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Articles

The Rehnquist Court’s Two Federalisms

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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


2. Charles Ares, for example, opined:
   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.’
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.

This Article makes both a descriptive and a normative claim about the Court’s federalism jurisprudence. The descriptive claim is that the Court’s decisions sketch out two distinct visions 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. Less obvious is the particular nature of the constraints imposed. Those constraints embody a rather narrow version of state “sovereignty,” defined here as the notion that state governments should be accountable 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

3. Because the current incarnation of the Rehnquist Court has served together for ten years, the voting blocs on most federalism issues have been remarkably stable over virtually the entire period of the Federalist Revival. See generally Thomas W. Merrill, The Making of the Second Rehnquist Court: A Preliminary Analysis, 47 ST. LOUIS U. L.J. 569, 569–70 (2003).

4. See, e.g., Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 360 (2001) (holding that state sovereign immunity bars suit by state employees for money damages against a state under Title I of the Americans with Disabilities Act of 1990 because such suits are prohibited by the Eleventh Amendment); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 67 (2000) (holding that state sovereign immunity bars private damage suits under the Age Discrimination in Employment Act of 1967); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 47 (1996) (holding that Congress may not abrogate states’ immunity from private damage suits when it acts pursuant to its Article I powers).

5. See, e.g., Fed. Mar. Comm’n v. S.C. State Ports Auth., 535 U.S. 743, 788 (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, 528 U.S. at 98–99 (2000) (Stevens, J., dissenting in part and concurring in part) (“The 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) [hereinafter Fried, Five to Four] (observing that “explicit commitments to keep dissenting until the dissent becomes the doctrine of the Court are rare”).

6. 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 remits them to politics.”); Kimel, 528 U.S. at 96 (Stevens, J., dissenting in part and concurring in part) (“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.”).
cases about federal statutory preemption of state law—one discovers that the supposedly antifederalism 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—in other cases—emphasized state “autonomy,” defined somewhat narrowly here as the ability of states to govern.\(^7\) The dissenters, for example, vote to uphold state regulatory measures against claims of federal preemption considerably more frequently than their colleagues.\(^8\) 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. My normative claim, however, is 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, and 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 is also critical to states’ ability to maintain their own place in the federal balance without relying primarily on judicial protection.

The second set of arguments revolves around the nature of judicial enforcement for federalism issues. Such enforcement 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 of federalism, as

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well as doctrines that avoid direct confrontations with the political branches. But because the Framers' 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 Article will not be of much use for those who believe that legal doctrine has little or no bearing on the actual deciding of cases. I have never had much sympathy for that view, but addressing it would take this Article far afield indeed. In any event, as long as doctrine has some purchase—and the extreme positions 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. Moreover, this Article takes the legitimacy of constitutional doctrine—as opposed to other sources of constitutional authority, like text or history—largely for granted. I do so not because doctrine's legitimacy is obvious, but because the argument for that proposition is sufficiently elaborate and distinct as to require separate treatment.

Part I identifies two different models of federalism doctrine: a "strong sovereignty" model often followed by the Rehnquist Court majority and a "weak autonomy" model sometimes advanced by the Court's dissenters. Part II develops arguments for choosing among the elements of these competing models, based on the underlying values of federalism and comparative institutional analysis. In Part III, I propose a third model of "strong autonomy." That model would track the approach of the Rehnquist Court dissenters by emphasizing autonomy over sovereignty, process over substance, and soft over hard rules. But—as the "strong" label suggests—my model would be considerably more aggressive in employing these approaches than the dissenters have been willing to be. Part III also offers a preliminary sketch of the doctrines that might make up a "strong autonomy" approach. Part IV offers a brief conclusion, assessing the prospects for federalism doctrine going forward.

We are probably in the final year of the Rehnquist Court. The 2004 elections, regardless of their outcome, will almost surely break the logjam on retirements that has caused this particular group of nine to serve together for

9. See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 1 (1993) (arguing that "the legal model serves only to cloak—to conceal—the motivations that cause the [Justices] to decide as they do"); see also Charles Fried, Constitutional Doctrine, 107 HARV. L. REV. 1140, 1140 (1994) [hereinafter Fried, Constitutional Doctrine] (observing that the assumption "that there are rules and 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").

longer than any other Court in almost two centuries.\textsuperscript{11} One of the first items of business on the new Court’s agenda is likely to be what to make of the Rehnquist Court’s federalism legacy: what to preserve, what to extend, what to discard. The new Court will have an opportunity to forge the consensus that has escaped its predecessor, but that effort is more likely to succeed—both in achieving agreement and in making sure such consensus actually strengthens the Court’s structural constitution—if it takes careful account of the Rehnquist Court’s two distinct federalisms.

I. Competing Visions

It is customary to start by saying that the Supreme Court has failed to develop a coherent theory of federalism.\textsuperscript{12} It would be closer to the truth, however, to say that it has developed \textit{two}. The two approaches correspond reasonably well to the two sides of the Rehnquist Court’s characteristic five-to-four split. Five Justices—Chief Justice Rehnquist and Justices O’Connor, Scalia, Kennedy, and Thomas—have generally favored limits on federal power. Four—Justices Stevens, Souter, Ginsburg, and Breyer—have generally opposed such limits. The central argument of this Part is that \textit{both} these groups care about federalism, but that they tend to want to protect it in quite different ways.

We need names for these two groups if we are to analyze their positions, but part of my point is that the most familiar labels are misleading. Many have referred to “conservative” and “liberal” factions, but attaching a strong political valence to federalism issues is problematic.\textsuperscript{13} I will occasionally use “pro-states” and “nationalist,” but one of my primary arguments is that the putatively nationalist four do, in fact, have their own vision of state autonomy. I will refer to the Court’s “majority” and “dissenting” factions on federalism, but it is important to understand that the dissenters have sometimes been able to form majorities around their own view of federalism.\textsuperscript{14} Sometimes it may be best to refer simply to “the Five” and “the Four.”\textsuperscript{15}

\textsuperscript{11} See Merrill, supra note 3, at 577 (noting that “[n]ot since the 1820s has a single group of Justices sat together for such a long unbroken period of time”).

\textsuperscript{12} See, e.g., Matthew D. Adler & Seth F. Kreimer, The New Etiquette of Federalism: New York, Printz, and Yeskey, 1998 SUP. CT. REV. 71, 71 (“[O]ne suspects that the new federalism doctrines quickly will drive political actors, judges, and practicing lawyers to distraction. The area lacks a fabric of constitutional law sufficiently coherent and well-justified to last.”).

\textsuperscript{13} See, e.g., Lynn A. Baker & Ernest A. Young, Federalism and the Double Standard of Judicial Review, 51 DUKE L.J. 75, 151–52 (2001) (arguing that federalism is politically indeterminate in both principle and practice); Ernest A. Young, Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror, 69 BROOK. L. REV. 1277, 1280 (2004) [hereinafter Young, Dark Side]. There is also considerable room for dispute about what should count as “conservative” and “liberal.” See generally Ernest A. Young, Judicial Activism and Conservative Politics, 73 U. COLO. L. REV. 1139, 1184–87 (2002).

\textsuperscript{14} See, e.g., Tennessee v. Lane, 124 S. Ct. 1978, 1994 (2004) (holding that Congress’s abrogation of state sovereign immunity in Title II of the Americans with Disabilities Act was constitutional as applied to cases involving rights of access to courts); Medtronic, Inc. v. Lohr, 518
This Part identifies the different theoretical perspectives already extant in current doctrine. My analysis presupposes that the Court is relatively free to develop federalism doctrine in ways that are responsive to functional considerations and that are not necessarily determined by the text and history of the Constitution. Subpart A sketches the basic argument for that view, although I can only summarize a position explored in greater depth elsewhere. I also argue that it is unrealistic to expect of the Court the sort of doctrinal "coherence" that is achievable in a law review article, but that it is nonetheless useful to develop models of doctrine as a general guide to doctrinal development.

Subpart B develops three different variables that organize my discussion of federalism doctrine. The first has to do with the ends of federalism doctrine—the tension between state "sovereignty" and state "autonomy." The remaining two variables are about means—that is, the role of judicial review in promoting federalism. These variables concern, respectively, the focus of judicial review on issues of substance or process and the rigidity of the doctrinal rules proposed vis-à-vis efforts by other branches of government to override them.

Subpart C 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, 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 high-profile cases limiting national power, such as Seminole Tribe or Lopez, but also in less widely-marked preemption cases that have declined to protect state regulatory autonomy.

A quite different vision emerges in subpart D. That vision stresses state "autonomy" over state "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 constitutional 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.  


15. Some of my liberal, nationalist friends prefer "the Federalist Five" and "the Fab Four," with apologies in the latter case to John, Paul, George, and Ringo.

16. For an example of the latter, see Edward L. Rubin & Malcolm Feeley, Federalism: Some Notes on a National Neurosis, 41 UCLA L. REV. 903, 909 (1994) (asserting that "there is no normative principle involved [in federalism] that is worthy of protection").
A. Federalism, Doctrine, and Theory

A growing literature explores the difference between constitutional doctrine and the Constitution itself.17 As Richard Fallon has observed, doctrinal rules like the Equal Protection Clause’s three tiers of scrutiny do not emerge directly from the constitutional text or its history; rather, they are judge-made tools for “implementing constitutional norms.”18 Judge-made doctrine has long played a central role in ordering our federal balance. The Court has admitted that the anticommendeering principle of New York v. United States,19 for example, has no direct grounding in the words of the Constitution but is instead inferred from more general principles of structure.20 Likewise, the venerable “dormant” commerce principle restricts state regulation, despite the absence of any textual evidence that the Commerce Clause does anything other than grant an affirmative power to Congress.21 There are many others: the abstention doctrines,22 rules of federal common lawmaking,23 the adequate and independent state grounds bar to U.S. Supreme Court review of state courts,24 both state and federal sovereign immunity,25 many of the rules governing federal habeas corpus review of state convictions,26 and virtually the whole corpus of conflict of laws27 are all primarily judge-made principles that mediate the relationships among our national and state governments.


20. See Printz v. United States, 521 U.S. 898, 905 (1997) (“[T]he answer . . . must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court.”).


Those relationships also have been mediated by important nonjudicial actions: Congress stakes its claim to regulate certain aspects of life while eschewing others and, in still others, creates mechanisms of shared state and federal responsibility. The Executive issues important regulations that structure state and federal relations in some fields, in others it consults with and sometimes even represents state governments. The basic point is that most of the complex web of relationships that constitutes our federalism can be found neither in the spare text of the Constitution nor in the contemplation of its Framers. Rather, our federalism has evolved over time in response to the necessities of governance, sometimes through the work of the political branches, but often through the doctrinal development by the courts.

Doctrinal development of federalism responds not only to the sparseness and ambiguity of the Constitution but to the need to adapt our institutions over time. Both the text and historical understandings of the Constitution plainly contemplate balance between national and state power, but many of the mechanisms originally intended to maintain that balance—such as the doctrine of enumerated powers—have been substantially undermined by such events as the integration of the national economy. As Larry Lessig has argued, fidelity to the original constitution in radically different times requires that we "translate that original structure into the context of today." Such translation will often require doctrinal innovation by courts; indeed, that is exactly what courts have done as the changing circumstances of federalism have spurred doctrinal change. This sort of innovation is likewise consistent with the Founders’ own expectation that "the text as ratified provided an important, but by design not necessarily a definitive matrix for analyzing sovereignty issues."
To say we need doctrine, of course, only begins a conversation about what sort of doctrine we should have. The text and history of the Constitution are important starting points, but they are necessarily incomplete guides; after all, that incompleteness is the major reason we turn to doctrinal development. Much of my discussion instead focuses on functional arguments about how courts can help maintain a viable federal system under modern conditions. Those arguments reflect, at least to some extent, what Cass Sunstein and Adrian Vermeule have called an “institutional turn” in constitutional law.\footnote{Cass R. Sunstein & Adrian Vermeule, \textit{Interpretation and Institutions}, 101 Mich. L. Rev. 885, 886 (2003).} That tendency insists that constitutional doctrine must be driven, at least in part, by analysis of the comparative institutional competences of the different competing institutions in our system.

We might use this sort of institutional analysis at two different levels. We might first ask, very broadly, whether courts should decide federalism issues at all or whether they should leave them to other institutions, such as Congress or the President. That strikes me, however, as primarily a question of institutional \textit{design}: If we were creating a system from scratch, we might well commit such questions entirely to the political process. But the system we have does not distinguish among constitutional claims by telling courts to decide some, but not others, in cases that come before them.\footnote{The political question doctrine is an obvious exception, but that doctrine’s modern incarnation is relatively narrow. See Baker v. Carr, 369 U.S. 186, 226 (1962) (shifting emphasis away from procedural considerations); Louis Henkin, \textit{Is There a “Political Question” Doctrine?}, 85 Yale L.J. 597, 604–05 (1976) (denying that the doctrine is necessary to explain the Court’s results in actual cases). Even Jesse Choper, who has argued that federalism issues should be entirely nonjusticiable, does not try to fit his argument into the doctrinal confines of political questions. \textit{See Jesse H. Choper, Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court} 214 (1980).} If, for instance, a criminal defendant being prosecuted for bringing a gun to school argues that the federal law that defines the offense exceeds Congress’s authority under the Commerce Clause,\footnote{See United States v. Lopez, 514 U.S. 549, 551–52 (1995).} no established jurisdictional principle in our system removes that issue from the court’s purview.\footnote{See, e.g., \textit{Marbury v. Madison}, 5 U.S. (1 Cranch) 137, 177–78 (1803) (grounding the power of judicial review itself in the Court’s obligation to resolve the conflicting claims of legal right that come before it); \textit{cf. Cohens v. Virginia}, 19 U.S. (6 Wheat.) 264, 404 (1821) (“We have 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.”).} This hardly means that institutional concerns are irrelevant. A court developing doctrine to police the limits of the Commerce Clause may have a number of different approaches open to it, and these approaches will vary in the amount of deference they accord to other institutional actors. The court might defer to Congress’s determination that a regulated activity substantially affects interstate commerce as long as that determination has a “rational basis,” or the court might try to assess the effect on commerce for itself \textit{de novo}. If the institutional design question involves “institutional
competence writ large,” then the formulation of doctrine by courts still raises “considerations of institutional competence writ small.”38 My own view is that the general obligation of courts in our system to decide the cases that come before them means that institutional analysis must generally take place at this second level. Nonetheless, this conclusion need not entail a primary role for courts in matters of federalism. Sufficient flexibility persists in the construction of doctrine that questions about the relative roles of courts, legislatures, the executive branch, and private actors remain very much on the table.

I have developed and defended these points at far greater length elsewhere,39 and anyone who is skeptical about them will probably need to turn to that other discussion for any hope of being convinced. Here, I want to ask how much theoretical coherence we can reasonably expect when courts make doctrine. The tone of much academic criticism faults the Court for not being more, well, academic.40 Unfortunately, it seems to be an occupational hazard of law-professing; one can hardly find an area of constitutional law in which academics do not pronounce the prevailing doctrine “incoherent.”41 Surely the fact that legal academics always say this ought to inspire some skepticism about the claim in each instance.

The fact is that articulating general theories is only tangentially related to the Court’s job description. The Court sits to decide cases. In order to

38. Sunstein & Vermeule, supra note 34, at 938.
39. See Young, Making Federalism Doctrine, supra note 10.
40. See, e.g., Jenna Bednar & William N. Eskridge, Jr., 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.”); Ronald J. Krotoszynski, Jr., Listening to the “Sounds of Sovereignty” but Missing the Beat: Does the New Federalism Really Matter?, 32 IND. L. REV. 11, 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”); Calvin Massey, Federalism and the Rehnquist Court, 53 HASTINGS L.J. 431, 518 (2002) (“The Rehnquist Court lacks a coherent federalism philosophy.”); Todd E. Pettys, 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”).
41. See, e.g., E. Donald Elliot, Why Our Separation of Powers Jurisprudence is So Abysmal, 57 GEO. WASH. L. REV. 506 (1989) (title says it all); 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 “betoken a jurisprudence that is both incoherent and doctrinally unstable”); Robert Post, Recovering 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.”). 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 doeful incidents.”).
decide like cases alike—more precisely, in order to tell which cases are "like" and which aren't—it must develop doctrine. But just as doctrine and the Constitution are not the same, doctrine and theory are not the same thing either. 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.\(^42\) 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 its own imperative to construct a coherent theory. Years may pass before the Court can return to a particular issue to elaborate on what it said before.\(^43\) Worst of all, the writing justice—charged with articulating a coherent theory—must achieve consensus with at least four 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?\(^44\)

As Adrian Vermeule and I have argued elsewhere, the Constitution resists grand unified theories.\(^45\) For good or ill, much judicial doctrine evolves in an incremental, common law fashion. This is particularly true in

\(^42\) For example, the original bicameral division of Congress reflected two quite different theories of representation. The House embodied the theory of "direct . . . privity" between federal representatives and their constituents that Justice Kennedy articulated in \textit{U.S. Term Limits, Inc. v. Thornton}, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). On the Senate side, however, that relation was mediated by the State legislatures, which initially selected senators themselves. \textit{U.S. Const. art. I, § 3, cl. 1} (amended 1913). We achieved a unified theory of federal representation only after ratification of the Seventeenth Amendment in 1913.

\(^43\) 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 5 of the Fourteenth Amendment, see\textit{ Fitzpatrick v. Bitzer}, 427 U.S. 445 (1976), and its parallel decision on abrogation under the commerce power, see \textit{Pennsylvania v. Union Gas Co.}, 491 U.S. 1 (1989).

\(^44\) Justice Frankfurter captured the Court's situation well when he characterized the judicial function in Commerce Clause cases as "statecraft":

but it is . . . statesmanship hemmed in by the restrictions attending the adjudicatory process. Far-reaching political principles arise through the accidents of unrelated and intermittent cases, presenting issues confined by the exigencies of the legal record, depending for elucidation upon the learning and insight of counsel fortuitously selected for a particular case, and imprisoning the judgment, at least in part, within legal habituations and past utterances.

FELIX FRANKFURTER, \textit{THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE} 22 (1937).

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 preoccupations, 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. That, in fact, is what the remainder of this Part tries to do. We should remember, however, that much of this added value derives from the fact that academics have very different jobs from judges.

B. The Ends and Structure of Judicial Review

We might describe different models of federalism doctrine in any number of ways, but I focus here on three dimensions: 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 (OED) defines “sovereignty” as “[s]upremacy in respect of power, domination, or rank; supreme dominion,


authority, or rule.”

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—the legal unaccountability of governmental entities for their violations of law.

“Autonomy,” on the other hand, emphasizes the positive use 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—and not simply shielding itself from threats. As Todd Pettys has remarked, “To say that a sovereign is autonomous means . . . that it is free to identify and pursue courses of action that it believes will earn it the affection of its constituents.”

An autonomy-based federalism doctrine would be concerned, for example, with the states’ ability to make their 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: the ability to do things with power, not just to be unaccountable for what has been done. Thomas Hobbes included in the rights of sovereignty not only the notion that “[w]hatsoever the Soveraigne doth, is unpunishable by the Subject” but also that “[t]he Soveraigne is judge of what is necessary for the Peace and


49. BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 198 (2d ed. 1992); see also 1 WILLIAM BLACKSTONE, COMMENTARIES *49 (“[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.”).


52. 1 THE OXFORD ENGLISH DICTIONARY, supra note 48, at 575.

53. Pettys, supra note 40, at 370; see also Massey, supra note 40, at 440 (“Collective autonomy describes . . . the freedom of the people of a state, acting collectively, to adopt public policies that suit them even though such policies are at odds with national preferences or the preferences of other states.”).

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.

Sovereignty and autonomy also overlap in a second, nondefinitional 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* and *Alden*—purports to benefit state autonomy by preserving the states’ control over their internal budgetary policies. I will return to this point in Part III, but for present purposes it is enough to say that I am not arguing sovereignty and autonomy are unrelated. I simply hope to demonstrate 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 “substance” and “process.” In *United States v. Morrison*, for example, the Court invalidated the civil suit provision of the Violence Against Women Act based on the substantive character of the federal regulation—in particular, the noncommercial 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. 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

56. 1 THE OXFORD ENGLISH DICTIONARY, supra note 48, at 575.
57. 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.
59. See infra subpart III(D).
60. 529 U.S. 598, 617 (2000).
61. See id. at 614. The Court’s decision in *United States v. 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 noncommercial 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 (process). See 514 U.S. 549, 561–63 (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 *Morrison*, 529 U.S. at 613–17.
process rather than one of result.”62 Thus, rules of “process federalism” 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.

The Rehnquist Court has been quite active in developing process-orientated checks on federal power. The anticommandeering doctrines are the most prominent example, requiring Congress to internalize the financial and political costs of its actions by prohibiting it from making state institutions enforce federal law.63 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.64

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 state governments have too few substantive responsibilities to be viable governments.65 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.66 Dean Ely’s theory has been criticized on a number of grounds,67 but no one claims that it amounts to judicial surrender; it was constructed, after all, to explain and justify the work of the Warren Court. So, too, a Democracy and Distrust for federalism doctrine would offer a different focus for judicial review but not necessarily require 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 of imposing categorical restrictions on other actors that may be overridden only by constitutional amendments (or judicial overruling), or they may be “soft” to

63. See infra section III(A)(2); Young, Two Cheers, supra note 8, at 1360–61.
64. See infra section III(A)(3).
65. See infra section III(A)(3).
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 fixing the boundary between state and federal power at a particular point. 68

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. 69 Despite some initial speculation to the contrary, it now seems clear that Congress can do nothing to supply this deficit of power. 70 Jones v. United States, 71 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 constitutional 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. 72 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. 73 I have argued elsewhere, however, that the avoidance canon is best understood as a means of enforcing—not avoiding the enforcement of—the underlying constitutional norms that create

70. 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. 18 U.S.C. § 922(q) (1996). 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 Lopez, 514 U.S. at 563. But the Court’s subsequent decision in United States v. Morrison makes clear that the presence of such findings cannot save a statute that does not regulate commercial activity. See 529 U.S. 598, 613–15 (2000). Congress could possibly achieve the same result through conditional spending, see Lynn A. Baker, Conditional Federal Spending After Lopez, 95 COLUM. L. REV. 1911 (1995) [hereinafter Baker, Conditional Spending], but that would implicate a different power altogether, and it would not involve “fixing” the Commerce Clause problem.
71. 529 U.S. 848 (2000).
72. See id. at 859 (concluding that “§ 844(i) is not soundly read to make virtually every arson in the country a federal offense”).
73. See Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 348 (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 of the statute is fairly possible by which the question may avoided.”) (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)); see also Jones, 529 U.S. at 857–58 (invoking the avoidance canon).
the doubt in the first place. Federalism doctrine is rife with other “clear statement” rules covering any number of intrusions on state sovereignty or state autonomy, including subjecting states to liability, imposing conditions on grants of federal funds, regulating traditional state government functions, and preemption of state law. But other federalism rules—such as the balancing test in *Pike v. Bruce Church, Inc.* 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. The important distinction for present purposes is between categorical limits on state or national power and limits that may yield in response to actions taken by particular actors, with sufficient clarity, or in pursuit of certain interests.

4. Combining Dimensions.—Combining the dimensions I have discussed in various ways produces quite different models of federalism doctrine. The first point is that the dimensions are not unrelated. It may be easier, for instance, to have strong, categorical rules protecting state sovereignty than to build similar fences around state autonomy. The reason is 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 *National League of Cities* doctrine, for example, did not interfere with the Fair Labor Standards Act’s ability to govern employment conditions in the


75. Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 781–82 (2000) (holding that Congress must speak clearly in order to authorize *qui tam* suits by private plaintiffs against state governments); Will v. Mich. Dep’t of State Police, 491 U.S. 58, 65 (1989) (requiring Congress to speak clearly if it wishes to include state governments in the class of persons liable in suits under federal statutes); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 240 (1985) (holding that Congress must speak clearly to abrogate state sovereign immunity when it legislates under Section 5 of the Fourteenth Amendment).


80. See Nat’l League of Cities v. Usery, 426 U.S. 833, 855 (1976) (holding that “Congress may not exercise [the commerce] power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made”) (emphasis added).
overwhelming majority of the economy.\textsuperscript{81} 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 seem likely to affect only a very small proportion of litigation under those statutes.\textsuperscript{82} It may thus be easier for the system to tolerate categorical sovereignty protections than equally categorical efforts to protect state regulatory autonomy that hold significant sections of American life off limits to federal legislation.

There is also an obvious affinity between process federalism and soft limits on federal power, particularly in the case of clear statement canons of statutory construction. Rules requiring that Congress speak clearly when it intrudes on state prerogatives 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.\textsuperscript{83} Second, they increase the costs of drafting and securing support for federalism-threatening measures, simply by adding another hurdle for such measures to jump.\textsuperscript{84} 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 to enhance those political and institutional checks. Any model emphasizing process doctrine is likely to feature soft rules of this kind.

\textsuperscript{81} See Martha A. Field, Garcia v. San Antonio Metropolitan Transit Authority: The Demise of a Misguided Doctrine, 99 HARV. L. REV. 84, 105 (1985) (acknowledging that the Court’s exemption of state employees could “serve as a reminder of the special authority of the state, without rendering the federal program ineffective”). It is true that state governments actually have a significant economic impact in their own right. See Maryland v. Wirtz, 392 U.S. 183, 194–95 (1968) (providing figures on the impact of state-operated schools and hospitals on the national economy).

\textsuperscript{82} See, e.g., Mitchell N. Berman, R. Anthony Reese & Ernest A. Young, State Accountability for Violations of Intellectual Property Rights: How to “Fix” Florida Prepaid (And How Not To), 79 TEXAS L. REV. 1037, 1077–79 (2001) [hereinafter Berman, Reese & Young] (reporting only sporadic instances of copyright or patent litigation involving state governments). There seems to be somewhat more ADA litigation against states, see Ruth Colker & Adam Milani, The Post-Garrett World: Insufficient Protection Against Disability Discrimination, 53 ALA. L. REV. 1075, 1077 n.7 (2002) (listing reported decisions), but the numbers remain low and it is hard to get a good sense of how many litigants have claims that cannot be remedied either through injunctive relief or through damage claims against individual state officers. Analysis of Garrett’s impact, such as the Colker & Milani article, tends to focus on its ramifications in principle, rather than on how many claims have actually been foreclosed.

\textsuperscript{83} See Young, Two Cheers, supra note 8, at 1359 (arguing that notice is necessary for opponents to “mobilize their forces”).

\textsuperscript{84} 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 any requirement that drafters 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 74, at 1596–98.
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.

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<th>Substance</th>
<th>Process</th>
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<tr>
<td><strong>Hard Limits</strong></td>
<td>(1) Subject matter limit on the Commerce Clause. <em>Lopez.</em></td>
<td>(2) Absolute anticommandeering rule based on concerns about political accountability. <em>Printz.</em></td>
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<tr>
<td><strong>Soft Limits</strong></td>
<td>(3) Clear statement rule against broad use of the Commerce Clause power. <em>Jones.</em></td>
<td>(4) Clear statement rule for conditions on federal funds, based on a need for states to know what they have agreed to. <em>Pennhurst.</em></td>
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Box 2 indicates that although process federalism is often associated with weak or even nonexistent judicial checks on Congress, it may also give rise to hard rules. For instance, the anticommandeering rule represents a categorical restriction on congressional power most persuasively grounded in the process imperative to force Congress to internalize the monetary and political costs of its programs.\(^{85}\) Likewise, Box 3 recognizes that the Court has often chosen to enforce substance-based limits on congressional power through nonabsolute techniques, such as clear statement requirements, notwithstanding conventional wisdom identifying substantive restrictions with more unyielding rules.\(^{86}\) I do not mean to argue at this point 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 and substance—process variables. Some pairings may be more natural than others, but all appear at least occasionally in current doctrine.

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85. See Printz v. United States, 521 U.S. 898, 930 (1997); New York v. United States, 505 U.S. 144, 168–69 (1992); see also Young, Two Cheers, supra note 8, at 1360–61 (discussing the process justifications for the anticommandeering rule).

86. See generally Eskridge & Frickey, supra note 78, at 619–29; Young, Constitutional Avoidance, supra note 74, at 1596–98.
To complete the set, we can do a similar matrix comparing the sovereignty–autonomy and hard–soft variables:

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 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.87

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

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87. See Young, Two Cheers, supra note 8, at 1384–86 (demonstrating that much more state autonomy has been at stake in recent preemption cases than in Commerce Clause litigation).
dichotomy between rules and standards. We might plot that dichotomy against the substance-process variable, for instance, to yield the following examples:

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<th>Figure 4. Rules &amp; Standards vs. Substance &amp; Process</th>
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<td><strong>Rules</strong></td>
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<td><strong>Substance</strong></td>
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<td><strong>Process</strong></td>
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Despite the prominence of the rules-standards dichotomy in constitutional discourse, that dichotomy plays a subordinate role in my analysis. For one thing, the options it produces are not all present in current law; in order to fill Box 2, we have to look to another federal constitutional system altogether—the principle of subsidiarity included in the Maastricht Treaty on European Union.

More important, the three variables upon which I have focused here—sovereignty-autonomy, substance-process, and strong-weak rules—seem to represent the defining choices that separate the models actually in play in our current debates about federalism. Other choices, such as whether doctrines

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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.

C. 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 opted 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 choose strong, substantive doctrines over rules that focus on process or leave open a dialogue with Congress. The Court’s preferences on the judicial review variables are less pronounced, however, and one can find numerous counterexamples.

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 prosovereignty 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.”

90. For example, the clear statement rules that characterize process-based models may take the form of rules or standards. 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 a statute itself, fit this latter description. See, e.g., Dellmuth v. Muth, 491 U.S. 223, 230 (1989). 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. See Eskridge & Frickey, supra note 78, at 597 (observing that the early Rehnquist Court sometimes expressed its “constitutional concerns” through presumptions that could be rebutted by “statutory language, legislative history, and overall purpose”).

91. See Merrill, supra note 3, at 571 (concluding that “devolutionary theory cannot account . . . for the continued willingness of the Court to find state laws preempted by federal regulation, to strike down discriminatory state laws under the dormant Commerce Clause doctrine, and to eliminate state experimentation with different sorts of electoral regimes under an ever-expanding First Amendment”).

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 the intergovermental tax immunity decisions of the Taft Court in the early twentieth century. Those cases concerned the taxing powers of both the state and national governments; indeed, Robert Post's recent survey of the Taft Court's cases suggests that the doctrine bore more heavily on state taxation than on federal. The important point for present purposes, however, is the extent to which the Court "dealt with the whole question as an infringement of sovereignty." The Court wrote in *Macallen Co. v. Massachusetts*, for example, that "for one government—state or national—to lay a tax upon the instrumentalities or securities of the other is derogatory to the latter's dignity, subversive of its powers, and repugnant to its paramount authority." The vision of "sovereignty" reflected in the intergovermental tax immunity cases thus prefigures the Rehnquist Court's more recent preoccupation with noninterference and dignity.

Under the Taft Court's vision of "dual federalism," the sovereignty principle coexisted with a strong principle of autonomy reserving significant regulatory authority to the states. Justice Sutherland explained:

> It is fundamental, under our dual system of government, that the Nation and the State are supreme and independent, each within its own sphere of action; and that each is exempt from the interference or control of the other in respect of its governmental powers, and the means employed in their exercise.

After 1937, however, sovereignty survived while autonomy waned. This shift is evident in *National League of Cities v. Usery*, which was one of a

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94. Professor Post cites, for example, *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218 (1928) (striking down a Mississippi gasoline tax as applied to sales to the U.S. Coast Guard and a veterans' hospital), *Macallen Co. v. Massachusetts*, 279 U.S. 620 (1929) (striking down a state tax on corporate income that included income from federal bonds), and *Long v. Rockwood*, 277 U.S. 142 (1928) (invalidating state taxes on royalties from federal patents).

95. Letter from Harlan Fiske Stone to Thomas Reed Powell (Jan. 30, 1931), quoted in Post, *supra* note 93, at 1535.

96. *Macallen*, 279 U.S. at 628. As Professor Post points out, this is language "that anticipates *Alden v. Maine.*" Post, *supra* note 93, at 1533.


series of cases involving the constitutionality of federal wage and hour regulation under the Fair Labor Standards Act (FLSA). 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” by *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* and *National League of Cities*)—as sharply different. The Government 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. Justice Rehnquist wrote:

> It is one thing 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.

Although the 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, sovereignty was limited to the states’ right to be free from federal regulation of state institutions themselves.

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99. 312 U.S. 100 (1941).
100. 392 U.S. 183 (1968).
102. *Id.* at 844–45.
103. *Id.*
104. *Id.* at 845.
105. *Id.*
The Court overruled *National League of Cities* just nine years later,\(^{106}\) 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.\(^{107}\) These cases represent neither the opening moves in the Federalist Revival nor its most dramatic departures from prior precedent.\(^{108}\) But they surpass all other areas of federalism doctrine in both number and in the Court’s willingness to push to the pro-states extreme on a continuum of doctrinal possibility.\(^{109}\) The Eleventh Amendment—and its background “postulates which limit and control” that actually seem to drive most of the recent cases\(^ {110}\)—has become the poster child of federalism doctrine in 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.

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106. See Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 531 (1985) ("[T]he attempt to draw the boundaries of state regulatory immunity in terms of 'traditional governmental function' is not only unworkable but is also inconsistent with established principles of federalism and, indeed, with those very federalism principles on which *National League of Cities* purported to rest. That case, accordingly, is overruled.").


110. 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 postulates which limit and control."); *Seminole Tribe*, 517 U.S. at 54 ("[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)).
themselves. This effort constantly invokes the rhetoric of state sovereignty. Justice Thomas began his analysis in Federal Maritime Commission v. South Carolina State Ports Authority, for example, by noting that the states “entered the Union ‘with their sovereignty intact,’” and that the states’ immunity from private suits is “‘[a]n integral component of that ‘residuary and inviolable sovereignty.’”\(^{111}\) Likewise, Justice Kennedy’s more extended discussion of the Framers’ original understanding in Alden v. Maine focused on “the close and necessary relationship understood to exist between sovereignty and immunity from suit.”\(^{112}\)

There is an important shift in emphasis from National League of Cities to the sovereign immunity cases, however. The former doctrine stressed the need to relieve state governments from federal regulation so that they might better serve their own constituents. Justice Rehnquist noted:

One 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.\(^{113}\)

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.”\(^{114}\) Although National League of Cities was couched in terms of sovereignty and operated by foreclosing federal regulation of state institutions themselves, one key to the doctrine was the degradation of the state’s ability to govern, which results from loss of control over its own governmental functions. In this sense, National League of Cities shared the basic concern of the autonomy model.\(^{115}\)

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


\(^{112}\) 527 U.S. 706, 715 (1999).

\(^{113}\) Nat’l 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.”).

\(^{114}\) Id. at 847.

\(^{115}\) See id. at 851 (observing that “governments are created to provide” services such as police and fire protection and that “[i]f Congress may withdraw from the States the authority to make those fundamental employment decisions upon which their systems for performance of these functions rest..., there would be little left of the States’ ‘separate and independent existence’”) (quoting Croy v. Oklahoma, 221 U.S. 559, 580 (1911)).
said that “[t]he preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities.”

And as I discuss in Part III, dignity may have some relationship to state governance. Likewise, the Court occasionally 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.’” But, most opinions have tended to focus either on more abstract notions of sovereignty or state dignitary interests. Indeed, the *Ports Authority* decision explicitly rejected an argument that autonomy concerns about state finances are necessary for state immunity: “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’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, and recent doctrinal developments in that area effectively constrict state accountability for violations of federal rules. The doctrine

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117. 527 U.S. at 750 (quoting Great N. Life Ins. Co. v. Read, 322 U.S. 47, 53 (1944)).
118. See, e.g., *id.* at 749 (discussing dignitary concerns); *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261, 277 (1997) (plurality opinion) (“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.”); *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.”).
119. *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.* He explained:

Sovereign 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).
120. 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.”).
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. As with state sovereign immunity, the effect is not to absolve state courts of 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.

The habeas case law, like sovereign immunity and 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 states’ ability to punish violations of their criminal laws—surely a core concern of state governance. And rules like the procedural default doctrine are designed to protect states’ ability to manage their criminal justice systems; if state procedural defaults are ignored on federal habeas review, the Court has argued, there is no incentive to comply with state procedural rules. Although courts occasionally refer to state dignitary interests in habeas opinions, such interests tend to take a back seat to the practical costs of federal habeas review to state law enforcement. Nonetheless, autonomy concerns in habeas cases are further removed from those at issue when the Court decides whether to impose federal constitutional rules on the states in the first place.

