TWO CHEERS FOR PROCESS FEDERALISM

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For some years now, the Rehnquist Court has been engaged in an attempt to revive the notion of judicially-enforceable limits on national power. Important and controversial decisions have reasserted outer limits to Congress’ commerce power, developed new doctrinal rules against the "commandeering" of state governmental institutions, and vastly expanded the scope of state sovereign immunity. The staying power of this "federalist revival," however, remains very much in doubt. Most of the relevant decisions are five to four, and in many the more nationalist justices have openly avowed their intention to reverse course the moment that they gain an additional vote. While the result of the 2000 election would seem to decrease the odds of near-term reversals in the Court’s jurisprudence, it seems a bit early to declare the federalist revival secure. It remains to be seen, in other words, whether cases like United States v. Lo-

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2. See Printz v. United States, 521 U.S. 898, 917-18 (1997) (holding that Congress may not require state executive officers to enforce federal laws); New York v. United States, 505 U.S. 144, 179 (1992) (holding that Congress may not require state legislatures to legislate according to federal directives).


5. Each of the cases cited in notes 1-3, supra, was decided by a vote of five to four except New York, in which Justice Souter joined the pro-states majority.

6. See, e.g., Kimel v. Florida Bd. of Regents, 528 U.S. 62, 97-99 (2000) (Stevens, J., dissenting) (“Despite my respect for stare decisis, I am unwilling to accept Seminole Tribe as controlling precedent. . . . The 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.”).
pe7 and Printz v. United States8 will be remembered as landmarks or mirages.

At this uncertain juncture in the Court's federalism jurisprudence, this panel is appropriately meant to take stock of the current debate over judicial review of federalism issues. For much of the past half-century, that debate has focused on whether we should even have judicial review of federalism issues, or whether the protection of the state-federal balance should be left to the political process.9 That is, courts and scholars have asked whether issues involving the federal balance should simply be declared non-justiciable10 or—what might amount to the same thing—those issues should be reviewed at such a deferential level by courts as to make the judicial role trivial from a practical standpoint.11 A few observations about this debate are in order at the outset.

First, it's important to recognize that the debate over judicial review has taken place at the extreme end of the range of possible options. In other words, the debate has generally been over whether we should have any judicial review or none at all; between total reliance on the political process to protect federalism or anything short of that. What this means is that proponents of judicial review might differ about how much judicial

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9. The latter view is commonly attributed to Herbert Wechsler, see 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), although Wechsler himself did not advocate that federal courts abstain altogether from deciding federalism issues. See infra note 80.
11. See, e.g., Lopez, 514 U.S. at 603 (Souter, J., dissenting) (“In reviewing congressional legislation under the Commerce Clause, we defer to what is often a merely implicit congressional judgment that its regulation addresses a subject substantially affecting interstate commerce ‘if there is any rational basis for such a finding.’ . . . If that congressional determination is within the realm of reason, ‘the only remaining question for judicial inquiry is whether the means chosen by Congress [are] reasonably adapted to the end permitted by the Constitution.’”) (quoting Hodel v. Virginia Surface Mining & Reclamation Ass’n, 452 U.S. 264, 276 (1981)); Larry Kramer, Putting the Politics Back Into the Political Safeguards of Federalism, 100 COLUM. L. REV. 215, 291 (2000) [hereinafter Kramer, Politics] (arguing that the Court should apply “rational basis scrutiny to questions regarding the limits of Congress’s power under Article I” because “the political process is structured in a way that entitles Congress’s decisions to a great deal of deference.”).

review is desirable, were the debate to shift to the "how much" question instead of the "any at all" question. Proponents of judicial review might, that is, be prepared to concede an important measure of reliance on the political process so long as some judicial review exists as an ultimate backstop.

The second point is that the proponents of judicial review who happen to fill five seats on the U.S. Supreme Court—the people who gave us *Lopez*, *Printz*, and *Seminole Tribe of Florida v. Florida* \(^{12}\) to name just a few examples—may not in all instances be giving us the *right kind* of judicial review. I will argue that some of these doctrines are helpful to the states' cause, that some are not, and that the so-called "states'-rights" majority may be ignoring and even doing real damage to the states in the category of cases that matters most.

Finally, I want to suggest that the dissenters in the cases I have mentioned—the four nationalist justices who take the rhetorical position that federalism should be relegated to the political process—actually do have a theory of judicial review in federalism cases. What's more, I will argue that the nationalists' approach to judicial review offers some real benefits to the states, especially in those areas that the "states'-rights" majority has neglected. By highlighting the extent to which the nationalists have offered a helpful contribution to federalism doctrine, I want to suggest some common ground on which a viable federalism jurisprudence might rest going forward.

In making this argument, it will help to have some idea of what we might want federalism doctrine to do. After all, until we figure out what we want federalism doctrine to accomplish, it is hard to tell whether the doctrines we have are getting the job done. Part I of this Article thus offers a sketch of an "ideal" theory of federalism, derived from some basic structural imperatives in the *Federalist Papers*. \(^{13}\) These imperatives suggest, as the opponents of judicial review in federalism cases often have argued, that what judicial review we have should be directed toward maintaining a vital system of political and institutional checks on federal power, not on policing some absolute sphere of state autonomy. I suggest, however, that this institutional role for judicial review may be far more robust than the opponents of judicial review have supposed.

In Part II, I evaluate the federalism jurisprudence of the current Supreme Court majority against the list of institutional priorities developed in Part I. \(^{14}\) I thus consider whether judicial doctrines limiting Congress' authority under the Commerce Clause and section Five of the Fourteenth Amendment, barring the "commandeering" of state institutions to serve federal ends, constitutionalizing state sovereign immunity, and imposing "clear statement" rules on certain forms of congressional policies, facilitate

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13. *See infra* notes 16-105 and accompanying text.
the more general imperative of helping the political process police itself. I conclude that some of these doctrines are helpful, but that some are not, and that the Court may be ignoring the most important constitutional imperative, that is, protecting state regulatory authority by limiting the preemptive effect of federal law. In fact, the “states’-rights” majority may have done serious damage to state regulatory interests in this area.

Part III turns to the “nationalist” justices who seem to have resisted the revival of judicial protections for federalism at nearly every turn. It turns out that these justices—namely Justices Stevens, Souter, Ginsburg, and Breyer—actually do have a federalism jurisprudence of their own. This jurisprudence, moreover, is most willing to protect state interests in precisely the cases that the “states’-rights” majority has neglected, that is, cases concerning the preemption of state regulatory authority by federal statutes and regulations. Although I ultimately conclude that the “process federalism” espoused by the nationalists is incomplete without some substantive backstop limiting Congress’ legislative power, this process-based approach contains important insights. The nationalists’ federalism thus provides not only opportunities for “common ground” going forward, but an opportunity to strengthen and redirect the federalism jurisprudence of the current majority.

I. A Sketch of an Ideal Federalism Theory

In order to tell whether the Court has given us a good set of federalism doctrines, it will help to have some idea of what we want federalism doctrine to do. In this section I sketch the outlines of an “ideal” federalism theory—not in the sense of offering a perfect set of doctrinal prescriptions, but rather simply a set of rough characteristics and priorities. What sort of doctrines should we have? And what objectives ought they promote?

The sketch I am offering is drawn from some basic structural imperatives in the Federalist Papers. That is surely not the only place to look for a federalism theory, and the problems with undue reliance on the Federalist Papers are well-known. I use the Federalist here for conventionalist rea-

15. See infra notes 136-200 and accompanying text.
16. See, e.g., William N. Eskridge, Jr., Should the Supreme Court Read The Federalist But Not Statutory Legislative History?, 66 GEO. WASH. L. REV. 1301, 1309 (1998) (noting that “[b]ecause they were propaganda documents, seeking (often disingenuously) to rebut the arguments of the Anti-Federalists, some historians are reluctant to conclude that the Federalist even honestly reflects the views of Madison and Hamilton themselves”); Larry D. Kramer, Madison’s Audience, 112 HARV. L. REV. 611, 611 (1999) (suggesting that the Federalist Papers were not widely read at the time of ratification); see also GARRY WILLS, EXPLAINING AMERICA: THE FEDERALIST XVIII-XXVI (1981) (recounting extended debates in American political science concerning the validity of the Federalist’s arguments).
sons—\textsuperscript{17} that is, because we are accustomed to using the \textit{Federalist} as a sort of "owner's manual" for the Constitution, and any other available starting points (aside from the ambiguous constitutional text itself) are likely to be equally or even more controversial.\textsuperscript{18}

\textbf{A. The Political Theory of the Federalist}

Madison's essays in \textit{Federalist No. 10} and \textit{No. 51} articulate a core structural theory that is overwhelmingly focused on political and institutional checks. \textit{Federalist No. 10} is about the virtues of size: Madison defends the national republic as a salutary check on the dangers of faction in small communities. \textit{Federalist No. 51}, on the other hand, offers a theory of separated powers and checks and balances, both horizontally (where the branches of the federal government check each other) and vertically (where the autonomous power of the state governments add a "double security" against tyranny).

Three things are conspicuously absent from this theory:

(1) an explicit endorsement of judicial enforcement for structural values;

(2) any mention of individual rights provisions as a check on government power; and

(3) concern for administrative efficiency as an institutional value.

One might take the first of these omissions—the lack of any explicit endorsement of judicial review—as an answer to this panel's question. That is, one might conclude that the political and institutional checks that Madison emphasizes make judicial review unnecessary. Certainly some of the critics of judicial review have read Madison that way.\textsuperscript{19} That reading seems unpersuasive to me, however, for at least three reasons.

First, if Madison's failure to mention judicial review is to condemn the practice, then it must condemn that practice in all instances—whether involving constitutional structure or individual rights. Most of the critics of judicial review in federalism cases are unwilling, however, to go that far. Some of them wish to abolish federalism review precisely so that the Court can spend more of its time and political capital on individual rights cases.\textsuperscript{20} Both history and logic have shown the necessity of a regime of individual rights restrictions on government that is enforceable by courts. That suggests that, while I will urge attention to Madison's priorities, one should hesitate before reading his omissions as a conclusive argument against further institutional protections.

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\item \textsuperscript{18} See Kramer, \textit{Politics, supra} note 11, at 257 (concluding that, on the subject of federalism, "what Publius had to say was no different from what everyone else was saying, just more clearly and fully articulated").
\item \textsuperscript{19} See, \textit{e.g.}, \textit{id.} at 257-65.
\item \textsuperscript{20} See, \textit{e.g.}, Choper, \textit{supra} note 10, at 169.
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Second, there is an important difference between suggesting that judicial review is not itself a core check—it’s not, say, like the presidential veto—and saying that judicial review isn’t an important secondary mechanism for keeping the basic political safeguards in place. Again, the development of judicial review in individual rights cases is instructive. As John Hart Ely has argued, we may well wish for courts to defer to the political process in the vast majority of cases. But judicial review may play its most important role as a referee within that process, policing and maintaining the system of political and institutional checks that we ordinarily rely on to prevent or resolve most problems.21 I will suggest in the next two sections that judicial review in federalism cases should follow precisely this model.

Third, the Framers seem to have explicitly contemplated at least this narrower role for the courts of helping to maintain the system of political and institutional checks in place. Federalist No. 78's defense of judicial review denied that "the legislative body are themselves the constitutional judges of their own powers,"22 and Federalist No. 80 explicitly mentions judicial review to enforce certain structural aspects of federalism.23 Our constitutional tradition has long involved judicial enforcement of other structural values, like the separation of powers.24 Saikrishna Prakash and John Yoo, moreover, have recently marshaled powerful evidence that the Framers and Ratifiers of the Constitution understood that judicial review would be available to police the limits of both federal and state authority.25

I see these arguments as reasons to reject an argument that the Framers’ emphasis on political and institutional checks rules out any role for the courts. Moreover, I will argue later on that some judicial review of the limits of Congress’ power is necessary to maintain the vitality of political and institutional safeguards.26 To say this, however, is not to deny the


23. The Federalist No. 80, at 535 (Alexander Hamilton) (J.E. Cooke ed., 1977); see also Wills, supra note 16, at 126-61 (explaining how Madison’s and Hamilton’s discussion of the constitutional structure in the Federalist necessarily entailed the idea of judicial review). To be sure, the reference in Federalist No. 80 appears to contemplate judicial enforcement of federalism limits on state authority. But because the federal government has political leverage at least equivalent to that possessed by the states, it is hard to see why judicial enforcement of federalism should run in only one direction.

24. On the inconsistency of favoring exclusive reliance on political checks in federalism cases but not in separation of powers cases, see Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 567 n.12 (1985) (Powell, J., dissenting); Baker & Young, supra note 11, at 130-32.

25. See Prakash & Yoo, supra note 11, at 1489-1521.

26. See infra notes 76-103 and notes 171-95 and accompanying text in surrounding sections.
primacy of those checks. On this point, the debate over whether to have judicial review at all sometimes distracts us from what ought to be the central questions: What is necessary for maintenance of a vital and functional system of political and institutional checks? And what sort of judicial review can best bring about that result?

B. Political Checks

Take political checks first: What are the prerequisites for a vital system of “political safeguards”? Like Wechsler and Choper almost two centuries later, Madison emphasized the institutional role of the states in selecting and participating in the national government. States are represented in Congress; states participate in the election of the President through the Electoral College; and state officials may—whether or not they must—participate in the administration of federal programs.

27. See, e.g., United States v. Lopez, 514 U.S. 549, 577-78 (1996) (Kennedy, J., concurring) (arguing that the political branches must protect federalism “in the first and primary instance,” but that this does not imply “a complete renunciation of the judicial role”).

