The Elastic Commerce Clause: A Political Theory of American Federalism

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INTRODUCTION

Federalism is sometimes said to be an unstable halfway house between unified national government and an alliance among separate

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We received very helpful comments on earlier drafts of this Article at a workshop held at the California Institute of Technology, a Federalism symposium held at the Vanderbilt School of Law, and at a conference on constitutionalism held at the Murphy Institute of Tulane University. Jenna Bednar, Linda Cohen, Lance Davis, and Sanford Levinson provided especially cogent criticisms—some of which we have been able to cope with, thanks to the research assistance of Jay Schiffman (New York University School of Law, 1993).

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sovereign states. This idea can be traced to a Hobbesian conception of the state, according to which sovereignty must ultimately be indivisible: either national institutions retain the authority to make decisions or they do not. Genuine federal arrangements are unstable under this perspective. The notion of indivisible sovereignty has a powerful hold on our view of politics, but we think it is limited, most importantly by its conflation of the question of where ultimate authority resides with the question of where state power is actually exerted. While the answer to the first question is obviously significant, economic and sociological conceptions of politics suggest that the answer to the second may tell much more about the nature of a polity.

Perhaps the main attraction of federalism in a country riven by internal differences is that it permits foundational issues like the location of sovereignty to be finessed, so that internal divisions can be accommodated in ad hoc, practical ways. It permits people who may differ greatly in their conception of a good public life to develop and maintain their own separate communities within the context of a larger and more powerful political economy, without requiring them to surrender their separate identities.[1] Echoing Rawls, we view federalism as a political rather than a metaphysical solution to the formation and maintenance of a state.[2]

But if federalism is viewed in practical terms, it is not clear that it has much bite. The standard view held by students of law and politics is that the history of American federalism has been an inexorable series of moves in which national power has displaced state and local power.[3] According to this conventional wisdom, the triumph of nationalism is seen everywhere—in election returns, in Congress, in the Presidency, and especially in the courts—and it has been interrupted only occasionally by futile and anachronistic efforts to turn back the clock (from the nullification controversies, through the Civil War, up through tremors of a "new federalism" in the Nixon and Reagan administrations). By the end of the New Deal, if not much earlier, the states had become little more than administrative instrumentalities of the national government, helping to administer

1. This view of federalism parallels the economist's conception in which the value of federal arrangements is that they permit subnational communities to decide autonomously what the mix of public goods and taxes shall be, so that citizens may then sort themselves into jurisdictions whose mixes they find attractive. In both views, it is important that the autonomy of local governments be preserved.

2. See generally John Rawls, *Political Liberalism* (Columbia U., 1993).

3. See sources cited in note 4-6.

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national programs and setting standards and regulations only at the sufferance of national policy-making institutions. There is, in this account, nothing genuine or guaranteed about state sovereiguty; it simply describes an historically convenient mode of public adminstration.

Various theories have been offered for this centralizing view of American federalism. William Riker, for example, argues that genuine federal systems, because they are essentially based on concerns of national security, tend to become centralized over time under the pressure of foreign policy crises and successive military mobilizations.[4] Paul Peterson presents a functional conception of federalism that foresees policy specialization among national and subnational governments, with day-to-day allocational (police power) duties and developmental policies often taking place at the state or local levels, and with redistributional policies being pressed to the national level.[5] Samuel Beer's historical conception of the foundations of the American government locates ultimate sovereign authority in the national electorate from the beginnings of constitutional history and argues that the roles of states have always been instrumental and contingent.[6] All of these theorists, and others we have not mentioned, espouse or assume a dynamic in which regulatory authority seeps inexorably from the state to the national level.[7]

While each of these theories was developed in the context of American politics and history, each has relevance to federal institu-

4. See generally William H. Riker, *Federalism: Origin, Operation, Significance* (Little, Brown, 1964).

5. Peterson offers a "demand side" theory that asserts that local and state governments will be motivated to engage in developmental and allocative policies, and reluctant to pursue progressive redistributions of wealth or income, whereas the national government may be able to engage in redistributive policies. His conclusions about allocative and developmental policies apply equally to the national government. Paul E. Peterson, *City Limits* ch. 4 (U. of Chicage, 1981).

6. See generally Samuel H. Beer, *To Make a Nation: The Rediscovery of American Federalism* (Harvard U., 1993).

7. While each of these theories regards federal arrangements as unstable or provisional in some sense, none of them is committed to a view that sees the national government as inevitably growing larger or faster, or exercising more authority in fact, than the states. Rather, each would say that under certain conditions—confronted by particular political circumstances—the dominance of national institutions either as a matter of fact or as a matter of normative authority will become evident. It is possible, in principle, for each of the theories to visualize a world in which federal arrangements are never subjected te the hard political circumstances that each posits as the motive force of nationalization (external threat, technical change, internal division). However, it seems te us that Peterson and Beer believe that circumstances (for Peterson, lowered transactions and mobility costs; for Beer, increased public identification with the nation rather than the states) have in fact changed in ways that made domination by the national gevernment inevitable. In Riker's case things are harder to decide since it is not clear that security issues are much more threatening now than they were earlier in our history.

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tions in settings outside the United States. If our experience teaches that federalist arrangements are unstable and therefore only temporary—if they must eventually succumb either to nationalizing or centrifugal forces for any or all of the foregoing reasons—federalism's potential as an institutional solution to various political conflicts would be vastly reduced. After all, federalism's attraction in Canada, South Africa, Russia and other former Soviet states, Nigeria, and contemporary Western Europe is based on the fact that it *promises* to leave significant arenas of decision to genuinely autonomous governmental units, while gaining the advantages (military and economic) accruing to the formation of a national government. If behind such promises of local autonomy is the certainty either that they will not be fulfilled or that the advantages of nationhood will not be realized, federalism would lose its power to settle political conflicts. In this sense federalism has a problem of *credibility*.

One way the Framers of a constitution might address the credibility problem is to vest the enforcement of federalism-based promises in an independent judiciary having the power to invalidate statutes as unconstitutional.[8] Unhappily, the legal literature insists that this has not worked out in practice: the main constitutional law casebooks emphasize the Supreme Court's inexorable transformation of the Commerce Clause from a limitation on national power into a limitation on state authority,[9] and leading scholars of constitutional law treat challenges to exercises of national power as essentially "nonjusticiable," that is, not enforceable by the judiciary. For example, Herbert Wechsler argues from James Madison's Federalist No. 46 that limitations on national power are "self-executing," enforced by structural features of the national government that ensured protection of state autonomy through the normal political process.[10] Wechsler's argument has gained wide, even if not universal, acceptance among law professors.[11]

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8. The power of judicial review was classically defended in Federalist No. 78 (Hamilton) in Clinton Rossiter, ed., *The Federalist Papers* 464 (Mentor, 1961), and articulated by the Supreme Court in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

9. See, for example, Gerald Gunther, *Constitutional Law* chs. 2-5 (Foundation, 12th ed. 1991); Daniel A. Farber, et al., *Constitutional Law: Themes for the Constitution's Third Century* ch. 7 (West, 1993); Geoffrey R. Stone, et al., *Constitutional Law* chs. 3-4 (Little, Brown, 2d ed. 1991). A notable exception is Paul Brest and Sanford Levinson, *Processes of Constitutional Decisionmaking* chs. 1-5 (Little, Brown, 3d ed. 1992).

10. Herbert Wechsler, *The Political Safeguards of Federalism*, in Herbert Wechsler, *Principles, Politics, and Fundamental Law: Selected Essays* 49 (Harvard U., 1961).

11 See, for example, Jesse H. Choper, *Judicial Review and the National Political Process* 171-259 (U. of Chicago, 1980).

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The standard academic views about the history of federalism-based restraints on national power are extremely unsatisfying. To begin with, the conclusions of the legal literature—that such restraints have not been enforced by the judiciary because they are best left to the functional protections of normal politics—are inconsistent with the conclusions of the political science literature—that for functional reasons normal politics would press toward ever-increasing national regulation.[12] Additionally, under either view, the anti-nationalists who acquiesced in the Constitution's ratification, and their successors at other points in the nation's history, seem either foolish (for believing the assurances of the Constitution's Framers) or politically inept (for being easily outmaneuvered at every turn by nationalists). While American history has its share of fools and bumblers, compelling descriptive theories usually do not rest upon such assumptions. Finally, as we shall explore in this article, the Court's Commerce Clause decisions have hardly shown a single-minded expansion of national power at the expense of state power. The Taney, Fuller, and Taft Courts witnessed serious judicial efforts to limit congressional power over state and local issues. These Supreme Court decisions are inconsistent with the thesis that national power will overwhelm state power. Although the conventional wisdom dismisses these cases as basically "overruled" by the New Deal, the New Deal Court insisted that its expansion of national authority be accompanied by rules of statutory interpretation protecting concurrent state authority as well. Also, the Rehnquist Court has struck down or narrowly construed national statutes on federalism grounds.

For these reasons, we seek to develop an alternative model of American federalism. A robust federalism must maintain boundaries between state and national authority by protecting the states against invasions by national institutions, by protecting states from incursions by their neighbors, and by restraining states from transgression on core national/constitutional values. Commerce Clause jurisprudence has been centrally concerned with these issues and is a natural laboratory for the development of a federalist theory. Our account is essentially structuralist: 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

12. See sources cited in note 4-6.

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(and generally ad hoc) restraints on national power. However, just because the Court has not actively restrained congressional actions does not mean that Congress has been unrestrained. Indeed, the various impediments to maintaining coherent legislative majorities have proved very effective at limiting congressional adventures against the states.

On the other hand, the Court has been much more active (and principled) regulating state regulatory policies. It has usually protected the integrity of state government and state police power (i.e., policies protecting public health or safety or promoting economic development) from being displaced by national regulation as long as the exercise of these powers has not had substantial spillover effects, either on nonresidents or on important constitutional values. But if there is strong evidence that a state is pursuing a policy that pushes costs onto nonresidents, the Court has not been reluctant either to set aside the state laws or authorize congressional action. This theme is consonant with the Framers' understanding that states would be the primary engines of what Paul Peterson has called "developmental" policies (policies aimed at improving the state economy) and "allocative" policies (traditional police powers, the day-to-day operation of state services).

Our Article will develop the foregoing thesis in three stages. First, we shall develop from the political science literature a theoretical model that predicts how an independent but nonetheless political Supreme Court would enforce the Constitution's federalist structure. The predictions of our model will then be tested and supplemented by a brief history of the Court's federalism precedents. The history will be organized around the major ideological shifts in American public life (1828, 1860, 1896, 1932, and possibly 1980). The Article will conclude with a refined version of our model, one that takes account of the complexities suggested by our constitutional history.

I. JUDICIAL ENFORCEMENT OF FEDERALISM

This Part develops a dynamic model of judicial enforcement of federalism norms. At the outset we should articulate our assumptions about each feature. We take "federalism norms" to be the Framers' general goals in dividing authority between national and state governments. On the one hand, national authority would be

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limited by the usefulness of keeping most regulation localized;[13] on the other hand, state regulation would be limited by the Framers' desire to avoid the balkanization characteristics of the Articles of Confederation.[14] We take "judicial enforcement" to involve not just the application of the federalism norms held by members of the Court, but also to involve the Justices' other preferences, including their substantive preferences as to the policy under review and their institutional preferences. Ours is a "dynamic model" in that it contemplates variation both in judicial political preferences and in judicial fidelity to federalism norms through diverse political eras of American history. These are our assumptions in a nutshell. We now elaborate on them.

A. Judicial Preferences Based on Rule of Law, Political, and Institutional Values

We assume that political officials, including federal judges, have and act upon preferences about ultimate policy outcomes.[15] Judicial policy preferences, in our account, reflect the views of the political coalitions responsible for their appointments, and are therefore sensitive to presidential and congressional policy preferences and indirectly to electoral judgments. Of course, at a particular moment, the policy preferences of those judges sitting on the Supreme Court may be out of phase with those held by other political leaders or by the electorate; because different political coalitions are responsible for the appointment of different Justices, at any given point in time the Court is likely to have an array of different preferences.

