FEDERALISM AS A CONSTITUTIONAL PRINCIPLE

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I'm grateful for the opportunity to give the William Howard Taft Lecture on Constitutional Law. It's an honor to share a podium with the likes of Justices Antonin Scalia and Sandra Day O'Connor, as well as scholars like Vicki Jackson and David Strauss. And it's always nice (if a little surprising) to see a bunch of people turn out to hear a talk about federalism. Justice O'Connor rightly called federalism "our oldest question of constitutional law."[1] But the constitutional balance between the nation and the states is hardly what the cool kids are talking about these days. My first-year con law students show up each Fall expecting to learn about same-sex marriage, flag burning, and abortion; they're plainly disappointed when they pick up the syllabus and see how much of the course is going to be about government structure.

The first part of my talk resists that intuition. The notion that federalism is *passé* is so tragically wrongheaded that I can't bear to leave it alone. As we say in North Carolina, "it hurts my heart." And thinking about why one should care about federalism can actually tell us a lot about the meaning of the federalism we have.

The second part of my talk explores how the Constitution protects federalism. I'll conclude by addressing what federalism needs to survive as a constitutional principle.

I. WHY CARE ABOUT FEDERALISM?

So why care about federalism? I confess that I started down the road of my life's scholarly work out of sheer orneriness and irritation. (This admission will probably not surprise my family members that are here today.) The irritation arose because even though federalism is plainly an important constitutional principle both textually and historically, lots of smart and powerful people seem to think it's OK to ignore it.

Consider the oral argument in *United States v. Lopez*,[2] which the Supreme Court decided in 1995. Alphonso Lopez was convicted under the federal Gun Free School Zones Act, which made it a federal crime to

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1. N.Y. v. U.S., 505 U.S. 144, 149 (1992).

2. 514 U.S. 549 (1995).

possess a gun within 1000 feet of a school. Lopez argued that the Act exceeded Congress's legislative power under the Commerce Clause. It seemed like a pretty good argument: the statute required neither a commercial transaction nor any sort of interstate travel, so how could it rest on Congress's power to regulate "commerce . . . among the several states"?

At oral argument, Justice O'Connor asked a critically important question to Solicitor General Drew Days, who was defending the statute. She asked whether, if the Gun Free School Zones Act were constitutional, there would be *anything* left that Congress could *not* regulate. General Days responded that he was "not prepared to speculate generally."[3] Translation: He hadn't really thought about the question.

It wasn't a good answer. In those days, Justice O'Connor might as well have had a big red "5" tattooed on her forehead. If the United States couldn't identify *any* limits on its own power under its interpretation of the Commerce Clause, then that interpretation was going down. But you can understand why General Days wasn't prepared to answer: After all, the Court had not struck a federal statute on the ground that it exceeded Congress's Commerce Power since the "switch in time" way back in 1937.[4] Days evidently thought, with some justification, that Mr. Lopez's quaint invocation of the doctrine of enumerated powers could simply be given the back of the hand. Four justices—including *my* justice, David Souter, who was obviously the smartest of them all—agreed with him.[5] And the overwhelming majority of legal academics—who by definition are smarter than *everybody*—trashed the Court's decision striking down the Gun Free School Zones Act as some kind of Neanderthal outburst of a conservative court that hadn't gotten the memo about the New Deal or the nature of modern society.[6]

As a young lawyer, I just couldn't wrap my head around the notion that the principle of enumerated powers could simply be read out of the Constitution because it seemed inconvenient or outdated. It bugged me.

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3. Transcript of Oral Argument at 7, *Lopez*, 514 U.S. 549 (1995) (No. 93-1260).

4. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (changing course from earlier rulings and upholding broad federal regulation of the economy); *see also* ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 117–19 (Sanford Levinson ed., 4th ed. 2005) (discussing the end of the era of judicial enforcement of limits on national authority).

5. *See Lopez*, 514 U.S. at 603 (Souter, J., dissenting); *id.* at 615 (Breyer, J., dissenting).

6. *See, e.g.*, Charles E. Ares, Lopez *and the Future Constitutional Crisis*, 38 ARIZ. L. REV. 825, 826 (1996) (arguing that the Court had "opened the floodgates . . . to begin the process of dismantling" national intrusions on state autonomy). In fact, Sylvia Law issued one of the most dramatic indictments from this very podium. *See* Sylvia A. Law, *In the Name of Federalism: The Supreme Court's Assault on Democracy and Civil Rights*, 70 U. CIN. L. REV. 267 (2002) (William Howard Taft Lecture).

So the first reason to care about federalism is that, well, federalism is *in the Constitution*. This is the argument from constitutional fidelity.[7] We don't get to treat the Constitution the way a six-year-old treats a slice of pizza—picking off the good parts, like the Free Speech or Equal Protection Clauses—and throwing out the rest.[8]

I think fidelity is enough to justify the Court's holding in *Lopez*: That was a case in which the only alternative to striking down the law was really to admit, as General Days implicitly conceded, that there were no real limits on Congress's powers anymore.[9] But most federalism questions are harder than that. The Constitution's federalism provisions are often ambiguous, and they leave a lot to be inferred from the general structure. The bare notion of fidelity can tell us that those provisions and principles must mean *something*, but it provides little guidance about exactly *what* they mean.[10]

We need to dig a little deeper. The Founding Generation thought that federalism is critical to liberty. The Federalists came to Philadelphia focused on strengthening the central government, in part to rein in oppressive tendencies in the States.[11] But to the extent that Alexander Hamilton, James Madison and the rest initially sought to subordinate the States to the national government—for instance, by proposing a congressional "negative" on state laws—they plainly lost that fight.[12] The Antifederalists who worried about national consolidation better captured American public opinion,[13] and by the time Madison sat down to write Federalist 51 he was extolling federalism as half of the "double

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7. *See generally* Ernest A. Young, *The Conservative Case for Federalism*, 74 GEO. WASH. L. REV. 874, 877–80 (2006) (developing this argument).

8. *See also* Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 267 (1992) ("[W]e should take the whole Constitution seriously. We cannot legitimately pick and choose the clauses we want enforced.").

9. *See Lopez*, 514 U.S. at 564 ("Under the theories that the Government presents . . . it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.").

10. *See* Young, *supra* note 7, at 879–80.

11. *See* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 168–69 (1996).

12. *See id.* at 170–80.

13. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at (1969) ("Under this Antifederalist pressure most Federalists were compelled to concede that if the adoption of the Constitution would eventually destroy the states and produce a consolidation, then the 'objection' was not only 'of very great force' but indeed 'insuperable.'"); Mark R. Killenbeck, *Pursuing the Great Experiment: Reserved Powers in a Post-Ratification, Compound Republic*, 1999 SUP. CT. REV. 81, 107 (observing that the Antifederalists' "concerns were widely shared, and these individuals payed an important role in shaping the text, the ratification dialogues, and, eventually, the drafting and ratification of what became the Tenth Amendment").

security" that the Constitution provides for liberty.[14]

States protect liberty in several different ways. First, they can be a rallying point for opposition to federal policies that threaten individual rights. Think of the Virginia and Kentucky legislatures, which passed resolutions opposing the Alien and Sedition Acts at the end of the 18th century.[15] Those resolutions involved *speech* by states, which will often have a bigger and more effective voice than individuals and private organizations. But sometimes state opposition takes the form of *non-cooperation* with federal laws, like the many states and localities that refused to implement certain aspects of the Patriot Act just a decade ago.[16]

The second point is that state-based dissent has a unique quality, because states are not simply speakers but also institutions that exercise power. If groups that are in the minority nationally find themselves in the majority within a particular state, they can actually *implement* their views under state law. Think of proponents of same-sex marriage, who for most of the past two decades have been on the short end at the national level but have had majorities in states like Vermont or New York. That meant that proponents could not only criticize national opposition to same-sex marriage, but actually give legalization a shot within their own jurisdiction.[17] My friend Heather Gerken calls this "dissenting by deciding."[18] It's often far more effective than regular dissent, because it gives minorities a chance to demonstrate that the sky won't fall if they get their way.

