

ESSAY

REALISM ABOUT FEDERALISM

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In this Essay, Professor Cross responds to recent academic efforts to develop a robust judicial federalism doctrine, which advocate increased judicial review of legislative activities and suggest that an expanded federalism doctrine would have significant, negative consequences. Professor Cross challenges the assumption that courts would apply a principled, neutral doctrine of federalism, using empirical evidence to demonstrate that courts consistently have invoked federalism for political or ideological reasons. He suggests that the flexibility of the proposed federalism doctrines would allow judges to manipulate results to achieve ideological ends and that the resulting intrusive judicial review would implicate separation of powers concerns and impair legislative functioning. He argues further that institutional realities—the susceptibility of judges to the concerns and influence of the other branches of government—would prevent such federalism from being a meaningful restriction on the powers of the federal government in any event. Professor Cross concludes that proponents of expanded federalism should focus their efforts on creating a practicable doctrine that is not as vulnerable to ready manipulation and high systemic costs.

INTRODUCTION

In recent years, the Supreme Court and the academic community appear to have rediscovered the virtues of federalism.¹ Both the justices and the academics seem to be grappling with what federalism means and how to make it into a workable doctrine. In this Essay, I maintain that these efforts are misplaced, that federalism does not now and will never have authentic legal significance as a principled constraint on the power of the national government. Some proposed efforts to give significance to federalism will have contrary effects,

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¹ Federalism literally means only the division of powers among national and subordinate governments. See Larry Kramer, *Understanding Federalism*, 47 Vand. L. Rev. 1485, 1502 (1994) (suggesting that there are “two sides to federalism: not just preserving state authority where appropriate, but also enabling the federal government to act where national action is desirable”); Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 Sup. Ct. Rev. 125, 135-37 (discussing balance of powers contemplated by federalism). In this Essay, I use the term federalism as shorthand (as do recent articles) for a doctrine of “states’ rights”—protecting the rights of states against federal action. The fundamental question in dispute is whether state sovereignty somehow limits the powers of the national government.

producing unprincipled, arbitrary judicial decisionmaking that can disrupt the functioning and accountability of Congress, without providing any principled zone of state power.

I contend that even if federalism were a beneficial principle, meaningful states' rights will not be realized under the U.S. Constitution, where definition and enforcement of those rights inescapably lies with the national Supreme Court. Relatively weak bright-line doctrines, such as the one set forth in *Printz v. United States*,² probably represent the apogee of states' rights.

Devotees of federalism concede that present bright-line rules such as that established in *Printz* are frail.³ They generally concede that truly powerful bright-line rules (e.g., no federal legislation regarding public education) are unrealistic and unwise. The proponents of federalism seem instead to be congealing around an alternative: a highly subjective judicial balancing test with a strong procedural component that would require Congress to justify federal involvement when legislating. Courts would review legislation to determine if the legislature has justified federal action sufficiently.

Leading examples of the new academic approach to judicial enforcement of federalism are Vicki Jackson's recent article in the *Harvard Law Review*⁴ and Stephen Gardbaum's article in the *Texas Law Review*.⁵ Jackson believes that courts should review "the adequacy of congressional process to justify assertions of federal power."⁶ Gardbaum believes that courts should police "Congress's deliberative processes and its reasons for regulating" to ensure that Congress seriously considered federalism concerns and adequately justified federal government action.⁷ Other recent prominent publications have also included articles arguing that, absent sufficient congressional justifica-

² 521 U.S. 898 (1997). *Printz* struck down the aspect of the Brady Handgun Violence Protection Act, 18 U.S.C. §§ 921-930 (1994 & Supp. 1999), which required officers of state governments to assist in the implementation of federal legislation. It established what is often called the anticommandeering principle, which represents a procedural, though not a substantive, bright line for federal action.

³ See *infra* notes 97-98 and accompanying text.

⁴ Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle*, 111 Harv. L. Rev. 2181 (1998).

⁵ Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 Tex. L. Rev. 795 (1996). Both Jackson's and Gardbaum's articles appear to descend from Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L.J. 267 (1993). Lawson and Granger argued that the intent of the Framers was that congressional authority to regulate commerce be limited to cases in which it truly was necessary and proper. They did not seriously address judicial enforcement of these conditions, however.

⁶ Jackson, *supra* note 4, at 2258.

⁷ See Gardbaum, *supra* note 5, at 799.

tion of national action, courts should strike down legislation as violating principles of federalism.⁸

The Supreme Court itself has hinted that it might implement a doctrine along the lines of that suggested by Jackson and Gardbaum. When Congress passed legislation applying patent law remedies to state governments, the Court held that Congress had established an insufficient record to demonstrate the need for its action.⁹ The Court's fairly extensive scrutiny of the legislative record and whether it demonstrated that the statute was "appropriate" appears similar to the analysis proposed by Jackson and Gardbaum. The Court considered only congressional power to enforce the Fourteenth Amendment, and not Article I power, but the opinion might represent a preliminary step toward judicial review of the basis for legislation. Such a doctrine would not consistently advance the objectives of federalism but would merely enable judges to strike down occasional laws in order to better effect their ideological policy objectives.

My response to advocates of an expanded federalism doctrine is both descriptive and normative. In Part I, I argue that federalism will be selectively invoked by courts only when ideologically convenient, so that it has no authentic restraining power of its own. In Part II, I maintain that institutional structures and incentives prevent federalism from ever acting as a meaningful, consistent constraint on the powers of the federal government. In Part III, I address proposals such as Jackson's and Gardbaum's to reinvigorate federalism. Part III.A argues that that these proposals are flawed in their efforts to create a genuine, principled doctrine of federalism. Part III.B concludes that such proposals risk inviting increased arbitrary judicial interference with legislative action by liberating judges to pursue their ideological agendas with greater vigor.

I

SELECTIVE POLITICAL USE OF FEDERALISM

Federalism's role in American history as a stalking horse for racism is infamous. Southern states invoked states' rights in an effort to

⁸ See, e.g., Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. Cal. L. Rev. 1447 (1995); Erwin Chemerinsky, *Rehabilitating Federalism*, 92 Mich. L. Rev. 1333 (1994) (reviewing Samuel H. Beer, *To Make a Nation: The Rediscovery of American Federalism* (1993)); Barry Friedman, *Valuing Federalism*, 82 Minn. L. Rev. 317 (1997); Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 Vand. L. Rev. 1563 (1994).

⁹ See *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S. Ct. 2199 (1999).

preserve first slavery and then segregation. This fact gave federalism a bad name for quite some time.¹⁰ Recent commentators have observed, accurately, that federalism may be deployed in support of much more virtuous causes, such as the recent efforts by liberals to defend against the constitutional assault on state and local redistricting programs.¹¹ They have failed to recognize, though, that federalism is consistently (and I contend inherently) employed only derivatively, as a tool to achieve some other ideological end, rather than as a principled end in and of itself.¹²

Today's advocates of federalism do seek to make a nonideological case for the intrinsic virtues of federalism, independent of liberal or conservative ideological policy objectives.¹³ Some of these virtues are ideologically neutral, such as recognition of local choice, whether it be liberal or conservative. Yet, even though states' rights arguments are

¹⁰ Even setting aside the civil rights experience, "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." Friedman, *supra* note 8, at 367. Federalism was invoked in the effort to frustrate New Deal reforms such as child labor and minimum wage legislation. See Chemerinsky, *supra* note 8, at 1333; see also Erwin Chemerinsky, *The Values of Federalism*, 47 Fla. L. Rev. 499, 499 (1995) (noting that federalism historically "has been used as a political argument primarily in support of conservative causes").

¹¹ See M. Elaine Hammond, *Toward a More Colorblind Society?: Congressional Redistricting After Shaw v. Hunt and Bush v. Vera*, 75 N.C. L. Rev. 2151, 2181 (1997) (criticizing Court for creating situation where "the principles of federalism have been reversed").

¹² See, e.g., Alison Grey Anderson, *The Meaning of Federalism: Interpreting the Securities Exchange Act of 1934*, 70 Va. L. Rev. 813, 846 (1984) (noting that federalism argument is "simply a weapon in the argument over substance" and will be made depending on whether federal or state action "will best advance certain policy objectives"); Ronald J. Krotoszynski, Jr., *Listening to the "Sounds of Sovereignty" but Missing the Beat: Does the New Federalism Really Matter?*, 32 Ind. L. Rev. 11, 12 (1998) (noting that "[o]ne could reasonably argue that federalism *du jour* merely serves as a convenient shill for the policy preferences of the current members of the Supreme Court"); Bill Swinford & Eric N. Waltenburg, *The Supreme Court and the States: Do Lopez and Printz Represent a Broader Pro-State Movement?*, 14 J.L. & Pol. 319, 322 (1998) (noting that recent pro-federalism decisions may be explained by "a result-oriented decision-making process in which the outcome desired by the majority is also readily supported by a federalism rationale").

¹³ See, e.g., Bednar & Eskridge, *supra* note 8, at 1467-68 (arguing that "a federal system can better satisfy political preferences and economic needs, especially over time, than can a simple unitary government"); Chemerinsky, *supra* note 8, at 1344 (arguing that "the values of community, utility, and liberty . . . provide a better basis for judicial decisionmaking than the traditional values invoked for federalism"); Friedman, *supra* note 8, at 389-405 (invoking public participation in democracy, accountability, states as laboratories, protecting citizens' health, safety, and welfare, cultural and local diversity, and diffusing power to protect liberty); Merritt, *supra* note 8, at 1584 (arguing that federalism "promotes a strong national government . . . while also preserving healthy state governments"). A persuasive criticism of these arguments can be found in Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. Rev. 903 (1994).

not inherently ideological,¹⁴ federalism advocates do not explain why courts would devote themselves to furthering such an ideologically neutral value.

Even though federalism itself may not have an ideological bent, most of the cases that raise federalism issues do. In such circumstances, judges couch their "personal legislative preferences . . . in the publicly venerated language of a judicial decree."¹⁵ Judges can be expected to decide ideologically before adhering to a neutral principle of federalism.

Justice Brennan and other constitutional liberals discovered the virtues of federalism for protecting individual rights once the Court became conservative and cut back on federal protections of these rights.¹⁶ They suggested that state constitutions might be interpreted to provide rights that extend beyond those protected by the national Constitution. Did purported devotees of federalism, such as Justices O'Connor and Rehnquist, embrace the liberal converts? To the contrary, O'Connor wrote and Rehnquist joined an opinion that cut back on state court decisions protecting individual liberties.¹⁷ Federalism was subordinated to a more general political ideology regarding the judicial protection of individual rights.

