

March 2005

Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments

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MAKING FEDERALISM DOCTRINE: FIDELITY, INSTITUTIONAL COMPETENCE, AND COMPENSATING ADJUSTMENTS

ERNEST A. YOUNG*

INTRODUCTION	1735
I. DOCTRINE, STRUCTURE, AND THE JUDICIAL ROLE	1740
A. <i>The Problem of Doctrine</i>	1741
B. <i>Compensating Adjustments and the Judicial Role</i> <i>in Structural Cases</i>	1748
1. <i>Our Adjustable Federalism</i>	1750
2. <i>Incrementalism and Constraint</i>	1758
II. FIDELITY AND THE DIRECTION OF DOCTRINAL ADJUSTMENT	1762
A. <i>Fidelity and Its Limits</i>	1764
1. <i>Text and History</i>	1765
2. <i>Obligation and Interpretation</i>	1771
B. <i>The Case for Adjustment</i>	1775
1. <i>The Constitution's Incompleteness on Federalism</i> . . .	1775
2. <i>Change and Adjustment</i>	1783
3. <i>Compensating Adjustment in Practice</i>	1795
C. <i>Objections</i>	1799
1. <i>The Indeterminate Object of Fidelity</i>	1799
2. <i>Finding the Balance Point</i>	1803
3. <i>Has History Moved On?</i>	1811
III. THE INSTITUTIONAL AND FUNCTIONAL DETERMINANTS OF FEDERALISM DOCTRINE	1815
A. <i>Institutional Choice</i>	1816

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1. <i>One Issue, Many Questions</i>	1820
2. <i>The Obligation to Decide</i>	1822
3. <i>The Ubiquity of Judicial Enforcement</i>	1827
B. <i>Interpretive Choice</i>	1831
1. <i>Collaborative Enforcement and Institutional Self-Dealing</i>	1834
2. <i>Judicial Decision Making and the Frankfurter Constraint</i>	1836
3. <i>Judicial Competence and Compensating Adjustments</i>	1840
C. <i>Underlying Values</i>	1844
D. <i>Some Examples</i>	1848
1. <i>Preemption</i>	1848
2. <i>Necessary and Proper</i>	1850
CONCLUSION	1853

INTRODUCTION

Our Constitution establishes a federal structure but says relatively little about what such a structure entails. Virtually every political actor in our system has had something to say about filling in the gaps in this structure: Presidents and Congresses have both extended and voluntarily limited their own power; state governments have protested national actions on some occasions and, on others, urged Congress to act; social movements outside the government have pressed for reform at all institutional levels. Throughout our history, the judiciary has operated alongside these other actors to help define and implement our federal balance. Because the text and history of the Constitution yield few clear answers to federalism questions, the courts have had to work through these issues primarily as a matter of *doctrine*—that is, judge-made rules that elaborate upon and implement the Constitution's requirements.

This judicial function has always been controversial. In the early nineteenth century, for example, South Carolina nullifiers rejected the Supreme Court's claim to authoritatively resolve federalism disputes and instead insisted on political settlement of such questions through negotiations between the national government and the states.¹ In our own era, prominent commentators and even some Supreme Court justices maintain that the Court should stay out of disputes about the boundary between state and national power, leaving that line to be drawn by the national political branches.² The issue has become particularly salient over the last decade, as the Rehnquist Court's "Federalist Revival" has reinvigo-

1. See KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* 80 (1999).

2. See, e.g., *United States v. Morrison*, 529 U.S. 598, 649 (2000) (Souter, J., dissenting) ("[W]ith supposed conflicts of sovereign political interests implicated by the Commerce Clause[] the Constitution remits them to politics."); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552 (1985) ("State sovereign interests ... are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power."); JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* (1980) (arguing that courts should declare federalism disputes nonjusticiable).

rated the notion of judicially-enforced limits on national power after nearly a half-century of dormancy.

This Article undertakes to explore and defend the enterprise of making federalism doctrine. I make three distinct claims. The first is that fidelity to the Constitution requires us to *have* federalism doctrine. The Constitution is vague on the specific contours of our federalism, and there is considerable evidence that the Founders left many details to be worked out over time. But those uncertainties cannot mask the widely shared commitment at the Founding to some sort of balance between national and state authority. On any of the most plausible accounts of constitutional obligation—not just on an originalist account—that commitment commands our respect today. As Jenna Bednar and William Eskridge have written, “[c]onstitutional law must make some sense of federalism.”³

My second claim is that courts legitimately can—and should—develop innovative doctrinal solutions to the problem of maintaining the federal balance, whether or not those doctrines can be grounded directly in the text and history of the Constitution. Much of the federalism debate has centered on textual and historical sources.⁴ But it seems fair to say that although those sources of law have been highly relevant to the Court’s enterprise, neither text nor history has *dictated* many of the resulting doctrines. Consider, for example, the rule that the federal government may not “commandeer” state legislatures or executive officers.⁵ Nothing in the constitutional text mandates such a rule.⁶ Although the relevant history supports the notion that the Framers intended the new national government to act directly on individuals rather than through state governmental institutions, that history is hardly so

3. 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, 1448 (1995).

4. See, e.g., *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (debating the Qualifications Clauses in Article I, §§ 2 and 3 in textual and historical terms); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001); Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993) (textually and historically analyzing the Necessary and Proper Clause).

5. *Printz v. United States*, 521 U.S. 898, 935 (1997); *New York v. United States*, 505 U.S. 144, 161, 175-76 (1992).

6. See *Printz*, 521 U.S. at 905 (acknowledging as much).

clear as to be dispositive.⁷ The more persuasive justifications for this and other rules, in my view, rest on their functional roles in protecting state autonomy.⁸ In any event, the important point is that the Court has been operating in a context where text and history suggest important directions but do not mandate particular doctrinal formulations. Instead, the Court has constructed doctrine to meet the needs of the federal system as it sees them. Federalism doctrine has been made, not found.

Many of the Rehnquist Court's critics, both on the bench and in the academy, have taken the failure of text and history to compel particular federalism doctrines as proof that the enterprise is illegitimate.⁹ This is a curious reaction—although perhaps not a surprising one—given that many of the same people favor judicial creativity in other contexts.¹⁰ My own view is that doctrinal creativity is essential if the Constitution's mandate of a federal balance is to be maintained in a world where many of the Founders' presuppositions about the structure of society and government have profoundly changed. Text and history tell us that our Constitution established a creative tension between national and state governments. I will argue, however, that those same sources can tell us relatively little about how that tension should be maintained in

7. See *id.* at 918 ("The constitutional practice we have examined ... tends to negate the existence of the congressional power asserted here, but is not conclusive."). See generally Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1042-50 (1995) (concluding that the historical record suggests the Framers intended to *permit* commandeering of state executive officers and that the record is too sparse to support a rule against commandeering state legislatures); Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 1971-2007 (1993) (finding historical support for a rule barring commandeering of state legislatures, but not for one barring commandeering state officers).

8. See H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 682 (1993) (rejecting the historical arguments against commandeering, but approving *New York's* rule on "prudential" grounds).

9. See, e.g., Martin S. Flaherty, *Are We to Be a Nation? Federal Power vs. "States' Rights" in Foreign Affairs*, 70 U. COLO. L. REV. 1277, 1286-96 (1999) (attacking the textual and historical bases for the anti-commandeering doctrine).

10. Compare, e.g., Sylvia A. Law, *In the Name of Federalism: The Supreme Court's Assault on Democracy and Civil Rights*, 70 U. CIN. L. REV. 367, 368-72 (2002) [hereinafter Law, *In the Name of Federalism*] (comparing the Rehnquist Court's federalism jurisprudence to *Lochner*), with Sylvia A. Law, *Physician-Assisted Death: An Essay on Constitutional Rights and Remedies*, 55 MD. L. REV. 292 (1996) (urging recognition of a substantive due process right to physician-assisted suicide).

today's world. And although adaptation of the original structure to present circumstances is not exclusively, or even primarily, a task for courts, I contend that they must nonetheless play an important role.

The third claim is really a cluster of arguments about how courts should go about shaping federalism doctrine. My approach is influenced by the "institutional turn" in constitutional scholarship. This movement has insisted that "debates over legal interpretation cannot be sensibly resolved without attention to [the institutional] capacities" of the institutions doing the interpreting.¹¹ To some extent, this institutional turn occurred long ago with respect to federalism. At least since the New Deal, debate has focused not only on what the allocation of authority between the states and the nation should be, but also on institutional questions about the extent to which courts should participate in drawing the line.¹² Recent scholarship on comparative institutional choice does suggest ways to sharpen this inquiry, lending a bit more rigor to longstanding generalizations about the "political safeguards of federalism."

I want to resist, however, the notion that comparative institutional choice can resolve basic questions about whether courts should decide federalism cases at all. One of the distinctive characteristics of courts as institutions is that they lack certain kinds of control over their own agendas; they are not free, in other words, to decline to decide disputes otherwise within their jurisdiction simply because they think some other sort of institution might do the job better. Moreover, the sorts of factors that drive comparative institutional analysis may well play out quite differently in different sorts of federalism cases, so that the question of choice should be treated as multifarious rather than unitary. My claim, then, is that institutional analysis may be employed best at the stage of *interpretive* choice, that is, in shaping the particular doctrines that courts adopt in various different federalism contexts. The generic question, "Should courts decide federalism cases?" is

11. Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 886 (2003) [hereinafter Sunstein & Vermeule, *Interpretation*].

12. See, e.g., 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, 572-78 (1954) [hereinafter Wechsler, *Political Safeguards*].

one that courts cannot legitimately ask, and one that has no single answer.

Part I of this Article explores the use of judicial doctrine as a tool for resolving disputes about federalism. The basic point is that doctrine and the Constitution are not the same; hence, the use of doctrine requires justification beyond the traditional arguments about judicial authority to interpret the Constitution itself. I offer a rudimentary model of how courts may act to maintain the federal balance, first by identifying the *direction* from which the principal threat to that balance comes at any given point in our history, and second by formulating doctrines designed as compensating adjustments in the direction of equilibrium. This basic model frames much of the discussion that follows.

Part II argues that fidelity to the Constitution obliges courts to play this role of doctrinal innovation. I suggest, however, that although the constitutional text and history support that obligation, these sources generally do not go so far as to mandate particular sorts of federalism doctrines. This is true because the original Constitution left many of these matters open, and because certain approaches apparently mandated by the text or historical expectation have become obsolete over the course of our history. This Part thus lays out the case for a judicial role in making “compensating adjustments” to the federal balance through doctrinal innovation. I also take up some objections concerning the ability of courts deciding individual cases to discern the appropriate direction and magnitude of such adjustments.

Part III addresses the more difficult step, that is, the formation and content of doctrine. Here I confront the question of institutional choice, for the failure of text and history to determine the content of federalism doctrine suggests that more functional considerations should play a leading role. As I have already suggested, comparative institutional analysis is more useful for influencing the structure of doctrine rather than for asking whether courts should decide federalism cases at all. I also consider the relevance of federalism’s underlying values—such as state experimentation or the ability of national action to overcome collective action problems—to the judicial task of doctrinal elaboration.

It is important to emphasize, however, that this Article is meant as a defense of the enterprise of making federalism doctrine, not an attempt to carry that enterprise through to its conclusion. I have pursued the latter course some distance in other work, suggesting different organizing models for federalism doctrine and assessing the Rehnquist Court's handiwork in light of those models.¹³ And Part III of the present Article concludes with two brief examples of how the adjustment model might approach particular doctrinal problems. But most of the task of making particular federalism doctrines will have to await future scholarship. The burden of the present effort is to elaborate the theoretical underpinnings that can permit that work to go forward.

I. DOCTRINE, STRUCTURE, AND THE JUDICIAL ROLE

Any casebook in constitutional law will illustrate the importance of doctrine to the subject. The widely-used Sullivan and Gunther text¹⁴ places the Constitution itself—the document drafted at Philadelphia in 1787 and ratified in 1789, as well as its subsequent amendments—in an appendix at the end of the book, immediately following page 1537.¹⁵ Much of the rest is doctrine, encompassing “not only the holdings of cases, but also the analytical frameworks and tests that the Court’s cases establish.”¹⁶ My central claim in this Article is that although the constitutional text (and its history) mandate a federal system, courts must give content to that system largely through doctrinal elaboration. This introductory Part

13. See Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1 (2004) [hereinafter Young, *Two Federalisms*].

14. KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW (14th ed. 2001).

15. *Id.* at A-1 to A-15. Similarly, Laurence Tribe's leading treatise begins with the proposition that “the provisions of the Constitution and the decisions of the Supreme Court, taken together, generate a body of [constitutional] law.” 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 1-1, at 3 (3d ed. 2000) (emphasis added).

16. Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 56 (1997) [hereinafter Fallon, *Foreword*]; see also ROBERT F. NAGEL, CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW 8 (1989) [hereinafter NAGEL, CONSTITUTIONAL CULTURES] (“The most familiar content of the Constitution is simply a series of judicial interpretations.”); McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631, 1639 (1995) (defining doctrine as “the set of rules and methods to be used to decide a particular class of cases”).

develops the distinction between text and doctrine and offers a summary account of the judicial role in fleshing out our federal structure.

A. *The Problem of Doctrine*

Doctrine is not the same as the Constitution.¹⁷ Sometimes it bears very little relation to the document itself, such as when the Court holds that states may not discriminate against interstate commerce¹⁸ or that Congress may not “commandeer” state legislatures or executive officials.¹⁹ Other times, the doctrine elaborates upon the text, rendering its directives more specific in their application to particular cases. In considering the scope of Congress’s affirmative commerce power, for instance, the Court has held that the power extends to “channels” and “instrumentalities” of commerce, as well as to activities that “substantially affect” interstate commerce.²⁰ In either case, however, the doctrine may permit or require things that the document, standing alone, might not.

Are the dormant commerce doctrine and the substantial effects test part of the Constitution? Sai Prakash surely states an intuitive reaction when he insists that “the exclusive, legitimate source of federal constitutional law [is] the Constitution—that document found at the National Archives and typically reproduced at the

17. See, e.g., Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 26-27 (2000) [hereinafter Amar, *Foreword*] (contrasting “documentarian” and “doctrinalist” approaches to constitutional interpretation); Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 50-107 (2004); Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 62-65 (1993) (giving reasons why judicial decisions should not be read as “incorporated” in the enactments they interpret).

18. Compare, e.g., U.S. CONST. art. I, § 8, cl. 3 (conferring power on Congress “to regulate Commerce ... among the several States”), with *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330 (1996) (observing that courts have long interpreted the Commerce Clause “as a limitation on state regulatory powers” that “prohibits economic protectionism”) (quoting *Associated Indus. of Mo. v. Lohman*, 511 U.S. 641, 647 (1994)).

19. See *Printz v. United States*, 521 U.S. 898, 905 (1997) (admitting the lack of “constitutional text speaking to this precise question” whether state executive officers may be required to implement federal law).

20. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

beginning of constitutional law casebooks.²¹ This view does not dismiss doctrine altogether, but it does insist "that other putative sources of constitutional law that could not somehow be traced back to this Constitution [are] not appropriate fonts of constitutional law."²² It turns out that virtually everything turns on what one means by "traced back" in this formulation. I want to acknowledge at the outset, however, that according constitutional status to judge-made tests and rules that are not themselves written into the text requires special justification. The nature and limits of such justifications are critical in determining how far federalism doctrine may go.

We might initially define constitutional "doctrine" as the residue of interpretation that accumulates over time. Constitutional interpretation is seldom easy. Judicial interpretations of the document are often contestable and sometimes wrong. Yet we often accept those interpretations as settled and move on, taking them as given and building upon them in the resolution of future questions. Doctrine in this sense is equivalent to precedent or *stare decisis*; it represents our unwillingness to reopen interpretive questions resolved in the past.

Even taken in this comparatively narrow sense, doctrine is moderately controversial in constitutional law. Gary Lawson, for example, has argued that it is unconstitutional to subordinate the Constitution itself to what the judges have said about it in the past.²³ The argument has a strong intuitive appeal: If a judge

21. Saikrishna B. Prakash, *Overcoming the Constitution*, 91 GEO. L.J. 407, 416-17 (2003) [hereinafter Prakash, *Overcoming*] (reviewing RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* (2001)).

22. *Id.* at 417.

23. Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 23-24 (1994); see also *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 491-92 (1939) (Frankfurter, J., concurring) ("[T]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it."). A counter-current holds that it is unconstitutional *not* to allow courts to produce binding doctrine. See, e.g., *Anastasoff v. United States*, 223 F.3d 898, 899-900 (8th Cir. 2000) (striking down circuit rule barring citation of unpublished opinions on the ground that the Article III "judicial power" necessarily encompasses the power to create binding precedent), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (en banc); *Lindh v. Murphy*, 96 F.3d 856, 885, 887 (7th Cir. 1996) (en banc) (Ripple, J., dissenting) (arguing that 28 U.S.C. § 2254(d)(1)'s confinement of the grounds for federal habeas corpus relief to situations where state courts have violated "clearly established Federal law, as determined by the Supreme Court of the United States" unconstitutionally denies lower

deciding today's case truly thinks—using all the tools of interpretation at his disposal—that the Constitution requires rule X, then by what authority does he discount that interpretation and adhere to rule Y, simply because rule Y was adopted in a prior decision? Surely the Constitution itself trumps any authority the prior court might have enjoyed.²⁴

As long as we take precedent and doctrine simply to entail deference to past interpretations, however, two answers to Professor Lawson's argument seem readily available. One is that adherence to interpretive precedent simply represents humility on the part of the present interpreter—a recognition that his own interpretation may be wrong and, more fundamentally, that prior readings are in fact one of the most important “tools of interpretation” to be employed in resolving present controversies.²⁵ A second answer rests on the practical—but basic—impossibility of treating all interpretive questions as open in resolving each new case. Some questions must be considered settled if we are to move forward. As Charles Fried points out, “[w]e want to avoid being like the man who cannot get to work in the morning because he must keep returning home to make quite sure that he has turned off the gas.”²⁶

courts authority to create binding precedent) (emphasis added), *rev'd*, 521 U.S. 320 (1997). That debate is well beyond the scope of my discussion here.

24. Professor Lawson makes the argument from an originalist perspective, where rule X would be supplied by the present interpreter's best determination of the Constitution's original meaning with respect to the point in issue. See Lawson, *supra* note 23, at 27-28. But as Sai Prakash has pointed out, originalism does not necessarily entail a rejection of precedent. See Prakash, *Overcoming*, *supra* note 21, at 428 (“Some originalists may believe that [the original understanding of] Article III's vesting of the ‘judicial Power’ in the federal courts enables courts to use precedent to allow supposedly erroneous doctrine to trump the original understanding of a particular provision.”).

25. See, e.g., Amar, *Foreword*, *supra* note 17, at 43-44 (noting that “precedent can teach and help find the right answer” because “precedents reflect the earnest efforts of thoughtful members of the nation's highest court deliberating about important issues with their minds focused by the real-world facts before them”); Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's “Moral Reading” of the Constitution*, 65 FORDHAM L. REV. 1269, 1292 (1997) (noting that “an essential element of responsible judging is a respect for the opinions and judgments of others, and a willingness to suspend belief, at least provisionally, in the correctness of one's own opinions”).

26. Charles Fried, *Constitutional Doctrine*, 107 HARV. L. REV. 1140, 1144 (1994); see also Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1064-68 (1990) (making a similar, but more foundational, argument for precedent).

Doctrine has an additional component, however.²⁷ In many instances, the activity of interpretation per se may not produce closure on a choice among doctrinal options, leaving the choice to be made on other grounds. Those grounds may include independent moral principles, pragmatic concerns about the workability of particular rules, or institutional issues concerning the Court's legitimacy. As Richard Fallon has observed,

Frequently, a perfect correspondence could not, even in principle, exist between the meaning of constitutional norms and the doctrinal tests by which those norms are implemented [S]ome constitutional norms may be too vague to serve directly as effective rules of law. In addition, in shaping constitutional tests, the Supreme Court must take account of empirical, predictive, and institutional considerations that may vary from time to time.²⁸

Doctrine thus entails the choices that judges must make "to implement the Constitution successfully. In service of this mission, the Court often must craft doctrine that is driven by the Constitution, but does not reflect the Constitution's meaning precisely."²⁹

This aspect of doctrine frankly acknowledges that it *supplements* the Constitution rather than encapsulating past interpretations of the document. As such, it seems more vulnerable to Professor Lawson's critique. Doctrine in this aspect is not simply privileging one court's interpretation (the earlier one) over another; it instead amounts to the use of something not quite the same as the Constitution as a vehicle for implementing the Constitution's provisions. That still seems relatively unproblematic where doctrine

27. As Professor Fried notes:

Doctrine and precedent are related, not identical. In civil law countries, doctrine plays a great role in giving the law its substance and texture, but treatise writers and academic discourse, not the opinions nor even the decisions of courts, are the dominant organs of the growth and statement of doctrine there.

Fried, *supra* note 26, at 1141.

28. Fallon, *Foreword*, *supra* note 16, at 62.

29. *Id.* at 57 (emphasis omitted); see also 1 *TRIBE*, *supra* note 15, § 1-16, at 81-82 ("[T]he bare words of the Constitution's text, and the skeletal structure on which those words were hung, only *begin* to fill out the Constitution as a mature, ongoing system of constitutional law.").

simply makes open-ended provisions more concrete. The majority opinion in *United States v. Lopez*, for instance, used the long-standing doctrinal trichotomy of “channels,” “instrumentalities,” and activities “substantially affect[ing]” commerce to make sense of Congress’s textual power over interstate commerce.³⁰ In these instances, the doctrinalist can plead necessity: Courts simply cannot decide cases under the Commerce Clause—and, in particular, the Supreme Court cannot guide future decisions by lower courts—without specifying what “commerce among the several states” means.³¹ The implementing doctrine is necessary in such instances to ensure that like cases applying the constitutional provision in question are, in fact, treated alike.³²

Some doctrine, however, exists at a further remove from the implementation of particular constitutional provisions. This is particularly true of much federalism doctrine. The anti-commandeering principle, for example, does not implement any particular constitutional provision;³³ likewise, the dormant commerce notion

30. See 514 U.S. 549, 558-59 (1995).

31. Fallon, *Foreword*, *supra* note 16, at 57. A related necessity occurs when a textual provision is relatively determinate but practically unworkable in that form. The Free Speech Clause, for instance, could hardly be more specific: “Congress shall make no law ... abridging the freedom of speech.” U.S. CONST. amend. I. But aside from Justice Hugo Black, we have never been able to live with a right of free speech in this absolute form. The provision thus cannot be implemented effectively without doctrine specifying exceptions and qualifications, such as the “clear and present danger” test for restrictions on incitement to unlawful activity. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *Abrams v. United States*, 250 U.S. 616, 627-28 (1919) (Holmes, J., dissenting).

32. See Amar, *Foreword*, *supra* note 17, at 28 (conceding that “even after close study the document itself will often be indeterminate over a wide range of possible applications,” so that “judicial doctrine can work alongside practical resolutions achieved by other branches to specify particular outcomes and thereby concretize the Constitution”).

33. Language in *New York v. United States* suggests that the Court believes the anti-commandeering rule to be an implicit limit on every power enumerated in the text of Article I:

[J]ust as a cup may be half empty or half full, it makes no difference whether one views the question at issue in these cases as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment.

New York v. United States, 505 U.S. 144, 159 (1992). But that limit is not necessary to implement these powers in the way, for example, that some sort of doctrinal test of equality is necessary to implement the Equal Protection Clause. One can imagine a Commerce Clause without an anti-commandeering limit; one cannot apply equal protection without defining what is meant by equality.

hardly serves to implement the Commerce Clause's text, which quite plainly operates only to confer power on Congress.³⁴ These sorts of doctrine require a more elaborate justification than the need to specify the meaning of particular constitutional text.

It may help to begin by adding a third category of constitutional "law" alongside the text and the doctrine. That category would include fundamental structural principles, like "federalism" or "separation of powers." Those words do not appear in the constitutional text, and yet they have long been understood as bedrock ideas undergirding the textual provisions in the document and tying them together into a coherent structure.³⁵ Nor are these sorts of principles properly classified as "doctrine," at least if we understand that term to encompass relatively specific rules and principles that implement the textual provisions. On the contrary, textual provisions such as the vesting clauses of Articles I, II, and III and the Tenth Amendment "implement" broader ideas of separation of powers and federalism, respectively. The text thus exists at an *intermediate* level of generality, implementing broader ideas and yet requiring further implementation through judicial doctrine.³⁶

The critical question for present purposes is the relationship between these fundamental structural principles and the doctrine made by courts. Sometimes, courts will want to justify doctrine on the ground that it directly implements structural principles, even though the doctrine has little support in the text itself. The anti-commandeering doctrine is an example. Other times, courts will fashion doctrine to implement text, yet recur to the text's underly-

34. Similarly, the broad sovereign immunity accorded to state governments in cases like *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), hardly implements the text of the Eleventh Amendment. On the contrary, the Court often describes the rather narrow text of that Amendment as implementing a preexisting (and much broader) notion of sovereign immunity in a particular instance where *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 452 (1793), had rejected such immunity. See *Alden v. Maine*, 527 U.S. 706, 723 (1999). My own view is that current doctrine goes well beyond what is necessary to implement the most plausible account of the Founders' views on state sovereign immunity.

35. See, e.g., Amar, *Foreword*, *supra* note 17, at 30 (observing that "the phrases 'separation of powers' and 'checks and balances' appear nowhere in the Constitution, but these organizing concepts are part of the document, read holistically"). One need not go all the way with Professor Amar's notion of holistic interpretation to agree with him on this point.

36. See generally Ernest A. Young, *Alden v. Maine and the Jurisprudence of Structure*, 41 WM. & MARY L. REV. 1601 (2000) [hereinafter Young, *Jurisprudence of Structure*] (discussing the role of the political theory underlying structural provisions of the Constitution).

ing principles to influence the form that the implementing doctrine takes. In *U.S. Term Limits, Inc. v. Thornton*,³⁷ for example, both Justice Stevens' majority opinion and Justice Kennedy's concurrence resorted to the Founders' underlying theory of representation to support a doctrine that the Qualifications Clauses in Article I supply the *exclusive* limitations on who can be a federal representative.³⁸ In each case, it is hard to say that the text itself is doing the work.

Can doctrine be justified even where it is not grounded in text? The power of judicial review itself is generally justified in terms of the Constitution's written-ness. Chief Justice John Marshall, for instance, wrote in *Marbury* that the theory "that an act of the legislature, repugnant to the constitution, is void" is "essentially attached to a *written* constitution."³⁹ Compared to more textualist forms of judicial review, then, the argument that courts may formulate constitutional doctrine driven not so much by text as by fundamental structural principles cannot be grounded as easily in the judiciary's obligation "to say what the law is."⁴⁰ One might go further and deny the existence on authority of structural principles apart from their specific instantiations in the text. One might insist, in other words, that provisions like the Commerce Clause and the Tenth Amendment *exhaust* the Constitution's commitment to federalism.⁴¹ I want to argue that the vast range of doctrinal elaboration by courts exercising the power of judicial review nonetheless *is* legitimate, particularly in the context of federalism doctrine. I also want to offer a general account of the considerations that ought to guide courts in fashioning such doctrine. The next Section advances an overview of that account, which is then elaborated and defended in the remainder of the Article.

37. 514 U.S. 779 (1995).

38. See *id.* at 806, 838, 841-42; see also Young, *Jurisprudence of Structure*, *supra* note 36, at 1644-45 (discussing this aspect of *Term Limits*).

39. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (emphasis added); see also *id.* at 176 ("The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is *written*.") (emphasis added).

40. *Id.* at 177.

41. Cf. *Buckley v. Valeo*, 424 U.S. 1, 124 (1976) ("The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787."). One need not, I think, read *Buckley* as denying that separation of powers means *more* than the sum of the specific provisions in the document.

The case for such doctrine rests on three distinct elements. First, the Constitution's contemporary interpreters owe obligations of fidelity not simply to the text, but also to the structure that the text created. This is true under any of the most plausible theories of constitutional obligation. Second, the text of the Constitution is sufficiently incomplete on the subject of federalism that, if we are to be faithful to the original structure, the gaps must be filled in through doctrinal "implementation" by courts, as well as by other political actors. Third, changes in the societal and political context of federalism over time require doctrine to play a more dynamic role; courts should not simply fill in the gaps in the federal system, but also should adapt that system and the mechanisms of its enforcement to historical change over time. This imperative owes much to Lawrence Lessig's notion of "translation,"⁴² although I ultimately think the judicial role is better characterized as one of "compensating adjustment."

I develop each of these arguments for doctrinal elaboration in Part II. To say that such elaboration is necessary, however, leaves scores of unanswered questions as to how it should proceed. The remainder of the present Part offers a general account of the considerations that ought to guide courts in fashioning federalism doctrine.

B. Compensating Adjustments and the Judicial Role in Structural Cases

My central claim in this Article is that making federalism doctrine can be an act of fidelity to the Constitution comparable to enforcing its textual commands. The argument, elaborated in Part II, is that the text and history of the Constitution unequivocally commit us to a federal structure, entailing some division and balance of authority between the nation and the states. But both text and history are remarkably ambiguous on the precise content of this commitment, and that ambiguity extends not only to the substantive balance to be struck, but also to the mechanisms for enforcing that balance. The open-textured nature of the

42. Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993) [hereinafter Lessig, *Fidelity*].

Constitution's structural commitments calls for judicial implementation through doctrine: There is simply no way to administer our federal system without developing rules to flesh out the allocation and balance of authority. The Constitution's extended existence over time, moreover, requires adjustment and adaptation to new circumstances. Indeed, the most likely explanation for constitutional ambiguity on federalism, to my mind, is that it represents a deliberate strategy on the part of the Framers to allow the mechanics of federalism to be worked out and adapted through practice over time⁴³—surely a prudent approach to a fundamentally innovative and untested form of government. In any event, that sort of filling-in and adaptation is what has actually occurred throughout our history.

This Article is about doctrine, which means that it is principally about courts. The role that courts should play is, at least to some extent, a question of institutional choice, and I take up that question in some detail in Part III. Much of what I say in this Section about the need to implement and adapt our structural commitments is applicable not only to courts, but also to other political institutions, all of which have obligations to interpret the Constitution.⁴⁴ And in fact much—perhaps most—of the work of implementing and adapting the federal structure has been carried on outside the courts.⁴⁵ Congress, the President, administrative agencies, state political branches, and even private actors take actions that operationalize federalism and adjust it to historical change, and in many ways the discussion of compensating adjustments by courts in this Section will remain relevant to those activities.

The discussion here might also be generalizable in a different way—that is, much of what I have to say about *federalism* doctrine may be relevant to the more general question of doctrinal construction in other areas of constitutional law. Others have addressed these questions more globally,⁴⁶ and I draw heavily on their work

43. See *infra* notes 254-56 and accompanying text.

44. See, e.g., NAGEL, *CONSTITUTIONAL CULTURES*, *supra* note 16, at 22-26 (arguing that stable constitutional principles cannot be solely the province of judicial interpretation).

45. See *infra* Part II.C.1; WHITTINGTON, *supra* note 1.

46. See, e.g., PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982); FALLON, *supra* note 21.

here. But I also want to suggest that some aspects of the questions are particular to subject matter; specifically, some arguments for judge-made doctrine arise out of the manner in which the Constitution approaches issues of structure. Notions of compensating adjustment, for instance, are probably more relevant to other "balance of power" aspects of the structural Constitution—particularly, to separation of powers—than they are to individual rights.⁴⁷ That, in any event, is a question for future work. The focus here is firmly on the more particular problem of doctrinal implementation and adjustment of the allocation of authority between the states and the nation.

