William & Mary Bill of Rights Journal

Volume 19 | Issue 3 Article 2

Federal Law in State Court: Judicial Federalism Through a Relational Lens

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Repository Citation

Charlton C. Copeland, *Federal Law in State Court: Judicial Federalism Through a Relational Lens*, 19 Wm. & Mary Bill Rts. J. 511 (2011), http://scholarship.law.wm.edu/wmborj/vol19/iss3/2

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FEDERAL LAW IN STATE COURT: JUDICIAL FEDERALISM THROUGH A RELATIONAL LENS

Charlton C. Copeland*

ABSTRACT

Enforcing federalism is most commonly thought to involve the search for a constitutional delegation of substantive power. Although in modern times the substantive power might be overlapping or shared authority, federalism enforcement proceeds from a determination about the site of substantive power. This conception of federalism enforcement preserves the Constitution's commitment to fractionated authority by determining whether power is legitimately possessed. Thus we understand significant federalism disputes in our age as framed by whether Congress has the authority to enact comprehensive health care reform legislation, or whether Congress has exceeded its authority in reenacting the Voting Rights Act's preclearance requirements. Federalism enforcement as allocation also underwrites much federal courts doctrine. We ask whether Congress has the authority to commandeer state courts, or whether states have the right to close their doors to federal claims.

This Article challenges allocation as the exclusive method of federalism enforcement. By focusing on the issue of state court duties to federal claims, this Article

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* Associate Professor, University of Miami School of Law. J.D., Yale Law School. I would like to thank my Deans, Dennis Lynch, Paul Verkuil, and Patricia White for their generous support of my research. I would also like to thank colleagues at the University of Miami and Tulane Law School for their willingness to read and comment on this Article, especially, Anthony Alfieri, Mario Barnes, Sergio Campos, Kenneth Casebeer, Michael Froomkin, Patrick Gudridge, Osamudia James, Donald Jones, Kunal Parker, Stephen Schnably and Keith Werhan. I would also like to thank participants in the 2009 Federal Courts Junior Faculty Workshop, especially Martin Redish and David Shapiro for feedback. I would like to thank participants in the John Mercer Langston Writing Workshop at Southern Methodist Law School, especially, Leonard Baynes, Henry Chambers, Mitchell Crusto, Darren Hutchinson, and Terry Smith, for their very helpful criticism of the piece. I would like to thank other very generous federal courts scholars for providing me with extraordinarily helpful comments, criticisms and suggestions; they include, Susan Bandes, John Collins, Scott Dodson, Even Tsen Lee, Caprice Roberts and Jamelle Sharpe. I owe a special thanks to both Bernadette Atuahene and Gera Peoples for talking through these issues with me during the writing of this paper. This article could not have been completed without the tremendous research assistance of both Patrick McCardle and Andrew Leedom, and the technical assistance of Rosa Lopez. I also extend my sincere thanks to my editor Joy Einstein for her excellent work. I dedicate this article to my parents.

asserts that federalism enforcement includes an alternative to allocation—relational federalism enforcement. Relational federalism enforcement is understood as the judicial mediation of the interaction of the national government and state governments that goes beyond merely invalidating particular practices as beyond the scope of power possessed by a particular institutional actor. Relational federalism enforcement is grounded in the recognition that the Constitution establishes an enduring relationship between states and the national government. Following from this, relational federalism enforcement relies on behavioral norms, imposed on both states and the national government, that are consistent with the enduring nature of their interaction under the constitutional structure of federalism. In contrast to several leading scholars who seek to justify state court duties to federal claims in relational terms, this Article argues that any duties imposed on state courts with respect to federal claims are better understood by looking through a relational lens. Further, this framework has far-reaching consequences for our understanding of other aspects of judicial federalism—abstention and Supreme Court appellate review of state court decisions—and legislative federalism—preemption, Dormant Commerce Clause and Spending Clause controversies.

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INTRODUCTION

Imagine a creditor bringing suit against an individual to recover on an unpaid debt in state court. The debt has been sold to a collection agency, which stands in for the original creditor.[1] After being served with the collection agency's complaint, the defendant files a counterclaim in state court under a federal statute, the Fair Debt Collection Practices Act (FDCPA).[2] The defendant alleges that the collection agency has violated the FDCPA through a series of allegedly aggressive and illegal acts, which the defendant contends were intended to threaten, intimidate and harass her into paying on past debts.[3] Must the state court resolve the counter-claimant's Fair Debt Collection claim? What grounds the state court's obligation? If the state court is obligated to entertain the action, can the court dismiss the Fair Debt Collection claim if the counter-claimant fails to allege facts in her complaint that meet the requirements of the state's pleading rules?[4] What are state courts' obligations to federal claims like those brought under the FDCPA, and what is the scope of the state's role to exercise control over state court jurisdiction and procedural rules, given the significant impact this has on the state court's capacity to vindicate federal rights claims?[5]

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[1] *See* Andrew Martin, *Automated Debt-Collection Lawsuits Engulf Courts*, N.Y. TIMES, July 13, 2010, at B1 (describing the growth in lawsuits brought by collection agencies and their impact on state tribunals).

[2] 15 U.S.C. § 1692 (2006).

[3] A practice prohibited by FDCPA. *Id.* § 1692(d).

[4] *See* Cent. Vt. Ry. Co. v. White, 238 U.S. 507, 513, 515–16 (1915) (upholding state pleading requirement in federal law claim).

[5] State court capacity to vindicate federal rights, commonly understood under the broad heading "parity," is an enduring aspect of American judicial federalism. State court capacity to vindicate federal rights was assumed by many of the Framers and was the basis of the their acceptance of not imposing a mandate on Congress to establish federal courts. For a discussion of the significance of parity in American judicial federalism, see *infra* note 475.

These issues arise out of the structure of American judicial federalism which represents a commitment to plural, yet interconnected, systems of adjudication.[6] The fact that provisions of the Constitution are aimed at state court judges strongly suggests that the Constitution assumes the existence of state courts as institutions.[7] Federal courts doctrine enshrines the institutional distinctiveness of state judicial institutions in its respect for state courts as the final expositors of the meaning of state law.[8] Nevertheless, American judicial federalism's commitment to the interconnections between these distinct systems is exemplified by the Constitution's command that state judges apply federal law in place of conflicting state law, and, to the extent of Article III jurisdiction, to claims involving disputes between parties of different states, regardless of the subject matter.[9] Moreover, federal courts doctrine further recognizes the interconnection between state and federal courts by authorizing Supreme Court review of state court decisions.[10] This recognition of distinctiveness, separation, interconnection, and union are central elements of the answers that the Court has provided to the questions posed above.

The Court has avoided imposing absolute obligations on state courts to either entertain federal claims or to forego application of their procedural rules when adjudicating federal claims. The Court's case law has usually made space for the possibility that state courts might legitimately decline to adjudicate federal claims, by releasing states with a "valid excuse" from the burden of entertaining federal claims.[11] This requirement has been recognized as imposing an obligation not to discriminate against federal claims.[12] Moreover, the Court's case law has avoided imposing a presumption that state procedural rules are presumptively displaced when they differ from federal rules.[13]

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[6] *See* Robert A. Schapiro, *Interjurisdictional Enforcement of Rights in a Post*-Erie *World*, 46 WM. & MARY L. REV. 1399, 1399–1402 (2005).

[7] *See, e.g.*, Vicki C. Jackson, Printz *and* Testa: *The Infrastructure of Federal Supremacy*, 32 IND. L. REV. 111, 112–13 (1998) (arguing that the Constitution requires that state courts exist).

[8] *See* Murdock v. Memphis, 87 U.S. (20 Wall.) 590 (1875); *infra* Part IV.A.3.

[9] U.S. CONST. art. III, § 2, cl. 1.

[10] *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

[11] *See, e.g.*, Herb v. Pitcairn, 324 U.S. 117, 120 (1945) (holding that state court *forum non conveniens* rule prohibiting exercise of jurisdiction over federal claim was a "valid excuse" exception to state court obligation to entertain federal law (citing Douglas v. N.Y., New Haven & Hartford R.R. Co., 279 U.S. 377, 387–88 (1929) (recognizing state court refusal to entertain federal claim where it had a valid excuse to refrain from exercising jurisdiction))).

[12] *See, e.g.*, Testa v. Katt, 330 U.S. 386, 389–94 (1947) (invalidating state procedural rule that was held to discriminate against federal law because the state court heard analogous non-federal claims); McKnett v. St. Louis & S.F. Ry. Co., 292 U.S. 230, 234 (1934) (same); *infra* Part IV.B.

[13] ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 3.5 (5th ed. 2007) (noting that state courts must follow federal procedure if Congress specifies procedure for a particular matter).

Here, the Court has allowed state procedural rules to stand, unless they "unnecessarily" burdened or frustrated a federal claim.[14]

Scholarly commentary has been divided in response to the Court's jurisprudence regarding state court obligations to federal law. Scholars have alternatively defended or criticized the Court's doctrine based on their agreement or disagreement with the imposition of a qualified obligation on state courts. Scholarly responses might be categorized in two broad groupings—those who reject the Court's doctrine as insufficiently supportive of the vindication of federal rights claims[15]—and those who defend the Court's articulation of a qualified state obligation.[16] The critics question the soundness of the Court's limitation of the state court obligation as either inconsistent with congressional authority under Article I or the Supremacy Clause.[17] They contend that there is a near-absolute obligation owed to federal claims by state courts.[18] This school is most clearly represented by Professors Martin Redish and Louise Weinberg.

Defenders of the Court's state obligation case law have argued that it represents the Court's recognition of the legitimacy of state courts as distinct institutions.[19] This distinctiveness is exemplified, in part, by state courts' ability to assert control over their jurisdictional agendas. The defenders have argued that the Court's case law is consistent with both the text and original understanding of the Supremacy Clause. This position maintains that the Supremacy Clause speaks only to a state court's obligation to follow and apply federal law where there might be a conflict between state and federal law.[20] The limits on state court obligation, they argue, are justified in light of the Supremacy Clause's silence regarding a state court's obligation to *entertain* federal law.[21] This position is best exemplified by Professor Michael Collins.

Beyond the scholarly response, the most recent judicial response to this question, in *Haywood v. Drown*,[22] came in a sharply divided decision in favor of displacing the state's procedural rule. There, the Court addressed the issue of whether New York's jurisdictional rule requiring damages actions against prison officials to be brought against the state should be displaced.[23] The majority held that the rule violated the

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[14] *See* Felder v. Casey, 487 U.S. 131, 150–51 (1988) (holding that state court rule requiring claims against government entities or officials be filed within 120 days of their occurrence should be displaced because they frustrated the vindication of rights under § 1983 of the United States Code).

[15] Martin H. Redish & Steven G. Sklaver, *Federal Power to Commandeer State Courts: Implications for the Theory of Judicial Federalism*, 32 IND. L. REV. 71 (1998).

[16] Louise Weinberg, *The Federal-State Conflict of Laws: "Actual" Conflicts*, 70 TEX. L. REV. 1743 (1992).

[17] *See infra* Part I.B.1.

[18] *Id.*

[19] *See* Jackson, *supra* note 7, at 112; Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 42.

[20] *See* Collins, *supra* note 19, at 40.

[21] *Id.* at 42.

[22] 129 S. Ct. 2108 (2009).

[23] *See* N.Y. CORRECT. LAW § 24 (Consol. 2005).

dictates of the Supremacy Clause.[24] In a sharply worded dissent, the minority of four rejected the notion that a state's procedural rule should be displaced because the rule did not discriminate against federal claims.[25]

What appears to unite both the scholarly critics and defenders of the Court's qualified obligations, and the majority and minority on the Court in *Haywood*, is that each argument attempts to resolve the issue of state court obligations to federal claims by referencing some set of authority that either states or the national government possesses.[26] This identification of a certain set of power, often guided by the reliance upon some specific constitutional provision, provides the ground upon which an allocation can be made with respect to whether a set of powers is possessed by the national government or the states or state courts. As I have previously argued, this is not unusual in our federalism discourse, and marks areas beyond judicial federalism.[27] This Article's central contention is that the scholarly and judicial focus on allocation as a method for enforcing federalism constraints is at best incomplete, and leaves much of the Court's reasoning out of the picture.

This Article proceeds in five parts. Part I will provide a brief overview of the Court's state obligation case law and the scholarly responses to the Court's recognition of a qualified state obligation to the vindication of federal claims.

Part II will offer an alternative conception of federalism and its enforcement—relational federalism based upon an understanding of federalism as an enduring relationship—that differs from the dominant conception of federalism as a structure of power division and allocation.[28] As against the conception of federalism as solely a constitutional structure for the allocation of power among governmental spheres, a relational conception of federalism asserts that the fact of relationship generates norms of behavior capable of constraining the national and state actors, even where there is a clear possession of substantive authority by one or both spheres of government.[29]

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[24] *Haywood*, 129 S. Ct. at 2118. The majority argued that the New York jurisdictional rule had the effect of immunizing state corrections officers from § 1983 liability. *Id.* The Court argued that one of the explicit purposes of § 1983 was to subject perpetrators of constitutional violations to liability for their wrongs. New York's decision to shield these private actors from liability was in conflict with § 1983.

[25] *Haywood*, 129 S. Ct. at 2135 (Thomas, J. dissenting).

[26] *Id.* at 2115 (majority opinion) (holding that states do not possess the authority to divest their courts of jurisdiction to hear federal claims); *id.* at 2118–23 (Thomas, J., dissenting) (discussing the Founding and Constitutional conception of State and Federal Power).

[27] *See* Charlton C. Copeland, Ex parte Young*: Sovereignty, Immunity, and the Constitutional Structure of American Federalism*, 40 U. TOL. L. REV. 843 (2009).

[28] *See, e.g.*, ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS 6–7 (2009) (discussing the extent to which federalism is thought of as a structure for dividing power between the national government and the states); *see also* Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 796 (1996).

[29] This Article's use of the term "relational federalism" should be distinguished from its use in discussions of relationship as an interpretive methodology. As an interpretive method, reasoning from the Constitution's structure and relationships is understood to be an alternative

This Part will articulate a behavioral norm generated from conceiving of federalism as enduring relationship-interest inclusion.

Part III will address criticisms of relational federalism enforcement. It will defend such enforcement as a form of judicial implementation of the Constitution's commitment to federalism.

Part IV will situate the discussion in the context of other doctrines of judicial federalism. This Part is premised on the contention that areas of judicial federalism—abstention and independent and adequate state ground doctrines—exemplify judicial attempts to mediate the relationship between state and federal courts by constraining federal or state power out of recognition of the interests of the other adjudicatory system.[30]

Finally, Part V attempts to recast the Court's state obligation case law in the light of a relational conception of federalism enforcement. This will serve as the ground for this Article's critique of the Court's recent decision in *Haywood* as a failure by both the majority and the dissent to take the norm of interest inclusion seriously.

I. THE SEARCH FOR POWER: STATE COURT DUTY TO FEDERAL CLAIMS

In the Court's decision in *Printz v. United States*,[31] the Court invalidated portions of the Brady Handgun Violence Prevention Act as unconstitutional commandeering

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approach to a Textualist methodology. The structural or relational methodology takes the text of the Constitution as the starting point but moves beyond the specific clauses of the constitutional text in an attempt to generate meaning from the structures and relationships in the text with the purpose of establishing the text's more general meaning. Through such a methodology, the Constitution might yield more answers to conflicts than would be presumed if constitutional meaning were limited to specific clauses. However, the relational interpretive method might be placed in the service of allocation decisionmaking—finding sites of delegation and power from a broader set of sources than does Textualism. Structural and relational methodology has been affirmed in many quarters, but its leading proponent remains Charles L. Black. *See* CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 7 (1969); *see also* Vicki C. Jackson, *Comparative Constitutional Federalism and Transnational Judicial Discourse*, 2 INT'L J. CONST. L. 91, 114 (2004). For a critique of reasoning from structure and relationship, see John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003 (2009). The relational account of federalism is more normative than a relational interpretive methodology in that it reads a specific norm in the federalism relationship.

[30] Inclusion in this Part should not be read to suggest substantive agreement with the conclusion the Court has reached. Yet, to the extent that this Article argues in favor of interest inclusion from a normative perspective, the methodology that the Court embraces is one with which this argument is sympathetic. However, I caution that the discussion of the issues of abstention and appellate review in this Part will be primarily descriptive in that the Part largely accepts the doctrinal account in an attempt to highlight certain features in it in an effort to allow for the possibility of an alternative way of understanding and critiquing the Court's work product.

[31] 521 U.S. 898 (1997).

of state executive officials for the implementation of federal law.[32] The Court was forced to explain the illegitimacy of "executive commandeering" in light of its past approval of the commandeering of state courts to entertain disputes under federal law.[33] The majority attempted to distinguish judicial versus executive (or legislative) commandeering by referencing the Constitution's Supremacy Clause.[34] The Court declared that "th[e] assumption [that state courts could be obligated to entertain federal claims] was perhaps implicit in one of the provisions of the Constitution [—Article III],[35] and was explicit in another [—the Supremacy Clause]."[36] Further, the Court stated "that state courts cannot refuse to apply federal law—a conclusion mandated by the terms of the Supremacy Clause . . . ."[37] Whether state court duties are justified by explicit or implicit constitutional provisions, they are justified by the Court's identification of constitutionally delegated power or the prohibition of the assertion of power. This search for delineated lines of authority has shaped the modern doctrinal and scholarly commentary surrounding state court duties to federal claims.

Modern case law and commentary on state court duties to federal claims revolves largely around the meaning of the Supremacy Clause[38] or the Inferior Tribunals Clause of Article I.[39] This Part will offer a brief overview of the use of the Supremacy Clause in both case law and scholarly commentary in order to provide foundation for the contention that each has approached the issue of state court duties as involving a search for the delegation of, or prohibition on, the exercise of substantive authority. Here, the substantive authority primarily involves either national authority to commandeer state courts to entertain federal claims or a state's authority to maintain control over its jurisdictional boundaries. Regardless of the positions ultimately taken by the Court

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[32] *Id.* at 902.

[33] *Id.* at 935.

[34] U.S. CONST. art. VI, cl. 2.

[35] The Court's Article III justification rests on a reading of the Madisonian Compromise. The Madisonian Compromise overcame the stalemate between those who wanted Article III to require the establishment of lower federal courts and those who sought to limit federal courts to the creation of the Supreme Court. *Printz*, 521 U.S. at 907. The Compromise left the establishment of lower federal courts to congressional choice. *Id.* As a result of the permissive, rather than mandatory, establishment of lower federal courts, some have argued that state courts would have been required to entertain federal claims if Congress had chosen not to establish lower federal courts. For a defense of this understanding of state court obligation, see Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957 (1993). *But see* Collins, *supra* note 19.

[36] *Printz*, 521 U.S. at 907.

[37] *Id.* at 928 (applying *Testa v. Katt*, 330 U.S. 386 (1947), to *New York v. United States*, 504 U.S. 114 (1992)).

[38] U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

[39] U.S. CONST. art. I, § 8, cl. 9 ("[The Congress shall have Power] To constitute Tribunals inferior to the Supreme Court[.]").

and the scholarly community each side has been primarily committed to grounding state court duties in the clauses of the Constitution that provide support for the allocation decision that is sought.[40]

A. The Doctrine: The Exercise of Power

The development of a doctrinal framework for determining when state courts' ordinary jurisdictional control must yield in the face of federal claims raises important questions in American judicial federalism. To suggest that state distinctiveness is not compromised whenever a state must reallocate its own judicial resources to entertain federal claims fails to recognize how central the issue of state court integrity has been to those who challenged the growth of the national government and its judiciary.[41] However, the vindication of federal claims—and the role envisioned by state courts in this process—has been an integral theme in American constitutional law and federal courts jurisprudence.[42] The contestation of these values has shaped American federal courts doctrine.[43] Indeed, the contestation of these values has shaped the Court's doctrinal framework for determining when a state court has shirked its duty to federal law.

The citation with which the Court supports its conclusion that the Constitution authorizes commandeering state courts is its 1947 decision, *Testa v. Katt*.[44] *Testa* clearly stands as the modern articulation of the state court's obligation to entertain federal claims.[45] It also provides rhetorical support for understanding state court duties as based in substantive allocation of power to the national government, or the denial of the exercise of power to the states.[46] As such, it is almost as important as the Supremacy Clause in understanding the modern conception of the basis of state court obligation.

In *Testa*, the Court rejected Rhode Island's refusal to hear a claim brought under the Emergency Price Control Act[47] on the ground that the statute's allowance for treble

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[40] The interpretation offered in this Part will be contrasted against a relational reading of the Court's case law in this area.

[41] Anti-Federalist opponents of the Constitution argued that the expansive power of the national government would prove ruinous for states and state courts. For an Anti-Federalist discussion of this debate with regard to state courts, see *Essays of Brutus, No. 1*, N.Y. J., Oct. 18, 1787, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 363–72 (Herbert J. Storing & Murray Dry eds., 1981).

[42] *See* Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141 (1988) (presenting the twin pulls of nationalist and federalist models as the primary organizing framework for understanding federal courts doctrine).

[43] *See id.*; *see also* DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE (1995) (arguing that federalism is persistent "dialogue" between proponents of national authority and state authority).

[44] 330 U.S. 386 (1947).

[45] *Id.* at 394.

[46] *Id.* at 389. I have emphasized a relational reading of this case in previous writing. Though I adhere to this reading, *Testa* exhibits dimensions of both allocation and relational federalism. *See* Copeland, *supra* note 27, at 858–59 & n.75.

[47] Pub. L. No. 77-421, 56 Stat. 23 (1942).

damages was inconsistent with state policy prohibiting state courts from enforcing the penal laws of foreign governments.[48] The Court overturned the state court's ruling, declaring that its treatment of federal law "disregards the purpose and effect of [the Supremacy Clause]. . . ."[49] The Court's reliance on the Supremacy Clause—more explicit than in earlier law involving state court obligation to federal claims—positions the Supremacy Clause as a means to limit the exercise of substantive state authority. The Court framed the issue before it as one involving "the right of a state to deny enforcement to claims growing out of a valid federal law."[50] Understood in this way, the Court's decision became a decision about determining whether the state possesses a right (understood as power and authority) to reject federal claims. Determining the existence of this power (or its absence) essentially resolves the dispute.[51]

B. The Critique

1. Absolute Obligations to Federal Claims and the Search for Power

Unlike most scholarly commentators who have addressed the question of state court duty to federal claims as a federalism problem, Professor Martin Redish and his co-author Steven Sklaver have rejected the Supremacy Clause as a basis for commandeering state courts.[52] Rather they have turned their attention to Congress's power under Article I.[53] This exemplifies the extent to which Redish and Sklaver frame the inquiry about state obligation as one involving a determination of the delegation of power to the national government. Redish and Sklaver argue that state courts owe an absolute duty to entertain federal claims, and that there ought to be a presumption in favor of the displacement of state procedural rules where federal claims are adjudicated in state courts.[54] Framing the inquiry as one focused on determining the textual

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[48] *See* Testa v. Katt, 47 A.2d 312, 314 (R.I. 1946).

[49] *Testa*, 330 U.S. at 389.

[50] *Id.* at 394.

[51] There has been criticism of the Court's use of the Supremacy Clause to ground the state court obligation to entertain federal claims. Scholars have argued that the Supremacy Clause does not answer the question of the basis of Congress's authority to assign or to compel state courts to adjudicate federal claims. Professor Martin Redish, as will be discussed more fully below, has offered the Inferior Tribunals Clause of Article I as the constitutional basis for grounding the federal power to commandeer state courts.

[52] Redish & Sklaver, *supra* note 15, at 76; *see, e.g.*, Anthony J. Bellia, Jr., *Congressional Power and State Court Jurisdiction*, 94 GEO. L.J. 949, 1009–12 (2006).

[53] For discussions that assert that the Inferior Tribunals Clause empowers Congress to impose jurisdiction on state courts to entertain federal claims, see Redish & Sklaver, *supra* note 15, at 88–89 (asserting that "the enumerated congressional powers contained in Article I, § 8, read in conjunction with the Necessary and Proper Clause," are the foundation of Congress's authority to commandeer state courts); *see also* James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 Nw. U. L. REV. 191 (2007).

[54] Redish & Sklaver, *supra* note 15, at 105 & n.180.

foundation of the national assertion of power, Redish and Sklaver argue that national authority to impose obligations on state courts lies not with the Supremacy Clause, but rather in Article I's Necessary and Proper Clause.[55] Redish and Sklaver contend that the Clause empowers Congress to do all that is necessary and proper to achieve its substantive legislative ends—which easily include protecting the vindication of federal claims.[56] Having recognized the existence of this power as an affirmative constitutional delegation, Redish and Sklaver appear to reject any judicial attempt to undercut this power through doctrinal frameworks that allow states to reject their obligations to federal claims.[57]

Redish and Sklaver do not rest their argument against the current doctrinal framework with the assertion of Article I's affirmative grant of power. Their conclusion about the legitimacy of national commandeering power draws on more than simply the text of Article I, but extends to "historical and philosophical" factors that further support their thesis.[58] Redish and Sklaver argue that the vindication of federal law and federal supremacy are the most paramount value in judicial federalism.[59] From this perspective, state court authority and obligation to entertain federal claims is premised upon the Constitution's commitment to the preservation of the supremacy of federal law.[60] Where this preservation involves harnessing state judiciaries, Congress is empowered to obligate state courts to open their doors to disputes based on federal law.[61]

Understood on these grounds, the Redish and Sklaver thesis contends that state court authority to entertain federal claims does not evidence "respect for the status or abilities of state judiciaries,"[62] but rather confirms their subordination to the overriding "principle of federal dominance."[63] Further, this activation of state judiciaries for federal purposes is not premised upon their equality with their federal counterparts, but based directly on their inferiority to the requirements of the vindication of federal law.[64] According to Redish and Sklaver, the Constitution empowers the national government to treat state courts as available to serve federal interests, seemingly without qualification.[65]

What is important, for our purposes, about Redish and Sklaver's argument is not necessarily its conclusions, but their framework for analyzing this particular dispute,

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[55] *Id.* at 88–89.