Evidence of the tendency of federal judges—Supreme Court justices in particular—to decide cases politically is considerable; social scientists now essentially agree "that members of the Court are by and large policy seekers."¹⁸ Legal researchers have come to like conclu-

¹⁴ See Chemerinsky, *supra* note 8, at 1334 (arguing that there is "nothing inherent in federalism that makes it conservative").

¹⁵ Anthony D'Amato, *Aspects of Deconstruction: Refuting Indeterminacy with One Bold Thought*, 85 Nw. U. L. Rev. 113, 118 (1990).

¹⁶ See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977). For in-depth discussions of this "new federalism," see James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 Mich. L. Rev. 761 (1992); Ellen A. Peters, *Capacity and Respect: A Perspective on the Historic Role of the State Courts in the Federal System*, 73 N.Y.U. L. Rev. 1065 (1998).

¹⁷ The decision, *Michigan v. Long*, 463 U.S. 1032 (1983), held that the U.S. Supreme Court would presume that a rights-protecting decision of a state court is based on the Federal Constitution and thus is reversible by the Supreme Court unless the state court decision is clearly based on the state constitution. This decision was not compelled by precedent; it actually represented a break from the traditional presumption against federal jurisdiction. See Richard A. Matasar & Gregory S. Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 Colum. L. Rev. 1291, 1367-68 (1986). The decision appears to be explained by the ideological outcome orientation of the justices. See Erwin Chemerinsky, *Federal Jurisdiction* 550-51 (1989) (critiquing *Long* as product of Court's ideological slant); Michael Wells, *Rhetoric and Reality in the Law of Federal Courts: Professor Fallon's Faulty Premise*, 6 Const. Commentary 367, 378-79 (1989) (same).

¹⁸ Lee Epstein & Jack Knight, *The Choices Justices Make* 23 (1998); see also Jeffrey A. Segal et al., *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57

sions.¹⁹ Indeed, a review of the Supreme Court justices' internal case discussions reveals that they typically focus on policy concerns.²⁰ Ideology or politics is pervasive in the experience and actions of federal judges.²¹

Experience with federalism doctrine in particular similarly demonstrates that judges invoke the doctrine selectively to promote policy objectives.²² The success of state governments appearing before the Supreme Court correlates with the ideological pattern of the case and

J. Pol. 812 (1995) (using newspaper editorials to examine ideological slant of Supreme Court justices); Jeffrey A. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* (1993) (conducting extensive empirical analysis of Supreme Court voting and demonstrating that it is consistently driven by justices' policy preferences). For an excellent summary of the research, see Lawrence Baum, *The Puzzle of Judicial Behavior* 57-88 (1997) (concluding that judges are influenced by traditional legal factors but that political objectives are the primary driving factor behind judicial decisionmaking). Not every study shows an ideological effect because not every issue has an ideological component. See, e.g., Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. Rev. 1377 (1998) (using data from hundreds of simultaneous federal district decisions on constitutionality of Sentencing Reform Act to conduct empirical study of influences of ideology and other background factors in judicial decisionmaking and finding strong evidence that such factors did affect decisions).

¹⁹ See, e.g., Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 Yale L.J. 2155 (1998) (reviewing appellate court adherence to doctrines governing review of administrative agencies); Tracey E. George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 Ohio St. L.J. 1635 (1998) (studying influence of ideology on en banc appeals decisions); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 Va. L. Rev. 1717 (1997) (studying influence of ideology on D.C. Circuit environmental cases); Colin S. Diver, *Book Review, Sound Governance and Sound Law*, 89 Mich. L. Rev. 1436, 1445 (1991) (reviewing Christopher F. Edley, Jr., *Administrative Law: Rethinking Judicial Control of Bureaucracy* (1990)) (describing opinions as judges exercising "their personal convictions under cover of open-textured doctrine and conclusory labels"); *Proceedings of the Fifty-First Judicial Conference of the District of Columbia Circuit*, 134 F.R.D. 321, 442 (1990) (remarks of Richard J. Pierce, Jr.) (describing voting on D.C. Circuit as looking like ideological congressional voting).

²⁰ See Epstein & Knight, *supra* note 18, at 32 (finding that 65% of internal discussions focus on policy matters, as distinguished from matters of precedent or fact). The authors' data are derived from the case files of Justices Brennan, Marshall, and Powell pertaining to a random selection of cases that were orally argued in 1983. See *id.*

²¹ For a more thorough review of this evidence, see Emerson H. Tiller & Frank B. Cross, *A Modest Proposal for Improving American Justice*, 99 Colum. L. Rev. 215, 218-24 (1999).

²² See generally Anderson, *supra* note 12, at 818 (observing that federalism is only "a cloak for decisions reached on substantive policy grounds"); Rubin & Feeley, *supra* note 13, at 948 (observing that "claims of federalism are often nothing more than strategies to advance substantive positions or, alternatively, that people declare themselves federalists when they oppose national policy, and abandon that commitment when they favor it"); Emerson H. Tiller, *Putting Politics into the Positive Theory of Federalism: A Comment on Bednar and Eskridge*, 68 S. Cal. L. Rev. 1493, 1498 (1995) (suggesting that major Supreme Court federalism decisions can be explained by ideology of justices).

the justices.²³ Conservative justices, for example, invoke federalism to turn down prisoners' habeas corpus petitions²⁴ but show no respect for federalism when striking down state redistricting plans aimed at increasing minority representation²⁵ or striking down state and local affirmative action programs.²⁶ The conservative justices have likewise disregarded federalism when enforcing the Takings Clause against state environmental regulations²⁷ or reviewing challenges to state taxing authority.²⁸ Perhaps most remarkably, conservative justices blithely strike down state legislative regulation of business in preemption cases, with scarcely a nod to the interests of federalism.²⁹ Liberals, conversely, may "cry federalism" in these contexts but disregard the concept when voting to strike conservative state legislation.³⁰ Eskridge and Ferejohn have graphically depicted the results of twenty-

²³ See Richard C. Kearney & Reginald S. Sheehan, *Supreme Court Decision Making: The Impact of Court Composition on State and Local Government Litigation*, 54 J. Pol. 1008, 1014-21 (1992) (analyzing success rates of state and local governments with respect to shifting Court ideology).

²⁴ See, e.g., *Schlup v. Delo*, 513 U.S. 298, 318 (1995) (declaring that habeas filings pose threat to federalism). Erwin Chemerinsky argues that when the Court invokes federalism in habeas decisions its true agenda is pro-prosecution policy. See Erwin Chemerinsky, *Thinking About Habeas Corpus*, 37 Case W. Res. L. Rev. 748, 762-64 (1987). Conservative justices have explicitly invoked federalism to protect prosecutors from Section 1983 civil rights actions. See, e.g., *Board of County Comm'rs v. Brown*, 520 U.S. 397, 415-416 (1997).

²⁵ In these cases, the only mention of federalism is in the liberals' dissents. See, e.g., *Shaw v. Hunt*, 517 U.S. 899, 949 (1996) (Stevens, Ginsburg, & Breyer, JJ., dissenting); *Bush v. Vera*, 517 U.S. 952, 1069 (1996) (Souter, Ginsburg, & Breyer, JJ., dissenting). The conservatives have recognized and deferred to federalism in rejecting minorities who challenge redistricting plans. See, e.g., *Grove v. Emison*, 507 U.S. 25, 32 (1993) (enumerating circumstances under which federalism requires deference to states).

²⁶ See generally David Chang, *Discriminatory Impact, Affirmative Action, and Innocent Victims: Judicial Conservatism or Conservative Justices?*, 91 Colum. L. Rev. 790, 844 (1991) (concluding that "conservative Justices have ignored principles of federalism" in affirmative action context).

²⁷ See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (striking down state land use plan requiring partial dedication of property for flood control).

²⁸ See Swinford & Waltenberg, *supra* note 12, at 340-43 (reviewing votes of justices in state tax authority cases). They note, for example, that Justice O'Connor voted against the state in each of three recent closely contested decisions in the area. See *id.* at 341.

²⁹ See, e.g., *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990) (giving broad preemptive effect to ERISA). As when it strikes down state redistricting plans that increase minority representation, see *supra* note 25, when the Court preempts state business regulation, the typical mention of federalism is found only in a liberal justice's dissent. See, e.g., *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 235-37 (1995) (Stevens, J., concurring in part and dissenting in part) (condemning majority's extension of preemption doctrine); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 533 (1992) (Blackmun, Kennedy, & Souter, JJ., concurring in part and dissenting in part) (suggesting that preemption be limited to situations where Congress expressly requires so).

³⁰ See Charles F. Abernathy, *Foreword: Federalism and Anti-Federalism as Civil Rights Tools*, 39 How. L.J. 615 (1996) (describing how both liberals and conservatives employ rhetoric of federalism to advance their respective ideological agendas).

eight major federalism cases, revealing a very high association between court ideology and case outcomes.³¹

The clearest empirical research comes from a study of Burger Court decisions.³² Sue Davis compared each justice's pattern of votes to affirm nonunanimous state court civil liberties decisions in general with the pattern for state court decisions that were "liberal" in direction. Table 1 displays her findings.³³ The second column lists the percentage of all decisions in which each justice affirmed a state supreme court decision taken under review, and the third column lists the percentage of decisions in which the justice affirmed a state court decision that was liberal in result.

TABLE 1

Justice	Affirm State	Affirm State Liberal
Rehnquist	67%	6%
Black	57%	66%
Harlan	55%	0%
Burger	52%	12%
Stevens	47%	83%
Blackmun	42%	25%
White	40%	21%
Stewart	37%	36%
Powell	36%	22%
Brennan	33%	89%
O'Connor	31%	8%
Marshall	30%	92%
Douglas	14%	60%

Justice Rehnquist, perhaps the most outspoken advocate of states' rights on the Court at the time, lost all interest in deferring to states when the underlying state decision was a liberal one. By con-

³¹ See William N. Eskridge, Jr. & John Ferejohn, *The Elastic Commerce Clause: A Political Theory of American Federalism*, 47 *Vand. L. Rev.* 1355, 1396 (1994). The Court held legislation to be invalid in all 10 cases in which the Court's ideology differed from that of the enacting Congress. See *id.* When the ideologies appeared aligned, though, the Court upheld 13 of the 18 statutes. See *id.*

A recent study of federalism decisions in the area of environmental policy did not focus on ideology but did find a complete lack of coherence in neutral federalism doctrine. See Charles Wise & Rosemary O'Leary, *Intergovernmental Relations and Federalism in Environmental Management and Policy: The Role of the Courts*, 57 *Pub. Admin. Rev.* 150 (1997).

³² See Sue Davis, *Rehnquist and State Courts: Federalism Revisited*, 45 *W. Pol. Q.* 773 (1992).