While judges (like other political actors) have ideologies or policy preferences, their preferences are also much influenced by their institutional circumstances. In particular, we believe that judges typically hold what might be termed rule of law, and institutional

13. The Framers believed that national power would be limited to those powers enumerated or delegated to it in Articles I-III. See U.S. Const., Amend. X.

14. This value is not set forth explicitly in the Constitution, but apparently was contemplated by at least some of the Framers. See, for example, Letter from James Madison to J.C. Cabell (Feb. 13, 1829), reprinted in Max Farrand, 3 *The Records of the Federal Convention of 1787* at 478 (Yale U., 1937). See also *H.P Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525 (1949).

15. For well-considered and typical examples, see Jerome Frank, *Law and the Modern Mind* (Brentano's, 1947); Walter F. Murphy, *Elements of Judicial Strategy* (U. of Chicago, 1964); Richard A. Posner, *Economic Analysis of Law* 505-07 (Little, Brown, 3d ed. 1986); Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* (Cambridge U., 1993); Robert A. Dahl, *Decision Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. Pub. L. 279 (1957); Glendon A. Schubert, *The Study of Judicial Decision-Making as an Aspect of Political Behavior*, 52 Am. Pol. Sci. Rev. 1007 (1958).

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preferences, in addition to policy preferences. For professional as well as historical reasons, the Court sees its primary role in American government to enforce the rule of law—obedience to the Constitution and duly enacted statutes and treaties of the United States. Where a legal rule is clearly applicable to an issue, the Court will be inclined to follow and apply it.

Even the most optimistic legal theories of the Court realize that it will also protect its own institutional interests and standing. Federal courts are politically vulnerable institutions that have powerful reasons to be cautious in imposing restrictions on the other branches of the national government. Thus, institutional prudence by itself would make judges reluctant to attempt to curb congressional initiatives, at least those that emerge with significant sustained majorities. While this form of judicial restraint could seem craven and unprincipled, it is consistent with a commitment to what we shall call democracy norms[16]—norms that assert that the Court should leave undisturbed legislative actions in which all affected parties were more or less adequately represented in the enacting legislature. Such a normative belief grounds the presumption of deference to legislatures on a broader commitment to constitutional values by assuming on evidence of formal respresentation that adequate procedural protection was available to concerned parties.

Democracy norms, insofar as they are held to apply to legislatures generally and not merely to Congress, permit a wide scope of subnational governments to pursue policies of interest to their own residents so long as such activities do not trespass too blatantly on the interests of their neighbors. By presumptively allowing those, and only those, whose interests are directly affected by a policy to make choices about it, democracy norms also permit the attainment of economically efficient outcomes. Thus we may see that a judicial commitment to democracy may provide additional support for an independently attractive efficiency norm.

B. Democracy and Efficiency Norms

While we argue that a commitment to democracy is functional for the Court, part of its attraction is that it can be seen to emerge from the American political tradition. Democracy norms may be

16. For an elaboration of widely held normative expectations at the time of the founding, see generally David F. Epstein, *A Political Theory of The Federalist* (U. of Chicago, 1985).

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traced to the centrality of consent in the American political tradition, to the Declaration of Independence's demand for representation as a precondition for cost imposition, or to structural features of the Constitution.[17] Each of these sources points to a commitment to the use of elections to protect fundamental interests. Each supports the view that, for the most part, citizens can use electoral processes to defend their interests without judicial intervention, but that those without adequate representation might need additional protection. While these expectations are quite general, two classes of vulnerable interests have special claims to judicial assistance: those unrepresented in the governmental unit making decisions that affect their interests (this problem arises from the federal organization of government), and those groups that are specially disadvantaged in the exercise of their political rights.[18]

From the perspective of democracy norms, congressional uses of the Commerce Clause would seem to need little judicial scrutiny (except where adverse effects fall disproportionately on politically disadvantaged groups), because the states and other interests are presumably represented in Congress. On the other hand, state and local regulations affecting interstate commerce would require regular judicial oversight to restrain local temptations to exploit outsiders (for example, the United States, other states, businesses located in other jurisdictions) who are not well-represented in the state political process. In other words, while restrictive readings of the Commerce Clause ought to be exceptional, restrictions on the states pursuant to the dormant Commerce Clause ought to be common and even increase as the the fall in transportation costs makes cost exporting easier to accomplish.

In the context of Commerce Clause adjudication, efficiency norms entail the presumption that states ought to be left free to formulate their own allocative and developmental policies, insofar as the effects of these policies are confined to the jurisdiction. When such policies create significant spillovers, either by pushing costs onto

17. See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard U., 1980). See also Alexander M. Bickel, *The Morality of Consent* (Yale U., 1975); Choper, *Judicial Review* (cited in note 11).

18. Both ideas have been articulated by Justice Harlan Stone in his opinions in *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938) and *South Carolina State Highway Dep't v. Barnwell Bros., Inc.*, 303 U.S. 177, 184 n.2 (1938). See generally David M. Bixby, *The Roosevelt Court, Democratic Ideology, and Minority Rights: Another Look at* United States v. Classic, 90 Yale L. J. 741 (1981). But we argue that these democracy concerns underlie our whole constitutional tradition.

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outsiders or by trespassing on significant national values or policies, the presumption that state action would lead to efficient outcomes would fail, and judicial oversight may be required.

With respect to state redistributive policies, matters are more complicated. Paul Peterson has argued that individuals and firms have significant locational motivations that work against the efficacy of progressive redistribution at the subnational level: beneficiaries will tend to migrate in and payers will tend to migrate out of a jurisdiction pursuing such policies, thus impoverishing such jurisdictions and undermining the policies themselves.[19] Thus, if mobility costs are small, state and local governments may find it difficult to achieve progressive redistributions of wealth, even if their citizens wish to do so. Thus, courts would seldom need to restrain states from progressive redistributions. On the other hand, when factor mobility is restricted so that genuine redistributive effects are achievable, courts will sometimes have occasion to restrain state actions.

C. A Model of Supreme Court Enforcement of Federalism

Combining these three features of judicial preferences (rule of law, policy, and the norms of democracy and efficiency), we may sketch out an elementary model of judicial enforcement of federalism. Our model is a twin model, with different predictions for national regulation than for state regulation.

We start with national regulation. We expect federal authority to be exercised most often for redistributive policies or for developmental policies where there is a need for a national and uniform response (as to emergencies), where state-by-state regulation tends to yield spillover effects or externalities, or where interstate competition for economic development yields a "race to the bottom." Federal authority is least necessary for basic allocational policies, such as regulation of marriage and families, health and personal safety, morals (including torts and basic crimes), contractual relationships, agency and corporate relationships, and so forth.

This typology provides a more formal way of expressing the rule of law values implicated by federalism and the limited nature of national authority: Localized allocational policies are presumptively off limits to national regulation, but that presumption can be offset by a showing that one of the reasons for national jurisdiction (uniform

19. Peterson, *City Limits* at 69-72, 79 (cited in note 5).

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response, interjurisdictional externalities, race to the bottom) exists. There is no presumption as to developmental policies, but they must be rationally related to one of the national justifications. The purpose of these requirements is to preserve the states' primacy over developmental and (especially) allocational policies; a corollary of that primacy is that the national government must not be allowed to undermine state governments themselves, for that would by necessity undermine the states' abilities to accomplish their primary functions. In contrast, redistributive policies are presumptively best left to national regulation and present no constitutional problems—unless they fall athwart political or constitutional norms valued by a particular Court.

We would not expect the Court to strike down national redistributions on democratic theory grounds, because of the relative openness of the federal electoral system and the representation of most interests in Congress.[20] Efficiency norms, however, may provide reasons to oppose national legislation, on the grounds that the incidence of benefits and costs may provide political incentives to subsidize some interests rather than others.[21] But, under the presumption that cost-paying groups have political access to the legislature, courts should be disposed to give wide latitude to federal action in such cases. Whether such concerns are triggered is closely connected to the relative political ideologies of the enacting Congress and the Court. Our working hypothesis is that a federal redistribution is most vulnerable when it is enacted by a Congress composed of a different and competing political coalition than that which appointed a majority of the Supreme Court reviewing the legislation.

This point can be crudely illustrated by reference to the "critical elections" thesis.[22] Under that thesis, the elections of 1828, 1860, 1896, 1932, and (possibly) 1980 involved large-scale political realignments, in which the nation voted for a new coalition and that coalition's solution of the big problems bedeviling the prior period.

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20. Our caveat about statutes hurting unrepresented minorities is much less severe at the national level than the state level, it is not a theme that is prominent for most of the Court's history, and it is not a theme much associated with the "federalism" cases. Hence our subsequent discussion will minimize this factor.

21. The classic example is the case in which the benefits of a federal program accrue te small, well-organized interests while the costs are spread widely through the tax system.

22. See generally Walter Dean Burnham, *Critical Elections and the Mainsprings of American Politics* (Norton, 1970); V.O. Key, *A Theory of Critical Elections*, 17 J. Pol. 3 (1955), as well as Richard Funston, *The Supreme Court and Critical Elections*, 69 Am. Pol. Sci. Rev. 795 (1975); Thomas Jahnige, *Critical Elections and Social Change: Towards a Dynamic Explanation of National Party Competition in the United States*, 3 Polity 465 (1971).

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After a time lag (except in one case, 1896), each critical election also yielded a realignment on the Supreme Court. We would expect that during the lag period the "old" Court would be most willing to overturn the "new" Congress' redistributive policies, but that after the realignment had occurred the new Justices would presumptively defer to the political coalition that put them on the Court.[23]

We illustrate some of the predictions of this simple theory in Table One.

Table One
Predicted Court Holdings on National Power Cases

	Court Ideology Near that of Enacting Congress	**Court Ideology Different From Enacting Congress**
High Burden on Core State Functions	no prediction	invalid
Low Burden on Core State Functions	uphold	probably invalid

23. We emphasize that the deference is *not* because the new Justices made any illicit promises to the appointing President or confirming Senators, or even because they were grilled on the issues of concern to the governing coalition (though any of these things may go on). The deference grows out of the political values the new Justices share with those who appoint and confirm them.

Our theory provides reasons to believe that that the Court will be more prone to strike down state or local, rather than national, regulation on grounds of federalism. This is so in part because the Court is more likely to diverge ideologically from any given state legislature than it is from Congress, given the political or ideological variability among the states. Moreover, the Court needs the cooperation of Congress to accomplish many of its goals (especially the smooth functioning of the federal judiciary as a whole) and has more to fear from Congress than from state legislatures: Congress can impeach justices, tinker with their pensions, refuse to increase judicial salaries to keep pace with inflation, enlarge the size of the Court, arbitrarily add to the Court's workload, leave lower court vacancies unfilled, fiddle with federal jurisdiction, and so forth.

The most important reason for greater scrutiny of state and local legislation is that such laws are more likely to impose external costs on people not well-represented in the state or local political process. This phenomenon not only poses efficiency problems, but also directly implicates the anti-balkanization value that gave rise to the Constitution. Concern for democratic process values should also make judges suspicious of state and local distributive policies that impact heavily on outsiders, or that are especially impervious to change by those who bear their costs. Such policies might seem especially likely to emanate from the capture of local political processes by powerful minorities and to warrant federal intervention on representation reinforcement grounds. In short, when cost-exporting state legislation appears to be an effort to redistribute wealth from state outsiders to state insiders and the local political process seems unable to correct the defect (as will typically be the case), we predict the Supreme Court will be most likely to invalidate the state effort.[24]

Conversely, the Justices will tend to be tolerant of state and local allocative and developmental policies insofar as their benefits and costs fall largely within the jurisdiction. The policies are executed and financed by the people whose welfare is directly affected, and therefore democratic incentives are well-placed to ensure relatively efficient results. Hence, the Court can be expected to permit these governments ample discretion in pursuing such ends.[25] Table

24. The cost-exporting theory is developed by Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 Wis. L. Rev. 125. See also Daniel A. Farber, *State Regulation and the Dormant Commerce Clause*, 3 Const. Comm. 395 (1986).

