

ARTICLE

STEADYING THE COURT'S “UNSTEADY PATH”: A THEORY OF JUDICIAL ENFORCEMENT OF FEDERALISM

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Like the Supreme Court's separation of powers jurisprudence, its federalism jurisprudence might, uncharitably, be described as “a mess.”¹ The Court's decisions setting forth jurisdictional limitations on national power have waffled famously. Taken as a whole, they flunk requirements of either good law or good policy: The decisions are inconsistent with constitutional text and with one another, and they lack a persuasive normative theory to justify the first inconsistency or to resolve the second. These difficulties are rehearsed in the six different opinions the Justices rendered in *United States v. Lopez*,² where a fractured Court invalidated a federal statute that made it a crime to possess a firearm in proximity to a school.

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Earlier versions of this Article were presented in workshops at the law schools of Stanford University and Washington University, and the last draft was presented at the conference organized by the California Institute of Technology and the University of Southern California Law Center. We appreciate comments from participants in those workshops. We received particularly detailed and usefully critical comments from William Cohen, Barbara Fried, Gerald Gunther (our gracious commentator and presenter at the Stanford workshop), Mark Kelman, Ron Levin, Bruce La Pierre, Margaret Radin, and Emerson Tiller (our gracious commentator at the CIT-USC conference). John Ferejohn, widely known as the “high priest of rational choice,” is the intellectual parent of our work, and to him we are grateful for both comments and inspiration.

1. Cf. Stephen Carter, *The Independent Counsel Mess*, 102 HARV. L. REV. 105 (1988).
2. 115 S. Ct. 1624 (1995).

The Court's decisions enforcing a "dormant" commerce clause against state regulations look worse on the law side (they do not even have a constitutional text with which they might be consistent) but better on the policy side (setting forth potentially attractive theories). The Court's vigorous enforcement of limits on state governments is in striking contrast to its virtual abandonment of limits on the national government. Part I of this Article explores these and other analytical problems with the Court's decisions under traditional rule of law criteria.³

Constitutional analysis is rarely exhausted by mechanical application of legal text and precedent. Hence, we are open to the possibility that at least some of the Court's decisions can be justified or reconciled by a political theory of federalism. This is an important endeavor, in part because federalism is so prominent in the Constitution, and prominent by design. Constitutional law must make some sense of federalism, an impulse reflected in each of the six *Lopez* opinions. Although there will inevitably be uncertainties of application in particular cases, rule of law values such as predictability and security are enhanced by a theory that makes federalism relatively intelligible or coherent.⁴ Not least importantly, federalism has substantial advantages for a polity, as we argue in Part II of this Article.

Justice O'Connor's important opinion in *Gregory v. Ashcroft*⁵ sets forth two theories of federalism and suggests the basis for a third. We elaborate upon this third path in Part II. Ours is a rational actor model along the lines developed by positive political theory ("PPT") and exploits the PPT assumption that institutional design and structure have profound effects on the way purposive, self-interested government institutions interact. Like Congress and the states, the Supreme Court is an institution whose pursuit of goals is influenced by the overall design of the political system. We have developed parts of the theory working with John Ferejohn on issues of comparative constitutional studies of former British Commonwealth countries (the United States, United Kingdom, and Canada).⁶

3. By "traditional rule of law criteria," we refer to the consistency of decisions with constitutional text, original intent of the Framers, and precedent (*stare decisis*).

4. See generally *The Rule of Law*, NOMOS XXXVI (Ian Shapiro ed., 1994) (papers exploring conditions necessary for the rule of law, and the value of the rule of law).

5. 501 U.S. 452 (1991).

6. See Jenna Bednar et al., *A Political Theory of Federalism* (1995) (unpublished draft, on file with authors) [hereinafter Bednar et al., *Political Theory*]; William N. Eskridge, Jr. & John Ferejohn, *The Elastic Commerce Clause*, 47 VAND. L. REV. 1355 (1994).

We start with the relatively uncontroversial propositions that the Constitution creates a federal polity with regulatory power divided between state and national governments, and that this federal arrangement has advantages for the country.⁷ The political science literature suggests, and the Framers believed, that such federal arrangements are fragile, for all the participants have incentives to cheat in their own self-interest but at the expense of the general good. Cheating by either the central government or by individual states not only undermines one or more values of federalism, but encourages a competition of cheating which threatens to undermine the Union itself.

The challenge of maintaining federal arrangements is what one of us has called the “federal problem” of commitment: All the participants must themselves be discouraged from cheating, and they must believe that other participants are discouraged from such conduct as well.⁸ We identify various kinds of cheating at both the national and state levels and explore the distinct risks posed by different modes of cheating. The Framers believed that each mode could be controlled through a combination of constitutional design and judicial enforcement, albeit a distinct mix of design and enforcement for each kind of cheating.

Part III of this Article applies our theory to understand as well as evaluate the Court’s federalism decisions described in Part I. There are several reasons why a positive political theory is the best way for understanding the Court’s federalism decisions. One is the inadequacy of competing theories. The other justifications for federalism discussed in *Gregory*, rooted in libertarian and republican values, are neither analytically robust nor coherently explanatory of the Court’s line of decisions. Our analysis provides a framework for reading the cases as a coherent whole. To the extent the Court is impelled in our system to rationalize its case law over time, the theory developed in this Article may be a useful vehicle. Moreover, our theory is one that would have been particularly congenial to the Framers, who not only established federalism as a central value in the Constitution but who shared the rational choice assumptions of PPT. To the extent that our

7. These propositions are somewhat disputed—and brilliantly so—in Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994).

8. Jenna Bednar, *The Federal Problem* (1995) (unpublished draft, on file with authors) [hereinafter *Bednar, Federal Problem*].

theory elaborates upon assumptions and choices made by the Framers, it provides a rationalization of the cases that should appeal to judges interested in the Framers' original expectations.

The rational choice approach explored in this Article also provides a normative foundation for evaluating the Court's federalism decisions. Our inclination is to deploy PPT as a means of figuring out how to read questionable decisions; others might press our perspective more aggressively. *Lopez*, for example, might be criticized as well as explained under our theory, and we find Justice Breyer's dissenting opinion hard to answer. Still, the main value of our approach is that it provides a relatively systematic normative context from which we should argue that *Lopez* ought not be read as a break with prior decisions and ought not be the occasion for an aggressive resurgence of Supreme Court monitoring of national jurisdictional limits. Instead, *Lopez* is most sensibly read as a constitutional "wake up call." The Court has reinserted itself as a monitor of congressional power, at least (and we think at most as well) to remind Congress that it operates within constitutional limits. This in our view is the "best" reading of the Court's decision, and one we urge the Court and lower courts to follow.

I. MYSTERIES OF THE COURT'S FEDERALISM DECISIONS

Few areas of constitutional law are more important than federalism, and few areas have seen more doctrinal churning. Consider some mysteries of the Court's constitutional federalism decisions over the last twenty years. The treatment that follows is not exhaustive, because it does not thoroughly analyze the Court's jurisprudence of habeas corpus, state tax burdens on interstate commerce, or intergovernmental interference. Those other decisions fit with our analysis generally, and we shall advert to them occasionally.

A. THE ELASTIC COMMERCE CLAUSE

American constitutional history is replete with the Supreme Court's efforts to enforce some kind of "principled" limitations on national power. The Framers expected Congress to be genuinely limited to and by the powers enumerated to it, especially those in Article I of the Constitution. For most of our history, Congress and the Court have been engaged in a *pas de deux* danced to the tune of the Commerce Clause in Article I, Section 8. Congress' authority to adopt

economic legislation has been largely defined by its ability to persuade the Court that its goal and effect were to "regulate Commerce . . . among the several states." The Court responded with a series of Commerce Clause "tests" that gradually expanded the ambit of congressional power, while sometimes invalidating specific regulations.⁹

The New Deal Court created by new appointments after 1937 articulated a much more elastic Commerce Clause. In *United States v. Darby*,¹⁰ for example, the Court upheld congressional regulation of local wages and hours on the ground that this was an "appropriate means" to the ultimate goal of regulating commerce. *Wickard v. Filburn*¹¹ held that Congress could reach local activities if they had an aggregate effect on commerce. The Warren Court extended the reasoning of these cases to sustain Congress' power to adopt the Civil Rights Act of 1964, based upon congressional findings that segregation ultimately affected commerce.¹² The Burger Court extended this chain-of-activities-until-interstate reasoning to sustain a law making localized loan-sharking a federal crime in *Perez v. United States*.¹³ The Court deferred to congressional findings that local loan-sharking contributed to nationally organized crime syndicates. Those syndicates interfered with interstate commerce. Hence, the loan-sharking law was an appropriate, even if attenuated, means for Congress to regulate commerce.

For sixty years (1936 to 1995), the Court deferred to Congress in every Commerce Clause case it decided. No statute was invalidated on the ground that Congress had exceeded its Commerce Clause authority. On the other hand, Commerce Clause norms did not go entirely unenforced. The Court interpreted statutes narrowly, to avoid unnecessary or un contemplated congressional intrusions into local matters traditionally left to state regulation. Even the New Deal Court started "with the assumption that the historic police powers of the States were not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress."¹⁴ Subsequent Courts have followed this rule of statutory interpretation to assure

9. For this doctrinal back-and-forth, see, for example, GERALD GUNTHER, CONSTITUTIONAL LAW 128-35, 151-56 (12th ed. 1991); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 186-93, 200-08 (2d ed. 1991).

10. 312 U.S. 100, 124 (1941).

11. 317 U.S. 111 (1942).

12. *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

13. 402 U.S. 146 (1971).

14. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

that Congress' freedom under the Commerce Clause does not needlessly close off state regulatory efforts, but the ambit of this rule is somewhat unclear.¹⁵

Sometimes the Court effectively rewrote congressional enactments to conform to Commerce Clause limitations. In *United States v. Bass*, the Court imposed an interstate commerce requirement on a federal firearms law. The law made it a crime when a convicted felon "receives, possesses, or transports in commerce or affecting commerce [a] firearm."¹⁶ In a case involving possession of a firearm, the Court held that the statute required the government to prove that the "possession" occurred "in commerce or affecting commerce."¹⁷ A dissenting opinion objected that the statute was clear and was constitutional under *Perez*, but the majority thought the statute susceptible to its creative reading and reserved judgment on the constitutional issue.

In *Lopez*, Chief Justice Rehnquist's opinion for a divided Court broke the federal government's six-decade winning streak in Commerce Clause cases. The Chief Justice's opinion did not clearly explain how the Court's invalidation of a law prohibiting possession of firearms near schools was consistent with prior cases, but it floated plenty of suggestions. First, the opinion suggested that criminal law is an area of primary state responsibility.¹⁸ This suggestion was at some odds with *Perez*, which the Chief Justice circumscribed by an ambitious reading of *Bass*. Moreover, the opinion seemed concerned that Congress did not make specific factual findings as to the link between school firearm possession and interstate commerce,¹⁹ although prior cases had not required such findings and Congress in other statutes has lavishly made them.²⁰ Finally, Chief Justice Rehnquist worried that accepting the government's justifications in this case would leave the federal-state boundary completely unmonitored by the Court.²¹

15. See the debate in *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), among Justice Stevens, writing for a four-Justice plurality; and Justice Blackmun, writing for three concurring Justices; and Justice Scalia, dissenting with Justice Thomas.

16. 404 U.S. 336, 337 (1971).

17. *Id.* at 347. Cf. *Scarborough v. United States*, 431 U.S. 563 (1977) (holding that *Bass* can be satisfied by proof that the firearm had at some time been in interstate commerce).

18. *United States v. Lopez*, 115 S. Ct. 1624, 1630-31 & n.3 (1995).

19. *Id.* at 1631-32.

20. See *id.* at 1659-62, 1665-71 (Breyer, J., dissenting).

21. *Id.* at 1632-33 (opinion of the Court).

As Justice Breyer forcefully argued in dissent, *Lopez* is in some tension with the Court's post-New Deal Commerce Clause jurisprudence. Justice Breyer would read the decision narrowly, as would Justices Kennedy and O'Connor, who joined in a cautious concurring opinion.²² In contrast, Justice Thomas' separate concurring opinion maintained that the post-1937 cases have taken the Commerce Clause far afield from the Framers' original vision, and that the Court must abandon the "wrong turn" it took during the New Deal.²³ Justice Souter responded that the New Deal was the right turn and that the old Commerce Clause cases were justifiably interred with their wicked twin, *Lochner v. New York*.²⁴ *Lopez* was treated as a significant constitutional moment by the Clinton administration, academics, and gun-control advocates, but it is not clear how broadly the Relinquist Court will apply the new precedent.