[56] *Id.* at 89.

[57] *Id.* at 89–90 & nn.99–103 (examining the various opinions and assertions of Justices Thomas and Scalia in *Printz*).

[58] *Id.* at 73. For an extended discussion of Redish and Sklaver's view on the historical and philosophical foundations, see *id.* at 75–88.

[59] *Id.* at 92–93.

[60] *Id.* at 93.

[61] *Id.*

[62] *Id.* at 73.

[63] *Id.* at 95.

[64] *Id.*

[65] *Id.* at 93.

and its implications for other issues in judicial federalism. For Redish and Sklaver, the determination of whether a state court has shirked its duties to federal claims is an inquiry that seeks to determine the existence and scope of national power.[66] Once it is determined that power is possessed to commandeer state court institutions for the vindication of federal claims, the inquiry appears to be over. There are no further questions about other possible bases for constraining such exercises of authority. Perhaps this should not be surprising in light of Redish and Sklaver's commitment to the "federal dominance" principle as there seems to be no competing principle— certainly not state court distinctiveness—that rises to the level of similar constitutional concern.[67]

Though Redish and Sklaver are explicit in their search for legitimately possessed commandeering power in determining state court obligations to federal law, Professor Louise Weinberg's critique of the Court's doctrinal framework is less explicit regarding the designation of national authority. In Weinberg's critique of current doctrine, the Supremacy Clause seems to play the role of determining what actions are prohibited by state courts—no less an allocation determination than one involving an inquiry into what power is possessed by a level of government.[68] Weinberg's reading of the Supremacy Clause requires the displacement of state law whenever there is an "actual" conflict between state and federal law.[69] What is central to understanding Weinberg's critique of current doctrine is the expansiveness with which Weinberg reads conflicts between state and federal rules where federal claims are involved. For Weinberg, the Supremacy Clause imposes an obligation on state courts to entertain federal claims.[70] Although Weinberg does not articulate a principle of federal dominance, as do Redish and Sklaver, it seems clear that the framework places great weight on the vindication of federal claims.[71] Any state rule that "impede[s] enforcement of federal law" is, for Weinberg, inconsistent with the federal law.[72]

For Weinberg doctrinal attempts to carve out space for some state control over state court jurisdiction—through the valid excuse or anti-discrimination norms—are avenues for the consideration of state interests.[73] That such consideration of state interests is anathema to Weinberg is supported by her assertion that every consideration of state interests in determining the duties that state courts owe to federal law are a derogation of federal law.[74] "[W]hy [should there] be a doctrine of excuse from the obligation imposed by the Supremacy Clause?"[75] Weinberg writes. "A state can have

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[66] *Id.* at 99.
[67] *Id.* at 95.
[68] Weinberg, *supra* note 16, at 1753–54.
[69] *Id.*
[70] *Id.* at 1779.
[71] *Id.*
[72] *Id.* at 1775.
[73] *Id.* at 1781–82.
[74] *Id.* at 1783.
[75] *Id.* at 1775.

no interest—a state can have no *want* of interest—that makes a difference to its federal enforcement obligations."[76] Thus, doctrinal attempts to make space for state interest in jurisdictional authority through the allowance of valid excuse and non-discriminatory procedural rules are criticized as undercutting the obligation imposed by the Supremacy Clause.[77] Even judicial implementation of constitutional principles of "comity" and "federalism" are inadequate for adjusting the scope as they are seen by Weinberg as impermissible judicial amendments to the Supremacy Clause.[78]

2. Qualified Obligations as the Limits of Power

Even defenders of the Court's declaration of a qualified state court obligation have framed their justifications as based on the determination of a constitutional delegation of authority to the national government or a prohibition imposed on the states. Through a textualist reading of the Supremacy Clause, and what he argues was the original understanding of the Clause's limits, Professor Michael Collins justifies the doctrinal imposition of only a qualified obligation on state courts as the limit on national authority.[79] Collins argues that nineteenth century thinkers who addressed the question of state court obligation to federal law were clearly hesitant to impose duties on state courts that might undermine the recognition of state judicial autonomy or state authority over its jurisdictional boundaries.[80] Collins argues that this hesitance is justified (and justifiable) because of the Supremacy Clause's textual distinction between a state court's obligation to *apply* federal law when at issue in state courts and a state court's obligation to *entertain* federal claims outright.[81] Collins interprets the qualified imposition of state court duties—via a nondiscrimination norms—as consistent with a dual commands reading of the Supremacy Clause. Collins sees the expansion of the nondiscrimination norm to include the entertainment command which risks the practice of "accommodating the tradition of state court jurisdictional autonomy."[82]

What is significant in Collins's argument for our immediate purposes is the fact that the judicial hesitance in imposing absolute obligations on state courts is framed as a concern about either the limits on national power, or the desire to preserve state power. The search for the legitimate site of power draws Collins back to the Supremacy Clause and to the limitations on national commandeering power that he attempts to justify.[83] In short, Collins's justification of the doctrinal framework that

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[76] *Id.* at 1780 (emphasis in original).

[77] *Id.* at 1783–84.

[78] *Id.* at 1784; *see also* Louise Weinberg, *Against Comity*, 80 GEO L.J. 53 (1991).

[79] Collins, *supra* note 19, at 143–44.

[80] *Id.* at 103–04.

[81] *Id.* at 77–78. This might be understood as the "dual commands" reading of the Supremacy Clause. The application command was thought to be the only command necessary for the vindication of federal law.

[82] *Id.* at 45.

[83] *Id.* at 43–46.

allows state courts some measure of jurisdictional control is expressed in terms that define the decision as one involving a determination about the delegation or prohibition of the exercise of authority.[84] Any changes in the doctrine simply occur to maintain the quantum of power originally delegated to the states or to keep the national government from exercising power beyond its boundaries. This is evidenced in Collins's criticism of the Court's decision in *Testa*.[85] He argues that the decision threatened to eradicate the Supremacy Clause's distinction between a duty to apply federal law and a duty to entertain federal claims.[86] Further it is evidenced in Collins's criticism of the Court's attempt to distinguish legislative and judicial commandeering case law.[87] Collins seems to argue in favor of an almost absolute freedom of state courts to reject federal claims on the ground that the Supremacy Clause only authorizes the power to commandeer state judges where state judges are called to apply federal law in place of conflicting state law, and Article III's establishment of Supreme Court appellate jurisdiction over state court decisions.[88]

II. BEYOND POWER: FEDERALISM AS RELATIONSHIP

The search for power and prohibitions shapes the analysis of federalism issues in areas that extend beyond the determination of state duties to federal claims. This search defines a significant portion of American federalism enforcement. This Part challenges the monopoly that the allocational method has on federalism enforcement. It begins by offering an overview of American federalism and its enforcement,

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[84] *Id.* at 171–72.

[85] *Id.* at 45, 166–70.

[86] *Id.* at 166–70.

[87] *Id.* at 188–94.

[88] *Id.* at 40–42. Professor Vicki Jackson has defended a qualified state court obligation to federal claims that is not dependent upon locating a specific delegation of authority in the textual provisions of the Constitution. *See* Jackson, *supra* note 7. Rather, Jackson offers a defense based on a structural reading of the Constitution, particularly the structural role that state courts play in the constitutional framework. *Id.* at 119–22. Jackson argues that the Constitution requires that state courts exist as independent judicial institutions. *Id.* at 117. Reasoning from this requirement, Jackson argues that state court independence is embodied by some recognition of institutional autonomy. *Id.* at 120–22. Such autonomy is embodied in state judicial control over its jurisdictional boundaries. *Id.* Jackson argues that the constitutional requirement of independent state judiciaries would be undermined by either the imposition of absolute obligations on state courts to entertain federal disputes or a presumption that state procedural rules are preempted whenever federal claims are in dispute. *Id.* at 140. Although Jackson's interpretive methodology is distinct from those above, it is not clear that she defines the question differently than Redish, Weinberg or Collins—as a search for the delegation of substantive authority. Structural interpretations have often been employed in searches for power's allocation in American constitutional experience. Perhaps the most famous structural interpretation in American constitutional history is a federalism dispute in which the court searches for the appropriate site for power between the national and state governments. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

as well as the relational model's place in this framework. This Part highlights the Constitution's creation of institutions that establish the circumstances of repeated, long-term interactions between the national government and the states. It will demonstrate how American constitutional history and experience—exemplified in the constitutional thought of Abraham Lincoln—translate institutional interactions into an enduring relationship capable of providing normative shape to state and national interactions by generating behavioral norms to regulate the interactions that the allocation of power cannot.[89] Finally, it proposes a norm of "interest inclusion" as a means of enforcing federalism under the circumstances described herein.

A. Explaining Relational Federalism Enforcement

Why does the federal arrangement require enforcement at all? Does it serve a purpose that deserves protection in modern American life? Some have suggested that, at least within the modern American context, protections of federalism are a peculiar "neurosis" in American political and legal culture.[90] Others have suggested that the centrifugal forces of modern American government are so strong that American federalism, far from being obsolete, has been destroyed.[91] Whatever their differences, these positions suggest that federalism requires no protection, either because it is useless in modern America or because it has been rendered meaningless and beyond repair. This Article challenges both of these positions and contends that a justification remains for federalism that underwrites the efforts to protect it. This Article accepts federalism as a system of governance that gives a larger polity's geographical subunits the ability to articulate alternative substantive norms than those articulated by the national polity.[92] Federalism challenges the national government's unitary status

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[89] It is necessary to point out that the relational conception of federalism does not reject the role, perhaps even dominant role, that allocation plays in framing and shaping national-state interactions. The argument is not meant to suggest that even interactions or analyses that I frame as relational are exclusively so. It is meant to highlight the ways in which relational norms serve as an important explanatory dimension of the constraints that are imposed on the behavior of both state and national actors which are not best explained by reference to an allocational conception of federalism enforcement.

[90] *See* Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 908 (1994).

[91] *See* ROBERT F. NAGEL, THE IMPLOSION OF AMERICAN FEDERALISM 13 (2001).

[92] This conception of federalism is consistent with various conceptions of federalism as a structure that allow particular kinds of minorities, whether ethnic, religious, or political, to exercise a certain level of decisional autonomy over some issues in exchange for joining a central state. Although some conceptions of federalism are based on a "thick" conception of identity, such as race, language, or religion, federalism can also be justified on the basis of the comparatively "thinner" identity of "political loser." That is, federalism allows political losers at the national level to have access to a space to articulate alternative or competing norms to those adopted by the central government. To be clear, federalism's subunits are not allowed infinite space to articulate such norms, but federalism provides space from which losers at the national level might offer alternative norms that contest the norms of the central government.

as the decider in all things, and serves to open space for differentiation from, and contestation with, the "center" by those who have failed in their attempts to control the national government.[93] In short, this Article understands federalism as a constitutional structure for fractionating power, primarily for losers at the national level of government.[94]

The justification offered here for protections of federalism are different from other justifications for federalism enforcement. The idea proffered in this Article clearly borrows from some of the assumptions of the "states as laboratories" justification that underwrites most normative conceptions of federalism protection.[95] This justification

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As can be seen, my disagreement with Professors Rubin and Feeley centers on their justification of federalism as necessarily tied to political identities that are thicker than needed. *See* Rubin & Feeley, *supra* note 90, at 942 (connecting separate or divided political identities to ethnic, linguistic, religious, or cultural differences). Further, federalism can be justified by the realization that nations continue to be composed of a variety of competing conceptions of "the Good," which might be capable of accommodation under a federal structure of government. This conception of federalism is not premised upon being able to identify *ex ante* those who might benefit from some form of regional autonomy because all can conceivably see themselves as potential political losers at the national level. Under this conception, federalism is a structure that prevents contests at the national level from being a "fight for all the marbles," in which either side is incentivized to wage "total war" against a particular opponent because all is either won or lost at the national level. For an insightful discussion of the need for democratic regimes to take account of the sacrifice of those whose political objectives are not realized in democratic politics, and sacrifice's centrality to democracy, see DANIELLE S. ALLEN, TALKING TO STRANGERS: ANXIETIES OF CITIZENSHIP SINCE *BROWN V. BOARD OF EDUCATION* 25–49 (2004).

[93] *See* Seth F. Kreimer, *Federalism and Freedom*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 66 (2001). Kreimer's conception of the role that federalism plays in making political contestation possible comes close to the idea that I advance. Kreimer argues that the existence of subunits of the national government with the capacity for at least minimal articulation of "the existence of alternatives to the authority of the national government can legitimate political opposition to repression in ways that would be unattainable in the absence of a diffusion of political authority." *Id.* at 70. Further, he has argued that "the existence of alternative political visions," which may be more easily fostered in a federal structure, "makes it more difficult to demonize and extirpate political dissenters. . . . [This may enable] the platform for efforts to oust potentially repressive leaders by political means." *Id.* Although I accept much of what Kreimer says, I am uncertain that it is bolstered by the threat of an oppressive national regime. That is, even a non-repressive regime can benefit from the form of contestation that federalism makes possible. Its legitimacy need not be premised on the tyrannical potential of the central government.

[94] For a truly insightful description and analysis of shifting constituencies for federalism in American political history, see Robert A. Schapiro, *Not Old or Borrowed: The Truly New Blue Federalism*, 3 HARV. L. & POL'Y REV. 33, 33–36 (2009).

[95] *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

contends that States can serve as laboratories for testing various responses to problems facing the public and that a certain degree of decision fractioning and autonomy is valuable because it allows the kind of testing that leads to better resolutions to the problems that bedevil larger societies. In addition to the laboratories justification for federalism is the idea that states serve a function in bringing democracy closer to the people, who find it easier and more effective to participate in the smaller political units of state governments than is otherwise possible in a nation as large as the United States.[96] Connected to the political participation justification for federalism is the political legitimacy argument, which contends that federalism allows for greater citizen accountability because citizens are closer to their decision makers.[97] Finally, each of these arguments is connected to an encompassing argument that federalism, by dividing sovereign power resists government tyranny.

If federalism is commonly thought to be a valuable structure, why does it require protection? Political scientist William Riker has described federalism as a compromise between parties with frustrated ambitions.[98] Federalism, for one party in the relationship, is the result of frustrated imperial ambition to centralize governing authority under its control.[99] For the other party, federalism is the product of the frustrated ambitions for independence from a consolidated political unit.[100] Because the federalism compromise is less than either party's ideal, each party has incentives to "cheat" on the compromise—to achieve as much consolidation as possible under the federalism arrangement, or as much independence as possible—without incurring the backlash of the other party.[101]

The Framers recognized federalism's value, and that there might be incentives to cheat from the constraints that the federalism structure imposes. The constitutional responses to the threats to federalism included both legal to political enforcement.[102]

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[96] *See* SHAPIRO, *supra* note 43, at 139.

[97] *See* New York v. United States, 505 U.S. 144, 168–69 (1992); *see also* SHAPIRO, *supra* note 43, at 139.

[98] WILLIAM H. RIKER, FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE 2, 11 (1964).

[99] *Id.* at 3–5, 12.

[100] *Id.* at 12.

[101] Jenna Bednar and William Eskridge argue that maintaining federal arrangements is the goal of enforcing federalism. They contend that all parties to the federal arrangement have incentives to "cheat on the federal arrangement" in ways that will undermine it. Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447, 1472–75 (1995). Using a variation of the prisoner's dilemma, they argue that both the national government and the states are incentivized to cheat in their commitment to adhering to the requirements of a federal structure of government by, for example, the federal government's aggrandizement by "legislating aggressively and preemptively in areas traditionally left to the states," or by a state's failure to participate in the "implementation and enforcement" of national policies with which it disagrees, or through the creation of externalities that negatively affect national policy priorities or other state governments. *Id.* at 1472–74.

[102] *See id.* at 1449.

The Framers suggested that the competition between states and federal governments for the affections of the people would serve as an effective protection for the federalist structure of the government.[103] That is, each level of government would possess only the amount of substantive authority that the people's trust and affection granted to it.[104] This might be read as implying that the loss of the people's trust would result in a diminishment of the possession of substantive authority by a particular level of government. Possession of authority by either level, then, could not be guaranteed.

Against the conception that the protection of substantive authority would be up for grabs, the Constitution also appears to commit to delegations of explicit authority, and their subsequent separation, as federalism enforcement tools. From the Republic's earliest days, those concerned with protecting the states' decisional autonomy from the national government's usurpation have contended that protecting America's federal structure of government is done best by allocating the powers of each government level.[105] At several points throughout American history, the courts have sought to protect the integrity of the federalism structure by allocating power based on distinctions between local versus non-local,[106] and economic versus non-economic activities.[107]

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[103] Todd E. Pettys, *Competing for the People's Affection: Federalism's Forgotten Marketplace*, 56 VAND. L. REV. 329, 332–33 (2003).

[104] *Id.* at 342–44.

[105] The Framers responded to criticism that the Constitution would create a central government that would trample over the states and make them superfluous in the governance of the new nation in part by minimizing the threat that the national government would pose to the states and by arguing that the separation of powers between the two levels of government would protect the states. Writing in favor of the Constitution's ratification, Alexander Hamilton wrote:

> It may be said, that it would tend to render the government of the Union too powerful, and to enable it to absorb in itself those residuary authorities, which it might be judged proper to leave with the States for local purposes. Allowing the utmost latitude to the love of power, . . . I confess I am at a loss to discover what temptation the persons entrusted with the administration of the general government could ever feel to divest the States of the authorities of that description. The regulation of the mere domestic police of a State appears to me to hold out slender allurements to ambition. Commerce, finance, negociation [sic] and war seem to comprehend all the objects, which have charms for minds governed by that passion; and all the powers necessary to these objects ought in the first instance to be lodged in the national depository.

THE FEDERALIST NO. 17, at 105–06 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

[106] *See* Hammer v. Dagenhart, 247 U.S. 251, 276–77 (1918) (invalidating the Child Labor Act, which prohibited the interstate transportation of goods produced in factories employing underage children as exerting power over "purely local matter[s] to which the federal authority does not extend"), *overruled by* United States v. Derby, 312 U.S. 100 (1941).

[107] *See* United States v. Lopez, 514 U.S. 549, 560–61 (1995) (invalidating portions of the Gun-Free School Zones Act on the basis that Congress's Commerce Clause authority over intrastate activity is limited to "economic activity").

Such divisions of power are thought to establish a zone of exclusivity for the national and state governments.[108] The enforcement of fidelity to the federalist structure is thought to be best achieved by preventing incursions by either level against the terrain of the other level of government.

In the wake of the post-New Deal transformation of the scope of national power, the courts significantly reduced their role in federalism enforcement.[109] For the most part, the modern era of American federalism enforcement has been marked by an almost-exclusive reliance on the political process. The Supreme Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*[110] marked the official declaration of its abdication of a role in federalism enforcement.

The so-called "federalism revolution"[111] that took place during the Rehnquist Court era marked the Supreme Court's reassertion of a judicial role in the protection of America's federal structure through the placement of constitutional limitations on national legislative authority.[112] The Court's foray into disputes between the national

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[108] *Id.* at 553 (citing Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194–95 (1824) (holding states have the exclusive authority to regulate purely internal commerce)).

[109] Between the Court's decision in *Wickard v. Filburn*, 317 U.S. 111 (1942), and *National League of Cities v. Usery*, 426 U.S. 833 (1976), the Court did not overturn a case involving Congress's exercise of Commerce power on federalism grounds. For a discussion of this history, see, MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER 36–42 (2003).

[110] 469 U.S. 528, 547–56 (1985) (holding local transit authorities were required to follow the mandates of the Fair Labor Standards Act because state sovereign immunity was not abrogated and overruling *National League of Cities*).

[111] Although the concern for the integrity of states is present in earlier eras in cases like *Younger v. Harris*, 401 U.S. 37, 53–54 (1971) (holding that federal courts were obligated to abstain from hearing constitutional claims in cases brought by plaintiffs challenging their ongoing state criminal prosecutions), the Court's sensitivity to the states' interests increased significantly during the Rehnquist Court in cases like *New York v. United States*, 505 U.S. 144, 188 (1992) (invalidating a provision of the Low-Level Radioactive Waste Policy Act Amendments, which required states to take title to radioactive waste in the absence of a disposal plan, as an unconstitutional commandeering of the state legislative process). *See also* Gregory v. Ashcroft, 501 U.S. 452, 473 (1991) (holding that the provisions of the Age Discrimination in Employment Act did not apply to state mandatory retirement-age requirements for appointed state-court judges absent a clear statutory statement). For a discussion of these cases as calling for a new form of interaction between the national government and the states, see Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism:* New York*,* Printz*, and* Yeskey, 1988 SUP. CT. REV. 71.

[112] The Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), marked the Court's rejection of a strong judicial presence in the enforcement of the Constitution's federal structure. *Id.* at 557. There, the Court reversed its one-decade old decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976), which was the first time since the New Deal that the Court invalidated a congressional statute on federalism grounds. *Id.* at 851–52. In *Garcia*, the Court declared that the political process was a sufficient institutional enforcer of the Constitution's federal structure. *Garcia*, 469 U.S. at 552–55; *see also* Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism after*

government and the states was marked by an increased suspicion toward the threats that certain impositions of national-policy priorities posed for the integrity of state governments.[113] Although the early forays into judicial enforcement of federalism were primarily aimed at the process, rather than the substance of federalism,[114] the Court's later federalism decisions invalidated Congress's substantive exercises of authority in both *United States v. Lopez*[115] and in *United States v. Morrison*.[116] The Court's enforcement of federalism moved to declare constitutional protection of states from suit on immunity grounds.[117]

As stated above, the dominant interpretation of the federalism revolution is that it has resulted in an allocation of substantive authority away from the national government (and its courts) to the states.[118] Such an interpretation traffics in the conception of federalism as exclusively a governance structure that allocates power between the national government and the states, despite evidence that the Court's federalism jurisprudence has also resorted to less absolute mechanisms of enforcing federalism than mere line drawing.[119]

Garcia, 1985 SUP. CT. REV. 341, 341–42 (discussing the significance of *Garcia* in relation to the Court's theory of federalism).

[113] *See Gregory*, 501 U.S. at 460 (describing the states mandatory retirement system as "a decision of the most fundamental sort for a sovereign entity").

[114] *See* H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 658 (1993) (describing the anti-commandeering constraints of *New York v. United States* as "one of process, not of substance"); *see also* Rapaczynski, *supra* note 112, at 359–68 (discussing "process jurisprudence"). For a discussion of the Court's "process-based" federalism decisions, *see infra* Part III.

[115] 514 U.S. 549, 567–68 (1995) (holding that Congress lacked the authority to enact portions of the Gun-Free School Zones Act).

[116] 529 U.S. 598, 627 (2000) (holding that Congress lacked the authority to enact portions of the Violence Against Women Act).

[117] *See, e.g.*, Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 75–76 (1996) (holding Congress cannot statutorily circumvent Florida's sovereign immunity under the Eleventh Amendment); *see also* Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743 (2002); Alden v. Maine, 527 U.S. 706 (1999).

[118] *See, e.g.*, JOHN T. NOONAN, JR., NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES 156 (2002) (describing the Supreme Court's sovereign immunity case law as ratcheting back the national government's substantive authority).

[119] Scholars have offered different conceptual frameworks for understanding the way in which the national-state relationship might be understood apart from an allocational method. Among the most prominent of the "dialogic" conceptions of national and state interaction has been Professor Robert Schapiro's attempt to conceptualize federalism as polyphony. *See* SCHAPIRO, *supra* note 28, at 95–97. Schapiro's conception of federalism as dialogue clearly rejects federalism enforcement as a search for the location of substantive authority. *Id.* at 97–98. Rather, polyphonic federalism understands the overlapping nature of state and national authority. *Id.* Understood this way, polyphonic federalism appears to offer interaction as the appropriate governing norm for state and national relationship. *Id.* It is not always clear whether polyphony has a vision of the role of the judiciary in enforcing the norm of interaction

A relational account of federalism enforcement challenges the notion that only the political enforcements of federalism are legitimate, and the notion that judicial federalism enforcement must be limited to allocation of substantive power.[120] Relational conceptions of federalism suggest that an incursion on substantive regulatory authority is not the only way that the federal arrangement can be undermined.[121] The federal arrangement might be undermined even where a particular level of government is legitimately operating within its sphere of substantive regulatory authority.[122] Relying solely on allocation to enforce fidelity to the federal arrangement fails to adequately protect the federal structure of government.[123]

(understood as the avoidance of monophony). *Id.* at 111–13. This interaction is understood as providing space for redundancy and differentiation, even if such differentiation is not ultimately protected by the articulation of some right that constrains national authority. *Id.* The very participation of states as articulators of substantive norms remains, even where a national norm might supersede it. *Id.* at 113–20. One might argue that Schapiro's polyphony fails to take seriously the incentives that both sides of the federalism relationship have to cheat and violate the norms of polyphony, and that its trust of the political process may fail to effectively protect against this cheating.

[120] *See* SCHAPIRO, *supra* note 43, at 92–120.