By giving groups that are out of power at the national level a chance to exercise power in a state, federalism protects liberty in a third way: by fostering political circulation. Democracies lose their freedom when a particular party or group secures a permanent lock on power. One way that can happen is if the opposition can't demonstrate a credible ability to govern. Think of the Labor Party in England, which was a voice crying in the wilderness for nearly two decades during the 80s and 90s. British opposition parties don't get to run anything, and so it's hard to demonstrate that their policies will work. But in America, the out-party in Washington will always be running any number of states, and politicians from those states can run for national office on a record of actual governing experience and achievement. It's no coincidence that

14. *See* FEDERALIST NO. 51, at 318, 321 (James Madison) (Isaac Kramnick, ed. 1987).

15. *See, e.g.*, Wayne D. Moore, *Reconceiving Interpretive Autonomy: Insights from the Virginia and Kentucky Resolutions*, 11 CONST. COMMENTARY 315 (1994).

16. *See, e.g.*, Ann Althouse, *The Vigor of Anti-commandeering Doctrine in Times of Terror*, 69 BROOKLYN L. REV. 1231 (2004) (discussing state and local noncooperation with the Patriot Act).

17. *See generally See, e.g.*, Ernest A. Young, *Exit, Voice, and Loyalty as Federalism Strategies: Lessons from the Same-Sex Marriage Debate*, 85 U. COLO. L. REV. 1133 (2014).

18. *See* Heather K. Gerken, *Dissenting by Deciding*, 56 STAN. L. REV. 1745 (2005).

four of our last *six* presidents were governors of their states during a period when their party was out of power in Washington, D.C.[19]

We should remember that the core of the Framers' political theory—as expressed in documents like Federalist 10 and 51—placed little weight on individual rights and judicial review as securities for liberty.[20] They thought that if you get the *structure* of the government right, then government will be unlikely—even *unable*—to behave tyrannically. It's easy to forget that nowadays, when the courts play a prominent role and we cherish legal rights like speech and religious exercise. But keep in mind that constitutions in the Soviet Union and other tyrannies purported to guarantee similar rights. Those guarantees weren't worth the paper they were written on, because the *structure* of those governments neither permitted the People to control the Government nor obliged it to control itself.[21]

A third and related reason to care about federalism is that Federalism fosters pluralism. Sometimes critics attempt to portray federalism as a vestige of days gone by. Maybe federalism made sense to Thomas Jefferson's yeoman farmers, whose world was relatively agrarian and homogeneous, but it's out of place in modern society.[22] I submit that absolutely the contrary is true: the need for federalism has radically *increased* as the world has become more diverse, complex, and interconnected.

Consider our most pressing social issue of the moment—the legitimacy of same-sex marriage. That issue is not, to put it mildly, something that our Founders had on their minds when they conceived our federal Union. It arises because modern society recognizes as legitimate a radically broader range of beliefs, lifestyles, and ways of being than our forebears did. But because we are diverse, there simply *is no* national consensus on this issue in popular morality and opinion.[23] Perhaps a uniform national answer can be derived from the text, structure, and theory of the Due Process and Equal Protection Clauses[24]—but it is anyone's guess whether a resolution of the issue by

19. *See* Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 BROOKLYN L. REV. 1277, 1286–87 (2004).

20. *See* Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1353–55 (2001).

21. *See* Antonin Scalia, *Foreword: The Importance of Structure in Constitutional Interpretation*, 83 NOTRE DAME L. REV. 1417, 1418 (2008).

22. *See, e.g.*, MALCOLM M. FEELEY & EDWARD RUBIN, FEDERALISM: NATIONAL IDENTITY AND TRAGIC COMPROMISE (2008).

23. *See, e.g.*, *Public Sees Religious Influence Waning*, PEW RESEARCH CENTER (Sept. 22, 2014), http://www.pewforum.org/2014/09/22/public-sees-religions-influence-waning-2/ (finding "a slight drop in support for allowing gays and lesbians to marry, with 49% of Americans in favor and 41% opposed").

24. By the time this lecture appears in print, the Supreme Court is likely to have ruled on the question. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 1039 (2015) (No. 14-556) (granting consolidation

judicial opinion (by a Supreme Court that would itself surely be closely divided on the question) would be perceived as legitimate by the roughly half of Americans that would wind up on the losing end.

Federalism provides a way forward in these scenarios of profound national division. Proponents and opponents of same-sex marriage are not evenly distributed geographically, and in different states different sides have found themselves in the majority. A few states, like New York, have adopted same-sex marriage through legislation; others, like Massachusetts, have adopted it through state courts' construction of their own state constitutional traditions. Many other states, including my own North Carolina, have gone the opposite way through state constitutional amendment.[25] Our federalism has permitted a pluralist response to the matter that reflects the underlying lack of national consensus far better than would a nation-wide up-or-down vote on the question.[26]

Or take another issue: pollution and environmental degradation. Environmental issues are the poster-children for uniform national regulation; after all, the effects of pollution do not respect state borders. But we don't actually regulate environmental matters in a nationally uniform way. Under the Clean Air Act, the Clean Water Act, and many other federal statutes, federal authorities set pollution targets but responsibility for development and implementation of regulatory plans to reach those targets is left to the States.[27] Why? Because environmental problems are so complex, so variegated by geography, and require so many governmental resources to address that a purely federal response would be overwhelmed. This situation recurs across most federal regulatory regimes. The complexity of modern problems does not render federalism obsolete—it makes federalism *essential.*

My final point is that federalism is *current.* One might even venture to say "trendy." Think about Scotland over the summer, where thousands of youngish Scots painted their faces blue and talked "secession" like some weird combination of William Wallace and Jefferson Davis. The Scottish secession referendum failed, but it might well have succeeded if the British government had not offered major guarantees of Scottish autonomy going forward, effectively lurching toward a federal system in fact.[28] And a majority of Scots between the

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and certiorari for four related cases addressing same-sex marriage).

25. *See generally Research Guides: Same-Sex Marriage Laws*, THE OHIO STATE UNIV. MORITZ COLL. OF L., http://moritzlaw.osu.edu/library/samesexmarriagelaws.php (last visited Feb. 26, 2015).

26. On the ways in which state-by-state diversity may ultimately help the cause of same-sex marriage, *see* Young, *supra* note 17.

27. *See, e.g.*, John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183 (1995).