³³ See *id.* at 780. The data are derived from an examination of every nonunanimous Burger Court civil liberties case on review from a state court of last resort, with the exception of takings cases. See *id.* at 776-77. For purposes of analysis, Davis defines a "liberal" vote as one for an accused or a civil rights claimant. See *id.* at 776 n.3.

trast, Justices Brennan and Marshall became extremely deferential to the state courts when they produced liberal outcomes. The analysis of more moderate justices produced more moderate results. The decisionmaking pattern makes clear that justices are, in general, influenced more by the ideological posture of the case at hand than by any interest in deferring to state courts.

An early study of the Warren Court came to similar, but even more detailed, results.³⁴ After studying the votes of the justices for the 1953-1960 terms, the author found that federalism was a "third order" determinant of decisionmaking, subordinate to both the primary determinant, ideological liberalism/conservatism, and to a secondary variable, power or activism, which was significant in cases in which the primary determinant was not applicable.³⁵ The more conservative justices of the era, such as Stewart and Whittaker, abandoned any concern for states' rights when, for example, the state action in question regulated business.³⁶ The author did not prove that true concern for federalism *never* matters, but the evidence establishes that such cases are rare and that federalism is typically invoked as an excuse to pursue other ends.

Vicki Jackson asks "whether a basis exists for overturning national action on federalism grounds that will *appear* sufficiently principled to be accepted as based on 'law.'"³⁷ Perhaps courts could establish a doctrine that *appears* principled. But mere appearances, without reality, will not advance the ideologically neutral merits of federalism propounded by its advocates. Ample experience, with federalism and throughout the law, demonstrates that doctrines are inevitably employed selectively to advance ideological policy agendas and not the rights of states.³⁸ Such a system may intermittently appear to protect states' rights, but such protection is necessarily unstable, con-

³⁴ See Harold J. Spaeth, *Judicial Power as a Variable Motivating Supreme Court Behavior*, 6 *Midwest J. Pol. Sci.* 54 (1962).

³⁵ See *id.* at 74.

³⁶ See *id.* at 75-77. Ironically, the greatest supporters of federalism in a large group of cases were the strong Warren Court liberals (Douglas, Black, Warren, and Brennan), because these cases involved state regulation of private enterprise. See *id.* at 75.

³⁷ Jackson, *supra* note 4, at 2225-26 (emphasis added). Elsewhere, she refers to "plausibly principled answers." *Id.* at 2229. Such language seems to suggest that she is seeking to salvage only the icon of federalism, without its reality. Symbolic action has its benefits, of course, but does not justify the potentially serious adverse consequences that could flow from her proposed doctrine.

³⁸ Such political involvement of the judiciary is fundamentally threatening to "the values of self-determination, accountability and representationalism that provide core notions of American political theory." Martin H. Redish, *Taking a Stroll Through Jurassic Park: Neutral Principles and the Originalist-Minimalist Fallacy in Constitutional Interpretation*, 88 *Nw. U. L. Rev.* 165, 166 (1993).

tingent on the ideology of judges and the nature of disputes coming before the courts.

My perspective of law is not entirely cynical, as the evidence does not suggest that judges are blindly ideological.³⁹ The law can and does constrain opinions to a degree.⁴⁰ No contemporary judge would seek to restore slavery or segregation, even if some judge desired these ends. Even the most adamantly anti-abortion lower court judges do not attempt to prohibit abortion (at least so long as *Roe v. Wade*⁴¹ survives in some form).⁴² The law currently restrains judges from striking down many actions on federalism grounds. One might imagine some sort of federalism doctrine that could likewise constrain ideological impulses of the judiciary and compel decisions more protective of state interests. *Printz* appears on its face to represent an effort by the Court to create such a doctrine. But even such a bright-line anticommandeering rule is unlikely to constrain federal power much.⁴³ An authentic and strong federalism doctrine is probably conceivable only in theory. The following section explains why the federal courts will never actually establish a principled doctrine of federalism that materially restrains federal power.

II

INSTITUTIONAL BARRIERS TO MEANINGFUL FEDERALISM DOCTRINE

If judicial decisionmaking were purely ideological in nature, federalism doctrine would be neither intrinsically strong nor weak. Rather, the application of federalism would depend upon the ideological direction of cases coming before the Court. Insofar as ideological direction is roughly orthogonal to federalism, one would expect federalism doctrine to sway unpredictably with the composition of the Court and the cases coming before the Court. There is, however, another factor affecting the Court: its institutional setting. This factor

³⁹ See Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 Nw. U. L. Rev. 251, 285-309 (1997) (reviewing limitations of evidence that judges are solely concerned with ideological policy); Eskridge & Ferejohn, *supra* note 31, at 1361-62 (contending that judges are influenced by policy preferences, institutional concerns, and rule of law).

⁴⁰ See Malcolm M. Feeley & Edward L. Rubin, *Judicial Policy Making and the Modern State* 354-55 (1998) (explaining how doctrine serves as some constraint on ideological inclinations of judiciary).

⁴¹ 410 U.S. 113 (1973).

⁴² The Supreme Court, of course, is not necessarily so inhibited. *Roe* has survived thanks to moderately conservative justices. A sufficiently conservative Court presumably would abandon abortion rights doctrine.

⁴³ See *infra* notes 97-98 and accompanying text.

drives federalism doctrine toward nationalization, though the powerful ideological factor in decisionmaking makes this drive appear somewhat erratic.

Any legal doctrine protecting states' rights depends upon the active support of federal courts. It is the Supreme Court and the federal courts of appeals that must create the principled basis to enforce federalism constraints. For their "rights," therefore, the states are supplicants before a group of courts that are agencies of the federal government. Martin Shapiro characterizes the United States Supreme Court as a device of centralized policymaking.⁴⁴ The success of states' rights depends on the self-denial of the agents of the federal government, which is surely a slender reed on which to rest federalism.⁴⁵ This section demonstrates that this reed of reliance on the federal courts has broken consistently.

Advocates of vigorous judicial defense of federalism must confront and counter the position espoused by Wechsler and Choper that the interests of states are amply protected by the political processes of the federal government and do not require protection by the judiciary.⁴⁶ This "political safeguards" theory of federalism has been both embraced and rejected by the Court.⁴⁷ It has also been criticized by devotees of judicial protection of federalism. One such critic, John Yoo, wrote:

As members of the federal government, legislators would possess the driving interest to expand the power of the federal government, even perhaps if it did not benefit them in terms of political support. The founding generation feared that Congress would seek to grab

⁴⁴ Martin Shapiro, *Courts: A Comparative and Political Analysis* 28 (1981) (calling Supreme Court "arm of the central government"); see also Andre Bzdera, *Comparative Analysis of Federal High Courts: A Political Theory of Judicial Review*, 26 *Canadian J. Pol. Sci.* 3, 10 (1993) (suggesting that Court often acts "much like a political agency of the federal government").

⁴⁵ See Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 *Nw. U. L. Rev.* 145, 149-51 (1998) (arguing that federal courts have incentives to expand national power).

⁴⁶ See Jesse H. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* passim (1980); 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 passim (1954). For a more recent review of this argument, see Mark Tushnet, *Why the Supreme Court Overruled National League of Cities*, 47 *Vand. L. Rev.* 1623 passim (1994).

⁴⁷ The Court explicitly embraced the political safeguards theory in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552 (1985) (declaring that state interests "are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power"). *Garcia* overturned *National League of Cities v. Usery*, 426 U.S. 833 (1976), which did not adopt this theory. Recent pro-federalism decisions seem to have abandoned the theory again.

more power from the states in order to enhance its own institutional power, prestige, and glory.⁴⁸

This claim is certainly plausible, yet it illustrates a glaring flaw in the argument for judicial involvement. The argument for judicial protection of federalism implies cynical, self-interested explanations for legislative behavior but then ignores such explanations for judicial behavior. Judges ruling in federalism disputes are, like legislators, typically “members of the federal government” with human concerns for “power, prestige, and glory.” If the interests of states are not sufficiently represented in the national legislature, they are represented no better in the makeup of the federal courts.⁴⁹ Simply finding even a compelling criticism of the political safeguards approach does not mean much unless the judiciary is exempt from that criticism. But the judiciary is not so exempt. As Philip Kurland has observed, “the Supreme Court has persistently and consistently acted as a centripetal force favoring, at almost every chance, the national authority over that of the states”;⁵⁰ it is the Court itself that “made substantial contributions to the ultimate demise of federalism.”⁵¹

Judges are strategic in effecting their ideological preferences, and strategy requires that they attend to the strongly held concerns of other branches of government. This is the institutional predicament in which judges find themselves. One consequence of this predicament is that the Court simply cannot effectuate doctrines that materially restrain the powers of Congress over the states, and that is the essential crucible of federalism.⁵²

Direct evidence that the Court attends to its standing with the other branches of government can be found in a recent book by Lee Epstein and Jack Knight, who argue that Supreme Court justices strategically consider the concerns of Congress and the Executive and

⁴⁸ John C. Yoo, *Sounds of Sovereignty: Defining Federalism in the 1990s*, 32 *Ind. L. Rev.* 27, 39 (1998). Others have questioned persuasively the assumptions underlying the political safeguards theory and called for greater judicial protection of federalism. See, e.g., Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 *Colum. L. Rev.* 847 (1979) (questioning political safeguards theory in light of political practice); William W. Van Alstyne, *The Second Death of Federalism*, 85 *Mich. L. Rev.* 1709, 1724-27 (1985) (criticizing *Garcia*'s reliance on political safeguards theory).

⁴⁹ See Howard Gillman, *The Court as an Idea, Not a Building (or a Game): Interpretive Institutionalism and the Analysis of Supreme Court Decision-Making*, in *Supreme Court Decision-Making: New Institutional Approaches* 65, 76 (Cornell W. Clayton & Howard Gillman eds., 1999) (listing “commitment to consolidate national power” as among “judicial motivations and concerns”).

⁵⁰ Philip B. Kurland, *Watergate and the Constitution* 156-57 (1978).

⁵¹ *Id.* at 157.