[121] *See id.*

[122] For our purposes, a state is clearly recognized as having the authority to pronounce a death sentence against a criminal defendant who is guilty of having committed a crime eligible for the death penalty. The state's unwillingness to perform certain procedural obligations imposed on it though various international conventions might be understood as turning on whether the national government possessed the authority to impose such an obligation, i.e., a determination of whether the treaty constitutes "binding domestic law" on state institutions—an allocational method of regulating state and national interaction. *See* Medellín v. Texas, 552 U.S. 491, 505–06 (2008). Or it might be understood along lines that are more relational. That is, that in the search for whether the treaty can bind states (a search for the site of sovereign power), the analysis might be better understood as one involving a consideration of the respective state and national interests at stake in the state's decision not to adhere to a process to which the national government has agreed for foreign affairs purposes. *See Medellín*, 552 U.S. 491 (holding that the International Court of Justice's decision on the Vienna Convention provision requiring states to inform foreign nationals of rights under the Convention did not apply in state court for the purpose of affecting post-conviction habeas petitions without further domestic legislation). From the opposite but related perspective, one might say that the search for ultimate national sovereign authority in the area of foreign affairs preemption might be better understood in relational terms as a consideration of the interests of both states and the national government's foreign affairs interests. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 366 (2000) (invalidating a Massachusetts statute prohibiting state purchases from companies doing business with Burma as violative of the national government's foreign affairs power).

[123] Relational conceptions of federalism might be profitably analogized to the anti-aggrandizement principle articulated in separation-of-power jurisprudence. For example, in *Weiss v. United States*, 510 U.S. 163 (1994), the Court upheld the constitutionality of the appointments process of military trial judges. *Id.* at 165. Military trial judges were to be appointed from among the ranks of already-commissioned officers. *Id.* at 168. They had been appointed pursuant to the Appointments Clause but did not receive a second appointment to the office of

B. The Constitution and Enduring Relationship

The Constitution establishes institutional structures so pervasive and interrelated that the consequence of the establishment of a web of relationships is almost unmistakable. Through the construction of the Congress, the Presidency, and other institutions and structures, which are significantly influenced by state actors, the Constitution establishes the framework for repeated interactions between the states and the national government.[124]

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military trial judge. *Id.* at 170. The lack of a second appointment was challenged as a violation of the Appointments Clause requirements. *Id.* at 165. The Court determined that the statute providing for their appointment was not unconstitutional, in part, because it concluded that Congress had not attempted to aggrandize power to itself at the expense of the President by endowing previously appointed officers with additional duties. *Id.* at 188–91 (Souter, J., concurring). Similarly, in *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986), the Court upheld the constitutionality of non-Article III judges entertaining common-law suits, in part, because it concluded that Congress was not attempting to undermine Article III courts. *Id.* at 854–55.

[124] Even if one were convinced of the argument that the original Constitution creates an enduring relationship between the national government and the states, one might contend that the Civil War and Reconstruction, particularly the Reconstruction Amendments to the Constitution, radically transformed the nature of the relationship. There can be no question that the Thirteenth, Fourteenth and Fifteenth Amendments enlarged the substantive authority of the national government to cure the wrongs related to slavery, racial discrimination, and the systematic denial of the right to vote of freed slaves. *See* U.S. CONST. amends. XIII–XV. Indeed, the Amendments have been rightly interpreted to have endowed Congress with the authority to cure wrongs that go beyond slavery or to protect classes of people other than blacks. *See, e.g.*, Johnson v. California, 543 U.S. 499 (2005) (holding strict scrutiny must be applied to all racial classifications even in a prison setting where administrators are usually given deference); United States v. Virginia, 518 U.S. 515 (1996) (declaring unconstitutional the prohibition on women attending the Virginia Military Institute); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (concluding a city ordinance specifically targeting the mentally disabled fails to survive even a rational basis inquiry under the Fourteenth Amendment); Brown v. Bd. of Educ., 347 U.S. 483 (1954) (invalidating racial segregation in public schools). The argument for an enduring relationship between the national government and the states is no less applicable after the Reconstruction and New Deal era changes in the conception of national authority. *See, e.g.*, Jackson, *supra* note 7, at 122–23 (pointing to the states as the audience of the Fourteenth Amendment to support the assertion that state governments and judiciaries remain important in the constitutional framework during the Reconstruction era). The central contention of relational federalism is that whatever the substance of national authority after the Reconstruction and New Deal "revolutions," the exercise of such expanded authority cannot be used in a way that completely negates the fact that an enduring relationship continues to exist. There can be no doubt that the duty owed to state governments acting in ways fundamentally hostile to the vindication of the constitutional rights of persons in the United States is transformed by such action. But even where state governments might be presumed to be bad-faith actors, a relational conception of federalism suggests that they cannot be deemed permanent pariahs. That is, rogue states are treated badly, and rightly so, in the hope that they might be transformed into regimes that are respectful of constitutional guarantees. *See infra* Part II.C. (Lincoln discussion); *see also* Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY

Article I of the United States Constitution establishes the national legislative body, and is the initial, and perhaps most important, embodiment of the relationship that is inaugurated between the states and the national government in the constitutional text.[125] After Article I, Section 1's vesting of "all legislative Powers" in two houses of Congress—the House of Representatives and the Senate[126]—the text immediately describes the qualifications for membership in each chamber, and the method by which representatives will be chosen.[127] The state governments are inextricably linked to each of these. The member of the House of Representatives are to be chosen "every second Year by the People of the several States . . . ."[128] In order to be qualified to serve in the House of Representatives, a member must "be an Inhabitant of that State in which he shall be chosen."[129] The members of the House are distributed "among the several States," based on the state's population.[130] Each state is guaranteed at least one representative in the House of Representatives.[131]

Article I, Section 3 of the Constitution establishes the second chamber of the national legislature—the Senate.[132] Each state, regardless of population, is represented by two members, each of whom was chosen by the state's legislature.[133] Like members of the House of Representatives, to be qualified to represent a state in the Senate, a member must be "an Inhabitant of that State for which he shall be chosen."[134] Article I, Section 4 of the Constitution delegates to the states the authority to establish the "Times, Places and Manner of holding Elections for Senators and Representatives . . . ."[135] The text reserves to Congress the authority to "make or alter such Regulations, except as to the Places of chusing [sic] Senators."[136]

As with the selection of members of the Congress of the United States, the states play an indispensible role in the selection of the President. Article II, Section 1 establishes the manner in which the President is elected.[137] Each state receives an elector for every member of the Senate and House of Representatives in Congress.[138] The original Constitution required that electors would meet in their respective states to

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L. REV. 605, 635 (1981). I thank my colleague Stephen Schnably for forcing me to consider the implications of this issue.

[125] U.S. CONST. art. I.

[126] *Id.* § 1.

[127] *Id.* §§ 2–4.

[128] *Id.* § 2, cl. 1.

[129] *Id.* cl. 2.

[130] *Id.* cl. 3.

[131] *Id.*

[132] *Id.* § 3.

[133] *Id.* cl. 1.

[134] *Id.* cl. 3.

[135] *Id.* § 4, cl. 1.

[136] *Id.*

[137] *Id.* art. II, § 1.

[138] *Id.* cl. 2.

cast votes for two candidates for President.[139] These votes were required to be tallied and transmitted to the nation's capitol, after which they would be opened in a proceeding involving the sitting Vice President (as President of the Senate).[140] The person having the greatest number of votes would be elected President, if that number constituted a majority of the total number of electors.[141]

As the Constitution establishes, states play a central role in the selection of the holders of every democratically accountable institution of the national government. The constitutional provisions below provide additional support that the Constitution inaugurates a relationship between the states and the national government, which is evidenced by the affirmative obligations and constraints imposed on the national government and the states, which protect both national unity and distinct political communities.

Article I, Section 9, Clause 6 of the Constitution, while not directly related to the establishment of Congress as an institutional structure, prohibits the national government from creating favored trading zones or erecting barriers to trade that might negatively affect the free flow of commerce between and among the states, and from creating classes of less favored states within the national economic system.[142]

The Constitution imposes an affirmative obligation on the national government to guarantee to every state a "Republican Form of Government."[143] Though the Court held that the Guarantee Clause was non-justiciable,[144] it has played an important role in American constitutional structure, serving as the basis of the Court's vindication of the Reconstruction Acts after the Civil War.[145] However, more recently the Court's "federalism revival" seemed to suggest a special concern for the political status of state governments,[146] and scholars identified the Guarantee Clause as the source of a national obligation to refrain from compromising state political integrity.[147]

There is also a certain irrefutability of the national-state relationship that might plausibly be drawn from Article V's substantive limitation on the amendment power.[148] Article V prohibits any constitutional amendment that would deprive a state of equal representation in the Senate.[149]

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[139] *See id.* cl. 3 (amended 1804).

[140] *Id.* art. II, § 1, cl. 3.

[141] *Id.*

[142] *Id.* art. I, § 9, cl. 6.

[143] *Id.* art. IV, § 4.

[144] Luther v. Borden, 48 U.S. (7 How.) 1 (1849).

[145] Texas v. White, 74 U.S. (7 Wall.) 700, 729–32 (1869), *overruled in part by* Morgan v. United States, 113 U.S. 476 (1885).

[146] *See, e.g.*, New York v. United States, 505 U.S. 144, 181–83 (1992).

[147] *See* Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 34 (1988).

[148] U.S. CONST. art. V. Constitutional scholar Lynn Baker has argued that Article V is instructive for its assertion of a protection of some core existence of state autonomy. Lynn A. Baker, *Federalism: The Argument From Article V*, 13 GA. ST. U. L. REV. 923, 946–52 (1997).

[149] U.S. CONST. art. V.

C. Abraham Lincoln: The Union as Enduring Relationship

The Constitution's establishment of structures that require the participation of states in the establishment of the national government, alongside other provisions, ground the claim of enduring relationship in the constitutional text. However, the claim of enduring relationship can also be supported on the basis of the theories of the American polity arising from the most profound challenge to the American union—the Civil War. Abraham Lincoln offers one of the most significant conceptions of the enduring nature of the American union in American constitutionalism.[150] Moreover, Lincoln articulated a conception of enduring relationship as justifying behavioral norms in national-state interaction.[151]

No examination of the larger meaning of the relationship between the national government and the states can avoid the significant impact that Abraham Lincoln's thought continues to play in our thoughts about federalism.[152] At the dawn of the Civil War, Lincoln rejected the legitimacy of the Confederacy on the ground that the Union was perpetual. In defense of the perpetuity of the Union, Lincoln declared:

> I hold, that in contemplation of universal law, and of the Constitution, the Union of these States is perpetual. Perpetuity

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[150] For recent scholarly treatment of Lincoln's constitutional thought, *see* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 51–53 (2005); DANIEL FARBER, LINCOLN'S CONSTITUTION 30 (2003); GEORGE P. FLETCHER, OUR SECRET CONSTITUTION: HOW LINCOLN REDEFINED AMERICAN DEMOCRACY (2001) (arguing that the Civil War and Reconstruction era inaugurated a second constitution, which included the heightened sense of nationhood); Akhil Reed Amar, *The David C. Baum Lecture: Abraham Lincoln and the American Union*, 2001 U. ILL. L. REV. 1109; *see also* ROBERT A. BURT, THE CONSTITUTION IN CONFLICT 77–102 (1992) (drawing upon Lincoln's political conception of equality to make an argument against judicial supremacy in constitutional interpretation).

[151] This is not to suggest that all of Lincoln's behavioral norms were appropriate for the challenges that the nation faced either during or after the Civil War. I would argue that Lincoln was very slow to accept the fact that the newly freed slaves would require protection from the defeated Confederates, who were unwilling to accept the consequences of their military defeat. However, to suggest that Lincoln's calculations were likely inaccurate does not suggest that his relational model was wrong. The relational model is empirical to the extent that it is capable of responding to changing circumstances, indeed the model springs from changed circumstances surrounding federalism enforcement. This responsive quality allows relational federalism enforcement to shift to accommodate its assessment of the ability of state governments to vindicate national supremacy (in this specific instance—the anti-slavery norm of the post-Civil War period) as it assesses what the national-state relationship requires. Nevertheless, it is always conscious of state existence, and stands ready to continue to test state ability to vindicate federal rights norms. For a discussion of this in the context of federal courts doctrine, see *infra* Parts IV.A.2–3 (abstention discussion).

[152] *See* HERMAN BELZ, ABRAHAM LINCOLN, CONSTITUTIONALISM, AND EQUAL RIGHTS IN THE CIVIL WAR ERA (1998).

> is implied, if not expressed, in the fundamental law of all national governments. It is safe to assert that no government proper, ever had a provision in its organic law for its own termination. Continue to execute all the express provisions of our national Constitution, and the Union will endure forever—it being impossible to destroy it, except by some action not provided for in the instrument itself.
>
> . . . .
>
> Descending from these general principles, we find the proposition that, in legal contemplation, the Union is perpetual, confirmed by the history of the Union itself. . . .
>
> But if destruction of the Union, by one, or by a part only, of the States, be lawfully possible, the Union is *less* perfect than before Constitution, having lost the vital element of perpetuity.[153]

Lincoln's cognizance of the significance of the enduring quality of the federal-state bond did not prevent him from acting against states to preserve the substantive value commitments for which federalism (of whatever variety) is a structural support. Moreover, Lincoln's framing of the Civil War as a conflict in whose advancement both the South and the North were complicit suggests a normative commitment to respect for the bond that the Union has fought to vindicate, even in light of the constraints that such respect placed on the national government.[154] Similarly, Lincoln's framing of the Reconstruction of the Union also embodies a respect for the relationship between the national government and the former Confederate states.[155] Regarding the

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[153] Abraham Lincoln, First Inaugural Address (March 4, 1861), *reprinted in* SELECTED SPEECHES AND WRITINGS BY ABRAHAM LINCOLN 284, 286–87 (Don E. Fehrenbacher ed., 1st Vintage Books, Library of America ed., 1992) [hereinafter LINCOLN].

[154] Lincoln attempts to recreate a union between the North and the South in their connected complicity in the evil of slavery, saying:

> Both [the North and the South] read the same Bible, and pray to the same God; and each invokes His aid against the other. It may seem strange that any men should dare to ask a just God's assistance in wringing their bread from the sweat of other men's faces; but let us judge not that we be not judged. The prayers of both could not be answered; that of neither has been answered fully. The Almighty has His own purposes. "Woe unto the world because of offences! For it must needs be that offences come; but woe to that man by whom the offence cometh!" If we shall suppose that American Slavery is one of those offences which, in the providence of God, must needs come, but which, having continued through His appointed time, He now wills to remove, and that He gives to both North and South, this terrible war, as the woe due to those by whom the offence came . . . .

Abraham Lincoln, Second Inaugural Address (March 4, 1865), *reprinted in* LINCOLN, *supra* note 153, at 449, 450.

[155] KENNETH M. STAMPP, THE ERA OF RECONSTRUCTION, 1865–1877, at 48 (1965).

re-inclusion of Louisiana into the Union, Lincoln debated those within the Republican Party about whether the national government would support the new Louisiana government, Lincoln stated:

> [The Louisiana] Legislature has already voted to ratify the [Thirteenth A]mendment . . . abolishing slavery throughout the nation. [The state is] thus fully committed to the Union, and to perpetual freedom in the state—committed to the very things, and nearly all the things the nation wants—and they ask the nations recognition, and it's [sic] assistance to make good their committal. Now, if we reject, and spurn them, we do our utmost to disorganize and disperse them. We in effect say to the white men "You are worthless, or worse—we will neither help you, nor be helped by you." To the blacks we say "This cup of liberty which these, your old masters, hold to your lips, we will dash from you, and leave you to the chances of gathering the spilled and scattered contents in some vague and undefined when, where, and how." If this course, discouraging and paralyzing both white and black, has any tendency to bring Louisiana into proper practical relations with the Union, I have, so far, been unable to perceive it.[156]

What Lincoln attempts to articulate is the centrality of trustworthiness to the relationship between the North and South after the Civil War.[157] The enduring nature of the Union demands that the national government and the states become worthy of the trust of the other. The development of the habits that inculcate trustworthiness is central to the future success of the American democratic project. The above statement appears aimed at bolstering the foundation of trustworthiness of a former Confederate state. While the failure of the project of Reconstruction undermines the faith that Lincoln placed in Louisiana, it is clear that Lincoln recognized the centrality of Louisiana's

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[156] Abraham Lincoln, Speech on Reconstruction (April 11, 1865), *reprinted in* LINCOLN, *supra* note 153, at 454, 457; *see also* JOHN HOPE FRANKLIN, RECONSTRUCTION: AFTER THE CIVIL WAR 15–31 (1961); STAMPP, *supra* note 155, at 24–49.

[157] Political theorist Danielle Allen has argued that trust is an essential component to the proper functioning of a democratic regime. Allen focused on the problem of interracial distrust in American political culture. ALLEN, *supra* note 92, at xiii–xxii, 143–59. However, her arguments might be applied with profit to the relationship between the national government and the states at various times in American history, the period of the Civil War being the most prominent age of antagonism in between the two levels of government. If we take seriously the idea, stated above, that both the national government and the state has incentives to "cheat" in a federal relationship, it is not hard to imagine that the maintenance of the relationship depends, in no small part, on the capacity of both the national government and the states to establish themselves as trustworthy. Lincoln's recognition of the collective "sin" of the Union in his Second Inaugural Address is intended to establish the ground upon which both the "free" and former slaveholding states might see the other as capable of proving themselves to be worthy of the trust of the other. *See supra* note 153.

transformation to the development of national-state relations in a post-Civil War world. Louisiana's capacity for trustworthiness would place demands on the national government to act in ways that would likewise demonstrate its own trustworthiness in the national-state relationship. Lincoln affirms that the development of practices and habits might serve as the foundation upon which mutual trust could be established in national-state interaction in the post-Civil War world.

D. From Relationship to Norm: German Federalism Enforcement

Numerous comparisons between the practice of judicial federalism enforcement in Germany and its American counterpart have been made by federalism scholars in recent years.[158] Among the leading commentators is Professor Daniel Halberstam, who contrasts the two forms of federalism enforcement as the "fidelity" approach and the "entitlement" approach, respectively.[159] The fidelity approach is marked by its attention to the duties that each level of government owes to the proper functioning of the governmental system as a whole, without special regard for the locus of substantive regulatory authority.[160] By contrast, the "entitlement" approach enforces federalism similar to its declarations of individual rights, which are deployed "without regard to whether the exercise . . . serves the system of democratic governance as a whole."[161] Although this Article evidences an attempt to highlight the "fidelity" dimensions of American federalism enforcement, an analysis of German federalism enforcement is important as a model of how the judiciary translates from a governmental system (read: enduring relationship) to a behavioral norm that serves to analytically organize its enforcement of federalism commitments.

The German Federal Constitutional Court first articulated the principle of pro-federal comity, *Bundestreue*,[162] in the *Housing Funding* case in 1952.[163] The principle

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[158] *See, e.g.*, Daniel Halberstam, *Of Power and Responsibility: The Political Morality of Federal* Systems, 90 VA. L. REV. 731, 817–32 (2004) [hereinafter Halberstam, *Of Power and Responsibility*]; Daniel Halberstam & Roderick M. Hills, Jr., *State Autonomy in Germany and the United States*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 173 (2001); Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223, 269–71 (2001) [hereinafter Jackson, *Narratives*]. For skepticism about the use of comparative constitutional decisions on justifying judicial federalism enforcement, see Mark Tushnet, *Judicial Enforcement of Federalist-Based Constitutional Limitations: Some Skeptical Comparative Observations*, 57 EMORY L.J. 135 (2007).

[159] Halberstam, *Of Power and Responsibility*, *supra* note 158, at 732–34.

[160] *Id.* at 734.

[161] *Id.* at 733.

[162] The term is a combination of the word *Bund*, meaning form of federation, and the word *Treue*, meaning trust or faith. Thus *Bundestreue* is an duty to "keep faith" with the federation, which obligates both the states and the federal government to respect the other level of governmental authority. *See* DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 69 (2d ed. 1997).

[163] *Id.* (citing Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1952, 1 ENTSCHEDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 299).

is not a part of the text of Germany's Basic Law.[164] According to Donald Kommers, the court has inferred the duty of fidelity based upon "the various structures and relationships created by the Constitution."[165] The court has pressed the principle into service in several cases in the intervening years, in areas such as state duty to honor federal treaties,[166] administrative commands from the federal government to the Länder (states),[167] and the subsidization of the poorer states by wealthier states.[168]

The Kalkar II Case serves as a paradigmatic example of the court's *Bundestreue* principle. Kalkar rose from a dispute over conflicting federal and state administrative directives regarding measures to ensure the safety of nuclear reactors.[169] Pursuant to the Basic Law, the states, or Länder, are authorized to administer federal law as agents of the federal government.[170] The conflict stemmed from the state minister's issuance of a directive that required the reassessment of the nuclear plant's safety system before permitting construction on the nuclear reactor.[171] The federal minister issued a contrary directive, ordering the construction to begin without a safety assessment of the nuclear reactor.[172] The Court did not hesitate to declare that the federal government had extraordinary power over the state governments to guide their actions over the administration of state law.[173] Nevertheless, the Court declared that in the exercise

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[164] *Id.*

[165] *Id.*

[166] Concordat Case, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1957, 6 ENTSCHEDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 309, *translated in* KOMMERS, *supra* note 162, at 80 (holding that the Länder (states) owed a profederal duty to the federal government's ability to enter into a treaty with the Holy See concerning the provision of religious education in state-supported schools, despite the Länder's exclusive authority in this substantive area).

[167] Kalkar II Case, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1990, 81 ENTSCHEDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 310, *translated in* KOMMERS, *supra* note 162, at 84.

[168] KOMMERS, *supra* note 162, at 90–91 (citing Finance Equalization I Case, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1952, 1 ENTSCHEDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 299).

[169] Concern over the safety of Germany's nuclear reactors was provoked by the Chernobyl disaster in the Soviet Union. *See* KOMMERS, *supra* note 162, at 84.

[170] Under a separate provision, the states are empowered to implement federal laws with greater freedom. Kommers writes, "Under Article 84 the *Länder* are empowered to implement federal laws as a matter of their own concern, in accord with their own procedures, and through their own agencies unless otherwise provided with the Bundesrat's consent." KOMMERS, *supra* note 162, at 83.

[171] *Id.* at 84.

[172] *Id.*

[173] Kalkar II Case, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1990, 81 ENTSCHEDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 310, *translated in* KOMMERS, *supra* note 162, at 84–85.

of even these extraordinary powers, the federal government was "bound by a duty of reciprocal loyalty."[174] The Court further declared,

> Certain conditions and restrictions for the execution of competences can be derived from this. In the German federal state the entire constitutional relationship between the federal government and its member *Länder* is guided by the unwritten constitutional principle of a duty of reciprocal loyalty; that is, the federal government and the *Länder* must act in a manner that promotes the [interests of the] federation [as a whole]. This duty requires that in exercising their functions, the federal government and the *Länder* reasonably consider the overrall interests of the federation and the concerns of the *Länder*. The federal government does not violate its duty solely by executing a constitutionally assigned competence. Rather, it can be deduced from the principle that the exercise must be abusive or in violation of procedural requirements.[175]

Here the Court's decision is clearly not one of allocation, as it respects the allocation that the constitution makes regarding the substantive authority to preempt state implementations of certain federal laws. Nevertheless, the Court imposes a behavioral norm that constrains the exercise of federal authority generated from the obligations of the relationship between the federal government and the states.

E. Interest Inclusion: The Norm of Enduring Relationship

The comparative discussion of Germany's experience with a relational enforcement of federalism provides us with a fuller conception of how the ethical dimension of relationship is translated into particular behavioral norms. The question for us is what behavioral norm is generated by the enduring national-state relationship for the relational enforcement of American federalism. The answer to this question must be a norm that is consistent with the ethical implications of an enduring relationship that is committed to the generation of trust. This Part articulates a norm of interest inclusion.[176] It relies on an elaboration of the moral dimension of relationality as articulated in feminist theoretical literature, including feminist legal theory.[177]

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[174] *Id.* at 86.

[175] *Id.*

[176] I do not suggest that interest inclusion is the only acceptable behavioral norm that might be consistent with a relational account of relational federalism enforcement. In fact, in a discussion of German federalism enforcement pursuant to the *Bundestreue* principal, Vicki C. Jackson has suggested the possibility of "anti-discrimination" as a norm of American federalism enforcement that is reminiscent of the relational conception. In Jackson's description of American federalism enforcement, however, her primary focus is on legislative federalism. *See* Jackson, *Narratives*, *supra* note 158, at 245–86.

[177] *See* ROBIN WEST, CARING FOR JUSTICE 33 (1997) (describing relational feminist

Feminist scholars, responding to their exclusion from the realms of "political" (understood as rational) moral discernment, claimed the modes of moral reasoning that had been bequeathed to the domestic sphere and to them as no less a part of the moral activity than more "public" or "political" counterparts.[178] These scholars turned to the spaces of women's everyday lives and engagements as the most appropriate sites of articulating and justifying women's capacity for moral reasoning.[179] Rather than fighting for admission into a male-dominated sphere of the agora, feminist theorists sought to "redeem" the spaces and interactions in which their activities were most concentrated.[180] Among the most prominent voices in this intellectual movement has been psychologist Carol Gilligan, who has articulated a conception of a "difference voice" feminism or epistemology, which advocated an alternative form of moral discernment that she described as uniquely feminine.[181] Difference voice feminism recognized a "conception of morality [ ] concerned with the activity of care" in addition "to a conception of morality as fairness."[182] The moral activity of care arose from women's unique valuation of the embedded nature of their lives and experiences in relationship with others, as opposed to the autonomous, individuated self of liberal moral theory and its attendant obsession with justice.[183]

What does such a "caring" activity require? Without going too far beyond the scope of this discussion, I focus on what I take to be a central component of an "ethic of care" proposed by relational feminist thought.[184] The significance of this ethic stems from its value conceptualizing the moral dimension of the navigation of relationships from which we cannot easily free ourselves. Relational feminism argues that an ethic of care encompasses the practice of considering the interests of the other as a separate, though connected, entity without an attempt to reduce the other's interests to our own.[185] Translated for our purposes, this becomes an affirmative obligation both to recognize the moral dimension of relationship,[186] and to act consistent with caring

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conception of caregiving as moral activity); *see also* WILL KYMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION 398–99 (2002).

