DUNWODY DISTINGUISHED LECTURE IN LAW

THE VALUES OF FEDERALISM

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Historically, federalism has been used as a political argument primarily in support of conservative causes. During the early 19th century, John Calhoun argued that states had independent sovereignty

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Portions of the introduction of this Article were taken from my review of Samuel H. Beer’s book To Make a Nation: The Rediscovery of American Federalism, which appears in the Michigan Law Review at the following citation: Rehabilitating Federalism, 92 Mich. L. Rev. 1333, 1333-35, 1337, 1341-44 (1994).
and could interpose their authority between the federal government and the people to nullify federal actions restricting slavery.\(^1\) During Reconstruction, Southern states claimed that the federal military presence was incompatible with state sovereignty and federalism.\(^2\)

In the early 20th century, federalism was successfully used as the basis for challenging federal laws regulating child labor, imposing the minimum wage, and protecting consumers.\(^3\) During the depression, conservatives objected to President Franklin Roosevelt’s proposals, such as Social Security, on the ground that they usurped functions properly left to state governments.\(^4\)

During the 1950s and the 1960s, objections to federal civil rights efforts were phrased primarily in terms of federalism. Southerners challenged Supreme Court decisions mandating desegregation and objected to proposed federal civil rights legislation by resurrecting the arguments of John Calhoun.\(^5\) Segregation and discrimination were defended less on the grounds that they were desirable practices, and more in terms of the states’ rights to choose their own laws concerning race relations.\(^6\)

In the 1980s, President Ronald Reagan proclaimed a “new federalism” as the basis for attempting to dismantle federal social welfare programs.\(^7\) In his first presidential inaugural address, President Reagan said that he sought to “restor[e] the balance between the various levels of government.”\(^8\) Federalism was thus employed as the basis for cutting back on countless federal programs.\(^9\)

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2. For example, in the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872), the Supreme Court narrowly construed the Reconstruction era amendments, in part, based on federalism considerations. Id. at 82. Notably, the Court gave the “privileges or immunities clause” an extremely narrow construction because of its belief that the provision was not meant to alter federal-state relations. Id.


6. Id.

7. Id. at 2.


Hindsight reveals that federalism has been primarily a conservative argument used to resist progressive federal efforts, especially in the areas of civil rights and social welfare. There is, of course, nothing inherent to federalism that makes it conservative. In recent years, for example, prominent liberals, such as Justice William Brennan, have argued that there should be more use of state constitutions to protect individual liberties.¹⁰

What is striking about the historical use of federalism arguments, however, is that the discussions of federalism are very value laden. Important issues of national policy are debated in terms of the proper allocation of power between federal and state governments.

Yet, each year as I teach Constitutional Law and the material about federalism, I am struck by the absence of discussion in the Supreme Court's federalism cases about the underlying values of federalism. The Court's decisions about federalism rarely do more than offer slogans about the importance of autonomous state governments. Occasionally, the Court mentions that states are important as laboratories of ideas or that state governments are crucial as a check on the tyranny of the national government.¹¹ But the Court never elaborates on the values of federalism and rarely explains how the values of federalism relate to the Court's holdings. For example, in 1992, in *New York v. United States*,¹² the Supreme Court relied on federalism and the Tenth Amendment to invalidate a federal law.¹³ Yet there was little discussion about how a federal statute requiring states to safely dispose of nuclear wastes undermined important values of federalism.

Indeed, I believe that of all the areas of constitutional law, discussions about federalism are the ones where the underlying values are least discussed and are the most disconnected from the legal doctrines. In separation of powers cases, the Court often explicitly considers the tension between accountability and flexibility.¹⁴ Further, in dormant Commerce Clause cases, there is often consideration of the importance of a national market economy unrestricted by protectionist state laws.¹⁵

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¹³. *Id.* at 156-66, 186-88.

¹⁴. *See, e.g.*, INS v. Chadha, 462 U.S. 919, 1002 (1983) (White, J., dissenting) (arguing in favor of the legislative veto based on the importance of checks and balances and accountability); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318-21 (1936) (discussing the importance of according the President broad powers in the area of foreign policy).

In equal protection cases, the Court eloquently speaks of the need for racial and gender equality. In due process cases, the Court identifies and expressly balances the underlying values of accurate decisionmaking, individual interests, and government efficiency. In freedom of speech cases, courts constantly discuss the value of expression and the dangers of government censorship. But where in federalism cases is there any careful exploration of why state autonomy matters and how it is undermined by specific federal actions?

In fact, until quite recently, post-1937 Supreme Court decisions concerning federalism have been paradoxical. The Supreme Court has aggressively used federalism as the basis for limiting federal judicial power, but until the last few years, has almost completely refused to employ federalism as the grounds for limiting federal legislative power. The Court's paradoxical approach to federalism persisted almost unchanged for fifty-five years, from 1937 until 1992, with only one federal statute being declared unconstitutional on federalism grounds. That case, National League of Cities v. Usery, was subsequently expressly overruled. But during this same period, the Court frequently used federalism as the basis for limiting federal judicial power, such as by requiring abstention, expanding the scope of the

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19. See infra text accompanying notes 26-54 (describing this paradox).
22. Garcia, 469 U.S. at 557.
23. See, e.g., Younger v. Harris, 401 U.S. 37, 44-45 (1971) (using "Our Federalism" as the basis for requiring federal courts to abstain when there is a pending state court proceeding).
Eleventh Amendment and state immunity to federal court litigation,24 and limiting the scope of federal habeas corpus review.25

Now this paradox appears to be ending. The Court’s 1992 decision in New York v. United States declared a federal law unconstitutional as usurping state sovereignty.26 More recently, in April 1995, in United States v. Lopez,27 the Court declared a federal law unconstitutional as exceeding the scope of Congress’ commerce power.28 This was the first time since 1936 that the Court struck down a federal statute on this basis.29 The paradox of federalism being a constraint on the federal courts, but not Congress, seems to be ending.

In this Article, I want to explore this paradox of 20th century federalism jurisprudence and its relationship—or more precisely its lack of a relationship—to the underlying values of federalism. Part I describes the paradox alluded to above: the Supreme Court’s use of federalism as a limit on federal judicial power and its refusal, at least until 1992 in New York v. United States and in 1995 in Lopez, to use federalism as a limit on the federal legislative power.

Part II considers the traditionally stated values of federalism in relation to this paradox. I suggest that the oft-quoted values of federalism—preventing national tyranny, enhancing democracy, and providing laboratories for experimentation—provide no support for the doctrinal paradox that has dominated federalism jurisprudence for a half century. Indeed, the values of federalism seem almost completely unrelated to the Supreme Court’s federalism decisions.

Finally, in Part III, I briefly suggest an alternative view of federalism: that it be considered as an empowerment, not as a limit. Discussions of federalism traditionally have been about how much it limits the powers of the federal government.30 A quite different conception would be to view the multiple layers of government as providing alternative means for dealing with problems. If the federal government fails to act, the presence of state and local governments makes solutions possible.


28. Id. at 1634.


through other governing bodies. Likewise, if state and local governments do not adequately deal with a particular problem, then there is the federal government to legislate. Similarly, in the area of federal courts, the presence of both federal and state courts increases the likelihood that a judicial forum will be available.

From this perspective, federalism should not be seen as a basis for limiting the powers of either Congress or the federal courts. Rather it should be seen as an empowerment; it is desirable to have multiple levels of government all with the capability of dealing with the countless social problems that face the United States as it enters the 21st century.

By "federalism," I simply mean the allocation of power between the federal and state governments. More specifically, federalism, as used throughout this Article, refers to the extent to which consideration of state government autonomy has been and should be used by the judiciary as a limit on federal power. Of course, this is neither the only meaning of federalism, nor the only relevance of federalism considerations in American government. It is, however, the focus of this Article which examines the values of federalism in relation to the way in which the Supreme Court has used—or not used—state sovereignty as a limit on federal government authority.

I. THE PARADOX OF POST-1937 JUDICIAL DECISIONS CONCERNING FEDERALISM

As a professor of both Constitutional Law and Federal Courts courses, I often have been struck by how seemingly inconsistent the cases I teach in one course are with the cases I teach in the other. Many semesters, in the morning, in Constitutional Law, I teach cases like United States v. Darby33 and Garcia v. San Antonio Metropolitan Transit Authority34 that eschew any use of federalism considerations as a limit on the federal legislative power.35 Then, in the afternoon, I teach Federal Courts and look at cases like Younger v. Harris36 that

31. Federalism, by this definition, has both a descriptive element in that it refers to the extent to which courts have used state sovereignty as a check on federal power and a normative application in that it refers to the extent to which state sovereignty should be a limit on federal government authority.

32. In a recent article, Professors Rubin and Feeley make the excellent point that much of what is usually discussed as federalism really is an argument for decentralized management and not federalism. Edward L. Rubin & Malcolm Feeley, Federalism: Some Notes on a National Neurosis, 41 UCLA L. REV. 903, 914 (1994).

33. 312 U.S. 100 (1941).
34. 469 U.S. 528 (1985).
35. See Garcia, 469 U.S. at 549-51; Darby, 312 U.S. at 113-15, 123-24.
proclaim the importance of "Our Federalism" as a major limit on federal judicial authority.\textsuperscript{37}

Indeed, I believe that this paradox has been at the core of the Supreme Court’s handling of federalism issues since 1937. Federalism has not been used by the judiciary as a limit on the federal legislative power; but federalism has been used by the judiciary as a limit on the federal judicial power.\textsuperscript{38}

In this section, I first describe the seeming inconsistency in the cases concerning federal legislative and federal judicial power. Then I suggest that the Court’s premises do not justify the difference in approach; the justifications for the absence of federalism as a limit on federal powers apply as much to the federal judiciary as to Congress, and the justifications for the use of federalism as a limit apply as much to Congress as to the states. Finally, I suggest that \textit{New York v. United States} and \textit{Lopez} could bring an end to the paradox by resurrecting the Tenth Amendment as a constraint on congressional actions and by creating judicially enforced limits on the scope of Congress’ Commerce Clause power.

