Valuing Federalism

Barry Friedman

Follow this and additional works at: https://scholarship.law.umn.edu/mlr

Part of the Law Commons

Recommended Citation
https://scholarship.law.umn.edu/mlr/883

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.
Valuing Federalism

Barry Friedman*

INTRODUCTION

"Value" is a word of many meanings. It can be used to refer to something believed to have worth, as in "I value your friendship." In a different sense, "values" are a set of ideals or beliefs, as in "family values." In yet a third sense, "value" or "values" implies a metric, as in "what is the value of X" or "how much value should I attach to that?"

In speaking of "valuing federalism," this Article relies upon all three of these senses of the word. The central point is that we do not value (care about) federalism as much as we might because we have made too little effort to value (weigh or measure) the worth of the values (ideals) federalism is said to serve. Initially, one might question this assertion. After all, politicians talk at length of the importance of federalism, especially today when the awkward term "devolution" is very much on the lips and minds of those who govern.1 Constitutional decisions of the nation's highest court contain paeans to

---

* I would like to thank Erwin Chemerinsky, Elizabeth Garrett, Vicki Jackson, Ed Rubin, and David Shapiro for their generous assistance with this project. I also want to thank the organizers of the conference for which this paper was prepared, both at the University of Minnesota Law School, and at the Minneapolis Federal Reserve Bank. The conference prompted an extremely fruitful exchange among lawyers and economists about issues of federalism. Jim Gaylord provided extremely valuable research assistance, for which I am grateful.

the federal system.\textsuperscript{2} And academic literature richly extols the oft-expressed reasons underlying the American invention of divided government.\textsuperscript{3} Much of this is just talk, however, evidencing little real effort to understand the tangible benefits of a federal system, or to take account of when governmental power sensibly is exercised at one level or another.

Here are two specific examples, developed at length below to prove the point, but also in the hope of correcting it. First, the literature of political economics reveals a fertile understanding of the justifications for regulating at the central or national level, rather than retaining regulatory authority in the states.\textsuperscript{4} Despite this, the judicial doctrine of federalism is virtually bereft of any mention or understanding of the principles spelled out in that literature. These principles are not discarded as controversial; they simply are ignored. Second, the Supreme

\begin{footnotesize}
\begin{enumerate}
\item See, e.g., Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (“This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous 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.”); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) (“[T]he States occupy a special and specific position in our constitutional system…. The ‘constitutionally mandated balance of power’ between the States and the Federal Government was adopted by the Framers to ensure the protection of our fundamental liberties.”) (citations omitted).
\end{enumerate}
\end{footnotesize}
Court, commentators and politicians frequently reel off the supposed values of federalism, i.e., the reasons for retaining regulatory power at a level lower than that of the national or central government. Despite this, the academic literature is surprisingly devoid of any serious study of these supposed values, or any sustained attempt to measure their true worth.\textsuperscript{5} The values of federalism are invoked regularly in much the same way as "Mom" and "apple pie": warm images with little content.

In short, we do not value federalism, because we have no idea what really is at stake.\textsuperscript{6} On the state side of the balance, we do not know whether retaining governmental authority at the subnational level fosters democracy, or even what we necessarily mean by this. We have not determined whether states really are laboratories for experimentation, and under what circumstances experimentation will flourish. We do not know if state governance enhances accountability. And so on. On the national side of the balance, there has been careful study of the reasons for exercising national or central control, such as the need to provide public goods, eliminate negative externalities from state regulation, avoid races to the bottom, or provide a national floor on fundamental rights.\textsuperscript{7} But, except for perhaps the latter, the law of federalism pays basically no attention to any of this.\textsuperscript{8}

\textsuperscript{5} Larry Kramer makes this point, observing that there is a good deal of work on the theoretical notions of the values of federalism, but "very little on how to get from Point A to Point B—little, that is, on the conditions needed for this competition to flourish and so to achieve the ends sought. Little on how federalism really works." Larry Kramer, \textit{Understanding Federalism}, 47 VAND. L. REV. 1485, 1490 (1994). Kramer's project is an effort to understand how federalism "really" operates, addressing the relationship of party politics and governmental administration to the federal system, which does much, in Kramer's word, to "broker" the relationships between state and federal governments. See id. at 1523.

\textsuperscript{6} Of course, there is the chance that if the values of federalism were examined carefully, we might value state and local governance less than we now do. The intuition motivating this Article, however, is just the opposite. One very real possibility is that careful scrutiny of the values of federalism simply will improve our ability to discern when matters of governance should be entrusted to one governmental unit or another.

\textsuperscript{7} See \textit{infra} text accompanying notes 368-386 (detailing the benefits derived from national control).

\textsuperscript{8} See Daniel B. Rodriguez, \textit{Turning Federalism Inside Out: Intrastate Aspects of Interstate Regulatory Competition}, 14 YALE J. ON REG., 149, 150 (1996) (discussing how the policy and constitutional talk of federalism fail to overlap). Rodriguez studies how the differing \textit{internal} architectures of the
In the face of both these failures, the trend over the long term is toward centralization. Indeed, there are centripetal forces, such as technological development and a strong emphasis on free trade, that ensure that this trend toward centralization will continue. In the face of such pressures, federalism will not be valued absent serious study of the true worth of the values it is said to foster.

This Article suggests that a federal system is something we should value, but that in order to do so we need to devote serious study to the problem of valuation. 9 The Article is not a

9. In a recent article, Steven Calabresi addresses the problem of the valuation that is the subject of this Article, but argues "probably counterintuitively" that "the historical case for American federalism is stronger than the economic case." Steven G. Calabresi, "A Government of Limited and Enumerated Powers": In Defense of United States v. Lopez, 94 MICH. L. REV. 752, 788 (1995). Although Calabresi surely is correct that American federalism is historically embedded in our culture, see infra notes 288-289 and accompanying text, the fact is that federalism's history has not always been a noble one, see infra notes 215-216 and accompanying text. For that reason, among many others, the concern here is on valuing the very real benefits of federalism in today's world, rather than offering historical support for federalism. Obviously there has been a recent movement, in the national legislature and in the Supreme Court, favoring a shift of power to the states. As has been frequently observed, however, the Supreme Court's shift is unlikely to be enduring absent some set of standards more determinate than what the Court has offered of late. See Barry Friedman, Legislative Findings and Judicial Signals: A Positive Political Reading of United States v. Lopez, 46 CASE W. RES. L. REV. 757, 759-60 (1996) [hereinafter Friedman, Signals] (discussing the analytical ambiguity of the Lopez decision); Lawrence Lessig, Translating Federalism: United States v. Lopez, 1995 SUP. CT. REV. 125, 206. As for Congress, it is possible to point to substantive legislation transferring power to the states, and to procedural safeguards such as the recent Unfunded Mandates Reform Act of 1995 (UMRA), Pub. L. No. 104-4, 109 Stat. 48 (to be codified in scattered sections of 2 U.S.C.), which purports to focus congressional attention on the problem of imposing mandates on state and local government without adequate funding for those mandates. There is reason to be skeptical on both counts. For a critical analysis of UMRA, see Elizabeth Garrett, Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995, 45 U. KAN. L. REV. 1113 (1997), discussing at length the loopholes in UMRA and questioning the extent to which its procedural safeguards will make a difference. One might similarly be skeptical of a devolutionary movement that shifts responsibility to the states while essentially retaining ultimate decisional authority in the national government. See Aid to Families with Dependent Children Act, 42 U.S.C. § 603(h) (1994) (providing for reduction in funding if state program deviates from federal requirements); Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 671(a) (1994) (setting forth elaborate requirements for state plans). There is an evolving literature which questions the extent to which Congress should be permitted to attach conditions to spending grants. See generally Lynn A. Baker, Conditional Federal Spending after Lopez, 95 COLUM. L. REV. 1911 (1995) (addressing the
reactionary call for returning authority to the states. As the
two final sections make clear, there are numerous real benefits
to centralized authority, and those benefits should not be denied
on the basis of glowing but essentially empty rhetoric about
federalism. At the same time, however, intuition suggests
that there are very real and tangible benefits to diffusing
power under some circumstances. These benefits also should
not be lost, either because of a failure to study and understand
them, or, worse yet, because of an unthinking drive to centralize.
It seems uncontroversial to suggest that our goal should be to
maximize the benefits of regulation at many levels of govern-
ment, yet the law of federalism makes little attempt to do so.

Part I provides an overview of the doctrine of federalism,
the point of which is that constitutional law values federalism
almost not at all. Despite often glowing political and legal
rhetoric regarding "Our Federalism," the doctrine speaks vol-
umes about how we really regard our federal system. Until re-
cently that doctrine has accorded barely any weight to the

conflict between Spending Clause doctrine and Commerce Clause doctrine);
Thomas R. McCoy & Barry Friedman, Conditional Spending: Federalism's
Trojan Horse, 1988 Sup. Ct. Rev. 85 (arguing that Dole's conditional spending
scheme violates the notion of delegated powers); Albert J. Rosenthal, Condi-
(concluding that the constitutionality of conditional spending schemes is de-
pendent on the area Congress is addressing); George Brown, Stealth Stat-
(1997) (unpublished manuscript, on file with author) ("The federal govern-
ment seems to be in the process of using a statute based on the spending
power as a general anti-corruption statute aimed at officials of subnational
entities, primarily state and local governments."). Nonetheless, Professors
Inman and Rubinfeld argue in a recent piece that welfare reform was very
much about federalism. See Robert P. Inman & Daniel L. Rubinfeld, Rethinking
Federalism, 11 J. Econ. Perspective (forthcoming 1997) (manuscript at 13-
18, on file with author).

10. See infra Parts II & III. See also Kramer, supra note 5, at 1502
("There are, after all, two sides to federalism: not just preserving state
authority where appropriate, but also enabling the federal government to act
where national action is desirable."); Lessig, supra note 9, at 135-36
(discussing the balance envisioned by federalism).

11. See, e.g., Kramer, supra note 5, at 1503, 1513-14 ("Put another way,
the test for federalism today can't turn on which approach looks more like the
original scheme in some crude, surface-like manner. It must be: Which ap-
proach does a better job of finding the appropriate balance between state and
federal authority in today's world?").


13. This Article focuses much attention on the impact that consideration
of the values of federalism might have on the doctrine of federalism. Such
impact is not limited to the courts, however. In adopting UMRA, Congress
had to determine which bills would be affected by its provisions and which
state side of the federalism balance, and even now lacks any clear understanding of why national authority should be exercised at some times rather than at others. For the most part, the doctrine of federalism is a doctrine of blind and uncomprehending deference to national authority. We are all aware of this in a vague sense, but when the broad doctrinal story is pieced together, the lack of any applied understanding about how a federal system should operate is really quite stunning. To the extent recent doctrine is shifting—and there are signs of such a shift—that shift is insufficiently rooted in a clear understanding of federalism to assure much generative or staying power.

Part II addresses the question of why it might be that the law of federalism fails to account accurately for the values of our federal system. This Part argues that certain centripetal forces operate to push much of the work of governing to the center. Although this Part assesses what is assuredly a global trend, special attention is devoted to the forces at work in the United States, in order to explain both the genesis of this centripetal movement and why it is likely to continue.

Part III addresses the calculus of federalism, arguing that there are benefits both to centralizing under certain circumstances and to dispersing power under others. Attention is devoted first to identifying the reasons why we might prefer to retain authority in the states. Despite frequent invocation, those reasons are not well developed in the literature, and woefully little attempt has been made to measure their actual worth. Next, attention is given to the arguments as to when national authority should be exercised, arguments drawn in part from a vast literature on the political economy of regulation. Political economists have developed these arguments at length, but constitutional law largely ignores them. Part III urges that legal scholars of federalism join together with those in other disciplines to enhance our knowledge of the values of federalism. Appropriate balance cannot be maintained in a federal system without some willingness to confront and understand the question of when national or local power properly is exercised.

Perhaps there is little point in trying to reassert federal values that the world seems eager to abandon. Yet, it is

would not, itself a judgment resting on a careful understanding of the values of federalism. See Garrett, supra note 9, at 1138-45 (arguing that definitions in the bill do not necessarily track the principles of federalism).
equally possible that in the face of strong centralizing tendencies, paying attention to those values neglected at the center becomes all the more important. As Benjamin Barber has pointed out, the result of unrelenting centralization often is a sort of "Big Bang," shattering an unthinkingly enforced unity. Federalism can serve as a stabilizing force in large democratic unions. As events in the European Union and the Balkan States have revealed, failure to protect local sovereignty threatens broader unions. Yet localism will not find adequate respect unless and until we understand its value and develop a means of weighing the benefits of centralization against those of decentralization.

I. FEDERALISM UNVALUED

To all appearances, the United States has a federal system. This generally means that regulatory authority is divided between a national government and many state governments. Those governments are free, within constitutional bounds, to develop and pursue their own regulatory agendas, supported by the power to tax and spend. State power is divided even further among countless substate governments, be they counties, cities, towns, municipal authorities, school boards, or any other place that democratic government operates. This further subdivision may be critically important for the values that federalism is said to represent, but for present purposes what is important is that in a formal legal sense shared regulatory responsibility derives from the relationship between nation and state. It is to the law regarding this relationship that we might look to see


15. Jenna Bednar argues, seemingly to the contrary, that federal systems are inherently unstable. See Jenna Bednar, Federalisms: Unstable by Design 2 (Apr. 15, 1997) (unpublished manuscript, on file with author). While her work is illuminating, it does not necessarily undermine the point made above. First, her study suggests that federalism can undergo significant tension and survive. See id. at 20. Second, a federal structure may be the only way to bring together certain peoples under one government. See Jenna Bednar & William N. Eskridge, Jr., Steady the Court’s "Unsteady Path": A Theory of the Judicial Enforcement of Federalism, 68 S. Calif. L. Rev. 1447, 1470-75 (1995) (describing incentives of national and state actors to cheat on the federalism deal).

16. The relationship between state and national authority is discussed infra text accompanying notes 112-116.
whether, and to what extent, federalism has any special value in the United States.\textsuperscript{17}

When we turn to the doctrine—the constitutional law of federalism—what we learn is that in the United States the federal system is valued very little.\textsuperscript{18} The rules that apply to exercises of authority by the national and state governments focus almost single-mindedly on nationalization, looking barely at all to the benefits of decentralization.\textsuperscript{19} The doctrine lacks a coherent vision of when national authority or state authority should be exercised, as well as a clear understanding of the true worth of federalism. Instead, the doctrine is a set of indeterminate, largely incoherent rules that by and large permit ad hoc decisions by judges. Given the centripetal forces outlined in Part II, it is little surprise that in applying these rules, judges usually find in favor of national authority. It is a tacit premise underlying this section that the doctrine of federalism ought properly to attempt to take serious account of the benefits and disadvantages of allocating responsibility to one government unit or another. The argument here is for a more analytical federalism. Some Justices have favored greater deference to state autonomy, relying primarily on originalist understandings.\textsuperscript{20} Others have favored tremendous deference to

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{17} This Article deals with the distribution of legislative or regulatory authority between national and subnational governments, not with the division of judicial power between those governments. Erwin Chemerinsky has pointed out the paradox that Supreme Court doctrine does little to address the distribution of legislative authority, even as it requires the federal courts often to defer to state judicial process. See Erwin Chemerinsky, \textit{The Values of Federalism}, 47 FIA L. REV. 499, 504-08 (1995).
\item \textsuperscript{18} Of course, law is not the only force that shapes society. See, e.g., Cass R. Sunstein, \textit{Social Norms and Social Roles}, 96 COLUM. L. REV. 903, 915 (1996) (identifying social norms, social roles, and social meaning as society-shaping factors). Judith Resnik makes the important point that in the face of the ongoing tug-of-war between national and state authority, many new forms of cooperation have sprung up that defy traditional categorization. See Judith Resnik, \textit{Afterword: Federalism's Options}, 14 YALE J. ON REG. 465 (1996).
\item \textsuperscript{19} See Chemerinsky, supra note 17, at 501 ("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. But the Court never elaborates on the values of federalism and rarely explains how the values of federalism relate to the Court's holdings.").
\item \textsuperscript{20} See, e.g., Printz v. United States, 117 S. Ct. 2365, at 2370-75 (1997) (evaluating the Brady Act against statutes enacted by the first Congresses and against \textit{The Federalist}); \textit{id.} at 2385 (Thomas, J., concurring) ("Although this Court has long interpreted the Constitution as ceding Congress extensive
\end{itemize}
\end{footnotesize}
the national Congress, favoring the post-New Deal collapse of judicial authority. Rather than privilege either of these methodologies and the extreme results that sometimes accompany them, the doctrine of federalism—properly enforced by the judiciary—ought to work in a way that maximizes the benefits of shared governmental regulation.

authority to regulate commerce (interstate or otherwise), I continue to believe that we must 'temper our Commerce Clause jurisprudence' and return to an interpretation better rooted in the Clause's original understanding.\(^\text{21}\) (citations omitted).

21. See, e.g., United States v. Lopez, 514 U.S. 549, 604 (Souter, J., dissenting) (1995) ("The modern respect for the competence and primacy of Congress in matters affecting commerce developed only after one of this Court's most chastening experiences, when it perforce repudiated an earlier and untenably expansive conception of judicial review in derogation of congressional commerce power.").

22. Although beyond the focus of this Article, there are sound reasons for judicial enforcement of the federalism doctrine. Given the incentives identified in Part II, infra, there is little reason to believe that members of Congress will represent state interests in making regulatory decisions. See Calabresi, supra note 9, at 796. There are those who have taken a different view. See, e.g., Jesse H. Choper, Judicial Review and the National Political Process (1980) (discussing the proper role of the Supreme Court and concluding that the Court should not decide constitutional questions regarding the doctrine of federalism); Herbert Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543 (1954) (values of federalism protected adequately in national Congress). The Supreme Court seems to have flirted with the abstentionist position. See infra notes 193-200 and accompanying text. The Court's reliance on Choper, and particularly Wechsler, is somewhat stunning given the many persuasive critiques of their position. See John C. Pittenger, Garcia and the Political Safeguards of Federalism: Is there a Better Solution to the Conundrum of the Tenth Amendment?, PUBLIUS, Winter 1992, at 1, 2-10 (questioning the soundness of Wechsler's position); Martin H. Redish & Karen L. Drizin, Constitutional Federalism and Judicial Review: The Role of Textual Analysis, 62 N.Y.U. L. Rev. 1, 15-23 (1987) (stating textual and historical grounds for judicial review of federalism questions). Of particular note is Lewis B. Kaden, Politics, Money and State Sovereignty: The Judicial Role, 79 Colum. L. Rev. 847 (1979). Kaden's devastating critique of Wechsler's and Choper's positions in light of the actual practice of American politics is oft-cited, but then equally often ignored.

The theme of this Article is that the judiciary ought to enforce limitations on national authority, at least in some instances. A provocative recent article by Jack Rakove argues that the very origins of judicial review were somewhat to the opposite conclusion: The judiciary would be necessary to enforce limitations on state authority explicit in the constitutional plan. See Jack N. Rakove, The Origins of Judicial Review: A Plea for New Contexts, 49 Stan. L. Rev. 1031, 1041-50 (1997).
A. THE CONSTITUTIONAL PLAN

The Framers of the Constitution divided power among the national government and the states. Framers of other federations have used different strategies for this division of power.23 The American constitutional plan is a familiar one. The American solution was to specify, or “enumerate” the powers of the national government, leaving the residue to the states.24 The Framers anticipated that the national powers would be few and limited, and expected that the vast bulk of authority would remain in the states.25 Of course, as the country grew and times changed, the impetus for the exercise of national authority increased. Part II explains that such growth was at times both inevitable and legitimate. But the point of this Part is that the doctrine of federalism contains little or no theory of when national authority should be found to exist under a spe-

23. Australia followed the United States’ lead in limiting its government to specific powers by express grant. See AUSTL. CONST. ch. I, pt. V, §§51-52; LESLIE ZINES, CONSTITUTIONAL CHANGE IN THE COMMONWEALTH 78, 87 (1991). The Canadian Constitution also contains an enumeration of powers, but this was “for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section.” CAN. CONST. (Constitution Act, 1867) pt. VI, §91; see also ZINES, supra, at 77. The Canadian plan in fact gives the provinces limited powers, leaving to the national government the large residue. See ZINES, supra, at 77; see also Neil Finkelstein & Russell Cohen, Suggestions for the Decentralization of Canada, 75 CANADIAN B. REV. 251, 254-55 (1996) (discussing the strong centralist orientation of the Canadian Constitution); Catherine Valcke, Quebec Civil Law and Canadian Federalism, 21 YALE J. INT’L L. 67, 89-101 (1996) (discussing the small sphere of provincial legislative competence). By contrast, the German Basic Law sets forth one of the most elaborate enumerations, comprising exclusive powers, concurrent powers (found only implicitly in the U.S. Constitution), and framework powers (which allow the federal government to lay down basic principles to be fleshed out by the states). See GRUNDEGESETZ [Constitution] [GG] arts. 71 & 73, 72, 74-74a, 75 (F.R.G.). See generally DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 35-52 (1994) (outlining exclusive federal authority, concurrent authority and framework authority); DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 75, 92 (2d ed. 1997).

24. See U.S. CONST. art. I, §8; id. amend. X (“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.”).

25. See Kramer, supra note 5, at 1495 & n.18 (arguing that there was consensus among the Framers that the powers of the national government would be limited).
specific enumerated power.\textsuperscript{26} Rather, national authority has just grown, like topsy.

The lack of a coherent theory explaining when national power should be exercised may in part be traced to the founding. The Framers present at the Constitutional Convention originally approved a resolution that Congress would exercise legislative power "in all cases . . . to which the states are separately incompetent[] or in which the harmony of the United States may be interrupted by the exercise of individual legislation."\textsuperscript{27} Fearing that this formulation would fail to constrain national authority, however, the Framers subsequently opted for what they believed was a better tactic to limit national authority—the enumeration of specific national powers.\textsuperscript{28} As it turned out, their specific division of power has done little to check the trend of centralization. Ultimately, the decision may not have mattered; the experience of many differently structured federations shows the same tendency to centralize authority.\textsuperscript{29} Nonetheless, as Part III explains, the Framers'

\textsuperscript{26} See Vicki C. Jackson, Seminole Tribe, The 11th Amendment and the Potential Evisceration of Ex Parte Young, 72 N.Y.U. L. Rev. 495, 499 (1997) ("[N]o coherent principle yet ties together the Court's emerging federalism jurisprudence . . . .").


\textsuperscript{28} See Carter v. Carter Coal Co., 298 U.S. 238, 292 (1936) ("The convention however, declined to confer upon Congress power in such general terms [as those given in the Virginia Plan]; instead of which it carefully limited the powers which it thought wise to entrust to Congress by specifying them, thereby denying all others not granted expressly or by necessary implication."); Douglas G. Smith, An Analysis of Two Federal Structures: The Articles of Confederation and the Constitution, 34 San Diego L. Rev. 249, 281 (1997) (discussing how delegates to the Constitutional Convention rejected the Virginia Plan's "functionalist" approach of defining federal powers in terms of the competence of the state governments).

\textsuperscript{29} "Common to federal systems, however, is a historical trend towards centralization where the federal government assumes more power and asserts the power to trump." Denis J. Edwards, Fearing Federalism's Failure: Subsidiarity in the European Union, 44 Am. J. Comp. L. 537, 541 (1996). On this trend in Australia, see Zines, supra note 23, at 79 ("[T]he power of Australian central government has grown and continues to grow, while that of the States has waned, to a degree that would have astonished the framers.") and Harry Gibbs, The Decline of Federalism?, 18 Queensl. L.J. 1, 7 (1994) (discussing "the way the Constitution has step by step descended downwards from the original idea of federalism"). On this trend in Germany, see Currie, supra note 23, at 101 ("[T]here seems to have been a general tendency toward increasing central authority in Germany."). However, in Canada, the federation which began with the strongest central government, the trend has been toward greater provincial authority. See General Motors of Can. Ltd. v. City
original, rejected formulation at least contained the seeds of a coherent doctrine of federalism.

Taking the constitutional plan as a given, the question is how national power could be, and was, expanded. Engage in the following mental exercise: Imagine our constitutional structure—enumerated national powers and residual state authority—and consider the various ways that national authority could be expanded well beyond its original bounds. There seem to be obvious candidates. First, the enumerated powers could be interpreted quite broadly. Second, implied powers—also broadly construed—could be piled atop explicit ones. The first two options have an air of legitimacy, but there are other candidates. Third, the distinction between enumerated and unenumerated powers simply could be ignored. Fourth, the courts could step in to displace state authority, even when the national legislature has not done so. As will be evident, all of these have occurred, and all in a fashion that fails to take into account in any serious way the countervailing interests of decentralized authority.