25. This treatment leaves aside the issue of whether state political structures are particularly likely to reach efficient outcomes even when the costs and benefits are entirely internal to the jurisdiction.

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Two presents predictions for the Court's handling of federalism attacks on state laws under the dormant Commerce Clause and other provisions.

Table Two
Predicted Court Holdings on State Power Cases

	Allocative or Developmeut Policy	**Redistributive Policy**
Large External Effects Not Corrected	not clear	invalid
Modest or Corrigible External Effeets	uphold	not clear (depends on ideology)

The predictions in Table Two rest strongly on the presumption that states and localities should be permitted wide discretion in executing polcies whose effects are confined to their own residents and which do not implicate constitutional values. When either prong of this test fails—as on the diagonal cells—the Court will resort to balancing considerations and the theory will not have strong predictions. We now turn, in the remainder of the article, to provide a brief history of federalism adjudication as a prelude to providing an evaluation of the theory.

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II. A BRIEF HISTORY OF FEDERALISM AT THE SUPREME COURT

In this Part, we trace the Supreme Court's federalism cases through history, as a means of testing and perhaps refining the hypotheses set forth in Tables One and Two. For ease of exposition, we follow critical elections theory to organize our discussion of the Court's decisions. The exposition does not pretend to be comprehensive but does touch upon the federalism decisions that are considered the major ones by the leading texts and general treatises on constitutional law.[26]

A. The Marshall Court, 1801-35

In light of the nation's experience under the Articles of Confederation, there was a consensus after the adoption of the Constitution that the federal government should be able to exercise national authority to facilitate a national market. The Supreme Court reflected this consensus, under the leadership of Chief Justice John Marshall (1801-35), prominently seconded by Justices William Johnson (1804-34) and Joseph Story (1811-45).[27] The Court's federalism decisions in this period relentlessly pursued this developmental objective, but without violating the original promise that state governments would be left free to follow local developmental policies.

The leading case was Marshall's opinion in *Gibbons v. Ogden*,[28] which struck down a New York law requiring a license to operate steamboats between New York City and New Jersey, on the ground that the license was inconsistent with a federal statute regulating "ships and vessels to be employed in the coasting trade and fisher-

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26. For texts, see Brest and Levinson, *Processes of Constitutional Decisionmaking* (cited in note 9); Gunther, *Constitutional Law* at chs. 2-5, 10 (cited in note 9); Stene, *Constitutional Law* at chs. 2-3 (cited in note 9). For general treatments, see Lawrence M. Friedman, *A History of American Law* (Simon & Schuster, 2d ed. 1985); Paul L. Murphy, *The Constitution in Crisis Times, 1918-1969* (Harper, 1972); Leonard W. Levy, Kenneth L. Karst, and Dennie J. Mahoney, eds., *Encyclopedia of the American Constitution* (Macmillan, 1986).

27. Marshall and his original Court were Federalists appointed by Presidents Washington and Adams. The election of 1800 brought a quarter century of Democrat-Republican Presidents, but Presidents Jefferson, Madison, and Monroe favored a strong national presence, and the Justices they appointed (such as Johnson and Story) reflected those views.

On the Marshall Court generally, see George Lee Haskins and Herbert A. Johnson, *Foundations of Power: John Marshall, 1801-1815* (Macmillan, 1981) (vol. 2 of the Oliver Wendall Holmes Devise History of the Supreme Court of the United States); G. Edward White, *The Marshall Court and Cultural Change, 1815-1835* (Oxford, 1991) (vols. 3 & 4 of the Holmes Devise History); Leonard W. Levy, *Marshall Court (1801-1835)*, in Levy, et al., 3 *Encyclopedia of the American Constitution* 1211 (cited in note 26).

28. 22 U.S. (9 Wheaton) 1 (1824).

ies."[29] Though the New York licensee argued that the New York regulation was merely an exercise of traditional state police power, Marshall responded that such exercise must give way to the national government's superior authority to regulate interstate commerce. From a development perspective, state-by-state regulation of the interstate coastal trade is inefficient, risking the sort of prisoner's dilemma games that had bedevilled the country under the Articles of Confederation. Under our theory, *Gibbons* is an easy affirmance of national power, because the national statute reflected the same political values as those held by the Court, and the development policy reflected in the statute was justified by the need for national uniformity and the avoidance of prisoners' dilemmas. *Gibbons* is less easy but also supportable as an invalidation of state power (developmental function but with large external costs), and the Court left open the possibility of state regulation of the coastal trade when it declined to adopt Justice Johnson's argument that the existence of national power negated the possibility of state regulation.[30]

Two other decisions considerably broadened federal regulatory authority; both are only slightly harder cases than *Gibbons* under our model. Marshall's opinion in *McCulloch v. Maryland*[31] upheld Congress' chartering of the second United States Bank, even though there was no explicit constitutional authorization. The opinion argued that the creation of the Bank was "necessary and proper" for the implementation of other powers delegated to Congress in Article I. Marshall then invalidated Maryland's effort to tax the Bank, as inconsistent with the exercise of national sovereignty. This is a harder case under our model, because the chartering of banks was a traditional state function. But Marshall characterized the national bank as needed for national development, and this Federalist policy was one with which the Marshall Court was thoroughly sympathetic. Hence, *McCulloch* goes in the same lower righthand quadrant as *Gibbons*, where national power will be affirmed.

In *Swift v. Tyson*,[32] the Court held that federal courts in diversity cases should decide commercial law issues by reference to "the

29. Id. at 2.
30. Id. at 222-39 (Johnson, J., concurring).
31. 17 U.S. (4 Wheaton) 316 (1819).
32. 41 U.S. 1 (1842). This case was decided during the Taney Court, but the opinion was written by Story and reflected Marshall Court themes. Also, Story's opinion rested upon an interpretation of the Judiciary Act of 1789, but the themes were clearly those of constitutional

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general principles and doctrines of commercial jurisprudence," rather than the "decisions of the local [state] tribunals," thereby federalizing the law of commerce (generally) and negotiable instruments (the issue in *Swift*).[33] We consider this a hard case, because contract regulation was and remains an essentially allocative state function. The Court obviously viewed the federalization of contract law as desirable for national economic development, and the Court was politically sympathetic to this regime. Hence *Swift* fits our model well enough, though it is in the more ambiguous quadrant right above the *Gibbons-McCulloch* quadrant. That *Swift* was an invasion of traditional state functions rendered it more vulnerable than the earlier precedents, moreover. When the Court grew less concerned with federalization of contract law, and especially when the Court realized that *Swift* had not produced the uniformity Justice Story had hoped for, the Court overruled the case in *Erie Railroad Co. v. Tompkins*.[34] The later case explicitly relied on federalism concerns as the basis for its overruling, and *Erie* securely fits in the upper righthand quadrant of our national regulation table—the quadrant suggesting the invalidity of national regulations that invade traditional state functions and that represent political values the Court does not favor.

The Marshall Court applied the national powers enumerated in Article I very broadly but was not insensitive to the need to recognize breathing room for state and local regulation, especially when it did not have spillover effects on other citizens. Thus, Marshall in *Gibbons* flirted with but did not adopt Johnson's philosophy of "dual federalism," under which the states were prohibited from regulating any issue which fell under the national authority to regulate interstate commerce.[35] Strict enforcement of dual federalism by a Court expanding national authority would have been a significant retreat from the theory of federalism as we have articulated it. Marshall implicitly rejected Johnson's theory in *Willson v. Black Bird Creek Marsh Co.*,[36] upholding a state authorization for the company to build a dam across a navigable river. Marshall upheld the law against a dormant Commerce Clause challenge, on the ground that the state law served valid economic and health purposes and did not clash with

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federalism and an instrumental view of the common law. See Grant Gilmore, *The Ages of American Law* 34 (Yale U., 1977).

33. *Swift*, 41 U.S. at 16.

34. 304 U.S. 64 (1938).

35. See *Gibbons*, 22 U.S. at 222-39 (Johnson, J., concurring). Marshall's opinion flirted with dual federalism but found it unnecessary to the decision in the case.

36. 27 U.S. 245 (1829).

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any enacted congressional law or policy.[37] This is consistent with our theory, for the state regulation in *Black Bird Creek* was a developmental one with few apparent effects external to the state. Note that Marshall was more open to a dual federalism argument in *Gibbons*, where the state regulation fits in the upper lefthand quadrant of our state regulation table (result unclear), than he was in *Black Bird Creek*, where the state regulation fits in the lower lefthand quadrant (always uphold). Also notably, Johnson advanced his thesis of federal exclusivity in a concurring opinion in the former case but silently joined Marshall's opinion in the latter.

The Marshall Court's most controversial federalism decisions were those which regulated state redistribution of "property." Under the Contract Clause, the Court held in *Dartmouth College v. Woodward*,[38] that New Hampshire could not unilaterally modify a private college's charter to regulate it. Generally, the Marshall Court was leery of retroactive state regulation of private contracting,[39] but this was on the whole an issue that divided the Court. Also divisive was the issue of slavery, which became especially prominent on the national agenda in 1819, when Missouri petitioned for statehood as a slave state. Marshall and Story considered slavery "repugnant to the general principles of justice and humanity,"[40] and Johnson's anti-slavery views impelled him to invalidate a South Carolina statute requiring the internment of any "person of color" arriving at a South Carolina port.[41] On the whole, and perhaps reflecting divisions within its nationalizing coalition, the Marshall Court did not stake out strong positions on Contract Clause and slavery issues, leaving them for the next generation of judges.

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37. Id. at 251. The economic purpose was to allow development along the creek banks. The health purpose was to draw off "pestilence" resulting from the slow-moving creek. Id. at 249.

38. 17 U.S. (4 Wheaton) 518 (1819).

39. See *Fletcher v. Peck*, 10 U.S. 87 (6 Cranch) (1810) (holding that Georgia could not rescind public land sale allegedly entered into by bribery); *Sturges v. Crowninshield*, 17 U.S. (4 Wheaton) 122 (1819) (holding that New York bankruptcy law cannot retroactively discharge a debt), explained in *Ogden v. Saunders*, 25 U.S. (12 Wheaton) 213 (1827).

40. *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 846 (C.C. Mass. 1822) (No. 15,551) (Story, sitting as circuit judge). See *The Antelope*, 23 U.S. (10 Wheaton) 66 (1825) (Marshall, C.J.).

41. *Elkison v. Deliesseline*, 8 F. Cas. 493, 493 (C.C.D.S.C.) (No. 4,366) (1823) (Johnson, J., sitting on the circuit).

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B. The Taney Court, 1836-65

The election of Andrew Jackson as President in 1828 and 1832 represented a realignment in American politics, and the Jacksonian period that followed can be characterized as one in which organized parties became important for the first time, economic development was on the whole left to the states (Jackson vetoed bills seeking to renew the U.S. Bank and to spend money to create interstate transportation networks), and the states were left free to deal with issues of slavery.[42] Jackson and his successor Martin Van Buren (the father of the modern party system) remade the Court with the appointments of eight Justices, including Chief Justice Roger Taney.[43]

Because the national government in this era did not pursue development or redistributive projects, the Taney Court was not called upon to apply or rethink the Marshall Court's expansive vision of national authority, but it was constantly asked to resolve issues arising out of the "dormant" features of the Commerce Clause. The Court generally allowed the states to pursue local development objectives, even in cases where the Marshall Court might have considered those objectives to have trenched upon national authority or private property rights. The most striking example was *Mayor of the City of New York v. Miln*,[44] an early Taney Court decision which upheld a New York law screening immigrants coming into the state from overseas and barring entry of immigrants the mayor felt were likely to become dependent upon the city. Although this regulation operated as a localized immigration policy, the Court (rather remarkably) held that it was a police law rather than a regulation of interstate commerce. Relying on *Gibbons*, only Story (a holdover from the Marshall Court) dissented. The Court distinguished *Gibbons* as a case in which "the theatre on which the law operated was navigable water," over which national regulation was paramount, while the new case in-

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42. On the Jackson era, see generally Carter Goodrich, *Government Promotion of American Canals and Railroads, 1800-1890* (Columbia U., 1960); Richard P. McCormick, *The Second American Party System: Party Formation in the Jacksonian Era* (U. of N.C., 1966).