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.


123. 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).

124. See, e.g., Calderon v. Thompson, 523 U.S. 538, 554–56 (1998) (explaining that limits on federal habeas relief are necessary to ensure states' ability to exercise their sovereign rights of articulating societal norms and deterring and punishing violations of those norms).

125. See, e.g., Smith v. Murray, 477 U.S. 527, 533–35 (1986) (asserting that the procedural default doctrine is necessary to avoid impairing the accuracy and efficiency of state judicial systems).

126. See, e.g., Coleman, 501 U.S. at 738–39. The Coleman Court observed:

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.

Id.

127. 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.
Given that most federalism doctrines will serve both sovereignty and autonomy to some degree, the evidence so far is merely suggestive; it hardly demonstrates a clear commitment to the former over the latter. But the case for such 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, 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, "It 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 of tobacco products 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

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(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.").


129. See Fallon, *Conservative Paths,* supra note 109, 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); Meltzer, *Judicial Passivity,* supra note 8, at 369–70 (reviewing the Court's voting patterns in eight nonunanimous preemption decisions during the 1999–2001 Terms and observing that in those cases, "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" and that, "in those same eight cases, Justices Souter, Ginsburg, and Breyer each voted to preempt only twice and Justice Stevens never voted to preempt").


133. Id. at 551.
the Federal Government lacks the constitutional authority to impose a similarly-motivated ban."134 Even more ironic was the lineup, which featured exactly the same five-four split as in Lopez, except that the putatively pro-states Justices voted to strike down the state law.

As I discuss in more detail in subpart III(B), preemption cases are the quintessential autonomy cases. They concern whether the states can 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 Five’s failure to see central federalism concerns at issue in preemption cases135 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 concerns. The anticommandeering cases,136 too, promote both sovereignty—by barring Congress from telling state officials what to do—and autonomy—by leaving state officials free to pursue their own policy agenda. These departures and overlaps serve as reminders of the difference between theoretical models and the inevitably messier judicial performance that the models help us 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 protect federalism.”137 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

134. Id. at 598 n.8. Of course, Congress could no doubt ban advertising within 1,000 feet of a school, since advertising presumably is a commercial activity. But Justice Stevens’s 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.


137. Fallon, Conservative Paths, supra note 109, at 482.
of the writ. Finally, the majority's position in the immunity, preemption, and habeas cases dovetails with politically conservative suspicions of civil plaintiffs and criminal defendants.

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' righters' 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? Many people on both sides of the federalism debate seem to agree that sovereignty is just what federalism is all about.

2. Substance over Process.—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? I consider the Rehnquist Court majority's preference for substance over process in this section; in the next, I argue that the Five have also preferred hard over soft rules.

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


139. 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., Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 672 (1999) (invalidating the state liability portion of the Patent Act—a statute under which large businesses often sue as plaintiffs); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (invalidating certain enforcement provisions of the not-exactly-ideologically charged Indian Gaming Regulatory Act). Likewise, the habeas picture is complicated by the fact that the Rehnquist Court has issued a number of prodefendant landmarks lately. See, e.g., Atkins v. Virginia, 536 U.S. 304 (2002) (holding that the Eighth Amendment bars execution of the mentally retarded); Ring v. Arizona, 536 U.S. 584 (2002) (holding that aggravating factors in capital sentencing must be found by a jury, not a judge); see also supra note 121 (citing cases upholding claims of ineffective assistance of counsel). In addition, the Court has often found itself in the role of narrowing and moderating harsher limits on habeas enacted by Congress. See, e.g., Williams v. Taylor, 529 U.S. 362, 435 (2000) (holding that AEDPA's bar against an evidentiary hearing in a habeas case only applied if the prisoner failed to develop the facts due to a "lack of diligence or some greater fault attributable to the prisoner or prisoner's counsel").

140. NOONAN, supra note 108, at 156. But see Young, *Sky Falling*, supra note 108, at 1560-66 (arguing that Judge Noonan radically overstates the importance of these cases).
balance between the national and state governments.”

That meant, for Professor Yoo, that the Court would “establish areas of state control that are to remain immune from federal regulation.”

Although 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 a 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 on the proportion of that activity that is actually unconstitutional under the constitutional provision Congress is enforcing. That would put these cases firmly on the substance side of the relevant divide.

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142. Id. This impression is shared by many of the Court’s critics. See, e.g., Post, supra note 93, at 1638–39 (suggesting that the Rehnquist Court is trying to revive the Taft Court’s substance-based approach of “dual federalism”).

143. Yoo, Judicial Safeguards, supra note 141, at 1312. 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 nonjusticiable. But there is considerable dispute as to the nature of the “line” to be drawn and the extent of the judicial obligation to draw it.

144. See supra text accompanying note 61 (discussing the Court’s mentioning of congressional findings and jurisdictional elements in *Lopez*).


146. 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).


148. Berman, Reese & Young, supra note 82, at 1072–74; see Young, *Sky Falling*, supra note 108, at 1577–80. As my colleague Doug Laycock has explained, “The 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 in determining whether the law in question was enacted by an appropriate process.
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 challenged statutes. And the rules produced—that Congress may not abrogate the sovereign immunity of 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.

As with the choice between sovereignty and autonomy, the Court’s preference for substantive rules may be best illustrated by the preemption cases. The basic presumption against preemption in statutory construction is substantive in the sense that it turns upon the substantive effect of the federal statute in question rather than on defects in the lawmaking process that gave rise to the statute. But as I discuss further in Part III, the best justifications for such a rule rest on process. The presumption against preemption seeks to remedy certain process defects—such as the organizational advantages of propreemption groups at the federal level and the threat posed by preemption to the states’ ability to compete for popular loyalty—and it operates through process mechanisms, by providing notice of and drafting impediments to incursions on state regulatory authority. Consistent with its focus on the substantive scope of federal power, the Rehnquist Court has been relatively uninterested in these sorts of arguments.

The anticommandeering doctrine of Printz and New York offers a more dramatic instance of process federalism. Although that doctrine is not

150. See Young, State Sovereign Immunity, supra note 92, at 60–65 (arguing that immunity rules may lead Congress to impose more draconian alternatives and to eschew devolution of authority to states).
152. Other antipreemption 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 8, at 1381–84 (discussing the preemptive powers of federal agencies).
153. See infra subpart III(B).
154. It is somewhat harder to place anticommandeering on the continuum between sovereignty and autonomy. Some have identified the anticommandeering cases with a sovereignty model of federalism, see, e.g., Keith Werhan, Checking Congress and Balancing Federalism: A Lesson from Separation-of-Powers Jurisprudence, 57 Wash. & Lee L. Rev. 1213, 1273–74 (2000), and it is true that the very term “commandeering” may connote some sovereignty-based concern about state
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*:

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.\(^{155}\)

Put another way, the anticommandeering 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.\(^{156}\)

The clear statement and commandeering cases are sufficiently important to undermine any claim that the Court’s substantive doctrines somehow “outweigh” its use of process. I want to make a somewhat different and more modest claim. What the Commerce Clause, immunity, and preemption cases suggest is that, where the Court’s majority has seen an opportunity to do so, it has replaced process rules with substantive ones. A process-oriented tendency to demand a clear statement when Congress legislates at the outer limits of the Commerce Clause has existed since at least the early 1970s;\(^{157}\)

dignity. Indeed, the Court sometimes seems to suggest that ordering state officials about is simply inconsistent with the respect that a coordinate sovereign government deserves. See *New York v. United States*, 505 U.S. 144, 162 (1992) (arguing that the Constitution does not confer upon Congress the ability to instruct states how to govern because “the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government”) (quoting *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1869)). But that strand of the anticommandeering argument coexists with another suggesting that conscripting state institutions to pursue federal policies trades off with those institutions’ autonomy to pursue their own goals. See, e.g., *Fed. Energy Regulatory Comm’n v. Mississippi*, 456 U.S. 742, 779–81 (1982) (O’Connor, J., dissenting) (arguing that requiring states to implement federal law trades off with the states’ ability to pursue their own policy agendas); *Massey*, *supra* note 40, at 454. 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.


\(^{157}\) *See United States v. Bass*, 404 U.S. 336, 349 (1971) (construing a federal firearms statute to require proof of interstate movement, on the ground that “[i]n traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision”); *Rewis v. United States*, 401 U.S. 808, 812 (1971) (holding that interstate travel
Lopez and Morrison, however, have substituted a willingness to review the substance of federal legislation in at least some cases. Seminole Tribe similarly replaced the clear statement rule for abrogation of state immunities with a substantive prohibition on that sort of action. And the Five's unwillingness to limit preemption of state law through the traditional process check of the presumption against preemption may well be motivated, at least in part, by a confidence that national power can be adequately limited through substantive Commerce Clause review. Regardless of the overall predominance of substantive or process doctrines in current law, the direction of doctrinal movement seems to be toward substantive review.

3. Hard over Soft Rules.—The Rehnquist Court's generally pro-states majority has also preferred, in most cases, to cast its doctrinal innovations in the form of hard rather than soft rules. Again, the best examples come from the Court's Commerce Clause and immunity cases. Although Congress has treated Lopez as a remand for more legislative findings, that effort is unlikely to save the statute should it be challenged again. It seems better to read Lopez and especially Morrison as categorical statements that noncommercial 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—for the pre-existing soft one—Congress may abrogate only by making a very, very clear statement of its intent. Indeed, to the extent that the soft rule remains operative in Section 5 abrogation cases, the Court has watered it down by no longer requiring painfully explicit abrogation language in the text of a statute itself. That move suggests that the Court has placed its faith in hard rules as the primary guarantors of state sovereignty.

by mere customers of a gambling establishment did not violate the federal Travel Act because Congress did not indicate in the text or the legislative history of the statute that it deliberately meant to "alter sensitive federal-state relationships".

158. The Court has not, however, abandoned its clear statement rule in this area. See supra text accompanying notes 71–72 (discussing Jones v. United States, 529 U.S. 848 (2000)). But the soft, process-oriented clear statement rule now exists as a screen on top of a hard, substantive constitutional prohibition.

159. See infra note 165 and accompanying text (observing that several pro-states commentators have rejected the presumption against preemption on this ground).


163. See Seminole Tribe, 517 U.S. at 59 (affirming that Congress retains the power to abrogate under Section 5 of the Fourteenth Amendment).

The Five’s preference for hard rules also emerges from their reluctance to enforce the presumption against preemption in statutory construction. That presumption is a quintessential soft limit on federal power. When 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 antipreemption canon rigorously may reflect a general lack of faith in soft rules and a preference for the harder limits offered in cases like *Lopez* or *Seminole Tribe*. That preference is explicit in the writings of several scholars who are sympathetic to the general aims of the Federalist Revival but critical of the presumption against preemption.165

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.166 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.167 I explore this question of motivation further in a companion article.168 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 choice of hard or soft rules. Under the Commerce Clause, for instance, *Lopez* and *Morrison* exist side by side with *Jones v. United States*169 and *Solid Waste Agency v. U.S. Army Corps of Engineers*,170 in which the Court employed soft clear statement rules to avoid deciding

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166. Meltzer, *Judicial Passivity*, supra note 8, at 369–70; Fallon, *Conservative Paths*, supra note 109, at 471–72 (explaining that the frequency with which the Court has upheld preemption claims in recent years results from the tendency of preemption rulings to “minimize the [state] regulatory requirement to which businesses are subject”).

167. Cf. Antonin Scalia, * Judicial Defercence to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521 (“One who finds 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 less often that the triggering requirement [of statutory ambiguity] for Chevron deference exists.”).

168. See Young, Preemption, *supra* note 131.


whether the statutes in question fell within the outer reaches of the Commerce Clause. Jones used a soft rule that turned on the substance of the regulated activity (arson of a noncommercial building). Solid Waste, on the other hand, employed what Dan Coenen calls a “who rule,” derived from process concerns about delegation of power to administrative agencies. In essence, Solid Waste held that administrative agencies—which incorporate no mechanism for representing state interests—may not push the limits of the Commerce Clause unless Congress—in which the states are represented—clearly authorizes them to do so.

There is a sense in which the Court’s refusal to place any meaningful limits on Congress’s power to condition federal funding on state compliance with federal directives transforms all the Court’s limits on national power into soft rules. Printz and New York, for example, establish the anticommandeering principle as a hard limit on national power: Congress cannot overcome that principle by clearly stating its intent to do so, and the doctrine as stated does not yield before sufficiently important federal interests. But much of that firmness disappears if Congress may generally purchase state implementation of federal policies by placing conditions on the grant of federal funds. That hardly renders the anticommandeering 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 anticommandeering rule into a soft doctrine that Congress can generally overcome through further action.

One might say the same thing of any hard rule, and in fact, conditional spending is proposed as a response to judicial decisions made under the Commerce Clause and Eleventh Amendment. Nonetheless, it is

171. See Jones, 529 U.S. at 859.

172. See Coenen, supra note 68, at 1374–75; see also Bradford R. Clark, Separation of Powers as a Safeguard of Federalism, 79 Texas L. Rev. 1321, 1433 (2001) [hereinafter Clark, Separation of Powers] (explaining how delegation of lawmaking authority to administrative agencies raises process federalism concerns); Young, Two Cheers, supra note 8, at 1363–64 (same).


176. See Hills, supra note 156, at 858–71 (arguing that requiring Congress to procure state services by negotiation rather than demand will lead to more rational outcomes).

177. See Baker, Conditional Spending, supra note 70, at 1913–14. Conditional spending (and its cousin, conditional preemption) does seem more prevalent in the commandeering context than in these other areas. That may simply be a function of the fact that the national government has always depended on the states for enforcement of some aspects of federal law, and even though the constitutional bar on mandatory commandeering is new, political pressures likely forced Congress
worthwhile to distinguish between this general means of rendering constitutional limits on national power provisional and more particular mechanisms like clear statement rules. For one thing, the Court may eventually tighten up its conditional spending doctrine.\textsuperscript{178} Moreover, an across-the-board acceptance of conditional spending is a blunt instrument for promoting interbranch dialogue and reinforcing process checks on Congress. Other sorts of soft rules may be more readily tailored to the particular problems arising in different doctrinal areas.

In any event, the Rehnquist Court’s partial acceptance of soft rules again demonstrates 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.

D. The Weak Autonomy Model

If the Five have pursued a strong sovereignty model of federalism, then what of the Four? Most observers have interpreted the dissenters in cases like Lopez as adopting a strong form of judicial restraint. Although no judges and relatively few commentators argue that federalism cases should be nonjusticiable, one could argue for a doctrinal model so deferential to political actors that it simply would not show up on the dimensions I have sketched. Larry Kramer, for example, has argued that federalism questions should be “addressed to the people, through politics.”\textsuperscript{179} On this view, there would be no choice between sovereignty and autonomy 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 “noninterventionist” model. But proponents of judicial nonintervention are hardly ever even-handed in this sense. They rarely argue, for example, for


\textsuperscript{179} Larry D. Kramer, Putting the Politics Back into the Political Safeguards of Federalism, 100 Colum. L. Rev. 215, 293 (2000) (hereinafter Kramer, Politics); see also id. at 291 (proposing a very deferential standard of review).
junking the dormant Commerce Clause limit on state legislation or various other doctrines of dormant preemption. 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" generally do not mean the dormant Commerce Clause. 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 to 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 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, which held that Congress may not tell a state where to put its capital. Beyond this, the nationalist model views state autonomy—the degree to which the states are allowed to exercise meaningful responsibilities—purely as a policy choice.

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 widespread assumption that the Four are nationalists is understandable if one focuses on high profile, overtly constitutional decisions like Lopez or Seminole Tribe. But if one

180. See, e.g., Zschernig v. Miller, 389 U.S. 429, 432 (1968) (holding that the federal foreign affairs power impliedly preempts state laws that affect foreign affairs).
182. See, e.g., Fulton Corp. v. Faulkner, 516 U.S. 325, 331 (1996) (Souter, J.); Camps Newfound/Owatonna v. Town of Harrison, 520 U.S. 564, 571–73 (1997) (Stevens, J., for majority including Justices Souter and Breyer) (rejecting a call to reconsider dormant Commerce Clause doctrine). 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. Id. at 610–20 (Thomas, J., dissenting, joined by Justices 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.
183. See, e.g., Field, supra note 81, at 111–12 (discussing the Court’s hints along these lines in Garcia).
184. 221 U.S. 559 (1911). For an example of this sort of argument, see Judith Resnik & Julie Chi-Hye Suk, Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty, 55 STAN. L. REV. 1921, 1956–57 (2003) (rejecting the Court’s state sovereign immunity jurisprudence and invoking Coyle as an example of a sovereignty protection that might be acceptable).
185. See, e.g., Rubin & Feeley, supra note 16, at 909–14 (arguing that the choice to decentralize “represents a deliberate policy that the leaders select . . . based on their view of the best way to achieve their goals” and that rendering decentralization constitutionally mandatory is counterproductive); see also id. at 909 (asserting that “there is no normative principle [in federalism] that is worthy of protection”).
expands the field of vision to take in more obscure cases—particularly cases about preemption of state policy by federal statutes and regulations—a different pattern emerges. That pattern emphasizes state autonomy over sovereignty, process over substance, and soft over hard rules. I do not claim that this pattern is consistent or fully realized. What I do suggest is that one can tease out of the Four’s jurisprudence a distinctive and helpful vision of federalism.

1. Autonomy over Sovereignty.—Justice Breyer articulated the core of the Four’s approach to federalism in a dissenting opinion in *Egelhoff v. Egelhoff.*186 That case involved an obscure preemption question under the Employee Retirement Income Security Act (ERISA).187 The majority, which included all of the Five plus Justices Ginsburg and Souter, held state law preempted; in dissent, Justice Breyer, joined by Justice Stevens, emphasized

the practical importance of preserving local independence, at retail, 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. Indeed, in today’s world, filled with legal complexity, the true test of federalist principle may lie, not in the occasional constitutional effort to trim Congress’ commerce power at its edges [citing *Morrison*], or to protect a State’s treasury from a private damages action [citing *Garrett*], but rather in those many statutory cases where courts interpret the mass of technical detail that is the ordinary diet of the law [citing *Iowa Utilities Board*].188

The point could hardly be clearer: State sovereign immunity has little to do with “federalism’s need to preserve state autonomy”; neither do the Court’s marginal efforts to limit the Commerce Clause by striking down minor federal statutes like the Gun-Free School Zones Act or the civil suit provision of the Violence Against Women Act. What matters, instead, is the authority of the states to set their own regulatory policies on the wide range of issues that fall within the concurrent jurisdiction of both Congress and state legislatures. The allocation of authority over such issues generally turns not on the Constitution itself, but on often intricate questions of statutory construction concerning how far Congress has chosen to regulate and how much it has left to the states. But these statutory cases nonetheless implicate constitutional values.


187. Specifically, the question was whether ERISA preempted a Washington law “provid[ing] that the designation of a spouse as the beneficiary of a nonprobate asset is revoked automatically upon divorce” to the extent that the state law “applies to ERISA plans.” *Id.* at 143.

188. *Id.* at 160–61 (Breyer, J., dissenting).
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 typical voting alignments: Ordinarily pro-states Justices forget about federalism in preemption cases, and generally nationalist Justices suddenly remember it. Nor are *Lorillard* or *Iowa Utilities Board* flukes. As several commentators have 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 Justices 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 subissues: How does the presence of an express preemption 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 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.


190. *See Fallon, Conservative Paths, supra* note 109, at 471–72; *Meltzer, Judicial Passivity, supra* note 8, at 369–70; *Schwartz, supra* note 128.

191. *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).

192. *Compare, e.g.,* Medtronic, Inc. v. Lohr, 518 U.S. 470, 505–06 (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).

193. *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,* 518 U.S. at 485 (majority opinion) (suggesting that the presumption applies “[i]n all pre-emption cases”).


195. For an example, compare Gade v. Nat’l Solid Wastes Mgmt. Ass’n, 505 U.S. 88, 96–104 (1992) (plurality opinion of O’Connor, J.) (finding that federal Occupational Safety and Health Administration 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”).
Justice Stevens's dissent in *Geier v. American Honda Motor Co.*\(^{196}\) is a good window into the weak autonomy model of federalism doctrine. *Geier* was one of five major preemption cases decided in the 1999 and 2000 Terms.\(^ {197}\) 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.*\(^ {198}\) *Geier* itself was a products liability suit by an injured motorist who claimed that her car was defectively designed because it lacked an airbag.\(^ {199}\) 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 Geier's model year and that this federal policy judgment preempted the common law tort suit.\(^ {200}\) A majority of the Court agreed, finding that while the Act itself did not expressly preempt Geier's suit, the suit did conflict with the policy embodied in the DOT's regulations promulgated under the Act.\(^ {201}\)

Justice Stevens began his analysis in dissent by noting that """"[t]his is a case about federalism.""""\(^ {202}\) Although he invoked the principle of """"respect for 'the constitutional role of the States as sovereign entities,'""""\(^ {203}\) Justice Stevens focused his analysis on the question of regulatory autonomy. The case raised """"important questions concerning the way in which the Federal Government may exercise its undoubted power to oust state courts of their traditional


199. *Geier*, 529 U.S. at 865.


201. *Geier*, 529 U.S. at 866.

202. *Id.* 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 as well as language from *Alden v. Maine*, 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.

jurisdiction over common-law tort actions." He thus emphasized the impact of federal preemption on the states' ability to make basic policy choices for themselves, insisting that "[t]he 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."

These same autonomy concerns pervade the Court's preemption jurisprudence, and they have been most often championed by members of the supposedly nationalist Four. Justice Breyer argued for state regulatory authority over the trillion-dollar local telephone market in *AT&T Corp. v. Iowa Utilities Board.* Justice Stevens sought to protect Massachusetts power to regulate cigarette ads directed at children in *Lorillard.* In *Yamaha Motor Corp. v. Calhoun,* Justice Ginsburg called into question the often pervasive preemptive effect of federal admiralty law on state tort remedies. And in *Engine Manufacturers Ass'n v. South Coast Air Quality Management District,* Justice Souter wrote a lone dissent defending California's right to go its own way on air pollution policy.

*Iowa Utilities Board* is a good case for demonstrating the preemption cases' importance relative to other areas of federalism doctrine. 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 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

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204. Id.
205. Id. at 894 (Stevens, J., dissenting).
208. 516 U.S. 199, 215–16 (1996); see also City of Columbus v. Ours Garage & Wrecker Service, Inc., 536 U.S. 424, 428 (2002) (Ginsburg, J.) (holding that federal law did not preempt state motor carrier safety rules simply because the state had delegated its authority to make such rules to local governments); infra text accompanying notes 236–38 (discussing Ours Garage).
210. I have discussed *Iowa Utilities Board* in greater detail in an earlier work. See Young, *State Sovereign Immunity,* supra note 92, at 39–42 (arguing that *Iowa Utilities Board* was far more important to federalism than the sovereign immunity decisions in the same Term, including *Alden* and the *Florida Prepaid* cases).
211. See Iowa Utils. Bd. v. FCC, 120 F.3d 753, 800 (8th Cir. 1997) (holding that the states retained administrative authority over the local market), rev'd, 525 U.S. 366 (1999).
“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” in one fell swoop than any other decision in recent memory. Preemption issues frequently go to the core of the states’ right to govern themselves; for that reason, they epitomize the questions on which an autonomy-based federalism jurisprudence should focus.

2. *Process over Substance.*—The Four have frequently invoked the political safeguards of federalism in dissent from cases limiting Congress’s powers under the Commerce Clause or affirming broad principles of state sovereign immunity. Justice Souter insisted in *Morrison*, for example, that the Constitution “remits . . . to politics” questions concerning the appropriate reach of Congress’s authority. Likewise, in *Kimel*, Justice Stevens argued that “[f]ederalism concerns do make it appropriate for Congress to speak clearly when it regulates state action. But when it does so . . . we can safely presume that the burdens the statute imposes on the sovereignty of the several States were taken into account during the deliberative process . . . .” In both these cases, of course, process arguments were advanced as a substitute for the exercise of judicial power. But Justice Breyer’s dissent in *Morrison* appeared ready to contemplate some sort of enforceable legislative findings requirement in Commerce Clause cases, and Justice Ginsburg’s opinion for a unanimous court in *Jones* narrowed the scope of the federal arson statute in the absence of a clear statement of Congress’s intent to press the limits of its commerce power.

The process-oriented character of the Four’s approach emerges most clearly, and has the most bite, in the preemption cases. Justice Stevens’s *Geier* dissent, for example, rejected the majority’s argument that the state courts’ ability to entertain airbag suits was implicitly preempted by federal law: “Congress neither enacted any such rule itself nor authorized the Secretary of Transportation to do so.” In such cases, he said, 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

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213. Tellingly, Justice Breyer compared the impact of *Iowa Utilities Board* with *Printz*, in which Justice Scalia had waxed eloquent about 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.” *Id.* at 427 (Breyer, J., dissenting).
216. *See Morrison*, 529 U.S. at 663 (Breyer, J., dissenting).
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. 219

Likewise, Justice Stevens identified even more serious process concerns where, as in Geier, “the preemptive effect of an administrative regulation is at issue.” 220 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. 221

These sorts of cautions about preemption by federal administrative agencies reinforce both the political and procedural safeguards of federalism, by insisting on the opportunity for state input and by raising impediments to federal action.

The Four’s commitment to process federalism operates only within certain narrow bounds, however. As I discuss further in the next section, they have accepted process-based clear statement rules in some areas but rejected them in others. 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. 222 This rejection of the process-based anticommandeering doctrine, taken together with their reticence concerning

219. Id. at 907 (Stevens, J., dissenting); see also Massey, supra note 40, at 512 (“Without [the presumption] there is no assurance that in fact Congress has attended to the consequences of displacing state authority.”).

220. Geier, 529 U.S. at 908 (Stevens, J., dissenting).

221. Id. at 908–90 (Stevens, J., dissenting) (quoting Cal. Coastal Comm’n v. Granite Rock Co., 480 U.S. 572, 583 (1987)).

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.

3. Soft over Hard Rules.—The minority faction on the Rehnquist Court seems strongly to favor soft over hard limits on national authority. In Seminole Tribe, for example, Justice Souter suggested that he could live with the prior rule requiring a very clear statement from Congress before finding abrogation of state sovereign immunity. Similarly, Justice Ginsburg’s opinion in Jones invoked constitutional limits on the Commerce Clause in rejecting a broad reading of the federal arson statute; her decision to rest on statutory grounds, however, left open the possibility that Congress could revisit the matter. And, Justice Stevens in Geier stressed the dialogic nature of the presumption against preemption; rejecting the preemption argument in the case before the Court, he noted, would still leave the political branches the option of clarifying their preemptive intent later on.

All of these rules are, of course, rules of statutory construction. That is no doubt why so many view the Four as rejecting constitutional limits on national power altogether; many observers seem to treat preemption cases, for example, as hardly raising any constitutional issues at all. But the presumption against preemption—along with the other profederalism “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. That requires us to ask: What justifies a court’s departure from what would otherwise be its best interpretation of what the enacting Congress intended? I argue in Part III 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 similar grounds as, say, the

225. See Geier, 529 U.S. at 912 (Stevens, J., dissenting); see also Massey, supra note 40, at 512 (noting that “[t]he presumption against preemption . . . would not deprive Congress of any power it has to formulate law and make it supreme by displacing state law”).
226. See, e.g., Gardbaum, Preemption, supra note 194, 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. Sullivan, Dueling Sovereignties, supra note 1, at 109 (“Preemption cases present only the question whether Congress has exercised power it concededly possesses, and thus are weak tools for juridical alterations of the federal/state balance of power.”).
227. See Schauer, Ashwander Revisited, supra note 74, at 86–88 (making this point in the particular context of the canon favoring construing statutes to avoid constitutional questions).
228. See infra section III(A)(1).
anticommandeering doctrine: Both doctrines are judge-made rules, not clearly grounded in constitutional text, but functionally promising as means of enforcing federalism under contemporary conditions.

In other words, when a court applies a judge-made rule of statutory construction for the purpose of protecting state autonomy, it is enforcing the Constitution. Such a decision neither ignores federalism concerns nor, as Justice Souter suggested in his *Morrison* dissent, “remits them to politics.”

The clear statement 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. Soft rules like the presumption against preemption are important, moreover, because statutory ambiguity is pervasive. In the *Engine Manufacturers* case, for example, Justice Souter acknowledged that “[a]s a purely textual matter, both the majority’s reading and mine have strengths and weaknesses. The point is that the tiebreakers cut in favor of sustaining the [state] Rules.”

And my brief canvass of the substantive rules involved in recent preemption litigation ought to demonstrate that the practical stakes in these cases for the balance of national and state authority are often higher than in the more overtly “constitutional” cases.

The Four’s willingness to employ soft rules has limits, however. While these Justices have promoted such constraints 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 profederalism 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 Justice Stevens and Justice Souter have been skeptical of clear statement rules protecting state governments

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231. See supra notes 206–09 and accompanying text.
232. The most important exception to this skepticism is *Jones v. United States*, 529 U.S. 848 (2000). *Jones* was unanimous, and Justice Ginsburg wrote the majority opinion. Justice Stevens’s concurrence explicitly linked the clear statement rule employed in *Jones* to the presumption against preemption. See id. at 859–60 (Stevens, J., concurring). He also invoked concerns about state regulatory autonomy, noting that “[t]he fact that petitioner received a sentence of 35 years in prison when the maximum penalty for the comparable state offense was only 10 years . . . illustrates how a [federal] criminal law like this may effectively displace a policy choice made by the State.” Id. at 859 (Stevens, J., concurring) (internal citations omitted).
233. 501 U.S. 452, 474 (1991) (White, J., concurring in part, dissenting in part, and concurring in the judgment, joined by Stevens, J.). Justice Souter joined the majority in *Gregory*, but Justice Ginsburg and Justice Breyer were not yet on the Court.
from statutory liability,\textsuperscript{234} 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.\textsuperscript{235}

4. An Assessment.—The contrast between visions of federalism in preemption cases is often striking. Justice Ginsburg’s opinion in \textit{City of Columbus v. Ours Garage and Wrecker Service, Inc.}, for example, stressed “the basic tenets of our federal system” in holding that federal law did not preempt a state’s authority to delegate authority as it chose to local regulators.\textsuperscript{236} By contrast, Justice Scalia—joined by Justice O’Connor—remarked that “the Court’s federalism concerns are overblown.”\textsuperscript{237} Most constitutional scholars, of course, have never heard of the \textit{Ours Garage} case. But it is in picayune statutory cases like these—Justice Breyer’s “ordinary diet of the law”\textsuperscript{238}—that members of the Four have begun to hammer out their own distinctive approach to federalism doctrine.

It must be said, however, that the various Justices’ positions in preemption cases, as well as in some of the other cases from which I have derived my “weak autonomy” model, are not nearly as consistent as their positions on the Commerce Clause or the Eleventh Amendment. For example, Justice Breyer wrote the pro-preemption majority opinion in \textit{Geier}, and Justice Thomas dissented in \textit{Iowa Utilities Board}.\textsuperscript{239} 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–four; many are unanimous, and most justices are likely to vote for preemption in some cases and not others.\textsuperscript{240} This should not be surprising, since preemption cases will

\textsuperscript{234} See \textit{Vt. Agency of Natural Res. v. United States ex rel. Stevens}, 529 U.S. 765, 797–98 (2000) (Stevens, J., dissenting, joined by Souter, J.) (criticizing the majority’s reliance on the “interpretive presumption that ‘person’ does not include the sovereign”) (quoting id. at 780); see also \textit{Will v. Mich. Dep’t of State Police}, 491 U.S. 58, 87 (1989) (Stevens, J., dissenting) (criticizing the majority’s use of a clear statement rule as support for its holding that a state is not a person under 42 U.S.C. § 1983).


\textsuperscript{236} 536 U.S. 424, 434 (2002). Justice Ginsburg’s majority included all of the Four plus the Chief Justice and Justices Kennedy and Thomas.

\textsuperscript{237} \textit{Id.} at 448 (Scalia, J., dissenting).


\textit{See generally Young, Preemption, supra} note 131 (describing the voting patterns in preemption cases in more detail).

always turn at least in part on what the particular statute in question actually says.

As I have already acknowledged, moreover, we lack a full explanation for the seemingly-surprising vote breakdown in preemption cases. Some of the pattern may have to do with cross-cutting views on statutory construction or aspects of administrative law; some of it no doubt stems from more ideological preferences concerning tort plaintiffs or regulation more generally. I delve into this question more deeply in a companion article,\(^{241}\) for now, I want to suggest that some of the variation is explainable by reference to different views of federalism and its enforcement. Moreover, even to the extent that results in preemption cases are "political," that simply illustrates my point: The issues and stakes in preemption cases—the availability of tort remedies, the stringency of regulation, the right approach to "hot button" social issues\(^{242}\)—implicate the central policy questions of regulatory autonomy that make federalism worth fighting over.

In any event, my point is not that the Four are pursuing a fully self-conscious and coherent pro-federalism agenda; rather, I suggest only that a distinctive approach to federalism can be teased out of the positions they have taken in various opinions. 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 Four's theory may be incomplete, but it deserves to be taken seriously.

II. Choosing a Model

Most federalism cases that come before courts present choices along the various dimensions that I described in Part I. So how should the Court choose? Sometimes the text and history of the Constitution will make those choices for us, but most often they will not. I argue in this Part that the Court should look to two additional considerations: the underlying values that federalism protects and analysis of comparative institutional competence. These considerations allow us to draw some conclusions about the alternatives offered in Part I, and they point toward the third federalism model offered in Part III. Subpart A defends a strong emphasis on state autonomy over state sovereignty. Subparts B and C then turn to the institutional competences of the political branches and the courts respectively. These institutional considerations generally favor process-based approaches over substantive ones, and soft over hard rules. As will become evident in Part III, however, I favor a considerably more aggressive

\(^{241}\) See Young, Preemption, supra note 131.

approach along both these judicial review dimensions than that of the "weak autonomy" model described in subpart I(D).

A. Sovereignty, Autonomy, and the Values of Federalism

An institutional strategy for protecting federalism ought to be influenced—although not completely determined—by why we care about federalism in the first place. One reason to look to underlying values is that 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 Merritt has argued that the Guarantee Clause can be interpreted to forbid national interference with the integrity of state governmental processes. Likewise, the Framers' discussions of state sovereign immunity indicate significant concern for 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, as does the omission of these reserved powers from Article I in the first place. And—to pick just one of several possible examples—the solicitude of Article III's drafters for preserving a meaningful role for 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.

243. 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.").

244. See Merritt, supra note 107, at 41 ("The guarantee clause... restricts the federal government's power to interfere with the organizational structure and governmental processes chosen by a state's residents.").

245. See, e.g., The Federalist No. 81, at 487–88 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("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... "); The Federalist No. 32, at 198–99 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (identifying a relatively narrow set of cases in which such a surrender could be deemed to have taken place).

246. See Evan H. Caminker, State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?, 95 Colum. L. Rev. 1001, 1057 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").
Given this ambivalence, it makes sense to look to the underlying values that federalism is generally thought to serve. 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 of the Rehnquist Court's working majority on federalism issues, by contrast, has emphasized the "separate and independent existence" of the states, as if mere existence were the primary value to be preserved.\footnote{The phrase itself goes back to then-Justice Rehnquist's opinion in \textit{National League of Cities v. Usery}, 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." 426 U.S. 833, 845–46 (1976) (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.}

The Court's focus on the states' sovereign immunity from private lawsuits, for example, has expended much time and political capital on an issue that has little to do with what functions remain for state governments to perform.\footnote{See, \textit{e.g.}, Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72–73 (1996) (holding that Congress may not, pursuant to its Article I powers, abrogate the states' immunity from suit); see also Fallon, \textit{Conservative Paths}, \textit{supra} note 109, 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, \textit{State Sovereign Immunity}, \textit{supra} note 92, 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).}

This subpart employs the values generally associated with federalism as criteria for assessing the relative importance of sovereignty and autonomy. Two caveats are in order. First, I do not mean to undertake a normative defense of federalism. The pros and cons of federalism have been ably debated by others,\footnote{\textit{See, e.g.}, Steven G. Calabresi, "A Government of Limited and Enumerated Powers": \textit{In Defense of United States v. Lopez}, 94 MICH. L. REV. 752, 756–70 (1995); Barry Friedman, \textit{Valuing Federalism}, 82 MINN. L. REV. 317 (1997) [hereinafter Friedman, \textit{Valuing Federalism}]; Merritt, \textit{supra} note 107, at 3–10; Rubin & Feeley, \textit{supra} note 16; Michael McConnell, \textit{Federalism: Evaluating the Founders' Design}, 54 U. CHI. L. REV. 1484, 1491–1511 (book review). For a particularly well-balanced appraisal of both sides in this debate, see DAVID L. SHAPIRO, \textit{FEDERALISM: A DIALOGUE} (1995).} and I have little to add to that discussion. Instead, I survey the grounds on which federalism has been defended and trace their
implications 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 federalism need not be defended in terms of its promotion of particular values at all. As Justice O'Connor has written, “Our 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.” 250 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 ways in which federalism may be beneficial. 251

1. 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, but Louisiana prefers looser regulation in order to attract industry. 252 Vermont relies on a state income tax as a source of revenue, while New Hampshire emphasizes property taxes. 253 New Jersey protects lesbian women and gay men from discrimination based on their sexual orientation, but Michigan does not. 254

250. New York v. United States, 505 U.S. 144, 157 (1992); see also Young, Making Federalism Doctrine, supra note 10 (manuscript at 21).