B. THE TRUISTIC TENTH AND EASY-TO-ABROGATE ELEVENTH AMENDMENTS

Rather than giving bite to the limits instinct in a regime of enumerated powers, the Burger Court sought to constrain national authority through an odd reliance on the nonconstraining Tenth Amendment. Providing that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people,"²⁵ the Tenth Amendment seems little (if anything) more than a truism. Nonetheless, the Burger Court in *National League of Cities v. Usery*²⁶ held that Congress could not constitutionally extend the minimum wage and maximum hour regulations of the Fair Labor Standards Act ("FLSA") to protect state employees such as police officers and firefighters. Even though Congress clearly can regulate wages and hours of similarly situated private employers under the Commerce Clause,²⁷ the Court held that the Tenth Amendment creates an additional layer of protection for regulation of the "States *qua* States."²⁸

22. *Id.* at 1634-42 (Kennedy, J., concurring).

23. *Id.* at 1650-51 (Thomas, J., concurring).

24. *Id.* at 1652-54 (Souter, J., dissenting).

25. U.S. CONST. amend. X.

26. 426 U.S. 833 (1976) (overruling *Maryland v. Wirtz*, 392 U.S. 183 (1968)).

27. This is the holding of *Darby v. United States*, 312 U.S. 100 (1941), which is also the decision where the Supreme Court dismissed the Tenth Amendment as a "truism." *Id.* at 124.

28. *National League of Cities*, 426 U.S. at 845, 847.

Justice Rehnquist's opinion for the Court reasoned that the Tenth Amendment "expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system."²⁹ That the Tenth Amendment "expressly declares" no such thing is the beginning of the doctrinal problems with *National League of Cities*. Nor did Justice Rehnquist's opinion articulate an attractive theory of federalism that would support his ambitious reading of the truistic Tenth Amendment. Portions of his opinion seem to value state autonomy for its own sake, while other portions echo the two-spheres features of the nineteenth century dual federalism cases.³⁰ Neither line of analysis explains why a layer-cake system of autonomous national and state sovereigns is a desirable system. Both lines of analysis seem at odds with the Court's decision in *Fitzpatrick v. Bitzer*,³¹ which held that Congress has plenary power under the Fourteenth Amendment to abrogate state Eleventh Amendment immunity from federal court lawsuits.

The rule announced in *National League of Cities* was that the federal government cannot "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions" or otherwise undermine the states' "separate and independent existence."³² Because this rule was not well grounded in either a constitutional text or a normative theory, it proved hard and ultimately futile to apply.³³ Its most dramatic nonapplication was in *FERC v. Mississippi*,³⁴ where the Court upheld against Tenth Amendment attack a congressional enactment that required state utility commissions to consider a specified list of approaches to rate structures and to consider adoption of specified rules, after federally mandated

29. *Id.* at 843 (quoting *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975)); see *New York v. United States*, 326 U.S. 572 (1946).

30. The dual federalism cases rested upon the premise that state and federal authority were mutually exclusive. Such a premise became rapidly untenable over the course of the nineteenth century, as practical necessity impelled concurrent (overlapping) federal and state regulation of a range of commercial matters. Other countries that have flirted with notions of mutually exclusive state and federal authority have witnessed similar practical difficulties. See KATHERINE E. SWINTON, *THE SUPREME COURT AND CANADIAN FEDERALISM: THE LASKIN-DICKSON YEARS* (1990).

31. 427 U.S. 445 (1976).

32. *National League of Cities*, 426 U.S. at 851-52.

33. The Court upheld challenged federal regulations in *EEOC v. Wyoming*, 460 U.S. 226 (1983); *United Transp. Union v. Long Island R.R.*, 455 U.S. 678 (1982); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981).

34. 456 U.S. 742 (1982).

public hearings were conducted and statements of reasons were issued. This congressional directive strikes us as a more significant intrusion on state "autonomy" than *National League of Cities*' FLSA rules had been. Justice O'Connor's dissenting opinion argued that the statute was an affront to the "cooperative federalism" instantiated in the Constitution.³⁵

After a decade of experience with *National League of Cities*, the Court overruled it in *Garcia v. San Antonio Metropolitan Transit Authority*.³⁶ The issue was whether the FLSA could constitutionally be applied to municipal public transit workers. The Court's internal discussions reveal how confused the Justices found this line of cases.³⁷ Some Justices thought the application unconstitutional because "transit systems are essentially local . . . like water" (Chief Justice Burger's statement, according to Justice Brennan's notes), while other Justices thought the application constitutional because state and local governments had not historically performed mass transit functions. The Court was clearly of two minds about the case—and so was one of the Justices! Justice Blackmun announced at conference that a "good opinion can be written either way" but that the application was "local" and therefore not subject to regulation by Congress. Justice Blackmun was assigned to write the opinion voiding the application, but the opinion he later circulated held that the regulation was constitutional. Justice Blackmun's cover memorandum stated that this area was one of "widespread confusion" that could only be settled by a bold rethinking.

Justice Blackmun's ultimate opinion for the Court in *Garcia* was a bold but less than successful rethinking. The opinion first, and most persuasively, argued that the inquiry as to whether the federal statute trenches on "'traditional governmental functions'" had been shown practically "unworkable."³⁸ Because the test had neither a referent in the Constitution nor a clearly articulated theoretical foundation, this is unsurprising. The opinion then maintained that other possible approaches would be no better, a more problematic assertion.³⁹ The

35. *Id.* at 783-88 (O'Connor, J., concurring in the judgment in part and dissenting in part).

36. 469 U.S. 528 (1985).

37. The analysis that follows draws from Mark V. Tushnet, *Why the Supreme Court Overruled National League of Cities*, 47 *VAND. L. REV.* 1623 (1994), which in turn is based upon the Court's internal memoranda found in Justice Brennan's papers on deposit at the Library of Congress.

38. *Garcia*, 469 U.S. at 537-43.

39. *Id.* at 543-47.

punch line, and apparent holding, of the opinion was that efforts to craft judicially enforceable limitations on Congress' authority were inconsistent with the constitutional design. "Apart from the limitation on federal authority inherent in the delegated nature of Congress' Article I powers, the principal means chosen by the framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself"—specifically, state "control of electoral qualifications" for House members, their "role in presidential elections," and their "equal representation" in the Senate and (before the Seventeenth Amendment) the selection of senators by state legislatures.⁴⁰ Consequently, the political and not the judicial process is the protection for the "States *qua* States."

Justice Blackmun posed an important inquiry about whether the Court could practically play a constructive role in adjudicating federalism disputes, but the factual premises of his negative judgment were vulnerable to criticism. Although commentators as well as Justices shot holes in *Garcia's* outdated pronouncements about the states' formal role in the national legislative process,⁴¹ *South Carolina v. Baker*⁴² extended that reasoning to insulate congressional direct taxation of the states *qua* states from judicial review. Like *Garcia*, *Baker* held open the possibility that the Court would invalidate a federal statute where state interests were neglected because of "extraordinary" defects in the national political process.

In the wake of *Bitzer* and *Garcia*, the Court had substantially declawed the Tenth and Eleventh Amendments as constitutional limitations on congressional authority. But what the Court giveth in constitutional interpretation, it can taketh away through statutory

40. *Id.* at 550-51 & n.11 (drawing from HERBERT WECHSLER, *The Political Safeguards of Federalism*, in PRINCIPLES, POLITICS AND FUNDAMENTAL LAW 49-82 (1954); JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980); and D. BRUCE LA PIERRE, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH. U. L.Q. 779 (1982)).

41. See, e.g., Martin Redish & Karen Drizin, *Constitutional Federalism and Judicial Review: The Role of Textual Analysis*, 62 N.Y.U. L. REV. 1, 38-39 (1987); Bernard Schwartz, *National League of Cities Again—R.I.P. or a Ghost That Still Walks?*, 54 FORDHAM L. REV. 141 (1985); William W. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709 (1985); and sources cited in note 132 *infra*. See generally Philip P. Frickey, *A Further Comment on Stare Decisis and the Overruling of National League of Cities*, 2 CONST. COMMENTARY 341 (1985) (criticizing *Garcia's* inability to construct a persuasive rationale for compromising *stare decisis*); Philip P. Frickey, *Stare Decisis in Constitutional Cases: Reconsidering National League of Cities*, 2 CONST. COMMENTARY 123 (1985) (similar).

42. 485 U.S. 505 (1988).

interpretation. In *Atascadero State Hospital v. Scanlon*,⁴³ Justice Powell's opinion for the Court concluded that "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute."⁴⁴ Stressing that abrogation of Eleventh Amendment immunity, though within congressional power, disrupts the "'constitutionally mandated balance of power'"⁴⁵ between the federal government and the states, the Court stated that "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the guarantees of the Eleventh Amendment. The requirement that Congress unequivocally express this intention in the statutory language ensures such certainty."⁴⁶ Since *Atascadero*, the Court has stuck with this strong presumption against congressional waiver of Eleventh Amendment immunity,⁴⁷ and has applied a similarly strict approach to judging whether a state itself has waived its Eleventh Amendment rights.⁴⁸

*Pennsylvania v. Union Gas Company*⁴⁹ is the apotheosis of the Court's ambivalence about both constitutional and clear statement rules limiting congressional abrogation of Eleventh Amendment immunity. Five Justices (Brennan, Marshall, White, Blackmun, Stevens—the same majority as in *Garcia*) expanded *Bitzer* to hold that Congress, acting under the Commerce Clause rather than the Fourteenth Amendment, can abrogate the states' Eleventh Amendment immunity. A different five Justices (Brennan, Marshall, Blackmun,

43. 473 U.S. 234 (1985).

44. *Id.* at 242.

45. *Id.* at 242 (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 547 (1985) (Powell, J., dissenting)).

46. *Id.* at 243. In dissent, Justice Brennan complained that the clear statement requirement frustrated congressional intent and was designed simply "to keep the disfavored suits out of the federal courts" based on "a fundamental policy decision, vaguely attributed to the Framers of Article III or the Eleventh Amendment, that the federal courts ought not to hear suits brought by individuals against States." *Id.* at 254 (Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ., dissenting).

47. See the heated debate in *Dellmuth v. Mutli*, 491 U.S. 223 (1989), as well as *Hoffman v. Connecticut Dep't of Income Maintenance*, 492 U.S. 96 (1989); *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989). The Court's application of the canon in *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991), trumped other canons protecting Indian tribes against state regulation. *Blatchford* raises the important question whether the Court's emerging federalism jurisprudence ignores the federalism values instinct in the Court's Indian law jurisprudence.

48. See, e.g., *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299 (1990) (finding a state waiver).

49. 491 U.S. 1 (1989).

Stevens, Scalia) found that Congress in the Superfund Act had “unambiguously” abrogated such immunity.

The Tenth Amendment followed the same clear statement road as the Eleventh. In *Gregory v. Ashcroft*,⁵⁰ the question was whether the proscription against mandatory retirement provided by the federal Age Discrimination in Employment Act (“ADEA”) prevented a state from requiring its judges to retire by age seventy. The outcome turned on whether a judge was an “employee” for purposes of the statute. Elected state judges clearly came within an exception to the definition of “employee” for elected officials; appointed state judges also arguably came within a different exception, one for “appointee[s] on the policymaking level.”⁵¹ This was not a difficult case,⁵² yet it became an important one.

Justice O’Connor’s opinion for the Court created a clear statement rule against federal regulation of at least some state functions. “[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.”⁵³ Because the ADEA by no means targeted state judges for inclusion in its statutory scheme, the Court held those state officials excluded under *Gregory*’s new “super-strong clear statement rule.”⁵⁴ With typical perversity in these cases, the Court declined to apply this new super-strong clear statement rule to the Voting Rights Act, in a decision handed down the same day as *Gregory*.⁵⁵

50. 501 U.S. 452 (1991).

51. The exceptions were for “any person elected to public office in any State or political subdivision . . . or any person chosen by such officer to be on such officer’s personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office.” 29 U.S.C. § 630(f) (1988).

52. The admitted ambiguity of the “policymaker” exception could have been easily resolved through well-established canons and conventional statutory interpretive approaches, and appointed judges should fall outside the ADEA and be subject to state rules about retirement. See *Gregory*, 501 U.S. at 474-85 (White, J., joined by Stevens, J., concurring in part, dissenting in part, and concurring in the judgment); Philip P. Frickey, *Lawnet: The Case of the Missing (Tenth) Amendment*, 75 MINN. L. REV. 755 (1991).