B. THE EXPANSION OF THE ENUMERATED POWERS: THE COMMERCE POWER

Over time, the scope of the enumerated powers has grown enormously. Though the analysis presented here is limited to the commerce power, one should not lose sight of the fact that the national government possesses many other important powers. Among these national powers are the war power, the

---

Nat'l Leasing [1989] S.C.R. 641, 658 ("Yet, as the American courts broadened their commerce clause until it meant essentially what the Fathers of Confederation had sought for Canada, so have the Privy Council and the Canadian courts reacted against the hopes of the framers of their constitution and have decentralized commercial control."); Peter W. Hogg, Constitutional Law of Canada 110 (3d ed. 1992) (noting the steady growth in the power and importance of the provinces); Zines, supra note 23, at 79-86 (discussing how judicial decisions have rendered the central government weaker than in any other federation).

30. Concerns about commerce also were a primary motivation to replace the Articles of Confederation with the Constitution. See Jethro K. Lieberman, The Enduring Constitution 350 (1987) ("The issue that most aggravated [the Framers] prompting the Philadelphia Convention, was commerce."); see also John A. Kasson, The Evolution of the Constitution of the United States of America and the History of the Monroe Doctrine 141-45 (1985) (arguing that the necessity of a central authority with the power to regulate commerce was "strongly appreciated and universally understood" among the colonies).

31. See U.S. Const. art. I, § 8, cl. 11.
treaty power, and other less encompassing powers such as the power to prescribe a uniform rule of bankruptcy.

The commerce power was given broad definition from the outset. In *Gibbons v. Ogden* the Supreme Court was asked whether a steamboat monopoly awarded by New York was inconsistent with Congress's power to regulate commerce. Of course, central to *Gibbons* was the question of what constituted commerce. John Marshall's definition of commerce for the *Gibbons* Court was sweeping. In holding, unexceptionally, that commerce included navigation, Marshall further explained that commerce "comprehend[s] every species of commercial intercourse" both foreign, and interstate. The power to regulate commerce is the power "to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself; may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution." Not only was the definition in *Gibbons* sweeping, the Court's opinion also suggested that the power was bounded only by the extent to which Congress chose to limit itself in exercising the power.

One might naturally have assumed that the question of what constituted "commerce" was, like all constitutional questions, appropriate for judicial resolution. In this fashion the power of Congress might have been kept within bounds by a vigilant judiciary. In *Gibbons*, however, the Chief Justice suggested that the only recourse for overreaching by Congress was the ballot box: "The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections are, in this, as in many other instances, . . . the sole restraints on which they have relied, to secure them from abuse."

32. *See id.* art. II, § 2, cl. 2.
33. *See id.* art. I, § 8, cl. 4.
34. 22 U.S. (9 Wheat.) 1 (1824).
35. *Id.* at 193, 194.
36. *Id.* at 196.
37. *See Kramer,* supra note 5, at 1495 & n.18 (arguing that the Framers intended that the courts would play a role in policing the limits imposed on the powers of the national government); *see also* Gary Lawson & Patricia B. Granger, The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, 43 DUKE L.J. 267, 281 (1993) (arguing that the judiciary should have the power to review the necessity and propriety of executory laws).
Though sweeping in tone, the breadth of the Gibbons decision was limited by the then-prevailing notions of "dual sovereignty," the notion that constitutional power was held in watertight compartments, each government supreme within its sphere.39 States could not regulate within the realm of the national government's enumerated powers, and neither could the national government exercise the states' police powers.40 The national government's authority within its sphere could be quite broad without trampling on state authority, thereby preserving a large residuum of power in the states.

Both the operation of this theory as well as the weak logic that held it together were apparent in the Court's decision in Willson v. Black Bird Creek Marsh Co.41 In Willson the issue was whether the state could charter a company to build a dam on a navigable body of water.42 An easy answer might have been "no," the Supreme Court having held in Gibbons that navigation was commerce.43 The Court nonetheless found the charter to be within the police power of the state:

39. Thomas Dye argues that the idea of dual sovereignty was in conflict with the Framers' ideas of intergovernmental competition. If the powers of the national and state governments were cabined, they could not compete with one another for the affection of the citizens. See THOMAS R. DYE, AMERICAN FEDERALISM 7 (1990).

40. The concept of dual sovereignty is evident in the language of Gibbons. Of the national government, the Court said, "the sovereignty of Congress, though limited to specified objects, is plenary as to those objects." Gibbons, 22 U.S. (9 Wheat.) at 197. So far as the states' police powers were concerned:

[id direct general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation. If the legislative power of the Union can reach them, it must be for national purposes; it must be where the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given.

Id. at 203-04.

In a recent case, Justice Scalia uses the term "dual sovereignty" in quite another fashion, remarking, "the Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the state and federal governments would exercise concurrent authority over the people." Printz v. United States, 117 S. Ct. 2365, 2367 (1997). Scalia's notion of dual sovereignty apparently addresses the means by which the respective governments may exercise their power, rather than the legitimate ends of that power.

41. 27 U.S. (2 Pet.) 245 (1829).

42. See id. at 250.

43. See also Lessig, supra note 9, at 156 ("If what determined constitutionality was the effect of a given law, Willson should have been no different from Gibbons."). In both Willson and Gibbons, the person challenging the regulation was licensed to ply the waterway in question. In Gibbons, the
The value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the States.\footnote{FELIX FRANKFURTER, THE COMMERCE CLAUSE 29 (1937) ("Marshall plainly implies that the Delaware statute falls outside the ban of the 'dormant' Commerce Clause, because it is not a regulation of commerce, but of 'police.'").}

By simply labeling the regulation at issue "police," the Supreme Court managed to avoid the appearance of any conflict between state power and that of the national government.\footnote{53 U.S. (12 How.) 299 (1851).}

The dam of dual sovereignty collapsed in the famous case of Cooley v. Board of Wardens,\footnote{See id. at 311-12.} and when it did the way was cleared for the waters of national authority to overwhelm the "reserved" powers of the states. Cooley addressed the question of whether the states could, consistent with allocation of the commerce power to the national government, require certain vessels to take on (and pay) a pilot when coming into or leaving port.\footnote{See id. at 316-17.} As in Willson, the Court could have resolved the problem simply by deeming the regulation an exercise of the police power. Instead, the Supreme Court conceded that this regulation was one of "commerce."\footnote{See id. at 320-21.} That being so, under the view expressed by Marshall in Gibbons, the states would lack authority whether or not Congress had acted. Although gladly acknowledging that the regulation of pilotage was a commercial regulation, the Cooley Court held nonetheless that states were not disabled from acting in the area, at least so long as Congress itself had not displaced state authority.\footnote{See id. at 320-21.} Thus, for

\footnote{Willson, 27 U.S. at 251. It was also true that in Gibbons Congress had acted, whereas with regard to the charter at issue in Willson, Congress had not. See id. at 252 ("We should not feel much difficulty in saying that a state law coming in conflict with [an act of Congress] would be void. But Congress passed no such act."). Thus, the difference in the cases might be explained by modern-day preemption doctrine. Marshall certainly relied on Congress's action or inaction, but as the quotation in the text illustrates, Willson still seems to place the decision squarely on the police power.}
the first time states could regulate even if what they were regulating was "commerce."

Of course, when barriers fall, they tend to allow movement in two directions. Ultimately the elimination of dual sovereignty would permit Congress to go tripping into areas that some might have once thought to be the exclusive province of states. Between the time of Cooley and the New Deal, however, the Supreme Court tried to hold back the expansion of congressional authority by drawing somewhat formal distinctions between what was "commerce" and what was a matter wholly internal to a state and properly left to the police powers of the state.50 Instructive is Patterson v. Kentucky,51 in which the Court decided, in an opinion by Justice Harlan, that a state inspector could condemn the use of a "burning oil," despite the fact that the oil's inventor had received a letter-patent from the United States. Even while assuring that the "court has never hesitated, by the most rigid rules of construction, to guard the commercial power of Congress against encroachment in the form or under the guise of State regulation,"52 the Supreme Court upheld the state law at issue as "in the best sense, a mere police regulation, deemed essential for the protection of the lives and property of citizens."53 Patterson recognized the difference between an exercise of state police power and the national commerce power, but did little to clarify how to tell one apart from the other. Instead, the Court merely stated that the "police power extends, at least, to the protection of the lives, the health, and the property of the community against the injurious exercise by any citizen of his own rights.54

50. See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 407 (2d ed. 1988) (describing the Court's national/local subject matter analysis during the decades following Cooley); Stephen Gardbaum, New Deal Constitutionalism and the Unshackling of the States, 64 U. CHI. L. REV. 483, 508 (1997) [hereinafter Gardbaum, New Deal] (discussing the Cooley Court's limited presumption of free movement of goods applicable to only some subjects of interstate commerce and subsequent shift to a more inclusive norm of free interstate commerce); Patrick C. McGinley, Trashing the Constitution: Judicial Activism, the Dormant Commerce Clause, and the Federalism Mantra, 71 OR. L. REV. 409, 414 (1992) ("For decades after Cooley, this 'national/local' interpretive approach was utilized by the Court.").

51. 97 U.S. 501, 505 (1879).
52. Id. at 506.
53. Id. at 504.
54. Id. The Court appeared to acknowledge that, despite its application of formal distinctions, consistent with the Cooley doctrine what was commerce could also be the subject of police regulation. For example, the Patterson
As is common knowledge, in the years between 1890 and 1937, the Supreme Court famously aroused the ire of the nation by relying upon formal distinctions as to what was commerce and what was not in order to tie Congress's hands in a number of areas in which national authority was seen as a necessity. In decisions like United States v. E.C. Knight Co., Hammer v. Dagenhart (The Child Labor Case), and A.L.A. Schechter Poultry Corp. v. United States, the Supreme Court struck down progressive legislation and New Deal measures that enjoyed wide support among the citizenry. The Court attempted to distinguish "commerce" from "police" power, "direct" effects on commerce from "indirect" ones, and what was in the "stream" of commerce from what was outside it. Typical of the Court's reasoning was its explanation for why the complete monopolization of sugar manufacturing was beyond Congress's commerce power: "Commerce succeeds to manufacture and is not a part of it." The Supreme Court's motivation for relying on formal categories was its oft-expressed concern that if Congress was permitted to regulate this or that under the commerce power, there would be nothing left to the realm of state police regulation.
In 1937, however, the Supreme Court did an about face, expanding Congress's power under the Commerce Clause in a series of decisions that showed greater practical appreciation for the workings of an integrated national market. Typical was the decision in *NLRB v. Jones & Laughlin Steel Corp.*,64 upholding Congress's power to regulate labor practices in the steel industry.65 Although giving lip service to the concept that "[t]he authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the Commerce Clause itself establishes, between commerce 'among the several States' and the internal concerns of a State,"66 the Court's attention was elsewhere. Rejecting the notion that it even must consider whether the regulated practice was in the "flow" or "stream" of commerce, the Court held that the question was whether the activities "have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions."67 The Court's opinion detailed at great length the interstate nature of respondent's business, concluding that "[i]n view of respondent's far-flung activities" the impact on interstate commerce of any work stoppage "would be immediate and might be catastrophic."68

The Court's shift in direction signaled the beginning of a tremendous expansion in Congress's commerce power, an expansion so great that many came to believe the power was without limit, or at least beyond judicially enforceable limits.69

---

64. *301 U.S. 1* (1937).

65. Of course, even before *Jones & Laughlin* there were decisions taking account of national integration and its effect on the commerce power. See Lessig, *supra* note 9, at 149-50 (arguing that the Court took an "organic" view of the economy in the early part of the Twentieth Century, thus expanding congressional power to regulate the national economy as a unified whole).


67. *Id.* at 36-37.

68. *Id.* at 41.

69. See Jonathan L. Entin, *Introduction* to Symposium, *The New Federal-
Generations of constitutional law students were taught to bootstrap argument upon argument to show how almost anything Congress might seek to regulate constituted interstate commerce. Relying on the "effects" test, the commerce power came to include the power to regulate intrastate crimes such as loan-sharking,\textsuperscript{70} a farmer's growing of wheat for individual use,\textsuperscript{71} and the practice of racial discrimination in an Alabama barbecue stand.\textsuperscript{72} In mood and result these decisions all stood in stark contrast to the pattern of the earlier part of the century. For example, in upholding the Civil Rights Act as an exercise of the commerce power, the Court said: "That Congress was legislating against moral wrongs in many of these areas rendered its enactments no less valid...[T]hat fact does not detract from the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse."\textsuperscript{73}

What is perhaps most important about these cases is not what they said, but what they did not say. Nowhere in any of the cases was there any theory as to why national regulation was either necessary or appropriate, although in many cases

\textit{ism After} United States v. Lopez, 46 CASE W. RES. L. REV. 635, 636 (1996) ("The Court struggled with the tensions implicit in Gibbons for more than a century before the New Deal transformation ushered in a doctrinal structure suggesting that there were no judicially enforceable limits on the commerce power."); see also Vincent A. Cirillo & Jay W. Eisenhofer, \textit{Reflections on the Congressional Commerce Power}, 60 TEMPLE L.Q. 901, 912 (1987) (stating that during the New Deal, "the congressional commerce power emerged as a virtually unlimited power and, in effect, became the national police power rejected by the Framers at the Constitutional Convention."); Richard A. Epstein, \textit{The Proper Scope of the Commerce Power}, 73 VA. L. REV. 1387, 1451 (1987) (arguing that the New Deal Supreme Court "rejected the idea of limited federal government and decentralized power" in favor of a centralized government acting for the public welfare); Laurence H. Tribe, \textit{Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation}, 108 HARV. L. REV. 1221, 1259 (1995) ("In addition, since the New Deal 'switch', the Commerce Clause power in particular has been understood to be remarkably inclusive. Consequently, the universe of legitimate ends has expanded to such a degree that it now seems almost brazen to suggest that there is anything Congress may not do.").

\textsuperscript{70} See Perez v. United States, 402 U.S. 146, 156 (1971) (stating that even wholly intrastate loan-sharking transactions directly affected interstate commerce).

\textsuperscript{71} See Wickard v. Filburn, 317 U.S. 111, 125 (1942) (holding that an activity may be regulated by Congress "if it exerts a substantial economic effect on interstate commerce").

\textsuperscript{72} See Katzenbach v. McClung, 379 U.S. 294, 304 (1964) (finding racial discrimination in local restaurants directly and adversely affected interstate commerce).

\textsuperscript{73} Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 257 (1964).
such an explanation was available. In a sense the "substantial effect" test was merely the substitution of one formalism for another. Especially in an economy in which virtually anything can be said to have some impact on commerce, the question ought to be what constitutes an effect sufficient to justify national regulation. There must be some answer beyond the ad hoc determination of whether a given effect is "substantial." The Court's decisions traced out the effect in each case, relying on congressional findings or the Congressional Record at times when the nexus seemed thin, but this analysis still ducked the important question. The issue was not only whether there was an impact on commerce, but why national regulation was necessary to address it.

Subsequent decisions have been no more illuminating regarding the value of federalism. Although seemingly beneficial for state authority, the Supreme Court's 1995 decision in *United States v. Lopez*\(^74\) actually is symptomatic of the problem. *Lopez* was the first case since the New Deal in which the Supreme Court struck a congressional enactment as beyond the commerce power. The *Lopez* Court held that it was beyond the commerce power to criminalize the possession of guns near schools.\(^75\) In explaining why, the Court fashioned a three-part test for when Congress might regulate a practice as within its commerce power, the heart of which is an inquiry into whether the challenged regulation has a "substantial effect" on interstate commerce:

First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce.\(^76\)

The problem is that this test is completely indeterminate and boundless.\(^77\) In dissent, Justice Breyer made several en-

---

75. See id. at 567-68 ("The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.").
76. Id. at 558-59 (citations omitted).
77. See Lessig, supra note 9, at 200-206 (arguing that *Lopez* fails to provide courts with the tools necessary to fashion limits on governmental power); see also Jesse H. Choper, *Did Last Term Reveal "A Revolutionary States'
tirely plausible arguments that guns in schools do have an impact on interstate commerce. Guns in schools make for bad schools, Breyer reasoned, providing disincentives for businesses to relocate, and turning out poorly educated children who cannot compete in a global economy. The Chief Justice's response was not that Breyer's reasoning was faulty, but simply that Breyer's logic placed no bounds on Congress's power.

Yet, aside from holding that Congress loses, the Lopez Court's decision lacked any coherent understanding of why it might be appropriate for Congress to regulate one activity or another as an exercise of its commerce power. Stating that a doctrinal test must have bounds says nothing about what those boundaries are or should be.

Notice also how the Lopez Court's test takes absolutely no account of state authority. The only focus of attention is on whether it is "commerce" that Congress regulated. There might be little quarrel to be had on this score. After all, the constitutional plan defines congressional power, leaving the residue to the states, not vice versa. But in the face of an unbounded, indeterminate, and incoherent test, any concern about preserving a role for the states is as likely to be ignored as it is to be respected, absent some articulation of the values furthered by state regulatory autonomy.

---

Rights Movement" Within the Supreme Court?, 46 CASE W. RES. L. REV. 663, 668 (1996) (arguing the Lopez majority struggled unsuccessfully "to draw some analytic line between what Congress may and may not regulate pursuant to its commerce power" while Justice Thomas's "revolutionary" concurrence advocated a return to the original understanding of commerce as buying, selling, and transporting); Melvyn R. Durchslag, Will the Real Alfonzo Lopez Please Stand Up: A Reply to Professor Nagel, 46 CASE W. RES. L. REV. 671, 679, 682 (1996) (noting Lopez "raises serious questions of judicially manageable standards"); cf. Deborah Jones Merritt, The Fuzzy Logic of Federalism, 46 CASE W. RES. L. REV. 685, 693 (1996) (predicting Lopez will have little practical effect, but will ultimately "tell us more about constitutional theory, and how the Court interprets constitutional text, than it tells us about what Congress can regulate" because the case provides no guidance for analyzing the relation between the activity being regulated and commerce).

78. See Lopez, 514 U.S. at 619-22 (Breyer, J., dissenting) (describing findings that violence in schools is prevalent and adversely affects the quality of education which in turn affects commerce).

79. See id. at 564-66.

80. See supra text accompanying note 24.

81. The concurring opinion of Justices Kennedy and O'Connor did discuss these values. See Lopez, 514 U.S. at 581-83 (Kennedy, J., joined by O'Connor, J., concurring) (advocating reserving powers to the states to further their role as laboratories of democracy); cf. Lawson & Granger, supra note 37, at 330 (contending that one of the functions of the Necessary and Proper Clause is to
Thus, we have an interpretation of Congress's most prominent enumerated power that is sweeping and practically unlimited. There is no serious doubt but that the commerce power is a monster permitting Congress virtually unlimited authority to regulate. Once, in sixty years, the Supreme Court has had the wherewithal to strike a congressional enactment as ultra vires. It is not likely to happen often, and given the forces explained in Part II, the decision is not likely to have even the in terrorem effect on Congress many commentators ascribed to it. The decisions defining commerce display no serious understanding about the circumstances under which Congress might need to exercise national power, or what advantages might adhere to retaining power in the states.

C. THE CREATION OF BROAD IMPLIED POWERS: THE NECESSARY AND PROPER CLAUSE

Not only are Congress's enumerated powers broad, but it turns out Congress possesses almost unlimited implied powers. This question was settled heavily in favor of national authority in another great decision by Chief Justice Marshall, *McCulloch v. Maryland*. In that case the question was whether Congress had the power to incorporate the Bank of the United States. Conceding that "[a]mong the enumerated powers, we do not find that of establishing a bank or creating a corporation," the Court also observed that "there is no phrase in the title of the Constitution which restricts the exercise of the power of the United States to such a limited extent, but which gives it authority to establish or create a corporation."

82. See, e.g., Bednar & Eskridge, *supra* note 15, at 1450 (referring to *Lopez* as "a wake up call"); Suzanna Sherry, *The Barking Dog*, 46 CASE W. RES. L. REV. 877, 877 (1996) (comparing the *Lopez* Court to a dog which must bite someone occasionally for its federalism barking to be taken seriously); see also Kathleen F. Brickey, *Crime Control and the Commerce Clause: Life After Lopez*, 46 CASE W. RES. L. REV. 801, 839-43 (1996) (noting that Congress might view *Lopez* as a warning shot across the bow, but that the case's real significance is symbolic); Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 712 (1995) ("At its narrowest, *Lopez* can be viewed as a case staking out the desperate position that *some* activity must fall beyond Congress's ken. Having made that point and encouraged Congress to think more carefully about its limited powers, the Court may be content to defer to most other exercises of congressional jurisdiction.").

83. 17 U.S. (4 Wheat.) 316 (1819).

84. *See id.* at 401.

85. *Id.* at 406.
[Constitution] which, like the articles of confederation, excludes incidental or implied powers." To the contrary, in addition to the enumerated powers, Congress may pass "all laws which shall be necessary and proper, for carrying into execution the foregoing powers." Rejecting calls for a narrow reading of that clause premised precisely on concerns about interference with state authority, the Chief Justice adopted an extremely broad interpretation: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." The McCulloch decision contained a limitation on congressional authority that might have provided some basis for distinguishing between powers commercial and police, but it too was abandoned in the modern era. Aside from the obvious constraint that Congress could not otherwise violate the Constitution, Marshall assured that "should Congress... under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land." In other words, if Congress attempted to regulate something not within its enumerated powers under the guise of exercising those powers, the Court would put a stop to the practice. And in fact the Court did so in the period prior to its New Deal switch, although likely employing too narrow a conception of the commerce power itself. But in the New Deal’s aftermath the Court was quite explicit in rejecting the concept of pretextual regulation: So long as the regu-

86. Id.
87. Id. at 411-12 (internal quotation marks omitted).
88. Id. at 421.
89. Id. at 423.
90. See United States v. Butler, 297 U.S. 1, 69 (1935) (“The power of taxation, which is expressly granted may, of course, be adopted as a means to carry into operation another power also expressly granted. But resort to the taxing power to effectuate an end which is not legitimate, not within the scope of the Constitution, is obviously inadmissible.”); Bailey v. Drexel Furniture Co., 259 U.S. 20, 38 (1922) (“[A]ll that Congress would need to do... would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word ‘tax’ would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the States.”).
lation was itself of "commerce" the "motive and purpose of a regulation" was irrelevant. 91

Once again, Congress's powers were expanded, this time by broad construction of the implied powers. Basically, implied powers are governed by the same broad rules as enumerated ones. And once again, the cases betray no understanding of how to tell when the need for national authority arises, or why it may make sense in some instances to preserve state authority.

D. ELIMINATION OF THE DISTINCTION BETWEEN ENUMERATED POWERS AND THOSE RESERVED TO THE STATE: CONDITIONAL SPENDING

Whatever the scope of Congress's enumerated and implied powers, the one thing that seemed apparent from the constitutional plan was that Congress was at least confined to those specific powers. After all, what point would there be to enumerating specific powers and reserving all others to the states, if the enumeration itself was meaningless as a limitation? The enumeration might only have been an iteration of the types of powers Congress possesses—sort of a constitutional ejusdem generis—but no one ever has been heard to make such an argument with regard to Article I of the Constitution.