28. See The Federalist No. 45, at 311 (James Madison) (J.E. Cooke ed., 1977) (observing that “[t]he State Governments may be regarded as constituent and essential parts of the federal Government”). Madison particularly emphasized the fact that “[t]he Senate will be elected absolutely and exclusively by the State Legislatures,” id.—an arrangement which perished with the ratification of the Seventeenth Amendment. Justice Souter has argued that that Amendment thus represents a conscious and deliberate rejection of federalism. See United States v. Morrison, 529 U.S. 598, 644 (2000) (Souter, J., dissenting). That view, however, requires one to embrace an unduly radical theory of constitutional amendment—that we ought to change the way we read other provisions of the Constitution, such as the Commerce Clause, based on collateral effects of constitutional amendments designed to achieve a wholly different purpose. See Baker & Young, supra note 11, at 96 n.103 (arguing that constitutional amendments should not be read to fundamentally alter the overall structure except to the extent that they explicitly purport to do so); Vikram D. Amar, Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment, 49 Vand. L. Rev. 1347, 1353-54 (1996) (observing that proponents of direct election focused primarily on “[s]tate legislative corruption and special interest group control,” and that “surprisingly few” opponents of direct election “pointed out that popular election would reduce the ability of the Senate to represent and protect the interests of States qua States”).

29. See The Federalist No. 45, supra note 28, at 311.

30. Compare Prinzip v. United States, 521 U.S. 898, 912 (1997) (recognizing that the Framers expected state officials to participate in the administration of federal programs, but arguing that such participation was optional on the states’ part), with id. at 971-73 (Souter, J., dissenting) (reading various statements in the Federalist Papers to mean that the Framers intended the central government to have the power to require such participation).

31. The Federalist No. 45, supra note 28, at 312. On this last point, Madison anticipated Larry Kramer’s effort to rehabilitate Professor Wechsler’s account of “political safeguards” by emphasizing the role of the states in administering federal programs rather than the direct role of the states in Congress and the Electoral College, upon which Wechsler had relied. See Kramer, Politics, supra note 11, at 223-25 (pointing out weaknesses in Wechsler’s safeguards argument). Professor Kramer also relies heavily upon the role of political parties in protecting the
Madison’s analysis added a key foundational ingredient, however, that modern “political safeguards” theorists have tended to ignore: the importance of popular loyalty. Madison’s response to the Anti-Federalists’ concerns about local autonomy was to say, in essence, “Don’t worry about the States. All power in this system derives from the People, and the States are likely to retain the people’s primary loyalty.” For Madison, it made little sense to debate the relative powers of the state and federal governments vis-à-vis one another.

“The adversaries of the Constitution seem to have lost sight of the people altogether in their reasonings on this subject,” he complained, “and to have viewed these different establishments, not only as mutual rivals and enemies, but as uncontrolled by any common superior in their efforts to usurp the authorities of each other.”

This was a mistake, Madison argued, because “the ultimate authority, wherever the derivative may be found, resides in the people alone.” As a result, “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.” Rather, “the event in every case, should be supposed to depend on the sentiments and sanction of their common constituents.”

The “sentiments and sanction” of the People might make themselves known through any number of institutional mechanisms. Madison’s own discussion tends to dwell on extreme scenarios—active obstruction of federal law by the people of the states, military conflict between a federal military establishment and the state militias—although he argued that such grand conflicts were unlikely if the system were set up properly. It is not hard to imagine how popular pressure today—reflected in calls and letters to federal representatives, daily tracking polls and the like—could stave off aggressive expansions of federal power if such pressure could be mobilized on behalf of state governments. If anything, our national leaders have been criticized for being too responsive to public opinion more often than the reverse. Madison concluded that:

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32. The Federalist No. 46, at 315 (James Madison) (J.E. Cooke ed., 1977); see also The Federalist No. 49, at 339 (James Madison) (J.E. Cooke ed., 1977) (stating that “the people are the only legitimate fountain of power”).
33. The Federalist No. 46, supra note 32, at 315.
34. Id. at 315-16.
35. Id. at 316.
36. See id. at 320-23 (noting possibility of military conflicts between federal and state governments).
37. See, e.g., John F. Harris, Policy and Politics by the Numbers, Wash. Post, Dec. 31, 2000, at A1 (reporting that “no previous president read public opinion surveys
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.38

In either the nightmare scenarios or the more prosaic ones, then, popular loyalty remained for Madison the ultimate political safeguard of federalism.

Although popular sentiment may operate directly in both exceptional and non-exceptional times—through what Bruce Ackerman has called, respectively, “higher lawmaking” and “normal lawmaking”39—popular loyalty to the states seems likely to make itself felt most often through the institutions of representation. This suggests, in turn, that a healthy system of political checks must include two elements: first, a process by which the states’ representation in the national councils actually can have an impact on national action, and second, a guarantee that national actors can be held accountable for their actions after the fact. I discuss each of these elements in turn.

1. Process

Modern “political safeguards” theorists like Professor Wechsler and Dean Choper have, of course, long focused on the representation of the states in Congress as the critical, even exclusive, constitutional protection for federalism.40 Many judges and scholars have been properly skeptical of these claims.41 If we focus, as we should, upon protection of the institutional interests of state governments rather than the representation of private interests that happen to be geographically concentrated within

with the same hypnotic intensity [as Bill Clinton]. And no predecessor has integrated his pollster so thoroughly into the policymaking operation of his White House”); Mimi Hall, New White House, New ‘War Room’ for Strategizing, USA TODAY, July 5, 2001, at 4A (observing that “Clinton’s reliance on opinion polls was derided by Republicans who said he followed polls, not principles or convictions”); The Indianapolis Star, Sept. 1, 1998, at A8 (complaining that “[w]e are becoming a country governed not so much by leaders, but by politicians mouthing the latest opinion poll”). Early reports indicate that the new administration is equally sensitive to public opinion. See Hall, supra, at 4A.

38. The Federalist No. 46, supra note 32, at 322.
39. See Bruce Ackerman, We the People: Foundations 6 (1991). My use of this terminology should not be read to connote acceptance of Professor Ackerman’s broader claims.
40. See, e.g., Wechsler, supra note 9, at 546-52.
41. See, e.g., Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 565-66 n.9 (1985) (Powell, J., dissenting); Prakash & Yoo, supra note 11, at 1471-80 (discussing “the errors of constitutional structure committed by the political-safeguards theorists”).
particular states, then state-by-state representation in Congress may not in itself be a reliable safeguard. We have good reason to suspect, for example, that while members of the national Congress represent the interests of their constituents back home, they may see state politicians and state governmental institutions as political competitors. National representatives thus may act in ways that are at best indifferent to the interests of state politicians, and that at worst seek to undermine the relative influence of state institutions.

These concerns do not, however, justify a wholesale rejection of the importance of “political safeguards” for federalism. At least some anecdotal evidence suggests that the states’ representation in Congress protects state institutional interests some of the time; the 104th Congress’ passage of the Unfunded Mandates Reform Act is a prominent example. Nor does an emphasis on process foreclose a meaningful judicial role in preserving federalism. Rather, a process-based approach simply shifts judicial review into a role reminiscent of John Hart Ely’s work on individual rights: while we count on the political process to resolve most substantive disputes about governmental policy, we rely on courts to enforce the basic rules of that process. Indeed, the most compelling argument for a process-based approach to judicial review stems from the fact that process arguments can take us a long way toward restoring balance in the federal system.

Process federalism has two important aspects. The first stems from the fact that, in order for political safeguards to work, the important governmental decisions actually have to be made through channels in which...

42. The emphasis on the institutional interests of state governments is critical because virtually all the important benefits of federalism stem from the existence of the states as self-governing entities. States cannot function as checks on the power of the central government, or as laboratories of experimental regulation, if they lack the institutional ability to govern themselves in meaningful ways. It is thus the independent policymaking authority of state governments that is the critical variable, not the extent to which geographically-concentrated private interests are represented. See Kramer, Politics, supra note 11, at 222 (stating that goal of federalism is to “preserve the regulatory authority of state and local institutions to legislate policy choices,” not to make federal government “sensitive to private interests organized along state or local lines”).

43. See, e.g., Clayton P. Gillette, The Exercise of Trumps by Decentralized Governments, 83 Va. L. Rev. 1347, 1357 (1997) (observing that “[w]here central representatives are popularly elected, they may have a stake in reelection that induces them to favor central intervention whenever they can thereby be perceived as addressing an issue of interest to constituents, regardless of whether centralized attention to the issue is required or authorized”); Larry Kramer, Understanding Federalism, 47 Vand. L. Rev. 1485, 1510-11 (1994) (concluding that “[s]tate officials are rivals, not allies [to federal representatives], a fact the Framers understood and the reason they made Senators directly beholden to state legislators in the first place”).

44. See Printz v. United States, 521 U.S. 898, 940-41 (1997) (Stevens, J., dissenting) (citing the passage of the Unfunded Mandates Reform Act as evidence that state representation in Congress is sufficient to protect state governmental interests).

45. See Ely, supra note 21, at 73 (describing “[t]he Court as Referee”).

46. See infra Section III.B.
the states are represented. In other words, Congress should be making the call on governmental action that affects the states—not some administrative agency or other governmental institution in which the states have virtually no voice. In this sense, almost every separation of powers issue acquires federalism connotations as well: the more we shift governmental authority away from Congress to the federal Executive and Judicial branches, the less meaningful the states’ representation in Congress becomes. Because delegation of legislative authority to administrative agencies and federal common lawmaking by the Article III judiciary both have the effect of circumventing the federalism checks on congressional activity, they ought to be suspect on process federalism grounds.

The second aspect is notice. In order for political safeguards to be effective, we would want to make sure that the defenders of the states on Capitol Hill have adequate warning when pending legislation may affect the interests or authority of state governments. Such warning both ensures that incursions on state autonomy will occur only as a result of the considered judgment of Congress, and it provides potential opponents of such incursions with an opportunity to mobilize their forces. The Supreme Court thus has imposed, in a number of different contexts, “clear statement” rules of statutory construction in cases implicating state autonomy. In *Gregory v. Ashcroft*, for example, Justice O’Connor explicitly invoked the “political safeguards” idea to justify such a rule:

"[I]nasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress’ Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise. To give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for lawmaking on which *Garcia* relied to protect states’ interests."

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I hope to demonstrate in Part III that merely insisting on these clear statement rules, particularly in the context of preemption of state law by federal legislation, can yield rather dramatic benefits for state regulatory autonomy.

2. Accountability

If our system of political checks is to rest on a foundation of popular loyalty, the people need to know when to get upset and at whom. The system requires a certain degree of transparency. It must be clear when the national government has acted, as opposed to the states, so that the people can provide feedback to the political process that resulted in the action. Without transparency and accountability, political safeguards do not have the necessary information to operate.

This sort of transparency differs from the concept of notice discussed in the previous subsection. By “notice,” I mean that various governmental actors in the system—and particularly those actors, like congressional representatives, most likely to care about state autonomy—must know in advance what measures are being proposed so that they can attempt to shape the final form of the measures or oppose them outright. Transparency, on the other hand, involves information transmitted to observers outside the government—to the sovereign people themselves. To the extent that it is the people's loyalty upon which Madison ultimately relied to protect the states, the people must have adequate information about the interaction of federal and state governments in order to bring popular pressure to bear when appropriate.

A second sort of accountability is also important. Federal power often is limited not simply by political disapproval of national actions, but also by limits on federal governmental resources. Federal resources, while vast, only extend so far, and many federal initiatives that might otherwise encroach on state regulatory authority are defeated by the lack of federal resources to carry them out. This check only works, however, if the federal government must internalize the costs of its actions. If Congress can expand the scope of federal regulation while shifting the enforcement costs of such regulation onto other actors, for example, then an important limit on federal activity has been circumvented.51

From a more general perspective, the first point is a subset of the second. Political disapproval is a “cost” of government activity, not dissimilar in principle from enforcement funding and manpower. When a given governmental actor seeks to blur responsibility for a particular program that may be unpopular, it is attempting to shift the political costs of that program onto other governmental entities. If the people cannot assign blame for an unpopular federal policy, because the lines of political ac-

countability are not transparent, then the national government responsible for the policy has avoided internalizing the political costs of its actions.

This idea has been most directly at work in the Court's anti-commandeering cases. Both *New York v. United States*\textsuperscript{52} and *Printz* involved politically controversial forms of regulation: respectively, siting of radioactive waste disposal facilities and background checks for gun purchasers. In each instance, the people who were the direct objects of regulation—the homeowners near proposed disposal facilities and persons denied the right to purchase a gun following a background check—were likely to resent the law. Congress, however, had blurred the lines of political accountability by forcing state legislatures to designate the waste sites and state law enforcement officials to conduct the background checks.\textsuperscript{53} "Commandeering" thus had the effect of allowing Congress to shift at least some of the political costs of its regulation from itself to actors at the state level.

The two forms of accountability discussed here are related in another sense as well. In a world of finite resources, the prioritization of resources can be politically charged even if individual goals are not politically controversial. Forcing the federal government to internalize the costs of its policies—thereby forcing difficult decisions about resource allocation—is thus likely to sharpen the functioning of the political safeguards of federalism. Governmental actors that oppose particular programs on state autonomy grounds are likely, in these circumstances, to find allies among those who oppose those programs based on a different set of priorities, with the net effect that legislation encroaching on state autonomy becomes more difficult to enact.

C. *Institutional Checks*

The checks on federal power I have discussed so far are *political* in the sense that they provide mechanisms whereby deliberate opposition to federal policy can prevent inroads on state power. These checks are, of course, a form of "institutional check." But I want to use that term in a narrower sense—that is, a limit on federal power that operates independently of political opposition to particular federal policies.