53. *Gregory*, 501 U.S. at 464.

54. See William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992).

55. *Chisom v. Roemer*, 501 U.S. 380 (1991). In *Chisom*, the Court broadly interpreted “representatives” in the Voting Rights Act to authorize federal regulation of elected state judges. The Court did not cite *Gregory* or its rule of construction. See Eskridge & Frickey, *supra* note 54, at 634-36.

Even though *Gregory* was a statutory interpretation case whose new rule of interpretation was immediately ignored by the Court itself, it marked the beginning of the Tenth Amendment's rehabilitation. In *New York v. United States*,⁵⁶ the Court struck down that portion of the Low-Level Radioactive Waste Act Amendments of 1985 that "commandeered" state regulatory apparatus by requiring them to take title (and potential liability) to radioactive wastes that they did not dispose of before 1996. The Court's decision was surprising in light of *FERC v. Mississippi*, a pre-*National League of Cities* decision where the Court had brushed aside an arguably stronger claim, and astounding in light of *Garcia*. As to the latter, *New York* rescued the Tenth Amendment from the truism status required by *Garcia*, even though the statute invalidated was an excellent example of *Garcia's* thesis. That is, the states not only were active within the federal legislative process (successfully extracting federal concessions, for example) but had arguably ratified the final deal.⁵⁷

New York continued what Justice O'Connor called the Court's "unsteady path."⁵⁸ The Court declined to overrule *Garcia*, even though *New York's* result and reasoning cast doubt upon that precedent and its viability in at least some circumstances.⁵⁹ If *Garcia* were overruled or narrowed, the Court would have to rethink *South Carolina* as well. Such a rethinking could also be fatal to *Union Gas's* holding that Congress acting under its Commerce Clause authority can abrogate the states' Eleventh Amendment rights. Four of the five Justices in the *Union Gas* and *Garcia* majorities have left the Court. The four *Union Gas* dissenters and three of the four *Garcia* dissenters are still on the Court, and they all joined *Lopez* and *New York*. Thus, not only is the Court's path already unsteady, but changes in the Court's personnel may twist the path even further askew in the future.

Another doctrinal quandary is the status of *Gregory's* super-strong clear statement rule if *Garcia* is overruled or severely narrowed. Is the clear statement rule necessary if the Court is willing to

56. 505 U.S. 144 (1992).

57. See *id.* at 188-200 (White, J., concurring in part and dissenting in part). The three dissenters (Justices White, Blackmun, and Stevens) were the only Justices remaining from the original *Garcia* majority. All four Justices appointed after 1985 (Justices Scalia, Kennedy, Souter, and Thomas) joined Justice O'Connor's *New York* opinion.

58. *Id.* at 160 (opinion of the Court).

59. *Id.* at 205-07 (White, J., concurring in part and dissenting in part). Cf. Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563, 1576-78 & n.51 (1994) (arguing that *Garcia* should not be read to justify application of FLSA to state police officers, even though lower courts soon after *New York* upheld such applications).

police Congress directly? One might think that the Supreme Court would be cautious in applying the *Gregory* clear statement rule. Not so. In 1994, the Court in *BFP v. Resolution Trust Corp.*⁶⁰ invoked *Gregory* to narrow the plain meaning of the federal Bankruptcy Code, so that it would not disrupt state title and foreclosure law (the apparent purpose of the narrowed provision).⁶¹ *BFP* is an odd venue for the *Gregory* canon, as the narrowed provision was not regulating the states qua states (none of the parties cited or considered *Gregory* relevant). *BFP* is better understood as an example of the related but distinct canon presuming against federal preemption of state law in areas traditionally regulated by the states.⁶² Nonetheless, *BFP* highlights the doctrinal confusion of the Court's new super-strong clear statement rules in federalism cases: When do they apply? What do they even stand for?

C. THE IMPLICIT DORMANT COMMERCE CLAUSE

Equally curious, from a rule of law perspective, are the Supreme Court's decisions enforcing a "dormant" commerce clause against state regulations burdening interstate commerce. Originating in the nineteenth century dual federalism cases suggesting that states were precluded from regulating at least some of the areas enumerated for national regulation, the twentieth century dormant commerce clause cases suffer under a debatable link to either the constitutional text or the Framers' intent.⁶³ A mystery is that the Court has been much

60. 114 S. Ct. 1757 (1994).

61. Section 548(a)(2)(A) of the Bankruptcy Code invalidates foreclosure sales of mortgaged real estate by insolvent debtors within a year of bankruptcy unless there is an exchange for "a reasonably equivalent value." Justice Scalia's opinion for the Court held that courts could not invalidate such sales based upon findings of no "reasonably equivalent value" and maintained that the statutory language is not sufficiently "clear and manifest" to "displace traditional state regulation" of foreclosure sales, explicitly invoking *Gregory*. *BFP*, 114 S. Ct. at 1765 & n.8.

62. *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992); *cf. id.* at 2632 (Scalia, J., concurring in the judgment in part and dissenting in part) (the author of the later opinion in *BFP* denouncing this canon as "extraordinary and unprecedented").

63. The Court occasionally mentions this difficulty. *E.g.*, *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978) ("The bounds of these restraints appear nowhere in the words of the Commerce Clause, but have emerged gradually in the decisions of this Court giving effect to its basic purpose."); *West Lynn Creamery, Inc. v. Healy*, 114 S. Ct. 2205, 2211 n.9 (1994).

A good number of constitutional scholars express attitudes that range from dubious to scornful about the textlessness of the dormant commerce clause. Some urge transferring its functions to the (more narrow) Privileges and Immunities Clause of Article IV. *E.g.*, Julian Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 446-55 (1982); Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 606-12. For a defense, see Donald H. Regan, *The Supreme*

more vigorous in enforcing this “dormant” provision of the Constitution than it has in enforcing the truistic Tenth Amendment, the protean Eleventh Amendment, or the elastic “real” Commerce Clause. In the 1993 Term, for example, the Court struck down state or local regulations in four different dormant commerce clause cases.⁶⁴ This activist record gave the implicit constitutional provision greater bite that term than any of the provisions (including the individual rights provisions) explicitly set forth in the Constitution.⁶⁵

Like the Commerce Clause and Tenth Amendment cases, the Court’s dormant commerce clause cases have “taken some turns.”⁶⁶ Most theories start with the premise that the dormant commerce clause reflects the Framers’ overall design that the federal system avoid the “Balkanization” of the Articles of Confederation period, but that not all state and local burdens on interstate commerce should be invalidated. Several different approaches have been developed to draw the line between permissible and impermissible burdens. Justice Powell’s plurality opinion in *Kassel v. Consolidated Freightways Corp.*⁶⁷ illustrates one approach. In striking down Iowa’s restrictions on travel by large trucks through the state, Justice Powell balanced the burden on interstate commerce against local safety benefits.⁶⁸ The *Kassel* approach threatens to turn the dormant commerce clause into an ad hoc regime thrusting the courts into ever more difficult judgments about state policies, without a clear constitutional text or robust political theory to guide them.⁶⁹ Justice Stewart’s opinion in *City of*

Court and State Protectionism: Making Sense of the Dormant Commerce Clause, 84 MICH. L. REV. 1091 (1986).

64. See *West Lynn Creamery*, 114 S. Ct. 2205; *Associated Indus. v. Lohman*, 114 S. Ct. 1815 (1994); *Oregon Waste Sys., Inc. v. Department of Env’tl. Quality*, 114 S. Ct. 1345 (1994); *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677 (1994).

65. The Speech Clause of the First Amendment was involved in two cases where the Court invalidated state regulations, *City of Ladue v. Gilleo*, 114 S. Ct. 2038 (1994), and *Ibanez v. Florida Dep’t of Business & Prof. Regulation*, 114 S. Ct. 2084 (1994); one case where the Court modified (but largely approved) a state injunction, *Madsen v. Women’s Health Ctr., Inc.*, 114 S. Ct. 2516 (1994); and one case where the Court remanded the matter for factfinding, *Waters v. Churchill*, 114 S. Ct. 1878 (1994).

66. *Oklahoma Tax Comm’n v. Jefferson Lines, Inc.*, 115 S. Ct. 1331, 1336 (1995).

67. 450 U.S. 662 (1981).

68. Justice Brennan’s concurring opinion, emphasizing protectionist motivations of key state officials, illustrates a variation of this approach. *Id.* at 687 (Brennan, J., concurring in the judgment).

69. This is the charge made by Justice Scalia in *CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 94-97 (1987) (Scalia, J., concurring); see also *Tyler Pipe Indus., Inc. v. Washington State Dep’t of Revenue*, 483 U.S. 232, 257 (1987) (Scalia, J., concurring in part and dissenting in part) (arguing that reliance on the Commerce Clause as a check on *state*, as opposed to *federal*, legislation is “shaky”).

*Philadelphia v. New Jersey*⁷⁰ illustrates another approach. In striking down a state law preventing out-of-state trash from being imported into the state, the Court applied a “virtual per se rule of invalidity” when a state or local law discriminates on its face against interstate commerce.⁷¹

Especially in the arena of waste and trash disposal, the dormant commerce clause has become a major instrument of judicial activism,⁷² and considerable case-by-case innovation.⁷³ For example, the Court in *C & A Carbone, Inc. v. Town of Clarkstown*⁷⁴ struck down a town ordinance that required solid waste to be processed at one local transfer station, which would later be taken over by the town. Justice Kennedy’s opinion for the Court simply declared the ordinance a “discrimination” against interstate commerce, without any careful analysis (as required by *City of Philadelphia*) of whether the measure was protectionist.⁷⁵ Justice O’Connor concurred in the judgment, based upon a *Kassel* finding that the town’s regulatory objectives did not outweigh the burdens imposed on interstate commerce.⁷⁶ Justice Souter’s dissenting opinion maintained that both approaches slighted the town’s regulatory objective, which was not protectionist but allegedly arose out of a need to centralize local trash processing.⁷⁷ Justice Souter’s position seems not only more sensible, but also more consistent with the federalist philosophy of *New York* and *Gregory*, yet six Justices (including Justice O’Connor, the author of *New York* and *Gregory*) disagreed.

Each line of cases described in this part (constitutional limits on federal regulation, constitutional limits on federal regulation of the states, and constitutional limits on state regulation) might be characterized as *internally incoherent*—shifting directions erratically and containing hard-to-explain inconsistencies over time. Is *Lopez* consistent with *Wickard*, the Civil Rights Act Cases, and *Perez*? Can *Garcia* survive *New York*, or are the cases distinguishable? If *Garcia* bites the

70. 437 U.S. 617 (1978).

71. *Id.* at 624.

72. For recent cases, see *Oregon Waste Sys., Inc. v. Department of Env’tl Quality*, 114 S. Ct. 1345 (1994); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep’t of Natural Resources*, 112 S. Ct. 2019 (1992); *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009 (1992).

73. See *West Lynn Creamery, Inc. v. Healy*, 114 S. Ct. 2205 (1994) (applying the dormant commerce clause for the first time to strike down a state tax-and-subsidy scheme).

74. 114 S. Ct. 1677 (1994).

75. *Id.* at 1682.

76. *Id.* at 1687 (O’Connor, J., concurring in the judgment).

77. *Id.* at 1696-98 (Souter, J., dissenting).

constitutional dust, can *Union Gas* and *South Carolina* survive? Is *Gregory's* clear statement rule necessary in a regime characterized by *New York*? Should the Court overrule *Kassel* and limit the dormant commerce clause to instances of facial discrimination against interstate commerce, as in *City of Philadelphia*? Does *Carbone* unnecessarily extend *City of Philadelphia*?

These lines of cases are also *mutually incoherent*, that is, each line of authority is at odds with each other line. Does *Garcia*, which reasons that federalism limits on Congress are best enforced by the political process, survive the Court's decision in *Lopez*, which insists that the Court remain as a monitor of congressional power? Why should the Supreme Court be so active in reviewing state incursions on the federalist bargain, while remaining relatively passive in reviewing national incursions? Is the Court's concern for state autonomy in cases like *New York* at odds with the Court's extraordinary invasions of state autonomy in cases like *Carbone*?

Other problems will surely occur to other scholars.