Nonetheless, in South Dakota v. Dole 92 the Supreme Court plainly permitted Congress to do indirectly what it could not do directly, essentially eviscerating the difference between enumerated and unenumerated powers. Dole involved a question regarding the scope of Congress's power to engage in "conditional spending." 93 Under generally accepted precedent, Congress's taxing and spending powers are not limited to taxing and spending in support of those powers enumerated in Article I; rather, Congress may tax and spend for anything that constitutes the "general welfare." 94 Thus, in and of themselves,
the taxing and spending powers add greatly to the other enumerated powers. Given the engine for revenue raising represented by the taxing power, Congress could spend to achieve many, many things. But one thing remained important: The power was to spend (i.e., buy things), not to regulate, and the enumeration of specific regulatory powers still was relevant in limiting congressional authority.\(^9\)

In *Dole*, however, the Supreme Court held that Congress could attach "conditions" (read: "regulations") to spending grants, even if those conditions exceeded the scope of Congress's otherwise enumerated regulatory powers.\(^9\) The specific question in *Dole*, answered in the affirmative by the Court, was whether Congress could condition the receipt of federal funds on the recipient states raising their minimum drinking age.\(^9\) The question was raised in *Dole* because in light of the Twenty-first Amendment Congress arguably lacked the authority to regulate drinking ages directly.\(^9\) The Court appeared willing to accept this, but upheld the law nonetheless: "Here Congress has acted indirectly under its spending power to encourage uniformity in the States' drinking ages.... [W]e find this legislative effort within constitutional bounds even if Congress may not regulate drinking ages directly."\(^9\)

If Congress can circumvent limitations on its enumerated power simply by purchasing compliance in areas it could not regulate directly, then the enumeration of powers is practically meaningless. Congress, through its taxing power, has a virtually limitless source of wealth—enough, at any rate, to buy compliance with the few things that otherwise exceed its grasp under the already broad interpretations of the enumerated powers.\(^9\) Congress likewise, and correctly, has an extremely broad power to spend. But if Congress can attach whatever conditions it wishes to the receipt of funds, Congress may

---

95. See supra note 90 and accompanying text.

96. See *Dole*, 483 U.S. at 211-12.

97. See id. at 206.

98. See id. at 205-06.

99. Id. at 206 (emphasis added).

100. This is especially the case given that the Supreme Court permits Congress to leverage the grants, using small portions of them to fund large regulatory conditions. In *Dole*, for example, Congress purchased a national drinking age for five percent of the funds otherwise obtainable under specified highway grant programs. See id. at 211; see also Vicki C. Jackson, Federalism and the Uses and Limits of the Law: A Matter of Printz? 47-48 (Aug. 4, 1997) (unpublished manuscript, on file with author).
achieve in that fashion what has been barred to it by limitations on the enumerated powers.\textsuperscript{101} At that point it becomes fair to ask, "What is the point of enumerating powers?"\textsuperscript{102}

Like its Commerce Clause counterparts, neither the doctrinal test employed in \textit{Dole} nor the Court's broader opinion contained any indication of when congressional power ought to be available, or any concern for the values of federalism jeopardized by the Court's holding. The omission was particularly apparent in this instance, because Justice O'Connor addressed federalism concerns directly in dissent.\textsuperscript{103} Moreover, concerns about eviscerating limitations on enumerated powers at the expense of state authority had played a major role in \textit{Dole}'s doctrinal predecessor, \textit{United States v. Butler}.\textsuperscript{104} Given this context, the silence was deafening. Once again, nationalized power was enhanced without any understanding of whether its exercise was necessary or appropriate, and the concern for state autonomy was virtually ignored.

E. \textsc{Congressional and Judicial Displacement of State Law: The Power of Preemption}

From the founding, there has been little doubt but that federal law trumps state law. If Congress intended a specific national law to displace a conflicting state law, the state law

\begin{itemize}
\item \textsuperscript{101} See McCoy and Friedman, \textit{supra} note 9, at 87.
\item \textsuperscript{102} The power to attach conditions was not left completely unlimited by the Supreme Court, but the limitations do not address the concerns about federalism to which this Part is addressed. The expenditure must be in the "general welfare" (a question the Court concedes is virtually nonjusticiable), the condition must be unambiguous, the condition cannot violate another constitutional prohibition such as the First Amendment, and the condition cannot be coercive. See \textit{Dole}, 483 U.S. at 207-08. The dissent urged an additional limitation which would have prevented expansion of the conditional spending power into a limitless means of regulation—that conditions on spending grants only be permitted if they were in effect specifications of how the money should be spent. See \textit{id}. at 213, 217 (O'Connor, J., dissenting). See Lessig, \textit{supra} note 9, at 188-190 (suggesting that Justice O'Connor's rule is superior to that of Chief Justice Rehnquist). The majority rejected this, however, instead stating only that the condition must relate to the expenditure in some very loose way. See \textit{Dole}, 483 U.S. at 208 n.3; McCoy & Friedman, \textit{supra} note 9, at 106-07, 122-23 (arguing that the majority's germaneness requirement is a contentless version of O'Connor's rule); see also Kathleen M. Sullivan, \textit{Unconstitutional Conditions}, 102 HARV. L. REV. 1413, 1462 (1989) (discussing the Court's divisions over the question of germaneness in \textit{Dole}).
\item \textsuperscript{103} See \textit{Dole}, 483 U.S. at 212-18 (O'Connor, J., dissenting).
\item \textsuperscript{104} United States \textit{v. Butler}, 297 U.S. 1 (1936).
\end{itemize}
must give way. The Supremacy Clause says as much, and harmonious relations require that one sovereign's law be deemed supreme. This supremacy of federal law has not received sustained challenge, other than at rare, if notable, junctures in our nation's history.

As history progressed, however, the Supreme Court came to recognize an even broader power in Congress to displace state law, the power of preemption. Preemption refers to the ability of Congress to displace state lawmaking power in any area in which Congress has regulatory authority, whether or not Congress ever has exercised its authority. Thus, not only

105. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws 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.").


108. See S. Candice Hoke, Preemption Pathologies and Civic Republican Values, 71 B.U. L. REV. 685, 687 n.4 (1991) [hereinafter Hoke, Preemption Pathologies] ("[T]he term 'federal preemption' expresses the conclusion that state or local law must be disabled from operation because it conflicts with some aspect of a federal legislative scheme."); see also TRIBE, supra note 50, at 479 (stating that preemption occurs "[s]o long as Congress acts within an area delegated to it").

109. States have only permissive power to legislate in fields in which Congress has inherent regulatory authority. See Chicago, Rock Island & Pac. Ry. Co. v. Hardwick Farmers Elevator Co., 226 U.S. 426, 435 (1913) ("[T]he State may exert authority until Congress acts under the assumption that Congress by inaction has tacitly authorized it to do so. . . . "). That power may be destroyed by congressional action. In the early part of this century, any congressional action would automatically destroy state regulatory authority throughout an entire field, see id., a doctrine Gardbaum calls "latent exclusivity". Gardbaum, Preemption, supra note 107, at 801-02. Today the scope of preemption is determined by the extent of actual conflict between federal and state law, or by congressional intent to occupy the field. See English v. General Elec. Co., 496 U.S. 72, 79 (1990); see also Gardbaum, Preemption, supra note 107, at 805-07 (discussing the centrality of intent in modern preemption doctrine).
do state laws fall in specific instances in which Congress intended a federal rule to be supreme, but the Supreme Court has held that Congress can—again, within its broad enumerated or implied powers—decide that in any given area the state's ability to regulate should be curtailed. This preemption may be complete, i.e., Congress may choose to occupy the field of regulation entirely, or it may be partial, preempting state law only within given bounds. Moreover, at times the Supreme Court will infer preemption from a pattern of national regulation even if Congress has expressed no intent on the subject.

The various preemption doctrines mirror these concepts precisely. Generally speaking, the Supreme Court applies a three-part test in order to determine if state law has been displaced. First, the Court looks to congressional enactments to see if Congress has been explicit in its desire to preempt. Second, in the absence of express preemption, the Court ascertains whether there is a direct conflict between the exercise of state and federal authority. Third, even if there is no direct conflict and no express preemption, the Court might find that state regulatory authority is preempted because it is clear from the pattern of federal enactments that Congress has "occupied the field."

The rhetoric of preemption law is somewhat favorable to state regulatory authority. Perhaps this is true because, at


111. See Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) ("The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.").

112. In a note to English v. General Electric Co., the Court remarked that the three-category framework is not a rigid one, and that it is invoked largely because of prior use. See English, 496 U.S. at 79-80 n.5 (1990).

113. See id. at 78-79.

114. See id. at 79.

115. Id.
least in the absence of express preemption, and particularly in the case of occupy-the-field preemption, the courts really are on their own in deciding whether to displace state authority. Moreover, in cases where no conflict is evident, a holding that state authority is preempted leaves a regulatory vacuum.\footnote{116} Thus, the Supreme Court has stated that in deciding preemption cases it must be respectful of not displacing state police power inappropriately.\footnote{117} The Court even has gone so far as to say that given the necessary solicitude for state regulatory authority, express congressional preemption of state authority must be construed narrowly.\footnote{118}

Although this rhetoric seems favorable to state interests, the reality is quite different. First, as Stephen Gardbaum has explained so well, preemption—the practice of displacing state law even when there is not a conflict—does not necessarily follow at all from the idea of federal supremacy.\footnote{119} Instead, it is a much greater intrusion wholly of the Court's making.\footnote{120}

\footnote{116} See Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 207-08 (1983) (eschewing a preemption holding to avoid a regulatory vacuum); TRIBE, supra note 50, at 479, 497-98 (discussing the legal vacuum created by field preemption); Hoke, Preemption Pathologies, supra note 108, at 719-21 (noting that regulatory vacuums are especially likely when preemption is imposed by judicial rulings rather than by Congress or federal agencies, and citing judicial elaboration of the Federal Arbitration Act as an example).

\footnote{117} See Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) ("[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.").

\footnote{118} See Medtronic, Inc. v. Lohr, 116 S. Ct. 2240, 2250 (1996) (declaring that the presumption against preemption applies to the scope as well as to the existence of congressional intent to invalidate state laws); Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517 (1992) ("Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.").

\footnote{119} See Gardbaum, Preemption, supra note 107, at 773-77; Gardbaum, New Deal, supra note 50, at 532-40; see also S. Candice Hoke, Transcending Conventional Supremacy: A Reconstruction of the Supremacy Clause, 24 CONN. L. REV. 829, 885-90 (1992) (arguing that preemption claims do not arise under the Supremacy Clause, although they must retain a linkage to it); Hoke, Preemption Pathologies, supra note 108, at 735 (arguing that the Supremacy Clause dictates that "any valid federal preemption decision must be based upon some notion of proscribed state law conflict with a federal legislative scheme").

\footnote{120} See Gardbaum, Preemption, supra note 107, at 803-04 (arguing that the legal principles governing preemption analysis were introduced in Southern Railway Co. v. Reid, 222 U.S. 424 (1912)); Gardbaum, New Deal, supra note 50, at 532-35 (arguing that nascent preemption doctrine was a product of
even if Congress is granted the affirmative power to displace state law (whether or not there are conflicting federal rules), the Court could have limited such preemption to situations in which Congress was express in its desire. As it is, however, occupy-the-field preemption (admittedly rarely invoked in recent memory) puts power in the courts to find state regulatory authority preempted even when Congress is silent.121 Third, empirical studies of Supreme Court preemption decisions indicate that even the Burger and Rehnquist courts, generally believed to be friendly to state interests, have frequently found state authority to be preempted.122

Not only is the preemption power quite broad, but as elsewhere, the preemption decisions display no theoretical appreciation concerning the appropriate allocation of national and state authority. When the Court interprets potentially preemptive enactments narrowly, it justifies the decision on the ground of preserving the police power. Yet those decisions offer no clue as to why such preservation is important. Rather, the Court simply observes that the states have traditionally exercised such power.123 Likewise, preemption decisions demonstrate no

the Lochner Court).

121. See, e.g., White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 151 (1980) (holding that “comprehensive” federal regulation preempted state authority to tax non-Indians on tribal reservations even though Congress had offered no explicit statement on the subject); Hines v. Davidowitz, 312 U.S. 52, 74 (1941) (holding state alien registration law preempted by the Alien Registration Act of 1940, by virtue of the latter’s uniform and national character). The same is true of the branch of “conflict” preemption that does not depend upon an actual conflict in laws, but only the existence of a state law that would, in the Court’s view, “frustrate” some more general “purpose” of Congress. See, e.g., Philko Aviation, Inc. v. Shacket, 462 U.S. 406, 411-12 (1983) (holding that state law permitting oral sales of aircraft would “defeat the purpose” of the Federal Aviation Act—“to create ‘a central clearing house for recordation of titles’”) (citations omitted); Perez v. Campbell, 402 U.S. 637, 654 (1971) (holding that the Arizona Safety Responsibility Act had the purpose and effect of frustrating federal bankruptcy law).

122. See David M. O’Brien, The Supreme Court and Intergovernmental Relations: What Happened to “Our Federalism”? 9 J.L. & POL. 609, 622-23 (1993) (showing that the Burger Court upheld preemption in 46% of cases and the Rehnquist Court in 52%—rates not dramatically different from those of earlier, less conservative Courts).

123. The mantra of Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)—“[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress”—is repeated without elaboration in the following: California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., 117 S. Ct. 832, 838 (1997); New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co., 514 U.S. 645, 655
coherent understanding of when and why national authority ought to preempt state law, mirroring precisely the lack of understanding present in the enumerated powers decisions.

F. JUDICIAL DISPLACEMENT OF STATE LAWS: THE DORMANT COMMERCE CLAUSE

At least with regard to preemption there is the appearance that Congress intended state law to give way to federal interests; in the final doctrinal area—the dormant Commerce Clause—this appearance disappears entirely. Under the dormant Commerce Clause courts strike down state enactments on the ground that they interfere with the concerns underlying the Commerce Clause, despite the fact that Congress has been completely silent on the subject.\(^{124}\) In other words, in dormant Commerce Clause cases the courts alone do the work of displacing state law, in the name of furthering national interests.\(^{125}\)

The Constitution itself provides no indication that courts are to strike state laws under the dormant commerce power. The Constitution says only that "Congress shall have the Power . . . [t]o regulate Commerce . . . among the several States."\(^{126}\) Congress not having regulated, one might conclude

\(^{(1995)}\); Cipollone, 505 U.S. at 516; English v. General Electric Co., 496 U.S. 72, 79 (1990); Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission, 461 U.S. 190, 206 (1983); and doubtless others. Only in Medtronic does the Court add the unilluminating tag: "First, because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action . . . That approach is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety." Medtronic, 116 S. Ct. at 2250.


125. Dormant commerce cases are not the only ones that supplant state authority in the name of national uniformity. Another example is federal common lawmaking in the area of foreign affairs. For a critique of that nationalizing authority that has an affinity with the approach developed here, see Jack Goldsmith, Federal Courts, Foreign Affairs, and Federalism, 83 VA. L. REV. (1977) (forthcoming Nov. 1997).

126. U.S. CONST. art. I, § 8, cl. 3 (emphasis added). Redish and Nugent examine the various textual and quasi-textual arguments for the dormant Commerce Clause and conclude that courts should not rely on it to invalidate state commerce legislation. See Redish & Nugent, supra note 124, at 582-90.
the states are free to (as the Court itself would say) "occupy the field." Moreover, Felix Frankfurter tells us that in the ratification history of the Constitution, "[t]he conception that the mere grant of the commerce power to Congress dislodged state power finds no expression." Partly for reasons of history, and partly because there is no coherent understanding of the values of federalism, the doctrine has evolved quite differently.

As we saw earlier, the dormant commerce power emerged early in the nation's history, in part as an artifact of judicial struggles to understand the shared nature of regulatory power. In a world of dual sovereignty, such as that hinted at in Gibbons v. Ogden, in which there is exclusive authority in each governmental body, the dormant commerce power is a redundancy. If the states cannot regulate "commerce" (just as Congress has no police power), then of course states cannot act in the area of commercial regulation, whether or not Congress has acted. The Supreme Court would be correct in striking down a state regulation of commerce as ultra vires. When the Supreme Court turned away from notions of dual sovereignty in Cooley v. Board of Wardens, states became free to regulate commerce, just as was Congress. It was then that the Supreme Court clearly spelled out a rule for itself in policing the line between legitimate and illegitimate state regulation of commerce.

At the same time as it enabled states to regulate in the commercial realm, the Cooley Court took a first—and in many ways intelligent—stab at identifying the appropriate realms for state or national decisionmaking. Under the Cooley doctrine states were not given free hand to regulate in the absence of congressional regulation. Rather, the Court distinguished between competing demands of uniformity and local diversity in formulating commercial rules:

[T]he power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding

Joining Professor Eule, they argue that the Privileges and Immunities Clause could fulfill the function now served by the dormant Commerce Clause. See id. at 605-10; Eule, supra note 124, at 446-55.

129. 53 U.S. (12 How.) 299 (1851).
130. See id. at 319.
that diversity, which alone can meet the local necessities of navigation.\footnote{131}

Seeing these two categories as themselves separate, the Cooley Court's solution was obvious: states could regulate commerce when local diversity was appropriate, so long as Congress did not displace state efforts, but if uniformity was necessary, then the states were disabled from regulating. Simply put, the Court would strike down state regulations that interfered with necessary national uniformity.

For almost the next century the Court adhered to the Cooley doctrine, seesawing on the key question of when national uniformity was necessary, and varying in the extent to which state prerogatives were respected. The low point for the states probably was \textit{Leissy v. Hardin},\footnote{132} in which the Court took a very broad understanding of when commercial uniformity was necessary, striking state laws regulating the sale of alcohol.\footnote{133} While mouthing platitudes about the state's police power,\footnote{134} the \textit{Leissy} Court relied on a formal distinction between commerce and the police power to find that laws regulating the sale of alcohol were plainly in the former camp.\footnote{135}

The high point for the states may have been right before the fall, in \textit{South Carolina State Highway Department v. Barnwell Bros}.\footnote{136} The \textit{Barnwell} Court upheld a state law regulating the weight of trucks on state highways, the Court stating that "[t]he fact that many states have adopted a different standard is not persuasive."\footnote{137} Eschewing the formal ap-

\begin{footnotes}
\footnotetext{131} Id.
\footnotetext{132} 135 U.S. 100 (1890).
\footnotetext{133} \textit{See id.} at 124-25 (holding state laws regulating the sale of alcohol to be unconstitutional and refusing to review congressional determinations of the subjects of interstate commerce).
\footnotetext{134} \textit{See, e.g., id.} at 108-09. According to the \textit{Leissy} Court:
\begin{quote}
The power to pass laws in respect to internal commerce, inspection laws, quarantine laws, health laws and laws in relation to bridges, ferries and highways, belongs to the class of powers pertaining to locality, essential to local intercommunication, to the progress and development of local prosperity, and to the protection, the safety and the welfare of society, originally necessarily belonging to, and upon the adoption of the Constitution reserved by, the State . . . .
\end{quote}
\textit{Id.}
\footnotetext{135} \textit{See id.} at 113-114 ("[W]hat does not belong to commerce is within the jurisdiction of the police power of the State, but that which does belong to commerce is within the jurisdiction of the United States . . . .").
\footnotetext{136} 303 U.S. 177 (1938).
\footnotetext{137} \textit{Id.} at 195.
\end{footnotes}
proach of the Leissy Court, and acting far more faithfully to the Cooley doctrine, the Barnwell Court recognized the importance of state regulatory authority even if it was commerce that was being regulated: "It is not any the less a legislative power committed to the states because it affects interstate commerce, and courts are not any the more entitled, because interstate commerce is affected, to substitute their own for the legislative judgment."  

The modern doctrine of the dormant Commerce Clause, born shortly after Barnwell, purports to accommodate both national and state interests. Eschewing the earlier formalism that divided the world into commerce on the one hand, and the police power on the other, the modern-day doctrine focuses instead on the evils that can arise when states regulate in a way that affects the national market. The modern test comes in two parts. First, the Court asks if a state law “discriminates” against interstate commerce. The concern here is protectionist legislation, which can lead to retaliation and balkanization among the states. Discriminatory, or protectionist, legislation is

138. Id. at 191.
139. The modern approach was ushered in by Southern Pacific Co. v. Arizona ex rel. Sullivan, 325 U.S. 761 (1945), in which the Court remarked:

"Hence the matters for ultimate determination here are the nature and extent of the burden which the state regulation . . . imposes on interstate commerce, and whether the relative weights of the state and national interests involved are such as to make inapplicable the rule, generally observed, that the free flow of interstate commerce and its freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the commerce clause from state interference."

Id. at 770-71. For a discussion of the case, see Gardbaum, New Deal, supra note 50, at 529-31; Redish & Nugent, supra note 124, at 580-81; Robert A. Sedler, The Negative Commerce Clause as a Restriction on State Regulation and Taxation: An Analysis in Terms of Constitutional Structure, 31 WAYNE L. REV. 885, 946-49 (1985); Mark Tushnet, Rethinking the Dormant Commerce Clause, 1979 Wis. L. REV. 125, 142-43 (1979).

140. See Oregon Waste Sys. v. Department of Envtl. Quality, 511 U.S. 93, 99 (1994) ("[T]he first step in analyzing any law subject to judicial scrutiny under the negative Commerce Clause is to determine whether it regulates evenhandedly with only incidental effects on interstate commerce, or discriminates against interstate commerce.") (quoting Hughes v. Oklahoma, 441 U.S. 332, 336 (1979)) (citation omitted); City of Philadelphia v. New Jersey, 437 U.S. 617, 625-26 (1978) (striking down a New Jersey statute which discriminated against articles of commerce coming from outside the state); cf. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (holding that nondiscriminatory legislation "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits").

per se invalid. Second, if a state law does not discriminate against interstate commerce, then the courts look further to ensure that the burdens on commerce do not outweigh the benefits to the state of regulating.

Among the members of the Court and among commentators there is some confusion about this second step. Some see it as a way only of smoking out more subtle protectionist legislation: if the burdens are high and the benefits illusory, then one suspects a protectionist purpose motivated the law.

1590, 1599 (1997) ("Avoiding . . . 'economic Balkanization' and the retaliatory acts of other States that may follow, is one of the central purposes of our negative Commerce Clause jurisprudence.") (quoting Hughes v. Oklahoma, 441 U.S. 322, 325 (1979)) (citations omitted); Fulton Corp. v. Paulkner, 116 S. Ct. 848, 855 n.3 (1996) ("[P]romotion of in-state markets at the expense of out-of-state ones furthers the 'economic Balkanization' that our Dormant Commerce Clause jurisprudence has long sought to prevent.") (quoting Hughes, 441 U.S. at 325-26 (1979)); see also Donald H. Regan, The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause, 84 Mich. L. Rev. 1091, 1112-25 (1986) (arguing that the purpose of the dormant Commerce Clause is to foster the national interest in avoiding state protectionism). But see Redish & Nugent, supra note 124, at 599-601 (critiquing Regan's argument).

142. See C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 392 (1994) ("Discrimination against interstate commerce in favor of local business or investment is per se invalid, save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest."); Oregon Waste, 511 U.S. at 99 ("If a restriction on commerce is discriminatory, it is virtually per se invalid."); see also Regan, supra note 141, at 1134-36 (arguing that "we should just make the per se rule absolute and have done with it").

143. See Carbone, 511 U.S. at 390 ("For this inquiry, our case law yields two lines of analysis: first, whether the ordinance discriminates against interstate commerce, and second, whether the ordinance imposes a burden on interstate commerce that is 'clearly excessive in relation to the putative local benefits.'") (quoting Bruce Church, 397 U.S. at 142) (citation omitted); Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 350 (1977) ("[A] finding that state legislation furthers matters of legitimate local concern, even in the health and consumer protection areas, does not end the inquiry. . . . Rather, when such state legislation comes into conflict with the Commerce Clause's overriding requirement of a national 'common market,' we are confronted with the task of effecting an accommodation of the competing national and local interests.") (citing Bruce Church, 397 U.S. at 142). The classic work encouraging adoption of the balancing part of the test is Noel T. Dowling, Interstate Commerce and State Power, 27 Va. L. Rev. 1, 20-21 (1940).

144. See Regan, supra note 141, at 1206-87 (arguing that although the Court purports to employ a benefit-burden balancing test, it in fact engages in review for discriminatory purpose). Justice Scalia has explicitly agreed with Regan, and added that the balancing test is "ill suited to the judicial function and should be undertaken rarely if at all." CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 95 (1987) (Scalia, J., concurring in part and concurring in the judgment). Similarly, Justice Souter has objected to use of the term
Others see true benefit-burden balancing, concluding that when the burdens are too high, interstate commerce simply is jeopardized to the extent that judicial invalidation of state law is necessary. As will be evident, the Court's weighing of interests under the second step has not been uniform.

On its face, the doctrine of the dormant Commerce Clause appears to be respectful of state authority. Protectionism is construed simply to mean "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." Under benefit-burden balancing, the state regulation supposedly will be upheld so long as the benefits to the state are not "illusory," the Court sometimes taking the view that a nondiscriminatory state law with any actual benefits will be upheld.

The opinions are rife with language praising the importance of state regulation to protect the health, safety, and welfare of state citizens.

"balancing test," and has remarked, "The analysis is similar to, but softer around the edges than, the test we employ in cases of overt discrimination." Carbone, 511 U.S. at 423 (Souter, J., dissenting) (footnote omitted); see also Tribe, supra note 50, at 417 ("The negative implications of the commerce clause derive principally from a political theory of union, not from an economic theory of free trade. The function of the clause is to ensure national solidarity, not economic efficiency."). (footnote omitted).

145. See Rule, supra note 124, at 446 (arguing that the Court is concerned with "the flow of commerce rather than with the nature of the process that produced the legislation") (footnote omitted); Tushnet, supra note 139, at 141-43 (arguing that the Court properly considers efficiency in the dormant Commerce Clause area).

146. See infra text accompanying notes 166-185.

147. Oregon Waste, 511 U.S. at 99 (defining discrimination as used in the phrase "discrimination against interstate commerce").

148. See CTS, 481 U.S. at 92 (holding that "possibility" of coercion in takeover bids provided justification for law that conditioned acquisition of control of a corporation on approval of a majority of the preexisting disinterested shareholders); Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 670 (1981) ("If . . . justifications are not illusory, the Court will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce.") (quoting Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 449 (1978) (Blackmun, J., concurring)).