The key ingredient here is inertia—the fact that it's hard to get much done in the constitutional system. The constitutional structure is designed to make a virtue of vice. Madison talks in *Federalist No. 51*, for instance, about harnessing the individual self-interest of politicians to hold the over-
all structure in place.\textsuperscript{54} Inertia and inefficiency are similar tools that play an important role in protecting state autonomy from federal incursions.\textsuperscript{55}

Here is an easy example: The Framer’s theory of separation of powers placed considerable importance on separating the legislative authority from the interpretive.\textsuperscript{56} That distinction would not be very meaningful in the absence of legislative inertia. We know Congress can overrule judicial interpretations of statutes that it does not like; if that could be done instantly and without costs, Congress would hold the interpretive authority as well. It is the fact that legislative overruling is difficult and relatively infrequent that renders the power to interpret statutes at least substantially independent of the power to make and amend them.\textsuperscript{57} In other words, inertia makes the interpretive authority an important check on the legislative branch.

Legislative inertia also plays a crucial role in what Brad Clark has called “the procedural safeguards of federalism.”\textsuperscript{58} This is more and more true as we get away from the old Dual Federalism’s attempt to stake out zones of regulatory concern that the federal government simply cannot enter.\textsuperscript{59} Consider, for example, Henry Hart and Herbert Wechsler’s famous characterization of federal law as “generally interstitial in its nature”:

Federal legislation, on the whole, has been conceived and drafted on an \textit{ad hoc} basis to accomplish limited objectives. It builds upon legal relationships established by the states, altering or supplanting them only so far as necessary for the special purpose. Congress acts, in short, against the background of the total \textit{corpus juris} of the states in much the way that a state legislature

\textsuperscript{54} See \textsc{The Federalist} No. 51, at 349 (James Madison) (J.E. Cooke ed., 1977) (urging a “policy of supplying by opposite and rival interests, the defect of better motives” so that “the private interest of every individual may be a sentinel over the public rights”).

\textsuperscript{55} See Clark, \textit{Federal Common Law}, supra note 48, at 1261 (observing that “[t]he Constitution . . . reserves substantive lawmaker power to the states and the people \textit{both} by limiting the powers assigned to the federal government \textit{and} by rendering that government frequently incapable of exercising them”).

\textsuperscript{56} See, \textit{e.g.}, \textsc{The Federalist} No. 78, supra note 22, at 523 (agreeing “that there is no liberty if the power of judging be not separated from the legislative and executive powers”) (quoting \textsc{Montesquieu, The Spirit of Laws}, vol. 1 (1748))).


\textsuperscript{58} Clark, \textit{Separation of Powers}, supra note 47, at 1339.

\textsuperscript{59} See generally Edward Corwin, \textit{The Passing of Dual Federalism}, 36 \textsc{Va. L. Rev.} 1 (1950) (discussing the pre-1937 regime of “dual federalism”); Ernest A. Young, \textit{Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception}, 69 \textsc{Geo. Wash. L. Rev.} 139, 142-52 (2001) [hereinafter Young, \textit{Dual Federalism}] (arguing that the Court’s current federalism jurisprudence has not generally revived “dual federalism”).
acts against the background of the common law, assumed to govern unless changed by legislation.60

It is hard to account for this observation—together with Hart and Wechsler’s equally famous decision to downplay “[p]roblems of federal and state legislative competence” that take the form of “questions of ultimate power”61—without according crucial significance to issues of inertia. Just because Congress can act, Hart and Wechsler suggest, does not mean they will.62 Federal action remains interstitial, “the special rather than the ordinary case,”63 not only because of political opposition from the states but because federal law is simply difficult to make. In other words, even if Congress’ power is broad in theory, it is hard to get around to preempting everything.

These “procedural safeguards” are enforced by preventing the federal government from circumventing the cumbersome and intricate process by which, under Article I, federal law is made.64 This means, for instance, insisting that if state law is to be displaced, this must happen only by way of federal legislation enacted by Congress, not by administrative fiat or by judge-made federal common law.65 The latter two forms of federal lawmaking, however, have become increasingly prevalent in recent years. As the current editors of the Hart and Wechsler casebook have observed, “[T]oday federal law appears to be more primary than interstitial in numerous areas.”66 It is no coincidence that the most dramatic incursions on state regulatory authority have come in the wake of the modern administrative state, which was erected in large part to streamline the process of federal lawmaking. The judicial abandonment of the nondelegation doc-


61. Hart & Wechsler, supra note 60, at xi.

62. See id. (“For every case in which a court is asked to invalidate a square assertion of state or federal legislative authority, there are many more in which the allocation of control does not involve questions of ultimate power; Congress has been silent with respect to the displacement of the normal state-created norms, leaving courts to face the problem as an issue of the choice of law.”).

63. Wechsler, supra note 9, at 544.


65. See, e.g., Marshall, supra note 48, at 265 (discussing the tension between process federalism values and preemption by administrative agencies); Young, Preemption at Sea, supra note 48, at 274 (discussing the same tension where judge-made maritime law preempts state law).

66. Richard H. Fallon, Daniel J. Meltzer, & David L. Shapiro, Hart and Wechsler’s The Federal Courts and the Federal System 522 (4th ed. 1996). They explain that “[i]n the 40 years since the First Edition was published, the process of expansion of federal legislation and administrative regulation noted in this discussion has continued if not accelerated. Today one finds many more instances in which federal enactments supply both right and remedy in, or wholly occupy, a particular field.” Id.
trine, as well as the flowering of what Judge Henry Friendly called "the new federal common law," have both meant that federal lawmaking no longer need run the cumbersome gauntlet of Article I.

D. Process Federalism and Judicial Review

Process federalism's central insight is that the federal-state balance is affected not simply by what federal law is made, but by how that law is made. Most classic separation of powers issues—delegation, for example, or the legitimacy of federal common lawmaking—thus have an important federalism dimension. The converse also seems true: We can go a long way towards assuring state autonomy by policing the federal lawmaking process, even if we are unwilling or unable to enforce substantive limits on federal power.

In addition to its historical grounding in Federalist political theory, a process federalism approach has a second virtue that is particularly salient today. To anyone even cursorily aware of the debates in constitutional theory over the past two decades, process federalism will recall John Hart Ely’s process-based defense of judicial review in the area of individual rights. For Professor Ely, the basic assumption of our constitutional system is that legislative majorities are ordinarily entitled to get their way; judges, therefore, should ordinarily defer to the legitimate outcomes of the political process. More aggressive judicial review, on this account, is justified only by some defect in the political process that undermines the ordinary rule of deference. As Professor Ely put it, "[unblocking] stoppages in the democratic process is what judicial review ought preeminently to be about."

Professor Ely highlighted two particular sorts of defects that justify more searching judicial review: (1) pervasive and enduring prejudice against "discrete and insular minorities," which might foreclose those groups from an adequate opportunity to protect their interests through


68. Henry J. Friendly, In Praise of Erie—And of the New Federal Common Law, 39 N.Y.U. L. REV. 383, 383 (1964). Although federal courts made common law before Erie, it did not preempt state law outside the context of diversity cases in federal court. See, e.g., William A. Fletcher, The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance, 97 HARV. L. REV. 1513, 1513-14 (1984) (demonstrating that state courts were not obligated to follow federal decisions construing the "general common law" under the regime of Swift v. Tyson); Friendly, supra, at 405 (noting that "Erie led to the emergence of a federal decisional law in areas of national concern that is truly uniform because, under the supremacy clause, it is binding in every forum").

69. See Ely, supra note 21; see also Andrzej Rapaczynski, From Sovereignty to Process: The Jurisprudence of Federalism after Garcia, 1985 SUP. CT. REV. 341, 364-65 (drawing this parallel).

70. Ely, supra note 21, at 103.
politics; and (2) when a particular governmental measure, such as a restriction on free political debate, undermines the functioning of the normal political process so that its results are no longer trustworthy.\textsuperscript{71} It is not difficult to fit process federalism under the second of these two concerns. When the federal government seeks to shift the political costs of its actions to state officials by commandeering them into enforcing federal law, for example, we would not expect courts to defer to the outcomes of the normal political process since those lines of accountability have become blurred. Similarly, when state regulatory authority is preempted by a federal law made not by Congress (where the states are represented) but by a federal administrative agency or a federal court, the ordinary political process designed to protect state interests may have been circumvented altogether, therefore justifying more searching judicial review.\textsuperscript{72}

Process federalism thus seeks to address one of the most prominent criticisms of the recent turn in federalism jurisprudence—that is, that the Rehnquist Court's federalism decisions mark an inappropriate return to judicial activism.\textsuperscript{73} It is not surprising that the Court's more nationalist justices have been willing to embrace process federalism, at least in theory. Justice Blackmun argued in \textit{Garcia} 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. 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."\textsuperscript{74}

The version of process federalism I am advocating here, of course, is considerably less deferential to federal authority than Justice Blackmun's view

\textsuperscript{71} See id. at 135-79 (protecting minorities); id. at 105-34 (preventing restrictions on functioning of the political process).

\textsuperscript{72} To the extent that administrative regulations or federal common law rules simply implement clear policy choices made by Congress, of course they raise relatively minor problems from a standpoint of process federalism. I do not explore these questions of degree further here, other than to say that reviewing courts will have to focus carefully on the relationship between the non-legislative federal action and the underlying statute by which the action is justified.

\textsuperscript{73} See, e.g., United States v. Lopez, 514 U.S. 549, 605-06 (1995) (Souter, J., dissenting) (comparing the Court's reinvigoration of limits on the commerce power to the activism of \textit{Lochner v. New York}); Peter M. Shane, Federalism's "Old Deal": \textit{What's Right and Wrong with Conservative Judicial Activism}, 45 \textit{Vill. L. Rev.} 201, 206 (2000) (suggesting that the Court's new jurisprudence is "at least a potential return to . . . the [pre-1937] 'Old Deal' with regard to the Court's treatment of federalism").

turned out to be.\textsuperscript{75} I will argue in Part III, however, that process federalism is more than just a fig leaf for deference to Congress for the nationalist justices presently on the Court.\textsuperscript{76} In any event, legal arguments frequently lead in directions unanticipated by their originators, and Justice Blackmun's argument in Garcia provides a more than adequate theoretical basis for judicial review that is much more meaningful than anything he likely intended.\textsuperscript{77}

The preceding discussion suggests that an "ideal" set of process federalism doctrines would do two things. First, it would enforce the procedural requirements for how federal law is made in order to ensure (a) that political defenders of state autonomy have both notice and an opportunity for input or opposition and (b) that the mechanisms that serve to reduce the overall output of federal law are not circumvented. Second, the doctrine would enforce the accountability of federal actors, by ensuring that lines of political responsibility for particular policies are transparent and that the federal government internalizes the costs of its regulation. As I demonstrate in Part III below, simply adhering to these principles would go a long way toward restoring some balance in the federal-state relationship.

I doubt, however, that these first two aspects of process federalism ultimately are sufficient to conform to Madison's original understanding of political safeguards. In the end, as in many parts of the law, substance and process are not totally unrelated.\textsuperscript{78} I develop that relationship in the next Section.

\textsuperscript{75} For example, Justice Blackmun joined Justice White's dissent in New York, which rejected the majority's argument that federal commandeering of state legislatures blurred lines of political accountability for federal programs. See New York v. United States, 505 U.S. 144, 189 (1992) (White, J., dissenting); see also South Carolina v. Baker, 485 U.S. 505, 527 (1988) (rejecting process federalism arguments in the course of upholding statute repealing federal tax-exempt status of certain state bonds).

\textsuperscript{76} See infra notes 131-95 and accompanying text.

\textsuperscript{77} See Rapaczynski, supra note 69, at 364-65 (outlining the breadth of potential "process jurisprudence" limitations on federal power left open by Garcia).

\textsuperscript{78} Cf. Laurence H. Tribe, The Puzzling Persistence of Process-Based Constitutional Theories, 89 YALE L.J. 1063, 1067-72 (1980) (arguing that process-based theories cannot avoid difficult questions concerning the substantive nature of rights). Although a full exploration would require more space than I can give it here, Professor Tribe's criticism of process-based theories (especially Professor Ely's "representation reinforcement" approach) seems inapplicable to process federalism. That is because the argument that federalism protects liberty must always concede what Tribe accuses Ely of not conceding—that is, that some further substantive content must be given to the "liberty" that is being protected. Process federalism does require attention to what substantive characteristics of state autonomy are important to protect, and I explore that question in the next section.
E. Only Two Cheers: State Regulatory Authority and the Continuing Need for Substantive Restraints

The extensive judicial and academic debate over the “political safeguards of federalism” tends frequently to take on an “all or nothing” tone: either federalism concerns should be remitted entirely to the political process, or judges should shoulder the entire burden of protecting state autonomy on their own. Proponents of judicial review do not generally take this position in reality. Saikrishna Prakash and John Yoo acknowledge, for instance, that “the political safeguards may, on occasion, safeguard the states’ constitutional powers and prerogatives.” In the heat of battle, however, defenders of a judicial role tended to neglect the ways in which the political process protects federalism and, more far-reaching, the opportunities that exist for expanding judicial review along process lines. I have undertaken to sketch the outlines of such an approach to judicial review in the preceding pages of this Part, and I will flesh out the practical implications of those ideas in Part III.

The nearly-exclusive focus of defenders of state autonomy on judicial protection is understandable, perhaps, because the modern proponents of the “political safeguards” idea—unlike Herbert Wechsler before them—do seem to advocate exclusive reliance on political processes to protect federalism. But exclusivity does not necessarily follow from an emphasis

79. Prakash & Yoo, supra note 11, at 1461; see also id. at 1471 (stating that “[s]upporters of the political safeguards of federalism theory deserve praise for reviving the understanding that the constitutional structure would protect the states”).

80. Professor Wechsler went no further than to say that “the Court is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the states, whose representatives control the legislative process and, by hypothesis, have broadly acquiesced in sanctioning the challenged Act of Congress.” Wechsler, supra note 9, at 559. And he insisted—in the same breath—that the Court cannot “decline to measure enactments by the Constitution when it is called upon to face the question in the course of ordinary litigation.” Id.