1. *Our Adjustable Federalism*

Federalism is typically defined in terms of both the division and balance of power.⁴⁸ The notion of "balance" need not require a single fixed point of equilibrium; the critical point is the tension between state and national governments that enables each to act as a check upon the other. Justice O'Connor thus argued in *Gregory v. Ashcroft* that "there must be a proper balance between the States and the Federal Government. These twin powers will act as mutual restraints only if both are credible. In the tension between federal and state power lies the promise of liberty."⁴⁹ Rather than insisting

47. That is not to say that compensating adjustments are totally irrelevant to rights questions. For example, one could argue that Fourth Amendment doctrine must be adjusted in light of advances in surveillance technology. See, e.g., *Kyllo v. United States*, 533 U.S. 27 (2001) (holding that the use of thermal imaging technology to look inside a home from the outside violated the Fourth Amendment).

48. See, e.g., Koen Lenaerts, *Federalism: Essential Concepts in Evolution—The Case of the European Union*, 21 *FORDHAM INT'L L.J.* 746, 748 (1998) ("[F]ederalism searches for the balance between the desire to create and/or to retain an efficient central authority ... and the concern of the component entities to keep or gain their autonomy so that they can defend their own interests."); see also, e.g., *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 611 (1997) (Thomas, J., dissenting) (expressing concern that an expansive interpretation of the dormant Commerce Clause undermined "the delicate balance in what we have termed 'Our Federalism'" (quoting *Younger v. Harris*, 401 U.S. 37, 44 (1971)); *Stone v. Powell*, 428 U.S. 465, 491 n.31 (1976) (observing that limits on *habeas corpus* are necessary to maintain "the constitutional balance upon which the doctrine of federalism is founded") (quoting *Schnecko v. Bustamante*, 412 U.S. 218, 259 (1973) (Powell, J., concurring)); *Austin v. New Hampshire*, 420 U.S. 656, 662 (1975) (invoking "the structural balance essential to the concept of federalism").

49. 501 U.S. 452, 459 (1991); see also *Pennhurst State Sch. & Hosp. v. Halderman*, 465

on a precise equilibrium of political and institutional forces, then, our scheme requires simply that each level of government have sufficiently meaningful prerogatives to act as a check upon the other. We must have *a* balance, but we have had different balances at different times in our history. Moreover, federal systems may become *unbalanced* in either direction—that is, toward disintegration or undue centralization.

This last point helps explain the very different roles played by the courts at different times in our history. The Marshall Court was a strong force for centralization, consistently interpreting Congress's powers broadly and limiting state prerogatives.⁵⁰ Throughout the nineteenth century, the Court imposed important judge-made limits on state regulation through the dormant Commerce Clause.⁵¹ The Taft Court of the early twentieth century played a more decentralizing role by limiting the growth of national regulation under the enumerated powers doctrine,⁵² although its simultaneous imposition of due process limits on *state* regulation had the effect of creating a uniform national economic policy of *laissez faire*.⁵³ The New Deal

U.S. 89, 123 (1984) (observing that sovereign immunity's reduction of a litigant's forum choice is "a part of the tension inherent in our system of federalism") (quoting *Employees v. Mo. Pub. Health & Welfare Dept.*, 411 U.S. 279, 298 (1973) (Marshall, J., concurring in the result)). Chief Justice Rehnquist has explained that federalism is simply a part of the Federalist scheme of checks and balances:

It is too well known to warrant more than brief mention that the Framers of the Constitution adopted a system of checks and balances conveniently lumped under the descriptive head of "federalism," whereby all power was originally presumed to reside in the people of the States who adopted the Constitution. The Constitution delegated some authority to the federal executive, some to the federal legislature, some to the federal judiciary, and reserved the remaining authority normally associated with sovereignty to the States and to the people in the States.

Trimble v. Gordon, 430 U.S. 762, 777-78 (1977) (Rehnquist, J., dissenting).

50. See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (construing Article I to permit Congress to establish a national bank, and imposing on the States an implied bar to taxation of federal entities).

51. See, e.g., *Wabash, St. Louis & Pac. Ry. Co. v. Illinois*, 118 U.S. 557, 572-77 (1886) (striking down an early state ban on freight rate discrimination by railroads on the ground that the subject matter of the regulation was of a "national" rather than "local" character).

52. See *Hammer v. Dagenhart*, 247 U.S. 251, 275-77 (1918) (striking down federal child labor law); Robert Post, *Federalism in the Taft Court Era: Can It Be "Revived"?*, 51 DUKE L.J. 1513, 1537-80 (2002).

53. See Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 487 (1997) [hereinafter Gardbaum, *New Deal*] (arguing that the "central goal of the *Lochner* era Court" was to promote a uniform "philosophy of economic

Court unshackled both levels of government,⁵⁴ while laying the groundwork for an overall shift toward national authority through its seeming refusal to recognize *any* limits on Congress's power.⁵⁵ The Warren and Burger Courts furthered this shift both through expansive rulings on Congress's enumerated powers⁵⁶ and by imposing a wide variety of individual rights-based restrictions on state policy.⁵⁷ Most recently, the Rehnquist Court has made some efforts to reinvigorate constitutional protections for state autonomy,⁵⁸ while continuing to play a centralizing role in other important areas.⁵⁹

nationalism"). Compare, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 309-12 (1936) (invalidating a federal attempt to regulate wages and working conditions in the coal industry under the Commerce Clause), with *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 609-11 (1936) (invalidating a state minimum wage law under the Due Process Clause).

54. See Gardbaum, *New Deal*, *supra* note 53, at 506 (arguing that "the net result of the Court's leading decisions in both [the Commerce Clause and due process] areas was far less a massive transfer of powers from the states to the federal government than a shift from a regulatory vacuum to concurrent powers").

55. See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 123-33 (1942) (upholding the federal Agricultural Adjustment Act, even as applied to a single farmer's production of wheat for home consumption); *United States v. Darby*, 312 U.S. 100, 118-26 (1941) (upholding the national Fair Labor Standards Act even as applied to intrastate commerce). See generally Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950) (commenting on the demise of the Court's pre-New Deal regime of doctrinal limits on national authority).

56. See, e.g., *Maryland v. Wirtz*, 392 U.S. 183, 192-99 (1968) (upholding the Fair Labor Standards Act as applied to state governments); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256-58 (1964) (upholding public accommodations provisions of the 1964 Civil Rights Act as within the Commerce Clause). The Warren and Burger Courts likewise construed Congress's power to enforce the Reconstruction Amendments broadly. See, e.g., *City of Rome v. United States*, 446 U.S. 156, 173-80 (1980) (upholding section 5 of the Voting Rights Act, requiring preclearance of changes to state and local election rules with the Justice Department); *Katzenbach v. Morgan*, 384 U.S. 641, 652-58 (1966) (upholding application of the Voting Rights Act to bar literacy tests, which the Court itself had declined to declare unconstitutional).

57. See, e.g., *Roe v. Wade*, 410 U.S. 113, 152-64 (1973) (invalidating state prohibitions on abortion); *Mapp v. Ohio*, 367 U.S. 643, 655-60 (1961) (imposing the Fourth Amendment exclusionary rule on the states); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493-95 (1954) (striking down racial segregation in public schools); see also LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 489-97 (2000) (arguing that the Warren Court's individual rights rulings amounted largely to an effort to impose values held by a majority of the country on the recalcitrant Southern states).

58. See *Printz v. United States*, 521 U.S. 898, 918-22 (1997) (holding that Congress may not "commandeer" state executive officials to enforce federal law); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67-68, 72-73 (1996) (holding that Congress, acting pursuant to its Article I powers, may not abrogate the states' sovereign immunity from private damages suits); *United States v. Lopez*, 514 U.S. 549, 553-68 (1995) (striking down the federal Gun-Free School Zones Act as outside the Commerce Clause).

59. See, e.g., *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 124 S. Ct. 1756,

This highly compressed story ought to dampen enthusiasm about judicial remedies for the long-term erosion of state authority; as Vicki Jackson has pointed out, "the Court's record of activism on behalf of the states as against national power is neither impressive nor durable."⁶⁰ Although the Court has been a nationalizing force in our history far more often than it has befriended the states, it has occasionally acted to check national power, and this Article is devoted to exploring how it might play that role more effectively. But counting on the Court to play a *primary* role in that regard seems unrealistic, and the most promising strategies for maintaining some sense of balance in our system will need to pursue action across a variety of legal, political, and private institutions.⁶¹

The important point for present purposes, however, is to mark the way in which the Court's federalism decisions have pushed in different directions at different times. The Court has not confined itself to implementing the Constitution's open-textured federalism provisions by giving them more specific—but consistent—content. Rather, the Court has tacked back and forth in response to different institutional trends in different eras. Its role has been one of compensating adjustment through doctrinal innovation, rather than one of consistent interpretation of static principles.

Adrian Vermeule has described compensating adjustments as a "second best" approach to maintaining our constitutional commitments:

1764-65 (2004) (upholding federal preemption challenge to state rules requiring state agencies and private fleet operators to purchase vehicles meeting strict anti-pollution standards); *United States v. Locke*, 529 U.S. 89, 112-16 (2000) (holding that federal law preempted Washington safety regulations of oil tankers in state waters); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 385 (1999) (interpreting ambiguous provisions of the Telecommunications Act of 1996 to preempt traditional state authority to regulate the local telephone market). *See generally* Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1384-86 (2001) [hereinafter Young, *Two Cheers*] (arguing that the Rehnquist Court's decisions on federal preemption of state law have taken more from the states than cases like *Lopez* have given back); Young, *Two Federalisms*, *supra* note 13, at 13-23 (expanding and updating this argument).

60. Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223, 280 (2001) [hereinafter Jackson, *Narratives*].

61. *See, e.g.*, Elizabeth Garrett, *Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995*, 45 U. KAN. L. REV. 1113, 1131-36 (1997) (exploring legislative reforms).

Given an irreversible departure from, or violation of, ideal constitutional design, the best response is *not* to approximate the ideal as closely as possible by adopting its remaining components. Rather, the best response is to violate the ideal along some other margin, in order to produce an offsetting condition or compensating adjustment.⁶²

In the federalism area, it may be less necessary than Professor Vermeule suggests to say that a particular adjustment “violates” the Constitution; the structure is sufficiently open-textured that many different implementing doctrines may be accommodated to the text. But the important point is that the text and history generally have not *compelled* many of the Court’s doctrinal innovations.⁶³ Nothing in the text compelled *McCulloch*’s doctrine of intergovernmental tax immunity or its application to protect *state* governments from federal taxation in response to a strengthened national government much later in the nineteenth century. And occasionally the Court’s adjustments *have* violated the best understanding of text and history. *Hans v. Louisiana*’s extension of state sovereign immunity to federal question cases was probably wrong as a matter of original understanding,⁶⁴ but it arguably protected state autonomy at a time of dire fiscal crisis and increasing federal power.⁶⁵

The form of compensating adjustment employed here owes much to Lawrence Lessig’s theory of “translation.”⁶⁶ That theory suggests that when the context of the Constitution changes, interpreters

62. Adrian Vermeule, *Hume’s Second-Best Constitutionalism*, 70 U. CHI. L. REV. 421, 426 (2003) [hereinafter Vermeule, *Second-Best*]. Professor Vermeule attributes this idea to David Hume. See *id.* at 421. Vermeule thinks that *courts* are generally ill-suited to make compensating adjustments. I take up that objection in Part III.B.3, concluding that the objections to judicial competence are sufficiently persuasive to counsel judicial caution but not to exclude courts from that role altogether.

63. See Evan H. Caminker, *Context and Complementarity Within Federalism Doctrine*, 22 HARV. J.L. & PUB. POL’Y 161, 162 (1998) [hereinafter Caminker, *Complementarity*] (arguing that many of the Court’s most important federalism doctrines, limiting both federal and state power, were not dictated by the text or history of the Constitution but derived instead from functionalist concerns).

64. 134 U.S. 1 (1890); see *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116-23 (1996) (Souter, J., dissenting) (demonstrating *Hans*’s error).

65. That is emphatically *not* to say that the Rehnquist Court’s further expansion of state sovereign immunity is a useful compensating adjustment today. See Young, *Two Federalisms*, *supra* note 13, at 23-32.

66. Lessig, *Fidelity*, *supra* note 42.

should change their readings of the Constitution in order to approximate the effect of the original understanding in the changed context. This notion that changes in context over time may require what looks like doctrinal innovation as an act of fidelity is central to my project. But at least in theory, compensating adjustments are not precisely the same as translation. As Professor Lessig makes clear, the "problem of translation" is a "problem faced by the originalists": "The translator's task is always to determine how to change one text into another text, while preserving the original text's meaning."⁶⁷ In the context of federalism, this suggests that the task is to preserve the precise equilibrium between national and state power embodied in the Constitution's original understanding.

My approach, by contrast, is more Burkean than originalist.⁶⁸ Indeed, one key aspect of this project is to operationalize a Burkean approach to constitutional interpretation. Burkean conservatives are skeptical of human reason and foresight in the setting-up of political arrangements, and they doubt the capacity of any single generation, no matter how extraordinary, to comprehend, anticipate, and capture in a set of political institutions all the needs and contingencies of a large and complex society.⁶⁹ They thus stress the organic and incremental growth of political institutions over time.⁷⁰ This perspective at once inspires a reverence for the past—the

67. *Id.* at 1173.

68. See generally Ernest A. Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation* 72 N.C. L. REV. 619, 625-34, 686-88 (1994) [hereinafter Young, *Rediscovering Conservatism*] (criticizing originalism on Burkean grounds).

69. See EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE, in 8 THE WRITINGS AND SPEECHES OF EDMUND BURKE 53, 138 (Paul Langford ed., Clarendon Press 1989) (1790) [hereinafter BURKE, REFLECTIONS]:

We are afraid to put men to live and trade each on his own private stock of reason, because we suspect that this stock in each man is small, and that the individuals would do better to avail themselves of the general bank and capital of nations and of ages.

See also J.G.A. Pocock, *Burke and the Ancient Constitution: A Problem in the History of Ideas*, in POLITICS, LANGUAGE AND TIME: ESSAYS ON POLITICAL THOUGHT AND HISTORY 202, 203 (1971) ("[Burke's] account of political society ... endows the community with an inner life of growth and adaptation, and it denies to individual reason the power to see this process as a whole or to establish by its own efforts the principles on which the process is based.").

70. See BURKE, REFLECTIONS, *supra* note 69, at 217 ("By a slow but well-sustained progress, the effect of each step is watched; the good or ill success of the first, gives light to us in the second The evils latent in the most promising contrivances are provided for as they arise We compensate, we reconcile, we balance.").

present generation, after all, is no more omniscient than its predecessors—and a limit on that reverence based on the need for constant reform.⁷¹ The insistence that reform be incremental, however, means that Burkeans will be almost prohibitively reluctant to launch a broad attack on established institutions.⁷²

Under this Burkean sort of approach, courts owe fidelity to a constitutional tradition that includes the whole sweep of our history, not just the Founding moment.⁷³ And courts proceed by moving the law in increments rather than by seeking to impose (or restore) a broad constitutional vision. This means that the appropriate equilibrium state in our federalism may shift over time, and that in any event the judicial task is to move incrementally in a particular direction rather than to take the law to a particular destination. Professor Lessig's particular doctrinal proposals in the federalism area suggest that he might not ultimately disagree with this approach; those proposals, such as "clear statement" rules and some version of the anti-commandeering doctrine,⁷⁴ seem aimed at imposing *some* incremental limits on federal power rather than restoring some particular original balance. In any event, the image of "compensating adjustment" fits my purpose better than that of "translating" a specific text.

Compensating adjustment differs from a pure theory of translation in a second sense. If the task of the translator is to preserve the meaning of a particular constitutional provision under new circumstances, her focus is likely to remain fixed on that particular provision. The adjuster's focus, by contrast, is more holistic: The question is how resolution of particular doctrinal questions may help move the overall system back toward balance. It follows that,

71. Burke, after all, spent most of his political career as a Whig reformer. *See, e.g., id.* at 206 ("A disposition to preserve, and an ability to improve, taken together, would be my standard of a statesman."). *See generally* CONOR CRUISE O'BRIEN, *THE GREAT MELODY: A THEMATIC BIOGRAPHY AND COMMENTED ANTHOLOGY OF EDMUND BURKE* (1992) (stressing the reformist aspect of Burke's career).

72. *See* BURKE, *REFLECTIONS*, *supra* note 69, at 112 ("[I]t is with infinite caution that any man ought to venture upon pulling down an edifice which has answered in any tolerable degree for ages the common purposes of society.").

73. *See* Young, *Rediscovering Conservatism*, *supra* note 68, at 669.

74. *See* Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125, 186-88 [hereinafter Lessig, *Translating Federalism*]. These proposals overlap substantially with my own proposals elsewhere. *See* Young, *Two Federalisms*, *supra* note 13, at 163-65.

as Evan Caminker has argued, "a court cannot craft an optimal doctrinal rule without considering the interactive effects between it and other rules [S]ometimes a court may properly assess federalism doctrines in the aggregate rather than as isolated solutions to discrete controversies."⁷⁵ That does not necessarily mean, as Dean Caminker suggests, that courts should formulate a pro-nation rule in case B because it created a pro-states doctrine in case A;⁷⁶ in *both* cases, the court's task is to push toward overall balance, and the likelihood is that neither case's rule will move the needle all that far. But compensating adjustment does entail a more holistic judgment than translation, because the court must make an incremental adjustment to the general balance rather than translate the meaning of a particular provision.⁷⁷ The crude model of federalism doctrine employed here has two steps. The first requires courts to determine the appropriate direction of doctrinal adjustment at any particular time. The Marshall Court interpreted Congress's enumerated powers broadly in an era when the national government was, practically speaking, much weaker than the states, and it likewise devised doctrinal rules reining in state regulation and taxation.⁷⁸ This was more an act of implementation than adjustment, because the Constitution's initial thrust was toward centralization. But the need for doctrinal creativity remained. It fell to the Court to develop doctrinal mechanisms, such as the principle of intergovernmental tax immunity in *McCulloch* or the origins of the dormant Commerce Clause in *Gibbons*, that helped carve out a place for the Constitution's new national institutions and restrained centrifugal tendencies in the states. By

75. Caminker, *Complementarity*, *supra* note 63, at 161.

76. *See id.* at 163 (arguing that "sometimes the Court should consider pairs or perhaps even sets of doctrinal rules and should measure these rules against each other to achieve an optimal overall balance").

77. In suggesting that the court should make this sort of holistic assessment of the federal balance, I am aware of arguments that holistic approaches to constitutional interpretation are often unrealistic about both constitutional meaning and the institutional capacities of courts. *See generally* Adrian Vermeule & Ernest A. Young, *Hercules, Herbert, and Amar: The Trouble with Intratextualism*, 113 HARV. L. REV. 730 (2000). But I am not advocating a holistic theory of the Constitution, but rather that one aspect of it—federalism—should be assessed in a holistic fashion. And the judgment I am asking courts to make is ultimately a rough and intuitive one. *See infra* Part II.C.2.

78. *See, e.g., Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 402-07 (1819).

the 1990s, with national power firmly established and state autonomy seemingly endangered, the Rehnquist Court was acting on a parallel imperative to rein in national authority.⁷⁹ Many of the Court's actions are best understood as compensating adjustments meant to push the system back toward balance. Any institution charged with helping to maintain the federal balance must be alert to the need, at different times, to throw its weight onto one or the other side of the scale.

2. Incrementalism and Constraint

The second step involves formulating particular doctrines to affect the necessary adjustment. Suggesting that courts should throw their weight onto the scale raises an obvious question: How *much* weight? This way of putting the question, however, unhelpfully suggests the need for courts to have a comprehensive ideal of the federal balance that should be achieved before acting to redress threats to the system. Academics love to castigate the Supreme Court for not having a full-blown, rigorously coherent theory of federalism before it acts in particular cases.⁸⁰ I think this demand assumes an exaggerated view of the Court's ability to shift the federal balance. Requiring the Court to develop a full-blown federal vision of its own, after all, presumes that the Court could impose that vision if it wished. But the limited ability of the courts to effect social change has been amply demonstrated in other contexts.⁸¹ It seems safe to say that if the federal courts could not impose school desegregation on one region of the country while Congress and the

79. See generally Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429 (2002) [hereinafter Fallon, *Conservative Paths*] (characterizing the current Court as pursuing a variety of doctrinal strategies designed to check national authority more generally).

80. See, e.g., Bednar & Eskridge, *supra* note 3, at 1447 ("[T]he Supreme Court's ... federalism jurisprudence might, uncharitably, be described as 'a mess.' ... The decisions are inconsistent with constitutional text and with one another, and they lack a persuasive normative theory to justify the first inconsistency or to resolve the second."); Todd E. Pettys, *Competing for the People's Affection: Federalism's Forgotten Marketplace*, 56 VAND. L. REV. 329, 330 (2003) (complaining that the Court has "failed to articulate an overarching vision of federal-state relations").

81. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991). But see Neal Devins, *Judicial Matters*, 80 CAL. L. REV. 1027 (1992) (reviewing ROSENBERG, *supra*).

Executive remained passive,⁸² it is unlikely that those same courts can fundamentally reorder the federal balance in the face of efforts by the national political branches to maintain their authority.⁸³

If the institutional environment in which courts operate is constrained in important ways, then we should develop different expectations for federalism doctrine. Those constraints come from a number of sources. There is the sheer institutional weight of the national administrative state, not to mention the many more active weapons—e.g., appointments, jurisdiction stripping, and control over budgets and facilities—at its disposal.⁸⁴ There is the force of the Court's own more nationalist precedents, derived from the Court's ultimate need to persuade other actors that it is enforcing the *law* rather than its own policy preferences.⁸⁵ And there is the fact that in some cases, the written Constitution comes fairly close to determinacy;⁸⁶ for example, it is simply not open to a court, in light of the Supremacy Clause, to announce a doctrine that federal statutes may not preempt state law.⁸⁷

Despite these constraints, there are some cases that come to the Court presenting open questions that may be resolved in favor of either national or state authority. These are the interesting cases for federalism doctrine. *Lopez* was such a case: Although the Court

82. ROSENBERG, *supra* note 81, at 41-169.

83. The Court has struggled to persuade even lower federal courts to go along with its fairly modest efforts to recalibrate the federal balance. See Brannon P. Denning & Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 ARK. L. REV. 1253, 1262-99 (2003).

84. See, e.g., RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 319-61 (5th ed. 2003) [hereinafter HART & WECHSLER]; McNollgast, *supra* note 16, at 1648-49.

85. See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 865-66 (1992) (joint opinion of O'Connor, Kennedy, & Souter, JJ.):

The Court must take care to speak and act in ways that allow people to accept its decisions ... as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.

86. See Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 404-11 (1985).

87. I put to one side disputes about the Supremacy Clause's precise mandate. See Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 773-77 (1994) [hereinafter Gardbaum, *Preemption*] (arguing that the Clause guarantees the supremacy of federal law but affords Congress no distinct "preemption power"). The text bars at least some doctrinal possibilities, such as denying the supremacy of federal law.

had upheld broad exercises of national authority under the Commerce Clause, it had never upheld a federal statute as close to the margin of that Clause as the federal Gun-Free School Zones Act.⁸⁸ It was thus open to the Court to take what would have been the *last* step—upholding the statute and, in effect, decreeing that the Clause lacked any cognizable limits—or to say that the Clause's expansion stops here. Either step would have required the articulation of doctrine. Neither the Government's proposed rule that courts should always defer to Congress's view of what affects interstate commerce, nor the formula that the Court ultimately adopted, allowing Congress to regulate only commercial activities, was clearly mandated by the text or history of the Constitution.

Choosing whether to uphold or to strike down the exercise of national power in such a case hardly required the Court to develop a full-blown theory of federalism. The possibilities open to the Court were far more limited. I see the doctrinal problem as having two basic elements. The first, as I have already suggested, is *directional*: The Court should ask whether its doctrinal elaboration should operate to promote or to check national power. This requires *some* view of the federal vision embodied in the Constitution, for it is the gravitational pull of that vision that ought to determine the direction of the Court's intervention. But the second doctrinal element does not require the Court to attempt to replicate that vision, and therefore the Court need not develop its vision with the specificity demanded by the Court's critics. The task is, instead, to choose a doctrinal principle *from among the options open in the given case*.

88. The cases most often cited as going further are *Wickard v. Filburn*, 317 U.S. 111 (1942), and *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). The latter, however, seems like an easy case under the formula that *Lopez* adopted: Selling rooms in a motel or barbecue in a restaurant, see *Katzenbach v. McClung*, 379 U.S. 294 (1964), is plainly commercial activity (the latter, in fact, is commercial activity of the highest order). Nor, in my view, was *Wickard* a much harder case. Every commercial activity will have some instances that are not performed for money. It is not implausible to say that activities that are *usually* commercial ought to be regulable as part of a general scheme regulating commercial and non-commercial activities alike. But see Young, *Two Federalisms*, *supra* note 13, at 139-41 (identifying problems with this approach). In any event, a close reading of *Wickard* reveals that Farmer Filburn used his homegrown wheat primarily to feed livestock that were later sold, bringing his actions within even a relatively narrow definition of "commercial" activity. See *Wickard*, 317 U.S. at 114.

The first thing to say about this second element is that it is necessarily incremental. The question presented in *Lopez* was not, "What should the scope of Congress's power be?" but instead "Is the Gun-Free School Zones Act within the Commerce Clause?" To be sure, it is possible to decide the latter question in a way that purports to determine the former. But because the Court's authority depends ultimately on the persuasiveness of its reasoning, such a violation of craft norms would incur its own costs in terms of compliance with and durability of the precedent set.⁸⁹ It is little surprise that the Court's Commerce Clause decisions have proceeded much more cautiously, refusing to articulate a comprehensive rule and leaving the ultimate boundary between state and national authority to be extrapolated from the series of data points marked by the Court's results.⁹⁰ As Cass Sunstein has noted, cases like *Lopez* are exemplars of judicial minimalism.⁹¹ Such decisions thus allow the Court to follow an "incompletely theorized" vision of federalism, making corrections as it goes along in successive cases.⁹² Attempts to develop a comprehensive theory in individual cases simply would impede agreement among the succession of judges that must tend the doctrinal stream over time.

The question remains, however, what guides these incremental doctrinal developments. We deal by hypothesis with "open" cases, in which the text (and possibly the history, too) does not dictate a clear answer. I conclude that the form of doctrine should be shaped primarily by functional or institutional considerations. These considerations include, importantly, the critical but difficult imperative that judicial doctrine command compliance by political actors. That imperative suggests that doctrine should strive to augment the self-enforcing aspects of federalism,⁹³ and that it must be

89. On the importance of judicial craft norms in constraining constitutional interpretation, see Charles Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 TEX. L. REV. 35, 37-46 (1981); Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973).

90. See, e.g., *United States v. Morrison*, 529 U.S. 598, 613 (2000) (declining to "adopt a categorical rule against aggregating the effects of any noneconomic activity").

91. Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 23 (1996).

92. See *id.* (noting that *Lopez* "gave no deep account of federalism"). See generally Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995).

93. See discussion *infra* Part III.B.1.

perceived as sufficiently principled and determinate to command respect as "law."⁹⁴ Finally, federalism doctrine should be designed to maximize the values that undergird our commitment to federalism in the first place, such as the values of state-by-state diversity and experimentation, political participation, and the ability of the states to protect individual liberty.⁹⁵

All of these points require further development. For now, the important point is the basic model of doctrinal elaboration: Courts must first determine the direction of incremental "push" in particular cases, then construct doctrines to implement that push by reference to considerations that are primarily functional in nature. I flesh out the relation of doctrinal elaboration to constitutional fidelity in Part II. Part III turns to the institutional considerations that guide courts in shaping doctrinal rules.

II. FIDELITY AND THE DIRECTION OF DOCTRINAL ADJUSTMENT

Federalism has many meanings, but the basic one in our system is that we have two levels of government—the nation and the states—and that power is divided between them as a matter of constitutional principle.⁹⁶ That concept has a rich history in this country,⁹⁷ and that history has played an important role in debates about doctrine. I argue in this Part that both the constitutional text and its history require us to *have* federalism doctrine. Fidelity to the constitutional design requires a continuing commitment to the basic elements of its structure. Even if one were convinced that all the functional arguments for federalism—e.g., state experimentation, ease of political participation—were spurious, it would not be open to us to reject federalism and create a unitary system. I thus argue in Section A that government officials bound by the Constitution

94. See discussion *infra* Part III.B.2.

95. See discussion *infra* Part III.C.

96. See Ernest A. Young, *Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism*, 77 N.Y.U. L. REV. 1612, 1641-42 (2003) [hereinafter Young, *European Union*] (discussing various definitions of federalism). Local governments, of course, comprise a third level. But those governments have no independent status as a matter of federal constitutional law.

97. See, e.g., SAMUEL H. BEER, *TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM* (1993); RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* (1987); FORREST McDONALD, *STATES' RIGHTS AND THE UNION: IMPERIUM IN IMPERIO 1776-1876* (2000).

have a continuing obligation to enact and enforce laws and create doctrines that maintain the basic attributes of the federal structure. But exploring the basis for such an obligation makes clear that it necessarily entails substantial flexibility in adapting the original structure to current needs.

If text and history commit us to *have* federalism doctrine, those sources also might function as a constraint. Text and history have played an important role in recent doctrinal debate; witness, for example, the historical trench warfare between Justices Stevens and Thomas in the *Term Limits* case.⁹⁸ As the remainder of this Article will make clear, however, these sources play a less central part in my own analysis. This hardly means that text and history are unimportant or that they impose no constraint on the doctrinal enterprise. I want to insist, however, that they leave many of the crucial questions unanswered. Sections B and C of this Part seek to explain the role of text and history and to explore the limits of what history can and cannot tell us about federalism.

The first point, developed in Section B, is that we should not view the text and history of the federal Constitution as a complete picture of our federal system. This is true for at least two reasons. The Constitution's great task was to reconstitute a national government after the failure of the Articles of Confederation; it was not necessary, however, to constitute the *state* governments, and the Constitution did not purport to define their powers or obligations to their citizens in any comprehensive way. So it should hardly be surprising that "Our Federalism"—defined as the complete set of structures at the national, state, and local level and the web of complex interrelationships between them—must be fleshed out in ways that are sometimes hard to tie directly to the document ratified in 1789. Moreover, our Founders seemed to have viewed the federal relationship as incomplete in 1789, requiring evolution and adaptation over time. That is consistent, in my view, with the best account of constitutional development, which emphasizes evolutionary change over the entire sweep of our history rather than an exclusive focus on particular founding episodes.