251. A third problem is possible in theory but does not arise in practice: If some values often advanced as grounds for federalism supported an emphasis on sovereignty, but others suggested autonomy is more important, then we would have to determine which values were, in fact, more important. That would be highly difficult to do, involving hard questions of both fact and value. I argue here, however, that the values usually thought to undergird our federalism uniformly point to an emphasis on autonomy over sovereignty.

Finally, I note that using federalism values in this way avoids the force of Malcom Feely and Ed Rubin’s well-known argument that those values do not support constitutional federalism, as opposed to mere decentralization as a matter of policy. See Rubin & Feeley, supra note 16, at 914. If we can agree that the Constitution simply commits us to federalism—a point outside the scope of this Article—then it makes sense to look to values associated with decentralization to determine what sort of federalism we should have.

252. See, e.g., Vincent J. Schodolski, California OKs Plan to Reduce Emissions, CHI. TRIB., Sept. 25, 2004, at C1 (covering the adoption of strict new auto emissions standards by California’s air quality board and noting that California often is a bellwether of trends in environmental regulations for other states); Oliver A. Houck, This Side of Heresy: Conditioning Louisiana’s Ten-Year Industrial Tax Exemption Upon Compliance With Environmental Laws, 61 TUL. L. REV. 289, 330–45 (1986) (documenting Louisiana’s leniency in environmental standards, especially with respect to heavy polluters that benefit from the state’s industrial tax exemptions).

253. See Shapiro, supra note 249, at 89 n.113 (discussing the disparities in taxing policy among the New England states).

New York's state judges are appointed by the governor; Texas elects them.\(^{255}\) 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.\(^{256}\) 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; the best way to please more of the people more of the time is to offer a choice of regulatory regimes.\(^{257}\) 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.\(^{258}\) 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.\(^{259}\) 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."\(^{260}\)

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

\(^{255}\) N.Y. CONST. art. VI, §§ 4(c)–(e), 21(a); TEx. CONST. art. V, §§ 2(a), 4(a), 6(b), 7, 15, 18(a), 30.

\(^{256}\) See Baker & Young, supra note 13, at 135 ("[J]ust 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).

\(^{257}\) See Baker, Conditional Spending, supra note 70, at 1947–51; Massey, supra note 40, at 444–47; McConnell, supra note 249, at 1493–94.

\(^{258}\) See McConnell, supra note 249, at 1493; Ilya Somin, Closing the Pandora's Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments, 90 GEO. L.J. 461, 464–65 (2002) (noting that "[r]esponsiveness to diverse local preferences is perhaps the oldest and best-known rationale for federalism"). Of course, even groups holding a particular preference may not be sufficiently numerous in their state of greatest concentration to enact a regime that reflects their preferences. 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.

\(^{259}\) 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"); Seth F. Kreimer, Federalism and Freedom, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 66, 72 (2001) ("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."). For the classic discussion of exit, see generally ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 106–12 (1970).

\(^{260}\) Kreimer, supra note 259, at 72.
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 recent federal welfare reform, many elements of which were tried out by individual states such as Wisconsin. Even more recently, Maine has provided health insurance for all of its residents, thereby providing a valuable test for similar proposals at the federal level. 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.

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

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


264. See, e.g., Clean Air Act, 42 U.S.C. § 7507 (2000) (allowing states to adopt California’s emissions standards instead of the default federal standards); Richard L. Revesz, Federalism and Regulation: Some Generalizations, in REGULATORY COMPETITION AND ECONOMIC INTEGRATION: COMPARATIVE PERSPECTIVES 3, 13–14 (Daniel C. Esty & Damien Geradin eds., 2001) (describing state innovation in hazardous waste regulation and cleanup). For other policy innovations by state governments, see SHAPIRO, supra note 249, 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”); Friedman, Valuing Federalism, supra note 249, at 399 (citing “bookmobiles, pre-election day ‘early’ voting, town meetings, televised court proceedings, greenways, community agenda programs, [and] leadership programs”); Merritt, supra note 107, at 9 (contrasting states that have enacted “stringent pollution control laws” with states such as Louisiana that advertise the “right to profit”); California Adds to Reputation as Nation’s Trailblazer, USATODAY.COM, at http://www.usatoday.com/news/nation/2002-09-25-calif-law_x.htm (Sept. 25, 2002) (reporting that “California has enacted first-in-the-nation laws this year on family leave, auto emissions and stem-cell research”).

265. Friedman, Valuing Federalism, supra note 249, at 398.

266. See, e.g., SHAPIRO, supra note 249, 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.”) (footnote omitted); see also Somin, supra note 258, at 468–69.

267. See, e.g., McConnell, supra note 249, at 1498–99 (arguing that “[s]ince most people are taxpayers, this means that there is a powerful incentive for decentralized governments to make things better for most people”).
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 *Hammer v. Dagenhart*, 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.\(^{268}\) For proponents of child labor, this was simply 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.\(^{269}\)

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 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.\(^{270}\) 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;

\(^{268}\) 247 U.S. 251, 273 (1918).

\(^{269}\) See 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.").

\(^{270}\) See, e.g., U.S. Const. Amend. XIV, XV; Civil Rights Act of 1964, 42 U.S.C. § 2000 (1964). 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 a consensus on the right package of remedies for it. On race, of course, many of the remedial questions were rightly federalized 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., Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? 78–82 (1991) (detailing state and local resistance to integration during the ten years before the Civil Rights Act of 1964). Even here, however, some room for experimentation among and within states remains. For example, by refusing to announce a categorical federal rule that affirmative action in higher education admissions is unconstitutional, Grutter v. Bollinger, 539 U.S. 306 (2003), the Supreme Court allowed room for experimentation and divergent choices. Thus, California's state universities remain bound by a state constitutional rule prohibiting race-based affirmative action, while The University of Texas at Austin has chosen to reinstate the practice. See Cal. Const. art. I, § 3; Press Release, The University of Texas at Austin, The University of Texas at Austin Proposes Inclusion of Race as a Factor in Admissions Process, at http://www.utexas.edu/opa/news/03newsreleases/nr_200311/nr_admission031124.html (Nov. 24, 2003).
in this sense, it seems plausible to say that regulatory diversity is better than uniformity whenever there is no consensus on substance.\textsuperscript{271} 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, and then ask whether regulatory experimentation and competition are likely to help or hinder the implementation of that outcome. Merely framing the question this way, however, makes clear that it is unanswerable. The range of relevant issues is broad, the effects of competition are hard to assess, and 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.\textsuperscript{272} When we look for doctrine that can realize and make sense of our constitutional commitment to federalism, it 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 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 can no longer count on controlling the national government.\textsuperscript{273} In any event, I have endeavored in other

\textsuperscript{271} One might say that in the classic race to the bottom situation, interjurisdictional 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.

\textsuperscript{272} See, e.g., C. Boyd Gray, Regulation and Federalism, 1 Yale J. on Reg. 93, 95 (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").

\textsuperscript{273} See Baker & Young, supra note 13, at 151–53. Progressives may retake power in Washington, D.C. by the time this Article sees print. 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 and state courts, even the national political parties—tend to swing back and forth over time. See, e.g., Edward A. Purcell, Jr., Brandeis and the Progressive Constitution: Erie, the Judicial Power, and the Politics of the Federal Courts in Twentieth-Century America 23–26 (2000). It would be a mistake to make basic structural judgments based on an ephemeral current configuration of political forces.
work to demonstrate that federalism generally lacks a reliable political valence. It may be impossible to demonstrate that interjurisdictional competition and experimentation will produce “good” policy outcomes in a majority of cases, but one 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.

2. 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 at the level of individuals and local communities, and another associated with the benefits of dividing power within 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 is brought closer to the people, and democratic ideals are more fully realized.” Public participation seems easier in state and local politics; 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. We might value this participation for a number of different reasons. For some, it is a good in itself. For others, it is a means of building community

274. See Baker & Young, supra note 13, at 149–62.

275. SHAPIRO, supra note 249, at 91–92; see also Friedman, Valuing Federalism, supra note 249, at 389; Russell Kirk, The Prospects for Territorial Democracy in America, in A NATION OF STATES 42, 45–47 (Robert A. Goldwin ed., 1963) (arguing that only state and local governments are truly “democratic,” as opposed to “representative and republican”); Massey, supra note 40, at 451–53; Merritt, supra note 107, 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.”).

276. 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 16, at 915. Moreover, this Article’s concern with values of regulatory autonomy is central to local and state governments alike. Finally, as David Shapiro points out, “[T]he 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 249, at 93–94.

277. Andrzej Rapaczynski, From Sovereignty to Process: The Jurisprudence of Federalism after Garcia, 1985 SUP. CT. REV. 341, 400 (noting that political activity, in the context of
solidarity and social capital. On this theory, federalism provides opportunities for participation in politics that encourage individuals to interact not only with the government but with each other, building networks of trust and reciprocity that redound to the benefit of citizens in a wide variety of ways.

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. Many forms of political accountability, moreover, are best exercised at close range. As Barry Friedman observes, “Officials, 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.”

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. As Lynn Baker and I have discussed elsewhere, Madison’s discussion in Federalist 46 emphasized worst case scenarios, in which the states would have to oppose the national government militarily, and this emphasis has sometimes distracted critics of federalism from more prosaic—but also more relevant—mechanisms by which participatory government, is not merely instrumental, but rather “a good in itself, something essentially implicated in the very concept of human freedom”).


279. See Mazzone, supra note 278, at 42–57; see also Massey, supra note 40, at 448–51 (arguing that federalism fosters political community).

280. See Friedman, Valuing Federalism, supra note 249, at 392–93; see also SHAPIRO, supra note 249, at 91–92.

281. Friedman, Valuing Federalism, supra note 249, at 395; see also Massey, supra note 40, at 453–54 (arguing that federalism clarifies lines of political accountability).


283. Baker & Young, supra note 13, at 137 & n.280.

284. See, e.g., THE FEDERALIST NO. 46, at 298–99 (James Madison) (Clinton Rossiter ed., 1961) (“Let a regular army, fully equal to the resources of the country, be formed; and let it be entirely at the devotion of the federal government; still . . . the State governments, with the people on their side, would be able to repel the danger.”).
federalism protects liberty.  

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. 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. The states thus, as Professor Friedman puts it, “serve as an independent means of calling forth the voice of the people.” More recently, “Some 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. 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.

More fundamentally, states serve as the seedbeds of political competition in our “compound republic.” 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


286. It is also worth noting that the policy diversity discussed in the previous section promotes a dimension of liberty—that is, the freedom to choose among a diverse set of legal regimes. See Massey, supra note 40, at 434.


288. Friedman, Valuing Federalism, supra note 249, at 403. Robert Nagel has described these basically expressive forms of resistance to federal authority as “a responsible version of interposition.” NAGEL, supra note 2, at 66.

289. Merritt, supra note 107, at 5.


291. See Merritt, supra note 107, at 7 (“Most importantly, states check national power by serving as a well-spring of political force.”).
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. 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." Opposition parties in nonfederal 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 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 counterarguments. A tradition in political science reaching back to Federalist 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

292. 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" while hanging on to California and that "the proportion of Americans living under Republican governors has shrunk from 70% in 1994 to only 46% today").

293. Id. Likewise, one can argue that the Republicans' recapture of California under Arnold Schwarzenegger in 2003 boosted the prospects for a revival of the moderate faction within the Republican party. That sort of political turnover may be equally important.


295. 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 (1967–75) was during the Nixon and Ford Administrations; and Jimmy Carter was governor of Georgia from 1971 to 1975, during the Nixon and Ford Administrations.


their own right that the state government hardly seems likely to realize the
benefits of political participation on a human scale. 299 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. 300

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 Congress's broad power to enact basic civil
rights legislation. 301 But state autonomy may enhance 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

(1985) (arguing that “the process of political choice in the states and local
governments is further from the democratic ideal than the national political process”). But see PUTNAM, supra note 278, at
35 (pointing out that voting is an atypical form of political participation and that other forms are
more important to building social capital).

[hereinafter Chemerinsky, Values]; see also SHAPIRO, supra note 249, at 93 (noting that “the goal of
realizing democratic values . . . may not be significantly enhanced by reducing the relevant po
ility
from one of some 280,000,000 (the United States) to one of, say, 30,000,000 (the state of
California”). 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.

300. See, e.g., SHAPIRO, supra note 249, 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”).

301. 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 Congress’s power to enact such laws. See, e.g., Bd. of
Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62
power, under Section 5 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 5. See, e.g., Hibbs, 553 U.S. at 738. The exceptions to
this trend are City of Boerne v. Flores, 521 U.S. 507 (1997), and 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 City of Boerne was
driven as much by separation of powers concerns as by federalism. See City of Boerne, 521 U.S. at
517. The Violence Against Women Act (VAWA) struck down in Morrison, on the other hand, was
an unusual civil rights statute in that its substantive prohibitions—for example, against 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. 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.
under federal law. 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.

3. The Overriding Significance of Autonomy.—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 that 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.

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 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


303. See, e.g., Friedman, Valuing Federalism, supra note 249, 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.”).
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 powers and responsibility necessary to be viable, functioning governments. A State may remain indestructible, in terms of the integrity of its own institutions, but retain 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 the difficulty, identified by a number of scholars, that federalism doctrine generally protects state governments while ignoring local governments, which have no independent status under the federal Constitution. This is true despite the fact that, as Richard Fallon has observed, “in functional analysis of the values that federalism serves, the


305. See, e.g., Rubin & Feeley, supra note 16, at 950 (“[F]ederalism is a neurosis, a dysfunctional belief to which we cling despite its irrelevance to present circumstances”); see also George D. Brown, Should Federalism Shield Corruption?—Mail Fraud, State Law and Post-Lopez Analysis, 82 CORNELL L. REV. 225, 225 (1997) (“There is a view of state and local governments as ethically-challenged backwater.”).

306. See Young, State Sovereign Immunity, supra note 92, at 51–58 (arguing that the Court’s state sovereign immunity decisions do little to protect the more important value of state regulatory autonomy).

307. 74 U.S. (7 Wall.) 700, 725 (1869).

308. Indeed, the State of Virginia was split as a result of the Civil War. See generally Vasan Kesavan & Michael Stokes Paulsen, Is West Virginia Unconstitutional?, 90 CAL. L. REV. 291 (2002) (assessing whether the split was constitutional).

significance of local governments is enormous.” 310 Threats to state regulatory autonomy like federal preemption, however, often fall on both state and local governments alike. 311 Autonomy-centered doctrines that limit the preemptive sweep of federal law, for example, are thus likely to benefit all governmental entities further down the food chain.

B. Institutional Capacity, Part I: The Perils and Potential of the “Political Safeguards” of Federalism

Doctrine should be shaped not only by the values that it seeks to promote but also by the relative institutional capacity of courts and other governmental actors to promote them. I have already sketched the basic contours of this inquiry; 312 in this subpart and the next, I suggest that judicial doctrine should be more or less deferential, depending on how we think courts compare with other institutions that might resolve federalism questions. That is 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. 313 Comparative institutional analysis will also be relevant to other issues as well; anyone concerned about federalism, for instance, would do well to think hard about how the political branches might structure their own internal operations to reflect these sorts of considerations. But this is primarily an article about courts and doctrine, so the bearing of institutional considerations on the judiciary 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 of who should decide federalism issues through what Neil Komesar describes as “single institutional analysis.” 314 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. As Professor Komesar explains, however, “Valid

310. Fallon, Conservative Paths, supra note 109, at 441.
311. See, e.g., Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 600 (1991) (addressing a preemption challenge to a local ordinance regulating pesticides); Hillsborough County v. Automated Med. Labs., 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.").
312. See supra subpart I(A).
313. See Baker & Young, supra note 13, at 87–88 (suggesting that the Court’s deference to politics after 1937 was, in part, a response to the Court’s experience in the preceding decades, which “[d]id not speak well for the judicial ability to develop doctrinal limits on national power that [were] at once meaningful and workable”) (citations omitted).
in institutional comparison calls upon courts to function when they can do a better job than the alternatives."315 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."316

My analysis here tries to address both sides of the comparison. This subpart focuses on the political branches, while the following one 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 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.317 In some instances, it may 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.318

My analysis responds 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. 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.319 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.320 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 the federalism

315. Id. at 149.
316. Id.
318. For example, section II(B)(2) accepts the argument that federal political actors represent state governmental interests some of the time, but I also suggest 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 field research. It would be even more difficult to calibrate 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.
319. Cf. Edmund Burke, Reflections on the Revolution in France (1791), in 8 THE WRITINGS AND SPEECHES OF EDMUND BURKE 138 (Paul Langford ed., Clarendon Press 1989) ("We are afraid to 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.").
320. See Young, Making Federalism Doctrine, supra note 10 (manuscript at 11, 18–19).
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.

Herbert Wechsler's classic article on The Political Safeguards of Federalism\(^\text{321}\) has dominated debates for several decades about which institutions should enforce federalism. Although his discussion focuses on only one side of the institutional comparison—the political branches—it otherwise fits comfortably with the sort of institutional analysis that has become influential more recently. Professor Wechsler, after all, was a charter member of the Legal Process school of jurisprudence that in many ways pioneered our modern notions of institutional choice.\(^\text{322}\) Much of this subpart will rehearse relatively familiar arguments about the capacity of and incentives for the federal political branches to limit their own power, so as to preserve the autonomy of state institutions. The problem with that debate, in my view, is that it has often taken on an excessively binary character: either the political safeguards of federalism are "good enough" and courts should not intervene in such disputes, or they are "inadequate" and courts should step in and impose strong substantive limits on federal action. I want instead to use these debates about institutional competence as a tool for shaping judicial doctrine on federalism questions so as to enhance the effectiveness of political and institutional checks on federal power. Systematic attention to that question has been substantially less common in the literature.

1. The Political Branches as Institutions.—I begin with some basic institutional features of the political branches, starting with Congress itself. The most obvious is that Congress is elected. That seems relevant to federalism questions in at least three different respects. First, electoral districts are defined geographically and within the boundaries of individual states, thereby rendering the representative presumptively responsive to interests concentrated at the state level. Second, the necessity of getting elected may render the representative dependent on other actors, such as state-level politicians. And third, the election itself lends democratic legitimacy to the legislature's decisions in a way quite different from courts,

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\(^\text{321}\) 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) [hereinafter Wechsler, Political Safeguards].

\(^\text{322}\) Institutional choice was central to Legal Process analysis. Henry Hart and Albert Sack's Preliminary Note on the Major Lawmaking Institutions, for example, takes as its aim "a preliminary comparison of the functions and functioning of the most important of the institutions. It puts the questions: What is each of these institutions good for? How can it be made to do its job best?" HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 158 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). On Professor Wechsler's relation to the Legal Process school. see id. at c–cii.
which must claim legitimacy by grounding their decisions in some external source of law. An elected member of Congress, in other words, is free to decide first-order federalism questions—such as whether to regulate guns in schools at the federal level—based on his own notions of good policy; a court, by contrast, will lack legitimacy unless it can ground its resolution of such a question in some relatively determinate principle of constitutional law.

This latter point—that a legislature's legitimacy does not necessarily turn on its acting in a principled manner—yields several other relevant characteristics. Compromises of the "split the difference" variety are easier for legislatures than for courts. And legislative actions do not create precedents in the same way that judicial decisions do.\(^\text{323}\) Inconsistent or unprincipled behavior may, of course, turn out to be politically costly in particular situations. But legislatures are likely to be judged at the end of the day on whether their policy decisions have benefited their constituents.

Equally important, Congress can act only with great difficulty. Article I of the Constitution prescribes a legislative gauntlet of bicameralism and presentment to the president, and that route is compounded by legislative rules providing for committee consideration, filibusters, appropriations hurdles, and the like. The upshot is multiple "veto gates" at which legislative proposals may be stymied by determined opposition.\(^\text{324}\) And the vast array of issues pressing for Congress's attention at any given time means that simple inertia may be as significant an obstacle as outright political opposition.\(^\text{325}\)

Finally, legislatures generally act prospectively—that is, they lay out rules of more or less general applicability to govern future behavior. And because it is so difficult for legislatures to act at all, they often try to address


\(^{325}\) It is also customary to cite the superior factfinding and investigatory resources of Congress. See, e.g., Broad. Sys., Inc. v. FCC, 512 U.S. 622, 665–66 (1994) ("Congress is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon an issue as complex and dynamic as that presented here.") (internal quotes omitted). This argument has always puzzled me. Is it obvious that a congressional hearing is a more effective tool for factfinding than a trial with expert testimony? I have therefore emphasized the superior informational resources of agencies here, rather than those of Congress.
problems in a comparatively sweeping way; after all, there is no telling when the legislature will be able to overcome inertia and return to the issue. If more ongoing and incremental adjustments are contemplated, legislatures must generally delegate authority to administrative agencies.

This notion of delegation, of course, points toward the other "political" institution: the Executive and, in particular, federal administrative agencies. The most salient characteristics here can likewise be characterized relatively briefly. Agencies derive their claims of legitimacy from a variety of sources: their expertise in technical fields of regulation; their political accountability to the People through subordinacy to an elected president; and even the transparency and opportunities for public participation afforded by agency procedures. Moreover, agencies must generally ground their actions in authority delegated by Congress, with judicial review generally available to hold them within the limits of that authority.

Agencies also face considerably less imposing barriers to action than Congress does. Agencies act not only more easily, but also more multifariously than Congress: Although Congress acts only by legislation, administrative agencies may proceed by rulemaking, adjudication, and various forms of informal action such as opinion letters and the like. Because agencies can circumvent the high inertial barriers faced by Congress, it is not surprising that the volume of federal administrative action outstrips Congress's output by a substantial margin.

These salient characteristics of political branch actors generate three distinct sets of claims about the self-enforcing nature of federalism. I address each, respectively, in the three sections that follow. Section 2 addresses the most common claim—advanced by Herbert Wechsler and Jesse Choper, among others—that political actors at the federal level represent and respond to the interests of state political institutions. Section 3 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 4, 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 that it is difficult to make federal law.

326. Indeed, Congress often delegates authority to agencies precisely to circumvent those barriers to legislation.
328. See Chadha, 462 U.S. at 984–86 (White, J., dissenting) (noting that administrative action does not require passage of legislation, and consequently, "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").
2. Representation.—In theory, one might claim that the states are so well represented in national politics that we may dispense with judicial review altogether in federalism cases. That was, in fact, Jesse Choper’s claim in 1980, and Larry Kramer has come close to echoing it by proposing a standard of review so deferential as to amount to no judicial review at all.\footnote{See Choper, \textit{supra} note 35, at 175; Kramer, \textit{Politics, supra} note 179, at 237–38.} There are a number of functional reasons to doubt that claim. Also relevant, however, is the widespread agreement among the argument’s most seminal proponents that the representation claim should not be taken so far.

Herbert Wechsler’s famous argument emphasized a number of different mechanisms. He 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.”\footnote{Wechsler, \textit{Political Safeguards, supra} note 321, at 544.} The bulk of Wechsler’s argument, however, emphasized 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.”\footnote{Id. at 548, 557.} 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.”\footnote{Id. at 559.}

The Federalists likewise relied heavily on political self-enforcement to maintain federalism. As John Yoo has recognized, “the Federalists themselves first developed the theory that Professors Wechsler and Choper would resuscitate to such great effect.”\footnote{Yoo, \textit{Judicial Safeguards, supra} note 141, at 1361. See, \textit{e.g.}, Letter to Thomas Jefferson from James Madison (Oct. 24, 1787), in 10 \textit{THE PAPERS OF JAMES MADISON} 205, 211 (Robert A. Rutland et al. eds., 1977) (“This dependence of the General, on the local authorities, seems effectually to guard the latter against any dangerous encroachments of the former: Whilst the latter, within their respective limits, will be continually sensible of the abridgment of their power, and be stimulated by ambition to resume the surrendered portion of it.”).} James Madison argued in \textit{Federalist} 45 that “[t]he State governments 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.”\footnote{\textit{THE FEDERALIST} NO. 45, at 291 (James Madison) (Clinton Rossiter ed., 1961).} That relationship would cause national officials to internalize the interests and preferences of the states; national officials, in other words, would function more as representatives and protectors of state-level politicians.\footnote{Madison explained that “[t]he prepossessions, which the members themselves will carry into the federal government will generally be favorable to the States.” \textit{THE FEDERALIST} NO. 46, \textit{supra} note 284, at 296 (James Madison). He therefore expected:
The Supreme Court largely adopted the Wechsler and Madison model of representation in *Garcia v. San Antonio Metropolitan Transit Authority*:

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.\(^{336}\)

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.”\(^{337}\)

There is no evidence that Professor Wechsler or James Madison meant 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.”\(^{338}\) By pointing out that “the supremacy clause governs there as well,”\(^{339}\) Wechsler seemed to insist that the limits on federal power in the Constitution itself, such as the doctrine of enumerated powers, remain supreme law that courts must enforce. Judicial review should be deferential, but it must still police the outer boundary of federal power. Likewise, as I elaborate in the next section, Madison envisioned that political safeguards would operate within constitutional boundaries, not as a substitute for those boundaries.

That would be consistent with Chief Justice Marshall’s own “political safeguards” argument in *Gibbons v. Ogden*:

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

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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. *Id.* at 296–97.


337. *Id.* at 552.


339. *Id.*
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.\textsuperscript{340}

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 \textit{United States v. 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"\textsuperscript{341} to the conclusion that "supposed conflicts of sovereign political interests implicated by the Commerce Clause" are "remit[ted] . . . to politics."\textsuperscript{342} 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. \textit{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 \textit{Gibbons} supports remitting boundary questions about the scope of that clause to politics.\textsuperscript{343} After all, \textit{Gibbons} decided precisely such a question.

\textsuperscript{340} 22 U.S. (9 Wheat.) 1, 197 (1824).


\textsuperscript{342} \textit{Id.} at 649 (emphasis added).

\textsuperscript{343} Chief Justice Rehnquist's majority opinion in \textit{Morrison} rightly pointed out the distinction between that case and \textit{Gibbons}:

[Justice Souter's] assertion that, from \textit{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 \textit{within that power's outer bounds}. As the language surrounding that relied upon by JUSTICE SOUTER makes clear, \textit{Gibbons} did not remove from this Court the authority to define that boundary.

\textit{Id.} at 617 n.7 (citing \textit{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 \textit{Jones & Laughlin}, \textit{Darby}, \textit{Wickard}, or \textit{Garcia} Courts, suggested that politics defines the commerce power." \textit{Id.} at 651 n.19 (Souter, J., dissenting). He argued that the outer boundary is described by the extremely lenient "substantial effects" test, and that the majority's exclusion of noncommercial regulation that nonetheless "affects" commerce thus operated within the sphere of political control. See \textit{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 Clause power, and Justice Souter conceded that \textit{that} question cannot be decided by politics.

Justice Souter cited \textit{Garcia}'s endorsement of Professor Wechsler as support for abstaining in \textit{Morrison}, 529 U.S. at 649 (Souter, J., dissenting) (discussing \textit{Garcia v. San Antonio Metropolitan Transit Authority}, 469 U.S. 528 (1985)), but \textit{Garcia} actually illustrates the distinction between the latter case and what Chief Justice Marshall most likely had in mind. \textit{Garcia}, unlike \textit{Morrison}, was \textit{not} a case about the boundaries of the commerce power. Instead, \textit{Garcia} concerned the validity of
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 nonjusticiable 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 idea opens up a range of possibilities for judicial review (or nonreview) 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 and Wechsler theory of protection through representation has all kinds of problems. The critical literature is extensive, and I will 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 National League of Cities doctrine—a new, judge-made principle of state sovereignty protecting "traditional state functions" from otherwise valid Commerce Clause regulation. See Nat'l League of Cities v. Ussery, 426 U.S. 833 (1976). Presumably, Wechsler (or Chief Justice 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.

Later on, I actually want to defend an exercise of judicial power in the class of cases that Wechsler, Garcia, and Gibbons did find problematic—that is, those cases within the outer enumerated limits of national authority. The case for such doctrine, however, must rest on the weakness of the political safeguards even in the cases Wechsler and Marshall contemplated.

344. Choper, supra note 35, at 175, 194–205.

345. See Baker & Young, supra note 13, 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).


347. See Wechsler, Political Safeguards, supra note 321, 546–48. Justice Blackmun's opinion in Garcia likewise seems to have assumed an ambassiodorial or intergovernmental model when it stated that the makeup of Congress provides for "state participation in federal governmental action." 469 U.S. 528, 556 (emphasis added).
the actual institutions of state government. The two are not the same; federal representatives may have preferences on substantive issues like environmental protection or gun control that reflect the geographically concentrated views of their constituents, but they will have little reason to want those issues to be decided at the state level.

The more likely scenario, in fact, is that federal and state politicians will 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 and 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 rather than to compete with state politicians. This dynamic no

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348. See Kramer, Politics, supra note 179, at 223 ("[W]hile allocating representation [by states] may enhance the power of geographically-defined interests at the federal level, it does so in a way that is likely, if anything, to diminish the institutional role of state governments.").

349. Jonathan R. Macey, Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism, 76 VA. L. REV. 265, 266 (1990) [hereinafter Macey, Federalism]. 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 section. See infra notes 391-406 and accompanying text. 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., Macey, Federalism, supra, 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 Trusts by Decentralized Governments, 83 VA. L. REV. 1347, 1357 (1997) ("Where central representatives are popularly elected, they may have a stake in reelection which 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 13, at 114-15 (arguing that the federal Gun-Free School Zones Act illustrates this dynamic); Friedman, Valuing Federalism, supra note 249, at 374-75 (noting the incentives that federal politicians have to move “‘apple pie’ issues” to the federal level).

350. See Kramer, Politics, supra note 179, at 282-86; Larry N. Kramer, Understanding Federalism, 47 VAND. L. REV. 1485, 1520-59 (1994) [hereinafter Kramer, Understanding
doubt works out the way Professor Kramer predicts at least some of the time. Yet there are also reasons to doubt 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.\footnote{351}

Unlike Madison's and Wechsler's version of the interdependence argument, Professor Kramer's account is predicated on mechanisms—the structure of political parties and the interlocking nature of state and federal administrative responsibilities—that are not themselves grounded in the Constitution.\footnote{352} 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.\footnote{353}

Professor Kramer's reference to administrative agencies highlights a second, more general problem with the representation argument. Even if we concede that Congress represents the states, Congress no longer makes most federal law. Federal administrative agencies now produce the bulk of federal law, and they lack any particular mechanisms for representing State interests.

\begin{footnotesize}
\footnote{351} See, e.g., Laylan Copelin & Michele Kay, \textit{D.C. Keeps Eye on Special Session, AUSTIN AMERICAN-STATESMAN}, June 19, 2003, at A1 (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 redraw federal house districts, in order to help Republican party fortunes in Congress); Dave Harmon, \textit{Representatives Seek Senate's Help for Threatened Bills, AUSTIN AMERICAN-STATESMAN}, May 15, 2003, at A9 (describing how the attempt to push redistricting legislation through the state legislature, at the behest of federal officials, endangered important state legislation); see also MARTHA DERTHICK, \textit{KEEPING THE COMPOUND REPUBLIC: ESSAYS ON AMERICAN FEDERALISM} 155 (2001) (noting that because of "party committees and interest groups organized on a national scale," "candidates for congressional seats or even lesser offices do not depend exclusively on funds raised from within local constituencies").

\footnote{352} See Prakash & Yoo, supra note 346, 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"); see also Baker & Young, supra note 13, at 115–17 (voicing a similar criticism).

\footnote{353} See, e.g., A. E. Dick Howard, \textit{Garcia and the Values of Federalism: On the Need for a Recurrence to Fundamental Principles}, 19 GA. L. REV. 789, 793 (1985) ("The 'nationalization' of campaign finance has led to the weakening of the federal lawmakers' loyalties to constituents."); Massey, supra note 40, at 460–61 (arguing that, due to political parties' need for funds from interest groups, "the result is a Congress of members who represent, not Alabama and California and New York and Wyoming, but the AARP, People for the American Way, the NRA, the NEA, the environmental lobby, the health insurance industry, and on and on").
\end{footnotesize}
To be sure, Congress retains various instruments for supervising and pressuring agencies—through budgetary and oversight hearings, for example—but these mechanisms do not erase the central point: If federal law comes from agencies rather than Congress, the representative arrangement upon which Wechsler relied is far more attenuated than if Congress legislates directly.

The mechanisms of party and administrative interdependence are, in any event, no answer to a third problem that arises when we distinguish between the classic issue of vertical aggrandizement—attempts by the national government to increase its own power vis-à-vis the states for its own purposes—and the distinct problem of horizontal aggrandizement.\textsuperscript{354} 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 uses 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, which preferred to give putative escapees more due process.\textsuperscript{355} Because the horizontal scenario depends on Congress’s responsiveness to states, it is driven by the very dynamic that Professor Wechsler and the Garcia opinion posited. Even if the political safeguards theorists are correct, in other words, horizontal aggrandizement remains a threat to the autonomy of individual states.\textsuperscript{356}

Fourth, 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{357}

\textsuperscript{354} See generally Baker & Young, supra note 13, at 109–10 (discussing the distinction between horizontal and vertical aggrandizement); see also Baker, Conditional Spending, supra note 70, at 1940 (arguing that conditional federal spending is problematic because it allows “some states to harness the federal lawmaking power to oppress other states”). As Lynn Baker and Mitch Berman have pointed out, the influence of state officials on national political parties “seems likely to facilitate, rather than deter, the use of the federal lawmaking process by some states as a means of imposing their majoritarian preferences on the minority.” Baker & Berman, supra note 178, at 476.

\textsuperscript{355} See, e.g., Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 625 (1842) (holding that the federal Fugitive Slave Law preempted Pennsylvania’s more lenient regime); Baker & Young, supra note 13, 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. CONST. art. IV, § 2, cl. 3; see also Earl M. Maltz, Slavery, Federalism, and the Structure of the Constitution, 36 AM. J. LEGAL HIST. 466, 471 (1992) (“The 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.”).

\textsuperscript{356} See Baker & Young, supra note 13, at 118.

\textsuperscript{357} Friedman, Valuing Federalism, supra note 249, at 374; see also Macey, Federalism, supra note 349, at 271 (observing that “transaction costs” help explain why “interest groups generally will prefer to obtain rents by invoking federal rather than state law”).
Interest groups seeking enactment of a particular policy may also prefer federal law because it is "considered a higher quality product than state law," or because it is harder for those who are made worse off by the regulation to avoid it by exiting to another jurisdiction. 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." Aside from the preferences of interest groups, there is the simple preference of national institutions themselves for expanding their own power. Even politicians who enter national office with an ideological commitment to state autonomy and devolution tend to end up maintaining or expanding national authority. Those tendencies will not, of course, be dispositive in all cases. But from the perspective of state regulatory autonomy, it is fair to say they do not help.