81. See, e.g., Prakash & Yoo, supra note 11, at 1471 (observing that “Choper and Kramer assume that the political safeguards of federalism are exclusive”); see also United States v. Morrison, 529 U.S. 598, 649 (2000) (Souter, J., dissenting) (insisting that “the Constitution remits [issues of federalism] to politics”); Kimel v. Florida Bd. of Regents, 528 U.S. 62, 96 (2000) (Stevens, J., dissenting) (“[O]nce Congress has made its policy choice, the sovereignty concerns of the several States are satisfied, and the federal interest in evenhanded enforcement of federal law . . . does not countenance further limitations.”). While Professor Prakash and Yoo seem correct in characterizing the views of Dean Choper and Professor Kramer, their attribution of the exclusive view to a third target, Professor Clark, seems incorrect. See Prakash & Yoo, supra note 11, at 1460 (characterizing Professor Clark’s argument as an “effort to prop up the deeply flawed political-safeguards theory”). Professor Clark does suggest that “strict adherence to federal lawmaking procedures arguably has a ‘larger influence upon the working balance of our federalism’ than the formal ‘distribution of authority between the nation and the states.’” Clark, Separation of Powers, supra note 47, at 1325 (quoting Wechsler, supra note 9, at 543-44). Nevertheless, nothing in his argument is inconsistent with judicial enforcement of substantive as well as procedural constraints on federal power.
on political safeguards. Justice Kennedy observed in *Lopez*, for instance, that “it would be mistaken and mischievous for the political branches to forget that the sworn obligation to preserve and protect the Constitution in maintaining the federal balance is their own in the first and primary instance.”82 “At the same time,” he insisted, “the absence of structural mechanisms to require those officials to undertake this principled task, and the momentary political convenience often attendant upon their failure to do so, argue against a complete renunciation of the judicial role.”83 Indeed, it may be that the vitality of political and institutional checks ultimately depends on the enforcement of certain substantive constraints on federal power.

1. The Relation of Power to Process

The political and procedural safeguards of federalism that I have discussed proceed from a common assumption: popular loyalty is the ultimate safeguard for state autonomy. But why would we expect people to be loyal to the States? Madison thought that “[m]any considerations . . . seem to place it beyond doubt that the first and most natural attachment of the people will be to the governments of their respective States.”84 One reason is that the state governments are closer to the people, so that “ties of personal acquaintance and friendship, and of family and party attachments” will bind the public more strongly to the states than to the nation.85 More particularly, Madison expected the state governments to provide a dramatically higher proportion of the public employment, governmental largesse, and beneficial regulation that engender popular loyalty than that provided by the central administration. “By the superintending care of these [state governments],” Madison observed, “all the more domestic and personal interests of the people will be regulated and provided for.”86

This point makes a great deal of intuitive sense. People care most about governmental actions that affect them in their daily lives—for example, the quality of public education, the enforceability of private contracts, the safety of local streets. When government performs well on these bread-and-butter issues, public loyalty follows. Madison expected the states to control all these areas and therefore to have more ready access to popular sentiment. Federal power, by contrast, was to be focused “principally on external objects, as war, peace, negotiation, and foreign commerce.” As a result, the federal role would be relatively unimportant to most of the people, most of the time.87

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82. See *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring).
83. *Id.* at 578.
85. *Id.* at 295.
86. *Id.* at 294-95.
87. THE FEDERALIST NO. 45, *supra* note 28, at 313. Madison recounts, for example, how the central government became the focus of attention during the Rev-
One can find a quite similar insight in the more contemporary economic theory of regulation. That theory holds that people give political support to politicians in return for beneficial regulation and government services.\textsuperscript{88} One would expect that political support to flow to politicians at the level of government that the people perceive as having the power to affect the issues that matter most to them. If I have budgeted $1000 for campaign contributions in a given year, for example, and I care most about the issue of public education, then I am more likely to direct my limited contributions to state and local candidates rather than federal ones.

All this means that, in order to attract and retain the loyalty of the People, state governments have to maintain the ability to provide beneficial regulation and services in areas that really matter. They must, in other words, have plenty to do. If we reach the point that most regulatory jurisdiction and government largesse flows to the national government, popular loyalty will follow. And at that point, we cannot expect the political process to protect the States.\textsuperscript{89}

The same point holds if we focus on popular participation in government. For Madison, popular loyalty flowed not only from what state government does for its citizens, but also from the greater opportunities that citizens have to participate in that government than in the far-away federal administration.\textsuperscript{90} Andrzej Rapaczynski has observed, however, that:

\begin{quote}
[T]he vitality of the participatory state institutions depends in part on the types of substantive decisions that are left for the states. Should the federal government preempt them from most fields that touch directly on the life of local communities, the states would become but empty shells within which no meaningful political activity could take place.\textsuperscript{91}
\end{quote}


\textsuperscript{89} See Robert F. Nagel, \textit{Federalism as a Fundamental Value}: National League of Cities in Perspective, 1981 Sup. Ct. Rev. 81, 100 ("[T]he Federalists understood and emphasized that influence through electoral politics presupposes that state governments would exist as alternative objects of loyalty to the national government. Unless the residents of the states and their political representatives understand that states are entitled to claim governmental prerogatives and unless they perceive states as legitimate, separate governments, there will be no impulse to use political influence to protect the interests of states as governmental entities.").

\textsuperscript{90} See, e.g., \textit{The Federalist} No. 46, \textit{supra} note 32, at 316 (noting that "a greater number of individuals will expect to rise" into state government).

\textsuperscript{91} Rapaczynski, \textit{supra} note 69, at 404.
The opportunity for citizens to participate is thus not just a benefit provided by state and local government, but also a necessary precondition for their vitality. That vitality is threatened whenever federal legislation deprives participants at the state and local level of meaningful responsibility.

2. Loyalty and Judicial Review

Revisiting Madison’s account of popular loyalty has at least two important implications for contemporary debates over the nature and adequacy of the “political safeguards of federalism.” First, it gives us a criterion for evaluating the efficacy of different strategies for protecting federalism. One of the difficulties in judging the various different doctrinal approaches is the frequent absence of any clear sense what to shoot for. Some scholars, for example, have attempted to identify certain federalism “values”—for example, state-by-state regulatory diversity and experimentation, or the ability of states to facilitate citizen participation in politics—and then evaluated different doctrinal approaches in light of their ability to further those values. This sort of metric raises obvious problems, however. We might, of course, disagree about what particular values we are seeking to maximize.

Greg Magarian’s contribution to this Symposium offers one way to dissolve such disagreements, by insisting that the only federalism values that count are those that have “independent constitutional force.” Based on this requirement, he is able to write off a variety of “good government” and efficiency justifications for federalism (e.g., the values of state experimentation, regulatory competition among jurisdictions, adaptation to local preferences and conditions, and governmental accountability to voters) on the ground that these values are not themselves of constitutional magnitude. But why must the values underlying a particular constitutional principle themselves have “independent constitutional force”? As Professor Magarian acknowledges, the Free Speech Clause has sometimes been thought to embody an “inherent value of self-definition through expression.” Does “self-definition” have “independent constitutional force”—that is, apart from its embodiment in the First Amend-


95. See id. at 1227.

ment? Frequently, we interpret particular constitutional provisions and features by reference to values that are not themselves independently articulated in the Constitution.

In any event, it is hard to see why the "good government" values disparaged by Professor Magarian are not of "independent constitutional force." I have already argued that many, if not most, of the provisions setting up the structural constitution embody values of dividing and impeding the exercise of power. But one need not even look so far. The Constitution expressly sets out some of the values that its provisions are meant to further in the Preamble, and the listing is capacious indeed: "to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty . . . ." This list is so inclusive that virtually any value we might want to further will have "constitutional force," robbing Professor Magarian's test of any practical limiting value. In any event, "good government" aspects of federalism certainly seem to fall within the ends that the Constitution was intended to further.

97. If it does, then what additional work does the First Amendment do? After all, if free speech is a necessary means to self-definition, and self-definition is an independent constitutional principle, then one would think that restrictions on speech are unconstitutional wholly apart from the First Amendment, based on their transgression of the self-definition principle.

98. To give another example, we sometimes (for good or ill) interpret the Due Process Clause to embody a value of personal privacy. See, e.g., Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 848-53 (1992) (joint opinion of O'Connor, Kennedy, & Souter, J.J.). One might argue that the value of privacy has "independent constitutional force" because, as Justice Douglas made clear in Griswold v. Connecticut, several other constitutional provisions are also thought to protect aspects of privacy. See 381 U.S. 479, 484 (1965) (discussing aspects of privacy protected by the First, Third, Fourth and Ninth Amendments). But surely an underlying value can be used as a guide to constitutional interpretation even if it is protected in only a single place. I would not expect Professor Magarian to disagree with this point, but it does highlight the murkiness of the "independent constitutional force" criterion.

A further difficulty arises if a given constitutional provision does not implicate any underlying values of independent constitutional force—or, indeed, if it serves no values that anyone would consider important at all. Can we disregard it? I would have thought that the mere decision to include a principle or requirement in the Constitution, endorsed by the required supermajorities of the People's representatives, would be conclusive on the question of whether that principle or requirement ought to be enforced (putting aside the question of whether it should be enforced by courts). See, e.g., Sanford Levinson & Ernest A. Young, Who's Afraid of the Twelfth Amendment? 29 Fla. St. U. L. Rev. (forthcoming Fall 2001) (manuscript at 61-69, on file with authors) (considering whether the Twelfth Amendment's Habitation Clause serves any important contemporary values and whether that matters).

99. See supra notes 19-27 and accompanying text. See generally Clark, Separation of Powers, supra note 47, at 1328-72 (making a similar argument).

100. One could also point to any number of more specific "good government" provisions in the Constitution. See, e.g., the Speech and Debate Clause, U.S. CONST. art. 1, § 6 (enhancing legislative independence by immunizing legislators
Attesting to use particular substantive values as a point of departure for the formulation of judiciously-enforceable doctrine, however, raises difficult problems. Some commentators have suggested that courts should simply ask, in a given case, whether a particular federal scheme can be justified under, or is instead a threat to, the analyst's favorite federalism values (whatever those may be). Ann Althouse, for example, has argued that:

We should begin a reconstruction of Commerce Clause jurisprudence that looks deeply into why it is good for some matters to be governed by a uniform federal standard, why it is good for some things to remain under the control of the various states, and what effect these choices will have on the federal courts. ¹⁰¹

These direct value-application inquiries tend to be fairly open-ended,¹⁰² and generally involve the sort of outright policy calls—for example, determining whether state-by-state experimentation is appropriate in a particular context—that most of us would prefer to reserve to Congress.¹⁰³

The Federalist suggests a different sort of criterion for a successful set of federalism doctrines: such doctrines should maximize the ability of the system to police itself.¹⁰⁴ The Federalists were chary about writing particular substantive values into the Constitution; instead, they sought to dis-


¹⁰² See, e.g., Donald H. Regan, How to Think About the Federal Commerce Power and Incidentally Revive United States v. Lopez, 94 Mich. L. Rev. 554, 555 (1995) (arguing that the Court should uphold national legislation that is designed to solve collective-action-type problems arising from action by individual states); Stephen Gardbaum, Rethinking Constitutional Federalism, 74 Tex. L. Rev. 795, 831-38 (1996) (advancing a similar proposal and linking it to the concept of “subsidiarity” in European Community).

¹⁰³ See, e.g., Young, Dual Federalism, supra note 59, at 165-66 (defending the Court's somewhat formalistic Commerce Clause analysis on the ground that direct application of values would involve unduly political judgments); Lawrence Lessig, Translating Federalism: United States v. Lopez, 1995 Sup. Ct. Rev. 125, 197 (defending a “sophisticated formalism” in federalism doctrine on similar grounds).

¹⁰⁴ See, e.g., A. McLaughlin, A Constitutional History of the United States 137 (1936) (“Almost everything points in only one direction—toward the
tribute power to different actors, creating a constructive tension from which—they hoped—liberty would emerge. Judicial review appears to have been intended to function at the margins, forcing the relevant political actors to adhere to the rules of the game, without necessarily taking primary responsibility for enforcing particular values. And although scholarly wars over constitutional interpretation in the past several decades have yielded other rationales for judicial review in other contexts, enforcement of the basic political rules of the road remains one of the most persuasive justifications for the institution.

The second and related implication of Federalist political theory, however, is to remind us that "process federalism" cannot be wholly indifferent to substance. The political structure of American federalism has envisioned from the start a competition between the states and the nation for popular affections. So long as the states retain some hold on popular loyalty, the political process can be counted upon to protect their interests and prerogatives. But this dynamic presupposes that the states have the means to inspire popular loyalty in the first place, which in turn requires continuing jurisdiction over matters of substance important to their citizens.

This is why—despite all the good it can do—a purely process-based federalism doctrine only warrants two cheers, not three. Political and institutional checks will ultimately be meaningful only if they are backed by popular loyalty to state institutions, and the states cannot maintain such loyalty if they are deprived of the authority to provide beneficial regulation, services, and largesse to their citizens. It thus may not be enough, for example, for courts to enforce the lawmaking procedures set forth in Article I; they may also have to maintain Article I’s theory of enumerated powers in cases like *Lopez* and *United States v. Morrison*\(^{105}\) in order to prevent Congress from appropriating to itself the wellsprings of popular support.

This insistence that even a process-oriented Court ought to impose some substantive limits on federal regulatory authority seems likely to be the most controversial part of my analysis, at least for the Rehnquist Court’s critics. What I suspect will surprise the Court’s friends, on the other hand, is the extent to which even concerns about the substantive scope of state regulatory authority can be met, in large part, through process-oriented approaches. I develop this point in the next two parts through analysis of the Court’s recent federalism decisions.