[178] For a discussion of the separation of men's and women's "spheres," see NANCY F. COTT, THE BONDS OF WOMANHOOD: "WOMAN'S SPHERE" IN NEW ENGLAND 1780–1835, at 197–206 (1977); JEAN BETHKE ELSHTAIN, PUBLIC MAN, PRIVATE WOMAN: WOMEN IN SOCIAL AND POLITICAL THOUGHT (2d ed. 1993).

[179] *See* COTT, *supra* note 178, at 69.

[180] *Id.* at 70.

[181] CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 69 (1982).

[182] *Id.* at 19.

[183] *See also* Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 604–05 (1986) (arguing that female judges generally pay closer attention to community and relationship than male justices, who give greater weight to rules).

[184] *See* GILLIGAN, *supra* note 181, at 173.

[185] *See* KYMLICKA, *supra* note 177, at 272–73.

[186] For an insightful discussion of this dimension of relationships, see GEORGE P. FLETCHER, LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS 11–16 (1993).

for and maintaining the relationship.[187] The maintenance of the relationship requires that the other never be reduced or transformed into the self in order for moral recognition to be accorded. Yet, it also obligates the self to an appropriate level of care for the self and its interests, while not equating care for one's own interest into a license to separate from the relationship.[188]

Relational feminist thought assists us in recognizing the components of behavior capable of demonstrating the capacity for trustworthiness central to the maintenance of the relationship instantiated by America's federal structure. Behavioral norms indicate both states and the national government have an affirmative obligation to at least act consistent with the fact that they exist in relation to one another; they are connected to one another, and this fact matters in shaping (constraining) their actions.[189] This does not mean—and indeed likely resists—the notion that federalism's structure is static rather than dynamic and changing. A relational account of federalism is not resistant to the necessity of enlarged national power at several important moments in American history, or the fundamental changes in the constitutional structure of federalism wrought by the Civil War and Reconstruction period.[190] Nevertheless, federalism

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[187] *See, e.g.*, Linda C. McClain, *"Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171, 1206 (1992) (analogizing John Rawls's concept of the capacity for a conception of the good with feminist morality).

[188] One must recognize the risk of translating the dynamics and interactions of human relationships into institutional frameworks; it is very clear that the conceptions of "self" and the "other" in feminist theoretical discourse of relationality may not have the same coherent or stable identity when they are transformed into political communities. Yet, the insight of feminist theory's recognition of the duties of relationships that are embedded in contexts that are larger than any single activity can illuminate our consideration of interactions of the national and state governments in the context of American federalism.

[189] Clearly there are limits to the obligation to maintain relationships that are meant to be enduring over long periods of time. I do not mean to suggest that relational federalism would result in a person remaining in a relationship that was abusive or damaging to their physical or psychological well-being. For a helpful discussion of these issues from a relational feminist perspective, see Katharine K. Baker, *Dialectics and Domestic Abuse*, 110 YALE L.J. 1459 (2001) (reviewing ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING (2000)). Neither am I suggesting that maintaining the federal structure of government is the highest commitment to fidelity to the larger project of American constitutionalism, which clearly commits to other goods that are rightly deemed to be more paramount than any commitment to federalism. That is, we are right to regard those who advocated secession in protest to slavery differently from those who advocated secession as a defense of slavery. What I mean is that whatever substantive decision is reached, and the wrong decision can be reached, the decision likely cannot be reached without the consideration of the rupture of relationship. Its value might be wholly negative and destructive, but its rupture is not inconsequential.

[190] Contrary to many conceptions of federalism, a relational account of federalism does not attempt to stand outside or beyond history. In fact, the content of what is possible in the national-state relationship is informed by specific historical incidents. There is no possible way to conceive of many of the expansions of national legislative and judicial authority without taking into account the fact that transformative political, economic, social and cultural

as an enduring relationship obligates each sphere of government to take into account the interests of the other in the exercise authority. On this account, federalism entails an affirmative obligation to include the interests of the other sphere of government, and the larger interests of maintaining federalism as a constitutional structure.[191]

The interactions of the federal and state judiciaries is a complex web, and no particular dispute between the two adjudicative systems can ever be thought to stand in for the entirety of the various interactions that take place between them. The recognition of this fact is central to understanding the dynamic that exists between federal and state judicial systems, and the ways in which several judicial doctrines designed to regulate their interaction exemplify relational practices. What is unacceptable in a conception of federalism as an enduring relationship is rupture—understood as the freedom to exclude the interests of the other from consideration. Understood this way, there are two primary threats to federalism as relationship—the exclusion of interests that is the result of the conclusion that there is nothing distinct between one's own interests and those of the other, such that the interests are synonymous, and the exclusion of interests as a result of the conclusion that self and the other are ineradicably distant.

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transformations would have occurred throughout American history. For an insightful discussion of this aspect of federal courts law and federalism jurisprudence, see Susan Bandes, Erie *and the History of One True Federalism*, 110 YALE L.J. 829 (2001) (reviewing EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA (2000), and rejecting the law's trans-historical conception of federalism). *See also* EDWARD A. PURCELL, JR., ORIGINALISM, FEDERALISM AND THE AMERICAN CONSTITUTIONAL ENTERPRISE: A HISTORICAL INQUIRY (2007) (exploring the evolution of federalism throughout American history, and rejecting the notion of an "original" version of federalism as capable of guiding current controversies).

[191] This is not meant to suggest that the maintenance of the federal system of fractionated power is ever, or always, the paramount consideration in constitutional adjudication. There might be very good reasons—commitments to racial, gender, or religious equality or commitments to the effective ability of the polity to respond in the face of crises—why an inflexible commitment to a federalist structure without any interrogation into the consequences that attend particular practices creates exactly the sort of sterile conceptions of federalism as have attended the search for state and national sovereignty. As will be discussed in more detail in Part IV, *infra*, the Court's abstention and appellate review doctrines responded to changes in its determinations about whether state courts could be trusted to vindicate federal law. The variation in responses does not violate what I understand to be relational federalism enforcement. However, it does suggest that doctrinal expansions of federal court oversight should not simply be taken for granted over long periods of time without additional "testing" of the accuracy of the empirical claim. For a recent example of exactly this sort of reconsideration, see *Northwest Austin Municipal Utility District v. Holder*, 129 S. Ct. 2504 (2009) (upholding section 5 of the Voting Rights Act, but calling into question the operation of preclearance requirements under changed circumstances). This opinion was joined by every member of the Court, save Justice Clarence Thomas. For a discussion of the constitutional challenges to the Voting Rights Act in the present era, see Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of its Own Success?*, 104 COLUM. L. REV. 1710 (2004).

III. IMPLEMENTING CONSTITUTIONAL FEDERALISM

The call for a relational model of federalism enforcement must respond to two broad challenges. To the extent that it remains a call for the judicial enforcement of federalism values, it is vulnerable to challenges to any judicial enforcement of federalism. Further, relational federalism enforcement is also vulnerable to Textualist assertions that all judicial enforcement of federalism ought to be limited to the explicit constitutional provisions that regulate state-national interaction.[192] Contrary to these arguments, this Part contends that judicial federalism enforcement legitimately involves more than merely determining whether authority is possessed by a particular unit of government but may extend to the declaration of behavioral norms that apply to legitimately possessed authority. This Part seeks to justify this practice as a legitimate implementation of constitutional meaning.[193]

This Part begins with a description of the forms of judicial decision making that exemplify the judicial practice of constitutional implementation inspired by federalism values not directly attributable to the constitutional text. Further, this Part will defend this form of constitutional implementation against its critics.

A. Articulating Federalism-Based Constraints

The recognition of a judicial role in the relational enforcement of constitutional federalism is not unusual if one thinks of this judicial activity as analogous to other attempts to regulate the interaction between states and the national government. This suggestion recognizes the extent to which the federal courts, over the last several generations, have attempted to mediate national and state interaction while avoiding a declaration of the constitutional invalidity of Congress's substantive policy objective. This has been especially so in the wake of the Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*,[194] which effectively declared the judicial attempt to

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[192] *See, e.g.*, U.S. CONST. art. I, § 3 (regulating election of senators); *id.* § 8 (delegating powers to Congress); *id.* art. III, § 2, cl. 1 (detailing the power of the judiciary to hear cases); *id.* art. VI, § 2 (Supremacy Clause).

[193] The cases that I discuss in this Part are generally cases that are protective of the interests of state autonomy and independence from national regulatory control. This should not be interpreted to mean that the enforcement of federalism values is exclusively about the protection of state interests. As I have written, federalism is best understood as a relationship in tension between unity and separation. Federalism is not always best understood in terms of state autonomy from the dictates of national authority. *See* Copeland, *supra* note 27, at 843 (describing an alternate view of *Ex parte Young*, 209 U.S. 123 (1908), under a relational model of federalism). Understood in this way, we can easily include the Court's development of the Dormant Commerce Clause doctrine as judicial policymaking in the service of the interests of a national community. Within the context of the Dormant Commerce Clause doctrine, and states' duties to the national union, states cannot discriminate against outsiders in favor of insiders.

[194] 469 U.S. 528 (1985).

carve out zones of protected state activity a dead project.[195] However, the Court has not allowed the death of dual federalism—and its progeny—to completely annihilate the judicial role in federalism enforcement. In *Garcia*'s wake, judicial oversight of state and national interaction has taken the form of process-based constraints that appear to increase the marginal cost of expanding governmental authority where state interests might be implicated.[196] Such process-based constraints have avoided drawing lines around certain sets of state authority as off limits to national regulatory authority.[197] The examples that follow provide models of the implementation of constitutional values aimed at protecting the federal structure of American government.

1. Clear Statement Principles and State Integrity

One of the primary tasks of judicial decision making is the determination of statutory meaning.[198] As scholars of statutory interpretation argue, the interpretation of a statute's meaning often involves divining congressional intention from unclear texts.[199] As repeat players in the statutory interpretation game, it is often beneficial for courts to articulate default rules of textual interpretation capable of eliciting congressional preferences with regard to particular decisions.[200] Clear statement rules are a species of default principles intended to elicit the preferences of the parties responsible for statutory enactments. Statutory clear statement principles are often aimed to force explicit identification of the parties' intention regarding some value deemed to be important in shaping the context in which those who enacted the statute acted.[201]

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[195] *See, e.g.*, MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 38–49 (1995) (describing *Garcia* as endorsing an "abdication model" and *National League of Cities v. Usery*, 426 U.S. 833 (1976), as endorsing an "enclave model" of judicial federalism enforcement).

[196] Surely this has not been the exclusive judicial response as anyone familiar with the Court's decisions in *Lopez* and *Morrison* can attest. For a critique of these cases as a return to the era of dual federalism, see generally SCHAPIRO, POLYPHONIC FEDERALISM, *supra* note 28, at 54–91.

[197] For example, the Court's expansive interpretation of Congress's Commerce power in the post-New Deal constitutional era was marked by the Court's articulation of doctrines that limited the preemptive effect of Congress's exercise of substantive regulatory authority. *See* Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 806–07 (1994).

[198] *See, e.g.*, GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1 (1982) (describing the "statutorification" of American law).

[199] On the search for legislative intention in statutory interpretation, see Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 869–72 (1930).

[200] *See, e.g.*, EINER ELHAUGE, STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION 4–5 (2008).

[201] Federalism need not be the only value to inspire clear statement rules. Clear statement rules have been articulated in courts' interpretation of ambiguous criminal statutes, which are interpreted in favor of criminal defendants. The rule of lenity aims to protect individual rights as significant enough to require explicit congressional declarations where such rights would be limited. For a detailed discussion of various clear statement rules beyond those discussed

In recent years the Court has articulated clear statement principles that are inspired by a desire to protect what the Court has deemed to be core values of federalism.[202] The Court's announcement of a federalism-inspired clear statement principle serves the function of forcing Congress to explicitly declare its intentions where it enacts statutes that might impose burdens on state governments that appear to impair state autonomy.[203] For example, in *Gregory v. Ashcroft*,[204] the Court addressed the issue of whether the Age Discrimination in Employment Act (ADEA) applied to state judges in Missouri, who were obligated to retire upon reaching the age of seventy.[205] Despite the fact that the ADEA's substantive provisions had been explicitly extended to include states as employers, it also excluded elected and high-ranking government state officials from the statute's protection.[206] The *Gregory* Court clearly concludes that "[t]he extension of the ADEA to employment by state and local governments was a valid exercise of Congress' powers under the Commerce Clause."[207] However, the Court describes what it declares to be a potential constitutional problem even in light of Congress's apparent constitutional authority. The Court concluded that the extension of the ADEA's provisions to protect state employees threatened to undermine the authority of a political community to "determine the qualifications of their government officials."[208] However, like a Shakespearean play, the Court reaches out and grasps the rope that operates the escape hatch that frees it from the constitutional conflict that it imagines lies around the corner. For the Court, this escape hatch is the clear statement rule, which it imposes on Congress in order to protect the integrity of the state as a political community.[209]

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

[202] For an important discussion of the role of clear statement rules, and other interpretive tools, see *id.* at 611–28.

[203] For an extended discussion of the Court's "clear statement" jurisprudence, see *Raygor v. Regents of University of Minnesota*, 534 U.S. 533, 543–47 (2002).

[204] 501 U.S. 452 (1991).

[205] *Id.* at 455–56.

[206] *Id.* at 464.

[207] *Id.* at 467–68.

[208] *Id.* at 463–64.

[209] Similarly, in the Spending Clause context, U.S. CONST. art. I, § 8, cl. 1, there is very little judicial control of congressional impositions of conditional spending on state governments. Despite calls by many in the academic community for the Court to reign in Congress's authority in ways that mirrored its decisions in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), the Rehnquist Court did not. This does not mean, however, that the Court completely ignored the federalism revolution of the Rehnquist era. For example, in *South Dakota v. Dole*, 483 U.S. 203 (1987), the Court addressed a challenge to a federal statute which required the Secretary of Transportation to penalize state governments by withholding federal highway funds from those whose drinking age was less than twenty-one. *Id.* at 205. The State of South Dakota challenged Congress's authority to condition federal highway funds on a state's decision to have a drinking age lower than twenty-one. *Id.*

2. Presumptions In Favor of State Regulatory Authority

Presumptions that courts establish are often very much like clear statement principles. Like clear statement rules, the presumptions articulate a default position that is the background norm, against which Congress legislates.[210] However, they operate slightly differently than clear statement rules. Where clear statement rules declare what Congress will have to do to disturb some value—explicitly declare its intention—a presumption does not simply require that Congress express its intentions clearly. That is, the presumption affects the judicial determination about the scope of a particular interpretive conclusion in ways slightly different from a clear statement rule. That said, presumptions, no less than clear statement rules, are used to enforce federalism values.

In addition to the articulation of clear statement principles, the Court has, for much of the twentieth century, maintained a presumption against the preemption of state law by national law.[211] Much like the Court's clear statement rules, which recognize the substantive legitimacy of Congress's exercise of regulatory authority, the presumption against preemption serves as a guide to courts to narrowly interpret statutory statements claiming to preempt state law. Here, the presumption acts very much like a clear statement rule in ordinary statutory interpretation in that it obligates Congress to clearly identify its preemptive preference in the text of the statute before according the statute express preemptive effect. However, even here, the presumption goes beyond the clear statement principle in that it also affects the scope of a statute's preemptive effect. That is, even where a court concludes that a statute expressly preempts state law, the scope of the statute's preemptive effect is often narrowly applied under the presumption against preemption.

The Supreme Court's current presumption against preemption springs from its post-New Deal declaration that both recognized the substantive breadth of Congress's regulatory authority, yet cabined its implications for concurrent state regulatory regimes.[212]

The State argued that the statute violated constitutional limitations on Congress's authority under the Spending Clause. *Id.* Although the Court began by stating that Congress's Spending Clause authority was not unlimited, it rejected the state's challenge. *Id.* at 207. Important to the Court's analysis, however, was its discussion of the limitations on Congress's authority to attach conditions on federal funding. The Court stated, "[I]f Congress desires to condition the States' receipt of federal funds, it 'must do so unambiguously . . . enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.'" *Id.* at 207 (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)). The Court concluded that the statute clearly identified the conditions that attached to state receipt of their full share of federal highway funding. *Id.*

[210] *See, e.g.*, ELHAUGE, *supra* note 200, at 311 (arguing that in some cases the Court's intention is to "elicit[ ] legislative preferences ex ante" by creating a background rule).

[211] *See* Gardbaum, *supra* note 197, at 772 n.17 (citing S. Candice Hoke, *Transcending Conventional Supremacy: A Reconstruction of the Supremacy Clause,* 24 CONN. L. REV. 829 (1991)).

[212] *Id.* at 806–07.

In *Rice v. Santa Fe Elevator Corporation*,[213] the Court rejected a challenge to Congress's substantive authority to regulate grain warehouses but also limited the preemptive effect that national legislation would have on state regulatory regimes.[214] In *Rice*, the Court articulated the framework for modern preemption analysis.[215] Again, one sees the Court's attempt to mediate state and national regulatory interaction without demarcating absolute boundaries between their exercise of authority as off limits to the other.[216] Nevertheless, the doctrine serves the purpose of enforcing the values of federalism.

3. Federalism-Based Avoidance Principles

Beyond federalism-inspired clear statement rules and judicial presumptions, the Court has also deployed avoidance principles on federalism-inspired grounds. For example, when the Court addressed the federalism impacts of decision making by administrative agencies, the Court has deployed avoidance principles to resist attempts by agencies that it deems as intruding on what might be deemed to be traditional state authority. In *Solid Waste Agency v. U.S. Army Corps of Engineers*,[217] the Court addressed a Commerce Clause challenge to the Army Corps of Engineers' Migratory Bird Rule,[218] which had the effect of extending the agency's regulatory reach to include intrastate, non-navigable waters. The Court avoided the issue of Congress's

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[213] 331 U.S. 218 (1947).

[214] *Id.* at 237.

[215] *Id.* at 231. Preemption is distinguished between two broad categories—express preemption and implied preemption. Implied preemption is also divided into three types: (1) conflict; (2) field; and (3) obstacle. *See* Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L. J. 2085, 2100–07 (2000).

[216] *Id.* at 237.

[217] 531 U.S. 159 (2001). The presumption against preemption has been criticized as inconsistent with the Supremacy Clause. *See* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 292–93 (2000). Nelson's arguments against the presumption against preemption appear to be based on an originalist interpretation of the Supremacy Clause. *Id.* The development of a presumption against preemption, however, might be understood as a "modern" innovation by the Court in its effort to preserve concurrent regulatory authority by state governments in the post-New Deal era of expanded national regulatory activity. For a historical discussion of the development of the Court's preemption jurisprudence, see Gardbaum, *supra* note 197, at 785–807.

[218] 51 Fed. Reg. 41,217 (Nov. 13, 1986). The Army Corps of Engineers had authority to issue permits allowing the discharge or dredge or infill material into "navigable waters" pursuant to the Clean Water Act (CWA). The CWA defined "navigable waters" as "waters of the United States including the territorial seas." 33 C.F.R. § 328.1 (2010). Pursuant to its regulations, the Corps defined "waters of the United States" to mean waters to include intrastate waters, "the use, degradation or destruction of which could affect interstate or foreign commerce," 33 C.F.R. § 328.3(a)(3) (2010). Pursuant to its "Migratory Bird Rule," the Corps regulatory authority included intrastate waters that provide habitat for migratory birds. 51 Fed. Reg., at 41,217.

constitutional authority by holding that the agency was not the most appropriate site for decisions having a significant impact on national-state balance of power.[219]

Each of the above examples demonstrates the ways in which the Court has recognized that it is exercising authority that transcends the simple invalidation of a particular activity because it violates a constitutional provision. Rather the Court has interpreted the Constitution's federalism structure as authorizing it to implement certain procedural norms that are instantiated in the doctrinal pronouncements such as clear statement rules or presumptions and that have an impact on the nature of national and state interaction.[220] These cases do not represent the judicial construction of enclaves that provide absolute bulwarks against national power in favor of state governments, but they do represent the judicial implementation of constitutional values into behavioral norms that impact the nature of national-state interaction.

B. Criticisms of Extra-Constitutional Judicial Policymaking

There are two primary criticisms of judicially-articulated behavioral norms in federalism disputes. The first is a general opposition to judicial policymaking of whatever sort. This critique has two dimensions, one judicially focused and the other constitutionally focused. The first class of critics asserts that the judiciary's institutional competence is best suited for the task of drawing lines that determine what is allowed or disallowed under the constitutional framework.[221] According to these critics the judicial function is not well suited for the task of adjudicating disputes where an activity does not explicitly contravene the Constitution.[222] The second is based on a conception of the Constitution as the embodiment of specific bargains, which cannot be expanded

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[219] *Solid Waste Agency*, 531 U.S. at 173–74. More recently, the Court rejected an attempt by the Food and Drug Administration to preempt state tort law claims on the basis of a preemption decision made in the preamble of an agency rule. Wyeth v. Levine, 129 S. Ct. 1187, 1201–02 (2009). There, the Court highlighted the agency's failure to undertake notice and comment rulemaking as a significant factor in its decision not to accord the agency's interpretation preemptive effect. *Id.* at 1202–04. For illuminating discussions of the way in which the Court has used administrative law in the service of federalism, see Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933 (2008); Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023 (2008).

[220] *See generally,* ELHAUGE, *supra* note 200 (detailing the default rules created by courts under an interpretation of federalism authority).

[221] *See, e.g.*, Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 NW. U. L. REV. 761, 768–85 (1989) (detailing the judicial role under institutionalist constitutional interpretation). *But see* Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709 (1998) (positing an aspect of the judicial role less rooted in a case or controversy).

[222] *See* Redish, *supra* note 221, at 763.

upon without doing violence to the intentions of those who engaged in the bargain.[223] These are best understood as the "institutionalist" critiques of the relational enforcement of federalism because of their emphasis on the interaction of the Constitution and the judiciary as distinct institutions.[224]

The second criticism is best understood as a substantive critique of the proposal for a judicially-based relational enforcement of federalism constraints. It argues that federalism values are not readily enforceable by the judiciary.[225] According to this view, federalism is best enforced through the political process, as has been shown through the doctrinal instability and confusion that has ensued whenever the Court has attempted to assert federalism as a constraint on any significant policy agenda.[226]

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[223] *See, e.g.*, John Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2009–11 (2009) (describing the differences between textual and purpovist interpretations in terms of the bargain made between the Founders). *But see*, Gillian E. Metzger, *The Constitutional Legitimacy of Freestanding Federalism*, 122 HARV. L. REV. F. 98, 102 (2009), http://www.harvardlawreview.org/media/pdf/Forum_Vol_122_metzger.pdf (arguing that Manning's approach fails to consider the Founders' intentions that federalism concerns evolve over time).

[224] The distinction between institutional and substantive criticisms of relational federalism enforcement might appear arbitrary. However, I draw the distinction between institutional versus substantive because the bases of the different critiques lie in the nature of specific institutions—either the judiciary or the Constitution—as against the criticisms that are based primarily on the judicial enforcement of federalism. These criticisms, while they might sound alike in this context, are motivated by different concerns. The substantive criticism might sound very different about the capacity of the judiciary when not addressing the enforcement of federalism (or other structural) constraints, while the institutional critique might be expanded beyond the domain of federalism enforcement to include judicial implementation of the sort I discuss in areas that include individual rights enforcement.

[225] *See, e.g.*, JESSE H. CHOPER, JUDICIAL REVIEW & THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980). Although I disagree with Choper's conclusion that judges should not enforce federalism, I am sympathetic to certain arguments that might bolster Choper's primary conclusions. That is, to the extent that federalism values might be judicially enforced, the articulation of such values is likely to be at an abstract level. Though abstraction doesn't mean that the articulation is useless (or else I am wasting my time), but it requires that we recognize that the mere fact of federalism enforcement does not mean some mechanical adherence to "state's rights" or "national dominance." That is, federalism values can certainly guide judicial decision making, but they do not substitute for the need to weigh these values against other values, some of which might rank higher in priority in a given context. For a discussion of the humility that this discussion requires, see Bandes, *supra* note 190.

[226] For the classic defense of the political process as the most appropriate site for regulation of state and national interaction, see Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954); *see also* Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000).

1. Institutional Criticisms of Relational Federalism Enforcement

a. Judicially-Focused Institutionalism

The judicially-focused institutional critics of relational federalism enforcement argue that the judicial role ought to be limited to declaring activity unconstitutional.[227] Any further attempt to regulate action of the political branches of government, including duties imposed on state courts, violates the separation of powers. According to this argument, the Constitution's explicit constraints, or those that might reasonably be drawn from such constraints, exhaust the judiciary's legitimate function in constitutional adjudication.[228]

Professor Martin Redish has advanced one of the most significant criticisms of the institutional legitimacy of judicial constitutional implementation of the sort most analogous to relational federalism enforcement.[229] Although Redish wrote to challenge the role of the federal courts in articulating statutory (and) constitutional common law, his criticism likely extends to the judicial articulation of behavioral norms like interest inclusion. Redish's argument begins with an assertion that the Constitution inaugurates a representative democracy, whose primary concern is the "political legitimacy"

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[227] *See* Fallon, *supra* note 42, at 1143–44 (arguing federalists would envision states emerging as sovereign entities which federal courts would only exercise limited powers against and state courts would be the ultimate guarantors of constitutional rights).