149. See General Motors Corp. v. Tracy, 117 S. Ct. 811, 823 (1997) (referring to "our traditional recognition of the need to accommodate state health and safety regulation in applying dormant Commerce Clause principles"); Raymond, 434 U.S. at 443 (1978) ("The Court has been most reluctant to invalidate under the Commerce Clause state legislation in the field of safety where the propriety of local regulation has long been recognized.") (internal quotation marks and citations omitted); Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 443-44 (1960) ("In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that the Constitution when conferring upon Congress the regulation
Although the rhetoric of the dormant Commerce Clause decisions sounds out favorably for state autonomy, in reality this line of cases may be the most devastating to state authority. While purporting to act with deference to the regulatory authority of the states, in reality the Supreme Court pursues a course of enforcing uniformity and a free market in trade, concepts that have the potential to level state authority. As Justice Stevens said in a somewhat different context, "uniformity is an ungovernable engine." By its very nature an insistence on uniformity has the potential to spell the end of state regulatory autonomy. As both Stephen Gardbaum and Don Regan have made clear, there is a significant difference between a prohibition on protectionism and an insistence on free trade, the latter necessarily running flat against countless state regulatory choices.

The Court's free-trade tendencies were evident in the recent decision in C & A Carbone, Inc. v. Town of Clarkstown, in which the Court struck down a city's flow-control ordinance. In order to handle solid waste, Clarkstown had entered into a contract with a company that would build and operate a transfer station at which goods were separated into recyclables and nonrecyclables. Construction of the facility was financed by a "tipping fee" charged at the transfer station. At the end of a five-year period, the town would purchase the facility for one dollar. In order to ensure the flow of goods sufficient to fi-
nance the facility over the initial five-year period, Clarkstown passed an ordinance requiring that all nonhazardous solid waste in the town be brought to the transfer station. The ordinance was challenged by another waste processor when the town sought an injunction enforcing the tipping law. The question was whether the flow-control ordinance requiring all waste to be tipped at the town facility violated the dormant Commerce Clause.

As the dissent in the case made clear, the Clarkstown ordinance did not follow the pattern of laws typically struck down as protectionist. The hallmark of protectionism, according to the Court, is differential treatment of in-state and out-of-state entities. Here, all were treated alike: every individual and company was required to tip waste at the municipal facility. Indeed, the municipal ordinance clearly disadvantaged one group of insiders more than it disadvantaged anyone else, that being the people of Clarkstown who voted to impose the tipping rule on themselves, thus raising their own costs for the disposal of solid waste. As the dissent understood matters, the law at issue was simply a nonprotectionist way for the municipality to fund a solution to the solid waste problems facing all communities.

The majority nonetheless struck down the law in an opinion that clearly privileged the idea of free trade, rather than simply eliminating protectionism. In the face of the dissent's careful analysis, it is difficult to accept the majority's repeated assertion that the flow-control ordinance discriminated against out-

156. See id.
157. See id. at 388.
158. See id. at 389.
159. See id. at 410-11 (Souter, J., dissenting) ("The ordinance ... falls outside that class of tariff or protectionist measures that the Commerce Clause has traditionally been thought to bar States from enacting against each other, and when the majority subsumes the ordinance within the class of laws this Court has struck down as facially discriminatory ... the majority is in fact greatly extending the Clause's dormant reach.").
161. See Carbone, 511 U.S. at 411 (Souter, J., dissenting) ("The town has found a way to finance a public improvement, not by transferring its cost to out-of-state economic interests, but by spreading it among the local generators of trash, an equitable result with tendencies that should not disturb the Commerce Clause and should not be disturbed by us.").
of-state interests in favor of in-state interests. It is true that only one company benefited from the ordinance, to the exclusion of out-of-state interests that might have sought to dispose of Clarkstown's waste. But the same was true vis-à-vis in-state interests, and as the dissent pointed out in a footnote, the record was silent as to whether the owner of Clarkstown's facility was from within or without the state.\textsuperscript{162} Yielding better insight into the Court's thinking were repeated references in the \textit{Carbone} decision suggesting that the Court saw the Commerce Clause as guaranteeing a free national market.\textsuperscript{163} It particularly is significant that in its central claim that the Commerce Clause promotes the "free flow" of commerce, the Court cited not a dormant Commerce Clause case, but the decision in \textit{Jones & Laughlin Steel}.\textsuperscript{164} Undoubtedly Congress could decide in favor of an entirely free market, but it has not done so, and the Court's limited antidiscrimination and antiprotectionism decisions do not justify the result in \textit{Carbone}.

For all its talk of deferring to state police regulations that provide nonprotectionist benefits to the state, in recent decisions the Court looks more toward ensuring national uniformity, a quite different approach and one far more devastating to state regulatory authority. This was evident in \textit{Kassel v. Consolidated Freightways},\textsuperscript{165} in which the Supreme Court struck an Iowa state law limiting the length of double trucks on its highways. \textit{Kassel} is best understood as a case in which uniformity was the Court's primary concern. The law in \textit{Kassel} was challenged by trucking companies because it forced those companies to either divert shipments around Iowa or move them to smaller trucks to ship through Iowa.\textsuperscript{166} The record as to the safety of the longer double trucks was distinctly mixed, and could been seen in quite different ways, as the plurality and dissent made

\textsuperscript{162} See \textit{id.} at 418 n.7.
\textsuperscript{163} See \textit{id.} at 389 ("[A]ctions are within the domain of the Commerce Clause if they burden interstate commerce or impede its free flow."); \textit{id.} at 393 ("The Commerce Clause presumes a national market free from local legislation that discriminates in favor of local interests."). Admittedly the second quote speaks of discrimination, but (a) the assertion is unsubstantiated on the record; and (b) in any event is not necessarily protectionist, since in-state interests were burdened as well. \textit{See also} Bednar & Eskridge, \textit{supra} note 15, at 1489-90 (accusing the Court of "fetishize"-ing the free market in \textit{Carbone}).

\textsuperscript{164} See \textit{Carbone}, 511 U.S. at 389 (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 31 (1937)).

\textsuperscript{165} 450 U.S. 662 (1981).

\textsuperscript{166} See \textit{id.} at 667, 674.
clear. Yet, as the dissent demonstrates, the safety benefits arguably achieved by the state regulation were far from "illusory." Thus under the Court's own formulation of the second step of its dormant Commerce Clause doctrine, the law should have been upheld.

Despite its troubling facts, Kassel can only awkwardly be viewed as a protectionism case. True, the Governor had vetoed a law passed by the legislature to raise the length limit, questioning (in the veto message) why Iowa should subject itself to additional through-state traffic. In addition, the older law did contain exceptions that seemed designed to favor longer truck lengths for traffic that benefited Iowa, such as an exception for agricultural vehicles, or a "border-cities" exception. The problem with the protectionist rationale, however, was that Iowa had clearly not enacted the law to frustrate interstate commerce, it had simply failed to change its law to accommodate the interests of the trucking industry. The law at issue was enacted long before it was challenged, at a time when it imposed no disuniformity of regulation. Many other states had

167. The plurality concluded that the record showed that 65-foot double trailers were as safe as 55-foot singles. See id. at 672-73. But as the dissent correctly pointed out: "Conclusions that the double configuration is as safe as the single do not at all mean the 65-foot double is as safe as the 60-foot double, or that length is not relevant to vehicle safety." Id. at 696 (Rehnquist, J., dissenting).

168. The dissent contended that longer trucks increased the risk of accident, were more likely to clog intersections, posed greater problems at the scene of an accident, and were more likely to jackknife or upset. See id. at 694-95 (Rehnquist, J., dissenting).

169. There were strong suggestions in Kassel, both in the plurality and in Justice Brennan's concurrence, that the legislation at issue was protectionist and hence invalid. The plurality complained that "Iowa's law tends to increase the number of accidents, and to shift the incidence of them from Iowa to other States," id. at 675, and that the laws contained exemptions that "secure to Iowans many of the benefits of large trucks while shunting to neighboring States many of the costs associated with their use," id. at 663. Justice Brennan agreed with these sentiments, but concluded that the purpose behind the law was protectionist in nature. See id. at 685 (Brennan, J. concurring). As will be seen, there are serious problems with this conclusion, which might explain why the plurality treated Kassel as a balancing case under the second step of the dormant commerce analysis. See id. at 670-71.

170. Governor Ray remarked, "However, with this bill, the Legislature has pursued a course that would benefit only a few Iowa-based companies while providing a great advantage for out-of-state trucking firms and competitors at the expense of our Iowa citizens." Id. at 677 (citation omitted).

171. See id. at 676-77.

172. The law was first enacted in 1947 and was entitled "An Act to promote
laws similar to Iowa’s. The trucking companies could have gone to Congress to obtain a national uniform law, but appeared to prefer picking the state laws off one by one in litigation.

Moreover, the Iowa law should have fared pretty well under some prior decisions of the Supreme Court. In Barnwell the Court had upheld a differential weight limit for trucks on state highways, stating that “[f]ew subjects of state regulation are so peculiarly of local concern as is the use of state highways.” And in Cooley the law at issue also was riddled with exceptions that suggested some protectionist purpose, but the Court there recognized that so long as the law generally achieved its aim, some such exceptions were permissible. The Cooley Court found these exemptions nothing but appropriate “legislative discretion.” Deriving the benefits of the general rule was appropriate in cases in which the harm followed, but the legislature could also generalize about vessels that might be exempted without causing such harm.

On the other hand, Kassel closely resembles another dormant Commerce Clause case in which the Court clearly chose the benefits of uniformity over the protection of state regulatory authority. That case was Southern Pacific Co. v. Arizona...

*uniformity with other states in the matter of limitations on the size, weight and speed of motor vehicles . . . .” Id. at 683-84 (Brennan, J., concurring) (alteration in original) (internal quotation marks omitted) (emphasis added).*

173. The dissent noted that 17 states and the District of Columbia, including all of New England and most of the Southeast, prohibited the longer trucks. *See id. at 688 (Rehnquist, J., dissenting).*

174. The truckers got the uniform law they wanted a year later, when Congress passed section 411 of the Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, 96 Stat. 2097 (codified as amended at 49 U.S.C. § 31111 (1994)). However, the law was the product of compromise; parts of sections 511 and 513 of the same act provide for increased taxes on gasoline and diesel fuel and heavy-truck usage. *See id.* (codified as amended at 26 U.S.C. §§ 4041 & 4481 (1994)). For discussion of the legislation, see Steven C. Kohl, *Recent Development,* 8 J. CORP. L. 543, 563-64 (1983); *see also* Bednar & Eskridge, *supra* note 15, at 1488-89 (making the point that Congress is better suited to deal with cases like Kassel).


176. Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299, 313 (1851) (“[F]air objects of a law imposing half-pilotage when a pilot is not received, may be secured, and at the same time some classes of vessels exempted from such charge.”).

177. *See id.* (declaring it to be a “fair exercise of legislative discretion” to relieve “from the charge of half-pilotage, such vessels as from their size, or the nature of their employment, should be exempted from contributing to the support of pilots”).
ex rel. Sullivan, in which the Court struck down a state law limiting the length of railroad trains. In Southern Pacific, as in Kassel, the safety evidence was surely a matter of fair dispute. Although the Court claimed the safety benefits were small, it was clear in Southern Pacific, as it was in Kassel, that the real concern was the obstruction of commerce created by disuniformity: "Enforcement of the law in Arizona, while train lengths remain unregulated or are regulated by varying standards in other states, must inevitably result in an impairment of uniformity of efficient railroad operation because the railroads are subjected to regulation which is not uniform in its application."

These cases clearly suggest that the Supreme Court's dormant commerce jurisprudence is tending toward requiring national uniformity. It could be, as Donald Regan suggests, that Kassel and Southern Pacific are transportation cases and should be understood as sui generis. Regan distinguishes transportation cases from movement of goods cases, arguing that the needs for uniformity are greater in transportation, and that antiprotectionism should be the only rule in movement of goods cases. It is true that the courts have tolerated some greater disuniformity in movement of goods cases. Yet, the argument is

178. 325 U.S. 761 (1945).
179. Justice Black called attention in his dissent to the failure of the train companies to seek relief in Congress:

It is significant, however, that American railroads never once asked Congress to exercise its unquestioned power to enact uniform legislation on that subject, and thereby invalidate the Arizona law. That which for some unexplained reason they did not ask Congress to do when it had the very subject of train length limitations under consideration, they shortly thereafter asked an Arizona state court to do.

Id. at 786-87 (Black, J., dissenting).
180. Justice Stone argued that shortening trains resulted in an increase in the number of trains and train operations, with an attendant rise in risk of accident. See id. at 775-79.
181. Id. at 773.
182. See Regan, supra note 141, at 1182-85.
183. See id. at 1098-1101.
184. Compare Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981), with Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959). In Clover Leaf, the Court upheld a Minnesota statute banning the retail sale of milk in plastic nonreturnable containers, despite the fact that the law burdened the out-of-state plastics industry more heavily than the local pulpwood industry. See Clover, 449 U.S. at 473. But in Bibb, a transportation case, the Court struck down an Illinois statute requiring that trucks be equipped with a specified type of mudguard. Justice Stevens specifically noted that the law was nondiscriminatory, but still burdened interstate commerce unconstitu-
not entirely persuasive, because increasingly, in contexts outside of transportation, the Court is coming to rely on the language of uniformity and on a less-deferential balancing of burdens and benefits.\textsuperscript{185}

The dormant commerce cases represent a clear and energetic effort by the Supreme Court to pursue a doctrinal line that accords very little value to federalism.\textsuperscript{186} Unlike the other doctrinal areas examined above, the Supreme Court is moving on its own here, with little guidance from Congress. Moreover, unlike the other areas, in which the Court has little sense of why national regulation must be preferred over state regulation, the Court here does advance strong national interests, certainly in antiprotectionism, but also in free trade and national uniformity. Yet it is ironic, to say the least, that the Court evidences no theory of national regulation when it reviews an explicit act of the national Congress, but when it acts alone the Court adopts a theory more aggressively nationalizing than any Congress has pursued.\textsuperscript{187} At the same time, the Court pays lip service to

\textsuperscript{185} See \textit{Bibb}, 359 U.S. at 529.

\textsuperscript{186} See, e.g., \textit{Healy v. Beer Inst.}, 491 U.S. 324, 336-37 (1989) ("[T]he practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation. Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another state."); \textit{Brown-Forman Distillers Corp. v. New York Liquor Auth.}, 476 U.S. 573, 583 (1986) (noting that proliferation of affirmation laws had increased the likelihood that a seller would be subjected to inconsistent obligations in different states); \textit{Edgar v. MITE Corp.}, 457 U.S. 624, 642 (1982) (observing that if all states enacted similar legislation, "interstate commerce in securities transactions generated by tender offers would be thoroughly stifled"); \textit{cf. CTS Corp. v. Dynamics Corp. of Am.}, 481 U.S. 69, 88-89 (1987).

\textsuperscript{187} In response to a reading of this section, David Shapiro offered the insightful point that to the extent the line between antiprotectionism and free-trade principles is not clear, the dormant Commerce Clause decisions could be seen as more helpful than hurtful to the states, simply because the greater danger for states is unreasonable trade barriers, not limitations on state regulatory authority. \textit{See} Letter from David L. Shapiro to Barry Friedman (July 11, 1997) (on file with author).

\textsuperscript{187} This is especially ironic in light of the fact that the Constitution does not adopt a free-trade principle, at least as the Court is coming to understand the idea of free trade. \textit{See} \textit{Eule}, supra note 124, at 429-34 ("The commerce clause thus cannot be said to establish and protect free trade or a national marketplace as a fundamental constitutional value."); \textit{Sedler}, supra note 139, at 886-91 (arguing that there is no evidence that a major historic purpose for the Commerce Clause was to create a free-trade area among the states).
the police power, but strikes down many state laws that come its way.

G. THE STATE AUTONOMY EXCEPTION: THE “AFFIRMATIVE LIMITATION” CASES

In fairness to the Supreme Court, concerns about state regulatory authority are not without some attention in the cases. There is another, smaller body of cases in which the Supreme Court’s focus has been on the value of state autonomy.188 From these cases, in fact, it is possible to begin to identify the values of federalism that register on the state side of the balance. The impact of these cases in the broader scheme of things is quite small, however, although it is not without some significance.

The seminal case in this line was National League of Cities v. Usery,189 in which the Supreme Court held that Congress’s commerce power was limited insofar as Congress sought to regulate the states directly (as opposed to regulating individuals and entities within them). National League of Cities was a clear attempt to find some limit on the commerce power, in the face of its dramatic expansion since the New Deal. In National League of Cities, the Court struck down the minimum-wage and maximum-hour provisions of the Fair Labor Standards

188. In addition to the cases discussed here, there is another recent trend in the case law to protect state autonomy, albeit in a different way. That is the Eleventh Amendment precedent holding that Congress may not rely on the Commerce Clause to abrogate a state’s sovereign immunity. See Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114, 1131 (1996). The Eleventh Amendment doctrine mirrors other recent trends in (a) siding with the states over the national Congress, and (b) basing the decision on fairly formalist considerations. Although the Seminole Tribe decision overruled Union Gas v. Pennsylvania, 491 U.S. 1 (1989), Union Gas was itself but a plurality and of recent vintage. In reality the result in Seminole had long been the one obtaining under the Eleventh Amendment. Nonetheless, there is a wide body of literature that would read the Eleventh Amendment differently than does the Supreme Court. See, e.g., Akhil R. Amar, Of Sovereignty and Federalism, 96 YALE L.J. 1425, 1473-84 (1987) (arguing that the Eleventh Amendment embodies no general principle of state sovereign immunity); John J. Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation, 83 COLUM. L. REV. 1889, 1890 (1983) (labeling the Court’s interpretation of the Eleventh Amendment “repressive and historically inaccurate”); Jackson, supra note 26, at 500 (“The great weight of contemporary scholarship concludes that the Eleventh Amendment does not require that states enjoy a jurisdictional immunity from suits in federal courts by their own citizens on federal claims . . . .”).

Act, to the extent those provisions were applied to state employees.\textsuperscript{190} The strategy of \textit{National League of Cities} was to carve out an area of state autonomy—of traditional state functions—in which Congress could not interfere with the essential attributes of state sovereignty.\textsuperscript{191} The \textit{National League of Cities} decision did not develop comprehensively the reason why states should be left alone, although it seems clear the Court felt that states should be able to deliver certain basic services to their citizens.\textsuperscript{192}

\textit{National League of Cities} was quickly overruled, however, both because of serious structural flaws in the theory of that case, and on the basis of an odd assessment of the role of the states in the political process. After a decade of trying to tell a "traditional" state function from one that was not, in \textit{Garcia v. San Antonio Metropolitan Transit Authority}\textsuperscript{193} the Court threw in the towel, holding that insofar as the states sought protection from direct congressional regulation, the proper forum was Congress, and not the courts.\textsuperscript{194} In part the \textit{Garcia} Court recognized that it is impossible and perhaps also unwise to attempt to identify a list of "traditional" state functions.\textsuperscript{195} Times change, and state regulatory authority must change with them. Similarly, the Court candidly faced up to the fact that the con-

\begin{footnotesize}
\textsuperscript{190} See \textit{id.} at 852.

\textsuperscript{191} See \textit{id.} ("We hold that insofar as the challenged amendments operate to directly displace the State's freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3.").


\textsuperscript{193} 469 U.S. 528 (1985).

\textsuperscript{194} See \textit{id.} at 556 (holding that although federal action is limited by the position of the states in our federal system, "the political process ensures that that laws that unduly burden the States will not be promulgated").

\textsuperscript{195} See \textit{id.} at 546-47 ("We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional.' Any such rule leads to inconsistent results at the same time that it deserves principles of democratic self-governance, and it breeds inconsistency precisely because it is divorced from those principles.").
\end{footnotesize}
institutional plan clearly envisages that the states only retain that authority not delegated to Congress. Thus, the correct constitutional question is not whether Congress has infringed state authority, but whether Congress in fact possesses the authority to regulate in a given area under the Commerce Clause (or any other power). Finally, the Court concluded that in the constitutional scheme the states are protected against burdensome legislation by their representation in Congress. Thus, complaints about congressional regulation should be directed there. On this last point the Court essentially deemed challenges of congressional infringement of state autonomy nonjusticiable.

Although there are aspects of the Garcia decision that make sense, it is deeply flawed in some other ways. First, while the Court correctly explained the workings of the constitutional plan with regard to the division of authority between the state and national governments, that explanation is troublesome given the Court's own abdication of its responsibility to decide whether Congress has exceeded the bounds of its enumerated powers. Garcia was decided even before Lopez, and as such any reliance on the existence of judiciously enforceable limitations on Congress's delegated powers was hardly credible. Second, and more troubling, the Court's claim that state interests were adequately protected in the political process was highly idealized and likely bad political science. Numerous

---

196. See McCoy & Friedman, supra note 9, at 97 ("If constitutional federalism is to survive, the overruling of National League of Cities in Garcia must be seen as a return to the delegation construct. If the constitutionally based federal structure is to have meaning, it must find an accommodation of interests by resolving questions with reference to Congress's delegated powers.").

197. See Garcia, 469 U.S. at 556 (noting that although the states occupy a special position that must be recognized in Congress's Commerce Clause authority, that authority is limited only by the political process inherent in the federal system).

198. See id. at 546 ("Any rule of state immunity that looks to the 'traditional,' 'integral,' or 'necessary' nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes."); id. at 550 ("In short, we have no license to employ freestanding conceptions of state sovereignty when measuring congressional authority under the Commerce Clause."); id. at 552 ("State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.").
commentators have questioned the soundness of the Court's reasoning. 199

Garcia was not the last word, however. Although it has not been explicitly overruled, it apparently has been so tacitly, 200 in part by new cases that are more forthcoming regarding the benefits of federalism. The first case was New York v. United States, 201 which held that Congress may not commandeer the regulatory authority of the states to further national purposes. 202 The New York decision, following suggestions in other opinions, began to articulate some of the reasons for preserving state autonomy in the federal system: the accountability of states to their citizens, democracy operating best at the lowest level of government, the ability of states to serve as regulatory innovators, and the corrupting effect of consolidated national authority. 203 New York was explicitly followed in the


200. See Chemerinsky, supra note 17, at 515 (arguing that the Court later rejected Garcia's conclusion); Entin, supra note 69, at 637 (arguing that subsequent cases "suggest the continuing allure of Court-policed federalism doctrines"); Kramer, supra note 5, at 1486 n.3 (suggesting that the Court's recent decisions may pose a serious threat to Garcia).


202. See id. at 183.

203. See id. at 169 ("[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disappro, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation."); id. at 187 ("[T]he Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day."); see also Gregory v. Ashcroft, 501 U.S. 452, 457-60 (1991) (cataloguing the benefits of federal structure); Garcia, 469 U.S. at 575-76 (Powell, J., dissenting) (discussing how state and local governments are better able than the national government to perform activities that affect the everyday lives of citizens); id. at 578-79 ("State and local officials of course must be intimately familiar with [traditionally local] services and sensitive to their quality as well as cost. Such officials also know that their constituents and
recent decision Printz v. United States, which held that the "anti-commandeering" principle of New York applies as well to state executive officials. Notice, however, that these opinions do not assess the relative merit of exercising national or state authority. Rather, they simply fashion rules to protect state authority.

Despite their rhetorical significance, the impact of the New York line of cases is extremely limited. The rule is not without benefit, however. It frees a state up to perform its own regulatory and administrative tasks while Congress pursues its own agenda. But the New York rule applies only when Congress regulates states directly, a relatively rare event. Moreover, given the broad power in Congress to preempt and buy state compliance, as well as the largely unsupervised breadth of Congress's substantive powers, these cases taken as a whole recognize some, but little, value in federalism.

***

In sum, constitutional doctrine undervalues federalism. National power has been expanded enormously, with state regulatory autonomy concomitantly narrowed. The cases for the most part provide no coherent theory of when national authority may be exercised, nor do they display much in the way of understanding what values might support a respect for state authority. In the one area in which the Court has any theory of national authority (the dormant commerce cases), the primary actor is the judiciary itself, and the impact of that judicial policy could be devastating to state autonomy. Curiously absent from the doctrine of federalism is any assessment of the specific weight of state interests, any understanding of when

the press respond to the adequacy, fair distribution, and cost of these services. It is this kind of state and local control and accountability that the Framers understood would insure the vitality and preservation of the federal system that the Constitution explicitly requires.

204. 117 S. Ct. 2365 (1997).