\section{The Paradox Described}

The paradox described above manifested itself early in the emergence of modern, post-1937 constitutional law.\textsuperscript{39} In \textit{NLRB v. Jones & Laughlin Steel Corp.},\textsuperscript{40} \textit{United States v. Darby},\textsuperscript{41} and \textit{Wickard v. Filburn},\textsuperscript{42} the Supreme Court made it clear that federalism would not be used as a limit on congressional powers.\textsuperscript{43} The Court rejected the core notion of dual federalism: that there is a zone of activities that is left exclusively to the states for regulation and control.\textsuperscript{44}

\textsuperscript{37} See id. at 44-45.
\textsuperscript{38} Professor George Brown has discussed the seeming inconsistency between the Supreme Court’s Tenth and Eleventh Amendment decisions. George D. Brown, \textit{State Sovereignty Under the Burger Court—How the Eleventh Amendment Survived the Death of the Tenth: Some Broader Implications of Atascadero State Hospital v. Scanlon}, 74 Geo. L.J. 363 (1985).
\textsuperscript{39} Professor Bruce Ackerman has written extensively as to why 1937 should be considered a “constitutional moment” that effectively changed the nature of the Constitution. See Bruce A. Ackerman, \textit{We the People: Foundations} 66, 76-78, 105-30 (1992); Bruce A. Ackerman, \textit{The Storrs Lectures: Discovering the Constitution}, 93 Yale L.J. 1013, 1051-52 (1984).
\textsuperscript{40} 301 U.S. 1 (1937).
\textsuperscript{41} 312 U.S. 100 (1941).
\textsuperscript{42} 317 U.S. 111 (1942).
\textsuperscript{43} See Wickard, 317 U.S. at 115-16; Darby, 312 U.S. at 113-15; Jones & Laughlin Steel Co., 301 U.S. at 27-28, 36-37.
\textsuperscript{44} See Wickard, 317 U.S. at 118-26; Darby, 312 U.S. at 113-15; Jones & Laughlin Steel Co., 301 U.S. at 29-32, 36-37 (all recognizing Congress’ plenary Commerce Clause power).
From the late 19th century until 1937, the Supreme Court used this notion of dual federalism both to narrowly construe the scope of congressional powers under Article I of the Constitution, and to invalidate laws as violating the Tenth Amendment. For example, the Court narrowly defined the meaning of "commerce" to exclude mining, manufacture or production from the scope of congressional regulatory power. Additionally, the Court held that federal laws regulating aspects of business such as production violated the Tenth Amendment. The Court expressly declared that the Tenth Amendment reserves a zone of activities to the states and thus invalidated federal laws limiting the use of child labor, providing subsidies to agriculture, and requiring a minimum wage on the grounds that they interfered with state sovereignty and violated the Tenth Amendment.

But Jones & Laughlin Steel Co., Darby, and Wickard ended the doctrine of dual federalism. No longer were considerations of federalism used as the basis for narrowly defining Congress' powers. No longer was the Tenth Amendment a restraint on federal legislative authority. Darby declared that the Tenth Amendment is "but a truism" that all powers not granted to Congress are reserved to the states. In other words, the Tenth Amendment simply was a reminder that Congress could legislate only if it had express or implied authority. The Tenth Amendment did not reserve to the states a zone of activities for their exclusive control.

Almost simultaneously with the demise of federalism as a limit on congressional authority, the Court proclaimed the importance of federalism as a limit on the federal judicial power. In Erie Railroad Co. v. Tompkins, the Court held that the use of federal common law in diversity cases was an unconstitutional usurpation of state powers. At the same time that the Court rejected the Tenth Amendment as a limit on Congress, the Court apparently relied on it to explain that the federal

45. See, e.g., E.C. Knight Co., 156 U.S. at 11-13 (precluding application of federal antitrust laws to production).
47. Id. at 274.
48. Id. at 272, 274, 277.
51. See supra text accompanying notes 39-43 (discussing those cases' role in ending the doctrine of dual federalism).
53. 304 U.S. 64 (1938).
54. Id. at 78-80.
common law had "invaded rights which . . . are reserved by the Constitution to the several states."\textsuperscript{55}

This approach to federalism—the Court's refusal to use state sovereignty to limit congressional powers and its use of federalism as a restraint on federal judicial authority—continued, almost without exception, from 1937 until at least 1992.\textsuperscript{56} Professor Tribe remarked that "[f]or almost four decades after 1937, the conventional wisdom was that federalism in general—and the rights of states in particular—provided no judicially-enforceable limits on congressional power."\textsuperscript{57}

In 1976, the Court appeared to resurrect federalism as a limit on congressional powers in\textit{National League of Cities}, where the Court invalidated a federal law that required state and local governments to pay their employees a minimum wage.\textsuperscript{58} But just nine years later, in\textit{Garcia}, the Court expressly overruled\textit{National League of Cities}.\textsuperscript{59}

Justice Blackmun, writing for the Court in\textit{Garcia}, unequivocally declared that it was not for the federal courts to enforce the Tenth Amendment.\textsuperscript{60} He explained that it had proven impossible to define what activities are so "integral" to state governments that Congress cannot regulate them.\textsuperscript{61} More importantly, he expressly relied on the writings of Professor Herbert Wechsler and concluded that the national political process provided sufficient safeguards to protect state government interests.\textsuperscript{62}\textit{Garcia} was thus a strong reaffirmation of the post-1937 judicial deference to Congress and the Court's unwillingness even to consider federalism challenges to federal legislation.

The Supreme Court's emphasis on federalism as a limit on federal judicial power has remained almost unchanged for the past half century. The Warren Court moved away from concerns about states' rights as a limit on federal court authority, especially in decisions expanding the scope of federal habeas corpus review.\textsuperscript{63} But the Burger and Rehnquist

\begin{footnotes}
55. \textit{Id.} at 80.
56. \textit{See} Tribe, supra 20, at 1067 (discussing \textit{National League of Cities} as the end of this approach to federalism—however, that case was later overruled, restoring the approach taken since 1937).
57. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 378 (2d ed. 1988).
60. \textit{Id.} at 550-52.
61. \textit{Id.}
62. \textit{Id.} at 550-51 n.11; see Herbert Wechsler, \textit{The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government}, 54 \textsc{Colum. L. Rev.} 543, 558 (1954).
63. \textit{See}, e.g., Fay v. Noia, 372 U.S. 391, 438 (1963) (holding that issues can be presented on federal habeas corpus that were not presented in state court unless there was a deliberate by-
\end{footnotes}
Courts consistently relied on federalism as the basis for narrowing the scope of federal judicial power. For example, both Courts have ruled that the Eleventh Amendment broadly bars suits against state governments in federal courts.\textsuperscript{64} Likewise, the Court frequently has invoked concerns about state sovereignty and autonomy as justifications for restricting the scope of federal habeas corpus review.\textsuperscript{65} As mentioned above, the Court expressly relied on federalism concerns to require that federal courts avoid interfering with pending state court proceedings.\textsuperscript{66} Indeed, in \textit{Rizzo v. Goode},\textsuperscript{67} the Supreme Court held that considerations of federalism limited the ability of federal courts to hear allegations of abusive practices by a local police department.\textsuperscript{68}

There is a striking difference between the Court’s declaration in \textit{Darby} that the Tenth Amendment is but a truism\textsuperscript{69} and its statement in \textit{Younger} that “‘Our Federalism, . . . occupies a highly important place in our Nation’s history and its future.”\textsuperscript{70} The difference reflects how the Court’s treatment of federalism has varied depending on whether the issue concerns Congress’s powers or the federal courts.

\section*{B. The Assumptions of the Paradox}

The paradox apparently rests primarily on two premises. One is that judicial enforcement of federalism as a limit on Congress is unnecessary because the political process adequately protects state government interests.\textsuperscript{71} This is implicit throughout the post-1937 period and explicit pass of state court procedures).

\textsuperscript{64} See, e.g., Welch v. Texas Dep’t of Highways & Pub. Transp., 483 U.S. 468, 493 (1987) (noting that the Court has recognized the broad bar “without exception . . . for almost a century”); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 98-99 (1984) (holding that sovereign immunity is a limitation on suits against a state). Most recently, in Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996), the Supreme Court held that Congress may not override the Eleventh Amendment, except when acting pursuant to § 5 of the Fourteenth Amendment and that state officers may not be sued to enforce federal laws that have a comprehensive enforcement mechanism.

\textsuperscript{65} See, e.g., McCleskey v. Zant, 499 U.S. 467, 491 (1991) (holding that federal habeas review of state convictions frustrates the sovereign power of state to punish); Teague v. Lane, 489 U.S. 288, 310 (1989) (recognizing frustration caused in state courts by federal habeas review and subsequent new constitutional commands).

\textsuperscript{66} See supra note 23 (citing examples of cases so holding).

\textsuperscript{67} 423 U.S. 362 (1976).

\textsuperscript{68} Id. at 366, 380.

\textsuperscript{69} \textit{Darby}, 312 U.S. at 123-24.

\textsuperscript{70} \textit{Younger}, 401 U.S. at 44-45.

\textsuperscript{71} See supra text accompanying note 62 (explaining Justice Blackmun’s source for this premise).
in the Court's decision in Garcia. As mentioned above, Professor Herbert Wechsler's landmark article, provided the intellectual foundation for this approach. Wechsler argued that the interests of the states are represented in the national political process and that the nature of that process provides sufficient protection of state sovereignty, thus making it unnecessary for the courts to enforce federalism as a limitation on Congress.

In contrast, the emphasis on federalism as a limit on federal judicial power is based on a second premise, that comity—respect for state governments—is a crucial value in the two-tiered system of government created by the Constitution. In Younger, for example, the Court explicitly invoked the notion of comity and emphasized that an injunction halting state judicial proceedings would be an undue negative reflection on the competence of state courts and a disruption likely to cause friction between the court systems. Similarly, in Fair Assessment in Real Estate Assoc. v. McNary, the Court refused to allow the federal court to decide a section 1893 challenge to the constitutionality of a state's tax collection practices because "such a determination would be fully as intrusive as the equitable actions that are barred by principles of comity."