II. A POSITIVE POLITICAL THEORY OF FEDERALISM

Justice O'Connor's decision in *Gregory* contains the Court's most sophisticated theorizing about why federalism is constitutionally desirable. We detect in her opinion traces of three distinct theories. A libertarian theory maintains that the federal structure assures a "double security," because citizens' liberty is much harder to trammel under a double layer of sovereign power.⁷⁸ Although invoking this theory as the one at least some of the Framers had in mind, Justice O'Connor expressed doubt that the theory is a robust one,⁷⁹ and we concur.

In our modern regulatory state, two layers of government seem as likely to impose double as to impose half the burdens that a single layer of government would impose. Moreover, such a libertarian theory of federalism is at odds with American constitutional history since the founding generation. The Reconstruction amendments and their

78. See *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991) (quoting THE FEDERALIST NO. 51 (James Madison); THE FEDERALIST NO. 28 (Alexander Hamilton)).

79. *Gregory*, 501 U.S. at 458-59 ("One can fairly dispute whether our federal system has been quite as successful in checking government abuses as Hamilton promised."). Unfortunately, Justice O'Connor spoke more approvingly of the double security theory in *New York v. United States*, 505 U.S. 144, 155-59 (1992), and this was the only theory invoked in *United States v. Lopez*, 115 S. Ct. 1624, 1626 (1995).

interpretation to "incorporate" and apply the Bill of Rights to the states are derogations from federalism. Their effect is to render rights-based protections more important for individual liberty than federalism-based protections. Whatever viability the Framers' libertarian theory had for federalism originally, it has been overtaken by the rights-based libertarian approach followed since the Civil War.

The Court itself has pressed liberty and federalism in antipodal directions even more than the above analysis would suggest, and a libertarian reading of federalism would be inconsistent with the Court's recent decisions. If a libertarian, "double security" theory were taken seriously, the Court's habeas corpus jurisprudence would have to be rethought, for example. Under the banner of "our federalism," the Court for twenty years has been curtailing the availability of federal courts to second-guess state court deprivations of individual liberty. *Gregory* itself invoked federalism norms to trump the libertarian claims of elderly Missouri judges who were subjected to age discrimination. The Framers' libertarian theory of federalism is not a solid basis for explaining or defending the Court's existing federalism-based doctrines or for urging changes in these doctrines.

Developing themes introduced in Justice O'Connor's dissent in *FERC v. Mississippi*, *Gregory* expressed a warmer endorsement of a republican, or democracy-enhancing, theory of federalism. This way of structuring sovereignty

assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.⁸⁰

These values seem more robust in the modern state, and they ought to inform the Court's federalism jurisprudence. Moreover, these values provide an attractive framework for understanding many of the Court's decisions, especially *New York*, *Atascadero*, and *Lopez*.

On the other hand, there are descriptive and prescriptive problems with this theory. As a matter of accounting for the Court's precedents, republican theory has difficulty with *Mississippi*, *Garcia*, and *South Carolina*, all decisions from which Justice O'Connor dissented. The Court in those cases expressed a tolerance for burdens on

80. *Gregory*, 501 U.S. at 458; see Akhil Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987); Merritt, *supra* note 59.

state governments that would seem to undermine the states' capacity for responsiveness, innovation, and so forth. If Congress can capriciously foist increased costs onto the states—by requiring states to pay their employees more (*Garcia*) or by directly depleting their tax base (*South Carolina*) or by requiring them to conduct regulatory hearings (*Mississippi*)—Congress can undermine local capacity for self-government. Justice O'Connor's theory would seem to require judicial monitoring of such activities, but the Court intervened in none of these cases. There is also some tension between this theory and *Union Gas* and even *Bitzer*: Why should the federal government be able to abrogate the states' constitutional right not to be sued in federal court? Do these precedents not allow the same kinds of burdens that *Gregory* and *New York* found objectionable?

There are deeper, normative problems with this theory of federalism. The republican virtues extolled by Justice O'Connor can be met by a nationalist system that is "decentralized" rather than "federalized." Edward Rubin and Malcolm Feeley maintain that federalism is unnecessary to achieve O'Connor's republican goals, and further that constitutionalizing federalism as the Court has done detracts from those goals by removing administrative flexibility to decentralize in functional (for example, around metropolitan areas) rather than formal (for example, around state boundaries) ways.⁸¹ In a related way, Justice O'Connor's theory seems insufficiently sensitive to the Supremacy Clause. Right after conceding that the Supremacy Clause suggests that "Congress may legislate in areas traditionally regulated by the States,"⁸² Justice O'Connor remarkably cautioned, "This is an extraordinary power in a federalist system."⁸³ In light of the New Deal, Justice O'Connor's statement is itself "extraordinary," for it would imply a surly reception for federal regulation of local air pollution, educational and residential apartheid, discrimination in the workplace, and so forth.⁸⁴ *Gregory* assumes a stance that is slightly akimbo to the balance between state and federal regulation that the Constitution seems to require, and reverses the priorities ordered by the Supremacy Clause.

81. Rubin & Feeley, *supra* note 7, at 914-26.

82. *Gregory*, 501 U.S. at 460.

83. *Id.*

84. *Id.* It is ironic that this localist statement is taken almost verbatim from Herbert Wechsler's 1954 article (*see supra* note 40, at 49-50), the same article that formed the intellectual basis for *Garcia* (from which Justice O'Connor issued a heartfelt dissent). The statement was quaint when Wechsler wrote it, and strikingly out of date in 1990 when Justice O'Connor revived it.

The problem of balance is also presented by the dormant commerce clause cases. Why should state and local laboratories of experimentation be regulated beyond the Supremacy Clause? Why would Justice O'Connor acquiesce, as she has done in cases like *Carbone*, in the Court's "extraordinary" activism enforcing a non-clause clause against state experiments?⁸⁵ The best candidate to fill this analytical gap in republican theory is Justice Stone's representation-reinforcement defense of dormant commerce clause review, as elaborated by Professor Tushnet.⁸⁶ Such a theory would regulate one local electorate's efforts to "export" regulatory costs to interests unrepresented in the local political system. But this theory does not sufficiently explain the Court's decisions, especially the many opinions invalidating state and local pollution control regulations. In *City of Philadelphia*, for example, the state prohibition against out-of-state trash would have pitted powerful in-state interests against each other: homeowners and environmentalists who favored the regulation versus trash disposal entrepreneurs and owners of landfills who opposed the regulation. New Jersey's regulation was democracy in action (the homeowners won, the landfill operators lost), but democracy was trumped by the Supreme Court's valorization of a completely free interstate market.

Although preferable to libertarian theory, Justice O'Connor's republican theory of federalism is at least incomplete. There is a third way of understanding the value of federalism and the role of the Supreme Court, and there is a whiff of such a theory in *Gregory's* reference to the value of making "government more responsive by putting the States in competition for a mobile citizenry."⁸⁷ In this part we shall develop this suggestion by outlining a theory of judicial federalism that draws upon a rational choice theory of the political process,

85. Justice O'Connor herself tends toward an ad hoc approach to the dormant commerce clause, balancing the benefits of local regulation against the costs it imposes on interstate commerce. See *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677, 1687 (1994) (O'Connor, J., concurring in the judgment). This seems an insufficient protection of state interests and sharply inconsistent with *Gregory's* philosophy.

86. See *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 189-92 (1938); see also Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125 (including an important revival and elaboration of Justice Stone's insight). Recall that Justice Stone in 1938 also authored the celebrated footnote 4 in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), the germinal case for representation-reinforcing theories of judicial review generally. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 73-104 (1980).

87. *Gregory*, 501 U.S. at 458. Justice O'Connor at this point cites Michael W. McConnell, *Federalism: Evaluating the Framers' Design*, 54 U. CHI. L. REV. 1489, 1491-511 (1984) (book review), whose defense of federalism closely follows and largely reiterates arguments made by Gordon Tullock and other rational choice theorists. See the references in note 88 *infra*.

namely, PPT. This theory assumes that institutional and other actors will pursue self-interested goals in the political process, that actors will behave strategically (that is, condition their actions upon responses of others), and hence that actions will be strongly influenced by the structure or framework in which they occur. PPT maintains that institutional design affects behavior, and that design can ameliorate collective action problems. We believe that the Framers operated under such assumptions, and that institutional theory better captures their aspirations than either a simple libertarian or republican theory.

We will demonstrate that the advantages of federalism, especially the establishment of competition among the states, have the unintended consequence of creating an incentive for the various political decisionmakers, both at state and federal levels, to try to shift the burden of membership on to the other actors. In this Article we refer to such behavior as "cheating." Institutions can be effective in combating the adverse effects of competition, although their efficacy depends upon the particular kind of cheating to be resolved. We demonstrate the utility of various institutional mechanisms and focus upon the role of the Court.

A. THE ADVANTAGES OF FEDERALISM

In a heterogenous society, a federal system can better satisfy political preferences and economic needs, especially over time, than can a simple unitary government.⁸⁸ Consider a unitary sovereign state with 100 people, sixty of whom desire policy *A* and forty of whom desire *not-A*.⁸⁹ Under majority rule, the state will choose policy *A*, leaving sixty of its citizens satisfied and forty dissatisfied. If the state were a federation rather than unitary, more of its citizens' preferences will likely be satisfied. Assume, for example, that one province contains fifty citizens desiring policy *A* and ten citizens desiring *not-A* and the second province contains ten citizens desiring policy *A* and thirty citizens desiring *not-A*.

88. Early political economists have argued this point convincingly, either explicitly or implicitly. See e.g., JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* (1962); ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970); Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956); Gordon Tullock, *Federalism: Problems of Scale*, 6 PUB. CHOICE 19 (1969). Important recent works include VINCENT OSTROM, *THE MEANING OF AMERICAN FEDERALISM* (1991); WALLACE E. OATES, *FISCAL FEDERALISM* (1972); PAUL E. PETERSON, *THE PRICE OF FEDERALISM* (1995) [hereinafter PETERSON, *PRICE OF FEDERALISM*]; *FEDERALISM AND THE CANADIAN ECONOMIC UNION* (Michael J. Trebilcock ed., 1983).

89. The example in text is taken straight out of Tullock, *supra* note 88, at 22.

TABLE 1

	<u>PREFERRING A</u>	<u>PREFERRING NOT-A</u>
PROVINCE 1	50	10
PROVINCE 2	10	30

Under this scenario, the policies adopted by each province (*A* and *not-A*, respectively) would satisfy the preferences of eighty citizens, leaving only twenty citizens dissatisfied.⁹⁰ The satisfaction effect of the federal arrangement would be enhanced if dissatisfied citizens from each province were to move to the province that better satisfied their preferences. Under an ideal scenario, twenty people would move, and everyone would be satisfied.⁹¹

This simple game of preference satisfaction becomes more interesting if viewed over time and under conditions of uncertainty about the eventual outcome if a particular policy were chosen.⁹² Assume that most of the citizens of the polity are uncertain about whether policy *A* is a good idea or not; a unitary state will adopt no policy in most circumstances. However, if the polity is a federation of two provinces and the citizens of one province have an interest in implementing policy *A* despite its uncertainties,⁹³ then that province will adopt the policy, while the other province will not. Over time, the first province will gain experience with policy *A*, and voters of both provinces will be able to observe whether it is a good policy. If it proves to be a good policy, the second province or the national government will adopt policy *A*. If policy *A* proves to be a bad policy, the

90. There is no way of cutting up the 100 citizens that would yield less satisfaction, and many ways that would yield more satisfaction, albeit sometimes just a little bit more. For example, if 31 people in province 1 preferred *not-A* (29 preferring *A*), and only 9 in province 2 preferred *not-A* (31 preferring *A*), the overall satisfaction would rise only from 60 to 62 (31 citizens in each province with satisfied preferences).

91. This point is not in Tullock, *supra* note 88, but is an obvious corollary from HIRSCHMAN, *supra* note 88. It is also explicitly noted as an advantage of federalism in Gregory. See text accompanying notes 80-87 *supra*.

92. The analysis in the text that follows is simply a rational choice version of Justice Brandeis' famous argument for federalism in order to protect the states as "laboratories" of experimentation. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). See also *FERC v. Mississippi*, 456 U.S. 742, 788 (1982) (O'Connor, J., concurring in the judgment and dissenting in part) (finding that the states often serve as "laboratories" for the development of new social, economic, and political ideas).