**II. The Federalist Revival: A Progress Report**

The discussion up to now admittedly has been somewhat abstract. Now that we have a sense of what we might want a federalism doctrine to do, however, we can use that analysis to evaluate the doctrines that the

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need of a competent central government and the necessity of finding a system of union which could maintain itself" (emphasis added).

Court has developed to protect state autonomy. My somewhat counter-intuitive conclusion is that the "states’ rights" majority is only getting part of the job done, and that for the rest of it one has to look to the opinions of their dissenting colleagues.

The current majority has, in the years since Gregory in 1991 and New York\textsuperscript{106} in 1992, given us four critical sets of doctrines:

(1) the revival of limits on Congress’ enumerated powers—on the Commerce Clause in Lópex and Morrison, and on the Section Five power in City of Boerne v. Flores;\textsuperscript{107}

(2) the anti-commandeering doctrine of Printz and New York;

(3) the constitutionalization of state sovereign immunity in Seminole Tribe and Alden v. Maine;\textsuperscript{108} and

(4) the development of clear statement rules in cases like Gregory. Most observers have taken these doctrines as a massive revival of judicially-enforced limits on federal power. To my mind, however, the record is considerably more mixed.

A. Areas of Strength

I have suggested that the most important aspect of any desirable federalism doctrine is the protection of state regulatory authority, because the state’s ability to defend its own interest in the political process depends on its ability to compete successfully for the loyalty of its citizens. The strength of the Court’s cases limiting Congress’ commerce and Section Five powers is that they speak to this concern directly; by limiting Congress’ power, they necessarily preserve some breathing space for state authority. In other work, I have argued that these cases, beginning with Lópex and City of Boerne, respectively, fall into the genre of “power federalism”—that is, they seek to impose substantive limits on the ability of Congress to intrude on state regulatory authority.\textsuperscript{109}

Nonetheless, there is reason to doubt that these limits are really that significant—especially in the Commerce Clause context. The laws at issue in Lópex and Morrison both strike me as extremely vulnerable statutes; it seems clear, as the Court suggested in both cases, that it could not have upheld either statute without abandoning the idea of any limits at all on Congress’ commerce power. Neither case, in my view, suggests that the Court will ever take this very far. I doubt, for instance, that the Court will ever try to carve out a whole field of state regulatory authority (family law,

\textsuperscript{106} Gregory and New York, taken together, are frequently thought to have inaugurated the "federalist revival." See, e.g., Althouse, supra note 101, at 809; Martin S. Flaherty, Are We to Be a Nation? Federal Power vs. States’ Rights’ in Foreign Affairs, 70 U. COLO. L. REV. 1277, 1284 (1999). This became clear only in retrospect after decisions like Lópex and Seminole Tribe.

\textsuperscript{107} 521 U.S. 507 (1997).

\textsuperscript{108} 527 U.S. 706 (1999).

\textsuperscript{109} See Young, State Sovereign Immunity, supra note 93, at 26-29 (discussing power federalism).
for example) that is immune to federal intervention. We are unlikely to see a return to dual federalism, and the federal government's regulatory jurisdiction seems likely to remain very broad indeed.

In a world where state and federal regulatory jurisdiction are largely concurrent, political and procedural checks take on central importance. And here the Court has done some useful things. As I have said, the anti-commandeering cases, *New York* and *Printz*, can be understood as efforts to ensure that lines of political accountability are clear and that the federal government has to internalize the cost of its regulatory endeavors. The clear statement rule cases likewise tend to force Congress to take notice of federalism issues and speak clearly when addressing them, thereby giving political and procedural safeguards a chance to work. In some of its most recent decisions, the Court has put a clear statement spin on *Lopez* by construing ambiguous statutes *not* to press the limits of Congress' commerce power—an approach that seems likely to minimize the line-drawing problems associated with any attempt to put hard limits on that power.

Nonetheless, these efforts, like *Lopez* itself, do not go very far. The commandeering rule does not come up very often, and it is easily circumvented by requiring states to implement federal regulatory programs in exchange for federal money. Moreover, the Court has neglected the

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110. See Young, *Dual Federalism*, *supra* note 59, at 146-52 (discussing the fall of dual federalism and its replacement by concurrent state and federal regulatory jurisdiction in most areas). The Court's pre-1937 doctrine of "dual federalism" attempted to define and to police exclusive spheres of state and federal regulatory jurisdiction. I have argued elsewhere that, in requiring that activity regulated under the Commerce Clause be "commercial" in nature, the Court is not engaged in a similar attempt to define an exclusive sphere of activity that only the states can regulate. See id. at 157-63.

111. See, e.g., Shane, *supra* note 73, at 206-07 n.37.


113. See, e.g., New York v. United States, 505 U.S. 144, 173 (1992). The fact that Congress has this option does not make the anti-commandeering doctrine meaningless, of course. As Roderick Hills has demonstrated, there are good reasons to prefer a regime where the federal government must purchase implementation services from the states to one in which it may compel such services. See Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 Mich. L. Rev. 813, 893-900 (1998).

The conditional spending power also offers a way around the Court's power and immunity federalism cases. See, e.g., Lynn A. Baker, *Conditional Spending After Lopez*, 95 Colum. L. Rev. 1911, 1924-32 (1995) (explaining how Congress might use conditional spending to get around the Court's ruling in *Lopez*); Alden, 527 U.S. at 755 (suggesting that Congress retains broad power to induce state waivers of sovereign immunity under the spending power); Mitchell N. Berman, R. Anthony Reese, & Ernest A. Young, *State Accountability for Intellectual Property Violations: How to "Fix" Florida Prepaid (And How Not To)*, 79 Tex. L. Rev. 1097, 1130-72 (2001) (assessing proposals to use conditions on federal benefits to states to in-
clear statement idea in the most important set of cases raising the issue—that is, the cases involving preemption of state law. I will discuss preemption further shortly, but first I want to note one respect in which the majority’s approach has been affirmatively counterproductive.

B. Counterproductive Efforts

I think it is fair to say that despite the hoopla surrounding cases like Morrison and Printz, the central focus of the current majority’s federalism strategy has involved the constitutionalization of state sovereign immunity. In sheer numbers, the state sovereign immunity cases far outstrip any of the Court’s other doctrinal initiatives in the federalism area. As a matter of interpreting the underlying text and historical materials, moreover, most observers would probably agree that the Court’s holdings have been more aggressive in the area of state sovereign immunity than, say, under the Commerce Clause.

There is reason to doubt, however, whether state sovereign immunity is actually helpful to the cause of state autonomy. If I am right about the primary importance of preserving state regulatory authority, then sovereign immunity is irrelevant at best and hurtful at worst. Sovereign immunity, after all, does not protect a single square inch of state regulatory turf. It has nothing to do with the states’ ability to regulate private entities; it interferes, rather, with the federal government’s ability to regulate the states. Even here, sovereign immunity does not exempt the states from federal regulation. It simply takes one arrow—retrospective suits for money damages—out of the remedial quiver available when Congress elects to enforce federal law through private individuals.

Worse than this, state sovereign immunity may actually be counterproductive to state interests, especially when those interests are viewed against the background of the states’ need to attract and retain the loyalty of their citizens. What we ought to want, from a federalism perspective, is vital state governments that are full participants—and fully accountable par-

114. See Young, State Sovereign Immunity, supra note 93, at 51 (suggesting that “immunity federalism is the Court’s new strategy of choice for preserving, or reestablishing, some balance between state and nation”).


116. This is not to say, however, that the Court’s cases in this area represent a major break with the past. Much of the Court’s expansive immunity jurisprudence dates back at least as far as Hans v. Louisiana, 134 U.S. 1 (1890).

117. See generally Young, State Sovereign Immunity, supra note 93, at 51-58 (elaborating these arguments).
participants—in the enterprise of American government. State sovereign immunity actually cuts against that role, by cutting off the accountability that is generally the price of admission to the public trust. How loyal are citizens likely to be to a government that is free to injure them with impunity?\footnote{118}

C. Glaring Omissions

Notwithstanding my criticism of the state sovereign immunity decisions, my primary objection to the federalism jurisprudence of the Rehnquist Court majority is not what it has done, but rather what it has left undone. If I am right about the central role of state regulatory authority in preserving popular loyalty to state governments, then the central issue ought to be the preemption of state law and its displacement by federal regulatory initiatives. The current "states' rights" majority has not had much to say about this issue. Worse than that, they have gone about busily holding that ambiguous statutes preempt state law without much regard for state prerogatives at all. So on this critical subject, one cannot give the "federalist revival" a passing grade.

In three important preemption cases in the 1999 Term, for example, the Court held state law preempted in every instance. Geier v. American Honda Motor Co.\footnote{119} held that the Department of Transportation's regulations phasing in an airbag requirement for automobiles preempted state tort suits alleging that auto manufacturers should have installed such devices sooner than mandated by federal law. United States v. Locke\footnote{120} held that Washington oil-tanker safety regulations designed to prevent oil spills in Puget Sound were preempted by less restrictive federal rules. And Crosby v. National Foreign Trade Council\footnote{121} held that Massachusetts' effort to induce state contractors not to deal with the repressive regime in Burma was preempted by milder sanctions imposed at the federal level.\footnote{122}

\footnote{118. See \textit{id.} at 57. I have argued elsewhere that state sovereign immunity may be counterproductive to state interests in three additional ways: (1) it may trade off with more productive judicial initiatives in the federalism area, particularly if the Court views its political capital as limited; (2) it may spur responses from Congress that intrude further on state autonomy than merely overriding sovereign immunity from private suits; and (3) it may discourage impulses in Congress to devolve substantive regulatory authority to state governments. \textit{See id.} at 58-65.}

\footnote{119. 529 U.S. 861 (2000).}

\footnote{120. 529 U.S. 89 (2000).}

\footnote{121. 530 U.S. 363 (2000).}

Each of these decisions was not only important in terms of its particular subject matter, but also as a matter of general preemption law. *Geier* overrode a state-law savings clause in the federal statute at issue and deferred to the preemptive judgment of a federal administrative agency—both actions in considerable tension with the traditional presumption against preemption. In *Locke*, the Court purported to hold that presumption inapplicable “when the State regulates in an area where there has been a history of significant federal presence,” such as maritime shipping. And *Crosby* held state law preempted by a mere delegation of preemptive authority from Congress to the President, despite the fact that the President had taken no action to preempt state law whatsoever. In each of these cases, moreover, all or most of the “states’ rights” justices joined the majority opinion holding state law preempted.

This trend seems to be continuing in the Court’s most recent Term, with all three of the preemption decisions having gone against the states. In *Lorillard Tobacco Co. v. Reilly*, for example, the Court held that a Massachusetts statute regulating the location of cigarette advertising was preempted by federal law dealing primarily with warning labels on cigarette packages. The *Lorillard* line-up on the preemption issue exactly replicated that in *Lopez*. As Justice Stevens pointed out in dissent, “The Court’s holding that federal law precludes States and localities from protecting children from dangerous products within 1,000 feet of a school is particularly ironic given the Court’s conclusion [in *Lopez*] that the Federal

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123. See *Geier*, 529 U.S. at 905-09 (Stevens, J., dissenting).

124. *Locke*, 529 U.S. at 90. I say “purported” because the unanimous opinion in *Crosby*, issued just three months after *Locke*, explicitly left open whether the presumption against preemption would apply in a case involving foreign affairs—surely an area with a “history of significant federal presence.” See *Crosby*, 530 U.S. at 374 n.8.

125. See *Crosby*, 530 U.S. at 374-77; Young, *Dual Federalism, supra* note 59, at 170-71; see also Levinson, *supra* note 122, at 2200 (noting “the stunning dismissal by the [Crosby] Court of a state’s interest in minimizing its own participation, however indirect, in political regimes that tyrannically deprive their own populace of . . . human rights”).

126. See *Crosby*, 530 U.S. at 365-66 (unanimous opinion by Souter, J.); *Locke*, 529 U.S. at 94 (Kennedy, J., writing for a unanimous court); *Geier*, 529 U.S. at 863 (Chief Justice Rehnquist, as well as Justices O’Connor, Scalia, and Kennedy joining majority opinion by Justice Breyer).


128. See *Lorillard*, 121 S. Ct. at 2430.

129. Chief Justice Rehnquist and Justices O’Connor, Scalia, Kennedy and Thomas were in the majority (with O’Connor writing), while Justices Stevens, Souter, Ginsburg and Breyer dissented.
Government lacks the constitutional authority to impose a similarly-motivated ban."^{130}

For the most dramatic example of the Court's almost disregard for state regulatory authority, however, one would have to go back three years to *AT&T Corp. v. Iowa Utilities Board.*^{131} Prior to 1996, the states had held almost exclusive authority to regulate local or intrastate telephone service, while the Federal Communications Commission regulated *interstate service.*^{132} The 1996 Telecommunications Act fundamentally altered the existing regulatory regime by mandating competition in local telephone markets. The statute was ambiguous, however, as to who would undertake the critical task of writing regulations to implement this mandate: the FCC or the various state utility commissions. Under traditional preemption rules, ambiguities concerning the existence or scope of federal preemption are resolved in favor of the states. Justice Scalia's majority opinion in *Iowa Utilities Board,* however, divested the states of their longstanding regulatory authority in favor of centralized rulemaking by the FCC.