28. *See After the No Vote*, THE ECONOMIST (Sept. 19, 2014),

ages of 16 and 24 seems to have voted in favor of secession.[29] I n Glasgow, if not in Cincinnati or Durham, federalism *is* what the cool kids are talking about these days.[30]

More broadly, contemporary Europe has been conducting the most interesting federal experiment in the world, and the Euro crisis has thrown the tensions in the EU's federal scheme into high relief. It is 1790 all over again over there, with Angela Merkel playing Alexander Hamilton, seeking to bind the member states together more closely by having the central government guarantee their debts, and David Cameron playing Thomas Jefferson and worrying about the politically-centralizing tendencies of it all. Some Europeans like federalism and some think of it as "the F word," but no one thinks it is boring or passé.[31]

But we can also look closer to home. High-profile contemporary American conflicts about healthcare, immigration, and even climate change have all played out on the legal terrain of federalism, with individual states like Virginia, Arizona, and California, respectively, wanting to go their own way out of dissatisfaction with national policy. Or consider the legalization of recreational marijuana use in Washington and Colorado. I was taught in school that Andrew Jackson put to rest any suggestion that individual states have the power to "nullify" federal laws, but Colorado's new version of "Rocky Mountain High" is demonstrating that a state may establish an extensive legal regime and a vibrant new industry predicated on the legality of an activity that federal law forbids.[32] The reason this works is that enforcement of national drug laws effectively depends, in most instances, on the cooperation and resources of state and local law enforcement. If a state opts out, there's not a whole lot the Feds can do a massive commitment of federal

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http://www.economist.com/blogs/blighty/2014/09/scotlands-referendum-1 (discussing efforts "to crack on with the promised devolution" that the U.K. government assured Scotland would occur if it remained in the Union, and concluding that "the United Kingdom will stay united. But it will also be looser and constitutionally messier than in the past").

29. *See* Christine Jeavans, *In maps: How close was the Scottish referendum vote?* BBC NEWS (Sept. 19, 2014), http://www.bbc.com/news/uk-scotland-scotland-politics-29255449.

30. And in Barcelona, too. *See* Simon Worrall, *Will Catalonia Hold a Referendum on Whether to Break Away from Spain?* NATIONAL GEOGRAPHIC (Oct. 11, 2014), http://news.nationalgeographic.com/news/2014/10/141011-spain-catalonia-barcelona-madrid-independence/.

31. *See generally* Ernest A. Young, *The European Union: A Comparative Perspective*, 1 OXFORD GUIDE TO EUROPEAN LAW (forthcoming 2015); Paul P. Craig, *Economic Governance and the Euro Crisis: Constitutional Architecture and Constitutional Implications*, *in* THE CONSTITUTIONALIZATION OF EUROPEAN BUDGETARY CONSTRAINTS (2014).

32. *See* Ernest A. Young, *Modern-Day Nullification: Marijuana and the Persistence of Federalism in an Age of Overlapping Regulatory Jurisdiction*, CASE WES. U. L. REV. (forthcoming 2015); Robert A. Mikos, *On the Limits of Supremacy:Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421 (2009).

resources. Whatever one thinks of legalizing marijuana, there is no doubt that federalism is, literally, ripped from today's headlines.

II. HOW DOES CONSTITUTIONAL LAW PROTECT FEDERALISM?

I want to turn now to constitutional theory and doctrine.

Part of what it means to say that federalism is a constitutional principle is that it is a creature of the law. But understanding federalism is not simply a matter of divining what the law requires. We are not looking for rules to write down in our Con Law outlines. I want to think of federalism as an institutional puzzle to be solved. We have a constitutional commitment to have a national government and at the same time to have states. We know that each of those two levels of institutions should have important powers and play important roles in government. But we also know that historical, political, social, and economic pressures constantly threaten to undermine this arrangement. And finally we know that each of the institutional approaches we might adopt to preserve our federalism—whether it is judicial review, political representation, or electoral competition—has its upsides and its downsides.[33]

We need to think about federalism as a question of *strategy*. What is the best approach, all things considered, to governing the relationship between the national government and the States? When we think of the problem this way, three things become apparent. First, the Constitution itself is open to multiple strategies for protecting federalism. Second, our law has emphasized different strategies at different times over the course of our history. And third, none of these strategies is perfect.

A. Enumerated Powers and Dual Federalism

The original constitutional strategy for limiting national power and protecting state autonomy was the doctrine of enumerated powers.[34] Article I, Section 8 lists explicitly confers certain powers on Congress; the Tenth Amendment then makes clear that the enumerated powers are *it*; whatever powers the Constitution doesn't confer remain with the States.[35]

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33. *See generally* Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1815–48 (2005) (exploring these institutional issues).

34. *See, e.g.*, FEDERALIST NO. 46, at 296 (James Madison) (Isaac Kramnick, ed. 1987) ("The powers delegated by the proposed Constitution to the federal government are few and defined.").

35. *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 195 (1824) ("The enumeration presupposes something not enumerated.").

Enumerated powers gave rise to a model of federalism doctrine called "dual federalism," and it worked well enough for the first century and a half of our history. The grant of certain powers to the national government and the reservation of the rest to the States created two separate and exclusive spheres of regulatory jurisdiction.[36] The federal government was not allowed to intrude on the States' reserved sphere by trying to regulate education or family law or *intra*state commerce, and the States were equally prohibited from sticking their noses into the federal sphere by acting in foreign affairs or regulating commerce that crosses state lines. Critically, the Supreme Court kept watch over the boundary, striking down actions by either level of government that crossed over into the other government's sphere.

The trouble with this strategy was threefold. The first problem was that expansionary possibilities were built into the Constitution right alongside the enumerated powers idea. Most obviously, the Necessary and Proper Clause opened the door to *implied* powers, like the power to create a national bank, when those powers were used in support of the governmental purposes enumerated in Article I. The Supreme Court construed the necessary and proper provision quite broadly in *McCulloch v. Maryland*,[37] although Congress didn't really *use* it very broadly until the New Deal. As John Marshall pointed out in *McCulloch*, some notion of implied powers is both necessary and inevitable, because we can't expect the constitutional drafters to anticipate every necessity that might come up in the future.[38] But he also recognized that opening the door to implication critically undermines enumeration as a strategy for confining national power.[39] The trouble with *McCulloch* is not that it was wrongly decided—it was plainly right—but rather that later readers of Chief Justice Marshall's opinion have taken his broad formulation of implied powers and run with it while ignoring his cautions about the continuing need for limits.

Potential for expansion was also built into the enumerated powers themselves—particularly Congress's power to regulate "commerce . . . among the several states."[40] The Founders probably meant this to cover two things: actual movements across state lines, like the steamboats on

36. *See, e.g.*, Alpheus Thomas Mason, *The Role of the Court*, *in* FEDERALISM: INFINITE VARIETY IN THEORY AND PRACTICE 8, 24–25 (Valerie A. Earle, ed., 1968) (observing that "dual federalism" contemplated "two mutually exclusive, reciprocally limiting fields of power—that of the national government and of the States. The two authorities confront[ed] each other as equals across a precise constitutional line, defining their respective jurisdictions").

37. 17 U.S. (4 Wheat.) 316 (1819).

38. *See id.* at 406–09.

39. *See id.* at 423 (recognizing that "congress, under the pretext of executing its powers" might seek to "pass laws for the accomplishment of objects not intrusted to the government").