In another case, holding that state court decisions should have preclusive effect in federal section 1893 actions, the Court emphasized that "comity between state and federal courts" is "a bulwark of the federal system" and that the dignity of the state courts necessitates federal judicial respect for state court judgments. Similarly, in limiting the scope of federal habeas corpus review, the Court frequently emphasized that "[f]ederal habeas review creates friction between our state and federal courts, as state judges—however able and thor-

72. 469 U.S. at 552.
73. Wechsler, supra note 62, at 558.
74. Id. More recently, Professor Jesse Choper has advanced a similar thesis. JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 2-3 (1980).
75. See supra text accompanying notes 64-68 (giving examples of the Court's deference to comity).
76. Younger, 401 U.S. at 43-45; accord Trainor v. Hernandez, 431 U.S. 434, 446 (1977) (holding that complaint should have been dismissed by federal court to avoid interference with state court action where adequate remedy is available); Julidice v. Vail, 430 U.S. 327, 334-37 (1977) (finding federal court should not interfere with state contempt proceeding where state proceedings offered ample opportunity to present federal claims).
77. 454 U.S. 100 (1981).
78. Id. at 113.
ough—know that their judgments may be set aside by a single federal judge, years after it was entered and affirmed on direct appeal. 80

Interestingly, each of the two premises seems very much confined to its own sphere. The Supreme Court does not speak of the importance of comity in the relationship between Congress and the states. Nor does the Court discuss whether the federal judiciary is sufficiently sensitive to the interests of the states so as to make unnecessary enforcement of federalism as a limit. However, neither premise, as a matter of logic, is confined logically to just its own sphere. Moreover, each premise is based on unsupported and highly questionable factual assumptions.

The Court’s refusal to use federalism as a limit on Congress has been based on the premise that the states’ interests are adequately represented in the national political process. 81 But why aren’t those interests just as adequately represented in the judicial process? Certainly, advocates before a court may argue the importance of states’ interests as a consideration in judicial decisionmaking. The judiciary can give weight to federalism as a value in deciding jurisdictional doctrines such as the scope of habeas corpus and state sovereign immunity. One of the problems with Supreme Court discussions of federalism in decisions concerning federal jurisdiction is that the Court has made it seem as though federalism dictates the result, rather than that federalism is one of the important values to be weighed and considered. For example, in its decisions about the scope of the Eleventh Amendment, the Court never really discusses the proper balance between the desire for state immunity and the need for state accountability. 82

Perhaps more importantly, the assumption that states’ interests are adequately represented in the national political process seems highly questionable. 83 At the time the Constitution was written, states chose Senators and thus were directly represented in Congress. 84 But now, with popular election of Senators, why believe that the states’ interests


81. See supra text accompanying note 62 (identifying this premise).

82. I discuss this more fully in, Erwin Chemerinsky, Foreword: The Vanishing Constitution: The Supreme Court, 1988 Term, 103 HARV. L. REV. 43, 102 (1989) (asserting that the Court should engage in a more candid discussion of the underlying values behind the competing interests of state sovereign immunity and state accountability).

83. In a recent article, Professor Larry Kramer makes a strong argument that the interests of the states are protected through mechanisms such as administrative bureaucracies and political parties. Larry Kramer, Understanding Federalism, 47 VAND. L. REV. 1485, 1520-59 (1994). These are not the traditional types of political safeguards, but rather offer a much more subtle account of the way in which the interests of the states are protected in the political process.

84. See U.S. CONST. amend. XVII.
as states are adequately protected in Congress.\textsuperscript{85} The assumption must be that the voters heavily weigh the extent to which the individual candidate will vote in a manner that serves the interests of the state as an entity. Yet, a simple observation of elections shows that the issues are usually basic ones about the economy, health care, and the personalities of the candidates.\textsuperscript{86} These issues are the focus of attention, not the institutional interests of state and local governments. Indeed, it may well be that the "primary constituencies of the national representatives may . . . be precisely those that advocate an extension of the federal power to the disadvantage of the states."\textsuperscript{87}

I am not making the "strong" claim that Herbert Wechsler was wrong and that Congress inadequately protects state governments' interests. Rather, I am suggesting the "weaker" claim that Wechsler's thesis depends on factual assumptions about congressional behavior that are neither proven nor intuitively obvious.

Correspondingly, the value of comity is not logically limited to the area of judicial federalism; comity applies with equal force to congressional legislation regulating state and local government conduct. In fact, virtually every federal law regulating state and local government actions could be objected to as inconsistent with comity.

But, again more importantly, comity seems a highly questionable basis for limiting federal judicial power. The very existence of a federal government and particularly the federal courts is based on a judgment about the inadequacy of state governments acting alone and a distrust of state courts.\textsuperscript{88} Diversity jurisdiction, for example, exists because of a fear that state courts will be parochial and protect their own citizens at the expense of out-of-staters.\textsuperscript{89} Removal jurisdiction, especially in the civil rights context, similarly reflects a distrust of state courts.\textsuperscript{90} General federal question jurisdiction was created in 1875 because of fears about state court hostility to federal claims.\textsuperscript{91} In fact the framers argued for the existence of federal courts because of doubts about the


\textsuperscript{86} See Howard Fineman, The Torch Passes, Newsweek, Nov./Dec. 1992, at 4, 10 (showing poll results on issues important to voters in the 1992 Presidential election).

\textsuperscript{87} Rapaczynski, supra note 85, at 393.

\textsuperscript{88} See BEER, supra note 1, at 4, 381 (discussing distrust of states by some of the nation's founders).

\textsuperscript{89} Jack H. Friedenthal et al., Civil Procedure 23-25 (2d ed. 1993) (discussing the rationale for the existence of diversity jurisdiction).


\textsuperscript{91} Id. at 341-42.
state courts, especially in cases involving federal law and out-of-state citizens. 92

Therefore, because the existence of federal courts and federal jurisdiction is, in itself, an implicit insult to the state courts, it does not make much sense to say that jurisdictional principles must be defined to avoid offending the dignity of state courts. In light of the insult to state courts represented by the very existence of federal jurisdiction, it is not clear how much additional affront there is in allowing federal courts to enjoin unconstitutional state court proceedings or in expanding federal habeas corpus jurisdiction.

Moreover, comity is at most one value. But the questions must be more specific: how are particular federal actions incompatible with comity, and what types of federal justifications warrant disregarding comity? 93 The concept of comity itself, of course, cannot answer these questions. Nor has the Supreme Court addressed these basic issues when it has invoked comity as a basis for decisions. 94 Again, I am not making the “strong” claim that comity is irrelevant. Rather, I am arguing that comity as a basis for deciding cases rests on assumptions that are, at the very least, highly questionable.

As discussed above, both aspects of the post-1937 paradox in judicial treatment of federalism rest on premises that do not justify the Court’s seeming inconsistency. In reality, the Court’s treatment of federalism since 1937 probably has much less to do with its expressly stated premises of trusting the political process and respecting state judiciaries, and much more to do with judicial value judgments that are not reflected in these premises.

The post-1937 Court’s general refusal to enforce federalism as a limit on Congress is very much a reaction to the earlier invalidation of New Deal programs. 95 President Roosevelt appointed Justices that he could trust to affirm federal regulatory efforts and these Justices—many of whom had been architects of New Deal programs—crafted legal


93. The concern for comity might reflect a related issue: a worry that “insulting” state court judges will adversely affect their performance. See Bator, supra note 80, at 624-26. But this is based on unsupported assumptions about the perceptions of state court judges and the behavior that follows from these perceptions. I respond in detail to this argument in, Erwin Chemerinsky, Parity Reconsidered: Defining a Role for the Federal Judiciary, 36 UCLA L. Rev. 233, 288-89 (1988).

94. See supra text accompanying notes 75-80 (discussing several comity cases).

95. For a good history of the Court’s early hostile position toward New Deal legislation, see Manchester, supra note 4, at 164-66.
doctrines which upheld federal congressional power without any judicially enforced federalism limits. These doctrines survived largely because of a combination of stare decisis, a generally shared recognition of the need for federal regulatory legislation, and a perceived inability to define meaningful limits based on federalism.

In contrast, the emphasis on federalism as a limit on federal judicial power, especially during the Burger and Rehnquist Courts, also reflects value choices not reflected in the rhetoric about comity. The Burger and Rehnquist Courts generally have restricted the scope of individual liberties and especially the rights of criminal defendants. These Courts have perceived that state courts would be less likely to vindicate federal rights and thus have limited federal jurisdiction as a way to achieve substantive goals. For example, Professor Burt Neuborne explains that the Supreme Court’s restrictions of federal court jurisdiction based on its stated belief that there is parity between federal and state courts may be a “pretext for funnelling federal constitutional decisionmaking into state courts precisely because they are less likely to be receptive to vigorous enforcement of federal constitutional doctrine.” In other words, one way in which the Burger and Rehnquist Courts have ruled against individual rights claims is by denying them access to the federal courts.

Yet, neither of the likely actual grounds for decisions suggested above is ever explored in the Supreme Court decisions. What results are decisions based on premises that are unsupported and dubious.

C. The Future of the Paradox: New York v. United States and United States v. Lopez

For more than a half century, the paradox described above has dominated Supreme Court decisions concerning federalism. Now, however, the paradox may be over as federalism has reemerged as a limit on congressional powers.

The first indication of this resurrection occurred in Gregory v. Ashcroft in 1991. State court judges in Missouri challenged a state

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97. See supra text accompanying notes 64-68 (noting this emphasis by the Burger and Rehnquist Courts).
98. See, e.g., Chemerinsky, supra note 93, at 246-48 (contrasting the Burger Court to the Warren Court).
99. Thus, it may well be that the comity-based deference to state courts discussed earlier, see supra text accompanying notes 64-68, 76-80, is actually serving a more substantive agenda: decreasing the protection of rights.
mandatory retirement law as being invalid for violating the federal Age Discrimination in Employment Act.\(^{102}\) The Supreme Court held that a federal law will be applied to important state government activities only if there is a clear statement from Congress that the law was meant to apply.\(^{103}\) The Court did not use the Tenth Amendment to invalidate the federal law on its face or as applied.\(^{104}\) Instead, the Court used the Tenth Amendment and federalism considerations as a rule of construction.\(^{105}\) Because the federal act lacked such a clear statement, the Court refused to apply it to preempt the Missouri mandatory retirement law.\(^{106}\)

A year later, in *New York v. United States*, the Court—for only the second time in fifty-five years and the first since it overruled *National League of Cities*—invalidated a federal law as violating the Tenth Amendment.\(^{107}\) A federal law at issue in *New York v. United States*, the 1985 Low-Level Radioactive Waste Policy Amendments Act,\(^{108}\) created a statutory duty for states to provide for the safe disposal of radioactive wastes generated within their borders.\(^{109}\) The Act provided monetary incentives for states to comply with the law, and allowed states to impose a surcharge on radioactive wastes received from other states.\(^{110}\) Additionally, and most controversially, to ensure effective state government action, the law provided that states would “take title” to any wastes within their borders that were not properly disposed of by January 1, 1996, and then would “be liable for all damages directly or indirectly incurred.”\(^{111}\)

The Supreme Court ruled that Congress, pursuant to its authority under the Commerce Clause, could regulate the disposal of radioactive wastes.\(^{112}\) However, by a 6-3 margin, the Court held that the “take title” provision of the law was unconstitutional because its gave state governments the choice between “either accepting ownership of waste or regulating according to the instructions of Congress.”\(^{113}\) Justice O’Connor, writing for the Court, said that it was impermissible for

\(^{102}\) *Id.* at 456. The ADEA prohibits employers, including a state, from firing anyone at least 40-years-old because of that person’s age. 29 U.S.C. §§ 623(a), 630(b)(2), 631(a).