⁵² See Chemerinsky, *supra* note 10, at 505 (observing that federalism has been used as limit on federal judicial power but “has not been used by the judiciary as a limit on the federal legislative power”).

adapt their opinions accordingly.⁵³ Epstein and Knight rely for evidence on a close investigation of the justices' conference discussions in over one hundred fifty cases.⁵⁴ In seventy percent of the nonconstitutional cases and forty-six percent of even the constitutional cases, the justices' discussions considered the preferences and likely actions of other government actors.⁵⁵ Epstein and Knight conclude that when the Court decides cases or even decides whether to decide cases, it accounts for "the likely reactions of other relevant actors, such as Congress and the President."⁵⁶

Similarly, Judith Resnik's review of the relationship between federal courts and Congress finds that "the current federal judiciary is already a bureaucratic institution, heavily dependent on Congress for resources and plainly eager to be as responsive as possible."⁵⁷ Thus, it is "clear that justices sometimes shift their positions in order to defuse conflict with the other branches."⁵⁸ The classic example of this, the "switch in time" that enabled more expansive federal commercial regulation in the New Deal, involved federalism explicitly.⁵⁹ A less well-known example is the introduction of "court-curbing laws" in Congress in the late 1950s, which appears to have produced a conservative shift in the Court.⁶⁰

Congressional and presidential influence over a judge begins with the appointment and confirmation process.⁶¹ When justices are appointed from the courts of appeals, Congress has a record of decisions on federalism to use as a confirmation screen.⁶² If the political safeguards approach to federalism is erroneous due to the hegemonic in-

⁵³ See Epstein & Knight, *supra* note 18, at 13-14.

⁵⁴ See *id.* at xiv-xv. The authors relied on a sample of 1983 Term cases in reaching their conclusions. See *id.*

⁵⁵ See *id.* at 149. They also found that the parties' briefs consistently indicated the preferences of other government actors to the Court. See *id.* at 147. The parties presented the information in 81% of nonconstitutional cases and 75% of constitutional cases. See *id.*

⁵⁶ *Id.* at 82.

⁵⁷ Judith Resnik, *The Federal Courts and Congress: Additional Sources, Alternative Texts, and Altered Aspirations*, 86 *Geo. L.J.* 2589, 2635 (1998).

⁵⁸ Baum, *supra* note 18, at 122.

⁵⁹ The "switch in time" is much analyzed. An interesting and persuasive interpretation is that the Court initially resisted the New Deal in hopes of provoking a political backlash. Once it became clear that the New Deal and a supportive Congress were established, the Court retreated. See McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 *S. Cal. L. Rev.* 1631, 1670-71 (1995).

⁶⁰ Epstein & Knight, *supra* note 18, at 143-44.

⁶¹ See Tiller & Cross, *supra* note 21, at 218-20 (describing how President and Congress seek judges with views similar to their own).

⁶² See Bzdera, *supra* note 44, at 23 (observing that "judicial selection by promotion from the lower courts encourages appellate court judges to defend the interests of the government that controls their eventual promotion to the federal high court").

terests of the legislative and executive branches, how likely is it that those branches will place individuals on the Court who will countermand those interests? Through appointment and confirmation, the political branches have some control over judicial doctrine.⁶³

Even after appointment and receipt of life tenure, federal judges remain dependent on the political branches. First, Congress may control the judiciary by restricting the jurisdiction of the federal courts.⁶⁴ But perhaps more importantly, federal judges remain dependent on Congress for their salaries, benefits, and support resources. Congress may not cut the salaries of federal judges, but it can freeze them. This power of the purse is notoriously influential.⁶⁵ Congress may directly prohibit the expenditure of funds on particular projects favored by judges or indirectly signal displeasure through reduced appropriations overall.⁶⁶ There is some empirical evidence that Congress uses its budgetary power to signal displeasure with Court decisions and that the Court responds rather compliantly.⁶⁷ When the Court does not

⁶³ On the ability of Congress to control the long-run path of judicial doctrine, see generally McNollgast, *supra* note 59, at 1652-56.

There is some testimonial support for my position. When questioned about his views on federalism during his confirmation hearings, Justice Scalia responded that "the primary defender of the constitutional balance, the Federal Government versus the States—maybe 'versus' is not the way to put it—but the primary institution to strike the right balance is the Congress." *Nomination of Judge Antonin Scalia: Hearings Before the Senate Comm. on the Judiciary, 99th Cong. 81 (1986)* (statement of Hon. Antonin Scalia). Similarly, when Senator Biden questioned Judge Bork on the subject, Bork remarked that "the enormous expansion of the commerce power . . . appears to be much broader than anything the Framers or the ratifiers intended[.]" but assured the Senators of his belief that "Congress's power under the commerce clause of the Constitution[] is settled and it is simply too late to go back and reconsider [it]." *Supreme Court Nominee's Record Examined: Bork Faces Tough Questions on Privacy and Equal Rights, 45 Cong. Q. Wkly. Rep. 2259 (Sept. 19, 1987)*.

⁶⁴ See Vicki C. Jackson, *Introduction: Congressional Control of Jurisdiction and the Future of the Federal Courts—Opposition, Agreement, and Hierarchy*, 86 *Geo. L.J.* 2445, 2445-48 (1998) (describing recent increase in use of this congressional power). See generally Lawrence Baum, *The Supreme Court 157* (5th ed. 1995) (addressing Congress's "significant power over the Court as an institution" through jurisdictional controls, among others).

⁶⁵ See generally Kate Stith, *Congress' Power of the Purse*, 97 *Yale L.J.* 1343 (1988) (explaining significance of congressional appropriations power). For a specific discussion of the significance of the power of the purse on judicial dependence, see Robert Destro, *Whom Do You Trust? Judicial Independence, the Power of the Purse & the Line Item Veto*, *Fed. Law.*, Jan. 1997, at 26.

⁶⁶ See Todd D. Peterson, *Controlling the Federal Courts Through the Appropriations Process*, 1998 *Wis. L. Rev.* 993, 994 (discussing power of purse). Congress specifically has prohibited expenditures on judicial councils to investigate bias. See *id.* at 996. "The indirect use of the appropriations power is more subtle, but it has the potential to have an even more pernicious effect on judicial independence." *Id.* at 1050.

⁶⁷ See Eugenia F. Toma, *A Contractual Model of the Voting Behavior of the Supreme Court: The Role of the Chief Justice*, 16 *Int'l Rev. L. & Econ.* 433 (1996) (analyzing role of

comply, Congress may pass legislation that overturns or evades judicial decisions. While the federal courts do have leeway in particular decisions,⁶⁸ the accountable branches can significantly inconvenience the federal courts, effectively depriving the courts of leeway to decide against the interests of the accountable branches as a rule. The result is that judges fundamentally are the agents of the legislature.⁶⁹

The Court has evinced its position of dependence and its deferential attitude towards the political branches of the federal government in a number of empirically demonstrable respects. We have seen that internal Supreme Court discussions are rife with comments about the preferences of other federal branches.⁷⁰ These discussions are not devoid of practical impact. Government petitions for certiorari review are accepted at a rate many times higher than average.⁷¹ The federal government has had "an extraordinary rate of success" before the Court as both a party and an amicus.⁷² Bednar and Eskridge observe that for "sixty years (1936 to 1995), the Court deferred to Congress in every Commerce Clause case it decided."⁷³ And when states attempted to impose term limits on federal legislators, the Court flatly rejected these efforts.⁷⁴ Judge Kozinski of the Ninth Circuit put the fundamental point succinctly when he observed that political con-

Chief Justice as agent of Congress that reacts to budgeting signals sent by Congress); see also Paul J. Wahlbeck, *The Life of the Law: Judicial Politics and Legal Change*, 59 J. Pol. 778, 792-95 (1997) (adducing evidence that views of President may also affect Court's decisions).

⁶⁸ See, e.g., *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997) (holding Religious Freedom Restoration Act unconstitutional as applied to states); see also Frank B. Cross, *The Justices of Strategy*, 48 Duke L.J. 511, 525-31 (1998) (reviewing Lee Epstein & Jack Knight, *The Choices Justices Make* (1998)) (arguing that some exaggerate congressional power to dictate outcome in particular cases).

⁶⁹ See Bzdera, *supra* note 44, at 22 (arguing that courts "are in a structurally fragile position with respect to the political branches of the central government"); Eskridge & Ferejohn, *supra* note 31, at 1362 (observing that "[f]ederal courts are politically vulnerable institutions that have powerful reasons to be cautious in imposing restrictions on the other branches of the national government"); William F. Shughart II & Robert D. Tollison, *Interest Groups and the Courts*, 6 Geo. Mason L. Rev. 953, 967 (1998) (reporting that "the legislature's power to determine judges' salaries and judicial budgetary appropriations assist it in controlling judicial behavior").

⁷⁰ See Epstein & Knight, *supra* note 18, at 149 (tabulating data to this effect).

⁷¹ See *id.* at 87. The government won Court hearings with 68% of its petitions in the 1992 Term, compared with about 1% for all other petitioners. See Baum, *supra* note 64, at 119.

⁷² See Baum, *supra* note 64, at 119.

⁷³ Bednar & Eskridge, *supra* note 8, at 1451. The authors note that the Court's hesitation to strike down national legislation may be ascribed to the fact that when it does so, it "assumes institutional risks." *Id.* at 1481.

⁷⁴ See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). This case was decided only shortly after the decision in *United States v. Lopez*, 514 U.S. 549 (1995), which purportedly represented a major shift toward state interests.

straints on the judiciary are "often overlooked but awesome nonetheless."⁷⁵

Federal legislative and executive power over the courts need not be so awesome to undermine a strong, principled doctrine of federalism. The key point is that the other federal branches have a variety of means with which to exert power over the courts. This is enough to undermine the possibility of a strong, principled doctrine of federalism as states, in contrast to the accountable federal branches, have *no* direct power over the federal courts. The national government thus has a thumb on the scale of judicial federalism doctrine. The weight of that thumb presumably will vary with the political salience of the controversy. But the inescapable presence of the thumb inevitably drives federalism doctrine over time in a direction contrary to states' rights.

The Court assumes few institutional risks when striking down state legislation. State governments cannot directly punish or reward the Court. Acquiescing to the demands of states' rights may aggravate Congress and limit the future authority of the Court itself. State governments tend to be relatively successful before the justices, winning over 60% of their cases as appellants and over 48% as respondents.⁷⁶ Yet states win only about 41% of their federalism cases at the Court.⁷⁷ In the first eighty years of this century, the Court has struck down nearly nine hundred state laws but fewer than one hundred federal laws.⁷⁸

The courts are not entirely fragile and may resist congressional or presidential pressures when it is strongly in their interests to do so. Such interests may be ideological or institutional. Federalism, however, does not possess the attributes necessary to provide such incentives. Federal judges are concerned with protecting their own powers.⁷⁹ As discussed earlier in this Part, these powers are at least

⁷⁵ Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decision Making*, in *Judges on Judging* 71, 75 (David M. O'Brien ed., 1997); see also Robert H. Jackson, *The Supreme Court in the American System of Government*, in *Judges on Judging*, *supra*, at 20, 20-22 (observing how dependent Court is on other branches of government).

⁷⁶ See Kearney & Sheehan, *supra* note 23, at 1012.

⁷⁷ See *id.* at 1015. "Federalism" cases are segregated by the authors by reference to "the Court's own statements concerning what the case was about." *Id.* at 1014 n.7.