40. U.S. CONST. art. 1, § 8.

the Hudson River in *Gibbons v. Ogden*,[41] and the buying and selling of goods.[42] But it seems artificial today to draw a line between, say, the sale of a good and the manufacture of that good for sale, and so the word "commerce" came to cover all phases of economic activity leading up to a commercial transaction.[43] And it's equally unrealistic to try to cordon off "intrastate" from "interstate" commerce. Even in the Founders' day, the price of wheat in Pennsylvania critically affected the price of bread in New York City. And so "commerce . . . among the several states" eventually came to cover pretty much *all* commerce.[44] These were all natural moves, and I don't really disagree with any of them. But they did mean that the Commerce Clause became largely equivalent to a national police power over just about all activities of life.[45] Chief Justice Marshall's warning in *Gibbons* that "the enumeration [of national powers] presupposes something *not* enumerated" largely got lost. That's why Solicitor General Days was so dumbfounded by Justice O'Connor's question in *Lopez* about whether there's anything left that Congress *can't* regulate.

The second problem was that Congress figured out ways to work around whatever limits on its power did exist. Congress could use its prerogative to grant or withhold federal benefits to the States in order to get them to do stuff that Congress *lacked* power to order directly.[46] After the Sixteenth Amendment's provision for an income tax vastly expanded the national government's financial resources, Congress was able to use the promise of federal funding to get the States to do all sorts of things that Congress could not directly mandate. Programs like the No Child Left Behind Act's education reforms,[47] which lack an obvious connection to commerce and interfere with traditional state primacy over education, are structured as conditions on the grant of federal monies to state and local governments. In the rare cases that enumerated powers don't cover something Congress wants to do, it can usually get its way indirectly via the Spending Power.[48]

The third problem was that the dual federalism regime put a great deal of pressure on courts' ability to draw bright lines between state and

41. 22 U.S. (9 Wheat.) 1 (1824).

42. *See, e.g.*, U.S. v. Lopez, 514 U.S. 549, 585-86 (1995) (Thomas, J., concurring) (canvassing Founding-era sources).

43. *See* NLRB v. Jones & Laughlin Steel, 301 U.S. 1, 40–41 (1937).

44. *See* U.S. v. Darby, 312 U.S. 100, 118 (1941).

45. *See, e.g.*, Gonzales v. Raich, 545 U.S. 1 (2005).

46. *See, e.g.*, Lynn A. Baker, *Conditional Federal Spending after* Lopez, 95 COLUM. L. REV. 1911 (1995) (arguing that the Spending Power offers an end run around other limits on Congress's power).

47. *See* Pub. L. 107-110, 115 Stat. 1425 (Jan. 8, 2002).

48. *See, e.g.*, South Dakota v. Dole, 483 U.S. 203 (1987).

national power. The distinctions became finer and finer; by the end of the 19th century, the Court had acknowledged that everything government does "affects" interstate commerce, and the legality of a national law would turn on whether that effect was "direct" or "indirect."[49] Amorphous standards lead to inconsistent results, and inconsistent application leads to charges that the courts are simply upholding programs they like and striking down those they don't.[50] When the Court struck down the National Industrial Recovery Act and other important New Deal programs, President Roosevelt criticized the Court in a fireside chat.[51] He read out quotations from the Court's own dissenting justices, whose arguments that the laws were constitutional sounded just as plausible as the majority's arguments they were not.[52] Basically, the *legal* distinctions seemed so arbitrary that it was hard to defend the Court as relying on *law* rather than politics. And when judges act like politicians, people tend to prefer the politicians they actually get to vote for.

For all these reasons, the constitutional model of dual federalism died out around 1937, a casualty of the Supreme Court's "switch in time" that staved off FDR's court packing plan by ending the Court's resistance to the New Deal.[53] Although we still see enumerated powers cases from time to time—*United States v. Lopez*[54] is the best example—the death of dual federalism meant that the Court would no longer try to define a sphere of exclusive state autonomy into which the feds could not intrude.

We're generally inclined to think of the Constitution as perfect, or at least highly successful, but I think the only fair conclusion is that the enumerated powers strategy for protecting federalism had failed.

B. Concurrent Jurisdiction

That hardly means, however, that federalism is dead. It just means that contemporary federalism is different. And in many ways, it's a lot more interesting. Contemporary federalism begins by replacing the model of dual federalism with one of concurrent jurisdiction.[55] Both the

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49. *See, e.g.*, U.S. v. E.C. Knight Co., 156 U.S. 1 (1895).

50. *See generally* Lawrence Lessig, *Translating Federalism:* United States v. Lopez, 1995 SUP. CT. REV. 125, 170–71, 174.

51. *See* Franklin Delano Roosevelt, *Fireside Chat on Reorganization of the Judiciary* (March 9, 1937).

52. *See id.*

53. *See* Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950).

54. 514 U.S. 549 (1995) (striking down the federal Gun Free School Zones Act as outside the commerce power).

55. *See generally* Ernest A. Young, *The Puzzling Persistence of Dual Federalism*, *in* NOMOS

national government and the states can regulate most subjects; there are few, if any, exclusive zones of state or national power. Nowadays, all sorts of federal laws regulate areas formerly reserved to the states, from family law to education to small-time drug offenses that never go near a state border.[56] And the states get involved in things like immigration or promoting foreign trade that formerly would have been reserved to national authorities.[57]

In a concurrent jurisdiction model, the dominant principle is not the Tenth Amendment but the Supremacy Clause, which says that validly-enacted federal laws prevail over contrary state law.[58] This could simply be a recipe for the nationalization of American law and politics, but it doesn't have to be. Three questions are critical to the vitality of federalism in this new regime: Who makes federal law, and how easy is it to make? How readily do we find *conflicts* between federal and state law? And who *enforces* federal law?

1. Making Federal Law: Of Political and Procedural Safeguards

Start with the *making* of federal law. At the beginning of the concurrent era, Professor Henry Hart wrote that

> Federal law is generally interstitial in its nature. It rarely occupies a legal field completely, totally excluding all participation by the legal systems of the states. . . . Congress acts, in short, against the background of the total *corpus juris* of the states in much the way that a state legislature acts against the background of the common law, assumed to govern unless changed by legislation.[59]

In other words, the fact that an issue falls within Congress's regulatory jurisdiction hardly means that it will be governed by federal law. Federal law displaces state law only when a political coalition decides to regulate at the national level and manages to push its proposal through the procedural gauntlet that Article I prescribes for enacting federal

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56. *See, e.g.*, Gonzales v. Raich, 545 U.S. 1 (2005) (permitting federal regulation of individual consumption of homegrown medicinal marijuana).

57. *See, e.g.*, Chamber of Commerce v. Whiting, 131 S. Ct. 1968 (2011) (upholding Arizona law regulating employment of undocumented immigrants); Julian Ku, *Gubernatorial Foreign Policy*, 115 YALE L. J. 2380 (2006).

58. *See* U.S. CONST. art. VI, cl. 2 (stating that "this Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made . . . shall be the supreme Law of the Land").

59. RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER, & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 459 (6th ed. 2009) (quoting the first edition, published in 1953); *see also* Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954).

statutes.[60]

The constitutional lawmaking process builds in two distinct sets of safeguards for state autonomy. One is the States' representation in Congress. Commentators from James Madison in the 18th Century down to Herbert Wechsler in the 20th have argued that members of Congress can be relied upon to protect the states' interests; as Wechsler emphasized, Congress can act only when the states' representatives have "acquiesced" in the federal proposal.[61] More recent work on federalism questions this assumption, pointing out that while federal representatives surely care about the political *interests* in their districts, we can't assume that they care about the *institutional* interests of state *governments*.[62] But it seems likely that the "political safeguards of federalism" do operate to protect state governmental prerogatives at least some of the time.