I have argued elsewhere that, although *Iowa Utilities Board* was decided in the same year with three particularly aggressive and widely criticized state sovereign immunity cases,^{133} it was nonetheless "the biggest federal-

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130. *Id.* at 2445 n.8 (Stevens, J., dissenting). For the 2000 Term's other preemption cases, see *Egelhoff v. Egelhoff,* 121 S. Ct. 1322, 1324 (2001) (holding that Employment Retirement Income Security Act of 1974 preempted a Washington statute concerning the status of a pension plan beneficiary after divorce); *Buckman Co. v. Plaintiff's Legal Committee,* 121 S. Ct. 1012, 1013-14 (2001) (holding that Food, Drug, and Cosmetics Act, as amended by the Medical Devices Amendments of 1976, preempted state law claim for fraud alleged to have been committed during Federal Drug Administration approval of medical device). In *Egelhoff,* Justice Thomas wrote for a majority that included Chief Justice Rehnquist, as well as Justices O'Connor, Scalia, Kennedy, Souter and Ginsburg. The Chief Justice wrote for the majority in *Buckman,* speaking for everyone except Justices Stevens and Thomas, who concurred in the judgment.


132. Indeed, Congress had specifically mandated this division of authority in the 1994 Communications Act. See 47 U.S.C. § 152(b) (1994). This provision was enacted in response to the Supreme Court's decision upholding federal regulatory authority over intrastate railroad rates in the *Shreveport Rate Cases.* See *Houston, E. & W. Tex. Ry. Co. v. United States,* 234 U.S. 342, 360 (1914). Fearing that the Court would be *too generous* in construing national authority under the 1994 Communications Act, Congress enacted a bright line rule rendering state authority over the local telephone market exclusive. See *Louisiana Pub. Serv. Comm'n v. FCC,* 476 U.S. 355, 372-73 (1986). That statute—which the Court pushed aside in *Iowa Utilities Board*—is surely one of our more dramatic examples of the political safeguards of federalism at work.

ism decision” of that Term.\textsuperscript{134} No other case in recent memory—and certainly not the more celebrated federalism decisions in cases like \textit{Lopez} or \textit{Printz}—involved such a great swath of state regulatory authority. As Justice Breyer’s dissent in \textit{Iowa Utilities Board} observed, “Today’s decision does deprive the States of practically significant power, a camel compared with \textit{Printz}’s gnat.”\textsuperscript{135} The acquiescence of the “states’ rights” justices in cases like \textit{Geier}, \textit{Crosby} and \textit{Iowa Utilities Board} thus represents a substantial gap in their theory of federalism. Equally interesting, however, is the fact that we often, though not always, find the more “nationalist” justices sticking up for state regulatory prerogatives in the preemption cases. I explore this phenomenon, and the possibility that the “nationalists” may care about the states after all, in Part III.

III. The Nationalists’ Federalism, or, How I Learned to Stop Worrying and Love Justice Stevens

If the Court’s current majority won’t stick up for the states, then who will? The answer—and it is, alas, only a partial answer—might be surprising. The Court’s nationalist minority, while steadfastly opposing the Court’s “federalist revival” in cases like \textit{Lopez}, \textit{Morrison}, \textit{Printz}, and \textit{Seminole Tribe}, has been quietly developing its own theory of federalism. That theory, I will argue, is strongest precisely where the majority’s theory is weak—that is, in its protection for state regulatory prerogatives in preemption cases. Justice Breyer summed up the nationalists’ view recently in a recent preemption dissent:

[T]he Court has recognized the practical importance of preserving local independence, at retail, \textit{i.e.}, by applying pre-emption analysis with care, statute by statute, line by line, in order to determine how best to reconcile a federal statute’s language and purpose with federalism’s need to preserve state autonomy. 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, \textit{United States v. Morrison}, 529 U.S. 598 (2000), or to protect a State’s treasury from a private damages action, \textit{Board of Trustees of University of Ala. v. Garrett}, 531 U.S. 356 (2001), but rather in those many statutory cases where courts interpret the mass of technical detail that is the ordinary diet of the law, \textit{AT&T Corp. v.}


Iowa Utilities Bd., 525 U.S. 366, 427 (1999) (Breyer, J., concurring in part and dissenting in part).\footnote{136}

In this Part, I explore some cases in which the nationalist justices have developed this sort of approach, as well as some in which they have fallen off the wagon. This approach to federalism issues, I contend, is a form of constitutional judicial review, despite the fact that it focuses on statutory construction. I further argue that the nationalists’ emphasis on vigorous process safeguards in preemption cases has the potential to do a great deal of good in terms of protecting state regulatory authority. Finally, I argue that the nationalists’ emphasis on process federalism is incomplete without some substantive backstop limiting Congress’ power, no matter how clearly Congress speaks.

A. The Nationalists on Preemption

Just as the “states’ rights” justices seem to forget about federalism when it comes to preemption cases, the nationalists seem to rediscover it in the same context. In Geier, for instance, Justice Stevens declared that “‘[t]his is a case about federalism,' . . . that is, about respect for ‘the constitutional role of the States as sovereign entities’.”\footnote{137} For Justice Stevens, Honda’s argument that federal regulations preempted state common law tort claims “rais[ed] important questions concerning the way in which the Federal Government may exercise its undoubted power to oust state courts of their traditional jurisdiction over common-law tort actions.”\footnote{138} Justice Stevens’ insistence on a presumption against preemption, moreover, was firmly grounded in process federalism:

The signal virtues of this presumption are its placement of the power of pre-emption squarely in the hands of Congress, which is far more suited than the Judiciary to strike the appropriate state/federal balance (particularly in areas of traditional state regulation), and its requirement that Congress speak clearly when exer-

\footnote{136} Egelhoff v. Egelhoff, 121 S. Ct. 1322, 1334-35 (2001) (Breyer, J. dissenting) (internal parallel citations omitted). As one observer dryly noted in an e-mail newsletter, Justice Breyer’s important and interesting statement on federalism in Egelhoff is likely to be ignored due to “a strategic gaffe of putting it in an ERISA dissent.” E-mail from John Elwood to Professor Ernest A. Young (Mar. 21, 2001, 20:03:09 EST) (on file with author).

\footnote{137} Geier v. American Honda Motor Co., 529 U.S. 861, 887 (2000) (Stevens, J., dissenting) (quoting Coleman v. Thompson, 501 U.S. 722, 726 (1991); Alden v. Maine, 527 U.S. 706, 713 (1999)). While Justice Stevens no doubt wished to highlight the irony of the majority’s stance in Geier by citing Coleman and Alden (both pro-states decisions in which Justice Stevens had dissented), the irony works both ways. That is, the pro-states majority no doubt found it difficult to take Justice Stevens’ newfound discovery of federalism seriously, after cases like Coleman and Alden, not to mention Lopez and Printz. Nonetheless, my argument in this part is that Justice Stevens’ pro-states stance in preemption cases is, in fact, worth taking seriously.

\footnote{138} Id.
cising that power. In this way, the structural safeguards inherent
in the normal operation of the legislative process operate to de-
defend state interests from undue infringement.139

Justices Souter and Ginsburg, of the nationalists, joined Justice Stevens’
dissent; of the states’ rights justices, only Justice Thomas did so.
The Geier dissent is probably the fullest statement of the process federal-
ism case for a presumption against preemption. But the last few years’
preemption cases are replete with other examples of the nationalist jus-
tices taking the more state-protective line. In Iowa Utilities Board, Justice
Breyer dissented on the ground that the states’ traditional primacy in local
telephone regulation should not be disturbed absent a clear indication of
Congress’ intent to do so.140 In Gade v. National Solid Wastes Manage-
ment Ass’n,141 Justice Souter’s dissent articulated the presumption against pre-
emption in extremely broad terms,142 and his opinion in Crosby was much
slower to abandon that presumption than was Justice Kennedy’s in
Locke.143 And Justice Ginsburg recently dissented in Norfolk Southern Rail-
way Co. v. Shanklin,144 arguing that the Court should not infer preemption
of state tort law simply from a federal decision to fund certain safety
improvements.145

The pattern, however, is not uniform. Preemption cases do not di-
play the same consistent five-to-four voting pattern that characterizes so
many of the Court’s federalism cases. And the nationalists have been far

139. Id. at 907 (citing Garcia v. San Antonio Metro. Transit Auth., 469 U.S.
528, 552 (1985)). Justice Stevens was particularly concerned that, rather than ap-
plying a presumption against preemption, the majority had deferred to the views
of a federal administrative agency that state law was preempted. “Unlike Con-
gress,” Justice Stevens warned, “administrative agencies are clearly not designed
to represent the interests of States, yet with relative ease they can promulgate com-
prehensive and detailed regulations that have broad pre-emption ramifications for
state law.” Id. at 908. See generally Marshall, supra note 48, at 277-82 (arguing that
agencies deserve less deference than Congress).

140. See Iowa Util. Bd., 525 U.S. at 420 (Breyer, J., concurring in part and
dissenting in part). Justice Scalia wrote for the majority, dismissing the federalism
argument against preemption in a footnote. See id. at 378-79 n.6.


142. See Geier, 505 U.S. at 116-17 (Souter, J., dissenting) (“If 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.”). Justices Blackmun, Stevens and Thomas
joined Justice Souter’s dissent in Gade; Justice O’Connor wrote for the majority
finding preemption, joined by Chief Justice Rehnquist and Justices White, Scalia
and (in part) Kennedy.

143. See supra notes 120-25 and accompanying text.

144. 529 U.S. 344 (2000).

145. Shanklin, 529 U.S. at 361 (Ginsburg, J., dissenting) (Justice Stevens
joined Justice Ginsburg’s dissent; Justice O’Connor wrote for the majority, finding
preemption); see also Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517 (1993)
(Justice Stevens writing for majority, over a vigorous dissent from Justice Scalia,
holding that the presumption against preemption applies not only to the existence
of preemption but also to its scope).
from consistent in their devotion to state regulatory prerogatives. Justice Breyer wrote the majority in Geier. Justice Ginsburg wrote the majority opinion in a 1998 case, El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng,\textsuperscript{146} opining that the presumption against preemption does not apply to treaty interpretation.\textsuperscript{147} Justice Souter joined the majority opinion in Iowa Utilities Board and wrote the unanimous opinion finding preemption in Crosby. And all the justices joined the unanimous opinion purporting to sharply limit the presumption against preemption in Locke.\textsuperscript{148} The state-protective position articulated by Justice Stevens in Geier thus remains more an available position for the nationalists rather than one consistently adopted in every case.

To some extent, we should expect more variation in the voting alignment in preemption cases. These cases, while carrying profound implications for the federal balance, are fundamentally about statutory interpretation. They are, in other words, not about what Congress has power to do, but about what Congress has in fact done. Given that federal power is generally conceded in these cases, even a justice who is extremely protective of state regulatory authority is bound to find preemption sometimes, in those cases where Congress has made its intent sufficiently clear. Conversely, there will be some cases in which Congress’ intent to leave state law alone will be sufficiently plain to satisfy even the most vigorous proponent of uniform national regulation.

Preemption cases, moreover, tend to implicate a wide variety of cross-cutting methodological and ideological divisions among judges and legal observers. One’s willingness to resort to interpretive presumptions, like the presumption against preemption, tends to be influenced by one’s views on textualism and one’s willingness to find statutory ambiguity in the first place.\textsuperscript{149} Similarly, different views among the Justices concerning the scope of deference to administrative agencies tend to play an important role in the cases that involve preemption of state law by federal administra-

\textsuperscript{146} 525 U.S. 155 (1999).
\textsuperscript{147} See El Al Israel Airlines, 525 U.S. at 175.
\textsuperscript{148} See United States v. Locke, 529 U.S. 89, 89 (2000); see also Buckman Co. v. Plaintiff’s Legal Comm., 121 S. Ct. 1012, 1014 (2001) (Souter, Ginsburg, & Breyer, JJ., joining majority opinion finding preemption).
\textsuperscript{149} Cf. Antonin Scalia, Judicial Deference 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.”); see also Viet D. Dinh, Reassessing the Law of Preemption, 88 Geo. L.J. 2085, 2118-17 (2000) (arguing against the presumption against preemption); Caleb Nelson, Preemption, 86 Va. L. Rev. 225, 292-303 (2000) (same). The views of Professors Nelson and Dinh both seem to be motivated by the sense that interpretive presumptions distort the will of Congress as reflected in the text—a view that itself tends to derive from broader methodological commitments.
tive action. Finally, because so many recent preemption cases seem to involve the preemption of common law tort claims under state law by federal regulatory regimes, one might suspect that general ideological sympathies towards plaintiffs or defendants are playing a role in the outcomes.

One reason that these cross-cutting divisions become salient in the preemption cases, however, is that most of the justices do not seem to view them as cases about federalism at all. In Iowa Utilities Board, for example, Justice Breyer’s invocation of federalism was met with incredulity from Justice Scalia. And all of the justices seem to have viewed Crosby and Locke as cases about foreign policy and international shipping, respectively, rather than as implicating federalism values in any direct or important way. But the importance of preemption cases for federalism is not diminished by the fact that preemption cases do not arrive at the Court—as cases like Lopez or Morrison did—with constitutional red flags attached. Indeed, I argue in the next section that the preemption cases may be far more important to the states than the cases that have so far monopolized the limelight.

B. The Virtues of Process Federalism

The states’ rights justices’ blind spot on preemption is important: it threatens, in a way that lawsuits against state governments or minor federal enactments like the Gun-Free School Zones Act do not, the core regulatory authority of state governments. And in so doing, preemption undermines the states’ ability to win, through provision of public goods and services, the popular loyalty necessary to make a system of political safeguards work. Broad preemption of state regulatory authority thus threatens the self-enforcing nature of the Framers’ original structure.

We might not worry about this development in preemption doctrine, I suppose, if the current majority’s own pro-states decisions offered a via-

150. See Young, State Sovereign Immunity, supra note 93, at 41 & n.193 (discussing the debate between Justices Scalia and Breyer in Iowa Utilities Board over the Chevron doctrine).