⁷⁸ See *The Constitution of the United States of America: Analysis and Interpretation*, S. Doc. No. 99-16 (1982 & Supp. 1986).

⁷⁹ Public choice research suggests that agency administrators act so as to maximize their power over policy. See, e.g., Barry R. Weingast, *Regulation, Reregulation, and Deregulation: The Political Foundations of Agency Clientele Relationships*, *Law & Contemp. Probs.*, Winter 1981, at 147, 151. While public choice research has attended little to the judiciary's incentives, it seems likely that concern for institutional power likewise motivates

partially derivative of the federal legislative power. A strong federalism doctrine that limits the scope of federal legislative authority might at the same time limit the scope of the authority of the federal judiciary, contrary to the judges' interests. Thus, while the Court need not defer to every exercise of federal power, it has a strong incentive not to hamstring the exercise of federal power generally and little incentive to establish a strong, principled, consistently enforceable doctrine of federalism.

Eskridge and Ferejohn have reached similar conclusions. After broadly canvassing the history of federalism, they suggest that

because the Court is politically vulnerable to Congress and the President, it has rarely attempted to construe the Commerce Clause to limit congressional authority. The circumstances when it has done so are marked by sharp ideological conflict between the Court and Congress and have been at best temporary (and generally ad hoc) restraints on national power.⁸⁰

They argue that political, rather than legal, influences have protected state powers. This is the direct result of rational judicial utility maximization. If the Court exercised its power in defense of states' rights more generally, it would spend scarce political capital that could be devoted to other objectives for which the justices have greater preference.⁸¹ Thus, one can rely on the judiciary no more than the political branches of the federal government to protect the interests of states.

The Court's decisions of course are not universally nationalizing. The justices occasionally make at least a feint in the directions of states' rights. For example, the Supreme Court may be willing to disavow its own powers within the judicial realm. Doctrines such as abstention⁸² and *Erie*⁸³ demonstrate that the Court is prepared to defer

the courts. See Robert Yates, *Brutus* (1788), reprinted in *The Anti-Federalist Papers and the Constitutional Convention Debates* 297 (Ralph Ketcham ed., 1986) ("Every extension of the power of the general legislature . . . will increase the power of the courts; and the dignity and importance of the judges, will be in proportion to the extent and magnitude of the powers they exercise.").

⁸⁰ Eskridge & Ferejohn, *supra* note 31, at 1359-60.

⁸¹ Cf. Choper, *supra* note 46, at 175-84 (arguing that judicial enforcement of federalism is unnecessary due to safeguards inherent in national political process).

⁸² Abstention refers to a set of distinct judicially created doctrines, each named after the case that established it. These doctrines include *Pullman* abstention—see *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941)—which provides that federal courts should not address a constitutional question if the case can be resolved through an issue of state law; *Younger* abstention—see *Younger v. Harris*, 401 U.S. 37 (1971)—which provides that federal courts should not act to enjoin an ongoing state criminal proceeding; *Brillhart* abstention—see *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491 (1942)—which provides that a federal court may choose to stay an action under the Federal Declaratory Judgments Act in favor of a parallel state court proceeding; and *Colorado River* abstention—see *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976)—which pro-

to state courts in a variety of legal matters. But such doctrines offer palpable benefits to the justices by permitting them to ease their own workloads and avoid dealing with issues in which their interests are low.⁸⁴ Moreover, most of the judicial doctrines of federalism leave sufficient discretion to enable the federal courts to intervene when they particularly care about a case.⁸⁵

Some will surely object, pointing to the Supreme Court's recent decisions striking down at least four federal statutes on federalism grounds as evidence of the Court's ability to deploy meaningful restrictions on the federal government's power.⁸⁶ Of course, many had similar hopes for *National League of Cities*, but that decision never was applied to hold another federal statute unconstitutional⁸⁷ and was soon overruled.⁸⁸ Scrutiny of the recent decisions reveals them to be largely symbolic bows to a federalism myth rather than real limitations on federal power.⁸⁹ In the words of one commentator, *New York v. United States*⁹⁰ cannot form the "foundation of a revitalized constitutional federalism" but will at most be a "reminder of the fed-

vides that a federal court may choose to avoid some claims in deference to parallel state court proceedings. For a general overview of abstention doctrines, see 17A Charles Alan Wright et al., *Federal Practice and Procedure* § 4241 (2d ed. 1988).

⁸³ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), provided that when a federal court addresses a state claim, as under diversity jurisdiction, it is to apply the law of that state rather than federal common law.

⁸⁴ Regarding abstention, see Bryce M. Baird, Comment, Federal Court Abstention in Civil Rights Cases: Chief Justice Rehnquist and the New Doctrine of Civil Rights Abstention, 42 *Buff. L. Rev.* 501, 504 & n.14 (1994) (claiming that abstention is used to reduce workload of judiciary and avoid civil rights claims).

⁸⁵ The *Erie* doctrine, for example, does not so much restrain federal judges as require them to pour their ideological ends into state rather than federal common law. It is thus not inconsistent with a legal realist account of federalism. See Michael C. Dorf, The Supreme Court, 1997 Term—Foreword: The Limits of Socratic Deliberation, 112 *Harv. L. Rev.* 4, 47 n.242 (1998) (observing that federalism justification supports *Erie* but decision "relied largely on legal realist notions"); Jack Goldsmith & Steven Walt, *Erie* and the Irrelevance of Legal Positivism, 84 *Va. L. Rev.* 673, 709-11 (1998) (reconciling *Erie* with outcome-oriented decisionmaking). Abstention doctrine is flexible and lacking in clear theoretical direction. See generally James C. Rehnquist, Taking Comity Seriously: How To Neutralize the Abstention Doctrine, 46 *Stan. L. Rev.* 1049 (1994).

⁸⁶ See, e.g., Jackson, *supra* note 4, at 2213 (arguing that "[t]he Court's new activism confounds assertions that federalism is dead").

⁸⁷ See Tushnet, *supra* note 46, at 1626.

⁸⁸ See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 557 (1985).

⁸⁹ See H. Geoffrey Moulton, Jr., The Quixotic Search for a Judicially Enforceable Federalism, 83 *Minn. L. Rev.* 849, 850-51 (1999); see also Feeley & Rubin, *supra* note 40, at 149 (suggesting that federalism is barrier to national policy only in "peripheral matters"); *id.* at 178 (arguing that "the less politically significant the issue, the greater the Court's insistence on the virtues of federalism").

⁹⁰ 505 U.S. 144 (1992) (holding that Congress may not commandeer state's legislative processes).

eralism we used to have.”⁹¹ *Lopez*⁹² garnered much attention but seems unlikely to have much impact on the exercise of federal power.⁹³ One scholar describes the decision as a “nine-days wonder” destined to be “ignored by the Court” in future cases.⁹⁴ Lessig describes the ruling as “a tool that will really protect nothing.”⁹⁵ *Printz*, by laying down a categorical anticommandeering rule, has some, albeit limited, potential practical significance. But the Court has not been very faithful to its federalism precedents in the past.⁹⁶ And even if *Printz* is consistently followed by future opinions, Congress has many tools to control the states without violating the anticommandeering rule.⁹⁷ *Printz*’s practical impact is thus “relatively minor.”⁹⁸ Consequently, the impact of the Court’s recent forays into federalism doctrine has been “vastly overstated.”⁹⁹

The just-completed 1998-1999 Term of the Court seemed to confirm a resurgent devotion to federalism under the Eleventh Amendment, but scrutiny of those opinions only confirms my theses.¹⁰⁰ While the language of the opinions is full of paeans to federalism, the

⁹¹ Tushnet, *supra* note 46, at 1654.

⁹² *United States v. Lopez*, 514 U.S. 549 (1995) (striking down Gun Free School Zones Act of 1990).

⁹³ See Friedman, *supra* note 8, at 336-37 (suggesting that *Lopez* may be ignored); Lino A. Graglia, *United States v. Lopez*: Judicial Review Under the Commerce Clause, 74 Tex. L. Rev. 719 (1996) (suggesting that *Lopez* is likely anomalous and arguing that there are legitimate constraints on any serious attempt by Court to limit national legislative authority); Lessig, *supra* note 1, at 200-06 (predicting little constraining effect of *Lopez*); Deborah Jones Merritt, The Fuzzy Logic of Federalism, 46 Case W. Res. L. Rev. 685, 693 (1996) (predicting little practical effect of *Lopez*).

⁹⁴ Suzanna Sherry, The Barking Dog, 46 Case W. Res. L. Rev. 877, 877 (1996).

⁹⁵ Lessig, *supra* note 1, at 196.

⁹⁶ *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), quickly reversed *National League of Cities v. Usery*, 426 U.S. 833 (1976), which in turn overruled the then-recent precedent of *Maryland v. Wirtz*, 392 U.S. 183 (1968). *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), overruled the decision in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989). This history does not hold out much promise for the Court’s ability to develop and adhere to a principled, nonideological doctrine of federalism.

⁹⁷ By attaching conditions to federal spending programs, for example, Congress can effectively control state action. The Court has found this control method constitutional. See *South Dakota v. Dole*, 483 U.S. 203 (1987). This approach “can be as coercive as any direct requirement.” Chemerinsky, *supra* note 10, at 524. See generally Thomas R. McCoy & Barry Friedman, Conditional Spending: Federalism’s Trojan Horse, 1988 Sup. Ct. Rev. 85 (criticizing *Dole*).

⁹⁸ Evan H. Caminker, *Printz*, State Sovereignty, and the Limits of Formalism, 1997 Sup. Ct. Rev. 199, 200.

⁹⁹ Jim Chen, *Filburn’s Forgotten Footnote—Of Farm Team Federalism and Its Fate*, 82 Minn. L. Rev. 249, 254 (1997).

¹⁰⁰ The three major Eleventh Amendment opinions were *Alden v. Maine*, 119 S. Ct. 2240 (1999); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219 (1999); and *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S. Ct. 2199 (1999).

concept remains at best a "third order" determinant of Supreme Court decisionmaking. Consider the *Alden* opinion, generally considered the most significant of the three recent decisions. The case involved the Fair Labor Standards Act¹⁰¹ requirement that a state government pay overtime to certain workers. The Court split five-four in holding that the state could not be sued under the Act, with the most conservative justices in the majority and the more liberal justices in dissent. Every justice voted consistently with the ideological dimension, wholly independent of federalism. Hence, the case provides no independent support for the position that the Court independently values neutral federalism. *College Savings Bank* and *Florida Prepaid* involved relatively non-ideological matters of intellectual property law and might indicate some Court concern for federalism in nonideological cases (which is consistent with it being a third order determinant). However, the implications of those opinions would restrict federal regulation of the states more generally, so even these opinions could be seen as mere stalking horses for an antiregulatory ideological conservative agenda. All of the opinions are consistent with the trend of "doctrinal resistance to federal regulation" across the board, and thus driven more by ideology than federalism.¹⁰² Alternatively, the opinions could consistently be read as part of a conservative antitort plaintiff agenda.