The more effective protection may arise simply from the procedural difficulty of enacting federal statutes.[63] Federal legislation is often thwarted by the sheer number of hoops that bills must jump through and the many opportunity those hoops afford for opponents to derail a legislative proposal. As anyone who watched the "I'm Just a Bill" cartoon growing up can tell you, it's a long way to Capitol Hill and lots can go wrong once you get there.[64] We might call these obstacles "the *procedural* safeguards of federalism."[65]

Political and procedural safeguards help maintain federal law's interstitial character. Congress has managed to enact a lot of statutes since Professor Hart wrote in 1953, but state law continues to govern important areas of American life. Most of the first year law school curriculum—contracts, torts, property, criminal law—falls in this category.[66] And while these safeguards are hardly perfect, they do point

60. *See* U.S. CONST. art. I, § 7.

61. *See* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954); THE FEDERALIST NO. 45, at 294–95 (James Madison) (Issac Kramnick, ed. 1987).

62. *See, e.g.*, Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L. J. 75, 113–15 (2001); Larry D. Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1510–11 (1994).

63. *See* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1339–40 (2001).

64. *See* Dave Frishberg, *I'm Just a Bill*, *in* SCHOOLHOUSE ROCK! (30th Anniversary ed. 2002); *but see Saturday Night Live*: *Capitol Hill Cold Open* (NBC television broadcast Nov. 23, 2014), *available at* https://www.youtube.com/watch?v=JUDSeb2zHQ0 (suggesting that President Obama's use of executive orders to change federal immigration law has revamped the federal legislative process).

65. *See* Bradford R. Clark, *The Procedural Safeguards of Federalism*, 83 NOTRE DAME L. REV. 1681 (2008).

66. I am indebted to Douglas Laycock for this observation. One could quibble: In addition to the state-law dominated subjects of Contracts, Torts, and Property, Duke's first year curriculum covers Constitutional Law (federal), Civil Procedure (federal), Criminal Law (mostly the Model Penal Code,

toward an alternative model for contemporary federalism to replace the old notion of dual federalism.

The primary thrust of a political and procedural model of federalism would be to insist that *Congress* make federal law. The political safeguards of federalism can't protect states if Congress doesn't make the laws. And yet, most federal law *isn't* made by Congress anymore—it's made by federal administrative agencies.[67] (If you don't believe me, walk over to the law library and compare the shelf space devoted to the U.S. Code to that taken up by the Code of Federal Regulations and the Federal Register.) The States have no built-in representation in the federal rulemaking process. And a big reason we use administrative agencies is that they can make law so much more easily than Congress. That's great for responding quickly to complex problems; it's terrible for protecting state autonomy.[68]

We could say much the same thing about the other form of federal lawmaking that circumvents Congress—the creation of federal *common* law by federal courts. Federal judges certainly don't represent states, and they face even fewer procedural constraints on lawmaking than agencies do. The Court recognized the danger of federal judicial lawmaking to state autonomy when it held in *Erie Railroad v. Tompkins*[69] that "[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. . . . There is no federal general common law."[70] We don't teach *Erie* in Constitutional Law, and most people think of it as a civil procedure case. But *Erie* is arguably the most important federalism decision of the 20th century, because it sums up the basic strategy of contemporary federalism doctrine: State law can be displaced only when Congress, which represents the states and can act only with considerable difficulty, has made the decision to do so.[71]

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with significant elements of federal procedural law thrown in). Many law schools now throw in another primarily federal course on legislation and regulation. *See, e.g.*, LISA SCHULTZ BRESSMAN, EDWARD RUBIN, & KEVIN STACK, THE REGULATORY STATE (2d ed. 2013).

67. *See, e.g.*, INS v. Chadha, 462 U.S. 919, 985–86 (1983) (White, J., dissenting) ("For some time, the sheer amount of law—the substantive rules that regulate private conduct and direct the operation of government—made by the agencies has far outnumbered the lawmaking engaged in by Congress through the traditional process.").

68. *See* Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869 (2008); Clark, *supra* note 63, at 430–38.

69. 304 U.S. 64 (1938).

70. *Id.* at 78.

71. *See generally* Ernest A. Young, *A General Defense of* Erie Railroad Co. v. Tompkins, 10 J. L. ECON. & POL'Y 17, 18 (2013).

2. Conflicts Between Federal and State Law

Of course, when Congress *does* validly enact a federal law, that law trumps state law in the event of a conflict. And so the second critical consideration in a concurrent jurisdiction regime concerns the rules for determining whether such conflicts exist. Those rules all under the doctrine of preemption—a topic that even most federalism experts consider boring. (Just stop for a moment and consider how boring something like that would have to be.)

Let me give you an example: In 2001, the Supreme Court decided a quiet little case called *Egelhoff v. Egelhoff*,[72] which concerned whether the beneficiary rules of a pension plan established under the federal Employee Retirement Income Security Act (ERISA) trumped a Washington statute providing that designation of a spouse as a beneficiary of a nonprobate asset was automatically revoked upon divorce. It just doesn't get any more exciting than that, right? But in dissent, Justice Stephen Breyer stepped back for a moment to discuss the broader importance of statutory preemption cases for federalism. He stressed "the practical importance of preserving local independence, at retail, that is, by applying pre-emption analysis with care, statute by statute, line by line, in order to determine how best to reconcile a federal statute's language and purpose with federalism's need to preserve state autonomy."[73] This task, Breyer suggested, is more consequential for federalism than "the occasional constitutional effort to trim Congress' commerce power at its edges" or "to protect a State's treasury from a private damages action."[74] He concluded that "in today's world, filled with legal complexity, the true test of federalist principle may lie . . . in those many statutory cases where courts interpret the mass of technical detail that is the ordinary diet of the law."[75]

I submit that Justice Breyer's statement is one of the most important things the Court has said about federalism in a very long time. In a world of concurrent jurisdiction state law can coexist with federal law, but must give way in the event of a conflict. So how often we find such conflicts largely determines how much room there will be for state law. Conflicts occur either when Congress intends to displace or preempt state law, or when state law gets in the way of what Congress is trying to

72. 532 U.S. 141 (2001).

73. *Id.* at 160 (Breyer, J., dissenting).

74. *Id.* at 160-61 (citing U.S. v. Morrison, 529 U.S. 598 (2000) (striking down part of the federal Violence Against Women Act as outside Congress's commerce power), and Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001) (holding that state sovereign immunity barred damages suits against a state government under the Americans with Disabilities Act)).

75. *Id.*

achieve.[76] But Congress's intent is often ambiguous, and preemption doctrine is concerned mostly with establishing default rules to deal with these ambiguous cases. How clearly must Congress speak in order to display its intent to preempt state law? How much of a conflict must exist before state law must give way?

Two things are worth noting here. First, although preemption is a constitutional principle in the sense that it derives from the Supremacy Clause, all the interesting questions in preemption cases concern the meaning of federal statutes. In fact, it is not too much to say that, in many if not most cases, the boundary between state and federal authority in most practical settings nowadays is determined by federal *statutes*, not constitutional principle.[77] The question is not generally how far did Congress have constitutional power to go, but rather how far did Congress intend to go in displacing state law.