152. I emphasize the “might” here. My own intuition is that interpretive issues such as Chevron and textualism are more important than pro-plaintiff and pro-defendant sympathies, although it is hard to imagine how anyone could ever be sure. It would be hard to make a parallel argument for the non-preemption federalism cases: Does anyone really think that the results in Lopez, New York and Seminole Tribe were motivated by affection for guns in schools, opposition to disposal of nuclear waste or strong views on Indian gaming, respectively?


154. To the extent that the justices saw Crosby as implicating structural issues, they seem to have seen it as a case about separation of powers rather than federalism. See Yoo, Foreign Affairs Federalism, supra note 122.
ble alternative approach to preserving the federal structure. Broad pre-
emption rules, for example, would be of little concern if the Court were
prepared to limit the Commerce Clause sufficiently to place a substantial
sphere of regulatory jurisdiction off limits to federal power. 155 But I have
already suggested that the Court's Commerce Clause decisions are un-
likely to go this far, and that its other doctrines are either not addressed to
or insufficiently far-reaching to preserve a vital system of political and insti-
tutional checks. 156 It is unclear, in other words, if the aid offered by the
current states' rights majority in cases like *Lopez*, *Printz*, and *Seminole Tribe*
is sufficient to offset the damage they are doing in the preemption cases.

To make this point more concrete, consider some of the Court's re-
cent results. From the perspective of protecting state authority to offer
beneficial regulation and public services to their citizens—from the stand-
point, in other words, of ensuring that states retain something meaningful
to do—would one rather win *Lopez*, *Printz*, and *Seminole Tribe* or *Iowa Utilities Board*, *Geier*, and *Locke*? In other words, would a sensible state government rather:

(a) regulate guns in schools, save sheriffs the trouble of conducting
federal background checks of gun purchasers, and avoid suits for money
damages under federal law; or

(b) control the local telephone market, provide tort remedies for in-
jured citizens, and prevent oil spills in crucial waterways?

This strikes me as a fairly easy set of choices. The "wins" seem fairly trivial
from the standpoint of state regulatory authority, while the losses border
on the disastrous. To be sure, cases like *Lopez* established principles whose
importance transcends the result in the particular case, and I will argue in
Section D, below, that this principle of limited federal power serves as an
important backstop to any scheme of process federalism. But the contrast
I have drawn ought to illustrate that states cannot live by *Lopez* alone, and
that process federalism rules have a great deal of potential for providing
protection for state autonomy.

Process rules like the presumption against preemption have, as I have
suggested, the additional virtue of fitting comfortably into the scheme of
political and institutional checks on which the Framers *primarily* relied to
protect federalism. Specifically, a rule like the presumption against pre-
emption does two things. First, it forces Congress to make a deliberative
political decision about how far it wants to intrude on state autonomy, and
it makes sure that all the states' potential defenders have notice of what is
at stake. Second, the presumption reinforces institutional checks by re-
quiring *Congress* to make the decision, with all the procedural hurdles and
roadblocks that process entails. Indeed, the presumption probably en-

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155. See Nelson, *supra* note 149, at 292-98 (arguing that the presumption against preemption is unnecessary because the Court can protect state regulatory authority directly under the Commerce Clause); Dinh, *supra* note 149, at 2098 (making a similar argument).

156. See *supra* notes 111-18 and accompanying text.
hances those obstacles by raising additional drafting and coalition-forming problems for preemptive federal action.\textsuperscript{157}

The presumption against preemption, of course, is only one form of process federalism.\textsuperscript{158} Consideration of this one example should be sufficient, however, to demonstrate that process doctrines have the potential to be much more than the crumbs left under Garcia's table.\textsuperscript{150} The Court's failure to pursue process federalism further may have resulted in large expenditures of political capital in cases like Lopez and Seminole Tribe, with relatively little gain for state autonomy to show. On the more optimistic side, process doctrines create an opportunity to make significant strides on the states' behalf while simultaneously de-escalating the Court's conflict with Congress.\textsuperscript{160} It is important to understand, however, that such an approach would not represent an abandonment of judicial review in federalism cases. I develop this point in the next Section.

C. Why the Judicial Review Debate Is a Red Herring

Process federalism—that is, reliance on political and institutional safeguards to preserve balance in the federal structure—is often proposed as an alternative to judicial review. Jesse Choper, for instance, has argued that federalism issues should be declared non-justiciable and left to political settlement.\textsuperscript{161} More recently, Larry Kramer has advocated a substan-

\textsuperscript{157} See, e.g., Daniel B. Rodriguez, The Presumption of Reviewability: A Study in Canonical Construction and Its Consequences, 45 VAND. L. REV. 743, 747 (1992) (noting that although Congress may override a clear statement requirement, "the presumption . . . ensures that legislators must expend greater than normal costs to rebut this presumption and thus to exercise their final collective judgment. As with other costs borne by legislators attempting to reach agreement over statutory policies, these costs may have the effect of changing the final bargain"); Brudney, supra note 57, at 30 ("[A]dding these details to text increases the possibility for delay and obstruction even though the details themselves would command overwhelming support. This is because every provision, clause, or word of a statute can become the focus of additional amendments or procedurally based attacks from a small but sufficiently determined minority.").

\textsuperscript{158} See Young, State Sovereign Immunity, supra note 93, at 21-25 (discussing some other kinds).

\textsuperscript{159} See, e.g., Rapaczynski, supra note 69, at 364 ("[I]n theory at least Garcia leaves the door open for a certain amount of judicial supervision of the national political process . . . . All that Garcia, on its face, requires is that a justification of any federalism-related limitation on the national government be one of 'process' (rather than relying on the alleged existence of some 'sacred province of state autonomy') and that the process failure, required for judicial intervention, be on the national level.").

\textsuperscript{160} Indeed, the Court seems increasingly willing to use a somewhat different process doctrine—the canon of avoiding constitutional doubts—to narrow the scope of federal legislation without ruling definitively that a given action is outside Congress' power. See supra note 112 for cases.

\textsuperscript{161} See Choper, supra note 10, at 175.
tially similar position. The rhetoric of the nationalist dissents in cases like *Lopez* and *Morrison* has thus focused on the claim that the courts should not intervene in disputes over the limits of Congress' powers, instead leaving these issues to the political process. And the nationalists seem to have felt no tension between this position and their protection of state prerogatives in the preemption cases, presumably because they see the latter sort of cases as involving statutory construction rather than constitutional review.

I want to suggest that this dichotomy is a false one, at least in the federalism context. When the nationalist justices apply a "presumption against preemption" in statutory construction, they are in fact engaging in constitutional review. In order to see why, it will help to remember that the presumption against preemption is a canon of statutory construction, and that such canons are of two different sorts: "descriptive" canons, which embody predictive judgments about how Congress most likely would have wanted certain kinds of statutory ambiguity resolved; and "normative" canons, which seek to protect certain kinds of public values whether or not Congress probably intended to do so. It is hard to defend the presumption against preemption on descriptive grounds. Although the political safeguards literature suggests that members of Congress have some incentives to protect the regulatory prerogatives of state institutions, members also have strong incentives to make sure they provide the regulatory goods to the folks back home rather than ceding such authority to state and local officials. And questions of preemption arise in so many diverse regulatory contexts that one suspects substantive preferences for particular regulatory outcomes are likely, for many members, to swamp more systemic concerns about state autonomy. In any event, whether Congress generally prefers not to preempt state law is a complicated empirical question, and I am not aware that anyone has tried to answer it.

Better, I think, to see the presumption against preemption as a normative canon designed to protect federalism values. As Peter Shane has suggested, when the Court requires a "plain statement" before reading a statute to trench on state autonomy, "[t]he Court, in essence, is instructing Congress that state autonomy values are of sufficient importance that the Court will not infer that they have been superseded absent evi-

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162. See Kramer, *Politics*, supra note 11, at 293 (arguing that "arguments over the limits of Congress's powers" should be "addressed to the people, through politics").


166. See supra note 46.
dence . . . that Congress has actually deliberated on the relevant state interests and the reasons for superseding them." 167 As such, the presumption against preemption is much like a number of other rules of construction derived from constitutional values, such as the rule of lenity in criminal law 168 or the rule disfavoring broad restrictions on the traditional jurisdiction of the federal courts. 169 These rules protect constitutional values by pushing interpretation of ambiguous statutes away from areas of special constitutional sensitivity, while leaving the Congress the option of pushing the constitutional limit if it plainly expresses its intent to do so.

Normative canons are controversial. To see why, consider two possible interpretations of an ambiguous federal statute. Interpretation A would preempt state law, while interpretation B would not. The presumption against preemption makes a difference only in those cases where, if a judge were to consider only the traditional sources of statutory meaning (whatever one defines that set to include), she would choose interpretation A, but because of the presumption she instead adopts interpretation B. A normative canon, in other words, will cause a judge to reject the interpretation of a statute she would otherwise prefer, in favor of an interpretation that is less persuasive ceteris paribus, all in favor of some substantive value that Congress probably never had in mind at all. 170 Judge Posner thus has criticized this sort of canon as creating a "judge-made con-

167. Shane, supra note 73, at 206-07 n.37. Dean Shane, who does not have much nice to say about most of the Court's recent federalism cases, concludes that such clear statement rules reflect "a careful balancing of judicial deference and concern for federalism." Id. at 206 n.37.

168. See, e.g., Evans v. United States, 504 U.S. 255, 289 (1992); Chapman v. United States, 500 U.S. 453, 465-64 (1991); Cass R. Sunstein, Nondelegation Canons, 67 U. Chi. L. Rev. 315, 332 (2000) (observing that "[t]he rule of lenity is inspired by the due process constraint on conviction pursuant to open-ended or vague statutes," and that "[w]hile it is not itself a constitutional mandate, it is rooted in constitutional principle").

169. See, e.g., Ex parte Yerger, 75 U.S. (8 Wall.) 85, 92 (1868) (narrowly construing repeal of federal habeas corpus jurisdiction); Sandoval v. Reno, 166 F.3d 225, 232 (9th Cir. 1999) (construing Yerger as creating a clear statement rule disfavoring restrictions on federal jurisdiction); Ernest A. Young, Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review, 78 Tex. L. Rev. 1549, 1587 (2000) (arguing that narrow construction of jurisdictional restrictions "generally protects the values embodied in Article III, and the Suspension and Due Process Clauses, or some combination of those provisions") [hereinafter Young, Constitutional Avoidance]. On constitutionally-based normative canons, see generally Cass R. Sunstein, Interpreting Statutes in the Regulatory State, 103 Harv. L. Rev. 405, 459 (1989) (observing that "interpretive principles may serve substantive purposes wholly apart from statutory meaning, interpretive instructions, or the lawmaking process," and that "[i]nterpretive principles are often a product of constitutional norms").

170. For a more detailed development of this criticism in the context of the canon of avoiding constitutional doubts, see generally Frederick Schauer, Ashwander Revisited, 1995 Sup. Ct. Rev. 71; Young, Constitutional Avoidance, supra note 169, at 1574-85.
stitutional 'penumbra' that has much the same prohibitory effect as the . . . Constitution itself."^{171}

This criticism of normative canons is built on the recognition that, when a court chooses one statutory interpretation over another based on constitutional imperatives, that court has engaged in constitutional review. To be sure, it is a different sort of review: if a court construes a federal statute not to preempt state law out of concern for state autonomy, for example, it remains open to Congress to amend the statute and clarify its preemptive intent. The presumption against preemption thus makes it harder to preempt state law—the burden of speaking clearly \textit{ex ante} or, if necessary, overcoming legislative inertia to amend a statute \textit{ex post} is born by the proponents of preemption—but far from impossible. So long as Congress acts within its enumerated powers, no one will gainsay its power to preempt state law where it clearly expresses its intent to do so.

I have argued elsewhere that constitutional law recognizes any number of such "resistance norms"—that is, constitutional principles that make it harder, but not impossible, for the government to do certain things.\textsuperscript{172} These sorts of constitutional rules are most useful in contexts where line-drawing is difficult.\textsuperscript{173} A general presumption against preemption, for example, shelters state regulatory autonomy without requiring the courts to draw precise lines circumscribing the outer limits of Congress' own regulatory authority. Moreover, an approach to federalism based on "resistance norms" harmonizes well with the recognition that the state/federal balance is primarily maintained through political and institutional checks. Norms such as the presumption against preemption operate, after all, by increasing the likelihood that the states' representatives in Congress will be made aware of potential threats to state autonomy before they become law, and by enhancing the institutional hoops that legislation must jump through in order to achieve a preemptive objective.\textsuperscript{174}

These arguments suggest that the presumption against preemption may have important advantages as an approach to judicial review of federalism issues over the anti-commandeering doctrine or efforts to limit scope of the commerce power. But make no mistake: courts applying this presumption are engaged in a form of constitutional review. For this reason, the nationalist justices should rethink their seemingly categorical opposition to judicial review in cases like \textit{Lopez} and \textit{Morrison}. The nationalists' approach to judicial review of federalism issues may be smarter, less intrusive, or more efficient in any number of ways, but it is still judicial review.

\begin{footnotesize}
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\item 172. See Young, \textit{Constitutional Avoidance}, supra note 169, at 1593-99.
\item 173. See id. at 1608-07.
\item 174. See id. at 1608 (arguing that "[n]ormative canons facilitate the operation of political checks").
\end{itemize}
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This point has more than semantic importance. Once we realize that process federalism is a form of, rather than an alternative to, judicial review, it becomes imperative to ask whether the presumption against preemption is the only form of process review that is necessary to maintain our system of political and institutional checks on national power. Certainly the work of John Hart Ely suggests that process-based review may take a wide variety of forms, and may even embrace doctrines that would strike most observers as “activist.” As I argue in the next section, it may well be that some substantive backstop on Congress’ power is necessary to ensure the proper functioning of our political checks.