While the concept of resistance to federal regulation might seem like an assertive judicial challenge to institutional barriers on judicial decisionmaking, and therefore a possible precursor to more active federalism, the Court itself was careful to dispel this notion. The majority in *Alden* devoted an entire section of its opinion in obeisance to congressional primacy. It observed that the defendant state of Maine had actually come into unquestioned compliance with the FLSA.¹⁰³ The Court insisted that commands of federal law would still be upheld because states could consent to being sued and would be expected to comply with the law even absent private litigation,¹⁰⁴ that plaintiffs could still sue for damages or enjoin state officers in their personal

¹⁰¹ 29 U.S.C. §§ 201-219 (1994).

¹⁰² This pattern was reported by Cynthia R. Farina, *Undoing the New Deal Through the New Presidentialism*, 22 Harv. J.L. & Pub. Pol. 227, 231 (1998) (citing cases involving federalism, standing, takings, and other doctrines as evidence that Court has embarked on conservative assault on regulatory New Deal).

¹⁰³ See *Alden*, 119 S. Ct. at 2269.

¹⁰⁴ See *id.* at 2266-67; see also *Florida Prepaid*, 119 S. Ct. at 2207-08 (noting that there was very little evidence of state patent infringement and that states generally complied voluntarily with patent law). The *Florida Prepaid* Court subsequently noted the presence of state law remedies and questioned whether any patent holders would be left without a remedy for infringement. See *id.* at 2210-11.

capacity¹⁰⁵ and could sue political subdivisions of the state such as municipalities.¹⁰⁶ Most importantly, the Court emphasized that its holding placed no limits on the ability of the federal government itself to prosecute actions against states for violations of federal law.¹⁰⁷ The decisions are not an attack upon the substantive authority of Congress. Kathleen Sullivan noted that "the striking feature of these rulings is how little they challenged the Federal Government's substantive power to make labor, patent and trademark law" and argued that the opinions "did less to divest Congress of power than they did to divest the courts of it."¹⁰⁸ The recent decisions are nothing like a strong federalism doctrine that would deny the national government the ability to take certain substantive actions. Rather, the decisions are ideological but careful not to deny Congress power; they just make it a little more difficult for Congress to exercise that power.

Federalism survives only as a "reassuring symbol."¹⁰⁹ Referencing the concept of federalism pays lip service to tradition and, as we have seen,¹¹⁰ can be used selectively to advance favored ideological policies. As a material and principled restraint on national power, however, federalism has dissipated. Barry Friedman observed that "centripetal forces" have caused federalism doctrine to become "a doctrine of blind and uncomprehending deference to national authority."¹¹¹ Lawrence Lessig described how the court had "unreflectively expand[ed] Congress's power through continual extension of the Commerce Clause."¹¹² One does not find the Court striking down any major federal laws on federalism grounds.¹¹³ If the structural institutional favoritism for the national government were not enough, private interest groups supplement the influence of the national

¹⁰⁵ See *Alden*, 119 S. Ct. at 2267. The famous case of *Ex Parte Young*, 209 U.S. 123 (1908), made clear that a person could obtain a federal court injunction against state officials ordering them to comply with the law, which should be a pretty effective means of private enforcement.

¹⁰⁶ See *Alden*, 119 S. Ct. at 2267.

¹⁰⁷ See *id.*

¹⁰⁸ Kathleen M. Sullivan, *Federal Power, Undimmed*, N.Y. Times, June 27, 1999, at A17; see also Michael Greve, *Federalism Is More than States' Rights*, Wall St. J., July 1, 1999, at A22 (lamenting that recent Court decisions had not significantly limited power of Congress).

¹⁰⁹ Feeley & Rubin, *supra* note 40, at 178. Philip Bobbitt suggests that the Court's occasional forays in defense of federalism reflect a "cueing function," reminding Congress to adhere to a political role of "protector of the states." Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* 194 (1982).

¹¹⁰ See *supra* Part I.

¹¹¹ Friedman, *supra* note 8, at 322.

¹¹² Lessig, *supra* note 1, at 144.

¹¹³ See Rubin & Feeley, *supra* note 13, at 949 (observing that "the Court has rejected federalism every time it really mattered").

government and further drive the Court toward nationalization of power.¹¹⁴

The meaninglessness of federalism is perhaps most easily seen through a simple comparison of judicial doctrine under the Tenth Amendment to that under the dormant commerce clause. The Tenth Amendment provides a textual commitment to federalism in the Bill of Rights itself.¹¹⁵ By contrast, there is no textual basis for the dormant commerce clause's preclusion of state legislation deemed by courts to unduly burden interstate commerce.¹¹⁶ Yet the Tenth Amendment has not been much used by courts to restrain national power,¹¹⁷ while the dormant commerce clause is a commonly invoked constitutional constraint on state action that may be selectively used for ideological ends.¹¹⁸

Doctrines such as the plain statement rule¹¹⁹ and the anticommandeering principle¹²⁰ are probably the farthest the Court will go in defending federalism. Neither doctrine seriously offends other federal institutions. Congress may assume national power simply by making a plain statement that state sovereign immunity is voided or using an enacting tool other than commandeering.¹²¹ Both doctrines are pro-

¹¹⁴ See Friedman, *supra* note 8, at 373-75. William Riker argues that nationalization is inexorable due to national security crises as well. See William H. Riker, *Federalism: Origin, Operation, Significance* 12 (1964).

¹¹⁵ The Tenth Amendment reads: "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." U.S. Const. amend. X.

¹¹⁶ For discussion of the weakness of the constitutional underpinning for judicial dormant commerce clause decisions, see generally Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 *Yale L.J.* 425 (1982); Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 *Duke L.J.* 569.

¹¹⁷ The classic Supreme Court exposition of the Tenth Amendment is to declare it merely an unenforceable "truism." *United States v. Darby*, 312 U.S. 100, 124 (1941). Justice Powell, dissenting in *Garcia*, declared that the Court had rendered the amendment "meaningless rhetoric." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 560 (1985). Even the dramatic pro-federalism decision in *Lopez* deemphasized the significance of the Tenth Amendment as a restraint on federal power. See Swinford & Waltenberg, *supra* note 12, at 329.

¹¹⁸ See David B. Spence & Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 *Cal. L. Rev.* 1125 (1999) (empirically demonstrating significance of dormant commerce clause review of state and local environmental regulation and how such decisions are driven by politics of judges).

¹¹⁹ The plain statement rule requires that Congress make perfectly clear its intention to abrogate state sovereign immunity. See *Seminole Tribe v. Florida*, 517 U.S. 44, 55-56 (1996).

¹²⁰ The anticommandeering principle, derived from *Printz*, proscribes Congress from commandeering state actors to take specific actions. See *Printz v. United States*, 521 U.S. 898, 935.

¹²¹ See Gardbaum, *supra* note 5, at 799 (observing that "Congress has the right to legislate around" these doctrines). Gardbaum argues for stronger constitutional constraints but

cedural and can be readily circumvented; neither represents a serious constraint on national power. They do add some cost to taking national action and may accordingly have applications, but only ones of relatively low legislative priority.

Restoring a more robust and substantive doctrine of federalism will not be an easy matter. Federal judges attend to their policy preferences and the concerns of other branches of government and, sometimes, to the constraints of law. The law is not meaningless, but neither is it self-executing. The optimal doctrine is not the one that "appears" best in the abstract but is the one that works best when filtered through the courts. The sort of flexible approach proposed by Jackson and Garbbaum is not promising in this regard. Furthermore, process-based judicial review of legislative decisionmaking could have very adverse unintended consequences.

III

SHORTCOMINGS OF DOCTRINAL PRESCRIPTIONS FOR REINVIGORATING FEDERALISM

I have sought to establish that creating a meaningful doctrine of genuine, principled federalism in America today is in practice unfeasible. Even if it were possible to create a doctrine sheltering the states from improper federal intrusions, proposals such as those put forth by Jackson and Garbbaum are unlikely to be effective in achieving that goal.¹²² Indeed, their proposed approach, however persuasive in the abstract, could well destroy those few slight slivers of federalism that retain their significance. More seriously, such broad, process-oriented proposals could have disastrous separation of powers consequences,

does not consider why the courts may have developed only doctrines that Congress could evade if necessary.

¹²² While the Jackson and Garbbaum proposals best exemplify my concerns, others are similarly indefinite. See, e.g., Chemerinsky, *supra* note 10, at 533-34 (arguing for functional analysis of federalism that pragmatically assigns responsibilities to state and federal governments); Barry Friedman, *Legislative Findings and Judicial Signals: A Positive Political Reading of United States v. Lopez*, 46 Case W. Res. L. Rev. 757, 758 (1996) (supporting requirement that Congress establish record justifying exercise of national power or risk judicial invalidation of legislation); Merritt, *supra* note 8, at 1583-85 (arguing that Court should use constitutional clause guaranteeing republican government for states as basis of protecting state autonomy, notwithstanding vagueness of determining what limitations on autonomy would truly compromise "republicanness" of state governments); Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 Mich. L. Rev. 554, 555 (1995) (calling for rule requiring "justification" for federal action without establishing any clear standards for sufficiency of justification to be required). The details of most of these proposals are sketchy, though Friedman does suggest that Congress must justify its action with an "ample record." Friedman, *supra*, at 799. Judicial application of such a standard potentially would be quite intrusive.

as they invite the camel's nose of judicial review into the tent of legislative deliberation.

A. The Intrinsic Weakness of Broad and Flexible Doctrines

Both Jackson and Gardbaum seek a principled, rule of law federalism grounded in a balancing of the legitimate interests of the various levels of government, focusing heavily on the process and justifications employed by the national Congress for its actions. Unfortunately, not only do they not explain how this ideal balance would be realizable in practice, but their doctrine's most persuasive benefit in the abstract—its flexibility in application—would likely be its undoing in practice.¹²³

The sort of doctrine propounded by Jackson and Gardbaum requires judicial determinations applying such vague standards as reasonability, necessity, propriety, and sufficient process. All these standards are sufficiently malleable as to enable an ideological judge to reach whatever policy result she might desire and justify that result doctrinally. Justice Scalia has confronted this issue directly, arguing that amorphous doctrinal standards do little to constrain ideological decisionmaking by the judiciary.¹²⁴ Such ideological decisionmaking would provide neither consistent doctrinal nor practical flesh to federalism itself.