Consistent with this evolutionary view, I argue in Section C that our foundational commitment to federalism can be enforced under

98. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

contemporary circumstances only by means of compensating adjustment. To the extent that the constitutional text and its original understanding identified particular strategies for enforcing federalism, those strategies largely have failed under modern conditions. The primary strategy of the original Constitution for preserving the federal balance—the doctrine of enumerated powers—has become far less effective over the last century with the advent of an integrated national economy. And the Framers' *political* strategy, relying on the direct representation of the states in Congress, has been undermined by such developments as the direct election of senators and the advent of political parties and interest group politics. We thus confront a choice between abandoning the basic commitment to federalism or developing new strategies for enforcing that commitment. Drawing on Professor Lessig's work on translation in constitutional interpretation, I argue that fidelity requires the latter course.⁹⁹

A. *Fidelity and Its Limits*

Debates about federalism often proceed as if the constitutional principle of federalism must stand or fall based on the functional values that it serves.¹⁰⁰ The implicit suggestion seems to be that if state autonomy is shown to be a bad idea from the standpoint of protecting human rights or promoting good policy, we would be justified in reading that principle out of the Constitution. That suggestion flies in the face of the very notion of constitutionalism, which is to entrench certain structures and values so that they will be highly resistant to change, even if those structures or values fall out of favor with the present generation.¹⁰¹ My view, of course, is that federalism *does* serve important values, and I argue in Part III that those values should help determine the structure of federalism

99. See Lessig, *Fidelity*, *supra* note 42.

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

101. See, e.g., 1 TRIBE, *supra* note 15, § 1-8, at 23 (comparing constitutional restrictions to the ropes that bound Ulysses to the mast of his ship so that he would not be able to succumb to the temptation of the Sirens); Lino A. Graglia, "Interpreting" the Constitution: Posner on *Bork*, 44 STAN. L. REV. 1019, 1030 (1992) ("The purpose of constitutional restrictions on self government is to *impede* policy adjustments in light of changing circumstances.").

doctrine in important ways.¹⁰² But I want to insist in this Section that the constitutional principle of a federal balance would compel our adherence even if it could be shown to be pernicious from a policy standpoint.¹⁰³

Any argument from fidelity must begin with what the text and history of the Constitution actually entail. Because those materials have been well-canvassed elsewhere, I provide only the briefest overview here. I then discuss the nature and limits of arguments from textual and historical fidelity in the context of federalism.

1. Text and History

The constitutional text says relatively little about federalism.¹⁰⁴ One critical component of the federal structure *is* present in the original text: the principle of enumerated powers. Simply by listing specific powers for Congress rather than conferring a general legislative authority, Article I establishes the notion that federal power is limited.¹⁰⁵ Although Article I also includes a robust notion of *implied* powers,¹⁰⁶ Chief Justice Marshall would acknowledge in

102. See discussion *infra* Part III.C; see also Young, *Two Federalisms*, *supra* note 13, at 51-53. On the values served by federalism, see Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317 (1997); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1491-1511 (1987) [hereinafter McConnell, *Federalism*].

103. See *New York v. United States*, 505 U.S. 144, 157 (1992) ("Our task would be the same even if one could prove that federalism secured no advantages to anyone. It consists not of devising our preferred system of government, but of understanding and applying the framework set forth in the Constitution.").

104. As Matthew Adler has observed:

Places in the constitutional text where the states are explicitly accorded rights against the national government are few in number and relatively minimal in importance—notably, Article I, Section 9's prohibition of federal taxes on exports from any state and of federal preferences for the ports of one state over another; Article IV, Section 3's ban on the creation of new states through the division or merger of old ones; and various references to the state legislatures, implying that Congress cannot validly abolish them.

Matthew D. Adler, *State Sovereignty and the Anti-Commandeering Cases*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 158, 162 (2001).

105. See, e.g., *United States v. Morrison*, 529 U.S. 598, 618 n.8 (2000) ("With its careful enumeration of federal powers and explicit statement that all powers not granted to the Federal Government are reserved, the Constitution cannot realistically be interpreted as granting the Federal Government an unlimited license to regulate.").

106. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (construing Article I's "Necessary and Proper" Clause).

Gibbons v. Ogden that “[t]he enumeration presupposes something not enumerated.”¹⁰⁷ The Tenth Amendment emphatically underlines this notion.¹⁰⁸ Even if Justice Stone was right to suggest that this Amendment states “but a truism that all is retained which has not been surrendered,”¹⁰⁹ contemporary confusion about that point suggests that this in itself is an important office. In any event, the Framers’ reliance on this principle obviated (at least in their minds) the need to incorporate in the text a more detailed description of the federal relationship. The task of the federal Constitution was simply to empower the new national government and establish its internal structure.

In hindsight, it turns out that categorical enumeration may not be such a great strategy for guaranteeing balance in a federal system.¹¹⁰ As I discuss in Section C, the failure of this strategy to prevent the national government from invading virtually every category of state activity presents a difficult problem for federalism doctrine. For present purposes, however, my point is simply that the original Constitution includes, as a purely textual matter, a strong commitment to a balanced federal structure. The document not only refers to the states as viable and responsible actors at several

107. 22 U.S. (9 Wheat.) 1, 195 (1824). The Necessary and Proper Clause is sometimes read as undoing the whole notion of enumerated powers, but that is not how the Clause was originally understood:

As with the quiet evolution of the supremacy clause, the lack of controversy over [necessary and proper] suggests that [the Framers] did not regard it as augmenting the powers already vested in the national government.... There is no reason to think that the framers believed the necessary-and-proper clause would covertly restore the broad discretionary conception of legislative power in the Virginia Plan.

JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 180 (1996). Some commentators have argued that “proper” also amounts to a textual protection for federalism. See Lawson & Granger, *supra* note 4.

108. See, e.g., *Alden v. Maine*, 527 U.S. 706, 713-14 (1999):

The limited and enumerated powers granted to ... the National Government ... underscore the vital role reserved to the States by the constitutional design Any doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment, which ... was enacted to allay lingering concerns about the extent of the national power. The Amendment confirms the promise implicit in the original document.

109. *United States v. Darby*, 312 U.S. 100, 124 (1941).

110. See *infra* Part II.C. For an argument that emerging federal systems should not rely overmuch on the strategy of enumeration, see Young, *European Union*, *supra* note 96, at 1663-77.

points, but also structures the basic grant of federal lawmaking power—arguably the Constitution’s most important feature—in a way designed to preserve state autonomy.

If the text itself focuses on empowering the federal government, the surrounding history features more prominent concern for protecting the states. Justice Powell observed in *Garcia v. San Antonio Metropolitan Transit Authority* that “[m]uch of the initial opposition to the Constitution was rooted in the fear that the National Government would be too powerful and eventually would eliminate the States as viable political entities.”¹¹¹ Some of this concern shaped the drafting of the document itself at Philadelphia. As Jack Rakove has recounted, James Madison and James Wilson arrived at Philadelphia with an aggressive plan “to render the Union politically independent of the states and the states legally dependent on national oversight.”¹¹² But this position “only inspired other delegates to articulate their notions of statehood with equal vigor, ultimately producing in recoil a reaffirmation of the vital place that the states would occupy in the federal system.”¹¹³ That reaffirmation is reflected in the structure of the Senate, implementation of the principle of federal supremacy, and the scope and definition of federal legislative power.¹¹⁴

These concessions did not satisfy everyone. In one of the most influential critiques, Elbridge Gerry complained that “[t]he

111. 469 U.S. 528, 568 (1985) (Powell, J., dissenting); see also SAUL CORNELL, *THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788-1828*, at 28 (1999) (identifying “[t]he consolidationist/nationalist character of the new government” as one of the central themes in Anti-Federalist writing).

112. RAKOVE, *supra* note 107, at 168-69; see also GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 525-26 (1969):

Both Madison and James Wilson fought hard in the Convention to prevent both equal representation of the states in the Senate and elimination of the congressional veto of all state laws that Congress deemed unjust and unconstitutional. Both proportional representation and the congressional veto, they believed, would deny any recognition of state sovereignty in the Constitution....

113. RAKOVE, *supra* note 107, at 170.

114. *Id.* at 170-80. Madison’s own views evolved as the Convention worked through these issues, so that in the end he incorporated the States’ role as a central component of his theory of checks and balances. See, e.g., LANCE BANNING, *THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC 139-40* (1995) (observing that the positions taken in *The Federalist* “confessed [Madison’s] reconciliation to decisions he had earlier opposed and outlined a position he defended through the rest of his career”).

Constitution ... has few, if any *federal* features, but is rather a system of *national* government."¹¹⁵ Brutus, a pseudonymous writer in New York, conceded that the proposed Constitution did not "go to a perfect and entire consolidation," yet warned that "it approaches so near to it, that it must, if executed, certainly and infallibly terminate in it."¹¹⁶ Most Anti-Federalists were not states' rights absolutists; many were willing to concede the need to strengthen national authority beyond the Articles of Confederation model.¹¹⁷ But virtually all Anti-Federalists feared that the Philadelphia draft took this imperative too far.¹¹⁸

The Anti-Federalist opposition does not itself establish a constitutional commitment to federalism; standing alone, it would corroborate claims that the Constitution was a profoundly nationalizing document.¹¹⁹ What is critical is the response to these concerns by the Constitution's proponents. They might have conceded the charge of consolidation and defended the virtues of national government; that is surely what most legal scholars today would have chosen to do had they been there. And the Federalists *did* defend the need for central authority in some areas, such as foreign affairs.¹²⁰

115. *Elbridge Gerry to the Massachusetts General Court*, MASS. CENTINEL, Nov. 3, 1787, reprinted in 1 THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION 231, 232 (Bernard Bailyn ed., 1993) [hereinafter DEBATE]. Luther Martin likewise complained that the Philadelphia draft was not "in reality a *federal* but a *national* government" that would bring about a "consolidation of all *State governments*." Luther Martin, *The Genuine Information, Address Before the Legislature of the State of Maryland (1788)*, reprinted in 2 THE COMPLETE ANTI-FEDERALIST 19, 45 (Herbert J. Storing ed., 1981).

116. "Brutus" I: *If You Adopt It ... Posterity Will Execrate Your Memory*, N.Y. J., Oct. 18, 1787, reprinted in 1 DEBATE, *supra* note 115, at 164, 166.

117. See, e.g., CORNELL, *supra* note 111, at 63 (observing that "[r]elatively few Anti-Federalists were willing to return to the Confederation as a model for federalism" and most conceded "that some central authority ought to be created with sufficient power to force compliance from the states").

118. See *id.* at 61-65, 98-99; RAKOVE, *supra* note 107, at 181 (observing that "[f]or Anti-Federalists, the decisive fact about the Constitution was how much more 'national' it was than the Confederation"); WOOD, *supra* note 112, at 526-27.

119. The persistence of the political tradition that the Anti-Federalists represent, on the other hand, does strengthen the case for a historical commitment to balance in our federal system. See CORNELL, *supra* note 111, at 303-07.

120. See, e.g., THE FEDERALIST No. 42, at 279-81 (James Madison) (J.E. Cooke ed., 1961) (defending the need for unified foreign affairs powers); see also RAKOVE, *supra* note 107, at 178-79.

But the Constitution's most prominent defenders also chose to concede—even reaffirm—the importance of state governments and to deny that the proposed national entity would unduly threaten their role. Gordon Wood has recounted that “[u]nder this Antifederalist pressure most Federalists were compelled to concede that if the adoption of the Constitution would eventually destroy the states and produce a consolidation, then the ‘objection’ was not only ‘of very great force’ but indeed ‘insuperable.’”¹²¹ According to Mark Killenbeck, the Anti-Federalists’ “concerns were widely shared, and these individuals played an important role in shaping the text, the ratification dialogues, and, eventually, the drafting and ratification of what became the Tenth Amendment.”¹²² The debates thus strongly suggest that both Federalist and Anti-Federalist leaders alike were committed to a meaningful role for state governments under the new regime.¹²³ More importantly, the fact that such arguments were thought to be necessary in order to achieve ratification indicates broad-based support for federalism in the Founding Generation at large.

The Federalist assurances about state sovereignty and autonomy have been well-catalogued elsewhere,¹²⁴ and I will provide only a few illustrative examples here. James Wilson’s summation to the Pennsylvania ratifying convention insisted that the proposed Constitution, “instead of placing the state governments in jeopardy, is founded on their existence.”¹²⁵ Madison conceded in *Federalist* 39 that the new government had several national features but emphasized that it remained federal in many crucial respects.¹²⁶ In particular, he insisted that in “the *extent* of its powers ... the proposed Government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all

121. WOOD, *supra* note 112, at 529.

122. Mark R. Killenbeck, *Pursuing the Great Experiment: Reserved Powers in a Post-Ratification, Compound Republic*, 1999 SUP. CT. REV. 81, 107.

123. *See id.* (acknowledging that “[p]reserving state ‘sovereignty’ was ... an operative and occasionally important founding principle”).

124. *See, e.g.,* RAKOVE, *supra* note 107, at 188-201.

125. James Wilson’s *Summation and Final Rebuttal: December 11, 1787*, reprinted in 1 DEBATE, *supra* note 115, at 832, 841.

126. THE FEDERALIST NO. 39, at 253-54 (James Madison) (J.E. Cooke ed., 1961).

other objects."¹²⁷ And more specific assurances were given as well. Hamilton, for example, pledged in *Federalist* 81 that nothing in Article III of the Constitution should be understood as overriding the traditional principle of state sovereign immunity.¹²⁸

Nor were these references to the continuing importance of state governments mere grudging concessions to the opposition. Federalism, for instance, constitutes half of the "double security" at the core of Madison's theory of checks and balances in *Federalist* 51.¹²⁹ Lance Banning has concluded that "[d]uring the ratification contest, as in 1793, Madison desired a well-constructed, partly federal republic—not, like Hamilton, because he thought that nothing more could be obtained, but (more like many *Anti-federalists* of 1788) because he thought that nothing else would prove consistent with the Revolution."¹³⁰ As Professor Banning's comments indicate, not all Framers—especially not Hamilton—necessarily shared this view. But where we must choose between them, it seems likely that Madison's is the more important perspective.¹³¹

127. *Id.* at 256; see also *THE FEDERALIST* NOS. 45, 46, at 311-12, 315-17 (James Madison) (J.E. Cooke ed., 1961) (assuring readers that the states would have the advantage in political competition between the two levels of government).

128. *THE FEDERALIST* NO. 81, at 548-49 (Alexander Hamilton) (J.E. Cooke ed., 1961). The tougher question is whether Hamilton meant that further measures, such as federal statutes purporting to strip the states of their immunity in particular classes of cases, could not override the traditional immunity from suit. On that question, see *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 143-50 (1996) (Souter, J., dissenting) (tracking carefully Hamilton's argument).

129. Madison argued that "the compound republic of America" provided a "double security ... to the rights of the people" because, through the combination of federalism and separation of powers, "[t]he different governments will controul each other; at the same time that each will be controuled by itself." *THE FEDERALIST* NO. 51, at 351 (James Madison) (J.E. Cooke ed., 1961). See generally *infra* text accompanying note 395 (discussing Madison's theory).

130. BANNING, *supra* note 114, at 297.

131. See, e.g., RAKOVE, *supra* note 107, at xvi (noting that "Madison was the crucial actor in every phase of the reform movement that led to the adoption of the Constitution"). Some of the Framers may have wished to undermine state power more broadly than their public comments suggested. See Calvin H. Johnson, *Righteous Anger at the Wicked States: The Meaning of the Constitution in Historical Context* (unpublished manuscript on file with author). But we deal here in original *understandings*, not intentions, and secrets do not count unless they cast light on public meaning. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 144 (1990); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 725-27 (1988) ("The relevant inquiry must focus on the public understanding of the language when the Constitution was developed.").

In the end, there seems little doubt that the Constitution was understood to reserve an important place for state governments. As Jack Rakove concludes,

[t]he existence of the states was simply a given fact of American governance, and it confronted the framers at every stage of their deliberations. In the abstract, some of the framers could imagine redrawing the boundaries of the existing states, and a few hoped to convert the states into mere provinces with few if any pretensions to sovereignty. But in practice the reconstruction of the federal Union repeatedly led the framers to accommodate their misgivings about the capacities of state government to the stubborn realities of law, politics, and history that worked to preserve the residual authority of the states—and with it the ambiguities of federalism with which later generations would continue to wrestle.¹³²

Federalism—defined simply as a measure of balance between the states and the nation—thus has to be reckoned as one of our basic constitutional commitments. If present-day interpreters may disregard this commitment simply because we find federalism outmoded, inefficient, or otherwise undesirable, then what exactly do we mean by constitutionalism?

2. *Obligation and Interpretation*

If the text and history of the Constitution entail a commitment to federalism, what does that mean for the Constitution's present interpreters? The answer depends on two different theories: a theory of *obligation* and a theory of *interpretation*. The former asks, "What is it about the Constitution that binds us?" The latter inquires, "How do we ascertain the *meaning* of the materials that bind us?" Although these two questions are related in important ways, they are not the same, and keeping them separate will help in assessing arguments about fidelity to the Constitution's federalist commitments.¹³³

132. RAKOVE, *supra* note 107, at 162.

133. See, e.g., Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1128-33 (1998) [hereinafter McConnell, *Dead Hand*] (demonstrating how various theories of obligation might lead to different theories of interpretation); Vermeule &

One might express the claim of fidelity in a number of different ways, depending on the theory of constitutional obligation that one brings to the enterprise. Those who view the Constitution as a binding social contract would stress the inherent authority of the initial bargain. Other sorts of originalists might stress the binding nature of the Constitution as law, based on the authority vested in the ratifiers by the sovereign people.¹³⁴ Conventionalists, on the other hand, would emphasize the need for society to agree on a basic set of constitutive principles; such agreement becomes difficult if, once a particular document is agreed upon, people remain free to pick and choose which principles in that document will actually be binding in individual instances.¹³⁵ Finally, Burkeans would point to the prescriptive wisdom immanent in a political order that has survived for over two centuries and view departures from that order with suspicion.¹³⁶

Each of these arguments establishes the binding nature of constitutional obligation, independent of whether we would approve various principles or structures *in* the Constitution on moral or policy grounds.¹³⁷ The breadth of obligation, however, will depend at

Young, *supra* note 77, at 744-48 (discussing theories of constitutional obligation and their relation to theories of interpretation).

134. See, e.g., Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 231 (1988) ("[T]he force that gives legal rules their authority is some pre-existing right of the lawmaker."); Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 375-76 (1981) ("Our legal grundnorm has been that the body politic can at a specific point in time definitively order relationships, and that such an ordering is binding on all organs of government until changed by amendment.").

135. See, e.g., David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 906-11 (1996) (discussing conventionalism as a basis for constitutional obligation).

136. See, e.g., Edmund Burke, *On the Reform of the Representation in the House of Commons* (May 7, 1782), in 2 THE WORKS OF THE RIGHT HON. EDMUND BURKE 486, 487 (Henry G. Bohn ed., 1841) ("It is a presumption in favour of any settled scheme of government against any untried project, that a nation has long existed and flourished under it."); see also Kronman, *supra* note 26, at 1031-34; Young, *Rediscovering Conservatism*, *supra* note 68, at 648-50.

137. Other theories of obligation might focus on moral or policy approval: We obey the Constitution because we think it is a good one. I generally agree with Michael McConnell that such approaches to constitutional obligation tend to defeat the very notion of constitutionalism. See McConnell, *Dead Hand*, *supra* note 133, at 1129 ("If the Constitution is authoritative only to the extent that it accords with our independent judgments about political morality and structure, then the Constitution itself is only a makeweight: what gives force to our conclusions is simply our beliefs about what is good, just, and efficient.").

least to some extent on the particular rationale one accepts. The broadest obligation would stem from the view that the original understanding binds by its own force—that is, we are bound by the Framers' conception of federalism because they said so.¹³⁸ I have argued at length elsewhere that this conception of constitutionalism is less persuasive than one that takes account of the entire arc of our history,¹³⁹ and most seem unwilling to accord this sort of dispositive authority to a particular phase of our national development. Even those who *do* accept the contractarian account of obligation tend to moderate its implications in other ways, such as a strong commitment to *stare decisis* in adjudication.¹⁴⁰ Others have insisted that fidelity to the Constitution's original understanding may *require*, under modern circumstances, some alteration in institutions or doctrine.¹⁴¹

The other accounts of obligation produce significantly more limited implications. Take conventionalism first. The basic notion here is that a diverse society needs to agree on a basic set of ground rules, which include not only a constitution, but also rules for interpreting that constitution.¹⁴² The need to secure widespread agreement tends to rule out efforts to substitute some other set of principles for the constitution that history has left us. But conventionalism is basically presentist in its fundamental criterion: the need to secure societal acceptance. As a result, the constitution that binds is the one that has come down to us—a product of the entire arc of our history, rather than a few isolated founding moments. If the goal is societal agreement on a basic set of rules, we cannot isolate the Constitution's provisions from "the gloss which life has written upon them"¹⁴³ because that gloss informs what our fellow

138. See, e.g., Prakash, *Overcoming*, *supra* note 21, at 417 (arguing that the Constitution binds "because of who originally enacted it (the Founders), how it was ratified (by a supermajority), and subsequently how it was amended").

139. See Young, *Rediscovering Conservatism*, *supra* note 68, at 673 (insisting that "there can never be a single isolated point in time to which we can appeal to find the complete meaning of our mutual commitments").

140. See, e.g., Kay, *supra* note 134, at 229; Monaghan, *supra* note 134, at 382 ("The expectations so long generated by this [nonoriginalist] body of constitutional law render unacceptable a full return to original intent theory in any pure, unalloyed form.").

141. See Lessig, *Fidelity*, *supra* note 42, at 1169.

142. See Strauss, *supra* note 135, at 906-16.

143. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).

citizens understand the Constitution to mean.¹⁴⁴ The conventionalist is thus bound by more recent history as well as by the Founding, and he will find it impossible to reject entirely the more nationalizing trends of the twentieth century.¹⁴⁵ But the widely felt need to maintain a demonstrable connection to the Founding means that the original commitment to federalism will retain some gravitational force for most conventionalists.

The Burkean perspective is similar. Like conventionalists, Burkeans believe that the binding force of history extends to the whole sweep of our national story: not just 1787, but 1800, 1868, 1876, 1937, 1964, 1980, 1994, etc. A Burkean proponent of federalism must be prepared to live with the New Deal, the Great Society, and other developments that have themselves stood the test of time.¹⁴⁶ At the same time, caution about radical change will argue for harmonizing these developments, to the extent possible, with the original structure. The Burkean will look, for example, for ways to maintain limiting principles on federal power notwithstanding the significant expansion of the national administrative state that has occurred since 1937.

From a variety of different theoretical perspectives, then, federalism's prominent place in the original constitutional design, as well as its continuing significance in the years since, impose an obligation of fidelity to the federal balance between the states and the nation. The conventionalist and Burkean perspectives allow for gradual evolution of this balance over time. Moreover, as I discuss further in the Sections that follow, even a strong originalist may have to allow for "translation" of the original understanding into

144. See, e.g., Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1070 (1981) ("The question is not simply what the framers thought, but what has become of their ideas in the time between their age and ours.").

145. It is true that a conventionalist would have to accept some other "constitution" if it could be shown that the substitute was able to secure broader societal acceptance than the Constitution as understood here. But conventionalists tend to care about questions like, "Is that likely to actually happen?" Conventionalism necessarily rests on an unproven but highly plausible empirical judgment that there are no alternative constitutions out there likely to secure anywhere near the same level of acceptance as the Philadelphia document, as interpreted by the Supreme Court.

146. I have attempted a more expansive account of the Burkean perspective elsewhere. See Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1183-87 (2002) [hereinafter Young, *Judicial Activism*]; Young, *Rediscovering Conservatism*, *supra* note 68.

contemporary circumstances, and any theory of interpretation must come to terms with institutional limits of courts as constructors and enforcers of doctrine. For that reason, history can provide only limited guidance on the question of what federalism doctrines to adopt. As my colleague Frank Cross has observed, “the Constitution clearly creates a federalist structure of government” but “it does not necessarily command anything approaching current federalism doctrine.”¹⁴⁷

B. The Case for Adjustment

The argument thus far supports a judicial obligation to enforce the Founders’ commitment to some sort of balance between national and state authority. The model of “compensating adjustment” that I sketched in Part I, however, asserts not only that judges owe fidelity to this commitment, but also that they should be willing to “make” doctrine to enforce it, even where such doctrines are not derivable directly from the text and history of the Constitution. I undertake to defend this latter point in the present Section. Along the way, I hope to illustrate more thoroughly how the first step of the adjustment model—identifying the direction of adjustment—should operate.

1. The Constitution’s Incompleteness on Federalism

We are accustomed to viewing the Constitution as a complete statement of our political arrangements, but that impression is false. Whether or not the states existed “prior” to the federal government as a matter of political theory, there is no dispute that the original state governments were already up and running when the Constitution was drafted in 1787. The new Constitution thus had no need to *constitute* them; its purpose was primarily to carve out a place for a new, stronger central government. As Chief Justice Marshall explained early on:

[I]t was neither necessary nor proper to define the powers retained by the States. These powers proceed, not from the

147. Frank B. Cross, *The Folly of Federalism*, 24 CARDOZO L. REV. 1, 3 (2002).

people of America, but from the people of the several States; and remain, after the adoption of the constitution, what they were before, except so far as they may be abridged by that instrument.¹⁴⁸

To be sure, this carving-out addressed many of the important and contested issues of federalism. But others were left unaddressed, especially in the original, unamended document. Most importantly, the federal Constitution did not empower state governments; rather, it left to the state constitutions the task of constituting state governments and delegating to them some portion of the popular sovereignty.¹⁴⁹ The Constitution's general agnosticism on the powers delegated to state governments initially went unremarked in the text; it would later be made explicit by the Tenth Amendment's proclamation that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, *or to the people*."¹⁵⁰ In other words, the sovereign people were free to delegate particular reserved powers to their state governments or simply not to empower their governments to act in those ways.

The original Constitution likewise did not address the question of sovereign immunity, either for the new national government or its state counterparts. Debate at Philadelphia and in the ratifying conventions focused on whether Article III would itself override the traditional immunities of state governments, with the apparent resolution that it would not.¹⁵¹ But whether one thinks that the states' preexisting immunity itself had constitutional status (the position of the Rehnquist Court majority)¹⁵² or that it was a form of common law subject to statutory override (the view of the Court's

148. *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 193 (1819).

149. *See* *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 846-50 (1995) (Thomas, J., dissenting).

150. U.S. CONST. amend. X (emphasis added).

151. *See, e.g., Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 142-44 (1996) (Souter, J., dissenting) (finding some disagreement on the issue, but acknowledging that "James Madison, John Marshall, and Alexander Hamilton all appear to have believed that the common-law immunity from suit would survive the ratification of Article III"); *THE FEDERALIST* NO. 81, at 548-49 (Alexander Hamilton) (J.E. Cooke ed., 1961).

152. *See, e.g., Alden v. Maine*, 527 U.S. 706, 713 (1999).

dissenters),¹⁵³ the present point is simply that the constitutional text did not address the question.¹⁵⁴ This was a significant omission given widespread concerns during the founding era about crippling lawsuits against state governments.¹⁵⁵ Sovereign immunity thus provides further evidence of the Framers' willingness to allow major issues of federal structure to be worked out through processes—judicial development, statutory enactments, norms of practice—other than constitutional drafting.¹⁵⁶

Nor did the federal Constitution, for the most part, define the rights of individuals vis-à-vis their state governments. This is true despite the fact that many of the Founders in Philadelphia felt strongly that state governments needed to be reined in.¹⁵⁷ The Constitution did state that the national government would be responsible for enforcing a basic commitment to republicanism, and it forbade the states to do certain things, such as to grant titles of nobility or to impair the obligation of contracts.¹⁵⁸ But this handful

153. See, e.g., *Seminole Tribe*, 517 U.S. at 130-32 (Souter, J., dissenting).

154. A majority of the Court in *Chisholm v. Georgia* thought that the text *did* address the question of state immunities in Article III. See, e.g., 2 U.S. (2 Dall.) 419, 450-51 (1793) (opinion of Blair, J.). But even there, several justices found it necessary to rely on broader structural arguments, see *id.* at 454-57 (opinion of Wilson, J.) (relying on a theory of popular sovereignty), and the reaction to *Chisholm* casts doubt on the correctness of the majority's reading of the text, see *Hans v. Louisiana*, 134 U.S. 1, 11 (1890) (observing that *Chisholm* "created such a shock of surprise throughout the country that ... the Eleventh Amendment ... was almost unanimously proposed, and was in due course adopted").

155. See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406 (1821) ("It is a part of our history, that, at the adoption of the constitution, all the States were greatly indebted; and the apprehension that these debts might be prosecuted in the federal Courts, formed a very serious objection to that instrument.").

156. One might think that the adoption of the Eleventh Amendment shortly after *Chisholm* was an attempt to move the question of sovereign immunity back into the realm of constitutional text. See generally John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663 (2004) (arguing that a precisely worded text like the Eleventh Amendment should be treated as exhaustive of its subject matter). But the Amendment's text could not have been intended as a complete statement on the subject: It left too many questions, like the immunity of states in federal question or admiralty cases, unresolved. (It said nothing about *federal* immunities, moreover.) And indeed the Amendment's text has played a much less important role in the development of our law of state sovereign immunity than one might have expected. See Young, *Jurisprudence of Structure*, *supra* note 36, at 1606-16.

157. See McDONALD, *supra* note 97, at 17-18; RAKOVE, *supra* note 107, at 47 (concluding that Madison intended for the Constitutional Convention "to seize the occasion of reforming the national government to treat the internal defects of the states").

158. See U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this

of restrictions hardly purported to be a complete description of the rights of citizens against their state governments, and when a more inclusive catalog of individual liberties was added in the Bill of Rights, those liberties bound only the national government.¹⁵⁹ The scope of individual rights enforceable against the *state* governments was left to rest on state constitutions. As cloudy as the meaning of the Ninth Amendment is,¹⁶⁰ it seems at least to disavow any suggestion that the federal Bill of Rights should be a complete description of a citizen's rights against government. As Forrest McDonald has observed, "[t]he Ninth was understood as integral to a system of divided sovereignty. By refusing to nationalize unenumerated rights, the Ninth left the question of the protection of such rights to the states or to the people of the states."¹⁶¹

The national Constitution thus did not establish a complete government. It essayed neither a comprehensive list of governmental powers nor an exhaustive list of individual rights. Sovereignty remained in the People, who gave life to their system of federalism by delegating that sovereignty to their several governments.¹⁶² The system can be fully appreciated only by viewing the whole, that is, the federal Constitution, the state constitutions, and—most important for present purposes—the web of practices that has grown up to mediate potential conflicts between these two levels of government.

Each of our various institutions has contributed to this web. Congress, for example, has enacted statutes staking an exclusive claim to some areas,¹⁶³ denying the existence of federal power in

Union a Republican Form of Government"); U.S. CONST. art. I, § 10.

159. See *Barron v. Baltimore*, 32 U.S. (7 Pet.) 242, 249-50 (1833).

160. See U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

161. MCDONALD, *supra* note 97, at 24. I do not mean to take any position here on whether federal law should also recognize certain unenumerated rights. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 766-74 (1997) (Souter, J., concurring). My point is simply that the Ninth Amendment suggests that the definition and protection of many rights unenumerated in the federal Constitution would fall to the states.

162. See generally WOOD, *supra* note 112, at 530-31 (discussing James Wilson's influential theory of popular sovereignty).

163. See, e.g., Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1144(a) (2000) (providing that federal law "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan").

others,¹⁶⁴ providing for cooperation in still others,¹⁶⁵ and occasionally regulating the lawmaking procedures themselves by which federal law impacts the states.¹⁶⁶ The President promulgates executive orders on federalism issues,¹⁶⁷ consults with states and represents their interests in supranational organizations,¹⁶⁸ and issues interpretive rulings on the preemptive effect of federal statutes.¹⁶⁹ State governments implement some federal statutes,¹⁷⁰ lobby Congress and the Executive on structural issues,¹⁷¹ and work together on issues of shared concern through interstate compacts,¹⁷²

164. See, e.g., Communications Act of 1934, 47 U.S.C. § 152(b) (2000) (providing that “nothing in this chapter shall be construed to apply or to give the [Federal Communications] Commission jurisdiction with respect to ... intrastate communication service”).

