. This reluctance is understandable: The clear statement rules are often predicated on the canon of avoiding constitutional doubts, and in many of these cases the dissenters believe that there is no constitutional difficulty under the Commerce Clause to be “avoided.” Better, then, simply to enforce the statute as it would be interpreted without any such presumption.

This view, however, neglects the possibility that federalism constraints like the Commerce Clause may simply be under-enforced. As Larry Sager has demonstrated, some constitutional principles are never fully realized in judicial doctrine because of institutional constraints on the ability of courts to enforce them; this does not mean, however, that those “underenforced” norms are not themselves constitutional law. For

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406 Simply acknowledging some limit on Congress, on the other hand, may be salutary even if it is not a strict one. As my colleague Doug Laycock has pointed out, “[t]he federalism cases . . . have already changed the way the federal government works. At the very least, vast amounts of effort are expended in the other two branches trying to figure out the limits of these cases and how to work within them or around them.” Posting of Douglas Laycock to CONLAWPROF@listserv.ucla.edu (Aug. 1, 2000) (quoted with permission).


408 See id. at 192-97 (rejecting any Commerce Clause argument against the federal regulation in question).

reasons that I discuss further in Part VI, it makes sense to think of many constitutional limits on federal power as underenforced, especially after 1937. That fact argues for decoupling the federalism clear statement rules from the existence of an underlying constitutional likelihood that a court would strike down the statute in question if it were not narrowly interpreted. The fact that Congress might well have the authority to regulate migratory birds in the Solid Waste case, for example, doesn’t mean that it is inappropriate to require a clear statement delegating authority to the Corps of Engineers to do so. Hence, even if one accepts the dissenting position that courts are not institutionally well-suited to enforce hard limits on the Commerce Clause, one might still think that soft limits on that authority are justified. The strong autonomy model would also value the process-forcing aspects of these clear statement rules, not just in preemption cases but across the board.

Second, the strong autonomy model contemplates that process federalism may be enforced through hard rules as well as soft ones. In this, it builds upon the suggestion in Garcia that “[a]ny substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process.” The anti-commandeering rule of Printz and New York is a good example: Because they clarify lines of political accountability and force the national government to internalize its financial and political costs, Printz and New York fit squarely into the model of process-correcting doctrines that Garcia seemed to authorize. Given the importance of such rules, moreover, the strong autonomy model might also seek ways to constrain Congress’s ability to circumvent them through the spending power.

The “weak autonomy” justices, however, have made relatively clear that they are unwilling to go beyond “soft” presumptions in imposing limits on federal power. It seems likely that this reluctance stems from an intuition that “clear statement” rules are not really constitutional rules at all – they’re just rules of statutory construction. I have already argued that that view is a mistake: One cannot justify pushing the interpretation of a statute in a particular substantive direction unless one thinks either that the enacting legislature would have intended that direction or some other source of law authorizes the push. Few think the federalism canons are in fact accurate descriptions of Congress’s intent, and the only alternative justification for them is that they are derived from the

410 See Young, Constitutional Avoidance, supra note ___, at 1603-04 & n.281 (suggesting that several important aspects of the structural constitution – including federalism limitations – are underenforced in the sense identified by Professor Sager).

411 See Gregory v. Ashcroft, 501 U.S. 452, 464 (1991) (“[I]nasmuch as this Court in Garcia has left primarily to the political process the protection of the States against intrusive exercises of Congress’ Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise. ‘To give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for lawmaking on which Garcia relied to protect states’ interests.’ “) (quoting LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-25, at 480 (2d ed. 1988)).


413 See, e.g., Seminole Tribe of Fla. v. Fla., 517 U.S. 44, 183-84 (1996) (suggesting that clear statement rules should be the primary strategy for limiting federal power and that harder rules – such as a total prohibition on legislative abrogation of state sovereign immunity – are inappropriate).
constitutional structure itself. 414 If that is so, then there is considerably less of a principled distinction between “hard” and “soft” rules than the Lopez dissenters seem to think.

Finally, the approach I propose recognizes a link between process and substance in cases implicating state autonomy. As I discuss in Part ___, arguments about “political safeguards” for federalism presuppose that states are viable, functioning governments with sufficiently important and salient responsibilities to attract and retain the loyalty of their citizens. For that to be true, however, states must retain some minimum level of autonomy. Process federalism probably cannot work without some ultimate check on the national government’s ability to appropriate important governmental responsibilities exercised by the states. Any rule designed to maintain that check, however, seems likely to be substantive in its structure. It seems likely that process checks should play a primary role in constraining the national government, but some minimal substantive check may also be necessary. 415

Much of the remainder of this essay is concerned with fleshing out and defending this strong autonomy model of federalism doctrine. Whether or not that defense is persuasive, however, it is important to recognize that different sorts of federalism doctrines may have quite different implications. Our current debates about federalism, unfortunately, generally fail to recognize many of these distinctions. That has lent a stilted and ideological cast to discussions about federalism in the academy and in the society at large. We are more likely to come up with persuasive solutions if we realize that the problem is more complex and multi-sided than is frequently supposed.

III. Federalism, History, and Constitutional Change

My central concern in this article is how we should choose among the different theories of federalism doctrine discussed in the preceding Part. One possibility is that the text and history of the Constitution make that decision for us, either by mandating particular doctrines or at least embodying a particular theory of federalism. Assuming we find text and history binding – and I will discuss different reasons why we might – these two possibilities suggest different degrees of constraint for judges tasked with enforcing federalism today. The former would leave relatively little room for judicial creativity; federalism doctrine would be found, not made. The latter, on the other hand, would leave judges free to fashion means for implementing, say, a strong sovereignty theory of federalism, but would foreclose consideration of alternate models.

I argue in this Part that neither text nor history constrains federalism doctrine in either of these two senses. While textual and historical arguments have played a critical role in recent federalism cases – witness, for instance, the historical trench warfare between Justices Stevens and Thomas in the Term Limits case 416 – they play a less central

414 See supra TAN ___; see also Young, Constitutional Avoidance, supra note __, at ___ (making a similar argument about the clear statement requirement for incursions on federal court jurisdiction).

415 See infra Section ___; see also Young, Two Cheers, supra note __, at ___.

part in my own analysis. This hardly means that text and history are unimportant, but they leave many of the crucial questions unanswered. This Part seeks to explain what the role of text and history is, and to explore the limits of what history can and can’t tell us about federalism.

The most important role for text and history, I argue in Section A, is to require us to have a federalism doctrine. The Constitution creates a federal structure and its provisions presuppose the continued viability of two distinct levels of government. Fidelity to that design requires a continuing commitment to the basic elements of that structure; even if one were convinced that all the functional arguments for federalism discussed in the previous Part were spurious, it would not be open to us to reject federalism and create a unitary structure. Government officials bound by the Constitution have a continuing obligation to enact and enforce laws and create doctrines that maintain the basic attributes of the federalism in place. But exploring the basis for such an obligation makes clear that it necessarily entails substantial flexibility in adapting the original structure to current needs.

Section B contends that this is true notwithstanding the fact that the historical thrust of the Founding era was to centralize government. A number of scholars have pointed out that the drafters of our Constitution generally were nationalists, driven by the failures of the Articles of Confederation to create a much stronger national government than anything the country had known before; as a result, these scholars claim, it is anachronistic to look to the Founders for support for limits on national authority. While conceding the premise, I argue that the conclusion does not follow. The fact that the Founders wished to create an equilibrium more nationalist than the previous arrangement hardly proves that under present circumstances, when national power has expanded beyond their wildest dreams, fidelity to the Constitution does not support movement in the opposite direction.

Finally, in Section C, I argue that text and history can tell us relatively little about the shape of federalism doctrine under contemporary circumstances. The primary strategy of the original Constitution for preserving the federal balance – the doctrine of enumerated powers – has become far less effective over the last century with the advent of an integrated national economy. And the Framers’ political strategy, relying on the direct representation of the States in Congress, has been undermined by such developments as the direct election of senators and the advent of political parties and interest group politics. These developments do not release us from the obligation to preserve a federal balance, but they do mean that contemporary statesmen and judges may well have to devise new and innovative techniques to protect that balance under modern conditions.

417 See, e.g., Mark R. Killenbeck, Pursuing the Great Experiment: Reserved Powers in a Post-Ratification, Compound Republic, 1999 SUP. CT. REV. 81, 85 (“[T]he recent federalism opinions undervalue the extent to which the Framers and Founders embraced certain constitutional precepts as necessary means for reaching appropriate ends, perhaps the most important of which was to curtail the sovereignty of the states.”).
A. Fidelity and Its Limits

Debates about federalism often proceed as if the constitutional principle of federalism must stand or fall based on the functional values that it serves. The implicit suggestion seems to be that if federalism can be shown to be a bad idea from the standpoint of protecting human rights or promoting good policy, we would be justified in reading that principle out of the Constitution. That suggestion flies in the face of the very notion of constitutionalism, which is to entrench certain structures and values so that they will be highly resistant to change, even if those structures or values fall out of favor with the present generation. My own view, of course, is that federalism does serve important values, and Part III of this essay argues that those values should help determine the structure of federalism doctrine in important ways. But I want to insist in this Section that the constitutional principle of a federal balance would compel our adherence even if it could be shown to be pernicious from a policy standpoint.

Any argument from fidelity, of course, must begin with what the text and history of the Constitution actually entail. Because those materials have been well-canvassed elsewhere, I provide only the briefest overview here. I then discuss the nature and limits of arguments from textual and historical fidelity in the context of federalism.

1. Text and History

The constitutional text says relatively little about federalism. But then, why would it? As I have discussed, this is the national government’s constitution, not a constitution for the system as a whole. The essential creative work of the federal constitution was to empower the new national government and establish its internal structure. Just as the federal Bill of Rights was originally unconcerned with limiting state governments, so too the original Constitution was not directly concerned with empowering state governments.

One critical component of the federal structure is present in the original text: the principle of enumerated powers. Simply by listing specific powers for Congress rather than conferring a general legislative authority, Article I establishes the notion that federal

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418 See, e.g., Lino A. Graglia, “Interpreting” the Constitution: Posner on Bork, 44 STAN. L. REV. 1019, 1030 (1992) (“The purpose of constitutional restrictions on self government is to impede policy adjustments in light of changing circumstances.”); 1 TRIBE, supra note 67, § 1 -8, at 23 (comparing constitutional restrictions to the ropes that bound Ulysses to the mast of his ship so that he would not be able to succumb to the temptation of the Sirens).

419 See supra Section ___.


421 See Matthew D. Adler, State Sovereignty and the Anti-Commandeering Cases, 574 ANNALS AM. POL. SCI. ASS’N 158, 162 (2001) ( “Places in the constitutional text where the states are explicitly accorded rights against the national government are few in number and relatively minimal in importance--notably, Article I, Section 9’s prohibition of federal taxes on exports from any state and of federal preferences for the ports of one state over another; Article IV, Section 3’s ban on the creation of new states through the division or merger of old ones; and various references to the state legislatures, implying that Congress cannot validly abolish them.”).
power is limited. Although Article I also included a robust notion of implied powers, Chief Justice Marshall would acknowledge in *Gibbons v. Ogden* that “[t]he enumeration presupposes something not enumerated.” The Tenth Amendment emphatically underlines this notion. Even if Justice Stone was right to suggest that this Amendment states “but a truism that all is retained which has not been surrendered,” contemporary confusion about that point suggests that this in itself is an important office.

In hindsight, it turns out that categorical enumeration may not be such a great strategy for guaranteeing balance in a federal system. As I discuss in Section B, the failure of this strategy to prevent the national government from invading virtually every category of state activity presents a difficult problem for federalism doctrine. For present purposes, however, my point is simply that the original constitution includes, as a purely textual matter, a strong commitment to a balanced federal structure. The document not only refers to the states as viable and responsible actors at several points, but also structures the basic grant of federal lawmaking power – arguably the Constitution’s most important feature – in a way designed to preserve state autonomy.

If the text itself focuses on empowering the federal government, the surrounding history features more prominent concern for protecting the states. As Justice Powell observed in *Garcia*, “[m]uch of the initial opposition to the Constitution was rooted in the fear that the National Government would be too powerful and eventually would eliminate the States as viable political entities.” Some of this concern shaped the drafting of the document itself at Philadelphia. As Jack Rakove has recounted, James Madison and

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422 See, e.g., United States v. Morrison, 529 U.S. 598, 619 n.8 (2000) (“With its careful enumeration of federal powers and explicit statement that all powers not granted to the Federal Government are reserved, the Constitution cannot realistically be interpreted as granting the Federal Government an unlimited license to regulate.”).


424 22 U.S. (9 Wheat.) 1, 195 (1824).

425 See, e.g., Alden v. Maine, 527 U.S. 706, 713-14 (1999) (“The limited and enumerated powers granted to the Legislative, Executive, and Judicial Branches of the National Government . . . underscore the vital role reserved to the States by the constitutional design, see, e.g., Art. I, § 8; Art. II, §§ 2-3; Art. III, § 2. Any doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment, which, like the other provisions of the Bill of Rights, was enacted to allay lingering concerns about the extent of the national power. The Amendment confirms the promise implicit in the original document.”).

426 United States v. Darby, 312 U.S. 100 (1941).

427 See *infra* Section C. For an argument that emerging federal systems should not rely overmuch on the strategy of enumeration, see Young, *European Union*, supra note 42, at 1662-77.

James Wilson arrived at Philadelphia with an aggressive plan “to render the Union politically independent of the states and the states legally dependent on national oversight.” But this position “only inspired other delegates to articulate their notions of statehood with equal vigor, ultimately producing in recoil a reaffirmation of the vital place that the states would occupy in the federal system.” That reaffirmation is reflected in the structure of the Senate, implementation of the principle of federal supremacy, and the scope and definition of federal legislative power.

These concessions did not satisfy everyone. In one of the most influential critiques, for example, Elbridge Gerry complained that “[t]he Constitution has few, if any federal features, but is rather a system of national government.” Brutus, a pseudonymous writer in New York, conceded that the proposed Constitution did not “go to a perfect and entire consolidation,” yet warned that “it approaches so near to it, that it must, if executed, certainly and infallibly terminate in it.” As I discuss further in Section B, most Anti-Federalists were not states-rights absolutists; many were willing to concede the need to strengthen national authority beyond the Articles of Confederation model. But virtually all Anti-Federalists feared that the Philadelphia draft took this imperative too far.

The Anti-Federalist opposition does not, of course, itself establish a constitutional commitment to federalism; standing alone, it would corroborate claims that the Constitution was a profoundly nationalizing document. What is critical is the response to these concerns by the Constitution’s proponents. They might have conceded the charge of consolidation and defended the virtues of national government; that is surely what most legal scholars today would have chosen to do had they been there. But

429 RAKOVE, supra note 51, at 169.
430 Id. at 170; [others]
431 See RAKOVE, supra note 51, at 170-80. As I discuss further infra TAN ___. Madison’s own views evolved as the Convention worked through these issues, so that in the end he incorporated the States’ role as a central component of his theory of checks and balances. See, e.g., LANCE BANNING, THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC 140 (1995) (observing that the positions taken in the Federalist “confessed [Madison’s] reconciliation to decisions he had earlier opposed and outlined a position he defended through the rest of his career”).
432 Elbridge Gerry to the Massachusetts General Court (Nov. 3, 1787), reprinted in 1 THE DEBATE ON THE CONSTITUTION 231, 232 (Bernard Bailyn, ed., 1993) [hereinafter DEBATE]. Luther Martin likewise complained that the Philadelphia draft was not “in reality a federal but a national government” that would bring about a “consolidation of all State governments.” Luther Martin, Genuine Information, reprinted in HERBERT J. STORING, ED., 2 THE COMPLETE ANTI-FEDERALIST 45 (1981).
433 Brutus I (Oct. 18, 1787), reprinted in 1 DEBATE, supra note 432, at 164, 166.
434 See infra TAN ___.
435 See RAKOVE, supra note 51, at 181 (observing that “[f]or Anti-Federalists, the decisive fact about the Constitution was how much more ‘national’ it was than the Confederation”); [more cites]
436 The persistence of the political tradition that the Anti-Federalists represent, on the other hand, does strengthen the case for a historical commitment to balance in our federal system. See infra TAN ___.
437 [cites]
instead the Constitution’s most prominent defenders chose to concede – even reaffirm – the importance of state governments and deny that the proposed national entity would unduly threaten the states’ role. As Mark Killenbeck observes, the Antifederalists’ “concerns were widely shared, and these individuals played an important role in shaping the text, the ratification dialogues, and, eventually, the drafting and ratification of what became the Tenth Amendment.” The debates thus strongly suggest that both Federalist and Anti-Federalist leaders alike were committed to a meaningful role for state governments under the new regime. More importantly, the fact that such arguments were thought to be necessary in order to achieve ratification indicates broad-based support for federalism in the Founding Generation at large.

The Federalist assurances about state sovereignty and autonomy have been well-catalogued elsewhere, and I will provide only a few illustrative examples here. James Wilson’s summation to the Pennsylvania ratifying convention insisted that the proposed Constitution, “instead of placing the state governments in jeopardy, is founded on their existence.” Madison conceded in Federalist 39 that the new government had several national features but emphasized that it remained federal in many crucial respects. In particular, he observed that in “the extent of its powers . . . the proposed Government cannot be deemed a national one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects.” And more specific assurances were given as well. Hamilton, for example, pledged in Federalist 81 that nothing in the Constitution should be understood as overriding the traditional principle of state sovereign immunity.

Nor were these references to the continuing importance of state governments mere grudging concessions to the opposition. Federalism, for instance, constitutes one half of the “double security” at the core of Madison’s theory of checks and balances in Federalist 51. Lance Banning has concluded that “[d]uring the ratification contest, as

438 Killenbeck, supra note 417, at 107. See also [others]

439 See Killenbeck, supra note 417, at 107 (acknowledging that “[p]reserving state ‘sovereignty’ was . . . an operative and occasionally important founding principle”).

440 [cites]

441 *James Wilson’s Summation and Final Rebuttal* (Dec. 11, 1787), reprinted in 1 DEBATE, supra note 432, at 832, 841.

442 Federalist No. 39, supra note ____, at 256 [Cooke ed.]; see also infra TAN ____ (discussing Madison’s assurance, in Federalist [45 or 46] that states would have the advantage in political competition between the two levels of government).

443 Federalist No. 81, supra note ____, at 548-49 [Cooke ed.]. The more difficult question is whether Hamilton meant that further measures, such as federal statutes specifically purporting to strip the states of their immunity in particular classes of cases, could not override the traditional immunity from suit. On that question, see Seminole Tribe of Fla. v. Fla., 517 U.S. 44, ____ (1996) (Souter, J., dissenting) (carefully tracking Hamilton’s argument).

444 Madison argued that “the compound republic of America” provided a “double security . . . to the rights of the people” because, through the combination of federalism and separation of powers, “[t]he different governments will controul each other; at the same time that each will be controuled by itself.” Federalist No. 51, supra note ____, at 351 [Cooke ed.]. See generally infra TAN ____ (discussing Madison’s theory).
in 1793, Madison desired a well-constructed, partly federal republic—not, like Hamilton, because he thought that nothing more could be obtained, but (more like many Antifederalists of 1788) because he thought that nothing else would prove consistent with the Revolution.”\textsuperscript{445} As Professor Banning’s comments indicate, not all Framers—especially not Hamilton—necessarily shared this view. But where we must choose between them, it seems likely that Madison’s is the more important perspective.\textsuperscript{446}

In the end, some of the Framers may have had their doubts about state power.\textsuperscript{447} But we deal here in original understandings, not intentions,\textsuperscript{448} and there seems little doubt that the Constitution was understood to reserve an important place for state governments. As Jack Rakove concludes,

The existence of the states was simply a given fact of American governance, and it confronted the framers at every stage of their deliberations. In the abstract, some of the framers could imagine redrawing the boundaries of the existing states, and a few hoped to convert the states into mere provinces with few if any pretensions to sovereignty. But in practice the reconstruction of the federal Union repeatedly led the framers to accommodate their misgivings about the capacities of state government to the stubborn realities of law, politics, and history that worked to preserve the residual authority of the states—and with it the ambiguities of federalism with which later generations would continue to wrestle.\textsuperscript{449}

I begin wrestling with exactly what the Framers’ accommodation commits us to in the next subsection.

2. The Argument from Fidelity

If the text and history of the Constitution entail a commitment to federalism, what does that mean for the Constitution’s present interpreters? The answer depends on two different kinds of constitutional theories: a theory of obligation and a theory of interpretation.\textsuperscript{450} The first asks, What is it about the Constitution that binds us? The second inquires, How do we ascertain the meaning of the materials that bind us? Although these two questions are related in important ways, they are not the same, and

\textsuperscript{445} BANNING, supra note 431, at 297.

\textsuperscript{446} See, e.g., RAKOVE, supra note 51, at xvi (noting that “Madison was the crucial actor in every phase of the reform movement that led to the adoption of the Constitution’’); [cites on Hamilton as idiosyncratic].

\textsuperscript{447} See also note 470 and accompanying text.

\textsuperscript{448} [cites; W&M?]

\textsuperscript{449} RAKOVE, supra note 51, at 162.

\textsuperscript{450} See Vermeule & Young, supra note 205, at ____ (discussing theories of constitutional obligation and their relation to theories of interpretation).
keeping them separate will help in assessing arguments about fidelity to the Constitution’s federalist commitments. 451

One might express this insistence in a number of different ways, depending on the theory of constitutional obligation that one brings to the enterprise. Those who view the Constitution as a binding social contract would stress the inherent authority of the initial bargain. Other sorts of originalists might stress the binding nature of the Constitution as law, based on the authority vested in the Ratifiers by the sovereign People. 452 Conventionalists, on the other hand, would emphasize the need for society to agree on a basic set of constitutive principles; such agreement becomes difficult if, once a particular document is agreed upon, people remained free to pick and choose which principles in that document will actually be binding in individual instances. 453 Finally, Burkeans would point to the prescriptive wisdom immanent in a political order that has survived for over two centuries and view departures from that order with suspicion. 454

Each of these different arguments establishes the binding nature of constitutional obligation, independent of whether we would approve various principles or structures in the Constitution on moral or policy grounds. 455 The breadth of that obligation, however, will depend at least to some extent on the particular rationale for constitutional obligation one accepts. The broadest obligation would stem from the view that the original understanding binds of its own force – that is, we are bound by the Framers’ conception of federalism because they said so. I have argued at length elsewhere that this conception


452 See, e.g., Henry P. Monaghan, Our Perfect Constitution, 56 N.Y.U. L. REV. 353, 375-76 (1981) (“Our legal gründnorm has been that the body politic can at a specific point in time definitively order relationships, and that such an ordering is binding on all organs of government until changed by amendment.”); Richard S. Kay, Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses, 82 NW. U. L. REV. 226, 231 (1988).


454 See, e.g., Edmund Burke, Speech on the Reform of the Representation in the House of Commons (1782), in 2 THE WORKS OF THE RIGHT HON. EDMUND BURKE 486, 487 (Henry G. Bohn ed., 1841) (“It is a presumption in favour of any settled scheme of government against any untried project, that a nation has long existed and flourished under it.”); see also Anthony Kronman, Precedent and Tradition, 99 YALE L.J. 1029 (1990); Young, Rediscovering Conservatism, supra note 80, at 648-50.