93. Consider a policy that has benefits from implementation that are separate from the potential (but uncertain) outcome, such as job creation or boosting a local industry. If these separate benefits accrue asymmetrically to the provinces, the one that stands to gain the most from its implementation is most likely to be amenable to accepting the risk of the policy than the other province.

citizens of the first province might repeal the policy, despite its separate benefits. Indeed, under a federal system the first province has strong incentives to monitor the efficacy of policy A, because citizens dissatisfied with it might well "vote with their feet," exercising their right to move to the second province.⁹⁴

The foregoing analysis provides a rationale for the constitutional cliché that ordinary "police powers"⁹⁵ are presumptively left to state and local governments. The analysis also suggests why policies of economic development should be handled most efficiently at the local rather than national level in a federation.⁹⁶ Provinces in a federation (or states in the United States) not only have incentives to provide for the absolute well-being of their own citizens, but also incentives to advance the relative well-being of their citizens, that is, their well-being compared to that of citizens elsewhere. Where there is free mobility within the federation, local governments are in competition with one another to maximize the welfare of their respective citizens. If one local government falls behind, as by providing rotten schools or police services, it will tend to lose citizens to the more efficient governments, unless it offers countervailing benefits not offered by those other jurisdictions. Thus, local governments will aspire not just to provide basic services, but also to expand the pie for their citizens through developmental projects that help everyone.

If the states are engines of efficient development and police service, what role ought the national government to play? The most obvious role for the national government is to provide public goods that the states are unlikely to provide through ordinary cooperation: a unified foreign policy, the interstate highway system, and the hydrogen bomb.⁹⁷ An equally important role for the national government is to prevent destructive interstate competition, such as tolls, and tariffs

94. For an explication of this collective action problem, see Charles C. Brown & Wallace E. Oates, *Assistance to the Poor in a Federal System*, 32 J. PUB. ECON. 307 (1987); Mark V. Pauly, *Income Redistribution as a Local Public Good*, 2 J. PUB. ECON. 35 (1973). See generally PAUL E. PETERSON ET AL., *WHEN FEDERALISM WORKS* 1-31 (1986) [hereinafter PETERSON ET AL., *WHEN FEDERALISM WORKS*].

95. By police powers, we mean the standard day-to-day public goods offered by the government: education, roads, some public utilities, trash collection, police and fire protection, rules governing sexuality and families, zoning, and nuisance abatement.

96. This analysis is largely taken from PETERSON ET AL., *WHEN FEDERALISM WORKS*, *supra* note 94, at 69-72, 79. See also PETERSON, *PRICE OF FEDERALISM*, *supra* note 88 (similar analysis).

97. On the collective action problems involved in producing such public goods, see MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1964).

against out-of-state products. Such trade wars are prisoners' dilemmas, in which states acting in their own self-interests have incentives to adopt policies which will beggar the polity. That is, each state adopts a toll which would benefit its coffers, but if all states adopt such tolls, interstate commerce will be so discouraged that all states will be worse off. (We explain the prisoners' dilemma problem below.)

Trade wars are the most obvious example of such dilemmas. A less obvious example is the celebrated "race to the bottom," which we now illustrate.⁹⁸ Return to our original configuration of preferences for policy *A* (Table 1). Assume that policy *A* represents strong measures to limit industrial pollution of air and water. Province 1 adopts such a policy, but province 2 does not. In the long term, policy *A* might be an excellent policy, but in the short or medium term adoption of the policy might undermine the ability of province 1 to attract or retain businesses. As province 1 loses businesses and citizens to province 2, it will feel electoral pressure to repeal its policy, not because it has changed its preferences about the policy but because it faces dire consequences along a different dimension.⁹⁹ Note that in the race to the bottom, the "bottom" is not necessarily the lowest preference; as long as competition encourages neighboring provinces to underprovide, it is conceivable that the ultimate policy adopted will include little or no regulation of industrial pollution, by most accounts a suboptimal provision of welfare. In such circumstances, it is desirable to have national regulation, essentially forcing policy *A* onto province 2, in order to avoid a race to the bottom.

B. INCENTIVES FOR CHEATING ON THE FEDERAL ARRANGEMENT AND WHY THEY MIGHT BE DISASTROUS

As presented above, the federal arrangement offers many advantages for a polity, but those advantages can evanesce if key actors cheat on the federal arrangement. For simplicity, we shall focus on

98. See RICHARD A. MUSGRAVE, *THE THEORY OF PUBLIC FINANCE* 132-33 (1959); PAUL E. PETERSON, *CITY LIMITS* 27-29 (1981); Wallace E. Oates, *An Economist's Perspective on Fiscal Federalism*, in *THE POLITICAL ECONOMY OF FISCAL FEDERALISM* 3 (Wallace E. Oates ed., 1977).

99. The situation might be worse than we describe. Even if the citizens of province 2 themselves desire policy *A*, they might have a higher preference for policy *B*, namely, attracting businesses and expanding its economic and tax base. Province 2's willingness to trade off policy *A* for policy *B* would, in a prisoners' dilemma world, have the same effect as the scenario in text. Additionally, to the extent that province 1 anticipates the reactions of province 2 and businesses, it will be discouraged from adopting policy *A*—its strongly preferred policy—in the first place.

Congress and the states as the key actors.¹⁰⁰ If the cheating becomes such that it is no longer beneficial for some actors to participate in the federation, the federation will likely collapse. It is in this sense that our theory differs from traditional political science scholarship on federalism. Traditional scholarship typically addresses questions of fiscal federalism, that is, the appropriate or prescriptive division of powers. Ours is a political theory of federalism; we are concerned with the maintenance of the federal nature of the polity in order to maximize the benefits to a heterogeneous citizenry.

We indicated above that the failure of federalism results from a tendency of the actors to violate the terms of the federation.¹⁰¹ This occurs even in a federation that creates significant benefits for all participants. As long as costs exist (despite the fact of a net benefit), participants in the federation will be tempted to shift these costs onto other actors. The concept flows from the logic of a prisoners' dilemma, which we now explain.

In a prisoners' dilemma game, two prisoners who apparently cooperated in a crime are presented with separate plea bargains. Each is told that if he turns state's evidence he will get off entirely, if his partner turns and he does not he gets an unusually high sentence, and if both turn they both get normal sentences. The payoff or benefit for each prisoner for each of four possible outcomes is reflected in Table 2. Higher ordinal numbers reflect higher benefits (*not* higher sentences), and prisoner 1's payoff is always listed first.

TABLE 2

	<u>PRISONER 2 LOYAL</u>	<u>PRISONER 2 DEFECTS</u>
PRISONER 1 LOYAL	10, 10	0, 15
PRISONER 1 DEFECTS	15, 0	5, 5

The collective utility of the two prisoners is greatest (20) if they remain loyal to one another and lowest (10) if they both defect. Perhaps

100. Our simplification does not ignore the importance of nonterritorial actors or interests. However, in our model, it is assumed that the federal structure provides a framework or constraint within which other actors participate. The interests of nonterritorial actors are assumed to be represented within the federal and provincial governments.

101. The following model is drawn primarily from the current dissertation work of one of the authors. See Bednar, Federal Problem, *supra* note 8, at 15-25. See also PETERSON, PRICE OF FEDERALISM, *supra* note 88 (posing as a challenge to federalism the possibility that costs imposed by rent-seeking national legislation might outweigh benefits of the functional division of labor); Bednar et al., Political Theory, *supra* note 6, at 6-7 (applying commitment theory to compare political systems in the United Kingdom, Canada, and the United States).

surprisingly, however, so long as neither knows what the other is doing, each prisoner will defect. Prisoner 1 will consider the deal offered by his jailers in the following way: If I am loyal, my possible payoffs will be ten (prisoner 2 is also loyal) or zero (prisoner 2 defects). On the other hand, if I defect, my possible payoffs will be fifteen (prisoner 2 is loyal) or five (prisoner 2 also defects). Since my possible payoffs are higher for defection than for loyalty, whatever prisoner 2 does, I should defect. Prisoner 2 engages in the same rational calculus and also decides to defect. Also, although neither our theory nor the prisoners' dilemma explicitly discusses relative gains, note the significantly worse penalty for being honest when the other cheats (in this case, zero), appropriately known as "the sucker's payoff," which everyone wants to avoid. Both have incentives to cheat, yet this is the worst result for the prisoners as a group.

The prisoners' dilemma is a way to think about trade wars, a longstanding justification for forming federations. The good of all is best served by eliminating barriers to trade, but each state is tempted to impose such barriers, thereby posing a danger that all states will do so. Ironically, although one incentive for states to form a federation is to avoid the disadvantages of trade wars and other such prisoners' dilemmas, the prisoners' dilemma threatens the stability of the federation even after it is formed. For even if an actor had decided to behave honestly and act according to the terms of the federal arrangement, it would be foolish to do so given the costliness of being honest when another actor cheats. Therefore, as long as the suspicion of cheating exists, it is in the interest of all actors to cheat.

The prisoners' dilemma, inherent in all federal arrangements, creates a commitment problem. At the birth of a federation, each state commits to respect and obey the rules of the federation and the federation commits to respect and not invade the autonomy of the various states. The benefits of the federation flow most readily when all actors are obeying their commitments (the upper left quadrant of Table 2). Each state and the national government has an incentive to improve its position by cheating (lower left and upper right quadrants). Once the other states learn of even partial defection, they can be expected to cheat in order to avoid the sucker's payoff. Serial defections and rampant cheating will negate the benefits of the federal arrangement and may even destroy the federation. We now consider in greater detail the precise incentives that Congress and the states have

to cheat on the federal arrangement established in the United States Constitution.

Responding to the pressures of national distributive politics, Congress may respond in ways that detract from the benefits of federalism and, ultimately, might sabotage the arrangement altogether. To begin with, Congress might *aggrandize* its own power by legislating aggressively and preemptively in areas traditionally left to the states. Recall our discussion of the national solution of the race-to-the-bottom problem. By adopting policy *A* for the entire nation, Congress is negating the basic advantage of federalism for a polity with heterogeneous preferences, namely, the possibility that different policies in different provinces will satisfy more citizens' preferences. Because political debates about distributive as well as many other issues will usually gravitate to the national level sooner or later, and because many such statutes will also preempt local police and development policies, the possibility arises that some benefits of federalism will be lost. It is worth losing the benefits of federalism when national regulation is needed for public goods or race-to-the-bottom reasons, but often not when national regulation represents nothing more than the substitution of distributional policies for developmental policies.

In a related way, Congress will be tempted to *burden* the states themselves as a consequence of national distributive politics. This is most destabilizing if the burdens are not equally shared by all states; charges of favoritism, or systematic discrimination against certain states or an entire region of the country, create strong incentives for the overburdened to depart from the federation.¹⁰² National regulatory burdens on the states would also be serious problems for federalism if they threatened the fundamental autonomy (the ability of the state to perform its day-to-day functions) or integrity (the ability of the state to structure itself) of at least some states.

A third, and perhaps most serious, form of congressional cheating involves *commandeering* the states to carry out, at their expense, federal regulatory programs. Members of Congress desiring electoral popularity or media prominence will want to sponsor regulatory programs purporting to solve some problem or serve a relevant interest. If such programs come at the expense of raising taxes or cutting other programs, they are much riskier. Therefore, members of Congress

102. However, in some cases, the cost of exiting might be prohibitive, in which case the federation might live in a perpetual state of instability. Consider, for example, the situation of Quebec within the Canadian federation.

have incentives to enact laws whose administrative costs are borne by other institutions, namely, the states. Commandeering the state regulatory apparatus is a threat to the autonomy or integrity of state governments, and this formal threat has possibly severe functional consequences. Because state officials are beset by the same pressures as federal officials, they may have to sacrifice police and developmental priorities in order to obey unfunded federal mandates.

Responding to the pressures of local distributive politics, individual states may respond in ways that detract from the benefits of federalism and, ultimately, might sabotage the arrangement altogether. The consequences of state cheating are just as dire as the consequences of congressional exploitation: Both deprive the federation of advantages that might accrue from the federal arrangement and may undermine the existence of the federation itself. By state cheating we mean strategies through which a state seeks to reap the benefits of federalism (such as a free and well-functioning interstate market for its goods) while not accepting the costs of federalism.

The mildest form of state cheating is *shirking*, where a state accepts the benefits of national policies generally, cooperates in the implementation and enforcement of policies it favors, but then fails to implement or enforce national policies not in the perceived local self-interest. Where the national policy (such as reducing pollution or regulating firearms) requires a truly national collective effort to succeed, state shirking undermines those policies, presumably to the detriment of citizens everywhere. Shirking is a more serious infraction where it allows the state to gain a comparative advantage on other states, as by lowering costs of doing business in the state. Once initiated, shirking by some can trigger a new race to the bottom by all.