205. See id. at 2384. At issue in Printz was a provision of the federal gun control legislation commonly known as the Brady Bill that required state and local law enforcement officials to conduct background checks on those purchasing handguns. See id. at 2369 (presenting the question of the constitutionality of the Brady Bill). This requirement of federal law was held invalid because it conscripted state and local officials to administer a federal program. See id. at 2384 (stating that the mandates of the Brady Bill were "incompatible with our constitutional system of sovereignty."). Professors Inman and Rubinfeld suggest that Printz "overturned the use of unfunded mandates on the states." Inman & Rubinfeld, supra note 9 (manuscript at 12 n.13). This may overread Printz, but it is an intriguing perspective.
national authority properly is exercised, or any attempt to balance state and national interests in a theoretically coherent fashion.

II. CENTRIPETAL FORCES

The doctrinal tour in Part I establishes that the Supreme Court's federalism decisions have had a nationalizing effect. But the Court is not necessarily leading; it also is mirroring, or even following, events of much larger scope. The process of centralization is occurring in many of the federal democratic countries of the world, such as Australia and Germany. Similarly, the forces at work in regional organizations such as the European Union are operating to displace national authority in many areas. Some hint of the same process has just begun to emerge under the North American Free Trade Agreement (NAFTA). Globally, it is already clear that adherence to the new World Trade Organization (WTO) which replaced

206. Even as centripetal forces operate to centralize authority, similar forces are permitting states to operate more vigorously in areas once reserved to the national government, such as foreign relations. See Julie Blase, Is U.S. Foreign Policy in the Post-Cold-War World Still Foreign? How U.S. States Are Developing Their Own Foreign Policy 3-4 (1997) (unpublished manuscript, on file with author) (discussing low-level foreign policy operating across the Texas/Mexico border).

207. See supra note 29 and accompanying text (discussing the trend toward centralization).


210. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF
the General Agreement on Tariffs and Trade (GATT),\textsuperscript{211} will have the effect of moving some regulatory authority to the national and global level.\textsuperscript{212}

This Part describes the centripetal forces\textsuperscript{213} that account for the tendency toward centralization of regulatory authority. The centralizing forces are not the same in every country, or under each regional organization or international agreement.\textsuperscript{214} Differ-

\begin{flushright}
\textsc{the uruguay round} vol. 1 (1994), 33 I.L.M. 1125 (1994).
\end{flushright}


\textsuperscript{213} There are similar centrifugal forces that move regulation to the lowest level of government. \textit{See} Calabresi, supra note 9, at 766-69 (detailing "centrifugal and devolutionary forces"); Jonathan R. Macey, Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism, 76 VA. L. REV. 265, 274-90 (1990) (discussing why Congress leaves some regulatory matters to the states). For this reason, much of the everyday work of governance—police, fire, education—is left to state and local governments. Even as to these matters, however, there is federal intervention. \textit{See} Some Say “Thanks Anyway” to Federal Police Funding, PITTSBURGH POST-GAZETTE, Sept. 10, 1997, at S1 (describing funding requirements built into federal police force grants); Students Put to Test: Clinton proposes national education standards, NEWSDAY, Sept. 9, 1997, at A23 (discussing president's proposal for national tests to measure education standards).

\textsuperscript{214} \textit{See}, e.g., George A. Zaphiriou, Unification and Harmonization of Law Relating to Global and Regional Trading, 14 N. ILL. U. L. REV. 407, 418 (1994) (characterizing the European Union as quasi-federal, but NAFTA as largely contractual). It is obvious that as some democratic government federations are centralizing, still others (albeit without, or with less well-established, democratic traditions) are splitting apart. Perhaps the most tragic example is the 1991 demise of Yugoslavia. \textit{See generally} SABRINA P. RAMET, NATIONALISM AND FEDERALISM IN YUGOSLAVIA, 1962-1991 (2d ed. 1992) (exploring the reforms which lead to the fall of Yugoslavia's centralized government and the rise of a international "balance-of-power" system); YUGOSLAVIA, A FRACTURED FEDERALISM (Dennison Rusinow ed., 1888) (focusing on the feasibility of a multinational community in an age of nationalism).
ences in culture and national governmental structure suggest that change will occur for different reasons, and in different ways. The primary, but not exclusive, focus here is on the United States.

A. HISTORY

Without question, one of the forces underlying the shift in power from the states to the national government has been widespread discontent with the choices made by the states at some critical moments in American history. Calhoun’s nullification movement in response to the tariff, slavery, the Civil War followed by Reconstruction, Jim Crow, and the struggle over civil rights are all events in which southern states made choices that ultimately led the national government to take power from the states. But the South is not alone: throughout history the states seem to have been hard at work earning a reputation that they are hostile to civil liberty and favor parochial interests. Much of this conduct has vindicated James Madison’s intuitions about factions operating at the state level.

Repeated reactionary state conduct has had its effect on the American psyche, leaving some Americans—particularly elites—with the idea that problems are best solved at the national level and states are not to be trusted. It is difficult to know the precise weight of these feelings in terms of their nationalizing influence, or whether the trend can be reversed. Certainly, the Fourteenth Amendment and much civil rights

---


216. See Chemerinsky, supra note 17, at 499-501 (making the point that federalism is associated with conservatism); Shapiro, supra note 215, at 55-56 (discussing state treatment of individual and group rights).

217. See The Federalist No. 51, at 358-59 (James Madison) (Benjamin F. Wright ed., 1961) (“[I]n exact proportion as the territory of the Union may be formed into more circumscribed Confederacies, or States, oppressive combinations of a majority will be facilitated; the best security, under the republican forms, for the rights of every class of citizens, will be diminished; and consequently the stability and independence of some member of the government, the only other security, must be proportionally increased.... It can be little doubted that if the State of Rhode Island was separated from the Confederacy and left to itself, the insecurity of rights under the popular form of government within such narrow limits would be displayed by such reiterated oppressions of factious majorities that some power altogether independent of the people would soon be called for by the voice of the very factions whose misrule had proved the necessity of it.”).
legislation has served to reduce state authority, \(^{218}\) reflecting a national consensus that at least when individual rights are at stake the correct level of government is the national one.

Recent devolutionary trends suggest greater faith in state government, but the signals are decidedly mixed. For example, the devolution accompanying welfare reform may reflect the failure of a national consensus about welfare, in which the states merely are beneficiaries of widespread national indifference. \(^{219}\) Moreover, much of the devolutionary legislation is "field office federalism," in which the national government dictates the terms of the transfer of power and retains substantial power to see that its will is done. \(^{220}\) In an important article, Edwin Rubin and Malcolm Feeley distinguish between true federalism and the decisions of an all-powerful national government to decentralize certain functions. \(^{221}\) Given the conditions attached to the transfer of power in recent legislation, it is at least plausible to understand what is happening in terms of the latter model, i.e., that the current trend toward devolution is a national decision to transfer some control to the states in limited areas, not true federalism.

B. TECHNOLOGICAL ADVANCE

Technology brings us together, but it also tends to centralize the authority that governs us. Much of the doctrine discussed in Part I was fashioned to deal with technological advances in transportation, communications, industrialization and the like. National industrialization sparked the transformation of the commerce power. \(^{222}\) Transportation develop-

\(^{218}\) See Shapiro, supra note 215, at 55-56 ("[The Bill of Rights] most significant use since the adoption of the Fourteenth Amendment has been to limit the exercise of state power against unpopular individuals or groups."); id. at 55-56 nn.146-53 (providing a useful catalogue of Fourteenth Amendment cases and congressional civil rights legislation which have served to limit state authority).


\(^{220}\) See supra note 9 (citing example).

\(^{221}\) See Edward L. Rubin & Malcolm Feeley, Federalism: Some Notes on a National Neurosis, 41 UCLA L. Rev. 903, 910-11 (1994) (classifying federalism as a structuring principle and decentralization as a managerial concept). Their article is discussed at length infra Part III.

\(^{222}\) See Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 583 (1985) (O'Connor, J., dissenting) ("Industrialization, coupled with advances in transportation and communications, has created a national economy in which
ments have given rise to seminal dormant Commerce Clause cases, just as new communications technology has placed strains upon existing doctrines, such as the rules governing interstate taxation.

None of this is a coincidence. These doctrinal changes mirror what is happening in the nation and world at large. The conventional story sees the New Deal response to the Great Depression as forcing the Supreme Court's hand, leading to greater doctrinal tolerance for nationalization. Although the New Deal may have been the immediate catalyst, the forces at work ran much deeper. Rapid advances in communications, transportation, and industrialization brought us together as a nation and forced reconsideration of the rules by which we governed ourselves. In 1787 it took days to travel from Boston to Philadelphia. Today the same journey takes less than two

virtually every activity occurring within the borders of a State plays a part. The expansion and integration of the national economy brought with it a coordinate expansion in the scope of national problems. This Court has been increasingly generous in its interpretations of the commerce power of Congress, primarily to assure that the National Government would be able to deal with national economic problems.

223. The "explosion in interstate truck traffic" at the expense of railroads furnishes one example. See Tribe, supra note 50, at 419-22. Tribe suggests that this development was one of the factors that prompted more rigorous judicial scrutiny of state transportation safety laws in cases like Kassel and Raymond. See id.

224. See, e.g., Goldberg v. Sweet, 488 U.S. 252, 260-65 (1989) (holding that a tax imposed on the gross charge of interstate telephone calls was fairly apportioned, despite appellants' contention that precedent required an apportionment formula based on mileage or some other geographic division of individual telephone calls). The Court remarked that such a traditional formula would "produce insurmountable administrative and technological barriers" because modern communications technology makes it "virtually impossible to trace and record the actual paths taken by the electronic signals which create an individual telephone call." Id. at 255, 264-65. See also Christina R. Edson, Quill's Constitutional Jurisprudence and Tax Nexus Standards in an Age of Electronic Commerce, 49 TAX LAW. 893, 893 (1996) (discussing how advances in technology have challenged the tax concept "jurisdiction to tax").

225. Indeed, for these reasons it is becoming difficult to tell which areas of regulation relate to foreign affairs, and which are domestic. See Goldsmith, supra note 125 (manuscript at 34-41).

226. The architect of the conventional wisdom was Edward Corwin. See Edward S. Corwin, COURT OVER CONSTITUTION 123-24 (1938) (arguing that Jones & Laughlin presented an overnight constitutional revolution which allowed Congress to regulate productive industry). For a critique of Corwin's position, see Barry Cushman, A Stream of Legal Consciousness: The Current of Commerce Doctrine From Swift to Jones & Laughlin, 61 FORDHAM L. REV. 105 (1992) (contending that Jones & Laughlin was congruent with the Court's modern jurisprudence).
hours, and the trip from Boston to Tokyo itself takes less than one day. Similar advances obviously underlie globalization.

It only seems evident that as technology permits us to interact across distances on a regular basis, rules become necessary to regulate that interaction. The greater our interaction, the greater our need for regulation.\textsuperscript{227} Law follows society, it does not precede it. Nationalizing law followed national interaction facilitated by nationalizing technology, and globalizing law inevitably will follow on the heels of even greater technological advancement.\textsuperscript{228}

C. THE DEATH OF LEGAL FORMALISM

Just as technology forced the hand of doctrine, doctrinal collapse itself served as a nationalizing force. As the country expanded and interstate traffic increased, the courts were hard put to retain old categories that gave definition to competing state and federal regulatory authority.\textsuperscript{229} At one time the states' "police power" and the national government's "commerce power" were each thought to be exclusive. Once this division broke down, courts attempted to assign to the national government the task of governing when "uniformity" was necessary, while local governments were left in charge when "diversity" was appropriate. The courts subsequently tried, through a series of formal dichotomies, to distinguish "direct" from "indirect" regulation of commerce, and things in the "stream of commerce" from those without. Today we still try to tell what has a "substantial effect" on commerce from what does not.

Doctrinal categories repeatedly crumble in the wake of nationalizing advances. The regulatory world simply cannot be

\begin{table}
\centering
\begin{tabular}{|c|c|c|}
\hline
\textbf{227.} & See Kramer, supra note 5, at 1497 (arguing that technological developments "made national solutions necessary for problems that had previously been handled at the state level"); Lessig, supra note 9, at 137-144 (arguing that integration of social and economic force results in changes in the scope of federal and state power). \\
\hline
\textbf{228.} & Technology also can serve as the impetus for national or global rules, to the extent it yields information that calls for or permits regulation, such as in the area of environmental protection. See Robert W. Hahn & Kenneth R. Richards, The Internationalization of Environmental Regulation, 30 HARV. INT'L L.J. 421, 425, 433 (1989) (arguing that greater scientific consensus about environmental problems increases the likelihood of international agreements). \\
\hline
\textbf{229.} & The various formal tests employed by the Court are discussed supra text accompanying notes 55-63. \\
\hline
\end{tabular}
\caption{Notes and References}
\end{table}
explained, let alone cabined, by outdated and unworkable doctrinal boundaries. As these categories have collapsed, power has been consolidated nationally, which itself is a direct function of the constitutional plan. The constitutional plan enumerates Congress's powers, leaving the residue to the states. Doctrinal limitations were an attempt to cabin growing national authority, preserving a realm for state regulation. Once the doctrinal boundaries between state and national authority failed, Congress's powers grew larger, and the residue evaporated.

Formalism may have been an illusion, but it was one that permitted the courts to hold certain state functions immune from national intervention. As it became gradually impossible to separate the police function from commerce, the courts acquiesced in the transfer of power to Congress. Everything was commerce, and Congress controlled commerce. Hence, state power dried up.

D. JUDICIAL DEFERENCE TO POLITICAL ACTORS

Accompanying the death of formalism was the judiciary's retreat from review of most matters touching on the economy. One lesson the courts seemed clearly to learn from the New Deal struggle was that they should keep their hands off of economic legislation. Following the New Deal, judicial deference to political decisions in the economic realm became the norm. Because many of the sharpest nationalizing forces were eco-

230. See Lessig, supra note 9, at 161-63, 176-77 (discussing the effects of legal culture and politicization on the Court's formal tools); Kramer, supra note 5, at 1497 (arguing that integration decreases the utility of formal distinctions).

231. See supra note 24 and accompanying text.

232. See Lessig, supra note 9, at 154-55 (noting the partial collapse of limits on the commerce power imposed to preserve a sphere of state regulatory authority).

233. See Alfred C. Aman, Jr., Administrative Law in a Global Era: Progress, Deregulatory Change, and the Rise of the Administrative Presidency, 73 CORNELL L. REV. 1101, 1157-58 (1988) (arguing that courts continue to apply the New Deal doctrine of deference to agency decisions in economic contexts); Steven H. Kropp, Reflections on Law, Economics, and Policy in Public Sector Labor Relations in Canada, the United States, and the United Kingdom, 27 LAW & POL'Y INT'L BUS. 825, 849 (1996) (book review) (“Ever since the New Deal's Wagner Act was upheld through a series of cases as being within the federal power to regulate interstate commerce, the Court has broadly deferred to federal economic regulation.”).
onomic, judicial patrolling of the boundaries between nation and state became rather lax. \(^{234}\)

For a very brief time this judicial deference over the economic realm worked to the advantage of the states. As Stephen Gardbaum has pointed out, in the period immediately following the New Deal, courts deferred to both national and state political actors. \(^{235}\) This explains, for example, the very deferential dormant Commerce Clause decision in *South Carolina v. Barnwell*. \(^{236}\) Eventually, however, other nationalizing forces took over. Although courts continued to defer to the national political authorities, deference toward state authority waned, \(^{237}\) creating even more of a movement towards the center.

Although deference to political actors has had its greatest impact in the economic realm, the same phenomenon presented itself in the area of civil rights. Only here, the deference was to national actors, \(^{238}\) and the source of the deference was the states’ own conduct. The states, by the 1950s and 1960s, had sullied their reputations as protectors of civil rights enough that courts were glad to defer to national decisionmakers. \(^{239}\) As

\(^{234}\) See Kramer, supra note 5, at 1497-98 (arguing that between 1937 and 1942, “for all practical purposes the era of judicially enforced federalism came to an end”); Lessig, supra note 9, at 154 (arguing that the New Deal “essentially ended judicially enforceable limits in the most important federalism domains”).

\(^{235}\) See Gardbaum, New Deal, supra note 50, at 509-10 (describing the courts’ approach as less nationalist).

\(^{236}\) 303 U.S. 177 (1938). For a discussion of this case see supra text accompanying notes 136-138.

\(^{237}\) See Eule, supra note 124, at 425-26 & n.4 (noting a resurgence in decisions concerning the validity of state regulations beginning in the mid-1970s).

\(^{238}\) See, e.g., Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968) (holding that Congress has the power under the Thirteenth Amendment to define slavery and to enact effective legislation on the basis of its definition); Katzenbach v. Morgan, 384 U.S. 641, 651 (1966) (holding that Congress has the power to determine “whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment”); United States v. Mississippi, 380 U.S. 128, 138, 140-41 (1965) (upholding the Civil Rights Act of 1960); United States v. Raines, 362 U.S. 17, 26 (1960) (upholding the Civil Rights Act of 1957). But see City of Boerne v. Flores, 117 S. Ct. 2157 (1997) (relying on concerns about division between state and national authority to invalidate the Religious Freedom Restoration Act as an impermissible exercise of Congress’s power under section 5 of the Fourteenth Amendment).

\(^{239}\) See SHAPIRO, supra note 215, at 52 (“[T]he states do not appear to have served as a bulwark of individual and group rights and interests.”); MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW 232-71 (1994) (discussing states’ resistance to Brown v. Board of Education in the period 1955-1961).
the *Heart of Atlanta Motel* and *Katzenbach v. McClung* decisions made clear, the line between economic and civil liberties regulation was often a thin one, and in either event the courts were ready to defer to national actors.

E. THE POLITICAL ECONOMY OF CENTRALIZATION

The forces identified thus far demonstrate that courts often would defer to national authority, creating incentives for individuals and entities to seek national regulation. With those incentives in place, some groups certainly were willing to move their rent-seeking efforts to the national regulatory forum. And the legislators at work there were only too glad to accommodate. On both the demand and supply side of legislation, regulatory battles increasingly were fought out in Washington, D.C., instead of in the fifty states.

Legislative losers never being content to let bygones be bygones, it became commonplace for those who had not prevailed in the state legislatures to leapfrog over their head to Con-

---

240. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964) (holding that the Civil Rights Act of 1964, which prohibited racial discrimination in places of public accommodation affecting interstate commerce, was a valid exercise of the commerce power).

241. 379 U.S. 294, 304-05 (1964) (upholding the Civil Rights Act of 1964 as applied to a restaurant solely because it received food which had moved in interstate commerce).


243. For an elaboration of the public choice argument about why this is so, see Reiner Eichenberger, *The Benefits of Federalism and the Risk of Overcentralization*, 47 KYKLOS 403, 413 (1994) (arguing that incentives for delegation of tasks to higher levels of government can result in overcentralization); see also WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 54-56 (2d ed. 1995) (discussing supply and demand patterns in legislative markets). *See generally* DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* (1991) (examining how public choice influences legislation and policy). Even though it "often" makes sense to play out regulatory battles in Washington, D.C., this is not always the case, as recent regulatory challenges to FCC rules governing phone competition make clear. *See* Iowa Util. Bd. v. FCC, 120 F.3d 753, 821 & n.59 (8th Cir. 1997) (vacating FCC pricing rules and "pick and choose" rule promulgated pursuant to the Telecommunications Act of 1996); California v. FCC, Nos. 96-3519 et al., 1997 WL 476529, at *1 (8th Cir. Aug. 22, 1997) (holding that the FCC exceeded the scope of its jurisdiction in issuing dialing parity rules); Competitive Telecomm. Ass'n v. FCC, 117 F.3d 1068, 1075 n.5 (8th Cir. 1997) (vacating the FCC's attempt to regulate temporary recovery of access charges for intrastate calls).
gress. These groups had every incentive to do so, hoping for a more favorable outcome. But then, why even bother with the state legislatures? Over time it became clear that it simply was much easier to fight a regulatory war in one central location, rather than in fifty state fora. Many groups with public interest causes—environmentalism, civil rights, consumerism—found a more sympathetic ear in Washington, whether or not the specific subject matter at issue actually was appropriate for national regulation.

It was not only those who sought regulation that preferred Washington. Regulated entities ironically also might prefer regulation to emanate from the center. Even if in some instances the regulatory scheme that emerged from Congress was stricter than what the states might have adopted, the transaction costs of fighting fifty legislative battles, only to comply with fifty different legislative schemes, made it attractive to submit to national control.

On the supply side, national politicians were only too glad to accommodate those who came to them asking for regulatory assistance, further displacing state regulatory authority. Campaign support follows those with regulatory authority, as do national media attention and increased stature. The vast cost of national office on today’s market is emblematic of the extent to which regulatory authority has shifted to the national government. The money has both followed the importance of the office and had a hand in creating it.

244. See Macey, supra note 213, at 271-73 (identifying four reasons why interest groups seek federal laws). For a critique of Macey’s work in this regard, see Kramer, supra note 5, at 1521-22.

245. This is Macey’s first factor. See Macey, supra note 213, at 271 (claiming that “[i]t is simply less expensive to obtain passage of one federal statute than to obtain passage of fifty state statutes because a different state legislature must be lobbied in each state”).

246. See id. (“Even if interest groups would benefit marginally by having a myriad of local statutes, the benefits may not outweigh the transaction costs associated with obtaining passage of all those statutes.”).

247. See id. at 269-90 (arguing that “politicians maximize the aggregate political support that they receive from interest groups by supplying the legal rules that result in the highest net receipt of support”).

248. Similar public choice analysis can influence the formation of international agreements. National leaders will pursue those agreements when the benefit to them exceeds any costs. See Hahn & Richards, supra note 228, at 436 (arguing that short-term political benefits influence the likelihood of achieving an international environmental agreement).
In addition to interest group politics motivating federalization, there are "apple pie" issues that legislators cannot resist moving to the federal arena. Perhaps the most common such example in recent years has been crime. Critics of Congress's apparent zeal to federalize what had been seen as a local matter are numerous. Nonetheless, members of Congress are quick to be seen as addressing matters that concern constituents, and hesitant to be characterized by an opponent as "doing nothing" about such matters. Thus, there is regulation of some matters that makes little or no sense coming from the national government.

F. TRADE: THE UNGOVERNABLE ENGINE

Perhaps no force has played or is likely to play more of a role in the future in centralizing regulatory authority than trade, both domestic and international. Local legislation is the antithesis of free trade. Trade thrives on uniformity ("harmonization" in global-speak). In part, trade law is designed to seek out and eliminate protectionist legislation—those local laws designed specifically to give insiders trading advantages over outsiders. The problem extends far beyond protectionist legislation, however. State laws enacted with protectionist motive in order to protect public safety, health, and welfare nonetheless are likely to run afoul of free-trade principles if they diverge from standards adopted elsewhere.

249. See DANIEL A. FARBER ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 965 (1993) (arguing that members of Congress will legislate on "consensual" issues, inter alia, in order to be reelected).


251. A good example of this phenomenon is the law at issue in Lopez. See supra text accompanying notes 74-82.


254. For a strong and strident statement to this effect, discussing the ef-
Indeed, any state or local law, whatever its purpose, runs the risk of imposing novel requirements that inhibit the easy movement of goods and people.\textsuperscript{255}

Increasingly, trade law is designed not only to ferret out protectionist legislation, but also to eliminate regulatory differences of all sorts that inhibit trade.\textsuperscript{256} Today, judicial interpretation of Article Thirty of the Treaty of Rome,\textsuperscript{257} new WTO accords (such as those on services, and sanitary and phytosanitary regulations),\textsuperscript{258} and recent United States Supreme Court dormant

\textsuperscript{255} Larry Lessig makes the valuable point that the more integrated the economy, the more significant are state regulations that interfere with uniformity. See Lessig, supra note 9, at 143. Within the U.S. economy, we may expect to see collisions between state law and trade law in the areas of securities, banking, insurance, and antitrust. See Friedman, Global Village, supra note 254, at 1448-53. There has been some suggestion that the promise of trade retaliation will lead the federal government to pressure states to change laws that international organizations such as the WTO consider an impediment to trade. See Nimmer, supra note 254, at 1418 n.195 (quoting 140 CONG. REC. S15302 (daily ed. Dec. 1, 1994) (statement of Sen. Kempthorne)).

\textsuperscript{256} Even foreign policy disputes are framed in terms of trade. See, e.g., EU, U.S. Work Toward Cuba Sanctions, TENNESSEAN, Apr. 13, 1997, at 16A (discussing the Helms-Burton Act, which the EU contends violates WTO rules but the United States characterizes as a foreign policy dispute).