\(^{103}\) *Gregory*, 501 U.S. at 460-61.

\(^{104}\) *See id.* at 461.

\(^{105}\) *See id.* at 457-64.

\(^{106}\) *Id.* at 470.

\(^{107}\) *New York v. United States*, 505 U.S. at 177-79.


\(^{110}\) *Id.* at 152-53.

\(^{111}\) *Id.*

\(^{112}\) *Id.* at 160.

\(^{113}\) *Id.* at 175.
Congress to impose either option on the states.\textsuperscript{114} Forcing states to accept ownership of radioactive wastes would impermissibly “commandeer” state governments, and requiring state compliance with federal regulatory statutes would impermissibly impose on states a requirement to implement federal legislation.\textsuperscript{115} The Court concluded that it was “clear” that because of the Tenth Amendment, “[t]he Federal Government may not compel the States to enact or administer a federal regulatory program.”\textsuperscript{116}

Although the Court said that it was not revisiting the holdings of earlier cases, such as Garcia, the Court clearly rejected Garcia’s conclusion that the federal judiciary would not use the Tenth Amendment to invalidate federal laws.\textsuperscript{117} Indeed, it appears that if a federal law compels state legislative or regulatory activity, the statute is unconstitutional, even if there is a compelling need for the federal action.\textsuperscript{118} After New York v. United States, the Tenth Amendment is again a solid basis on which to rest a challenge to federal laws that force state administrative or legislative action. Federal energy and environmental laws, which often rely on state government implementation, appear to be especially vulnerable to Tenth Amendment challenges.

Two aspects of New York v. United States are especially troubling. The first is the Court’s merger of what was once separate Article I and Tenth Amendment analyses. In an effort to avoid overruling Garcia, the Court said that its decision was based both on limits on congressional powers under Article I and on the Tenth Amendment.\textsuperscript{119} Justice O’Connor’s opinion, unfortunately, presented these two arguments as if they were completely indistinct.

The claims, however, are quite different. One focuses on whether Congress has authority under Article I of the Constitution to act,\textsuperscript{120} the other considers whether there is a constraint on this power.\textsuperscript{121} Justice O’Connor’s approach conflates these two issues. There is no doubt that under post-1937 constitutional law Congress has authority under the Commerce Clause to regulate the disposal of nuclear wastes.\textsuperscript{122} Therefore, Justice O’Connor must be saying that, entirely apart from the

\textsuperscript{114} Id. at 176.
\textsuperscript{115} Id.
\textsuperscript{116} Id. at 188.
\textsuperscript{117} Id. at 176-77.
\textsuperscript{118} Id. at 176 (stating that such an outcome “has never been understood to be within the authority conferred upon Congress by the Constitution”).
\textsuperscript{119} Id. at 177-78.
\textsuperscript{120} See id. 155-56.
\textsuperscript{121} See id.
\textsuperscript{122} Id. at 159-60.
Tenth Amendment, state sovereignty creates a limit on congressional powers.

This is very similar to the Court’s approach to the Eleventh Amendment in that state sovereignty operates as a limit on federal court subject matter jurisdiction, even apart from the text of the Amendment.\(^{123}\) In fact, *New York v. United States* most powerfully indicates that the paradox described above might be over in that it states that state sovereignty is a limit on congressional power entirely apart from the Tenth Amendment.\(^{124}\) This is similar to the Court using state sovereignty as a limit on federal court power, such as in precluding suits by a citizen against his or her own state, entirely apart from the Eleventh Amendment.\(^{125}\)

Yet in both instances, it is unclear why the Court gives this non-textual value so much weight. Indeed, for a Justice who emphasizes text as the central focus of constitutional analysis, these conclusions should be especially troubling. The constitutional text protects state sovereignty in certain circumstances, such as by barring suits against states by citizens from other states, and perhaps in the Tenth Amendment. But in other areas, it is troubling that a non-textual value is allowed to trump textual protections.

More generally, the key question is: why is protecting states so important that it should be seen as limiting the very definition of congressional powers under Article I? If the Court is serious that state sovereignty restricts the scope of Article I, entirely apart from Tenth Amendment considerations, then *New York v. United States* has even broader implications than generally recognized. The case could portend a return to pre-1937 constitutional jurisprudence where the Court also used considerations of state sovereignty to narrowly define the scope of federal powers—such as in defining commerce to apply to only one stage of business, distinct from mining, manufacture or production.\(^{126}\) Although it is unlikely that these particular distinctions will reemerge, others could arise in the future.

A second troubling aspect of *New York v. United States* lies in the Court’s central rationale for protecting federalism: ensuring government

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123. *See*, e.g., Hess v. Port Auth. Trans-Hudson Corp., 115 S. Ct. 394, 407 (1994) (Stevens, J., concurring) (discussing his belief that the “Court’s decisions have given us ‘two Eleventh Amendments,’ one narrow and textual and the other—not truly a constitutional doctrine at all—based on prudential considerations of comity and federalism”).


125. *See* Hess, 115 S. Ct. at 407 (Stevens, J., concurring) (commenting on the Court’s use of non textual prudential policies to preclude suits against states by citizens).

126. *See supra* text accompanying notes 46-50 (discussing pre-1937 Court decisions limiting scope of Commerce Clause power).
accountability. Justice O'Connor's opinion emphasized that when Congress compels state government action, accountability is undermined. She explained that although Congress makes the decision, states take the political heat and are held responsible.

On the one hand, Justice O'Connor is to be commended for articulating an explicit value of federalism, something that is all too rare in the federalism cases. But on reflection, the factual assumptions behind Justice O'Connor's position are highly questionable. Justice O'Connor assumes that if Congress forces the states to do something, voters will not hold Congress responsible but rather will blame the conduct on state governments. Voters, however, surely can understand that the state is acting under federal compulsion. Federal mandates cause people to do many things they otherwise would not. Paying taxes is a simple example. It is difficult to understand why people would not understand that a state government, too, might have to do something because of a federal mandate? In addition, state government officials, of course, can explain to the voters that the federal government required the particular actions. Justice O'Connor never explains why the federal government will not be held accountable under such circumstances.

*New York v. United States* marks the return of federalism as a basis for declaring federal laws unconstitutional. The more recent decision in *Lopez* marks the return of federalism as a basis for limiting the scope of congressional authority. From 1936 until April 26, 1995, the Supreme Court did not declare unconstitutional even one federal law as exceeding the scope of Congress' powers under the Commerce Clause. A vast array of social and economic regulations were adopted under this power, ranging from civil rights laws to environmental protection statutes, from criminal laws to statutes creating most federal

128. Id.
129. Id.
130. See *supra* note 82 and accompanying text (asserting a lack of candid discussion of values by the Court).
132. *See Lopez*, 115 S. Ct. at 1653-54 (Souter, J., dissenting) (lamenting the return to the old federalism jurisprudence).
133. *See*, e.g., *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 252-53 (1964) (finding that the discriminatory practices of a motel substantially affected interstate commerce by discourage interstate travel); *Katzenbach v. McClung*, 379 U.S. 294, 299-301 (1964) (finding that a restaurant's discriminatory service practices substantially affected interstate commerce by selling less Interstate goods and obstructing interstate travel).
regulatory agencies.\textsuperscript{136} For almost sixty years, Congress has broad authority to legislate pursuant to the Commerce Clause.\textsuperscript{137} So long as Congress did not violate another constitutional provision, such as the First Amendment, legislation adopted under the commerce power was upheld because almost any activity has some reasonable relationship to interstate commerce.\textsuperscript{138}

However, in \textit{Lopez}, by a 5-4 margin, the Supreme Court declared unconstitutional the Gun-Free School Zones Act of 1990\textsuperscript{139} which made it a federal crime to have a gun within 1000 feet of a school.\textsuperscript{140} Splitting along ideological lines,\textsuperscript{141} the Court ruled that the relationship to interstate commerce was too tangential and uncertain to uphold the law as a valid exercise of Congress' commerce power.\textsuperscript{142}

Alfonso Lopez was a twelfth-grade student at Edison High School in San Antonio, Texas, when he was arrested for carrying a concealed .38 caliber handgun and five bullets.\textsuperscript{143} He was charged with violating the Gun-Free School Zones Act of 1990 which made it a federal offense “for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.”\textsuperscript{144} The law defines a school zone as “in, or on the grounds of, a public, parochial or private school” or “within a distance of 1,000 feet from the grounds of a public, parochial or private school.”\textsuperscript{145} Lopez was convicted of violating this law and sentenced to six months imprisonment and two years of supervised release.\textsuperscript{146}

\begin{itemize}
  \item 136. \textit{See, e.g.}, \textit{Kentucky & Ind. Bridge Co. v. Louisville & Nashville R.R.}, 37 F. 567, 613 (C.C.D. Ky. 1889) (holding that Congress has Commerce Clause authority to create commissions to supervise, investigate, and report on matters related to interstate commerce), \textit{appeal dismissed}, 149 U.S. 777 (1893).
  \item 137. \textit{See Lopez}, 115 S. Ct. at 1653-54 (Souter, J., dissenting).
  \item 138. \textit{See, e.g.}, \textit{Fry v. United States}, 421 U.S. 542, 547 (1975) (holding that “[e]ven activity that is purely intrastate in character may be regulated by Congress” where it has some effect on interstate commerce).
  \item 141. \textit{Lopez}, 115 S. Ct. at 1626. Chief Justice Rehnquist wrote the opinion of the Court and was joined by Justices O'Connor, Kennedy, Scalia, and Thomas, and dissenting were Justices Stevens, Souter, Ginsburg, and Breyer.
  \item 142. \textit{id.}
  \item 143. \textit{id.}
  \item 144. \textit{id.} (quoting 18 U.S.C. § 922(q)(1)(A)).
  \item 145. 18 U.S.C. § 921(a)(25).
  \item 146. \textit{Lopez}, 115 S. Ct. at 1626.
\end{itemize}
Lopez appealed on the ground that the Act was an unconstitutional exercise of Congress’ commerce power. The Supreme Court agreed and concluded that the law was unconstitutional because it was not substantially related to interstate commerce.