Finally, it is worth pointing out that the Supreme Court has very explicitly rejected Garcia's theory of representation, although the Court seems not to have realized it. In U.S. Term Limits, Inc. v. Thornton, the Court rejected the notion that the states may interpose themselves between the People and their federal representatives. Justice Stevens, writing for

358. See Macey, Federalism, supra note 349, 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." Id.
359. See id. at 272–73.
360. Id. at 273.
361. Daryl Levinson has recently questioned whether politicians and political institutions really seek to expand their own authority, as Madison expected in Federalist 51. Daryl Levinson, Empire-Building Government in Constitutional Law, 118 HARV. L. REV. (forthcoming 2005) (manuscript on file with author). I cannot do justice to Professor Levinson's sophisticated argument here. Rather, I venture only three observations. First, the idea that politicians are motivated by "ambition," and that "[t]he interest of the man" can be "connected with the constitutional rights of the place," THE FEDERALIST NO. 51, supra note 282, at 322 (James Madison), is foundational to the Federalist political theory that undergirds our structure. Surely both the theoretical and empirical burdens of proof ought to lie with those who would reorient our thinking around a different set of assumptions. Second, I think Levinson over-discounts the natural desire of politicians to have their own way, not necessarily because there is some tangible reward but, perhaps, because they entered public service to vindicate their own view of the public good. While Levinson plausibly argues that sometimes a politician can best achieve his favored ends by voting to cede power to another institution that holds similar views, there is no reason to believe that that scenario will predominate; moreover, in a democracy, an elected representative needs to be able to demonstrate to his constituents that he—not some other actor—is responsible for desirable political outcomes. Third, while Levinson's claim undermines some of my arguments advanced here, it also—as he demonstrates—demolishes the traditional notion underlying the "political safeguards of federalism," that is, that state governments will use their influence in Washington, D.C., to maintain or expand the states' prerogatives.
362. See DERTHICK, supra note 351, at 36 (observing that "not even under Ronald Reagan did the federal government step back from the new constitutional frontiers mapped out in the 1960s and 1970s" because "[s]ubstantive policy goals often were in tension with discretion for the states").
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 people." 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.

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364. Id. at 821. Ironically, the Term Limits majority was primarily made up of nationalist justices who either joined Garcia when it was initially decided (Justice Stevens) or who have endorsed its "political safeguards" theory in the years since (Justices Souter, Ginsburg, and Breyer). See, e.g., Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 93 (2000) (Stevens, J., dissenting) ("[T]he Framers designed important structural safeguards to ensure that when the National Government enacted substantive law (and provided for its enforcement), the normal operation of the legislative process itself would adequately defend state interests from undue infringement."); Printz v. United States, 521 U.S. 898, 957 (1997) (Stevens, J., dissenting) ("Recent developments demonstrate that the political safeguards protecting Our Federalism are effective."). Equally ironic, the Term Limits dissenters—who relied on a conception of representation basically similar to Garcia—included two of Garcia's dissenters (Chief Justice Rehnquist and Justice O'Connor), as well as two other justices (Justices Scalia and Thomas) who have rejected the "political safeguards" notion whenever it has been raised. 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)).

365. Term Limits, 514 U.S. at 838, 841 (Kennedy, J., concurring) (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 432 (1819)) (emphasis added); see also Cook v. Gralike, 531 U.S. 510, 528 (2001) (Kennedy, J., concurring) (arguing that under our "idea of federalism... freedom is most secure if the people themselves, not the States as intermediaries, hold their federal legislators to account for the conduct of their office").
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.366 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 and Wechsler representational safeguards never operate to protect state autonomy. There are, no doubt, situations in which they do.367 State and local governments have also, at least to some extent, learned to function in Washington much like other interest groups; the Council of Governors, National Association of Attorneys General, National League of Cities, and similar organizations all lobby on behalf of state and local interests. 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 (UMRA),368 indicating some concern for state institutional autonomy on the part of federal politicians.

Nevertheless, it would be hard to conclude that the representation argument can offer a complete and sufficient protection for state autonomy.369 I suggest later on that courts might shape doctrine to improve the processes of state representation. Moreover, at least two other forms of political safeguards—competition and inertia—may offer a more persuasive account of self-enforcement mechanisms in our federal system.

366. See, e.g., Cook, 531 U.S. at 518–27 (invalidating a state’s attempt to instruct its national representatives on a particular question, albeit without completely ruling out other forms of instructions).

367. 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 “under some circumstances, the federal process model accurately describes the political relationship between state and national governments... 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”).

368. 2 U.S.C. §§ 1501–1571 (1995); see also Printz, 521 U.S. at 957–58 (1997) (Stevens, J., dissenting) (invoking the UMRA as evidence that the political safeguards are effective in protecting state governmental interests).

369. See Field, supra note 81, at 110 (observing that if “diffusion of power between state and federal governments [is] a central constitutional value, the reliance on process as protection is insufficient”).
3. Competition.—The Founders’ model of self-enforcement depended on institutional *competition* at least as much as representation. James Madison argued in *Federalist 51* that “[i]n framing a government which is 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.”

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.

While the Founders probably contemplated some judicial role in maintaining these allocations, 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.” In many ways this competitive model of self-enforcement is more sophisticated and even—perhaps ironically—more relevant to our current institutional arrangements than the *Garcia* and Wechsler revision.

Madison laid out his “political safeguards” theory in *Federalist 45* and *Federalist 46*. He had defended the initial allocation of power between states and nation in prior essays, arguing that good reasons supported each individual delegation of power to the center in the proposed constitution. 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.” The question was not so much whether the federal government had been granted too much power, but 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

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371. *Id.* at 323.
372. *See Young, Two Cheers*, supra note 8, at 1353–54; *see also* Prakash & Yoo, supra note 346, at 1521–23 (“[T]he Framers believed that judicial review flowed quite naturally from the idea that under a written, limited Constitution, no branch could be allowed to exceed the scope of its delegated powers.”).
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." In addition to noting that confederacies throughout history tended to fall apart rather than devolve into centralized tyranny, Madison identified two broad sorts of checks on central authority. The first, which I discussed in the previous section, relied on the federal government's institutional dependence on state institutions. The more important mechanism, however, involved institutional competition for the People's loyalty. Madison observed:

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 Popular 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."

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." First, "The number of individuals employed

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375. Id. at 289.
376. See id. at 289–90 (discussing the Achaean League, the Lycian Confederacy, and the feudal systems of Europe).
377. Id. at 300.
378. Id. at 294.
379. Id. Hamilton took a similar view in Federalist 28:
Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress.
380. The Federalist No. 46, supra note 284, at 294 (James Madison). Hamilton agreed:
Upon the same principle that a man is more attached to his family than to his neighborhood, to his neighborhood than to the community at large, the people of each State would be apt to feel a stronger bias towards their local governments than towards
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."

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." But it was not just the number of powers allocated to each government that mattered; rather, the relation of these responsibilities to citizens’ own lives was critical. In particular, "The 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."

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. 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."

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 most extensive and important in times of war and danger; those of the State 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 in terms of present allocations of responsibilities, Madison expected the average

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the government of the Union; unless the force of that principle should be destroyed by
much better administration of the latter.

381. THE FEDERALIST NO. 45, supra note 334, at 291 (James Madison).
382. THE FEDERALIST NO. 46, supra note 284, at 294 (James Madison).
383. Id. at 292.
385. THE FEDERALIST NO. 46, supra note 284, at 294–95 (James Madison).
386. THE FEDERALIST NO. 17, supra note 380, at 119–20 (Alexander Hamilton). 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. at 120.
387. THE FEDERALIST NO. 45, supra note 334, at 293 (James Madison).
388. Id.
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. 389

This argument accords with modern political science’s “economic theory of regulation.” 390 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 individuals and groups in society. 391 The theory has a number of controversial implications, such as its prediction that rent-seeking activities of private interest groups will dominate legislative outcomes. 392 To support Madison, however, we need look only to the basic “political-support-maximization” model that undergirds the theory. 393 That basic model confirms Madison’s insight that the ability of politicians to generate “the predilection and support of the people” 394 depends on their ability to “regulate[] and provide[] for” the “domestic and personal interests of the people.” 395

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 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.

389. See also THE FEDERALIST NO. 17, supra note 380, at 108 (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 an habitual sense of obligation and an active sentiment of attachment”).


391. See, e.g., Macey, Federalism, supra note 349, at 269 (“[P]oliticians maximize the aggregate political support that they receive from interest groups by supplying the legal rules that result in the highest net receipt of support.”); see also William N. Eskridge, Jr., Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation, 74 VA. L. REV. 275, 285 (1988) (“Public choice theorists typically treat legislation as an economic transaction in which interest groups form the demand side, and legislators form the supply side.”).


393. Macey, Federalism, supra note 349, at 265–66 (describing this model).

394. THE FEDERALIST NO. 46, supra note 284, at 294 (James Madison).

395. Id. at 294–95.
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, but one does increasingly see national political parties playing an important role in state-level electoral races, both through funding and other forms of support. Moreover, state governments have become dependent upon Washington, D.C., in other important ways. Many states now depend on federal grants for large portions of their budgets, and that dependence is only likely to increase as many states

396. 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 269, 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) (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 KOMESAR, supra note 314, at 58–65 (1994) (arguing that the motivation of government officials—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, then that would suggest that legislators simply are not as tied to the interests and preferences of their constituents as Madison and contemporary public choice-theorists 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 or at least to rely on a more inertia-based model of political self-enforcement.

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 269, at 33. The fact that the model is mixed does not mean that Madison's analysis is not an important part of the dynamic; further, it seems the part of the dynamic most directly relevant to issues of process federalism.

397. THE FEDERALIST NO. 45, supra note 334, at 291 (James Madison).

398. See, e.g., Dana Canedy, The Florida Vote; Bush Wins 2nd Term With Surge, N.Y. TIMES, Nov. 6, 2002, at B7; Anne E. Kornblut, Campaign 2002: President Tries to Tip the Balance, BOSTON GLOBE, Nov. 3, 2002, at A1 (both noting the role of prominent national political figures in the 2002 Florida gubernatorial election); see also Bob Mahlburg, Surge of Cash Fed Campaigns, ORLANDO SENTINEL, Nov. 13, 2002, at B1 (noting the national prominence and importance of the 2002 Florida gubernatorial election to both major political parties and the resulting influx of money from outside the state); see also supra note 351 (discussing the national Republican Party's involvement in Texas redistricting).
face sizeable shortfalls in the years ahead.\textsuperscript{399} As many commentators have observed, Congress is able to translate this financial dependence into policy control through the mechanism of conditional spending.\textsuperscript{400}

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 government have of course grown enormously, but the national government has grown more. Measured in terms of revenues and expenditures, the national government was roughly half the size of the state and local establishments in 1902; by 2000, the national government had eclipsed state and localities on both measures.\textsuperscript{401} 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.\textsuperscript{402}

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” of the Twentieth Century.\textsuperscript{403} Nor should it be surprising that


\textsuperscript{400} See, e.g., Baker, \textit{Conditional Spending, supra} note 70, at 1913–15, 1918.

\textsuperscript{401} State and local expenditure and revenue information is hard to find prior to 1902. Total expenditures of the national government in that year were $485.2 million, compared with $1,095 million combined spending by states and localities. See U.S. BUREAU OF THE CENSUS, THE STATISTICAL HISTORY OF THE UNITED STATES: FROM COLONIAL TIMES TO THE PRESENT 1114, 1127 (1976) [hereinafter STATISTICAL HISTORY]. In 2000, the national government spent $1,788.8 billion, compared with $1,742.9 billion by states and localities. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2003, at 285, 322 (2003) [hereinafter STATISTICAL ABSTRACT]. On the revenue side, the national government took in $653 million in 1902, compared to $1,048 million for states and localities. See STATISTICAL HISTORY, supra, at 1122, 1126. By 2000, national government revenue was $2,025.2 billion, compared to $1,942.3 billion for states and localities. See STATISTICAL ABSTRACT, supra, at 285, 322. There are complications, of course. For instance, in 2000, $291.9 billion of state and local revenue came from the federal government. Id. at 285. Depending on how one looks at them, these grants may reflect either state and local influence in Washington, D.C. or federal leverage over state policy. More generally, the definitions and accounting methods involved with these statistics are sufficiently complex to counsel caution. But the basic picture should be clear: The institutional weight of the national government vis-à-vis states and localities has grown enormously over the last century.

\textsuperscript{402} See, e.g., Lynn K. Rhinehart, Note, \textit{Is There Gender Bias in the Judicial Law Clerk Selection Process?}, 83 GEO. L.J. 575, 577–79 (1994) (discussing the results of a survey of third-year law students on law reviews at top-ranked schools and finding that 72% of respondents sought a federal judicial clerkship and 5% of respondents sought a state court clerkship); Harvard Law School Office of Career Services, Clerkship Statistics (2001) (noting that 93% of Harvard graduates clerked for a federal court while only 6% clerked at a state supreme court), at http://www.law.harvard.edu/ocs/prospective_students/Clerkship_Statistics_Prospectives.htm.

\textsuperscript{403} See PHILIP BOBBITT, \textit{THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY} 24 (2002) (urging that “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”
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.\textsuperscript{404} We may still hope for a Madisonian world in which "periods [of war and danger] will \ldots bear a small proportion to [times of peace and security],"\textsuperscript{405} 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.\textsuperscript{406}

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."\textsuperscript{407} These metaphors seek to tie into Madison's intuition that national activity is most justified in response to fundamental threats to society. They also reflect, however, the pressure now bearing on the Founders' fundamental assumptions about 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, \ldots can never be desirable cares of a general jurisdiction."\textsuperscript{408} He therefore found it "impossible that there should exist a disposition in the Federal councils to usurp [these] powers."\textsuperscript{409} Subsequent experience, however, has disappointed Hamilton's expectation; the federal government, often for very good reasons, has frequently concerned itself with these "local" matters. In a world in which 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."\textsuperscript{410} 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 may well have occurred on account of the states' failure—or at least perceived failure—to adequately perform these

\textsuperscript{404} See, e.g., Linda Greenhouse, \textit{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).

\textsuperscript{405} The Federalist No. 45, supra note 334, at 293 (James Madison).

\textsuperscript{406} See, e.g., Fred Hiatt, \textit{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 \ldots disappointed").


\textsuperscript{408} The Federalist No. 17, supra note 380, at 118.

\textsuperscript{409} Id. at 118–19.

\textsuperscript{410} The Federalist No. 46, supra note 284, at 294–95 (James Madison).
responsible
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although Morton Grodzins has demonstrated that an expansion of federal responsibilities is at least as likely to follow from state policy \textit{success} as from failure. In any event, the erosion of state authority 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.”\footnote{413} 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.”\footnote{414} 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 the federal power can, in the nature of things, be advantageously administered.”\footnote{415} Much like John Marshall’s later assumption that political safeguards would operate \textit{within} the scope of the Commerce Clause defined by courts,\footnote{416} Madison’s discussion also seems to presume an ultimate constitutional limit on political shifts.\footnote{417}

Two conclusions thus emerge from Madison’s competitive account of political safeguards in \textit{The Federalist Papers}. First, the states’ present ability to compete for popular support is under enough pressure to justify doubt as to whether political checks can sufficiently protect state autonomy on their own. Second, Madison’s analysis of the link between regulatory responsibilities and popular support provides a focus for contemporary federalism doctrine. If we (1) care about preserving state autonomy but (2) prefer that autonomy to be as self-enforcing as possible, Madison suggests that we should look to

\footnote{411. See, e.g., Dwyer, supra note 28, at 224 (“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, \textit{Valuing Federalism}, supra note 249, at 367 (invoking 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.}

\footnote{412. See Grodzins, supra note 350, at 17–21.}

\footnote{413. \textit{The Federalist} No. 46, supra note 284, at 295 (James Madison).}

\footnote{414. \textit{Id.}}

\footnote{415. \textit{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.” \textit{The Federalist} No. 45, supra note 334, at 292 (James Madison). That language suggests a \textit{legal} limit on federal authority.}

\footnote{416. See supra text accompanying note 340.}

\footnote{417. See \textit{Lance Banning, The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic} 296 (1995) (concluding that “the Constitution, as [Madison] understood it, made the central government supreme within its sphere \textit{and} strictly limited that sphere to matters that could not be managed by the states”).}
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. We, however, enjoy no such luxury. 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 in the name of superior administration at the national level.

4. Inertia.—Both of the previous arguments relied upon the claim that politicians at the federal level will deliberately act to protect state institutional interests, either because they are responsive to state governments themselves (representation) or because they are responsive to the People, who will in turn care about state responsibilities in areas in which the states have performed well (competition). A distinct argument is indifferent to Congress’s intentions; this argument from governmental inertia suggests that the federal political process may protect state autonomy 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 processes by which legislative proposals must secure a place on the legislative agenda, navigate both houses of Congress, and either secure presidential approval or a supermajority sufficient to override a veto as the “procedural safeguards of federalism.”

The point bears emphasis because inefficiencies in government are generally thought to be lamentable defects that we should make every effort to correct and overcome. The inertia argument claims, instead, that inefficiencies at the federal level are—as the guys in tech support might say—not a “bug” but a “feature” of the system. Congress may lack any

418. Clark, Separation of Powers, supra note 172, at 1339; see also Young, Constitutional Avoidance, supra note 74, at 1609.

419. Clark, Separation of Powers, supra note 172, at 1339; see also Richard W. Creswell, The Separation of Powers Implications of Implied Rights of Action, 34 MERCER L. REV. 973, 991–92 (1983) (observing that “[t]he system of checks and balances, is a most effective means, in conjunction with the doctrine of separation of powers, of preserving power to the several states, for it retards and impedes any action by the national government”).

sympathy at all for state institutions; it may be confident that the sovereign People are behind it in its efforts to centralize authority; it may intend to preempt as broad a swath of state regulatory authority as it possibly can. But none of this matters if Congress cannot achieve consensus, if other priorities or even pure political squabbling compete for its attention, if an obstructive minority of its members can exploit procedural bottlenecks to stave off legislative action, or if Washington, D.C. simply lacks the financial resources to undertake further federal initiatives. As Martha Derthick has observed, "The states are the ‘default setting’ of the American federal system. To the extent that other levels of government lack the resources to act—authority, revenue, will power, political consensus, institutional capacity—the states have the job."\footnote{421}

The problem is that most federal law no longer passes through the traditional legislative gauntlet. Congress delegates broad authority to administrative agencies, which act outside the normal channels of bicameralism and presentment. To be sure, the Administrative Procedure Act imposes procedural gauntlets of its own on agency lawmaking, but these restrictions have themselves often been circumvented by the migration of agency activity to less formal procedures.\footnote{422} Given the breadth of agency lawmaking, one must wonder how meaningful the procedural safeguards limiting legislative action at the national level really are.

Federal administrative agencies are not the only means of circumventing legislative inertia. The rise of the "new federal common law" has empowered federal courts to play a similar role, notwithstanding the earlier restriction of judicial lawmaking in \textit{Erie Railroad Co. v. Tompkins}.\footnote{423} While I have argued that courts should be entrusted with enforcing constitutional limits on national power, courts may also threaten the federal balance by producing federal law outside the Article I process. Like agencies, federal courts face none of the inertial barriers to lawmaking that impede national legislation; unlike agencies, moreover, courts generally lack the capacity to \textit{refuse} to act once a case is properly before them.\footnote{424} The problem is particularly acute in areas like maritime law, where federal courts

\footnote{421. Derthick, supra note 351, at 28.}
\footnote{422. See Thomas O. McGarity, \textit{Some Thoughts on “Deossifying” the Rulemaking Process}, 41 Duke L.J. 1385, 1393 (1992) (observing that the “ossification” of the notice-and-comment rulemaking procedure under the Administrative Procedures Act has led to an “increasing tendency of agencies to engage in ‘nonrule rulemaking’ through relatively less formal devices such as policy statements, interpretative rules, manuals, and other informal devices”).}
\footnote{423. 304 U.S. 64, 78 (1938) (“Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. . . . There is no federal general common law.”). On federal common lawmaking notwithstanding this command, see generally Henry J. Friendly, \textit{In Praise of Erie—And of the New Federal Common Law}, 39 N.Y.U. L. Rev. 383 (1964).}
\footnote{424. See Steven D. Smith, \textit{Courts, Creativity, and the Duty to Decide a Case}, 1985 U. Ill. L. Rev. 573, 580 (“[I]f the judiciary cannot decline to decide a case, then the judiciary cannot avoid adopting its own rule of decision when one does not exist.”).}
view federal common law as composing a complete system.\footnote{425} In other areas, there is at least some possibility that a gap in federal statutory commands may be filled by borrowing (or adopting) a state rule of decision.\footnote{426} Nonetheless, the body of federal common law is large and growing.

Three conclusions follow from these considerations of inertia. First, we can probably be more sanguine about these procedural safeguards than about the political safeguards afforded by state representation in Congress. It remains hard to get a bill passed in Congress, and the days of blank-check delegations of lawmaking authority to federal agencies and freewheeling construction of federal common law may be behind us.\footnote{427} Moreover, the procedural safeguards have an advantage in that they operate to impede both vertical and horizontal aggrandizement: Federal law is difficult to make, whether Congress is acting to increase its own authority or is behaving as a tool of interests concentrated in a bloc of powerful states. One would not want to press the good cheer too far, however. As I have suggested, the procedural safeguards remain under siege as power seeks ways to circumvent impediments to its exercise.

If we cannot conclude that inertial barriers to national action are so strong as to obviate the need for judicial enforcement of federalism, the nature of those barriers can nonetheless guide us in matters of interpretive choice. The second conclusion is thus that a process-based model that would protect state autonomy by maintaining or enhancing procedural barriers to federal action has considerable promise. As Brad Clark has demonstrated, process-oriented rules against legislative self-delegation and nonconventional federal lawmaking (by administrative agencies and federal courts) can restrain federal power in important ways.\footnote{428} Some such rules will raise impediments within the national legislative process: Clear statement rules, for example, raise drafting hurdles and thus increase the costs of enacting legislation that intrudes on state autonomy.\footnote{429} Other process rules will focus

\footnote{425. See Ernest A. Young, Preemption at Sea, 67 GEO. WASH. L. REV. 273, 337–41 (1999).}

\footnote{426. See generally United States v. Kimbell Foods, Inc., 440 U.S. 715, 728–29 (1979) (discussing the conditions under which federal courts should adopt state rules of decision).}

\footnote{427. See Sidney A. Shapiro & Robert L. Glickman, Congress, the Supreme Court, and the Quiet Revolution in Administrative Law, 1988 DUKE L.J. 819, 820 (observing that, since the 1980s, “Congress has increasingly resorted to narrow and specific legislative grants of authority”); Atherton v. FDIC, 519 U.S. 213, 218 (1997) (characterizing as “few and restricted” “those cases in which judicial creation of a special federal rule would be justified”) (quoting O’Melveny & Myers v. FDIC, 512 U.S. 79, 87 (1994)).}


\footnote{429. See Brudney, supra note 84, at 69 (noting courts’ ability, “through systematic judicial rejections or discounting of legislative signals. . . . [to] impose[ ] significant costs on Congress”).}
on *who* makes federal law, channeling lawmaking into the more cumbersome congressional processes, for example, and away from more efficient administrative and judicial processes.\(^{430}\)

The third and related conclusion is that soft rules may go a long way to stem centralization, even though they leave final decision to Congress. A soft limit often functions as a "remand" to Congress, requiring Congress to reconsider and, in many cases, re-enact legislation that trenches on state authority. While Congress may still reinstate its earlier decision, the inertial barriers to doing so are often high. The effectiveness of some soft rules—such as clear statement requirements—may decline over time; some such statements may become legislative boilerplate, built into the word processing macros of legislative staffers. But this will not always be possible.\(^{431}\) Soft rules thus seem worth pursuing as a means of enhancing the procedural safeguards of federalism.\(^{432}\)

C. **Institutional Capacity, Part II: Courts, Doctrine, and the Frankfurter Constraint**

If institutional choice is to be *comparative*, then it is not enough to assess the strengths and weaknesses of the political branches in addressing questions of federalism. We also have to look at courts. As with the political branches, the ground on this side of the comparison is not exactly untraveled. In addition to commentators debating the role of courts in enforcing federalism in particular, recent years have seen a surge of more general academic interest in "taking the Constitution away from the courts.\(^{433}\) Although I have argued that courts are obliged to hear federalism cases in most instances, these debates about the institutional capacities of the courts remain relevant at the level of interpretive choice.

\(^{430}\) See Coenen, *supra* note 68, at 1370–81 (arguing that the Rehnquist Court is well aware of its ability to use "who" rules to "steer policy choices away from one decision maker to another, on account of institutional capacities with regard to particular constitutional choices").

\(^{431}\) In order to overcome the soft presumption against preemption, for example, Congress must ordinarily make a particularistic statement of exactly what sort of state law it is preempting. That type of statement does not lend itself to boilerplate language.

\(^{432}\) Emphasizing soft rules also blunt[s] the force of the Rubin and Feely critique, which argues that values like political participation and policy experimentation may justify decentralization, as a policy choice, but not constitutionally entrenched federalism. See Rubin & Feely, *supra* note 16, at 427–35. Soft rules blur the distinction between policy choices and entrenched principles. If we think national politicians have any incentives to give us a suboptimal level of decentralization, see, e.g., Macey, *Federalism, supra* note 349, at 267–68, then rules that encourage decentralization without categorically requiring it should have a place even if one accepts Rubin and Feely's critique. For other answers to that critique, see Jackson, Printz and Principle, *supra* note 1.

Concerns about courts’ ability to enforce the federal balance have been 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.’”\(^{434}\) The Supreme Court’s institutional experience with federalism over the past two centuries bears out Madison’s concern. That experience is a story of relatively vigorous early enforcement,\(^ {435}\) a fall from grace followed by a period of judicial repentance and abdication, and more recently, a period of cautious revival. 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”\(^ {436}\) of the *Lochner* era. That era, the institutional attacks on the Court that it helped provoke,\(^ {437}\) and the ultimate collapse of the “dual federalism” model of doctrine that marked the era’s end, loom as a “brooding omnipresence”\(^ {438}\) over current efforts to make federalism doctrine.

1. *The Courts as an Institution.*—Once again, it will help to start by getting the relevant institutional characteristics of courts out on the table. The first is that courts must act according to *law*\(^ {439}\). They do not, in other words, have the same freedom to forthrightly make policy and value choices that a legislature generally enjoys. One can say this without taking any strong position on the extent to which nonlegal factors—politics, ideology, even diet—influence judicial decisionmaking. One might believe that courts in fact make decisions according to law, or that they simply need to take decisions reached on other grounds and “dress them up” in legal language in order for them to be accepted, or even that judicial decisionmaking need only be *somewhat* more law-like than decisionmaking by other institutions in either of the prior two senses. If the gentle reader does not accept at least that much, I doubt whether she has read this far into a long article about judicial doctrine.

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\(^{435}\) 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 179, at 234–52, seems to my mind to discount improperly the vigorous enforcement of federalism-based limits on *state* power throughout that century, see Baker & Young, *supra* note 13, at 94 n.100, but I do not need to pursue that disagreement here.


\(^{437}\) See, *e.g.*, Bruce Ackerman, *We the People: Transformations* 255–79 (1998) (describing the institutional confrontation precipitated by the Court’s decisions).

\(^{438}\) Southern Pacific Co. v. *Jensen*, 244 U.S. 205, 222 (1917).

\(^{439}\) See Young, *Making Federalism Doctrine*, *supra* note 10 (manuscript at 87).
Several additional characteristics come out of this obligation to decide according to law. One is that courts must generally wear blinders of some kind; they are limited in the scope of facts and arguments that they legitimately consider. The excluded factors may range from partisan political affiliations all the way to facts not in evidence. This obligation is at least partially enforced by another characteristic, the obligation to give written explanations for decisions. Moreover, the fact that decisions are made according to law and written down for public consumption and posterity reinforces the tendency of judicial decisions to become precedents—that is, part of the relevant law in their own right. As Larry Sager puts it, any judicial act is "situated in an ongoing stream of decision-making." Regardless of the particular version of stare decisis that one adopts, future decisions must then "fit" this pre-existing legal background in a way that, say, a new congressional statute generally need not accommodate itself to a pre-existing pattern of legislation.

The courts' basis of legitimacy also arises from this notion that they decide according to law. That basis is in some sense a mirror image of the legislature's: Legislators' legitimacy rests on their basic connection to the public will; judicial legitimacy, however, arises from being cut off from that will—from the institutional independence that allows judges to seek the law rather than respond to possibly short-sighted public preferences. But of course this notion of legitimacy can be viewed as fundamentally antidemocratic, leading to Alexander Bickel's famous "counter-majoritarian difficulty." It may also constrain the frequency of judicial action counter to majority preferences; that is, courts' nondemocratic nature may limit their "institutional capital" and, therefore, favor doctrines of judicial restraint in most situations.

440. Larry Sager, Lecture, Legal Process, The University of Texas School of Law (Spring 2004).

441. Legislation is different in this way notwithstanding the general tendency to harmonize new statutes with pre-existing ones. See David L. Shapiro, Continuity and Change in Statutory Interpretation, 67 N.Y.U. L. REV. 921, 927–41 (1992) (discussing canons promoting harmonization). No one denies that it is within Congress's prerogative to make a clean break with the pre-existing law in a given area, and few would suggest that such a break raises the same sorts of legitimacy concerns as, say, the concerns about judicial overruling expressed by the joint opinion in Planned Parenthood v. Casey, 505 U.S. 833, 854–69 (1992).


443. This last point is quite controversial. Jesse Choper has argued, for example, that "[t]he people's reverence and tolerance is not infinite and the Court's public prestige and institutional capital is exhaustible." The judiciary's ability to strike down laws without incurring severe institutional costs, therefore, "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." CHOPER, supra note 35, at 139. Others, by contrast, have asserted that the Court may—at least in some circumstances—actually enhance its legitimacy by actively confronting the political branches. See, e.g., Peter M. Shane, Rights, Remedies and Restraint, 64 CHI.-KENT L. REV. 531,
Courts not only decide according to law, they decide in the context of a case. Judicial activity is generally passive, retrospective, and incremental. American courts lack the power to initiate and actively prosecute cases that one occasionally sees in civil law contexts. Although discretionary jurisdiction at the highest level will sometimes confer some control over their agenda, courts must generally wait for cases to come to them. Moreover, doctrines of justiciability—most prominently, ripeness and standing—ensure that judicial decisionmaking generally deals with finite sets of facts arising out of past events. Other doctrines and craft norms press judges to decide as little as possible at a time, resolving the case before them without broadly pronouncing rules for issues and situations not directly before the court.

Finally, the courts are neither completely independent of the political branches nor monolithic in their composition. Unlike Congress or the president, the judiciary is appointed and confirmed by its two institutional rivals. The federal courts likewise depend on Congress for grants of jurisdiction to decide cases, for the budget and staff necessary to render those decisions, and in many instances, for the legal standards that guide judicial outcomes. And although observers often like to speak of “the Court,” we must remember not only that the Court’s nine members constitute “a ‘they’, not an ‘it’,” but also that the Court sits atop a large and sometimes unruly hierarchy of state and lower federal courts. Judicial decisions must strive not only for consensus among at least five justices but must also seek to control the future actions of lower courts that may have divergent views.

546 (1988) (suggesting that, in some cases, the Court may enhance its legitimacy through opposing the political branches). It would be exceptionally difficult to verify either proposition empirically; about all that can be said with confidence is that the Court sometimes seems to behave as if it thinks its “institutional capital” is limited in this way, and the notion may at least constrain judicial behavior in this sense. See Young, State Sovereign Immunity, supra note 92, at 58–60.

444. See H.W. Perry, Jr., Deciding to Decide: Agenda Setting in the United States Supreme Court (1991); Edward A. Hartnett, Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill, 100 COLUM. L. REV. 1643 (2000).


446. See, e.g., Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 345–47 (1916) (Brandeis, J., concurring). The breadth of decision issue is, of course, somewhat controversial; Justice Scalia has argued, for example, that judicial restraint actually compels the announcement of broad rules that constrain courts in future cases, while more flexible and incremental decisionmaking actually licenses judicial activism. See generally Scalia, supra note 89. But I think it remains fair to say that courts generally approach issues more incrementally than do other branches of government.


448. Cf. Kenneth A. Shepsle, Congress is a “They.” Not an “It”: Legislative Intent as Oxymoron, 12 INT’L REV. L. & ECON. 239, 249 (1992) (arguing that the concept of “legislative intent” to describe Congress’s actions is meaningless because, although individuals have intentions and motives, collections of individuals do not).
These institutional characteristics cash out to three points that structure the discussion that follows. The first is that courts generally are incremental decisionmakers. I have argued elsewhere that this is in itself a reason to favor some judicial role; it is also, as I have already discussed here, a reason not to expect too much in the way of theoretical coherence.\textsuperscript{449} Second, as I argue in section 2, courts ought to avoid too many confrontations with the political branches. This means not only that the courts should pick their battles but also that, if possible, they should structure doctrine to mitigate those confrontations that they cannot or do not wish to avoid. The third point, discussed in section 3, is what Larry Lessig has called the "Frankfurter Constraint"—that courts will be effective and respected only if they are able to construct doctrine that is persuasively determinate and principled.\textsuperscript{450} Both of these latter two points, I argue, favor process-oriented doctrines over substantive ones, and "soft" over "hard" rules.

2. Confrontations with Congress.—Whether or not Alexander Hamilton was right to call the judiciary the "least dangerous branch,"\textsuperscript{451} both contemporary theory and historical experience suggest that courts’ ability to defy the national political branches is not unlimited. Those limits bear on federalism doctrine in at least three respects. First, they support, at least to some extent, the notion that the judiciary has limited institutional capital. If that is true, then courts may not be able to pursue all possible doctrinal avenues at once and may, in consequence, have to choose among them. Second, these limits suggest that courts should pursue certain kinds of doctrine. In particular, they support doctrine that advances the goal of state autonomy without forcing direct confrontations by invalidating political branch actions. Finally, the limits on the judiciary’s ability to confront the political branches ought to temper our expectations (or fears) of what judicial federalism doctrine can accomplish.

The first impediment to a strong judicial role limiting national power stems from the appointments process and culture of the federal judiciary itself. Federal judges are, of course, nominated by the president—our most national official—and it would be surprising for any president to nominate persons strongly committed to reducing national power. Moreover, as Steven Calabresi has pointed out, federal judges—once confirmed—are national officials with strong incentives to have a nationalist outlook.\textsuperscript{452}

\textsuperscript{449} See supra subpart I(A).

\textsuperscript{450} See Lessig, Translating Federalism, supra note 31, at 174. Professor Lessig derived this term from Justice Frankfurter’s lectures on Commerce Clause jurisprudence. See Frankfurter, supra note 44. The notion that legitimate doctrine must be sufficiently coherent to seem principled rather than political permeates those lectures, although it is hard to pin down particular references.

\textsuperscript{451} The Federalist No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

\textsuperscript{452} See Calabresi, supra note 249, at 807–08. Professor Calabresi explains:
Indeed, the instincts and training of judges to seek “right answers” to legal questions may at some level be opposed to federalism, which is designed to permit different political communities to answer the same legal questions differently. Robert Nagel thus argues that any strong view of state autonomy “contradict[s] deep instincts that are the natural outgrowths of judges’ essential task of authoritative dispute resolution.”

Culture aside, the political branches retain significant levers by which they may influence judicial behavior and curb judicial efforts to weaken national authority. Congress may restrict the jurisdiction of the federal courts or seek to influence decisions through its control of budgets and staffing. The executive may influence judicial outcomes through the positions taken by the Solicitor General in the Supreme Court and through agency interpretations of federal statutes. A less obvious mechanism involves the political branches’ control over the size of the federal judiciary: As the “McNollgast” collaborators have demonstrated, Congress can rein in lines of Supreme Court doctrine by increasing the number of lower courts, thereby making it more difficult for the Supremes to enforce compliance with particular doctrines. Because federal courts are much less likely to face

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[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.

453. NAGEL, supra note 2, at 43.

454. On jurisdiction stripping, see, for example, the sources cited supra note 447. For budgetary and staffing controls, see McNollgast, supra note 447, at 1648–49 (“L[egal] reforms that superficially appear to be ‘housekeeping details’ about legal procedures can change the ability of the Court to influence policy on completely unrelated matters.”).


456. See McNollgast, supra note 447, at 1634 (noting that sometimes “expansion of the lower judiciary can have the same effect on judicial doctrine as packing the Supreme Court. . . . The creation of a large number of potentially noncomplying lower courts forces a strategic court to expand its doctrine so that a wider range of lower court decisions is acceptable”). McNollgast argues that the same effect can be achieved by expanding the number of judgeships, filling a higher percentage of vacant judgeships, or by “altering jurisdictions and controlling the resources available to the courts for hearing cases.” Id. at 1635. The key point about these mechanisms is that unlike, say, stripping the Supreme Court of its appellate jurisdiction in certain cases, manipulation of the size and resources of the lower federal judiciary is not the institutional equivalent of nuclear weapons: They are measured enough in their impact to actually be used on occasion. See id. at
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.