\textsuperscript{257} Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 30, 298 U.N.T.S. 11. See Case 8/74, Procureur du Roi v. Dassonville, 1974 E.C.R. 837, 852 (holding that Article 30 prohibits "trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade"). But see Joined Cases 3-267/91 & C-268/91, Keck and Mithouard, 1993 E.C.R. I-6097, 6131 (holding that national provisions restricting certain selling arrangements do not hinder trade "so long as those provision apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States"). See generally Gardbaum, New Deal, supra note 50, at 518-19 (discussing Dassonville and Keck).

commerce decisions\textsuperscript{259} are all aimed at routing out regulatory differences that make it more difficult for free trade to operate. Any law that has the effect of discriminating against trade is suspect, even if not protectionist. These agreements all purport to respect "appropriate" state regulation of the health, safety, and public welfare of citizens. But what is appropriate often is defined in terms of standards that have obtained international or regional acceptance, with the burden of proof resting on governments that seek to impose stricter requirements.\textsuperscript{260} Thus, free trade levels the protection states may offer, sweeping away innovative or stringent measures.\textsuperscript{261}

More and more the police authority of governments runs afoul of free-trade principles, including in areas traditionally believed to be the domain of more localized government. A classic case abroad is the recent litigation concerning a French

\textsuperscript{259} Dormant Commerce Clause decisions are discussed supra text accompanying notes 124-187. For a comparison of the dormant Commerce Clause with the GATT legal system, see Daniel A. Farber & Robert E. Hudec, Free Trade and the Regulatory State: A GATT's-Eye View of the Dormant Commerce Clause, 47 VAND. L. REV. 1401 (1994).

\textsuperscript{260} See Farber & Hudec, supra note 259, at 1410 (arguing that emphasis on international standards can pressure countries with stricter regulations to "harmonize down"). As anyone familiar with scientific uncertainty can appreciate, burdens of proof may well be determinative here. See DANIEL A. FARBER, ECO-PRAGMATISM (forthcoming 1998) (on file with author); see also Curtis A. Bradley & Jack L. Goldsmith, Customary International Law as Federal Common Law: A Critique of the Modern Position, 110 HARV. L. REV. 815, 846-47 (1997) (arguing that the norms of the international community, as interpreted by federal courts, can transfer constitutional power away from the states).

\textsuperscript{261} Concerns about the impact of WTO decisions on environmental and health laws dogged implementation of the WTO. See Farber & Hudec, supra note 259, at 1409-11 (discussing criticisms of present and prospective GATT rules); see also Schultz, supra note 212, at 3-5 (discussing tension between trade rules and environmental rules).

The first WTO panel decision is an example of the threat to domestic health, safety, and public welfare regulations in the face of free-trade challenges. At issue was a U.S. regulation designed to eliminate smog-producing products from gasoline. The law required domestic refiners to see that gasoline in 1995 was 15% cleaner than that sold in 1990. The EPA regulation applied a statutory baseline to foreign producers because of concerns about data availability and enforcement, but the WTO panel held against the regulation on the ground that it discriminated against foreign producers, and was not the least GATT-inconsistent measure available to protect United States health interests. See Dispute Settlement Panel Report on United States—Standards for Reformulated and Conventional Gasoline, 35 I.L.M. 274, 297-300 (1996). For a discussion of the political commentary on the case, see supra note 212.
law requiring the use of the native tongue in a number of contexts, including the marketing of goods.\textsuperscript{262} Although it is easy to see how such a law can inhibit free trade, it also is easy to see why it makes sense to require goods to be marketed in the tongue spoken by purchasers. Yet rulings of the European Court of Justice call such laws into question.\textsuperscript{263} The effects of nationalizing forces based on free trade are felt in the United States as well. The Supreme Court is calling the tune on the financing of local solid waste facilities in the name of free trade,\textsuperscript{264} and even state alcoholic-beverage laws have been subject to regulation in accord with an international GATT panel decision.\textsuperscript{265}

III. VALUING FEDERALISM

Part II examines the centripetal forces that account for the centralization of regulatory authority. Occasional movement in the other direction, however, suggests some latent concern for local police legislation and local choice. In a recent decision, the European Court of Justice upheld French legislation prohibiting underprice selling in the face of a challenge on free-trade grounds.\textsuperscript{266} In that decision the court commented disapprov-

\begin{itemize}
\item \textsuperscript{263} Feld, supra note 262 (manuscript at 17-29), suggests that the Toubon Law is incompatible with such Article 30 cases as Dassonville, Case 8/74, Procureur de Roi v. Dassonville, 1974 E.C.R. 837, and the Casis de Dijon case, Case 120/78, Rewe-Zentral AG v. Bundesmopolverwaltung für Branntwein, 1979 E.C.R. 649.
\item \textsuperscript{264} See C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994) (holding that a local solid waste ordinance regulated and impermissibly discriminated against interstate commerce). \textit{Carbone} is discussed supra text accompanying notes 152-164.
\item \textsuperscript{265} See United States Measures Affecting Alcoholic and Malt Beverages, June 19, 1992, GATT B.I.S.D. (39th Supp.) at 206, 297-299 (1993) (concluding that various state laws according imported beverages less favorable treatment with respect to excise taxation, transportation, licensing, and price affirmation were inconsistent with Article III of the GATT). \textit{But see} U.S. CONST. amend. XXI, § 2 ("The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, \textit{in violation of the laws thereof,} is hereby prohibited.") (emphasis added).
\item \textsuperscript{266} See Joined Cases 3-267/91 & C-268/91, Keck and Mithouard, 1993
ingly on what it saw as the current fashion of challenging any undesirable national legislation on the basis of free trade. 267 Similarly, widespread popular concern about the centralizing trend of the European Union has caused at least some rhetorical fealty to the idea of "subsidiarity." 268 Here in the United States as well, some politicians claim to see increased support for devolution of authority to the states. 269 Many of these anti-nationalizing movements are native ones, reflecting unease among the people about the extent to which governmental authority is slipping from their grasp.

The thesis of this Article is that we might be more confident about the values federalism promotes, and thus value fed-

---

267. See id. at 6131 ("In view of the increasing tendency of traders to invoke Article 30 of the Treaty as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States, the Court considers it necessary to reexamine and clarify its case-law on this matter.").


268. "Subsidiarity" refers to the idea that governance should occur at the lowest level at which it is expedient. See Bermann, Subsidiarity and the EC, supra note 208 (explaining the principle of subsidiarity and its development); Edwards, supra note 29 (expressing skepticism about subsidiarity as a limiting principle, but arguing that it should be justiciable). One of the most compelling works on subsidiarity is George Bermann's contrasting of the principle's workings in European and United States federalism. Bermann concludes that although it will be difficult to make subsidiarity an operative principle in Europe, the effort should be made because there are fewer constraints on centralization in the European Union than there are in the United States. See Bermann, Taking Subsidiarity Seriously, supra note 208, passim.

269. See, e.g., William J. Clinton, Address Before a Joint Session of the Congress on the State of the Union (Jan. 24, 1995), in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES 1, 78 (1996) ("Taking power away from Federal bureaucracies and giving it back to communities and individuals is something everyone should be able to be for."); CONTRACT WITH AMERICA 66, 133, 165 (Ed Gillespie & Bob Schellhas eds. 1994) (claiming that "the ideas in the Contract are shared by the vast majority of the American people"—ideas which include devolution of welfare and reform of unfunded mandates).
eralism more, if we devoted more effort to assessing the tangible benefits of a federalist system. This Part seeks to introduce more rigor into the study and application of the principles of federalism, with the premise that there is value to federalism, albeit value that still needs to be quantified. After stage-setting observations about the baselines and perspectives that should be used to approach federalism questions, Part III catalogues some of the factors that ought to motivate federalism decisions. First, there is an enumeration of the very tangible questions the academy should be studying in order to assess the worth of leaving regulatory authority at the sub-national level. Intuition certainly suggests that governance at the state and local level will have its benefits. Next, there follows a discussion of the reasons political economists have developed for exercising power at the national level. If indeed there is worth in retaining state and local autonomy, then a way must be found to cabin national authority. Political economics provides a theoretical basis for addressing questions of national authority, but constitutional law remains relatively impervious to the lessons of political economy in this regard. The overarching point of this Part is that sound constitutional doctrine should take account of both sides of the federalism calculus.

A. PRELIMINARY THOUGHTS

In a provocative piece entitled Federalism: Some Notes on a National Neurosis, Professors Edward Rubin and Malcolm Feeley argue that there is no particular benefit to a federalist system. In making their argument, Rubin and Feeley compare federalism to a model of decentralized national decisionmaking. Federalism is a system in which government units actually have autonomy in decisionmaking, while in a decentralized system of government ultimate authority rests at the top, or center, and the center makes the strategic decision to delegate

270. Taking quite another approach, Vicki Jackson seeks to reconcile development of a pragmatically sound doctrine of federalism with “rule of law” concerns that require judicial decisions to be based on principle. See Jackson, supra note 100 passim. Jackson’s concern that rule of law considerations be satisfied bears some relationship to Lawrence Lessig’s critique of federalism doctrine as violating the Frankfurterian constraint, i.e., that the doctrine is so judicially malleable that it fails to constrain judges in any meaningful way. See Lessig, supra note 9, at 174-80.

271. See Rubin & Feeley, supra note 221, at 907 (“In our view, federalism in America achieves none of the beneficial goals that the Court claims for it.”).

272. See id. at 910-11.
decisionmaking authority or administration to the lower levels of government.\textsuperscript{273} Rubin and Feeley believe that, in effect (if not in design), our system more closely resembles the latter sort, and that in any event, most of what we commonly think of as the benefits of federalism are actually benefits of a decentralized system of national government.\textsuperscript{274} Thus, Rubin and Feeley argue that courts should not act to protect state autonomy but should allow centralization to go its happy way.\textsuperscript{275} In a sense Rubin and Feeley follow others in arguing that federalism questions should be nonjusticiable.\textsuperscript{276}

National Neurosis is one of the most important and provocative pieces written about federalism in recent years. The value of the piece lies in the aggressively critical line it takes toward extant doctrines of federalism. In a sense, Feeley and Rubin develop the best case that can be made against federalism. If they are right in much of what they say, then perhaps—as they indeed argue—we should not value federalism at all.\textsuperscript{277} There are some very real difficulties with the argument advanced in National Neurosis, however, despite the force and eloquence with which the argument is presented. First, although there is good sense to many of the points made in National Neurosis, the argument begins from an unrealistic baseline.\textsuperscript{278} Even if it were true that decentralization would better

\begin{footnotesize}
\begin{itemize}
\item 273. See id.
\item 274. See id. at 914-26.
\item 275. See id. at 909.
\item 276. See id. ("The Supreme Court should never invoke federalism as a reason for invalidating a federal statute or as a principle for interpreting it. . . . Our rationale for this conclusion, however, is not that states are capable of protecting themselves . . . but that there is no normative principle involved that is worthy of protection."). Professors Herbert Wechsler and Jesse Choper have made this argument quite explicitly. See Choper, supra note 22, at 171-259; Wechsler, supra note 22, at 558-60.
\item 277. What follows is in large part a response to Rubin and Feeley. For another such response, in many ways more thorough, see Jackson, supra note 100, at 54-69.
\item 278. Rubin and Feeley might disagree with this, arguing that the very first question on the table must be that of government structure. In a "sequel" to the Rubin and Feeley article, Edward Rubin argues forcefully that the question of allocation of governmental authority transcends any question of the benefits of federalism, for those benefits themselves assume the existence of certain political choices such as federalism. Thus, it makes no sense to argue, according to Rubin, that federalism furthers values such as "democratic participation" that are inherent in the Constitution, because the question of what values matter is one made by the political entities established by the Constitution. See Edward L. Rubin, The Fundamentality and Irrelevance of Fed-
\end{itemize}
\end{footnotesize}
achieve certain benefits than does federalism, federalism is the system that we (and many other countries and regional and global organizations) have had for a very long time. It is not easy to sweep away two hundred years of history. Federalism may be a historical artifact, but historical artifacts do not wither and die easily. Although Rubin and Feeley’s approach is a useful heuristic, as a practical matter, we do not now have a choice between the federalism we have and a system of unitary national authority, with the latter having the option to decentralize when it makes sense. The real choice is between the current trend of making federalism decisions in an ad hoc manner that tends to nationalize authority with no rhyme or reason, and a system in which there is some sense brought to the problem of allocating responsibility. The question that should have our attention is whether there are benefits that can be achieved within our system, and how we best can achieve them. National Neurosis surely contributes to that.

279. In making this point, I echo Richard Briffault and Dan Rodriguez. See Richard Briffault, “What About the ‘ism’?” Normative and Formal Concerns in Contemporary Federalism, 47 VAND. L. REV. 1303, 1348 n.161 (1994) (“Federalism, or, more accurately, the federal structure, just is. It does not need an argument. The structure exists and defines our government.”); Rodriguez, supra note 8, at 152-53 (emphasizing the centrality of federalism as an element of American constitutional ideology in response to Rubin and Feeley); see also Calabresi, supra note 9, at 787 (“Rubin and Feeley completely overlook the difference between our constitutionally mandated system of decentralization and a system like France’s where decentralization is merely a policy option easily reversed—a matter of temporary national legislative grace.”).

280. Rubin and Feeley concede that they do not see state boundaries being eroded anytime soon, but seem equally content for states, within those boundaries, to be mere administrative units of the national government. See Rubin & Feeley, supra note 221, at 951.

281. See, e.g., id. at 908-09 (“States fulfill the important governmental functions of facilitating decentralization . . . . Yet there is no policy reason why other subdivisions of the nation could not fulfill this function, or why state lines could not be redrawn on a functional rather than historical basis.”).

282. See Briffault, supra note 279, at 1349-53 (arguing that courts should focus on federal structure rather than on more nebulous questions of the norms of federalism); Rodriguez, supra note 8, at 153 (“The proper question is not: If we were starting from scratch and designing a system of government, would we construct the national government and the states and distribute power to them as the Constitution of 1787 does? Rather, it is: How does the existence of the fifty states construct the argument about the allocation of power?”).
discussion, though its arguments must be recognized as somewhat idealized.

Even where they see benefits in the existing structure, Rubin and Feeley are quick to deny that these are benefits of federalism. They attribute them instead to localism,283 as though the two can be so easily divided. As others, most notably Richard Briffault, have observed, many of the benefits of federalism actually occur at a lower level of government.284 Yet again it is important to keep straight the baseline from which we begin. There is no serious proposal to eliminate states and constitutionalize local government. Instead, under the system of government we actually enjoy, cities, counties, townships and the like all derive whatever authority they have from the nation-state system of federalism.285 Arguments about local government are important, and they may be useful in suggesting to states how they in turn should arrange their internal affairs. But it is important to bear in mind that all of this discussion occurs in the context of our actual federal system.

Moreover, even if we could adopt Rubin and Feeley's idealized system, it is less than clear that the system of decentralized authority is as rosy as it is painted. Rubin and Feeley devote virtually no time or thought to the problems that might accompany the system they describe. No political system is perfect. Political theory is in many ways the search for the second best. Given their approach, it is understandable that Rubin and Feeley would focus on federalism's flaws.286 A centralized sys-

283. See Rubin & Feeley, supra note 221, at 915-26 (arguing that public participation, citizen choice, state competition, and experimentation are benefits of decentralization rather than federalism).

284. See Briffault, supra note 279, at 1312-17 (suggesting that the small size and multiplicity of local governments allows them to advance the values of federalism more effectively than the states).

285. See Richard Briffault, Our Localism: Part I—The Structure of Local Government Law, 90 COLUM. L. REV. 1, 7 (1990) (“The local government is a delegate of the state, possessing only those powers the state has chosen to confer upon it. Absent any specific limitation in the state constitution, the state can amend, abridge or retract any power it has delegated, much as it can impose new duties or take away old privileges.”); Gerald E. Frug, The City As a Legal Concept, 93 HARV. L. REV. 1057, 1062-67 (1980) (discussing how federal and state law defines and limits cities’ power).

286. See, e.g., Rubin & Feeley, supra note 221, at 909 (“Federalism does not diffuse power in our system, but may actually act as an impediment to its diffusion.”); id. at 949 (“Federalism, as opposed to decentralization, acts as a constraint on our ability, as a nation, to achieve the policies we want, including policies of participation, local variation, and experimentation.”).
tem has its own possible difficulties, however, including agency problems, lack of local initiative resulting from overly centralized control, or the compounded cost of errors. 287

Indeed, the very tone of National Neurosis highlights a problem of perspective that taints much of the academic and popular discussion about federalism. There is a reason that the authors of National Neurosis, like many others, are quick to ignore the potential benefits of the American federalist system. That reason is history. It is commonplace that perspective determines how we see things, and how we see things influences how we think about them. Those who came of age with pictures of foaming segregationists cursing civil rights marchers, or African-American students trying to enter schools desegregated by order of national courts, are likely to be enamored of national authority and skeptical of leaving matters to the states to solve. 288 Nonetheless, there are those who look at the corrupting influence of interest groups and money in the national Congress, at the stasis that takes hold in that body, and at the clear loss of faith in democracy many in this country feel, and believe that there are disadvantages to overweening national authority—disadvantages that perhaps could be ameliorated by a vibrant federal system. 289 Caution requires that we consider federalism not only with a clear understanding of history,

287. See Jackson, supra note 100, at 56 (arguing that “a national government unhappy with decisionmaking in its centrally defined administrative units could simply reorganize the political boundaries of the provinces to create more compliant decisionmaking, or to isolate ‘troublemakers’”) (footnote omitted).

288. See Rubin & Feeley, supra note 221, at 916 (“Actual alignments are likely to depend on the correspondence of substantive policies. For example, the white-dominated governments of the southern states undoubtedly fostered the autonomy of white-dominated towns against federal intervention; on the other hand, the federal government was correspondingly more solicitous of black communities, at least during the Reconstruction and Civil Rights eras.”); see also Rubin, supra note 278, at 48 (“Ever since the South’s defeat, there has been an ongoing moonlight-and-magnolia, gone-with-the-wind, lost-but-glorious-cause mentality that conceals the deep and inherent racism behind the facade of nostalgia.”).

289. See, e.g., Linda Feldmann, Ballot Initiatives Rise As a Route Around Legislative Gridlock, CHRISTIAN SCI. MONITOR, Oct. 23, 1996, at 1 (discussing state ballot initiatives as a response to legislative gridlock); Judy Keen, States a Testing Ground for Campaign Finance Reform, USA TODAY, May 2, 1997, at 1A (“The states are the laboratories that will lead us to reform on Capitol Hill. . . . What’s happening in the states proves that people want reform. It proves reform works.”) (internal quotation marks omitted) (quoting Becky Cain, president of the League of Women Voters).
but with an equally clear understanding of the biases we bring to the problem.

Professional training also impacts perspective. Those trained in economics are likely to see efficiency as the only desired outcome, measuring systems of government against this norm just as they would measure competition between firms. On the other hand, those whose training has been in government and the law are likely to disdain the sole concern for efficiency, seeing other values that perhaps are not so easily measured, or values that appear incommensurable with concerns for efficiency.

Just as the discussion of baselines suggests we must begin somewhere, differing perspectives suggest we ought to be sensitive to where we begin. The starting point of analysis has an uncanny way of affecting its end. It ought to be our task to take these differing perspectives into account in assessing the American federal system. We ought to try to influence the workings of our federal system to avoid the negative aspects of parochialism while at the same time maximizing the advantages of localized democracy. We ought to care about efficiency, but also about values that are not so easily measured. When valuing federalism, we ought to try and take all values into account, doing our best to accommodate them.

290. See, e.g., DAVID W. BARNES & LYNN A. STOUT, CASES AND MATERIALS ON LAW AND ECONOMICS 1 (1992) ("While there are economists evaluating law from all political perspectives, many take the traditional or neo-classical perspective that allocates the benefits and burdens of a legal rule according to a single principle, economic efficiency."); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 23-24 (4th ed. 1992) (discussing efficiency as a norm in economic analysis of law).

291. See, e.g., Jane B. Baron & Jeffrey L. Dunoff, Against Market Rationality: Moral Critiques of Economic Analysis in Legal Theory, 17 CARDOZO L. REV. 431, 432 (1996) ("[W]e also have a range of preferences (and attributes and qualities) that markets cannot satisfy—preferences that are not self-interested, but other-regarding; preferences about our own preferences, as well as the public good. To submit these latter preferences to market trading—to speak of them in market rhetoric—is not just mistaken but ethically wrong, because it denies the reality of, and fails to nurture, the important aspects of our humanity that markets are incapable of expressing."); Gregory Scott Crespi, The Mid-Life Crisis of the Law and Economics Movement: Confronting the Problems of Nonfalsifiability and Normative Bias, 67 NOTRE DAME L. REV. 231, 234-37 (1991) (discussing the inadequacy of efficiency criteria).
B. THINKING ABOUT THE VALUES OF FEDERALISM

Valuing federalism means making a serious attempt to identify and measure the values on both sides of the federalist balance. As it happens, constitutional lawyers have spent a fair amount of time discussing the values of state autonomy, but political economists and other social scientists have done surprisingly little work testing these ideas to determine whether they actually bear fruit. On the other hand, political economists have developed fairly sophisticated arguments as to why centralization is efficient in certain circumstances, yet constitutional lawyers have made little effort to apply this theoretical understanding to real federalism problems. Looking first to the benefits of state decisional autonomy, and then to the arguments for nationalization, this section offers an agenda for further study and a plea for better understanding of the values of federalism.

1. Re-evaluating State Authority

The question of why we care about retaining authority in the states has received inadequate attention. The arguments of constitutional lawyers are shopworn, uttered so often they no longer are heard when spoken. It will not suffice simply to utter shibboleths like "accountability" or "states as laboratories" and expect to win an argument (or anticipate that, as usual, the argument will be lost). At some level Rubin and Feeley's criticism is devastating, yet there has not been a sustained response.

Political economists have developed their own theories to support federalism, but ground those theories almost exclusively in efficiency, creating some serious pitfalls. There are essentially two common, related theories of federalism based upon efficiency. The first theory, "decentralization," makes

---

292. See Chemerinsky, supra note 17, at 534 ("[F]ederalism 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?"); Kramer, supra note 5, at 1502-03 (noting the two sides of federalism).

293. See infra text accompanying notes 303-367 (cataloguing reasons in favor of maintaining independent state authority).

294. See infra text accompanying notes 368-386 (discussing the benefits of centralized authority).

295. But see Jackson, supra note 100, at 54-60.

296. See Alan P. Hamlin, Decentralization, Competition and the Efficiency
the point that when power is diffused, different governments can adopt a mix of policies that meet the preferences of different citizens, thus maximizing the way in which government as a whole satisfies individual preferences. The second theory, "competition," argues that citizens will vote with their feet by moving to jurisdictions that maximize their individual preferences. Thus governments can compete with one another to attract firms or individuals in the most efficient manner. Much of the debate about local tax incentives, for example, centers on whether this latter sort of competition always is economically efficient and should be permitted by the national authority.

Despite the obvious utility of these models, intuition suggests that they suffer from deep flaws. For example, at the core of each theory is a presumption of mobility, that citizens and firms can and will vote with their feet. Yet, focusing for a moment on individuals, there is every reason to question whether this mobility is nearly as great as the models would suggest. People can and do move, but inertia is a large factor in why each of us lives where we do. Even when moves occur, they

of Federalism, 67 ECON. REC. 193, 194 (1991). Hamlin argues that these two theories may be somewhat at odds, and that federalism may not work to further either of them. Rubin and Feeley discuss this tension in the context of citizen choice. See Rubin & Feeley, supra note 221, at 917.

297. See Hamlin, supra note 296, at 194-99 (discussing the decentralization thesis).

298. A powerful case for the competition model is made by Dye. See DYE, supra note 39, passim; see also Hamlin, supra note 296, at 201-03 (discussing competition). Ideas of competition are also explored in COMPETITION AMONG STATES AND LOCAL GOVERNMENTS (Daphne A. Kenyon & John Kincaid eds., 1991).

299. See, e.g., Melvin L. Burstein and Arthur J. Rolnick, Congress Should End the Economic War Among the States, THE REGION, March 1995, at 3 (arguing that Congress should exercise its Commerce Clause power to end preferential state taxes that misallocate resources and cause states to provide too few public goods); Peter D. Enrich, Saving the States From Themselves: Commerce Clause Constraints on State Tax Incentives for Business, 110 HARV. L. REV. 377, 423-24 (1996) (arguing that the Commerce Clause should be understood to constrain state business tax incentives because they divert business activity from its economically most efficient location); Kary L. Moss, The Privatizing of Public Wealth, 23 FORD. URB. L.J. 101, 140 (1995) (discussing proposals to curb state tax incentives at the federal level).