Second, these questions are often highly technical—like the ERISA question in *Egelhoff*. They involve, as Justice Breyer said, "the mass of technical detail that is the ordinary diet of the law." Major preemption cases over the past decade or so have concerned the intricacies of Congress's regulatory regime for medical drugs and devices,[78] the federal air bag rules for minivans,[79] and safety measures required under state and federal law for oil tankers navigating in Puget Sound.[80] But although these cases are a nerd's banquet, the stance that the Court takes toward statutory preemption cases probably has a greater impact on the federal balance than the grand clash of constitutional principles in a case like *United States v. Lopez*.[81] Not only do preemption cases tend to involve issues of greater practical importance, but there are also just a whole lot more of them. The Supreme Court decided five preemption cases, for example, in the 2010 Term alone.[82] Preemption is, by a considerable margin, the most common constitutional claim in civil litigation.

The way that the modern Court has approached preemption cases illustrates an important point about federalism doctrine in a world of concurrent jurisdiction. The Court's most important tools in this area

76. *See, e.g.*, Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372–73 (2000) (summarizing the types of preemption).

77. *See generally* Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L. J. 408 (2007).

78. *See, e.g.*, Wyeth v. Levine, 555 U.S. 555 (2009) (drugs); Riegel v. Medtronic, Inc., 552 U.S. 312 (2008) (devices).

79. *See* Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000).

80. *See* U.S. v. Locke, 529 U.S. 89 (2000).

81. *See* Young, *supra* note 20, at 1384–86.

82. *See generally* Ernest A. Young, *"The Ordinary Diet of the Law": The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253 (2012) (surveying these cases).

are canons of statutory construction—default rules for resolving questions about Congress's intent when it fails (as it often does) to make that intent clear. Ever since the 1940s, the Court has applied a "presumption against preemption," requiring either clear evidence that Congress intended to preempt state law or a clear conflict between state law and a federal statute's purposes.[83] The presumption fits well with a federalism theory grounded in the political and procedural safeguards of federalism.[84] By requiring Congress to speak clearly, the presumption provides notice to members of Congress that care about state autonomy that a proposed measure may preempt state law. And by adding an additional drafting hurdle to federal bills, the presumption makes it a little more difficult to enact preemptive federal statutes.[85] This is an instance where the rules of statutory construction further the purposes of constitutional interpretation.

3. Cooperative and Uncooperative Federalism

The third critical consideration in a world of concurrent jurisdiction is who enforces federal law. In the beginning, the Articles of Confederation denied the national government any direct power to act on individuals.[86] The Confederation Congress depended on the States to implement any laws that it enacted, much like the contemporary European Union generally issues directives that are implemented by the Member States. This didn't work out well for us, partly because many of the American states simply refused or dragged their feet in response to Congress's mandates. One of the key changes in the new Constitution of 1789 was that national government gained the power to legislate directly over individuals, without depending on the States as intermediaries.

But the national government was still confined to its separate sphere of enumerated powers, which were construed pretty narrowly. That meant that the national government and the States operated pretty much independently of one another. The Feds mostly implemented federal laws, and state officials implemented state law. This was wonderfully simple, and so naturally it had to change.

Nowadays the norm is "cooperative federalism," under which most federal programs are implemented by federal and state officials working

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83. *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947); *see also* Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767 (1994).

84. *See* Young, *supra* note 82, at 265–69.

85. *See id.* at 265.

86. *See* N.Y. v. U.S., 505 U.S. 144, 163 (1992).

together.[87] Under the Clean Air Act, for example, the national Environmental Protection Agency has primary responsibility for setting standards; it issues regulations telling us how much ozone should be in the air. But primary responsibility to *enforce* these standards is delegated to the States, which must formulate and implement "state implementation plans" that specify how each state is going to go about meeting the federal emissions targets.[88] States have significant flexibility in this; they might mandate automobile emissions inspections, build mass transit, impose restrictions on factories, etc. Of course, state implementation plans have to meet many specific federal requirements, and the national EPA supervises state implementation.

This pattern of state implementation of federal programs recurs across the whole range of federal law, from environmental protection to healthcare to social security. State participation is optional; as the Court held in *New York v. United States*[89] in 1992 and *Printz v. United States*[90] in 1997, it is unconstitutional for Congress to "commandeer" state legislators or executive officials by requiring them to enforce federal law. Congress must *persuade*, not command, States to participate in cooperative federalism schemes.

But States have strong incentives to cooperate. Often state implementation of federal programs is tied to massive grants of federal funds. And even when it is not, States know that along with burdens of enforcement comes the opportunity to participate in shaping federal policy. Anyone who has ever sent a teenager to the grocery store knows that when you ask someone else to do something on your behalf, there will be a certain amount of slippage between your vision and theirs. Agents inevitably have a certain amount of discretion in carrying out a principal's instructions; moreover, as principals become *dependent* on their agents, they have to listen if the agent would prefer to do things differently.[91]

Heather Gerken and Jessica Bulman-Pozen have described this dynamic as "uncooperative federalism"—emphasizing the potential of state officials administering federal programs to bend the rules, exercise their discretion in a way that federal officials may not like, and even force concessions from federal agencies.[92] Think, for instance, about the

87. *See, e.g.*, Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663 (2001).

88. *See* Dwyer, *supra* note 27, at 1193–97.

89. 505 U.S. 144 (1992).

90. 521 U.S. 898 (1997).

91. *See, e.g.*, JOHN J. DIIULIO, JR. & DONALD F. KETTL, FINE PRINT; THE CONTRACT WITH AMERICA, DEVOLUTION, AND THE ADMINISTRATIVE REALITIES OF AMERICAN FEDERALISM 18 (1995).

92. *See* Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L. J. 1256 (2009).

massive resistance by state educators to some of the No Child Left Behind law's testing requirements, which eventually forced the federal Department of Education to change those requirements.[93]

To be sure, if federal officials don't like the ways that state officers are implementing federal program, they can generally take over the entire program and implement it with federal personnel and resources. But this is so burdensome as to be impracticable most of the time. One student of mine, who wrote a lovely paper on the EPA's ability to take over Clean Air Act implementation, concluded that much as the U.S. military tries to have a one-and-a-half war capability, the EPA has a one-and-a-half *state* capability. EPA could, in other words, fire one medium-sized state (say North Carolina) and maybe a little bitty one (say New Hampshire) and implement the Act on its own in those states. But forget about taking over for California or Texas, or for more than a couple of smaller states at once. It seems unlikely that Congress would support the massive expansion of resources that it would take to alter this situation. So you can see why state implementation gives state officials a *lot* of leverage over the way that federal law is enforced and interpreted on the ground.

Sometimes, as in the case of Colorado's marijuana policy, a state's decision *not* to cooperate in furthering a federal policy may simply mean that federal policy can't be pursued.[94] What the Colorado example makes clear is that, even when state and federal executive officers work closely in tandem (as state and federal law enforcement often do), state officials remain accountable to the *state* legislature and the *state* electorate. This is a big part of what it means for a state to be "sovereign" in the modern regulatory environment.[95] At the end of the day, state officials don't work for the federal government, and this translates into meaningful policy autonomy in a number of areas.