165. See, e.g., *General Motors Corp. v. United States*, 496 U.S. 530, 532 (1990) (observing that the 1970 amendments to the Clean Air Act “made the States and the Federal Government partners in the struggle against air pollution”).

166. See, e.g., Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (codified in scattered sections of 2 U.S.C.) (imposing certain procedural restrictions on the enactment of federal legislation imposing financial burdens on the states).

167. See, e.g., Exec. Order No. 13,132, 3 C.F.R. 206, 208 (2000), *reprinted in* 5 U.S.C. § 601 (2000):

Agencies shall construe ... a Federal statute to preempt State law only where the statute contains an express preemption provision or there is some other clear evidence that the Congress intended preemption of State law, or where the exercise of State authority conflicts with the exercise of Federal authority under the Federal statute.

168. See, e.g., Uruguay Round Agreements Act, 19 U.S.C. § 3512(b)(1)(C) (2000) (establishing a consultation mechanism when state law is challenged before the World Trade Organization).

169. See, e.g., Preemption of State Standards and Waiver Procedures for Nonroad Engines and Nonroad Vehicles, 40 C.F.R. § 85.1603 (construing the preemptive effect of federal environmental law on state standards).

170. See, e.g., John P. Dwyer, *The Role of State Law in an Era of Federal Preemption: Lessons from Environmental Regulation*, 60 LAW & CONTEMP. PROBS. 203, 214-20 (1997) (describing the states' role in implementing federal environmental laws).

171. See, e.g., Nat'l Governors' Ass'n, Principles for State-Federal Relations (Feb. 4, 2000) (statement of proposals for reform on structural federalism issues), available at http://www.nga.org/nga/legislativeUpdate/1,1169,C_ISSUE_BRIEF^D_3164,00.html; see also Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1566-67 (2003) (discussing the role of the National Association of Attorneys General in lobbying for the Prison Litigation Reform Act, which restricted the powers of federal courts to interfere with the administration of state prison systems).

172. See, e.g., *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978) (upholding compact among twenty-one states coordinating taxation of businesses, notwithstanding failure to secure congressional consent). See generally 1 *TRIBE*, *supra* note 15, § 6-35, at 1238-42 (discussing interstate compacts).

uniform state laws,¹⁷³ and collective litigation.¹⁷⁴ And private and semi-private organizations and social movements have influenced the federal balance by creating non-governmental mechanisms for interstate cooperation,¹⁷⁵ motivating and responding to inter-jurisdictional competition,¹⁷⁶ altering the workings of the “political safeguards of federalism,”¹⁷⁷ and simply by choosing to focus reform efforts at either the state or federal levels. The focus of this Article on judicial doctrine should not distract us from federalism’s very vigorous life “outside the courts.”¹⁷⁸

Courts have, however, played a significant role in defining our federalism through their own web of doctrine. Judicial doctrine implementing the federal system includes not only such familiar constitutional issues as the scope of the affirmative and negative Commerce Clauses or the principle of state sovereign immunity, but also the whole corpus of conflict of laws,¹⁷⁹ judge-made abstention

173. See, e.g., UNIFORM COMMERCIAL CODE (2004); MODEL BUS. CORP. ACT (1999).

174. See, e.g., *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 770 (1993) (examining joint antitrust action against various insurance companies by nineteen state attorneys general); Philip C. Patterson & Jennifer M. Philpott, Note, *In Search of a Smoking Gun: A Comparison of Public Entity Tobacco and Gun Litigation*, 66 BROOK. L. REV. 549, 552-55 (2000) (describing state cooperation in litigation against tobacco companies).

175. The American Law Institute, for instance, is an organization of judges, lawyers, and law teachers that eases coordination problems in areas dominated by state law by publishing “Restatements” of basic principles in each subject. See <http://www.ali.org/ali/thisali.htm> (describing the ALI’s functions and membership) (last visited Feb. 3, 2005). Likewise, the National Collegiate Athletic Association—which includes both state and non-state actors—effectively imposes uniform national regulation of college athletics, overcoming collective action problems with state-by-state regulation while avoiding the need for extensive federal rules. See http://www2.ncaa.org/about_ncaa/overview/ (describing the NCAA) (last visited Feb. 3, 2005).

176. See, e.g., THOMAS R. DYE, *AMERICAN FEDERALISM: COMPETITION AMONG GOVERNMENTS* 23-25 (1990) (observing that state and local governments respond to relocation and investment decisions made by private companies and individuals).

177. See, e.g., Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 115-18 (2001) (discussing the impact of the national political parties’ decisions to move to a primary system in presidential elections on the role of such parties in protecting federalism).

178. See, e.g., Mark Tushnet, *The Constitution Outside the Courts: A Preliminary Inquiry*, 26 VAL. U. L. REV. 437 (1992).

179. See, e.g., *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818-23 (1985) (holding that a forum state may not constitutionally apply its own law to civil claims with which it has no significant contacts); Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249 (1992) (discussing the relation between choice of law rules and the federal system).

doctrines,¹⁸⁰ and interpretations of foundational statutes like the *habeas corpus* statute,¹⁸¹ Section 1983,¹⁸² or laws governing the scope of federal jurisdiction.¹⁸³ It is worth noting how little of this web is constitutionally entrenched; most of it can be changed through ordinary legislative processes.¹⁸⁴ I have argued elsewhere for recognizing the constitutional aspects of such non-entrenched rules,¹⁸⁵ the important point for present purposes, however, is simply to emphasize how little of our federalism is directly controlled by the constitutional document itself.

This web of statute, practice, and doctrine is considerably more complicated than anything the Founders could have envisioned in 1789. Their initial strategy for dividing powers through enumeration and reservation gave rise to the regime of "dual federalism," predicated on the "maintenance of the independent integrity of

180. See, e.g., *Colo. River Conservation Dist. v. United States*, 424 U.S. 800, 813-17 (1976) (holding that federal courts may sometimes abstain to avoid duplicating state court litigation); *Younger v. Harris*, 401 U.S. 37, 41, 43-54 (1971) (holding that federal courts must ordinarily abstain from interfering with pending state criminal proceedings); *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 498-501 (1941) (holding that federal courts should abstain in order to allow state courts to resolve state law questions that would avoid decision of a federal constitutional question).

181. 28 U.S.C. §§ 2241-2255 (2000); see, e.g., *Teague v. Lane*, 489 U.S. 288, 310 (1989) (holding that federal courts generally may not grant *habeas* relief based on "new rules" that were announced after the petitioner's state conviction became final); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977) (restricting federal courts' ability to grant *habeas* relief where the petitioner has procedurally defaulted in state court).

182. 42 U.S.C. § 1983 (2000) (providing a cause of action for violations of federal law by persons acting "under color of" state law); see, e.g., *Maine v. Thiboutot*, 448 U.S. 1, 4-8 (1980) (holding that § 1983 provides a cause of action against state officials for violations of at least some federal statutes); *Mitchum v. Foster*, 407 U.S. 225 (1972) (holding that § 1983 creates an exception to the federal anti-injunction statute, 28 U.S.C. § 2283, which ordinarily bars injunctions against state court proceedings).

183. See, e.g., 28 U.S.C. § 1331 (2000) (federal question jurisdiction); *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 807-10 (1986) (holding that federal courts have significant discretion in determining the scope of § 1331). See generally Henry M. Hart, Jr. & Herbert Wechsler, *Preface to the First Edition*, in HART & WECHSLER, *supra* note 84, at ix (suggesting that "[f]or every case in which a court is asked to invalidate a square assertion of state or federal legislative authority, there are many more in which the allocation of control does not involve questions of ultimate power").

184. See Ernest A. Young, *What British Devolutionaries Should Know About American Federalism*, in PATTERNS OF REGIONALISM AND FEDERALISM (Basil Markesinis & Jörg Fedtke eds., forthcoming 2005) [hereinafter Young, *British Devolutionaries*] (arguing that, like the British Devolution Acts, most key aspects of U.S. federalism are not constitutionally entrenched).

185. See Young, *Two Federalisms*, *supra* note 13, at 132-34.

federal powers and state powers through separations of national and state spheres of action.”¹⁸⁶ Dual federalism seemed to promise a fairly straightforward role for courts, which could evaluate the constitutionality of both state and federal measures simply by asking whether the right government was acting in the right sphere. For most of the nineteenth century this chiefly entailed limiting *state* power under the judge-made doctrine of the negative commerce power;¹⁸⁷ later on, the Court also began to enforce the textual limits of the Commerce Clause itself as a limit on *national* power.¹⁸⁸ As I have discussed elsewhere,¹⁸⁹ policing separate state and federal spheres turned out to be a highly complex and ultimately unsustainable task. From the beginning, however, courts have used not just the federal constitutional text but a vision of the structure of the whole as a basis for constitutional federalism doctrine.

The Framers also had a second strategy, which relied on political and institutional safeguards for federalism. That strategy, at least as they envisioned it, obviously relied much less on courts and judicial doctrine in favor of political competition.¹⁹⁰ Unfortunately, as Robert Nagel has pointed out, the Framers “significantly underestimated the forces that would favor centralization.”¹⁹¹ As I discuss further in the next Section, the notion of political enforcement has been undermined by changes in the incentives facing federal politicians, the severance of direct ties between federal representatives and state political institutions, and the watering-down of institutional mechanisms at the national level that once

186. John Kincaid, *From Dual to Coercive Federalism in American Intergovernmental Relations*, in *GLOBALIZATION AND DECENTRALIZATION: INSTITUTIONAL CONTEXTS, POLICY ISSUES, AND INTERGOVERNMENTAL RELATIONS IN JAPAN AND THE UNITED STATES* 29 (Jong S. Jun & Deil S. Wright eds., 1996).

187. See, e.g., *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 445-49 (1827) (holding that a state could not require a foreign importer to be licensed by the state prior to selling imported goods).

188. See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (striking down a federal law restricting interstate shipment of goods made by child labor as an effort to regulate labor conditions internal to a state).

189. See Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 157-61 (2001) [hereinafter Young, *Dual Federalism*].

190. See, e.g., THE FEDERALIST NOS. 45 & 46 (James Madison) (J.E. Cooke ed., 1961); Pettys, *supra* note 80.

191. See ROBERT F. NAGEL, *THE IMPLOSION OF AMERICAN FEDERALISM* 9 (2001).

encumbered federal lawmaking. These changes in the institutional context call for corresponding changes in the “political safeguards” strategy, including an enhanced role for judge-made doctrine.

2. *Change and Adjustment*

The courts have always derived doctrine from both the text of the Constitution *and* the underlying structure of our federal system, but the need to rely upon the latter may have increased over time.¹⁹² This is not surprising: the critique of written constitutions has long been that they are incapable of foreseeing and adapting to the future circumstances and needs of the polities they constitute.¹⁹³ Most acknowledge that our own Constitution has accommodated this difficulty chiefly by being open to adaptation without formal amendment through the evolving practices of the political branches and the incremental doctrinal development of courts.¹⁹⁴ As Professor Lessig has explained, this adaptive enterprise can—and should—be a means of fidelity to the original document and structure, rather than a departure from them.¹⁹⁵ The “response of fidelity” to changed circumstances, he argues, “is to articulate these previously understood conventions, and apply them today to assure that the constitutional structure original[ly] established is, so far as possible, preserved.”¹⁹⁶ This effort—“to *translate* that original structure into the context of today”—must at least in part be a judicial effort of “implying limits on the growth of federal power.”¹⁹⁷

Compensating adjustment, like Professor Lessig’s notion of translation, involves changed readings of the constitutional text and

192. I say “may” because it is not clear that any foreseeable version of the modern Supreme Court would develop structure-based doctrines to limit federal power that are comparable in aggressiveness to the negative commerce jurisprudence that developed in the nineteenth century and survives to this day. In other words, the most radical use of doctrine to order the federal relationship has existed without serious jurisprudential challenge for over a century and a half.

193. See, e.g., Joseph de Maistre, *Essay on the Generative Principle of Political Constitutions* (1810), in *THE WORKS OF JOSEPH DE MAISTRE* 147, 149, 151 (Jack Lively trans., 1965); see also Young, *Rediscovering Conservatism*, *supra* note 68, at 666-69.

194. See, e.g., Jackson, *Narratives*, *supra* note 60, at 276-77.

195. See generally Lessig, *Fidelity*, *supra* note 42, at 1187-89; Lessig, *Translating Federalism*, *supra* note 74.

196. Lessig, *Translating Federalism*, *supra* note 74, at 127.

197. *Id.* at 127, 145.

structure in response to changes in the context in which the text and structure must operate. With respect to federalism, three related sets of changes are central. The first involves changes of *fact*—for example, the integration of the national economy, the explosion of communication and transportation among the several states, changes in the nation's external and internal security environment, and the advent of comparatively new problems, such as environmental pollution, that often seem to defy state-by-state solutions. These sorts of factual changes have been central to the evolution of federal power in our system. As Professor Lessig observes, "[t]he scope of the [federal] power clause is seen to turn upon facts in the world, and as these facts change, the scope of the power too is seen to change."¹⁹⁸ To cite just one example, the notion of what counts as "[c]ommerce ... among the several States"¹⁹⁹ cannot help but change in response to the nationalization (and globalization) of the economy.

The question is not *whether* constitutional doctrine should change in response to these factual changes in the world; it already has. Consider the "dormant Commerce Clause" doctrine. That doctrine started out with at least some tie to the constitutional text; it simply read Article I's grant of power to Congress to regulate interstate commerce as exclusive, thereby forbidding state regulation of commerce "among the several States."²⁰⁰ As the national economy became more integrated, however, it became increasingly difficult to distinguish between interstate and intrastate commerce. That made it impossible to enforce a rule that the states could not regulate in ways that impacted interstate commerce, much as it made it equally difficult to enforce a rule that Congress could *not* regulate in-state activities. The dormant Commerce Clause doctrine accordingly morphed into a quite different rule that simply barred the states from *discriminating* against out-of-staters.²⁰¹

198. *Id.* at 132.

199. U.S. CONST. art. I, § 8, cl. 3.

200. *See, e.g., Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 209-10 (1824).

201. *See* Lessig, *Translating Federalism*, *supra* note 74, at 164. Vestiges of a second rule—that the states may not impose undue *burdens* on interstate commerce, even if they are non-discriminatory—may also survive. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). But like the anti-discrimination rule, the *Pike* balancing test bears almost no relation to the constitutional text. In any event, the balancing test has not been applied very rigorously in recent years. *See* 1 *TRIBE*, *supra* note 15, § 6-6, at 1062.

This rule makes a fair amount of functional sense, and it has a formal quality that makes it relatively easy for courts to enforce.²⁰² But the doctrine no longer bears any recognizable relationship to the text. Once one abandons the rule that at least some Article I powers are simply exclusive, there is no longer any warrant to read the Commerce Clause as limiting state powers. Certainly the Clause says nothing about discrimination, and the presence of other constitutional provisions that *do*—the Privileges and Immunities and Equal Protection Clauses²⁰³—suggests that textualist attention is best directed elsewhere. Thus, it is better to understand the modern dormant Commerce Clause as a doctrinal construction meant to facilitate the structural needs of the federal system as a whole.

A similar transition has occurred in “affirmative” Commerce Clause doctrine. Prior to 1937, the courts focused on whether an act of Congress addressed interstate or intrastate commerce. Chief Justice Marshall’s opinion in *Gibbons* had insisted that “[t]he enumeration [of Congress’s powers in Article I] presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State.”²⁰⁴ *Lopez* and its progeny, however, focus simply on whether the regulated activity is “commercial” at all. The Court has said that the effects of such “commercial” activities will be aggregated across the range of similar activity occurring nationwide, thus virtually guaranteeing a finding that the activity “substantially affects” interstate commerce.²⁰⁵ This concession to the integrated national market arguably departs from the text by effectively reading “among the several States” out of Article I.²⁰⁶ The new doctrine thus represents a doctrinal compromise

202. See Lisa Heinzerling, *The Commercial Constitution*, 1995 SUP. CT. REV. 217, 217 (criticizing the antidiscrimination test but conceding that “[d]ecisions applying this principle generally have provoked little disagreement on the part of individual Justices”).

203. U.S. CONST. amend. XIV, § 1.

204. *Gibbons*, 22 U.S. (9 Wheat.) at 195.

205. The classic “aggregation” case is *Wickard v. Filburn*, 317 U.S. 111, 128 (1942), which held that Congress could regulate even a single farmer’s wheat crop on a substantial effects theory, because the aggregate activities of all similarly-situated farmers would affect the national economy. But *Lopez* made clear that the underlying activity must be commercial in nature to support this move. See *United States v. Lopez*, 514 U.S. 549, 560-61 (1995).

206. Alternatively, one could say that current doctrine recognizes that regulating *intrastate* commerce will almost always be “necessary and proper” to regulating *interstate* commerce.

meant to balance the system's need for *some* line of demarcation between Congress's broadest power and the states' reserved authority, on the one hand, with the recognition that the old line—the *textual* line—simply did not prove coherent or workable in actual application. Current doctrine *nods* to the text by carrying over the insistence that regulated activity be “commercial,” but *Lopez*'s looser standard amounts to “fidelity” only in the adaptive sense that Professor Lessig has described.²⁰⁷

As these examples suggest, changes in the factual context of federalism led to a second sort of change, that is, the failure of the original enforcement strategies. I have already described how the Constitution's original strategy for allocating and balancing federal and state powers relied on enumeration of federal powers and reservation of the remainder to the states. “Dual federalism” was the most natural form for this strategy to take, and it counted heavily on the feasibility of drawing a sharp line between exclusive spheres of state and federal authority. That line-drawing effort ultimately failed,²⁰⁸ both because of changes in the factual world—the increasing integration of the economy, which blurred lines between interstate and intrastate commerce—and because the Founders may simply have underestimated the indeterminacy of Article I's enumerative language and the doctrinal rules that courts would develop to implement it. I doubt whether the factual change can wholly account for the failure; after all, it seems likely that the economy was sufficiently integrated to link interstate and intra-state markets (e.g., the price of wheat in New Jersey and the price of bread in New York) even in the Founders' day. Rather, I suspect that the collapse of dual federalism was in substantial part a failure of *doctrine*—the failure of courts to develop doctrinal tests that could command widespread acceptance and support for separating state and federal power.²⁰⁹

That account does less violence to the text. But either way, a part of the Commerce Clause's operative language has been rendered meaningless or irrelevant to the decision of cases.

207. See Lessig, *Fidelity*, *supra* note 42. More rigorous fidelity to the text would no doubt look much like Justice Thomas's concurrence in *Lopez*, which recommended uprooting a much broader swath of jurisprudence and returning to a far narrower view of federal power. See *Lopez*, 514 U.S. at 584-602 (Thomas, J., concurring).

208. See Corwin, *supra* note 55; Lessig, *Translating Federalism*, *supra* note 74, at 129-31.

209. See *infra* notes 410-17 and accompanying text (discussing the “Frankfurter constraint”). Whether we should even call this a “failure” is itself a valid question. After all,

Whatever the cause, the failure of the original enforcement strategy requires either that we accept a basic alteration in the character of our federal system or that new doctrines be constructed to preserve the original norm of balance. In reality, the choice is probably between a stark version of the former and some combination of the two. No doctrinal proposal on the table today would come close to restoring the particular balance struck in 1789; an expanded federal role is simply a fact of modern life.²¹⁰ By balance, then, I mean simply that some meaningful measure of state autonomy is constitutionally guaranteed. Fidelity to even this more modest objective, however, will require some measure of doctrinal innovation in lieu of a strong doctrine of enumerated powers. That is not to say that a reconstructed enumerated powers doctrine—one that does not depend on defining mutually-exclusive state and federal spheres—cannot play some role.²¹¹ But that sort of constraint seems likely to be relatively weak. If that is correct, then preservation of a federal balance will likely require doctrinal innovation that is less directly grounded in constitutional text.

A third aspect of change in the Constitution's institutional context has to do with the maturation of the system itself. By "maturation," I mean the tendency of successful constitutional systems to outlive the immediate set of problems that gave rise to them. Structural provisions are often drafted against a historical and institutional background in which particular problems loom large.²¹² Gordon Wood has recounted, for example, how the first wave of state constitutions after Independence were designed to compensate for the experience of unchecked executive authority under George III

dual federalism endured for over a hundred years. It may be a mistake to expect greater permanence from any doctrinal construct. Nor was the failure necessarily unanticipated by at least some of the Founders. See RAKOVE, *supra* note 107, at 176-77 (discussing Madison's misgivings about "the impossibility of dividing powers of legislation, in such a manner, as to be free from different considerations by different interests, or even from ambiguity to the judgment of the impartial") (quoting a letter from Madison to Jefferson, Oct. 24, 1787).

210. See, e.g., *Lopez*, 514 U.S. at 601 & n.8 (Thomas, J., concurring) (acknowledging that it may be "too late in the day to undertake a fundamental reexamination of the past 60 years").

211. See, e.g., Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485 (1994); Young, *Dual Federalism*, *supra* note 189, at 157-61 (arguing that post-*Lopez* commerce jurisprudence plays a useful role without returning to the assumptions of dual federalism).

212. See, e.g., JED RUBENFELD, *FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT* 182-84 (2001).

and his royal governors.²¹³ By 1787, however, the powerful state legislatures that those initial constitutions created had themselves come to be perceived as a threat to liberty—a threat with which the original documents, with their focus on cabining executive power, were ill-equipped to deal.²¹⁴ This sort of change presents two obvious alternative responses: The Constitution can be amended again, reorienting its structural provisions against the new threat, or the Constitution's current interpreters can work to adapt the structure more incrementally.²¹⁵ The latter option would include not only doctrinal innovation by courts, but also sub-constitutional changes to statutory law or institutional practice by the political branches.

Our own national Constitution has moved in a number of ways beyond the original set of problems that inspired the Philadelphia drafters, and these changes have important implications for federalism. With good reason, the Founders perceived the central problem in moving from the Articles of Confederation to the Constitution as one of re-establishing and strengthening the central government. James Madison insisted, for example, "that the balance is much more likely to be disturbed by the preponderancy of the [State Governments] than of the [Federal Government]."²¹⁶ The original document thus includes a ringing statement of national supremacy in Article VI; the considerably more ambiguous affirmation of state sovereignty in the Tenth Amendment comes in as a response to post-Philadelphia criticism. And judicial review of federalism issues was initially conceived—and implemented by the Marshall Court—primarily as a tool for reining in centrifugal impulses in the states.²¹⁷ As late as the early twentieth century,

213. See WOOD, *supra* note 112, at 148-50.

214. See *id.* at 409.

215. See generally Adrian Vermeule, *Constitutional Amendments and the Constitutional Common Law* (unpublished manuscript on file with author) (comparing these two options from an institutional perspective).

216. THE FEDERALIST NO. 45, at 310 (James Madison) (J.E. Cooke ed., 1961).

217. See, e.g., RAKOVE, *supra* note 107, at 81-82 (recounting that judicial review was endorsed early on at Philadelphia as an alternative to Madison's proposal for a general congressional negative on state laws). The Marshall Court struck down only one federal statute—the minor provision of the 1789 Judiciary Act at issue in *Marbury v. Madison*. On the other side of the ledger, it invalidated eighteen state laws. THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 2005-37 (Johnny H. Killian & George A. Costello eds., 1996). See generally Larry Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000) [hereinafter Kramer,

Justice Oliver Wendell Holmes contemplated dispensing with judicial review of Acts of Congress while insisting on the need to check state legislation.²¹⁸

The pendulum of federalism has swung far indeed since then. The federal government is here to stay, and its supremacy over the states is largely unquestioned. This is not to say that centrifugal forces have disappeared. The Supreme Court still sees a need to rein in state protectionism under the dormant Commerce Clause doctrine,²¹⁹ and it has increasingly asserted authority to close off state forays into foreign affairs.²²⁰ The system has "matured," however, in the sense that threats to the federal balance are at least as likely to come from the *national* direction. These threats take any number of forms, including federal forays into traditional fields of state regulation like education²²¹ or local telephone service,²²² congressional imposition of unfunded mandates²²³ and the states'

Politics].

218. See OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 295-96 (1920) ("I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States.").

219. *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997); *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996).

220. See *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 397 (2003) (invalidating California's Holocaust Victim Insurance Relief Act on the ground that it interfered with national foreign policy); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (finding Massachusetts's program disadvantaging would-be state contractors that did business in Burma to be implicitly preempted by federal legislation).

221. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified in scattered sections of 20 U.S.C.); Kate Zernike, "No Child Left Behind" Brings a Reversal: Democrats Fault a Federal Education Plan, N.Y. TIMES, Jan. 12, 2004, at A16 (reporting Democratic candidates' criticism of the Act, partly on grounds that it usurps local control of schools); *Political Battle Surges over Bush Education Policy*, CNN.com, Jan. 8, 2004, LEXIS, CNN.com File (reporting criticisms that federal law imposes mandates without adequate funding).

222. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 412 (1999) (Breyer, J., concurring and dissenting in part).

223. See, e.g., Paul Gillmor & Fred Eames, *Reconstruction of Federalism: A Constitutional Amendment to Prohibit Unfunded Mandates*, 31 HARV. J. ON LEGIS. 395 (1994). The Unfunded Mandates Reform Act of 1995 (UMRA), Pub. L. No. 104-4, 109 Stat. 48 (codified in scattered sections of 2 U.S.C.) was supposed to alleviate this problem, but the Act simply imposes a fairly loose procedural constraint on such mandates. See *Recent Legislation—Federalism*, 109 HARV. L. REV. 1469 (1996) (describing the Act's provisions). Since UMRA's enactment, at least fifty-four additional mandates have been enacted. CONGRESSIONAL BUDGET OFFICE, A REVIEW OF CBO'S ACTIVITIES IN 2003 UNDER THE UNFUNDED MANDATES REFORM ACT 7 (2004) (finding sixteen intergovernmental mandates); CONGRESSIONAL BUDGET OFFICE, A REVIEW OF CBO'S

increasing dependence on federal funding grants,²²⁴ the federalization of crime,²²⁵ and federal efforts to quash state positions on social and moral issues that differ from the national majority view.²²⁶ The extent to which any of these developments are a bad thing is, not surprisingly, both contestable and contested. What seems clear is that centralizing pressures are considerably stronger now than they were in the early Republic.

The constitutional structure was created with a second problem in mind alongside the weakness of the central authority. That problem was the "tyranny of the majority," which plays a central role in the Founders' analysis of the problem of faction. In *Federalist* 10, for example, Madison rather blithely states that "[i]f a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote"; the *difficult* problem arises "[w]hen a *majority* is included in a faction."²²⁷ This focus on majority tyranny colors some of the Founders' most important views on federalism; in particular, it gives rise to their assumption that the national government will be less vulnerable to faction than the governments of the several states.²²⁸

ACTIVITIES IN 2002 UNDER THE UNFUNDED MANDATES REFORM ACT 3 (2003) (finding twenty intergovernmental mandates); CONGRESSIONAL BUDGET OFFICE, A REVIEW OF CBO'S ACTIVITIES IN 2001 UNDER THE UNFUNDED MANDATES REFORM ACT 3 (2002) (finding twelve intergovernmental mandates); CONGRESSIONAL BUDGET OFFICE, CBO'S ACTIVITIES UNDER THE UNFUNDED MANDATES REFORM ACT, 1996-2000, at 14-15 (listing six enacted intergovernmental mandates). One of the most important is the No Child Left Behind Act, *see supra* note 221.

224. *See* Ilya Somin, *Closing the Pandora's Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments*, 90 GEO. L.J. 461 (2002).

225. *See, e.g.*, Susan R. Klein, *Independent-Norm Federalism in Criminal Law*, 90 CAL. L. REV. 1541 (2002).

226. *See, e.g.*, *Raich v. Ashcroft*, 352 F.3d 1222 (9th Cir. 2003) (striking down federal law preempting California provision for medical marijuana use), *cert. granted*, 124 S. Ct. 2909 (2004); *Dispensing of Controlled Substances to Assist Suicide*, 66 Fed. Reg. 56,607 (Nov. 9, 2001) (AG Order No. 2534-2001) (to be codified at 21 C.F.R. pt. 1306) (ruling seeking to preempt, pursuant to the federal Controlled Substances Act, Oregon's allowance of physician-assisted suicide).

227. THE FEDERALIST NO. 10, at 60 (James Madison) (J.E. Cooke ed., 1961) (emphasis added).

228. *See, e.g., id.* at 64:

Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a *majority* of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists,

Here, too, the passage of time has required us to expand the universe of potential threats to the integrity of the system. Certainly there are areas and issues concerning which Madison's analysis still seems to hold true, and the national government may enjoy significant advantages over state governments in protecting local minorities from local majorities.²²⁹ But as the scope, institutions, and responsibilities of government at all levels have expanded over time, more recent political science has also produced a strong countercurrent critical of Madison's "failure to appreciate the disproportionate influence that can be wielded on a national level by certain groups that may be relatively small in numbers but that are cohesive and can avoid the problem of too many free riders."²³⁰ This literature suggests that "the diffusion of power among a multiplicity of governments may increase the difficulties such groups experience in realizing their objectives."²³¹ Our contemporary structure must thus guard against *two* kinds of factions—majorities *and* cohesive minorities—and Madison's assumption of national superiority at combating faction can no longer be taken for granted.²³²

The third and possibly most basic way in which our institutions have "matured" involves a transformation in the range of functions and responsibilities ascribed to government. The Founders seem to have presupposed a rather minimalist vision of government responsibilities. This vision enabled them to rest much of the vertical and horizontal separation of powers on institutional

it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.

(emphasis added); *id.* (asserting that "the same advantage, which a Republic has over a Democracy, in controlling the effects of faction, is enjoyed by a large over a small Republic—is enjoyed by the Union over the States composing it").

229. See, e.g., DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* 45 (1995) (identifying examples).

230. *Id.* at 79.

231. *Id.* at 80 (footnote omitted).

232. Madison's argument has also been undermined by the maturation of the states themselves into large political communities by the standards of Madison's day. The total United States population in 1790 was around 3.9 million. See *TIME ALMANAC* 2003, at 120 (Borgna Drummer ed.). In 2000, the State of California alone boasted 33.8 million inhabitants. *Id.* at 143. The United States in 1790 had slightly more people than the State of Oregon (the 28th most populous state) today. *Id.* at 166. The largest state in 1790—Madison's own Virginia, with approximately three-quarters of a million people—was about the size of the city of San Francisco or Indianapolis today. See *2000 Census: US Municipalities over 50,000: Ranked by 2000 Population*, available at <http://www.demographia.com/db-uscit98.htm> (last visited Oct. 21, 2004).

mechanisms that also tended to hamstring governmental action. The division of the legislature through bicameralism, for example, as well as the provision for Presidential veto, makes federal statutes hard to enact. Brad Clark and others have demonstrated that the proliferation of "veto gates" throughout our national lawmaking institutions—that is, mechanisms that allow particular actors to derail or delay national action—is central not only to the separation of powers, but also to federalism.²³³ A national government that can act only with difficulty, after all, will tend to leave considerable scope for state autonomy.²³⁴

Over time, however, the People have demanded that government take on a wider and more activist role, and our horizontal and vertical separation of powers has come under pressure.²³⁵ In particular, the nondelegation doctrine has slipped from being a potentially important constitutional rule against assigning lawmaking authority outside the Article I process to a less pervasive canon of construction limiting delegations that implicate particular constitutional values.²³⁶ It is now fair to say that most federal law is made not through the cumbersome method prescribed by Article I but through administrative procedures in executive agencies.²³⁷

233. See Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1341-42 (2001).

234. See *id.* at 1325:

[E]ven when national power is quite unquestioned in a given situation, constitutionally prescribed lawmaking procedures frequently operate to screen out attempts by the federal government to exercise such authority. The states are the direct beneficiaries of this screening mechanism because the federal government's inability to adopt "the supreme Law of the Land" leaves states free to govern.