455 Other theories of obligation might focus on this sort of moral or policy approval; we obey the Constitution because we think it is a good one. I generally agree with Michael McConnell that these sorts of approaches to constitutional obligation tend to defeat the very notion of constitutionalism itself. See McConnell, Dead Hand, supra note 451, at 1129 (“If the Constitution is authoritative only to the extent that it accords with our independent judgments about political morality and structure, then the Constitution itself is only a makeweight: what gives force to our conclusions is simply our beliefs about what is good, just, and efficient.”). Federalism can, of course, still be defended on these grounds, but the arguments would have little to do with history; instead, they would focus on the political and policy benefits of a federal structure. See infra Part ____. The present Part is concerned with what text and history can and cannot tell us; accordingly, it makes sense to focus on theories of obligation placing some value on those sources.
of constitutionalism is less persuasive than one that takes account of the entire arc of our history, and most seem unwilling to accord this sort of dispositive authority to a particular phase of our national development. And even those who do accept the contractarian account of obligation tend to moderate its implications for radical change in other ways, such as a strong commitment to \textit{stare decisis} in adjudication. Others have insisted that fidelity to the Constitution’s original understanding may \textit{require}, under modern circumstances, some alteration in institutions or doctrine.

The other accounts of obligation produce significantly more limited implications. Take conventionalism first. The basic notion here is that a diverse society needs to agree on a basic set of ground rules, which include not only a constitution but also basic rules for interpreting that constitution. The need to secure widespread agreement tends to rule out efforts to substitute some other set of principles for the constitution that history has left us. But conventionalism is basically presentist in its fundamental criterion: the need to secure societal acceptance. As a result, the constitution that binds is the one that has come down to us – a product of the entire arc of our history, rather than a few isolated founding moments. If the fundamental goal is societal agreement on a basic set of rules, we cannot isolate the Constitution from “the gloss that life has written on it,” because that gloss informs what our fellow citizens understand the Constitution to mean. The conventionalist is thus bound by more recent history as well as the Founding, and he will find it impossible to reject entirely the more nationalizing trends of the Twentieth Century.

The Burkean perspective is similar. Like the conventionalist, the binding force of history extends to the whole sweep of our national story: not just 1787, but 1800, 1868, 1876, 1937, 1980, 1994, etc. Burkes are skeptical of human reason and foresight in the setting-up of political arrangements, and they doubt the capacity of any single generation, no matter how extraordinary, to comprehend, anticipate, and capture in a set of political institutions all the needs and contingencies of a large and complex society. They thus

\begin{enumerate}
\item[456] See Young, \textit{Rediscovering Conservatism}, supra note 80, at 673 (insisting that “there can never be a single isolated point in time to which we can appeal to find the complete meaning of our mutual commitments”).
\item[457] See, e.g., Kay, supra note 452, at 229; Monaghan, supra note 452, at 382 (“The expectations so long generated by this [nonoriginalist] body of constitutional law render unacceptable a full return to original intent theory in any pure, unalloyed form.”).
\item[459] \[Strauss\]
\item[460] \[Missouri v. Holland?\]
\item[461] See, e.g., Terrance Sandalow, \textit{Constitutional Interpretation}, 79 Mich. L. Rev. 1033, 1070 (1981) (“The question is not simply what the framers thought, but what has become of their ideas in the time between their age and ours.”).
\item[462] See Edmund Burke, \textit{Reflections on the Revolution in France}, in \textit{8 The Writings and Speeches of Edmund Burke} 138 (Paul Langford ed., Clarendon Press 1989) (hereinafter Burke, \textit{Reflections}) (“We are afraid toto put men to live and trade each on his own private stock of reason, because we suspect that this stock in each man is small, and that the individuals would do better to avail themselves of the general bank and capital of nations and of ages.”); see also J.G.A. Pocock, \textit{Burke and the Ancient Constitution—a Problem in the History of Ideas}, in \textit{Politics, Language and Time: Essays on Political Thought and}
stress the organic and incremental growth of political institutions over time.\textsuperscript{463} This perspective at once inspires a reverence for the past – the present generation, after all, is no more omniscient than its predecessors – and a limit on that reverence based on appreciating the need for constant reform.\textsuperscript{464} The insistence that reform be incremental, however, means that Burkeans will be almost prohibitively reluctant to launch a broad attack on established institutions.\textsuperscript{465} Like the conventionalist, then, a Burkean proponent of federalism must be prepared to live with the New Deal and other institutional alterations in the original structure that have themselves stood the test of time.

From a variety of different theoretical perspectives, then, federalism’s prominent place in the original constitutional design as well as its continuing significance in the years since impose an obligation of fidelity to the notion of a federal balance between States and Nation. As Jenna Bednar and William Eskridge have observed, “[c]onstitutional law must make some sense of federalism.”\textsuperscript{466} The conventionalist and Burkean perspectives allow for gradual evolution of this balance over time, however. Moreover, as I have already discussed, even a strong originalists may have to allow for “translation” of the original understanding into contemporary circumstances.\textsuperscript{467} For that reason, history can provide only limited guidance on the question of what federalism doctrines to adopt. Before discussing that problem, however, I must deal with a potential counter-argument – that is, that because the Founding Generation intended the Constitution to create a more nationalistic one than existed under the Articles of Confederation, fidelity in fact requires adherence to a strong nationalist vision. I address that argument in the next section.

B. The Nationalist Vector

One cannot dispute that the Constitution is a centralizing document. The Framers did not meet in Philadelphia in 1787 because they feared the overweening power of the Confederation Congress. Rather, they were concerned about weakness at the center:

\begin{quote}
HISTORY 202, 203 (1971) (“[B]urke’s account of political society . . . endows the community with an inner life of growth and adaptation, and it denies to individual reason the power to see this process as a whole or to establish by its own efforts te principles on which the process is based.”).
\end{quote} \textsuperscript{463}

\begin{quote}
See \textit{Burke, Reflections, supra} note 462, at 217 (“By a slow but well-sustained progress, the effect of each step is watched; the good or ill success of the first, gives light to us in the second . . . . The evils latent in the most promising contrivances are provided for as they arise. . . . We compensate, we reconcile, we balance.”).
\end{quote} \textsuperscript{464}

Edmund Burke, after all, spent virtually his entire political career as a Whig reformer. See, e.g., \textit{Burke, Reflections, supra} note 462, at 206 (“A disposition to preserve, and an ability to improve, taken together, would be my standard of a statesman.”); see generally CONOR C. O’BRIEN, THE GREAT MELODY: A THEMATIC BIOGRAPHY AND COMMENTED ANTHOLOGY OF EDMUND BURKE (1992) (stressing the reformist aspect of Burke’s career).

\begin{quote}
See \textit{Burke, Reflections, supra} note 462, at 112 (“[I]t is with infinite caution that any man ought to venture upon pulling down an edifice which has answered in any tolerable degree for ages the common posse of society.”).
\end{quote} \textsuperscript{465}

\begin{quote}
Bednar & Eskridge, \textit{supra} note 202, at 1448.
\end{quote} \textsuperscript{466}

\begin{quote}
See \textit{supra} Section ____.
\end{quote} \textsuperscript{467}
Congress’s inability “to frame and implement satisfactory foreign policies,”468 for example, or to put the Union on a firmer financial footing.469 Many of the Framers were also profoundly distrustful of the competence and good faith of the state governments with respect to their internal policies, and they sought a national constraint on state politics.470 The direction of movement at Philadelphia clearly was from a comparatively less centralized to a more centralized plan of government.

The question is the significance of this centralizing purpose for contemporary constitutional interpretation. Some have urged that fidelity to the Founders’ purpose requires that we continue their nationalist project. Mark Killenbeck, for example, has insisted that “current reserved powers opinions . . . shortchange the extent to which the decisions made in the nation’s formative years were motivated by and directed toward a pervasive desire to curtail the sovereignty of ‘subordinately useful’ states.”471 The suggestion seems to be that since the Framers meant to move the country from a less to a more centralized state, it is illegitimate to invoke their understanding of the federal balance for the opposite purpose – that is, to justify an effort to reinvigorate state power and autonomy.

The counter-argument – which I mean to argue for here – is that however much more centralized the 1787 Constitution was than the Articles of Confederation, we have now moved far beyond what even the most nationalist Framers could have envisioned. The position is not so much that the Framers would favor a more limited federal government if we could ask them today – we can’t. Rather, it is that the original understanding of the Constitution embodied a notion of balance between state and national authority that was more centralized than the Articles but less centralized than, say, the New Deal or the Great Society. The same vision that inspired centralizing pressure in 1787 thus ought to tug in the opposite direction today. That vision need not mandate a reactionary effort to tear down the administrative state and return to the early 19th century; it does suggest, however, that the primary direction of incremental reform ought to be toward shoring up the limits on federal authority.

An analogy to elementary geometry may help illustrate the contending positions. In geometry, a “ray” is a line that extends from a set starting point in a particular direction to infinity.472 A “vector,” on the other hand, has a set magnitude; it extends in a particular direction for a specified distance, but goes no further.473 With these terms in mind, we might restate our question as whether the Framers’ centralizing intentions should be treated more like a vector or a ray. Did they, in other words, intend to keep centralizing indefinitely? Or did they simply desire a more centralized government than

468 RAKOVE, supra note 51, at 26.
469 See McDONALD, supra note 43, at 12-14.
470 See RAKOVE, supra note 51, at 29-30.
471 Killenbeck, supra note 417, at 97.
472 [cite]
473 [cite]
existed in 1787 while nonetheless contemplating that some degree of centralization might be excessive?

Some constitutions may explicitly mandate a ray rather than a vector. The Treaty of Rome that established the European Economic Community – predecessor to today’s European Union – committed the signatories to seek an “ever closer union of the Peoples of Europe.”⁴⁷⁴ European courts have tended to treat the EU’s foundational treaties as a constitution of sorts, and they have invoked the “ever closer union” language to support an explicitly teleological approach pressing for increasing centralization.⁴⁷⁵ More generally, it is safe to say that many Europeans see a teleological purpose to EU institutions as a whole – to function as engines of integration – rather than a purpose to maintain a balance.

One can find similar examples of a centralizing teleology in our own law, albeit arguably on a somewhat more modest scale. For much of our history, the federal judiciary – and particularly the Supreme Court – has functioned as an engine of integration. Certainly that was the thrust of federalism doctrine in the Nineteenth Century, which both legitimated an expansive view of federal legislative power⁴⁷⁶ and reined in state attempts to regulate the national economy.⁴⁷⁷ It was also the thrust of the Warren Court, which my colleague Scot Powe has described as centrally concerned with imposing national norms on recalcitrant states, primarily in the South.⁴⁷⁸ The Lochner-era Commerce Clause cases – which restricted Congress’s legislative power – might seem like an obvious exception to this trend.⁴⁷⁹ But as Stephen Gardbaum has demonstrated, the Supreme Court simply used the Commerce Clause (as a check on federal economic regulation) in tandem with theories of economic substantive due process (as a check primarily on state economic regulation) to achieve a uniform, nationally-imposed policy of laissez faire.⁴⁸⁰ And one can argue that even the Rehnquist Court’s gestures in the direction of “states’ rights” have been overshadowed, as a practical matter, by its willingness to squelch state policy in any number of areas.⁴⁸¹

The Supreme Court’s centralizing tendency should surprise no one, given that the Justices are national officials and face relatively strong incentives to favor the national


⁴⁷⁹ See, e.g., Hammer v. Dagenhart, 247 U.S. 251 (1918) (striking down a federal child labor law as outside the commerce power).

⁴⁸⁰ See Gardbaum, New Deal, supra note 122, at ___.

⁴⁸¹ See Young, Two Cheers, supra note ___, at 1384-86; infra TAN ___.

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government. But the constitutional text and historical record on this side of the Atlantic hardly provide the same support for a centralizing teleology that one finds in Europe. Indeed, the question whether the Framers contemplated infinite centralization virtually answers itself. To deny that possibility is to concede that, at some point, we will reach a point of optimal centralization and at that point the task of constitutionalists will be to prevent further consolidation. Nor is there any particular reason to think that centralization occurs at a uniform rate across the wide variety of areas of governmental concern, or that the optimal centralization point is the same in each of these different areas.

If all this is true, then surely it is the task of federalism doctrine to ask, in each area, not only whether we are centralized enough but also whether we have centralized too much. There are no true rays, only vectors. Federalism doctrine must guard against both centripetal and centrifugal forces. As Richard Fallon has observed, “[i]t is not enough for courts to identify constitutional values and weight those values against each other. . . . [C]ourts must also ask what are the main threats to constitutional values at any particular time, which rules would work more or less effectively to protect those values, and what would be the empirical effects of alternative rule structures.” The “main threats” to the balance of federalism are likely to come from different directions in 2004 than in 1789.

The best reading of the history seems to bolster this conclusion – that is, that we should think of federalism as a state of balance rather than a centralizing teleology. Even in 1787, neither the proponents nor the opponents of the Constitution seem to have had much sympathy for extreme polar positions of centralization or decentralization. With respect to the Anti-Federalists, Saul Cornell has observed that

Relatively few Anti-Federalists were willing to return to the Confederation as a model for federalism, and few of the Anti-Federalist elite were willing to challenge the Federalist claim that the Articles of Confederation were inadequate and that some central authority ought to be created with sufficient power to force compliance from the states. Most Anti-Federalists conceded that some limited degree of coercive authority had to be ceded to the federal government.

As a result, Professor Cornell concludes, the Antifederalists’ “quarrel with the Federalists was, not over consolidation, but the degree to which the new government would be nationalized.”

483 The teleological provision in the Treaty of Rome seems like a provision that could only crop up very early in a polity’s institutional existence. [check if there’s a similar provision in the draft constitution] Not surprisingly, the ECJ has tended to moderate its centralizing impulses as the EU system has matured. [cites – Halberstam?]
484 Fallon, Foreword, supra note ___, at 65 n.51.
485 CORNELL, supra note 428, at 63.
486 Id. at 64.
Likewise, few Federalist proponents of the new constitution were unwaveringly committed to consolidation. Jack Rakove has observed that while the Anti-Federalists focused on the Philadelphia draft’s centralizing tendencies, “for the framers, by contrast, the greater irony was that it was much more ‘federal’ than the alternatives they had rejected.”\textsuperscript{487} The Supremacy Clause, for example, is far more respectful of state autonomy than Madison’s initial proposal for a congressional negative of all state laws.\textsuperscript{488} Likewise, the Necessary and Proper Clause’s recognition of implied powers, even defined broadly as in \textit{McCulloch}, stops well short of the Virginia Plan’s initial grant of a discretionary federal legislative power.\textsuperscript{489}

The area of agreement between Federalists and Anti-federalists thus turns out to have been larger than is sometimes supposed. Both groups wanted some movement in a more nationalist direction from the Articles of Confederation; neither wanted to push that movement to its logical extreme. James Madison’s own political trajectory exemplifies this wish to push centralization only so far. Lance Banning has documented that “[a]s late as August 1789, Madison believed that state encroachments on the powers of the federal government would be most likely to endanger constitutional reform. By 1792, his fears were on the other side.”\textsuperscript{490} The case seems strong for treating centralization as a vector – with a limited magnitude – rather than a ray extending infinitely in the nationalist direction. That, of course, leaves plenty of room to argue over the appropriate magnitude of the vector. I argue in the next section that that argument is less important than it might seem, and that more generally the history can tell us relatively little about the particular shape of federalism doctrine.

C. Limits of History, Limits of Change

So if history doesn’t tell us to centralize relentlessly, can it tell us how to maintain balance? Unfortunately, I think the answer will generally be “no” – at least if we are looking for specifics. I have already argued that history does bind us to have federalism doctrine, that is, fidelity to both history and text forecloses a conclusion that federalism is simply unattractive under modern circumstances and therefore not something courts should worry about.\textsuperscript{491} In this Section, however, I argue that history is comparatively less useful in helping us choose among particular federalism doctrines. As my colleague Frank Cross has observed, “the Constitution clearly creates a federalist structure of government” but “it does not necessarily command anything approaching current federalism doctrine.”\textsuperscript{492} Rather, those doctrines will most often have to be chosen based on a variety of more functional and pragmatic grounds.

The obvious alternative, of course, is to cast off the “dead hand” of the past and seek the answers to questions of federalism in purely presentist terms. Those terms might  

\textsuperscript{487} Rakove, supra note 435, at 181.

\textsuperscript{488} [cites]

\textsuperscript{489} [cites]

\textsuperscript{490} Banning, supra note ___, at 295-96.

\textsuperscript{491} See supra Section III.A.

\textsuperscript{492} Frank B. Cross, The Folly of Federalism, 24 Cardozo L. Rev. 1, 3 (2002).
include a broad array of concerns, such as economic efficiency, protection of minority rights and interests, or maximizing the accountability of public officials. I do not want to deny that all of these presentist values – and no doubt many others – are important, and they should play a role in resolving federalism issues. But I also want to insist on an important role for the “dead hand” in the definition of the federal balance, rather than simply – as I argued earlier – in requiring us to have one. While my argument in Section A sought to justify some respect for federalism from a variety of different perspectives on the relevance of history, the latter half of this Section adopts an explicitly Burkan view. Changes in the structure of our constitution should be incremental, and the direction of marginal change should be influenced – at least in part – by an imperative to stay reasonably close to historical norms.

1. Can History Dictate Doctrine?

One thing we might search the history for is a description of the appropriate equilibrium between state and federal power. I claimed in the previous section that the Founders most likely understood federalism to entail such a state, rather than viewing it as an open-ended centralizing imperative. But that does not mean that they clearly envisioned what such a state should look like. Aspects of such a vision emerge from their debates, but so does a general sense that much would remain to be worked out. The immediate task that the Framers confronted was to choose the direction and mechanisms of present reform, not necessarily to crystallize the ideal end-state. As Mark Killenbeck has observed, the Framers were “pragmatists who viewed their assignment [as] creating not the ‘ultimate’ Union, but simply ‘amore perfect’ one.”

Likewise, I doubt that we need to agree on an end-state in order to choose contemporary federalism doctrine. The judicial process proceeds incrementally; as I have argued elsewhere, that is one of its most important strengths. As long as courts formulate doctrine in incremental rather than sweeping terms, they can focus on ascertaining the direction of incremental change without necessarily formulating a firm idea of how far that change ought to go in the future. In Lopez, for example, the Court confronted the question whether it should end its half-century moratorium on striking down federal statutes as outside the Commerce Power. One could answer that question affirmatively, deciding that the Court should be more willing to strike down federal laws on this ground than it had been, while leaving a more complete version of Commerce Clause doctrine to be developed in future cases. For reasons that I will discuss further, the incremental method seems like the best approach. Even if history could paint us a complete picture of the federal end-state envisioned by the Founders, I would suggest that courts should pay it relatively little attention.

493 See Killenbeck, supra note 417, at 85; [others]

494 Killenbeck, supra note 417, at 86.

495 See Ernest A. Young, Judicial Activism and Conservative Politics, 73 U. COLO. L. REV. 1139, 1208-09 (2002) [hereinafter Young, Judicial Activism].

496 Cf. United States v. Lopez, 514 U.S. 549, ___ (1995) (noting that if the Court had upheld the statute in question, there would have been no basis for ever invalidating commerce legislation).

497 See infra TAN ___.

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We might alternatively ask two somewhat narrower questions of history. First, can history tell us how to choose between the two different ends of federalism—state sovereignty or state autonomy—that I identified in Part II? Second, does history sanction particular means for enforcing federalism? I think the answer to the first question is no; both the constitutional text and history seem relatively indeterminate on the choice of ends. Evidence of concern for both sovereignty and autonomy appears in the record. On the sovereignty side, the constitutional text includes specific guarantees against dismemberment of states, and Deborah Jones Merritt has argued that the Guarantee Clause can be interpreted as a safeguard against national interference with the integrity of state governmental processes. Likewise, the Framers’ discussions of state sovereign immunity indicate significant concern for protecting state sovereignty. On the other hand, the whole notion of reserving governmental powers over key policy areas to the States in the Tenth Amendment speaks to state autonomy. And—to pick just one of several possible examples—the solicitude of Article III’s drafters for preserving a meaningful role of state courts indicates a strong concern that state institutions should retain important things to do. Nor should we necessarily take the balance of this evidence as conclusive, even if it all pointed in the same direction. In particular, we would not expect to see as much evidence of concern for state “autonomy,” defined primarily in terms of state regulatory prerogatives, in an era that generally eschewed activist government. Obviously, state autonomy may be a much more important factor today.

The answer to the second question is “yes, but.” The Framers did seem to envision two particular strategies for enforcing federalism. One was to rely heavily on political and institutional checks. The second was through enumeration of federal responsibilities and reservation of the remainder to the states—a strategy which does seem to have contemplated some degree of judicial enforcement. The problem is that these strategies have each been substantially undermined by subsequent developments.

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498 See U.S. CONST. art. IV, § 3 (“[N]o new State shall be formed or erected within the Jurisdiction of any other States; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.”).


500 See, e.g., Federalist No. 81, supra note ____, at 548-49 (Alexander Hamilton) [Cooke ed.] (“It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual without its consent. . . . Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states. . ..”); Federalist No. 32, supra note ____, at 200 (Alexander Hamilton) (identifying a relatively narrow set of cases in which such a surrender could be deemed to have taken place).

501 As does the omission of these reserved powers from Article I in the first place.

502 See Evan Caminker, State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law? 95 COLUM. L. REV. 1001, 1056 n.220 (1995) (observing that “the opposition to ubiquitous inferior federal court jurisdiction reflected in the Madisonian Compromise was driven largely by the fear that . . . state court lawmaking power [in common law cases] would be essentially trumped”).

503 [cites]
The notion of political enforcement has been undermined by changes in the incentives facing federal politicians, the severance of direct ties between federal representatives and state political institutions, and the watering-down of institutional mechanisms at the national level that once encumbered federal lawmaking. Likewise, I have already discussed the changes of fact and failures of doctrine that undermined the enumerated powers strategy.

The question thus becomes whether history binds us to these failed strategies or permits innovations designed to shore up their weaknesses. There is good reason to find the latter course consistent with historical understandings. Mark Killenbeck, for example, finds that the Framers “understood that the text as ratified provided an important, but by design not necessarily a definitive matrix for analyzing sovereignty issues.” Rather, they expected that many issues of federalism would be worked out in the course of time. Likewise, Jack Rakove states more generally that “[w]hatever else we might say about [the Framers’] intentions and understandings, this at least seems clear: They would not have denied themselves the benefit of testing their original ideas and hopes against the intervening experience that we have accrued since 1789.”

The Founders’ vision of a flexible federalism may be understood through a variety of different interpretive lenses. We might shift to new, ahistorical strategies for protecting federalism as an act of “translating” the original design into new contexts. Such translation, as Larry Lessig has pointed out, often entails a “duty of creativity” for the contemporary interpreter. A Burkean, on the other hand, might simply say that our duty of fidelity runs to the whole of our history, not simply the founding moment, and that part of the duty of fidelity is the adoption of incremental reforms designed to preserve the basic character of our institutions. Finally, a conventionalist might argue that the essential characteristic of federalism doctrine is its ability to command widespread assent, and pragmatic virtues of consistency and coherence are more important by this measure than the connection of doctrine to the Founders’ own expectations about how federalism would be enforced. The case for departure from or modification of the Founders’ own enforcement strategies can thus be made from any of these perspectives.

See infra TAN ___.

See U.S. CONST. amend. XVII (replacing selection of senators by state legislatures with direct election by the people). As I discuss further infra TAN ___, it is implausible to view the 17th Amendment as a deliberate constitutional amendment designed to weaken constitutional protections for state autonomy.

See supra TAN ___.

See supra TAN ___.

Killenbeck, supra note 417, at 85.

See id.

RAKOVE, supra note ___, at xv.

Lessig, Fidelity in Translation, supra note 82, at 1205-06.

See Young, Rediscovering Conservatism, supra note 80, at ___.