43. The Jackson Democrats appointed to the Court by these Presidents were John McLean of Ohio (1829), Henry Baldwin of Pennsylvania (1830), James Wayne of Georgia (1835), Roger Taney of Maryland (1836), Philip Barbour of Virginia (1836), John Catron of Tennessee (1837), John McKinley of Kentucky (1837), and Peter Daniel of Virginia (1841). Note that six (the last six) of the eight were from slave-holding states.

On the Taney Court and federalism, see Felix Frankfurter, *The Commerce Clause Under Marshall, Taney, and Waite* (U. of N.C., 1937); Carl B. Swisher, *The Taney Period, 1836-1864* (MacMillan, 1974) (vol. 5 of the Holmes Devise History); R. Kent Newmyer, *Taney Court (1836-1864)*, in Levy, et al., 4 *Encyclopedia of the American Constitution* 1867 (cited in note 26).

44. 36 U.S. 102 (1837).

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volved only "the territory of New York over which the state possesses an acknowledged, an undisputed jurisdiction for every purpose of internal regulation."[45] Under our state regulation model, *Miln* is an unclear case (consistent with the Court's internal division), because the local regulation clearly had external effects but was apparently a local developmental policy. Whether such a regulation would be upheld depends on the Court's political values, which is why we suggest the Marshall Court might have reached a different result and why the current Court would surely do so.

The suggestion in *Miln* that potential national authority to regulate an issue does not automatically preclude state regulation was the basis for the Court's holding in *Cooley v. Board of Wardens*.[46] The Court upheld a Pennsylvania statute requiring vessels entering and leaving the port of Philadelphia to engage local pilots to guide them through the harbor. Consistent with *Gibbons* (though not citing it), the Court held that Congress had the authority to regulate pilots under the Commerce Clause, but reasoned that the states could exercise concurrent jurisdiction unless the "subjects of this power are in their nature national, or admit only of one uniform system."[47] Although *Cooley* was not the Court's last word on the subject, it was a landmark decision rejecting a broad (Johnson) reading of *Gibbons* to constrict the authority of the states as the national authority expanded or became better defined.[48] Under our model, *Cooley* is an easier case than either *Gibbons* or *Miln*, because the local regulation was an allocational one (safety) and had modest external effects—thereby placing it in the same quadrant as *Black Bird Creek*, the lower lefthand side of our state regulation table.

Consistent with the Jacksonian political agenda and its general willinguess to accommodate state regulation under the dormant Commerce Clause, the Taney Court also applied the Contract Clause with some leniency in evaluating state developmental programs. The

45. Id. at 135. The Court also observed that there had been a direct clash of national and state laws, while in the new case federal laws did not reach the situation regulated by New York.

46. 53 U.S. 299 (1851).

47. Id. at 319. The Court also observed that Congress had not legislated directly on the subject, and that the most relevant federal statute evidenced a congressional intent to leave this area to the states. Id. at 317-18.

48. See also *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421 (1855) (holding, by a divided Court, that Congress can authorize the state to regulate a matter lying in interstate commerce).

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leading case was *Charles River Bridge v. Warren Bridge*,[49] where the Court (again over Story's lone dissent) rejected Harvard College's Contract Clause challenge to the state's building a bridge across the Charles River, which effectively destroyed the value of Harvard's ferry franchise. Taney's opinion for the Court did not retreat from the Marshall Court's cases prohibiting retrospective abrogation of contract rights, but it did set forth a more liberal rule for construing public grants: "any ambiguity in the terms of the contract, must operate against the adventurers, and in favor of the public."[50] Like the Court's Commerce Clause jurisprudence, its Contract Clause jurisprudence was friendly to state development programs.[51] On federalism grounds, *Charles River* is an easy case to uphold (developmental policy, no external effects).

The Jackson-appointed Justices achieved a substantial amount of consensus on the issues discussed above, but they fragmented on the issue of slavery—at the same time the Democrat and Whig parties were similarly fragmenting, in the 1850s. Taney as early as 1842 had staked out a strong states-rights position on the slavery issue, in which he interpreted the Constitution to give slave states wide berth to maintain and protect their institution, as through fugitive slave laws supplementing the federal Fugitive Slave Act of 1793.[52] But his Court broke wide open on the issue in *Dred Scott v. Sandford*.[53] The Court dismissed the lawsuit of Dred Scott, a Missouri slave seeking freedom based upon his and his master's residence in the free state of Illinois and in the congressionally created free territory north of Missouri. Taney's opinion reasoned, in part, that the Missouri Compromise of 1820, which created the free territory, was unconstitutional, both because Article I did not specifically authorize it and because it operated as an unlawful "taking" of the master's "property" when he brought Scott into the free territory.[54] The

49. 36 U.S. 420 (1837). See generally Stanley Kutler, *Privilege and Creative Destruction: The* Charles River Bridge *Case* (Lippincott, 1971).

50. 36 U.S. at 544.

51. See also *West River Bridge Co. v. Dix*, 47 U.S. 507 (1848). But see Benjamin F. Wright, *The Contract Clause of the Constitution* 62-63 (Harvard U., 1931) (emphasizing the continuities between the Marshall and Taney courts).

52. *Prigg v. Pennsylvania*, 41 U.S. 539, 626 (1842) (Taney, J., concurring in the judgment, hut not in the opinion for the Court by Story, J.) (invalidating Pennsylvania statute punishing slaveholders who forcibly recovered their escaped slaves in Pennsylvania). See *Ableman v. Booth*, 62 U.S. 506 (1859) (Taney, C.J.) (holding that Wisconsin state court could not issue writ of habeas corpus to free a federal prisoner convicted of violating the Fugitive Slave Act).

53. 60 U.S. 393 (1857). See generally Don E. Fehrenbacher, *The Dred Scott Case, Its Significance in American Law and Politics* (Oxford U., 1978).

54. *Dred Scott*, 60 U.S. at 432-52 (opinion of the Court by Taney, C.J.).

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opinion also ruled that federal courts had no diversity jurisdiction to hear the case, because African Americans were not "citizens" within Article III's authorization of federal jurisdiction.[55] Six Justices (four of them from the South) wrote separate concurring opinions, differing in various ways with Taney's analysis. Two (Northern) Justices dissented and would have granted Scott relief. That *Dred Scott* was a hard case for the Court is consistent with our model of national regulation: The federal legislation was redistributive legislation, but it was politically offensive to a Southern-dominated Court. Hence the statute fits in the lower righthand quadrant of the national regulation table, which yields no clear prediction.

C. The Reconstruction Court, 1865-95

The Court's decision in *Dred Scott* precipitated the nation's greatest crisis of federalism.[56] In the election of 1860, the Republican candidate, Abraham Lincoln, won on a platform vowing to overturn the decision, and Southern states promptly "seceded" from the union. The Civil War was fought over their right to withdraw, and the seceders lost. The Party of Lincoln governed the country continuously (with the exception of the two Presidencies of Grover Cleveland) for the next two generations and filled the Court with Republicans to replace the Taney Court.[57] The Lincoln platform was strikingly different from the Jacksonian one of the previous period, emphasizing the role of the national government in economic development (through railroad land grants, for example) and in redistributing social power (ultimately favoring the abolition of slavery and the badges of servitude it imposed).

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55. Id. at 452-54.

56. See generally Eric Foner, *Reconstruction: America's Unfinished Revolution* (Harper & Row, 1988); James G. Randall, *Constitutional Problems Under Lincoln* (U. of Illinois, 1964); Kenneth M. Stampp, *The Era of Reconstruction, 1865-1877* (Knopf, 1965); Arthur Bestor, *The American Civil War as a Constitutional Crisis*, 69 Am. Hist. Rev. 327 (1964).

57. Lincoln himself appointed five Justices, Chief Justice Salmon Chase (1864-73) and Associate Justices Noah Swayne (1862-81), Samuel Miller (1862-90), David Davis (1862-77), and Stephen Field (1863-97). Other notable appointments of the era were Joseph Bradley (1870-92) and John Harlan (1877-1911) as Associate Justices and Morrison Waite (1874-88) as Chief Justice.

On the Reconstruction Court generally, see Charles Fairman, *Reconstruction and Reunion, 1864-88* (MacMillan, 1971) (vols. 6 & 7 of the Holmes Devise History); William W. Wiecek, *Chase Court (1864-1873)*, in Levy, et al., eds., 1 *Encyclopedia of the American Constitution* 234 (cited in note 26).

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A political coalition of radical abolitionists decisively won the election of 1866, and that mandate ensured the adoption of the Fourteenth Amendment to the Constitution in 1868.[58] This and the other Reconstruction measures dramatically altered the balance of federalism in the United States. Unlike the pre-Civil War Constitution, whose first ten amendments provided rights enforceable against the national government, the Constitution after Reconstruction provided rights for citizens enforceable against the states. This was an important move, whose unfolding we explore below, but we should emphasize also that the Reconstruction Court was cognizant of the need to preserve a strong role for continuing state autonomy in the face of new national economic and civil rights policies. Hence it was the Reconstruction Court that extended *McCulloch*'s assertion of federal immunity from state taxation to create a reciprocal state immunity against federal taxation in *Collector v. Day*.[59] As Chief Justice Salmon Chase put it, "the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government."[60]

The former abolitionists who had presided over Reconstruction were pretty much united on the proposition that the Fourteenth Amendment redistributed civil rights in this country by sweeping away state laws that sought to perpetuate the subordination of African Americans in the post-slavery South. In 1868, the Court in *Crandall v. Nevada*[61] struck down a Nevada statute imposing a capitation tax on every person leaving the state. Two Justices considered the tax violative of the dormant Commerce Clause, but Justice Samuel Miller's opinion for the Court reasoned from the general design of the Constitution that citizens ought to be able to travel freely across state borders. *Crandall* is an exceedingly easy case under our model (invalid as a redistributive state policy with large external costs). It was also a potentially important signaling case, suggesting the possibility that the Supreme Court would interpret the Reconstructed Constitution to create a corpus of rights based upon the concept of national citizenship. And the Court appeared to be heading

58. See William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (Harvard U., 1988). The irregular process by which that amendment was ratified is recounted in Bruce Ackerman, *We The People: Foundations* (Belknap, 1991).

59. 78 U.S. 113 (1871) (striking down federal income tax applied to salary of state judge), overruled by *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939).

60. *Texas v. White*, 74 U.S. 700, 725 (1869).

61. 73 U.S. 35 (1867).

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in that direction when it decided *Strauder v. West Virginia*,[62] which struck down a state law excluding black citizens from juries. *Strauder* was a harder case than *Crandall* (lower righthand rather than upper righthand quadrant of our state regulation table) and therefore might have suggested an aggressive stance on the part of the Court.

Yet the Reconstruction Court fragmented on this issue, with a majority of the Court after *Crandall* interpreting the Constitution, including the Fourteenth Amendment, consistent with Taney Court precedent protecting local development policies. In *The Slaughter-House Cases*,[63] a five-Justice majority refused to apply the various clauses of the Fourteenth Amendment to strike down a Louisiana statute vesting a monopoly in one butcher's establishment in the city of New Orleans. Relying on *Miln* and dicta in *Gibbons*, Justice Miller's opinion for the Court held that health and inspection laws were classic applications of state police powers that were not altered by the Reconstruction amendments. Instead, those amendments were limited to the narrow redistributive goal of integrating African Americans into national and state citizenship—a goal hardly implicated by state regulation of slaughter houses. Chief Justice Salmon Chase and Associate Justices Stephen Field, Noah Swayne, and Joseph Bradley (all but Bradley were Lincoln nominees) dissented, arguing that economic rights to free trade and to contract were protected against state infringement by the Fourteenth Amendment's Privileges and Immunities Clause. The Court's internal divisions are consistent with our model, for *The Slaughter-House Cases* were hard in the same way that *Strauder* was (a redistributive policy but with few external effects, hence the lower righthand quadrant of our state regulation table). That the Court invalidated the law in *Strauder* and upheld it in *The Slaughter-House Cases* owes to the different political reactions of the Justices. More generally, this clash between a "liberal free labor" ideology held by many of the former abolitionists, and the more traditional "states' rights republican views" recurred through the post-Reconstruction Court, with the latter views prevailing during the Chase (1864-73) and Waite (1874-88) Courts.[64]

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62. 100 U.S. 303 (1880).