(footnote and internal quotation marks omitted); Young, *Two Cheers*, *supra* note 59, at 1361-64 (making a similar argument).

235. See 1 TRIBE, *supra* note 15, § 1-7, at 16 ("In the modern era of increasingly accepted, and indeed often demanded, affirmative governance, there has emerged an inescapable tension between Model I's ideal of dividing, separating, and checking powers so as to contain government, and the conviction that real freedom requires governmental action rather than passivity.").

236. See Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 316 (2000).

237. See, e.g., *INS v. Chadha*, 462 U.S. 919, 985-86 (1983) (White, J., dissenting) ("For some time, the sheer amount of law—the substantive rules that regulate private conduct and direct the operation of government—made by the agencies has far outnumbered the lawmaking engaged in by Congress through the traditional process."); *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) ("The rise of administrative bodies probably has been the most significant legal trend of the last century.... They have become a veritable fourth branch

The effect of this shift—and the resulting vast expansion in federal lawmaking capacity and output—on federalism has only recently become a subject of study.²³⁸ It is true that state governments have also become far more activist governments than their early Republic counterparts.²³⁹ Nonetheless, it would be surprising if the small-government mechanisms that the Founders assumed would protect state autonomy turned out to work as well in a big-government age.

One can understand a number of well-established doctrinal innovations as responsive to the maturing of our institutions. For example, the federal Constitution's Bill of Rights has evolved, through constitutional amendment and judicial interpretation, from a set of provisions narrowly directed at the national government to a charter of basic guarantees comprehensively directed at *all* American governments.²⁴⁰ This shift expanded the sort of federalism concerns that courts must heed. The potential of individual rights decisions to restrict the autonomy of state governments is well understood,²⁴¹ but prior to incorporation, this was not a concern of the federal courts. Although state courts might restrict the autonomy of state governments by broadly construing individual rights provisions of their own state constitutions, this raised no issue of federalism; these restrictions were imposed by the states on themselves. The autonomy of state political systems in rights situations was guaranteed by the federal structure itself, which simply did not apply federal rights provisions to state governments.²⁴² There was no need for judicially-created federalism doctrines to add to that safeguard.

After incorporation, however, state policies (including, perhaps most importantly, state criminal convictions) became subject to

of the Government, which has deranged our three-branch legal theories").

238. See, e.g., Clark, *supra* note 233.

239. See Gardbaum, *New Deal*, *supra* note 53, at 491.

240. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968) (noting that nearly all of the Bill of Rights has now been incorporated into the Due Process Clause of the Fourteenth Amendment so as to bind the states).

241. See, e.g., *id.* at 172-73 (Harlan, J., dissenting) (complaining that the Warren Court's criminal procedure decisions had the effect of "fastening on the states federal notions of criminal justice"); Baker & Young, *supra* note 177, at 157-59 (discussing how the Supreme Court's recognition of a broad right of association in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), constrained state autonomy to regulate discrimination).

242. See, e.g., 1 *TRIBE*, *supra* note 15, § 1-3, at 7-8 (describing the nineteenth century non-incorporation doctrine as a principal protection for state autonomy).

override by federal rights provisions.²⁴³ It is now commonplace to think of a case like *Lawrence v. Texas*,²⁴⁴ which recognized a right to engage in homosexual sex under the Due Process Clause, as raising significant issues of federalism. In effect, *Lawrence* nationalized a core issue of gay rights by articulating a federal right binding on the states.²⁴⁵ Although the Court's incorporation cases tended to reject federalism-based opposition to the notion of incorporation per se,²⁴⁶ the Court responded by crafting a number of doctrines that protected state autonomy in other ways. In particular, it created a number of remedial doctrines, including the abstention doctrines²⁴⁷ and judge-made limits on federal *habeas corpus* relief,²⁴⁸ which limit the practical impact of federal rights on state autonomy.²⁴⁹ Incorporation brought the federal Constitution close to being a complete charter of rights, with the consequence that federalism safeguards against over-expansive interpretations of rights had to be created *within* federal constitutional law and grafted onto the interpretation of federal statutes.

Likewise, the fading of the enumerated powers doctrine has brought the Constitution much closer to describing a comprehen-

243. Like many of the changes I have described, this was a function of both constitutional and statutory developments. Incorporation would have had far less impact on state governments if Congress had not extended the writ of *habeas corpus* to state prisoners in 1867, Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (repealed by Act of Mar. 27, 1868, ch. 34, § 2, 15 Stat. 44) (current version at 28 U.S.C. § 2254 (2002)), or created a private right of action against state officers for violating federal rights in 1871, Ku Klux Klan (Civil Rights) Act of 1871, ch. 22, § 1, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983).

244. 123 S. Ct. 2472 (2003).

245. Whether the Court will take the further step of nationalizing the related—but far more controversial—question of gay *marriage* remains to be seen.

246. See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 681 (1961) (Harlan, J., dissenting) (arguing, to no avail, that “this Court should continue to forbear from fettering the States with an adamant rule which may embarrass them in coping with their own peculiar problems in criminal law enforcement”).

247. See, e.g., *La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 32-34 (1959) (Brennan, J., dissenting); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *R.R. Comm'n v. Pullman Co.*, 312 U.S. 496, 500-01 (1941).

248. See, e.g., *Teague v. Lane*, 489 U.S. 288, 316 (1989); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977); *Stone v. Powell*, 428 U.S. 465, 494 (1976).

249. I do not claim that these doctrines were exclusively a response to incorporation. Some, such as *Pullman* abstention, originated in response to claims under provisions like the Equal Protection Clause that had always applied to the states. See *Pullman*, 312 U.S. at 498. I do think, however, that incorporation gave substantial impetus to these sorts of doctrines by proliferating federal rights-based threats to state autonomy.

sive government. In such a comprehensive system, state autonomy cannot be protected adequately simply by relying on the jurisdictional limitations of federal institutions. Instead, limits on federal power must be developed within the purview of the federal Constitution itself—despite the fact that that Constitution could not have originally been intended as a complete description of the federal relationship. The Rehnquist Court has been struggling with this doctrinal task since 1991, when it stepped back from the brink of total judicial abdication in *Gregory v. Ashcroft*.²⁵⁰ Justifying that effort and suggesting how it ought to proceed is the principle burden of this Article.

3. *Compensating Adjustment in Practice*

The notion that courts should formulate doctrinal constraints on federal power in order to preserve the Founders' notion of a federal balance under modern circumstances seems more controversial than many other contemporary instances of adjustment. Few have disputed, for example, the notion that our concept of a "search" under the Fourth Amendment must evolve along with the development of ever more sophisticated surveillance technology.²⁵¹ The controversy over doctrinal innovation in federalism derives from a variety of sources, including the painful history of the Court's effort to impose similar limits prior to 1937²⁵² and the perception of many current legal academics, who came of age in the 1960s, that state governments are a retrograde force in American society.²⁵³ The

250. 501 U.S. 452, 461 (1991) (imposing a clear statement rule of statutory construction to limit Congress's ability to regulate state institutions). The Court had flirted with such abdication in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549 (1985).

251. See, e.g., Lessig, *Translating Federalism*, *supra* note 74, at 132-35 (describing the evolution of Fourth Amendment doctrine to cope with technological changes that threatened individual privacy); see also *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (holding that the use of thermal-imaging technology to look inside a house counts as a "search" under the Fourth Amendment); *Katz v. United States*, 389 U.S. 347, 358 (1967) (extending Fourth Amendment protection to cover telephone wiretaps).

252. See, e.g., *United States v. Lopez*, 514 U.S. 549, 604-07 (1995) (Souter, J., dissenting) (summarizing the pre-1937 cases).

253. See, e.g., Seth Kreimer, *Federalism and Freedom*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 66, 67 (2001) ("In my formative years as a lawyer and legal scholar, during the late 1960s and 1970s, [federalism] was regularly invoked as a bulwark against federal efforts to prevent racial oppression, political persecution, and police misconduct."). But see Baker & Young,

depth of this opposition requires careful consideration of the appropriate role of courts in preserving the federal balance.

Nonetheless, there is good reason to find the notion of compensating adjustment consistent with both historical understandings and current practice. Mark Killenbeck, for example, finds that the Framers "understood that the text as ratified provided an important, but by design not necessarily a definitive matrix for analyzing sovereignty issues."²⁵⁴ Rather, they expected that many issues of federalism would be worked out in the course of time.²⁵⁵ Likewise, Jack Rakove states more generally that "[w]hatever else we might say about [the Framers'] intentions and understandings, this at least seems clear: They would not have denied themselves the benefit of testing their original ideas and hopes against the intervening experience that we have accrued since 1789."²⁵⁶

As I have already suggested, the Founders' vision of a flexible federalism may be understood through a variety of different interpretive lenses. We might shift to new, ahistorical strategies for protecting federalism as an act of "translating" the original design into new contexts. Such translation, as Professor Lessig has pointed out, often entails a "duty of creativity" for the contemporary interpreter.²⁵⁷ A Burkean, on the other hand, might simply say that our duty of fidelity runs to the *whole* of our history, not simply the founding moment, and that part of the duty of fidelity is the adoption of incremental reforms designed to preserve the basic character of our institutions.²⁵⁸ Finally, a conventionalist might argue that the essential characteristic of federalism doctrine is its ability to command widespread assent, and pragmatic virtues of consistency and coherence are more important by this measure than the connection of doctrine to the Founders' own expectations about how federalism would be enforced.²⁵⁹ The case for departure from,

supra note 177, at 133-62 (arguing that the equation of federalism with a particular political orientation is a fundamental mistake).

254. Killenbeck, *supra* note 122, at 85.

255. *See id.*

256. RAKOVE, *supra* note 107, at xv.

257. Lessig, *Translating Federalism*, *supra* note 74, at 1205-06 (emphasis omitted).

258. *See* Young, *Rediscovering Conservatism*, *supra* note 68, at 664.

259. *See* Strauss, *supra* note 135, at 912 ("Conventionalism suggests that, other things equal, the text should be interpreted in the way best calculated to provide a focal point of agreement and to avoid the costs of reopening every question.").

or modification of, the Founders' own enforcement strategies can thus be made from any of these perspectives.

The Supreme Court itself has recognized that history provides only limited assistance in answering particular doctrinal questions. In the *Ports Authority* case,²⁶⁰ for instance, the Court confronted the question of whether state governments should enjoy sovereign immunity in proceedings before federal administrative agencies. Writing for the majority, Justice Thomas acknowledged that "[i]n truth, the relevant history does not provide direct guidance for our inquiry. The Framers ... could not have anticipated the vast growth of the administrative state."²⁶¹ As a result, "the dearth of specific evidence indicating whether the Framers believed that the States' sovereign immunity would apply in such proceedings is unsurprising."²⁶²

The *Ports Authority* Court overcame this lack of specific historical evidence primarily through doctrine rooted in more functional considerations.²⁶³ Justice Thomas first examined proceedings before the Federal Maritime Commission, to which the South Carolina Ports Authority had been subjected, to determine whether they were institutionally similar to federal judicial proceedings in which the Eleventh Amendment would bar jurisdiction.²⁶⁴ He then asked whether the underlying value of federalism that state sovereign immunity is supposed to protect—state dignitary interests—is threatened by federal administrative adjudications.²⁶⁵ One can quarrel about whether the particular value of dignity is really

260. Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743 (2002).

261. *Id.* at 755.

262. *Id.*

263. Justice Thomas did say that "[w]e ... attribute great significance to the fact that States were not subject to private suits in administrative adjudications at the time of the founding or for many years thereafter." *Id.* But this argument seems important primarily as simply indicating the absence of historical counterexamples to the Court's ultimate result; it can bear little affirmative weight. After all, "[b]ecause formalized administrative adjudications were all but unheard of in the late 18th century and early 19th century," we should not be surprised that states did not appear in them. *Id.* In any event, the remainder of the majority opinion makes clear that the more functional considerations are doing the analytical heavy lifting here.

264. See *id.* at 756-59.

265. See *id.* at 760-61.

crucial to federalism,²⁶⁶ but the basic approach of building doctrine with an eye on federalism's underlying values seems sound.

Justice Scalia's opinion in *Printz v. United States*²⁶⁷ illustrates a similar dynamic. Much of that opinion discusses historical arguments for and against the anti-commandeering doctrine,²⁶⁸ but those arguments have struck many observers as inconclusive. This should not be surprising. The early Republic featured a nascent central government with few resources of its own and strong political representation of state institutions. Daniel Halberstam has shown that in the European Union—which shares those characteristics—implementation of central policy by subunits may actually safeguard the autonomy of those subunits. But state implementation is *not* necessarily good for state autonomy when the central government is established, has vast resources of its own, and political representation of the states is less entrenched.²⁶⁹ The best justification for the anti-commandeering doctrine, then, arises from the need to translate the Founders' vision of state autonomy from the first situation to the second, that is, from a new federal republic with weak central institutions to an established one dominated by a strong national authority.

This need to adapt the structure through doctrine is pervasive. For that reason, we cannot count on history to mandate particular doctrines. I do not mean to reject historical influences entirely in the shaping of contemporary strategies for enforcing federalism; I argue in Part III, for example, that the Founders' basic notion of promoting self-enforcing limits on national power is a good starting point for current doctrine.²⁷⁰ The important point is simply that if contemporary functional and institutional considerations suggest that a particular doctrine can limit national power in a workable

266. See, e.g., Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921 (2003); Young, *Two Federalisms*, *supra* note 13, at 157-58.

267. 521 U.S. 898 (1997).

268. See *id.* at 905-25.

269. See Daniel Halberstam, *Comparative Federalism and the Issue of Commandeering*, in THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION 245-49 (Kalypso Nicolaidis & Robert Howse eds., 2001) [hereinafter Halberstam, *Comparative Federalism*]; see also Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813 (1998).

270. See *infra* Part III.B.1; see also Young, *Two Federalisms*, *supra* note 13, at 69-91.

way, one ought not have to ground that doctrine in text and history as the ultimate test of its legitimacy.

C. *Objections*

I want to conclude this Part by addressing some objections that may arise at the first stage of my proposed analysis. Each potential objection questions either the notion that courts can identify the appropriate direction in which to adjust the federal balance at any given time, or that the appropriate direction at *our* given time is in the direction of greater state autonomy. This is likely not a complete catalog of potential objections, but the points considered here may serve to illuminate the central proposal.

1. *The Indeterminate Object of Fidelity*

Michael Klarman has been the most prominent critic of notions of translation and compensating adjustment (he groups them together).²⁷¹ Professor Klarman argues that “this translation enterprise is quite hopeless.” “The obvious problem,” he contends, “is one of indeterminacy—translating old concepts into modern contexts inevitably implicates the very sort of unconstrained judicial subjectivity that translation’s proponents seek to avoid.”²⁷² The initial objection need not detain us long: Klarman criticizes translators for “adjust[ing] the Framers’ constitutional commitments to reflect changed circumstances, but fail[ing] to ask whether the Framers would have remained committed to the same concepts had they been aware of future circumstances.”²⁷³ The right question is thus *not* “how the Framers’ commitment to federalism principles should be adjusted to reflect the reality of a modern, industrial, highly integrated economy,” but rather “whether the Framers would retain their commitment to federalism at all in light of these radically changed circumstances.”²⁷⁴ But what difference does the

271. See Michael Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381 (1997); see also *id.* at 398 (suggesting that “this notion of compensating adjustments” is “really just another variation of the translation question”).

272. *Id.* at 395.

273. *Id.*

274. *Id.* at 396.

latter question make? Our commitment is not to the Framers themselves, but to the Constitution that they in fact produced. The possibility that they might have produced a different constitution under different circumstances is interesting, but hardly authoritative.

Professor Klarman also asks a more compelling question, however: "[W]hen translating, how do we know which circumstances to hold constant and which to vary—that is, when asking what the Framers would have done under modern circumstances, which aspects of their world do we vary and which do we leave in place?"²⁷⁵ The examples that Klarman gives of this problem seem unilluminating to me,²⁷⁶ but I think the following puts his point in its best light: The Framers' commitment to federalism existed at several different levels of generality, including not only a structural commitment to constitutionalized decentralization, but also more general values that the structure was thought to serve (such as the efficient provision of social services) and more specific mechanisms to implement the commitment (such as the guarantee of equal representation in the Senate). All three levels may be thought to be in harmony in the beginning, but over time they may diverge, and in that event the translator or adjuster must determine which level to try to maintain, and which is subject to change. So, for instance, if in 1937 we no longer think of states as the most efficient providers of government services, may an adjusting court modify the original commitment to federalism in order to maintain the commitment to efficiency? Likewise, if the Senate comes frequently to act at cross-purposes to state autonomy (perhaps because senators now perceive themselves as national politicians with national interest-group constituencies), should the adjuster compensate by protecting state autonomy in some other way or move away from protecting states in order to maximize the prerogatives of the Senate? Daryl Levinson has argued in the same vein that compensating adjustments depend

275. *Id.* at 402.

276. Professor Klarman asks, for instance, why one should "vary the existing state of technology when translating the congressional power to regulate interstate commerce," but not "treat as relevant variables ... the modern proliferation of national and international markets, the transportation and communications revolutions, and so forth." *Id.* at 402-03. The answer is that of course all these things are relevant, but they have little to do with what I took to be Klarman's more serious objection, which is that it is hard to identify the right aspects of the Framers' world to hold *constant*, not the relevant changes in circumstance.

on “framing” the relevant constitutional transaction in a particular way; otherwise, one does not know which alterations or continuities in the structure count for purposes of evaluating the need for compensation.²⁷⁷

The answers to these sorts of questions are not easy. But I think Professor Klarman’s objection suffers from a common problem with indeterminacy arguments. It helpfully demonstrates that choices that have sometimes been taken for granted are in fact choices, and that the bases for those choices are not obvious. But the objection then moves far too quickly from the observation that a choice must be made to the conclusion that any such choice must be arbitrary.²⁷⁸ The fact that an assumption can be questioned does not mean that the question has no answer—only that more work must be done to provide that answer. Notably, Professor Levinson is not so ready to throw up his hands in the face of these framing problems. Such problems, he says, argue not for judicial abdication but for “redirect[ing] the focus of constitutional adjudication from identifying and remedying harm”—in this case, to particular state prerogatives—“to addressing broader social problems related to political process, distributive outcomes, or the structure of institutions.”²⁷⁹ This need for broader focus may be another reason to prefer compensating adjustments, which pay attention to the overall state of the federal balance, to narrower forms of “translating” the meaning of isolated provisions.²⁸⁰

So how do we tell which aspects of the original understanding to extract and preserve, and which ones to jettison as expendable? One way to answer that question is as an originalist: The historical materials will sometimes tell us what is a core structural principle, what is an incidental benefit of that principle, and what is an implementation mechanism. I think that claim can be made out in

277. See Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311, 1367-71 (2002).

278. See, e.g., Klarman, *supra* note 271, at 408 (“[T]he enterprise of translation is fundamentally about abstracting from the Framers’ more specific intentions. Yet there are an infinite number of ways in which one can abstract from specific intentions.”).

279. Levinson, *supra* note 277, at 1383-84.

280. Framing problems also argue, in my own view, against attempting to fix a particular equilibrium point that compensating adjustments seek to achieve. Better to move incrementally in individual cases than to attempt to define and implement a specific and comprehensive vision of federalism.

the context of federalism, although I will not recapitulate the historical evidence necessary to do so here. My own reading of the Founding era debates and the historical literature strongly suggests that the concern was for an overall balance between the nation and the states, and that more specific mechanisms like the structure of the Senate or the doctrine of enumerated powers were advanced in service of that broader commitment. If that is true, then one can say without fear of arbitrariness that the commitment to a federal balance is the constant to be maintained, and the failure of the enumerated powers mechanism is a change for which to be compensated. Likewise, I think the history can take us at least some distance toward discerning which values, such as government efficiency or state-by-state experimentation, were incidental benefits of the structure and which, such as the protection of individual liberty, are central values to be held constant.²⁸¹

This originalist answer might seem strange, given my rejection of other aspects of originalism.²⁸² But I do not think I have to reject this much. The primary problem with originalism is its rigidity: One simply cannot expect one generation to anticipate all the problems or craft solutions to the challenges that will inevitably arise as history unfolds. But using originalist methods to identify core values in the Constitution does not implicate those problems.²⁸³ In any event, a more evolutionary answer would be to look at the course of our history and our law to see what is the core commitment and what is an implementation mechanism. What one finds, I think, is that the commitment to some basic notion of meaningful checks on the central authority recurs across all kinds of different doctrinal contexts. Mechanisms like enumerated powers, as well as background values like state experimentation or policy diversity, have waxed and waned in importance; the commitment to some sort of federal balance has remained relatively constant. In any event, the

281. The members of this more fundamental class of values may, of course, come into conflict, as individual liberty and federalism surely have in the context of race throughout our history. But these sorts of conflicts are endemic to any theory of constitutional interpretation that does not foolishly try to assimilate all of constitutional law to a single value. *See generally* LAURENCE TRIBE & MICHAEL DORF, ON READING THE CONSTITUTION 24-30 (1991) (criticizing these sorts of theories).

282. *See supra* text accompanying notes 68-72.

283. One might ask, "Can't core values evolve, too?" And the answer would be that of course they do. I address that objection in subsection 3, *infra*.

occasional difficulty of making these sorts of choices among different aspects of our constitutional heritage does not mean the choices are impossible to make.

It ought to be no surprise that Professor Klarman's critique of translation and compensating adjustments ultimately leads him to reject constitutional fidelity altogether. Klarman recognizes that his arguments implicate a "more fundamental" question: "Does the Constitution deserve our fidelity at all?"²⁸⁴ And his answer is, "Of course not. Why would one think, presumptively, that Framers who lived two hundred years ago, inhabited a radically different world, and possessed radically different ideas would have anything useful to say about how we should govern ourselves today?"²⁸⁵ I will not recapitulate here the many arguments for constitutional fidelity, notwithstanding this "dead hand" problem.²⁸⁶ The important observation for present purposes is that Klarman ends up at this point because his version of the indeterminacy argument is a counsel of despair: We cannot possibly figure out which aspects of the Constitution are worth preserving under changed circumstances, so why bother? But if one accepts that indeterminacy need not be complete—and if one is writing at least in part for non-academic lawyers who do not have the luxury of throwing up their hands and need to think about how to muddle through with the business of constitutionalism—then something like the compensating adjustments model I have offered here seems helpful.

2. *Finding the Balance Point*

The second set of potential objections posits a need for courts to identify a particular point of equilibrium as a predicate to making

284. Klarman, *supra* note 271, at 381.

285. *Id.*

286. See, e.g., Kronman, *supra* note 26; McConnell, *Dead Hand*, *supra* note 133. It is also worth noting that Professor Klarman addresses notions of translation and compensating adjustments as *answers* to the dead hand problem. See Klarman, *supra* note 271, at 382 (asking, "Are there any interpretive approaches that can avoid both the dead-hand problem and the judicial subjectivity problem?"). But I make no attempt to answer the dead hand question here. I have tried to show that compensating adjustments are appealing across a variety of different theories of obligation, but I have not tried to establish any particular theory of obligation here. Anyone expecting compensating adjustment to do that much theoretical work is bound to be disappointed.

compensating adjustments in the direction of that equilibrium. We might feel such an imperative for at least two different reasons. First, one might accept that the text and/or history of the Constitution do not dictate particular federalism doctrines in many instances and yet still insist that one can derive from those sources a correct or mandatory overall allocation of power. Any judicial innovation would thus have to be carried out in fidelity to this mandatory goal. Alternatively, one might simply say that a particular point of equilibrium is inherent in the notion of "balance" upon which I have relied. It is meaningless to say the Constitution prescribes "balance" between the nation and the states unless one really means that the Constitution prescribes a particular balance. The first version of the argument might be employed either to constrain innovation to work toward a particular end or, perhaps more likely, to discredit the whole notion of fidelity to balance on the ground that the Founders' particular vision of federal-state relations is unsustainable today. The second version would raise a daunting practical objection to my approach, on the ground that some "optimal" equilibrium would, if not manifest in the text or history of the Constitution, be exceptionally difficult for courts to identify.

I want to reject the notion that courts must identify a particular point of optimal or correct equilibrium between national and state power in order to make federalism doctrine. If the Founders envisioned a specific balance of power, as opposed to simply an unspecified equilibrium in which each level of government would have meaningful responsibilities of its own and some ability to check the other, that vision does not emerge clearly from either the text or the history of the Constitution. The text itself incorporates elements in the allocation of power that practically guaranteed alterations over time—most obviously, the Commerce Clause tied the allocation of authority to the level of integration in the economy.²⁸⁷ Moreover, historical accounts convey a general sense that much concerning the federal balance would remain to be worked out.²⁸⁸ The immediate task that the Framers confronted was to choose the direction and mechanisms of present reform, not

287. Likewise, Madison explained in *Federalist* 41 that the textual division of powers would accord relatively greater authority to the nation in wartime than in peacetime. THE FEDERALIST NO. 41, at 278 (James Madison) (J.E. Cooke ed., 1961).

288. See Killenbeck, *supra* note 122, at 85.

necessarily to crystallize the ideal end-state. As Mark Killenbeck has observed, the Framers were “pragmatists who viewed their assignment [as] creating not the ‘ultimate’ Union, but simply ‘a more perfect’ one.”²⁸⁹

But what about the other version of the objection, that identifying a point of equilibrium is necessary not so much because the Framers had one in mind, but because it is inherent in the task of translation or compensating adjustment? We might posit that necessity in two different senses: Either, as Michael Klarman has suggested, we “need[] to identify with precision the point at which ... changes [in circumstances] have become sufficient to justify a translation,”²⁹⁰ or we need to identify the point of equilibrium to which the Court is trying to get back. On either account, the notion of compensating adjustment requires a court to identify a specific balance between state and national authority that is “in” the Constitution.

I want to deny the need to identify a precise point of equilibrium for either of these purposes. Professor Klarman’s version seems to assume that the constitutional principle that the Court must preserve defines a bright line between government activity that is completely acceptable, on one side, and that which is completely unacceptable, on the other. That is why the Court must identify the precise point at which historical change pushes government behavior from one side of the line to the other. But at least when the constitutional principle in question is, like federalism, a norm of rough balance, Klarman’s picture seems an inapt description of affairs. The point is not that at some instant in the first part of the twentieth century, national power crossed a constitutional line in the sand. Rather, I have argued that the Constitution embodies a norm of meaningful power-sharing between the states and the nation, and that the steady erosion of that balance, in one direction or the other, is something for which courts ought to compensate when they decide individual cases. The judge in such a case need

289. *Id.* at 86; see also WHITTINGTON, *supra* note 1, at 75 (stating that the original constitution “left many issues regarding the nature of American federalism unresolved and available for future debate”); WOOD, *supra* note 112, at 525 (“[A]s crucial as the idea of federalism was to the Federalists in explaining the operation of their new system, it seems clear that few of them actually conceived of it in full before the Constitution was written and debated.”).

290. Klarman, *supra* note 271, at 407.

not identify precisely when one level of the government became too powerful; instead, he must simply determine which side of the equation predominates at that moment and use whatever freedom the current case affords to compensate in the other direction.

The question then becomes whether it is possible for a judge to tell the direction of dis-equilibrium in the system at any given time. Surely many observers at the present time, for instance, would say that the system has drifted out of balance in favor of national power.²⁹¹ But is it possible for a judge to assess or demonstrate that sort of intuition in any rigorous way? Just two years ago, this humble author chastised a judge for making the opposite assertion—that the Supreme Court had shifted the balance of federalism too far in favor of the states—on the ground that we lack a good metric by which to gauge governmental power.²⁹² Moreover, even if we do accept intuitive judgments, it seems clear that *both* the state and national governments have increased in power since the nineteenth century.²⁹³ Is it so clear that the federal balance needs to be pushed back in the direction of more limited federal power?

I think the answer is yes, despite difficulty of demonstrating that answer to be true. Notwithstanding the growth of state governmental authority in absolute terms, we deal with a norm of *balance*; one key value behind that norm, after all, is the ability of each level of government to check the other.²⁹⁴ The relevant question, then, is the *relative* growth of national power vis-à-vis the states. Absent any good overall measure of government authority, we may have to rely on an intuitive judgement here. But I think the basic intuition—that the power of the national government has grown to the

291. This is true of both friends and foes of state power. See, e.g., LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 149 (2d ed. 1996) (describing federalism, in the sense of limits on national power, as a “wasting force in U.S. life”); John O. McGinnis, *Reviving Tocqueville’s America: The Rehnquist Court’s Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485, 511 (2002) (observing that “constitutional federalism has been declining for the better part of a century”); Timothy Zick, *Statehood as the New Personhood: The Discovery of Fundamental “States’ Rights”*, 46 WM. & MARY L. REV. 213, 215 (2004) (“Federal power and supremacy long ago eclipsed state power, no matter what barometer one consults.”).

292. See Ernest A. Young, *Is the Sky Falling on the National Government? State Sovereign Immunity, the Section Five Power, and the Federal Balance*, 81 TEX. L. REV. 1551, 1587 (2003) [hereinafter Young, *Sky Falling*] (reviewing JOHN T. NOONAN, JR., *NARROWING THE NATION’S POWER: THE SUPREME COURT SIDES WITH THE STATES* (2002)).

293. See, e.g., Gardbaum, *New Deal*, *supra* note 53, at 566.

294. See, e.g., THE FEDERALIST NO. 51, at 349 (James Madison) (J.E. Cooke ed., 1961).

point of tilting the constitutional balance at the expense of the states—is widely shared. To the extent that one can imagine a gray area in which it would not be clear whether the national government or the states were predominant, we are not presently living in that gray area. The states are not dead by any stretch of the imagination, but it seems fair to say that they are plainly subordinate entities rather than “balancing” ones today.

Although it is hard to prove this assertion in any sort of rigorous way, I can bolster it along several different dimensions. One thing that *is* fairly easy to measure is the financial resources gathered and expended by governments. In 1902 (the first year for which both national and state/local figures are readily available), the total combined revenue and expenditure of states and local governments exceeded national revenues and expenditure by roughly two to one. By 2000, however, the national government had surpassed states and localities by both measures.²⁹⁵ One would expect the change to be even more stark if figures dating back to the Founding were available. In any event, the shift in financial resources over time is quite striking.