[cites]
The Supreme Court itself has recognized that history provides only limited assistance in answering particular doctrinal questions on a number of occasions. In the *Ports Authority* case,\(^{514}\) for instance, the Court confronted the question whether state governments should enjoy sovereign immunity in proceedings before federal administrative agencies. Writing for the majority, Justice Thomas acknowledged that, “[i]n truth, the relevant history does not provide direct guidance for our inquiry. The Framers . . . could not have anticipated the vast growth of the administrative state.” \(^{515}\) As a result, “the dearth of specific evidence indicating whether the Framers believed that the States’ sovereign immunity would apply in such proceedings is unsurprising.” \(^{516}\)

The *Ports Authority* Court overcame this lack of specific historical evidence primarily through doctrine rooted in more functional considerations.\(^{517}\) Justice Thomas first examined proceedings before the Federal Maritime Commission, to which the South Carolina Ports Authority had been subjected, to determine whether they were institutionally similar to federal judicial proceedings in which the Eleventh Amendment would bar jurisdiction.\(^{518}\) He then asked whether the underlying value of federalism that state sovereign immunity is supposed to protect – state dignitary interests – is threatened by federal administrative adjudications.\(^{519}\) One can quarrel about whether the particular value of dignity is really crucial to federalism,\(^{520}\) but the basic approach of building doctrine with an eye on federalism’s underlying values seems sound.

History thus does not generally propose particular doctrines; in fact, most of the doctrines that we have employed for much of the past two centuries are, well, *history*. The history does suggest a basic *strategy*, however – that is, that federalism and other structural values ought to be as self-enforcing as possible. I doubt that we are *bound* to this strategy if it can be shown to be ineffective, but surely respect for the Founders’ vision counsels that we should look to this strategy *first* in seeking to reinvigorate federalism doctrine. I turn to the prospects for reviving that strategy in Part V. In the remainder of this Section, however, I focus on the relation between history and structural change.


\(^{515}\) *Id*. at 755.

\(^{516}\) *Id*.

\(^{517}\) Justice Thomas did say that “[w]e . . . attribute great significance to the fact that States were not subject to private suits in administrative adjudications at the time of the founding or for many years thereafter.” *Id*. But this argument seems important primarily as simply indicating the absence of historical counter-examples to the Court’s ultimate result; it can bear little affirmative weight. After all, “[b]ecause formalized administrative adjudications were all but unheard of in the late 18th and early 19th century,” *id.*, we shouldn’t be surprised that States didn’t appear in them. In any event, the remainder of the majority opinion makes clear that the more functional considerations are doing the analytical heavy lifting here.

\(^{518}\) See *id*. at 756-59.

\(^{519}\) See *id*. at 760-61.

\(^{520}\) [cites]
2. **History and Incremental Change**

It turns out, as I argue in Part VI, that a desire to make changes incremental is a good reason to choose *courts* as the agents of that change. (It also, of course, shapes the *sorts* of doctrines that courts should adopt.)

**IV. Sovereignty, Autonomy, and the Values of Federalism**

The shape of an institutional strategy for protecting federalism ought to be influenced – although not completely determined – by why we care about federalism in the first place. Many reasons are often given, and I try to collect the major themes in this Section. They tend to fall into two loose groups. The first is concerned with regulatory outcomes: Federalism permits a diversity of regulatory regimes from state to state, which may allow satisfaction of more people’s preferences, regulatory experimentation, and competition among states to provide the most attractive regime. The second group has to do with the political process itself: State governments provide a check on national overreaching, foster political competition and participation, and may even help build social capital.

Autonomy, not sovereignty, provides the common theme of all these arguments. Just *having* state governments is not enough; those governments need to have meaningful things to *do*. Federalism cannot provide regulatory diversity unless states have autonomy to set divergent policies; state governments cannot provide fora for political participation and competition unless meaningful decisions are being made in those fora. The sovereignty model advanced by the Rehnquist Court’s working majority on federalism issues, by contrast, has emphasized on the “separate and independent existence” of the States, as if mere *existence* were the primary value to be preserved.521 The Court’s focus on the States’ sovereign immunity from private lawsuits, for example, has expended much of the Court’s time and political capital on an issue that has little to do with what functions remain for state governments to perform.522

This Section surveys the values generally associated with federalism and uses them as criteria for assessing the relative importance of sovereignty and autonomy. Before undertaking that discussion, however, two caveats are in order. First, I do not mean this section as a normative *defense* of federalism. The pros and cons of federalism

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521 The phrase itself goes back to then-Justice Rehnquist’s opinion in *National League of Cities v. Usery*, 426 U.S. 833, 845-46 (1976), which framed the crucial issue as whether setting wages and hours for state employees “are ‘functions essential to separate and independent existence’ so that Congress may not abrogate the States’ otherwise plenary authority to make them.” (quoting *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1869)). Much has changed since 1976 in the Court’s jurisprudence, but the current majority remains focused on this principle.

522 See, e.g., *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (holding that Congress may not, on suant to its Article I powers, abrogate the States’ immunity from suit); *see also* Fallon, *Conservative Paths, supra* note 291, at 459 (commenting on “the relative boldness of the sovereign immunity decisions” as compared with the Court’s caution in other areas of federalism doctrine); Young, *State Sovereign Immunity, supra* note 184, at 1-2 (arguing that the Court’s “most persistent and aggressive efforts” to advance the cause of federalism have occurred in the area of sovereign immunity).
have been ably debated by others, and I am unsure whether I have anything much to add to that discussion. What I want to do instead is to survey the grounds on which federalism has been defended, and trace the implications of those arguments for federalism doctrine. Obviously I do find these reasons for valuing federalism persuasive, but that is not what this Article is about. The point is simply to identify with some precision why we care about federalism in the first place so that we can then ask what follows in terms of enforcement strategies.

The second caveat is that, as I argued in the last Part, federalism need not be defended in terms of its promotion of particular values at all. The Constitution presupposes some meaningful balance between state and federal power; constitutional fidelity therefore requires some level of constitutional protection for state governmental prerogatives. As Justice O’Connor has written, “[o]ur task would be the same even if one could prove that federalism secured no advantages to anyone. It consists not of devising our preferred system of government, but of understanding and applying the framework set forth in the Constitution.” Nonetheless, we still confront questions of interpretive choice concerning the particular form that protections for federalism should take. And it makes sense for the answers to those questions to be shaped, to the extent that binding legal materials permit, by the respects in which federalism may be beneficial.

A. Regulatory Diversity, Competition, and Experimentation

One of the most basic aspects of state autonomy is the right to do things differently. California chooses to set rigorous environmental standards, while Louisiana prefers looser regulation in order to attract industry. Vermont relies for revenue on a state income tax, while New Hampshire emphasizes property taxes. New Jersey protects lesbians and gay men from discrimination based on their sexual orientation, while Michigan does not. New York’s state judges are appointed by the governor,


\[524\] See supra Section ___.

\[525\] New York v. United States, 505 U.S. 144, 157 (1992). The obligation is comparable to our commitment to protect broad categories of harmful expression under the First Amendment. See, e.g., Reno v. ACLU, 521 U.S. 844 (1997) (indecency); R.A.V. v. St. Paul, 505 U.S. 377 (1992) (hate speech). The analogy is not a perfect one; most critics of particular forms of speech do not claim that “free speech” is on-balance a bad thing, whereas that claim is sometimes made with respect to state autonomy. [cites] But few actually do make the on-balance claim about federalism, and it is not clear that it would matter in terms of constitutional obligation if they did.

\[526\] [cite]

\[527\] [cite]; see also SHAPIRO, supra note 523, at 89 n. 113 (discussing the disparities in taxing policy among the New England states).

while Texas elects them. As my examples demonstrate, state-by-state diversity extends not only to particular substantive policies, but also to the structure of the government and the means by which policy choices are carried out.

Lynn Baker and I have argued elsewhere that federalism is analogous to the “negative freedom” of individuals in that federalism frees state governments from constraints on their policy options without dictating what choices they should actually make. This makes it difficult to argue for or against federalism based on the attractiveness or unattractiveness of particular policies that the states might adopt. The most basic argument for state autonomy thus starts with the observation that individuals often have different preferences, so that the best way to please more of the people, more of the time is to offer a choice of regulatory regimes. Assuming that the initial geographical distribution of preferences is not uniform, then a higher proportion of citizen preferences are likely to be satisfied by state-level regulation than by adoption of a uniform national rule. On issues that are sufficiently important to induce individuals to “vote with their feet,” the proportion of satisfied preferences is likely to be even higher. As Seth Kreimer has observed, “the lesbian who finds herself in Utah, like the gun lover who lives in Washington, D.C., and the gambler in Pennsylvania, need only cross a state border to be free of constraining rules.”

A related set of arguments does suggest that regulatory diversity will in turn lead to “better” policy outcomes. The first is that, as Justice Brandeis famously noted, “a single courageous state may serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” The most well-known recent example of such experimentation is the recent federal welfare reform, many elements of which were tried out by individual states such as Wisconsin. Even more recently,

529 [cite]
530 See Baker & Young, supra note 10, at 135 (“Just as negative freedoms do not prescribe what the individual shall do within this protected sphere of liberty, so too federalism does not dictate that the state government make any particular substantive choice within the range of options permitted it.”). On the concept of “negative freedom,” see generally ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY 122 (1969).
531 See Baker, Conditional Spending, supra note 364, at 1947-51; McConnell, supra note 523, at ___.
532 See McConnell, supra note 523, at ___. Of course, groups holding a particular preference may not be sufficiently numerous even in their state of greatest concentration to enact a regime that reflects their preference. This may be an argument for further decentralization on some issues (if, say, the group is more politically powerful in particular localities) or simply an occasion for observing that no system can satisfy everyone’s preferences.
533 See, e.g., Richard A. Epstein, Exit Rights Under Federalism, 55 LAW & CONTEMP. PROBS. 147, 150 (1992) (observing that “[f]ederalism works best where it is possible to vote with your feet”); Kreimer, supra note 134, at 72 (“Mormons moved from Illinois to Utah, while African Americans migrated from the Jim Crow South. Rail travel and, later, automobiles and airplanes enabled residents of conservative states to escape constraints on divorce and remarriage.”). See generally ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 106-12 (1970).
534 Kreimer, supra note 134, at 72.
535 New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); see also Friedman, Valuing Federalism, supra note 523, at 397-400.
536 [Friedman n. 346]
Maine has provided health insurance for all of its residents, thereby providing a valuable test for similar proposals at the federal level.\textsuperscript{537} Important aspects of federal environmental regulation are based on prior experimentation at the state level, and state programs have moved in to fill gaps in the federal scheme.\textsuperscript{538}

Much of this innovation, as Barry Friedman has observed, “just happens as governments try to solve problems.”\textsuperscript{539} But a second argument provides a further impetus, that is, that state governments will compete with one another to offer a more attractive policy mix to mobile employers, investors, and taxpayers.\textsuperscript{540} Drawing an analogy to the free market, proponents of regulatory diversity thus argue that competition among jurisdictions will result in “better” policies.\textsuperscript{541}

One problem with these sorts of arguments, of course, is that we have not yet defined “better,” and definitions may be hard to agree upon. One man’s regulatory competition may be another’s “race to the bottom” – that is, a situation in which regulatory competition among autonomous jurisdictions makes it impossible to implement desirable policies. In \textit{Hammer v. Dagenhart},\textsuperscript{542} for example, the Court recognized that competitive dynamics made it difficult for individual states to implement restrictions on child labor, since industry could avoid one state’s restrictions by relocating to another state, with a concomitant loss in jobs and tax revenue to the regulating state. For proponents of child labor, this would simply be an example of regulatory competition at its best, while reformers saw these dynamics as an argument for national regulation. Others have made similar arguments for action at the national level in a variety of contexts.\textsuperscript{543}

When a national consensus emerges in a particular policy area, arguments from regulatory diversity lose much of their force. We have such a consensus, for example, on

\textsuperscript{537} \textit{See On Health Care, Maine Leads}, N.Y. \textit{TIMES}, June 19, 2003, at ___.

\textsuperscript{538} \textit{See [cite on California’s pre-existing mobile source emissions limits]; Richard L. Revesz, \textit{Federalism and Regulation: Some Generalizations, in Regulatory Competition and Economic Integration: Comparative Perspectives} 3, 13-14 (Daniel Esty & Damien Gerardin, eds., 2001) (describing state innovation in hazardous waste regulation and cleanup). For other policy innovations by state governments, see, e.g., Friedman, \textit{Valuing Federalism, supra} note 523, at 399 (citing “bookmobiles, pre-election day ‘early’ voting, town meetings, televised court proceedings, greenways, community agenda programs, leadership programs”); Merritt, \textit{Guarantee Clause, supra} note 523, at 9 [examples]; \textit{Shapiro, supra} note 523, at 87-88 (citing “the development of workers’ compensation programs, experiments in public education, welfare reform, health care, taxation systems, penology, environmental protection, and a number of other subjects”).

\textsuperscript{539} Friedman, \textit{Valuing Federalism, supra} note 523, at 398.

\textsuperscript{540} \textit{See, e.g., Shapiro, supra} note 523, at 78 (“The argument rooted in the value of competition among the states, especially when combined with the right of exit of capital or labor, remains at the heart of the economic case for federalism.”).

\textsuperscript{541} [cites]

\textsuperscript{542} 247 U.S. 251, 273 (1918).

\textsuperscript{543} [cites]; \textit{see also Daniel A. Farber & Philip P. Frickey, Law and Public Choice: A Critical Introduction} 76 (1991) (“Interstate competition hampers inefficient regulation, but it can also hamper efficient regulation as well.”).
the unacceptability of most forms of racial discrimination, and those areas have been appropriately federalized – placed off-limits to state-by-state regulatory diversity – as a result. 544 But in many, many other areas – environmental policy, safety regulation, other forms of discrimination, to name just a few examples – no such consensus exists. We either do not know the best way to reach an agreed-upon policy end, or we disagree about the proper ends themselves.

All this makes it quite difficult to say that regulatory diversity will result in more (or less) “good” policy outcomes on balance. Two possible lines of argument are available. The first would be to define a “good” set of outcomes as simply that which maximizes the preferences of the most voters; in this sense, it seems plausible to say that regulatory diversity is “better” than uniformity whenever there is no consensus on substance. 545 Even this argument, of course, assumes the absence of spillover effects or public goods problems. The second argument would attempt to define the “better” policy outcome on the merits across a broad range of issues, then ask whether regulatory experimentation and competition are likely to help or hinder the implementation of that outcome. Merely to frame the question this way, however, is to make clear that it is unanswerable. Not only is the range of relevant issues broad and the effects of competition hard to assess, but also normative agreement on many, if not most, of the relevant policy questions will be contested.

These problems pervade the extensive literature disputing whether federalism is a “good” or “bad” thing. I would prefer to make two less ambitious points. The first is that our constitutional tradition is committed to some degree of state autonomy, and that autonomy has traditionally been justified, in part, on grounds of regulatory diversity. 546 When we look for doctrine that can realize and make sense of our constitutional commitment to federalism, it thus makes sense to focus on the value of regulatory diversity. We should have doctrines that preserve the ability of state governments to regulate in diverse ways, and downplay doctrines that offer little or no protection for that function.

The second point is that many critics of state autonomy seem to think that the normative question can be answered in a definitive way. They seem convinced, despite

544 As the child labor example suggests, such consensus will more often than not be negative in character – that is, we are more likely to agree that particular practices are unacceptable than that a particular regulatory program is optimal. Racial equality is another example of this kind; we can agree that segregation was unacceptable, but it is harder to reach consensus on the right package of remedies for it. On race, of course, the remedial questions were rightly federalized as well once it became apparent that deferring to state and local policymakers on remedies would thwart implementation of the more general principle of racial equality. See, e.g., [cites].

545 One might say that in the classic “race to the bottom” situation, inter-jurisdictional competition actually thwarts the realization of voters’ preferences. The voters of New Hampshire, for example, might prefer to ban child labor, but might nonetheless be deterred from enacting such a law by fear that their vital manufacturing industries will move to Vermont. It seems more accurate in that situation, however, to say that New Hampshirites’ real preference is for jobs and tax revenue over a child labor ban.

546 See, e.g., C. Boyden Gray, Regulation and Federalism, 1 Yale J. Reg. 93 (1983) (justifying the Reagan Administration’s “New Federalism” initiative in part on the ground that returning regulatory authority to the States “fosters diversity and experimentation”).

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the problems canvassed above, that races to the bottom predominate over beneficial competition, and in particular that state-by-state regulatory diversity will tend to thwart the implementation of “progressive” policy reforms. Many of these arguments come from political liberals who seem not to have woken up to the fact that they no longer control the national government.\footnote{See Baker & Young, supra note 10, at 151-53. Progressives may, of course, retake power in Washington, D.C. But the important point is that a broader view of our history demonstrates that the political leanings of individual institutions – the national political branches, the federal or state courts, even the national political parties – tends to swing back and forth over time. It would be a mistake to make basic structural judgments based on an ephemeral current configuration of political forces.} In any event, I have endeavored in other work to demonstrate that federalism generally lacks a reliable political valence.\footnote{See id. at 149-62; Young, Preemption, supra note ___.} It may be impossible to demonstrate that inter-jurisdictional competition and experimentation will produce “good” policy outcomes in a majority of cases, but one \textit{can} identify a wide range of instances in which regulatory diversity fosters rather than impedes “progressive” policy goals. This is not to say that such goals are inevitably the ones that ought to be pursued; rather, the point is that debates over state autonomy ought not to break down on simple ideological lines.

\section*{B. Political Participation, Competition, and Checks on the Center}

A second set of values associated with federalism focuses on the political process itself rather than the substantive policies likely to be adopted by institutions at the state or national level. We might usefully divide these values into two clusters – one associated with the benefits that citizens derive from participating in politics on the level of individuals and local communities, and another associated with the benefits of dividing power to the system as a whole.

David Shapiro (along with many others) has pointed out that “to the extent the electorate is small, and elected representatives are thus more immediately accountable to individuals and their concerns, government brought closer to the people, and democratic ideals are more fully realized.”\footnote{SHAPIRO, supra note 523, at 91-92. See also Merritt, supra note 523, at 7 (“The greater accessibility and smaller scale of local government allows individuals to participate actively in governmental decisionmaking. This participation, in turn, provides myriad benefits: it trains citizens in the techniques of democracy, fosters accountability among elected representatives, and enhances voter confidence in the democratic process.”); Friedman, Valuing Federalism, supra note 523, at 389 (“States, and their substate local governments, are closer to the people and provide an opportunity for greater citizen involvement in the functional process of self-government.”).} Public participation seems easier at the state and local level; this may be so because the issues seem more immediate, because citizens are more likely to know state or local politicians personally, or because the barriers to entry into politics are lower at the state and local level.\footnote{Many of these benefits are far more pronounced at the local level than at the state level, and for that reason some have suggested that notions of constitutional federalism – which protect only state governments as a constitutional matter – are therefore irrelevant to values of citizen participation. See, e.g., Rubin & Feeley, supra note 523, at 915. As I explain further infra at TAN ___, this Article’s concern with values of regulatory autonomy is central to local and state governments alike. Moreover, as David Shapiro points out, “the states are in a far better position to respond to local pressures for home rule than is a more remote and centralized government.” SHAPIRO, supra note 523, at 93 94.} We might value this participation for a
number of different reasons. For some, it is a good in itself.\textsuperscript{551} For others, it is a means of building community solidarity and social capital.\textsuperscript{552} On this theory, the opportunities for participation in politics that federalism affords encourage individuals to interact not only with the government but with each other, building networks of trust and reciprocity which in turn redound to the benefit of citizens in a wide variety of ways.\textsuperscript{553}

The operation of state and local governmental processes may also benefit our political system as a whole. To the extent that state and local processes are more participatory and responsive to citizens, shifting responsibilities to them may alleviate the “democratic deficit” suffered by a distant central government that is often perceived as bureaucratic and dominated by special interests.\textsuperscript{554} Many forms of political accountability, moreover, are best exercised at close range. Barry Friedman thus observes that “[o]fficials, elected and appointed, should be available for public comment, anger, approval, suggestions, and ideas about the course of public affairs. . . . Officials ought to look their constituents in the eye on the street and see them in the grocery store.”\textsuperscript{555}

More fundamentally, our federalism has always been justified as a bulwark against tyranny. Madison extolled federalism as part of the “double security” that the new Constitution would provide for the people; just as the three branches of the central government were to check one another, the state governments would check the center.\textsuperscript{556} As Lynn Baker and I have discussed elsewhere,\textsuperscript{557} Madison’s discussion in the Federalist emphasized worst-case scenarios in which the States would have to oppose the Center militarily,\textsuperscript{558} and this emphasis has sometimes distracted critics of federalism from more prosaic – but also more relevant – mechanisms by which federalism protects liberty.\textsuperscript{559} Even in the Founding period, however, state autonomy buttressed individual liberty in other, less dramatic ways.

States may oppose national policies not only militarily but politically, and in so doing they may serve as critical rallying points for more widespread popular opposition.

\textsuperscript{551} [cites]
\textsuperscript{553} See Mazzone, supra note 552, at 42-58.
\textsuperscript{554} See Friedman, \textit{Valuing Federalism}, supra note 523, at 392-93; SHAPIRO, supra note 523, at 91-92.
\textsuperscript{555} Friedman, \textit{Valuing Federalism}, supra note 523, at 395.
\textsuperscript{556} The Federalist No. 51, at 323 (Clinton Rossiter ed., 1961).
\textsuperscript{557} Baker & Young, supra note 10, at 137 & n.280.
\textsuperscript{558} [cites]
\textsuperscript{559} See, e.g., Rubin & Feeley, supra note 523, at 928-29 (treating federalism’s protection of liberty purely as a military issue).
Madison and Jefferson, out of national power during the Federalist administration of John Adams, worked through the Virginia and Kentucky legislatures to oppose the Alien and Sedition Acts.\textsuperscript{560} The States thus, as Professor Friedman puts it, “serve as an independent means of calling forth the voice of the people.”\textsuperscript{561} More recently, “[s]ome state and local governments have proven themselves formidable lobbyists and indefatigable litigants” on issues such as affirmative action, benefits for the disabled, and environmental policy.\textsuperscript{562} The intertwining of federal and state bureaucracies through various forms of “cooperative federalism” likewise gives state and local officials the ability to resist federal initiatives in more subtle ways. Recently, for instance, dozens of localities and several states have criticized – and sometimes even refused to cooperate with – aspects of the War on Terrorism that they felt intruded too far into personal liberties.\textsuperscript{563}

More fundamentally, states serve as the seedbeds of political competition in our “compound republic.”\textsuperscript{564} Many political and social movements – such as abolitionism and Progressivism – originate and gain strength at the state level before making a bid for national power. The existence of the states as alternate arenas for political competition bolsters our two-party system, moreover, by ensuring that a party defeated at the national level can nonetheless exercise power in statehouses around the country. In the 2002 elections, for example, the Democrats lost their hold on the Senate but picked up power at the state level by winning three additional governorships.\textsuperscript{565} Because the loyal opposition can not only oppose but actually govern at the state level, the opposition party can develop a track record of success that enhances its prospects in subsequent national elections. Hence, the Democrats’ control of so many statehouses “prepared the ground for a revival of their own party.”\textsuperscript{566} Opposition parties in non-federal systems, by contrast, face greater obstacles in staying competitive. A recent comparison of the British Tories with American Republicans, for example, noted that the Tories “face

\textsuperscript{560} [cite Virginia and Kentucky Resolutions]; see also Friedman, Valuing Federalism, supra note 523, at 403 & n.363. For another example, see McDonald, supra note 43, at 66-70 (describing the New England states’ opposition to the War of 1812).

\textsuperscript{561} Friedman, Valuing Federalism, supra note 523, at 403.

\textsuperscript{562} Merritt, supra note 523, at 5.