63. 83 U.S. 36 (1873).

64. The quoted phraseology is taken from Rogers M. Smith, *"One United People": Second-Class Female Citizenship and the American Quest for Community*, 1 Yale J. L. & Human. 229, 260 (1989).

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Even on issues of race, the consensus that had marked the Reconstruction Court dissolved over time, especially after the "compromise" of 1877, which allowed Republican Rutherford Hayes to become President after the contested election of 1876 in return for the end of Reconstruction in the South. The coalition that had enacted the Reconstruction Amendments and civil rights laws in 1866, 1871, and 1875 collapsed. Its collapse was immediately echoed by the Court.[65] Justice Bradley's opinion in *The Civil Rights Cases*[66] struck down the Civil Rights Act of 1875 on the ground that its prohibition of private discrimination in public accommodations was beyond the authority of the federal government. The opinion reasoned that the federal government could only regulate "state action," and not private action, under its authority to enforce the Fourteenth Amendment. As Justice Harlan pointed out in his lone dissent, this was a distinct retreat from the ideology that inspired the Reconstruction Amendments. *The Civil Rights Cases* reflected the Court's disinclination to create a national forum for further redistribution of political power to African Americans in the South, as well as the Court's concern that the statute regulated allocative matters (public accommodations) traditionally left to the states. In such circumstances, the Court would be expected to invalidate the statute under our national regulation model.

Our model is strikingly illustrated by the Chase Court's most celebrated volte-face: *The Legal Tender Cases*. In the first case, decided in 1870,[67] the Court by a four (holdover Democrats plus Chase, who had been a Democrat) to three (Lincoln Republicans) vote invalidated the Legal Tender Act of 1862, which made paper money legal tender to pay preexisting debts. Since the Contracts Clause was by its terms inapplicable to federal legislation, Chief Justice Chase lamely struck down the statute as contrary to the "spirit of the Constitution" and the Due Process Clause.[68] Evaluating a federal redistribution statute with which a (narrow) majority of Justices was

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For leading cases where the states' rights view prevailed, see *Loan Ass'n v. Topeka*, 87 U.S. 655 (1874) (Miller, J.); *Minor v. Happersett*, 88 U.S. 162 (1874) (holding Fourteenth Amendment does not ensure women the right to vote); *Bradwell v. State*, 83 U.S. 130 (1872) (opinion of the Court by Miller, J., with concurring opinion by Bradley, J.) (holding that women do not have a right to practice law under the Fourteenth Amendment).

65. See *United States v. Cruikshank*, 92 U.S. 542 (1875) (limiting the application of the Civil Rights Act of 1870 to state action).

66. 109 U.S. 3 (1883). See also *United States v. Harris*, 106 U.S. 629 (1882) (invalidating the anti-lynching provisions of the Civil Rights Act of 1871, because not aimed at state action).

67. *Hepburn v. Griswold* ("The First Legal Tender Case"), 75 U.S. 603 (1869).

68. Id. at 614, 622-24, 626.

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politically suspicious, *The First Legal Tender Case* fits our model as an uncertain decision—and one vulnerable to overruling, as the Court did in 1871 when two new Republican votes on the Court produced the opposite result by a five (Republicans) to four (Democrats plus Chase) vote.[69]

D. The Lochner *Court, 1895-1937*

The next major political realignment, in our view, was one in which the Court led the way, and not one in which a realigning election yielded shifts in the Court. The "free labor" views of the former abolitionists became the rallying ideology for a generation of state and federal judges who were shocked by the increasing social polarization of the post-Civil War industrializing America, a polarization reflected in acrimonious labor strikes and boycotts, state laws imposing myriad employment restrictions on small businesses, and a wave of mergers and trusts that directly threatened their Arcadian vision of America as a land of striving individuals and small businesses.[70] The Supreme Court was remade by the state-court judges appointed by Presidents Cleveland (1885-89, 1893-97) and Benjamin Harrison (1889-93).[71]

On federalism issues, these judges in 1895 and 1896 staked out an ambitious agenda that had the following three features: First, the federal government should enjoy virtually plenary power to regulate interstate railway transportation, an arena of economic development that required nationwide rather than state-by-state regulation.[72]

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69. *Legal Tender Cases*, (*Knox v. Lee, Parker v. Davis*), 79 U.S. 457 (1871). Newly appointed Justices Strong and Bradley voted to overrule *Hepburn*.

70. See generally Sidney Fine, *Laissez Faire and the General Welfare State* (U. of Michigan, 1956); Arnold Paul, *Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887-1895* (Cornell U., 1960); Benjamin Twiss, *Lawyers and the Constitution: How Laissez Faire Came to the Supreme Court* (Princeton U., 1942).

71. The appointments were Chief Justice Melville Fuller (1888-1910) and Associate Justices Lucius Lamar (1888-93), David Brewer (1889-1910), Henry Brown (1890-1906), George Shiras (1892-1903), Howell Jackson (1893-95), Edward White (1894-1921), and Rufus Peckham (1895-1909).

On the Fuller Court, see generally Owen M. Fiss, *Troubled Beginnings of the Modern State, 1888-1910* (Macmillan, 1993) (vol. 8 of the Holmes Devise History); William F. Duker, *Mr. Justice Rufus W. Peckham and the Case of* Ex Parte Young: Lochner*izing* Munn v. Illinois, 1980 B.Y.U. L. Rev. 539; Alan Westin, *The Supreme Court, the Populist Movement and the Campaign of 1896*, 15 J. Pol. 3 (1953).

72. See *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897) (applying Sherman Act against railroad cartel).

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The most notable case was *In re Debs*,[73] where a unanimous Court held that the Commerce Clause vested the President and the judiciary with authority to quash the 1894 Pullman Strike, in order to ensure the continuing flow of interstate commerce. *Debs* was a very easy case, because it involved the exercise of national redistributive and developmental authority by the same political coalition that had appointed most of the Court (automatic validity in the lower lefthand quadrant of the national regulation table). The existence of federal regulatory power did not preclude state regulation in some circumstances, and the Court explicitly held that Congress could sanction state regulation of interstate commerce.[74]

Second, the Court continued to insist that the federal government had no authority to invade the states' autonomy[75] or their local developmental prerogatives, even under the "pretext" of their established constitutional powers. A divided Court in *United States v. E.C. Knight Co.*[76] held that the Sherman Act could not be applied to manufacturing as opposed to transportation enterprises, and in *Plessy v. Ferguson*[77] signaled that the federal government could not interfere with Southern "Jim Crow" (apartheid) laws enacted after Reconstruction. *Knight*, in particular, was a hard case: The Sherman Act was adopted by the same political coalition that produced most of the Justices, but the application of the statute to manufacturing raised the possibility that national legislation was invading state allocative responsibilities. Hence the case fell into the upper lefthand quadrant of the national regulation table, an unstable position from which the Court subsequently retreated.

Third, and most important from the Court's perspective, neither the state nor federal governments had the authority to engage in "naked" economic redistribution from the "haves" to the "have nots." This was the premise under which the Court reviewed rate determinations by state regulatory bodies[78] and, in cases like *Lochner*, struck down state laws depriving people of their "liberty of contract."[79] It

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73. 158 U.S. 564 (1895) (Brewer, J.).

74. *In re Rahrer*, 140 U.S. 545 (1891).

75. See *Hans v. Louisiana*, 134 U.S. 1 (1890) (granting expansive interpretation of Eleventh Amendment to prevent lawsuits against states).

76. 156 U.S. 1 (1895).

77. 163 U.S. 537 (1896).

78. *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362, 399 (1894). See *Ames v. Union Pac. Ry. Co.*, 64 F. 165, 170 (C.C.D. Neb. 1894) (Brewer, J., sitting on circuit duty) (invalidating state law prescribing local freight rates on railroads).

79. See *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), and later *Lochner v. New York*, 198 U.S. 45 (1905).

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was also the underlying premise of *The Income Tax Case*,[80] which struck down the federal income tax as a direct tax in violation of Article I's requirement that such taxes be apportioned among the states. *The Income Tax Case* was an unusually hard national power case under our model: It involved a redistributive statute of the sort that the Chase Court had upheld,[81] and it was enacted as part of the economic program of President Grover Cleveland, who had appointed three of the sitting Justices, including Chief Justice Fuller, who wrote the opinion for the Court. On the other hand, the income tax was precisely the sort of "radically" redistributive legislation that archconservative Justices Stephen Field and David Brewer deplored, and the Cleveland Administration's Attorney General Richard Olney presented only a half-hearted defense of the statute. The case could have gone either way, in our view, and in fact did go every which way: The initial vote was a four-to-four deadlock; on rehearing, the nonvoting ninth Justice voted to sustain the tax, meaning that one of the Justices originally voting to sustain changed his mind.[82]

These aggressive moves by the federal judiciary were a major campaign issue in the presidential election of 1896, in which the Democratic Party renounced the stand-pat policies of its sitting President (Cleveland) and vigorously attacked *Debs*, *E.C. Knight*, and *The Income Tax Case* in its platform and on the campaign trail. That the Democrats lost the election, and elected only one President (Wilson) between 1896 and 1928, represented a realignment in American politics around the position staked out by the Court in 1895-96. For once in American history, the election returns followed, rather than preceded, the Court's actions. The Fuller Court's liberty of contract agenda had a profound effect on American federalism. The most important inroad on state power was the Court's decision in *Ex parte Young*,[83] in which the Court held that the Eleventh Amendment, which bars lawsuits directly against the states in federal courts, did

80. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 599 (1895) (Field, J., concurring); David Brewer, *The Income Tax Cases and Some Comments Thereon* (address June 8, 1898) (Brewer Papers, Yale U., Doc. 3-142).

81. See *Veazie Bank v. Fenno*, 75 U.S. 533 (1869) (upholding federal income tax adopted during Civil War).

82. Democrat Justice Howell Jackson (appointed by Republican President Harrison, however) did not participate in the first round of voting, because of ill health. He did participate in the second round and voted for the tax—yet the Court still split five-to-four against the tax. This meant that one of the original supporters of the tax changed his vote. We go with the conventional wisdom that it was the muddy-headed Republican Justice George Shiras, perhaps browbeaten into submission by Justices Field and Brewer.

83. 209 U.S. 123 (1908).

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not bar a lawsuit to enjoin a state official from enforcing confiscatory (and presumably other unconstitutional) state policies. The Court repeatedly upheld applications of the Interstate Commerce Act to intrastate commerce,[84] and applied the Sherman Act to interstate labor boycotts in *Loewe v. Lawlor*.[85] These were easy cases (redistributive or national development policies reflecting political preferences similar to the Court's), in contrast to *Young*, which was hard because it imposed substantial burdens on the states' ability to carry out their traditional police powers, as Justice Harlan argued in another of his solo dissents.