300. See Eichenberger, supra note 243, at 406 (arguing that the assumption of high mobility of the citizenry is not borne out by evidence from Switzerland); Ann Markusen, American Federalism and Regional Policy, 16 NYL REGIONAL SCI. REV. 3, 9 (1994) (stressing the high transaction costs involved in household moving); Rubin & Feeley, supra note 221, at 918 (calling the mobility argument "a bit fanciful"). But see DYE, supra note 39, at 15-6 (arguing that there is sufficient mobility to make the model work).
tend to be for reasons largely unrelated to government policy decisions: We move because our work takes us elsewhere, or because of marriage or some other personal need, or perhaps because of climate and health. Thus, mobility may be overstated and poorly understood, and yet it is central to economic theories of federalism.

Perhaps more significantly, political economists' single-minded focus on efficiency may miss all that is most important about federalism. American democracy rests explicitly on the idea that there is a benefit to inefficiency. Liberty, the Framers felt, was best achieved if power was diffused. It seems odd to test a system designed to some extent to defeat efficiency solely against efficiency's metric. If efficiency were the sole goal, the optimal arrangement might be government by a benevolent dictator. The dictator could then orchestrate many of the benefits of the economic modeling of federalism by structuring whatever jurisdictional differences made most sense. We could have low-tax regions in the mountains where the skiing is good, and higher tax regions with strong educational systems that appealed to those who also like beaches. The Framers, however, had enough dictated to them to favor political principles of an entirely different sort, principles not adequately acknowledged in efficiency-based models.

Political economists and constitutional thinkers ought to work together to bring to life the other values of federalism. The reason for the lack of sustained attention to the tangible benefits of divided government may well be that those values are difficult to assess or to measure. But the work must be done. Rubin and Feeley argue that there is no substance to the "airy, flag-waving-in-the-breeze rhetoric" of federalism. Intuition

---

301. See INS v. Chadha, 462 U.S. 919, 958-59 (1983) ("[T]t is crystal clear from the records of the Convention, contemporaneous writings and debates, that the Framers ranked other values higher than efficiency."); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("[T]he Constitution diffuses power the better to secure liberty."); Inman & Rubinfeld, supra note 9 (manuscript at 12) (in addition to economic efficiency, federalism allocations implicate values of "political participation" and "protection of individual rights and liberties"); cf. THE FEDERALIST No. 47, at 336 (James Madison) (Benjamin F. Wright ed., 1961) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.").

302. Rubin & Feeley, supra note 221, at 915.
suggests otherwise, despite the strength of their arguments. Intuition alone does not win arguments, however; substance does.

What follows is a catalogue of some of the reasons federalism might matter. The catalogue necessarily is incomplete, and others have catalogued similar reasons in different ways.\textsuperscript{303} What is important about this catalogue is that it seeks to give substance to frequently uttered rhetoric about federalism, to develop intuition as to why retaining authority in the states may be important and to suggest clear areas for study.

\textbf{a. Public Participation in Democracy}

States, and their substate local governments, are closer to the people and provide an opportunity for greater citizen involvement in the functional process of self-government.\textsuperscript{304} We have a system of democracy, one that welcomes and privileges the voice of the people. The founders may not have intended it,\textsuperscript{305} but as the system evolved, the franchise consistently was expanded. When we despair of the operations of our national government, we tend to criticize special-interest influence and bemoan the apathy and lack of participation of average citizens.\textsuperscript{306}

\begin{itemize}
\item \textsuperscript{303} The very best catalogue may be found in David Shapiro’s wonderful “brief” on both sides of the federalism question. See Shapiro, supra note 215, at 76-106.
\item \textsuperscript{304} See id. at 92-94 (arguing that a smaller electorate brings the government closer to the people); Kramer, supra note 5, at 1498 (acknowledging the argument that state governments protect liberty because they are smaller and closer to the people).
\item \textsuperscript{305} See The Federalist No. 63, at 417 (James Madison) (Benjamin F. Wright ed., 1961) (noting the “total exclusion of the people, in their collective capacity” from the American system of government); Arthur S. Miller, Myth and Reality in American Constitutionalism, 63 Tex. L. Rev. 181, 189 (1984) (book review) (“The framers of the Constitution were not at all interested in creating a democracy; the word ‘republic,’ with all its vagueness, more closely describes what they had in mind. True democracy was abhorrent to the framers. Only in this century has the word come to ‘describe’ American government.”).
\item \textsuperscript{306} See, e.g., Jeffrey A. Roberts, Senate Seat a Fixer-Upper Hopefuls Seek to Reform, Denver Post, Feb. 18, 1996, at A01 (“A culture of lobbyists, special interests, political action committees and political financiers has distorted the legislative process and excluded ordinary Americans from participation.”) (internal quotation marks omitted) (quoting Gene Nichols, 1996 candidate for U.S. Senate); Stephanie Stetson, An Open Letter . . . on Leadership, The Virginian-Pilot and The Ledger-Star (Norfolk), Oct., 6, 1996, at J1, available in LEXIS, News Library, Curnws File (“Frustrated by the perception that the public good has been sold out to the special interest groups . . . citizens wonder whether their participation in the political process even makes a difference.”).
\end{itemize}
Although the distinction between ordinary citizens and special interests may well be overstated, state and local government does provide many more avenues for citizen participation than does the national government.

Rubin and Feeley, among others, doubt that states will serve the function of promoting democracy, but in doing so they repeat the two baseline errors discussed above. They argue that states are unnecessary to preserve democracy (just as they argue that the Guarantee Clause is unnecessary today), because democracy is so ingrained that it will not be disturbed. But states also are embedded deeply in the system we enjoy today, and it is possible that the two—states and democracy—have become ingrained together such that eliminating the autonomy of states would weaken our democracy. Indeed, intuition suggests that disenchantment with government and anemic levels of citizen participation in democracy positively correlate with nationalizing trends. Second, Rubin and Feeley argue (somewhat in tension with their first point) that local participation by definition occurs locally, not at the state level. This may or may not be the case, and likely varies from state to state. But even if so, again, under the system that we have local governments are creatures of and fostered by the state governments.

Intuition suggests that more people would and could participate in smaller levels of government, and common experience seems to bear this out. Some commentators look primarily to

307. See Rubin & Feeley, supra note 221, at 916.
308. See id. at 915.
309. Rubin and Feeley live in California, as does Professor Chemerinsky, who also doubts that democracy will be promoted at the state level. As Professor Chemerinsky asks, “is a state the size of California, or for that matter, a city the size of Los Angeles, sufficiently more homogenous than the United States so as to increase the likelihood of responsive government?” Chemerinsky, supra note 17, at 528. But California may not be typical of the rest of the country in this regard, although it does make sense that one’s perspective is going to be influenced by one’s experience. It at least bears considering whether what is true in Los Angeles is true in Bozeman, Nashville, Macon, Nashua, and the like, and whether what is true in California is necessarily true in Montana, Wyoming, New Hampshire, Alabama, or North Dakota.
electoral turnout and argue to the contrary, pointing out that important national elections rouse far more interest than elections for state and local offices. But a single-minded focus on voter turnout misses the point that participation can and should stretch well beyond electoral participation. The fact is that many Americans can call their state and local officials on the phone—and do—and have those phone calls returned by the actual officeholder, not a staffer tallying opinions in a polite voice. The fact is that countless citizens attend city council and state legislative sessions, watching to see some matter of interest resolved. The fact is that interest groups at the state and local level all tend to be more grass roots, less mechanized, and more responsive to the efforts of concerned individuals. There is work to be done to test these assertions, but they are easily observable in many states and communities.

Moreover, state and local governments appear to serve as breeding grounds for democracy. They provide a way for many people interested in public service to step on to the ladder in a manageable way. National office has become frightfully and frighteningly expensive. It does not matter how many of these officials actually make it to (or even vie to get to) the “top” of the ladder, the part of the ladder that academics

311. See, e.g., D. Bruce La Pierre, Political Accountability in the National Political Process—The Alternative to Judicial Review of Federalism Issues, 80 NW. U. L. REV. 577, 631 & n.310 (1985) (arguing that state and local governments are farther from the democratic ideal than the national political process on the basis of voter participation).

312. See Markusen, supra note 300, at 8 (“It is not unusual for dozens of people to attend a school board meeting when controversies arise or for hundreds to pack legislative galleries when bills important to them are under consideration.”). As with many students of federalism, Markusen cites little data. But she makes a number of stimulating observations, among them that local politics have more to do with policy than with party affiliation. See id.

313. Rubin and Feeley argue that the idea of local participation is “one of many unproven assumptions that fester in this field without either theoretical or empirical support.” Rubin & Feeley, supra note 221, at 916. I agree, certainly, about the lack of empirical support.

314. See Markusen, supra note 300, at 8 (arguing that local levels of government provide a “training ground for citizens, potential politicians, and activists”).

315. In 1992, the average seat in the Senate cost about $3.9 million, while seats in the House of Representatives were a comparative bargain at $543,000 each. See Robert Peck et al., Constitutional Implications of Campaign Finance Reform, 8 ADMIN. L.J. AM. U. 161, 179 (1994) (citing Jamin Raskin & John Bonifaz, Equal Protection and the Wealth Primary, 11 YALE L. & POLY REV. 273, 297 (1993)).
seem to be watching. For democracy to function it may matter only that someone starts as a city council member and ends up in the state legislature. Numerous other citizens serve on local and state boards and commissions, school boards, or even the PTA.

The simple fact is—and this has been a subject of far more study abroad than here at home—there is a "democracy deficit" in our society, one that is bound to get larger. Most good work on this subject focuses on Europe. As the EU takes over functions once performed by member states, the balance of authority in Europe is shifting from elected parliamentary bodies to executive officers and unelected bureaucrats. The same sorts of problems are already present in the United States and bound to get worse. Congress often shirks important decisions by foisting them off on bureaucratic officials. The impact of international treaties like the WTO likely will mirror the democracy deficit emerging as Europe unifies, with executive officials representing state and national interests in WTO panels, and the devolution of power to subnational governments.


317. See FARBER ET AL., supra note 249, at 966-67 (arguing that legislators delegate powers of standard creation to agencies in order to avoid conflictual issues). In the United States, concern about the democracy deficit has been expressed frequently in the context of environmental law. See, e.g., Richard B. Stewart, United States Environmental Regulation: A Failing Paradigm, 15 J.L. & COM. 585, 590 (1996) ("By regulating vital decisions about environmental risk management through a remote, arcane, and piecemeal bureaucratic process, the command and control system necessarily runs a serious democracy deficit."); Michael P. Vandenbergh, An Alternative to Ready, Fire, Aim: A New Framework to Link Environmental Targets in Environmental Law, 85 KY. L.J. 803, 849-54 (1996-97) (noting that the public is largely excluded from environmental decisionmaking and that decisionmaking is vulnerable to control by special interests). But see Esty, supra note 4, at 648-52 (1996) (arguing that the participation of uninformed citizens in environmental regulatory judgments is of dubious value).
and then deciding upon compliance with such decisions in an ad hoc process of negotiation largely removed from the public eye.\textsuperscript{318}

Although the direction of trade and decisionmaking may well prove a good thing for international harmony and economic stability, it is also well worth paying attention to, learning about, and preserving the institutions we care about most. Democracy is one of them. We ought to be studying the extent to which important decisions are made remote from the public, and whether local and state governments can and do help solve the deficit we are creating elsewhere.

Rubin and Feeley are skeptical about the entire concept of public participation, in part because it favors elites.\textsuperscript{319} Of course, elites often are the primary participants in government.\textsuperscript{320} But if elitism is the concern, it likely is far more of a problem at the national level. In many communities, diversity among non-elite voices—those of school parents, minorities, churches, and unions—far exceeds that at the national level.\textsuperscript{321}

\textsuperscript{318} The events leading up to World Trade Organization Report of the Panel in United States—Standards for Reformulated and Conventional Gasoline, 35 I.L.M. 274 (1996), make this clear enough. When Venezuela filed a complaint alleging that U.S. gasoline standards discriminated against imports, the U.S. dispatched bureaucrats from the EPA, Energy Department, and office of the U.S. Trade Representative to negotiate a deal. See EPA Announces Fuel Plan for Venezuela: Threatened GATT Complaint is Shelved, 11 Intl' Trade Rep. (BNA) No. 13, at 504 (Mar. 30, 1994). The discussions were secret; the public did not learn of them until the Secretary of State leaked details to the U.S. Ambassador to Venezuela. See id. For discussion of the abortive settlement attempt, see Schultz, supra note 212, at 12; Aubry D. Smith, Note, Executive-Branch Rulemaking and Dispute Settlement in the World Trade Organization: A Proposal to Increase Public Participation, 94 MICH. L. REV. 1267, 1267-68 (1996); see also Friedman, Global Village, supra note 254, at 1478 (discussing the democracy deficit in the context of GATT); Hahn & Richards, supra note 228, at 441 (discussing the role of bureaucrats in advocating international agreements).

\textsuperscript{319} See Rubin & Feeley, supra note 221, at 915 ("[P]articipation . . . is as likely to exclude and disadvantage less fortunate citizens as it is to help them.").

\textsuperscript{320} Members of financial elites, for example, appear to dominate the U.S. Senate. See Debra Burke, Twenty Years after the Federal Election Campaign Act Amendments of 1974: Look Who's Running Now, 99 DICK. L. REV. 357, 357 (1995) ("Today . . . over half of the Senators who serve in Congress are millionaires, and no Senator prior to election earned anywhere near the median level of personal income in the United States."); Raskin & Bonifaz, supra note 315, at 289 ("At least fifty-one out of one hundred senators are millionaires, compared to less than one-half of one percent of the general population.").

\textsuperscript{321} See Merritt, Guarantee Clause, supra note 3, 8-9 (arguing that state governments provide political and cultural diversity).
Again, this is a question that has received insufficient empirical attention.

b. Accountability

Closely related to the idea of local participation is the notion that government officials should be held accountable to the electorate for decisions that they make. One might agree that federalism in and of itself is bad for accountability because it blurs or confuses the lines of responsibility. Although there is some truth to this, in part the blame rests not with federalism, but with a failure of the courts and legislative bodies to come to grips with what federalism entails.

Those who doubt that federalism fosters accountability tend to equate accountability with electoral participation. Any meaningful understanding of accountability must, however, look deeper. There are many problems with notions of electoral accountability. Among them is the fact that we are forced to buy our representation wholesale, yet most government officials who have an impact on our lives do not run for office. The discussion about federalism and accountability often overlooks the fact that there are many other ways to think about accountability that transcend these immediate problems.

Accountability in a democracy means responsiveness on the part of those petitioned. Perhaps this is why participation at the national level seems depressingly low to some. People

322. See SHAPIRO, supra note 215, at 111-12 (discussing the tension between the accountability of state officials and coercive federal legislation); Merritt, Guarantee Clause, supra note 3, at 7 (suggesting that participation fosters accountability among elected representatives).

323. Professor Lessig argues that today no one has a clear sense of what tasks should be performed by the national or state governments. See Lessig, supra note 9, at 125.

324. See, e.g., Chemerinsky, supra note 17, at 528 (linking voter responsiveness to electoral turnout).

325. Commentators especially point to actors in administrative agencies. See John Devlin, Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions, 66 Temp. L. Rev. 1205, 1268 (1993) (arguing that the ability of legislators to appoint administrative officials "raises obvious problems of lack of electoral accountability"); Cass R. Sunstein, Constitutionalism After the New Deal, 101 Harv. L. Rev. 421, 447 (1987) (noting that agency actors are "not responsive to the public as a whole").

326. The American Bar Association may be among them. The title of a recent symposium was "The Disappearance of the American Voter Re-Visited."
seem to feel the national government is beyond our control. It is at least not crazy to suggest that if state and local officials were merely bureaucratic arms of the national government (as Rubin and Feeley seem to suggest they ought to be), they too would be less responsive to the people’s needs.

Accountability entails much more than periodic elections. Officials, elected and appointed, should be available for public comment, anger, approval, suggestions, and ideas about the course of public affairs. They should be accessible, by phone, by fax, by e-mail. Of course, the fewer layers of staff one has to go through, the better. Indeed, accountability also ought to imply something bordering on moral approval. We should be able to convey to our officials what kind of a job it is we think they are doing. Officials ought to look their constituents in the eye on the street and see them in the grocery store. In its broadest sense, officials should live the lives of those they govern, for then they are likely to make good choices about how those lives should be lived.

From this perspective, it is obvious that federalism provides for broadened accountability. Officials at the local level are likelier to be available, and thus are likelier to be held accountable. Local officials actually responsible for making policy live in the localities where the impact of their policies are felt. This would not be the case under the Rubin-Feeley model, because even decentralized power is just that; it is ultimately accountable to some authority far away.

STANDING COMMITTEE ON LAW AND THE ELECTORAL PROCESS, ABA, THE DISAPPEARANCE OF THE AMERICAN VOTER REVISITED (1989); see also KEVIN P. PHILLIPS & PAUL H. BLACKMAN, ELECTORAL REFORM AND VOTER PARTICIPATION: A FALSE REMEDY FOR VOTER APATHY, 1 (1975) (noting that the U.S. electoral participation rate is “easily the lowest among free democratic countries”).


328. See Rubin & Feeley, supra note 221, at 951 (arguing that the use of the states as a mechanism for decentralization “does not convert the states into political communities; citizens can make the decisions necessary to carry out state functions, but their political identity is formed by their membership in the nation as a whole”).

329. See Merritt, Guarantee Clause, supra note 3, at 7 (suggesting that greater accessibility of local government enhances participation); see also Calabresi supra note 9, at 778 (arguing that the smaller size of state governments “makes it far easier for citizens to exercise a greater and more effective degree of control over their government officials”).

330. One might think, for example, of the relationships between the colonial legislatures and the Crown. See BERNARD BAILYN, THE IDEOLOGICAL
This question of accountability has played a larger role in Supreme Court doctrine of late, and it should play a larger one yet.331 The reason the Court prohibited the commandeering of state and local government in New York v. United States332 was in part a problem of accountability. One government should not be permitted to act on the citizens through the facade of another government, for this serves to confuse lines of authority, blurring in the minds of citizens and officials just who is responsible for what. Authority becomes no more than a giant shell game, and it becomes increasingly difficult to know under what shell the seed of responsibility lies.333

Moreover, as other commentators have recognized, accountability poses a problem for reasons that go beyond those identified in the Supreme Court's decisions. Even if citizens are aware that the specific law with which they disagree is a product of choices made by the national legislature, they will have a much harder time connecting the failure of state and local regulation in other areas to the resource drain from national commandeering.334 The most important problem with the Brady Bill challenged in Printz was not that citizens angry about background checks would blame state rather than national officials. Rather, it was that state citizens whose calls to police officials went unanswered would have no way of knowing that those officials were distracted by the work the national government had imposed.335

A concern for accountability should spill over to other doctrinal areas. The Supreme Court should be far more attentive

331. See Jackson, supra note 100, at 94-103 (arguing that particularly stringent limits on commandeering are justified).


333. But see Chemerinsky, supra note 17, at 517 ("Voters, however, surely can understand that the state is acting under federal compulsion."). One might have considerably less confidence than Chemerinsky on this point.

334. See Garrett, supra note 9, at 1134 ("Unfunded mandates force other officials to raise taxes or make cuts in government services. This ability to engage in 'liability-shifting' may lead members of Congress to impose more mandates on states and localities than they think is consistent with a robust federal system.") (footnotes omitted); see also Evan H. Caminker, State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law, 95 COLUM. L. REV. 1001, 1065 (1995) (arguing that this is a unique accountability concern of federal mandates).

335. Beth Garrett deserves credit for insisting this point be stressed.
than it was in *South Dakota v. Dole* to the problem of conditional spending. In many ways the greatest threat to state autonomy follows from the problem of conditions attached to spending grants, yet both the Supreme Court and Congress generally have left this area unregulated. Conditions on spending grants, when permitted to stray far beyond the purpose of the expenditure, allow the national government to regulate by pulling strings from behind a veil while remaining invisible to all but a few. Similarly, the very failure to develop a coherent understanding of when national or state authority is appropriate blurs the lines of accountability, making it impossible for the governed or the governors to know who bears responsibility for what.

c. States as Laboratories for Experimentation

Intuition suggests that with fifty different parallel state governments, and countless substate governments as well, innovations in governing or problem solving will occur that will inure to the benefit of the entire populace in the long run. Intuition may be incorrect, however, and counterarguments have been raised. In an important and oft-cited paper Professor Susan Rose-Ackerman argues that in fact states will not serve as laboratories for experimentation, largely due to the risk aversion of those who govern. For most public officials, Rose-
Ackerman argues, it is better to pursue a known course than run the risk of committing resources to ideas that might fail or prove unpopular. Professors Rubin and Feeley pursue a somewhat similar line, but take it a step further by arguing that good experimentation means a willingness to try a variety of options, some unappealing, and to control the experiments in order to obtain meaningful data. Thus, they argue, decentralization will promote experimentation; federalism will not.

Although there may be merit to these arguments, they misunderstand the idea of "experimentation" in the actual world of governing. Rose-Ackerman's point is an interesting one, but it seems to presume a governor sitting at a desk carefully calculating whether to try out a novel ideal someone has concocted. In reality what governments do is solve immediate and pressing problems. Those who govern do not always have a choice. Experimentation is not an option, it is a way of life. It may be better if there were more well-considered experiments, but some of what happens just happens as governments try to solve problems. Similarly, Rubin and Feeley seem to imagine a giant boardroom where great national thinkers develop novel ideas and try them out on the states (or whatever decentralized bodies we then have) in controlled experiments. But necessity is the mother of invention, and the spirit of state experimentation is one of creative response to immediate necessity, often addressed to solving a real problem staring the official in the face.

341. See id. at 594 ("[S]ecure incumbents are likely to behave as if they were 'risk averse' even if their underlying preferences are risk neutral. In a multiple government system the overall incentive to take risks is reduced if the politician hopes to free ride on the activities of other governments.").

342. See Rubin & Feeley, supra note 221, at 923-26 (analogizing the central control necessary for governmental experimentation to the control exercised by a medical researcher over her subjects).

343. McConnell makes the important point that Rose-Ackerman's model considers only a single decentralized constituency: "[T]here will be more innovation in a decentralized system as a whole, both because there are more actors and because individual constituencies will perceive risk and reward differently." McConnell, supra note 339, at 1498 n.58.

344. See, e.g., Rubin & Feeley, supra note 221, at 924 ("[T]he argument for experimentation, like the argument for participation, citizen choice, or competition, supports only managerial decentralization. A unitary manager can experiment with different policies for achieving the same goal, just as it can encourage different sub-units to compete against each other in pursuit of that goal.").
“Innovation” might have been a better word choice for Justice Brandeis than “experimentation,” saving us all a lot of bother. It seems apparent that government officials can and do innovate, and that good ideas are picked up by other governmental units and replicated. Welfare reform was born in the states, as a response to inadequate funding. So was Social Security for that matter. But those are only the most prominent examples. What about bookmobiles, pre-election day “early” voting, town meetings, televised court proceedings, greenways, community agenda programs, leadership programs, and the like? Common intuition suggests that the vast majority of techniques used today to govern were developed at the state and local level.

Indeed, the best model to describe what is at stake here may be an understanding of innovation as an evolutionary process. Countless state and local governments, remote from

345. See Deborah J. Merritt, Federalism as Empowerment, 47 FLA. L. REV. 541, 551 (1995) [hereinafter Merritt, Federalism as Empowerment] (“Despite his pseudo-scientific language, it is doubtful that Justice Brandeis expected states to engage in controlled social experiments. Instead, experimentation in a federal system is akin to natural selection.”).

346. Section 1115 of the Social Security Act allowed the Secretary of Health and Human Services to waive a state’s compliance with many requirements of the AFDC in order for the state to run experimental projects. See Public Welfare Amendments of 1962 § 122, 42 U.S.C. § 1315(a) (1994). In the mid-1980s, the Reagan administration began granting large numbers of waivers to revamp the AFDC through “state-sponsored, community-based demonstration projects.” See Lucy A. Williams, The Abuse of Section 1115 Waivers: Welfare Reform in Search of a Standard, 12 YALE L. & POL’Y REV. 8, 16-17 (1994) (citation omitted). Wisconsin was one of the first states to undertake significant reforms. See id. at 17-18.

347. See Matthew Diller, Entitlement and Exclusion: The Role of Disability in the Social Welfare System, 44 UCL A L. REV. 361, 373 n.27 (1996) (“Most of the programs in the Social Security Act had antecedents in earlier state programs. In fact, the public assistance programs in the Act were structured to provide federal funding to pre-existing state programs.”).