\textsuperscript{563} See Portland Decision Highlights Differing Attitudes, CNN.com, Nov. 22, 2001 (available at http://www.cnn.com/2001/LAW/11/21/inv.portland.questioning/index.html); see also Town Criminalizes Compliance with Patriot Act, CNN.com, May 18, 2003 (available at http://www.cnn.com/2003/us/west/05/18/patriot.act/ai/index.html) (describing Arcata, California’s symbolic ordinance directing town officials not to comply with federal investigations under the Patriot Act). For a general discussion of these acts of state and local opposition, and their relationship to broader debates about federalism, see Ann Althouse, The Vigor of Anti-Commandeering Doctrine in Times of Terror, ___ BROOKLYN L. REV. ___ (forthcoming 2004); Young, Dark Side, supra note ___.

\textsuperscript{564} See Merritt, supra note 523, at 7 (“Most importantly, states check national power by serving as a well-spring of political force.”).

\textsuperscript{565} See One Cheer for the Democrats, ECONOMIST, Nov. 9, 2002, at 34 (noting that the Democrats “picked up four big industrial states—Illinois, Michigan, Pennsylvania, and Wisconsin” as well as hanging on to California, and that “the proportion of Americans living under Republican governors has shrunk from 70% in 1994 to only 46% today”).

\textsuperscript{566} Id.
problems in imitating Mr. Bush—not least because they lack a testing ground for their ideas. It should not be surprising, then, that four of the last five U.S. presidents were former governors who developed a reputation for competence at the state level while the other party held the White House. As Deborah Merritt has pointed out, federalism buttresses our liberty by “maintain[ing] the multiparty system and prevent[ing] the growth of a monolithic political power on the federal level.”

Again, of course, there are counter-arguments. A tradition in political science reaching back to Federalist No. 10 holds that it is state and local governments—not the national one—that are more likely to be dominated by special interests. While participation may be easier at the state and local levels, voter turnout measures suggest that it is also less valued by many people. And some states have become such large political communities in their own right that the state government hardly seems likely to realize the benefits of political participation on a human scale. Finally, the whole experience of racial subordination in this country demonstrates that state governments will sometimes be the oppressors, and the national government the bringer of liberty.

I would hesitate to argue for state autonomy without an agreed-upon, national floor for fundamental human rights. But that, in fact, is the system we have. Virtually no proponent of state autonomy today wishes to roll back the Reconstruction Amendments, the incorporation of the Bill of Rights as binding on the States, or even the broad power of the Congress to enact basic civil rights legislation. But state autonomy may enhance

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567 A Tale of Two Legacies, ECONOMIST, Dec. 19, 2002, at ___.
568 George W. Bush governed the Great State of Texas from 1995 to 2000, during the Clinton Administration; Bill Clinton was governor of Arkansas from 1983 to 1992, during the Reagan and Bush Administrations; Ronald Reagan became governor of California in 1967 during the Johnson Administration, although most of his term (1967-1975) was during the Nixon and Ford Administrations; and Jimmy Carter was governor of Georgia from 1971 to 1975, during the Nixon and Ford Administrations.
569 Merritt, supra note 523, at 7.
570 [cites]
571 See, e.g., D. Bruce La Pierre, Political Accountability in the National Political Process—The Alternative to Judicial Review of Federalism Issues, 80 NW. U. L. REV. 577, 631 & n. 310 (1985) [check]. But see PUTNAM, BOWLING ALONE, supra note 552, at 35 (pointing out that voting is an atypical form of political participation and that other forms are more important to building social capital).
572 See, e.g., Erwin Chemerinsky, The Values of Federalism, 47 FLA. L. REV. 499, 528 (1995); SHAPIRO, supra note 523, at 93 (noting that “the goal of realizing democratic values . . . may not be significantly enhanced by reducing the relevant polity from one of some 280,000,000 (the United States) to one of, say, 30,000,000 (the state of California)”). For some relevant statistics, see supra note 116. The point that many states may no longer be small enough to capture the benefits of popular participation tends also to blunt the force of Madison’s argument for national government in Federalist 10.
573 See, e.g., SHAPIRO, supra note ___, at 52-55; but see id. at 95 (noting that “another side to the story cannot be ignored—a side that acknowledges the role of the states in protecting individual and group rights and interests”).
574 The Court’s recent decisions restricting the scope of Congress’s authority to enforce the Reconstruction Amendments have generally focused on the particular remedies available against state governments themselves, rather than power of Congress to enact such laws. See, e.g., Bd. of Trustees of the Univ. of
personal liberties even in the sphere of individual rights by allowing space for more expansive interpretations of those rights. In areas of privacy, criminal procedure, and civil rights protections, for example, individual states have chosen to provide a greater measure of protection for individual liberty than that available under federal law.\textsuperscript{575} More fundamentally, nothing in the logic supporting the necessity of federal protection for individual rights suggests that such protections are a sufficient condition for liberty. Modern constitutional law has focused its attention on those individual rights provisions, but the federalism and separation of powers constraints on government tyranny have always been operating in the background. Our history affords no reason for confidence that a significant erosion of state autonomy would not have a negative impact on individual freedom.\textsuperscript{576}

C. Sovereignty, Autonomy, and Decentralization

All these values associated with federalism share a common characteristic: They are predicated on active state governments with important responsibilities. “Active” in this context need not mean intrusive or interventionist; whether states adopt rigorous regulatory policies or laissez faire ones, the important point is that the policy questions they confront must be meaningful ones, and their regulatory jurisdiction must cover a broad range of issues important to their citizens. Regulatory diversity means little, after all, if it extends only to a handful of unimportant issues. And citizens will have little incentive to participate in state and local politics if the issues decided at those levels are not important to them.

Alabama v. Garrett, 531 U.S. 356 (2001); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000); \textit{but see} [Hibbs] (upholding Congress’s power, under Section Five of the Fourteenth Amendment, to abrogate state sovereign immunity for private suits under the Family Medical Leave Act). This line of cases, moreover, has gone out of its way to reaffirm earlier precedents upholding the Voting Rights Act – probably the most important civil rights statute enacted under Section Five. [cites] The exceptions to this trend are \textit{City of Boerne v. Flores}, 521 U.S. 507 (1997), and \textit{United States v. Morrison}, 529 U.S. 598 (2000), which held that Congress lacked power entirely to enact civil rights protections against burdens on religious exercise and gender-motivated violence. But \textit{Boerne} was driven as much by separation of powers concerns as by federalism, [cite]. The Violence Against Women Act struck down in \textit{Morrison}, on the other hand, was an unusual civil rights statute in that its substantive prohibitions – i.e., assaults and rapes – were duplicative of existing state law protections and strayed outside the traditional spheres of employment and public accommodations, in which Congress has been able to employ the Commerce Clause. \textit{See, e.g.}, Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964). Nothing in the Court’s recent jurisprudence suggests that other recent civil rights statutes – such as the Americans with Disabilities Act or the Age Discrimination in Employment Act, or even the other provisions of the VAWA itself – are in any danger of being found to lie outside the commerce power.


\textsuperscript{576} \textit{See, e.g.}, Friedman, \textit{Valuing Federalism, supra} note 523, at 404 (“Perhaps we have been so successful in creating the institutions that protect us that our liberty will never again be threatened. Perhaps, on the other hand, the dispersion of political voice represented by federalism is part of this protection.”).
This might seem like an obvious point. Why, after all, should anyone care about state governments if those governments have nothing to do? The point is worth belaboring, however, because of the Rehnquist Court’s focus on issues of sovereignty rather than autonomy. Although many aspects of the jurisprudence are positive, the Court has done relatively little to protect the regulatory jurisdiction of the States or their ability to provide essential services to their citizens. Instead, the Court has focused on limiting the accountability of state governments when they violate federal law. The most important line of such cases – those expanding the sovereign immunity of the states from suits for money damages under federal law – has even emphasized the “dignity” of the states over the impact of federal damages remedies on the states’ ability to perform their governmental functions. To be sure, limiting the ability of courts to impose extensive financial liabilities on state governments may protect important aspects of state autonomy, such as the ability of state institutions to control the allocation of scarce financial resources pursuant to their view of the public good. And even dignity may have some importance, especially in an age in which state sovereignty is so often denigrated in the most extreme terms. But these considerations, in my view, pale beside the importance of preserving meaningful state regulatory responsibilities.

The Court’s federalism jurisprudence has thus been preoccupied with Texas v. White’s notion of “an indestructible Union, composed of indestructible States.” But “indestructibility” gained prominence at a time when dismemberment – either of the individual States or the Union as a whole – was a more than credible threat. It has little relevance to the problems confronting our federal system today, because “indestructibility” in itself offers no guarantee that the States will retain the sorts of powers and responsibility necessary to be viable, functioning governments. A State may

577 The defunct doctrine of National League of Cities v. Usery, 426 U.S. 833 (1976), was often justified in terms of the need to protect state governments’ ability to serve their citizens. That doctrine held that Congress could not subject the institutions of state governments themselves to generally-applicable federal laws, at least where those laws regulated the “traditional governmental functions” of those governments. But the threats against which the doctrine was erected were hardly credible. Under the Fair Labor Standards Act – the statute at issue in both Usery and Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) – Congress merely asked state governments to abide by the same wage and hour rules that bound General Motors and virtually all other private employers. As Bruce La Pierre has noted, in such cases the fact that Congress is subjecting a broad set of private entities to the same regulation as the States helps to ensure that such regulation will not be overly burdensome. See D. Bruce La Pierre, The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation, 60 Wash. U. L.Q. 979, ___ (1982).


580 See, e.g., Rubin & Feeley, supra note 523, at 908-09 (“[F]ederalism is a neurosis, a dysfunctional belief to which we cling despite its irrelevance to present circumstances.”); [others].

581 See Young, State Sovereign Immunity, supra note 184, at 51-58 (arguing that the Court’s state sovereign immunity decisions do little to protect the more important value of state regulatory autonomy).

582 74 U.S. (1 Wall.) 700, 725 (1869).
remain “indestructible,” in terms of the integrity of its own institutions, while retaining no meaningful role in the broader system.

A federalism jurisprudence focused on problems of regulatory autonomy would directly address many of the values that motivate our attachment to federalism in the first place. An autonomy-centered model may also be well-adapted to address two other functional dilemmas facing doctrines that rely more heavily on notions of state “sovereignty.” The first of these, identified by a number of scholars, is that federalism doctrine generally protects state governments while ignoring local governments, which have no independent status under the federal Constitution.583 This is true despite the fact that, as Richard Fallon has observed, “in functional analysis of the values that federalism serves, the significance of local governments is enormous.”584 Threats to state regulatory autonomy like federal preemption, however, often fall on both state and local governments alike.585 Autonomy-centered doctrines that limit the preemptive sweep of federal law are thus likely to benefit all governmental entities further down the food chain.

Likewise, autonomy doctrine is well-suited to address an argument by Edward Rubin and Malcolm Feeley to the effect that the benefits of federalism discussed in this Section generally flow from decentralization of decisionmaking, whether such decentralization arises from constitutional mandate or merely from the policy decisions of officials at the center to devolve power. Values of regulatory diversity and citizen participation, in other words, are not necessarily reasons to enforce protections for state autonomy as a matter of constitutional law.586 The short answer, which I explain further below,587 is that autonomy doctrine has the capacity to address these values on both levels – that is, the constitutional guarantee of state prerogatives and the policy choice to devolve power. To appreciate how this is so, however, requires an investigation of the institutional imperatives involved in the enforcement of federalism. That investigation is the subject of the next Section.

V. Federalism in the Political Branches: The Viability and Extent of Self-Enforcement

Doctrine should be shaped not only by the values that it seeks to promote but also by the relative institutional capacity of courts to promote them. This question, as I acknowledged in Part I, is a matter of comparative institutional choice. At least in theory,


584 Fallon, Conservative Paths, supra note 291, at 441.

585 See, e.g., Wisconsin Public Intervenor v. Mortier, 501 U.S. 597 (1991) (addressing preemption challenge to local ordinance regulating pesticides); Hillsborough Cty. v. Automated Medical Laboratories, Inc., 471 U.S. 707, 713 (1985) (“[F]or the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws.”).

586 See Rubin & Feeley, supra note 523, at 914.

587 See infra TAN ____.
the institutional choice question (Are the courts or the political process better suited to protecting the federal balance?) is distinct from and prior to a second question of *interpretive* choice (What sort of doctrinal tools should courts adopt for protecting federalism?). I have already argued, however, that the institutional question will generally be so multifarious in the federalism context as to preclude categorical conclusions, and that in any event courts are not free simply to abstain from deciding federalism questions institutional grounds. 588 A third reason emerges from the discussion in this Part: The political branches’ capacity to protect federalism is simply too limited and uncertain to justify a categorical exclusion of the matter from judicial concern.

If we are unwilling or unable to exclude courts entirely, then comparative institutional analysis is best brought to bear on doctrine – that is, we will resolve the interpretive questions in federalism doctrine to give courts a broader or narrower role, depending on whether we think courts compare with other institutions that might resolve federalism questions. That is certainly commonplace enough: Courts adopted federalism doctrines that were highly deferential towards Congress after 1937, for example, because their experience of the prior two or three decades suggested (to them, at least) that the political branches were better suited for resolving such questions. 589 Comparative institutional analysis will also be relevant to other issues as well; I conclude this Part, for example, with some very brief speculations about how the political branches might structure their own internal operations to reflect these sorts of considerations. But this is primarily an essay about courts and doctrine, so the bearing of institutional considerations on the latter must necessarily take center stage.

Although I frame the issue as one of interpretive choice, a frequent observation by institutional analysts remains critical: Too many scholars and judges have addressed the question who should decide federalism issues in what Neil Komesar describes as “single institutional analysis.” 590 Some have stressed the strengths or weaknesses of courts in addressing federalism issues; others have emphasized the capacity, or lack thereof, of the political branches. 591 As Professor Komesar explains, however, “[v]alid institutional comparison calls upon courts to function when they can do a better job than the alternatives.” This means that “[c]ourts may be called upon to consider issues for which they are ill equipped in some absolute sense because they are better equipped to do so in a relative sense.” 592

My analysis here tries to address both sides of the comparison. The present Part focuses on the political branches, while the following Part emphasizes courts. The analysis is far from definitive in either case. As I have suggested, it is simply not possible to draw many firm conclusions at a high level of generality on these sorts of

588 See supra TAN ___.
589 [Cushman?]
590 See KOMESAR, supra note ___, at 27.
591 [examples]
592 KOMESAR, supra note ___, at 149.
questions. Moreover, as Adrian Vermeule has demonstrated, issues of interpretive choice (and institutional choice as well) often turn on empirical questions, and in many cases the answers may be unknown or even unknowable.\textsuperscript{593} I have tried throughout my discussion to point out areas where it might be possible to advance the ball through empirical research. But many important facts will remain unknown, and courts will often have to frame doctrine under conditions of uncertainty.

For example, my discussion in Section A of the argument that federal political actors represent state governmental interests accepts that this dynamic operates some of the time, but also suggests that in other situations federal representatives may actually compete with state-level politicians. Which effect dominates is, at bottom, an empirical question, but one would be hard pressed to resolve it through further research. It would be even more difficult to calculate the “optimal” level of judicial intervention to counteract the competitive activities of federal politicians, even if we could agree on exactly how much federalism we want. Similar sorts of difficult and possibly intractable empirical uncertainties pervade this area of the law.

My analysis here attempts to respond to these uncertainties through several related strategies. First, I address these institutional questions at a relatively high level of generality, assessing general tendencies while recognizing that individual doctrinal contexts may require different resolutions, depending in part on how the underlying empirical issues play out in that particular context. Second, I pay relatively close attention to the claims made by prior advocates of judicial deference to the political branches, on the view that the factual intuitions reflected in those views represent the considered assessments of informed and intelligent observers over time. Third, I argue that the development of federalism doctrine should be incremental, so that we need only decide the direction and approach of incremental change while leaving its magnitude to be worked out over a series of decisions. Finally, I suggest that empirical uncertainty is itself an argument for choosing a “soft” over a “hard” model of judicial review; under the former, the court’s resolution of federalism question is provisional and subject to modification by the political branches, who may have better information in any given case. I will still have to make certain assumptions and leaps, but hopefully I can at least press some distance toward a more nuanced analysis of the “political safeguards of federalism” than has sometimes appeared in the prior literature.

I consider three different sets of claims about the institutional capacity of the political branches to protect federalism. Section A begins by addressing the most common claim, that political actors at the federal level 	extit{represent} and respond to the interests of state political institutions. This is the classic Twentieth Century version of the “political safeguards” claim advanced by Herbert Wechsler and Jesse Choper, among others. Section B considers an older variant, identified most closely with James Madison, which holds that the sovereign People control the federal balance of power and that federal and state governments compete for their loyalty. In Section C, I canvass the quite different claim that the federal political process protects the States not through representation but through sheer inertia; States retain their freedom of action to the extent

\textsuperscript{593} [cite]
that it is difficult to make federal law. Finally, Section D considers what each of these arguments can tell us about how to build current federalism doctrine.

A. Representation

Herbert Wechsler’s classic article began by describing a national “mood,” under which national action is “regarded as exceptional in our polity, an intrusion to be justified by some necessity, the special rather than the ordinary case.” The bulk of his argument, however, emphasized the first aspect of Madison’s discussion in Federalist 45, that is, the extent to which federal political institutions are derived from and dependent on the institutions of state government. The Senate, Wechsler observed, “cannot fail to function as the guardian of state interests as such,” and “[f]ederalist considerations . . . play an important part even in the selection of the President.” Because of these relationships, he concluded that “the Court is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interests of the states, whose representatives control the legislative process and, by hypothesis, have broadly acquiesced in sanctioning the challenged Act of Congress.”

The Supreme Court largely adopted Professor Wechsler’s analysis in Garcia, observing that

The Framers thus gave the States a role in the selection both of the Executive and the Legislative Branches of the Federal Government. The States were vested with indirect influence over the House of Representatives and the Presidency by their control of electoral qualifications and their role in Presidential Elections. . . . They were given more direct influence in the Senate, where each State received equal representation and each Senator was to be selected by the legislature of his State. Because of these safeguards, the Court concluded that “[s]tate sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.”

There is no evidence that Professor Wechsler meant the “political safeguards” to be a complete theory of federalism enforcement. To the contrary, he carefully denied “that the Court can decline to measure national enactments by the Constitution when it is called upon to face the question in the course of ordinary litigation.” By pointing out that “the supremacy clause governs there as well,” Wechsler seemed to insist that the limits on federal power in the Constitution itself, such as the doctrine of enumerated

594 Wechsler, supra note ___, at 544.
595 Wechsler, supra note ___, at 548, 557.
596 Id. at 559.
598 Id. at 552.
599 Wechsler, supra note ___, at 559.
600 Id.
powers, remain supreme law that courts must enforce. Judicial review should be
deferential, but it must still police the outer boundary of federal power.

That would be consistent with the apparent position of Chief Justice Marshall,
who made his own “political safeguards” argument in *Gibbons v. Ogden*601:

If, as has always been understood, the sovereignty of Congress, though
limited to specified objects, is plenary as to those objects, the power over
commerce with foreign nations, and among the several States, is vested in
Congress as absolutely as it would be in a single government, having in its
constitution the same restrictions on the exercise of the power as are found
in the constitution of the United States. The wisdom and the discretion of
Congress, their identity with the people, and the influence which their
constituents possess at elections, are, in this, as in many other instances, as
that, for example, of declaring war, the sole restraints on which they have
relied, to secure them from its abuse. They are the restraints on which the
people must often rely solely, in all representative governments.602

Critics of judicial review in federalism cases have sometimes read this passage as an
argument for abdicating judicial enforcement altogether. Justice Souter’s dissent in
*Morrison*, for example, moves seamlessly from Marshall’s declaration that politics is the
“one restraint on [the] valid exercise” of Congress’s “plenary . . . power within the sphere
of activity affecting commerce”603 to the conclusion that “supposed conflicts of sovereign
political interests implicated by the Commerce Clause” are “remit[ted] . . . to politics.”604
But the italicized concepts are not equivalent. Justice Souter carefully and correctly (as is
his wont) characterizes Marshall as holding that politics take over only when Congress is
actually regulating commerce. *Morrison*, however, was a case about whether that
condition was met in the first place. That question surely “implicates” the Commerce
Clause, but nothing in *Gibbons* supports remitting boundary questions about the scope of
that clause to politics.605

602  Id. at 197.
added).
604  Id. at 649 (emphasis added).
605  Chief Justice Rehnquist’s majority opinion in *Morrison* rightly pointed out the distinction between that
case and *Gibbons*:

[Justice Souter’s] assertion that, from *Gibbons* on, public opinion has been the only restraint on
the congressional exercise of the commerce power is true only insofar as it contends that political
accountability is and has been the only limit on Congress’ exercise of the commerce power within
that power’s outer bounds. As the language surrounding that relied upon by JUSTICE SOUTER
makes clear, *Gibbons* did not remove from this Court the authority to define that boundary.

Id. at 616 n.7 (majority opinion) (citing *Gibbons*, 22 U.S. (9 Wheat.) at 194-95). Justice Souter admitted as
much, acknowledging that “[n]either Madison nor Wilson nor Marshall, nor the Jones & Laughlin, Darby,
Wickard, or Garcia Courts, suggested that politics defines the commerce power.”  Id. at 651 n.19. He
argued that the outer boundary is described by the extremely lenient “substantial effects” test, and that the
majority’s exclusion of non-commercial regulation that nonetheless “affects” commerce thus operated
Justice Souter cited the Court’s endorsement of Wechsler in *Garcia* as support for abstaining in *Morrison*, but *Garcia* actually illustrates the distinction between the latter case and what Chief Justice Marshall most likely had in mind. *Garcia*, unlike *Morrison*, was not case about the boundaries of the commerce power. Instead, *Garcia* concerned the validity of the *National League of Cities* doctrine—a new, judge-made principle of state sovereignty protecting “traditional state functions” from otherwise-valid Commerce Clause regulation. Presumably, Wechsler (or Marshall) would have said that while the Court cannot abdicate its responsibility to enforce limits on federal power that are clearly “in” the Constitution, the political safeguards of federalism largely obviate the need to fashion new limits through doctrinal innovation.

It is an important enough point that neither Marshall nor Wechsler nor *Garcia* spoke to the right and duty of the Court to police the outer boundary of Congress’s power. But I actually want to defend an exercise of judicial power in the class of cases that Wechsler, *Garcia*, and *Gibbons* all render problematic. For reasons that I discuss in Part VI, the scope of the commerce power is likely to remain so broad as to offer largely a symbolic constraint on Congress. If federal power is meaningfully to be limited, it will have to come through doctrines that restrain national action even within the scope of the enumerated powers. The anti-commandeering doctrine, for example, operates to check otherwise-valid exercises of the commerce power. “Weaker” doctrines like pro-federalism clear statement rules also generally operate to restrict the scope of federal legislation even without a colorable argument that Congress has exceeded the boundaries of its constitutional authority.

To justify such doctrines, we might look to Justice Blackmun’s opinion in *Garcia*. That opinion invoked Professor Wechsler’s idea of political safeguards, but read (or misread) him as eschewing virtually all substantive limits on Congress’s power in favor of a nearly exclusive focus on the process of representation. Blackmun argued that

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within the sphere of political control. *See id.* That simply makes clear, however, that the disagreement between Justice Souter and the majority was over the proper doctrinal test for defining the boundary of the commerce power, and Justice Souter conceded that *that* question cannot be decided by politics.

*See id.* at 649 (Souter, J., dissenting) (discussing *Garcia* v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985)).

*See National League of Cities v. Usery, 426 U.S. 833 (1976).*

*See infra TAN ___. As I explain, that does not mean that the symbolic constraint is unimportant.

*See Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992).* Souter’s dissenting position in *Morrison* thus would have been more persuasive in *Printz* or *New York*, although Justice Souter in fact joined the majority in the latter case.