States are also tempted to breach their commitments by imposing *externalities* on other states. An externality is a cost imposed on another state without accompanying compensation. An example would be a state restriction against heavy trucks traveling within the state. Such a rule would benefit the state by ensuring that only lighter and less damaging trucks traveled on the state's roads, but also by encouraging trucks to bypass the state altogether and thereby damaging the roads of the detour states. The latter effect is an externality. Once one state adopts such a rule, there might be another race to the bottom. The net effect of such a race might be to impair the free flow of interstate commerce, the classic reason for forming a federation.

The flip side of *externalities* is state *protectionism* that shields local interests. Protectionism is usually the worst form of state cheating, because it strikes at the heart of the freely flowing national market presumed by federalism. While externalities may obstruct interstate commerce, protectionist measures directly impede it. Because protectionist measures tend to be easier to spot, they are more likely to trigger retaliatory responses. Barriers to trade, the classic protectionist policy, trigger trade wars, the classic prisoners' dilemma response.

TABLE 3

	<u>CONGRESSIONAL CHEATING</u>	<u>STATE CHEATING</u>
MILDEST	Aggrandizement Burdens	Shirking Externalities
WORST	Commandeering	Protectionism

C. MECHANISMS TO PRESERVE THE ADVANTAGES OF FEDERALISM AND TO AMELIORATE THREATS TO THE FEDERAL ARRANGEMENT

Because of either national or state cheating (or both), most federations in recent as well as distant history have dissolved, through centralization of power at the national level (England in the early nineteenth century) or through federation breakdown by secession or civil war (Yugoslavia in the 1980s).¹⁰³ PPT maintains generally that institutional design can ameliorate—or exacerbate—political dysfunctions. What governmental designs or mechanisms might preserve the advantages of federalism as well as ameliorating threats to the federal arrangement?

An obvious answer, attractive to lawyers, is that the Constitution itself regulates many of the threats we describe. Examples include the Supremacy Clause,¹⁰⁴ which prohibits state shirking and recruits state as well as federal judges to enforce that prohibition; the implicit but unmistakable limitation of the national government to powers enumerated in the Constitution,¹⁰⁵ which is supposed to limit congressional aggrandizement; the Duty Clauses,¹⁰⁶ which prevent some state

103. See WILLIAM H. RIKER, *FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE* 49-50 (1964).

104. U.S. CONST. art. VI, cl. 2.

105. U.S. CONST. art. I, § 8; *id.* art. II, § 2, cl. 2; *id.* art. III, § 1; *id.* art. IV, §§ 3, 4; *id.* art. V.

106. U.S. CONST. art. I, § 10, cls. 2, 3.

protectionism unless Congress consents; and the Direct Taxation Clause,¹⁰⁷ which precludes congressional favoritism among the states in matters of direct taxation. Political scientists are more skeptical of the general claim, for the protection afforded these specific constitutional directives is dependent upon their being enforceable in a world where people and institutions behave in self-interested ways. American legal history is filled with examples of apparent constitutional protections that have been rendered dead letters when overwhelmed by political forces. These constitutional clauses are not self-enforcing; we are interested in the institutions that maintain them.

Our approach seeks protections in more systematic mechanisms of institutional interaction. In this spirit, we hypothesize three different kinds of protections: self-enforcing political structures, practical mechanisms of institutional interdependence, and judicially created interpretive regimes. We also propose that different protections are differently applicable to the potential threats to federalism.

1. *Self-Enforcing Political Structures*

Several features of national political decisionmaking diminish the problem of congressional cheating on the federal arrangement. The procedures of lawmaking—constitutionally required bicameral approval of both chambers in Congress and presentment to the president,¹⁰⁸ together with other procedures adopted by custom—create a gauntlet which will tend to protect against congressional aggrandizement or burdens on state governments. These procedures constitute a series of “veto gates”¹⁰⁹ through which legislation must pass or, conversely, where it may be ambushed. One consequence of these many veto gates is that a salient interest group harmed by a piece of legislation will have numerous opportunities to block such legislation, and sponsors have incentives to purchase their cooperation by including provisos and exceptions accommodating their needs. State and local governments are organized into formal lobbying groups inside the Beltway, and the casually empirical evidence found in the legal literature tentatively suggests that these groups have at least as much clout as other groups.¹¹⁰ Indeed, after *Garcia* upheld the application of the

107. U.S. CONST. art. I, § 9, cl. 4.

108. U.S. CONST. art. I, § 7.

109. See McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705 (1992).

110. See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 359-72 (1991); Carol F. Lee, *The Political Safeguards of Federalism?*

FLSA to state employees, Congress at the behest of the states amended the FLSA to allow the states to provide compensatory time off rather than higher wages for overtime work.¹¹¹

Another structural feature of ordinary politics protects against burdens that systematically discriminate against certain states: the composition and customs of the Senate.¹¹² Each state receives the same representation (two people) in the Senate, which ensures that the Senate will not contain many people and that discrimination against particular states will be rare. Nothing would be more lethal to a senator's career than the perception that the senator's state was always a loser in Washington politics. Therefore, a senator will fight like a wildcat to protect the state against specially targeted harms. The senator can usually obtain chamber accommodation of the state's particular interest even when no other state has quite the same interest, by means of logrolling (trading away a vote on issues one does not care about so strongly), appealing to other members of the senator's party, and threatening to shut down the chamber with parliamentary stalls.¹¹³

The power of the president to veto legislation and to influence or control its implementation also may help protect against discriminatory burdens, especially if those burdens fall on entire regions or upon a large state. The winner-take-all calculus of the Electoral College makes the president institutionally leery of alienating an entire state, and at the very least a first-term president ought to be sensitive to charges that legislation needlessly hurts a big-vote state or a region. Note how the Electoral College and the Senate complement one another: The former protects the interests of big states, while the latter protects the interests of small states.¹¹⁴

Congressional Responses to Supreme Court Decisions on State and Local Liability, 20 URB. LAW. 301 (1988).

111. FLSA Amendments of 1985, Pub. L. No. 99-150, 99 Stat. 787 (1985).

112. We are not inclined to view the Senate as a major force against aggrandizement, as the Framers originally planned. See William H. Riker, *The Senate and American Federalism*, 49 AM. POL. SCI. REV. 452, 452-69 (1955); Roger G. Brooks, Comment, Garcia, *The Seventeenth Amendment, and the Role of the Supreme Court in Defending Federalism*, 10 HARV. J.L. & PUB. POL'Y 189 (1987).

113. The best example is Alaska, a small population state with a huge federal land interest. The Alaskan senators work feverishly to protect their state's interests and are usually successful even though no other state quite shares their unique interests. Contrast the District of Columbia, a semisovereign entity whose autonomy has been repeatedly bashed and whose laws are repeatedly overturned by Congress. Usually such initiatives start in the Senate, where the District has no formal or informal representation.

114. Ron Levin suggested this neat point to us.

The primary and maybe the only self-enforcing structure protecting against state cheating is the existence of a Supreme Court chosen at the national level and with power to monitor state court implementation of the Supremacy Clause. As an institution of national power, the Supreme Court might be expected to enforce national consensus politics against outlier or shirking states.¹¹⁵ This mechanism might have a weakly retarding effect on state shirking, but any such effect has declined in importance as the number of states has risen arithmetically and the number of national policies geometrically.

2. *Practical Mechanisms of Institutional Interdependence*

A more important mechanism for regulating state shirking is a practical one: conditional federal grants to the states.¹¹⁶ State budgets for education, highways, and other fundamental areas depend upon federal grants. As *Dole v. South Dakota*¹¹⁷ held, the Spending Clause confers upon Congress a great deal of freedom to condition such money on state compliance with a host of national rules (such as the fifty-five miles per hour national speed limit in that case). Surely Congress or its agents do not perfectly monitor state compliance with conditional grants, but it would appear likely that potential cutoff of funds would be a useful motivator for state compliance with national obligations.

The flip side of state dependence on national grants is central government reliance on state officials for the administration of their programs. Political scientists have documented the remarkable extent to which national programs (especially New Deal ones) depend upon state administrators for their success.¹¹⁸ The constant intercommunication among national and local administrators and a recognition of the importance of their good will may help explain why state and local governments have been politically salient interest groups at the national level. This phenomenon would provide a practical protection against congressional burdens on the states. It provides more equivocal protection against aggrandizement or commandeering. On the

115. See Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957). For recent evidence along these lines, see William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26 (1994).

116. See DANIEL ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATES* (3d ed. 1984).

117. 483 U.S. 203 (1987).

118. The leading work is MORTON GRODZINS, *THE AMERICAN SYSTEM: A NEW VIEW OF GOVERNMENT IN THE UNITED STATES* (1966), somewhat updated by ELAZAR, *supra* note 116.

one hand, the existence of state officials who could help administer national programs might make Congress more inclined to legislate in areas of traditional state concern or to commandeer those officials without pay. On the other hand, Congress could be pressed away from such actions by federal administrators who were sensitized to the local perspective or attentive to the need for essential good will at the state level.

Another practical mechanism protecting against congressional cheating might be the institution of political parties. Political parties have served an integrating function in American political history, linking together the lives and interests of local, state, and national party members.¹¹⁹ These interpersonal as well as politically pragmatic links might be yet another explanation for the success of state and local lobbies in limiting direct national burdens on the states, and they might serve as long-term checks on national aggrandizement and commandeering as well. Most notable legislation is effectively sponsored by a political party. A party might be reluctant to sponsor national legislation that ruins its chances to win state and local elections.

3. *Judicially Created Interpretive Regimes*

The Supreme Court has incentives to protect the federalist arrangement at least some of the time: its legal interest in promoting a rule of law and its institutional interest in situating itself as an arbiter of national power dynamics. The Court can accomplish these goals through the creation of an interpretive regime of rules and guidelines that both national and state governments can consider *ex ante* when they decide whether to cheat on the federal arrangement. An analytically separate question is how the Court chooses to implement or enforce such a regime. Possibilities include constitutional rules, clear

119. See Michael A. Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. PA. L. REV. 1567 (1988); Larry Kramer, *Understanding Federalism*, 45 VAND. L. REV. 1485, 1523-42 (1994) (useful survey of the political science literature). On the importance of parties as federalizing agents, see THE AMERICAN PARTY SYSTEMS (William Chambers & Walter Dean Burnham eds., 2d ed. 1967); RIKER, *supra* note 103, at 129-36; CLINTON ROSSITER, PARTIES AND POLITICS IN AMERICA (1960). Literature refuting the claim that political parties do not matter includes LEON D. EPSTEIN, POLITICAL PARTIES IN THE AMERICAN MOLD (1986); MALCOLM E. JEWELL & DAVID M. OLSON, AMERICAN STATE POLITICAL PARTIES AND ELECTIONS (1982); XANDRA KAYDEN & EDDIE MAHE, JR., THE PARTY GOES ON: THE PERSISTENCE OF THE TWO-PARTY SYSTEM IN THE UNITED STATES (1985); CORNELIUS P. COTTER & JOHN F. BIBBY, *Institutional Development of Parties and the Thesis of Party Decline*, 95 POL. SCI. Q. 1 (1980).

statement rules of statutory interpretation, and articulated but unenforced norms. The Court's choice of enforcement depends upon the institutional advantages and disadvantages of each strategy.

Rules against state shirking, externalities, and protectionism usually have to be enforced at the national level, and the Court is best situated to enforce them. Although Congress exists as a remedy for state cheating of all sorts, the veto gate mechanisms discussed above make congressional monitoring uneven at best. The same structure that discourages congressional aggrandizement discourages congressional action against transgressing states. Monitoring such cheating by the Court is easier, since the victims of state cheating will self-identify (and sue). Constitutional review serves the Court's institutional interests, because the Court thereby becomes a key agent in the federalist arrangement; individual Justices or the Court as a whole also will enjoy an opportunity to give expression to their political values.¹²⁰

The Court is not nearly as well situated to regulate congressional cheating. The structural and practical protections against congressional cheating not only render judicial monitoring less essential, but also suggest a danger of judicial intervention. If national politics is operating in the normal way, judicial intervention poses a risk to the federal arrangement, because the Court might upset a political balance that accommodates the states. A melodramatic example is *Dred Scott v. Sandford*,¹²¹ where a proslavery Court invalidated the Missouri Compromise of 1820, which had prohibited the spread of slavery into lands of the Northwest Territories. While ostensibly enforcing constitutional limits on congressional power, the Court was unsettling a statute which had in fact considered and accommodated competing state interests very carefully. Our theory would lend support to claims that *Dred Scott* helped precipitate secession: By discrediting a previous congressional compromise, the decision destabilized efforts to mediate the slavery and antislavery states; by forcing the slavery issue back to the top of the national agenda, the decision also fractured the Democratic Party and contributed to the election of Lincoln as president.