History confirms what these institutional factors predict: Federal judges have, in fact, functioned as a strong centralizing influence over the course of our history. John Marshall’s Supreme Court played an important role in consolidating national power early on, and throughout the Nineteenth Century judicial enforcement of federalism primarily took the form of enforcing constitutional limits on state power.\textsuperscript{457} The early Twentieth Century, of course, saw a new judicial willingness to limit Congress’s commerce power in cases like \textit{United States v. E.C. Knight Co.}\textsuperscript{458} and \textit{Hammer v. Dagenhart},\textsuperscript{459} leading up to a sharp confrontation between the Court and the New Deal.\textsuperscript{460} It is not clear, however, that these cases demonstrated any great sympathy for state autonomy in the federal judiciary. Stephen Gardbaum has shown that the pre-1937 Commerce Clause cases, in tandem with the \textit{Lochner} line of economic substantive due process decisions restricting state regulation, had the effect of imposing a uniform national economic policy of laissez faire,\textsuperscript{461} and Robert Post’s study of the Taft Court has concluded that even “in the 1920s the Supreme Court was, on the whole, a highly nationalist institution.”\textsuperscript{462} In any event, the federal courts renewed

\textsuperscript{1663–73} (documenting occasions in which these mechanisms have been used). This is not to say that there are no disincentives to these sorts of measures. \textit{See id.} at 1650 (noting that “expanding the courts also imposes costs on the elected branches in areas where they generally agree with existing Court doctrine”).


\textsuperscript{458} 156 U.S. 1 (1895) (construing the Sherman Act not to reach a merger that would result in a single company acquiring 98% of the nation’s sugar refining capacity, on the grounds that the commerce power did not reach “manufacturing” and that a monopoly in manufacturing would have only an “indirect” effect on interstate commerce).

\textsuperscript{459} 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).

\textsuperscript{460} \textit{See, e.g.}, Carter v. Carter Coal Co., 298 U.S. 238 (1936) (striking down the Bituminous Coal Conservation Act of 1936 as outside the commerce power); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (striking down, on both Commerce Clause and nondelegation grounds, an industry code for the poultry industry promulgated under the National Industrial Recovery Act of 1933).

\textsuperscript{461} \textit{See generally} Stephen Gardbaum, \textit{New Deal Constitutionalism and the Unshackling of the States}, 64 U. CHI. L. REV. 483 (1997); \textit{see also} Post, \textit{supra} note 93, at 1518 (describing the Taft Court as “unabashedly supportive of the use of federal judicial power to sustain the national market” through “imposition of nationally uniform constitutional protections for property and contract” and “innovative protections for foreign corporations against discrimination by state governments”).

\textsuperscript{462} Post, \textit{supra} note 93 at 1634.
their nationalizing tendencies in 1937 and extended them under the Warren Court. In our own era, the deep reluctance of lower federal courts to build upon the Commerce Clause limits established in *Lopez* and *Morrison* demonstrates an affinity between national courts and national power.

The history also illustrates a second and related point. Whether we see the *Lochner*-era Court as protecting state autonomy or as imposing a national policy of laissez faire, there is little doubt that the Court emerged from its collision with the national political branches in the 1930s at least somewhat chastened. William Leuchtenberg has observed that “[e]ver since 1937, jurisprudence has been haunted by the memory of that year, though not everyone has drawn the same lessons from it.” The fear of “Lochnering”—and, implicitly, of renewing the pre-1937 institutional conflict between the courts and the political branches—has constrained both the Court’s willingness to extend individual liberties and to renew its enforcement of structural checks on national power. At the very least,

463. See NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) (holding that Congress can regulate intrastate activities that have a “close and substantial relationship to interstate commerce”); see also Wickard v. Filburn, 317 U.S. 111, 127–29 (1942) (upholding a Department of Agriculture regulation limiting small farmers’ wheat production for home consumption); United States v. Darby, 312 U.S. 100, 115 (1941) (upholding Congress’s imposition of federal wage and labor standards on private employers).


465. See Reynolds & Denning, *supra* note 2, at 371 (demonstrating that lower courts tend to limit *Lopez* to its facts rather than using it to strengthen federalism). Very recently, the United States Court of Appeals for the Ninth Circuit has begun to buck this trend. See United States v. McCoy, 323 F.3d 1114 (9th Cir. 2003) (striking down a federal statute prohibiting possession of child pornography on Commerce Clause grounds); *Raich v. Ashcroft*, 352 F.3d 1222 (9th Cir. 2003) (holding that federal regulation of home-grown marijuana for medical purposes was beyond the scope of Congress’s Commerce Clause power). I suspect that at least the former ruling will be reversed on appeal.


467. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 194–95 (1986) (asserting that the illegitimacy of judicial expansion of individual rights “was painfully demonstrated by the face-off between the Executive and the Court in the 1930’s”).

468. Compare, e.g., United States v. *Lopez*, 514 U.S. 549, 556–57 (1995) (insisting that the Court’s recognition of some outer limit to the commerce power was consistent with the post-1937 decisions repudiating more aggressive judicial enforcement of federalism), with *id.* at 608–15 (Souter, J., dissenting) (arguing that the majority was, in fact, taking the Court back to the *Lochner* era and warning of disastrous institutional consequences to follow).
every effort to extend judicial review of government action since 1937 has had to grapple with, and distinguish, this history of institutional conflict.469

The post-New Deal Court has, of course, been willing to exercise relatively aggressive judicial review in a number of areas. Cases like Brown v. Board of Education,470 Baker v. Carr,471 and Roe v. Wade472 hardly reveal a shrinking violet judiciary. But at least two points emerge from these sorts of examples. First, they involved judicial checks on state political institutions and therefore tend to confirm the centralizing bent of the federal judiciary.473 Despite somewhat hysterical suggestions to the contrary in recent years,474 it remains much harder to find judicial actions aggressively checking the national political branches.475 Although some have suggested that state and local governments are simply more likely to threaten liberty than are national institutions,476 surely some of this disparity in the rigor of judicial review may be traced to the broader range of retaliatory options open to the national political branches.

It is also important to remember that while cases like Brown or Roe may articulate sweeping visions of constitutional rights, courts have only a limited ability to actually vindicate those rights without assistance from the political branches. Gerald Rosenberg’s recent study has demonstrated, for example, that the Court’s order in Brown itself achieved remarkably little

469. See LEUCHTENBURG, supra note 466, at 234–35; see also 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” based on efforts to distinguish the pre-1937 experience from current uses of judicial review); Baker & Young, supra note 13, at 80–87.


471. 369 U.S. 186 (1962) (rejecting arguments that courts may not scrutinize the equality of state legislative apportionments).


474. See, e.g., NOONAN, supra note 108, at 11 (arguing that the Supreme Court’s federalism decisions have “narrowed the nation’s power”).


476. See, e.g., LEUCHTENBURG, supra note 466, at 229.
desegregation in the South; rather, widespread desegregation came only after congressional and executive action made large amounts of federal funding to local school districts contingent on compliance with Brown.\textsuperscript{477} Professor Rosenberg has likewise shown that even sustained judicial adherence to Roe's broad notion of abortion rights has had only limited results in terms of maintaining widespread access to abortion on the ground.\textsuperscript{478} Rosenberg's critics have argued that judicial action may matter as a catalyst or spur to subsequent political measures,\textsuperscript{479} but few dispute the central point that courts often depend on the other branches for full implementation of their rulings. That suggests, in turn, that courts have a greater impact when they act with the support of the national political branches to enhance national authority than when they try to confront those national institutions in the name of state autonomy.

Many of these observations support the notion that the federal courts in general—and the Supreme Court in particular—have limited "institutional capital." Whether or not the national political branches are in fact inclined to keep the Court on a short leash after 1937, the Court seems to have drawn from that decade the lesson that it should exercise self-restraint (in at least some contexts) rather than confront the political branches. Moreover, at least some of the mechanisms Congress and the President can use to check the Court capitalize on the Court's limited resources. The McNeilgast model of political checks, for example, emphasizes the political branches' ability to expand the number of potentially noncomplying lower court judges or decrease the Supreme Court's resources for reviewing lower court decisions as a means of forcing the Court to tolerate deviations from doctrines that the political branches oppose.\textsuperscript{480} Those sorts of checks, in essence, force the Court to pick its battles more carefully.

Finite institutional capital—and limits on judicial efficacy more generally—is important to a study of judicial doctrine for two reasons. First, it suggests that courts must at least sometimes make choices between different lines of doctrinal development even if those lines are not inconsistent in principle; the necessity of choice arises simply from courts' inability to pursue too many avenues at once. I have argued in subpart II(A) that an autonomy-based model of federalism doctrine will generally be superior to a sovereignty-based model, but that discussion identified

\textsuperscript{477} ROSENBERG, supra note 270, at 42-52; see also MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 363, 344-63 (2004) (concluding that "[t]he 1964 Civil Rights Act, not Brown, was plainly the proximate cause of most school desegregation in the South").

\textsuperscript{478} ROSENBERG, supra note 270, at 175-78, 189-95.

\textsuperscript{479} See, e.g., Neal Devins, Judicial Matters, 80 CAL. L. REV. 1027, 1030 (1992) (book review) (asserting that the Court both influences, and is influenced by, other components of the political process).

\textsuperscript{480} See supra note 456 and accompanying text.
relatively few respects in which both models could not peacefully coexist. To the extent that judicial institutional capital is limited, however, coexistence in principle may give way to tradeoffs in practice. If the Court wishes—as it should—to pursue an autonomy-based strategy, it may need to back off on state sovereignty.\textsuperscript{481}

The second point goes to the choice of doctrines.\textsuperscript{482} Some doctrinal formulations seem likely to draw down institutional capital more than others; in particular, courts may be more willing and able to check the national political branches by acting indirectly or in ways that do not purport to raise impenetrable barriers to congressional action. Courts may thus fare better with soft limits on congressional power, such as clear statement requirements for national actions that intrude on state autonomy. Soft limits avoid direct confrontations with Congress, and they encourage the political branches to take part in a dialogue about the proper balance of federalism.\textsuperscript{483} Less obviously, they may ease linedrawing difficulties and permit courts to impose some restraint in areas where constitutional norms would otherwise be “underenforced.”\textsuperscript{484} 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{485} As a result, it is hard to know exactly how much faith to put in these soft constraints.

Finally, we should be realistic about what federalism doctrine may accomplish. 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.\textsuperscript{486} Any interpretation of the constitutional

\textsuperscript{481} Such tradeoffs may also be necessary to forge an enduring consensus on federalism within a sharply divided Court. See Young, State Sovereign Immunity, supra note 92, at 66–73.

\textsuperscript{482} See Massey, supra note 40, at 436–37 (“The political cost to the Court of asserting a reformist vision of federalism . . . is certain to be considerable. . . . [T]hat factor may be relevant to determining the precise limits of judicial review of federal legislative powers.”).

\textsuperscript{483} See generally Friedman, Dialogue, supra note 68.

\textsuperscript{484} See Young, Constitutional Avoidance, supra note 74, at 1603–09. On underenforcement, see generally Lawrence Gene Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212 (1978).

\textsuperscript{485} See, e.g., Vermeule, Interpretive Choice, supra note 317, at 76–77 (detailing the many empirical uncertainties plaguing this effort).

\textsuperscript{486} See Dworkin, supra note 323, at 1099 (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 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 109, at 482. Similar constraints will help guide any new directions that the Court might wish to take in protecting the federal balance.
structure that would invalidate much of the United States Code—such as Justice Thomas's originalist reading of "commerce" in *Lopez*\(^{487}\)—is simply out of court under this constraint. That means, in turn, that courts most likely cannot take us back to a robust version of state autonomy under which individuals identify primarily with their states and state governments are free to pursue radically different regulatory agendas from Washington, D.C.\(^{488}\) Federalism doctrine should thus focus, for the most part, on how to resolve presently open questions in ways that foster state autonomy.\(^{489}\)

These "chastened aspirations,"\(^{490}\) however, ought also to temper nationalist fears about where the Federalist Revival may take us. If the Supreme Court could not desegregate public schools in the South without Congress's help, how in the world do the Rehnquist Court's critics expect the Court to dismantle the national administrative state?\(^{491}\) And, given its character as an arm of the national government, why would the Court want to do so? The structural factors and historical experience canvassed in this section go a long way toward explaining why the Court's efforts to protect states to this point have been so modest, as well as why those efforts are unlikely to go much further in the foreseeable future. What is at stake in debates about federalism doctrine is primarily the direction and form of incremental changes on the margin of our current institutional structures.

Any truly radical challenge to national authority will have to come from outside the courts. As Keith Whittington has demonstrated, judicial interpretation is not the only way of establishing constitutional meaning; political actors also "construct" that meaning through the positions they take and the practices they develop over time.\(^{492}\) Just as the national administrative state came to be through electoral mandate and political decision rather than judicial sanction, any strong move in the direction of decentralization will likely depend on similar nonjudicial mechanisms. Even

\(^{487}\) See United States v. *Lopez*, 514 U.S. 549, 585–86 (1995) (Thomas, J., concurring) (observing that "[a]t the time the original Constitution was ratified, 'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes" and did not include "productive activities such as manufacturing and agriculture").

\(^{488}\) See Young, *European Union*, supra note 89, at 1723–26 (distinguishing between strong and weak forms of federalism); NAGEL, supra note 2, at 31–67 (distinguishing between "radical" and "domesticated" federalism).

\(^{489}\) See Young, *Making Federalism Doctrine*, supra note 10 (manuscript at 47–49).

\(^{490}\) Cf. Mark Tushnet, *The Supreme Court, 1998 Term—Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 33 (1999) (using the phrase in a quite different sense to describe the Court's reduced expectations of "achieving justice directly through law").

\(^{491}\) On the likelihood that the federal political branches will prevail over judicial opposition in the long term, see Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285, 283–91 (1957) (concluding that "it would be most unrealistic to suppose that the Court would, for more than a few years at most, stand against any major alternatives sought by a [national] lawmaker majority").

on a more mundane level, institutional steps taken by the political branches—such as establishing special rules for legislative proposals that impose "unfunded mandates" on state governments—may be equally or more important than judicial doctrine to maintaining some level of balance in the system. That is emphatically not to say, however, that judicial action is irrelevant to our federal balance. The fact that courts cannot take us back to some Antifederalist utopia does not mean that some measure of balance is not worth preserving, and the fact that success in that endeavor will require cooperation from other branches does not mean we should ignore the need to get the judicial role right.

3. Substantive Doctrine and the Frankfurter Constraint.—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 of an elected national legislature, those judges had better have a theory that explains, in a consistent and understandable way, why their action is grounded in constitutional principle. This is the essence of Justice Frankfurter's constraint: Judicial doctrine must be sufficiently coherent and determinate to convince other actors—including not only the political branches but the People at large—that the judges are doing law, not politics. 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. As Robert Post has observed, "The principles of dual sovereignty . . . both produced intellectual incoherence and failed to protect state autonomy. It is no wonder that the ideology of dual sovereignty effectively disappeared from these doctrinal domains during the turmoil of

494. See, e.g., United States v. Lopez, 514 U.S. 549, 607 (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 216–18 (1998) (arguing, based on internal court memoranda, that the difficulty of distinguishing between appropriate and inappropriate federal regulation of economic activity under pre-1937 case law pushed the Wickard Court strongly in the direction of abdicating judicial limits altogether); Friedman, Valuing Federalism, supra note 249, at 370 (noting that "doctrinal collapse itself served as a nationalizing force"). See generally Baker & Young, supra note 13, at 87–106 (discussing the "judicial competence problem" as a basis for abandoning judicial review of federalism issues after 1937).
496. See Lessig, Translating Federalism, supra note 31, at 174; see also Lawrence Lessig, Understanding Federalism's Text, 66 GEO. WASH. L. REV. 1218, 1224 (1998) (defining the Frankfurter Constraint as "the requirement that a reading offer a rule that can be applied in context without 'appearing political'").
the New Deal.  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.

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. Likewise, they have expressed substantial willingness to innovate doctrinally in the context of individual rights, where legitimacy concerns ought to be at least as salient. But just because the Court’s nationalists are inconsistent does not mean they are wrong to worry about the coherence of federalism doctrine. I focus here 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 for the Court to 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

497. Post, supra note 93, at 1635.

498. See Nat’l League of Cities v. Usery, 426 U.S. 833, 852 (1976) (holding that Congress may not regulate state governmental institutions in their performance of traditional governmental functions). For the doctrine’s collapse, see Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 546 (1985) (“Any rule of state immunity that looks to the ‘traditional,’ ‘integral,’ or ‘necessary’ nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes.”) and Field, supra note 81, at 84, 94–95 (observing that when judges apply concepts of “state sovereignty ... in the absence of clear guidelines,” they “must resort to their own opinions concerning the worth of social and economic legislation” and “the Court becomes vulnerable to a charge that it is acting as a superlegislature”).

499. United States v. Morrison, 529 U.S. 598, 647 (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”).

500. See id. at 649–50 (Souter, J., dissenting).


502. See, e.g., Washington v. Glucksberg, 521 U.S. 702, 774–82 (1997) (Souter, J., concurring); see also Lawrence v. Texas, 539 U.S. 558 (2003). A decision like Lawrence, of course, does both: It protects individuals’ rights while eliminating the state’s autonomy to go its own way on questions of moral policy. I do not mean to suggest Lawrence is wrongly decided—only that it has a strong centralizing effect.

503. See Ernest A. Young, Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception, 69 GEO. WASH. L. REV. 139, 142–50 (2001) [hereinafter Young, Dual Federalism].
the States.\textsuperscript{504} The Court pursued a variety of conceptual distinctions to define these fields: commercial vs. police regulation,\textsuperscript{505} essentially local vs. essentially national concerns,\textsuperscript{506} commerce vs. manufacturing,\textsuperscript{507} and indirect vs. direct effects.\textsuperscript{508} Little of this edifice survived 1937’s “switch-in-time”; by 1950, Edward Corwin was able to observe that the “entire system of constitutional interpretation” associated with dual federalism lay “in ruins.”\textsuperscript{509}

Dual federalism’s demise suggests the futility of trying to divide up the world into separate and exclusive spheres of governmental competence.\textsuperscript{510} 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

\textsuperscript{504} Alpheus Thomas Mason, \textit{The Role of the Court, in FEDERALISM: INFINITE VARIETY IN THEORY AND PRACTICE} 8, 24 (Valerie A. Earle ed., 1968); \textit{see also MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE} 26 (1995) (contrasting “dual” and “cooperative” federalism); John Kincaid, \textit{From Dual to Coercive Federalism in American Intergovernmental Relations, in GLOBALIZATION AND DECENTRALIZATION: INSTITUTIONAL CONTEXTS, POLICY ISSUES, AND INTERGOVERNMENTAL RELATIONS IN JAPAN AND THE UNITED STATES} 29 (Jong S. Jun & Deil S. Wright eds., 1996); Post, supra note 93, at 1526–27. “Dual federalism” should not be confused with “dual sovereignty,” the Federalists’ political theory that both state and federal governments derive their sovereignty from delegations by the People. \textit{See generally U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) (“Federalism was our Nation’s own discovery. The Framers split the atom of sovereignty.”)}; Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 151–52 (1996) (Souter, J., dissenting) (“The People possessing this plenary bundle of specific powers were free to parcel them out to different governments and different branches of the same government as they saw fit.”); GORDON S. WOOD, \textit{THE CREATION OF THE AMERICAN REVOLUTION 1776–1787}, at 524–32 (1969) (discussing the Framers’ political theory). “Dual sovereignty” is consistent with any number of strategies for allocating powers and functions, only some of which depend on defining the mutually exclusive spheres of activity that characterize “dual federalism.” \textit{See Young, Dual Federalism, supra note 503, at 143–46.}

\textsuperscript{505} \textit{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”).

\textsuperscript{506} \textit{See, e.g., Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299, 319 (1851) (“Whatever subjects of [the commerce] power 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.”).}

\textsuperscript{507} \textit{See, e.g., Kidd v. Pearson, 128 U.S. 1, 16–18 (1888)} (upholding state prohibition on manufacture of liquor because it did not regulate “commerce”); \textit{Hammer v. Dagenhart, 247 U.S. 251, 273–74 (1918)} (holding that the Commerce Clause did not confer power to regulate manufacturing on Congress).

\textsuperscript{508} \textit{See, e.g., United States v. E.C. Knight Co., 156 U.S. 1, 12 (1895)} (stating that the Commerce Clause did not cover regulation of activities which have only an “indirect” effect on interstate commerce).

\textsuperscript{509} Edward S. Corwin, \textit{The Passing of Dual Federalism, 36 VA. L. REV. 1, 17 (1950).}

dissenters seemed willing to concede as off limits to federal authority.\textsuperscript{511} That sphere overlaps with traditional federal concern over interstate travel in the context of interstate child support enforcement,\textsuperscript{512} with traditional federal foreign affairs concerns in the context of international human rights conventions bearing on family relations,\textsuperscript{513} and even with the federal government’s administration of federal taxes, pensions, and the like in the context of the Defense of Marriage Act.\textsuperscript{514} Cases involving these issues cannot be 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. \textit{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 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.”\textsuperscript{515} I would go one step

\textsuperscript{511} 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’”).

\textsuperscript{512} See Child Support Recovery Act (CSRA), 18 U.S.C. § 228 (2000); United States v. Lewko, 269 F.3d 64, 70 (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, 283 F.3d 804, 812 (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).


\textsuperscript{515} Kramer, \textit{Understanding Federalism}, supra note 350, at 1499. 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.
further and urge that federalism doctrine generally need not try to carve out exclusive domains at all. Meaningful protections for state autonomy must operate in a world of largely concurrent state and federal regulatory jurisdiction.

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 intrastate commerce, if such regulation is necessary to protect the federal ability to regulate interstate 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 Court sought to bar such devices by means of a purpose test that would invalidate “pretexual” uses of the commerce power. Both the necessity and purpose tests had the virtue of grappling with the reality of overlapping spheres, but the Court was unable to achieve consistency under either rubric.

Similar problems plague contemporary efforts to revive some form of a necessity test. The ability to produce consistent and principled results is the essence of the Frankfurter Constraint. It is somewhat ironic that comparative institutional analysis should turn our focus from political science back to the internal coherence of doctrine, and I do not mean to suggest that such coherence is the only institutional factor to be considered. But surely a key difference between courts and legislatures is the different legitimating bases

Kramer, *Politics*, *supra* note 179, at 289. Obviously, my own view is that Professor Kramer was right the first time.


517. *See also* R.R. Comm’n of Wis. v. Chicago, Burlington & Quincy R.R., 257 U.S. 563, 588 (1922) (“[l]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 ...”).


519. 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.”).


521. On the difficulty of applying *Shreveport*, see Cushman, *supra* note 494, at 217 (quoting a memo from Justice Jackson to his law clerk in conjunction with *Wickard*, to the effect that “legal standards for weighing economic effects and for applying them to the commerce power” under *Shreveport* were “neither consistent nor well defined”). On the inconsistent application of the purpose test, see, for example, 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 instate businesses that it considered immoral.
for their decisions. If that is true, then the courts’ ability to make their federalism cases “hang together”—to convince both other institutions and the People themselves that national power is being limited by law, not the judges’ own preferences—must be a key consideration in making federalism doctrine. I discuss how this consideration bears on the different models of federalism doctrine in the next section.

4. Doctrinal Coherence and the Choice of Models.—The looming shadow of 1937 has generally deterred courts from returning to categorical models of federalism analogous to dual federalism. Contemporary efforts to reinvigorate substantive checks on national power often pursue one of the two noncategorical lines sketched out at the end of the previous section. Shreveport’s necessity principle, for example, is often expanded into a more general approach that would approve national action when it furthers the underlying values of our federal system. I call this approach “direct valuation.” Others have advocated a return to the sort of purpose test suggested in McCulloch. The Rehnquist Court, by contrast, has tended to cast its substantive doctrines in more formal sorts of rules. This section considers the prospects for these different approaches in light of the Frankfurter constraint.

A number of commentators have noted the disconnect between the Rehnquist Court’s federalism doctrines—which involve a set of essentially formal tests—and the values that federalism is supposed to serve. 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

522. Both dissenting Justices and the Court’s academic critics frequently do charge that the current cases seek to revive “dual federalism.” See, e.g., United States v. Morrison, 529 U.S. 598, 643–44 (Souter, J., dissenting) (characterizing the majority’s position as insisting that “assertions of national power are to be limited in favor of preserving a supposedly discernible, proper sphere of state autonomy”); H. Geoffrey Moulton, Jr., The Quixotic Search for a Judicially Enforceable Federalism, 83 MINN. L. REV. 849, 868 (1999) (asserting that New York and Printz “embrac[ed] the ‘dual federalism’ or state-sovereignty model [the Court] had abandoned twice before”); Peter M. Shane, Federalism’s “Old Deal”: What’s Right and Wrong with Conservative Judicial Activism, 45 VILL. L. REV. 201, 215 (2000) (advancing a “dual federalism” interpretation of Lopez). I have addressed these arguments at length elsewhere. See Young, Dual Federalism, supra note 503, at 153–63. The short answer is that many of the Court’s critics seem to define “dual federalism” so broadly as to encompass virtually any effort to limit national authority.

523. I consider a more narrow version of the necessity argument in section III(C)(1), infra.

524. See, e.g., Friedman, Valuing Federalism, supra note 249, at 410, 412 (criticizing the 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”); Massey, supra note 40, at 480. But see generally Allison H. Eid, Federalism and Formalism, 11 WM. & MARY BILL OF RTS. J. 1191 (2003) (arguing that this critique understates the extent to which the Court’s jurisprudence reflects functional values).
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{525} 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{526}

These sorts of tests make a great deal of sense as a legislative 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 literature on European subsidiarity seems generally to have concluded that that principle should guide the Community’s political and administrative institutions but should generally not be enforced directly by courts.\textsuperscript{527} 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 than simply attempting to weigh them in each individual case.\textsuperscript{528}


\textsuperscript{527} See, e.g., Bermann, \textit{supra} note 89, at 336–37 (remarking that the European Court of Justice (ECJ) is not “especially well equipped to make the substantive judgment as to whether the institutions correctly identified and assessed the consequences of Community inaction”). Many have argued that courts can play a role in encouraging deliberation about subsidiarity concerns. See Christoph Henkel, \textit{The Allocation of Powers in the European Union: A Closer Look at the Principle of Subsidiarity}, 20 BERKELEY J. INT’L L. 359, 378 (2002) (“Perhaps the only objective standard for judicial review of subsidiarity is provided by the procedural requirement to show sufficient grounds.”); Bermann, \textit{supra} note 89, at 391 (suggesting that the ECJ “can seek to verify whether the institutions themselves examined the possibility of alternative remedies at or below the Member State level” and that “[t]hat very inquiry should encourage the political institutions to structure their discussion and focus their debate”). That view is consistent with my emphasis here on “process federalism.”

\textsuperscript{528} See Lessig, \textit{Translating Federalism, supra} note 31, at 197 (suggesting that courts should develop federalism doctrines characterized by “sophisticated formalism”).
Purpose tests have been less broadly mooted in contemporary discourse about federalism,529 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 state of the enacting legislature.530 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.531

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,532 and particular means that Congress is generally allowed to employ for any end that it likes.533 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.534 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?535 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

529. But see Baker & Berman, supra note 178, at 536–39 (offering a purpose test for the validity of conditions on federal spending); Halberstam, supra note 525, at 825–27 (suggesting purpose tests in certain areas).

530. 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.").


533. See David E. Engdahl, The Spending Power, 44 DUKE L.J. 1, 113–19 (1994) (noting that if Congress is free to fashion policy for those "objects of government" entrusted under its plenary power, Congress may "manipulate them even to promote objects of government (in the sense of aims or ends) that are not constitutionally enumerated for it").

534. Cf. Regan, supra note 525, at 578 (observing that it is very difficult to distinguish between "moral" and "economic" purposes for federal laws).

current doctrine, but would likely encounter the same indeterminacy troubles that plagued earlier incarnations of the doctrine.

What about more formal rules? Many of the Rehnquist Court’s substantive doctrines have taken this form. Morrison strongly suggests that the Commerce Clause inquiry boils down to whether the regulated activity is “commercial” or not. Likewise, the bright line rules against commandeering and abrogating state sovereign immunity are formal in character. Larry Lessig has suggested that the viable federalism doctrine—doctrine that satisfies the Frankfurter constraint—“will be made only with the tools of a sophisticated formalism,” because only such formal tools are sufficiently determinate to be employed “by a court against the will of a legislature.”

I share Professor Lessig’s enthusiasm for formal rules up to a point. His argument rests on the familiar theory of the second-best: courts should formulate “a second-best rule because of the constraints making impossible any first-best rule.” Despite the attractions of direct value-application, for example, courts may need to accept “a rule that is both under- and overinclusive, which does not directly seem to advance federalism interests, but which can, because of its simplicity, be applied by the Courts to advance federalism values.” Nonetheless, the institutional experience traced in the last section suggests that the day is past when courts can rely entirely on a formal strategy of dividing up the world into substantive state and federal spheres. I want to suggest that formal rules will have to play more of a supporting role in contemporary doctrine, and that they may do better when cast as soft rules and oriented toward process concerns.

The core substantive rule in the Rehnquist Court’s canon is the “commercial/noncommercial” distinction articulated in Lopez and

536. See, e.g., United States v. Darby, 312 U.S. 100 (1941).
538. That is, they turn on neither the values underlying the rules or the governmental interests at stake in particular cases. See also Regan, supra note 525, at 562 (arguing that the Commerce Clause law prior to Lopez was also “a new formalism”).
539. Lessig, Translating Federalism, supra note 31, at 197. Professor Lessig thinks that the commercial and noncommercial distinction is not sufficiently formal. See id. at 206 (suggesting that “a hopeless inquiry about the nature of ‘commercial’... will cross the line of the Frankfurter constraint”). My own view is that the distinction is a relatively workable one, but this disagreement itself highlights the limitations of substantive doctrine.
540. Formalism is often criticized to the extent that it masks the value judgments embodied in the legal rule being applied. See, e.g., Cass R. Sunstein, Justice Scalia’s Democratic Formalism, 107 Yale L.J. 529, 531 n.11 (1997) (book review) (distinguishing this bad kind of formalism and more benign sorts). But it should be clear that the formal rules that I (and Professor Lessig) defend are meant to protect values associated with federalism. The point is simply that those values are best served by rules that do not attempt to weigh them in individual cases.
541. Lessig, Translating Federalism, supra note 31, at 192.
542. Id.
Morrison.\textsuperscript{543} For this rule to be formal and determinate, it will have to be interpreted fairly narrowly. As I discuss further in Part III, the Court has already had to accept that Congress may regulate all commerce rather than only the interstate kind.\textsuperscript{544} From the standpoint of the Frankfurter constraint, this move has the advantage of obviating the need to make indeterminate distinctions between "direct" and "indirect" effects on the national economy; the problem, however, is that the concession of a national market also saps Commerce Clause doctrine of much of its constraining force.\textsuperscript{545} That makes the judges’ task all the harder, because it is even harder to locate formal, substantive constraints within the broad scope of concurrent federal and state jurisdiction that exists in current law.

A second and related problem is that the search for formal substantive rules may push the Court toward sovereignty-based doctrine.\textsuperscript{546} State sovereign immunity doctrine, in particular, has two advantages under the Frankfurter constraint. First, it yields a relatively formal and determinate rule: Private persons simply cannot sue state governments for money damages. Difficult definitional questions exist at the margins: For example, where do we draw the line between prospective relief (which may be had in a suit against a state officer) and retrospective remedies tantamount to damages (which may not)?\textsuperscript{547} But these questions are, for the most part, secondary ones; they hardly compare to the difficulties in protecting state autonomy by either defining the substantive limits of federal power or constructing new, nonsubstantive limitations within the domain of concurrent power. Second, the state sovereign immunity cases have the additional virtue of coherence with a longstanding body of precedent. Indeed, as Richard Fallon has suggested, the Court's fixation on sovereign immunity is probably best


\textsuperscript{544} See infra section III(C)(1).

\textsuperscript{545} See Lessig, Translating Federalism, supra note 31, at 206 n.227 (suggesting that "to the extent that [the commercial/noncommercial distinction] does not violate the Frankfurter constraint, we might wonder about whether it will have any significant effect"); Fallon, Conservative Paths, supra note 109, 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."). I have argued elsewhere that the doctrine retains some importance, see Young, Dual Federalism, supra note 503, at 163–67, but I would not claim that the Commerce Clause has anywhere near the constraining force it had 75 years ago.

\textsuperscript{546} This will not always be the case. Some sovereignty doctrines, such as National League of Cities's effort to shield altogether state institutions from national regulation, involve highly difficult categorization decisions. See Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 557 (1985) (arguing that the National League of Cities doctrine was unsustainable for workability reasons).

understood as a path-dependent effort to advance federalism in an area in which state-protective precedent already existed.548

Even a court seeking to emphasize state regulatory autonomy may find itself stymied by the over- and underinclusive propensities of formal rules. 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.549 Much of the literature developing this latter argument deals with Europe, where individual nations 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.550 The federal law at issue in New York v. United States,551 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.552 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 doctrines the Court articulated in the past—such as the distinction between valid federal regulation of “direct” effects and invalid federal regulation of “indirect” ones553—failed to track these considerations in any meaningful way. And the leading cases establishing the Rehnquist Court’s more formal doctrines illustrate similar perverse effects. Recognition of the anticommandeering rule in New York thwarted a national effort, supported by most states, to help solve the difficult collective action problem of nuclear waste disposal.554 And the strong sovereign immunity rule announced in Seminole Tribe ultimately left Florida with less authority over gaming rights on Indian reservations than it would have otherwise enjoyed.555 There is

548. See Fallon, Conservative Paths, supra note 109, at 482; see also Young, Sky Falling, supra note 108, at 1556–60 (tracing the continuities in the Court’s state sovereign immunity jurisprudence).
549. Barron, supra note 309, at 382–90.
552. See id. at 189–94 (White, J., concurring in part and dissenting in part).
553. See, e.g., United States v. E.C. Knight Co., 156 U.S. 1, 15–16 (1895).
554. See New York, 505 U.S. at 189–94 (White, J., concurring in part and dissenting in part).
555. The Indian Gaming Regulatory Act (IGRA) at issue in Seminole Tribe authorized the states to negotiate compacts with Indian tribes governing gaming on tribal lands. Once the Eleventh
little reason to think that either the anticommandeering or the sovereign immunity rule will systematically disadvantage state governments in any direct sense. Nonetheless, the perverse results on the facts of both *New York* and *Seminole Tribe* give weight to Professor Barron’s suggestion that national action can sometimes empower state governments, and federalism doctrine needs to be sufficiently flexible to address that possibility.

I draw several conclusions from all of this. The first is the general difficulty of developing substantive federalism doctrines. The Court’s experience suggests that we should rule out dual federalism-type subject-matter categories altogether, and that other substantive rules should be employed with caution. Formal rules may have the greatest chance of surviving the Frankfurter constraint, but they are likely to be sharply underinclusive most of the time, and may be overinclusive in certain cases. I suggest in the next section that it may be easier for courts to develop rules focused on *process* rather than substance.

The second conclusion runs in favor of soft rules. The Court may sometimes be unable to avoid defining federalism doctrine in terms of substance; I argued in the previous subpart, for example, that process-based approaches cannot be entirely indifferent to substance because the states’ ability to compete for popular loyalty depends on retaining meaningful regulatory responsibilities. But if substantive lines are difficult to draw, and if they will inevitably retain some degree of indeterminacy, then it makes sense to try to lower the stakes. It is true that applying a soft rule often requires the same sort of difficult substantive judgment that previously unsuccessful hard rules involved; *Gregory’s* rule requiring that Congress speak clearly if it wishes to regulate the traditional functions of state governments, for example, requires as a predicate the same effort to define “traditional state functions” on which the *National League of Cities* doctrine ran aground. But as I explain further in Part III, we can tolerate a bit more indeterminacy in the operative definitions if the only consequence of a finding that the line has been transgressed is to refer the decision back to Congress for clarification.