Clear rules normally constrain the judiciary much more effectively than do general standards for decisionmaking. Factor analyses and balancing tests often are derided as fronts for the "personal preferences" of judges.¹²⁵ While one might argue that endowing judges with considerable balancing discretion better promotes the optimal legal resolution of individual cases, this position depends on the power of naïve formalism and assumes that judges sincerely seek optimal legal resolutions without regard to personal policy proclivities.¹²⁶ It is surely too late in the day to embrace formalism so vigorously. Discre-

¹²³ See generally Cross, *supra* note 39, at 326 (noting importance of analyzing realizability of doctrinal rules); Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. Rev. 1, 3 (1998) (observing that "constitutional theory has no power to command agreement from people not already predisposed to accept the theorist's policy prescriptions").

¹²⁴ See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1179-80 (1989).

¹²⁵ See, e.g., T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 Yale L.J. 943, 973 (1987) (noting that balancing inescapably involves judges' use of personal preferences); see also Stephen E. Gottlieb, *The Paradox of Balancing Significant Interests*, 45 Hastings L.J. 825, 827 (1994) (arguing that "balancing appears political"); Lessig, *supra* note 1, at 171 (noting that indeterminate rules yield inconsistency of application).

¹²⁶ See Scalia, *supra* note 124, at 1178 (criticizing search for perfection through discretion).

tionary balancing tests simply enable judicial manipulation of law in pursuit of policy ends.¹²⁷

Consider Shapiro and Levy's analysis of federal appellate court application of the *Chevron* doctrine,¹²⁸ wherein they find that the doctrine is, in practice, too indeterminate and manipulable.¹²⁹ After reviewing the empirical evidence, Shapiro and Levy conclude that the indeterminacy enables judges to pursue their preferred political outcomes rather than legal craft values.¹³⁰ They argue that the only potential restraint on judges is clear, determinate doctrine, which Shapiro and Levy believe must be created by Congress. Thus, while it is doubtful that the Court would create a clear, determinate doctrine to advance ideologically neutral federalism, the indeterminate doctrine propounded by Jackson and Gardbaum is unlikely to produce the neutral, principled decisions that they seek.

Even if the Supreme Court itself were somehow ready, willing, and able to establish a neutral, process-oriented standard for federalism cases, the change might have little practical impact on the overall law of federalism. Few cases reach the Supreme Court. Therefore, in order to produce significant practical effects, the Supreme Court must provide clear guidance for lower courts.¹³¹ Flexible, vague doctrinal standards are relatively ineffective in this regard;¹³² they "reduce the

¹²⁷ Cf. Pierre Schlag, Rules and Standards, 33 UCLA L. Rev. 379, 400, 405-10 (1985) (emphasizing manipulability of indeterminate rules). See generally Kathleen M. Sullivan, The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards, 106 Harv. L. Rev. 22, 56-69 (cataloguing both advantages and shortcomings of balancing tests).

¹²⁸ See Sidney A. Shapiro & Richard E. Levy, Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions, 44 Duke L.J. 1051 (1995). *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), set in place "a two-step approach to statutory interpretation under which courts were to overturn agency interpretations that were contrary to the clear intent of Congress, but defer to permissible agency constructions of a statute." Shapiro & Levy, *supra*, at 1051.

¹²⁹ See Shapiro & Levy, *supra* note 128, at 1069-72; see also Paul L. Caron, Tax Myopia Meets Tax Hyperopia: The Unproven Case of Increased Judicial Deference to Revenue Rulings, 57 Ohio St. L.J. 637, 658-59 (1996) (discussing Shapiro and Levy's analysis).

¹³⁰ Shapiro & Levy, *supra* note 128, at 1058-62 (addressing how determinacy of doctrine reduces outcome-oriented decisionmaking). The authors further suggest that judges have an inherent incentive to keep doctrines indeterminate in order to maintain their power to effectuate preferred results. See *id.* at 1062-64.

¹³¹ See Sullivan, *supra* note 127, at 111 (noting that impact of standards depends on how lower courts apply them).

¹³² Indeterminate judicial review norms permit judges to exercise their personal policy predilections. See Edward W. Warren & Gary E. Marchant, "More Good than Harm": A First Principle for Environmental Agencies and Reviewing Courts, 20 Ecology L.Q. 379, 400-01 (1993); see also Lessig, *supra* note 1, at 173 (reporting that indeterminate rules reduce Supreme Court control over lower court judges). On the willingness of circuit court judges to decide ideologically rather than on Supreme Court precedent, see Jeffrey A. Segal et al., Decision Making on the U.S. Courts of Appeals, in *Contemplating Courts* 237 (Lee Epstein ed., 1995).

Court's ability to control lower court decisions."¹³³

This intuitive position has empirical support. In their extensive study of federal district court decisionmaking, political scientists Robert Carp and Ronald Stidham found that ideological decisionmaking at the district court level is far more common when the relevant Supreme Court rulings are ambiguous and fail to establish definite standards for decisions.¹³⁴ Flexible doctrines devolve considerable discretionary power to the lower federal courts. Those courts may deploy their discretion in pursuit of personal ideological objectives rather than abstract ideals of federalism.

B. The Real Danger of Broad and Flexible Judicial Review Doctrines

Jackson's "deferential, flexible, multifactor" theory of federalism decisionmaking is unlikely to actually result in principled federalism.¹³⁵ Such an approach offers little prospect of constraining ideological judging. Her theory might reinvigorate federalism jurisprudence in a particularly perverse and unprincipled fashion, however. The principal unanticipated consequence of such a doctrine would be the judicial cooptation of political authority at the expense of Congress.

Jackson propounds a "process-based 'clear evidence/clear statement'" standard, under which Congress must produce the equivalent of record evidence that it "acted reasonably in concluding that federal legislation was 'necessary and proper' to the exercise of one or more of its [enumerated] powers."¹³⁶ The record would consist of legislative hearings and floor debate.¹³⁷ A law might be struck, for example, because Congress did not hold enough hearings.¹³⁸

Her proposal for procedural review of congressional decisionmaking is not entirely new.¹³⁹ Arguments for general due process review of legislative decisions have arisen on occasion only to be

¹³³ Ashutosh Bhagwat, *Hard Cases and the (D)Evolution of Constitutional Doctrine*, 30 Conn. L. Rev. 961, 981 (1998).

¹³⁴ See Robert A. Carp & Ronald Stidham, *The Judicial Process in America* 378 & n.27 (1996) (citing studies).

¹³⁵ Jackson, *supra* note 4, at 2257. Gardbaum likewise emphasizes that his proposal is "flexible . . . but not too flexible." Gardbaum, *supra* note 5, at 800.

¹³⁶ Jackson, *supra* note 4, at 2240.

¹³⁷ See *id.*

¹³⁸ See *id.* at 2243 (suggesting that best explanation for result in *Lopez* was fact that Congress held only one hearing on law, and this hearing "did not focus on the particular need for federal action or on the connection to interstate commerce").

¹³⁹ See, e.g., Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and United States v. Lopez*, 46 Case W. Res. L. Rev. 695, 724 (1996) (arguing that congressional findings and fact-gathering procedures can influence constitutional outcome).

rejected.¹⁴⁰ But Jackson's theory, if accepted, would surely expand into such a general judicial review of legislation. If Congress were obliged to establish the necessity and propriety of its actions and its authority to take such actions under constitutionally enumerated powers whenever its actions implicated federalism concerns, the Court would eventually require analogous justifications for statutes which implicate other constitutional provisions.¹⁴¹ There is no firebreak to stop such a prudential doctrine of judicial review of legislation.

A doctrine of reasonability or procedural review of congressional action could easily transform itself into the old economic substantive due process analysis of *Lochner*.¹⁴² The question addressed by the Court in *Lochner*, whether the law was a "fair, reasonable, and appropriate exercise of the police power,"¹⁴³ is strikingly similar to Jackson's proposed requirement that the courts review whether Congress made a "reasoned and reasonable" determination that federal action is "necessary and proper."¹⁴⁴ Intrusive judicial review of legislation and its wisdom has been fought off consistently throughout our history, beginning with the founders' rejection of a council of revision that would have authorized the Court (with the President) to review legislative action for procedural fairness or reasoned decisionmaking.¹⁴⁵ The proposal was rejected due to the judiciary's lack of expertise in policy matters, the improper mixing of government functions, and faith in the accountability of elected officials.¹⁴⁶ These concerns similarly animate deferential rational basis review under the Equal Protection Clause.¹⁴⁷ However dedicated one may be to the virtues of

¹⁴⁰ See, e.g., Hans A. Linde, Due Process of Lawmaking, 55 Neb. L. Rev. 195 (1976); Laurence H. Tribe, Structural Due Process, 10 Harv. C.R.-C.L. L. Rev. 269 (1975).

¹⁴¹ Even if the reasonability review of legislation were somehow limited to federalism, the review would still be expansive. Virtually any federal legislative action can be challenged on the basis that the matter could be left to the states.

¹⁴² *Lochner v. New York*, 198 U.S. 45 (1905).

¹⁴³ *Id.* at 56.

¹⁴⁴ Jackson, *supra* note 4, at 2242-43.

¹⁴⁵ For a history of the council of revision proposal, see John F. Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 Colum. L. Rev. 612, 643-44 (1996); Jack N. Rakove, The Origins of Judicial Review: A Plea for New Contexts, 49 Stan. L. Rev. 1031, 1056-60 (1997).

¹⁴⁶ See Todd D. Peterson, Restoring Structural Checks on Judicial Power in the Era of Managerial Judging, 29 U.C. Davis L. Rev. 41, 54 (1995) (noting that constitutional drafters were concerned that council "would give judges too much unchecked power"); Rakove, *supra* note 145, at 1058 (noting six objections leveled by Framers against proposed council).

¹⁴⁷ The rational basis test under the Equal Protection Clause is testimony to the Court's deference to Congress. Generally, such review has been "notoriously[] toothless." David A. Strauss, Affirmative Action and the Public Interest, 1995 Sup. Ct. Rev. 1, 33. Such review occasionally has been used to strike down statutes but often "amount[s] to no re-

federalism, the principle of states' rights is surely an insufficient hook for a drastic transformation of American constitutional separation of powers that grants the judiciary a central role in legislation.

Jackson's doctrine would effect such a transformation. While Jackson apparently intends her review to be deferential,¹⁴⁸ her proposed standard would, in practice, be anything but. Indeed, it is actually far less deferential than the "arbitrary and capricious" standard of review of administrative regulations under the Administrative Procedure Act (APA).¹⁴⁹ Under Jackson's theory, Congress would have to establish the "*necessity* for federal regulation."¹⁵⁰ This has enormous separation of powers significance: As Justice Marshall long ago recognized, for the Court "to undertake . . . to inquire into the decree [sic] of [a law's] necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground."¹⁵¹ The pragmatic consequences of the shift could be vast.