On other federalism issues, the Court fragmented badly over time, because of disagreements within the freedom of contract coalition over the authority of government (state or federal) to engage in specific redistributive policies. The leading state case was *Lochner v. New York*,[86] in which a five-to-four Fuller Court majority struck down a state law fixing maximum hours that bakers could work. The main Commerce Clause decision, *The Lottery Case*,[87] was decided two years before. A different five-Justice majority upheld an 1895 federal statute prohibiting the sending of lottery tickets through the mails or interstate. Four Justices (three of whom were part of the *Lochner* majority) dissented, on the ground that the ostensible regulation of "commerce" was merely a pretext for substantive regulation of morals that was left to the states. The Court followed *The Lottery Case* in upholding federal regulation of bad food, sex, and booze,[88] but sometimes declined to follow that precedent when the federal regulation trenched upon liberty of contract concerns. Thus, the Court in *Adair v. United States*[89] overturned the federal law prohibiting "yellow dog" railway contracts (i.e., prohibiting workers from joining unions), in part because the law was not within Congress' Commerce Clause

84. See *Houston, E. & W. Texas Ry. Co. v. United States (The Shreveport Rate Case)*, 234 U.S. 342 (1914) (holding that the ICC could prohibit railroads from charging discriminatory intrastate rates, because of effect on interstate commerce); *Southern RR. Co. v. United States*, 222 U.S. 20 (1911) (upholding regulation of defective railroad couplers, even intrastate).

85. 208 U.S. 274 (1908) (drawing from *Debs* the precept that the Sherman Act applied to labor unions).

86. 198 U.S. 45 (1905).

87. *Champion v. Ames*, 188 U.S. 321 (1903).

88. See *Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U.S. 311 (1917) (holding that Congress can regulate interstate transport of liquor); *Caminetti v. United States*, 242 U.S. 470 (1917) (reading interstate transportation of women for "immoral purposes" to include extramarital sex); *Hoke and Economides v. United States*, 227 U.S. 308 (1913) (regarding prostitution); *Hipolite Egg Co. v. United States*, 220 U.S. 45 (1911) (regarding impure food and drugs).

89. 208 U.S. 161 (1908).

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power, though Justice Harlan's opinion for the Court started with the proposition that such laws violated the liberty of contract precepts of *Lochner*.[90] A five-Justice majority in *Hammer v. Dagenhart*[91] invalidated the federal child labor law. The Court labored to distinguish *The Lottery Case* and precedents following it. All of these were ambiguous cases, *The Lottery Case* because the federal statute regulated a traditional state function (morals), and *Adair* and *Hammer* because they were redistribution and development policy cases. Yet the first case upheld the federal lottery law because it was consistent with the Court's puritan ideology, and the latter two cases struck down federal labor regulations in tension with the Court's liberty of contract politics.

The coalition that reigned during the Fuller Court (1888-1910) ran out of gas during the White Court (1910-21), but ruled again after the election of Warren Harding as President in 1920. Because of conservative appointments during the Era of Normalcy, the Taft (1921-30) and early Hughes (1930-41) Courts witnessed a resurgence in the liberty of contract ideology.[92] The Normalcy Court was suspicious of both state and federal regulatory legislation. The modern dormant Commerce Clause jurisprudence began to take form in this period. In *Pennsylvania v. West Virginia*,[93] the Court invalidated a West Virginia statute requiring in-state gas pipelines to meet local gas needs before exporting West Virginia gas to out-of-staters. This is an ambiguous case under our model, because the state policy was generally allocative or developmental but had significant external effects, placing it in the upper righthand quadrant of our state regulation table (no clear prediction).

The Normalcy Court is not best known for its dormant Commerce Clause decisions, however, but instead for a series of fiercely contested decisions striking down New Deal statutes as be-

90. Id. at 172-73, 179-80. See also *Coppage v. Kansas*, 236 U.S. 1, 17-18 (1915) (striking down 6-3 the state prohibition of yellow dog contracts as a naked redistribution of power to unions).

91. 247 U.S. 251 (1918).

92. A voting block, the Four Horsemen of the Apocalypse, ensured liberty of contract pressure in every case. Two of the Horsemen, Willis VanDevanter (1910-37) and James MacReynolds (1914-41), were appointed before the Era of Normalcy. The other two Horsemen, George Sutherland (1922-38) and Pierce Butler (1922-39), were appointed through the connivance of Taft in the 1920s.

On the Taft Court, see generally Alpheus Mason, *William Howard Taft: Chief Justice* (Simon & Schuster, 1964); Rebert M. Cover, *Taft Court (1921-1930)*, in Levy, et al., eds., 4 *Encyclopedia of the American Constitution* 1849 (cited in note 26).

93. 262 U.S. 553 (1923).

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yond Congress' Commerce Clause powers.[94] Perhaps the most significant case was *Carter v. Carter Coal Co.*,[95] in which a divided (six-to-three) Court invalidated the Bituminous Coal Conservation Act's regulation of maximum hours and minimum wages in coal mines. *Carter* is a hard case under our model, because it involves a developmental or redistributive statute reflecting different political values from those held by the liberty-of-contract Court, hence placing it in the lower righthand quadrant of our national regulation table. This and other New Deal statutes were struck down by the "old" Normalcy Court, but, consistent with our model, other New Deal statutes in the lower righthand quadrant were upheld.[96]

E. The New Deal Court, 1937-86

The liberty of contract philosophy of the *Lochner* era was repudiated at the polls in 1932 and 1936, when Franklin Roosevelt and the Democratic Party won sweeping victories. Roosevelt's New Deal ran into trouble with the old Court, as recounted above, and that triggered the crisis of 1937, in which Roosevelt's proposal to expand the Court's membership triggered a firestorm of protest but coincided with the Court's own overtures to the New Deal's regulatory measures.[97] In *NLRB v. Jones & Laughlin Steel Corp.*,[98] a five-to-four majority of the Court upheld the National Labor Relations Act's regulation of unfair labor practices. Contrary to *Dagenhart* and other precedents, Chief Justice Charles Evans Hughes' opinion for the Court upheld substantive labor regulation on the ground that it "affected" commerce. Like *Carter*, *Jones & Laughlin* is a hard case under our typology, falling in the lower righthand quadrant of the national regulation table. It is hard to tell exactly what distinguishes

94. See *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (invalidating Bituminous Coal Conservation Act by a vote of 6-3); *United States v. Butler*, 297 U.S. 1 (1936) (invalidating the Agricultural Adjustment Act); *Railroad Retirement Bd. v. Alton R.R. Co.*, 295 U.S. 330 (1935) (invalidating the Railroad Retirement Act by a 5-4 decision). See also *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (invalidating the National Industrial Recovery Act, with some fragmentation as to rationale, by a unanimous vote).

95. 298 U.S. 238.

96. See *Norman v. Baltimore & Ohio R.R. Co.*, 294 U.S. 240 (1935) (upholding joint resolution declaring "gold clauses" in private contracts to be "against public policy"); *Perry v. United States*, 294 U.S. 330 (1935) (holding, by a divided Court, that United States could void public obligations to redeem in gold).

97. See generally James MacGregor Burns, *Roosevelt: The Lion and the Fox* ch. 15 (Harcourt, 1956); William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing Plan,"* 1966 Sup. Ct. Rev. 347.

98. 301 U.S. 1 (1937).

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Carter (statute invalid) from *Jones & Laughlin* (statute upheld), beyond the increasing pressure on the Court to bend to the New Deal. Although doctrinal stories can be concocted to reconcile the various cases, our model lends support to theories positing that the Court's "switch in time" was politically rather than doctrinally motivated.[99]

The Court's switch in time averted a constitutional showdown between the Court and the political system, and between 1937 and 1943 Roosevelt remade the Court with nine nominees.[100] The immediate agenda of the New Deal Court was to interpret the Commerce Clause broadly enough to embrace regulatory legislation with incidental (but demonstrable) effects on interstate commerce, and with this the coalition consolidated the new Commerce Clause jurisprudence with unanimous majorities by 1942.[101] In *United States v. Darby*,[102] for example, the Court overruled *Hammer* and *Carter* and upheld the Fair Labor Standards Act regulation of hours, wages, and other conditions of employment. *Darby* is an easy case under our model, because the federal development and redistribution statute reflected New Deal political values with which the New Deal Court was completely comfortable. *Darby* falls within the lower lefthand quadrant of our national regulation table, where statutes are always upheld.

The larger agenda of the New Deal Court was to rethink federalist premises in light of the emerging regulatory state. The Court's rethinking is consistent with our theory of federalism. On the one hand, the Court reaffirmed the authority of the states to engage in efficient allocation and development policies without federal interference. In *Erie Railroad Co. v. Tompkins*,[103] for example, the Court overruled *Swift v. Tyson* to require federal courts in diversity jurisdiction cases to apply state law rather than federal common law. Justice Louis Brandeis' justification for the overruling rested mainly on constitutional federalism, suggesting that neither Congress nor the

99. This is the majority view, recently challenged in Barry Cushman, *Rethinking the New Deal Court*, 80 Va. L. Rev. 201 (1994), and also recently given a fascinating new historical spin in Michael Ariens, *A Thrice-Told Tale, or Felix the Cat*, 107 Harv. L. Rev. 620 (1994).

100. Roosevelt elevated Justice Harlan Stone to Chief Justice (1941-46) and appointed as Associate Justices Hugo Black (1937-71), Stanley Reed (1938-57), Felix Frankfurter (1939-62), William Douglas (1939-75), Frank Murphy (1940-49), James Byrnes (1941-42), Robert Jackson (1941-54), and Wiley Rutledge (1943-49).

101. See *Wickard v. Filburn*, 317 U.S. 111 (1942) and *United States v. Darby*, 312 U.S. 100 (1941) (two unanimous decisions that substantially expanded Congress' Commerce Clause powers).

102. 312 U.S. 100.

103. 304 U.S. 64.

Court had the authority to displace state law in such a global manner. Additionally, the New Deal Court developed rules of statutory interpretation to reconcile state allocation and development policies with new federal development and redistribution statutes. As the Court said in *Rice v. Santa Fe Elevator Co.*, courts must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[104] We would interpret this rule to mean that national laws will normally not trump state allocation and development policies unless the latter undermine needs for national uniformity, impose costs outside the state, or reflect the dysfunctions of the race to the bottom and other prisoner's dilemma games.

On the other hand, the New Deal Court vigorously developed our model's themes for the assertion of national regulation. The United States economy was a national one in ways it had not been before the *Lochner* era, characterized by industry-wide labor unions and manufacturing oligopolies, national stock and commodity exchanges, coast-to-coast markets even for perishable goods, and so forth.[105] The Depression had indicated the need for federal rather than just state-by-state regulation of these increasingly nationalized (and transnationalized) features of the economy. Starting with *Jones & Laughlin*, the new Court repeatedly sanctioned these national development policies, though carefully preserving state prerogatives to pursue local development objectives as well.

More important, this was a period of vigorous state regulation, and the Court was called upon to monitor externalities imposed by state regulation on the national market. The Court's dormant Commerce Clause jurisprudence received its mature development in this period. The New Deal Court sought to draw the fine line between primarily local legislation, and laws excessively burdening interstate commerce. Chief Justice Harlan Stone led the way in his opinion for the Court in *South Carolina State Highway Dep't v. Barnwell Brothers*,[106] which upheld South Carolina's law prohibiting trucks more than ninety inches wide or weighing more than 20,000 pounds. Stone characterized the law as a standard safety measure (allocation) having modest external effects; this had the effect of situating the

104. 331 U.S. 218, 230 (1947). For leading recent statements, see *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978).

105. See Gardiner Means, *The Structure of the American Economy* (Natural Resources Committee, 1939).

106. 303 U.S. 177 (1938).

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state statute in the lower lefthand quadrant of our state regulation table, where regulations are always upheld. But Stone anticipated features of our theory when he warned that "[s]tate regulations affecting interstate commerce, whose purpose or effect is to gain for those within the state an advantage at the expense of those without" might be unconstitutional.[107] "Underlying the stated rule has been the thought . . . that when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state."[108] Stone reached a different result seven years later, in *Southern Pacific Co. v. Arizona*,[109] which struck down a state prohibition of railroad trains of more than fourteen passenger or seventy freight cars. Although this too was a safety measure by the state (albeit one that struck the Court as minimal), Stone found that it imposed extraordinary externalities on the interstate transportation system—thereby securing for the Arizona law a spot in the upper lefthand quadrant of our state regulation table (result unclear). Consistent with that placement, the Court was divided in *Southern Pacific*.