D. The Need for a Substantive Backstop

I have suggested that process federalism approaches can fill important holes in the Court’s current federalism jurisprudence, and that in fact process rules may be superior to a number of the Court’s doctrinal innovations. To say all this, however, is not to press the counter-intuitive proposition that the nationalists are “right” about what is good for the states, and the states’ purported defenders on the Court are “wrong.” While the virtues of the nationalists’ approach should not be overlooked, I want to conclude by arguing that any process-based theory of federalism is incomplete without some ultimate substantive limit on federal power.

This is true for at least four reasons. First, I have argued elsewhere that we live in a world of largely concurrent regulatory jurisdiction, and that any judicial attempts to define and police separate and exclusive state and federal “spheres” of power are likely to fail. Ideally, in such a world, state and national authorities would negotiate an allocation of authority that makes functional sense in each individual area of regulatory concern. But these sort of negotiations seem unlikely to take place, or at least to take place on distorted terms, if the federal party is told in advance that its power to simply impose a settlement is unlimited.

175. See, e.g., Ely, supra note 21, at 148-64 (making process-based arguments for extending strict equal protection scrutiny beyond the core case of racial classifications); Kapczynski, supra note 69, at 365 (observing that “process jurisprudence does not limit the scope of judicial intervention to explicitly procedural remedies or to the enforcement of specifically procedural principles”).

176. See Young, Dual Federalism, supra note 59, at 1711-14.

177. See id. at 1726-27. For a related argument in the context of the European Community, see George A. Bermann, Taking Subsidiarity Seriously: Federalism in the European Community and the United States, 94 COLUM. L. REV. 331 (1994). Professor Bermann concedes that the courts do not have the institutional competence to rigorously enforce substantive limits on the authority of the Community institutions, and that therefore the political branches of the Community should be the primary custodians of the principle of subsidiarity—that is, the principle that the regulatory autonomy of the Member States should be respected to the greatest degree possible. See id. at 396. Nonetheless, Professor Bermann argues that the courts should impose some substantive limit on the central authority. “Although the Court’s level of scrutiny should . . . be plainly and unapologetically deferential,” he writes, “its willingness to entertain the question of subsidiarity would significantly
Second, such deliberative conversations seem unlikely to take place if federalism is relegated to the status of a second-class constitutional value. To be sure, Congress and the executive branch have an important role to play, along with the courts, in the articulation and preservation of constitutional values. But it seems likely that the political branches take at least some of their cues from the Court as to what constitutional values should be articulated and preserved. If the Court were simply to announce—as it has not done for any other constitutional value that I can think of—

that federalism values are entirely subject to the whims of politics, I suspect that the federal political branches would be less likely to take these values seriously in their own deliberations.179

Third, the historical record suggests that the prominence and efficacy of particular political and institutional checks fluctuate over time, and that the law of unintended consequences plays a prominent role. Consider, for example, Professor Kramer’s argument that political parties are the most important political safeguard for state governments.180 Kramer concedes that the Framers did not envision any such role for parties; indeed, the evils of such “factions” are one of Madison’s central preoccupations in the Federalist.182 Kramer also concedes that the role of political parties in our system has changed dramatically over the years as a result, for example, of the advent of powerful government bureaucracies and reforms designed to democratize party nomination processes.183 It seems risky—to say the least—to rely exclusively on a system of political checks that has proven so contingent and mutable over the course of our history.184

Finally, as a matter of judicial politics, an acknowledgment by the nationalist justices of some substantive limit on national power would likely gain them some much-needed credibility with their pro-states colleagues. The basic matters of government structure involved in the federalism cases are simply too important to fluctuate in roughly ten-year cycles, as they

reinforce its essential procedural demand that the political branches themselves take subsidiarity seriously.” Id. at 336-37.

178. See Baker & Young, supra note 11, at 101-07.

179. Cf. Paul A. Freund, Umpiring the Federal System, 54 COLUM. L. REV. 561, 578 (1954) (observing that “judicial review . . . is an educative and formative influence which . . . may have consequences beyond its immediate application for the mind of a people”).

180. See Kramer, Politics, supra note 11, at 278 ("For most of our history, the decentralized American party system completely dominated the scene and protected the states by making national officials politically dependent upon state and local party organizations.").

181. See id. at 286.


183. See Kramer, Politics, supra note 11, at 280-81 (outlining changes in political parties due to civil service systems, the New Deal, technology, and campaign financing).

184. See generally Prakash & Yoo, supra note 11, at 1480-89. See also Baker & Young, supra note 11, at 116-18.
have done since the Court’s 1968 decision in *Maryland v. Wirtz*. If the Court is to construct something more permanent than a series of tenuous five-to-four holdings, however, some degree of compromise seems necessary. For the nationalists, some concession of a judicially-enforceable substantive limit on federal power seems likely to be the price of admission to that discussion.

Adrian Vermeule has raised a potentially damaging counterargument to the claim that *some* substantive review is needed in his contribution to this Symposium. Professor Vermeule notes that, under current doctrine, an instance of federal regulation that might exceed Congress’ commerce power ifconsidered in isolation may nonetheless withstand scrutiny if it is part of a “comprehensive scheme” of federal regulation. In *Hodel v. Indiana*, for example, the Court considered a number of different constitutional challenges to various provisions of the Surface Mining Control and Reclamation Act of 1977. Although the plaintiffs argued that some particular provisions were not really related to the interstate commerce justification of the overall Act, the Court found this claim “beside the point”:

A complex regulatory program such as established by the Act can survive a Commerce Clause challenge without a showing that every single facet of the program is independently and directly related to a valid congressional goal. It is enough that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies this test.

This principle, seemingly reaffirmed by the Court in *Lopez*, raises the possibility that a Congress that sees a particular regulatory provision struck down under the Commerce Clause might well respond by regulating more broadly—a course which, under *Hodel*, the Court would be forced to uphold. Professor Vermeule rightly describes such a net in-

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185. 392 U.S. 183 (1968). *Wirtz* held that the internal governmental operations of the states could be subjected to generally-applicable laws, like the Fair Labor Standards Act. *See id.* at 197. The Court overruled *Wirtz* in *National League of Cities v. Usery*, 426 U.S. 833, 855 (1976), which was in turn overruled in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 557 (1985). The *Garcia* era arguably came to an end in *Lopez*, but the nationalist justices show every inclination to overrule all the current majority’s handiwork as soon as they get an additional vote. *See generally Young, State Sovereign Immunity, supra* note 93, at 66-70.

186. *See id.* at 70-73 (discussing the prospects for and barriers to compromise on the current Court).

187. *See Adrian Vermeule, Does Commerce Clause Review Have Perverse Effects?, 46 Vill. L. Rev. 1325 (2001).*


crease in centralization as a "perverse effect" of Commerce Clause review.\textsuperscript{191}

Professor Vermeule is surely correct that this scenario poses a downside risk for substantive federalism review of national laws. His claim that judges favoring decentralization should therefore not engage in such review,\textsuperscript{192} however, is more problematic. As Professor Vermeule observes, judicial invalidation of a federal statute on Commerce Clause grounds seems to leave Congress with two options: (a) legislate more broadly or (b) not legislate at all.\textsuperscript{193} Professor Vermeule asserts that "there is no particular reason" to assume legislators will choose (b) over (a)—the decentralizing option—as a second best option,\textsuperscript{194} but he also seems to concede that there is no reason to expect (a) over (b)—the perverse effect.\textsuperscript{195} If both outcomes are in fact equally likely, then his conclusion does not follow. One would have to believe that Congress more often will choose (a) than (b) in response to judicial invalidation of an intermediate statute in order to counsel the decentralizing judge not to invalidate the statute in the first place.\textsuperscript{196} The mere demonstration of the actual effects of Commerce

\textsuperscript{191} Vermeule, supra note 187, at 1325.

\textsuperscript{192} See id. at 1339-40.

\textsuperscript{193} See id. at 1340. I say "seems" because the Court's entire discussion of the "comprehensive scheme" principle in Hodel, while technically necessary to the decision, occupies a single footnote. See 452 U.S. at 329 n.17. The Court's reaffirmation of the principle in Lopez is even more cursory, and dictum to boot. See 514 U.S. at 561.

\textsuperscript{194} Vermeule, supra note 187, at 1336.

\textsuperscript{195} See id. at 1338 (noting that "we have to approach the empirical question without presuppositions in either direction").

\textsuperscript{196} Professor Vermeule does suggest one potential answer to this problem by arguing that the downside risks may be greater for Commerce Clause review than for other sorts of federalism doctrine. But that answer encounters two difficulties of its own. First, it assumes that Commerce Clause review "trades off" with other forms of judicial review in the federalism area. I am inclined to think this may in fact be the case due to limitations on the Court's "political capital." See Young, State Sovereign Immunity, supra note 93, at 58-60; see also Choper, supra note 10, at 139. However, the limited capital thesis is not obviously true, and I am not aware of any empirical verification for it. See Young, State Sovereign Immunity, supra note 93, at 59 (suggesting the possibility that "the Court's ability to enforce federalism limits is more like muscles than money: it atrophies unless it is exercised regularly"); see also Erwin Chemerinsky, Cases Under the Guarantee Clause Should Be Justiciable, 65 U. COLO. L. REV. 849, 860 (1994) (questioning the limited capital thesis). Second, and more important, the perverse effects engendered by other forms of substantive review may be substantially worse than the risks posed by Commerce Clause review. See Printz v. United States, 521 U.S. 898, 959 (1997) (Stevens, J., dissenting) (attacking the anti-commandeering doctrine on the ground that "[b]y limiting the ability of the Federal Government to enlist state officials in the implementation of its programs, the Court creates incentives for the National Government to aggrandize itself. In the name of State's rights, the majority would have the Federal Government create vast national bureaucracies to implement its policies"); Pamela S. Karlan, The Irony of Immunity: The Eleventh Amendment, Irreparable Injury, and Section 1983, 53 STAN. L. REV. 1311, 1326-29 (2001) (arguing that by eliminating the possibility of an adequate damages remedy for state misconduct, sovereign immunity makes even more intrusive injunctive relief more likely);
Clause review on centralization thus implies no particular prescription for judges regarding such review. There is, in other words, no escape from making the most educated guess we can regarding which scenarios are in fact more likely.

Although certainty may well be impossible, there are reasons to believe that the outcomes of Commerce Clause review will be biased against centralization. Expanding the scope of federal regulation in response to a decision like Lopez should, in most instances, increase opposition to the measure. In the context of adding clear statements of congressional intent to statutes, James Brudney has observed that:

[A]dding these details to text increases the possibility for delay and obstruction even though the details themselves would command overwhelming support. This is because every provision, clause, or word of a statute can become the focus of additional amendments or procedurally based attacks from a small but sufficiently determined minority.197

Expanding or even simply modifying federal legislation, in other words, increases the opportunities for the political safeguards of federalism to operate. One would expect such difficulties to multiply when, instead of merely adding clarifying language, we contemplate expanding a narrow federal regulation like the Gun-Free School Zones Act into a comprehensive regulatory scheme.

Moreover, it seems unlikely that just any provision of federal law can plausibly be integrated into a broader regulatory scheme that will pass constitutional muster, and it would be surprising if the Court refrained completely from reviewing the question whether the scheme really constitutes an integrated whole. Although the Court did seem to eschew such review in Hodel, its language in Lopez was considerably narrower. There, the Court said that the Gun-Free School Zones Act "is not an essential part of a larger regulation of economic activity, in which the regulatory scheme would be undercut unless the intrastate activity were regulated."198 This language strongly suggests at least some degree of means/ends analysis of the relationship between the challenged provision and the overall scheme. Significantly, the Court did not uphold the Gun-Free School Zones Act simply because it was incorporated into the more general scheme of firearm regulation in 18 U.S.C. § 922.199 To the extent that the Court will not

199. See, e.g., Vermeule, supra note 187, at 1334-35 (discussing the relationship between the school zones law, found in 18 U.S.C. § 922(q), and the restriction on machinegun possession in 18 U.S.C. § 922(o)).
accept some attempts to save federal legislation by expanding its centralizing scope, that ought to decrease the likelihood of perverse effects.

None of these arguments, of course, conclusively refutes the possibility of perverse effects that Professor Vermeule raises in his thought-provoking Article. While I doubt that he has made the case for eschewing substantive judicial review altogether in the federalism area, his argument does provide an additional reason to emphasize the primary role that political process safeguards play in protecting state prerogatives. Substantive limits on Congress' authority ought to function as a symbolic reminder and a safeguard of last resort. These are important functions, but they hardly address the entire range of potential threats to state autonomy. Having revived the basic idea of limited federal powers in cases like *Lopez* and *Morrison*, it is time that the Court turned its attention to the problems of federalism that Justice Breyer saw lurking in "the mass of technical detail that is the ordinary diet of the law."200

### IV. Conclusion

I began this Article by suggesting that judicial doctrines of federalism ought to be designed in such a way as to reinforce political and institutional checks on federal power. We need a *Democracy and Distrust* for federalism doctrine—that is, a doctrine of judicial review constructed to protect the self-enforcing nature of the federalist system. Neither side of the Supreme Court's current division offers a complete answer to this problem. The states' rights majority has importantly reaffirmed the importance of limited federal powers, but it has ignored the centrality of state regulatory power in the preemption cases. The nationalist dissenters, on the other hand, have offered a reasonably coherent vision of process federalism that promises real gains for state regulatory authority, but they have undermined this project by refusing to accept the need for *some* substantive backstop limiting Congress' authority.

One can view this glass as half-empty or half-full. On the "empty" side, a decade of extraordinary activity in the sphere of federalism has failed to yield a coherent set of federalism doctrines that can command a solid and consistent majority of the Court. On the "full" side, however, all the pieces for such a doctrine are there, available to any potential centrist coalition that is willing to collect them. We need await no spontaneous burst of judicial creativity—only a group of justices with the courage to compromise.

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