The variables I have discussed are not the only critical factors in a constitutional regime where national and state authorities enjoy largely concurrent jurisdiction over most policy areas. In particular, we haven't said much at all about *money*, and yet the allocation of authority to tax, spend, and borrow is crucial to a healthy federal system. But in the interests of time I want to turn instead to the last part of my talk, which has to do with the legal and social preconditions necessary to maintain federalism as a viable constitutional principle.

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93. *See* JOHN D. NUGENT, SAFEGUARDING FEDERALISM: HOW STATES PROTECT THEIR INTERESTS IN NATIONAL POLICYMAKING 195–200 (2009).

94. *See* Mikos, *supra* note 32, at 1463–69.

95. *See* Young, *supra* note 32.

III. WHAT DOES FEDERALISM NEED TO SURVIVE?

What does federalism need to survive? We're mostly lawyers here, and so the obvious conclusion is that survival as a constitutional principle requires constitutional *law*. And law is enforced by *courts*. Hence a central preoccupation of the legal literature has been with whether courts should enforce limits on national power through judicial review.

A. Judicial Review

One odd thing about this debate is that few seem to doubt that the courts should enforce limits on *state* power—such as the so-called "dormant Commerce Clause"—through judicial review.[96] (I've always wanted to give a Coffee Talk-style exam on this topic: "The Dormant Commerce Clause is neither dormant nor a clause—discuss!") But the argument for not enforcing constitutional limits on *national* power has been that the political (and possibly procedural) safeguards of federalism limit that power sufficiently without judicial review.[97] That seems dubious. We have, after all, seen a pretty inexorable expansion of national power vis-à-vis the States over the past two centuries notwithstanding those safeguards. Most people who advocate abandoning judicial review of federalism issues are simply nationalists who do not accept that federalism is a legitimate constitutional principle at all.[98]

That is not to say, however, that the political and procedural safeguards of federalism should not *shape* the ways in which courts review federalism questions. We have existing models of constitutional doctrine designed to ensure that the political process safeguards important constitutional principles. John Hart Ely's famous book, *Democracy and Distrust*,[99] argued that courts should protect individual rights by focusing on "representation reinforcement." The idea was that the political process ordinarily protects people from oppression, and judicial review was needed primarily in those situations where politics

96. *See, e.g.*, Philadelphia v. N.J., 437 U.S. 617 (1978) (striking down New Jersey law barring out-of-state trash from New Jersey landfills).

97. *See, e.g.*, JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000).

98. *See, e.g.*, Edward L. Rubin, *Puppy Federalism and the Blessings of America*, 574 ANNALS AM. ACAD. POLI. & SOC. SCI. 37, 45 (2001) (asserting that the "only purpose [of federalism], in the period that followed the Civil War, was to allow the southern states to maintain their system of apartheid").

99. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

could not be trusted to work properly—such as when the government itself seeks to distort political debate by restricting opposition speech, or when racial prejudice predicts minorities from forming political coalitions. One can readily imagine a "Democracy and Distrust" for federalism that would design judicial doctrine to reinforce political structures that work to protect states.[100] The Court's extensive jurisprudence of pro-federalism "clear statement rules" in statutory construction cases is a good example. As in the statutory preemption cases I've already discussed, clear statement canons provide notice to political forces that care about federalism, and they raise another procedural obstacle to intrusive national laws.

It seems unlikely, however, that judicial review operating alone is enough to preserve federalism as a viable constitutional principle. We need to think about the underlying political and sociological forces that support federalist structures, and how likely they are to endure. I want to talk briefly about three: opportunistic invocations of federalism; sincere personal commitments to particular states; and a more general commitment to the importance of process and structure.

B. The Virtues of Opportunism

The conventional wisdom among many lawyers is that no one cares either about federalism *per se* or about particular states.[101] I want to question whether that's true, but for a moment let's assume it is. The same conventional wisdom suggests that when people do invoke federalism as a reason to do or not do something, it's simply an opportunistic move motivated by preferences about the underlying substantive issue.[102] So if I invoke federalism in opposition to Obamacare, for instance, that must be because I don't like public healthcare—not because I actually care about whether it is done at the state or federal level. A more sophisticated version holds that because partisan alignments may differ at the state and federal level, each political party will advocate or oppose national action based on which level they expect to control.[103]

Let's assume that all this is true. The question is, does all that insincerity and opportunism undermine the case for federalism as a

100. *See, e.g.*, Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 123–29 (2004).

101. *See, e.g.*, ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS 27 (2009); Rubin, *supra* note 98, at 45–46.

102. *See, e.g.*, Peter J. Smith, *Federalism, Instrumentalism, and the Legacy of the Rehnquist Court*, 74 GEO. WASH. L. REV. 906 (2006).

103. *See* Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077 (2014).

constitutional *principle*. A lot of people seem to think that it does, but I think that fails to understand the Founders' basic thinking about government structure. Consider Federalist 51, where Madison laid out his basic theory of checks and balances. He began with the view that human nature is basically selfish and unprincipled, then set out to "supply[] by opposite and rival interests, the defect of better motives."[104] The trick to keeping the structure in balance, then, was to give "to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments by the others."[105] In this way, "[a]mbition must be made to counteract ambition. The interest of the man must be connected to the constitutional rights of the place." Madison was the Gordon Gecko of political theory: selfish ambition—like greed—is good. Since we cannot count on people to believe in federalism or separation of powers as a matter of high-minded principle, we make sure that at least some people have selfish and opportunistic incentives to fight for the rights of states.[106]

C. Federalism and Identity

I think that opportunistic reasons to protect state prerogatives go a long way toward preserving the autonomy of the states. But I doubt it is a complete solution. In order for the political safeguards of federalism to work, for example, we need national politicians tasked with representing the states to have reasons to defend not only their own interests, but the often-distinct interests of the state government; we need state officials tasked with implementing federal law to be responsive to their state constituents rather than being coopted by their federal supervisors; and we need voters to care about the state enough to punish both their state and federal representatives when those politicians fail to defend the state's autonomy.

Federalism is unlikely to survive, in other words, unless significant numbers of Americans identify with and feel loyalty to their States, distinctly from the loyalty that they feel to the nation as a whole.[107] We do not need modern-day Robert E. Lees, who turned down command of the *Union* army in order to fight for his native Virginia—but we do need a significant number of people who care enough for their States for it to

104. FEDERALIST NO. 51, *supra* note 14, at 320.

105. *Id.* at 319.

106. *See, e.g.*, Thomas H. Lee, *Countermajoritarian Federalism*, 74 FORDHAM L. REV. 2123, 2125–26 (2006); Young, *supra* note 19, at 1308–11.

107. *See generally* Ernest A. Young, *The Volk of New Jersey? State Identity, Distinctiveness, and Political Culture in the American Federal System*, DUKE L. SCH. PUB. L. & LEGAL THEORY (Feb. 24, 2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2552866.

affect how they vote, which politicians they support, and, in some cases, to invest their time and attention in state governance. Madison was able to take these sorts of attachments for granted in the late 18th Century, when the states were both more different from one another than they are today and more well-established as institutional objects of allegiance than the fledgling national government.[108] And we can still take them for granted in Europe, where the strong identification of citizens with their Member State governments—with Britain, France, or Germany, for instance—seems to form a strong bulwark against centralizing tendencies in the European Union.[109]

In America, however, prominent academics like Edward Rubin and Malcolm Feeley have asserted that state identity no longer exists. And because states no longer command any particular sense of loyalty, they say, there is no particular point in having federalism.[110]

There are two related but distinct issues here. First, are the states distinctive any more, or have they basically become homogeneous? Second, do the people of each state feel any particular loyalty to or identity with that state? The second question is what we're really interested, but the puppy federalism proponents rely mostly on the first. There's a Starbucks on every corner whether you're in Boston or Austin, they say, and therefore it's hard to imagine why anyone would care which state they live in or feel any particular attachment to it.