*See, e.g., Gregory v. Ashcroft, 501 U.S. 452 (1991) (requiring a clear statement of Congress’s intent to regulate state governments in circumstances that once would have implicated the *National League of Cities* doctrine); Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) (presumption against preemption of state law).*

The “virtually” is required by Justice Blackmun’s statement, late in the opinion, that “[t]hese cases do not require us to identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause.” *Garcia* v. San Antonio Metro. Transit Auth., 469 U.S. 528, 556 (1985) (citing *Coyle v. Oklahoma, 221 U.S. 559 (1911).* The citation to *Coyle* – which held that the Federal Government may not dictate the location of a state capitol – suggests that even
“the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the ‘States as States’ is one of process rather than one of result.”612

Because of this procedural focus, “[a]ny substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a ‘sacred province of state autonomy.’”613

The Garcia majority is often read as completely disavowing a judicial role in the protection of state autonomy. But whether or not Justice Blackmun intended to do so, the opinion left the door open to a “Democracy and Distrust”614 for federalism doctrine – that is, doctrines that would derive their justification from failures in the political process but which might fairly aggressively limit federal incursions on state autonomy.615 John Hart Ely’s work on process failures surely demonstrates how far-reaching such review can be in the context of individual rights, and Andrzej Rapaczynski traced the outlines of such a theory in the federalism area shortly after Garcia came down.616 Some of the promise of such a jurisprudence has been realized in the anti-commandeering doctrine, which may be justified on process grounds,617 as well as in the various “clear statement” rules that

the Garcia majority might be willing to acknowledge some very narrow affirmative limit imposed by state sovereignty concerns on Congress’s enumerated powers. But this limit would seem to be so narrow as to hardly be worth mentioning.

612 Id. at 554 (emphasis added). See also id. at 552:

In short, the Framers chose to rely on a federally system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority. State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.

There is, to be sure, ambiguity in statements like this. The allusio to “judicially created limitations” suggestions a position similar to that I have just attributed to Wechsler: Courts may enforce textual limits on Congress’s power, but there is no need to make up new limits. However, the textual limitation of federal power to “commerce among the several states,” for example, is a “discrete limitation[] on the objects of federal authority” even though it is not “judicially created.” In any event, Justices on the present Court who would follow Garcia’s approach have invoked it in enumerated powers cases as well as in cases involving “judicially created” limits on federal authority. See United States v. Morrison, 529 U.S. 598, 649-50 (2000) (Souter, J., dissenting).

613 Garcia, 469 U.S. at 554 (citing EEOC v. Wyoming, 460 U.S. 226, 236 (1983)).

614 See, of course, John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (1980); see also Young, Two Cheers, supra note ___, at 1364-66 (applying Professor Ely’s theory to federalism doctrine).

615 See, e.g., Louis Michael Seidman, The Preconditions for Home Rule, 39 Cath. U. L. Rev. 373, 409 (1990) (suggesting that Justice Blackmun might have had in mind a “sort of ‘equal protection for states’ principle” that could be invoked if “other States took advantage of their political power to impose limitations on certain disfavored geographic areas that those States were unwilling to live with themselves”).

616 See Rapaczynski, supra note ___, at 364-65.

617 See Printz v. United States, 521 U.S. 898, 927-28 (1997); New York v. United States, 505 U.S. 144., 182-83 (1992); see also Young, Two Cheers, supra note ___, at 1360-61 (discussing the anti-
guard against interpretations of federal statutes that encroach on state sovereignty. These sorts of doctrines make clear that *Garcia* need not be read as the “Second Death of Federalism.”

Others, however, have pressed the “political safeguards” theory so far as to justify a complete abdication of judicial responsibility for enforcing the federal balance. Most famously, Jesse Choper urged that the Court should simply declare federalism cases non-justiciable, in order to save its political capital for the more important task of enforcing individual rights. Lynn Baker and I have criticized this version of the “political safeguards” argument elsewhere. The important point for present purposes is that Professor Wechsler’s (and Madison’s) idea opens up a range of possibilities for judicial review (or non-review) of federalism issues. I want to suggest that how we choose among them ought to be guided by our assessment of the soundness of Wechsler’s political theory, as well as the strengths and weaknesses of the alternative approaches to judicial review that may be available.

It must be said that the *Garcia*/Wechsler theory of protection through representation has all kinds of problems. The critical literature is extensive, and I will

commandeering doctrine as a means of requiring Congress to internalize the financial and political costs of its programs); La Pierre, *Political Safeguards*, supra note 577, at 989.


619 Van Alstyne, supra note 288, at 1709 (criticizing *Garcia* as an abdication of the Court’s responsibility). I do not mean to suggest that Professor Van Alstyne was wrong in his assessment of what *Garcia* meant to the justices in the majority at the time it was decided. Justice Blackmun may very well have intended to minimize judicial review of federalism issues across the board, and some of his subsequent votes suggest no great enthusiasm for finding process-based limits on federal power. See, e.g., New York v. United States, 505 U.S. 144, 189 (1992) (joining Justice White’s dissent rejecting the anti-commandeering rule). The point is simply that *Garcia* – perhaps inadvertently – pointed the way toward a more rigorous doctrine of federalism. When life gives you lemons . . . .

620 See CHOPER, supra note ___, at ___ [quote?].

621 See Baker & Young, supra note 10, at 103-06 (arguing that the political question doctrine exhausts the category of “non-justiciable” constitutional claims, and that federalism issues cannot be fit within that category).

hit only the high points here. The first has to do with Professor Wechsler’s theory of representation. Because federal representatives are dependent upon constituents at the state level, Wechsler assumed Members of Congress will function effectively as ambassadors for their states in Washington, guarding their states’ interests against federal encroachment. As Larry Kramer has demonstrated, however, this view conflates representation of interests at the state level with representation of the actual institutions of state government. The two are not the same; indeed, federal and state politicians are likely to find themselves competing to provide for the needs of their common constituents. This competition provides strong incentives for federal representatives to expand their own responsibilities at the expense of their state-level colleagues. As Jonathan Macey has explained, “the political-support-maximization model would seem to predict that the federal government will always exercise its power to preempt local law – either to regulate or to forbear from regulating – in order to obtain for itself the political support associated with providing laws to interested political coalitions.”

Some opponents of judicial review in federalism cases have acknowledged these sorts of problems, but have sought to rehabilitate the Garcia/Wechsler approach by identifying alternative political mechanisms that protect state autonomy. Larry Kramer, for example, has argued that political parties and administrative agencies tie the fortunes of state and federal-level politicians together, so that federal representatives and bureaucrats are inclined to look out for the institutional interests of state government instead of competing with state politicians. This dynamic no doubt works out the way Professor Kramer predicts at least some of the time. Yet there are also reasons to doubt

623 I have already discussed the objection that the judicial abdication called for by strong versions of the “political safeguards” argument is inconsistent with the obligation of Courts, outside the narrow scope of the political question doctrine, to decide constitutional issues that come before them. See supra TAN ___.

624 [cite Wechsler]. Justice Blackmun’s opinion in Garcia likewise seems to have assumed an ambassadorial or intergovernmental model when it stated that the makeup of Congress provides for “state participation in federal governmental action.” 469 U.S. at 556.

625 See Kramer, Politics, supra note 622, at ____ [quote].

626 Macey, Federalism, supra note ___, at 266. Professor Macey notes, however, that “contrary to this prediction, we observe that the federal government willingly defers to local governments over a wide range of issues by allowing them to continue to supply laws.” Id. He identifies three sets of circumstances in which, under the economic theory of regulation, we would expect such federal deference, and I address these circumstances in the next Subsection. See infra TAN ___. The important point for present purposes is that, as Macey’s analysis makes clear, state politicians are often dependent upon federal ones, rather than the reverse. See, e.g., id. at 291 (“Deferring regulatory matters to the state legislatures must take its place alongside the other strategies by which federal politicians can offer wealth transfers to interest groups in exchange for political support.”). For the notion that state and federal politicians compete with one another, see also Clayton P. Gillette, The Exercise of Trumps by Decentralized Governments, 83 V.A. L. REV. 1347, 1357 (1997) (“Where central representatives are popularly elected, they may have a stake in reelection that induces them to favor central intervention whenever they can thereby be perceived as addressing an issue of interest to constituents, regardless of whether centralized attention to the issue is required or authorized.”); Baker & Young, supra note 10, at 114-15 (arguing that the federal Gun Free School Zones Act illustrates this dynamic); Friedman, Valuing Federalism, supra note 523, at 374-75 (noting the incentives that federal politicians have to move “‘apple pie’ issues” to the federal level).

627 See Kramer, Politics, supra note ___, at ____ [quote]; Kramer, Understanding Federalism, supra note ___, at ___.

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how far the argument goes. Mutual dependence is a double-edged sword; in some instances, it may encourage state politicians to sacrifice their own institutional interests and the interests of their state for the good of the national party.628

Unlike Madison’s and Wechsler’s version of the interdependence argument, moreover, Professor Kramer’s account is predicated on mechanisms – the structure of political parties, the interlocking nature of state and federal administrative responsibilities – that are not themselves grounded in the Constitution.629 They change with every alteration in party nomination and campaign financing rules, executive orders centralizing or decentralizing control within the Executive branch, and the structure of cooperative federalism statutes and federal funding programs. In each of these settings, protections for state autonomy are often a byproduct of a structure designed primarily to meet other needs. Under these circumstances, we have little reason to be sanguine that preservation of those protections will be an imperative when the structures are redesigned for other reasons.630

Professor Kramer’s mechanisms are, in any event, no answer to a second problem that arises when we distinguish between the classic problem of vertical aggrandizement – that is, attempts by the national government to increase its own power vis-à-vis the states for its own purposes – and horizontal aggrandizement.631 Most discussion of “political safeguards” focuses on the vertical scenario. In the horizontal version, one group of state governments or interests concentrated at the state level use the national government as an instrument for imposing its preferences on other states. A good nineteenth century example is the Fugitive Slave Law, by which the Southern states were able to use the federal government as an instrument for enforcing their preference for a draconian regime of recovery of escaped slaves on states in the North that preferred to give putative

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628 See, e.g., Laylan Copelin & Michele Kay, D.C. Keeps Eye on Special Session, AUSTIN AMERICAN-STATESMAN, June 19, 2003 (available at http://www.statesman.com/legislature/content/coxnet/texas/legislature/0603/0619perry.html) (describing pressure on Texas state officials from House Majority Leader Tom Delay and presidential advisor Karl Rove to convene a contentious special legislative session to re-draw federal House districts, in order to help Republican party fortunes in Congress); Dave Harmon, Representatives Seek Senate’s Help for Threatened Bills, AUSTIN AMERICAN-STATESMAN, May 14, 2003 (available at http://www.statesman.com/hp/content/coxnet/texas/legislature/0503/0515deadbills.html) (describing how the attempt to push redistricting legislation through the state legislature, at the behest of federal officials, endangered important state legislation).

629 See Prakash & Yoo, supra note 226, at 1480-89 (arguing that Professor Kramer’s theory “relies on an extraconstitutional structure of politics that is so admittedly mutable and uncertain that it only proves our point: more permanent mechanisms, such as judicial review, are necessary to safeguard federalism”); Baker & Young, supra note 10, at 115-17 (voicing a similar criticism).

630 See, e.g., Howard, supra note 173, at 793 (observing that “[t]he ‘nationalization’ of campaign finance has led to the weakening of the federal lawmakers’ loyalties to constituents”).

631 On the distinction between horizontal aggrandizement, see generally Baker & Young, supra note 10, at 109-10; see also Baker, Conditional Spending, supra note ____ at 1940 (arguing that conditional federal spending is problematic because it allows “some states to harness the federal lawmakers’ power to oppress other states”).
escapees more due process.\textsuperscript{632} Because the horizontal scenario depends on Congress’s responsiveness to the states, it is driven by the very dynamic that Professor Wechsler and the \textit{Garcia} opinion posited. Even if the political safeguards theorists are correct, in other words, horizontal aggrandizement would remain as a threat to the autonomy of individual states.\textsuperscript{633}

Third, political safeguards theorists often seem to downplay the many political and economic forces that press for resolution of problems at the national level. One factor is that “it simply [is] much easier to fight a regulatory war in one central location, rather than in fifty state fora.”\textsuperscript{634} Interest groups seeking enactment of a particular policy may also prefer federal law because it is “considered a higher quality product than state law,”\textsuperscript{635} or because it is harder for those who are made worse off by the regulation to avoid it by exiting to another jurisdiction.\textsuperscript{636} The result of these factors, according to Professor Macey, is that “we observe interest groups exhibiting a strong preference for federal as opposed to state law in most areas.”\textsuperscript{637} Those tendencies will not, of course, be dispositive in all cases. But from the perspective of state regulatory autonomy, it’s fair to say they don’t help.

Finally, it’s worth pointing out that the Supreme Court has very explicitly rejected \textit{Garcia}’s theory of representation, although the Court seems not to have realized it. In the \textit{Term Limits} case, the Court rejected the notion that the States may interpose themselves between the People and their federal representatives.\textsuperscript{638} Justice Stevens, writing for the majority, stated that “the Framers, in perhaps their most important contribution, conceived of a Federal Government directly responsible to the people, possessed of direct power over the people, and chosen directly, not by States, but by the

\begin{itemize}
\item \textsuperscript{632} See, e.g., \textit{Prigg v. Pennsylvania}, 41 U.S. (16 Pet.) 539 (1842) (holding that the federal Fugitive Slave Law preempted Pennsylvania’s more lenient regime); \textit{Baker & Young, supra} note 10, at 121-24 (discussing the Fugitive Slave Law as an instance of horizontal aggrandizement). In this instance, of course, the Southern States were sufficiently influential to obtain a Fugitive Slave Clause in the Constitution itself. U.S. \textit{CONST.} art. IV, § 2, cl.3. \textit{See also} Earl M. Maltz, \textit{Slavery, Federalism, and the Structure of the Constitution}, 36 \textit{AM. J. LEGAL HIST.} 466, 471 (1992) (“[T]he fugitive slave clause clearly restricts the freedom of state governments to define the status of some individuals—runaway slaves—within the territorial limits of their power. A federal standard thus displaces preexisting state authority in contravention of the general principle of state autonomy.”).
\item \textsuperscript{633} \textit{See} Baker & Young, \textit{supra} note 10, at 118.
\item \textsuperscript{634} \textit{Friedman, Valuing Federalism, supra} note 523, at 374; \textit{see also} Macey, \textit{Federalism, supra} note ___, at 271 (observing that “transaction costs” help explain why “interest groups generally will prefer to obtain rents by invoking federal rather than state law”).
\item \textsuperscript{635} \textit{See} Macey, \textit{Federalism, supra} note ___, at 272. Professor Macey explains that this perception may arise because “federal bureaucrats and judges are perceived as more sophisticated than their state rivals,” because federal regulators have more resources available, or because federal politicians are considered to have more “reputational capital invested in the stability of the deals they make.” \textit{Id.}
\item \textsuperscript{636} \textit{See} Macey, \textit{Federalism, supra} note ___, at 272-73.
\item \textsuperscript{637} \textit{Id.} at 273.
\end{itemize}
Justice Kennedy explained this point in more detail, and it is worth quoting him at some length:

It was the genius of [the Framers’] idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.

... The political identity of the entire people of the Union is reinforced by the proposition, which I take to be beyond dispute, that, though limited as to its objects, the National Government is, and must be, controlled by the people without collateral interference by the States. McCulloch affirmed this proposition as well, when the Court rejected the suggestion that States could interfere with federal powers. “This was not intended by the American people. They did not design to make their government dependent on the States.” ... The States have no power, reserved or otherwise, over the exercise of federal authority within its proper sphere. 640

Federal representatives, then, are not ambassadors from their states to Washington, D.C. They are not “dependent,” as Professor Wechsler and the Garcia majority thought, on the institutions of state government. Attempts by those state institutions to “control” the federal government – through specific instructions to representatives, perhaps, or ballot access restrictions on representatives who vote against the state’s interests in Congress – amount to “collateral interference” and may well be, under the Term Limits result, unconstitutional. Instead, federal representatives have their own relationship with the people and consequently their own incentives, in competition with state politicians, to provide for their constituents.

Despite all of these problems, I do not mean to suggest that the Garcia/Wechsler representational safeguards never operate to protect state autonomy. There are, no doubt, 639

639 Id. at 821. Ironically, the Term Limits majority was primarily made up of nationalist justices who either joined Garcia when it was initially decided (Stevens) or who have endorsed its “political safeguards” theory in the years since (Souter, Ginsburg, Breyer). See [cites endorsing political safeguards]. Equally ironically, the Term Limits dissenters – who relied on a conception of representation basically similar to Garcia – included two of Garcia’s dissenters (Rehnquist and O’Connor), as well as two other justices (Scalia and Thomas) who have rejected the “political safeguards” notion whenever it has been raised. [cites] Only Justice Kennedy emerged from Term Limits with anything approaching consistency on this point. See generally Term Limits, 514 U.S. at 841 (Kennedy, J., concurring) (“That the States may not invade the sphere of federal sovereignty is as incontestable, in my view, as the corollary proposition that the Federal Government must be held within the boundaries of its own power when it intrudes upon matters reserved to the States.”) (citing United States v. Lopez, 514 U.S. 549 (1995)).

640 Id. at 838, 841 (Kennedy, J., concurring) (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 432 (1819)) (emphasis added).
situations in which they do. Indeed, the fact that significant state autonomy remains in practice, despite over 50 years of judicial unwillingness to enforce significant restrictions on federal power, suggests that something in the federal political process must act to restrain Congress. And it is not hard to find the occasional piece of anecdotal evidence, such as Congress’s enactment of the Unfunded Mandates Reform Act, that points to some concern for state institutional autonomy on the part of federal politicians.

The federal political process may protect state autonomy, however, not so much because it represents state interests but simply because it is cumbersome. Brad Clark, for example, has emphasized the difficult procedural gauntlet facing federal legislation under Article I. “Each set of procedures,” he argues, “requires the participation and assent of multiple actors to adopt federal law. This creates the equivalent of a supermajority requirement and thus reinforces the burden of inertia against federal action, leaving states greater freedom to govern.” We thus might think of the familiar but difficult process by which legislative proposals must secure a place on the legislative agenda, navigate both houses of the Congress, and either secure Presidential approval or a supermajority sufficient to override a veto as the “procedural safeguards of federalism.”

This overview of the political and procedural safeguards of federalism suggests several conclusions for judicial review. First, we should set aside Dean Choper’s version of the “political safeguards” argument, which dispensed with judicial review entirely out of confidence that politics would protect federalism on its own. This is true for several reasons. First, none of these political and procedural safeguards inspire complete confidence. The representation model, as I have discussed, is significantly flawed, and the procedural safeguards mostly limit the rate at which the federal government can make inroads on state authority. Neither is likely, without more, to provide a sustainable bulwark against the continued erosion of state autonomy.

Second, process-based theories of constitutional law in other contexts emphasize the need for courts to police the rules of the game and to make sure that all relevant interests are, in fact, represented. A federalism-centered “Democracy and Distrust”

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641 See, e.g., Deborah Jones Merritt, Three Faces of Federalism: Finding a Formula for the Future, 47 Vand. L. Rev. 1563, 1567 (1994) (conceding that “[u]nder some circumstances, the federal process model accurately describes the political relationship between state and national governments. State governments have powerful lobbying groups to assert their interests, and national representatives frequently heed those voices. The history of national legislation demonstrates that the states frequently influence the legislative process and that they have achieved exemption from many important national laws”).

642 Pub. L. 104-4, 109 Stat. 48 (1995); see also Printz v. United States, 521 U.S. 898, 957 (1997) (Stevens, J., dissenting) (invoking the UMRA as evidence that the political safeguards are effective in protecting state governmental interests).

643 Clark, Separation of Powers, supra note 117, at 1339. See also Young, Constitutional Avoidance, supra note 246, at 1609.

644 Clark, Separation of Powers, supra note 117, at 1339.

645 See Choper, supra note ___, at ___.

646 See, e.g., Ely, supra note 614, at 103 (arguing that the institutional independence of courts “put[s] them in a position objectively to assess claims . . . that either by clogging the channels of change or by acting as
would thus emphasize a judicial role in enforcing the procedural requirements for federal action and in ensuring that dysfunctions in the process do not effectively exclude the institutional interests of state governments. A process-based approach to federalism simply shifts the focus of judicial review; unless we think the process is perfect, however, it is hard to see why that shift in emphasis would warrant the judicial abdication that many propose. As I discuss further below, courts can and should enhance the operation of political and procedural safeguards in a number of ways.

Third, a complete judicial abdication cannot be squared with traditional notions of the judicial power. Chief Justice Marshall’s justification for judicial review in *Marbury v. Madison* relied heavily on the obligation of courts to apply the relevant rules – including constitutional rules – to whatever cases come before them. That obligation cannot simply be declined because the court would prefer to focus on individual rights cases. As Marshall observed in *Cohens v. Virginia*, the Court has “no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.” Unless we think federalism cases fit the narrow contours of the modern political question doctrine – and few argue that they do – then the Court must decide them.

The better approach, I think, is to combine the Garcia and Wechsler models. As I have discussed, Professor Wechsler seemed to envision judicial enforcement of the Constitution’s textual limits on federal power without explicitly endorsing the

accessories to majority tyranny, our elected representatives in fact are not representing the interests of those whom the system presupposes they are”).

647 See id. (arguing that the two types of dysfunction that should trigger judicial intervention on behalf of individual rights are claims that the process has been distorted or that certain interests are “systematically disadvantaging” some other interest).


649 See, e.g., BICKEL, *supra* note ___, at 114 (interpreting *Marbury* to hold that “the judiciary’s power to construe and enforce the Constitution . . . is to be deduced from the obligation of the courts to decide cases conformably to law”); Herbert Wechsler, The Courts and the Constitution, 65 COLUM. L. REV. 1001, 1006 (1965) (arguing that courts decide constitutional questions “for the reason that they must decide a litigated issue that is otherwise within their jurisdiction and in doing so must give effect to the supreme law of the land”).

650 19 U.S. (6 Wheat.) 264, 404 (1821).

651 Personally, I don’t much believe in the political question doctrine, at least if it is construed to mean that the Court is simply not permitted to enforce the Constitution in certain instances where it actually has been violated. See Louis Henkin, *Is There a Political Question Doctrine?*, 85 YALE L. J. 597 (1976) (arguing that most instances in which courts deny relief pursuant to the political question doctrine can be ascribed to the simple absence of a constitutional violation or the discretion to deny equitable relief). One might also point to the abstention doctrines, under which courts decide not to decide constitutional questions in certain circumstances. But these doctrines are also justified primarily in terms of courts’ traditional discretion to deny equitable relief where such relief would not serve the public interest. See, e.g., Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996) (holding that abstention is impermissible outside claims for equitable relief). And they tend to rest on the primacy of some other judicial forum – usually a state court – to decide the question.

652 See *supra* TAN ___.

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development of new doctrines to protect and enhance the operation of political checks. This approach might be adequate, notwithstanding the weaknesses of political checks operating alone, if one had a great deal of confidence in substantive limits based on text. For reasons having to do with the Court’s pre-1937 experience, however, substantive limits also seem likely to remain a highly incomplete solution.653

The Garcia opinion, on the other hand, can be read to invite the development of doctrines “tailored to compensate for possible failings in the national political process,” but left no role for judicial enforcement of substantive restrictions on Congress – even those grounded in the constitutional text.654 While the Court properly has not heeded Garcia’s call to ignore substantive limits entirely, it has begun to develop Garcia’s affirmative potential in several ways. I discuss the sort of directions that this sort of process-based federalism might take in the next subsection.