[228] The conception of a limited judicial role in testing the means by which Congress acts might be inferred from the Court's seminal decision in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1816). In upholding Congress's establishment of the Bank of the United States, the Court stated:

> We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

Id. at 421. However, as will be explained below, I read the Court's qualifications of the legitimacy of means used toward the furtherance of even constitutional ends as a basis for articulating a role for the judiciary that transcends the mere invalidation of authority that has overstepped its constitutionally established bounds.

[229] Redish's criticism of "judicial policymaking" has spanned the entirety of American constitutional law. *See* Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 114–15 (1984); Redish, *supra* note 221, at 793–94; Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 613–15.

of the decisionmaker, rather than the substance of any particular decision.[230] This "normative premise" of the Constitution underwrites Redish's conclusion that "issues not controlled by the Constitution . . . are to be resolved on the basis of judicial policy assessment only to the extent the representative branches have not already made that policy choice through legislative action."[231]

Understood as it relates to the federalism constraints discussed above, Redish's institutionalist perspective rejects what he takes to be judicial overreaching to substitute its policy choices with respect to the interaction of states and the national government.[232] These decisions have been made either by the constitutional text or by Congress in enacting specific pieces of legislation. If the authority under which the political branches have acted is constitutionally legitimate, then the judicial role must be circumscribed to its appropriate boundaries.[233] This argument recognizes that the Constitution's implementation involves branches beyond the judiciary, but including Congress and the President as well.[234]

b. Constitutionally-Focused Institutionalism

The constitutionally-focused institutional argument defends the legitimacy of the Constitution as a political institution, which is the result of the negotiations and compromises of the Framers.[235] This view challenges the legitimacy of judicial action

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[230] Redish, *supra* note 221, at 762. Redish readily admits that this is not the case in every instance. *Id.* The Constitution and constitutional doctrine clearly places some substantive decisions beyond the reach of democratic majorities of whatever size. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[231] Redish, *supra* note 221, at 768.

[232] *Id.* at 765.

[233] One can see connections between Redish's rejection of judicial policymaking, generally, and his search for a site to justify the commandeering of state courts discussed in Part I, *supra*. This further supports the conclusion that scholars who deem it necessary to find some constitutional delegation of authority for the commandeering power would likely oppose the type of federalism enforcement offered in this Article on broader grounds than that they disagree with any specific arguments about the foundation of state court duties to federal claims.

[234] There has been a burgeoning literature on the Constitution outside the courts. For discussions of extrajudicial constitutional implementation, see David P. Currie, *Prolegomena for a Sampler: Extrajudicial Interpretation of the Constitution, 1789–1861*, *in* CONGRESS AND THE CONSTITUTION 18 (Neal Devins & Keith E. Whittington eds., 2005); *see also* WILLIAM N. ESKRIDGE & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION (2010) (addressing administrative implementation of the "super-statutes" and its effects on constitutional meaning).

[235] The notion that the Constitution represents a compromise of different factions is, itself, not a radical conclusion. The very basis of the Garrisonian rejection of the Constitution as a legitimate authority came from the belief that it was a compromise with the forces of slavery. *See* DAVID WALDSTREICHER, SLAVERY'S CONSTITUTION: FROM REVOLUTION TO RATIFICATION 16 (2009). But there is a difference between those who understand the Constitution's negotiated

that involves anything beyond giving clear effect to the explicit "bargains" of what the Constitution represents.[236] If a challenged activity exceeds the authority of the governmental institution, as prescribed in the text, then it is prohibited as inconsistent with the Constitution.[237] Based on this view, the Constitution admits of only one constraint on governmental authority, and it is the scope of authority delegated to the institution.[238] Underlying this argument is the premise that the Constitution's regulation of interaction between governmental institutions—or between the government and the individual—is exhausted by the allocation of power (or the avoidance of an allocation) to one branch as against another or the individual rights protected by the Constitution.[239] It argues that where an institution possesses the requisite authority, the Constitution does not require (or presumably allow) superintendence by anything other than the political process.[240] The Constitution's allocation of substantive authority, this view maintains, represents the bargain that was made by the founding generation and subsequent generations of Americans in the form of constitutional amendments.[241] The terms of the bargain established in the Constitution's textual provisions represent the commitment to the protection and preservation of particular values—e.g. individual rights, separation of powers, and federalism.[242] To the extent that the judiciary seeks to impose greater protections for constitutionally-enshrined values, it devalues the Constitution's bargained-for protections.

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status as a descriptive fact and those who take it as a normative starting point, which constrains constitutional meaning.

[236] *See* Redish, *supra* note 221, at 771 n.44 (analyzing Frank H. Easterbrook, *The Court and the Economic System*, 98 HARV. L. REV. 4 (1984)).

[237] *Id.* at 768–69.

[238] *Id.* at 764.

[239] *Id.* at 761–68.

[240] *See supra* note 227.

[241] *See* John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 431–32 (2010).

[242] One of the most insightful critics of the Court's federalism-inspired policymaking is John Manning. Although Manning does not directly aim his fire at judicial "policymaking" of the sort discussed in this Article, I think his challenge—which explicitly criticizes the Court's deployment of federalism-inspired clear statement rules—would indict the argument being made in this Article. *Id.* at 404–05, 449. Manning understands federalism as a specific structure that, at bottom, contains specific textual provisions, which are, themselves, the result of significant contestation and compromise. *Id.* at 427. He argues that judicial policymaking unmoored from specific textual provisions undermines the significance of the constitutional compromise to the extent that it relies on generalizations from the Constitution's specific provisions. *Id.* at 404. Further, Manning contends that the Constitution does not simply enshrine federalism as its exclusive value. *Id.* at 434. Alongside federalism is the commitment to establishing an effective government, capable of solving real problems. *Id.* at 433. He argues that federalism-inspired judicial policymaking either implies that federalism values do not have to be weighed against other competing values (also the result of compromise), or that, worse, the process of federalism-inspired judicial policymaking hides the conflict by reducing it to sub-constitutional status by not actually invalidating an institution's substantive exercise of authority. *Id.* at 402.

2. Substantive Criticisms of Relational Federalism Enforcement

The call for a judicial enforcement of relational norms in federalism is also vulnerable to attack from those who view the judicial enforcement of federalism as an ill-conceived task.[243] This argument is based primarily on what critics deem to be the failure of the judiciary's past attempts to regulate federalism. It asserts that the Court's past practices were based on its creation of unworkable categories that were incapable of squaring with the felt needs and sustained policy preferences of political majorities or were inconsistent across categories of case law.[244]

These criticisms have been leveled by, among others, Professors Eskridge and Frickey, who have maintained that the Court's protection of state autonomy interests in its recent clear statement cases is inconsistent with the Constitution's declaration that the political process be left to decide the scope of congressional regulatory authority.[245] They contend that the rhetoric attached to the Court's declaration of clear statement requirements harkens back to an age in which the courts were concerned about upsetting core areas of state interest, which is reminiscent of the now-rejected dualist age in federalism jurisprudence.[246] Professors Eskridge and Frickey have argued that the Court's identification of state autonomy as a core federalism value suffers from the

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[243] *See, e.g.*, Eskridge & Frickey, *supra* note 201, at 619–21.

[244] For a critique of the formalism of the Court's federalism case law, see ERWIN CHEMERINSKY, ENHANCING GOVERNMENT: FEDERALISM FOR THE 21ST CENTURY 57–97 (2008). *But see* Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180 (1998) (affirming the conception of federalism as compromise and rejecting the notion that federalism has a single normative meaning).

[245] *See* Eskridge & Frickey, *supra* note 201, at 635–36.

[246] Eskridge and Frickey were writing at the beginning of what has come to be called the Rehnquist Court's "federalism revival," which appeared to call into question the Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). In cases exemplified by *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), the Court's federalism jurisprudence seemed to turn toward a dualist framework. This turn might call into question the current cogency of Eskridge and Frickey's criticism. However, I think their criticism remains appropriate in the light of the Court's continued respect for its previous decision in *Garcia*. The heated debate within the Court during this period over the appropriate judicial role in protecting the Constitution's federalism structure, and the Court's more recent refusal to expand upon its decisions in *Lopez* and *Morrison*. *See* Gonzales v. Oregon, 546 U.S. 243 (2006) (invalidating the Attorney General's regulation of physician-assisted suicide, in part, on grounds that it would undermine state regulation of physicians); Gonzales v. Raich, 545 U.S. 1 (2005) (upholding the Congressional ban on homegrown marijuana against a Commerce Clause challenge). For the most recent example of the continuing debate within the Supreme Court of the expansion of the Court's Commerce Clause jurisprudence, see *Alderman v. United States*, No. 09-1555, 2011 WL 5949 (U.S. Jan. 10, 2011) (Thomas, J., dissenting) (dissenting from a denial of certiorari and criticizing the Court's failure to prevent what he sees as the undermining of its precedents in *Lopez* and *Morrison*).

same indeterminancy as past efforts to enforce federalism by carving out areas of protection for state authority.[247]

C. Justifying Judicial Policymaking in the Service of Federalism

The assertion that the above examples of judicial constitutional implementation usurp other branches of government rests on a legitimate concern that democratic decisionmaking cannot ignore the democratic legitimacy of the decisionmakers. The judicially-focused institutionalist criticism offered by Professor Redish, among others, assumes that a democratic deficit plagues judicial institutions.[248] This deficit undermines any judicial involvement in spheres beyond those strictly laid down in the Constitution. However, this argument seems to be at its weakest when one considers judicial implementation aimed at protecting or enhancing the functioning of the political process.

As Professor David Strauss has written regarding the judicial articulation of prophylactic rules[249] in constitutional adjudication involving individual rights, the judiciary might possess a comparative institutional competency that justifies its declaration of rules aimed at protecting the legitimacy of the political process.[250] It is exactly here that there might be a residual judicial role aimed at protecting the integrity of state and national interaction beyond boundary maintenance. According to Strauss, judicial declaration of prophylactic rules serves an important function when it is likely that actors will violate constitutional norms,[251] and the traditional enforcement mechanisms have been abandoned—resulting in the under-enforcement of the constitutional value. One of the major factors that may cause the breakdown in the proper functioning of the political process and its ability to adequately protect constitutional

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[247] *See* Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950); Eskridge & Frickey, *supra* note 201, at 633–40.

[248] *See* Redish, *supra* note 221, at 774. The theme of the judiciary's democratic deficit has been a constant theme in American constitutional law and theory. *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962). For a rejection of the argument that courts are anti-majoritarian institutions, see GIRARDEAU A. SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA (1993).

[249] Prophylactic rules in constitutional adjudication are rules that are not dictated by the Constitution but are fashioned by the courts as implementing substantive constitutional rights guarantees. Perhaps the most famous of the Court's prophylactic rules is *Miranda v. Arizona*, 384 U.S. 436 (1966), which imposed an obligation on arresting officers to provide individuals with a warning against self-incrimination. *Id.* at 467–79. For defenses of the legitimacy of the court's creation of prophylactic rules, see Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988).

[250] *See* Strauss, *supra* note 249, at 208–09.

[251] On the incentives for states and the national government "cheat" in their interaction, see Bednar & Eskridge, *supra* note 101, at 1470–76.

federalism is the growth of national political parties and the extent to which they distort the incentive structures of both state and national political leaders to protect the interests of their respective levels of government.[252]

The constitutionally-focused institutionalist challenge to relational federalism enforcement asserts that the Constitution's delegations of substantive authority—along with its individual rights guarantees—is the exclusive limit on government's exercise of power. This assertion is premised on the Constitution as a negotiated bargain whose terms were set by the Framers. For those who seek to protect the Constitution from what they consider to be a "free-floating" federalism,[253] the notion that the Constitution's text establishes a set of structures and relationships that appear to suggest constraints on state and national interactions beyond the explicit grants and prohibitions of power is of no small moment.[254] The specific textual compromises are the sole basis for enforcing constitutional federalism.

This challenge to relational federalism is perhaps the most fundamental of the challenges addressed here because it has a conception of the Constitution as a set of compromises that fully exhaust the text's concern with a specific issue. A relational conception of American federalism and a relational model of federalism enforcement could not be more opposed to this conception of the Constitution's function. Beyond these arguments, which have been articulated in the previous Part, the proponents of the negotiated Constitution fail to appreciate the extent to which the specific circumstances that gave rise to the original compromise may no longer be present.[255] Changed facts, however, does not obviate the normative concern that motivated the compromise. The value remains a constitutional value even where the specific compromise, as enshrined in the text, becomes obsolete or incomplete. Where this is the case, fidelity to the Constitution, its values, and its framers might require making "compensating adjustments."[256] As Professor Ernest Young has written, there is a legitimate judicial role in adjusting for changed circumstances.[257] Since the Constitution's ratification,

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[252] On the threat that political parties pose to the constitutional commitment to separation of powers, see Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006). *See also* Franita Tolson, *Partisan Gerrymandering as a Safeguard of Federalism*, 2010 UTAH L. REV. 859 (2011), *available at* http://www.epubs.utah.edu/index.php/ulr/article/view/432/330.

[253] Manning, *supra* note 29, at n.234.

[254] Note, *Textualism as Fair Notice*, 123 HARV. L. REV. 542, 547 n.21 (2009). As Professor Gillian Metzger has pointed out, the dismissal of this way of regulating federalism is inconsistent with constitutional-interpretive practice going as far back as *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), and *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Metzger, *supra* note 223, at 102, *responding to* Manning, *supra* note 29.

[255] *See* Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993) (arguing that changed interpretations can be faithful to constitutional values).

[256] *See* Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1739 (2005).

[257] *Id.* at 1762.

constitutional doctrine aimed at protecting federalism values has been changed fundamentally. Indeed the Constitution's text has changed fundamentally with the inclusion of the Reconstruction Amendments.[258] Each of these changes has called for adjustments in the implementation of the Constitution's concern for federalism.[259] The notion that judges have no legitimate role to play in these adjustments is antithetical to American constitutional practice.

Even if we were to conclude that power allocation is a dominant method of enforcing the appropriate interactions between the states and the national government, it is not clear that judicial policymaking aimed at eliciting the preferences of the legislative branch is inconsistent with the post-*Garcia* framework. In *Garcia* the Court appeared to abdicate a strong judicial presence in the enforcement of federalism structure in favor of political process determinations about the scope of national regulatory

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[258] *Id.* at 1812–13.

[259] This Article has proceeded without making mention of an important argument against the claims offered herein. The challenge that goes "all the way down" regarding the arguments presented is clearly the argument that federalism is not a constitutional value in the way that I suppose. This position rejects the notion that federalism is a value of constitutional dimension such that it ought be weighted in any equation that attempts to work out the problems that face the American political community. A slightly different version of this argument might suggest that federalism is so inextricably connected to the subordination of minority groups that it cannot possibly persist as a value alongside a constitutional commitment to an egalitarian social and political order. Although addressing these arguments as they deserve is beyond the confines of this Article, they deserve some response. It cannot be denied that federalism was central to shielding racist state policies from the scrutiny of constitutional authority in post-Reconstruction America and during the Civil Rights Movement. However, federalism has also made it possible for states to critique certain national policies that might mark blacks for oppression. For example, anti-slavery activists argued for states' rights against a national slavery-protecting power after the enactment of the Fugitive Slave Clause. *See* HAROLD M. HYMAN, THE RECONSTRUCTION JUSTICE OF SALMON P. CHASE: *IN RE TURNER* AND *TEXAS V. WHITE* 37–54 (1997). In the post-Civil Rights era, state and local governments have contributed significantly to the diversification of American political leadership. *See* Merritt, *supra* note 147, at 8 (citing statistics showing that blacks and women made up a greater percentage of offices at the state and local level than they did in national legislative bodies). This is certainly not meant to suggest that state and local governments are not guilty of rights violations but that the context in which we ought to think about federalism has significantly changed from the middle of the twentieth century. It might also be argued that federalism is far more complicated in America today, particularly as proponents of the equality rights of gays and lesbians defend state authority against what is perceived to be national authority opposed to same-sex marriage. *See* Kathleen M. Sullivan, *From States' Rights Blues to Blue States' Rights: Federalism After the Rehnquist Court*, 75 FORDHAM L. REV. 799, 800–01 (2006); *see also* LISA L. MILLER, THE PERILS OF FEDERALISM: RACE, POVERTY, AND THE POLITICS OF CRIME CONTROL (2008) (examining the extent to which poor minority communities lose control over crime control initiatives once policymaking decisions shift from the local level to state national levels of government). This suggests that there ought to be greater protection of local governments within the framework of federalism. For an insightful defense of this position, see Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010).

authority.[260] Eskridge and Frickey argue that the Court's clear-statement requirements undermine its earlier decision in *Garcia*.[261] However, commentators have suggested that the Court's articulation of clear statement principles seemed to be the logical progression of the Court's relinquishment of its authority to enforce substantive constraints on congressional lawmaking authority on federalism grounds.[262] To the extent that *Garcia* stands for the proposition that the political process is a more accurate site for federalism decisions to be made, judicial attempts to ensure that political preferences are aired is not inconsistent with the original determination. In fact, to the extent that the *Garcia* Court envisioned a residual judicial role in policing congressional action *vis à vis* state governments, the Court declared that the judicial role would be limited

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[260] Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

[261] *See* Eskridge & Frickey, *supra* note 201, at 633–34.

[262] *See, e.g.*, Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1352 (2001) (arguing that clear statement rules "help[ ] the political process police itself"). Experience indicates that the judiciary can play an important role in the enforcement of constitutional guarantees that have been thought to be non-justiciable by articulating procedural obligations and behavioral norms to parties involved in contestation over such constitutional guarantees. For example, the Constitutional Court of South Africa recently decided *Occupiers of 51 Olivia Rd. v. City of Johannesburg*, 2008 (3) SA 208 (CC), *available at* http://www.saflii.org/zacases/ZACC/2008/1.pdf, a case involving the judicial enforcement of the constitution's guarantee of a right to housing. *Id.* The Court declared an obligation of the government to undertake "meaningful engagement" when making condemnation decisions that affect the housing status of homeless citizens. *Id.* at para. 9. The Court declared: "Engagement is a two-way process in which the City and those about to become homeless would talk to each other meaningfully in order to achieve certain objectives. There is no closed list of the objectives of engagement." *Id.* at para. 14. Further, the Court declared that the engagement between the city and the squatters would "contribute towards the resolution of disputes and to increased understanding and sympathetic care if both sides are willing to participate in the process." *Id.* at para. 15. Nowhere in its opinion did the Constitutional Court of South Africa declare that the City of Johannesburg lacked the authority to condemn property that met the requirements for condemnation, yet the City's exercise of its authority was constrained by the imposed obligation of respect for the fact that the squatters would almost certainly become homeless as a result of the City's action. The South African Constitution's articulation of a right to housing obligates the state to a behavioral norm that demonstrates its sensitivity to the fact that homelessness will result as a consequence of its actions. S. AFR. CONST. §16, 1996. The Constitutional Court of South Africa encapsulates this behavioral norm in the obligation that the City undertake meaningful engagement in situations that might lead to homelessness for occupiers of condemned property. *See Occupiers of 51 Olivia Rd.*, (3) SA 208. For a discussion of the role of the judiciary in ensuring socio-economic rights from two different perspectives, *compare* MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 227–264 (2008) (arguing for a reduced judicial role as necessary for effective development of constitutionally-enshrined socio-economic rights), *with* Brian Ray, *Extending the Shadow of the Law: Using Hybrid Mechanisms to Develop Constitutional Norms in Socioeconomic Rights Cases*, 2009 UTAH L. REV. 797 (arguing for the legitimacy of an expanded judicial role built on the procedural model of engagement obligations).

to maintaining the integrity of the political process, as it would be looked to as the first line of defense of states' interests.[263]

In short, it might be argued that the Court's clear statement rules simply demand the national political process live up to its billing as the most appropriate protector of state interests by explicitly engaging in politics *about* state interests.[264] The discussions below will demonstrate a form of judicial policymaking in the service of regulating national-state judicial interactions. These doctrines exemplify the kinds of constitutionally-inspired judicial practices discussed herein.

IV. JUDICIAL FEDERALISM AND THE NATIONAL-STATE RELATIONSHIP

The relationship between the states and the national government is governed as much by the interactions between state and federal judiciaries as by the interactions between states and the national legislatures.[265] Part I described the nature of the interactions between federal and state judiciaries and the basis of their overlapping jurisdictional authority, so it need not be rehearsed here. Suffice it to say that a significant portion of federal courts law trains its attention on resolving disputes that arise from the overlapping exercise of judicial authority.

So far this Article has asserted that the national-state relationship ought to be reconceptualized as being regulated by more than the allocation of substantive power to a particular sphere of government—whether that decision is made by the Constitution or through the political process.[266] It has argued that the regulation of the national-state relationship involves the recognition of behavioral norms that impose a duty to consider the interest of the other level of government in any exercise of authority.[267] Further, this article has argued that we can see this alternative account of federalism deployed in the Court's case law involving state court duties to federal claims.[268]

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[263] *Garcia*, 469 U.S. at 547–57. Eskridge and Frickey have remarked that "judicial aggressiveness at the interpretive level correlates with judicial deference at the constitutional level." Eskridge & Frickey, *supra* note 201, at 621.

[264] This does not suggest that the model of relational federalism that I have offered accepts the Rehnquist Court's framing of federalism issues. The Court has repeatedly treated federalism as though it were solely about the protection of state autonomy interests to the exclusion of national interests. As I have articulated, the lasting tension of both union and separation is the irrefutable element of federalism. As such, the conception of relational federalism offered above places the value of state autonomy—understood as the value of recognizing the independence of states as political communities—alongside the value of national supremacy—understood as union. For a discussion of the conditional nature of state autonomy, see Copeland, *supra* note 27.

[265] "The jurisdiction of courts in a federal system is an aspect of the distribution of power between the states and the federal government." RICHARD H. FALLON, JR. ET AL., THE FEDERAL COURTS AND THE FEDERAL SYSTEM ix (5th ed. 2003).

[266] *See supra* Part II.

[267] *See supra* Part II.

[268] *See supra* Part I.B.2.

Here, I hope to illustrate that a relational account of federalism enforcement is present in other areas of federal courts law.[269] Understanding the relational dimension of the Court's decision making in these areas affords the opportunity for refined critique and intervention in certain areas of federal courts jurisprudence.

This Part contends that both the Court's abstention jurisprudence and its appellate review of state courts jurisprudence demonstrate elements of relational federalism. In each of these areas, the Court imposes limitations on its jurisdictional authority in favor of the recognition of the integrity of state judicial systems. Nevertheless, each body of case law demonstrates the Court's engagement with federalism's inherent tension between union and separation. The recognition of the value of state court separateness is not considered in isolation. In each area the Court has articulated doctrine that purports to reduce the threat of a rupture in the relationship between the state courts and national law.[270]

A. Negotiating Overlapping Jurisdiction: Abstention Doctrines

1. Statutory Limits on Federal Jurisdiction: The Anti-Injunction Act

One of the earliest congressional attempts to regulate the interaction between federal and state courts was the Anti-Injunction Act of 1793.[271] The Act prohibited federal courts from enjoining proceedings in state court.[272] Although commentators have stated that the full purpose of the original statute is unclear, they surmise that its primary purpose was "to prevent unhampered intrusions by the new federal courts into

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[269] My inclusion of these two areas of federal courts law is not meant to suggest that I agree substantively with the Court's particular analysis or the particular conclusions reached but rather is meant to highlight the relational dimension of the Court's decision making.

[270] To say that the Court's doctrine evidences a recognition of and an engagement with the tension of union and separation is not to say that the Court comes to the correct conclusion with respect to the values to be placed on these two poles. There are critics who argue convincingly that the Court's abstention doctrine undervalues the legacy of the Reconstruction era and its commitment to the jurisdictional authority of federal courts to entertain federal claims. *See* Aviam Soifer & H. C. Macgill, *The* Younger *Doctrine: Reconstructing Reconstruction*, 55 TEX. L. REV. 1141 (1977). Nevertheless, the Court's abstention doctrine is recognizable as an attempt to balance the sometimes competing claims of the vindication of federal law and the integrity of state court processes. Though there might be criticism of the formalism that began to undermine the coherence of the Court's abstention jurisprudence, this is not, itself, a rejection of the Court's analytical framework for addressing these issues. On the extent to which formalism undermines the integrity of judicial decision making in the context of federalism, see Bandes, *supra* note 190.

[271] Act of Mar. 2, 1793, ch. 22, § 5, 1 Stat. 333, 334–35 (current version at 28 U.S.C. § 2283 (2006)).

[272] *Id.*

the then well-established state court domain and to codify the then prevailing prejudices against any extension of equity jurisdiction and power."[273] Despite the Act's language, the federal courts interpreted several exceptions to the bar against enjoining state judicial proceedings. The two exceptions that the federal judiciary read into the subsequent versions of the Act were the *res* exception[274] and the exception allowing federal courts to enjoin actions to enforce fraudulently obtained state court judgments.[275] The Anti-Injunction Act underwent other minor changes during the nineteenth century, including the 1874 Act, which explicitly limited federal court authority to enjoin state court proceedings.[276]

Despite the purpose behind the 1874 revisions of the Act as a bar on federal court intrusions into state judicial proceedings, the federal courts continued to articulate exceptions to the Act such that by the twentieth century, commentators declared the statute dead.[277] However, the Court revived the Act in its decision in *Toucey v. New York Life Insurance Co.*,[278] in which it reversed a district court's decision to enjoin

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[273] See MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 260 (1980) (quoting Comment, *Anti-Suit Injunctions Between State and Federal Courts*, 32 U. CHI. L. REV. 471, 480 (1965)). For a rejection of this thesis, see William T. Mayton, *Ersatz Federalism Under the Anti-Injunction Statute*, 78 COLUM. L. REV. 330, 332 (1978) (contending that the second Congress did not intend to enact an anti-injunction statute in 1793, contrary to the traditional interpretation of the statute, but that it rather sought to empower Supreme Court justices to issue injunctive relief, but conditioned its exercise within certain limits—here, that it not be exercised by a single justice). Whatever the correctness of Professor Mayton's arguments with respect to the 1793 iteration of the prohibition on enjoining state court proceedings, it is clear that by 1948 a central purpose of the Anti-Injunction Act was the protection of state court systems from undue interference by the federal judiciary. *See* Diane P. Wood, *Fine-Tuning Judicial Federalism: A Proposal for Reform of the Anti-Injunction Act*, 1990 BYU L. REV. 289, 289–90 (maintaining that the 1948 Anti-Injunction Act attempts to incorporate both the value of "the autonomy of the state courts" and the protection of "superior federal interests").