Issues of redistribution inevitably found their way to national politics, and the New Deal Court upheld federal statutes redistributing wealth through a system of social security and welfare,[110] and social power through a string of civil rights laws.[111] The Civil Rights Act of 1964 was passed under Congress' Commerce Clause powers, and the Court unanimously applied it to situations having very little connection with interstate commerce in *Katzenbach v. McClung*,[112] the famous "Ollie's Barbecue" case. Because this was a redistributional statute whose political values reflected those held by the Warren Court, *McClung* was an easy case, falling under the lower lefthand quadrant of our national regulation table.

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107. Id. at 184 n.2.

108. Id. at 185 n.2.

109. 325 U.S. 761 (1945).

110. See *Helvering v. Davis*, 301 U.S. 619 (1937) and *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937) (upholding Social Security Act).

111. The (Second) New Deal and the Great Society were the occasions for major welfare legislation. Civil rights statutes were enacted in 1957, 1961, 1964, 1965, and 1968, with important amendments added in the 1970s and 1980s.

112. 379 U.S. 294 (1964). See also *Heart of Atlanta Hotel, Inc. v. United States*, 379 U.S. 241 (1964).

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The New Deal Court enjoyed a relatively long period of internal harmony on federalism issues, especially as they related to national market regulation and civil rights. That consensus dissolved over several issues prominent in the late 1960s and early 1970s. For example, the Court's consensus that the Commerce Clause justified the 1964 Civil Rights Act evanesced when the Court was faced with civil rights laws enacted under authority of the Reconstruction Amendments. A majority of the Court partially overruled *The Civil Rights Cases*' limitations on Congress' authority to implement the Reconstruction amendments, but dissenting opinions made powerful historical arguments.[113]

Also divisive within the Court was the dormant Commerce Clause issue, with some Justices strenuously objecting to the Court's open balancing of local and national interests to overturn state development policies. For example, in *Kassel v. Consolidated Freightways Corp.*,[114] a badly divided Court struck down Iowa's regulation of truck lengths. The key distinctions between *Kassel* and *Barnwell* were that in the former case the Court found very substantial externalities resulting from the state safety rule, externalities that state law ameliorated for in-state users, placing the Iowa law squarely in the upper (rather than lower) lefthand quadrant. Moreover, as two concurring Justices argued, there was some intimation that Iowa's truck-length policy was in some way redistributive (protecting Iowa truckers at the expense of out-of-staters), and not just a pure safety measure.[115] In other decisions as well, the Court has actively enforced our model's suggestion that state laws having significant external effects will either be struck down (if apparently redistributive) or subject to serious challenge (if serving only domestic policies).[116] This was the Court's approach in *Edgar v. MITE*

113. See *City of Rome v. United States*, 446 U.S. 156 (1980) (giving expansive interpretation of Fifteenth Amendment, with two Justices concurring in separate opinions and three Justices dissenting); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (giving expansive interpretation of Thirteenth Amendment, with two justices dissenting); *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (giving expansive interpretation of Fourteenth Amendment, over dissent of two Justices).

114. 450 U.S. 662 (1981).

115. Id. at 681-82 (Brennan, J., concurring in the judgment). This would tend to move *Kassel* into the upper righthand quadrant of our state regulation table, where legislation is always invalidated. Since the Court plurality did not accept this analysis, we shall not insist on this point, though.

116. See, for example, *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978) (invalidating trucking regulation because it imposed excessive costs on commerce); *Hunt v. Washington State Apple Comm'n*, 432 U.S. 333 (1977) (invalidating state rule requiring Washington apple growers to follow less stringent USDA labeling rules, so that Washington

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Corp.,[117] in which the Court struck down an Illinois statute regulating corporate take-overs. The statute was a classic allocational one, but with significant external effects because of the interstate nature of corporate take-overs—thereby putting the case in the upper righthand quadrant of our state regulation table. This suggests that *MITE* was a tough case, and indeed the Court splintered badly.[118]

Not all dormant Commerce Clause cases have been so difficult as *Kassel* and *MITE*. In *City of Philadelphia v. New Jersey*,[119] the Court invalidated a New Jersey law prohibiting the importation of waste material into the state. Though this was ostensibly an allocational safety and health measure, it was vulnerable because it imposed major externalities on neighboring states and cities (like Philadelphia). Indeed, there was some indication that the New Jersey law was a rank effort to redistribute benefits from these states to its own residents, raising many constitutional red flags, and moving the state law into the upper righthand quadrant of our state regulation table, where laws are always invalidated. In contrast to the controversial decisions in *Kassel* and *MITE*, the Court's decision in *City of Philadelphia* has been rejected only by Justice Rehnquist on the current Court.[120]

The hardest federalism issues raised by the modern regulatory state relate to the integrity of state government, and the legitimacy of national intrusions into core governmental functions. The Court's willingness to adjudicate unequal state representation issues was strenuously resisted by Justice Frankfurter's dissent in *Baker v.*

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apples would lose some of their competitive advantage for quality); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (invalidating law requiring cantaloupes sold in Arizona to be packed in Arizona crates). Of course, many state rules (in the lower quadrants) survive dormant Commerce Clause scrutiny. See, for example, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) (upholding local milk container rule that does not have substantial burden on interstate commerce).

117. 457 U.S. 624 (1982).

118. Three justices (White, Burger, Blackmun) considered the Illinois statute preempted by federal law; six justices (the above three, plus Powell, Stevens, O'Connor) considered the statute in violation of the dormant Commerce Clause; three justices (Brennan, Marshall, Rehnquist) considered the case moot.

119. 437 U.S. 617 (1978).

120. Id. at 629 (Rehnquist, J., dissenting). Rehnquist also dissented in later cases applying that precedent. See *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009, 2017 (1992) (Rehnquist, C.J., dissenting); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 112 S. Ct. 2019, 2028 (1992) (Rehnquist, C.J., dissenting).

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Carr,[121] for example. In the most befuddled case, the Court fractured badly in *Oregon v. Mitchell*,[122] which adjudicated 1970 amendments to the Voting Rights Act. The Court unanimously upheld the statute's suspension of literacy tests as a prerequisite to voting but split on the statute's lowering the miniumum voting age to eighteen in state and national elections. Justice Black concluded that this rule was constitutional for national elections, but not for state elections. Four Justices agreed with Black on the first point, and a different four Justices agreed with him on the second, making his single vote the judgment of the Court. We would treat *Mitchell* as a case falling in the upper lefthand quadrant of our national regulation table, making it a hard and unpredictable case, as the split within the Court confirmed.

The thorniest federalism issue of the period was the authority of Congress to impose regulatory obligations directly on the states. The early New Deal Court had established that state and federal governments could tax federal and state employees, respectively, so long as the burdens did not discriminate against such employees.[123] The New Deal regulatory measures, such as labor regulations, did not apply to state governments, and the early New Deal Court believed that the states themselves could not be directly taxed.[124] This consensus changed in response to new federal laws imposing direct regulations on the states; the Court's response was chaotic. In *Maryland v. Wirtz*,[125] a divided Court upheld amendments to the Fair Labor Standards Act which extended minimum wage and maximum hour rules to employees of states, their political subdivisions, and state enterprises. Eight years later, a five-to-four Court majority overruled *Wirtz* and held in *National League of Cities v. Usery*[126] that the federal government could not directly regulate or burden "integral government functions" of the states.[127] Nine years after that, a different five-to-four majority overruled *National League of Cities* in *Garcia v. San*

121. 369 U.S. 186 (1962) (holding state apportionment disputes to be "justiciable," with three Justices writing separate concurring opinions and Justices Frankfurter and Harlan dissenting).

122. 400 U.S. 112 (1970).

123. See *Graves v. O'Keefe*, 306 U.S. 466 (1939) (upholding state income tax on federal employees); *Helvering v. Gerhardt*, 304 U.S. 405 (1938) (upholding federal income tax on state employees).

124. See *New York v. United States*, 326 U.S. 572, 586 (1946) (Stone, C.J., concurring).

125. 392 U.S. 183 (1968).

126. 426 U.S. 833 (1976).

127. Id. at 851-52.

Antonio Metropolitan Transit Authority.[128] That the Court would fracture so badly in these cases is consistent with our model. Although wage and hour laws like the FLSA are developmental and redistributive (*Darby*), their application to the states themselves might implicate the states' ability to perform their basic police power (allocative) functions. In that event, the statute is within the upper lefthand quadrant of our national regulation table, which yields no certain prediction. The issue is genuinely hard, as illustrated by the Supreme Court's waffles.

F. The Reagan Court, 1986-?

We share the doubts of political scientists who are uncertain as to whether there has been a critical election since 1932. For our purposes, the most plausible candidate would be Reagan's election in 1980, which has certainly produced important effects on the Supreme Court and federalism, even if it may not have reformed the political landscape as profoundly as earlier electoral transformations. As the Burger Court's wild peregrinations from *National League of Cities* to *Garcia* suggest, there was no consensus even among the Nixon-appointed Justices about the hard federalism issues (Justice Blackmun didn't even enjoy a personal consensus during this period). There appears to be a new consensus on some federalism issues among the six Justices appointed during the Reagan-Bush administrations.[129]

The Reagan Court's consensus does not question the broad contours of the New Deal Court's federalism jurisprudence. Thus, the Reagan Court has not yet questioned the New Deal Court's broad reading of the Commerce Clause and in *South Dakota v. Dole*[130] interpreted the Spending Clause to allow the national government to do indirectly (by withholding money to states refusing to follow regulatory conditions) what it could not directly accomplish under its Commerce Clause powers. Nor does the Reagan Court question the

128. 469 U.S. 528 (1985). The key development was that Justice Blackmun (who concurred separately in *National League of Cities* and wrote the opinion for the Court in *Garcia*) changed his vote. See also *FERC v. Mississippi*, 456 U.S. 742 (1982) (upholding federal rules severely burdening states with 5-4 split Court).

129. Namely, Justice William Rehnquist as Chief Justice (1986), and Sandra Day O'Connor (1981), Antonin Scalia (1986), Anthony Kennedy (1988), David Souter (1990), and Clarence Thomas (1991). Justices Ruth Bader Ginsburg (1993) and Stephen Breyer (1994) have been appointed by Democrat President Clinton and may or may not share some of the federalism views of the Reagan-Bush appointees.

130. 483 U.S. 203 (1987).

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now traditional use of the dormant Commerce Clause to regulate cost-exporting state and local discriminations against interstate commerce.[131] On the other hand, the Court is much less likely to strike down state rules that are on their face not discriminatory but which have external effects. In *CTS Corp. v. Dynamics Corp.*,[132] for example, the Court upheld an Indiana take-over statute, politely distinguishing *MITE*. That both *CTS* and *MITE* reviewed allocative statutes having external effects (upper lefthand quadrant of the state regulation table) is consistent with our model, which suggests no clear prediction for these cases.

The most important move of the Reagan Court has been to protect the integrity of state governments against federal encroachment. Although the early Rehnquist Court upheld federal taxation of state bonds in *South Carolina v. Baker*,[133] later decisions have revealed a stronger constitutional approach. All six Reagan-Bush Justices joined Justice Sandra Day O'Connor's opinion for the Court in *New York v. United States*,[134] which invalidated that part of a 1985 federal statute requiring states to "take title" to radioactive wastes in their jurisdiction, and take responsibility for damages flowing from it, if they failed to provide for its disposal by 1996. Justice O'Connor objected to this requirement as "coercing" the states to be the instruments for the federal government's regulatory policy—incurring the costs without having any say in the policy itself. *New York* represents a more vigorous protection of state autonomy than *Garcia* and draws inspiration instead from O'Connor's opinion in *Gregory v. Ashcroft*,[135] which contains an elegy for the virtues of federalism. Rather tentatively, we would place *New York* in the upper lefthand quadrant of our national regulation table, where prediction is uncertain, because the Court's opinion exhibited a hostility to the statutory policy of "coercion."

Gregory reflects the Reagan Court's most original contribution to federalism. The case involved the applicability of the Age Discrimination in Employment Act of 1967 to prevent states from

131. See, for example, *Fort Gratiot Sanitary Landfill*, 112 S. Ct. 2019 (1992); *Chemical Waste Management*, 112 S. Ct. 2009.