B. Competition

Self-enforcement figures prominently in the political theory of the Founders. James Madison argued in Federalist 51 that “[i]n framing a government which to be administered by men over men . . . you must first enable the government to control the governed; and in the next place oblige it to control itself.”655 The proposed constitution was to achieve this through the combination of federalism and separation of powers:

In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.656

While the Founders probably contemplated some judicial role in maintaining these allocations in place,657 courts are certainly not the primary mechanism. Rather, “the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights.”658

Applied to federalism, this self-enforcement notion holds that states can take care of themselves through the political process – an idea that has dominated debates about judicial enforcement of federalism in this country over the past several decades. This

653 See infra TAN ____.


655 THE FEDERALIST No. 51, at 322 (Clinton Rossiter, ed. 1961).

656 Id. at 323.

657 See Young, Two Cheers, supra note Error! Bookmark not defined., at 1353-54; Prakash & Yoo, supra note 226, at 1489-1521.

658 THE FEDERALIST No. 51, at 322 (Clinton Rossiter, ed. 1961).
idea, adopted as the law of the land in the *Garcia* case\footnote{Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).} although arguably undermined by more recent decisions,\footnote{See Yoo, *Judicial Safeguards*, supra note 163, at 1311 (arguing that while “[a] survey of leading constitutional law courses and casebooks might suggest that [Garcia] is good law,” it “is not, nor should it be”). I discuss the extent to which *Garcia*’s paradigm has been shifted by more recent developments in the next subsection. *See infra TAN ___.} is usually traced to Herbert Wechsler’s seminal article in 1954.\footnote{Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954); *see also Choper, supra note 720, at ___ (expanding on Wechsler’s theory). For a typical attribution of credit, *see, e.g.*, Yoo, *supra* note 333, at 1312 (“*Garcia* explicitly adopted an academic theory concerning the nature of the Constitution and the political process in order to justify its finding of nonjusticiability. Known commonly as the ‘Political Safeguards of Federalism,’ this theory first was put forward by Professor Herbert Wechsler and then elaborated and expanded by Professor Jesse Choper.”).} But its antecedents – as Wechsler recognized – go back much further than that to James Madison’s essays in the Federalist and John Marshall’s opinion in *Gibbons v. Ogden*.\footnote{22 U.S. (9 Wheat.) 1 (1824).} As John Yoo has recognized, “the Federalists themselves first developed the theory that Professors Wechsler and Choper would resurrect to such great effect.”\footnote{Yoo, *supra* note 333, at 1361.} It is worth paying attention to the original version, because in many ways it is more sophisticated and even – perhaps ironically – more relevant to our current institutional arrangements than the Wechsler/Choper revision.

Madison laid out his “political safeguards” theory in Federalist 45 and 46. He had defended the initial allocation of power in prior essays, arguing that good reasons supported each individual delegation of power to the center in the proposed constitution.\footnote{[cites]} Numbers 45 and 46 addressed the *stability* of this initial allocation; hence, Number 45 considered “whether the whole mass of [powers transferred to the federal government] will be dangerous to the portion of authority left in the several states.”\footnote{The Federalist No. 45, at 288 (Clinton Rossiter, ed. 1961).} The question was not so much whether the Federal Government had been granted too much power, but rather whether the proposed structure would allow that government to draw *more* power to itself in the years ahead.

The answer, according to Madison, was that we should be more worried about the States aggrandizing themselves than the Federal Government. Although he had set out to consider the notion that “the operation of the federal government will by degrees prove fatal to the State governments,” he concluded that “the more I revolve the subject, the more fully I am persuaded that the balance is much more likely to be disturbed by the preponderancy of the last than of the first scale.”\footnote{Id. at 289.} In addition to noting that confederacies throughout history had tended to fall apart rather than devolve into
centralized tyranny. Madison identified two broad sorts of checks on central authority. The first relied on the institutional dependence of the federal government on state institutions. “The State governments,” he pointed out, “may be regarded as constituent and essential parts of the federal government; whilst the latter is nowise essential to the operation or organization of the former.” That relationship would cause national officials to internalize the interests and preferences of the States; national officials, in other words, will function more as representatives of than as competitors to state-level politicians. This is the idea that Professor Wechsler emphasized and, probably as a direct result, the mechanism on which current debates have focused.

Madison, however, had another string to his bow. He observed that

Either the mode in which the federal government is to be constructed will render it sufficiently dependent on the people, or it will not. On the first supposition, it will be restrained by that dependence from forming schemes obnoxious to their constituents. On the other supposition, it will not possess the confidence of the people, and its schemes of usurpation will be easily defeated by the State governments, who will be supported by the people.

The People’s loyalty, Madison insisted, is the key determinant of political power in a system based on popular sovereignty. This is what he thought the Antifederalists had forgotten in their focus on the powers allotted to the central government. “They must be told that the ultimate authority . . . resides in the people alone, and that it will not depend merely on the comparative ambition or address of the different governments whether either, or which of them, will be able to enlarge its sphere of jurisdiction at the expense of the other.” Because the People remain sovereign at the end of the day, “the event in every case [of federal-state conflict] should be supposed to depend on the sentiments and sanction of their common constituents.”

667 See id. at 289-90 (discussing the Achaean League, the Lycian Confederacy, and the feudal systems of Europe).
668 Id. at 291.
669 Madison explained that “[t]he prepossessions, which the members themselves will carry into the federal government will generally be favorable to the States.” The Federalist No. 46, at 296 (Clinton Rossiter, ed. 1961). He therefore expected that

For the same reason that the members of the State legislatures will be unlikely to attach themselves sufficiently to national objects, the members of the federal legislature will be likely to attach themselves too much to local objects. . . . Measures will too often be decided according to their probable effect, not on the national prosperity and happiness, but on the prejudices, interests, and pursuits of the governments and people of the individual States.

Id. Madison invoked the record of the Confederation Congress to bear out this prediction. See id. at 296-97.
670 [cites]
671 The Federalist No. 46, at 300 (Clinton Rossiter, ed. 1961).
672 Id. at 294.
673 Id. Hamilton took a similar view in Federalist 28:
Madison argued that, in this sort of contest, it was “beyond doubt that the first and most natural attachment of the people will be to the governments of their respective States.”674 This was true for two major reasons. First, “[t]he number of individuals employed under the Constitution of the United States will be much smaller than the number employed under the particular States. There will consequently be less of personal influence on the side of the former than of the latter.”675 The argument is basically one of political patronage: Because there are more jobs at the state level, “[i]nto the administration of these a greater number of individuals will expect to rise. From the gift of these a greater number of offices and emoluments will flow.”676

The second reason arose out of the allocation of governmental responsibilities between the States and the Union. “The powers delegated by the proposed Constitution to the federal government,” Madison noted, “are few and defined. Those which are to remain in the State governments are numerous and indefinite.”677 But it was not just the number of powers allocated to each government that mattered, but the relation of these responsibilities to the citizens’ own lives. In particular, “[t]he powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.”678 As a result, “all the more domestic and personal interests of the people will be regulated and provided for” by “the superintending care” of the States.679 Hamilton likewise saw this “variety of more minute interests” as “necessarily fall[ing] under the superintendence of the local administrations” and forming “so many rivulets of influence running through every part of the society.”680

Madison expected the Federal Government to be far less involved with these “bread and butter” sorts of issues. “The operations of the federal government will be

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674 Id. Hamilton agreed. See Federalist No. 17 (Cook ed.) at 107 (“Upon the same principle that a man is more attached to his family than to his neighbourhood, to his neighbourhood than to the community at large, the people of each State would be apt to feel a stronger byass towards their local governments than towards the government of the Union; unless the force of that principle should be destroyed by a much better administration of the latter.”).

675 THE FEDERALIST No. 45, at 291 (Clinton Rossiter, ed. 1961).

676 THE FEDERALIST No. 46, at 294 (Clinton Rossiter, ed. 1961).

677 Id. at 292.

678 THE FEDERALIST No. 45, at 292-93 (Clinton Rossiter, ed. 1961).

679 THE FEDERALIST No. 46, at 294-95 (Clinton Rossiter, ed. 1961).

680 THE FEDERALIST No. 17, at 107 (J.E. Cooke, ed. 1961). In particular, Hamilton cited “the ordinary administration of criminal and civil justice” as the “most universal and most attractive source of popular obedience and attachment” because it is “the immediate and visible guardian of life and property.” Id.
most extensive and important in times of war and danger; those of the States governments in times of peace and security.”  

Because he hoped that “the former periods will probably bear a small proportion to the latter,” Madison predicted that “the State governments will here enjoy another advantage over the federal government.” To put the argument more in terms of present allocations of responsibilities, Madison expected the average citizen to care more, most of the time, for the state (and local) governments that run his children’s local elementary school, arrest the burglar who breaks into his house, or enforce his contract with his employer than for the distant national government that maintains the Nation’s nuclear deterrent.

This argument accords with modern political science’s “economic theory of regulation.” That theory holds that politicians obtain political support – in the form of votes and campaign contributions, for example – in exchange for providing regulation that benefits those groups. The theory has a number of controversial implications, such as its prediction that the rent-seeking activities of private interest groups will dominate legislative outcomes. To support Madison, however, we need look only to the basic “political-support maximization” model that undergirds the theory. That basic model confirms Madison’s insight that the ability of politicians to generate “the predilection and support of the people” – in Madison’s phrase – depends on their ability to “regulate[] and provide[] for” the “domestic and personal interests of the people.”

We would thus expect the ability of both state and federal governments to generate political support to be largely a function of their jurisdiction and responsibilities. Nominally, of course, it is possible for citizens to support both state and federal

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681 THE FEDERALIST No. 45, at 293 (Clinton Rossiter, ed. 1961).
682 Id.
683 See also THE FEDERALIST No. 17, at 108 (J.E. Cooke, ed. 1961) (Alexander Hamilton) (predicting that “[t]he operations of the national government” would “[r]elat[e] to more general interests” and therefore be “less apt to come home to the feelings of the people; and, in proportion, less likely to inspire a habitual sense of obligation and an active sentiment of attachment”).
686 Macey, Federalism, supra note 684, at 265-66 (describing this model).
687 THE FEDERALIST No. 46, at 294 (Clinton Rossiter, ed. 1961).
688 Id. at 294-95.
politicians; most of us vote for several of each in every election. But citizens are likely to pay the most attention and devote their campaign contributions and participatory energies to the level of government likely to have the greatest impact on their most central concerns. And in the situations that Madison had in mind – that is, conflicts between state and federal institutions in which popular sentiment holds the key to the balance of power – the People can be expected to back the institutions that have earned their most intensive loyalties in the past.

Although the basic dynamics that Madison identified remain plausible today, many of his factual assumptions are under pressure. Consider, for example, his expectation that “the component parts of the State governments will in no instance be indebted for their appointment to the direct agency of the federal government, and very little, if at all, to the local influence of its members.” This may still be largely so, although one does increasingly see national political parties playing an important role in state-level electoral races, both through funding and other forms of support.691 Moreover, state governments have become dependent upon Washington, D.C., in other important

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689 Plausible, but certainly not uncontested. The economic theory of regulation has its critics. Daniel Farber and Philip Frickey, for example, have argued that ideology is a more important factor in determining the positions taken by legislators than the economic interests of their constituents. See FARBER & FRICKEY, supra note 543, at 24-33; see also Mark Kelman, On Democracy-Bashing: A Skeptical Look at the Theoretical and “Empirical” Practice of the Public Choice Movement, 74 VA. L.REV. 199, 205 (1988) (likewise disputing the premise that government officials act based on narrow self-interest). I doubt this is much of a problem for Madison’s model as I wish to use it, however. First, to the extent that ideology is an important factor in explaining the votes of legislators, it seems likely that it would also be an important factor in appealing to constituents at re-election time. If that is true, then the legislator needs to make sure that (a) her own ideology basically reflects that of a majority of her constituents, and (b) that the legislator’s “jurisdiction” includes items which give her an opportunity to act on that ideology; otherwise, voters that care about ideology will be more interested in politicians that do have jurisdiction over the ideological issues that matter to them. The scope of legislative jurisdiction seems likely to be important to a politician’s ability to generate political support regardless of whether ideology or economic interest is driving decisions. See generally NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 58-65 (1994) (arguing that the motivation of government officials – e.g., whether they act out of self-interest, ideology, or public spirit – is actually irrelevant to the interest-group model of politics).

If I am wrong about the first point, that would suggest that legislators simply aren’t as tied to the interests and preferences of their constituents as Madison and contemporary public choice-types suggest. That would undermine any “political safeguards” approach to federalism that relied on the representation of the states on the federal level. It would accordingly suggest that, if we do value federalism, we need to find more direct ways to protect state autonomy. Preemption doctrine can readily do that simply by making it less likely that existing federal legislation will be interpreted to supplant broad swathes of state authority and more difficult for broadly preemptive legislation to be enacted in the future. See infra TAN ____.

Finally, critics like Professors Farber and Frickey do not say that there is nothing to the economic theory of regulation – only that it is an incomplete account. “Our best picture of the political process,” they conclude, “is a mixed model in which constituent interest, special interest groups, and ideology all help determine legislative conduct.” FARBER & FRICKEY, supra note 543, at 33. The fact that the model is mixed doesn’t mean that Madison’s analysis isn’t an important part of the dynamic; further, it seems the part of the dynamic most directly relevant to issues of “process federalism.”

690 THE FEDERALIST No. 45, at 291 (Clinton Rossiter, ed. 1961).

691 [cites on Florida gubernatorial election]; see also [nat’l GOP involvement in TX redistricting]
ways. Many states now depend for large portions of their budgets on federal grants, and that dependence is only likely to increase as many states face sizeable shortfalls in the years ahead. As many commentators have observed, Congress is able to translate this financial dependence into policy control through the mechanism of conditional spending.

Madison’s assumptions about the relative sizes of the state and federal governmental establishments have also not held up. In absolute terms, both layers of governments have of course grown enormously. Relatively speaking, the differentials between the two in terms of employment and gross spending have declined, although the states still come out ahead. And in the world that many leading constitutional lawyers inhabit, the States’ prior advantage may have flipped entirely. Most graduates of elite law schools, for example, seem to prefer federal clerkships and posts in the federal Justice Department to equivalent roles in state government.

So, too, with Madison’s assumption that federal institutions would move to the fore only during relatively infrequent crises in foreign affairs. It is no accident, if we accept Madison’s view, that the explosion of federal power came over the course of what my colleague Philip Bobbitt has called “the Long War.” Nor should it be surprising that the advent of the War on Terrorism – which might make the “Long War” look short before it is through – has already brought new calls to abandon concerns for state autonomy in the name of the national need. We may still hope for a world in which “periods [of war and danger] will . . . bear a small proportion to [times of peace and security],” but it is not on the horizon. Traditionally federal concerns about foreign relations and security from external attack are likely to remain highly salient for the foreseeable future.

692 [cites on state budget crises]
693 See, e.g., Baker, Conditional Spending, supra note 364, at ___.
694 [cites]
695 [cites]
696 See PHILIP BOBBITT, THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY 24 (2002) (“We should regard the conflicts now commonly called the First World War, the Second World War, and the Korean and Viet Nam Wars, as well as the Bolshevik Revolution, the Spanish Civil War, and the Cold War as a single war because all were fought over a single set of constitutional issues that were strategically unresolved until the end of the Cold War and the Peace of Paris in 1990.”).
697 See, e.g., Linda Greenhouse, Will the Court Reassert National Authority?, N.Y. TIMES, Sept. 30, 2001, Week in Review Section, at 4 (calling for the Court to abandon its recent federalism jurisprudence in the wake of the September 11 attacks).
698 THE FEDERALIST No. 45, at 293 (Clinton Rossiter, ed. 1961).
699 See, e.g., Fred Hiatt, Challenging Bush’s World View, WASH. POST, June 9, 2003, at A21 (observing that “Congress has accepted the idea that terrorism allied with weapons of mass destruction represents a threat comparable to that posed by communism during the Cold War,” and concluding that “those who hope the terrorist threat has been overstated are likely to be . . . disappointed”). But see infra TAN ___ (arguing that in a world of globalization and asymmetrical threats, these concerns cannot remain uniquely federal).
Significant expansions of federal power have been justified, in the past century, on the basis of other “wars,” such as the “War on Poverty” or the “War on Drugs.”\(^{700}\) These metaphors seek to tie into Madison’s intuition that national activity is most justified in response to fundamental threats to the society. They also reflect, however, the substantial pressure that now bears on the Founders’ fundamental assumptions concerning the state and federal roles. Hamilton, for example, thought that “[t]he administration of private justice between the citizens of the same State, the supervision of agriculture and of other concerns of a similar nature, . . . can never be desirable cares of a general jurisdiction.” He therefore found it “improbable that there should exist a disposition in the Federal councils to usurp the powers with which they are connected.”\(^{701}\) Subsequent experience, however, has disappointed Hamilton’s expectation; the federal government, often for very good reasons, has frequently seen fit to concern itself with these “local” matters. In a world where the federal government provides social security, health insurance, and civil rights protections for millions – to name just a few examples – the states no longer have a monopoly of “the more domestic and personal interests of the people.”\(^{702}\) States can thus no longer rely on the unchallenged political support they might once have enjoyed as the exclusive guardians of these interests.

Much of this shift has no doubt occurred on account of the States’ failure – or at least perceived failure – adequately to perform these responsibilities.\(^{703}\) That was a prospect that Madison was prepared to face. He remarked that “[i]f . . . the people should in future become more partial to the federal than to the State governments, the change can only result from such manifest and irresistible proofs of a better administration as will overcome all their antecedent propensities.”\(^{704}\) In that event, “the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due.”\(^{705}\) These statements cannot be read, however, as condoning a wholesale shift of state responsibilities to the center, beyond what the enumerations of the Constitution provided. Madison insisted that even in the case just contemplated, “the State governments could have little to apprehend, because it is only within a certain sphere that

\(^{700}\) [cites linking these initiatives to expansions of federal power]

\(^{701}\) Federalist No. 17 (Cook ed.) at 106.

\(^{702}\) The Federalist No. 46, at 294-95 (Clinton Rossiter, ed. 1961).

\(^{703}\) See, e.g., John P. Dwyer, The Role of State Law in an Era of Federal Preemption: Lessons from Environmental Regulation, 60 L. & CONTEMP. PROBS. 203, ___ [near n.95] (1997) (“Various failed efforts to get states to set and enforce air and water pollution standards convinced federal policy makers in the early 1970s that the only viable solution was federal regulation.”). Moreover, as Barry Friedman points out, “one of the forces underlying the shift in power from the states to the national government has been widespread discontent with the choices made by the states at some critical moments in American history.” Friedman, Valuing Federalism, supra note 523, at 367 (involving nullification, the Civil War, and Jim Crow laws). Many of the factors tending to press toward centralized regulation, however, have little to do with state regulatory failure. I discuss these factors in the next section. See infra TAN ___.

\(^{704}\) The Federalist No. 46, at 295 (Clinton Rossiter, ed. 1961).

\(^{705}\) Id.
the federal power can, in the nature of things, be advantageously administered.” Much like John Marshall would later assume that political safeguards would operate within the scope of the Commerce Clause defined by courts, Madison’s discussion also seems to presume an ultimate constitutional limit on political shifts.

In any event, Madison’s analysis of the linkage between regulatory responsibilities and popular support provides a focus for contemporary federalism doctrine. If we (1) care about preserving state autonomy but (2) prefer for that autonomy to be as self-enforcing as possible, Madison suggests that we should look to the States’ regulatory responsibilities. If those responsibilities remain intact and important to the sovereign People, then the institutions of state government have little to worry about. But if we find those responsibilities under pressure, then that pressure may also undermine the ability of the system to police itself. Because Madison thought a wholesale shift of policy momentum to the center unlikely, he was not forced to contemplate the consequences of such a shift to the system as a whole. States exist for reasons other than policy competence; they also, for example, help preserve liberty throughout the system. Those sorts of values would be sacrificed if state policy responsibilities were allowed to wither away.

C. Inertia

D. “Political Safeguards” and Doctrine

VI. Federalism in the Courts: Judicial Experience and the Shape of Doctrine

The development of federalism doctrine should be guided not only by the values that federalism seeks to promote but also by the institutional capacities of courts and other governmental institutions to promote them through law. This concern has been

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706 Id. Madison’s allusion to “advantageous” administration might be read to suggest that the limits on federal jurisdiction would be set chiefly by practical policy considerations, but he had emphasized in the preceding essay that “[t]he powers delegated by the proposed Constitution to the federal government are few and defined.” THE FEDERALIST No. 45, at 292 (Clinton Rossiter, ed. 1961). That language suggests a legal limit on federal authority.

Chief Justice Marshall’s version of the “political safeguards” argument seems to have contemplated a similar limit. His statement in Gibbons v. Ogden that “[t]he wisdom and the discretion of congress, their identity with the people, and the influence which their constituents possess at elections, are . . . the sole restraints,” 22 U.S. (9 Wheat.) 1, ___ (1824), comes after his finding that the regulation at issue fell within the text of the Commerce Clause. See id. at ___. Marshall synthesized the two points by stating that “the sovereignty of Congress, though limited to specific objects, is plenary as to those objects.” Id. at ___. In other words, political safeguards operate within the bounds set by enumerated powers.

707 See supra TAN ___.

708 See also BANNING, supra note ___, at 296 (concluding that “the Constitution, as [Madison] understood it, made the central government supreme within its sphere and strictly limited that sphere to matters that could not be managed by the states”).
with us from the beginning. As Jack Rakove has observed, "Madison doubted whether adjudication alone could produce legally demonstrable and politically persuasive solutions, given 'the impossibility of dividing powers of legislation, in such a manner, as to be free from different constructions by different interests, or even from ambiguity in the judgment of the impartial.'" We look to a number of sources to inform our judgments about judicial capacities, including history, political science, and the history of political science. But in this particular corner of constitutional law the institutional experience of the Court itself tends to play a dominant role.

The history of federalism doctrine in the Supreme Court is a story of relatively vigorous early enforcement, a fall from grace followed by a period of judicial repentance and abdication, and more lately a period of cautious revival. As the opinions of the "Federalist Revival" demonstrate, much of the current debate is preoccupied with the institutional lessons to be drawn from this legacy. Justice Souter, for example, has argued vigorously that new decisions like Lopez and Morrison "can only be seen as a step toward recapturing the prior mistakes" of the Lochner era. That era, and the collapse of the "dual federalism" model of doctrine that helped mark the era’s end, looms as a brooding omnipresence over any current effort to make federalism doctrine.

A. Confrontations with Congress

The relevant decisional history is familiar. In a series of cases like United States v. E.C. Knight Co. and Hammer v. Dagenhart, the Court narrowly construed or struck down federal legislation on the ground that it exceeded Congress’s authority under


710 By "early" I mean the entire period prior to 1937. Larry Kramer’s contention that the Court did not enforce federalism until the late 19th century, see Kramer, Politics, supra note 222, at 234-52, seems to my mind to improperly discount the vigorous enforcement of federalism-based limits on state power throughout that century, see Baker & Young, supra note 10, at 95 n.100, but I do not need to pursue that disagreement here.

711 [cites]

712 [cites]

713 [cites]


715 156 U.S. 1 (1895) (construing the Sherman Act not to reach a merger that would result in a single company acquiring 98 percent of the nation’s sugar refining capacity, on the ground that the Commerce Power did not reach “manufacturing,” and that a monopoly in manufacturing would have only an “indirect” effect on interstate commerce).

716 247 U.S. 251 (1918) (striking down a federal statute banning interstate shipment of goods produced by child labor, on the ground that the law’s ban on interstate shipment was a pretextual attempt to regulate manufacturing activity within particular states).
the Commerce Clause. Later decisions building on these precedents placed the Court in direct confrontation with efforts by President Franklin Roosevelt and the New Deal Congress to dramatically expand federal regulatory power as a response to the Depression. These decisions – and the institutional attacks on the Court that they helped provoke – form a "brooding omnipresence" over current efforts to construct a viable federalism doctrine.