[274] *See, e.g.*, Hagan v. Lucas, 35 U.S. (10 Pet.) 400, 403 (1836) (setting forth the basis of the *res* exception to the prohibition on enjoining state court proceedings on the ground that once a court takes possession of the *res*, it should be allowed to litigate the issues without interference).

[275] *See* Toucey v. New York Life Ins. Co., 314 U.S. 118, 136 (1941) (citing *Simon v. S. Ry. Co.*, 236 U.S. 115 (1915), and *Marshall v. Holmes*, 141 U.S. 589 (1891), among others, as examples of the judicial creation of the exception to the Anti-Injunction Act to enjoin litigants from enforcing fraudulently obtained judgments).

[276] The 1874 statute read: "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." Rev. Stat. of 1874, ch. 12, § 720, 18 Stat. 134 (current version at 28 U.S.C. § 2283 (2006)); *see* Mayton, *supra* note 273, at 347. Mayton rightly highlights the irony of the establishment of and bar directed at the federal courts at the same time that federal courts were being endowed with significant additional authority under Reconstruction era statutes and other expansions of federal court jurisdiction. *Id.*

[277] Mayton, *supra* note 273, at 349.

[278] 314 U.S. 118.

a state court proceeding under the relitigation exception to the Act.[279] The Court held that there was no relitigation exception and that the Act was an absolute bar to federal court enjoining of state court proceedings.[280] The Court rejected the various exceptions that the judiciary had articulated throughout the Act's life. The 1948 version of the Act was enacted as a response to the Court's decision in *Toucey* in an effort to restore the law of anti-suit injunctions to its previous status.[281] The 1948 Act, which is the current version, codified various exceptions to the prohibition on the issuance of anti-suit injunctions by federal courts against state courts.[282] The Act included three exceptions: (1) express congressional authorization; (2) in aid of the exercise of federal court jurisdiction; and (3) where necessary to protect or effectuate the federal court judgments.[283]

2. Abstention Doctrines: Mediation of Cooperative Judicial Authority

The Supreme Court has imposed constraints on the federal courts' exercise of legitimate jurisdictional authority even beyond express congressional limits of the Anti-Injunction Act. The federal courts have long subjected the use of its equitable powers to rigorous scrutiny, particularly when its use threatened to invade territory deemed significant to the states' exercise of authority.[284] Beyond the Court's rigorous policing of its equitable authority, the Supreme Court has further elaborated doctrines of abstention that counsel federal judicial restraint under the broad principle of comity toward state judicial systems.[285] The Court's various abstention doctrines have been variously justified by a desire to avoid unnecessary constitutional decisions,[286] to refrain from interfering with ongoing state criminal prosecutions,[287] to avoid disruption

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[279] *Id.* The relitigation exception belongs to the class of exceptions that serve to effectuate federal court judgments. *See* 28 U.S.C. § 2283.

[280] *Toucey*, 314 U.S. at 139.

[281] Act of June 25, 1948, ch. 646, 62 Stat. 869, 968.

[282] *See* 28 U.S.C. § 2283 (2006).

[283] *Id.*

[284] *See, e.g.*, *Ex parte* Young, 209 U.S. 123, 161–62 (1908) (accepting the proposition that federal courts are without authority to enjoin a state criminal proceeding but also recognizing that exceptions to this presumption where the state forum did not provide an adequate opportunity to challenge the constitutionality of the state criminal proceeding). For a discussion of the relational dimension of *Ex parte Young*, see Copeland, *supra* note 27, at 850–55.

[285] The abstention doctrine's reliance on principles of comity reflects judicial sensitivity to the interaction between the state and federal courts and is a significant example of the Court's attention to relationship in mediating judicial federalism. For a discussion of the role of comity in federal courts jurisprudence, see Michael Wells, *The Role of Comity in the Law of Federal Courts*, 60 N.C. L. REV. 59 (1981) (criticizing the inconsistency of the Court's application of the comity principle, and the inconsistency of the values for which comity stands in the Court's abstention case law).

[286] *See, e.g.*, R.R. Comm'n. v. Pullman Co., 312 U.S. 496, 501 (1941).

[287] *See, e.g.*, Younger v. Harris, 401 U.S. 37, 40–41 (1971).

of substantial state policy,[288] and to prevent duplicative litigation in federal and state courts.[289] In each of these justifications, although present with varying degrees of potency, is the desire by federal courts to avoid impugning the ability or willingness of state courts to vindicate federal constitutional or statutory rights.[290] In short, the federal courts' abstention jurisprudence is justified by solicitousness toward the role of state judicial systems within the federal system of government.

As has been stated, a relational model of federalism enforcement is premised upon the Constitution's inauguration of a relationship between the states and the national government that is capable of generating norms that obligate each sphere to act in consideration of the other. The Court's abstention case law aims to constrain the exercise of federal court jurisdictional authority in favor of the exercise of state judicial authority in an effort to protect various state interests.

3. Abstention Doctrine as Relational Federalism

Railroad Commission of Texas v. Pullman Co. marks the Court's initial attempt to articulate a separate abstention doctrine with specific federalism concerns at its center.[291] The Court held that the district court's injunction against the Texas Railroad Commission should not have been issued.[292] The dispute arose because the Railroad Commission had ordered that all sleeper cars operated in the state were required to be supervised by a Pullman conductor.[293] At the time trains with one sleeper were not supervised by a Pullman conductor, but rather were supervised by a Pullman porter.[294] At that time, only whites could serve as Pullman conductors, while blacks could only serve as Pullman porters.[295] The Commission's order was challenged by the Pullman Company and by black Pullman porters, who argued that it violated the Fourteenth Amendment's Equal Protection Clause.[296]

The Court began by analyzing whether it was appropriate for the district court to have enjoined the Commission's order.[297] Although the Court noted that the claims

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[288] *See, e.g.*, La. Power & Light Co. v. Thibodaux, 360 U.S. 25, 30 (1959); Burford v. Sun Oil Co., 319 U.S. 315, 317–18 (1943).

[289] *See, e.g.*, Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817–18 (1976).

[290] *See, e.g.*, Steffel v. Thompson, 415 U.S. 452 (1974).

[291] *Pullman*, 312 U.S. at 501.

[292] *Id.*

[293] *Id.* at 497–98.

[294] *Id.* at 497.

[295] *Id.* For a discussion of the role of Pullman porters in the history of black protest and the rise of the black middle-class, see BETH TOMPKINS BATES, PULLMAN PORTERS AND THE RISE OF PROTEST POLITICS IN BLACK AMERICA, 1925–1945 (2001); LARRY TYE, RISING FROM THE RAILS: PULLMAN PORTERS AND THE MAKING OF THE BLACK MIDDLE CLASS (2004).

[296] *Pullman*, 312 U.S. at 498.

[297] *Id.*

made by petitioners raised serious constitutional issues, it pointed to the fact that there was also a challenge to the Commission's authority to issue its order under Texas law.[298] If the Commission was without authority under Texas law to issue the challenged order, then the federal constitutional challenges to the order would be mooted by a declaration that the Commission's regulation was invalid on that ground.[299] The Court concluded that the law in Texas regarding the validity of the Commission's order was unclear.[300] Maintaining that the federal courts were "outsiders without special competence in Texas law," the Court asserted that it had "little confidence" in its ability to ascertain Texas law in this area.[301] The Court continued stating that the judicial exertion of its equitable authority requires the Court to employ its "sound discretion" for the consequences that attach to its issuance of injunctive remedies.[302] The most obvious consequence that the Court identified is the friction that might ensue between the federal and state courts, which have primary authority in the interpretation of state law. Federal court recognition of the "rightful independence of the state governments" constrains the federal courts, despite their possession of jurisdictional authority over disputes like those at issue in *Pullman*.[303] The Court identified its abstention constraints as being based in "considerations of policy," which are aimed at "furthering

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[298] *Id.* at 498–99.

[299] *Id.* at 499. The Court's conclusion that Texas state law might eliminate the need for judicial confrontation with the constitutional issues is not unique to the abstention doctrine, as the canon of constitutional avoidance counsels federal courts to refrain from making unnecessary constitutional decisions. *See* Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CAL. L. REV. 1409, 1419–20 (1999) (discussing *Pullman* as an example of the Court's avoidance of unnecessary constitutional decisions).

[300] *Pullman*, 312 U.S. at 499.

[301] *Id.* The Court's "modesty" is somewhat curious, given the fact that originally the jurisdiction of the lower federal courts extended only to cases arising under diversity jurisdiction, which involves the federal courts in interpreting state law. Even under the regime of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), which upheld the judicial creation of a federal common law in cases arising under an Article III grant of diversity jurisdiction, the federal courts deferred to state statutory law, which required interpretation. *Id.* at 16. The *Pullman* Court's statement that the "last word" on the "statutory authority of the [Texas] Railroad Commission" should reside in Texas, rather than the federal courts, *Pullman*, 312 U.S. at 499–500, belies the fact that under its diversity jurisdiction it passes on the meaning of state statutes regularly. However, the Court's concern about its competence regarding unclear or complex issues of state law is a basis of the statutory grant of discretion regarding its supplemental jurisdictional authority. *See* 28 U.S.C. § 1367(c)(1) (2006) (allowing a federal court discretion to decline supplemental jurisdictional authority over claims that raise novel or complex issues of state law). *See* Schapiro, *supra* note 28, at 1421–22. The Court's reasoning also appears to suggest that federal and state courts are strangers, which is clearly inconsistent with the conception of state and federal court relationship in other lines federal courts law. However, the Court's recognition of the special province of state law in state court suggests the Court's recognition of state court's special role in articulating state law apart from federal judicial oversight.

[302] *Pullman*, 312 U.S. at 500 (quoting Beal v. Mo. Pac. R.R. Corp., 312 U.S. 45, 50 (1941)).

[303] *Id.* at 501 (citations omitted).

the harmonious relation between state and federal authority."[304] The Court's emphasis on the state legal norms available to resolve the dispute without reference to federal constitutional norms underwrites its recognition of the states as independent political communities, whose courts are worthy of respect.[305] This recognition is not very different from an earlier recognition of state courts as institutions of a distinct sovereign in the case law addressing federal claims in state court.[306]

Pullman's relational dimension is even more appreciable when we see the Court's comparison of its decision to forego the exercise of its authority in the light of the federalism relationship against the "rigorous congressional restriction of [the judiciary's equitable] powers."[307] The Court's description seems to highlight the distinction between the congressional restriction of substantive judicial authority, which sounds as a direct allocation of substantive authority, and the abstention doctrine that it has developed.[308] Whether the Court is correct to think that abstention is a responsible alternative to congressional policing of judicial authority, there is no doubt that the Court thinks of abstention as something other than policing the allocation of the substantive authority of the federal courts.

Although the period between the Court's decision in *Pullman* in 1946 and its decision in *Younger v. Harris*[309] in 1971 saw the Court articulate additional abstention doctrines,[310] *Younger* is commonly perceived to be the most important abstention decision of the post-*Pullman* era because it pits the presumption of the availability of a federal forum to adjudicate federal claims against a state's right to enforce its law.[311] In *Younger*, the Court held that the lower federal courts were obliged to abstain from enjoining a state criminal proceeding, even where federal constitutional rights were implicated.[312] *Younger* involved an action brought by a criminal defendant—John Harris—who was being prosecuted under California's Criminal Syndicalism Act for having handed out leaflets that were alleged to have advocated communism.[313] Harris subsequently filed a petition for injunctive relief in the United States District Court, which was granted based on a facial challenge to the constitutionality of the state

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[304] *Id.*

[305] *Id.*

[306] *Id.* (referencing Thompson v. Magnolia Petroleum Co., 309 U.S. 478, 484 (1940)).

[307] *Id.*

[308] *Id.*

[309] 401 U.S. 37 (1971).

[310] *See, e.g.*, La. Power & Light Co. v. Thibodaux, 360 U.S. 25, 29 (1959); Burford v. Sun Oil Co., 319 U.S. 315, 317–18 (1943).

[311] *See, e.g.*, George D. Brown, *Dealing with* Younger *Abstention as a Part of Federal Courts Reform—The Role of the Vanishing Proposal*, 1991 BYU L. REV. 987, 989 & n.14 (citing Nancy Levit, *The Caseload Conundrum: Constitutional Restraint and the Manipulation of Jurisdiction*, 64 NOTRE DAME L. REV. 321, 336 (1989)).

[312] *Younger*, 401 U.S. at 40–41.

[313] *See id*. at 38–40.

statute.[314] In reversing the district court's issuance of an injunction against the state court criminal proceeding, the Court explicitly declared that its decision was not dictated by statutory command, but rather by "longstanding public policy against federal court interference with state court proceedings."[315] The underpinnings of the Court's public policy rationale included limitations on the authority of equity courts to interfere with ongoing criminal proceedings, the preservation of the role of the jury and the avoidance of "duplication of legal proceedings and legal sanctions."[316]

In addition to the above, the Court emphasized that these reasons were "reinforced by an even more vital consideration" that supported its reversal of the district court's enjoining of the California criminal proceeding.[317] The Court declared that a "proper respect for state functions" demanded that the federal courts exercise restraint in the exercise of its jurisdictional authority in the face of demands that it enjoin ongoing state criminal proceedings.[318] The Court's justification for abstaining in the face of alleged constitutional violations lay in its recognition of the dictates that attached to the relationship between the national government and the states under the federal system of government.[319] The Court declared that the relationship inaugurated by "Our Federalism" required "a recognition of the fact that the entire country is made up of a Union of separate state governments."[320]

The Court's depiction of federalism as involving an ongoing tension between separation and centralization resists either the separation of the states from the dictates of the constitution, or the domination of the states by the national government. The Court stresses the obligation to restrain the impulse for a resolution in either direction, describing "Our Federalism" as meaning neither "blind deference to States' Rights" nor "centralization of control over every important issue in our National Government and its courts."[321] The Court described the posture that the federal judiciary ought to have with respect to decisions to interfere with ongoing state processes as requiring "sensitivity to the legitimate interests of *both* State and National Governments."[322] The recognition of the perpetual tension demands a dual sensitivity to the interests of states and the national government, even as the Court appears to guard against the notion that it is abdicating its role as a protector of federal rights.[323] The Court's commitment to a dual sensitivity does not appear to come with an abdication of its rightful authority, but rather a declaration that even though committed to the protection of

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[314] *Id.* at 39.
[315] *Id.* at 43.
[316] *Id.* at 44.
[317] *Id.*
[318] *Id.*
[319] *Id.*
[320] *Id.*
[321] *Id* (internal quotation marks omitted).
[322] *Id* (emphasis added).
[323] *Id.* at 44–45.

federal rights, such commitment "always endeavors to do so *in ways* that will not unduly interfere with the legitimate activities of the States."[324]

At bottom, the relational dimension of the Court's decision in *Younger* is based not on its conclusion, which is not without rightful criticism, but rather on its rejection of any resolution that would have created a federal court monopoly over federal constitutional claims. The Court's conclusion rests on its determination that there could not be an automatic ouster of a state's authority to enforce its own law in its own courts by removing the entire action to federal court.[325] A refusal of a state's interest to enforce its law in its tribunals threatens to undermine the authority to make law in its capacity as a political community. Once the question of wholesale removal of all state enforcement actions involving federal claims is taken off the table, the range of responses narrows to the separation of the state and federal claims, resulting in a declaratory or injunctive ruling to halt state proceedings if the petitioner prevails on her federal claim, or the allowance of state courts to adjudicate the entire action, with federal review.[326] The Court's decision in *Younger*, following its equity jurisprudence, is to accept the latter choice of allowing state courts to hear enforcement actions and federal claims challenging these actions.[327] To be sure this is an act that symbolizes

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[324] *Id.* at 44 (emphasis added). Although I take the Court's statement to suggest a judicial oversight of the *means* of protection and vindication of federal rights, one might state that the Court's reference to the "legitimate activities of the States," *id.*, suggests a certain line drawing that might be more consistent with an allocational conception of federalism. To the extent that "legitimate activities of States" can be interpreted to look like a "traditional state function," Garcia v. San Antonio Metro. Transit. Auth., 469 U.S. 528, 536 (1985), or the like, *Younger*'s statements, which seem to sound in relational terms, are also pregnant with allocational references. As stated above, this fact does not undermine the description of federal case law in relational terms, if we are clear that case law need not sound exclusively in either allocational or relational terms, but that these represent separate chords that are simultaneously present in a particular case, even if emphasized at different times.

[325] *See* Bator, *supra* note 124, at 610 (describing three responses to challenge of federal claims raised in state enforcement actions: (1) removal; (2) collateral review; and (3) separation of federal and state claims).

[326] *Id.*

[327] This decision is consistent with what Martin Redish believes is the strongest basis for the Court's result in *Younger*—respect for state judicial process. REDISH, *supra* note 273, at 302. Even though Redish believes that this value does not justify the expansions of the *Younger* doctrine in subsequent decisions, *id.* at 303, it is clear that the value of state judicial proceedings rests in part on the role that state courts play in the vindication of federal rights guarantees. The enduring status of state courts as instruments of the vindication of federal law, even after the Reconstruction revolution, serves as the basis for the aspiration that state judiciaries are presumed capable of vindicating federal rights guarantees. The presumption, or the strength of such a presumption, is not commanded by the fact of the relationship. The presumption could work in the opposite direction, or work in the opposite direction with regard to particular state courts. The essential point of this illustration is that by establishing a rebuttable presumption, in whatever direction, the Court acts in a way that is respectful of the existence of a relationship that either allows state courts to "earn" or "retain" their status as institutions

trust in the state judiciary's capacity and willingness to invalidate state actions that violate federal law, but this is no different than the trust that the Supremacy Clause appears to place in state court judges.[328]

Moreover, the Court's abstention doctrine, at least as articulated in *Younger*, grants a presumption in favor of state enforcement of its criminal statutes without federal court interference that is rebutted by a showing that the defendant cannot effectively challenge the validity of her prosecution.[329] *Younger*'s rebuttable presumption recognizes the fact that the federalism relationship is more than a blank check to state government; it also requires an effective means of ensuring the supremacy of federal law. As articulated in *Younger*, the abstention doctrine constrains federal judicial authority in the service of a relationship that involves the judicial vindication of federal rights from which state courts cannot be banished.[330]

B. The Adequate State Ground: Mediating Appellate Jurisdiction

Federal courts law does not interpret either Article III or the federal question statute to require that all federal questions be brought in federal court. For example, the well-pleaded complaint rule prohibits federal defenses to serve as the foundation of the district courts' original federal question subject-matter jurisdiction.[331] Simultaneously, federal courts law requires state courts to entertain disputes involving federal questions without discrimination.[332] Further, as discussed above, the abstention doctrine has further protected state court litigation involving even federal constitutional challenges to state law.[333] The legitimacy of these decisions to allow (or mandate) state court decision on federal law questions is premised upon the ultimate reviewability of state decisions of federal law by the Supreme Court.[334] That said, the Supreme

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capable of vindicating federal rights guarantees. *See Younger*, 401 U.S. at 49–54. The doctrine resists a final resolution to the problem of state court hostility to federal rights guarantees by not articulating a doctrine that monopolizes judicial enforcement of federal rights.

[328] Amanda Frost & Stefanie A. Lindquist, *Countering the Majoritarian Difficulty*, 96 VA. L. REV. 719 (2010) (questioning the trust that abstention doctrine places in state court judiciaries in the light of the electoral vulnerability of a majority of state court judges).

[329] Laura S. Fitzgerald, *Suspecting the States: Supreme Court Review of State-Court State-Law Judgments*, 101 MICH. L. REV. 80, 97 n.68 (2002).

[330] Younger v. Harris, 401 U.S. 37, 52 (1971).

[331] Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908).

[332] Testa v. Katt, 330 U.S. 386, 392 (1947). More will be said about the basis of the Court's decision below.

[333] See discussion *supra* Part IV.A.3.

[334] The structure of Article III clearly contemplates Supreme Court review of state decisions of federal law. The bargain reached during the Constitutional Convention regarding the creation of lower federal courts supports the assertion that Supreme Court review of state decisions of federal questions is constitutionally required. *See* Collins, *supra* note 19, at 40. To the extent that the Madisonian Compromise left it to Congress's discretion to establish lower federal courts, and the limits on the Supreme Court's original jurisdiction, failure to create such courts

Court's exercise of its appellate jurisdiction affects the relationship between the state and federal courts.[335] The authority of the Supreme Court to review such state court decisions is without question.[336] The scope of the Supreme Court's appellate jurisdiction over state courts fundamentally affects the status of state courts as the arbiters of legal meaning.

The constitutional basis of the Supreme Court's authority to review state court judicial decisions of federal law is found in Article III's grant of the Court's appellate jurisdiction over this set of decisions.[337] In *Martin v. Hunter's Lessee*, the Court rejected the Virginia Supreme Court's challenge to its authority to review its decisions by referencing Article III's affirmative grant of power to entertain appeals on all issues not included in the Court's original jurisdiction.[338] The Court further reasoned that the Constitution's Supremacy Clause supported its assertion of appellate jurisdiction over state decisions in light of the Constitution's clear concern for both the uniformity of federal law, and the integrity of federal law against potential state court bias.[339]

Although *Hunter's Lessee* is correctly cited as having definitively established the Court's appellate jurisdiction over state court decisions of federal law, the interaction of the federal and state courts is not exhausted by the declaration that the Supreme Court possesses the authority to review state court decisions of federal law. Beyond this initial decision of judicial authority, the Supreme Court has announced important (and not uncontroversial) doctrines to regulate the interaction of the Supreme Court's appellate review.[340]

This Part examines the Court's regulation of its exercise of appellate jurisdiction over state court decisions by the independent and adequate state grounds doctrine. The independent and adequate state grounds doctrine narrows the scope of the Court's exercise of its appellate jurisdiction over state court decisions to exclude or review of state decisions of federal law where there is an independent and adequate state ground for the state court's decision. The doctrine, a court-designed mechanism for regulating its appellate jurisdiction, also exemplifies the relational conception of federalism articulated in this Article.[341]

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would have left state courts as the final arbiters of federal law, a prospect inconsistent with the dictates of the uniformity, if not supremacy, of federal law. *Id.*

[335] *See* Martin H. Redish, *Supreme Court Review of State Court "Federal" Decisions: A Study in Interactive Federalism*, 19 GA. L. REV. 861, 899 (1985).

[336] Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 340 (1816); *see also* Thomas E. Baker, *The Ambiguous Independent and Adequate State Ground in Criminal Cases: Federalism Along a Möbius Strip*, 19 GA. L. REV. 799, 801 (1985).

[337] U.S. CONST. art. III, § 2.

[338] *Hunter's Lessee*, 14 U.S. (1 Wheat.) at 337.

[339] *Id.* at 340, 347–48.

[340] *See, e.g.*, Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 502–05 (1975) (Rehnquist, J., dissenting) (discussing court-created exceptions to the final judgment rule).

[341] By "court-designed" I mean to include it within the larger class of judicial policymaking discussed earlier in this essay. The conclusion that the independent and adequate state grounds doctrine is a form of common lawmaking is detailed in Martha A. Field, *Sources of Law: The*

The Judiciary Act of 1789 regulated the scope of the Supreme Court's appellate review over state court decisions of federal law.[342] The Act limited the Supreme Court's review of state court decisions of federal law to only those decisions that denied assertions of federal rights and included language that suggested that Supreme Court review of state court decisions was limited to federal law grounds.[343] However in 1867, Congress amended the Judiciary Act to remove the proviso to section 25 from the Act.[344] This removal appeared to imply congressional approval of expanded Supreme Court review of state court decisions involving federal claims, whether decided on state and federal law grounds.[345]

The Court's decision in *Murdock v. City of Memphis*[346] required the Court to address the consequences of the amendments to the Judiciary Act for its appellate jurisdiction. The dispute involved a suit for recovery of property that had been transferred by Murdock's ancestors to the City of Memphis for the purpose of the construction of a naval depot.[347] Subsequently, the City conveyed the land to the United States government for $20,000.[348] Arguing that the land had been conveyed by his ancestors with the condition that it ultimately be used as a naval depot, Murdock brought suit in Tennessee state court arguing that both state and federal law required the City to return the property to him.[349]

Scope of Federal Common Law, 99 HARV. L. REV. 881, 963–73 (1986); Richard A. Matasar & Gregory S. Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 COLUM. L. REV. 1291 (1986); Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1137–45 (1986); Kermit Roosevelt, III, *Light from Dead Stars: The Procedural Adequate and Independent State Ground Reconsidered*, 103 COLUM. L. REV. 1888 (2003). It is my conclusion that the independent and adequate state grounds doctrine is not constitutionally mandated. This is based on the argument that justifications that the Court makes for its appellate authority over state court decisions of federal law—supremacy and uniformity of federal law—are inconsistent with a doctrine that would require the Court to accept disuniformity in federal law. That said, the doctrine does not violate the holding in *Hunter's Lessee* because the Court maintains its status as the authoritative interpreter of federal law and accepts non-uniformity only where it does not matter to the outcome of any particular litigation.

[342] Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–87 (codified as amended at 28 U.S.C. § 1257 (2006)).