It's worth noting that this conclusion does not necessarily follow. Consider the famous first line of Tolstoy's novel, *Anna Karenina*, which asserts that "[e]very happy family is alike."[111] No one thinks that prevents me from identifying strongly with *my* family, as opposed to someone else's family. And anyone who's ever been to a high school football game can attest to the ability of the inhabitants of basically similar communities to whip themselves into a frenzy based on their identity with one team or the other.[112]

But putting that objection aside, it just isn't true that differences between the States have disappeared. For one thing, the catchy phrase that there's a Starbucks on every corner no matter where you go is false; there's actually a significant latte gap in this country, with states like Massachusetts and Texas enjoying ten times as many Starbucks per

108. *See* Jacob T. Levy, *Federalism, Liberalism, and the Separation of Loyalties*, 101 AM. POL. SCI. REV 459, 465 (2007).

109. *See* THOMAS RISSE, A COMMUNITY OF EUROPEANS? TRANSNATIONAL IDENTITIES AND PUBLIC SPHERES (2010).

110. *See* FEELEY & RUBIN, *supra* note 22, at 16.

111. LEO TOLSTOY, ANNA KARENIN 13 (Rosemary Edmonds, trans. 1978) (1873–1877).

112. *See, e.g.*, H.G. BISSINGER, FRIDAY NIGHT LIGHTS: A TOWN, A TEAM, AND A DREAM (1990).

capita as West Virginia, Mississippi, and Vermont.[113] States vary widely in size, economic prosperity, demographic makeup, and religious affiliation.[114] And one particularly interesting study, based on a robust database of nationwide polling over an extended period of time, found that one's state of residence is as powerful a predictor of one's political party and ideology as one's race or religion.[115]

What about identity and loyalty? We lack direct empirical measures. But we do know several things. People trust state and local governments a *lot* more than they trust the federal government. A recent Pew Center survey found that 63% of Americans viewed local governments favorably; 58% viewed state governments favorably; and only 28% viewed the national government favorably.[116] This poll is consistent with many other surveys over the last several years.[117] We know that political movements have looked to state governments and state constitutions to protect their rights on many critical issues, from workers' and educational rights in the 19th century to environmental and same-sex marriage marriage rights in the 20th and 21st.[118] We also know that recent migrations from blue states to red states have not tended to change voting patterns in the destination states, which suggests that personal mobility tends to have more of a sorting effect than a dilution effect on political culture.[119] And we have a wide variety of cultural evidence, from essays to fiction to music, suggesting that the American people continue to have a love affair with their states.[120] I once tried to string cite all the songs about Texas in a law review footnote,[121] only to find that there are way too many to list.

No one is ever likely to conclusively prove that people identify with

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113. *See* ANDREW GELMAN, RED STATE, BLUE STATE, RICH STATE, POOR STATE: WHY AMERICANS VOTE THE WAY THEY DO 29–30 (2008).

114. *See* Young, *supra* note 107, at 43–59.

115. *See* ROBERT S. ERIKSON, GERALD C. WRIGHT, & JOHN P. MCIVER, STATEHOUSE DEMOCRACY: PUBLIC OPINION AND POLICY IN THE AMERICAN STATES 47 (1993).

116. *State Governments Viewed Favorably as Federal Rating Hits New Low*, PEW RES. CENTER (Apr. 15, 2013), http://www.people-press.org/2013/04/15/state-governments-viewed-favorably-as-federal-rating-hits-new-low/.

117. *See* Cindy D. Kam & Robert A. Mikos, *Do Citizens Care about Federalism? An Experimental Test*, 4 J. EMP. LEG. STUD. 589, 598 (2007).

118. *See* EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS (2013).

119. *See* Harry Enten & Nate Silver, *Migration Isn't Turning Red States Blue*, FIVETHIRTYEIGHT POLITICS (Aug. 29, 2014), *available at* http://fivethirtyeight.com/features/migration-isnt-turning-red-states-blue/.

120. *See, e.g.*, STATE BY STATE: A PANORAMIC PORTRAIT OF AMERICA (Matt Weiland & Sean Wilsey, eds. 2009).

121. *See* Mitchell N. Berman, R. Anthony Reese, & Ernest A. Young, *State Accountability for Violations of Intellectual Property Rights: How to "Fix"* Florida Prepaid *(And How* Not *To)*, 79 TEX. L. REV. 1037, 1039 n.1 (2001).

their states, much less to accurately document how much that identity has increased or declined since the Founding. But the question is simply whether enough people care to make a political difference. And the evidence I've seen so far strongly suggests that they do.

D. Process, Structure—and Lawyers

The final sociological element necessary for federalism to survive as a viable constitutional principle takes us back to where we began. Federalism is in the Constitution. It is an integral part of a constitution that is obsessed with government structure and process; that has a lot more to say about who makes the laws and how than it says about what laws should be made. Maintenance of a federal system requires, in other words, that Americans continue to care not just about results, but about the structure of government and the process by which it exercises power.

As I've already noted, many students of politics assume that both politicians and voters care *only* about the substance of policy. It's worth emphasizing just how implausible this assumption is. Consider Mitt Romney, who favored public healthcare as governor of Massachusetts but opposed replicating that program on a national scale. Or ask yourself whether Justice O'Connor—a justice so grandmotherly that she made her clerks carve Halloween pumpkins for the Supreme Court trick-or-treat—was really in favor of guns in schools when she cast the deciding vote in *United States v. Lopez*.[122] It's much more plausible that she cared about the underlying structural issues in the case. And in any event, why would anyone make opportunistic appeals to federalism unless there's an *opportunity* there—that is, unless there's a meaningful component of public opinion that might not agree on the underlying substantive issue but might be persuaded by an appeal to structural principles.

I want to suggest, however, that there is a particularly strong connection between federalism and lawyers. Lawyers are steeped in process; from the first semester of law school, we train you to care at least as much—and probably more—about how decision-makers decide, and by what procedures, as you care about *what* they decide. It is commonplace in law school to reject a decision we agree with on the merits because we cannot accept the way in which it was made. In fact, the whole phrase "on the merits"—which one rarely encounters outside the law—exists mostly because we spend so much time focused on other considerations. One vital function that lawyers play in society is to continually introduce this perspective into the national cultural

122. 514 U.S. 549 (1995).

conversation—through our example, our statements in public settings, and even the way we talk about politics to our neighbors over the grill in the back yard.

A viable federalism requires this kind of lawyerly detachment. It requires us to oppose things we believe in, and support things we don't approve, because we care about the structure of governmental decisionmaking. In law school, we create a special kind of nerd—one obsessed with technicalities like jurisdiction, standards of review, and procedure. William Howard Taft seems to have been that kind of nerd; it is no doubt part of why he famously preferred being Chief Justice to being President. That is the kind of nerd who might actually care about federalism.