Perhaps the broadest and most obvious lesson of this period is that there are limits on the Court’s ability to confront the federal political branches over basic issues of governance. This observation is consistent with, but not necessarily the same as, the longstanding theory that the Court has limited “institutional capital” which it must allocate with care among the many different areas in which it might potentially exercise the power of judicial review. I have suggested elsewhere that this idea has some intuitive appeal and that the justices may perceive it to be true – and shape their behavior accordingly – even if such limitations are not necessary incidents of the institution. But one might adopt the reverse theory – that responsible exercise of the power of judicial review generates increased public tolerance for judicial intervention – and still view the Lochner-era experience as suggesting an outer limit on that tolerance. At least the bottom line conclusion ought to be non-controversial – that is, that the Court should

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718 See, e.g., Bruce Ackerman, We the People: Transformations ___ (___) (describing the institutional confrontation precipitated by the Court’s decisions).

719 The phrase is from Justice Holmes’ dissent in Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917), in which Holmes observed that “[t]he common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign . . . that can be identified.” Id. at 222 (Holmes, J., dissenting). Jensen was itself a case about federalism and preemption, and its holding illustrates the fact that the Court’s record during the pre-1937 period was more complicated than is sometimes thought. The Court held that the general maritime law, produced by federal judges deciding common law cases within their admiralty jurisdiction, is federal law in the sense that it trumps state law under the Supremacy Clause. See id. at 217-18 (majority opinion); see generally Ernest A. Young, Preemption at Sea, 67 Geo. Wash. L. Rev. 273, 291-94 (1999) (discussing Jensen). The decision was thus consistent with the Court’s general activism during this period, striking down a state statute, but strongly nationalist in its thrust. I discuss federal maritime law and Jensen further infra at TAN ___.

720 See, e.g., Jesse H. Choper, Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court 139 (1980) (arguing that “[t]he people’s reverence and tolerance is not infinite and the Court’s public prestige and institutional capital is exhaustible,” so that the judiciary’s ability to strike down laws within incurring severe institutional costs “is determined by the number and frequency of its attempts to do so, the felt importance of the policies it disapproves, and the perceived substantive correctness of its decisions”).

721 See Young, State Sovereign Immunity, supra note 184, at 58-60.

722 See, e.g., Peter M. Shane, Rights, Remedies, and Restraint, 64 Chi. Kent L. Rev. 531, 546 (1988) (suggesting that, in some cases, the Court may enhance its legitimacy through opposing the political branches).
avoid confronting the federal political branches where it is possible to do so without sacrificing basic constitutional values.

One can, of course, take this “lesson” too far. Federal judges – as officers of the national government – tend to have a host of natural incentives to underenforce limits on federal power. Moreover, since the federal courts are much less likely to face effective institutional retaliation from state governments than from the federal political branches, it is natural that federal judges should function primarily as agents of uniformity, preempting divergent state practices through articulation of constitutional rules and federal common law. If the federal system is to be preserved, then it would seem counterproductive to add too strong a normative imperative on top of all the institutional incentives that counsel restraint in checking national power. Most federal systems, after all, seem to feature a central constitutional court charged with acting as a neutral arbiter between the center and the periphery, and there may be times when we need the Supreme Court to perform this function. It may not be realistic, however, to rely too heavily on the Supreme Court in this role. The unlikelihood over the long term of serious judicial obstacles to the determined exercise of national power thus suggests yet another reason to prefer federalism doctrines that promote balance while minimizing such confrontations.

Minimizing confrontations with the political branches means forgoing a direct judicial assault on the national administrative state. Experience suggests that, in Ronald Dworkin’s terms, a viable federalism doctrine must “fit” most, while perhaps criticizing some, of our existing institutional arrangements. Any interpretation of the


[T]he Justices and judges of the U.S. federal courts are national officers in every possible sense of that term. Every good thing they have to hope for and every bad thing that they have to fear will happen to them as a result of some national political or social institution. Such Justices and judges are far more nationalistic in their outlooks than Members of Congress or even federal bureaucrats, who may have to deal personally with state and local officials on a regular basis. Thus, even national jurists who arrive on the federal bench from a state court soon may end up with a very nationalistic perspective on the world.

Id. at 808.

724 Cf. LUCAS A. POWE, THE WARREN COURT AND AMERICAN POLITICS ___ (2000) (arguing that the primary thrust of the Warren Court was to impose national norms in the areas of race and criminal procedure on the Southern states). For a more recent example, see [Garamendi] (purporting to protect federal foreign policy from state departures).

725 See Martin Shapiro, The European Court of Justice, in THE EVOLUTION OF EU LAW 321 (Paul Craig & Gráinne de Búrca eds., 1999).

726 On the likelihood that the federal political branches will prevail over judicial opposition in the long term, see also Robert A. Dahl, Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker, 6 J. PUB. L. 279 (1957) (concluding that “it would be unrealistic to suppose that the Court would, for more than a few years at most, stand against any major alternatives sought by a [national] lawmaking majority”).

727 See RONALD DWORKIN, TAKING RIGHTS SERIOUSLY ___ (___) (discussing the extent to which a theory of law may criticize some of the existing legal materials as mistakes). Another way to think of this is in terms of path dependence. As Richard Fallon has noted, the Court has pushed state sovereign immunity
constitutional structure that would invalidate much of the United States Code – such as Justice Thomas’s narrow, originalist reading of “commerce” in *Lopez* – is simply out of court under this constraint. Federalism doctrine should thus focus, for the most part at least, on how to resolve presently open questions in ways that foster state autonomy. This is not to say that the existing apparatus of the federal establishment ought to be immune to judicial criticism. But such criticism is likely to come at a high institutional cost, and doctrines that are generally compatible with present arrangements and focus on checking further shifts toward the center are more likely to survive.

### B. The Quest for Doctrinal Coherence

Part of the reason that subsequent courts rejected the pre-1937 Commerce Clause jurisprudence was surely the conviction that it was doctrinally incoherent. If unelected judges are going to overturn the work-product of an elected national legislature, those judges had better have a theory that explains, in a consistent and understandable way, why that action is grounded in constitutional principle. By 1937, in addition to all the other pressures bearing on the Court, the Court’s doctrine was awash in a sea of fine distinctions – indirect vs. direct effects, “commerce” vs. manufacturing or agriculture, pretextual vs. sincere commercial regulation – that persuaded no one that the Court was not just simply enforcing its own policy preferences. Similar concerns motivated the collapse of a later, more limited judicial attempt to enforce limits on national power under the *National League of Cities* doctrine.

more aggressively than other forms of federalism doctrine precisely because that line of advance was not blocked by established precedents or pervasive assertions of federal authority by the political branches. *See* Fallon, *Conservative Paths, supra* note 291, at 482. Similar constraints will help direct any new directions that the Court might wish to take in protecting the federal balance.

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728 *See, e.g.,* United States v. Lopez, 514 U.S. 549, 608 (1995) (Souter, J., dissenting) (observing that, after 1937, “under commerce, as under due process, adoption of rational basis review expressed the recognition that the Court had no sustainable basis for subjecting economic regulation as such to judicial policy judgments”); BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 216-17 (1998) (arguing, based on internal court memoranda, that the difficulty of distinguishing between appropriate and inappropriate federal regulation of economic activity with effects on commerce under pre-1937 case law, pushed the *Wickard* Court strongly in the direction of abdicating judicial limits altogether); Friedman, *Valuing Federalism, supra* note 523, at 370 (noting that “doctrinal collapse itself served as a nationalizing force”); *see generally* Baker & Young, *supra* note 10, at 87-106 (discussing the “judicial competence problem” as a basis for abandoning judicial review of federalism issues after 1937).

729 *See, e.g.,* Wechsler, *Neutral Principles, supra* note 194, at 15-16.

Invoking this history, Justice Souter has warned of a “portent of incoherence” hanging over the Court’s current attempt to revive limits on national authority. Justice Souter would get out of the business altogether, leaving limits on national power to the political process. It must be said that Justice Souter and his fellow dissenters in *Morrison* have little problem with judge-made doctrine when it limits state power or promotes individual rights. But just because the Court’s nationalists are inconsistent does not mean they are wrong to worry about the coherence of federalism doctrine. I discuss the many merits of this “process federalism” approach later in this Section, although I believe a total abandonment of substantive review would be a mistake. But we might also usefully focus on the particular failings of the Court’s prior federalism jurisprudence as a clue to what sorts of doctrines are unlikely to work. That, in turn, may suggest more fruitful avenues that the Court might pursue going forward.

Much of the pre-1937 case law can be filed under the heading of “dual federalism.” I have traced the contours of dual federalism in more detail elsewhere in brief, the doctrine contemplated “two mutually exclusive, reciprocally limiting fields of power—that of the national government and of the States.” The Court pursued a variety of conceptual distinctions to define these fields: commercial vs. police

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732 United States v. *Morrison*, 529 U.S. 598, 627 (2000) (Souter, J., dissenting); *see also id.* at 656 (Breyer, J., dissenting) (emphasizing “the difficulty of finding a workable judicial Commerce Clause touchstone—a set of comprehensible interpretive rules that courts might use to impose some meaningful limit, but not too great a limit, upon the scope of the legislative authority that the Commerce Clause delegates to Congress”).

733 *See id.* at 649-50 (Souter, J., dissenting).

734 *See, e.g.*, [Garamendi]

735 *See, e.g.*, [Lawrence] A decision like *Lawrence*, of course, does both: It protects the individuals rights while eliminating the state’s autonomy to go its own way on questions of moral policy. I do not mean to suggest the *Lawrence* is wrongly decided – only that it has a strong centralizing effect.

736 *See Young, Two Cheers, supra note Error! Bookmark not defined.*, at 1390-95.

737 *See Young, Dual Federalism, supra note 94, at 142-50.

regulation, essentially local vs. essentially national concerns, commerce vs. manufacturing, indirect vs. direct effects.

By 1950, Edward Corwin was able to observe that the “entire system of constitutional interpretation” associated with dual federalism lay “in ruins.” The doctrine’s demise suggests the futility of trying to divide up the world into separate and exclusive spheres of governmental competence. The respective state and federal spheres always turn out to overlap. Consider, for example, the sphere of family law – a traditional enclave of state authority if there ever was one and an area that even the Lopez dissenters seemed willing to concede as off limits to federal authority. That sphere overlaps with traditional federal concern over interstate travel in the context of interstate child support enforcement, with traditional federal foreign affairs concerns in the context of international human rights conventions bearing on family relations, and even with the federal government’s administration of federal taxes, pensions, and the like in the context of the Defense of Marriage Act. Cases involving these issues cannot be

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739 See, e.g., Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102, 132 (1837) (upholding a New York statute requiring arriving ship captains to provide information on passengers on the ground that it was “not a regulation of commerce, but of police”).

740 See, e.g., Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299, 319 (1851) (“Whatever subjects of [the commerce] powe are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.”).

741 See, e.g., Kidd v. Pearson, 128 U.S. 1 (1888) (upholding state prohibition on manufacture of liquor on the ground that it did not regulate “commerce”); Hammer v. Dagenhart, 247 U.S. 251, 273-74 (1918) (holding that the Commerce Clause did not confer power to regulate manufacturing on Congress).

742 See, e.g., United States v. E.C. Knight Co., 156 U.S. 1 (1895) (stating that the Commerce Clause did not cover regulation of activities which have only an “indirect” effect on interstate commerce).


745 See United States v. Lopez, 514 U.S. 549, 624 (1995) (Breyer, J., dissenting) (arguing that “[t]o hold this statute constitutional is not . . . to hold that the Commerce Clause permits the Federal Government . . . to regulate ‘marriage, divorce, and child custody’”).

746 See Child Support Recovery Act (CSRA), 18 U.S.C. § 228; United States v. Lewko, 269 F.3d 64, 68 (1st Cir. 2001) (upholding the CSRA against a Commerce Clause challenge). Notwithstanding a few invalidations at the district court level, see, e.g., United States v. Bailey, 902 F. Supp. 727 (W.D. Tex. 1995), rev’d, 115 F.3d 1222 (5th Cir. 1997), every circuit court to have considered the issue has upheld the CSRA as a valid exercise of the commerce power. See Lewko, 269 F.3d at 68 (collecting cases). For another example of the intersection of family law concerns with interstate travel, see United States v. Al-Zubaidy, 284 F.3d 804 (6th Cir. 2002) (upholding 18 U.S.C. § 2261A, a provision of the Violence Against Women Act criminalizing interstate stalking, as applied to a man who crossed state lines for the purpose of stalking and assaulting his ex-wife).

747 [cites]

748 [cites]
classified as “family law” cases, on the one hand, or “interstate travel,” “foreign affairs,” or “governmental administration” cases, on the other. They obviously implicate both sets of concerns.

The failure of dual federalism strongly suggests that a revival of judicially-enforced federalism should not be built around separate “spheres” of state and federal regulatory jurisdiction. Garcia had this much right, at least: “Traditional state functions” – or federal ones – and similar tests are simply too indeterminate to hold up under the pressure of time and practical experience. But to say this is not, as Garcia suggested, necessarily to abdicate enforcement to the political branches. As Larry Kramer has observed, “just because it's no longer possible to maintain a fixed domain of exclusive state jurisdiction it's not necessarily impossible to maintain a fluid one.”

I would go one step further and urge that federalism doctrine generally need not try to carve out exclusive domains at all. The central preoccupation of the present essay is thus to sketch out meaningful protections for state autonomy that can survive in a world in which state and federal regulatory jurisdiction is largely concurrent.

The pre-New Deal Courts were not oblivious to the difficulty of defining and enforcing mutually exclusive spheres of state and federal activity. In decisions like the Shreveport Rate Case, the Court acknowledged that Congress legitimately may regulate within traditional state spheres, such as wholly intra-state commerce, where such regulation is necessary to protect the federal ability to regulate inter-state commerce.

Other decisions recognized the reverse possibility – that federal regulation of interstate shipment might be used as a lever effectively to regulate in-state behavior, such as child labor. Building on Chief Justice Marshall’s dictum in McCulloch v. Maryland, the

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749 See Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 552 (1985) (“State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.”). This statement is most often read as a near-total renunciation of judicial enforcement, and perhaps that is how Justice Blackmun meant it. I argue infra TAN ___, however, that it need not be read in that way.

750 Larry Kramer, Understanding Federalism, 47 Vand. L. Rev. 1485, 1499 (1994). Professor Kramer’s more recent work is less sanguine about judicial enforcement:

Theoretically, it may be possible for the Court to replace rigid lines that establish a fixed domain of exclusive state jurisdiction with more fluid tests that turn on some notion of functionality. But governing a modern society is much too complicated for the Court’s preferences about where or how to draw the line to inspire much confidence.

Kramer, Politics, supra note 222, at 289. Obviously, my own view is that Professor Kramer was right the first time.

751 Houston, East & West Texas Railway Co. v. United States, 234 U.S. 342 (1914).

752 See also Railroad Comm’n of Wisconsin v. Chicago, B. & Q. R. Co., 257 U.S. 563, 588 (1922) (“[I]nterstate and intrastate commerce are ordinarily subject to regulation by different sovereignties, yet when they are so mingled together that . . . the nation . . . cannot exercise complete, effective control over interstate commerce without incident regulation of intrastate commerce, such incidental regulation is not an invasion of state authority.”).

Court sought to bar such devices by means of a purpose test that would invalidate “pretextual” uses of the commerce power.\textsuperscript{755} Both the necessity and purpose tests had the virtue of grappling with the reality of overlapping spheres, but the Court was able to achieve consistency under neither rubric.\textsuperscript{756}

Similar problems plague contemporary efforts to revive some form of necessity test. A number of commentators have noted the disconnect between the Rehnquist Court’s federalism doctrines – which involve a set of essentially formal tests\textsuperscript{757} – and the values that federalism is supposed to serve.\textsuperscript{758} Some have suggested that the Court should employ an analysis more directly rooted in those values; Donald Regan, for example, has urged that “in thinking about whether the federal government has the power to do something or other, we should ask what special reason there is for the federal government to have that power. What reason is there to think the states are incapable or untrustworthy?”\textsuperscript{759} Such a test might look much like the European concept of “subsidiarity,” which was written into the European Union’s governing structure in the Maastricht Treaty. Under that principle, “the Community shall take action . . . only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and therefore by reason of the scale or effects of the proposed action, be better achieved by the Community.”\textsuperscript{760}

\textsuperscript{754} 17 U.S. (4 Wheat.) 316, 422 (1819) (“[S]hould Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal . . . to say, that such an act was not the law of the land.”)\textsuperscript{755} See \textit{Hammer}, 247 U.S. at __. \textsuperscript{quote} \textsuperscript{756} [find cites on Shreveport]; see also \textit{Cushman}, supra note __, at 217 (quoting a memo from Justice Jackson to his law clerk in conjunction with \textit{Wickard}, to the effect that “legal standards for weighing economic effects and for applying them to the commerce power” under \textit{Shreveport} were “neither consistent nor well defined”). On the inconsistent application of the purpose test, see, e.g., Hoke v. United States, 227 U.S. 308 (1913) (upholding the Mann Act, which prohibited the transportation of women in interstate commerce for immoral purposes); Champion v. Ames, 188 U.S. 321 (1903) (upholding the Federal Lottery Act, which banned interstate shipment of lottery tickets). In both cases, Congress’s purpose was evidently to make life difficult for in-state businesses that it considered immoral.\textsuperscript{757} The Court’s opinion in \textit{Morrison} strongly suggests that the Commerce Clause inquiry boils down to whether the regulated activity is “commercial” or not. See \textit{Morrison}; see also [Lessig]. Likewise, the bright line rules against commandeering and abrogating state sovereign immunity are formal in character. \textsuperscript{cites}; see also Donald H. Regan, \textit{How to Think About the Federal Commerce Power and Incidentally Rewrite \textit{United States v. Lopez}, 94 Mich. L. Rev. 554, 562 (1995) (arguing that the Commerce Clause law prior to \textit{Lopez} was also “a new formalism”).\textsuperscript{758} See, e.g., Friedman, \textit{Valuing Federalism}, supra note 523, at 410, 412 (criticizing the \textit{Lopez} Court for “fail[ing] to support its doctrinal analysis regarding the substantiality of the effect of [the Gun Free School Zones Act] on commerce with any understanding of the values of federalism,” and urging that “[t]here has got to be a way to bring arguments about the scope of national authority to bear on constitutional doctrine”).\textsuperscript{759} Regan, supra note 757, at 557; see also [Althouse].\textsuperscript{760} EC Treaty art. 5 (ex art. 3b); see also George A. Bermann, \textit{Taking Subsidiarity Seriously: Federalism in the European Community and the United States}, 94 COLUM. L. REV. 331 (1994); Reimer von Borries & Malte Hauschild, \textit{Implementing the Subsidiarity Principle}, 5 COLUM. J. EUR. L. 369 (1999); Young, \textit{European Union}, supra note 42a t 1677-82.
These sorts of tests make a great deal of sense as a standard for when the federal government ought to act. But they have obvious liabilities as a template for judicial doctrine. Whether there are sound reasons for federal action – whether they be the existence of a collective action problem at the state level, a need for uniform standards, or the like – will almost always be at bottom a policy judgment, and often a highly political one. Not surprisingly, the European literature on subsidiarity generally seems to have concluded that that principle should guide the Community political and administrative institutions but should generally not be enforced directly by courts.\footnote{Many have argued that courts can play a role in encouraging deliberation about subsidiarity concerns, [cites], and I return to this sort of option under the heading of “process federalism.” See infra TAN ___.} While it certainly makes sense to take account of the values underlying federalism in constructing doctrine, it seems likely that judges will have to find more formal proxies for those values rather than attempting simply to weigh them in each individual case.\footnote{See Lessig, Translating Federalism, supra note ___, at ___ (suggesting that courts should develop federalism doctrines characterized by “sophisticated formalism”).}

Purpose tests have been less broadly mooted in contemporary discourse about federalism\footnote{See [Berman & Baker]} and they may bear further exploration. Conventional wisdom typically disparages legislative purpose or motive tests, based on familiar arguments about the difficulty of ascertaining the motivation of collective bodies and the possibility that the same enactment might be constitutional in some scenarios and yet unconstitutional in others, depending on the mental states of the enacting legislature.\footnote{See, e.g., Richard A. Posner, Economics, Politics, and the Reading of Statutes and the Constitution, 49 U. CHI. L. REV. 263, 272 (1982) (“Courts do not have the research tools that they would need to discover the motives behind legislation.”). [other cites]}. This may not be an altogether satisfactory answer. As both Mitch Berman and Elena Kagan have shown, the use of purpose tests is considerably more common than many people seem to think.\footnote{See Mitchell N. Berman, Coercion Without Baselines: Unconstitutional Conditions in Three Dimension, 90 GEO. L. J. 1, 23-27& n.100 (2001); Elena Kagan, Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine, 63 U. CHI. L. REV. 413 (1996).}

A more fundamental problem in this particular area, however, has to do with the circumstances of the commerce power under Article I. That Article defines both particular ends that Congress may pursue, with the Necessary and Proper Clause granting broad discretion as to means,\footnote{See, e.g., McCulloch v. Maryland [cite].} and particular means that Congress is generally allowed to employ for any end that it likes.\footnote{[cites on Madisonian and Hamiltonian views of the Spending Power; Engdahl]} The problem is that the Commerce Clause has traditionally been employed as both an end and a means, and it is often hard to tell the difference.\footnote{Cf. Regan, supra note 757, at 578 (observing that it is very difficult to distinguish between “moral” and “economic” purposes for federal laws).} If Congress regulates the price of wheat, is the end to protect commerce in an important commodity, or to preserve the viability of a rural lifestyle for cultural
reasons? If Congress requires that proprietors of public accommodations open their restaurants and hotels to African-Americans and other minorities, is it to protect the ability of these people to engage in commercial transactions or to promote broader ideals of racial equality? Perhaps a workable test could be constructed to weed out those regulatory enactments with no commercial purpose at all, but I doubt whether such a test would catch enough extensions of federal power to be worth the candle. Anything more rigorous would not only run strongly against the grain of current doctrine, but would seem likely to encounter the same sorts of indeterminacy troubles that plagued earlier incarnations of the doctrine.

To sum up, the experience of judicial activism under the Commerce Clause – as well as under the more amorphous doctrine of freedom of contract – cautions against frequent confrontations with the political branches, and especially against aggressive efforts to overturn existing institutional arrangements. It also suggests two more particular dangers that future developments in federalism ought to do their best to avoid. On the one hand, attempting to construct formal subject-matter categories in which either the States or the Nation would have primacy seems doomed to failure. On the other, trying to manage a world of concurrent jurisdiction by direct application of values associated with federalism by political economy and democratic theory would almost surely embroil the judiciary in unmanageable policy judgments. Given these lessons, one can understand how many judges and commentators have thrown up their hands and urged that federalism be left almost entirely to the political process. I explore the foundations and implications of that notion – that federalism ought basically to be “self-enforcing” – in the next two Subsections.

C. Process Failures and Judicial Review

Given the imperfections of both political and procedural protections for safe autonomy, one might advocate a more aggressive judicial role than I have just outline. That is, one might insist that the Court develop “hard” constitutional limits on congressional power. The pre-1937 experience, of course, suggests that this would be difficult.

There are good reasons to eschew hard constitutional rules that go beyond historical experience. One is that national action sometimes loosens, rather than tightens, the constraints on state autonomy. As David Barron has observed, sometimes national action is justified on the ground that values of uniformity or efficiency simply trump those associated with state-by-state diversity; other times, however, action at the national level is designed to help states overcome collective action problems and other impediments to realization of preferred policies at the state level. Much of the literature developing this latter argument deals with Europe, where individual nations

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769 See, e.g., [Darby; more recent cites]
770 See, e.g., Lochner v. New York [cite]
771 See, e.g., [Kramer; Souter in Morrison].
772 Barron, supra note ___, at 382-90.
have found themselves increasingly constrained in regulating a pervasively integrated market. Those nations have thus chosen to cede certain forms of authority to the European Union as a means of achieving their substantive policy goals.773 The federal law at issue in New York v. United States,774 however, provides a domestic example. That law reinforced state-level efforts to agree on shared responsibilities for radioactive waste disposal by providing a federal enforcement mechanism.775 In this sense, federal action reduced constraints on state autonomy by removing collective-action impediments to state-level policymaking.