120. The Rehnquist Court, for example, is libertarian on economic issues and cost-conscious about environmental measures in particular. The Court is cautious in implementing these preferences against Congress but highly activist in implementing these preferences against state and local governments, especially in dormant commerce clause cases. See Eskridge & Frickey, *supra* note 115 (analyzing the 1993 Term).

121. 60 U.S. (19 How.) 393 (1857).

Another difficulty with Supreme Court protection against congressional cheating is that the Court assumes institutional risks when it invalidates congressional enactments. In contrast to the states, Congress can hurt the Court institutionally, by refusing to fund judicial operations (or to increase needed appropriations), by curtailing the Court's jurisdiction, by holding up Court nominees to litmus tests on issues Congress cares about, by flooding the federal courts with new causes of action, and so forth. Hence, the Court is not likely to challenge national political equilibria very often, and when it does (as in *Dred Scott*) the consequences are not likely to be those the Court desires. On the other hand, because the Justices are appointed by the president (not Congress) and because the president or either chamber of Congress can block assaults on the judiciary, the Supreme Court has considerably more independence than the highest court in a parliamentary system. Hence, when there is not a strong presidential-congressional consensus on an issue of national power, the Court has considerable leeway to exercise a truly independent judgment.¹²²

III. WHAT OUR THEORY HAS TO SAY ABOUT THE SUPREME COURT'S FEDERALISM DECISIONS

The understanding of federalism we have outlined is only a theory, and one that has not been tested.¹²³ Still, our approach offers several advantages for legal analysts. It is a better normative pitch today than a libertarian theory of "double security" (for reasons discussed in Part II), but it has at least as powerful a connection with the

122. This phenomenon is revealed most dramatically in separation of powers or other structural cases which pit the president against Congress. See *Morrison v. Olson*, 487 U.S. 654 (1988) (finding independent counsel constitutional); *Bowsher v. Synar*, 478 U.S. 714 (1986) (holding Gramm-Rudman enforcement provision unconstitutional); *INS v. Chadha*, 462 U.S. 919 (1983) (finding legislative veto unconstitutional).

123. In a separate paper, we have collaborated with a coauthor to set forth a comparativist case for such a theory. See Bednar et al., *Political Theory*, *supra* note 6. We compare the experience of American federalism with that of England between 1700 and 1832 and of Canada after 1867 and argue that federalism arrangements are unstable unless protected by a regime of separate powers or a genuinely independent judiciary. Lacking a regime of separate powers, Canada was able to sustain a robust federalism until 1949 because both parliamentary and provincial decisions were reviewed by the Privy Council in London, a court of last resort independent of Canadian national or provincial politics. K.M. Lysyk, *Reshaping Canadian Federalism*, 13 U. BRIT. COLUM. L. REV. 1 (1979). After 1949, when Privy Council review ended and the Canadian Supreme Court became the court of last resort, effective review of parliamentary statutes effectively ended. P.W. Hogg, *Is the Supreme Court of Canada Biased in Constitutional Cases?*, 57 CANADIAN B. REV. 721, 727, 729 (1979). The termination of independent judicial review, in the context of no separation of powers, has contributed to separatist movements (which would be important in any event because of ethnic and linguistic divisions in Canada).

Framers' understanding about why federalism is a useful arrangement and how its advantages are to be preserved against cheating. The federalists sold the Constitution as a liberty-protecting social contract, but they also sold it as an arrangement that would assure vigorous, energetic (their term), and efficient (our term) government.¹²⁴ The explication in Part II reveals how rational choice thinkers (which the Framers were) could believe this. The Framers also expected federalism to be effectuated through a combination of institutional structuring, practical politics, and judicial review—but they provided very little elaboration about how these different mechanisms were supposed to work in 1789 and, of course, no elaboration about how they are supposed to work today. Our theory provides a plausible, and we hope persuasive, account of how these different mechanisms might operate.

A further advantage of our model (for lawyers) is that it provides a normative theory that might sustain doctrinal innovation beyond the text and original intent of the Constitution. This is a path the Court chose long ago. Once the choice of an alternate path has been made, it is better to follow a good rather than a bad path. In the legal realist tradition, our theory assumes that political function is more important than analytical form in constitutional cases and seeks functionally productive doctrines. In the legal process tradition, our theory suggests that a functional approach can nonetheless subserve rule of law values if it induces stable and productive institutional interactions. In that spirit, this part will revisit the constitutional quandaries raised in Part I, and apply the analysis of Part II to rationalize some apparent inconsistencies.

A. THE *PEREZ-BASS-LOPEZ* LINE OF CASES

We are strongly attracted to Justice Breyer's dissenting opinion in *Lopez*. As a matter of law, it is most faithful to the Court's twentieth century precedents (Justice Thomas' concurring opinion is most consistent with the nineteenth century precedents, however). As a matter of policy, it makes a detailed case for the proposition that schoolyard guns are a national crisis demanding national solutions. The dissent also shows that Congress was aware of and responding to such a national crisis when it passed the law. As a matter of political theory, Justice Breyer recognizes that the Court should play a secondary role

124. See DAVID F. EPSTEIN, *THE POLITICAL THEORY OF THE FEDERALIST* (1984) (discussing the political theory and rational choice assumptions in *THE FEDERALIST*).

in monitoring jurisdictional limits on Congress' authority and should defer to congressional judgments where they are reasonably grounded.

Complementing Justice Breyer's argument, our theory maintains that other mechanisms work better than judicial review to protect against congressional overreaching. Structural limits on congressional power (bicameralism and presentment) provide many veto points where local interests can be considered.¹²⁵ More important, local interests have compelling means of signaling their opposition if a proposal overreaches. Opposition by either national political party would doom most measures, and practical cooperation by local officials is necessary for their effective operation.¹²⁶ Finally, the Supreme Court can narrowly construe statutes that venture beyond the constitutional periphery, as it did in *Bass*.¹²⁷

On the other hand, a danger that our theory recognizes is that the Court's overall pre-*Lopez* record might have been too deferential to national political processes, allowing Congress and the states to believe that there are, effectively, no limits on congressional authority to regulate local matters. This is the belief that the Court's post-New Deal case law had engendered, fanned by academic commentary dismissing the Commerce Clause as entirely toothless. *Lopez*, in fact, illustrates that phenomenon. The federal law was enacted without the detailed factual findings such as those in *Perez*,¹²⁸ and without any reference in the prohibitory language to an interstate commerce nexus such as that in *Bass*. There is probably some relationship between the perception that there are no effective limits on Congress' power, and Congress behaving as though its power is unlimited.

Like Congress, the states have inferred from prior cases that there are no limits on congressional jurisdiction. It is unclear precisely what effect this has on the states, but it may threaten their willingness

125. These veto points do not guarantee such arguments will prevail, of course. President Bush expressed federalism concerns about the Gun-Free School Zones Act of 1990 but still signed the law, probably because of the strong support it enjoyed in Congress.

126. For example, the FBI was not expected to enforce the schoolyard gun law. The defendant in *Lopez* was apprehended by school officials and then processed by local law enforcement officers. Only after local charges were filed was the defendant charged with a federal offense. *United States v. Lopez*, 115 S. Ct. 1624 (1995).

127. *United States v. Bass*, 404 U.S. 336 (1971).

128. *Perez v. United States*, 402 U.S. 146 (1971). Congress added some findings—after the “fact”—in the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320904, 108 Stat. 1796, 2125.

to adopt aggressive and innovative local regulations.¹²⁹ A perception of limitless congressional power could be expected to dampen the states' enthusiasm for the federal arrangement. The Canadian experience is a tentative parallel. Before 1949, the Privy Council in London enforced jurisdictional limitations on the Canadian Parliament at the behest of the provinces. After 1949, the Privy Council was gradually divested of this power, leaving the Canadian Supreme Court as the only judicial monitor. As a coordinate rather than superior branch, the Supreme Court rarely invalidated national legislation. Some commentators think this dearth of judicial monitoring has contributed to the increased provincial dissatisfaction with Canada's federal arrangement.¹³⁰

Lopez is the Court's reminder to the states, Congress, and the Court itself that the jurisdictional limits on congressional authority are too textually tangible and politically important to leave completely unattended by the judiciary. On the other hand, *Lopez* is no declaration that the Court is prepared to stop a wide range of congressional initiatives, as it did (to disastrous effect) in the 1930s. The decision's curious focus on the absence of statutory language and of congressional findings of an interstate commercial nexus can be read as a "remand" to Congress, which can probably enact a more carefully crafted statutory scheme. As a remand to the legislature, *Lopez* then becomes more like *Bass* and (in the Tenth Amendment context) *Gregory*.

In short, *Lopez* does not and should not augur a new period of aggressive judicial enforcement of jurisdictional limitations on congressional power. It is best read as a remand for Congress to attend to federalism values more explicitly. It was a constitutional wake-up call.

B. THE *GARCIA-GREGORY-NEW YORK* LINE OF CASES

Our theory provides a way of understanding *Garcia*¹³¹ and reconciling it with the Court's other precedents. *Garcia* has, justifiably, taken an academic beating for arguing that the formal representation of the states in the Senate and the Electoral College and their ostensible control over House redistricting assure that states qua states will

129. In *Lopez*, the state dismissed charges against the defendant after the federal criminal charges were filed. *Lopez*, 115 S. Ct. at 1626.

130. See *supra* note 123.

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

be adequately protected by the ordinary political process.¹³² Our theory considers *Garcia* defensible for different reasons. To begin with, ordinary burdens on the states, especially those borne equally by the states and by private concerns, are not as threatening to the federal arrangement as are congressional aggrandizement at the expense of traditional state regulations, burdens that discriminate among states or regions, and national commandeering of state resources to carry out national programs. To the extent such burdens do undermine the federal arrangement, the states seem well equipped to avoid "excessive" burdens, not because states can threaten Congress or the president through the powers ascribed to them in *Garcia*, but instead because the states are a well-organized lobbying group, with unusually good clout because of their importance in national political parties and (often) in administration as well. For similar reasons, our theory supports the Court's decision in *Union Gas* to allow congressional abrogation of the states' Eleventh Amendment immunity.

The attacks on *Garcia* as the "second death of federalism" seem overblown, especially in light of *New York*. Some commentators have assumed that *New York* narrows or implicitly overrules *Garcia*,¹³³ and a dedicated legal realist might speculate that *Union Gas* and *South Carolina* are also at risk of being overruled or somehow narrowed.¹³⁴ To the contrary, *New York* is not inconsistent with these decisions. Ironically, *New York* is hardest to explain along the republican lines left open in *Garcia* and *South Carolina*, where the Court said that judicial review might be appropriate if the states' interests were not in

132. See A.E. Dick Howard, *Garcia: Of Federalism and Constitutional Values*, 16 PUBLIUS 17 (1986); John C. Pittenger, *Garcia and the Political Safeguards of Federalism: Is There a Better Solution to the Conundrum of the Tenth Amendment?*, 22 PUBLIUS 1, 2-10 (1992); Van Alstyne, *supra* note 41. Even defenders of *Garcia* dissent from the Court's political analysis. See Martha A. Field, *Garcia v. San Antonio Metropolitan Transit Authority: The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84, 110 (1985).

133. E.g., Candice Hoke, *Constitutional Impediments to National Health Reform: Tenth Amendment and Spending Clause Hurdles*, 21 HASTINGS CONST. L.Q. 489 (1994); Martin H. Redish, *Doing It With Mirrors: New York v. United States and Constitutional Limitations on Federal Power to Require State Legislation*, 21 HASTINGS CONST. L.Q. 593 (1994).

134. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989); *South Carolina v. Baker*, 485 U.S. 505 (1988). Four of the five Justices in the *Union Gas* majority have left the Court; two (Brennan and Marshall) have been replaced with more conservative Justices (Souter and Thomas). All of the *Union Gas* dissenters are still on the Court, and all joined Justice O'Connor's opinion in *New York* and Chief Justice Rehnquist's opinion in *Lopez*.