132. 481 U.S. 69 (1987).

133. 485 U.S. 505 (1988). Justice Brennan's opinion for the Court relied on *Garcia*, which was disavowed by concurring Chief Justice Rehnquist and Justice Scalia. Justice O'Connor dissented. Newly appointed Justice Kennedy did not participate. Hence all four of the then-Reagan Justices refused te join Brennan's core analysis. Three of the five Justices who unreservedly joined the Brennan opinion have left the Court.

134. 112 S. Ct. 2408 (1992).

135. 501 U.S. 452.

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imposing mandatory retirement ages on their judges. Under traditional canons of statutory interpretation, the answer was probably, "no." But O'Connor's opinion, joined by all five of the (then) Reagan-Bush Justices and none of the previously appointed Justices, started with a different baseline: "[I]nasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be *absolutely certain* that Congress intended such an exercise."[136] Hence, O'Connor announced that the Court would require a manifestly clear statement by Congress before it would interpret a statute to apply to core state functions of governance. Her "super-strong clear statement rule" is similar to one the Court has crafted before it will find a congressional abrogation of the states' Eleventh Amendment immunity,[137] and just a bit stronger than the Court's presumptions against finding implied conditions on federal funding of state programs,[138] against application of federal criminal statutes to disrupt local political processes,[139] and against constructions of federal antitrust statutes to apply to local politics.[140]

The Reagan Justices are also poised to adjust federal regulatory power under both the Commerce Clause and the Reconstruction Amendments. In *Pennsylvania v. Union Gas Co.*,[141] a divided Court held that Congress has authority under the Commerce Clause to abrogate states' Eleventh Amendment immunity, so long as the abrogation is manifestly clear on the face of the statute. Significantly, all four of the Reagan Justices then on the Court dissented; three of the majority Justices have left the Court since 1989, casting some doubt on Congress' power in this area. A similarly divided Court (again, with all four Reagan Justices in dissent) upheld federal power to establish affirmative action requirements for broadcast licensing in *Metro Broadcasting, Inc. v. FCC*.[142] Again, with new Reagan Justices now on the Court, it is not clear what will become of expansive con-

136. Id. at 464 (emphasis added).

137. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239-40 (1985), followed in *Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775 (1991); *Hoffman v. Connecticut Dep't of Income Maintenance*, 492 U.S. 96, 101 (1989); *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989).

138. *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 22-26 (1981).

139. See *McNally v. United States*, 483 U.S. 350, 360 (1987); *McCormick v. United States*, 500 U.S. 257, 286 n.6 (1991).

140. *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 379 (1991). See also *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 333 (1991) (Scalia, J., dissenting) (arguing for broad construction of Sherman Act's interstate commerce requirement).

141. 491 U.S. 1, 14-15 (1989).

142. 497 U.S. 547, 600-01 (1990).

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gressional power to enforce the Reconstruction Amendments. A harbinger may be Justice O'Connor's opinion for the Court in *Shaw v. Reno*,[143] which held that race-based gerrymandering required by the Voting Rights Act of 1965, could nonetheless violate the Equal Protection Clause. Five of the six Reagan-Bush Justices joined her opinion.

III. REVISITING OUR MODEL OF FEDERALISM LIMITS ON NATIONAL AND STATE REGULATION

Reconsider our model of national regulation in light of the brief history presented above. We start by filling in our national regulation table with the actual results of our survey. Table Three reports those results.

The two predictions in our model held perfectly well: All the decisions in the upper righthand quadrant invalidated federal laws, and all in the lower lefthand quadrant upheld federal laws. Note the two instances in which the Court changed its mind, in one instance after one hundred years (*Swift* to *Erie*) and in the other after just one (*First Legal Tender Cases* to *Second*).

In cases of significant ideological divergence between the Court and the current Congress (the righthand quadrants), the Supreme Court has been reluctant to give expansive interpretations of congressional powers. We are both impressed and surprised by the cases arrayed in the righthand quadrants. We are impressed that not only do all the decisions in the upper righthand quadrant strike down federal intrusions, but that there are so few of them. We are surprised that almost all the cases in the lower righthand quadrant (where we made no predictions) invalidated national legislation. Comparing the righthand and lefthand sides of Table Three, we now hypothesize that the primary determinant of Supreme Court evaluation of congressional legislation is inspired by political values. On the other hand, in light of the pattern of some invalidations in the upper lefthand quadrant, our findings support the further hypothesis that the Court does, secondarily, enforce federalism values. In addition, we note that the pattern suggested by *Gregory* and *Rice* (federal statutes will be narrowly construed, to avoid interfering with the

143. 113 S. Ct. 2816, 2831 (1993).

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states' allocative responsibilities)[144] provides explicit and very important further protection for state interests against federal encorachment.

Table Three
A Classification of Commerce Clause Cases

	Court Ideology Near That of Enacting Congress	Court Ideology Different from Congress
High Burden on Core State Functions	*Swift* (invalid) *Knight* (invalid) *Ex Parte Young* (valid) *Lottery Cases* (valid) *Mitchell* (invalid) *NLC* (invalid) *Garcia* (valid) *S. Carolina* (valid) *S .Dakota* (valid) *Union Gas* (valid) *Gregory* (invalid)	*Erie* (invalid) *Civil Rights Cases* (invalid) *New York* (invalid)
Low Burden on Core State Functions	*Gibbons* (valid) *McCulloch* (valid) *Second Legal Tender Cases* (valid) *Debs* (valid) *Loewe* (valid) *Darby* (valid) *McClung* (valid)	*Dred Scott* (invalid) *First Legal Tender Cases* (invalid) *Income Tax Case* (invalid) *Adair* (invalid) *Hammer* (invalid) *Carter* (invalid) *Jones & Laughlin* (valid)

We now fill in the state regulation table with the results of our historical survey. Table Four reports those results.

144. For a more extensive analysis of the many canons of interpretation that protect federalism values, see generally William N. Eskridge, Jr. and Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand. L. Rev. 593 (1992).

Table Four
A Classification of Dormant Commerce Clause Cases

	Allocative or Dcvelopmental Policy	**Redistributive Policy**
Significant External Effects on Nonresidents	*Gibbons* (invalid) *Miln* (valid) *Pennsylvania* (invalid) *Southern Pacific* (invalid) *MITE* (invalid) *Kassel* (invalid) *CTS* (valid)	*Crandall* (invalid) *City of Philadelphia* (invalid)
Insignificant or Corrigible Exterual Effects on Nonresidents	*Black Bird* (valid) *Cooley* (valid) *Barnwell* (valid)	*Slaughter-House Cases* (valid) *Strauder* (invalid)

Again, the two predictions made in our model hold firmly: State redistributive policies with externalities (upper righthand quadrant) will always be struck down, while state allocative or distributional policies with few externalities (lower lefthand quadrant) will always be upheld.

We are most impressed with the upper quadrants, for they suggest that the key factor in the Court's evaluation of state policy under the dormant Commerce Clause is whether the policy imposes external effects on residents of other states who are not well-represented in the state political process. We emphasize here that what matters is the Court's perception of external effects: What distinguishes cases like *Miln*, *Barnwell* and *CTS* (valid) from *Southern Pacific*, *Kassel* and *MITE* (invalid) is that the factual record reviewed by the Court was replete with evidence of substantial external effects in the latter cases but not in the former. A case like *Cooley* might be decided differently today, because the city's requirement of local pilots might be shown to interfere with interstate shipping, just as the

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statutes in *Kassel* and *Southern Pacific* were shown to interfere with interstate trucking and rail transportation, respectively.

CONCLUSION: FEDERALISM AND THE COMMITMENT ISSUE

We have not offered a complete theory of federalism but have put forward a *structural* account of judicial enforcement of federalism norms. A complete theory would explain the actions of the legislature, the executive, and the states in explaining variation and stability in federal boundaries. Our theory is structural in that it says that courts have both principled and pragmatic reasons to defer to expansive congressional interpretations of its Commerce Clause authority, while policing rather more vigorously state actions that trespass on their neighbors or on constitutional values. This theory, while primarily descriptive rather than normative, owes much to constitutional conservatives such as Weschler, who emphasize the self-policing features of the U.S. Constitution. We do not point to these features to justify judicial restraint in the federalism area, but to provide part of an explanation for the pattern of judicial enforcement of federalism. We should also note that because it is a structural theory, our account is not tied to any particular constitutional clause. We might have chosen to focus on the Contract Clause, Section 5 of the Fourteenth Amendment, or the Due Process Clause, and developed a similar explanation. Indeed, we regard ourselves as committed to the truth of such detailed accounts.

This theory, to the extent that it is borne out in the United States and elsewhere, suggests that courts might be counted on to monitor or police violations of federal understandings quite unevenly. Specifically, national courts are unlikely to have either the desire (because judges believe that states are adequately represented in the Congress so that congressional actions take state interests into account, and because new appointments tend to align judicial and congressional policy preferences) or the opportunity (because of their political vulnerability to the more popular branches at the national level) to restrain sustained congressional assertions of authority over the states. If the Framers of new federalisms in other countries wish to assure the credibility of a federal agreement, therefore, they would be wise to design their constitutional structures to be self-enforcing as far as possible. Reliance on judicial oversight by politically subordi-

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nate judges to check determined efforts by the other branches of the national government to trample federalism norms seems naive.

The American experience suggests that the key to restraining the other branches is to design constitutional structures to make it difficult for them to agree among themselves. Require supermajorities, bicameral agreement, and presentment; stagger election times; restrain the development of coherent national parties; etc. These familiar techniques accomplish the twin purposes of making congressional assertions of authority relatively rare and simultaneously decreasing the vulnerability of the Court to the other branches. By making congressional restraint relatively likely, there is less need to rely on courts to restrain congressional action. Indeed, we think it is impossible to understand the "exceptionalism" of American history without remarking on the relative timidity of Congress with respect to federal institutions and practices.[145]

We suggest that constitutionally undermining the capacity of the other branches to reach agreement provides the Court the opportunity, on occasion, to oppose legislative majorities. And in fact, we have seen that occasionally the Court has read the Commerce Clause narrowly, most recently in the *New York* decision. Often judicial motivation for such action is ideological, as in *Hammer*, *Carter Coal*, and *Dred Scott*, but sometimes, as in *National League of Cities* and *Gregory*, more principled reasoning probably motivated the result. Whatever the motivation, these occasions are rare and transient at best, and are unsustainable against a unified Congress, as in *Ex Parte McCardle* or *West Coast Hotel*.

However, when it comes to policing abuses by subnational units, the federal courts might be counted on to do a more consistent job. Our evidence, even though unsystematic, suggests that the Court has been fairly consistent in restraining states from abusing the interests of nonresidents and, though the record here is not as clear, trespassing widely shared constitutional values. The key idea here, of course, is identifying what constitutes a widely shared constitutional value. Evidently, for most of our history, civil rights for women and minorities did not count, nor did the rights of slaves in the antebellum period, and neither does abortion currently. Without broad popular and legislative support for a particular constitutional value, the Court

145. Nowhere is this phenomenon better illustrated than in American social policy which, in contrast with Europoan welfare states, is extraordinarily fragmented. For a recent account see generally Theda Skocpol, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* (Harvard U., 1992).

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cannot be counted on to do a very good job in redeeming this kind of federal promise.

For federalism to be a credible and therefore an attractive political solution in pluralistic societies, political institutions must be so constructed so that nationalizing forces are politically rather than judicially restrained. It is too much to hope that courts can stand in the way of popular institutions bent on suborning subnational units. National courts are rather a better bet when it comes to policing the subunits themselves, even if these subunits are quite politically powerful. In such cases all of the subunits whose actions are not being challenged frequently share an interest in judicial action. We can see already in the brief history of the European Community quite assertive actions by the European Court of Justice in restraining member states from dumping costs on nonresidents. The political conditions for such court actions are structurally favorable (nonresidents of a given state are both numerous and respresented in those institutions in a position to control the ECJ), and so its occurrence is unsurprising.

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