[343] Section 25 of the Judiciary Act declared:

> But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before mentioned questions of validity or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute.

Id. at 86–87.

[344] Act of Feb. 5, 1867, ch. 28, § I1 14 Stat. 385.

[345] *See* Matasar & Bruch, *supra* note 341, at 1315–17.

[346] 87 U.S. (20 Wall.) 590 (1874).

[347] *Id.* at 596.

[348] *Id.* at 597.

[349] *Id.*

Murdock argued that state property law obligated the return of the property to him.[350] Further, Murdock argued that federal law obligated the City to return the property to him because the property had been conveyed to the City, and by extension to the national government, with the aforementioned conditions.[351] The congressional conveyance of the property by statute to the City, therefore, necessarily conveyed the property to the City with the same conditions that accompanied the original transfer.[352] The state court rejected each of Murdock's arguments. On the state property law claim, the state held that the City held title to the property free of any conditions that it be transferred to a trust for which Murdock would be an heir because the statute of limitations prevented Murdock from challenging the terms of the original conveyance.[353] On the federal law claim, it held that the act of Congress transferred the land for the City's exclusive use, and not in trust for the original conveyors.[354] Murdock appealed to the Supreme Court seeking review of both the state law and federal law issues.[355] Murdock argued Congress's 1867 amendments to the Judiciary Act of 1789 authorized the Supreme Court to "decide all the questions presented by the record which are necessary to a final judgment or decree, when it has once got jurisdiction of a case by reason of any Federal question[,]"[356] including questions of state law.

The Court rejected Murdock's argument. The Court held that the 1867 Amendments did not authorize its review of state court decisions of state law.[357] The Court explained that its review of the record upon appeal from a state court would include review of the state law ground only insofar as such review would allow the Court to determine

> whether the decision of the Federal question alone is sufficient to dispose of the case, or to require its reversal; or on the other hand, whether there exist other matters in the record actually decided by the State court which are sufficient to maintain the judgment of [the state] court, notwithstanding the error in deciding the Federal question.[358]

The Court concluded that beyond this review of state law questions, it could not go. On this basis, the Court concluded that its appellate jurisdiction did not extend to cases in which the state court's judgment was not affected by the correctness of the decision

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[350] *Id.* at 599.
[351] *Id.*
[352] *Id.* at 598.
[353] *Id.* at 598–99.
[354] *Id.* at 599.
[355] *Id.* at 598, 616.
[356] *Id.* at 607.
[357] *See id.* at 633.
[358] *Id.* at 635.

of the federal question.[359] That is, where the decision on the federal question was not necessary for the final judgment, the Court did not have appellate jurisdiction.

The *Murdock* Court approached this decision as though it were one of statutory interpretation—determining the effect of the 1867 amendment.[360] The Court concluded that it is "impossible to believe" that Congress intended to require it to expand its appellate jurisdiction over state courts to the extent that Murdock's argument would allow.[361] Such a change would mark a significant transformation in the scope of the Court's appellate jurisdiction. At this point, the Court reached beyond the Judiciary Act to justify the constraints on its exercise of appellate authority, saying:

> And though it may be argued with some plausibility that the reason of [limits on the scope of its appellate review] is to be found in the restrictive clause of the act of 1789, . . . an examination of the cases will show that it rested quite as much on the conviction of this court that without the clause and on general principles the jurisdiction extended no further.[362]

It is not clear whether the "general principles" to which the Court refers are principles of its own articulation or principles within the statutory framework.[363]

Despite the Court's posture, which suggests that it attempted to glean Congress's intention in removing the restriction on its appellate authority, the Court again resorted to justifications that appear to underwrite the conclusion that the Court framed policy between the state courts and itself in the light of its own conception of the relationship between state courts and the Supreme Court. The Court recognized the argument that there may be times when it must exercise authority over the entire action in order to effectively protect federal rights.[364] Yet, the Court responded to this answer by offering eighty-five years of experience as a satisfactory answer.[365] Moreover, the Court declared a faith in the state judiciary that underwrites its conclusions about the proper scope of its appellate review. The Court stated:

> It is not to be presumed that the State courts, where the rule is clearly laid down to them on the Federal question, and its influence on the case fully seen, will disregard or overlook it, and this is all that the rights of the party claiming under it require.[366]

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[359] *See id.*

[360] The suggestion that the independent and adequate state grounds doctrine is statutorily mandated has been roundly criticized by scholars. *See, e.g.*, Field, *supra* note 341, at 920; Matasar & Bruch, *supra* note 341, at 1318–19; Meltzer, *supra* note 341, at 1163.

[361] *Murdock*, 87 U.S. (20 Wall.) at 629.

[362] *Id.* at 630.

[363] *See id.*

[364] *See id.*

[365] *Id.* at 632.

[366] *Id.*

The Court's reasoning seems less the reasoning of a court acting as the mere agent of the Congress and more the reasoning of a court offering its own justifications for the policy outcome that it thinks best for the relationship between the state courts and itself.[367]

The focus of this discussion is the federalism interests that underwrite the Court's decision. As scholars have noted, the doctrine allows for the growth and development of a so-called "separate sphere," in which state governments are able to articulate norms and values that are distinct from those expressed in federal law.[368] The danger inherent in the independent and adequate state grounds doctrine, however, is that the Court's abdication of jurisdiction over even wrongly decided federal claims by state courts frees state courts to undermine federal law by substantively incorrect applications, which go uncorrected.[369] Perhaps worse than the prospect of incorrect decisions of federal law in the legal world is the prospect that state courts would manufacture grounds to avoid Supreme Court review of a federal claim.[370]

The articulation of the independent and adequate state ground doctrine would, by necessity, require a judicial determination of the state ground's adequacy. However, the Court's early pronouncement of the modern version of the doctrine suggested that the determination of adequacy would be limited to an inquiry of whether the state law decision would be affirmed regardless of what the Supreme Court decided with respect to federal law.

Despite the limitations of the adequacy determination articulated in the Court's early cases, the Court developed additional requirements for determining the adequacy of state law grounds where federal rights were at stake. In one of its earliest decisions, *Rogers v. Alabama*,[371] the Court reversed a state court's dismissal of a convicted

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[367] The Court has also justified its independent and adequate state ground doctrine as rooted in the prohibition against advisory opinions, see Herb v. Pitcairn, 324 U.S. 117, 126 (1945), and in the avoidance of unnecessary constitutional decisions, another prudential justification that underwrites the Court's avoidance canons, and the *Pullman* doctrine. *See* R.R. Comm'n v. Pullman, 312 U.S. 496 (1941); *supra* note 299 & text accompanying notes 315–16.

[368] *See* Ann Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485 (1987).

[369] *See* Eustis v. Bolles, 150 U.S. 361, 369 (1893) (dismissing action despite the presence of a federal claim on the ground that the state court's decision was based on an independent and adequate state law decision). This is the primary argument against the doctrine offered by Professors Matasar and Bruch, *supra* note 341, at 1294 ("[T]he presence of state grounds, adequate or not, should never preclude the Supreme Court from reaching *federal* issues in an appeal from a state court.").

[370] The Court is clearly on guard for the possibility that states will express hostility to federal rights claims by manufacturing state law grounds to evade federal court review. *See* Chapman v. Goodnow, 123 U.S. 540, 547 (1887) (inspecting the state law ground of decision to determine whether it was "the real ground of decision, and not used to give color only to a refusal to allow the bar of the decree").

[371] 192 U.S. 226 (1904).

criminal's constitutional challenge to the composition of the jury.[372] The state court dismissed the petitioner's motion because of its "prolixity," which justified the Court's refusal to entertain the petition pursuant to Alabama law.[373] The Court, after reviewing the two-page petition, held that "a motion of that length . . . cannot be withdrawn for prolixity from the consideration of this court . . . ."[374] The Court's ruling appears to have been based on the insufficiency of the evidence to establish the state's finding of prolixity as a predicate for an adequate state ground.[375] The failure of a state court to offer substantial support of the factual predicate for its state law ground rendered the state ground inadequate.[376] Beyond factual insufficiency, the Court's adequacy determination expanded to conclude that state law grounds that themselves violated the Constitution were inadequate grounds for decision.[377]

From a relational perspective, these judicial modifications of the state grounds doctrine served federalism interests by preserving the supremacy of federal law and the availability of its receiving a hearing in the Supreme Court. Federal rights might continue to be threatened by state procedural rules, however, with which the failure to comply was consistently deemed to be an adequate state law ground.[378] Increasingly, the Court was faced with state court determinations that plaintiff's federal rights claims were forfeited for failure to comply with state procedural rules.[379] In response to these cases, the Court developed doctrine to determine whether an allegedly neutral state rule was being applied in ways that might suggest hostility to plaintiff's federal claims.[380]

The Court's adequacy determination of state procedural rules resulting in the forfeiture of federal claims expanded to include a determination of whether a state's procedural rule was mandatory or discretionary.[381] Where the state rule had been applied in a discretionary fashion, the Court held that a state procedural ground supporting the forfeiture of a federal claim was not an adequate state ground.[382] In other procedural default cases, the Court held that state procedural rules that had not been applied with the "severity" applied in the context of denying review of a federal claim were an inadequate ground for the state's decision.[383]

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[372] *Id.*

[373] *Id.* at 230.

[374] *Id.*

[375] *Id.*

[376] *See also id.* at 229–30; Staub v. City of Baxley, 355 U.S. 313, 319–20 (1958).

[377] *Staub*, 355 U.S. at 319 (holding that the state's standing requirement was an inadequate state law ground because it would have obligated petitioner to have applied for a license under a statute that was facially unconstitutional).

[378] *See, e.g.*, Wolfe v. North Carolina, 364 U.S. 177, 196 (1960).

[379] *See, e.g.*, Douglas v. Alabama, 380 U.S. 415, 422 (1965).

[380] *See* Williams v. Georgia, 349 U.S. 375, 383 (1955).

[381] *See, e.g.*, *id.*

[382] *Id.*

[383] *See* NAACP v. Alabama, 377 U.S. 288, 297–98 (1964).

In *Henry v. Mississippi*,[384] the Court addressed the issue of whether a state procedural rule requiring the contemporaneous objection to allegedly illegal evidence was an adequate state ground for dismissing a convicted criminal defendant's challenge to his conviction.[385] Here, the Court introduced a new factor for consideration of the adequacy of a state procedural rule. The Court declared that to find adequacy in procedural default cases involving federal rights claims, the state must establish that compliance with the rule "serves a legitimate state interest."[386] The state interest determination is a fact-intensive analysis of the factual setting and the state's interest in compliance with the particular procedural rule.[387]

At the time of these decisions, the scholarly community appeared concerned that the Court's decisions were moving in a direction that indicated an eradication of the state grounds doctrine.[388] This was clearly an important concern regardless of whether this was seen as a good or bad development. But for the purposes of this discussion, what is most significant is the way in which the Court's state grounds doctrine both its original deployment and the Court's later cabining of its threats to the vindication of federal rights demonstrates both the flexibility and attractiveness of judicially-managed jurisdictional doctrines. Moreover, doctrinal developments demonstrate the extent to which state and federal interests remain in the equation throughout. The weights ascribed to variables may change, and the presumption of trust in state courts may diminish (or increase), but the relationship between state courts and federal courts is not negated.

V. FEDERAL LAW IN STATE COURTS: A RELATIONAL RECONSIDERATION

The interaction between state and federal judicial systems is likely nowhere more evident than when a state judicial system exercises adjudicatory authority over federal claims, and vice versa. The treatment of the law of a "separate" sovereign is one of the central issues in judicial federalism, and, indeed, all of federalism.[389] Though scholars

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[384] 379 U.S. 443 (1965).

[385] *Id.*

[386] *Id.* at 447.

[387] *Id.* at 447–48.

[388] *See, e.g.*, Alfred Hill, *The Inadequate State Ground*, 65 COLUM. L. REV. 943, 991 (1965) (arguing that *Henry* "undermine[d] [the state grounds doctrine] by expanding the basis for attack on the state procedural ground"); Terrance Sandalow, Henry v. Mississippi *and the Adequate State Ground: Proposals for a Revised Doctrine*, 1965 SUP. CT. REV. 187, 239 (arguing that *Henry* posed a danger that the Court would "swing to the other extreme, abolishing the concept of adequacy so far as state procedural grounds are concerned"). As we now know, none of these extremes came to pass, as the Court has stepped back from these decisions in recent case law, particularly in the context of habeas challenges. *See, e.g.*, Murray v. Carrier, 477 U.S. 478 (1986). *But see* Bush v. Gore, 531 U.S. 98, 110 (2000) (deploying the adequate state ground cases over a vigorous dissent by Justice Ginsburg, *see id.* at 137–45 (Ginsberg, J., dissenting)).

[389] *See, e.g.*, Erie R.R. v. Tompkins, 304 U.S. 64, 79–80 (1938).

and commentators have spent significant amounts of time (and ink) describing the history, transformation, and continuing intricacies of the phenomenon of federal courts entertaining state causes of action,[390] the reverse phenomenon is not treated with nearly as much attention.[391] This Part attempts to review the history and theory of state courts' adjudication of federal claims as a window to both judicial federalism and the role of judicial policy making in the resolution of disputes arising from state court adjudication. This review supports the assertion that, in answering the question of state court duties to federal law, the Court has relied on more than specific textual provisions. To be specific, the Court has relied on a reading of enduring connection and relationship between the state and federal courts as a significant basis in its articulation of state court duties to federal law. Moreover, this review will establish that the Court is engaged in judicial policymaking based upon its articulation of behavioral norms that derive from the fact of relationship. This discussion proceeds in three parts. This Part reviews the history and justification of both the state court authorization and duty to entertain federal claims, and then examines the jurisprudence of state law preemption in the face of conflicting federal rules. Each discussion is aimed at uncovering the role that the national-state relationship plays in the Court's attempt to respond to each of these issues.

A. State Court Authority to Adjudicate Federal Claims

State court authority to entertain federal claims has largely been assumed throughout American history. Arguments in favor of state court authority to entertain federal causes of action date back to the constitutional framing, particularly the Madisonian Compromise.[392] These debates focused on the question of whether lower federal courts would be made mandatory in the Constitution. Madison and others argued in favor of mandatory lower federal courts.[393] This proposal was opposed by John Rutledge.[394]

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[390] *See, e.g.*, John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693 (1974); Henry J. Friendly, *In Praise of* Erie: *And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964); Craig Green, *Repressing* Erie*'s Myth*, 96 CAL. L. REV. 595 (2008); Martin Redish & Carter Phillips, Erie *and the Rules of Decision Act*: *In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356 (1977).

[391] Kevin M. Clermont, *Reverse*-Erie, 82 NOTRE DAME L. REV. 1, 2 (2006); Joseph R. Oliveri, *Converse*-Erie: *The Key to Federalism in an Increasingly Administrative State*, 76 GEO. WASH. L. REV. 1372 (2008). The Court's decision in *Erie Railroad Co. v. Tompkins* has the distinction of speaking for an entire era or way of thinking about law and federal judicial power. *See* EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 209 (2000).

[392] Prakash, *supra* note 35, at 2018.

[393] *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 124 (Max Farrand ed., 1937) [herinafter THE RECORDS OF THE FEDERAL CONVENTION].

[394] 2 *id.* at 428.

A compromise was reached by the two sides empowering, but not requiring, Congress to establish lower federal courts.[395] From this decision not to impose a duty on Congress to establish lower federal courts, commentators have concluded that the Framers impliedly concluded that state courts would exercise jurisdiction over federal claims.[396]

State court obligation to entertain federal claims has been thought to flow from the Constitution's Supremacy Clause. The Supremacy Clause, which is partly directed at state court judges, obligates state courts to apply federal law where it might apply as the law of the land, even invalidating state law that contradicts with such federal law.[397] The provision has been read to make federal law the governing law of the state, and as such authorizes state law to adjudicate federal disputes.

The assumption of state court jurisdiction over such claims is based largely on the Founding-era conception of judicial jurisdiction. Judicial jurisdiction was thought to be commensurate with the claims available to be brought by those within its adjudicatory authority.[398] Alexander Hamilton argued that state courts would possess authority to exercise concurrent jurisdiction over federal claims,

> [t]he judiciary power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction though the causes of dispute are relative to the laws of the most distant part of the globe. Those of Japan not less than New-York may furnish the objects of legal discussion to our courts.[399]

Yet even as Hamilton justifies state court adjudication of "foreign" claims as deduced "from the nature of judiciary power," he also draws the state courts and the federal courts into a special relationship.[400] In addition to the understanding of judicial power, Hamilton adds that when

> we consider the state governments and the national governments as they truly are, in the light of kindred systems and as parts of ONE WHOLE, the inference seems to be conclusive that the state

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[395] Prakash, *supra* note 35, at 2018; *see* U.S. CONST. art. 1, § 8, cl. 9.

[396] *See* Prakash, *supra* note 35, at 2018 (arguing that the Madisonian Compromise establishes the founding-era belief that state courts had authority to entertain federal claims). *But see* Collins, *supra* note 19, at 105 (questioning the significance of the Madisonian Compromise in determining state authority to entertain federal claims).

[397] U.S. CONST. art. IV, § 2.

[398] 2 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 393, at 430 (Madison's notes of Aug. 27, 1787, demonstrating that the delegates "generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature").

[399] THE FEDERALIST NO. 82, *supra* note 105, at 555 (Alexander Hamilton); *see* Bellia, *supra* note 52, at 969–76.

[400] THE FEDERALIST NO. 82, *supra* note 105, at 555 (Alexander Hamilton).

> courts would have a concurrent jurisdiction in all cases arising under the laws of the union, where it is not expressly prohibited.[401]

Each of the above arguments in favor of state court authority to entertain federal claims was articulated by the Court's first, and unequivocal, declaration of the state judicial authority in *Claflin v. Houseman*.[402] There, the Court maintained that a state court could exercise jurisdiction over a claim arising from the bankruptcy statute.[403] Against the assertion that a state court was prohibited from adjudicating a claim arising under a congressional statute, the Court concluded, "[I]f exclusive jurisdiction be neither express nor implied, the State courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it."[404] The Court's decision traversed the explanations of the state court's authority based on Hamilton's argument in *Federalist No. 82*, the Supremacy Clause and the trans-territorial nature of judicial authority.

Beyond these arguments, federal relationship played an important role in the Court's rejection of the challenge to the state courts' exercise of concurrent jurisdiction over federal claims. In addition to its explicit inclusion of Hamilton's discussion of the kinship of the national and state governments, the *Claflin* Court expanded upon this discussion.[405] The Court maintained that acceptance of the assertion that state courts cannot exercise jurisdiction over federal law claims would imply that the two systems are not connected into "one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other . . . having jurisdiction partly different and partly concurrent."[406] From this reading of relationship—whose basis is, at least partially, the Supremacy Clause—the Court concluded that there is unity between the two judicial systems.[407] The Court declared a relationship that did not result in the eradication of the distinctiveness of either judicial system.[408] This conception of relationship is central to its justification of

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[401] *Id.*

[402] 93 U.S. 130 (1876).

[403] *Id.* at 142–43.

[404] *Id.* at 136.

[405] *Id.* at 137.

[406] *Id.*

[407] Patrick Gudridge has described the Court's reference to the relationship between the state and federal courts as imbued with the impact of the Civil War and Reconstruction era. *See* Patrick O. Gudridge, *Pangloss*, 61 U. MIAMI L. REV. 763, 782 n.105 (2007). The Union victory in the Civil War affirms the faith that the Nation's union could not be refuted by the forces of secession. After the Civil War, as at no other time in American history, the enduring nature of the Union was a fact and not a profession of faith. For a discussion of the history of the theme of disunion in Antebellum America, see ELIZABETH R. VARON, DISUNION! THE COMING OF THE AMERICAN CIVIL WAR, 1789–1859 (2008).

[408] For an insightful discussion of the benefits of the intersystemic enforcement of rights in a federal judicial regime, see SCHAPIRO, *supra* note 28.

duties imposed on state courts and the extent to which such duties justify the displacement of state law.

B. From Authority to Duty: Relationship as the Source of Obligation

Does state authority to entertain federal claims evolve into a duty to entertain federal claims? If so, what is the basis of such an obligation? The discussion of state court obligation to entertain federal law follows along a similar track as the above discussion of state court authority. The debates of the Constitutional Convention establish that there was likely a belief that state courts would be open to federal claims.[409] Again, the debate between James Madison and John Rutledge regarding the creation of lower federal courts serves as one of the primary originalist arguments in favor of state court duty.[410] Not only did the opposition to the creation of lower federal courts by Rutledge and others imply state court authority to entertain federal claims, Professor Saikrishna Prakash argues that it establishes the expectation that state courts would be open to federal claims.[411] Further, the Madisonian Compromise, resulting in the option to establish lower federal courts, rested on the conclusion that state courts could be called upon to enforce federal law, and "[m]any . . . wanted state courts to be the exclusive courts of original jurisdiction."[412]

Beyond the Convention debates, there is a basis in the Constitution to conclude that states have a duty to adjudicate federal claims in Article I's Inferior Tribunals Clause.[413] As Professor James Pfander has argued, this constitutional provision was interpreted by many in the Founding era as establishing Congress's authority to turn to state courts to constitute lower federal courts.[414] This interpretation is buttressed by the historical practice of the Continental Congress and the Articles of Confederation, which pressed state courts into service to adjudicate federal claims.[415]

On whatever ground Congress's authority to commandeer state courts is based, it generally proceeds as a debate about the scope and limits on Congress's power. As such, the search to discern reasonable limits on such power is based on identifying enclaves of sovereignty that are retained by the states, or some explicit constitutional

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[409] For one of the most authoritative discussions of state court commandeering, see Prakash, *supra* note 35, at 2021–22 (arguing that the Framers likely believed that state courts could be obligated to entertain federal claims). For an incisive critique of Prakash's interpretation of Founding-era debates about the commandeering of state courts, see Collins, *supra* note 19, at 137–44.

[410] Prakash, *supra* note 35, at 2018.

[411] *Id.* ("[W]hen Rutledge, Sherman, et al., opposed the creation of inferior courts, they were implicitly pledging that state courts would always be open to enforce federal law.").

[412] *Id.*

[413] *See* U.S. CONST. art. I, § 8, cl. 9.

[414] Pfander, *supra* note 53, at 202.

[415] *See* ARTICLES OF CONFEDERATION of 1781, art. IX, para. 1–2; Prakash, *supra* note 35, at 1967–71.

principle from which a limit might be implied. Neither the scholarly commentary seeking to define the constitutional basis for commandeering state courts, nor the Court's own articulations of such authority seem to imply recognition of any limits on commandeering authority on the basis of a corresponding duty of respect for state court integrity. Even Professor Michael Collins's insightful discussion of the foundation of the qualified nature of state court commandeering is based on a determination of the perceived inability of state courts to entertain the full scope of federal question jurisdiction.[416] None of these suggest that there might be another basis for constraining or conditioning state court duty.

A review of the Court's case law, when understood in conjunction with the Court's previous deployment of the national-state relationship, suggests that the Court's continued conditioning of state court duty is based in something other than solely the Constitution's textual provisions. More specifically, the duty of state courts to entertain federal claims, and the limits on this duty, are at least in part the result of judicial policymaking based on the fact of relationship and norms that arise from it. As discussed above, state authority to entertain federal law is based on the court's jurisdictional availability to entertain disputes arising under law of another jurisdiction.[417] The Court's case law addressing state court duties to federal law appear to condition such availability on state court jurisdiction. A significant element of the Court's jurisprudence is that state court jurisdictional availability is determined by the state itself. Federal law does not provide the basis for determining state court jurisdictional ability.[418] This is logically consistent with the Court's recognition, cited above, of the state court's distinctiveness from the federal judicial system. Though there is clearly connection between the two systems in many respects that transforms them into "one" system, this connection does not eliminate the separateness of the two systems.

The Court's decision in *Mondou v. New York, New Haven & Hartford Railroad Co.*[419] might be read as imposing the duty of state court availability with few discernable limits, however even here, the state court's distinctiveness from the federal courts is appreciated. There, the Court addressed the issue of whether a state court could refuse jurisdiction over a Federal Employers' Liability Act (FELA) claim.[420] The Court rejected the state court's conclusion that it could refuse to exercise jurisdiction over the federal claim on two grounds. The first was that the state's jurisdiction was competent to address the claim brought under the FELA.[421] The Court concluded that the FELA did not represent an attempt by "Congress to enlarge or regulate the jurisdiction of state courts . . . but only a question of the duty of such a court, *when its ordinary*

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[416] Collins, *supra* note 19, at 49–50.

[417] *See* Douglas v. N.Y., New Haven & Hartford R.R. Co., 279 U.S. 377, 385–86 (1929) (upholding a state court's denial of jurisdiction over federal claim).

[418] *See id.* at 386 (emphasis added).

[419] 223 U.S. 1 (1912).

[420] *Id.*

[421] *Id.* at 57–58.

jurisdiction as prescribed by local laws is appropriate to the occasion . . . ."[422] The recognition that state law is the determining factor of state court jurisdictional availability rests on a recognition of the separate identity of state governments, as the Court declares in quoting the "distinct sovereignties" language from *Claflin*.[423] This suggests that state duty to federal claim is not without limit and that the limit cannot be set from an external source.