The last point is that, in practice, all of the Rehnquist Court’s formal rules are “soft” to the extent that they are subject to various kinds of circumvention. The states may always *voluntarily* implement federal programs, for example, and Congress may encourage such agreement by way of conditional spending or conditional preemption. Likewise, state

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556. *See infra* section III(A)(1).

557. *See Young, Constitutional Avoidance, supra* note 74, at 1606–07.

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.\(^{559}\) Conditional spending likewise offers a route around the Court’s Commerce Clause decisions.\(^{560}\) These avenues hardly render the rules meaningless; for example, 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.\(^{561}\) Moreover, these sorts of work-around options provide an important safety valve for cases in which rigid application of the rule might thwart important values. It is important to recognize, however, that the work-arounds themselves—particularly conditional spending—raise difficult doctrinal problems, and that the Court has generally not been able to resolve them through formal, substantive rules.\(^{562}\) I discuss the potential of nonsubstantive approaches in the next section.

5. Process Failures and Judicial Review.—We might contrast the difficulties that have dogged substantive approaches to federalism doctrine with the generally more promising story of process-based judicial enforcement of individual rights. That story appears most prominently in John Hart Ely’s account of “representation reinforcement,” which distinguished sharply between judicial efforts to identify fundamental values and judicial action to correct defects in the political process of representation.\(^{563}\) Dean Ely criticized the Court’s fundamental rights jurisprudence in cases like Roe v. Wade,\(^{564}\) but applauded vigorous enforcement of rights of political participation and representation as well as judicial intervention on behalf of minority groups historically excluded from

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559. See, e.g., Alden v. Maine, 527 U.S. 706, 755 (1999) (noting that immunity waivers may be induced through the conditional spending power). For a full—some might say exhausting—discussion of Congress’s options in getting around state immunities, see Berman, Reese & Young, supra note 82.

560. See Baker, Conditional Spending, supra note 70, at 1914. For further discussion of the prospects for protecting state autonomy through Commerce Clause limitations, see infra section III(C)(1).


562. The doctrine limiting conditional spending under South Dakota v. Dole, 483 U.S. 203 (1987), for example, is notoriously murky. See infra section III(C)(2).

563. See Ely, supra note 66, at 102 (explaining that his approach “recognizes the unacceptability of the claim that appointed and life-tenured judges are better reflectors of conventional values than elected representaties” and “devot[es] itself instead to policing the mechanisms by which the system seeks to ensure that our elected representatives actually represent”).

the political process. I argue in this section that this process-based jurisprudence has generally fared reasonably well; that experience suggests, in turn, that a process-based approach to federalism jurisprudence may have significant advantages over a more substantive model.

The primary criticism of Dean Ely's representation reinforcement model has been that it fails to avoid the need to make value choices. That is a telling criticism in the individual rights context, where a model has been sold as a "neutral" alternative to identification of fundamental values. But that is not an issue in the federalism context: Federalism has long been understood to embody certain structural values rooted in the text and history of the Constitution, and advocates of federalism doctrine should be prepared to defend them. The utility of the process model here is not to evade value choices but simply to channel judicial review into modes that are more likely to produce coherent and effective doctrine. Such a model should seek to guarantee and enhance three separate aspects of the constitutional structure: the political representation of the states in Congress; the procedural hurdles and burdens of inertia that impede the creation of federal law; and the underlying ability of the states to generate loyalty by providing meaningful services and regulation to their citizens.

The great advantage of process doctrine is that it can operate within the substantive outer limits of national power. Because substantive limits are so difficult to formulate and enforce, the scope of the commerce power is likely to remain broad enough to offer a largely 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 anticommandeering doctrine, for example, operates to check otherwise valid exercises of the commerce power. Softer doctrines like profederalism clear statement rules also often operate to

565. See ELY, supra note 66, at 103 (arguing that vigorous judicial review is necessary to remedy two sorts of process defects: "(1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out or (2) . . . representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest").


567. See infra section III(A)(3). As I explain, that does not mean that the symbolic constraint is unimportant.

568. See Printz v. United States, 521 U.S. 898, 935 (1997); New York v. United States, 505 U.S. 144, 166 (1992) ("[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts."). 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.
restrict the scope of federal legislation even without a colorable argument that Congress has exceeded the boundaries of its constitutional authority.\footnote{See, e.g., Gregory v. Ashcroft, 501 U.S. 452, 460–61 (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, 230 (1947) (articulating a presumption against preemption of state law); see also Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 780–81 (2000) (stating that there is a presumption against subjecting states to damages liability); Gregory, 521 U.S. at 461 (stating that there is a presumption against regulating state governmental functions). Other clear statement rules do require at least some doubt as to whether Congress has exceeded its authority. See Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 174 (2001) (refusing to defer to an administrative agency's interpretation of a statute that would push the bounds of Congress's Commerce Clause authority); Jones v. United States, 529 U.S. 848, 857–58 (2000); United States v. Bass, 404 U.S. 336, 349 (1971).
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To justify such doctrines, we might look to Justice Blackmun's opinion in \textit{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 "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."\footnote{Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 554 (1985) (emphasis added).
} Because of this procedural focus, "Any 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.'"\footnote{Id. at 554 (citing EEOC v. Wyoming, 460 U.S. 226, 236 (1983)).}

The \textit{Garcia} majority is often read as completely disavowing a judicial role in the protection of state autonomy.\footnote{See, e.g., Rubin & Feeley, supra note 16, at 403.
} And contemporary advocates of political safeguards have often moved very quickly from a rejection of substantive limits to a rejection of judicial review altogether.\footnote{See Kramer, Politics, supra note 179, at 293 (arguing that because aspects of the political process such as political parties protect state governments, a political decision on a federalism question is entitled to respect; judges should not "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 to the abdication of judicial review in federalism cases.\footnote{Saikrishna Prakash and John Yoo, for example, have attacked Brad Clark's argument that separation of powers doctrines can protect state autonomy, see Clark, Separation of Powers, supra note 172, at 1341–42, 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." Prakash & Yoo, supra note 346, at 1460.
} These scholars seem optimistic that the relatively modest substantive limits on Congress's authority imposed in decisions like \textit{Lopez} and \textit{Morrison} can be extended far enough to meaningfully protect the
states from federal encroachments.\textsuperscript{575} I find such extension unlikely for reasons I discuss in Part III.\textsuperscript{576} Both proponents and opponents of judicial review, however, have overlooked process federalism’s potential to develop meaningful limits on national power.

Whether or not Justice Blackmun intended to do so, the \textit{Garcia} opinion left the door open to a \textit{Democracy and Distrust}\textsuperscript{577} 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.\textsuperscript{578} John Hart Ely’s work on process failures surely demonstrates how far such review can reach in the context of individual rights, and Andrejz Rapaczynski traced the outlines of such a theory in the federalism area shortly after \textit{Garcia} came down.\textsuperscript{579} Some of the promise of such jurisprudence has been realized in the anticommandeering doctrine, which may be justified on process grounds,\textsuperscript{580} as well as in the various clear statement rules that guard against interpretations of federal statutes that encroach on state sovereignty.\textsuperscript{581} These sorts of doctrines make clear that \textit{Garcia} need not be read as the “Second Death of Federalism.”\textsuperscript{582}

\textsuperscript{575} See Dinh, supra note 165, at 2117 (“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 III, the “presumption against preemption” is probably the most important of the process-oriented doctrines. See infra subpart III(B).

\textsuperscript{576} See infra section III(C)(1).

\textsuperscript{577} See, of course, Ely, supra note 66; see also Young, \textit{Two Cheers}, supra note 8, at 1364–66 (applying Professor Ely’s theory to federalism doctrine).

\textsuperscript{578} See, e.g., Louis Michael Seidman, \textit{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”).

\textsuperscript{579} See Rapaczynski, supra note 277, at 364–65; see also Stephen Gardbaum, \textit{Rethinking Constitutional Federalism}, 74 TEXAS L. REV. 795, 824–26 (1996) [hereinafter Gardbaum, \textit{Federalism}] (proposing that 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); Jackson, \textit{Printz and Principle}, supra note 1, at 2245 (same).

\textsuperscript{580} See Printz \textit{v. United States}, 521 U.S. 898, 927–28 (1997) (rejecting Congress’s proposed distinction between policymaking and implementation in the anticommandeering context as an “imprecise barrier against federal intrusion upon state authority [that] is not likely to be an effective one”); New York \textit{v. United States}, 505 U.S. 144, 182–83 (1992) (arguing that the constitutional authority of Congress cannot be expanded by the consent of the states and explaining the Court’s role in policing the Constitution’s intergovernmental allocation of power); see also Young, \textit{Two Cheers}, supra note 8, at 1360–61 (discussing the anticommandeering doctrine as a means of requiring Congress to internalize the financial and political costs of its programs); D. Bruce La Pierre, \textit{The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation}, 60 WASH. U. L.Q. 779, 989 (1982) [hereinafter La Pierre, \textit{Political Safeguards}].

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. \(^{583}\) A federalism-centered *Democracy and Distrust* would thus emphasize a judicial role in enforcing the procedural requirements for federal action; as Brad Clark’s work on the “procedural” safeguards of federalism suggests, courts may serve state autonomy best by enforcing separation of powers requirements built into the federal lawmakers process. \(^{584}\) Process federalism might also follow Ely by ensuring that dysfunctions in the process—such as horizontal or vertical aggrandizement—do not effectively exclude the institutional interests of state governments. \(^{585}\) 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 in Part III, courts can and should enhance the operation of political and procedural safeguards in a number of ways.

The Rehnquist Court’s efforts on the process federalism front have taken three primary forms. I have already mentioned the anticommandeering doctrine, which aims to make Congress internalize the political and financial costs of its policies. \(^{586}\) The Court has also 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

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582. See William W. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709, 1733 (1985) (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*, 505 U.S. at 189 (joining Justice White’s dissent rejecting the anticommandeering rule). The point is simply that *Garcia*—perhaps inadvertently—pointed the way toward a more rigorous doctrine of federalism. When life gives you lemons . . . .

583. See, e.g., ELY, supra note 66, 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 accessories to majority tyranny, our elected representatives in fact are not representing the interests of those whom the system presupposes they are”).


585. 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).

586. See also infra section II(A)(2).
state government,\textsuperscript{587} subject the states to liability,\textsuperscript{588} impose conditions on the receipt of federal funds,\textsuperscript{589} or press the limits of its Commerce Clause authority.\textsuperscript{590} Finally, the Court has at least arguably imposed a strong deliberation requirement, enforced through review of the legislative record, when Congress acts in certain ways.\textsuperscript{591} 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 findings made by Congress in support of such legislation.\textsuperscript{592}

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 Congress’s failure to supply adequate legislative findings generally results in invalidation of the statute in question. Although Congress may disagree with the Court’s interpretation of a statute in clear statement cases and, in some cases, act to overrule the Court’s decision,\textsuperscript{593} these confrontations seem less, well, \textit{confrontational} than cases in which 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.\textsuperscript{594}

Moreover, the Court has thus far applied deliberation rules primarily when Congress acts under Section 5 of the Fourteenth Amendment.\textsuperscript{595} 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 5 is generally redundant with the Commerce Clause; in most instances, the only reason that Congress wishes to use the Section 5 power instead of the commerce power is that the former

\begin{itemize}
\item \textsuperscript{589} See Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 24 (1981).
\item \textsuperscript{591} But see Young, \textit{Sky Falling}, supra note 108, at 1577–80 (suggesting that the Court’s review of the legislative record actually serves a different and narrower function).
\item \textsuperscript{592} See, e.g., Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 368 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91 (2000). \textit{But see Young, Sky Falling, supra note 108, at 1580 (arguing that neither the state of the legislative record nor the quality of Congress’s deliberations is actually critical in the Court’s Section 5 cases).}
\item \textsuperscript{593} See William N. Eskridge, Jr., \textit{Overruling Statutory Precedents}, 76 GEO. L.J. 1361, 1402–08 (1988).
\item \textsuperscript{594} These might include attacks on the Court’s operational funding or its jurisdiction, for example. \textit{See supra text accompanying notes 454–56.}
\item \textsuperscript{595} Compare, e.g., Garrett, 531 U.S. at 368–74, and Kimel, 528 U.S. at 88–91, with United States v. Morrison, 529 U.S. 598, 614 (2000) (downplaying the importance of congressional findings in Commerce Clause cases).
\end{itemize}
will allow it to abrogate the states’ sovereign immunity from private damages suits. A further problem is that the deliberation arguably required by cases like Kimel and Garrett may impose unrealistic requirements on Congress. See generally 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 108, at 1579–81, but in that instance we would be treating the Court’s limits on Section 5 as substantive rather than process-based rules.

598. KOMESAR, supra note 314, at 71.

599. See id. (“The more complex the social issue the more difficult or expensive it is to recognize one’s position.”).

600. See Brudney, supra note 84, at 26–32 (observing that each drafting requirement may impede or even block legislation).
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 multisided than is frequently supposed.

III. The Strong Autonomy Model

The discussion in Part II suggests that the Four’s weak autonomy model
of federalism doctrine has much to recommend it: It properly places
autonomy ahead of sovereignty, and it is more appreciative of the virtues of
process and soft rules than the Five’s strong sovereignty model. But I doubt
that weak autonomy 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—namely, that it may behave as if no such boundaries exist. And it
likely underestimates the extent to which problems with the process of state
representation in Congress may require stronger medicine than clear
statement rules. In this Part, 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.”

Subpart A fleshes out this strong autonomy model of federalism
document in very general terms. At the end of a long article about federalism
document, however, one might reasonably expect to find some doctrines. I do
not mean to shirk that obligation entirely here, and the remainder of this Part
identifies some directions in which my strong autonomy approach suggests
that federalism doctrine should go. Subpart B insists on the centrality of
preemption doctrine; such cases, more than any other category, concern the
survival of state regulatory autonomy in the face of federal power. Subpart C
suggests approaches, heavy on process and soft rules, to Congress’s
enumerated powers under the Commerce, Spending, and Treaty Clauses, as
well as Section 5 of the Fourteenth Amendment. Finally, subpart D argues
that the Court’s relentless drive to expand state sovereign immunity is
misdirected.

I want to stress that this Article seeks to analyze the Rehnquist Court’s
federalism doctrine and point some directions that future courts ought to
take. The task of doctrinal development itself, however, is different and far
more particularistic. The present project does not, for example, seek to work
out the best approach to preemption doctrine at the level of specificity that
would be required to decide actual cases. That is a task for future work.
This Part seeks only to identify some particular doctrinal directions and
priorities as a means of lending concreteness to the arguments that have gone
before.
A. Strong Autonomy

A strong autonomy approach to federalism doctrine makes sense in terms both of the underlying values that federalism is generally thought to advance and of the comparative institutional characteristics of the courts and political branches. It begins with the Founders’ notion that limits on national authority should be primarily self-enforcing, but recognizes that the political and procedural safeguards of federalism have eroded over time. Courts have a role in compensating for that erosion, but they have generally been better at intervening on process grounds than at defining substantive limits on Congress’s powers. Moreover, a system of dialogue inducing soft limits on national authority can both minimize interbranch confrontations and capitalize on the different institutional strengths enjoyed by each set of actors. Finally, the courts should not eschew hard or substantive rules entirely. Hard rules may be effective in some instances, especially if they are used to enforce the rules of the game. And process doctrine cannot be entirely indifferent to substance, since the ability of the states to protect themselves politically by appealing to popular loyalty ultimately depends on their retention of significant regulatory responsibilities.

The approach I propose differs from the Four’s 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. Second, the strong autonomy model contemplates that process federalism may be enforced through hard rules as well as soft ones. Finally, the approach I propose recognizes a link between process and substance in cases implicating state autonomy.

1. Expanding the Use of Soft Rules.—While the dissenters have been relatively strong supporters of the presumption against preemption, they have been more reluctant to accept a number of other clear statement rules. At least some of the Four have balked, for example, at requiring Congress to speak clearly if it wishes to regulate the core functions of state governments, to subject the states to statutory liability, to override state immunities (in circumstances in which it enjoys the power to do so at all), or to delegate its authority to regulate at the outer limits of the Commerce Clause to an administrative agency. Strong autonomy, by contrast, wholeheartedly embraces these sorts of rules.

The primary criticism of these and other clear statement rules is that they “amount to a ‘backdoor’ version of the constitutional activism that most Justices on the current Court have publicly denounced.” The debate

605. Eskridge & Fricke, supra note 78. at 598.
between the majority and dissenting opinions in the *Solid Waste* case provides an instructive example. A consortium of municipalities challenged the Army Corps of Engineers’ denial of a permit to operate a solid waste disposal facility, arguing that the Corps’ rule—which prohibited development of land serving as a habitat for migratory birds—exceeded Congress’s power under the Commerce Clause. A majority of the Court stopped short of deciding that question and instead construed the underlying provisions of the Clean Water Act as not authorizing the Corps’ regulation.

In response to the Government’s argument that the statute was ambiguous and the Court should therefore have deferred to the Corps’ interpretation, Chief Justice Rehnquist invoked a clear statement rule: “Where an administrative interpretation of a statute invokes the outer limits of Congress’ power, we expect a clear indication that Congress intended that result.”

This principle, he contended, was grounded in the longstanding canon of constitutional doubt, which holds that “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”

The dissenters thought the majority’s statutory interpretation was incorrect, contending that the statute did in fact authorize the Corps to protect migratory birds even on nonnavigable waters. They also thought that there was no constitutional problem to avoid. Justice Stevens argued that the activity in question—“the discharge of fill material into the Nation’s waters”—met the test for regulable activity under *Lopez* and *Morrison* on the ground that it “is almost always undertaken for economic reasons.”

One can best test the effect and legitimacy of the majority’s clear statement rule if one assumes (quite plausibly, in my view) that the dissenters were right on both these points—that is, that Congress *did* most likely intend to delegate power to protect migratory birds on nonnavigable waters to the Corps and that such protection would have been found constitutional if the Court had analyzed it under *Lopez* and *Morrison*.

Clear statement rules only matter if they cause the Court to adopt a statutory construction that it would not otherwise have adopted. Moreover, the canon of constitutional doubt differs from related principles, like the saving construction rule, in that it counsels a court to avoid not only

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607. *Id.* at 172.
608. *Id.*
those statutory interpretations that would be actually unconstitutional, but also those that are merely doubtful (and hence that might be upheld if the constitutional question were actually addressed). Richard Posner and Frederick Schauer have thus criticized this sort of avoidance rule on the ground that it extends the constraining effect of constitutional provisions beyond the scope they would have if the Court were to decide the relevant constitutional question. If we assume that the dissenters were right in *Solid Waste*, then the majority rejected the most plausible interpretation of what Congress intended, in the interest of avoiding a constitutional doubt that most likely would have been dispelled had the Court actually decided whether a federal rule protecting migratory birds on nonnavigable waters fell within Congress’s commerce power.

Is the majority’s clear statement rule—that Congress must speak clearly if it wishes to delegate its legislative authority in the doubtful outer reaches of the Commerce Clause—therefore illegitimate? I think the proper answer is “no.” I have argued elsewhere that we often do—and should—enforce constitutional principles through “resistance norms,” that is, soft limits on governmental action that are more or less yielding, depending on the circumstances. This class of principles includes not only normative canons of statutory construction but also balancing tests and—as an element of institutional design—supermajority requirements. A balancing test, for instance, forbids a governmental action that intrudes on a constitutional value—free speech, for example—absent a sufficiently important state interest; likewise, a normative canon of construction forbids the government from doing something constitutionally problematic—such as regulating the core functions of state government—unless it meets special drafting requirements of particular clarity. Both sorts of rules can be contrasted with “invalidation norms” that forbid certain types of government action regardless of the circumstances or the government’s clarity of purpose.

612. See Vermeule, *Saving Constructions*, supra note 609, at 1960 (noting that “[t]he case law is rife with constitutional questions that the Court has avoided by construction, only later to hold, when forced to confront the question under a different statute, that the constitutional claim should not prevail”).

613. Posner, supra note 74, at 816 (arguing that the avoidance canon creates a “judge-made constitutional ‘penumbra’ that has much the same prohibitory effect as the ... Constitution itself”); Schauer, *Ashwander Revisited*, supra note 74, at 94 (arguing that the judicial use of the avoidance principle to interpret a statute is “nothing other than using constitutional norms to supplant what would otherwise be the outcome ... [and] is an exercise of constitutional decision making); see also Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 564 (1990) (describing a similar effect in immigration law, where statutory interpretation frequently is driven by “phantom constitutional norms” that would not hold if courts were to decide the cases on their constitutional merits).


615. For example, Congress may not create a legislative veto or commandeer state officers under any circumstances, no matter how clearly it wants to do so. See *Printz v. United States*, 521 U.S. 898, 935 (1997); *INS v. Chadha*, 462 U.S. 919, 959 (1983).
Invalidation norms work best when a court is confident of the right place to draw the line between valid and invalid government actions. But the limits of valid federal action vis-à-vis the states have always been fuzzy. For this reason, federalism-based limits on national power have often been underenforced.\textsuperscript{616} Softer resistance norms tend to work better under these circumstances because they ease the pressure on the court's line drawing decision: If the line drawn is provisional, then the costs of drawing it in the wrong place—and the pressure not to draw it at all—are accordingly reduced.\textsuperscript{617} The clear statement device is thus especially appropriate in the federalism context, where the Court confronts a long and discouraging history of failures to formulate principled and determinate boundaries for federal authority.

Resistance norms likewise function well in areas in which the relevant constitutional principles are designed primarily to be self-enforcing, through the political processes at work in the coordinate branches of government. Certain kinds of soft limits—particularly clear statement canons of statutory construction—function effectively by increasing the political costs of particular kinds of government action. Requiring Congress to state its purpose with special clarity both imposes an additional drafting hurdle and may serve to mobilize opposition by highlighting the proposed intrusion on state authority.\textsuperscript{618} Clear statement rules in this sense embody both the soft and process-based dimensions of federalism doctrines discussed in Part II.

It thus seems best to justify the Court's state-protective clear statement canons not through fictional attributions of congressional intent—that is, by assuming that Congress generally intends to protect state autonomy—but as doctrinal innovations by courts designed to protect state autonomy.\textsuperscript{619} We should also forthrightly acknowledge that these clear-statement doctrines are constitutional in nature; as Larry Sager has demonstrated, the fact that a norm is "under-enforced"—that is, enforced through something short of a strong invalidation norm—does not mean the norm lacks grounding in the Constitution.\textsuperscript{620} And I have argued elsewhere that these sorts of innovations ought not to be dismissed simply because they cannot be grounded directly in

\textsuperscript{616} See Eskridge & Frickey, supra note 78, at 630–31 (agreeing that federalism is underenforced). On underenforcement generally, see Sager, supra note 484.

\textsuperscript{617} See Young, Constitutional Avoidance, supra note 74, at 1603–07.

\textsuperscript{618} See Young, Two Cheers, supra note 8, at 1394 (noting that modifying federal legislation with clear statements of congressional intent "increases the opportunities for the political safeguards of federalism to operate").


\textsuperscript{620} Sager, supra note 484, at 1221 (arguing that "constitutional norms which are underenforced by the federal judiciary should be understood to be legally valid to their full conceptual limits").
text or history. Rather, they should be assessed by how well they implement the commitments to state autonomy that are embodied in the Constitution. On those criteria, the strong autonomy model would embrace a broad range of “soft” rules because of their attention to autonomy values and their responsiveness to the institutional limitations courts confront in enforcing federalism.

2. *Hard Rules for Process Federalism.*—While the strong autonomy model would frequently employ soft rules, it would not do so exclusively. Instead, my proposal suggests that sometimes courts should employ categorical restrictions on government practices that undermine the “political safeguards of federalism.” 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 anticommandeering doctrine is a case in point. It is the hardest of rules, apparently recognizing no exceptions for even the clearest of statements or the weightiest of federal interests. But the doctrine’s most persuasive justification arises not from the historical arguments often advanced in its support, but rather from its functional relation to the political safeguards of federalism.

Forbidding commandeering requires the national government to internalize two kinds of costs. The first are the political costs of unpopular policies. As Justice O’Connor pointed out in *New York v. United States*, implementation of federal law by state officials blurs lines of political accountability: “[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.” This argument recognizes that the most important political opposition to any given federal policy that encroaches on state autonomy may come, not from principled defenders of federalism, but from people who are simply against

621. See Young, *Making Federalism Doctrine, supra* note 32 (manuscript at 32–33). For an example of an argument rejecting a clear statement rule for lack of textual and historical support, see Nelson, *Preemption, supra* note 233, at 232.


623. See Printz v. United States, 521 U.S. 898, 932 (1997) (“It is the very principle of separate state sovereignty that [commandeering] offends, and no comparative assessment of the various interests can overcome that fundamental defect.”). *But cf.* Althouse, *supra* note 175, at 1266–68 (speculating whether the need to enlist state and local officials in the War on Terror may not force the Court to recognize an exception for national security interests).

624. I do not mean to suggest that the historical grounds of the anticommandeering doctrine are unpersuasive. I have generally found them more compelling than not. But the question is vigorously controverted, and I want to focus on functional justifications here.

the particular federal policy at issue. In Printz, for example, opposition to the Brady Act originated not so much from those who could not bear to see their state officials implementing federal law but from political opponents of gun control. If Congress can divert political disapproval onto state officials, it may be encouraged to take national action more often than it would otherwise be inclined to do so.

The second set of costs are simply the administrative costs of enforcing any given federal program. To the extent that any federal program is costly to implement, those costs will always be a disincentive to federal action. These sorts of costs can, moreover, easily translate into political opposition. The other likely opponents of any given federal initiative, after all, are those who would rather see the money spent on something else. If Congress can shift implementation costs onto the states, however, it will likely feel far freer to act nationally and may face considerably less political opposition to any particular national program.

Congress's ability to shift political and bureaucratic costs onto the states may thus be regarded as a distortion in the ordinary political process that we generally count on to protect state autonomy. From this perspective, the anticommandeering doctrine functions as a Democracy and Distrust sort of rule—that is, a judicial intervention that does not substitute for political mechanisms but rather seeks to perfect the operation of those mechanisms. One can imagine others. In Reno v. Condon, for example, the Court reserved the question whether "Congress may only regulate the States by means of generally applicable laws, or laws that apply to individuals as well as States." The argument for such a rule would be that, where Congress regulates generally, the presence of private parties burdened by the regulation serves as a political check; if Congress may single out the states for adverse treatment, on the other hand, the political check on national action is weaker. I do not mean to make the case for such a rule here; my point is simply to illustrate the sort of hard process rules that a strong autonomy Court might develop.

The weak autonomy Justices, however, have made relatively clear that they are unwilling to go beyond soft presumptions in imposing limits on

626. See Althouse, supra note 175 (manuscript at 20–22).
627. See La Pierre, Political Safeguards, supra note 580, at 989 (emphasizing "the political check inherent in the requirement to provide financial and administrative resources to enforce national policies").
628. See supra note 66 and accompanying text.
629. 528 U.S. 141, 151 (2000). The Court found that the law in question, the Driver's Privacy Protection Act, did apply to private actors as well as to states. See id.
630. See La Pierre, Political Safeguards, supra note 580, at 1009–10 (arguing that the "political safeguards of federalism" operate less effectively when states are singled out as the objects of federal regulation).
federal power. It seems likely that this reluctance stems from an intuition that clear statement rules are not really constitutional rules at all; rather, they are just rules of statutory construction. I have already argued that this view is a mistake and that we should think of such rules as derived from the constitutional structure itself. 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.

3. Process Federalism’s Substantive Predicate.—Although process federalism can take us a long way, I doubt that a successful federalism jurisprudence can be wholly indifferent to substance. As I have already discussed, James Madison’s original political safeguards argument predicted that the national political process would operate to protect states not simply because they were represented in Congress, but rather because both state and national politicians remained accountable to the sovereign People. The central dynamic was thus a vertical competition between the national and state governments for the People’s loyalty. So long as the states could compete effectively in this regard, they would be able to thwart nationalist encroachments on their authority simply by appealing for popular support.

The critical aspect of Madison’s argument for present purposes is that each level of government’s ability to compete for popular loyalty depends on having meaningful governmental responsibilities. In this vein, Todd Pettys has argued that “if the state and federal governments are to compete with one another in the manner that the Framers envisioned, both sovereigns must be assured of opportunities to prove their competence to the American people, and any interpretation of Congress’s enumerated powers that threatens to rob the states of all such opportunities must be rejected.” Process federalism thus cannot be entirely indifferent to substance; national actions that supplant states from their most meaningful substantive functions would undermine the viability of process safeguards.

For obvious reasons, the substantive constraint here is hardly rigorous. Despite the massive growth of the national state in the last century, we

631. See, e.g., Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 183–84 (1996) (Souter, J., dissenting) (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).

632. See supra section I(B)(3); see also Young, Constitutional Avoidance, supra note 74, at 1609–13 (making a similar argument about the clear statement requirement for incursions on federal court jurisdiction).

633. See THE FEDERALIST NO. 45, supra note 334, at 288–94 (Alexander Hamilton); THE FEDERALIST NO. 46, supra note 284, at 294–300 (Alexander Hamilton). For a thoughtful contemporary development of this argument, see Pettys, supra note 40; see also Young, Two Cheers, supra note 8, at 356–57 (discussing the competition for popular loyalty).

634. Pettys, supra note 40, at 362.
remain a long way from the elimination of all meaningful state functions. Madison’s account does suggest that the Court did the right thing in *Lopez* and *Morrison*: faced with the Government’s interpretation of the Commerce Clause that would have eliminated *any* enforceable limits on congressional authority, the Court opted instead for a minimal but enforceable limit. Although the lines drawn in those cases do not guarantee the states an exclusive sphere of regulatory authority defined by particular subject matters, the limits imposed should constrain the scope of federal intrusion to some degree.

Even minimal substantive limits, moreover, may have salutary effects on political outcomes. I have suggested elsewhere that negotiations about the allocation of authority between state and federal officials may reach better outcomes if federal officials lack *carte blanche* to supplant state regulation. More important, signals from the Court may encourage Congress to restrain itself. As my colleague Doug Laycock has pointed out, “The 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.” The fundamental point is that process federalism is unlikely to work without *some* substantive backstop. As Vicki Jackson has observed, “To make political safeguards of federalism work, some sense of enforceable lines must linger.”

B. The Centrality of Preemption

The first priority of federalism doctrine ought to be limiting the preemptive impact of federal law on state regulation. Stressing preemption shifts the focus firmly back onto what state governments *do*. As Candice Hoke has observed, preemption “is inherently ‘jurispatic’; 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

635. A similar point can, of course, be made in response to hysterical predictions that the Court’s Federalist Revival is on the brink of wiping out *national* authority. *See, e.g.*, sources cited infra notes 791–96.

636. *See Young, Dual Federalism, supra* note 503, at 163–67 (elaborating on this point).

637. *See id.* at 166.

638. Posting of Douglas Laycock, posting to CONLAWPROF@listserv.ucla.edu (Aug. 1, 2000) (quoted with permission); *see also* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 191–95 (1982) (discussing the “cueing function” of the *National League of Cities* doctrine); Bednar & Eskridge, *supra* note 40, at 1484 (arguing that *Lopez* may serve the same function).


and local governments, requiring that citizen participation and deliberation with respect to those issues take place at the national level.

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. Calvin Massey has observed:

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 . . . the very real values . . . inherent in federalism. 641

Likewise, Justice Breyer has recognized that notwithstanding their low profile, preemption cases present “the true test of federalist principle.” 642 Any set of federalism doctrines focused on autonomy must make preemption its primary concern.

Institutional concerns about the scope and method of judicial review likewise support a focus on preemption. The primary argument, briefly stated, is threefold: First, the courts have been relatively unsuccessful in drawing hard, substantive lines that define the scope of national legislative power, and attempts to do so have resulted in damaging confrontations with Congress and the President. Preemption doctrine avoids this pitfall because it 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. 643 The doctrinal rules in this area have thus never attempted to define the substantive scope of Congress’s power; rather, preemption doctrine has traditionally focused on interpretive rules that tend to moderate the impact of what Congress has enacted on state authority. 644 To the extent that virtually all regulatory authority is concurrent now—Lopez and Morrison notwithstanding—then preemption ought to emerge as the central preoccupation of constitutional federalism.

Second, limiting preemption seeks to address certain process defects that may render the national political process less protective of state autonomy. Professor Hoke has argued 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. 645 More fundamentally, I have already emphasized the extent

641. Massey, supra note 40, at 508.
643. See, e.g., Susan Raeker-Jordan, The Pre-emption Presumption that Never Was: Pre-Emtion Doctrine Swallows the Rule, 40 ARIZ. L. REV. 1379, 1386 (1998) (“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.”).
644. Indeed, as Stephen Gardbaum has demonstrated, “soft” rules limiting preemption have historically substituted for substantive constraints on Congress’s legislative power. See Gardbaum, Preemption, supra note 194, at 805–07.
645. See, e.g., Hoke, supra note 640, at 691–93.
to which widespread preemption threatens the state autonomy necessary to maintain a viable system of political checks on central power.\textsuperscript{646} Limits on preemption thus address problems that undermine the self-enforcing character of the system.

Third, the central aspects of preemption doctrine rely on process \textit{mechanisms}—in this case, soft rules of statutory construction—to do their work. The presumption against preemption tends to enhance the political safeguards of federalism by requiring clear notice to legislators when state authority is at stake, thereby reducing the information costs associated with mobilizing against federal legislation. The presumption likewise reinforces the procedural safeguards of federalism by raising the costs of federal lawmaking, both in terms of drafting costs and, in some cases, by requiring a judicial remand to Congress in order to clarify the preemptive scope of federal statutes.

One particular prescription suggested by these institutional considerations involves the subspecies of “dormant” preemption. If we are attempting to enhance the effectiveness of political and inertial impediments to federal lawmaking, then dormant rules—which preempt state law even in the absence of \textit{any} official action by Congress or the Executive—ought to be anathema. It may be that the Dormant Commerce Clause doctrine is so entrenched, after almost two centuries, that uprooting it would be prohibitively disruptive. But there is still room to limit the expansion of that doctrine beyond the bounds of stare decisis and, even more importantly, to cut off the development of parallel doctrines in the field of foreign affairs.\textsuperscript{647}

Moving beyond dormant preemption raises more complex issues. It is relatively simple to say “Go forth and enforce the presumption against preemption” as a canon of statutory construction. And, in fact, if the courts took that canon more seriously then state law would undoubtedly survive in a number of important cases in which the preemptive intent of Congress is, well, \textit{clearly} unclear.\textsuperscript{648} But the heart of the preemption problem involves issues of great conceptual and practical difficulty. Many, if not most, preemption cases are not about the interpretation of ambiguous statutory text, but rather about how to identify the underlying purposes of federal statutes and to assess the acceptable degree of conflict between those purposes and state regulatory measures. Those questions are hardly straightforward. Likewise, many preemption cases involve difficult issues about the role of administrative agencies and the appropriate degree of deference that they

\textsuperscript{646} See supra section II(B)(3).

\textsuperscript{647} See, e.g., Zschernig v. Miller, 389 U.S. 429, 432 (1968) (invalidating an Oregon statute that denied inheritance to East German heirs because it was “an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress”). \textit{But see} Jack J. Goldsmith, Federal Courts, Foreign Affairs, and Federalism, 83 Va. L. Rev. 1617, 1622–24 (1997) (criticizing the Zschernig doctrine).

\textsuperscript{648} See Young, Two Cheers, supra note 8, at 1389.
should receive from courts. Simple resolutions, such as "only Congress ought to be able to preempt state law," tend to break down when we try to apply them. In any event, these and other questions require far more extended treatment than I can give them here. The important point for present purposes is simply that these are the important questions in federalism doctrine.

The failure of preemption to emerge as a central issue of federalism poses something of a puzzle. To some extent, preemption and other autonomy issues have suffered due to the majority's preoccupation with sovereignty values. And 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, i.e., by applying preemption 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." It is thus relatively unsurprising, for example, that constitutional law scholars have been less than eager to learn the details of federal statutory schemes, like ERISA or the Medical Devices Act, that regularly give rise to preemption litigation. 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.