Chief Justice Rehnquist’s opinion for the Court began by emphasizing that the Constitution creates a national government of enumerated powers. In other words, Congress may only legislate if there is express or implied power provided in the Constitution. The basis for this is a strong belief that federalism requires defining congressional powers so that there are real and meaningful limits on their scope.

The majority next reviewed the history of decisions under the Commerce Clause and then identified three types of activities that Congress may regulate under this power. First, “Congress may regulate the use of the channels of interstate commerce.” The Court cited to Heart of Atlanta Motel v. United States, which upheld a federal law prohibiting discrimination by hotels and restaurants as an example of protecting the channels of interstate commerce.

Second, the Court said that Congress may legislate “to regulate and protect the instrumentalities of interstate commerce,” and persons and things in interstate commerce. The Court cited to several cases upholding congressional power to regulate the railroads under its commerce power.

Finally, the Court said that Congress may “regulate those activities having a substantial relation to interstate commerce.” Chief Justice Rehnquist said that the law was uncertain as to whether an activity must “affect” or “substantially affect” interstate commerce to be regulated under this approach. He concluded that the more restrictive interpretation of congressional power is preferable and that “the proper test requires an analysis of whether the regulated activity ‘substantially affects’ interstate commerce.”

147. Id.
148. Id. at 1626, 1630-31.
149. Id. at 1626.
150. Id.
151. Id., at 1626-30.
152. Id. at 1629.
153. Id.
154. Heart of Atlanta Motel, 379 U.S. at 261.
155. Lopez, 115 S. Ct. at 1629.
156. Id. (citing Perez, 402 U.S. at 146; Shreveport Rate Cases, 234 U.S. 342 (1914); Southern Ry. v. United States, 222 U.S. 20 (1911)).
157. Id. at 1629-30.
158. Id. at 1630.
159. Id.
The Court concluded that the presence of a gun near a school does not substantially affect interstate commerce and that therefore the federal law was unconstitutional.\textsuperscript{160} Chief Justice Rehnquist noted that nothing in the Act limited its applicability to instances where there was proof of an effect on interstate commerce.\textsuperscript{161} The Court specifically rejected the federal government's claim that regulation was justified under the Commerce Clause because possession of a gun near a school may result in violent crime that can adversely affect the economy.\textsuperscript{162}

Concurring opinions were written by Justices Thomas and Kennedy, with Justice Kennedy's opinion joined by Justice O'Connor.\textsuperscript{163} Justice Thomas wrote a concurring opinion that was notable because it urged a much narrower view of congressional power than that adopted by the majority.\textsuperscript{164} The concurring opinion written by Justice Kennedy and joined by Justice O'Connor stressed federalism and the relationship between limiting Congress' authority and protecting state prerogatives.\textsuperscript{165}

Justices Stevens, Souter, and Breyer wrote dissenting opinions.\textsuperscript{166} Justice Breyer's dissent was the most thorough and was joined by the other dissenting Justices—Stevens, Souter, and Ginsburg. Justice Breyer's dissent criticized the majority for engaging in undue judicial activism; for abandoning almost sixty years of precedent; and for invalidating an important federal statute.\textsuperscript{167} Justice Breyer argued that the judiciary should uphold a federal law as a valid exercise of the commerce power so long as there is a "rational basis" that an activity affects interstate commerce.\textsuperscript{168} Justice Breyer then explained why guns inherently are a part of interstate commerce, and why guns near schools have an economic impact that justifies federal regulation under the commerce power.\textsuperscript{169}

Notice that in \textit{Lopez}, it was the five most conservative Justices—one who was appointed by President Nixon, three who were appointed by President Reagan, and one who was appointed by President Bush—who invalidated an unquestionably popular federal statute. Although these Justices are most commonly associated with advocating judicial restraint,

\begin{itemize}
  \item \textsuperscript{160} \textit{Id.} at 1634.
  \item \textsuperscript{161} \textit{Id.} at 1631.
  \item \textsuperscript{162} \textit{Id.} at 1632.
  \item \textsuperscript{163} \textit{Id.} at 1625.
  \item \textsuperscript{164} \textit{See id.} at 1642-51 (Thomas, J., concurring).
  \item \textsuperscript{165} \textit{See id.} at 1634-42 (Kennedy, J., concurring).
  \item \textsuperscript{166} \textit{Id.} at 1625.
  \item \textsuperscript{167} \textit{See id.} at 1657-65 (Breyer, J., dissenting).
  \item \textsuperscript{168} \textit{Id.} at 1659.
  \item \textsuperscript{169} \textit{Id.} at 1659-61.
\end{itemize}
in *Lopez* they abandoned almost sixty years of deference to the legislature under the Commerce Clause. The *Lopez* Court’s narrow definition of Congress’ powers provides a basis for striking down countless federal laws.

For example, many federal drug laws are vulnerable because they regulate activities that are only tangentially related to interstate commerce. Innumerable federal criminal laws were adopted under Congress’ Commerce Clause authority. Similarly, a vast array of civil laws, ranging from environmental statutes like the Endangered Species Act to discrimination laws like the Americans with Disabilities Act, might be challenged based on *Lopez*. Thus far, lower courts generally have been reluctant to invalidate laws based on *Lopez*.

The impact of *Lopez* and the extent to which it will change Congress’ powers and constitutional law will not be known for many years to come. The majority opinion did little to explain what the “substantially affects” interstate commerce test means. In addition, the Court never articulated the criteria to be used by lower courts to judge. Thus, lawyers have every incentive to challenge the constitutionality of federal statutes. In short, the *Lopez* decision opened a door to constitutional challenges that had been closed for almost sixty years ago.

Two cases, of course, do not make a trend, and making predictions from a ruling or two is inherently hazardous and unreliable. After all,

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there were many predictions about the likely impact of National League of Cities and virtually none of them came true. But even with this caution in mind, New York v. United States and Lopez are a dramatic change in the law. For the fifty-five years preceding New York v. United States, with the brief exception of National League of Cities, the Court ruled that the Tenth Amendment does not limit congressional powers. For sixty years, the Court limited the scope of the commerce power. Now, again, federalism and the Tenth Amendment are a check on federal legislative power.

First, thus far the Court has not indicated that the Tenth Amendment will be used as a limit on federal laws regulating private conduct. Rather, federal laws challenging private conduct may be challenged as exceeding the scope of Congress' powers. During the earlier era of dual federalism, the Tenth Amendment was used to invalidate federal regulation of private employment relations, such as in regulating child labor and in declaring a federal minimum wage unconstitutional. However, the cases thus far do not suggest that the Court will use the Tenth Amendment as a restriction on federal regulation of the private sector. This likely will occur by decisions, such as Lopez, constricting the scope of Congress' powers.

Second, federal laws that compel state legislative or regulatory activity are unconstitutional. Unless the Court backs away from Justice O'Connor's strong language in New York v. United States, federal laws will be invalidated if they "commandeer" state governments to regulate or legislate.

Third, the law is most uncertain when Congress attempts to regulate state government conduct other than by compelling the adoption of legislation or the enactment of rules. What will be the Court's approach if there is another challenge to the federal law requiring that states pay the minimum wage? Arguably, such a federal law forces state legislatures to act by appropriating money. The Court could find this—and for

174. See supra text accompanying notes 27-29.
175. See Lopez, 115 S. Ct. at 1634.
178. New York v. United States, 505 U.S. at 188.
179. See id. at 161 (quoting Hodel, 452 U.S. at 288).
that matter all unfunded mandates imposed on state and local governments—to be unconstitutional.

In addition, it is unclear whether limits will be imposed on Congress when it seeks to directly regulate state and local government actions. In *New York v. United States*, the Court held that Congress could not compel states to adopt laws providing for the safe disposal of low-level nuclear wastes.\(^{180}\) But what if Congress mandated state clean-ups and set specific standards for the state? This appears to be even more intrusive than Congress setting a goal and allowing states to decide how to achieve it. Yet, it is not clear whether *New York v. United States* applies or whether the existence of state government discretion means that there is no violation of the Tenth Amendment.\(^{181}\)

The Court, in *New York v. United States*, expressly declared that it was not overruling *Garcia*.\(^{182}\) Perhaps this can be best understood as meaning that the Court was not reconsidering an instance where Congress regulated state conduct and mandated specific behavior. However, the Court did hold in *Gregory* that a federal law burdening state conduct in an important area will be applied to state governments only if there is a clear statement from Congress.\(^{183}\)

Perhaps in the future the Court will go even further than it did in *Gregory* and overrule *Garcia*, resurrecting *National League of Cities*. Since *Garcia* was decided, Justices Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer have replaced Justices Burger, Powell, Brennan, Marshall, White, and Blackmun. There is thus a real possibility that a conservative majority, comprised of Justices Rehnquist, O’Connor, Scalia, Kennedy, and Thomas will overrule *Garcia* and expand the scope of Tenth Amendment protections for state sovereignty.

The fourth point is that it appears that the Court will allow Congress to induce states to behave in particular ways by placing strings on federal grants. In *South Dakota v. Dole*,\(^ {184}\) in 1987, the Court expressly held that even though grants often have the effect of coercing state behavior, Congress may properly place choices before state governments.\(^ {185}\) Apparently Congress can force states to clean-up low-level

\(^{180}\) *Id.* at 188.

\(^{181}\) As this Article is finally going to press, the Supreme Court has before it Mack v. United States and Printz v. United States, 66 F.3d 1025 (9th Cir. 1995), *cert. granted*, 116 S. Ct. 2013 (1996), which poses the issue of whether the Brady Bill violates the Tenth Amendment in its command that state and local law enforcement do background checks before issuing permits for firearms.

\(^{182}\) 505 U.S. at 201.

\(^{183}\) *Gregory*, 501 U.S. at 469-70.


\(^{185}\) *Id.* at 211.
nuclear wastes so long as Congress does this as a condition for receipt of federal funds. The reality, of course, is that strings on grants can be as coercive as any direct requirement. Therefore, it is possible that this, too, might be limited in the future on federalism grounds.