Despite the implication that there are limits on state court jurisdictional availability, the Court's jurisprudence clearly stands for the proposition that a state is not free to configure jurisdictional authority in any way it sees fit. The Court has concluded that where a state court exercises general jurisdictional authority, the state's only justification for refusing to entertain federal claims is a substantive disagreement with federal policy.[424] Such a disagreement with federal policy cannot serve as a justification for refusing jurisdiction over federal actions, because it both undermines Congress's authority to legislate for the nation, and rupture the state's relationship from the whole.[425] In *Mondou*, the Court declared:

> When Congress, in the exertion of the power confided to it by the Constitution, adopted [the Federal Employers' Liability Act], it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the State.[426]

States are understood as having a special connection to the law made by the national legislature, and their courts are obliged to act consistently with the fact that national law is state law. This relationship serves as the basis for generating a behavioral norm imposed on state courts not to discriminate against federal law.[427] Such discrimination treats federal law as though it were "foreign" and imposed from an illegitimate source of authority.[428] Such a conclusion must be rejected, even where state distinctiveness is recognized.

The federalism relationship plays an even larger role in the Court's seminal decision rejecting a state's attempt to close its doors to a federal claim in *Testa v. Katt*.[429] In *Testa*, the courts of Rhode Island had dismissed a suit brought under the Emergency

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[422] *Id.* at 56–57.
[423] *Id.* at 57–58 (quoting Claflin v. Houseman, 92 U.S. 130, 136 (1876)).
[424] *See, e.g.*, *id.* at 55.
[425] *Id.* at 57.
[426] *Id.*
[427] See Douglas v. New York, 279 U.S. 377 (1929) (upholding a state court's denial of jurisdiction over federal claim).
[428] Testa v. Katt, 330 U.S. 386 (1947).
[429] *Id.*

Price Control Act.[430] The Rhode Island Supreme Court held that the state courts lacked jurisdiction to entertain the claim because the Act provided for treble damages and, as such, was a penal statute.[431] In an earlier decision the Rhode Island Supreme Court had held that it could not enforce the penal statutes of foreign governments.[432] The Court rejected the Rhode Island Supreme Court's holding. Reasoning from the Supremacy Clause, the Court concluded that the "States of the Union constitute a nation."[433] But the *Testa* Court also rested its decision on the reasoning offered in *Claflin*.[434] Again, the Court emphasized the connection between the states and the national government—a connection that undermined any conclusion based on the treatment of the national government as though it were a "foreign sovereign."[435] The full extent of state court duty to adjudicate federal claims remains a bit unclear from the Court's discussion of the relationship. It is unclear what if any limits exist regarding the duty state courts owe to federal claims. The relationship theme might be read to suggest that there are no limits on state court duty. But the Court's holding seems to be a bit narrower. It appears to recognize some limit on state court duty to adjudicate federal claims. Again, the state court's availability (and its limit) is consonant with the scope of a state's jurisdiction, which the state establishes itself. The *Testa* Court concluded that the Rhode Island courts had exercised jurisdiction over claims analogous to those arising under the Emergency Price Control Act, including multiple-damage awards.[436] As such the Court held that the state courts could not discriminate against the federal law claim that is cognizable under its self-imposed jurisdiction.[437]

C. Federal Preemption of State Law in State Court

As in each of the other areas, the themes of union and independence are explicitly considered and put forth as justifying the Court's decisions regarding the preemption of state procedural rules when state courts adjudicate federal claims. The evolution of the Court's jurisprudence exhibits its attempt to wrestle with the issues of the extent to which the federal and state courts represent one system or two separate systems. To an even greater extent than in the two preceding discussions of state courts and federal law, the area of federal preemption of state law raises questions of the balancing of the implications of unity and separation.

Nowhere is the Court's explicit recognition of the tension of connection and separation clearer than in its decision in *Minneapolis & St. Louis Railroad Co. v.*

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[430] *Id.* at 386.
[431] *Id.* at 388.
[432] *Id.* (discussing Robinson v. Norato, 43 A.2d 467 (R.I. 1945)).
[433] *Id.* at 389.
[434] *Id.* at 390–92.
[435] *Id.* at 391.
[436] *Id.* at 394.
[437] *Id.* at 392–94.

Bombolis.[438] There, the Court faced the question of whether a state's rule allowing for non-unanimous jury verdicts was preempted by the Seventh Amendment when the state courts adjudicated federal claims.[439] The Court unanimously answered the question with an emphatic no, explaining that long-settled precedent had concluded that the Seventh Amendment's obligations did not fall on state courts.[440] Beyond this, the Court explained why preempting state law would be inconsistent with the separation of two judicial systems, as imposing federal procedural obligations on state courts would suggest that they be "treated as Federal courts."[441] Such a "fluctuating hybridization," the Court reasoned, would rob both federal and state courts of "all real, independent existence."[442] The Court concluded that imposing federal procedural burdens on state courts would make their status as state or federal courts "depend not upon the character and source of the authority with which they were endowed by the government creating them, but upon the mere subject-matter of the controversy which they were considering."[443] For the Court, a conclusion that state procedural rules must yield in the face of national procedural rules would be to invalidate their existence as separate adjudicatory structures.

Although the Court emphasized the separation of the state and federal judicial systems as one explanation for refusing to preempt state law regarding jury verdicts, the Court also highlighted the connection between the two systems as the basis for its refusal to displace state procedures.[444] The Court concluded that the argument in favor of preemption of state procedural rules is inconsistent with the "essential principle" of concurrent state and federal judicial authority over federal claims.[445] On the Court's reading, concurrent of adjudicatory authority "cause[s] the governments and courts of both the Nation and the several States not to be strange or foreign to each other . . . but to be all courts of a common country . . . ."[446] Though the Court recognized connection between the state and federal courts, it is a connection that accepts the distinctiveness of the authority undergirding each system.[447]

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[438] 241 U.S. 211 (1916). For a useful discussion placing the case in a larger historical context, see EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870–1958 (1992).

[439] *Bombolis*, 241 U.S. at 216.

[440] *Id.* at 222–23.

[441] *Id.* at 221.

[442] *Id.*

[443] *Id.*

[444] *Id.*

[445] *Id.*

[446] *Id.* at 222.

[447] The *Bombolis* Court appeared to equate all preemption of state procedure with obliteration of the distinction between the state and federal judicial systems. This characterization of preemption does not provide adequate accommodation of the interests of the federal right entertained in state court. Henry M. Hart, Jr., *The Relations Between State and Federal Law*,

Although the Court's opinion in *Bombolis* failed to create space in its framework for the consideration of the interests that might justify preemption of state law in a particular case, it appears to lay the foundation for its later consideration of equal treatment of state and federal claims as a factor in the preemption analysis. As was discussed above, the Court maintained that the state court's duty to entertain federal claims arose from its having been empowered to entertain such actions by state law.[448] As such, there is an implicit obligation upon the state not to discriminate against federal causes of action. Yet in the Court's post-*Erie* cases it appeared to reject non-discrimination as a useful analytic distinction in determining when federal law would preempt state law.

In these cases, the Court seemed to interpret every procedural distinction between the federal and state courts as substantively impairing the federal right under which an action was filed. In *Brown v. Western Railway of Alabama*,[449] the Court held that federal law preempted both a state procedural rule allocating the decision of fraud to the judge rather than the jury and a state's restrictive pleading standard.[450] In each of these cases the Court emphasized federal interest in the uniform application of federal law, and its conclusion that the procedural rule was "bound up" with the substantive federal right.[451] In these cases the Court failed to provide a useful analytical framework for determining when a procedural rule was so "bound up" with a substantive right that a procedural deviation would undermine it. What is clear, however, is that

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54 COLUM. L. REV. 489 (1954). As stated above, the relational model of federalism enforcement does not require either party to engage in acts of self denial. This is especially problematic because the vindication of federal rights is at stake and because the federal relationship is undermined when such rights are frustrated by hostile state governments. A failure to respond to this hostility undermines the values of separation to the detriment of unity. *See* Meltzer, *supra* note 341, at 1131–32 (arguing in favor a judicially-created body of law to protect federal rights from state procedural rules that result in forfeiture on the basis that the federal system requires it). This argument rested on the adage that federal rights claimants took the state courts as they found them. *But see* Davis v. Wechsler, 263 U.S. 22 (1923).

[448] *Bombolis*, 241 U.S. at 221–22.

[449] 338 U.S. 294 (1949). The Court's decision in *Brown* has been criticized by members of the scholarly community, who argued that the Court's decision left it free "to impose a second procedural system upon the states in accordance with its own conceptions of what a reasonable system ought to provide." Hill, *supra* note 388, at 972–73.

[450] *Brown*, 338 U.S. at 298. The dissent agreed that the allocation of fact-finding authority to the judge was a substantive violation of the federal law under the Seventh Amendment and was preempted by virtue of the Supremacy Clause. *Id.* at 299–303 (Frankfurter, J., dissenting). The Court's framework foreshadowed the analytical framework that it would adopt in one of the most important post-*Erie* decisions, *Byrd v. Blue Ridge Electric Cooperative*, 356 U.S. 525 (1958), in which the Court held that the Constitution's Seventh Amendment allocation of decision-making authority to the jury (rather than to the judge, as was the case in the state court) was a "countervailing" federal interest that merited sacrificing its strict adherence to litigant equality.

[451] *Byrd*, 356 U.S. at 535.

the majority of the Court rejected a singular reliance on the non-discrimination factor as capable of protecting important federal interests in state court adjudications.[452]

Lying underneath the *Brown* Court's analysis was the relational thread that underwrote the Court's subsequent shift from a non-discrimination principle to what might be best called a non-frustration principle. This shift developed a preemption analysis that provides for the protection of national interests, even where equal treatment of state and federal claims is not the worry. In addition to its reference to both the restrictive pleading requirement's substantive impact on a federal right, and worries about uniformity, the Court also declared that the pleading standard imposed "unnecessary burdens" on the vindication of a federal right.[453] Again, the Court failed to explain what it meant by "unnecessary," but the introduction of such language opened the possibility for a more textured consideration of the competing interests at stake when the question of displacing state law arises.

The seeds of the Court's frustration analysis began to bear fruit in its decision in *Felder v. Casey*,[454] in which the Court reversed the Wisconsin Supreme Court's dismissal of a section 1983 action for failure to comply with the state's notice-of-claim statute.[455] The Court held that the notice-of-claim statute was preempted with respect to federal civil rights claims brought in state court.[456] The Court's analysis is not a model of clarity, and it begins with a discussion of the Supremacy Clause that appears reminiscent of the language of *Brown*, however, the Court engaged in a textured analysis that tried to place the federal right in context against the burden that the state procedural rule imposed.[457] Moreover, the Court identified the state's interest in maintaining the applicability of its notice-of-claim rule, and weighed it against the interest to be vindicated by the federal right.[458] Perhaps most importantly, the Court highlighted

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[452] *See generally* Wilkerson v. McCarthy, 336 U.S. 53 (1949); Bailey v. Cent. Vt. Ry., Inc., 319 U.S. 350 (1943).

[453] *Brown*, 338 U.S. at 298.

[454] 487 U.S. 131 (1988).

[455] *Id.* The notice-of-claim statute required plaintiffs bringing actions against any state, governmental subdivision or officer to notify the defendant within 120 days of the alleged injury, or show that the defendant had actual notice of the claim and was not prejudiced by the failure to provide written notice. *Id.* at 131. Further, the statute required the plaintiff to provide an itemized statement of relief to the defendant, which has the right to grant or refuse the request within 120 days. *Id.* The plaintiff was obligated to file suit no later than six months after being refused relief by defendant. *Id.*

[456] *Id.* The statute applied to claims brought under federal and state law.

[457] *Id.* at 138–40. The majority highlighted the fact that civil rights plaintiffs "often do not appreciate the constitutional nature of their injuries, and thus will fail to file a notice of injury or claim within the requisite time period, which in Wisconsin is a mere four months." *Id.* at 152 (internal citation omitted).

[458] *Id.* at 142–43. The Court identified the state interests as intended for the benefit of government defendants. The statute allowed "defendants to investigate early, prepare a stronger case, and perhaps reach an earlier settlement." *Id.* at 142 (internal quotations omitted). Unable to reach a settlement, the Court noted that the statute "forces claimants to bring suit within

the fact that the application of the state rule would result in dismissal for the state court plaintiff, and extinguishment of all possible vindication of his federal claim, while a similarly situated federal claimant would not suffer the same fate.[459] The *Felder* Court undertook this context-sensitive analysis in order to determine whether state law ought to be preempted in a particular instance.[460] Although there is no mention of enduring connection, the framework that the Court constructs is the embodiment of a relational analysis committed to the inclusion of the interests of the state courts and the federal rights at issue in preemption disputes.[461]

Like *Felder*, *Haywood v. Drown*[462] forced the Court to address the issue of when state procedural rules must give way to the vindication of federal rights.[463] The case involved a section 1983 prisoner suit brought against state corrections officers for alleged violations of the prisoner's civil rights that grew out of prison disciplinary proceedings.[464] The plaintiff filed an action in the New York State Supreme Court (the trial court of New York).[465] The trial court dismissed the suit on the ground that it lacked jurisdiction to entertain the suit based on a state statute that deprived it of jurisdiction over state and federal suits seeking money damages against correction officers for job-related actions.[466] The dismissal was appealed through the New York Court of Appeals (the state's highest court), where the trial court's decision was narrowly upheld.[467] The Supreme Court reversed the decision in a 5-4 vote. The majority held that the New York jurisdictional statute violated the Supremacy Clause, which obligates state courts to apply federal law against conflicting state law.[468]

The Court reasoned that the state's statute resulted from a policy decision to immunize corrections officers from section 1983 liability.[469] The Court declared this to be in direct conflict with "Congress' judgment that all persons who violate federal rights while acting under color of state law [ ] be held liable for damages."[470] The state's statute was seen as an attempt by the state to "dissociate [itself] from federal

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a relatively short period" in order to "minimiz[e] liability." *Id.* These interests are weighed against the interests of section 1983 claimants. *Id.*

[459] *Id.* at 151–52. The Court noted that when entertaining claims against the class of defendants protected by the notice-of-claim statute under diversity jurisdiction, federal courts apply the notice of claim statute because it is outcome-determinative. *Id.*

[460] *See generally* Meltzer, *supra* note 341, at 193 (advocating a context-specific analysis in some instances of conflict between state procedural rules and federal law).

[461] *See generally* Clermont, *supra* note 391.

[462] 129 S. Ct. 2108 (2009).

[463] *Id.*

[464] *Id.* at 2112.

[465] *Id.*

[466] *Id.*

[467] *Id.*

[468] *Id.* at 2117–18.

[469] *Id.* at 2115.

[470] *Id.* (emphasis omitted).

law because of disagreement with its content or a refusal to recognize the superior authority of its source."[471] As such, the state's statute was treated as one in direct conflict with a federal law, and eligible for preemption on that basis. The *Haywood* Court's analysis rested primarily on the conclusion—that New York's procedural law was actually a substantive law to immunize a class of defendants in opposition to the dictates of federal law.

Although the Court's conclusion is likely correct, the Court's analysis leaves something to be desired from a relational perspective. The *Haywood* Court, like the *Brown* Court of an earlier era, failed to provide a framework for determining when a purportedly non-discriminatory procedural rule is so "bound up" with the substantive federal right that its continued application is the equivalent of an abridgement of the substantive right.[472] The *Haywood* decision is not clear with respect to what the specific problem is with the statute. That is, is the problem with the state's effort to immunize state corrections officers? This would imply that the Court would have invalidated a state procedural rule solely because it substituted the state for state corrections officers as defendants in a suit for damages—regardless of where the suit was maintained. This substitution would, by itself, have resulted in the effective immunization of a class of defendants from section 1983 liability. Or is the problem with the New York law the fact that it channels a class of section 1983 plaintiffs to a court in which they receive different (and fewer) protections than other section 1983 claimants? If this is the basis of the preemption, then it is less clear that there is a direct conflict between federal law and state procedure that justifies the Court's invocation of the Supremacy Clause, without anything more.[473] This failure is all the more important in light of the advance that seems to have been made in the Court's analysis in this area over the last two decades. These advances mark a turn toward a careful consideration of state and national interests in the service of the vindication of federal rights.

As stated above, the Court's decision in *Felder* is not a model of clarity with respect to the central foundation of its decision to preempt state procedure because the Court makes reference to both Supremacy Clause justifications for preemption, yet it conducts an analysis that appears to move beyond the Supremacy Clause to engage the respective interests represented by the conflict between section 1983 and Wisconsin's notice-of-claim rule.[474] Here, the Court rests its decision solely on Supremacy without identifying why this is an easy choice. In the light of the failure to provide a

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[471] *Id.* at 2114 (citation omitted) (internal quotation marks omitted).

[472] Byrd v. Blue Ridge Elec. Coop., 356 U.S. 525, 535 (1958).

[473] *See* Felder v. Casey, 487 U.S. 131, 138 (1988). This is not meant to suggest that the imposition of such clear procedural burdens as a 90-day notice requirement, or the prohibition on attorneys' fees, or punitive damages do not raise a conflict with the congressional scheme of section 1983 as per *Felder*; what it means is that the *Felder* Court thought it helpful to engage in a much more expansive analysis of the ways in which the exercise of the section 1983 right was unreasonably burdened by the state procedures than occurs in *Haywood*.

[474] *See id.* at 138–45.

framework, the Court's conclusion would have been better served by an analysis that engaged with the interests of states in enacting particular procedural regimes.[475]

Unlike *Felder*, the Court in *Haywood* deploys the language of enduring connection between the national and state governments, and consequently their respective judicial systems.[476] However, the rhetorical use of relational discourse does not lead to an analysis that recognizes a bilateral set of duties and sympathies but simply the displacement of a state procedural rule without any effort to weigh the state's competing interest. Because the state court seemed to be working within an analytical framework in which non-discrimination norms seem to have been the touchstone, it would have been helpful for the Court to further instruct all state courts of the appropriate analysis within the non-frustration framework.[477] Indeed, if my argument is correct about the analytical role that the concept of an enduring relationship has played in the doctrinal development of the Court's "reverse-*Erie*" case law, it might suggest that the Court should undertake a narrow reading of the direct conflict between state procedural rules and federal law to foster the weighing and balancing that seems to honor the relationship between federal and state judiciaries.[478]

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[475] This conclusion is in direct conflict with the solution that Professors Redish and Sklaver propose—that there ought to be a "strong presumption in favor of the use of federal procedures when a state court is called upon to adjudicate a federal cause of action." *See* Redish & Sklaver, *supra* note 15, at 105. Redish and Sklaver's conclusion is based, as they readily admit, on their conclusion that the authority to commandeer state courts to entertain federal claims is based on federal dominance, rather than parity. *Id.* First, a relational conception of federalism need not conclude that state courts are equal to federal courts to justify state court duties to federal claims; it suggests that another basis for the duty exists in the nature of the enduring connection between the courts of the national and state governments. This conclusion makes it more logically consistent with weighing and balancing, which allows for the inclusion of state and national interests, in light of the duties that are generated from the relational connection that seeks to avoid domination. As stated prior, this does not mean that there is not a recognition of the supremacy of national law and authority and this is not meant to obliterate the obligation to consider the normative significance of the fact of relationship. The argument, though not articulated in this way, appears to be assented to by Professor Vicki C. Jackson, who argues against the sort of bright line rules that Redish and Sklaver advocate. Her argument in favor of balancing is premised upon her contention that state courts are not "junior varsity versions of federal courts." *See* Jackson, *supra* note 7, at 127–31.

[476] *See Haywood*, 129 S. Ct. at 2114–16.

[477] In no way do I want to be read as suggesting that the interest-weighing procedure does not involve significant judicial effort. The *Byrd* interest-weighing approach has been described as "analytic labor of the most demanding sort." GENE R. SHREVE & PETER RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE 194 (4th ed. 2009). But this fact, rather than suggesting a rejection of the approach, suggests that federal courts have an obligation to develop a consistent analytic framework for state courts when addressing the types of issues that arise when federal claims are litigated in state courts.

[478] In some ways this appears to be what takes place in recent Supreme Court *Erie* analysis, in which the Court has tried to narrow the displacement of state law. *See, e.g.*, Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415 (1996); *see also* Walker v. Armco Steel Corp., 446 U.S.

Finally, what is perhaps most significant in the *Haywood* decision is the majority's silence in the face of the frontal attack by Justice Thomas. In dissent, Justice Thomas does not merely reject the Court's application of the non-frustration principle articulated in *Felder*, he (joined by Justices Scalia and Alito) took dead aim at the non-discrimination principle articulated in *Testa* and other cases. Thomas asserted that there was "no textual or historical support for the Court's incorporation of this anti-discrimination principle into the Supremacy Clause."[479] For three justices, the Court's Supremacy Clause justification of state court obligation to federal law does not bear the burden demanded of it. Justice Thomas asserts that neither a textual reading of the Supremacy Clause nor an understanding of the "historical record" supports the conclusions of the last century of reverse-*Erie* jurisprudence. These arguments are not very different than arguments made by Professor Michael Collins, who has questioned the basis of the Court's state obligation jurisprudence in much the same way that Justice Thomas has outlined.[480] The difference at this point is that the issues are not merely academic, and the *Haywood* majority offered no rebuttal to this attack. While it might strike some as imminently reasonable for the majority to remain silent regarding the basis of its reliance on the Supremacy Clause, the better to preserve its slim majority.

The Court's silence might also stem from its failure to account for the role that the Supremacy Clause plays in its state obligation jurisprudence. This Article, and the project of relational federalism, offer the Court an invitation to move beyond its single-minded commitment to a strict, clause-bound textual support for its state obligation jurisprudence. Justice Thomas's attack on the foundation of modern state obligation jurisprudence is not an invitation, but a demand that the majority confront the weakening foundation of its Supremacy Clause justifications of state court obligations to federal claims. Silence in the face of a frontal assault is either arrogant or irresponsible.

CONCLUSION

This Article has offered an alternative theoretical landscape for thinking about the fundamentally important issues of federal and state court interaction. Though this Article has focused primarily on the subject of state court obligations when federal claims are litigated in state tribunals, its relational account of federalism has significant implications for other federal courts issues. Most directly, the relational account of federalism might offer a theoretical frame for understanding the heightened sensitivity to state interests in the Court's *Erie* decisions.[481] Perhaps less directly, but no less

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740 (1980) (attempting to narrow the range of conflict between the Federal Rules of Civil Procedure and state procedural rules to avoid direct supremacy preemption). The Court's decision in *Gasperini* has not been without its detractors. *See* Richard D. Freer, *Some Thoughts on the State of* Erie *after* Gasperini, 76 TEX. L. REV. 1637 (1998).

[479] Haywood, 129 S. Ct. at 2123.

[480] *See* Collins, *supra* note 19.

[481] *See e.g.*, Semtek v. Lockheed-Martin Corp., 531 U.S. 497 (2001); Gasperini v. Ctr. for the Humanities, 518 U.S. 415 (1996). For a recent case that appears to move away from the

important, a conception of federalism as enduring relationship, in which rupture is to be avoided, might be capable of offering a different perspective from which to critique the Court's policy of federal court abstention in cases involving domestic relations.[482] To the extent that the domestic relations exception amounts to a wholesale abdication of federal judicial responsibility over a host of cases that might otherwise be brought within federal court jurisdiction, it might be read as the Court's selective tolerance of "rupture" without any empirical basis that state courts serve as the best forums for the vindication of significant federal interests.[483]

Though important to the reconsideration of the interaction of the judicial systems of the two levels of government, relational conceptions of federalism also contribute valuably to our understanding of legislative federalism as well. Given revived debates about the scope of national authority to enact significant health care reform,[484] and the authority of states to regulate immigration,[485] among other areas, it is important that American constitutional thought remain open to the reconceptualization of areas and debates with which we have become most familiar. It is the hope of this project that we might see the familiar with new eyes.

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heightened sensitivity to state interests demonstrated in both *Semtek* and *Gasperini*, see *Shady Grove Orthopedic Associates v. Allstate Insurance*, 130 S. Ct. 1431 (2010). For academic criticisms of the Court's *Gasperini* case law, see C. Douglas Floyd, Erie *Awry: A Comment on* Gasperini v. Center for Humanities, Inc., 1997 BYU L. REV 267; Richard D. Freer, *Some Thoughts on the State of* Erie *After* Gasperini, 76 TEX. L. REV 1637 (1998); Wendy Collins Purdue, *The Sources and Scope of Federal Procedural Common Law: Some Reflections on* Erie *and* Gasperini, 46 U. KAN. L. REV 751 (1998). For a more sympathetic reading of *Gasperini*, see Thomas D. Rowe, Jr., *Not Bad For Government Work: Does Anyone Else Think the Supreme Court is Doing a Halfway Decent Job in Its* Erie-Hanna *Jurisprudence*, 73 NOTRE DAME L. REV. 963 (1998).

[482] *See, e.g.*, Ankenbrandt v. Richards, 504 U.S. 689 (1992).

[483] The domestic relations exception has been the subject of significant criticism. *See, e.g.*, Naomi R. Cahn, *Family Law, Federalism, and the Federal Courts*, 79 IOWA L. REV. 1073 (1994); Jill Elaine Hasday, *Federalism and the Family Reconsidered*, 45 UCLA L. REV. 1297 (1998); Judith Resnik, *"Naturally" Without Gender: Women, Jurisdiction and the Federal Courts*, 66 N.Y.U. L. REV 1682 (1991).

[484] *See, e.g.*, Commonwealth *ex rel.* Cuccinelli v. Sebelius, 728 F. Supp. 2d 768 (E.D. Va. 2010); *see also* Renee Landers, *"Tomorrow" May Finally Have Arrived—The Patient Protection Act: A Necessary First Step toward Health Care Equality in the United States*, 6 J. HEALTH & BIOMED. L. 65, 75 & nn.41–42 (2010) (noting that the Attorneys General of thirteen states filed suits alleging the Patient Protection and Affordable Care Act violates the Tenth Amendment and exceeds Congress's power the day after the President signed the bill into law, and that the Attorney General of Virginia filed a separate challenge).

[485] *See, e.g.*, United States v. Arizona, 703 F. Supp. 2d 980 (D. Ariz. 2010).