Experience with the APA demonstrates the risk of adopting a doctrinal formulation that invites such reaching judicial intervention. While Jackson's approach is even more severe, Gardbaum's approach to judicial review of legislative enactments is analogous to that of the APA. Gardbaum expressly compares his proposed standard of judicial review to the "hard look" doctrine of judicial review of administrative decisionmaking.¹⁵² Thus, he does not bother to pretend that application of his standard would be deferential. Yet the analogy to the APA does not recommend his proposal, for APA review has been quite destructive of the regulatory process.

Judicial review of administrative rulemaking has "ossified" the regulatory process.¹⁵³ Process and justification requirements compel agencies to predict the nearly unpredictable: the expectations of reviewing courts.¹⁵⁴ The consequence has been a huge increase in the

view at all." Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans*, 32 Ind. L. Rev. 357, 359 (1999).

¹⁴⁸ See Jackson, *supra* note 4, at 2182.

¹⁴⁹ See Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706 (1994).

¹⁵⁰ Jackson, *supra* note 4, at 2245 (emphasis added).

¹⁵¹ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819).

¹⁵² See Gardbaum, *supra* note 5, at 800.

¹⁵³ See Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 Tex. L. Rev. 525, 528 (1997) (noting that intrusive effects of judicial review have halted entire regulatory programs); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 Duke L.J. 1385, 1400 (1992) (attributing ossification to "[j]udicially [i]mposed [a]nalytical [r]equirements") [hereinafter McGarity, *Some Thoughts*]; Richard J. Pierce, Jr., *Rulemaking and the Administrative Procedure Act*, 32 Tulsa L.J. 185, 199 (1996) (explaining that open-ended judicial review is primary source of ossification).

¹⁵⁴ See Thomas O. McGarity, *Reforming OSHA: Some Thoughts for the Current Legislative Agenda*, 31 Hous. L. Rev. 99, 109 (1994) (reporting ossifying effect of "prospect of

time agencies require to regulate.¹⁵⁵ The Jackson and Gardbaum proposals would have a similarly ossifying effect on Congress. Congress finds it hard enough to act as is; imposing substantial new process and justification requirements could cause the whole process to grind to a halt. In this sense, the Jackson/Gardbaum doctrine would be radically conservative, making legislation far more difficult and sometimes impossible.

Aggressive judicial review under the APA has had a variety of other perverse effects on sound policymaking. Agencies tilt their evaluations toward legal concerns, empowering lawyers at the expense of those with knowledge about the substantive policy (e.g., scientists, health care managers, etc.).¹⁵⁶ Judges often are ill informed about the substance of administrative policy and accordingly render poor quality judgments about the reasonability or justifiability of agency action.¹⁵⁷

Jackson intends her federalism doctrine to be applied deferentially by the courts. But, beyond the good faith of the judges, there is no way to ensure such deference. And experience with various judicial activisms, and particularly with the APA, demonstrates the inadequacy of depending on judicial self-abnegation.¹⁵⁸ The APA's

judicial review by a judge who demands that every fine nuance of the agency's decision be explained to that judge's satisfaction"). Since agencies cannot predict what a court might choose to require, the agency will go overboard in trying to anticipate and address every conceivable objection.

¹⁵⁵ See McGarity, *Some Thoughts*, *supra* note 153, at 1387-88 (noting that time required for typical OSHA rulemaking increased from six months to five years).

¹⁵⁶ See R. Shep Melnick, *Regulation and the Courts: The Case of the Clean Air Act* 302-03 (1983) (observing that judicial review under Clean Air Act "greatly enhanced the bureaucratic position of politically naive and technically ignorant attorneys within the EPA"); Richard J. Pierce, Jr., *The Unintended Effects of Judicial Review of Agency Rules: How Federal Courts Have Contributed to the Electricity Crisis of the 1990s*, 43 *Admin. L. Rev.* 7, 27 (1991) (noting that judicial review of Federal Energy Regulatory Commission decisions had caused reallocation of resources that elevated "apparent quality of decision-making over actual quality of decisionmaking"); Nicholas S. Zeppos, *Judicial Review of Agency Action: The Problems of Commitment, Non-Contractibility, and the Proper Incentives*, 44 *Duke L.J.* 1133, 1147-49 (1995) (observing that judicial review causes agency lawyers to "emphasize the law over the policy" and transfers power to agency lawyers).

¹⁵⁷ See Donald Horowitz, *The Courts and Social Policy* 31 (1977) (remarking that "adjudication process conspires in a dozen small and large ways to keep the judge ignorant of social context"); Melnick, *supra* note 156, at 371 (noting that judges reviewing EPA "came to their policy-based decisions without using the adjudicatory process to investigate policy issues").

¹⁵⁸ See William H. Allen, *The Durability of the Administrative Procedure Act*, 72 *Va. L. Rev.* 235, 248 (1986) (describing judicial review of agency action and observing that APA's provisions "are the subject[s] of creative interpretation" or are "simply ignored"); Linda R. Cohen & Matthew L. Spitzer, *Judicial Deference to Agency Action: A Rational Choice Theory and an Empirical Test*, 69 *S. Cal. L. Rev.* 431, 453 (1996) (arguing that lower court judge could evade deference commands from Supreme Court such that "there would be enough arguments in favor of doing so that the evasion would not appear to be blatant defiance").

arbitrary and capricious review standard was initially meant to be deferential,¹⁵⁹ but it has devolved into aggressive hard-look judicial review. Many federalism proposals contain far less restrictive language and virtually encourage active and ideological judicial review of legislation. Justice Souter has recognized that such review "would function merely as an excuse for covert review of the merits of legislation."¹⁶⁰

Lawrence Lessig argues descriptively that courts will never adopt a broad and discretionary federalism doctrine precisely because such a doctrine would produce results that appear political.¹⁶¹ Such an appearance might undermine judicial credibility and, indirectly, judicial power.¹⁶² This is why judges couch their decisions in neutral principles even when those decisions are driven by ideological or political inclinations. To protect its standing, Lessig argues, the Court will shun a discretionary federalism doctrine. Lessig may be right; if so, the Jackson/Gardbaum proposal would not be as disastrous as I fear, just ineffective. But, it is not clear that the Court will always be so self-restrained.¹⁶³ Equally plausibly, the Court might be quite comfortable with a rule that grants deference to congressional power generally but enables the justices to invalidate occasional legislative acts that they find unappealing.

Excessive judicial intervention in legislative processes might also be restrained by the congressional authority over the courts, discussed above in Part II.¹⁶⁴ Jackson's proposal makes such congressional control more difficult, however. She would allow judges more easily to cloak their policy predilections with process values. As Judge Posner has observed, "what could be more attractive to judges than a theory of judicial legitimacy that allowed them to do anything they wanted provided they employed a rhetoric determinedly self-abnegating?"¹⁶⁵ Courts would not need to prohibit absolutely any category of congress-

¹⁵⁹ See Martin Shapiro, *The Supreme Court's "Return" to Economic Regulation*, 1 *Stud. Am. Pol. Dev.* 91, 105 (1986) (observing that arbitrary and capricious standard was initially contemplated to be lenient "lunacy test").

¹⁶⁰ *United States v. Lopez*, 514 U.S. 549, 614 (1995) (Souter, J., dissenting).

¹⁶¹ Lessig, *supra* note 1, at 174.

¹⁶² For a discussion of the justices' concern about the public's impression of their decisionmaking, see Epstein & Knight, *supra* note 18, at 164-65 (suggesting that this concern explains Court's adherence to precedent when Court does not have strong contrary ideological preferences).

¹⁶³ See Krotoszynski, *supra* note 12, at 23 (suggesting that Court affirmatively prefers "fuzzy" standard of federalism precisely because it allows them to enact their ideological preferences).

¹⁶⁴ Given congressional control of the courts, the proposed standard of review, if established, might evolve into a deferential glance, as opposed to a hard look. If so, it would cease to be disastrous but instead would be meaningless. In any event, it hardly seems unfair to consider the implications of Jackson's proposal if it worked as intended.

¹⁶⁵ Richard A. Posner, *The Problems of Jurisprudence* 142 (1990).

sional action—an action that might incite institutional response—but would simply engage in case-by-case review of legislation. Judges would make ideologically motivated surgical strikes against disfavored statutes without restricting inherent legislative powers.

Experience with the APA demonstrates that judges might use their newfound authority to control and manipulate policy. In the early days of the APA, judges remained quite deferential. They waited until their review authority was well established and the cultural or political opportunity to engage in intrusive hard look review arose. Until now, judicial review of congressional procedures has represented a firebreak beyond which the Court would not pass. Eliminating this barrier could open quite a Pandora's box; Mark Tushnet has warned that judicial review of legislative process and reasonability would "destroy the legislative process as we know it."¹⁶⁶ One cannot be sanguine about running such a risk.

CONCLUSION

One must ask the question: "Why would the federal courts adopt and sincerely implement a broad, subjective but deferential, process-oriented protection of federalism interests?" Because a persuasive substantive case has now been made in the *Harvard Law Review*? Alas, academic scholarship is not so powerful. Chief Judge Posner observes that "neither the conditions of judging nor the methods of selecting judges . . . would lead one to expect the deep introspection and moral insight that academic literature often attributes to judges."¹⁶⁷ When commentators criticize the consistent nationalization found in judicial federalism decisions, they should pause to consider if there might be some institutional or ideological reason for the pattern, a reason not readily overcome with new doctrinal language alone.

To be meaningful and effective, proposals to revitalize judicial review must account for (i) the motivations of the judiciary; (ii) the institutional concerns and constraints of the judiciary; and (iii) any unanticipated consequences. Federalism proposals such as those of Jackson and Gardbaum fail to so account. Surely it is too late in the day to rely entirely on naïve doctrinal formalism to achieve desired legal or policy ends.¹⁶⁸ Devotees of expanded federalism protection should turn their attention to designing pragmatic doctrines or struc-

¹⁶⁶ Mark Tushnet, *Red, White, and Blue: A Critical Analysis of Constitutional Law* 210 (1988).

¹⁶⁷ Posner, *supra* note 165, at 191.

¹⁶⁸ See Eskridge & Ferejohn, *supra* note 31, at 1398-99 (suggesting that "[r]eliance on judicial oversight by politically subordinate judges to check determined efforts by the other branches of the national government to trample federalism norms seems naïve").

tures that might realizably promote the concept, not ones that are readily and perversely manipulable by the courts. There may be some hope for a rational and balanced system of federalism, but the proposed federalism doctrines would not realize such a system and may present serious threats to the broader structure of the Constitution.