Although *South Carolina* was a more lopsided decision (only Justice O'Connor dissented), Chief Justice Rehnquist and Justice Scalia expressed disagreement with parts of Justice Brennan's opinion. Four of the six Justices who joined the Brennan opinion (including Brennan) have left the Court.

fact represented in the national political process. This process-based loophole was not available to the Court in *New York*, for the radioactive waste law's take-title provisions were part of an elaborate bargaining process in which the states fully participated and in which New York's representatives were most active.¹³⁵

The best way to reconcile *New York* with *Garcia* is to focus on the different degrees of threat that simple burdens and commandeering pose to the federal arrangement. Commandeering poses a threat to federalism for one reason state burdens do: States lose decisionmaking flexibility and may have fewer resources to devote to their basic police and developmental policies. Commandeering poses additional threats not posed by simple burdens, however: It blurs lines of political accountability and enables the national government to follow inefficient policies for which it does not pay.¹³⁶ Perhaps most important, commandeering represents a disrespect for state autonomy that might be more likely to undermine the states' overall enthusiasm for the federal arrangement.

Under our theory, *Gregory*¹³⁷ can be viewed as reconciling the judicial deference found in *Garcia-South Carolina-Union Gas* with whatever threats to federalism are posed by congressional burdens on

135. This point is emphasized in Justice White's *New York* dissent, *New York v. United States*, 505 U.S. 144, 194-99 (1992) (White, J., concurring in part and dissenting in part), and conceded in Justice O'Connor's majority opinion. *Id.* at 180-81 (opinion of the Court). *New York* seems to have benefitted from a bait-and-switch tactic, by which it obtained some benefits from the statute, at the price of the take-title provisions which it was able to nullify.

Justice O'Connor justified the bait-and-switch by arguing that federalism is of value not because it protects the states but because it provides a double security for personal liberty. *Id.* at 181-82. Her enthusiasm for the libertarian theory of federalism here is in contrast to her lukewarm statement of it in *Gregory*, and is impossible to reconcile with her and the Court's curtailment of federal habeas corpus review in the name of federalism. Ironically, Justice O'Connor supported the libertarian theory of federalism with a reference and quote from Justice Blackmun's dissent in *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting). *New York*, 505 U.S. at 181. Justice Blackmun's dissent was an impassioned libertarian objection to an O'Connor opinion that, in the name of federalism, refused to allow an apparently innocent man to challenge his death sentence in federal court, on the ground that his lawyers had missed an obscure (and unpublished) state court filing deadline. Mr. Coleman was subsequently executed.

136. See generally *FERC v. Mississippi*, 456 U.S. 742, 783-88 (1982) (O'Connor, J., concurring in part and dissenting in part) (holding that the challenged provisions were within Congress' power under the Commerce Clause); D. Bruce La Pierre, *Political Accountability in the National Political Process—The Alternative to Judicial Review of Federalism Issues*, 80 Nw. U. L. REV. 577, 636-39, 657 (1986) (providing a more extensive analysis of the particularly acute problems posed by commandeering).

137. *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

the states qua states. If these threats are not great dangers to the federal arrangement, and structural and practical mechanisms protect against their being realized very often, these particular threats need not be policed by constitutional judicial review. Because of the vulnerability of the Court to national political pressures, any such review would predictably have little bite. Nonetheless, both procedural and substantive federalism values would be served by some judicial role. These various concerns can all be satisfied by the interpretive regime of super-strong clear statement rules the Court has created in *Gregory*, *Atascadero*, and other cases: Congress can burden the states with rules and liabilities, but only if those burdens are explicitly laid out on the face of the statute.¹³⁸ Burdens such as these will not be inferred from general language or broad statutory purposes (*Atascadero*), and those burdens that are created on the face of these statutes will not be liberally applied (*Gregory*).

By protecting against state burdens by means of super-strong clear statement rules rather than constitutional invalidation, the Court makes it harder or more expensive for Congress to enact legislation burdening the states directly. This would itself provide some protection for the states, since ambiguous statutes will be interpreted in their favor (*Gregory*). A clear statement approach rather than a constitutional approach to state burdens is also one with fewer political risks for the Court, because Congress can assert its preferences by overriding the Court with the requisite clear statement (as it did in response to *Atascadero*). Even when Congress does override the Court, the federalist arrangement might be somewhat strengthened, because the values of federalism might become a specific focus of congressional attention. As Justice O'Connor said in *Gregory*, "inasmuch 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."¹³⁹

C. THE *PHILADELPHIA-KASSEL-CARBONE* LINE OF CASES

Our theory provides a normative justification for at least some judicial monitoring of state protectionism (*City of Philadelphia*) and

138. *Gregory*, 501 U.S. 452; *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985).

139. *Gregory*, 501 U.S. at 464; see LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-25, at 480 (2d ed. 1988) (quoted in *Gregory*).

externalities (*Kassel*).¹⁴⁰ Thus, we endorse the activism entailed in the Court's dormant commerce clause jurisprudence. Correspondingly, we reject the suggestion of several commentators that the Court abandon its dormant commerce clause jurisprudence and focus instead on the Privileges and Immunities Clause.¹⁴¹ That provision has the advantage of being in the Constitution, but is too narrow a protection against state cheating, as it has been interpreted.¹⁴² The Privileges and Immunities Clause has been construed to protect only against state rules affecting fundamental rights (such as the right to practice a profession) and distinguishing between citizens and noncitizens of states. Without major rethinking, privileges and immunities jurisprudence would not be up to the task of displacing the dormant commerce clause as the doctrinal basis for the Court's regulation of state protectionism and externalities.

Our theory does, however, pose the following challenge to the Court's activist regulation of state protectionism and externalities, whatever the doctrinal basis: Should such monitoring be left to the national political process (Congress), and the role of the Court limited to a perhaps more expansive preemption analysis? In other words, should the Supremacy Clause (another explicit provision in the Constitution) be the primary basis for monitoring all sorts of state cheating—from shirking, which is now regulated mainly under the Supremacy Clause, to externalities and protectionism, which are now regulated primarily under the dormant commerce clause? Congress can correct state regulations that impose significant externalities on other states, such as the truck-length regulation in *Kassel*. Having lost in the Iowa political process (because the governor vetoed a truck-length bill), trucking interests could have turned to Congress rather than the Court for relief. Congress has strong incentives to be responsive to petitions supported by such a powerful group, and it is doubtful that Iowa could have blocked efforts to resolve the truck-length problem through national legislation. It is telling that, even after the Court invalidated the Iowa limitation in *Kassel*, Congress enacted a series of statutes that dealt with the problem.¹⁴³ Not only could Congress deal

140. *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981).

141. See sources in note 63 *supra*.

142. See *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988); *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985); *United Building & Constr. Trades Council v. City of Camden*, 465 U.S. 208 (1984).

143. The Surface Transportation Act of 1982 eliminated state restrictions on double-axle trucks on interstate highways. 49 U.S.C. § 2301, *repealed by* Pub. L. No. 103-272, 108 Stat. 1379

with this problem more effectively than could the Court, but the existence of activist judicial review funnels these political disputes into the federal courts and possibly discourages Congress from taking greater responsibility for monitoring state externalities especially.

On the other hand, the structural mechanisms that are supposed to protect state and local regulation against congressional interference generally might also protect protectionist states against congressional reprimand. Because New Jersey was just as well represented in the congressional process as the city of Philadelphia, for example, Congress was not likely to offer an effective remedy against the former's protectionist legislation. Contrast *Kassel*, where national trucking interests and a variety of states were arrayed against Iowa's interests. *Kassel* was also a case where the effects on interstate commerce were substantial. Congressional monitoring would not be as reliable where a single local policy has modest effects, as in *Carbone*.¹⁴⁴ This is the sort of regulation that would not trigger much congressional attention but is well suited for case-by-case adjudication.

Our theory is critical of the views of some Justices that the dormant commerce clause should be limited to cases of open and formal "discrimination" against interstate commerce. If the dormant commerce clause were so limited, it would cease to be an effective monitor against interstate externalities. Conversely, our theory is equally critical of the view that the Court should strike down any and every instance of interstate discrimination. For example, we are concerned that *Carbone* (and perhaps *City of Philadelphia*) presents *Gregory* concerns: Is the United States (here the Court rather than Congress) being sufficiently sensitive to local policies that are not protectionist? Justice Kennedy's opinion in *Carbone* set forth a hard test for the municipality to pass: "Discrimination against interstate commerce in favor of local business or investment is per se invalid, save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest" ¹⁴⁵ Justice Kennedy required the town to make "the clearest showing that the unobstructed flow of interstate commerce itself is unable to solve the local problem." ¹⁴⁶ Stated this way, is it any

(1994). Before that part of the statute could take effect, Congress in 1984 authorized the Secretary of Transportation to prohibit double-axle trucks from portions of the interstate highway system on the basis of traffic safety and at the petition of state governors.

144. *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677 (1994).

145. *Id.* at 1683.

146. *Id.*

surprise that Clarkstown lost the case? Our theory of federalism suggests that the Court should not fetishize the free national market and should approach the cases with a more lenient eye toward state and local police and developmental policies.¹⁴⁷

CONCLUSION

The theories we have examined in this paper—libertarian theory, republican theory, and positive political theory—are *procedural theories* of federalism. That is, they depend upon the premise that the structure and procedures of government can add to or detract from the polity's well-being. It has been suggested to us by several commentators that a robust theory of federalism must be substantive as well as procedural. According to this view, *Lopez* should be criticized for insensitivity to the national crisis of guns in the schoolyard; *New York* for interfering with a good scheme for disposing of dangerous radioactive waste; and *Carbone* for discouraging local efforts to deal creatively with waste disposal. Overall, the Court's recent decisions have a decidedly libertarian slant reminiscent of the *Lochner*-era bias that was repudiated by the New Deal.¹⁴⁸

Although this Article does not set forth a substantive theory, it invites such theories. Thus, *Carbone*, a decision we criticize on procedural grounds, might and should also be criticized on substantive environmental grounds. The two criticisms can be complements: The town of Clarkstown ought to have the flexibility to experiment with different forms of environmental regulation, and the form it has chosen is appropriate. Moreover, our analysis suggests the following dilemma for any theory of federalism. An advantage of federalism is that most regulation and government service are provided at the local level, but for race-to-the-bottom issues, the national level is the best place for regulation. What we do not address is, What is the "bottom"? Environmental issues often pose race-to-the-bottom problems, often defining the "bottom" as very little protection for the environment. Also, national regulation is not a desirable solution to environmental race-to-the-bottom issues if such regulation distributes power and resources in normatively undesirable ways. National environmental regulation might suffer from this flaw, as might local regulation (recall

147. This teaching would not necessarily require a different result in *Carbone*, though we are persuaded by Justice Souter's excellent dissent. *Id.* at 1692-1702. Justice O'Connor's opinion concurring in the judgment is consistent with our recommendation as well. *Id.* at 1687-92.

148. See *United States v. Lopez*, 115 S. Ct. 1624, 1652-55 (1995) (Souter, J., dissenting).

City of Philadelphia v. New Jersey).¹⁴⁹ Conversely, local regulation of traditional local functions might not be desirable if localities are politically ossified.

Ought the bow to substance overwhelm any procedural theory, including ours? Descriptively, it seems to us that the overall jurisdictional contours of federalism are unaffected by substantive judgments, which at best operate at the margins. And even at the margins, we are not persuaded that substance overwhelms process. The pivotal Justices have repeatedly submerged their immediate substantive preferences to serve longer-term procedural values. This seems particularly true of Justices Kennedy and O'Connor (no fans of guns) in *Lopez*, Justice Blackmun (who changed his mind) in *Garcia*, and environmentally friendly Justices Stevens and Ginsburg in *Carbone*. It strikes us as unlikely that the Justices are more tolerant of guns in the schoolyard (*Lopez*) than they are of loan-sharking (*Perez*), or that they view radioactive waste (*New York*) as less pressing than the wages and hours of government employees (*Garcia*).

Prescriptively, a substance-driven theory of federalism strikes us as one that too quickly gives up on rule of law values and undermines the potential advantages of federalism. If the rules of constitutional jurisdiction are supposed to depend primarily on the Court's judgment about often controversial substantive issues, they will be much harder to predict in advance, and impossible to figure over the medium or long term. The commitment problem we describe would be exacerbated rather than ameliorated by the Court, and exploitive cheating could be expected to increase. If anything, we should recommend the Court follow an "anti-substance" strategy: To improve its own credibility, the Court should frequently note its disdain for statutory schemes it is validating, and should occasionally strike down a good scheme if it contravenes a constitutional boundary the Court is charged with maintaining. It is in this manner that the Court is best able to preserve the long-term health of the federal union.

149. 437 U.S. 617 (1978).