348. To this list Deborah Merritt adds: unemployment compensation, minimum-wage laws, public financing of political campaigns, no-fault insurance, hospital cost containment, and prohibition against discrimination in housing and employment. See Merritt, Guarantee Clause, supra note 3, at 9. Professor Shapiro would not have us forget state experiments in public education, health care, taxation, penology, and environmental protection. See SHAPIRO, supra note 215, at 87-88.

one another but facing similar problems, develop numerous twists on solving them.\textsuperscript{350} At conferences, and through observation, governments learn of techniques employed elsewhere. The ones that seem sensible, that work, survive; many other ideas die on the vine.\textsuperscript{351} This evolutionary process works best precisely because many governments concoct ideas on their own, not a few of which prove to be unsuitable in the long run. One might doubt whether so much creative thinking would emanate from Rubin and Feeley's national boardroom or laboratory.

Of course, just how much of this innovation occurs, and under what conditions, remains unclear. What sort of national behavior chills innovation, or encourages it, remains equally unclear. These are all areas for more study. As presently configured, however, the doctrine of federalism pays only lip service to the idea of state innovation, thereby ensuring that we will not make the most of it.

d. Protecting Citizens' Health, Safety and Welfare

State and local governments can work to protect the safety, health and welfare of their citizens. We all too often forget that governments exist for this very purpose. State and local governments are the ones that make the myriad decisions that really matter to our lives. How many police shall there be, how shall they conduct themselves, and where shall they be stationed? Where shall schools be, and what shall they teach? Should we have light rail, or other means of assisting commuters?

The easy response is that if there was no federalism these decisions would be made at the national level, but it is unclear

\textsuperscript{350} In the field of welfare reform, for example, states have pursued many different strategies aimed at achieving similar goals. For a description of the various solutions developed by some states, see Welfare Reform Success Stories: Hearing Before the Subcomm. on Human Resources of the Comm. on Ways and Means, 104th Cong. 87 (1996).

\textsuperscript{351} For instance, Virginia's 1995 welfare reform plan incorporated the experiences of pilot projects from other states. See John E. Littel, Comment on Edward Wayland's Welfare Reform in Virginia, 3 VA. J. SOC. POLY & L. 311, 317 (1996); cf. Calabresi, supra note 9, at 777 (emphasizing competition as a motive force behind innovation).
that these are questions better answered at the center, or even that they would be answered at all if authority over them was transferred. Recall that federalism decisions do not always pit national versus state authority. Under the dormant Commerce Clause,\textsuperscript{352} and with regard to some forms of preemption,\textsuperscript{353} the courts make the decision to strike a state law even when there is no national legislation necessarily on point. Thus, certain decisions create a regulatory vacuum, leaving interests traditionally protected by the police power in jeopardy.

This is a problem likely to be exacerbated by governing international agreements, under which laws having a negative impact on free trade are vulnerable.\textsuperscript{354} It is true that those agreements often expressly acknowledge the interests protected by the police power, but those same agreements also presume against the validity of regulation more protective than international standards suggest is necessary. Thus, a government which decides to be more protective of the health or safety of its citizens may find its power to act in such a fashion diminished.

As the importance of trade grows, governments will lose control over many of the decisions that truly matter to their citizens. It is unclear whether we have adequately studied the extent to which this is possible. Yet, if any lesson is clear, it is that power lost is not easily regained; power gained is not easily relinquished. These questions deserve careful attention.

e. Cultural and Local Diversity

Similarly, cultural and local diversity are threatened by uniformity, whether legislatively enacted or judicially imposed.\textsuperscript{355} This is a point that might meet initial resistance. One of the arguments brought in most troubling fashion to the defense of federalism has been the idea of "local conditions," language all too reminiscent of the rhetoric used to defend something like Jim Crow.\textsuperscript{356} Indeed, to the extent that local di-

\textsuperscript{352} See supra Part I.F.
\textsuperscript{353} See supra Part I.E.
\textsuperscript{354} See supra Part II.F.
\textsuperscript{355} See Feld, supra note 262 (manuscript at 17-29) (describing how EU trade policy threatens legislation designed to protect French language and culture); Merritt, Guarantee Clause, supra note 3, at 9 n.44 (arguing that the incentives for uniformity in a centralized government may overwhelm the desire for diversity).
\textsuperscript{356} See, e.g., Sam J. Ervin, Jr., The Case for Segregation, \textit{Look}, Apr. 3, 1956, at 32 (criticizing desegregationists for lack of familiarity with "Southern
versity was a sensible justification for state regulatory author-
ity at the time of Cooley, it may be less so now. Nonetheless,
there is some substance to this idea of diversity, substance that
cannot be taken into account through national legislation.
Drinking ages, speed limits, and gun usage all are examples of
subjects that have played out on the national stage in recent
years despite good arguments in each instance that state cul-
tures differ in important ways that justify decisions being
made at a more local level.357

The more intriguing argument about diversity is not that
federalism permits localities to regulate in accordance with local
differences, but that federalism enhances our lives by preserving
and creating diversity.358 This surely is a proposition that is
testable. The fact is that the ease and efficiency of uniformity
is fast turning our lives into a parade of McDonald's, Walmarts,
and cookie-cutter amusement parks. Obviously it overstates
matters substantially to attribute such changes to governmen-
tal centralization, but the greater the centralization of regula-
tion the greater the impetus to regulate all aspects of our lives
in a way that crushes local differences.

f. Diffusing Power to Protect Liberty

A common argument brought to the defense of federalism
is that divided government will protect liberty.359 This also is
an argument that meets with much scoffing. As Rubin and
Feeley point out, if national authority threatened our liberty,
who would stand up to the Marine Corps? The states? It

357. See supra notes 97-99 (drinking ages), 172 (speed limits), 205 (gun
control laws) and accompanying text; see also Calabresi, supra note 9, at 775
(assuming that "social utility can be maximized if governmental units are small
enough and powerful enough so that local laws can be adapted to local condi-
tions").

358. See A.E. Dick Howard, Garcia and the Values of Federalism: On the
Need for a Recurrence to Fundamental Principles, 19 GA. L. REV. 789, 795
(1985) ("Federalism both reflects and encourages pluralism, allowing indi-
vidual idiosyncracies to flourish."); Merritt, Guarantee Clause, supra note 3,
at 8 (arguing that federalism provides political and cultural diversity).

359. See, e.g., United States v. Lopez, 514 U.S. 549, 578 (1995) (Kennedy,
J., concurring) (noting that the federal balance plays a vital role in securing
freedom); THE FEDERALIST NO. 51 (James Madison) (arguing that federalism
provides a double security for the rights of the people); Calabresi, supra note
9, at 787; William T. Coleman, Jr., Federalism, The Great Vague Clauses and
Judicial Supremacy: Their Constitutional Role in the Liberty of a Free People,
49 U. PITT. L. REV. 699, 703 (1988) ("Federalism has provided the impetus
for many of our basic liberties.").
seems unlikely that the states could generate the necessary military might.360

Yet, there is more to this argument than often is understood. Whatever the shifts in regulatory authority from the states to the national government, the fact is that the states remain independent political fora, with popular assemblies capable of expressing popular sentiment. The states have performed this function throughout history. Sometimes it has been exercised in regrettable fashion. Some of them have stood up and opposed desegregation of schools,361 or the elimination of the institution of slavery.362 But some states also stood up against the Alien and Sedition Acts.363 It was the states that first called for balanced budgets and fiscal responsibility,364 and many recent state government decisions afford greater liberty to citizens than they receive under the federal constitution.

The point is that the states serve as an independent means of calling forth the voice of the people, if and when this is necessary. Despite well-meaning arguments about how government operates best from the national level, the people's voice is not always heard there. The continued existence of the states

360. See Rubin & Feeley, supra note 221, at 928-29.
361. Governor Talmadge of Georgia, for example, said in the wake of the Brown decision, "Georgians will not tolerate the mixing of the races in the public schools or any of its public, tax-supported institutions." Talmadge Urges Georgians to be Calm, THE ATLANTA CONSTITUTION, May 18, 1954, at 9. For discussion of tactics used by southern state legislatures to evade integration, see Arthur S. Miller, The Strategy of Southern Resistance, THE REPORTER, Oct. 2, 1958, at 18.
362. Delaware and Kentucky, for instance, would not voluntarily abolish slavery after the Civil War. See J.G. RANDALL & DAVID DONALD, THE CIVIL WAR AND RECONSTRUCTION 395 (2d ed. 1969). After passage of the Thirteenth Amendment, these two states refused to ratify. See id. at 396.
363. Larry Kramer points out that as a political movement emanating from state legislatures, the fight against the Alien and Sedition Acts met with limited success. See Kramer, supra note 5, at 1519. But he goes on to explain how this momentum carried over into the national party fight between the Federalists and the Republicans. See id. Kramer's observation, which is surely correct, does not diminish the point. It only serves to show that popular governance involves a complex interaction among many of the extant institutions of American democracy.
364. In 1985, the General Accounting Office wrote, "Significant interest has surfaced for a balanced federal budget, similar to those which many states employ." U.S. GENERAL ACCOUNTING OFFICE, BUDGET ISSUES: STATE BALANCED BUDGET PRACTICES: BRIEFING REPORT TO THE CHAIRMAN, TASK FORCE ON BUDGET PROCESS, COMMITTEE ON THE BUDGET, U.S. HOUSE OF REPRESENTATIVES 12 (1985). By that time 49 states already had balanced budget requirements. See id. at 2.
ensures that there is an entirely separate forum in which the people can work to develop consensus. For this very reason there is sense in those Supreme Court decisions that have maintained the political integrity of the states, even while permitting growth of national authority.

It is all too easy to become complacent regarding threats to our personal liberty, and it would be wonderful if such complacency were as warranted as Rubin and Feeley seem to think it is. Perhaps we have been so successful in creating the institutions that protect us that our liberty will never again be threatened. Perhaps, on the other hand, the dispersion of political voice represented by federalism is part of this protection. Before assuming the contrary, we might at least attempt to study the question and arrive at some conclusion.

***

Several points should emerge from this brief enumeration of the values of federalism. First, this has been but a small sample of possible reasons to protect a vibrant federalism. Others have been offered that make additional sense, such as Erwin Chemerinsky’s idea of federalism as “empowerment,” encouraging governments at every level to work to solve the problems their citizens face. Second, even familiar arguments

---

365. Chemerinsky, supra note 17, at 538-39. Chemerinsky’s central point is that federalism should be seen as a way of enabling government at all levels to solve social problems. In making this argument, he does not believe that federalism should “be seen as a basis for limiting the powers of either Congress or the federal courts.” Id. at 504. At least as to Congress, there is a basis for serious disagreement. Power is not infinite, and in its exercise different levels of government are bound to trip over one another. See Friedman, Signals, supra note 9, at 793 (arguing that the law at issue in Lopez interfered with effective state programs to rid schools of guns). As to the courts, despite the rhetoric of federalism, the Supreme Court often actually uses jurisdictional theory to allocate cases sensibly between state and federal governments, albeit at times with limited success. See, e.g., Barry Friedman, A Revisionist Theory of Abstention, 88 MICH. L. REV. 530, 550-54 (1989) (suggesting that “federal jurisdiction lie[s] when necessary to vindicate federal rights, but that abstention is appropriate when significant state interests exist and the federal interest is minimal, or could be protected by Supreme Court review”).

366. See Chemerinsky, supra note 17, at 538-39; Merritt, Federalism as Empowerment, supra note 345, at 552-54 (arguing that the cumulative effect of many federal commands to states might “disempower” state governments). Federalism also is seen as furthering values of communitarianism, which may or may not differ from the participatory goals described above. See, e.g., Kraig James Powell, The Other Double Standard: Communitarianism, Federalism, and American Constitutional Law, 7 SETON HALL CONST. L.J. 69, 89 (1996)
VALUING FEDERALISM

for federalism are remarkably poorly developed in the literature. Instead, we tend to utter these reasons as slogans, without thinking through them or testing them. Thus, they become vulnerable to criticism, such as that offered by Rubin and Feeley. What is needed is careful and sustained study of how our federalism can and does enhance the lives of our citizens. It is more than a little ironic that at a time when many parts of the world are studying our federalism as a way to bring diverse peoples together, we give that system so little credit ourselves.

2. Evaluating National Authority

This has been half of the story about valuing federalism. It establishes only that there is some weight on the state autonomy side of the scale. In order to gain the benefits of regulation at varying levels, there also must be some idea of when national power should be exercised.

After substantial study, political economists have provided us with a ready catalogue of reasons for exercising national power, of situations in which the exercise of centralized government power is efficient. The doctrine of federalism takes account of very little of this, however. Before turning to that catalogue, therefore, it is useful to pause and think about why this body of work largely has been ignored by judges, constitutional lawyers, and constitutional theorists in the legal academy. The most likely answer (observations regarding lack of professional expertise to one side) is that the constitutional plan does not seem to require the question be answered, or even to be asked at all. As explained above, under the constitutional plan Congress possesses plenary authority in all the

---

(24) See Kramer, supra note 5, at 1487-88 (suggesting that American scholars study the workings of federalism before advising other nations to adopt it).

(25) A notable exception is Jacques LeBoeuf, who argues that precisely these factors should inform the scope of the commerce power, and also argues this was the Framers' intention. See Jacques LeBoeuf, The Economics of Federalism and the Proper Scope of the Federal Commerce Power, 31 SAN DIEGO L. REV. 555, 559-65, 592-607 (1994).

(26) See supra text accompanying note 24.
enumerated areas, while the residue is left to the states. The Framers rejected a formulation that explicitly would have permitted Congress to act only when central authority was essential, ironically believing that would not sufficiently protect against undue centralization.  

In light both of doctrinal developments since the founding, and of what political economists have taught us about public choice, such complacency about the appropriate sphere of national authority is no longer warranted. We have seen the commerce power stretched almost into a national police power, limited only (and barely) by a doctrinal formulation that is itself incoherent and depends upon an extraordinary act of will of judges to implement. By the same token, public choice theory has taught us to have grave skepticism regarding the motives of those who hold legislative power, suggesting at the least that we cannot trust them to decide the bounds of their own power. It thus becomes essential to develop a sense of when it is appropriate to exercise national power—the more coherent and testable the better. Without necessarily providing an entire list, these reasons include the following:

1. Public Goods: Public goods are those that would not be provided if it were not for the existence of some central authority to fund them. That is because their cost often is high, and yet it is relatively costless for each individual to take advantage of them. Thus, left to their own devices, individuals will free-ride, not paying their fair share of the cost of these goods. Common examples are lighthouses, or a national

---

370. See supra text accompanying notes 27-28 (discussing the Framers' delegation of specific enumerated powers to the federal government rather than a general mandate to act where the states were incompetent).

371. See generally FARBER & FRICKEY, supra note 243 (analyzing the accuracy of public choice theory's criticisms of the American political process); JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW (1997) (discussing the problem of transforming public choice theory into useful principles for change).


373. See MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 12-16 (1971) (arguing that states must resort to taxation in order to fund public goods because of the free-rider problem); SHAPIRO, supra note 215, at 39 (discussing the free-rider problem); Daniel A. Farber & Philip P. Frickey, The Jurisprudence of Public Choice, 65 TEX. L. REV. 873, 892 (1987) ("Although every American presumably benefits from improved national security, a single individual's actions in support of national security normally has only an infini-
military. Political economists often agree that government, and in some logical cases national government, should be given the responsibility of providing these public goods.\textsuperscript{374}

2. Externalities: When states regulate, it sometimes is the case that the benefits of regulation are felt within the borders of the state, but the burdens or costs are exported. These exported costs are called externalities,\textsuperscript{375} and political economists generally agree that it is appropriate for the national government to restrict regulation by the states that may impose great negative externalities on sister states.\textsuperscript{376} A common example here is environmental protection. For example, a state may regulate a factory in a manner that protects its citizens, but causes pollution to be thrown off to people in bordering states. This same kind of reasoning arguably underlies the discrimination prong of the Supreme Court's dormant Commerce Clause analysis.\textsuperscript{377}
3. **Race to the Bottom:** Closely related to the problem of externalities, but perhaps not precisely the same, is the problem of the race to the bottom. The theory of the race to the bottom is that in enacting otherwise sensible regulations, states may disadvantage themselves by raising the cost of doing business in the state, thus driving the business to states that regulate less rigorously. Yet, the more stringent regulation may be desirable for gross reasons of efficiency, or for other reasons of social welfare. An example of this is the struggle to eliminate child labor. In such situations political economists often agree that centralized regulation makes sense.

4. **Uniformity:** It may sometimes be the case that disuniformity is inefficient, raising the cost to those firms that must do business in several jurisdictions. Thus, uniformity may

---

Politics into the Positive Theory of Federalism: A Comment on Bednar and Eskridge, 68 S. CAL. L. REV. 1493, 1501 (1995) (arguing that the Court selectively uses the dormant Commerce Clause to impose constitutional review in cases involving externalities).


381. See SHAPIRO, supra note 215, at 49 ("In areas not preempted by federal law, multistate companies must have the resources to search out and comply with the laws of every state in which they do business. To paraphrase a recent comment by an attorney, it would often be far better to have one bad... federal rule on a particular topic than to have fifty less burdensome but significantly different state rules."); see also Robert M. Ackerman, *Tort Law and Federalism: Whatever Happened to Devolution?,* 14 YALE J. ON REG. 429, 448,
be a reason for exercising national authority, for there may be no other way to achieve it. However, considerable caution is necessary before relying on the argument concerning uniformity, because—as explained earlier—uniformity can be a great leveler. In addition, it is not entirely clear the states cannot obtain uniformity by acting together without the imposition of national authority. Numerous uniform laws, such as the Uniform Commercial Code, stand as a testament to this. At the very least, disuniformity alone seems a bad reason for permitting the courts to strike state laws under the dormant commerce power, despite the contrary suggestion in some Supreme Court decisions. Even in the area of congressional regulation, however, it seems that more work is needed in order to tell appropriate regulation in the name of uniformity from situations in which disuniformity should be tolerated. The answer may well depend on the values of leaving power in state hands, as discussed above.

***

These may not be the only reasons to exercise national authority, and efficiency may not be the only appropriate goal. For example, there is a broad consensus (although not

451. (1996) (arguing that federal legislation may be warranted when enterprises conducting business in several states are encumbered by a lack of uniformity among states).

382. See supra text accompanying note 150; see also Catherine L. Fisk, The Last Article About the Language of ERISA Preemption? A Case Study of the Failure of Textualism, 33 HARV. J. ON LEGIS. 35, 95 (1996) (characterizing the phrase "national uniformity equals regulatory efficiency" as an "unexamined and perhaps erroneous" assumption).

383. See Larry E. Ribstein & Bruce H. Kobayashi, Uniform Laws, Model Laws and Limited Liability Companies, 66 U. COLO. L. REV. 947, 950 (1995) (arguing that National Conference of Commissioners on Uniform State Laws proposals are uniformly adopted in areas of the law in which uniformity is efficient); Norman Silber, Why the U.C.C. Should Not Subordinate Itself to Federal Authority: Imperfect Uniformity, Improper Delegation and Revised Section 3-102(c), 55 U. PITT. L. REV. 441, 456-57 (1994) (“Because each state has adopted its own version of the 'model' and 'uniform' Code, the Code remains subject to legislative modification and judicial interpretation by state authorities. ‘Rough’ uniformity has resulted in greater efficiency without eliminating the responsiveness of the law to changing local conditions and without entirely diminishing the well-recognized potential of the states as ‘laboratories’ in the federal system. Indeed, several important Code revisions and a number of federal consumer protection initiatives of the past decade might not have occurred without the state law experimentation made possible by limited federalization.”) (footnotes omitted).

384. For discussion of these cases, see supra text accompanying note 185.

385. As with the catalogue of reasons for state autonomy, the best collection of arguments along these lines is in SHAPIRO, supra note 215, at 39-56. A
unanimous by any measure) that most questions of fundamental rights should be resolved at the national level. There may be other matters for which an argument could be made that national commitment or consensus is necessary. This suggests there is more work to be done, both in identification and assessment. But the lack of complete understanding does not excuse the failure to try to implement some sensible regime for identifying when the exercise of national authority is appropriate.

*United States v. Lopez* is a perfect example of the failure to take any of this understanding into account, and of the failure of the legal academy in trying to value federalism. Although the Supreme Court was correct to strike down the Gun Free Schools Zone Act, that Court's opinion failed to support its doctrinal analysis regarding the substantiality of the effect of that law on commerce with any understanding of the values of federalism. As Justice Breyer's dissent established, in today's world virtually anything can be said to affect commerce, and the concept of "substantial effect" is entirely indeterminate. Yet, that is about all the case offers us as an understanding of when Congress properly may regulate.

The real answer is that *Lopez* was correctly decided because there was virtually no serious argument why guns in schools should be regulated at the national level. The only argument from the list above that supports national regulation— an argument actually suggested by a few—is that a state's

---

shorter, but pointed, examination of these arguments is found in Calabresi, *supra* note 9, at 779-84.

386. *See Shapiro, supra* note 215, at 52-56 (criticizing the states' record in protecting individual and group rights); Susan R. Estrich & Kathleen M. Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 U. Pa. L. Rev. 119, 151 (1989) ("[F]undamental liberties are not occasions for the experimentation that federalism invites."). Even among those who favor vigorous enforcement of civil rights, there has been some question whether, in light of conservatism at the national level, some of these questions should not be left to the states. *See Shapiro, supra* note 215, at 97-99 (citing examples of states going further than the national government in protecting minority or individual rights); Charles F. Abernathy, *Foreword: Federalism and Antifederalism as Civil Rights Tools*, 39 How. L. Rev. 615, 617-620, 627-32 (1996) (discussing this commentary); Calabresi, *supra* note 9, at 817-23 (questioning whether there is a strong case for a national role in criminal procedural rights and social and cultural rights).


390. *See id.* at 623 (Breyer, J., dissenting) ("Congress could have found that gun-related violence near the classroom poses a serious economic threat (1) to consequently inadequately educated workers who must endure low
underregulation of the problem creates negative externalities because students educated in fear of gun violence will be less well educated, and then will be exported to the national labor market. But this argument is an extremely vulnerable one. First, as an empirical matter, one suspects that the students are likelier to remain in the state than to leave for an out-of-state labor market. Second, the immediate concern of guns in schools is of crime and carnage, of injury and death among students. It is cynical and ignorant of reality to fail to recognize that parents care deeply enough about this issue that they will want to solve the problem as quickly and well as possible, without some perverse goal of exporting uneducated children. *Lopez* was not a case about national competition. It was a case about how best to stop carnage and violence among our youth, and it is highly dubious that this could be done better at the national, rather than the local, level.\footnote{391}

None of this is to suggest that by taking a more reasoned approach all questions will become easy or all answers clear. Even in the realm of political economy scholars can and do differ as to proper outcome, as Richard Revesz’s provocative work on the race to the bottom in the environmental area makes clear.\footnote{392} But it does seem that *some* attention to the problem is warranted to keep us from tumbling to the conclusion that Congress can, and should, do whatever it wishes.

---

\footnote{391.} See Abernathy, *supra* note 386, at 620 (arguing that local authorities should have the power to deal with school problems in a noncriminal manner); Lewis B. Kaden, *Courts and Legislatures in a Federal System: The Case of School Finance*, 11 Hofstra L. Rev. 1205, 1205 (1983) (“Throughout nearly two centuries of debate over the meaning of federalism, there has been a general consensus that elementary and secondary education are primarily the responsibility of state and local government . . . .

\footnote{392.} Compare Revesz, *supra* note 379, at 1244-47 (arguing that the race to the bottom rationale is an unsound reason for environmental regulation at the federal level) *with* Stewart, *supra* note 317, at 586 (noting the current paradigm which states that the race to the bottom does justify federal regulation). Revesz is in some sense a “second generation” of scholarship on the question of whether to nationalize environmental policy. For a “third generation” piece, see Esty, *supra* note 4, at 613-52 (making an argument in response to second generation scholars and examining nationalization of some environmental regulation).
There has got to be a way to bring arguments about the scope of national authority to bear on constitutional doctrine. Largely, however, lawyers and judges ignore the sound lessons political economists take for granted. This is the other half of the story of how we presently fail to value federalism.

CONCLUSION

It is easy to write off those who defend federalism, seeing them as antiquated relics of an era perhaps best bygone. Many of us enjoy the global community, the ease of international travel, and goods made cheaper by international competition. Perhaps most important, interweaving of the peoples of the earth, through trade and otherwise, holds out some hope for greater global harmony.

These are all good things—the question is, "At what price?" Are there values that, in our zeal to nationalize and globalize, we run the risk of losing? We cannot know the answer to this question unless we identify those values and make some effort to assess their worth. This Article has argued that we do not value federalism because we have not devoted enough attention to understanding how a federal system actually furthers values we hold dear. The solution is to study the real and supposed benefits of federalism, and to incorporate what is learned into the actual business of governing, including the constitutional law of federalism.

393. See Powell, supra note 366, at 70 ("The consensus thus seems to be that federalism is an antiquated concept whose risks outweigh its rewards in modern constitutional interpretation.").