A considerably more impressionistic measure uses as a yardstick a well-known passage from the Hart and Wechsler Federal Courts casebook. The introduction to the unit on “the Relation Between State and Federal Law” in the first edition, published in 1953, stated that: “Federal law is generally interstitial in its nature. It rarely occupies a legal field completely, totally excluding all

295. Total expenditures of the national government in 1902 were \$485.2 million, compared with \$1.095 billion combined spending by states and localities. See U.S. BUREAU OF THE CENSUS, *THE STATISTICAL HISTORY OF THE UNITED STATES: FROM COLONIAL TIMES TO THE PRESENT* 1114, 1127 (1976). In 2000, the national government spent \$1.7888 trillion, compared with \$1.7429 trillion by states and localities. U.S. CENSUS BUREAU, *STATISTICAL ABSTRACT OF THE UNITED STATES: 2003*, at 285, 322 (2004). On the revenue side, the national government took in \$653 million in 1902, compared to \$1.048 billion for states and localities. See *STATISTICAL HISTORY*, *supra*, at 1122, 1126. By 2000, national government revenue was \$2.0252 trillion, compared to \$1.9423 trillion for states and localities. See *STATISTICAL ABSTRACT*, *supra*, at 285, 322. There are complications, of course. For instance, in 2000, \$291.9 billion of state and local revenue came from the federal government. *Id.* at 285. Depending on how one looks at them, these grants may reflect either state and local influence in Washington, D.C., or federal leverage over state policy. More generally, the definitions and accounting methods involved with these statistics are sufficiently complex to counsel caution. Nonetheless, the overall picture ought to be relatively clear.

participation by the legal systems of the states.”²⁹⁶ By the fifth edition of the casebook, published in 2003, this statement was in quotes and followed by a question asking whether it is still true.²⁹⁷ The current editors conclude that “at present federal law appears to be more primary than interstitial in numerous areas.”²⁹⁸ Again, the shift in assessment by knowledgeable observers of the nation-state balance seems considerable even over just the last half-century.

We might also think about the assessment problem indirectly, by looking not to the state of the balance itself but to the mechanisms that the Framers themselves looked to for preservation of that balance. I do not mean to deny the possibility that other safeguards may substitute for the original mechanisms.²⁹⁹ But if we respect the Framers as intelligent architects with some idea of what maintaining a federal balance might require, then the deterioration of their original safeguards should be at least circumstantial evidence of a shift. Consider two such safeguards: the textual doctrine of enumerated powers and the expectation that federal law would be made only through a cumbersome legislative process. Nowadays, as Gary Lawson has observed, “discussing the doctrine of enumerated powers is like discussing the redemption of Imperial Chinese bonds.”³⁰⁰ Likewise, the advent of the administrative state—designed to ease the process of national lawmaking—and the courts’ abandonment of the nondelegation doctrine have considerably undermined inertial barriers to the replacement of state law with

296. HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1953) (quoted in HART & WECHSLER, *supra* note 84, at 494). Even this early edition recognized significant change since the Founding: “This was plainly true in the beginning when the federal legislative product (including the Constitution) was extremely small. It is significantly true today, despite the volume of Congressional enactments, and even within areas where Congress has been very active.” *Id.*

297. See HART & WECHSLER, *supra* note 84, at 495 (“In the fifty years since the First Edition was published, the expansion of federal legislation and administrative regulation noted in this discussion has accelerated; today one finds many more instances in which federal enactments supply both right and remedy in, or wholly occupy, a particular field.”).

298. *Id.* at 495.

299. Compare, e.g., Kramer, *Politics*, *supra* note 217, at 219 (arguing that political parties substitute for the original “political safeguards of federalism”), with Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459, 1480-89 (2001) (denying that parties play this role effectively).

300. Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1236 (1994). This remains basically true notwithstanding the Court’s decisions in *Lopez* and *Morrison*, which occurred after Professor Lawson’s comment.

federal norms.³⁰¹ If these original safeguards of the federal balance are largely nonexistent today, then it seems appropriate to encourage courts to develop compensating mechanisms.

One question remains outstanding: If courts know that the system is out of balance, must they determine a single correct equilibrium point in order to restore that balance? Again, I think the answer is no, because the question mistakes the task actually before the courts in federalism cases. If we were instead amending the Constitution, we would be tempted to try to fix the federal balance at the “right” point of equilibrium. There would be pressure to do this in part because once one embeds some particular aspect of federalism in constitutional text, it becomes hard for courts to adjust away from that aspect in the future. For that reason, amenders of the text would need to be quite confident that they were fixing the balance at the optimal point.

Courts deciding individual cases confront a quite different situation. As I have already suggested, courts simply *cannot* impose a comprehensive vision of federalism on the system³⁰²—and this relieves them of the obligation to try. Individual cases generally do not present more than one or two of the myriad different legal issues that may arise in federalism cases, and even with respect to a single issue an individual decision generally can make only a marginal adjustment in the doctrine. Moreover, virtually all cases present any number of constraints on the doctrinal options open to the court. In view of all these limitations, it is unclear that a specific vision of the optimal federal balance is even *useful*, let alone necessary, to resolving individual disputes. There is no reason, in other words, to assume that approximating a definitive equilibrium point is a viable “second best” way to decide individual cases. Instead, courts just

301. On the importance of limits on non-congressional lawmaking to federalism, see generally Clark, *supra* note 233. On the rejection of any judicial enforcement of this principle, see *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting) (observing that “the scope of delegation is largely uncontrollable by the courts”); Lawson, *supra* note 300, at 1240 (noting that “[t]he Supreme Court ... has rejected so many delegation challenges to so many utterly vacuous statutes that modern nondelegation decisions now simply recite these past holdings and wearily move on”). Professor Lawson goes on to point out that “[t]he rationale for this virtually complete abandonment of the nondelegation principle is simple: the Court believes—possibly correctly—that the modern administrative state could not function if Congress were actually required to make a significant percentage of the fundamental policy decisions.” *Id.* at 1241.

302. See *supra* text accompanying notes 82-83.

need to know in which direction to move—always incrementally—in the case in front of them.

It may be helpful to think of the individual court as a long-distance hiker setting off on a journey that cannot be completed in a single day. The hiker need not know exactly how far it is to the ultimate destination. Instead, he need only know the general direction of that destination and be able to choose a hospitable resting place at the close of each day. Likewise, the court must know the general direction in which to make its compensating adjustment, and the doctrinal instantiation of that adjustment must meet a number of practical criteria to be viable.³⁰³ Of course, the closer the hiker comes to his destination—the closer we think the federal balance is to equilibrium—then the more we need to be specific about where the destination lies. But as long as we are convinced that the destination remains some way off, then both the hiker and the court can afford to be a bit vague about how far away it is.³⁰⁴

Indeed, if we take more pessimistic views of the factors pushing for centralization in our system and the capacity of courts to effect sweeping changes in the structure of government, then those courts may *never* need to know where the precise point of equilibrium lies. Think of our poor hiker now pressing into a gale-force wind, so that the best he can do is to resist being blown backward too quickly. Peter McCutchen has described compensating adjustments “as a form of constitutional damage control,”³⁰⁵ and that term aptly portrays courts not as moving the system in a desired direction but trying to slow movement *away* from equilibrium. In this conception, the optimal point of balance obviously becomes even less important; a court needs to know which sort of changes to resist, but need not worry overmuch about how far to push back in the opposite

303. See *infra* Part III.

304. If hypothetical hikers will not do, consider the Federal Reserve's effort to steer the economy toward a “neutral” interest rate that would balance the supply and demand of capital. In practice, it is extremely difficult to tell where the neutral rate actually is. This need not paralyze current policy, however, because most agree that “a nominal fed funds rate of 2.25% [the current rate in December 2004] is still below any sensible estimate of neutrality.” *Aiming for a Happy Medium*, *ECONOMIST*, Dec. 18, 2004, at 118. As part of an institution that makes marginal adjustments to forces it cannot control outright, “Fed officials can head for neutrality, even while acknowledging that they do not really know where it is.” *Id.*

305. Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 *CORNELL L. REV.* 1, 2 (1994).

direction. This may be a somewhat less inspiring picture of the judicial function, but from a Burkean standpoint, slowing the pace of change is itself a valuable office.

For all these reasons, I doubt that we need to agree on an end-state in order to choose contemporary federalism doctrine. The judicial process proceeds incrementally; as I have argued elsewhere, that is one of its most important strengths.³⁰⁶ As long as courts formulate doctrine in incremental rather than sweeping terms, they can focus on ascertaining the *direction* of incremental change without necessarily formulating a firm idea of how far that change ought to go in the future. In *Lopez*, for example, the Court confronted the question of whether it should end its half-century moratorium on striking down federal statutes as outside the Commerce Power. One could answer that question affirmatively, deciding that the Court should be more willing to strike down federal laws on this ground than it had been, while leaving a more complete version of Commerce Clause doctrine to be developed in future cases.³⁰⁷ For reasons that I will discuss further,³⁰⁸ the incremental method seems like the best approach. Even if text, history, or contemporary political theory *could* paint us a complete picture of the federal end-state envisioned by the Founders, I would suggest that courts should pay that picture relatively little attention.

3. *Has History Moved On?*

The last set of potential objections that I want to consider here all raise the possibility that historical, social, and institutional changes since the Founding have cancelled or overridden the imperative to adhere to an eighteenth century conception of federalism. A short answer to the objection, stated that way, is that no one is arguing for courts to reimpose an *eighteenth century* conception of federalism. The question is whether they should, from time to time, make compensating adjustments to our present constitutional doctrine in

306. See Young, *Judicial Activism*, *supra* note 146, at 1208-09.

307. Cf. *United States v. Lopez*, 514 U.S. 549, 565 (1995) (noting that if the Court had upheld the statute in question, there would have been no basis for *ever* invalidating commerce legislation).

308. See *infra* Part III.B.

order to bolster limits on national authority. I have embraced an evolutionary view of constitutional change in this and other work, but nothing in our history since the Founding absolves courts of their obligation of fidelity to the basic notion of a federal balance.

A number of scholars and judges have argued that the Constitution has changed in ways that undermine the Founders' commitment to federalism. Some have claimed that the Reconstruction Amendments that followed the Civil War—or even the War itself—substantially established a new commitment to national supremacy and predominance.³⁰⁹ Others have relied on later amendments, such as the Seventeenth, which altered the political dynamics of federalism in ways detrimental to the states.³¹⁰ Still others have cited the New Deal as a watershed “constitutional moment” that amended the federal bargain, even in the absence of any formal alteration in the constitutional text.³¹¹ These changes are said to undermine the case for compensating adjustments limiting federal power. As Justice Souter observed in *Morrison*, “[a]mendments that alter the balance of power between the National and State Governments, like the Fourteenth, or that change the way the States are represented within the Federal

309. See, e.g., *New York v. United States*, 505 U.S. 144, 207 n.3 (1992) (White, J., dissenting):

[T]he nature of federal-state relations changed fundamentally after the Civil War. That conflict produced in its wake a tremendous expansion in the scope of the Federal Government's law-making authority, so much so that the persons who helped to found the Republic would scarcely have recognized the many added roles the National Government assumed for itself.

See also Erwin Chemerinsky, *Rehabilitating Federalism*, 92 MICH. L. REV. 1333, 1340 (1994) (book review) (“[T]he Civil War and the constitutional amendments that followed it dramatically changed the conception of the relationship of the federal and state governments.”); Michael Stokes Paulsen, *The Civil War as Constitutional Interpretation*, 71 U. CHI. L. REV. 691, 691 (2004) (reviewing DANIEL FARBER, *LINCOLN'S CONSTITUTION* (2003)) (“The outcome of *Grant v. Lee* [sic] resolved the most important issue of antebellum constitutional dispute—the nature of the Union—in favor of the nationalist view of sovereignty and against the South's state-sovereignty view.”); Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992 (2003) (arguing that the Reconstruction Amendments render the Rehnquist Court's revival of federalism illegitimate).

310. See *United States v. Morrison*, 529 U.S. 598, 650-52 (2000) (Souter, J., dissenting) (arguing that the Fourteenth and Seventeenth Amendments established federal supremacy over the states).

311. See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 105-08 (1991); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 268-74 (1998).

Government, like the Seventeenth, are not rips in the fabric of the Framers' Constitution, inviting judicial repairs."³¹²

This strand of nationalist argument raises too many different issues of both history and constitutional theory to permit adequate treatment here. For that reason, I have set aside the burden of more thorough treatment for a separate essay.³¹³ Here, I wish only to sketch the outlines of an answer. Where the argument relies on formal changes in the Constitution, such as the Fourteenth or the Seventeenth Amendment, there is no way to deny that the Constitution *has*, in fact, changed. The question is in what sense. The Fourteenth Amendment, like the Thirteenth and Fifteenth, nationalized a set of individual human rights and conferred power on the national government to enforce them. This a fundamental change, to be sure, but the argument that those amendments should also defeat efforts to preserve federalism in *other* areas—such as the scope of Congress's Article I powers, or Congress's ability to "commandeer" state officials to enforce ordinary federal laws—stands on far shakier ground. Much historical evidence suggests that the Framers of these amendments meant to confer national power to deal with the issues of racial oppression that led to the War, while preserving the basic allocation of authority between states and nation intact in other areas.³¹⁴

The argument that amendments directed at individual rights have collateral effects on structure also raises theoretical questions concerning the proper construction of amendments. The history of the Seventeenth Amendment, for example, suggests that its primary purpose was to further direct democracy by allowing the people of each state to choose their senators directly.³¹⁵ That change, however,

312. 529 U.S. at 652 (Souter, J., dissenting).

313. See Ernest A. Young, *Federalism and the Movement of History* (unpublished manuscript on file with author).

314. See, e.g., PAMELA BRANDWEIN, *RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH* 57 (1999) (concluding that the authors of the Fourteenth Amendment "were not hearty enthusiasts for national power, and they understood the incorporation of the Bill of Rights as a narrow and limited grant of national power"). Even one of the most radical proponents of the notion that Reconstruction repealed federalism has conceded that "the survival thesis [that a strong commitment to federalism survived Reconstruction] enjoys a closer link to historical instantiations of our national identity than any claim that the Reconstruction Amendments represent a new constitutional order." Spaulding, *supra* note 309, at 2029.

315. See, e.g., Vikram David Amar, *Indirect Effects of Direct Elections: A Structural*

had important collateral attacks on the "political safeguards of federalism" by ensuring that senators would represent interests concentrated at the state level but *not* the institutions of state government themselves.³¹⁶ The question then becomes how we should treat this collateral change: Should we read it as part of the amendatory force of the new constitutional provision, so that we would consider the Seventeenth Amendment as having altered our basic commitment to federalism along with the election procedure for senators? Or is it a regrettable side effect that may warrant some form of compensating adjustment in federalism, such as an effort to bolster the "political safeguards" in other respects?³¹⁷ To answer this question, one needs a theory of constitutional amendment, and I have no space to develop such a theory here. The short answer, however, is that to the extent one finds Burkean incrementalism appealing as an approach to constitutional change, one would want to read amendments more narrowly.

Non-textual events like the Civil War and the New Deal raise somewhat different issues. I do not want to reject entirely the notion that changes in the Constitution may occur without amendments that go through the Article V process; the essence of common law constitutionalism, after all, is that the meaning of the Constitution evolves over time.³¹⁸ I do want to suggest that the bar should be awfully high before we find that historical events, unaccompanied by Article V amendments, have cancelled structural commitments reflected in the original text. More importantly, we need not think of changes like the New Deal as having changed the meaning of the Constitution for courts in order for those changes to have a significant impact on constitutional structure. Such changes are reflected

Examination of the Seventeenth Amendment, 49 VAND. L. REV. 1347, 1353-55 (1996).

316. Kramer, *Politics*, *supra* note 217, at 223-26.

317. One can see the difficulty of this question by comparing a parallel example from individual rights jurisprudence. If, for instance, an amendment permitting school prayer were to become part of the Constitution, should we interpret such an amendment narrowly, with little gravitational force outside the situation to which it is specifically addressed? Or should we read it broadly, as watering down the prior aversion to government endorsements of religion, so that the non-endorsement principle should be read to have less force in other contexts as well?

318. I am profoundly skeptical, however, of punctuated non-textual change as a result of "constitutional moments" and the like. See, e.g., Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995) (criticizing such notions).

in changes to the environment in which courts operate—in the statutory schemes and institutions with which they must coexist, in the pressures brought to bear on the appointments process, and the like. Those changes affect the constraints on judicial decisions in innumerable ways and therefore affect doctrine. And they may make the commitment to federalism harder to enforce. But to recognize these constraints is *not* to say that, in cases where all those constraints still leave courts some room to maneuver, courts owe no fidelity to the original value of federalism.

One might, however, push the nationalist argument further. Michael Klarman has suggested, for instance, that “if national power expanded to meet changing reality, perhaps this is a good argument for *not* making any compensating adjustment.”³¹⁹ But this is simply a suggestion that the course of history may reveal normative deficiencies in the Constitution’s structural values. By and large, the constraints on national power in the Constitution have been generous enough to allow significant expansions of power to meet modern needs. But until the Constitution is validly amended, the Founding commitment to federalism should also retain some degree of gravitational force.

III. THE INSTITUTIONAL AND FUNCTIONAL DETERMINANTS OF FEDERALISM DOCTRINE

Once courts identify the direction in which constitutional equilibrium lies, they must still formulate specific doctrinal rules designed to push in that direction. This is the second step in the model of doctrinal evolution that I summarized in Part I. I have already suggested that, in many instances, constitutional text and history will provide relatively little guidance in this task. Instead, courts must rely on more functional considerations. This is in keeping with the basic notion of translation and adjustment discussed in Part II: Text and history can point the direction that we need to go, but the route to get there will be different because the terrain has changed.

My account of doctrinal construction in this Part tries to bring to bear some of the emerging literature on comparative institutional

319. Klarman, *supra* note 271, at 400.

choice. That literature argues that decisions should be assigned to the institutions most competent to make them, and that the competence of any given institution must be assessed in comparison with other candidate institutions rather than in isolation.³²⁰ I conclude in Section A that either/or versions of this inquiry are less useful in federalism disputes than they might appear. Although it is interesting to ask whether such disputes should be assigned exclusively to courts or to other actors as a matter of institutional design, the system we in fact have generally does not leave courts with discretion to decline to decide cases within their jurisdiction simply on the ground that some other actor might do the job better. Institutional considerations *are* helpful, however, at the level of *interpretive* choice—that is, at the point that courts must formulate doctrine to answer particular federalism questions. Section B canvasses how considerations of institutional character and competence can inform that inquiry. Section C considers the relevance of federalism’s underlying values and the ways in which those values might be translated into specific doctrines. Finally, Section D offers two brief examples of how this analysis might apply to particular doctrinal problems.

A. Institutional Choice

A discussion of federalism *doctrine* necessarily assumes that courts should have a role in federalism disputes. But the proper role of courts in disputes over allocation of authority in our own federal system has been deeply controversial.³²¹ Prominent commentators—and some Supreme Court justices—have argued that courts should not “intervene” in federalism disputes; rather, those controversies should be left entirely to politics.³²² The

320. See generally NEIL H. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 5-13 (1994).

321. Compare, e.g., Kramer, *Politics*, *supra* note 217 (arguing for little or no judicial role), with Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951 (2001) (responding to Kramer), and Marci A. Hamilton, *Why Federalism Must Be Enforced: A Response to Professor Kramer*, 46 VILL. L. REV. 1069 (2001) (same).

322. See, e.g., sources cited in note 2, *supra*. Putting the question this way—and it usually is put this way, see, e.g., William Marshall, *American Political Culture and the Failures of Process Federalism*, 22 HARV. J.L. & PUB. POLY 139, 153 (1998) (describing the core debate as one over “judicial intervention to enforce federalism”)—is itself somewhat misleading. See

participation of courts in federalism disputes, and thus the relevance of judicial doctrine to such disputes, cannot be taken for granted.

Part of the problem with the institutional debate is that it has typically been framed as a question whether the federal balance should be enforced "by courts."³²³ But I have never seen a proponent of judicially-enforced federalism who argues that the judicial role should be *exclusive*. And certainly much development in our federal relationship has stemmed from the practice of the political branches at national, state, and local levels.³²⁴ The issue is whether the courts must be uniquely excluded from this process. My basic argument is that if federalism is constitutionally mandatory—if it is part of the law—then courts must play a part in enforcing it when presented with cases within their jurisdiction that raise such issues.³²⁵

Lynn Baker and I have taken up the basic judicial review question—whether there is something unique about federalism questions that warrants their exclusion from the norm of judicial review—at great length elsewhere.³²⁶ That discussion identified three distinct sets of arguments for exclusion, based on a lack of judicial competence to decide such questions, the sufficiency of non-judicial enforcement, and federalism's lack of normative appeal.³²⁷ We found none of these arguments persuasive. The same common-law method of doctrinal elaboration that has facilitated judicial enforcement of individual rights, for example, is available in federalism cases.³²⁸ There are equally good reasons to reject the

infra text accompanying notes 429-30.

323. See, e.g., Peter M. Shane, *Federalism's "Old Deal": What's Right and Wrong with Conservative Judicial Activism*, 45 VILL. L. REV. 201, 228-29 (2000).

324. See WHITTINGTON, *supra* note 1, at 2-3.

325. See Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2182 (1998) [hereinafter Jackson, *Principle*] (arguing that "[w]ithin the framework of U.S. constitutionalism ... the rule of law requires some judicial enforcement of federalism constraints on national power").

326. See Baker & Young, *supra* note 177, at 80-87; see also John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1332 (1997) [hereinafter Yoo, *Judicial Safeguards*] (comparing issues of federalism with individual rights cases and the respective judicial review standards for each).

327. See Baker & Young, *supra* note 177, at 78.

328. See *id.* It is striking that some of the same Justices who have most vocally doubted the competence of judges to make federalist doctrine have been the most eloquent advocates of common law doctrinal innovation to protect individual rights. Compare, e.g., United States v. Morrison, 529 U.S. 598, 647-50 (2000) (Souter, J., dissenting) (suggesting that the judiciary

notion that the national political process affords complete protection for state autonomy: National politicians tend to protect the interests of their private constituents but may often view state political institutions as competitors; to the extent that vertical representation of state interests is effective, it may facilitate the horizontal imposition of powerful states' preferences on other states; and much federal law is produced through processes that avoid the "political safeguards of federalism" altogether.³²⁹ Finally, we rejected the notion that federalism has a constant political valence, so that "liberals" should oppose judicial enforcement of it (or "conservatives" favor it) as a normative matter; rather, as issues like gay marriage or preemption of state environmental measures demonstrate, people of all political stripes may find state autonomy normatively appealing in some instances even if not in others.³³⁰

In this Article, I want to consider the judicial review question more explicitly as one of institutional choice. Federalism posits a goal—balancing national and state authority—but, as Neil Komesar has insisted, we must still ask which institutions are best positioned to pursue that goal.³³¹ This analysis, moreover, must be *comparative* in nature. It is not enough to say that this or that institution is well- or ill-suited to handle a certain set of questions. Instead, the likely performance of each institution must be compared with that of the alternatives. "Issues at which an institution, in the abstract, may be good may not need that institution because one of the alternative institutions may be even better. In turn, tasks that strain the abilities of an institution may wisely be assigned to it anyway if the

is not competent to develop doctrinal limitations on national power), and *United States v. Lopez*, 514 U.S. 549, 607-08 (1995) (Souter, J., dissenting) (comparing efforts to develop such limits to *Lochner*), with *Washington v. Glucksberg*, 521 U.S. 702, 755-65 (1997) (Souter, J., concurring) (finding that, despite the failure of substantive due process doctrine in the *Lochner* era, the judiciary remains not only competent but obligated to develop doctrine protecting unenumerated rights under the Due Process Clause).

329. See Baker & Young, *supra* note 177, at 106-33; Hamilton, *supra* note 321; Marshall, *supra* note 322, at 144-55; Prakash & Yoo, *supra* note 299.

330. See Baker & Young, *supra* note 177, at 133-62; see also Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 BROOK. L. REV. 1277 (2004) [hereinafter Young, *Dark Side*] (discussing state and local resistance to the USA PATRIOT Act based on concerns for civil liberties).

331. See KOMESAR, *supra* note 320, at 5 ("Goal choice and institutional choice are both essential for law and public policy. They are inextricably related.").

alternatives are even worse.”³³² We thus need to focus on the distinctive institutional capabilities of courts, legislatures, and executive actors, and ask how these different capacities bear on federalism questions.

Comparative institutional analysis is relevant to federalism questions in at least two ways. There are what we might call “first order” questions that involve allocating decision making authority between federal and state institutions. For example, should we entrust the states with primary responsibility to resolve the issues of physician-assisted suicide or gay marriage, or should those questions be resolved at the federal level? Then there are the “second order” issues, which involve choosing institutions to decide the first order questions. In other words, should the allocation of authority over physician-assisted suicide or gay marriage be settled by Congress, the Executive, or a court deciding the matter as a question of constitutional law? The first order questions are important and interesting, but my concern here is with the second order issue: Which institution should draw and police the boundary between state and federal authority?

This turns out to be a very complex question. I make two primary points about it in this Section. The first is that once we start thinking about the factors involved in comparative institutional analysis, the “question” turns out to be incredibly multifarious. It seems highly unlikely that all the various incarnations of the boundary-drawing question will have the same answer, or that the answer to many of them will involve a categorical choice of one institution over all the others. The second point is that comparative institutional analysis functions most comfortably at the level of institutional design. Once we shift to the perspective of participants within the legal system as it is presently constituted, opportunities to shift decision making authority altogether in response to comparative institutional analysis narrow considerably. Institutional analysis is more likely to influence *how* decisions are made by the institutions involved. For courts, this means that institutional analysis may be most important in shaping doctrine rather than in determining whether courts may decide federalism issues at all. As I note at the conclusion of the Section, this impres-

332. *Id.* at 6.

sion is consistent with the practice of many other federal systems around the world, which entrust at least some level of authority to enforce the federal arrangement to courts.

1. *One Issue, Many Questions*

The debate in the federalism literature—and in judicial opinions in federalism cases—is whether courts should decide federalism issues. The same arguments are routinely imported from one doctrinal context to another. For example, Herbert Wechsler's notion that the political process generally protects federalism better than courts³³³ was transformed by Justice Blackmun into an argument for judicial abdication in the *Garcia* case, which involved judge-made restraints on congressional action that admittedly fell within the commerce power.³³⁴ Then Justice Stevens invoked it in *Kimel*,³³⁵ a case about state sovereign immunity from suits by private litigants. Finally, Justice Souter took up the same notion in *Morrison*,³³⁶ a case about whether courts should enforce the limits of the commerce power itself. We are accustomed to treating different first-order federalism questions differently: We do not assume, for example, that the national government should control public education simply because it regulates the safety of nuclear power. But we frequently treat the second-order, who-should-draw-the-boundary issue, as a unitary question.

That strikes me as a mistake. Thinking about the question from the perspective of comparative institutional analysis can help us start to see why. This perspective typically considers such factors as the distribution of stakes that various actors have in an issue, the costs of information about the issue, the costs of participating in the alternative institutions, and the expertise and scale of those institutions.³³⁷ But surely these factors will vary considerably depending on the particular aspect of federalism under discussion. The costs of information about issues of basic legislative power, such as the scope of the Commerce Clause, may be quite different from

333. See Wechsler, *Political Safeguards*, *supra* note 12, at 558-60.

334. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552-56 (1985).

335. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 93-95 (2000) (Stevens, J., dissenting in part).

336. *United States v. Morrison*, 529 U.S. 598, 647-50 (2000) (Souter, J., dissenting).

337. See generally KOMESAR, *supra* note 320, at 7-8.

the costs of understanding the ins and outs of the relationships between state and federal courts. Likewise, the likelihood that state institutional actors will intervene to protect their own structural interests may be considerably greater in the case of suits by private actors than limits on Congress's spending power. The point is simply that if we run the comparative institutional analysis on each of the various federalism questions currently in dispute, we have little reason to think that the results will point uniformly in one direction.

A second problem is that issues of federalism generally arise in the context of a particular policy that either the federal or a state government seeks to implement. Congress, for example, may wish to ban possession of a gun within 1,000 feet of a school, thereby raising an issue of whether such legislation falls within the scope of the Commerce Clause.³³⁸ The participation of and positions taken by various actors are likely to be driven at least as much by the particular policy at stake (How do you feel about gun control?) as by the issue of allocating authority between the nation and the states. Even a casual observer of recent debates about federalism in Congress will recall instances in which one political party or the other has championed state autonomy depending on its views on the underlying policy issue. Republicans—the supposed party of state autonomy—have pressed for national uniformity on gay marriage, physician-assisted suicide, and partial-birth abortions; Democrats have rediscovered the virtues of state autonomy on tort reform and regulation of Health Maintenance Organizations.³³⁹

A really sound comparative institutional analysis would have to assess the various key factors in terms of both the federalism issue and the underlying policy issue (medical marijuana vs. school safety). That would likely be awfully hard to do, and the results would not be broadly applicable to all cases of the same federalism question. After all, the dynamics of institutional participation on the

338. See generally *United States v. Lopez*, 514 U.S. 549 (1995).

339. See, e.g., E.J. Dionne, Jr., *States' Rights Isn't the Issue*, WASH. POST, June 22, 2001, at A25. It is easy to discount these sorts of political shifts on structural matters as simple opportunism. Our Founders, however, seem to have counted on just such opportunism as a critical mechanism for maintaining both vertical and horizontal checks and balances among governing institutions. See THE FEDERALIST NO. 51, at 349 (James Madison) (J.E. Cooke ed., 1961); Young, *Dark Side*, *supra* note 330, at 1308-09.

second-order federalism question (Who decides how broad the Commerce Clause is?) might be quite different in a context involving a different underlying policy issue. All of the factors crucial to comparative institutional analysis—the distribution of stakes, the costs of information, etc.—are likely to vary depending on whether the underlying first-order question involves Congress's authority to legislate on, for instance, tort reform, abortion, or physician-assisted suicide.

There is an important place for comparative institutional analysis of federalism questions, but it will have to be done retail rather than wholesale. That suggests that categorical polar positions on judicial review—courts should always have the final say on federalism issues, or courts should stay away from such questions entirely—are misguided, at least from the pragmatic perspective of institutional analysis. My argument here would not answer the quite different claim that the Constitution itself mandates a categorical institutional choice.³⁴⁰ But to the extent that functional considerations guide the choice of institutions, a categorical choice of either judicial or political channels for resolution of federalism disputes seems out of place.

2. *The Obligation to Decide*

As Neil Komesar has observed, institutional choice “is about deciding who decides.”³⁴¹ Institutional analysts often seem to assume that the institutions being compared—say, courts and legislatures—are equally free to decide or not to decide the issue in question. Critics of a judicial role on federalism questions often seem to make the same assumption that courts are free *not* to decide when such questions are put to them. But the question of when a court may decide not to decide an issue presented to it is itself a complicated, doctrine-intensive question, and I argue that the law governing this question severely limits the ability of courts to forego decision simply because another institution might have comparative advantages relevant to the issue. This does not make institutional

340. My arguments about the political question doctrine in the next subsection are at least partially responsive to such claims. See *infra* text accompanying notes 346-57.

341. KOMESAR, *supra* note 320, at 3.

choice irrelevant to courts; rather, such considerations are chiefly relevant to the types of doctrines that courts should employ in particular kinds of cases, which will in turn control the extent of judicial involvement with particular sorts of issues.

Practitioners of institutional choice must distinguish between two perspectives: the perspective of institutional design and the perspective of participants in the system that exists. Institutional analyses seem generally to proceed from the former perspective. They ask: If we were setting up a system to resolve a particular kind of issue, what sort of institutions would we choose? My primary interest here, by contrast, is in developing a theoretical template to guide real courts when confronted with real federalism cases. Comparative institutional analysis thus ought to inform their choice among the options that the legal system provides, but such analysis cannot supply a basis for radical alterations in the system itself. Indeed, the willingness to contemplate fresh starts and wholesale revisions implicit in most discussions of institutional design is inconsistent with the Burkean, incrementalist perspective offered here.