The result of New York v. United States, as reflected in these four points, is that the paradox in the judicial treatment of federalism appears to be at least partly over. There is every reason to believe that federalism will continue to be used as a limit on the federal judicial power in areas such as habeas corpus review, abstention, and the Eleventh Amendment. At the same time, federalism will now be used, at least in some areas, as a limit on the federal legislative power. This analysis raises some basic normative questions that are discussed in the next part: What values should be achieved in the judicial protection of federalism? Are those values advanced by the Court’s current federalism doctrines?

II. APPLYING THE VALUES OF FEDERALISM

In teaching Constitutional Law, I have been continually struck that the values of federalism are not carefully explored in the cases. From time to time, the Court alludes to the underlying benefits of federalism: limiting tyranny by the federal government; enhancing democracy by providing governance that is closer to the people; and providing laboratories for experimentation. But these values are seldom more than just slogans. Rarely, if ever, is there any explanation of how these particular values are compromised by particular federal laws.

Initially in this section, I consider these values and especially the Court’s treatment of them. Then, I return to the paradox described in Part I and suggest that neither aspect of the paradox has any relationship

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186. Compare New York v. United States, 505 U.S. at 161 (prohibiting congressional commandeering of state legislative process by direct compulsion) with Dole, 483 U.S. at 211 (finding conditional grants of federal highway funds were not coercive in nature).

187. See Gregory, 501 U.S. at 458 (stating that “the principle benefit of the federalist system is a check on abuses of governmental power”).

188. See, e.g., id. (discussing some of the advantages of federalism). In Gregory, Justice O’Connor enumerated some of the advantages of a federalist statute:

It assure a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

Id.
to the underlying values of federalism. In fact, even the Supreme Court's decisions that have been the most protective of states' institutional interests have little relation to the underlying values of federalism.

A. The Traditionally Stated Values of Federalism

Many Supreme Court decisions protecting federalism say relatively little about the underlying values that are being served.189 When the Court does speak of the values of federalism, usually three benefits of protecting state governments are identified: decreasing the likelihood of federal tyranny, enhancing democratic rule by providing government that is closer to the people, and allowing states to be laboratories for new ideas.190 Each merits examination.

The first justification for protecting states from federal intrusions is that the division of power vertically, between federal and state governments, lessens the chance of federal tyranny.191 Professor Rapaczynski noted that "[p]erhaps the most frequently mentioned function of the federal system is the one it shares to a large extent with the separation of powers, namely, the protection of the citizen against governmental oppression—the 'tyranny' that the Framers were so concerned about."192 The Framers of the Constitution relied primarily on the structure of government as a protection against tyrannical government. The Constitution itself, apart from the amendments, has relatively few protections of individual rights. Instead, the Framers saw the separation of powers horizontally, among the branches of the federal government, and vertically, between the federal and state governments, as the best safeguard against autocratic rule.

How do state governments prevent federal tyranny? Perhaps most importantly, the Framers thought that the possibility of federal abuses could be limited by restricting the authority of the federal government.193 The Framers envisioned that the vast majority of governance would be at the state and local levels and that federal actions would be relatively rare and limited. Alexander Hamilton explained that "[t]he necessity of local administrations for local purposes, would be a complete barrier against the oppressive use of such a power."194 If the

189. See supra text accompanying notes 10-14 (discussing the lack of treatment of federalism values in Supreme Court decisions).
191. Rapaczynski, supra note 85, at 380-95.
192. Id. at 380.
193. Id. at 381.
powers of the federal government are limited, most governing, of necessity, must be done at the state and local levels.

Yet, the notion of radically limited federal powers seems anachronistic in the face of a modern national market economy and decades of extensive federal regulations. Additionally, there has been a major shift over time in the views about how to most effectively control abusive government. Now it is thought that if a federal action intrudes upon individual liberties the federal judiciary will invalidate it as unconstitutional. Judicial review is seen as an important check against tyrannical government actions.

Professor Rapaczynski offers a more sophisticated and contemporary explanation for why state governments limit the likelihood of federal tyranny. He writes that:

[T]he most influential protection that the states offer against tyranny is the protection against the special interest of the government itself. For the fact that the federal government may be less likely than the states, in what we may call "normal times," to oppress small minorities whose mode of life offends a homogeneous majority does not mean that it is never likely to oppress them as well as to deprive the citizenry as a whole of their legitimate voice in running the national affairs. Should the federal government ever be captured by an authoritarian movement or assert itself as a special cohesive interest, the resulting oppression would almost certainly be much more severe and durable than that of which any state would be capable.195

Professor Rapaczynski is undoubtedly correct that a tyrannical federal action stemming from the capture of the federal government would be extremely undesirable. But the relationship of this observation to the content of federalism is not clear. Is it an argument that the fewer the powers accorded to the federal government the better it is because federal powers might be used for ill? Ultimately, this is an argument against having any federal powers because all could be abused. Once it is decided that there should be a federal government and federal powers, it is necessary to decide which federal powers offer enough prospect for benefits to outweigh the prospect of their tyrannical use.

Alternatively, Professor Rapaczynski might be arguing that particular federal powers are undesirable because if there is capture of the federal government these could be used in particularly abusive ways. For example, it might be better to have most policing done at the local level

195. Rapaczynski, supra note 85, at 388.
and avoid a national police force because of the dangers to civil liberties if there is a capture by autocratic rulers at the national level. This is an important concern that requires careful consideration of which particular federal powers so risk abuse as to outweigh their likely benefits.

A second frequently invoked value of federalism is that states are closer to the people and thus more likely to be responsive to public needs and concerns. Professor David Shapiro clearly summarizes this argument when he writes: "One of the stronger arguments for a decentralized political structure is that, to the extent the electorate is small, and elected representatives are thus more immediately accountable to individuals and their concerns, government is brought closer to the people, and democratic ideals are more fully realized." This argument has intuitive appeal. It suggests that the smaller the area governed, the more responsive the government will be to the interests of the voters.

However, it must be recognized that this value of federalism could be inconsistent with the first value discussed above. To the extent that voters at the state and local level prefer tyrannical rule—or more likely rule that abuses a particular minority group—greater responsiveness increases the dangers of government tyranny. In other words, the substantive result of decreasing tyranny will not always be best achieved by the process approach of maximizing electoral responsiveness; indeed, the reverse might well be the result.

In fact, there is a greater danger of special interests capturing government at smaller and more local levels. James Madison wrote of the danger of "faction" in Federalist No. 10 and modern political science literature offers support for his fears.

In City of Richmond v. J.A. Croson Co., the Court emphasized these dangers in invalidating a city's affirmative action to benefit minority businesses. The Supreme Court also has expressed concern about the dangers of special interest capture at the local level. The Court distinguished an earlier case that had upheld a similar federal program on the ground that capture by special interests was much less likely at the federal level than at the local level.

196. Id. at 395-97.
199. See, e.g., Rapaczynski, supra note 83, at 398-99 (discussing the advantages of groups over individuals in a close government).
201. Id. at 495-96.
202. Id. at 489-93 (distinguishing Fullilove v. Klutznick, 448 U.S. 448 (1980)).
Indeed, arguments about responsiveness likely rest on one of two assumptions. One assumption may be that voters more closely monitor the conduct of representatives the more local the level of government. Yet, this assumption is seemingly at odds with current practice. Presidential and senatorial elections usually attract more voter interest and more knowledgeable electoral decisions than elections for purely local offices. Alternatively, the assumption may be that the smaller the governing unit, the greater the likelihood of voter homogeneity and the ability of government to easily ascertain the will of the voters. But it is not clear what size government unit is necessary for such homogeneity. For example, is a state the size of California, or for that matter a city the size of Los Angeles, sufficiently more homogeneous than the United States so as to increase the likelihood of responsive government? Professor Shapiro writes: "[T]he goal of realizing democratic values to the maximum extent feasible may not be significantly enhanced by reducing the relevant polity from one of some 280,000,000 (the United States) to one of, say, 30,000,000 (the state of California)." He explains that "[i]n either case, the size of the electorate and its heterogeneity tend to dwarf participation by the individual and to frustrate the recognition of small group preferences."

The point is that assertions about the responsiveness of government are descriptively shaky and normatively not necessarily desirable. There is little historical evidence that one level of government is inherently more responsive than any other. Interestingly, if the real concern is with responsiveness, the concern should be with protecting local governments much more than state governments. But as Professors Rubin and Feeley point out, "federalism only protects the autonomy of states, not the autonomy or variability of local governments."

A final argument that is frequently made for protecting federalism is that states can serve as laboratories for experimentation. Justice Brandeis apparently first articulated this idea when he declared:

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a

203. SHAPIRO, supra note 197, at 93.
204. Id.
205. Rubin & Feeley, supra note 32, at 919.
206. Rapaceynski, supra note 85, at 408.
laboratory; and try novel social and economic experiments without risk to the rest of the country.207

More recent federalism decisions, too, have invoked this notion. Justice Powell, dissenting in Garcia, lamented that “[t]he Court does not explain how leaving the States virtually at the mercy of the Federal government, without recourse to judicial review, will enhance their opportunities to experiment and serve as ‘laboratories.’ ”208 Likewise, Justice O’Connor, dissenting in Federal Energy Regulatory Commission v. Mississippi,209 stated that the “Court’s decision undermines the most valuable aspects of our federalism. Courts and commentators frequently have recognized that the 50 States serve as laboratories for the development of new social, economic, and political ideas.”210

However, any federal legislation preempting state or local laws limits experimentation.211 Indeed, the application of constitutional rights to the states limits their experimenting with providing less safeguards of individual liberties.212 The key question is: when is it worth experimenting and when is experimentation to be rejected because of a need to impose a national mandate? The value of states as laboratories provides no answer to this issue.

There also is a related process question: who is in the best position to decide when further experimentation is warranted or when there is enough knowledge to justify federal actions? A strong argument can be made that the need for using states as laboratories should be a policy argument asserted before Congress in opposition to federal legislation rather than a legal argument asserted before the judiciary complaining that a federal law unduly limits experimentation. Additionally, Congress and even federal agencies can design experiments and try differing approaches in varying parts of the country.