I have already acknowledged that the Rehnquist Court's voting pattern in preemption cases may reflect political views on the optimal extent of government regulation. That suggests, however, a side benefit of moving preemption to the center of our federalism debates—to wit, the benefit of throwing a wrench into traditional assumptions about the political valence of federalism. In the past half-century, American liberals (especially in academia) have cast their lots with the national government and viewed the states with profound suspicion. Most preemption cases, however, involve claims by business entities that rigorous regulation at the state level must give way to comparatively less rigorous regulation at the national level. Examples are legion, ranging from oil tanker safety rules in Washington and air pollution standards in California, to tort standards in Tennessee and


650. See Young, Preemption, supra note 131.


652. See, e.g., Kremer, supra note 259, at 66–67 (describing the author's own mistrust of states-rights federalism during the 1960s and 1970s, during his "formative years as a lawyer and legal scholar").

653. See United States v. Locke, 529 U.S. 89, 94 (2000) (holding that certain Washington state laws regulating oil tankers were preempted by the less demanding federal statutory scheme
restrictions on tobacco ads in Massachusetts. In each situation, the Court held a more demanding state standard preempted by federal statutes and regulations. And in each, the politically "liberal" side was the side of the State.

I do not claim that state autonomy in general or even preemption limits in particular will always promote liberal politics. Many political liberals are beginning to recognize, however, that they will not always control the national government, and that many states may be receptive to their views. The emerging debate over gay marriage, for example, finds a conservative Republican president advocating a nationwide ban on the practice, in the form of a federal constitutional amendment, while the more liberal Democratic candidates argue that the issue should be left to the states. In any event, our debates about federalism doctrine will be healthier if they can be decoupled from entrenched assumptions about their political implications. Preemption doctrine is a helpful place to start in that sense, as in many others.

C. Congress’s Enumerated Powers

Preemption doctrine has the enormous advantage of operating within the scope of Congress’s enumerated powers. Although those powers have become broad with the development of an integrated national market and the overwhelming financial predominance of the national fisc, marking the boundaries of Congress’s enumerated powers retains both a symbolic and a practical importance. This subpart considers how the strong autonomy model might deal with four of those powers: Congress’s power over interstate commerce, spending, enforcement of the Reconstruction Amendments, and treaties with foreign nations.


655. See Chemerinsky, Values, supra note 299, at 501 (stating that in recent years “prominent liberals . . . have argued that there should be more use of state constitutions to protect individual liberties”); Young, Dark Side, supra note 13, at 1278. For an earlier example, focused on the court system, see William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977) (“The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.”).

the Federalist Revival. *Lopez* was the most dramatic of 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.  

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. Dan Meltzer, for example, has described *Lopez* as simply a "warning shot across the bow," and we have little concrete evidence that the Court is prepared to go further.

The structure of the Court's current Commerce Clause doctrine bears this conclusion out. The Court has conceded that the national economy has become integrated to the extent that there is no meaningful distinction

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657. The Commerce Clause cases are also the easiest to teach in a first-year constitutional law course, 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. I once tried to teach a reasonably detailed unit on the Eleventh Amendment to first years in Con Law I. Some of my students are probably still in therapy.

658. 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 370–71.* They updated their research in 2003, almost three years after the Court's *Morrison* decision confirming the new course charted in *Lopez.* See Brannon P. Denning & Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts,* 55 ARK. L. REV. 1253 (2003).

Denning and Reynolds 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, Denning and Reynolds 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.* Since Denning and Reynolds wrote, the Ninth Circuit does seem to have discovered the Commerce Clause. See Oregon v. Ashcroft, 368 F.3d 1118 (9th Cir. 2004); Raich v. Ashcroft, 352 F.3d 1222 (9th Cir. 2003); United States v. McCoy, 323 F.3d 1114 (9th Cir. 2003).

659. See United States v. Morrison, 529 U.S. 598, 615–18 (2000); United States v. Lopez, 514 U.S. 549, 567 (1995) ("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.").

between intra- and inter-state commerce; rather, there is just "commerce."\(^{661}\) And 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."\(^{662}\) Now all of these things are "commerce"; that term, the Court has made clear, comprehends all "economic activity."\(^{663}\) Nonetheless, it is important to maintain some enforceable limit on the Commerce Clause. Precisely because these cases are so high profile, they play an important symbolic role. As I have already suggested, they may serve an important process function of reminding Congress to consider the limits of its powers when it acts. At the same time, limits on the Commerce Clause are closely linked to the states' autonomy; those limits, after all, preserve a zone of regulatory authority that Congress may not preempt. 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. 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.\(^{664}\)

As Justice Breyer explained in *Morrison*, efforts to develop meaningful limits under the Commerce Clause have often founndered on "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."\(^{665}\) This problem has dominated the history of federalism jurisprudence, and I have already discussed the cautionary nature of the Court's experience in this area. The difficulty of formulating workable Commerce Clause doctrine suggests that the *Lopez* and *Morrison* line of cases will never go that far in limiting

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663. *See* *Morrison*, 529 U.S. at 611 ("[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.").


Congress's authority, but the importance of that doctrine also cautions against judicial abdication.

At bottom, the task of interpreting the Commerce Clause is inescapably substantive: The judiciary must give content to Chief Justice Marshall's admonition that "[t]he enumeration [of power over commerce among the several states] presupposes something not enumerated." The Rehnquist Court majority has sought to draw a largely formal line between "commercial" and "noncommercial" activities, while conceding the existence of an integrated national market that robs the additional limiting language—"among the several states"—of virtually any operative force. That strategy, in my view, has rendered current doctrine at least somewhat more determinate than the old jurisprudence of "direct" and "indirect" effects, which was predicated on drawing distinctions between economic relationships that were in fact part of a demonstrably integrated economy. I am not aware of anyone who has seriously contended that bringing a gun to school or raping a woman is itself a "commercial" activity.

The primary objection is instead that the distinction is arbitrary, since both commercial and noncommercial activities affect the interstate economy that is the Commerce Clause's core concern. There is little reason to believe that the commercial/noncommercial line maps well onto the values that lead us to limit national power in the first place: Why, for instance, would we think that state-by-state policy diversity or public political participation were any more important with respect to regulation of noncommercial activities? But these objections are inherent in the nature of formal rules; as I have already discussed, such rules are almost always over- and underinclusive with respect to their underlying values. Less formal tests that turn directly on those values seem likely to give up far too much in terms of determinacy. As a result, it will be hard for such tests to satisfy the Frankfurter Constraint. At the same time, this inability of a formalist jurisprudence to embody relevant values more directly provides reason to doubt suggestions by some scholars that Commerce Clause doctrine alone can adequately protect state autonomy.

Even the Court's formal test, moreover, is "not easy to apply." In my view, the principal difficulty lies in selecting the appropriate level of generality at which to evaluate the regulated activity. Consider, for example, what may be the Court's next big Commerce Clause case: *Raich v.*

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668. See, e.g., Lopez, 514 U.S. at 627–31 (Breyer, J., dissenting).
670. See, e.g., Dinh, *supra* note 165, at 2117. At the same time, I have argued that even a formal distinction between commerce and noncommerce may have a salutary impact on political negotiations about federalism. See Young, *Dual Federalism,* supra note 503, at 163–66.
which involves the constitutionality under the Commerce Clause of the federal Controlled Substances Act, as applied to the use of home-grown medical marijuana. A California statute exempts possession of marijuana from the state drug laws when the marijuana is for medical use on the advice of a physician. Most observers would probably agree that consumption of marijuana in general is a commercial activity; most marijuana, after all, is consumed for recreational purposes as part of an (unfortunately) thriving interstate market in illegal drugs. That is the level of generality at which the federal law regulates marijuana, and the lower courts have repeatedly upheld the Controlled Substances Act as applied to relatively minor individual instances of marijuana possession under the aggregation principle of *Wickard v. Filburn*. It is far less clear, however, that the medicinal use of marijuana that figures in *Raich* is commercial activity. The California statute makes no exemption to the distribution laws, which means that commercial transactions in marijuana remain prohibited. The state-law safe harbor thus shields only a subset of marijuana use that is itself just as noncommercial as the gun possession in *Lopez*. The question, obviously, is whether the Controlled Substances Act must be defended as regulating a "commercial act" at this narrower level of generality. One fairly straightforward answer would be to always treat Commerce Clause cases as as-applied challenges, rather than facial ones, so that the question is simply whether the regulated activity in the case before the court—in *Raich*, the medical use of home-grown marijuana—is "commercial" in character. That approach would

672. 352 F.3d 1222 (9th Cir. 2003), cert. granted, 124 S. Ct. 2909 (2004). In the interest of full disclosure, I note that I have filed an amicus curiae brief in *Raich* on behalf of several legal academics in support of the medical marijuana users. See Brief of Constitutional Law Scholars as Amici Curiae in No. 03-1454, *Ashcroft v. Raich*, October Term 2004. That brief fleshes out, in considerably more detail, the argument sketched here.


675. 317 U.S. 111, 128–29 (1942) (holding that the commerce power reached one farmer growing wheat for on-farm consumption, on the ground that similar activities across the country, considered in the aggregate, substantially affect interstate commerce). For examples of lower federal courts upholding the Controlled Substances Act on this principle, see *Proect v. United States*, 101 F.3d 11, 14 n.1 (2d Cir. 1996), and *United States v. Leshuk*, 65 F.3d 1105, 1111–12 (4th Cir. 1995).

676. Cf. *Sabri v. United States*, 124 S. Ct. 1941, 1948 (2004) (reiterating, in a Spending Clause case, the Court's general preference for as-applied challenges). *Wickard* is often read as mandating an approach more akin to facial challenges. Farmer Filburn's wheat production is generally thought to have been noncommercial in its own right; if it was reachable by Congress, that could only have been because the federal law regulated a general category of activity—wheat farming—that is generally undertaken for commercial purposes, and the idiosyncratic nature of Filburn's own production did not detract from the validity of the statute. The federal law, in other words, was constitutional on its face because most of its applications involved commercial activity. This conventional understanding of *Wickard*, however, turns out to be incorrect. As the Court itself noted, Filburn's practice was "to sell a portion of the crop; to feed part to poultry and livestock on
help preserve the law-like character of judicial action by avoiding discretionary judgments about the proper level of generality to apply.

If the courts do not adopt a bright-line as-applied rule, then they will have to choose a level of generality at which to evaluate the regulated activity in Commerce Clause cases—and that choice will frequently be open to manipulation. People opposed to California’s experiment with medical marijuana will naturally gravitate, in *Raich*, to the more general approach to the question, while California’s defenders will be drawn toward the narrower view of the issue. Any judicial effort to choose between them substantively—that is, to say that either the narrow or the general view just “fits better”—is likely to have a tough time with the Frankfurter Constraint. The level of generality problem, after all, has long bedeviled the definition of individual rights in other areas of constitutional law.  

This, in my view, is a place where the process aspect of the strong autonomy model can help resolve a question that is, in the end, basically substantive. The difficult task is to find a “neutral principle,” external to the court, for choosing a level of generality rather than relying on the Court’s own intuitions (possibly driven by policy or value) about the best substantive “fit.” One such principle would be to defer to California’s judgment, arrived at through its own democratic processes, that the medicinal subset of marijuana consumption is sufficiently distinctive to require separate regulatory treatment. California would not be allowed to carve out an exception to the federal statute simply by making a contrary policy choice, but it would be permitted to define the Court’s frame of reference in determining whether the federal act regulates a “commercial activity.”

At that point, one could run the doctrine in two different ways that reflect the choice between hard and soft rules. The “hard” route would be to simply end the analysis here: If the regulated activity, defined at the level of generality at which the state has chosen to “carve out” an exemption, is not commercial, then Congress would lack power to regulate that subset of marijuana consumption. The “soft” alternative, on the other hand, would turn back to the federal statute and ask whether Congress specifically contemplated regulating the subset of marijuana consumption that the state had

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the farm, some of which is sold; to use some in making flour for home consumption; and to keep the rest for the following seeding.” *Wickard*, 317 U.S. at 114. Almost all of these uses, in other words, involved production for market. Once Filburn’s activity is understood to have been commercial in its own right, the need to see *Wickard* as departing from the usual practice of evaluating statutes as applied to particular conduct evaporates.

sought to carve out. One might require a "clear statement" in this regard, or simply some evidence in the history or structure of the federal statute. If Congress did indicate its intent to reach the narrower subset of activity as part of its general regulatory scheme, under this "soft" approach, then the court might evaluate the federal law at the broader level of generality. In Raich, for example, it would surely be relevant that the federal drug laws generally do treat medical uses (for drugs acknowledged to have such uses) quite differently from nonmedical ones.\textsuperscript{678}

Raich also raises a second critical issue for the future development of Commerce Clause doctrine, and here, too, the strong autonomy model offers a helpful lens for addressing it. The strongest argument that Congress may reach medical uses of home-grown marijuana rests on language in Lopez suggesting that Congress may regulate noncommercial activity where doing so is "an essential part of a larger regulation of economic activity."\textsuperscript{679} The Government has argued that legalizing any subset of marijuana use will make it more difficult to enforce its general regulation of the market for recreational use of narcotics; drugs grown for medical use might be diverted to the illegal market, for example, or persons arrested for recreational use might claim to have a medical need.\textsuperscript{680} The obvious problem with these "comprehensive scheme" arguments is that they have no stopping point; similar arguments could have been made in Lopez, for example, that the Gun-Free School Zones Act was part of a comprehensive scheme of firearms regulation.\textsuperscript{681} What is needed, then, is a way to give some scope to Congress's authority to regulate things that are "necessary and proper" to carry into execution the commerce power, without eliminating the potential for meaningful limits.\textsuperscript{682}

The strong autonomy model suggests two complementary limits on "comprehensive scheme" arguments. The first focuses on process: The need to regulate noncommercial activity in order to facilitate a scheme of

\textsuperscript{678} Compare 21 U.S.C. § 812(b)(1)(B) (1995) (categorizing "schedule I" drugs as those with "no currently accepted medical use"), with id. §§ 821–829 (setting out a different set of regulatory provisions for drugs on schedules II through V, which are permitted to be dispensed and prescribed for medical use). The relevant question to the Commerce Clause, of course, is whether medical and nonmedical uses are sufficiently distinct to require different regulatory treatment—not whether marijuana does or does not have such medical uses.


\textsuperscript{681} See, e.g., Adrian Vermeule, Does Commerce Clause Review Have Perverse Effects?, 46 VILL. L. REV. 1325 (2001) (discussing the possible reach of this exception).

\textsuperscript{682} It is important to remember that the Court's recognition of national authority to regulate all commerce—interstate or intrastate—already gives important meaning to the Necessary and Proper Clause. In other words, the Court has recognized that regulating intrastate commercial transactions will almost always be necessary and proper to regulating interstate ones. See supra notes 661–63 and accompanying text (discussing the erosion of the interstate/intrastate distinction).
commercial regulation should be grounded in Congress’s actual purposes and judgments—not, as in *Raich*, in the ex post rationale of the Government’s lawyers—and those legislative judgments should be stated clearly. The second limit is unavoidably substantive: for the same reasons that the Court cannot afford to abandon the substantive principle of enumerated powers, so too there must be some substantive backstop limiting capacious exceptions like the “comprehensive scheme” principle. In some cases, courts will need to evaluate whether the Government’s necessity judgments have a reasonable basis in fact. My discussion in Part II, however, suggests that such review should be relatively deferential; the judgment that a particular measure is necessary to render a legislative scheme workable, after all, is hard to reduce to a matter of legal principle suitable for courts. The courts will be better off relying on process limits to do as much of the work as possible.

This is not the place for either a comprehensive discussion of Commerce Clause doctrine or a thorough evaluation of the *Raich* case. The important point for present purposes is that the choice between substantive and process-oriented doctrines occurs at both the wholesale and retail levels. Even a doctrinal stream concerned with making a substantive choice (e.g., What activities may Congress regulate?) can benefit from process-oriented elements at discrete steps in the analysis. Because of the historical difficulties that courts have encountered in making substantive judgments about federalism in a principled way, the courts might well benefit from making the most of such opportunities.

2. *The Spending Power.*—If the Commerce Clause is an area where courts have tried and failed in the past to develop sustainable limits on national power, the spending power is of such difficulty that courts have barely even tried. Even as the Rehnquist Court has sought to revive other doctrinal limits on Congress, its leading Spending Clause precedent, *South Dakota v. Dole*,683 stands as a landmark of permissiveness and deference. It will help to distinguish two separate doctrinal problems under the Spending Clause. The first concerns Congress’s power to impose conditions on grants of money to the states. The second involves Congress’s power to legislate directly, under the Necessary and Proper Clause, in furtherance of its spending programs. I make no pretense of resolving either of these problems here; instead, I wish simply to indicate how the strong autonomy model might begin to address them.

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683. 483 U.S. 203 (1987). For example, the Court has made clear that Congress may condition federal funds on states’ agreement to implement federal programs, *see* New York v. United States, 505 U.S. 144, 167 (1992), or to waive their sovereign immunity from suits by private individuals, *see* Alden v. Maine, 527 U.S. 706, 737 (1999), notwithstanding the strong constitutional prohibitions that the Court has erected against commandeering state officials and abrogating state sovereign immunity.
The problem of conditional spending arises from the fact that, after the Sixteenth Amendment, the national government has been the financially predominant actor in the system.\textsuperscript{684} Given the states' corresponding dependence on grants from Washington, D.C.,\textsuperscript{685} few states are in a position to reject regulatory conditions that Congress may place on federal funds. In consequence, as my colleague Lynn Baker has observed, Dole's reluctance to impose meaningful constitutional limits "offer[s] Congress a seemingly easy end run around any restrictions the Constitution might impose on its ability to regulate the states."\textsuperscript{686}

What makes conditional spending questions so difficult is that they implicate the "unconstitutional conditions" doctrine—that is, the principle that government may not condition the receipt of a governmental benefit on the surrender of a constitutional right.\textsuperscript{687} The Supreme Court's application of that principle across a variety of doctrinal contexts, implicating the rights of both individuals and institutions, has been so sporadic as to lead some scholars to deny the existence of any unified doctrine;\textsuperscript{688} those that continue to believe have been largely unable to agree on any unifying principles.\textsuperscript{689}

\textsuperscript{684} See, e.g., Lino A. Graglia, From Federal Union to National Monolith: Mileposts in the Demise of American Federalism, 16 HARV. J.L. & PUB. POL'Y 129, 130–31 (1993) ("The Sixteenth Amendment, establishing the income tax, effectively gave the national government unlimited control of the nation's wealth and, consequently, a virtually unlimited spending power.").

\textsuperscript{685} Lynn Baker noted in 1995 that "o[ver] the past fifty years, federal grants to states and localities have increased nearly 20,000%, growing from $991 million in 1943 to $18.173 billion in 1968 and $195.201 billion in 1993. . . . In addition, these federal grants have constituted an increasingly large proportion of total state and local revenues, increasing from 10.8% in 1950, to nearly twice that—19.9%—in 1991." Baker, Conditional Spending, supra note 70, at 1918 n.24. The most recent round of state financial crises underscored this continuing dependence on federal funds. See Greve, supra note 399.

\textsuperscript{686} Baker, Conditional Spending, supra note 70, at 1914.

\textsuperscript{687} See, e.g., Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831–37 (1987) (explaining that a State may not require one to give an easement for which she receives no compensation in exchange for a government approved building permit); Sherbert v. Verner, 374 U.S. 398, 403–06 (1963) (holding that forcing one to choose between abandoning the precepts of their religion and receiving unemployment payments is an unacceptable burden on the free exercise of religion); Speiser v. Randall, 357 U.S. 513, 529 (1958) (holding that it is a violation of due process for the states to deter constitutionally protected speech through enforcement procedures that place certain burdens of proof and persuasion on taxpayers). See generally Kathleen M. Sullivan, Unconstitutional Conditions, 102 HARV. L. REV. 1413 (1989) [hereinafter Sullivan, Unconstitutional Conditions].


\textsuperscript{689} Compare, e.g., Berman, Coercion, supra note 531, at 6 (relying on a sophisticated philosophical concept of coercion), with Richard A. Epstein, Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent, 102 HARV. L. REV. 4, 14–15 (1988) (analyzing the unconstitutional conditions doctrine as a check against enforcing bargains plagued by monopoly, collective action problems, and externalities), and Seth F. Kreimer, Allocational Sanctions: The Problem of Negative Rights in a Positive State, 132 U. PA. L. REV. 1293, 1300–01 (1984) (categorizing allocational sanctions as either threats or offers and using that framework to determine the constitutional constraints), and Sullivan, Unconstitutional Conditions, supra note
The literature applying the doctrine to the Spending Clause is itself extensive and contentious.\(^{690}\) Obviously, I am not going to solve the puzzle in this brief section of an article. My considerably more modest aim is to point out how elements of the strong autonomy model can take some of the pressure off the central substantive elements of Spending Clause doctrine. Consider the five-part test set forth in *Dole*, which held that a conditional spending proposal is only valid if it (1) is in pursuit of the “general welfare,” (2) states the condition in unambiguous terms, (3) is not “unrelated to the federal interest in particular national projects or programs” (“germaneness”), (4) does not violate any independent constitutional bar, and (5) is not coercive.\(^{691}\)

Elements (1), (3), (4), and (5) of this test are “substantive” in the sense I have used that term here. As such, they reflect the usual difficulties with substantive tests. The Court has frankly acknowledged that “general welfare” cannot be defined without reference to political and moral values that belong in the legislature’s province, and so it defers almost completely to Congress on that point.\(^{692}\) “Germaneness” involves a kind of means–ends scrutiny that the Court has generally been reluctant to apply with any “bite” outside the context of fundamental rights and specially protected classes.\(^{693}\) “Coercion” is usually viewed as an intractable question of degree. And the “independent constitutional bar” is administrable but provides little constraint.\(^{694}\) Various commentators have articulated ways to tighten up

687, at 1489–90 (justifying the unconstitutional conditions doctrine as protection for the overall distribution of power between government and rightholders generally, and among classes of rightholders).

690. See, e.g., Baker & Berman, *supra* note 178, at 460–61 (arguing against Congressional exploitation of the spending power to circumvent limitations imposed by the Rehnquist Court’s states’ rights decisions); Engdahl, *supra* note 533, at 2–4 (examining the anomalies and contradictions present in the variety of decisions that only nominally claim to follow the Hamiltonian view of the spending power); Kaden, *supra* note 54, at 881–83 (examining categories of conditions that have attached to the exercise of the spending power); Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism’s Trojan Horse*, 1988 SUP. CT. REV. 85, 125–27 (criticizing the Court’s decision in *Dole* as an abrogation of the concept of delegated powers); Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1120–23 (1987) (illustrating how existing constitutional law offers little guidance in applying the doctrine of unconstitutional conditions to the federal spending power).

691. South Dakota v. *Dole*, 483 U.S. 203, 207–08 (1987). *Dole* stated its test as encompassing the first four elements, but later in the opinion considered the coercion factor as well. See *id.* at 211.

692. Chief Justice Rehnquist’s majority opinion in *Dole* noted that “[i]n considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress.” *Id.* at 207. In a footnote, he questioned “whether ‘general welfare’ is a judicially enforceable restriction at all.” *Id.* at 207 n.2.


694. While it sounds as if it might be much more, that prong requires only that the condition not direct the state to do something that would in itself be unconstitutional. See *Dole*, 483 U.S. at 210. Congress may not, for example, condition the receipt of federal funds on a state’s agreement to ban free speech within its borders.
these substantive tests, and some of these avenues seem promising. But they are neither so clearly workable nor so likely to be adopted as to obviate the need to look for alternatives.

One obvious process-based approach is to focus on the second prong of *Dole*, which functions as a “clear statement” rule requiring the unambiguous articulation of conditions on federal spending that will bind the states. Two other process considerations are less frequently noted in the general spending literature. First, it matters who imposes the condition on the states. Sometimes conditions appear in statutes adopted by Congress, but sometimes they are imposed by administrative agencies who have been delegated general authority to administer grant programs. The latter case is far more problematic from a process standpoint, as the states lack the built-in representation before federal administrative agencies that they enjoy in Congress. Thus, the Court might impose a rule that spending conditions must appear in the text of the statute, much as it has denied administrative agencies the power to push the envelope of Congress’ commerce power in the absence of express statutory language.

Another process-oriented restriction could focus on who enforces the condition. The most obvious means of enforcement is for the national government itself to cut off funds where a state has breached a condition of the grant. Cutoffs are an extreme remedy for noncompliance, and they seem more likely to be used as a bargaining chip in negotiations over state compliance measures than as an actual federal course of action. There is a continuing debate over private enforcement of spending conditions under 42 U.S.C. § 1983. The political safeguards that check funding cutoffs have

695. See Baker, *Conditional Spending, supra* note 70, at 1935–54 (arguing that the *Dole* test be abandoned in favor of one that presumes invalidity for any condition that could not be achieved directly through regulation); Berman, *Coercion, supra* note 531, at 30–47 (utilizing a philosophical concept of coercion to identify unconstitutional conditions).

696. See, e.g., David Freeman Engstrom, *Drawing Lines Between Chevron and Pennhurst: A Functional Analysis of the Spending Power, Federalism, and the Administrative State*, 82 TEXAS L. REV. 1197, 1201 (2004) (“Only *Dole*’s clear-statement prong, which requires that states have fair notice of spending conditions before assenting to spending programs, seems to hold any potential at all for narrowing the reach of the spending power.”) (internal citations omitted).


700. Although the most familiar form of litigation under § 1983 involves constitutional claims against state and local officers, the Court has held for some time that many federal statutory claims are likewise actionable, even where the underlying federal statute does not itself provide a private right of action. *See Maine v. Thiboutot*, 448 U.S. 1, 4 (1980). Recently, the Court has considered a string of § 1983 cases where private individuals have sought to sue state officials for violating spending conditions on federal grants. *See Gonzaga University v. Doe*, 536 U.S. 273 (2002); *Blessing v. Freestone*, 520 U.S. 329 (1997); *Suter v. Artist M.*, 503 U.S. 347 (1992). While the Court has generally rejected such claims, it has not categorically held that spending conditions may
little purchase in suits by private plaintiffs. Drawing a line between public and private enforcement would thus be an important—and readily administrable—check on the impact of spending conditions on state autonomy.

The second doctrinal problem concerns Congress’s authority to enact legislation that is “necessary and proper for carrying into Execution” its spending authority.\(^{701}\) In \textit{Sabri v. United States}, for example, the Court considered a prosecution under 18 U.S.C. § 666(a)(2), which imposes federal criminal penalties for bribery of state or local government officials, where those officials work for an entity that receives at least $10,000 in federal funds.\(^{702}\) This problem is quite distinct from the question of conditional spending. As Richard Garnett has explained, “persons prosecuted under § 666 are not the federal government’s contracting partners, and the requirement that they avoid bribery is in no way a condition attached to their receipt of federal-program funds.”\(^{703}\) Conditional spending thus regulates states by contract; cases like \textit{Sabri}, on the other hand, raise the question of affirmative legislative power.

Congress’s “necessary and proper” authority to legislate in support of spending programs is potentially vast because the spending power itself is not limited to the enumerated ends set forth in Article I. That was Alexander Hamilton’s view of the spending power, and as David Engdahl has observed, “No one today candidly denies that Hamilton’s view of the spending power was correct.”\(^{704}\) Pairing this broad view of the spending power with the comparably broad interpretation of “necessary and proper” in \textit{McCulloch} yields an extensive power indeed; Richard Garnett explains:

If, under the Spending Power, Congress can spend beyond the confines of Article I to promote the General Welfare; and if, under the Necessary and Proper Clause, Congress’s amorphous “interest” in the flow of once-federal dollars toward what is unreviewably identified by Congress as the General Welfare is sufficient to support any regulation or prohibition that is rationally related to that “interest”; then Congress can regulate or outlaw anything.\(^{705}\)


\(^{701}\) U.S. CONST. art. I, § 8. This provision is often called the “Sweeping Clause,” for reasons that should be obvious. See, e.g., Gary Lawson & Patricia B. Granger, \textit{The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause}, 43 DUKE L.J. 267 (1993).

\(^{702}\) 124 S. Ct. 1941 (2004). For an account of the statute’s provenance, see Garnett, supra note 92, at 40–47.

\(^{703}\) Garnett, supra note 92, at 60.


\(^{705}\) Garnett, supra note 92, at 82.}
The statute at issue in Sabri indicates Congress’s potential reach under this theory. By making bribery of any official working for an entity receiving at least $10,000 in federal funds—and it is hard to imagine too many public entities that do not receive at least that—§ 666 operates as a general anticorruption statute enforced by the national government. Nonetheless, the Court upheld § 666(a)(2) by a unanimous vote.\footnote{706}

Sabri is a case study in the difficulty of formulating substantive limits once process approaches are overlooked or abandoned. David Engdahl has colorfully insisted that “[t]he Constitution does not contemplate that federal regulatory power should tag along after federal money like a hungry dog,”\footnote{707} but it is easier to declare that there must be limits than to say what those limits should look like. Professor Garnett has suggested that the courts should analyze the connection between the end of ensuring that federal funds are not diverted and the means of criminalizing all bribery of fund recipients; because § 666 has been interpreted not to require any showing by the prosecution of a nexus between the bribe and federal monies,\footnote{708} Garnett argues that the statute must fail any nonrubber stamp version of means–ends scrutiny.\footnote{709} But Justice Souter’s majority opinion argued that the federal interest in the integrity of federal funding programs extended beyond cases in which federal funds themselves are directly affected. He noted, “[C]orruption does not have to be that limited in order to affect the federal interest. Money is fungible, bribed officials are untrustworthy stewards of federal funds, and corrupt contractors do not deliver dollar-for-dollar value.”\footnote{710} That argument surely passes the laugh test; to reject it, a court would have to employ a more demanding form of means–ends scrutiny than we are used to associating with the Necessary and Proper Clause under McCulloch v. Maryland.\footnote{711}

706. See Sabri, 124 S. Ct. at 1944. Only Justice Thomas refused to join the majority’s necessary and proper analysis; he preferred to uphold § 666 under the Commerce Clause. See id. at 1949–51 (Thomas, J., concurring in the judgment).

707. Engdahl, supra note 533, at 92.

708. See United States v. Lipscomb, 299 F.3d 303 (5th Cir. 2002); United States v. Grossi, 143 F.3d 348 (7th Cir. 1998). In Sabri, Justice Souter’s majority opinion said that the Court took the case to resolve a circuit split over the existence of such a nexus requirement, see 124 S. Ct. at 1945, but the opinion focused exclusively on whether a no-nexus version of the statute would be constitutional. Because the Court would not have had to reach that question if it had construed the statute to require a nexus to federal funds, it seems safe to read the Court as rejecting that construction.

709. See Garnett, supra note 92, at 79–83.

710. 124 S. Ct. at 1946.

711. 17 U.S. (4 Wheat.) 316 (1819). In McCulloch, Chief Justice Marshall stated: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” Id. at 421. This formulation is often understood today as indicating minimum rationality review of federal legislation. See, e.g., Sabri, 124 S. Ct. at 1946; Oregon v. Mitchell, 400 U.S. 112, 286 (1970) (Stewart, J., concurring in part and dissenting in part).
Courts are understandably reluctant to ratchet up the level of means-ends scrutiny, at least outside the areas of fundamental rights and suspect classifications. After all, meaningful means-ends rationality review was the signature method of the Lochner Court. It may be that some such substantive review is unavoidable if the Necessary and Proper Clause is not to annihilate the principle of enumerated powers. But surely it would have been preferable to avoid these difficult constitutional questions in Sabri by construing § 666 more narrowly. As Professor Garnett has demonstrated, limiting constructions of that statute were available; indeed, the history of § 666 suggests that Congress meant to deal with a narrower class of corruption than any bribery of an official who works for an entity accepting federal funds. A narrowing construction would have functioned as a soft limit, effectively initiating a dialogue with Congress over the proper extent of federal law; moreover, it would have strengthened process protections for state autonomy by highlighting the federalism concerns at issue and shifting the burden of inertia to those advocating a more extreme view of national power. Sabri thus serves as a cautionary tale, demonstrating why the strong autonomy model emphasizes process-based and soft rules over the development of more substantive constraints on Congress.

3. The Section Five Power.—Perhaps no other strand of the Rehnquist Court’s federalism jurisprudence has aroused more academic criticism than the Court’s cases construing the scope of Congress’s power to enforce the Reconstruction Amendments—particularly its enforcement power under

Even Justice Thomas, who did not accept the majority’s necessary and proper analysis, acknowledged that “[t]he Court does a not-wholly-unconvincing job of tying the broad scope of § 666(a)(2) to a federal interest in federal funds and programs.” Id. at 1950 (Thomas, J., concurring in the judgment). In order to reject the majority’s analysis, Justice Thomas had to question the orthodox interpretation of McCulloch “as having established a ‘means-ends rationality’ test.” Id. at 1949.

712. See Lochner v. New York, 198 U.S. 45 (1905) (striking down a New York maximum hours law for bakers as not rationally related to legitimate state ends); see also City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 460 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part) (arguing that the majority’s suggestion that “the traditional rational-basis test allows this sort of searching inquiry” is “a small and regrettable step back toward the days of Lochner”).

713. Cf., e.g., Lawson & Granger, supra note 701, at 330–33 (prescribing some form of substantive review under the Sweeping Clause, but remaining vague about its contours).

714. See Garnett, supra note 92, at 40–44. For a lower court decision interpreting the statute narrowly based on the clear statement rule disfavoring statutory alterations to the federal-state balance, see United States v. Zwick, 199 F.3d 672, 686–87 (3d Cir. 1999).

715. The way may yet be open for such a narrowing construction in a future case. The Sabri majority emphasized that Sabri’s challenge was to § 666 on its face, and that such challenges are very difficult to win. See Sabri, 124 S. Ct. at 1948. The Court also stressed that “the acts charged against Sabri himself”—relatively large bribes to community development officials administering large sums of federal development grants—“were well within the limits of legitimate congressional concern.” Id. That suggests that an as-applied challenge in a more tenuous case might yet prompt a narrowing construction of the statute.
Section 5 of the Fourteenth Amendment.\textsuperscript{716} The enforcement provisions of the Reconstruction Amendments confer on Congress the power to enforce each amendment’s substantive provisions “by appropriate legislation.”\textsuperscript{717} Because the scope of Congress’s legislative authority is tied to the substantive scope of the rights conferred in each amendment and because the scope of those rights is highly contested, the enforcement power implicates difficult issues concerning the location of interpretive supremacy under the Constitution.\textsuperscript{718} This fundamental separation of powers dimension to the Section 5 cases may overwhelm the federalism dimension, making it difficult to fit these decisions into any model of federalism doctrine. Certainly it raises issues beyond the scope of this Article. What follows in this brief section is simply an examination of how the factors I have been discussing bear on Section 5 cases, with the recognition that these are not the only issues at stake.

The first point concerns the complicated relationship between these cases and state autonomy. The Section 5 power is an enumerated power, but many of its applications will overlap with the commerce power. If Congress wishes to regulate gender-based wage discrimination by state employers, for example, it may do so under either the Commerce Clause (employment is a commercial activity) or Section 5 of the Fourteenth Amendment (to enforce the equal protection of the laws). We must worry about the scope of the Section 5 power, then, only when Congress wishes to do something it could not do under the Commerce Clause. This explains why most of the Rehnquist Court’s Section 5 cases have been intertwined with its decisions on state sovereign immunity. The Court has held that Congress may not abrogate state sovereign immunity from private damage suits to enforce federal laws enacted under Congress’s Article I powers, but that it may override that immunity when it acts to enforce the Reconstruction Amendments.\textsuperscript{719} The advent of this distinction has led Congress to reenact several statutes, originally conceived as Commerce Clause legislation, under Section 5—thus requiring the Court to carefully construe the scope of the latter power.\textsuperscript{720}


\textsuperscript{717} See, e.g., U.S. CONST. amend. XIV, § 5 (“The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.”).

\textsuperscript{718} Compare, e.g., KRAMER, supra note 433, at 128–44 (rejecting judicial supremacy in constitutional interpretation), and TUSHNET, supra note 433, at 6–32 (same), with Larry Alexander & Frederick Schauer, \textit{On Extrajudicial Constitutional Interpretation}, 110 HARV. L. REV. 1359, 1387 (1997) (defending judicial supremacy).


\textsuperscript{720} See HART & WECHSLER, supra note 445, at 1029–32.
What all this means is that when the Court has limited the scope of Congress's power under Section 5 in cases like *Board of Trustees of the University of Alabama v. Garrett*\(^7\)\(^2\)\(^1\) or *Kimel v. Florida Board of Regents*,\(^7\)\(^2\)\(^2\) the Court has not freed the states from federal regulation but, instead, has preserved their sovereign immunity from private suits for money damages. The underlying statutes, after all, remain constitutional under the Commerce Clause, and they bind the states except to the extent that sovereign immunity forecloses certain private remedies for violations.\(^7\)\(^2\)\(^3\) In this sense, the Rehnquist Court's Section 5 jurisprudence has had the primary effect of buttressing its sovereignty-based model of federalism. That, I have argued, is less helpful than it might initially appear.