Although the most obvious instances of institutional *design* occur in the drafting or amendment of a constitution, other uses for the design perspective exist outside the realm of radical and explicit constitutional change. If Congress is convinced that federal courts are not well-suited to decide particular federalism questions, for example, it may be able to restrict their jurisdiction over such questions.³⁴² Likewise, courts have some occasion to make design decisions by defining the contours of the political question doctrine, which might take certain federalism issues out of the judicial purview altogether.³⁴³ Neither of these approaches, however, has

342. The issue of constitutional limitations on Congress's power to restrict federal jurisdiction is one of the most famously murky issues in constitutional law. See, e.g., Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953); Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981). The most important practical limit is that wherever Congress seeks to use federal courts to enforce federal law, see, e.g., *United States v. Lopez*, 514 U.S. 549 (1995) (addressing a federal criminal prosecution in federal court), the federal courts necessarily will have the opportunity to consider the defense that the federal law in question falls outside Congress's power.

343. See, e.g., *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849) (rejecting as nonjusticiable a request to settle the locus of state governmental authority under the Guarantee Clause).

played a major role with respect to federalism. In the mid-nineteenth century, Congress did strip the Supreme Court of jurisdiction to decide a case involving the constitutionality of Reconstruction—certainly a federalism issue of the first magnitude.³⁴⁴ But since that time there has been no significant effort to confine the Court's jurisdiction over federalism questions.³⁴⁵

Nor has the political question doctrine played a significant role in federalism disputes, at least since the Court declared a Guarantee Clause claim nonjusticiable in 1849.³⁴⁶ Prior to *Baker v. Carr*,³⁴⁷ the Court might have chosen to make the political question doctrine into a general vehicle for comparative institutional analysis. But *Baker*

344. See *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 512-15 (1868) (upholding Congress's action as valid under the Exceptions Clause of Article III). But see *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869) (reading Congress's action very narrowly to permit Supreme Court review of a similar case).

345. The only clear instance of jurisdiction-stripping since Reconstruction did bear some relation to federalism concerns, but its practical significance seems relatively minor. One provision in the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2244(b)(3)(E), barred Supreme Court review of federal court of appeals decisions granting or denying leave to state prisoners to file a second or successive petition for a federal writ of *habeas corpus*. See generally *Felker v. Turpin*, 518 U.S. 651 (1996) (upholding this provision of the AEDPA). Restricting Supreme Court jurisdiction in *habeas* cases effectively denies the Court the opportunity to decide the proper allocation of authority between federal and state courts in state criminal litigation; in that sense, the 1996 Act raised an institutional design issue of the sort I have been discussing. But the 1996 Act restricted only the Supreme Court's jurisdiction (not the jurisdiction of the federal judiciary as a whole) over a small set of court of appeals decisions concerning a small subset of federal *habeas* petitions—appellate “gatekeeper” decisions denying the right to file a successive *habeas* petition. The AEDPA thus seems to be the exception proving the rule that jurisdiction-stripping has not been a favored vehicle for Congress to redesign the Constitution's allocation of institutional authority to decide federalism disputes.

Issues of federalism also helped prompt one of the major institutional re-design proposals of the last century: President Franklin Delano Roosevelt's court-packing plan. See WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 133 (1995) (describing how the old Court's federalism and economic substantive due process cases together moved FDR to try and change the structure of the Court). Interestingly, however, that plan did not seek to reallocate authority to decide federalism issues; instead, it simply sought to change the result in such cases by appointing justices friendly to the President's broad view of federal legislative authority.

346. See *Luther*, 48 U.S. (7 How.) at 42 (“Under this article of the Constitution it rests with Congress to decide what government is the established one in a State.”). On the extent to which some Guarantee Clause claims may remain justiciable, see Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988).

347. 369 U.S. 186 (1962) (holding that equal protection claims for equal apportionment of state legislative districts are justiciable).

began a process of transforming a general prudential inquiry into a basically rule-bound, narrow exception to a general principle of judicial review.³⁴⁸ The Court's most recent pronouncement, in *Nixon v. United States*,³⁴⁹ makes clear that non-justiciability turns on two of the factors identified in *Baker*: a textual commitment of the issue in question to the political branches, and a lack of judicially manageable standards for deciding the issue.³⁵⁰ Neither of these factors fit comfortably with the notion that courts may decline to decide federalism issues if, based on a comparative institutional analysis, they find some other institution better suited to the task. The first factor—textual commitment—obviously substitutes a text-based inquiry for institutional analysis.³⁵¹ The second—judicially manageable standards—does seem more consonant with an inquiry into judicial competence.³⁵² It is, however, single-institutional in that so long as courts have manageable standards to decide, we do not ask whether some other institution could decide even better.³⁵³ More importantly, it makes institutional analysis subservient to

348. A more prudential and broadly applicable version of the political question doctrine may survive in foreign affairs cases, see Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1402-03 (1999), although the Supreme Court has not definitively ruled on such a case in several decades. But even here, the most recent decisions tend to get rid of foreign affairs issues on other grounds, such as standing or ripeness. See, e.g., *Doe v. Bush*, 323 F.3d 133 (1st Cir. 2003) (dismissing a claim that the war in Iraq was unconstitutional primarily on ripeness grounds; a second ground suggested the simple absence of a constitutional question on the merits). My own view is that Louis Henkin was largely correct to suggest that there is no such thing as a political question doctrine. See generally Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 622 (1976) (arguing that all political question cases amount to either the Court's decision to "accept decisions by the political branches [as being] within their constitutional authority" or to "refuse some (or all) remedies for want of equity").

349. 506 U.S. 224 (1993).

350. *Id.* at 228-29.

351. See *id.* at 228 (observing that under the first prong, "the courts must ... interpret the text in question and determine whether and to what extent the issue is textually committed"); *Powell v. McCormack*, 395 U.S. 486, 518-48 (1969) (conducting a detailed inquiry into the original understanding of the Qualifications Clauses of Article I in order to determine whether those clauses were a "textual commitment" of qualifications controversies to Congress).

352. See, e.g., *United States v. Munoz-Flores*, 495 U.S. 385, 395-96 (1990) (undertaking a limited inquiry into the judiciary's institutional competence in rejecting argument for nonjusticiability under this prong).

353. See KOMESAR, *supra* note 320, at 6-7 (criticizing institutional analysis that focuses only on a single institution without comparing it to others).

doctrine; only if doctrinal tools are wholly lacking can a court choose some other institution to decide.³⁵⁴

I am unaware of any serious argument that the text of the Constitution commits federalism issues generally to Congress, and few seem to argue more narrowly that particular federalism questions can meet the high standard for nonjusticiability in *Baker* and *Nixon*.³⁵⁵ Jesse Choper has called for courts to hold federalism issues nonjusticiable, but he relies on a prudential notion of nonjusticiability that has little connection to the political question doctrine in its present form.³⁵⁶ Dean Choper's proposal is thus one of institutional *design*; under current institutional arrangements, the political question doctrine exhausts the set of circumstances in which federal courts may refuse to decide a constitutional issue based on the characteristics of the issue itself. Courts may decline decision on grounds of standing or ripeness or abstention, for example, but these principles turn on the characteristics of the parties, the timing of the claim, or the equitable nature of the relief requested. There is no general "out" for courts on the ground that some other institution may do a better job.³⁵⁷

354. Moreover, I am aware of only one case in which the Supreme Court has held an issue nonjusticiable based solely on a lack of judicially manageable standards, without also relying on a textual commitment of the issue to a coordinate branch. That is certainly understandable. As I have noted elsewhere, one sees claims that doctrinal standards are incoherent and unmanageable in virtually every area of constitutional law. See Young, *Two Federalisms*, *supra* note 13, at 11. If that were itself a basis for declaring the cases nonjusticiable, we could do away with much constitutional law altogether. See Baker & Young, *supra* note 177, at 104-05. For a general discussion, see Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning* (unpublished manuscript, on file with author).

355. John Yoo notes, for example, that the majority opinion in *Garcia*—generally regarded as the high water mark of the notion that courts should not decide federalism issues—"did not resort to the political question doctrine." Yoo, *Judicial Safeguards*, *supra* note 326, at 1332; see also Zick, *supra* note 291, at 310 ("In light of subsequent events [to *Garcia*], it seems that no one ... subscribes to the theory that federalism ought to be treated as *nonjusticiable*.").

356. See CHOPER, *supra* note 2, at 193.

357. To be sure, a fair amount of such comparative institutional analysis goes on in shaping standing, ripeness, and mootness doctrine. Justice Scalia, for instance, has argued that the aspect of standing doctrine barring adjudication of "generalized grievances" stems from a judgment that widely-shared harms are best addressed through the political process, while focused injuries are better suited for courts. See Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894-97 (1983). The important point, though, is that the institutional analysis is *internal* to standing doctrine and must be accommodated to other, non-institutional aspects of standing doctrine. It is thus a form of interpretive choice, which I discuss in the next Section. One does not do comparative

From the perspective of institutional design, of course, we might choose to have a broader political question doctrine.³⁵⁸ At the level of ordinary practice, however, courts will generally be bound by John Marshall's insistence that "[w]e have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the [C]onstitution."³⁵⁹ Chief Justice Marshall's justification for judicial review in *Marbury v. Madison*³⁶⁰ relied heavily on the obligation of courts to apply the relevant rules—including *constitutional* rules—to whatever cases come before them.³⁶¹ It would be hard to introduce institutionally-based *choice* about when to engage in judicial review without undermining the case for judicial review across the board.

3. *The Ubiquity of Judicial Enforcement*

It is worth noting that the controversy over a judicial role in federalism disputes is a relatively unusual feature of American constitutional law. Many federal systems around the world seem to assume, virtually as a matter of course, that the institutional independence of a court is crucial to enforcing allocations of power among the system's various component units.³⁶² The European

institutional analysis in its pure form in the context of standing doctrine.

358. A broad doctrine that held constitutional issues nonjusticiable whenever comparative institutional analysis suggested that some other institution might perform better would, of course, throw much of constitutional law open to question. That does not make the possibility uninteresting, of course, but I have no occasion to pursue it here.

359. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821). This rule has exceptions, but they are rarely wholly prudential. See, e.g., *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711 (1996) (holding that federal courts' ability to dismiss claims on abstention grounds generally depends on whether the plaintiff seeks only equitable relief).

360. 5 U.S. (1 Cranch) 137 (1803).

361. See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 114 (1962) (interpreting *Marbury* to hold that "the judiciary's power to construe and enforce the Constitution ... is to be deduced from the obligation of the courts to decide cases conformably to law"); Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1006 (1965) (arguing that courts decide constitutional questions "for the reason that they must decide a litigated issue that is otherwise within their jurisdiction and in doing so must give effect to the supreme law of the land").

362. See, e.g., Martin Shapiro, *The European Court of Justice*, in *THE EVOLUTION OF EU LAW* 321 (Paul Craig & Gráinne de Búrca eds., 1999) (observing that most divided power systems envision a boundary-policing role for courts); O. HOOD PHILLIPS, PAUL JACKSON & PATRICIA LEOPOLD, *O. HOOD PHILLIPS AND JACKSON: CONSTITUTIONAL AND ADMINISTRATIVE*

Court of Justice has long played such a role in the European Union, and the proposed new Constitution for Europe does nothing to abrogate that role.³⁶³ British commentators on the new Devolution Acts, which shift some aspects of domestic governance from Westminster to Scotland, Wales, and Northern Ireland, have widely assumed that dividing power in this way will necessarily require British courts to enforce the division through judicial review.³⁶⁴ Other federal systems likewise provide for judicial review in enforcing the federal balance,³⁶⁵ and some foreign commentators even include a role for a court as part of the basic definition of a federal system. The European jurist Koen Lenaerts, for example, has stated that "Federalism is present whenever a divided sovereign is guaranteed by a national or supranational constitution *and* *unimpired by the supreme court of the common legal order.*"³⁶⁶

These examples should be considered with caution: The ubiquitous risks of cross-national comparisons are often at their maximum when we consider questions of structure.³⁶⁷ The fact that these other

LAW 7 (8th ed. 2001) (British textbook, observing that judicial power to invalidate legislation "is comparatively rare ... except in federal states ... where some check is necessary to preserve the rights of the federation and its component members").

363. See, e.g., Case C-376/98, *Germany v. Parliament and Council (Tobacco Advertising)* 2000 E.C.R. I-8419 (European Court of Justice decision invalidating a Community directive banning advertising of tobacco products as outside Community "competence"). See generally J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2457 (1991) (describing the European Court of Justice's role in drawing the boundaries of the European Union's authority vis-à-vis the Member States); Young, *European Union*, *supra* note 96, at 1634-36, 1671-76 (same). The German Constitutional Court has likewise insisted on the right to police the boundary between the respective authorities of the EU and the German state. See *Brunner v. European Union Treaty*, BVerfGE 89, 155 (1993) *printed in translation in* [1994] 1 C.M.L.R. 57.

364. See, e.g., Paul Craig & Mark Walters, *The Courts, Devolution and Judicial Review*, 1999 PUB. LAW 274, 289 ("[A]ny division of legislative power will raise certain fundamental issues which must be resolved by the courts and which will shape the entire nature of that division of authority."); Timothy Jones, *Scottish Devolution and Demarcation Disputes*, 1997 PUB. LAW 283, 283 ("If powers are to be distributed between two legislatures (Edinburgh and Westminster), a legal line of demarcation must be drawn, which inevitably means litigation and a role for the courts.").

365. See, e.g., Daniel Halberstam, *Of Power and Responsibility: The Political Morality of Federal Systems*, 90 VA. L. REV. 731, 734, 756-59 (2004) (describing the role of constitutional courts in enforcing federalism in Germany).

366. See Koen Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 AM. J. COMP. L. 205, 263 (1990) (emphasis added).

367. See Halberstam, *Comparative Federalism*, *supra* note 269, at 213 (showing that compelling subnational units to enforce national law may promote or undermine subnational

systems have some form of judicial review for federalism questions, moreover, tells us little about how deferential that review is with respect to other political actors. George Bermann has observed, for example, that "the European Court of Justice has never taken the opportunity to define restrictively the Treaty's competence-conferring provisions, nor has it seriously questioned whether a Community law measure bears a sufficient connection to the internal market to justify its adoption" under the treaty.³⁶⁸ On the other hand, the same court has been quite aggressive in "adjusting" the legal framework to bolster European integration by announcing the direct effect and supremacy of Community law, and by establishing the liability of Member States for failure to implement Community directives.³⁶⁹ Whether these courts have chosen, as a matter of interpretive choice, to be deferential or not, the important point at present is that they have treated federalism questions as questions of law, subject to judicial resolution.

My own view is that many foreign discussions take the judicial review issue a little too much for granted; surely the American debate has taught us that a judicial role must be *defended*.³⁷⁰ The widespread embrace of judicial review by federal systems around the world, however, ought at least to shake the conventional wisdom in American academia that federalism disputes should be left entirely to politics. It suggests that this conventional wisdom may be shaped by many Americans' association of federalism with certain substantive evils, such as slavery and racism,³⁷¹ rather than by any universal truths concerning the institutional capacities of courts to deal with questions of government structure. Neither the

autonomy, depending on the surrounding institutional context); Jackson, *Narratives*, *supra* note 60, at 272-74.

368. George A. Bermann, *The Role of Law in the Functioning of Federal Systems*, in THE FEDERAL VISION, *supra* note 269, at 199-200.

369. As Professor Bermann points out, the reluctance of the ECJ to restrict the powers of the Community institutions, at the same time that the Court has been quite willing to *enhance* Community powers vis-à-vis the Member States, may be attributable to "the EU's great potential for effective political safeguards of federalism," such as the regular opportunities for the Member States' direct representatives to amend the relevant treaties. *See id.* at 203, 212.

370. *See* Young, *British Devolutionaries*, *supra* note 184 (criticizing British assumption that courts will necessarily take the primary role in enforcing allocation of power embodied in the Revolutionary Acts).

371. *See* Baker & Young, *supra* note 177, at 121-25, 143-49.

pro- nor the anti-judicial review position should be embraced uncritically.

The argument that courts should not enforce federalism principles has generally been part and parcel of the "double standard" in constitutional law that grew up after the Supreme Court's "switch in time" in 1937.³⁷² Just as the courts have been generally unwilling to enforce notions of economic substantive due process after 1937, so too they have been reluctant to enforce principles of federalism, such as limits on the national commerce power.³⁷³ This notion of a "double standard" has been criticized in general³⁷⁴ and with particular regard to federalism.³⁷⁵ The important point for present purposes, however, is that the double standard has *not* generally taken the form of a categorical rule that courts may not decide economic substantive due process or federalism cases.³⁷⁶ Rather, the courts have simply fashioned doctrines on the merits that defer in most cases to judgments by political actors.³⁷⁷

372. See, e.g., HENRY J. ABRAHAM, *FREEDOM AND THE COURT: CIVIL RIGHTS AND LIBERTIES IN THE UNITED STATES* 10 (4th ed. 1982) (describing "a double standard of judicial attitude, whereby governmental economic experimentation is accorded all but *carte blanche* by the courts, but alleged violations of individual civil rights are given meticulous judicial attention").

373. See Baker & Young, *supra* note 177, at 75-76 (noting that federalism principles have been linked with economic substantive due process in constitutional "exile" after 1937).

374. See, e.g., Laycock, *supra* note 179, at 267 ("[W]e should take the whole Constitution seriously. We cannot legitimately pick and choose the clauses we want enforced.").

375. See, e.g., Baker & Young, *supra* note 177, *passim* (arguing that none of the plausible rationales for a "double standard" justify a refusal to enforce federalism principles); A.E. Dick Howard, Garcia and the Values of Federalism: On the Need for a Recurrence to Fundamental Principles, 19 GA. L. REV. 789, 797 (1985) ("It is no less legitimate and proper for the Supreme Court to concern itself with assuring the health of federalism as it is for the Court to uphold individual liberties as such. In neither case is abdication of the Court's proper role consistent with the principles inhering in the Constitution.").

376. One possible exception is *Ferguson v. Skrupa*, 372 U.S. 726 (1963), in which Justice Black's majority opinion asserted that the Court had abandoned entirely "the use of the 'vague contours' of the Due Process Clause to nullify laws which a majority of the Court believed to be economically unwise ..."; such arguments should be "addressed to the legislature, not to us." *Id.* at 731 (footnote omitted). But Justice Harlan's separate concurrence, which simply stated that "this state measure bears a rational relation to a constitutionally permissible objective," *id.* at 733 (Harlan, J., concurring in the judgment), probably better states the governing law. The Court has continued to suggest that it is willing to assess economic regulation under the rational basis test, although it never strikes such legislation down. See, e.g., *Fitzgerald v. Racing Ass'n*, 539 U.S. 103 (2003).

377. See, e.g., *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313-15 (1993) (stating a particularly deferential version of the "rational basis" test).

B. Interpretive Choice

To say that courts should have a role is emphatically *not* to say that comparative institutional competence is irrelevant to issues of federalism. Rather, they remain highly relevant—even central—to the decisions that particular institutions make as to how to handle these issues. Institutions frequently decide, after all, to accord deference to other institutions in the decision of particular questions. Congress, for example, ordinarily has the power to draw some boundaries between state and federal authority by deciding when to preempt state law. It may decide, however, that an executive agency could perform this task better in certain circumstances and delegate its preemptive power to the agency.³⁷⁸ Likewise, courts may adopt highly deferential federalism doctrine based on the comparative institutional judgment that the boundary between state and national authority ordinarily ought to be drawn by the political process. The adoption of such doctrine does not obviate the court's obligation to render a decision, but the manner of decision incorporates substantial deference to other actors. The institutional capacities of courts and other actors in the system are critical to that judgment. Institutional choice thus folds into the *interpretive* choices required in making federalism doctrine.

This question, as Cass Sunstein and Adrian Vermeule have observed, is one "of institutional competence writ small. To the extent that interpretive authority over certain questions has been allocated to the courts ... there remains the question what interpretive rules courts should use in constitutional cases."³⁷⁹ My objective in this Article is not to formulate a comprehensive set of doctrinal recommendations on federalism questions, but rather to explore how the development of such doctrines should proceed.

378. See, e.g., *Symens v. Smithkline Beecham Corp.*, 152 F.3d 1050, 1053-54 (8th Cir. 1998) (finding that Congress implicitly delegated authority to the Department of Agriculture to preempt state laws on cattle vaccines). We might term these sorts of decisions provisional institutional choices because the delegations in question are subject to recall by the delegating institution. Congress, for example, can always reassume its control over preemption decisions notwithstanding its prior delegation to an executive agency. That, however, hardly makes these choices unimportant.

379. Sunstein & Vermeule, *Interpretation*, *supra* note 11, at 938.

Interpretive choice typically involves “the selection of one interpretive doctrine, from a group of candidate doctrines, in the service of a goal specified by a higher-level theory of interpretation.”³⁸⁰ For present purposes, however, that description must be qualified in three ways. First, choosing federalism doctrine does not truly involve “a choice among possible means to attain *stipulated ends*.”³⁸¹ We may agree on a very general end—preservation of some notion of balance between national and state authority—and yet have very different notions of what elements of that balance are actually important. In a companion article to this one,³⁸² for example, I distinguish between state “sovereignty,” defined as the unaccountability of state governmental institutions to federal actors and to their citizens, and state “autonomy,” by which I mean the state government’s right to make certain decisions and to perform certain functions for its citizens. These concepts overlap to some extent but differ widely in emphasis, and the choice of which sort of federalism “end” to pursue has important implications for doctrine. My view is that we ought to consider state autonomy more important, but the primary point for present purposes is that the ends of federalism doctrine are contested.

The second qualification is that we are not choosing one interpretive doctrine for federalism questions. As I have already discussed, issues of federalism arise in a vast array of different contexts, and it would be highly surprising if one interpretive doctrine could address them all. Attempting to fashion a global doctrinal solution to federalism problems at a particular point in time would also sacrifice one of the chief virtues of the common law method, which is the incremental development of principles to solve particular problems in particular circumstances. One can, I think, propose a set of more general doctrinal strategies to help guide the development of doctrine in particular contexts, and I have tried to do that elsewhere.³⁸³ I have space here only for an overview of how these strategies should be developed.

380. Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 76 (2000) [hereinafter Vermeule, *Interpretive Choice*].

381. *Id.* (emphasis added).

382. See Young, *Two Federalisms*, *supra* note 13, at 13-15.

383. See *id.* at 120-58.

Finally, interpretive choice generally presupposes that the *institutional* choice questions are settled. As Professor Vermeule points out, “[i]nterpretive choice is the *intra-institutional* parallel to Komesar’s conception of the allocation of responsibilities among institutions.”³⁸⁴ But the institutional question is not settled here; rather, I have argued that outside the setting of *ex ante* institutional design, courts must generally address institutional issues in the context of choosing particular doctrines that are more or less deferential to other institutional actors. As Professor Kramer has noted, “there is no single doctrine of judicial review [C]onstitutional law is filled with doctrines that require the Justices to defer in varying degrees to other decisionmakers acting in the realm of ordinary politics.”³⁸⁵ Even though I have ruled out wholesale judicial abdication of federalism issues to the political process, the comparative advantages and disadvantages of courts vis-à-vis other actors plays an important role in shaping federalism doctrine.

This is hardly a revolutionary insight. David Strauss noted years ago that “in deciding constitutional cases, the courts constantly consider institutional capacities and propensities [C]ourts create constitutional doctrine by taking into account *both* the principles and values reflected in the relevant constitutional provisions *and* institutional realities.”³⁸⁶ The use of institutional factors as tools to shape doctrine both enhances and constrains ordinary institutional analysis. The remainder of this Section considers two senses in which this is true. The first is that because we are no longer making a binary choice between institutions, judicial doctrine may be used to reinforce rather than supplant the political branches’ own institutional mechanisms for handling federalism issues. The second point is that although institutional analysts typically seem to assume that different institutions approaching the same problem will ask basically the same questions, judicial decision making is actually quite different from action by the political branches. In particular, courts’ obligation to decide cases according to *law* imposes important burdens of coherence on judicial action. Those

384. Vermeule, *Interpretive Choice*, *supra* note 380, at 91 (emphasis added).

385. Kramer, *Politics*, *supra* note 217, at 287.

386. David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 207 (1988).

burdens have played, and will continue to play, an important role in shaping federalism doctrine.

1. Collaborative Enforcement and Institutional Self-Dealing

Institutional analysis of the allocation of authority over federalism questions sometimes seems to proceed as if one institution or another will have sole authority over a particular sort of question. Either the courts are to “establish areas of state control that are to remain immune from federal regulation”³⁸⁷ or those questions must be “remit[ted] ... to politics.”³⁸⁸ Other applications of comparative institutional analysis often qualify this binary model, of course, but the qualifications often seem to assume that we are still simply allocating particular aspects of an issue to one institution or the other.³⁸⁹ I am suggesting here, however, that institutional analysis should primarily shape judicial doctrine, and doctrine is sufficiently flexible to open up a third possibility—that is, that one institution’s activity on a particular question might be tailored primarily to helping another institution decide that question in a sensible way.

What I have in mind is the notion, prominent in the constitutional theory of our Founders, that structural constraints on federal political actors ought generally to be *self-enforcing*. As I have observed elsewhere, Madison’s famous account of separation of powers and federalism in *Federalist 51* does not mention judicial review as an enforcement mechanism; rather, it depends primarily on the ambitions of the multifarious state and federal institutional actors to keep one another in check.³⁹⁰ “Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.”³⁹¹ The system is thus

387. Yoo, *Judicial Safeguards*, *supra* note 326, at 1312.

388. *United States v. Morrison*, 529 U.S. 598, 649 (2000) (Souter, J., dissenting).

389. Professor Komesar’s discussion of tort reform, for example, often seems to take this tack by suggesting that judicial decision making should predominate on issues with a particular distribution of information and decision costs, while political institutions should control on other issues. See KOMESAR, *supra* note 320, at 171-95. But he also occasionally qualifies that categorical view by noting techniques of shared responsibility, such as judicial narrowing constructions of legislative enactments. See *id.* at 193.

390. See THE FEDERALIST NO. 51, at 348-51 (James Madison) (J.E. Cooke ed., 1961); Young, *Two Cheers*, *supra* note 59, at 1353-54.

391. THE FEDERALIST NO. 51, at 349 (James Madison) (J.E. Cooke ed., 1961).

primarily intended to police *itself* through a "policy of supplying, by opposite and rival interests, the defect of better motives"³⁹² This does not mean that judicial enforcement is inappropriate; as *Federalist* 78 makes clear, the Framers expected some judicial role in boundary-enforcement.³⁹³ But it does suggest that courts were not envisioned as the *primary* line of defense.

At the same time, I want to insist that there are limits on the extent to which courts should rely on other political institutions to hold the federal structure in place. Much of the Framers' constitutional theory can be summed up in the rule that "foxes should not guard henhouses,"³⁹⁴ and yet the argument for exclusive reliance on the political safeguards of federalism ultimately asks Congress to restrain *itself*. It may be that Congress often *will* be sympathetic to state institutional interests; indeed, the limited efficacy of judicial review (and the course of our history) suggests that power will steadily shift from the states to the nation, even *with* judicial intervention, unless Congress (and the Executive) restrains itself most of the time. Basic concerns about institutional self-dealing, however, ought to counsel that no part of our government should be the ultimate judge of its own power in all instances.³⁹⁵ As Vicki Jackson has observed, "[j]udicial renunciation of continued review of federalism cases ... is likely to be destabilizing; telling any

392. *Id.*

393. See THE FEDERALIST NO. 78, at 524-25 (Alexander Hamilton) (J.E. Cooke ed., 1961); see also THE FEDERALIST NO. 39, at 252-54 (James Madison) (J.E. Cooke ed., 1961); RAKOVE, *supra* note 107, at 175-76.

394. See Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 446 (1989). A less homey version states that no man should be judge in his own case. See, e.g., *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (opinion of Chase, J.) (citing "a law that makes a man a Judge in his own cause" as an example of an act "contrary to the great first principles of the social compact," and insisting that "[i]t is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it").

395. See, e.g., 1 TRIBE, *supra* note 15, § 1-7, at 17:

[T]he continuing perception of many Americans over two centuries has been unshaken: ... [G]overnment officials cannot always be relied upon to behave voluntarily as the Constitution demands. Neither the effective maintenance of structural checks and balances, nor the adequate discharge of government's affirmative obligations, have been thought likely without some form of intervention from a point at least partially outside of ordinary majoritarian politics.

political body that its power vis-à-vis another political body is legally unchecked is not conducive to responsible action."³⁹⁶

The likelihood that nonjudicial political and institutional mechanisms will often function imperfectly suggests an intermediate role for courts—not as alternative decision makers, but as collaborators who sit to ensure that the essential checks and balances within the political branches remain in place. This is the basic idea of "process federalism."³⁹⁷ As I have developed elsewhere, I doubt that process-based doctrine is a complete answer to the problem of enforcing federalism.³⁹⁸ I do believe, however, that critics of the process approach have missed the vast potential that this sort of collaborative enforcement has for redressing some of the current imbalances in the system.³⁹⁹ If that potential is largely unrealized at present, it may be in part because the notion of process-based doctrine has not yet adequately been explored.

2. Judicial Decision Making and the Frankfurter Constraint

A second problem with institutional analysis is that it often seems to assume that the basic character of the decision to be made, once we choose the right institution to make it, does not vary according to the institution chosen.⁴⁰⁰ But courts, legislatures, executive officials, and markets decide questions quite differently due to the

396. Jackson, *Narratives*, *supra* note 60, at 281.

397. See generally Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341; Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1, 21-25 [hereinafter Young, *State Sovereign Immunity*].

398. See Young, *Two Cheers*, *supra* note 59, at 1390-91; Young, *Two Federalisms*, *supra* note 13, at 90.

399. See Young, *Two Federalisms*, *supra* note 13, at 121-28.

400. See, e.g., Timothy D. Lytton, *Lawsuits Against the Gun Industry: A Comparative Institutional Analysis*, 32 CONN. L. REV. 1247, 1266 (2000):

Judges have the power to make policy by ruling in ways that determine the outcome of litigation. Judges in lawsuits against the gun industry have frequently exercised this power by granting defense motions to dismiss and motions for summary judgment, thereby rejecting plaintiffs' policy proposals. Judges could, in future cases, rule in favor of plaintiffs, thereby supporting their policy proposals.

(footnote omitted). This assumption is somewhat more defensible—although still questionable—in contexts like tort law, where judges have independent common lawmaking powers.

ways that they are constituted and the constraints imposed by their institutional roles. To assume that when we commit a given problem to a court rather than a legislature, the court will nevertheless ask the same question that the legislature would ask, is to disregard many of the rich differences between institutions that lie at the heart of institutional choice. Choosing who decides often fundamentally affects what question will be decided.

A crucial characteristic of *judicial* decision making—as opposed to executive or legislative action—is that courts must make decisions according to *law*.⁴⁰¹ We all know that courts make policy and value choices, but for most it is crucial that courts do *not* have the same entitlement to forthrightly choose policy and value as a legislature might. Rather, the value and policy choices that courts make arise from the inevitable indeterminacies in the law that courts must apply.⁴⁰² Ideally those choices are themselves grounded in the applicable legal materials, broadly construed.⁴⁰³ Failing that, they are at least constrained in scope by those legal materials.⁴⁰⁴ One can, of course, argue endlessly about the nature of the difference between judicial and legislative decisions. But most would agree that courts are more constrained in the sorts of choices they can make than legislative or executive actors.⁴⁰⁵

This aspect of judicial decision making imposes two strong constraints on interpretive choice. The first is to privilege constitutional text and, to a lesser extent, history over other more functional or consequentialist sources of doctrine. Part II argued that neither text nor history can provide many determinate answers to federalism questions. Nonetheless, sometimes they *do* provide clear

401. See, e.g., Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 373 (1978) (observing that “adjudication cannot function without some standard of decision”).