Professors Rubin and Feeley take this argument even further. They assert that political realities mean that relatively few experiments will be done at the state and local levels.213 They write:

To experiment with different approaches for achieving a single, agreed-upon goal, one sub-unit must be assigned an option that initially seems less desirable, either because that

208. Garcia, 469 U.S. at 568 n.13 (Powell, J., dissenting).
210. Id. at 787-88 (O’Connor, J., dissenting in part).
211. See New State Ice Co., 285 U.S. at 310-11 (Brandeis, J., dissenting).
212. See Garcia, 469 U.S. at 572 (Powell, J., dissenting).
option requires changes in existing practices, or because it offers lower, although still-significant chances of success. . . . As a result, individual states will have no incentive to invest in experiments that involve any substantive or political risk, but will prefer to wait for other states to generate them; thus will, of course, produce relatively few experiments.\textsuperscript{214}

On the other hand, Professors Rubin and Feeley contend, Congress has far more incentive to structure and monitor experiments.\textsuperscript{215} They thus conclude that "most significant 'experimental' programs in recent years have in fact been organized and financed by the national government."\textsuperscript{216}

None of this discussion is to imply that the traditional justifications for protecting federalism are wrong.\textsuperscript{217} Rather, I want to suggest that each is much more complicated than the traditional judicial treatment makes it seem. Each proposition is primarily a descriptive statement—states will limit the likelihood for federal tyranny, states are more responsive to the people, states will serve as beneficial laboratories for experimentation. Yet, the descriptive accuracy of each statement is highly questionable. Moreover, the normative implications of each descriptive proposition is very uncertain. Will limiting the powers of the federal government to prevent tyranny, on balance, preclude further beneficial federal actions or further undesirable ones? When is responsiveness to the people a virtue and when is it to be avoided or ignored? When is experimentation desirable and worth encouraging? None of these questions have been explored in any depth by the Supreme Court.

\textbf{B. The Values of Federalism and the Paradox of Post-1937 Judicial Decisions Concerning Federalism}

I believe that the recognized federalism doctrines have little relationship to the underlying values of federalism. Indeed, even the decisions that have been the most protective of states' rights seem to have little to do with the underlying values that the Court has said need to be served. Although comparisons are difficult to support, I cannot

\textsuperscript{214} Id. at 925.
\textsuperscript{215} Id.
\textsuperscript{216} Id.
\textsuperscript{217} See supra text accompanying notes 191, 196 & 206 (identifying the traditional justifications for protecting federalism).
think of any other area of constitutional law where the doctrines and
decisions have been so totally unrelated to the basic policy objectives.
As described in Part I, there have been two core aspects of post-1937
Supreme Court federalism decisions, at least up until the 1990s.218 One
has been the Court’s refusal to use federalism as a limit on federal
legislative power.219 There is no apparent link between this judicial
deerence and the underlying values of federalism. Court decisions
refusing to protect federalism emphasize the inability to define limits on
Congress based on state sovereignty and the adequacy of protection of
state governments’ interests in Congress.220 The Court, in cases like
Garcia, declared that there is nothing in the federal law “that is
destructive of state sovereignty or violative of any constitutional
provision.”221 But, of course, assuming the validity of the traditional
arguments for federalism, every expansion of federal power, in theory,
marginally increases the possibility of federal tyranny, risks decisions
that are more unresponsive to the people, and denies state experi-
mentation. Moreover, as Professor Tribe remarked, “no one expects Congress
to obliterate the states at least in one fell swoop. If there is any danger,
it has in the tyranny of small decisions.”222
However, decisions protecting state sovereignty also seem unrelated
to the underlying values of federalism. For example, earlier in this
century, when the Supreme Court invalidated federal laws such as those
limiting child labor and requiring a minimum wage, there was little
express attention to the benefits of protecting state sovereignty.223 The
Court appeared to draw bright lines, reserving particular activities such
as production for exclusive state regulation without justifying the
choices in terms of the values of federalism to be attained. In Hammer
v. Dagenhart,224 the Supreme Court simply defended its decision in
apocalyptic terms:

The far reaching result of upholding the act cannot be more
 plainly indicated than by pointing out that if Congress can
thus regulate matters entrusted to local authority by prohibi-
tion of the movement of commodities in interstate com-

218. See supra text accompanying notes 39-70 (describing the two core aspects).
219. See supra text accompanying notes 39-43, 51-52 (describing the Court’s refusal).
220. See, e.g., Garcia, 469 U.S. at 538-57 (finding congressional provision for minimum
wage did not usurp state’s role in the federal system).
221. Id. at 554.
222. Tribe, supra note 57, at 302.
223. See supra text accompanying notes 44-50 (describing this era of the Court’s federalism
decisions).
224. 247 U.S. 251 (1918).
merce, all freedom of commerce will be at an end, and the power of the states over local matters may be eliminated, and thus our system of government be practically destroyed.\textsuperscript{225}

On reflection, it is quite unclear why allowing the federal government to regulate child labor is to be feared as paving the way to tyranny or the destruction of American constitutional government. Moreover, it is possible that the federal legislation regulating child labor was closer to the views of the people. Perhaps state governments were limited in their ability to regulate child labor unilaterally for fear that they would place their businesses at a competitive disadvantage compared to businesses in states that allow child labor.\textsuperscript{226} Responsive government at the state level might well have been a victim to the realities of an interstate market economy. Finally, it is highly doubtful that state experimentation with child labor was to be preserved or encouraged.

Similarly, in one of the most recent Supreme Court decisions invalidating a federal law on federalism grounds, \textit{New York v. United States}, the relationship between the holding and the values of federalism is very questionable.\textsuperscript{227} It seems far-fetched to see federal requirements for safe state disposal of nuclear wastes as putting the country more at risk to federal tyranny. It is a fair to assume that New York citizens want safe disposal of low level nuclear wastes. If the State of New York is responsive to its citizens' wishes and assured safe disposal, a federal law would be redundant and thus minimally intrusive upon state autonomy. But if New York is unresponsive to its citizens—perhaps because of a desire to avoid clean-up costs or because of pressure from particular industries—federal regulation increases responsiveness.

Finally, little seems to be gained from experimenting with not cleaning up the wastes. Under the federal law, states had the ability to experiment with techniques and mechanisms for the clean-up.\textsuperscript{228} The one thing that states could not do is experiment by providing inadequate clean-ups.\textsuperscript{229} The federal law at issue hardly seems an intrusion upon desirable and reasonable state experimentation.

Cases such as \textit{Hammer} and \textit{New York v. United States} are indicative of federalism decisions. The Court's holdings appear completely removed from the underlying values of federalism. The Court appears

\textsuperscript{225} \textit{Id.} at 276.
\textsuperscript{226} \textit{See id.} at 273.
\textsuperscript{227} \textit{See New York v. United States}, 505 U.S. at 187-88 (holding that federalism prohibits Congress from compelling states to enact or administer federal regulations).
\textsuperscript{228} \textit{See id.} at 152-53 (describing the federal law requirements).
\textsuperscript{229} \textit{Id.}
to be enforcing mechanical limits on congressional powers, entirely apart from the policy benefits or costs the limits will create.

Nor have the judicial decisions using federalism as a limit on federal judicial power reflected these underlying values. For example, limiting federal habeas corpus review of state court convictions has nothing to do with avoiding tyranny by the federal government. If the goal is decreasing abusive government, expanding habeas corpus would seem a better solution.

State responsiveness to the people does not justify restrictions on federal judicial review. The ability of the federal courts to uphold constitutional rights, such as on the writ of habeas corpus, should not be compromised because of the unpopularity of protecting criminal defendants. Likewise, though states can experiment in some realms, they cannot lessen federal constitutional rights. The desire for experimentation, therefore, does not justify restricting the scope of federal habeas corpus or enlarging instances where federal courts must abstain from review.

I recognize that the application of federalism as a limit on federal judicial power since 1937 can be defended on grounds other than these traditional values. For instance, the value of comity, discussed earlier, is a traditional justification for federalism. My point is simply that the values of federalism seem inconsistent with the Supreme Court’s federalism doctrines and decisions.

III. REORIENTING FEDERALISM

I believe that the central problem with the Supreme Court’s approach to federalism is that it has treated the concept as if it were a rule for deciding cases rather than an important value to be weighed and considered in decisionmaking. When the Court has relied upon federalism, it has reasoned in a quite mechanical, formalistic manner. The Court has defined rigid categories of activities left to the states—production in the earlier era, freedom from federal control of legislation or regulation in the modern one—and invalidated laws that intruded into these areas. By using this categorical approach, the Court has avoided careful consideration of the values of federalism.

230. See supra text accompanying notes 76-79.

231. See supra text accompanying notes 46-50 (describing Court decisions in the earlier era).

232. See supra text accompanying notes 118, 132 (summarizing the Court’s position today).

My goal here is not to describe in detail a theory of federalism. That, obviously, would be a task far exceeding the scope and length of this Article. I would, however, offer three thoughts for consideration of federalism issues.

First, federalism requires a functional analysis as to how power should be allocated between the federal and state governments. That is, the critical question is: When is it necessary or preferable to regulate at the national level rather than on a decentralized basis? Unfortunately, too often careful analysis has been absent and federalism has been used as a slogan or as a guise to hide the real issue in dispute. For example, during the debate over civil rights in the 1950s and 1960s, opponents talked about federalism and states' rights rather than the real issue: racial equality.

The proper content of federalism analysis cannot be found in the Constitution, Supreme Court cases, or even in the experiences of American history. The analysis can only be functional: what types of problems should be handled nationally and which at the state level?

The Constitution provides little guidance as to federalism. Several constitutional provisions concern federalism. Most importantly, Articles I, II, and III of the Constitution create a national government with broad powers. There is no dispute that the central difference between the Constitution and its predecessor, the Articles of Confederation, was in the establishment of the federal government. Article VI of the Constitution is crucial in understanding federalism because it provides that the Constitution, and laws and treaties made pursuant to it, are the supreme law of the land.

No provision of the Constitution speaks directly to the allocation of power between the national and state governments. Sometimes, both in


235. See supra text accompanying notes 5-6 (discussing role of federalism in civil rights debates).

236. BEER, supra note 1, at 250-51.

237. See U.S. CONST. art. VI, cl. 2.

This Constitution, and the Law of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.
political rhetoric and in court decisions, the Tenth Amendment is invoked as protecting state governments from federal encroachments. The text of the Tenth Amendment, however, simply does not say this. The Tenth Amendment says: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." In other words, the Tenth Amendment states that Congress may act only if power is granted to it by the Constitution. States, in contrast, may act unless the Constitution prohibits the conduct. Phrased slightly differently, the Tenth Amendment is an important reminder that the states possess the police power—not Congress. The text of the Tenth Amendment simply does not say that legislation within Congress' Article I authority is invalid if it interferes with state prerogatives. Nothing in the language of the Tenth Amendment provides a basis for declaring federal laws unconstitutional if they are adopted within the scope of powers given Congress by the Constitution.