Nonetheless, the Section 5 cases also respond to more important concerns about state autonomy. Some of the cases have involved the overall validity of statutes that could not be justified under some other power.\(^7\)\(^2\)\(^4\) Even the decisions in sovereign immunity cases have acted to reject broad interpretations of Congress's power that would have posed a serious threat to state autonomy. Both *Kimel* and *Garrett*, for example, involved forms of discrimination (based on age\(^7\)\(^2\)\(^5\) and disability\(^7\)\(^2\)\(^6\)) that ordinarily receive rational basis review. *Any* distinction or classification drawn by government is subject to this level of review. Indeed, any governmental action, whether or not it classifies or distinguishes among persons, is subject to a basic rationality requirement under the Due Process Clause. If the Court must defer to Congress's judgment of what state government policies are irrational, then there is literally no state policy that Congress may not legislate to preempt. *Kimel* and *Garrett* held, by contrast, that the deference to state policy judgments that the "rational basis" test builds into judicial review is likewise binding on Congress. That is an important principle from the standpoint of state autonomy, even though its most recent applications have come in service of more sovereignty-oriented doctrines.\(^7\)\(^2\)\(^7\)

The second set of issues has to do with the method of judicial review in Section 5 cases. Congress's power is hedged by double clear statement rules: Congress must speak clearly if it wishes to rest on the Section 5 power rather than the more prosaic Commerce Clause, and it must also clearly state its

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727. *See generally Young, State Sovereign Immunity*, supra note 92, at 73–79 (elaborating on this argument).
intent to use that power to override state sovereign immunity. \(^{728}\) More fundamentally, the Court’s “congruence and proportionality” analysis under *City of Boerne v. Flores* has often been interpreted to impose some sort of deliberation requirement on Congress, which must make findings establishing a pattern of constitutional violations by state governments prior to acting to remedy those violations. \(^{729}\) I have argued elsewhere that the best interpretation of “congruence and proportionality” would not emphasize this prior pattern element, \(^{730}\) and I have already discussed how deliberation requirements may heighten the risk of confrontations with Congress in a way that other process tools, such as clear statement rules, do not. \(^{731}\) The only additional point is that requiring Congress to “find” a pattern of pre-existing constitutional violations seems to reintroduce a substantive element into what might have seemed a process-oriented rule. To the extent that the doctrine requires courts to evaluate when a series of state transgressions is “serious enough” to warrant Section 5 legislation, the courts would seem to be making the sort of substantive policy judgment that they generally ought to avoid. \(^{732}\) At that point, more overtly substantive approaches—such as a straightforward comparison of the statute’s prohibitory sweep with that of the Constitution itself \(^{733}\)—may prove more sustainable over time.

4. The Treaty Power.—Congress’s power to implement treaty commitments by legislation is less frequently discussed outside the more specialized literature of foreign affairs law. For most of our history, international law generally and treaties in particular have been concerned primarily with the relationship of nations to one another. With certain well-known exceptions, implementation of foreign agreements on that subject have rarely implicated questions of federalism. \(^{734}\) That situation may be

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729. See, e.g., Bryant & Simeone, supra note 147, at 354.

730. See Young, *Sky Falling*, supra note 108, at 1578–81; Berman, Reese & Young, supra note 82, at 1057.

731. See supra text accompanying notes 591–600.

732. For example, the recent debate in *Tennessee v. Lane*, 124 S. Ct. 1978 (2004), about whether the legislative record showed a sufficiently egregious history of state conduct, hardly seems an edifying exercise. Compare id. at 1988–92 with id. at 1999–2003 (Rehnquist, C.J., dissenting). It would be exceptionally difficult to develop a principled quantitative or qualitative standard for when the states have violated the Constitution “enough.”

733. See Young, *Sky Falling*, supra note 108, at 1578–81 (urging this approach); Berman, Reese & Young, supra note 82, at 1057 (same).

734. See United States v. Belmont, 301 U.S. 324 (1937) (holding that an executive agreement with the Soviet Union preempted New York law governing rights to a bank deposit owned by a Russian corporation); Missouri v. Holland, 252 U.S. 416 (1920) (upholding a federal statute protecting migratory birds, enacted to implement a treaty with Britain); Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796) (holding—in what may be the earliest exercise of judicial review—that a Virginia
changing, however. International law deals increasingly with the relationship between the government and its citizens, which has led to considerable overlap between the subject matter of treaties and the regulatory concerns of state governments. Not surprisingly, some commentators have called for Congress to employ its “Treaty Power” to circumvent narrow judicial interpretations of other enumerated powers. Some treaty regimes, moreover, establish supranational institutions with authority to judge the validity of state regulatory regimes and judicial decisions, although such decisions have not yet been given direct effect as a matter of domestic law. We seem likely to hear more and more of the Treaty Power in debates about federalism.

Treaties threaten state autonomy in two senses: The treaty itself may preempt state law, or Congress may use the treaty as a predicate for implementing legislation that supplants state policy choices. In Missouri v. Holland, the Court held that Congress may legislate to implement a treaty even in areas where it could not otherwise legislate pursuant to its enumerated powers. The question is whether this power can be limited, given the expansion of international law to cover virtually any potential subject of state regulatory concern. As with the other topics considered in

statute providing for the discharge of debts to British creditors was preempted by the Jay Treaty that ended the Revolutionary War).

735. See, e.g., Dominguez v. Nevada, 961 P.2d 1279 (Nev. 1998) (considering a claim that the International Covenant on Civil and Political Rights preempted Nevada’s law permitting execution of murderers for crimes committed while underage); Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M. 1448 (dealing with many issues currently governed, in this country, by state family law). See generally Goldsmith, supra note 647, at 1670–78 (discussing changes in the nature of international law and foreign relations that have increased the potential for conflict with state governmental authority).

736. I have put quotes around Congress’s Treaty Power because the Constitution actually confers no such power expressly. It does give the President the power to make treaties, with the advice and consent of the Senate, see U.S. CONST. art. II, § 2, and implementing legislation by Congress is generally thought to be “necessary and proper” to that power. But there is no legislative Treaty Power in the sense that there is a commerce power.

737. See, e.g., Gerald L. Neuman, The Global Dimension of RFRA, 14 CONST. COMMENT. 33, 49–57 (1997) (urging that the Religious Freedom Restoration Act, later struck down as outside the Section 5 power, can be justified as implementing the International Covenant on Civil and Political Rights under the Treaty Power).


741. For an introduction to the growing literature on this question, see Bradley, The Treaty Power, supra note 513; Curtis A. Bradley, The Treaty Power and American Federalism, Part II, 99
this section, I undertake only a few comments here regarding how the strong autonomy model might bear on this question.

Much of the debate about limiting treaties has focused on hard, substantive limits. Some have emphasized language in Holland suggesting that the broad power recognized there might be confined to cases involving “a national interest of very nearly the first magnitude” or “cases where the States individually are incompetent to act.”742 These phrases suggest a subject matter limitation predicated on either the strength of the national interest involved or the existence of a collective action problem at the state (or perhaps the international) level. But the Court’s experience in other areas of federalism doctrine suggests that interests are difficult to weigh in a principled fashion,743 and the collective action problem implicates all the difficulties associated with direct value-application.744 A different “hard” limit would construe the Treaty Clause as conferring power only to bind the United States on the international plane, leaving implementation of the resulting agreements to whatever institutions would otherwise be empowered to take the requisite measures under our system of limited and enumerated powers.745 That limit seems more readily administrable as a matter of doctrine, but represents a radical enough departure from current understandings as to raise doubts that it will be adopted anytime soon.746

What the strong autonomy model might emphasize, in contrast, is two process-oriented limits that are more readily grounded in current practice. The first would limit direct preemption of state law by international agreements by presuming that such agreements are non-self-executing in the absence of express language in the treaty or the ratification materials.747 A presumption against self-execution would thus function much like the other clear statement rules that I have discussed throughout this Article. An even

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742. 252 U.S. at 433, 435.

743. See, e.g., Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment) (complaining that because the interests courts are asked to balance are often “incommensurate,” balancing tests are “more like judging whether a particular line is longer than a particular rock is heavy”).

744. See supra text accompanying notes 525–52.


746. See Swaine, supra note 741, at 418–19 (noting that Professor Bradley’s proposal would require overturning Holland).

narrower approach might target specific aspects of self-execution—for instance, by holding that treaties confer no private right of action for judicial enforcement in the absence of clear provision in the document.\footnote{748} These examples are meant to be illustrative, not exhaustive; a full-blown approach to self-execution is far beyond the scope of this Article.

The second process limit would simply insist that, where Congress wishes to legislate pursuant to the Treaty Power, the United States must actually make a treaty and secure its ratification by two-thirds of the Senate. One would not expect this point to be contested, and yet it is: Many of the recent international agreements with the greatest potential to threaten state autonomy, such as the North American Free Trade Agreement and the World Trade Organization agreement, were in fact enacted as “Congressional-Executive Agreements” rather than treaties.\footnote{749} Such agreements are negotiated by the President and “ratified” by enactment of a statute by majorities in both House and Senate—the point being to avoid the higher hurdle of convincing two-thirds of the Senate.\footnote{750} Widespread use of this procedure as a substitute for the treaty process suggests that the Senate remains an effective “political safeguard” for state autonomy in this respect, despite the general weakening of Senators’ ties to state governments. Resolving current debates about congressional-executive agreements in favor of the textually-mandated treaty procedure thus might be an important first step in protecting state autonomy from encroachments in the name of international agreements.\footnote{751}

A final point is that American treaty practice over the past century has been rather strongly influenced by the “political safeguards of federalism.” As Ed Swaine has documented, domestic concerns about the impact of proposed agreements on federalism have resulted in special dispensations in some agreements for federal states; in U.S. ratification subject to reservations, understandings, and declarations that limit a treaty’s impact; in exemptions or procedural protections for states incorporated into a treaty’s


\footnote{750} Moreover, such agreements are often ratified under “fast track” procedures that erode the usual “procedural safeguards of federalism” inherent in the federal legislative process. See id. at 537 (arguing that “[t]he ‘fast track’ authority under which trade agreements are negotiated . . . minimizes the ability of Congress—and through it, state governments—to block or modify trade agreements after they are negotiated”).

implementing legislation; and in the derailment of some treaties altogether.\footnote{752} Some of these limiting measures are under pressure, however, from internationalists; in particular, internationalists frequently claim that reservations protecting domestic law and practices are void.\footnote{753} The challenge of federalism doctrine in the treaty area may thus be as much about maintaining state protective rules that already exist as about formulating new limiting principles.

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I have tried in this subpart to suggest some directions that a “strong autonomy” approach might pursue in limiting Congress’s enumerated powers. That model can also help us identify wrong turns and areas that the Court should de-emphasize. I discuss one such area in the next section.

D. The Very Limited Utility of Immunity

As I have noted, the heart of the Rehnquist Court’s approach to federalism doctrine has involved strengthening and expanding traditional notions of state sovereign immunity. The most important case here is \textit{Seminole Tribe of Florida v. Florida}, which held that Congress may not overcome the states’ immunity and subject them to private damages suits, at least when Congress acts pursuant to its ordinary Article I powers.\footnote{754} The immunity cases are more aggressive, both quantitatively and qualitatively, than any other doctrinal strand of the Federalist Revival.\footnote{755} In this section, I want to flesh out the argument—sketched earlier in the course of defining the sovereignty and autonomy models—\footnote{756} that the Court’s commitment to state immunity represents a bad investment from the perspective of state autonomy.

My basic claim is simple enough: State sovereign immunity limits the national government’s ability to subject states to national policy, but it does little to protect the states’ ability to enact and implement policies of their own. The key to state autonomy lies in the ability to regulate the vast majority of human activity carried on by private individuals and entities; sovereign immunity has the effect—at most—of excepting state institutions

\footnote{752. See Swaine, supra note 741, at 441–42.}
\footnote{753. See, e.g., Jordan J. Paust, \textit{Customary International Law and Human Rights Treaties are Law of the United States}, 20 MICH. J. INT’L L. 301, 322–23 (1999) (asserting that “reservations that are fundamentally inconsistent with the objects and purposes of the treaties [are], under international law, . . . void \textit{ab initio} and can have no legal effect”).}
\footnote{754. 517 U.S. 44, 72 (1996).}
\footnote{755. See Fallon, \textit{Conservative Paths}, supra note 109, at 452–68 (providing “a rough overview of the Supreme Court’s federalism jurisprudence”); Young, \textit{State Sovereign Immunity}, supra note 92, at 1.}
\footnote{756. See supra subparts I(B) & (C).}
from themselves being the objects of regulation. One can imagine, at the extreme, a state government which was perfectly exempt from all federal requirements but which had been left with nothing at all to do.

One might seek to rebut this argument in three ways. First, one might argue that subjecting state governments to suit undermines state autonomy by forcing compliance with burdensome federal laws. Todd Pettys, for instance, argues that a state is stripped of its governing capacity “[w]hen one sovereign compels the other to act in a particular way—whether to subject itself to private lawsuits or to regulate in a particular manner.”

The Court has made clear, however, that 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.” Indeed, the Court plainly expects that state governments will generally continue to comply with federal law notwithstanding their immunity from suit, and Peter Menell has demonstrated that public entities—like states—will often be inclined to comply with the law even when shielded from the direct threat of monetary sanctions. In any event, a broad range of private remedies against state entities remain; in particular, individuals may sue state officers for injunctive relief to force compliance with federal law, and they may also sue the same officers in their personal capacities for damages. As John Jeffries has noted, “The real role of the Eleventh Amendment is not to bar redress for constitutional violations by states but to force plaintiffs to resort to [suits against state officers under] Section 1983.”

Congress, moreover, retains an impressive array of legislative instruments to ensure state compliance with federal law. It may condition the receipt of federal funding or other federal benefits on state waivers of sovereign immunity, subject only to marginal constraints under current

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759. 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.”).
law.\footnote{See South Dakota v. Dole, 483 U.S. 203 (1987) (laying out a lenient test for the validity of conditions on the receipt of federal funds by states); Berman, Reese & Young, supra note 82, at 1143–72 ( canvassing, in excruciating detail, the issues involved in extracting waivers of state sovereign immunity as a condition on federal benefits).} Or it may authorize the Justice Department to bring suits against states to enforce federal mandates.\footnote{See United States v. Texas, 143 U.S. 621, 646 (1892) (holding that the states consented to such suits when they entered the Union); see also United States v. Raines, 362 U.S. 17, 27 (1960) (upholding Congress’s power to authorize suits by the United States to protect private rights).} None of this means 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.\footnote{See Meltzer, Overcoming Immunity, supra note 763, at 1333.} My point is simply that the Court’s immunity decisions are unlikely to give states confidence that they may ignore federal law with impunity. In this sense, 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.\footnote{See, e.g., Nat’l League of Cities v. Usery, 426 U.S. 833 (1976). Of course, National League of Cities itself had a fairly attenuated impact given the Court’s inability to crystallize the principle into workable doctrine.}

A second argument might stress the financial impact of private damages suits against state governments. Justice Kennedy argued in *Alden*, for example, that “[a] general federal power to authorize private suits for money damages would place unwarranted strain on the States’ ability to govern in accordance with the will of their citizens.” Aside from this passage, however, concern for the degradation of state governance arising from damages liability hardly ever crops up in the Court’s analysis. That does not, of course, mean that the financial rationale linking immunity to autonomy should not figure more prominently in the Court’s reasoning. But the case that private damages awards have actually undermined the states’ practical functions seems far from proven. There have been times in our history—such as the crises over Revolutionary War debts or Reconstruction bonds—when the states labored under such crippling debt burdens that private

\footnote{Alden v. Maine, 527 U.S. 706, 750–51 (1999). 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 751; see also Pettys, supra note 40, at 372 (“Each dollar paid as damages by a state to a private citizen is a dollar that the state cannot spend in ways of its own choosing in an effort to please the larger public.”).}
damages liability would have crippled their capacity to govern.\textsuperscript{769} That is not today, however. Justifications for state sovereign immunity must be sought—and the Court has sought them—on other grounds.

What, then, of the state “dignity” that has dominated the Court’s analysis? Although it is easy to disparage concepts of dignity as wholly ephemeral, it seems at least colorable to argue that they do in fact bear some relation to governing capacity. The prestige of state governments, for instance, may well affect their ability to attract and retain qualified employees.\textsuperscript{770} Prestige, of course, is not a perfect synonym for the dignity that figures so prominently in the Court’s immunity opinions. But it would be surprising if there was no link between the two.\textsuperscript{771} In that sense, then, dignity may enjoy some link to autonomy and governing capacity.\textsuperscript{772}

Recent work by Judith Resnik and Julie Chi-Hye Suk adds broader support for a link between state dignitary interests and governing capacity. Rejecting claims that dignity arguments unduly anthropomorphize state governments, Resnik and Suk contend that “dignity ought not to be reserved exclusively to individuals.”\textsuperscript{773} They note the Framers’ and the Supreme Court’s frequent invocations of institutional dignity in the Founding era, as well as contemporary insistence on institutional dignity by indigenous peoples: “Reliance [in the early Republic] on the language of role-dignity was an effort to invent the nation’s authority to enforce boundaries, pursue debtors, and protect law and order, just as First Nations and indigenous peoples today turn to the concept of dignity to claim political capital.”\textsuperscript{774} The


\textsuperscript{770} One example arises from my own experience as a judicial clerkship advisor to students at the University of Texas School of Law. One need not buy into conspiracy theories of the clerks’ role to appreciate that courts function best when they have good law clerks. Clerkship hiring can thus be regarded as a particular instance of the more general point that the ability to attract good employees is an aspect of a State’s governing capacity—that is, autonomy. The Texas courts—especially those located within the blissful confines of Austin—have certain natural advantages in attracting our students. Nonetheless, it is frequently difficult to persuade the best students to apply to the state courts; the perceived prestige advantage of the federal system is simply too great. And one could probably observe similar effects across much of the spectrum of governmental hiring.

\textsuperscript{771} Cf. Robert F. Nagel, Judicial Power and the Restoration of Federalism, 574 Annals Am. Acad. Pol. & Soc. Sci. 52, 58 (2001) (arguing that the Court’s federalism rulings “insist that states retain a certain degree of dignity and status, and this is an important precondition to the sort of competition between levels of government that the Framers envisioned”).

\textsuperscript{772} For example, Professor Pettys notes:

Each time a citizen learns that her state has been haled into court or that a sizeable verdict has been entered against her state, she has cause to resent the use of a portion of her tax payments for such purposes, as well as cause to doubt the good judgment of her state leaders and to view those leaders as no more worthy of respect, trust, and affection than common tortfeasors.

Pettys, supra note 40, at 373.

\textsuperscript{773} Resnik & Suk, supra note 184, at 1927.

\textsuperscript{774} Id. at 1946.
purpose of ascribing dignity to institutions, Resnik and Suk suggest, is to “sho[ ]e up the institution to provide it with the capacity to do its work.”

One might nonetheless conclude that the Court’s state sovereign immunity decisions do not further state dignity in this valuable sense. As Resnik and Suk point out, the existence of numerous immunity waivers at both the federal and state level—for instance, the broad Federal Tort Claims Act and many analogous state statutes—suggests that American governments generally have not seen the indignity of being “haled into court” as crippling. Moreover, they argue that although governmental institutions ought to have some latitude to control the timing of, and remedies available in, suits against them, broad doctrines of sovereign immunity unduly prioritize institutional over individual indignity and eliminate the government’s obligation to account for its actions. In a democracy, legitimacy must be grounded in accountability as well as dignity.

Reasonable people may disagree about the extent to which the current law of state sovereign immunity correctly strikes the balance between dignity and accountability. My own view is that there are sufficient remedies not barred by state sovereign immunity—such as, officer suits for injunctive relief and individual capacity suits for damages—that governments do in fact have to account for their actions. But the important point for present purposes is simply that the incremental gain to state dignity from barring damages actions against the State itself—when we continue to allow the government to be “haled into court” to defend its officers in suits for injunctive relief and personal capacity damages—is unlikely to further any significant measure of state autonomy. If that is true, then the Court’s heavy emphasis on state sovereign immunity seems misdirected. At best, the case for promoting viable state governance through a sovereign immunity jurisprudence based on state dignitary interests is far from proven.

The argument thus far suggests that state sovereign immunity is relatively unhelpful to the cause of state autonomy. I have argued elsewhere, however, that the problem may go deeper. The Court’s immunity focus might be counterproductive in three respects. First, to the extent that the Court’s political capital is limited, then the time, effort, and docket space

775. Id. at 1943.


777. See Resnik & Suk, supra note 184, at 1952. Likewise, though municipalities generally lack sovereign immunity, see Lincoln County v. Luning, 133 U.S. 529, 530 (1890), Resnik and Suk note that they seem able to struggle on nonetheless. See Resnik & Suk, supra note 184, at 1952.


779. 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, 1371 (1953) (suggesting that the government’s ability to employ immunity and other restrictions on remedies is limited by the fact that “no democratic government can be immune to the claims of justice and legal right”).

780. See Young, State Sovereign Immunity, supra note 92, at 58–65.
devoted to sovereign immunity may require the Court to trade off doctrinal avenues more closely linked to autonomy, such as limiting statutory preemption or even narrowing Congress’s Commerce Clause authority.\(^{781}\) Second, Congress may respond to immunity decisions by imposing measures on the states that are more burdensome than the private damages lawsuits that immunity prevents.\(^{782}\) For example, it would hardly facilitate intergovernmental comity if Congress chose to expand substantially the Justice Department’s own capacity and inclination to bring suits against state governments.\(^{783}\) Third, broad immunity might increase Congress’s reluctance to devolve policy responsibilities to the states. Devolution often comes with federal minimum conditions and other strings attached, and immunity doctrines may make these federal requirements harder to enforce.\(^{784}\) Any perverse effect of immunity in discouraging policy devolution would, of course, exact a direct cost to state autonomy.\(^{785}\)

One might also make a variant of the political capital argument that focuses on the Court’s internal dynamics rather than on the external constraints on its actions. I have suggested elsewhere that a stable federalism doctrine will require the Court to identify some sort of common ground that can attract support from both the “conservative” and “liberal” wings.\(^{786}\) The immunity cases seem uniquely counterproductive in this regard; it is they, for example, that have led the Court’s liberals practically to denounce the notion of stare decisis itself.\(^{787}\) To the extent that taking the hard line on state

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781. See supra note 443 and accompanying text.

782. These measures will often require states to waive immunity as a condition for receiving federal funds. As Ilya Somin has noted, federal grant conditions often entail “tight federal oversight of state spending” involving “a degree of federally imposed uniformity even over those state policies that are not directly subject to conditional restriction.” Somin, supra note 258, at 467.

783. Other examples might include conditions on federal monies and other benefits that not only require immunity waivers but also impose various monitoring or recordkeeping requirements, or a new enactment that tests the limits of Congress’s ability to authorize *qui tam* suits on behalf of the United States. See generally Young, *State Sovereign Immunity, supra* note 92, at 60–63.


785. Pam Karlan has identified a fourth perverse dynamic that goes to the states’ fortunes in litigation. See Pamela S. Karlan, *The Irony of Immunity: The Eleventh Amendment, Irreparable Injury, and Section 1983*, 53 STAN. L. REV. 1311, 1313–14 (2001). She notes that the availability of injunctive relief generally turns on the inadequacy of remedies at law (i.e., damages). Id. at 1314. Where immunity bars damages relief, then, states may find courts *more* willing to grant injunctive remedies against them. *Id.* Hence, “The very mechanism by which the Court seeks to enhance federalism and state autonomy may in fact channel litigation into a form that imposes greater constraints on state action.” *Ibid.*

786. See Young, *State Sovereign Immunity, supra* note 92, at 68–69.

787. See, e.g., Fed. Mar. Comm’n v. S.C. State Ports Auth., 535 U.S. 743, 788 (2002) (Breyer, J., dissenting) (“Today’s decision reaffirms the need for continued dissent . . . .”); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 99 (2000) (Stevens, J., dissenting) (asserting that “[t]he kind of judicial activism manifested in cases like *Seminole Tribe* . . . represents such a radical departure from the proper role of this Court that it should be opposed whenever the opportunity arises”). For a discussion of this sort of judicial behavior’s corrosive effects, see Fried, *Five to Four, supra* note 5,
immunities undermines the majority’s ability to forge a lasting doctrinal synthesis on, say, the scope of the Commerce Clause, then the long term prospects for state autonomy may suffer.

All of these perverse effects are speculative in various ways, and I have suggested that we cannot entirely discount possible benefits to autonomy on the other side of the ledger. The necessary qualifications to my argument, moreover, illustrate the extent to which autonomy and sovereignty are not truly independent concepts: Autonomy cannot be long preserved without some form of sovereignty, and sovereignty is pointless without autonomy. The question is one of emphasis and priorities. What I want to insist is that the Court should more self-consciously focus on autonomy as a value, and that its doctrinal innovations should be tailored toward promoting that end. Some form of immunity might be justified from that perspective. But there is every reason to believe that the Court’s current immunity jurisprudence is a path-dependent effort to advance state authority without disrupting too much existing precedent or striking down important and popular statutes—not a considered judgment that sovereign immunity is the best way to promote autonomy. If we insist on that sort of judgment, we are likely to see less focus on state sovereign immunity.

IV. Conclusion: Federalism Doctrine after the Rehnquist Court

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 contemplate substantial revision, perhaps even wholesale reversal, of many of the assumptions that have guided American constitutional doctrine and public policy this century.

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at 180–92. One would think that justices who supported the result in Planned Parenthood v. Casey, 505 U.S. 833 (1992)—to name just one example—would be less eager to undermine stare decisis.

788. My own view—putting stare decisis questions to one side—would favor a return to the pre-Seminole Tribe notion that the states retain a federal common law immunity that may be overcome only by a clear statement of Congress’s intent to do so. See, e.g., Pennsylvania v. Union Gas Co., 491 U.S. 1, 23–28 (1989) (Stevens, J., concurring).

789. See Fallon, Conservative Paths, supra note 109, at 481–85, 491.


Sandy Levinson and Jack Balkin even viewed *Bush v. Gore*\textsuperscript{792} as a sinister maneuver designed to perpetuate the current pro-states majority and allow it to wreak greater havoc on national authority.\textsuperscript{793}

Nor has the hysteria been confined to predictions about what the Court may do in the future. In a widely noted book, Judge John T. Noonan, Jr., asserted that the Court has already “by its own will, moved the middle ground [between federal and state authority] and narrowed the nation’s power.”\textsuperscript{794} Erwin Chemerinsky announced 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.”\textsuperscript{795} And Sylvia Law has claimed 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

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792. 531 U.S. 98 (2000).

793. Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1053, 1063–64 (2001). The enormity of the charge requires a somewhat extended quotation to show that 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.” *Id.* at 1052–53. Although Balkin and Levinson mention racial equality and civil rights, all of their primary examples come from federalism doctrine. *See id.* at 1053 (discussing Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (11th Amendment); Seminole Tribe of Fla. 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:

[T]his same bloc of five conservatives [that prevailed in the federalism cases] handed the presidency to George W. Bush in *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.

*Id.* In so doing, the Court has committed “flagrant judicial misconduct” amounting to a “constitutional coup.” *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. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003) (striking down the Texas sodomy statute and overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)); Grutter v. Bollinger, 539 U.S. 306 (2003) (upholding affirmative action policy at the University of Michigan law school); Wiggins v. Smith, 539 U.S. 510 (2003) (invalidating a death sentence on grounds of ineffective assistance of counsel); Nev. Dept. of Human Res. v. Hibbs, 538 U.S. 721 (2003) (upholding the Family Medical Leave Act’s provisions abrogating state sovereign immunity). And in fact my dear friend Professor Levinson seems, in both private and public conversations, to have receded somewhat from his earlier position. For a thoughtful assessment of some of the more recent cases, see Sanford Levinson, *Redefining the Center: Liberal Decisions from a Conservative Court*, VILLAGE VOICE, July 2–8, 2003, at 38–40. 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.


denied the New Deal Congress and president the power to adopt federal responses to the Great Depression.\textsuperscript{796} One would think, to hear these observers tell it, that Chief Justice Rehnquist has done everything but walk across the street and turn off the lights in the Capitol.

It is hard to square these assessments with actual results on the ground. The Gun-Free School Zones Act is no more\textsuperscript{797}—but it has been replaced with a nearly identical provision sporting legislative findings of a substantial effect on interstate commerce,\textsuperscript{798} and it was, in any event, redundant with state law in over forty states.\textsuperscript{799} The Brady Act’s interim provisions for background checks of firearm purchasers went down,\textsuperscript{800} but they were due to be superseded as soon as a federal computer database went online.\textsuperscript{801} And it is considerably harder for private individuals to sue state governments for money damages for violations of a wide variety of federal laws. But these suits were relatively infrequent even before the Court held them barred by sovereign immunity,\textsuperscript{802} and plaintiffs injured by state official action retain a host of alternative remedies for both damages and injunctive relief.\textsuperscript{803} As Martha Derthick has concluded, the Court’s pro-states decisions “have not changed the day-to-day conduct of intergovernmental relations, having no effect, for example, on the ability of Congress to preempt state laws or to attach onerous and far-reaching conditions to grants-in-aid to the states.”\textsuperscript{804}

Over the same period in which the Court was supposedly “narrowing the nation’s power,” the Court in fact decided a whole host of decisions against the states. This class of cases included: statutory preemption cases in which federal law was held to oust state regulatory authority, often in areas of traditional state authority and often in quite sweeping ways;\textsuperscript{805} “dormant” preemption cases under the Commerce Clause or the foreign affairs power, in which state law was ousted even without affirmative action by Congress.\textsuperscript{806}

\textsuperscript{796} 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).


\textsuperscript{799} Lopez, 514 U.S. at 641.

\textsuperscript{800} See Printz v. United States, 521 U.S. 898 (1997).


\textsuperscript{802} In our study of suits against the states for intellectual property violations, for example, Mitch Berman, Tony Reese, and I were hard-pressed to find widespread claims of infractions, much less litigated claims for relief. See Berman, Reese & Young, supra note 82, at 1077–79.

\textsuperscript{803} See Young, Sky Falling, supra note 108, at 1561–62.

\textsuperscript{804} DERTHICK, supra note 351, at 6.

\textsuperscript{805} See supra notes 131–35, 189–93, 220–21 and accompanying text.

and invalidation of state policies based on expansive interpretations of federal constitutional rights. Although it would require an extremely nuanced and difficult analysis to verify the claim empirically, it is easy to make an intuitive claim that the cases that the states have lost in the last ten years or so have been more important, practically speaking, than the cases they have won.

The problem with the Rehnquist Court's federalism doctrine is not that it is too extreme, but rather that it is misdirected. I have tried to assess where we stand, a full decade into the Court's project of reasserting constitutional limits on national power. The Court remains sharply divided on federalism, with a five-member majority devoted to a strong sovereignty model focused on minimizing state accountability for violations of federal norms. Perhaps surprisingly, however, I conclude that the four-member dissenting bloc is not best viewed as promoting a nationalist alternative to the majority's vision of "states' rights." Rather, I have argued that the dissenters frequently demonstrate concern for state autonomy, defined as the states' capacity to govern. Unfortunately, the dissenters have so far been largely unwilling to extend their concerns about autonomy outside the ambit of statutory cases concerning the scope of preemption under federal law.

The dissenters' autonomy-based vision has much to recommend it. In particular, autonomy bears a closer relation than sovereignty to virtually all of the values that undergird our commitment to federalism. State experimentation, policy diversity, popular participation, and checks on central power all depend, to a large extent, on the states having meaningful governmental responsibilities. A state government that was perfectly sovereign—that is, perfectly unaccountable for its violations of federal norms—would nonetheless have little meaning unless it also had the authority and capacity to enact its own policies in response to the demands of its citizens.

I have thus argued that the Court should reorient its federalism doctrine toward concerns about state autonomy. In particular, the whole Court should focus on statutory preemption cases as critically implicating constitutional concerns about the persistence of state authority. Correspondingly, the Court should de-emphasize state sovereign immunity, which minimizes state accountability but does little to protect state governing capacity. Finally, the


808. See Young, Sky Falling, supra note 108, at 1589–91; Young, Two Cheers, supra note 8, at 1382.
Court should bolster this shift by strengthening the autonomy model—primarily by pursuing a mix of process-forcing measures such as clear statement rules and the anticommandeering doctrine.

We need a Democracy and Distrust for federalism—an approach to doctrine that does not pretend indifference to constitutional substance, but that grounds the justification and shape of judicial review in the institutional relationships between the courts and the political process. To build such a doctrine, we should look at the reasons we care about federalism in the first place and at the institutional constraints that limit its enforcement by courts. Most important, we should focus on ways in which judicial review can complement and reinforce the self-enforcement of federalism that occurs through the political process. Process review, as John Hart Ely showed, need not imply judicial abdication. The tragedy of Garcia is not that it emphasized political safeguards for federalism; rather, it is that subsequent decisions have not done more to realize Garcia's promise of a meaningful set of judicial doctrines designed to ensure that the federal political process does, in fact, protect the states.

The strong autonomy model outlined in this Article may offer some prospect of ameliorating the Rehnquist Court's persistent division on matters of federalism. One of the most interesting facets of Robert Post's study of the Taft Court—which featured the last sustained effort by the Court to enforce limits on national power—is that justices from across the ideological spectrum contributed to the Court's doctrinal project. Not only Sutherland and McReynolds, but also Stone and Brandeis, were committed to meaningful judicial enforcement of federalism, and the results in the cases featured shifting coalitions as the Court struggled to develop workable rules. At present, by contrast, the Five and the Four seem "dug in" to their respective positions, to the point that the Four refuse even to accept the stare decisis force of their past defeats. That is hardly a recipe for lasting doctrine. As I have argued elsewhere, a truly viable federalism doctrine needs to achieve consensus, or at least acceptance, of six or more justices.

809. See, e.g., Post, supra note 93, at 1535–37 (discussing Justice Stone's efforts to develop a workable doctrine of intergovernmental tax immunity); id. at 1545–46 (discussing the Taft Court's generous construction, in some contexts, of Congress's commerce and spending powers); id. at 1578–79 n.234 (recounting and quoting then-Attorney General Stone's 1924 federalism-based defense of the Court's general power to strike down legislation) (citing and quoting William H. Crawford, La Follette Plan Called a Menace: Harlan Fiske Stone Says Attacks are on the Constitution, not the Supreme Court, N.Y. Times, Oct. 2, 1924, at A4). For a later example, see A.L.A. Schechter Poultry Corp. v. United States, 292 U.S. 495, 549–50 (1935) (Justices Brandeis, Stone, and Cardozo joining the unanimous opinion by Chief Justice Hughes striking down the National Industrial Recovery Act as beyond Congress's commerce power).

810. See Fried, Five to Four, supra note 5, at 185–92.

811. See Young, State Sovereign Immunity, supra note 92, at 68.
"Strong autonomy" may help move past this impasse by partaking of both the Four's focus on state regulatory authority and the Five's commitment to rigorous judicial enforcement. For that reason, members of both blocs may find at least some elements congenial. The 2004 Term will offer opportunities to coalesce around a more sustainable approach: *Ashcroft v. Raich*,\(^8\) for example, will offer an opportunity for the Five to add a process element into Commerce Clause doctrine and for the Four to retreat from their obdurate opposition to any substantive judicial review at all. But hoping for doctrinal compromise, at this point, with these Justices, may be unrealistic. A new synthesis may have to await the changes in personnel that will surely follow in the wake of the impending presidential election.

Federalism is fundamental to our constitutional structure, and on fundamental things we need doctrine that can last. No single doctrinal prescription is likely to resolve the problem of maintaining a vital federal balance as the nation heads into the twenty-first century. Indeed, one of the virtues of doctrinal elaboration by courts is that it tends to proceed by incremental adjustments over time rather than by sweeping reconceptions of the field. The Rehnquist Court has reinvigorated interest in federalism throughout the profession and the academy, and it has pointed out important doctrinal initiatives, some more helpful than others. As that Court recedes into history, it will be up to its successors to determine whether a new, more viable model will emerge.

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