Outright constitutional prohibitions on certain forms of national action are relatively blunt instruments for distinguishing between national acts that undermine and those that enhance state autonomy. Certainly the sort of doctrines the Court articulated in the past – such as that between valid federal regulation of “direct” effects and invalid federal regulation of “indirect” ones776 – fail to track these considerations in any meaningful way. The obvious alternative is a far more flexible analysis that would focus explicitly on whether a given national initiative furthers or injures state autonomy. But that sort of analysis would share all the institutional liabilities of the subsidiarity-type inquiries that I have already discussed.777

By and large, the constitutional rules that the Court has articulated avoid this hard-and-fast quality without wandering into outright policy judgments. The most absolutist of these rules, as I have suggested, are the Court’s bright-line prohibitions against federal “commandeering” of state institutions and congressional abrogation of state sovereign immunity. But Congress may avoid these prohibitions in any number of ways. The States may always voluntarily implement federal programs, for example, and Congress may encourage such agreement by way of conditional spending or conditional preemption.778 Roderick Hills has argued convincingly that this regime of state-option commandeering will generally capture the potential benefits of state implementation without allowing Congress to exploit state institutions in ways detrimental to the system as a whole.779 Likewise, state governments may waive their sovereign immunity, and Congress can use similar tools to induce such waivers; Congress may also authorize suits by the United States itself to recover damages from state governments.780 While I do not

773 See, e.g., [Moravcsik; De Burca or Nicolaidis?]
775 See id. at 189-94 (White, J., concurring in part and dissenting in part).
777 See supra TAN ____.
778 See New York, 505 U.S. at 167-68.
argue here that this structure is optimal, it does allow Congress to overcome the states’ immunity in cases where it feels that the benefits strongly outweigh the costs.

The Court’s Commerce Clause jurisprudence is similarly accommodating. First of all, it is remarkably modest. The cases appear to require only that Congress identify some aspect of the regulated activity that is “commercial” in nature. In most cases, that is not a very high barrier. The Court has, moreover, accepted the unity of the national market; it has defined “commercial” activity generously to include travel as well as non-profit activity; and it seems even to have accepted Wickard v. Filburn’s notion that Congress may regulate particular instances of non-commercial activity if most instances of the regulated activity are commercial in nature. Finally, the limits that have been imposed on the Commerce Power remain subject to evasion through conditional spending in much the same fashion as the anti-commandeering doctrine and state sovereign immunity.

The Court’s “hard” limits on federal power are thus unlikely to unduly constrain federal authority; they are also unlikely to do much to protect state autonomy. That brings us back to the prospects for process federalism. As I have suggested, any judicial attempts to buttress the political and procedural safeguards of federalism should take heed of several criteria generated by the Court’s institutional experience and by Federalist political theory. First, it should minimize the need for direct confrontations between the courts and the political branches. Second, it should avoid rules that place too much weight on subject matter categories, on the one hand, or direct value-application, on the other. Third, it should seek to guarantee and enhance three separate aspects of the constitutional structure: the political representation of the of the States in Congress; the procedural hurdles and burdens of inertia that impede the creation of federal law; and underlying ability of the States to generate loyalty by providing meaningful services and regulation to their citizens. Finally, we can add one more criterion to this list based on my discussion of the limits of hard constitutional restrictions on Congress’s power: Any rules that the Court develops must be designed to operate in a world where state and federal power are largely concurrent.

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781 See, e.g., Morrison, 529 U.S. at 613 (“While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far . . . our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.”).

782 See, e.g., Fallon, Conservative Paths, supra note 291, at 476 (“[T]his is by no means a trivial limitation, but neither is it one that appears to threaten the great bulk of federal regulatory legislation.”)

783 See Young, Dual Federalism, supra note 94, at 159-60. See also Adrian Vermeule, Does Commerce Clause Review Have Perverse Effects? 46 VILL. L. REV. 1325 (2001) (noting that Congress may regulate noncommercial activity so long as such regulation is part of an integrated regulatory scheme bearing on commercial activity); Fallon, Conservative Paths, supra note 291, at 432 (“Although the Court has imposed limits on Congress’s general regulatory powers, its decisions in that domain have displayed a cautious tentativeness. Notably, the Court has not overruled a single case upholding congressional power to regulate commercial activities.”).

784 See Baker, Conditional Spending, supra note __, at __. I discuss the prospects for protecting state autonomy through Commerce Clause limitations further infra at TAN __.
The Rehnquist Court’s efforts on the process federalism front have taken two primary forms. The Court has articulated a number of “clear statement rules” requiring that Congress legislate with particular clarity if it wishes to encroach on various aspects of state autonomy. Such rules apply, for example, when Congress wishes to regulate the traditional operations of state government, subject the states to liability, impose conditions on the receipt of federal funds, or press the limits of its Commerce Clause authority. The Court has also (arguably) imposed a strong deliberation requirement, enforced through review of the legislative record, when Congress acts in certain ways. In particular, the Court has suggested that the validity of legislation enacted under Congress’s power to enforce the Reconstruction Amendments will turn on the sort of findings made by Congress in support of such legislation.

There may well be a place for both these strategies in a sound federalism jurisprudence. But the first – the clear statement strategy – fits my criteria better. It is, for instance, more likely to avoid confrontations with Congress, because clear statement cases are statutory construction cases while failure to supply adequate legislative findings generally results in invalidation of the statute in question. While Congress may well disagree with the Court’s interpretation of a statute and, in some cases, acts to overrule the Court’s decision, these confrontations seem less, well, confrontational than where the Court issues a constitutional holding that the political branches perceive as illegitimate. Indeed, the obvious option of simply amending the statute in question may divert political forces from more damaging forms of retaliation.

Moreover, the Court has thus far applied deliberation rules primarily when Congress acts under Section Five of the Fourteenth Amendment. In this context, such rules do little to safeguard the state regulatory autonomy that I have identified as crucial.
to self-enforcement of federalism. The reason is that power to regulate per se under Section Five is generally redundant with the Commerce Clause; in most instances, the only reasons that Congress wishes to use the Section Five power instead of the Commerce Power is that the former will allow it to abrogate the states’ sovereign immunity from private damages suits. The Section Five deliberation rules, then, primarily guard the states’ sovereign immunity; they do not limit the scope of Congress’s power to preempt state regulatory authority over private individuals.

The clear statement strategy, on the other hand, is likely to minimize confrontations with Congress and avoid the need either to draw categorical lines or to apply federalism values directly. These rules enhance the States’ political representation in Congress by providing notice when federalism values are threatened. The ability of any interest group – including state governments – to protect its interests is powerfully affected by the costs of information, and, as Neil Komesar has observed, “one important form of information is the basic recognition of the existence of an interest. The most dormant groups are those whose members do not even recognize a need for political action.” This difficulty increases with the complexity of governmental activity, and many important issues are mind-numbingly complex. Clear statement rules thus serve an important function by easing the States’ task of monitoring congressional activity for threats to state autonomy.

Clear statement rules also raise procedural hurdles to intrusive federal enactments by imposing additional drafting or amendment costs on proponents. Rules requiring a clear statement by Congress, moreover, may be extended to further buttress political and procedural safeguards by demanding that particular sorts of decisions not be farmed out to other federal actors, such as administrative agencies and courts. This is an important point, since the States have no direct representation in these bodies, and courts and agencies are often able to act more easily than Congress.

The remaining criteria highlight the importance of one particular clear statement rule – the traditional “presumption against preemption.” That presumption is the only

794 [cites]

795 A further problem is that the deliberation arguably required by cases like Kimel and Garrett may impose unrealistic requirements on Congress. See Philip P. Frickey & Steven S. Smith, Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique, 111 YALE L. J. 1707 (2002). This problem is avoided if we read cases like Kimel and Garrett to turn on disparities in coverage between the statutes in question and the constitutional rules they are enforcing, see Young, Sky Falling, supra note ____, at ____, but in that instance we would be treating the Court’s limits on Section Five as substantive rather than process-based rules.

796 KOMESAR, supra note ____, at 71.

797 See id. (“The more complex the social issue the more difficult or expensive it is to recognize one’s position.”).

798 See [intergovernmental relations book – expand this part].

799 [cite Brudney]

800 See, e.g., Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (“[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”).
one of the Court’s pro-federalism doctrines that directly implicates the survival of state regulatory authority.\textsuperscript{801} It is therefore the doctrine most nearly relevant to Madison’s competition for loyalty between state and federal politicians. Preemption is also the classic problem of concurrent power. Preemption doctrine \textit{starts} from the proposition that the States and the Nation share power in an area; its central preoccupation is the management of conflicts that inevitably arise in such situations.\textsuperscript{802} To the extent that virtually all regulatory authority \textit{is} concurrent now – \textit{Lopez} and \textit{Morrison} notwithstanding – then preemption ought to emerge as the central preoccupation of constitutional federalism.

Why it has not done so is something of a puzzle.\textsuperscript{803} Part of the problem may be that preemption cases do not seem to raise questions of high constitutional principle. As Justice Breyer has pointed out, preemption doctrine emphasizes “the practical importance of preserving local independence, at retail, \textit{i.e.}, by applying pre-emption analysis with care, statute by statute, line by line, in order to determine how best to reconcile a federal statute’s language and purpose with federalism’s need to preserve state autonomy.”\textsuperscript{804} This “retail” federalism, however, may well be both more “doable” for the courts and more important for the states than the attempt to construct hard limits on national power.

\section*{D. Hard and Soft Rules}

A focus on preemption also has the virtue of responding to a central question in the debate over federalism’s underlying values. Edward Rubin and Malcolm Feeley have claimed that all the values I have discussed – regulatory competition and experimentation, for example, or citizen participation – are products of \textit{decentralization}, not federalism. Both involve shifting decisions to the state and local level; under decentralization, however, the decision to do so lies in the policy discretion of the central authority, whereas under federalism at least some such shifts are mandated as a matter of constitutional principle.\textsuperscript{805} Most of the advantages usually ascribed to federalism, Professors Rubin and Feeley argue, stem simply from shifting authority downward, not from any constitutional rule \textit{requiring} such a shift.\textsuperscript{806} Moreover, since regulatory diversity and citizen participation will be more helpful in some contexts than others, Rubin and Feeley argue that a constitutional rule forcing devolution without regard to the

\begin{footnotesize}
\footnotesize\textsuperscript{801} Other federalism doctrines – most importantly, the dormant Commerce Clause – directly impact state regulatory authority. But the dormant commerce doctrine has remained an effective tool for \textit{attacking} state autonomy, even in the hands of the Rehnquist Court. \textit{See}, \textit{e.g.}, [Carbone; Camps Newfound].

\footnotesize\textsuperscript{802} \textit{See, e.g.}, Raeker-Jordan, \textit{supra} note \____, at 1386 (“These preemption questions arise because Congress has sought to regulate to some extent in some field in which the states also regulate or attempt to regulate.”).

\footnotesize\textsuperscript{803} I return to this puzzle \textit{infra} TAN \____.


\footnotesize\textsuperscript{805} \textit{See generally} Rubin & Feeley, \textit{supra} note 523, at 910-14 (explaining this distinction).

\footnotesize\textsuperscript{806} Professors Rubin and Feeley concede that some values often associated with federalism – such as the diffusion of power and the promotion of local communities – are not secured by decentralization. \textit{See id.} at 927. They argue, however, that federalism does not really promote these values either. \textit{See id.} at 927-35 (diffusion of power), 936-51 (community).
\end{footnotesize}
circumstances of particular policy areas frustrates the ability of national authorities to respond to these variations. 807

A number of scholars have responded to Professors Rubin and Feeley. 808 Vicki Jackson, for example, has argued that their critique “fails to appreciate the degree to which decentralization in the United States is a function of, and bound up with, federalism . . . [P]resent realities are conditioned by the existence of the states, and by a belief, shared by many, that their existence and functioning as governments are constitutionally secured.” 809 One cannot simply assume that Texas or Oregon or New Hampshire would provide the same degree of viable regulatory diversity and citizen participation if they were transformed, from the standpoint of constitutional autonomy, into “Administrative Districts 1, 2 and 3.” Thus, as Professor Jackson points out, “abandoning constitutional federalism has potentially high costs for values Rubin and Feeley attribute to mere ‘decentralization.’” 810

I want to focus, however, on a somewhat different answer. The dichotomy postulated by Professors Rubin and Feeley assumes a bright line between decentralization as a policy choice and federalism as a matter of constitutional right. This assumption is evident in the definition of “federalism” that Professors Rubin and Feeley propose: “[I]n a federal system, the subordinate units possess prescribed areas of jurisdiction that cannot be invaded by the central authority, and leaders of the subordinate units draw their power from sources independent of that central authority.” 811 The first half of this definition – focusing on “prescribed areas of jurisdiction” – seems to describe the old doctrine of “dual federalism” that I discussed earlier. That doctrine, however, is long since dead. 812

More modern forms of constitutional federalism rely considerably less on judicial definition and enforcement of mutually-exclusive spheres of regulatory jurisdiction. The Court’s cases on anti-commandeering and state sovereign immunity, for example, limit the means by which Congress may enforce federal law but do not confine that law to

807 Id. at 914.
809 Jackson, Principle, supra note 808, at 2217.
810 Id.
811 Rubin & Feeley, supra note 523, at 911.
812 Some have argued that the Rehnquist Court’s recent Commerce Clause decisions have revived “dual federalism,” see, e.g., Peter M. Shane, Federalism’s “Old Deal”: What’s Right and Wrong with Conservative Judicial Activism, 45 Vill. L. Rev. 201, 215 (2000), and there is some language in the opinions to support this, see United States v. Morrison, 529 U.S. 598, 617 (2000) (“The Constitution requires a distinction between what is truly national and what is truly local.”). My own view is that, stray language aside, the holdings and operative analysis of these cases do not attempt to define an exclusive sphere of state activity. See Young, Dual Federalism, supra note 94, at 157-63; accord Petty, supra note __, at 364 (“It would be easy – but a serious mistake – to confuse the modern Court’s economic/noneconomic and local/national distinctions with the ‘dual federalism’ of the nineteenth-century Court.”). If “dual federalism” survives in current constitutional doctrine, we are more likely to find it in the Court’s continuing solicitude for the principle of federal exclusivity in foreign affairs. See Young, Dual Federalism, supra note 94, at 177-85.
particular areas. These contemporary doctrines blur the bright line between federalism and decentralization by conceding a large – virtually unlimited, even – realm of concurrent regulatory jurisdiction. Congress may regulate virtually any subject it chooses, so long as it does not require states to implement federal policy or subject them to private suits for money damages. That means that the decentralization decision – that is, the decision to regulate at either the state or federal level that Professors Rubin and Feeley argue is critical – remains primarily a policy choice even under the Rehnquist Court’s constitutional doctrine.

But to the extent we think decentralization is a good thing, we may want to foster it as a matter of interpretive policy in the construction of federal statutes. Professors Rubin and Feeley provide little legal basis for doing this. If decentralization is merely a policy question like any other, then courts engaged in statutory interpretation have little justification for construing statutes to protect regulatory diversity unless they can find evidence that the enacting legislature intended them to do so. As I develop in Part III, however, viewing federalism as a constitutional imperative provides a legitimate basis for normative, decentralizing canons of construction. That is what the Court’s clear statement rules – and particularly the presumption against preemption – are designed to do.

Process federalism thus can blunt much of the Rubin and Feeley critique by softening the dichotomy between federalism as a constitutional requirement and decentralization as a policy choice. Process rules will often allow Congress to centralize policy in areas where the public interest seems to require it. At the same time, they foster decentralization by strengthening the forces – both political and interpretive – that push against national uniformity. Rubin and Feeley are right to seek more flexibility in federalism doctrine; they are wrong to the extent that they assume that constitutional values cannot be an important part of a flexible analysis.

VII. Strong Autonomy and the Future of Federalism Doctrine

Predictions from the legal academy about federalism doctrine have often bordered on hysteria. Here is Mark Killenbeck, for example, writing just after the Court decided *Alden v. Maine* in 1999:

[The Rehnquist Court’s majority] has embarked on a course of constitutional reformation whose ultimate boundaries are becoming increasingly clear. The opinions themselves speak in largely measured terms, stressing the need for “great restraint” and averring respect for “established federalism jurisprudence.” There is, nevertheless, every reason to believe that in their single-minded quest to protect the “residuary and inviolable sovereignty” of the states, these Justices

813 See Young, *Dual Federalism*, supra note 94, at 154.
814 See infra Section III.A.1.

Likewise, in a widely-noted book, Judge John T. Noonan, Jr., asserted that the Court “has, by its own will, moved the middle ground [between federal and state authority] and narrowed the nation’s power.”\footnote{NOONAN, supra note 332, at 156.} Sandy Levinson and Jack Balkin even viewed \textit{Bush v. Gore}\footnote{531 U.S. 98 (2000).} as a sinister maneuver designed to perpetuate the current pro-States majority and allow it to wreak greater havoc on national authority.\footnote{Jack M. Balkin & Sanford Levinson, \textit{Understanding the Constitutional Revolution}, 87 VA. L. REV. 1045 (2001). The enormity of the charge requires a somewhat extended quotation to show I am not making it up. Professors Balkin and Levinson argue that “[i]n the past ten years, the Supreme Court of the United States has begun a systematic reappraisal of doctrines concerning federalism, racial equality, and civil rights that, if fully successful, will redraw the constitutional map as we have known it.” \textit{Id.} at 1052-53. Although Balkin and Levinson mention racial equality and civil rights, all of their primary examples come from federalism doctrine. \textit{See id.} at 1053 (discussing Bd. of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001) (11th Amendment); Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) (same); City of Boerne v. Flores, 521 U.S. 507 (1997) (limiting Congress’s power under Section 5 of the 14th Amendment); United States v. Lopez, 514 U.S. 549 (1995) (Commerce Clause); United States v. Morrison, 529 U.S. 598 (2000) (same)). Balkin and Levinson then assert that “this same bloc of five conservatives [that prevailed in the federalism cases] handed the presidency to George W. Bush in \textit{Bush v. Gore}. By doing so, they helped ensure a greater probability for more conservative appointments and more changes in constitutional doctrine. The conservative five are not through yet. They have selected a president to keep their constitutional transformation going.” \textit{Id.} at 1049-50. This is a spectacularly bold claim. It doesn’t look so good now, of course, in light of the surprisingly liberal – but in some cases quite revolutionary – holdings at the end of the 2002 Term. \textit{See, e.g.}, Lawrence v. Texas, 123 S. Ct. 2472 (2003) (striking down the Texas sodomy statute and overruling \textit{Bowers v. Hardwick}, 478 U.S. 186 (1986)); Grutter v. Bollinger, 123 S. Ct. 2325 (2003) (upholding affirmative action policy at the University of Michigan law school); Wiggins v. Smith, 123 S. Ct. 2527 (2003) (invalidating death sentence on grounds of ineffective assistance of counsel); Nevada Dept. of Human Res. v. Hibbs, 123 S. Ct. 1972 (2003) (upholding the Family Medical Leave Act’s provisions abrogating state sovereign immunity). For a thoughtful assessment of some of these cases, \textit{see} Sanford Levinson, \textit{Redefining the Center: Liberal Decisions from a Conservative Court}, \textit{Village Voice}, July 2-8, 2003 (available at http://www.villagevoice.com/issues/0327/levinson.php). In any event, perhaps the actual plausibility of charges made in a polemic like Balkin and Levinson’s is really beside the point. Their fulminations do show just how revolutionary many legal academics have expected the Rehnquist Court’s “federalist revival” to be.}

It is hard to square these predictions with actual results on the ground. The Gun Free School Zones Act is no more\footnote{See United States v. Lopez, 514 U.S. 549 (1995).} – but it has been replaced with a nearly identical
provision sporting legislative findings of a substantial effect on interstate commerce, and it was, in any event, redundant with state law in over forty states.  

Sylvia Law has asserted that “the Supreme Court has diminished the power of Congress to address national problems in ways that we have not seen since the Taft Court Era and the constitutionally disastrous period when the Court denied the New Deal Congress and president the power to adopt federal responses to the Great Depression.”

A. The Centrality of Preemption

Preemption shifts the focus firmly back onto what state governments do. Federal preemption eliminates state-by-state regulatory diversity and generally forecloses competition and experimentation. By removing whole policy areas from the state governmental agenda, moreover, preemption reduces the importance of state governments as an arena for political participation and competition. Doctrines limiting federal preemption of state law thus go straight to the heart of the reasons why we care about federalism in the first place.

A jurisprudence that sought to limit federal preemption of state law, on the other hand, would address these concerns directly. Preemption, as Candice Hoke has observed, “is inherently ‘jurispathic’; it kills off one line, perhaps even an entire scheme, of a particular community's law.” The whole point of preemption is generally to force national uniformity on a particular issue, stifling state-by-state diversity and experimentation. And preemption removes issues within its scope from the policy agenda of state and local governments, requiring that citizen participation and deliberation with respect to those issues must take place at the national level.

“Given the broad range of issues over which Congress has undoubted power to regulate, the failure of the Court to apply preemption doctrine sparingly, and with real attention both to Congress's intent and the values of federalism, will in the long run prove disastrous to perpetuation of the very real values underlying the diffusion of power inherent in federalism.”

822 See Lopez, 514 U.S. at ___.  
823 Sylvia A. Law, In the Name of Federalism: The Supreme Court’s Assault on Democracy and Civil Rights, 70 U. CIN. L. REV. 367, 371 (2002).  
824 Hoke, Preemption Pathologies, supra note ___, at 694 (borrowing the term from Robert M. Cover, The Supreme Court, 1982 Term: Foreword -- Nomos and Narrative, 97 HARV. L. REV. 4, 40 (1983)).  
825 Massey, supra note 318, at 508.
B. Against Dormant Preemption

C. Other Process-Forcing Rules

1. Clear Statements

a. Regulation of Governmental Functions.

b. Private Causes of Action Against State Institutions.

c. Conditions on Federal Grants.

2. Anti-Commandeering

The anti-commandeering rule has been criticized as a formalism, and formal it is. The question is whether that is such a bad thing. Sometimes the adoption of a formal judicial rule can prompt functional analysis by the political branches. In the commandeering context, for instance, the anti-commandeering rule simply forces Congress to consider whether its interests are sufficiently important to justify taking further action either to persuade state institutions to enforce federal law, or to override state resistance by mandating federal enforcement. There is no reason to think a court would do a better job of this analysis up front. Critics of Printz are in the habit of accusing the Court of “ignoring” the relevant history. See, e.g., Werhan, supra note ___, at 1278. But Justice Scalia’s opinion in Printz discusses the history for ___ pages; he simply reaches a different conclusion than the dissent and Printz’s critics do. Perhaps that conclusion is wrong, but it does no one any good to “ignore” the extent to which the majority grappled with that history in reaching its decision. This phenomenon in the commandeering debate seems representative of a broader pathology, whereby participants in legal debates seem driven to paint their opponents as completely mistaken, absolutely wrong, etc. It is rarely the case, however, that something intelligent cannot be said on both sides of most of our constitutional debates, and that is certainly true of debates about federalism.

D. A Zone of Guaranteed Autonomy?

E. The Very Limited Utility of Immunity

[rebut Pettys, who thinks anti-abrogation enhances states’ ability to compete for popular affection]

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826 See, e.g., Werhan, supra note ___, at 1281.