Nor do the Supreme Court's decisions concerning the Tenth Amendment provide much guidance as to the appropriate content of federalism analysis. Over the course of American history, the Supreme Court has shifted back and forth between two different interpretations of the Tenth Amendment. One is that the Tenth Amendment is a reminder that Congress may act only if it has express or implied authority. By this view, no law within Congress' powers is to be invalidated for interfering with states' rights. The other view is that the Tenth Amendment reserves a zone of activities to the states, and that Congress may not intrude into this zone even when it is exercising power under Article I of the Constitution.

I argue that the analysis must be functional. What situations must be handled or are best dealt with by the federal government and which by the states? There is no substitute for facing these questions directly in Congress or in the courts. Appeals to the text, to the Framers' intent, or to prior Supreme Court decisions cannot avoid the need for a functional analysis.

238. See supra text accompanying notes 44-50 (discussing use of Tenth Amendment to protect state sovereignty).
239. U.S. CONST. amend. X.
240. Tribe, supra note 57, at 298.
241. Id.
242. See id.
244. Id.
245. Id.
246. Id.
Second, discussions about federalism, therefore, should be explicit with regard to the competing values. For example, in any case concerning federalism, the Court should explicitly identify the values of federalism to be served—or compromised—by a particular judicial ruling. The Court also should identify the competing concerns, and explicitly explain the basis for its ultimate balance.

Certainly, the values of federalism include limiting federal tyranny, encouraging responsive government, and protecting states as laboratories.\(^{247}\) I believe, however, that in very few cases will any of these values really be at stake when the Court considers the constitutionality of a federal statute or the appropriateness of a particular limit on federal court jurisdiction. It is very difficult to think of past Supreme Court cases where these values really were at stake.

Therefore, I suggest that courts identify and weigh additional values of federalism. In a new book, Professor Samuel Beer articulates three values served by federalism.\(^{248}\) One value he labels “community.”\(^{249}\) He writes: “The argument from community, which descended from the political philosophy of ancient Greece through medieval conceptions of the organic, corporate society, had been reformulated by continental thinkers such as Althusius and Bodin. This idealization of the small community had played no part in the thought of the American rebels. . . .”\(^{250}\)

There are many values of communities worth protecting. Safeguarding community decisionmaking enhances diversity, as groups are allowed to decide their own nature and composition. Communities can define themselves to best serve the needs of their members. Thus, the Court can ask in a particular case whether a specific federal law will intrude upon the ability of a community to define itself and, if so, whether the federal action is justified by another important interest.

The attention to community as a federalism concern need not be limited to just cases about the Tenth Amendment and federal jurisdiction. For example, in Village of Belle Terre v. Boraas,\(^{251}\) the Court upheld a zoning ordinance that limited the number of unrelated individuals who could live together in the same household.\(^{252}\) The Court emphasized community self-determination.\(^{253}\) But in Moore v.

\(^{247}\) See supra text accompanying notes 190-94, 196-97, 206-10 (discussing these three traditional values of federalism).
\(^{248}\) BEER, supra note 1, at 386.
\(^{249}\) Id.
\(^{250}\) Id.
\(^{251}\) 416 U.S. 1 (1974).
\(^{252}\) Id. at 7-10.
\(^{253}\) See id. at 9.
City of East Cleveland, the Court declared unconstitutional a similar restriction when it was applied to keep a grandmother from living with her two grandsons who were first cousins. The community's interest was the same, but the Court explained that the constitutional right to keep the family together was violated by the application of the East Cleveland zoning ordinance.

The value of community will need elaboration and judicial development. It is not a value that will lead to predictable decisions. Instead, it is an additional value of federalism to be considered.

The second value identified by Professor Beer is "utility." He writes:

The argument from utility had provided a rationale for the division of authority between the colonies and Westminster when the prerevolutionary debate turned to the federal option. Reflecting the way economists think . . . it was and has continued to be a sensible and practical premise for deciding what functions should be assigned respectively to central and to local governments.

Some tasks are better accomplished on a national scale while others are better handled at the state or local level. Undoubtedly, this should be a relevant consideration in congressional decisionmaking about what federal laws to enact. However, it is unclear how much weight the judiciary should give to utility when it evaluates the constitutionality of federal laws on federalism grounds. Absent a reason to distrust congressional determinations, there is no reason why Congress cannot consider utility arguments and give efficiency concerns their appropriate weight. Professors Rubin and Feeley powerfully argue that this should be treated as a value of decentralization and distinguished from a constitutional argument about federalism.

Also, efficiency is a value to be considered as the Supreme Court defines the jurisdiction of the lower federal courts. Efficiency and utility, though, must be treated as among the values to be attained and not the ultimate goals of the system. Any restriction of federal court jurisdiction arguably enhances efficiency by decreasing federal court

255. Id. at 496-97, 506.
256. Id. at 504-05.
257. BEER, supra note 1, at 386.
258. Id. at 386-87.
259. Rubin & Feeley, supra note 32, at 911.
260. See BEER, supra note 1, at 387.
caseloads. The focus must be on the detriment jurisdictional restrictions cause as compared with the benefits in efficiency gained.

Third, Professor Beer suggests that "liberty" is a value to be gained by federalism. He writes: "The argument which was foremost in the minds of the framers and which still holds greatest promise as a rationale for states is the argument from liberty." Federalism is most likely to enhance liberty when state governments are expanding the scope of individual rights beyond those protected by the federal government. For example, courts in many states have found a state constitutional right to equality in educational funding. Likewise, states have used their constitutions to provide more protection for speech and additional safeguards for privacy.

I believe that the additional values of federalism — community, utility, and liberty—need to be much more fully developed to be considered in discussions about federalism. I do not contend that these values, when added to the traditional values discussed earlier, are exhaustive of all the values of federalism. Rather, the point is that in a functional analysis, many values must be considered and Professor Beer offers an excellent description of three additional values to be weighed.

Finally, federalism needs to be reconceptualized as being primarily about empowering varying levels of government and much less about limiting government. A key advantage of having multiple levels of government is the availability of alternative actors to solve important problems. If the federal government fails to act, state and local government action is still possible. If states fail to deal with an issue, federal or local action is possible. In other words, the greatest beauty of federalism is its redundancy: multiple levels of government over the same territory and population, each with the ability to act.

Certainly, each will recognize that in particular instances the other levels of government are better suited to deal with a problem. But there

261. Id.
262. Id.
264. See, e.g., Edgewood Indep. Sch. Dist. v. Kirby, 804 S.W.2d 491, 496 (Tex. 1991) (finding state’s inequitable tax funding structure for public school system was unconstitutional); Serrano v. Priest, 537 P.2d 929, 951 (1976) (applying strict scrutiny to state public school financing system because of state’s “fundamental interest” in education).
is a great benefit in preserving the ability of each to act when it is necessary or desirable.

For example, for obvious political reasons, it was very unlikely that state courts in Southern states would have declared unconstitutional laws imposing segregation, or state legislatures in those states would have adopted laws prohibiting racial discrimination. Therefore, the availability of federal courts and a federal legislature were crucial in advancing racial equality.

Correspondingly, there are instances when Congress and federal courts fail to act and the availability of states to act is very beneficial. For example, the failure of the National Labor Relations Act to guarantee fair working conditions for all employees has led to the development of state common law restrictions on at will employees.²⁶⁷

In other words, federalism can be reconceived not as about limiting federal power or even as about limiting state or local power. Rather, it should be seen as based on the desirability of empowering multiple levels of government to deal with social problems.

Many implications might flow from reconceptualizing federalism. For example, preemption doctrines—a key but often overlooked aspect of federalism—might be narrowed so as to maximize the ability of state and local governments to act.²⁶⁸ Doctrines of federal court jurisdiction might be redefined so as to maximize the availability of both federal and state courts, at least in constitutional cases, to allow litigants a choice of forum.²⁶⁹

Most importantly, of course, from this perspective, federalism generally should not be the basis for invalidating federal laws or restricting federal court jurisdiction. All levels of government should be available to deal with the complex and difficult social problems facing the United States as it enters the next millennia.

IV. CONCLUSION

Professors Rubin and Feeley have described federalism as a national “neurosis.”²⁷⁰ It is that and much more. It is a constitutional principle


²⁶⁹. I have argued for this at greater length in Chemerinsky, supra note 93, at 233, 236-37, 300-27.

²⁷⁰. Rubin & Feeley, supra note 32, at 908.
that finds little expression in the text of the Constitution, but often is
given more weight than clear textual provisions. For instance, a person
may not sue his or her state in federal court for violating freedom of
speech even though the text offers states no immunity to suits, but the
First Amendment protects speech.

Federalism also is a political concept. Federalism is a powerful
argument that can be used to oppose federal efforts and to hide the real
substantive issues. During the 1950s and 1960s, objections to federal
civil rights efforts were phrased primarily in terms of federalism. 271
Rather than defend discrimination and government-mandated segrega-
tion, opponents of civil rights reforms cloaked their arguments in the
rhetoric of states rights. 272 Efforts to use federalism to mask the real
issue are not a thing of the past. Isn’t it terribly ironic that many of the
same leaders in the House of Representatives who are proclaiming a
renewed commitment to federalism also are proposing national
legislation over products liability and tort law that would federalize an
area that has been left entirely to state law since the earliest days of the
country?

Especially now, when federalism seems to be given so much weight
in the Supreme Court and Congress, it is essential to advance the
discussion of federalism beyond slogans. Simplistic slogans about
avoiding tyranny, and states being closer to the people, and states being
laboratories, are of little use in deciding particular issues in the courts
or legislatures. Likewise, lofty rhetoric about restoring the proper
balance of power between the federal and state governments is
misleading and useless because the proper balance is not clearly
prescribed in the Constitution, the cases, or the concept of federalism.

Discussions about federalism therefore must openly focus on the
underlying values to be achieved and must be explicitly functional.
What situations must be handled or are best dealt with by the federal
government and which by the states? How can all levels of government
best be empowered to deal with the problems facing American society?
There is no substitute for facing these questions directly in Congress, or
in the courts, or even in the academic literature about federalism.

271. See supra text accompanying notes 5-6 (discussing use of federalism arguments to
resist civil rights legislation).

272. See id. (discussing use of state’s rights arguments to resist civil rights legislation).