402. See, e.g., H.L.A. HART, *THE CONCEPT OF LAW* 128 (1961).

403. See, e.g., Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1060 (1975) (arguing that where the directly applicable legal materials fail to determine an answer, judges should return to the more basic principles and policies of the law).

404. See, e.g., HANS Kelsen, *PURE THEORY OF LAW* 351-52 (Max Knight trans., 1967) (1960) (arguing that “the law to be applied constitutes only a frame within which several applications are possible” and that “there is no [legal] criterion by which one possibility within the frame is preferable to another”).

405. They may be *less* constrained in other respects. Individual legislators, of course, are highly constrained by the need to convince a majority of their colleagues and the procedural hurdles to lawmaking. In this respect, they can only envy the splendid isolation and broad remedial flexibility accorded to the single federal trial judge.

answers: The text clearly guarantees, for example, each state the right to elect two senators absent some fundamental change in the structure.⁴⁰⁶ Few theories of constitutional interpretation allow departures when the text speaks clearly,⁴⁰⁷ and most also consider the historical understanding of that text to be relevant in some way.⁴⁰⁸ There will thus be some instances in which clear text and/or history dictate particular doctrinal outcomes, regardless of institutional factors.

The second and probably more important constraint is that judicial decision making must be coherent in a way that decisions by the political branches need not always be. Professor Lessig has observed that "[w]hatever else defines a successful judicial system, one dimension of its success is its ability to deliver consistent rulings in cases that appear to be the same."⁴⁰⁹ Consistency is central to the legitimacy of the judicial role, as Lessig explains:

To the extent that results of a particular rule appear consistent, it is easier for the legal culture to view this rule as properly judicial, and its results as properly judicial To the extent, however, that the results appear inconsistent, this pedigree gets questioned; it becomes easier for observers to view these results as determined, or influenced, by factors external to the rule—in particular, factors considered political.⁴¹⁰

406. See U.S. CONST. art. I, § 3 ("The Senate ... shall be composed of two Senators from each State"); U.S. CONST. art. V ("[N]o State, without its Consent, shall be deprived of its equal Suffrage in the Senate."). I set to one side the more difficult question whether the requisite change would require something other than an ordinary amendment. See 1 ACKERMAN, *supra* note 311, at 79-88.

407. See, e.g., Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1195 (1987) ("Arguments from text play a universally accepted role in constitutional debate Where the text speaks clearly and unambiguously ... its plain meaning is dispositive.").

408. See, e.g., Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 614-20 (1999) (arguing that some version of originalism has become widely accepted throughout the community of constitutional lawyers); Jack N. Rakove, *Fidelity Through History (Or to It)*, 65 FORDHAM L. REV. 1587, 1592 n.14 (1997) ("[I]n truth, the turn to originalism seems so general that citation is almost beside the point.").

409. Lessig, *Translating Federalism*, *supra* note 74, at 170-71; cf. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959) ("[T]he main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved.").

410. Lessig, *Translating Federalism*, *supra* note 74, at 174.

This phenomenon gives rise to what Lessig calls “the Frankfurter constraint”: “[A] rule is an inferior rule if, in its application, it appears to be political, in the sense of appearing to allow extra-legal factors to control its application.”⁴¹¹ Because we can expect the Court to try to minimize the political costs that arise when its results are perceived to be political, the Court will—and should—move away from rules that are not susceptible to determinate application.⁴¹²

The “Frankfurter constraint” derives its name from Felix Frankfurter’s analysis of Commerce Clause decisions in the first part of the nineteenth century, which emphasized the Court’s desire to avoid the appearance of “judicial policy-making.”⁴¹³ This constraint plays a crucial role with respect to contemporary doctrine. Both the majority opinion in *Garcia* and Justice Souter’s dissents in *Lopez* and *Morrison*, for example, claimed that the Court should defer to the political branches on federalism questions because such questions cannot be resolved in a sufficiently determinate, law-like way.⁴¹⁴ Justice Souter has warned of “the portent of incoherence” hanging over any attempt to develop doctrinal limits on the commerce power⁴¹⁵ and explicitly invoked the Court’s painful institutional memories of the *Lochner* period.⁴¹⁶

411. *Id.*

412. *Id.* at 174-75.

413. See FELIX FRANKFURTER, *THE COMMERCE CLAUSE: UNDER MARSHALL, TANEY AND WAITE* 54 (1937); see also Lessig, *Translating Federalism*, *supra* note 74, at 174 n.142 (invoking Frankfurter’s analysis).

414. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985) (complaining that prior doctrine, which tried to protect “traditional” state functions “inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes”); *United States v. Lopez*, 514 U.S. 549, 603-04 (1995) (Souter, J., dissenting) (stressing the Court’s tradition of deference to Congress in Commerce Clause cases, as well as the judiciary’s comparative weakness as a finder of facts); *United States v. Morrison*, 529 U.S. 598, 628 (2000) (Souter, J., dissenting) (same); see also *id.* at 656 (Breyer, J., dissenting) (emphasizing “the difficulty of finding a workable judicial Commerce Clause touchstone—a set of comprehensible interpretive rules that courts might use to impose some meaningful limit, but not too great a limit, upon the scope of the legislative authority that the Commerce Clause delegates to Congress”).

415. *Morrison*, 529 U.S. at 647 (Souter, J., dissenting).

416. See *Lopez*, 514 U.S. at 611 (Souter, J., dissenting). Specifically, Justice Souter stated: And here once again history raises its objections that the Court’s previous essays in overriding congressional policy choices under the Commerce Clause were ultimately seen to suffer two fatal weaknesses: when dealing with Acts of

These concerns are serious. They do not, in my view, justify total judicial withdrawal from the field, but they do suggest that the Frankfurter constraint should have a powerful influence on the shape of doctrine. My companion piece to this Article is thus centrally concerned with uncovering the characteristics of federalism doctrine in the pre-1937 period that caused that doctrine to fail the Frankfurter test.⁴¹⁷ That experience in turn suggests directions that contemporary doctrine might pursue in order to avoid similar problems in the future.

3. *Judicial Competence and Compensating Adjustments*

One might accept that courts should decide federalism cases and still deny that they should undertake to use those cases to make compensating adjustments in the federal structure. That appears to be the position of Professor Vermeule, who points out that “the ubiquity of compensating adjustments does not entail that any particular constitutional actor should attempt to supply such adjustments, least of all judges deciding constitutional cases.”⁴¹⁸ He suggests that “[t]he legislative process is better suited than the litigation process to forestall unintended consequences and to identify compensating adjustments on margins remote from the questions at hand in particular cases.” As a result, “the common-law judges should focus solely on the local effects of the rules they adopt.”⁴¹⁹ “Despite its apparent modesty,” Vermeule argues, the compensating adjustment notion “is a counsel of perfection, one that

Congress ... nothing in the Clause compelled the judicial activism, and nothing about the judiciary as an institution made it a superior source of policy on the subject Congress dealt with. There is no reason to expect the lesson would be different another time.

Id. Academics have been equally quick to cry “*Lochner!*” For instance, one scholar has noted: The assumption that *Lochner* was wrong—that courts should not quash state or federal legislative judgments about social and economic regulation—was bedrock in our legal and political culture from 1937 to 1995. Since 1995, the Supreme Court has rejected that assumption. In effect, a bare majority of the Supreme Court seeks to reverse six decades of settled federalism jurisprudence.

See Law, *In the Name of Federalism*, *supra* note 10, at 369-70 (footnote omitted).

417. See Young, *Two Federalisms*, *supra* note 13, at 91-122.

418. Vermeule, *Second-Best*, *supra* note 62, at 422.

419. *Id.* at 435.

assumes a heroic judicial capacity to identify the global effects of particular institutional innovations."⁴²⁰

Far be it for a Burkean to urge any "counsel of perfection",⁴²¹ indeed, Professor Vermeule and I have joined in criticizing holistic approaches to constitutional interpretation that require judges to articulate and evaluate broad readings that cut across multiple provisions.⁴²² Vermeule is certainly right to the extent that courts should be cautious and aware of their institutional limitations when undertaking compensating adjustments, and that the system should rely on a variety of institutions—not just courts—to make such adjustments. The case for totally excluding judges from this function, however, is not proven. For one thing, Vermeule at times seems to romanticize the legislature's own capacities for rational deliberation and global evaluation of consequences.⁴²³ Furthermore, courts do have certain institutional advantages in this regard, such as the ability to evaluate the effects of assertions of federal power after the fact, rather than abstractly and prospectively as a legislature must do.⁴²⁴ If no institution has a monopoly of institutional advantages, we may do better with a mix of institutions engaged in the process of adjustment. I have already suggested that the most successful judicial interventions are likely to be those which encourage the political branches to do their own adjusting, rather than judge-made doctrines imposing substantive limits on national power of their own force.

Professor Vermeule might respond that any opening for judicial review may well have perverse effects,⁴²⁵ and that rather than

420. *Id.* at 436.

421. See, e.g., Young, *Rediscovering Conservatism*, *supra* note 68, at 664 (observing that Burkean constitutionalism is grounded in a critique of excessive faith in reason).

422. See Vermeule & Young, *supra* note 77, at 739-59 (criticizing Akhil Amar's theory of "intratextualism" on this ground).

423. In fairness, Professor Vermeule has also done some of the most interesting work on improving the capacity of legislatures to consider constitutional issues. See Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L. J. 1277 (2001).

424. See, e.g., BICKEL, *supra* note 361, at 26 (observing that "courts are concerned with the flesh and blood of an actual case," which "provides an extremely salutary proving ground for all abstractions").

425. For an example of a possible perverse effect, compare Adrian Vermeule, *Does Commerce Clause Review Have Perverse Effects?*, 46 VILL. L. REV. 1325, 1333-37 (2001) (noting that, under *Lopez*, the Court permits regulation of noncommercial activity where such regulation is part of a "comprehensive scheme" of federal regulation, and suggesting that

risking them courts should refrain from compensating adjustments entirely. At least when courts adjust in the direction of limiting national power, however, they seem unlikely to *overcompensate*; as I have already discussed,⁴²⁶ federal courts are staffed by federal officials whose bias toward national power has been evident for two centuries. Moreover, at least some of the Rehnquist Court's adjustments have respected James Bradley Thayer's admonition to intervene only in cases of "clear mistake."⁴²⁷ *Lopez's* restriction of the Commerce Clause, for instance, was a case in which the courts could have refused to intervene only by abdicating *any* enforcement role.⁴²⁸

More importantly, it is not clear that courts *can* refrain from "adjusting" the federal balance. Federalism doctrine is typically made in cases where the courts are asked to enforce an extension of national power. In *Lopez*, the federal courts were asked to enforce a federal statute that went further than any statute that the courts had previously upheld under the Commerce Clause.⁴²⁹ In *Seminole Tribe* and *Printz*, the courts were asked to enforce congressional innovations—abrogation of state sovereign immunity under the Article I powers and mandatory enforcement of federal law by state officials, respectively—that had few clear precedents in American practice. Either of the options available to the Court—enforcing the extension of federal power, or blocking it—is an adjustment to the federal scheme.⁴³⁰

Lopez will therefore encourage Congress to draft broader regulatory schemes to the ultimate detriment of the states), with Young, *Two Cheers*, *supra* note 59, at 1392-95 (arguing that Professor Vermeule overstates this risk).

426. See *supra* text accompanying notes 50-60.

427. James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893) (defining such a mistake as one "so clear that it is not open to rational question").

428. At oral argument in *Lopez*, Solicitor General Drew Days was asked to identify any form of regulation that would fall *outside* the Commerce Clause if the Gun Free School Zones Act were upheld, and he was unable to think of an example. *United States v. Lopez*, 514 U.S. 549, 600 (1995) (Thomas, J., concurring) ("When asked at oral argument if there were *any* limits to the Commerce Clause, the Government was at a loss for words.").

429. See, e.g., Brief for Respondents at 13-18, *Ashcroft v. Raich*, *cert. granted*, 125 S. Ct. 491 (2004) (No. 03-1454) (demonstrating that even *Wickard v. Filburn* involved commercial activity as defined in *Lopez*).

430. Cf. BICKEL, *supra* note 361, at 69-72 (noting that Supreme Court decisions upholding laws against constitutional challenge tend to validate or legitimize those laws).

It is open to the courts in such a case, of course, to defer to the political branches on the question of which adjustment is more appropriate. But Congress has one particularly salient institutional drawback in this context: It is acting as the judge of its own power. That hardly means that the national political process cannot be trusted to protect federalism in some instances; I have already argued that federalism doctrine should often rely on and try to enhance such "political safeguards." But complete deference to any institution's judgments about the scope of its own powers is rare in our system. Moreover, when a court imposes a limit on national power, it will often be deferring to a different set of political actors—that is, political actors at the state level. The Court in *Printz*, for example, chose to defer to a local (and elected) sheriff's decision about enforcement priorities rather than Congress's.

It is true that when the Court limits Congress, it is also judging the extent of its *own* power of judicial review. But at the same time it is limiting the power of the national government of which it is a part, and in a more direct way its own power to enforce federal law.⁴³¹ At any given time, in any given doctrinal context, the greater risk may lie with either congressional or judicial aggrandizement. This suggests that judge-made doctrine should perhaps be more deferential in contexts where the Court's powers trade off directly with those of Congress,⁴³² and that the courts should prefer collaborative doctrines that do not exclude Congress altogether. But the basic point is simply that the meaning of judicial restraint in this context is more complex than is sometimes acknowledged.

The last point is the Burkean one that the courts have been making compensating adjustments in the realm of federalism for a very long time. The focus of most constitutional lawyers on the Commerce Clause cases obscures the many other areas—abstention doctrines, choice of law, the dormant Commerce Clause, preemption doctrine—where judicial innovation has been far less controversial. Although each doctrine has its critics, excluding the courts from

431. See, e.g., Young, *Judicial Activism*, *supra* note 146, at 1154-57 (developing the argument that the state sovereign immunity cases limit the powers of the federal courts to impose particular remedies).

432. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 516-20, 527-29 (1997) (considering the respective powers of the Court and Congress to interpret the Fourteenth Amendment).

adjusting federalism would be a radical change, and as such it should bear a heavy burden of justification. My proposal here is that we be more explicit about making compensating adjustments, but the principle itself is hardly new.

C. Underlying Values

A final—and somewhat obvious—component of federalism doctrine is the underlying functional values that federalism has traditionally been thought to serve. Part II argued that fidelity to the Constitution requires enforcement of federalism whether or not we think it is good, useful, or otherwise normatively attractive.⁴³³ But the structural notion of federalism embedded in the Constitution is sufficiently open-ended to allow considerable flexibility in the development of doctrine, and to the extent that is true it makes sense to promote the most normatively attractive version of federalism that we can achieve.⁴³⁴ As Ronald Dworkin might say, we should develop doctrine in such a way as to show federalism in its “best light.”⁴³⁵ That requires attention to federalism’s underlying values.

A substantial literature catalogs the values associated with state and national action, and I have no intention of replicating it here.⁴³⁶ The virtues associated with state autonomy fall into two primary groups. The first concerns the policy outputs of federal systems: Through experimentation and inter-jurisdictional competition, federal systems are said to produce “better” policies. Where citizens fail to agree about what “better” means, and where contending positions are concentrated geographically, federal systems can at least satisfy a greater proportion of citizen preferences than can a unitary government.⁴³⁷ The second set of values focuses instead on

433. See *supra* notes 100-03 and accompanying text.

434. Likewise, we would expect judges convinced that federalism is *not* normatively attractive to develop a much less robust set of doctrines to enforce it.

435. RONALD DWORKIN, *LAW'S EMPIRE* 226 (1986).

436. See, e.g., SHAPIRO, *supra* note 229; Friedman, *supra* note 102.

437. See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (stressing the value of state experimentation); McConnell, *Federalism*, *supra* note 102, at 1492-96 (demonstrating how federalism maximizes the satisfaction of diverse citizen preferences).

the relation of federalism to the political process itself, emphasizing opportunities for citizen participation at the state level, the ability of multiple jurisdictions to foster political competition, and the function of state governments as intermediary institutions that can, on occasion, check tyrannical impulses at the center.⁴³⁸

National action may yield benefits that are, in many instances, mirror images of the virtues of state action. National policies are obviously better where uniformity is a prime virtue, and the national government may also enjoy advantages of administrative efficiency and the concentration of expertise.⁴³⁹ Similarly, national action may overcome collective action problems, such as externalities, spillover effects, and races to the bottom, that plague action by individual state governments.⁴⁴⁰ Finally, ever since Madison's argument in *Federalist 10*,⁴⁴¹ national action has been thought to mitigate the problem of faction in smaller political communities and, in consequence, to provide a good vehicle for the protection of individual rights.

Federalism's ability to realize each of these virtues—on both sides of the scale—in practice is vigorously contested,⁴⁴² but I want to bracket those disputes here. The more interesting question for present purposes is how these values are translated into doctrine. Some commentators have suggested that they should translate fairly directly. Rather than draw formal limits to federal legislative power, for example, courts should simply invalidate national measures that seem unlikely to capture any of the benefits associated with centralized action. Donald Regan has thus argued that “in thinking about whether the federal government has the power to do something or other, we should ask what special reason there is for

438. See, e.g., NAGEL, *supra* note 16, at 66 (viewing states as intermediary institutions checking national authority); Merritt, *supra* note 346, at 7-8 (citing the value of participation and accountability); Young, *Dark Side*, *supra* note 330, at 1284-91 (identifying different ways in which federalism protects liberty).

439. See SHAPIRO, *supra* note 229, at 131-33.

440. See *id.* at 132-33.

441. THE FEDERALIST NO. 10, at 63-69 (James Madison) (J.E. Cooke ed., 1961).

442. See, e.g., Rubin & Feeley, *supra* note 100, at 908-09 (arguing that virtually all of these federalist values can be captured by a policy decision to decentralize government, and that federalism's constitutional entrenchment of decentralization is unnecessary and unwise).

the federal government to have that power. What reason is there to think the states are incapable or untrustworthy?"⁴⁴³

We might call this approach "direct value-application," and I doubt that it is an appropriate role for courts. As I have discussed, courts are bound by the "Frankfurter constraint": Doctrine must be sufficiently determinate to differentiate what judges do from simple policymaking.⁴⁴⁴ For all its virtues in conforming doctrine to the reasons we care about federalism in the first place, I doubt that direct value-application can pass this test.

This is true for at least two reasons. First, there are a lot of different values in play here. That makes direct value-application readily subject to manipulation by judges bent on reaching a particular result. As in Judge Leventhal's classic criticism of the resort to legislative history, relying on the values associated with state and national action may be like "looking over a crowd and picking out your friends."⁴⁴⁵ Although the values of federalism may not point in different directions in all cases, in most situations any lawyer who cannot invoke one or more of the values I have discussed on either side of a question just is not trying.

Even putting deliberate manipulation aside, it is hard to differentiate the considerations involved in deciding whether national action is necessary to avoid a collective action problem, for example, from the policy judgments ordinarily reserved to legislators. Other questions, like the degree of uniformity required in addressing a particular problem, or the relative prevalence of factional "special interest" politics at state and national levels on a given issue, likewise seem more legislative than judicial in nature. If the experience of the *Lochner* era Court teaches anything, it is that these

443. Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554, 557 (1995); see also Ann Althouse, *Enforcing Federalism After United States v. Lopez*, 38 ARIZ. L. REV. 793, 817 (1996) (arguing for a "jurisprudence that looks deeply into why it is good for some matters to be governed by a uniform federal standard, why it is good for some things to remain under the control of various states, and what effect these choices will have on the federal courts"); Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 826-27 (1996) (making a similar suggestion).

444. See *supra* notes 413-17 and accompanying text.

445. Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (quoting a conversation with Harold Leventhal).

sorts of judgments will frequently be perceived as political rather than legal, and that the legitimacy of the courts may suffer as a result. That dilemma is the essence of the Frankfurter constraint.

My own view is that the values associated with federalism should be consulted in making broad judgments about the *ends* of federalism doctrine, but that they are insufficiently determinate to be much help in fashioning particular doctrines. For example, I argue in a companion article that the current Court confronts a choice between doctrines that promote state "sovereignty," defined as the inviolability of state institutions and their unaccountability for violations of federal law, and those that emphasize state "autonomy," that is, the freedom of states to make their own policy judgments in meeting the needs of their citizens. One may see this distinction most starkly in the contrast between state sovereign immunity cases, in which the Rehnquist Court has aggressively fashioned doctrine to protect the states,⁴⁴⁶ and cases concerning the preemption of state law by federal statutes and regulations, in which the current Court has been much less solicitous of state prerogatives.⁴⁴⁷ All of the values associated with state governance turn on the retention of significant regulatory responsibilities by state governments (state *autonomy*), while the link between those values and state inviolability or sovereignty is considerably more difficult to draw.⁴⁴⁸ These underlying values can thus help us make general choices of direction even where it is difficult to translate them into specific doctrinal rules.

To say this, of course, is hardly to offer a comprehensive recipe for how doctrinal elaboration should proceed. Any such recipe, however,

446. See, e.g., *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002) (holding that Congress may not abrogate state sovereign immunity in suits before federal administrative agencies); *Alden v. Maine*, 527 U.S. 706 (1999) (holding that Congress may not abrogate state sovereign immunity with respect to suits in state courts); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (holding that Congress cannot abrogate state sovereign immunity when it acts under its Article I powers).

447. See, e.g., *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 124 S. Ct. 1756 (2004) (finding that the Federal Clean Air Act preempted a state air quality control standard); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (holding that federal labeling requirements for tobacco products preempt state advertising restrictions); *Geier v. Am. Honda Motor Corp.*, 529 U.S. 861 (2000) (holding that federal regulations preempted common law tort suits regarding the lack of air bags in automobiles).

448. See Young, *Two Federalisms*, *supra* note 13, at 13, 51-58.

would be inconsistent with the basic notion that doctrinal development should be incremental, particularistic, and responsive to the circumstances of individual cases. The answer to the difficulties that courts and commentators have encountered in producing a single coherent theory of federalism is not necessarily to keep trying to come up with a better theory; instead, we may well be better off developing approaches to judging structural cases that do not depend on such an overarching theory. More can no doubt be said to guide these approaches, but that inquiry is probably best pursued at a less abstract level than my discussion here.

D. Some Examples

Notwithstanding its title, this Article has had little to say about specific doctrines that courts should construct and employ to enforce the federal balance. My primary purpose has been to explore and defend the theoretical presuppositions that have undergirded my doctrinal work elsewhere. A companion piece to this one lays out an overview of different doctrinal models of federalism that courts might pursue.⁴⁴⁹ But some examples seem necessary to illustrate the theoretical arguments that I have pursued here. This last Section thus explores the implications of my discussion of compensating adjustments in two areas: the preemption of state law by federal statutes, and the interpretation of the Necessary and Proper Clause as an adjunct to Congress's commerce and spending powers.

1. Preemption

I have argued for some years now that the most important problem of federalism doctrine is how to limit federal preemption of state law.⁴⁵⁰ And I have urged that the best way to do that is by expanding the scope and force of the "presumption against preemption" as a rule of statutory construction. That rule, however, is a normative rule of construction, which means it cannot be grounded in some descriptive judgment about Congress's intent in enacting

449. See Young, *Two Federalisms*, *supra* note 13; Young, *State Sovereign Immunity*, *supra* note 397, at 39-42.

450. See, e.g., Young, *Sky Falling*, *supra* note 292.

the relevant statute. Even worse, Caleb Nelson has made a strong argument that any anti-preemption canon is inconsistent with the original understanding of the Supremacy Clause.⁴⁵¹ So how does one justify a strong anti-preemption canon?

The analysis set forth here, I think, provides a theory that explains why courts should be able to impose an anti-preemption canon as a compensating adjustment for failure of the doctrine of enumerated powers to protect state autonomy.⁴⁵² Indeed, there is good evidence that the canon evolved in just this way. Around the turn of the twentieth century, courts generally construed the preemptive force of federal statutes broadly. As Stephen Gardbaum has shown, this broad doctrine of preemption did not threaten state autonomy so long as the scope of Congress's powers was narrow; once the courts began to interpret the Commerce Clause more broadly in the 1930s, however, preservation of state regulatory autonomy required a correspondingly narrower doctrine of preemption.⁴⁵³ The seminal cases recognizing the "presumption against preemption" thus appeared in the 1930s and 1940s.⁴⁵⁴ A theory of compensating adjustments thus explains what the Court was doing during this period, defends the canon against Professor Nelson's charge of unconstitutionality, and possibly justifies stronger (or at least more consistent) enforcement of the canon in light of the continued erosion of state autonomy.⁴⁵⁵

My discussion may also shed light on other aspects of the preemption problem. The analysis of interpretive choice in Section B points to why courts should favor "soft," process-based rules—like the presumption against preemption—over substantive ones like a renewed effort to limit the Commerce Clause.⁴⁵⁶ Rules of statutory

451. See Caleb Nelson, *Preemption*, 86 VA. L. REV. 225 (2000).

452. I do not propose to refute Professor Nelson's argument in the brief discussion here. Rather, my purpose is to sketch the outlines of a counterargument as an illustration for which a theory of compensating adjustments might be good.

453. See Gardbaum, *Preemption*, *supra* note 87, at 806-07.

454. See, e.g., *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947); *Mintz v. Baldwin*, 289 U.S. 346 (1933).

455. See Young, *Two Federalisms*, *supra* note 13, at 130-34 (arguing for stronger limits on federal preemption of state law).

456. Critics of the presumption against preemption who nonetheless care about state autonomy have suggested that federal power should be limited through constrictive interpretations of the Commerce Clause, rather than statutory construction rules. See, e.g.,

construction are a form of collaborative enforcement: They employ judicial doctrine not to limit federal authority in its own right, but rather to enhance the political and procedural safeguards that safeguard state regulatory autonomy.⁴⁵⁷ Because such rules are "soft" in the sense of being overridable by a sufficiently determined Congress, they lower the stakes when the courts move to check legislative exercises of national authority.⁴⁵⁸ And a focus on statutory construction may help courts respect the Frankfurter constraint, because statutory construction tends to be more constrained than either freewheeling inquiries into whether an activity is commercial or noncommercial, or the creation of doctrines wholesale like the anti-commandeering doctrine.

Finally, the preemption example illustrates the ways in which federalism's underlying values may guide courts in choosing which kinds of federalism doctrine to emphasize, even if courts are unwilling to undertake direct value-application of the kind involved in subsidiarity-type tests. I have argued elsewhere that preemption doctrine is uniquely significant for values like state-by-state experimentation, regulatory diversity, and governmental participation.⁴⁵⁹ Preemption doctrine, after all, goes to whether state governments actually have the opportunity to provide beneficial regulation for their citizens; there can be no experimentation or policy diversity, and little point to citizen participation, if such opportunities are supplanted by federal policy. A strengthened presumption against preemption thus provides an excellent example of the sort of adjustment that courts ought to undertake in response to the decline of state autonomy.

2. *Necessary and Proper*

A second problem, concerning how broadly to interpret Congress's "necessary and proper" authority in conjunction with the Spending and Commerce Clauses, illustrates both the potential and the

Nelson, *supra* note 451, at 303-05.

457. See Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549 (2000) (discussing the role of clear statement rules).

458. See Young, *Two Federalisms*, *supra* note 13, at 16-17.

459. See *id.* at 130-31.

limitations of my approach. Last term, in *Sabri v. United States*,⁴⁶⁰ the Supreme Court upheld the federal program bribery statute, which makes it a crime for any employee of any entity accepting federal money to accept a bribe.⁴⁶¹ The Court rested this result on Congress's "necessary and proper" authority to implement the Spending Clause; the regulatory thrust of the bribery statute, the Court said, was necessary and proper to ensure that federal funds were properly used.⁴⁶² Justice Souter's majority opinion refused, moreover, to impose any requirement that the prosecution show that the bribe adversely impacted the federal spending program.⁴⁶³ In other words, the majority was uninterested in requiring anything approaching a showing of actual necessity for the regulation.

In the present term, the Court must decide *Ashcroft v. Raich*,⁴⁶⁴ which asks whether the Commerce Clause permits Congress to regulate, pursuant to the Controlled Substances Act, the possession of homegrown marijuana for medical use.⁴⁶⁵ The medical patients in *Raich* produced and consumed marijuana under a California law that permitted such activities where authorized by a physician.⁴⁶⁶ It seems fairly clear that the possession itself is not commercial activity, and the question will be whether the Government may reach this activity as part of a comprehensive scheme to regulate the drug market.⁴⁶⁷ The Government has argued, for example, that the existence of legal uses for marijuana under state law undermines the enforcement of federal prohibitions on recreational use; anyone caught and prosecuted for such use, after all, may argue

460. 124 S. Ct. 1941 (2004).

461. 18 U.S.C. § 666(a)(2) (2000). For a comprehensive discussion of the bribery statute, see Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1 (2003).

462. *Sabri*, 124 S. Ct. at 1946.

463. *Id.* at 1945-46.

464. No. 03-1454, *argued* Oct. 31, 2004. The decision in *Raich* had not come down as this Article went to press in March 2005.

465. 21 U.S.C. § 801 *et seq.* (2000). The Ninth Circuit struck down the Act as applied to home-grown medicinal use. *Raich v. Ashcroft*, 352 F.3d 1222 (9th Cir. 2003), *cert. granted*, 124 S. Ct. 2909 (2004).

466. *Raich*, 352 F.3d at 1225-26.

467. See *United States v. Lopez*, 514 U.S. 549, 561 (1995) (suggesting that Congress may regulate non-commercial activity that is "an essential part of a larger regulation of economic activity").

that they possessed the marijuana for medicinal purposes.⁴⁶⁸ These sorts of comprehensive scheme arguments are “necessary and proper” arguments: The claim is that regulating non-commercial activity is necessary and proper to Congress’s regulation of interstate commerce in illicit drugs. The problem is that similar arguments may be used wholly to evade even the minimal restrictions imposed on the Commerce Clause in cases like *Lopez* and *Morrison*.⁴⁶⁹

Each of these cases raises two problems that illustrate the usefulness and the limits, respectively, of the approach I have developed here. The first is the problem of doctrinal change over time. In *McCulloch v. Maryland*, Chief Justice John Marshall articulated an extremely broad vision of the “necessary and proper” authority: “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.”⁴⁷⁰ Such a broad “necessary and proper” power made sense in 1819, when the underlying powers were narrow. In this sense, *McCulloch*’s doctrine is an example of a compensating adjustment designed to strengthen a weak central government against the much more well-established states.

Now that the underlying powers have become very broad, however, grafting onto those enumerated powers a toothless necessity requirement for *further* implied powers removes the limits entirely. Contemporary doctrine recognizes very few limits on either the spending or commerce powers.⁴⁷¹ Under those circumstances, tightening up on *McCulloch*’s test would seem to be a legitimate compensating adjustment. That sort of argument, in *Sabri*, would have justified some requirement that the Government show a nexus between the bribery charged under the federal statute and the disbursement of federal funds. And the same reasoning, in *Raich*, would support some meaningful scrutiny of the Government’s

468. See Petitioner’s Brief at 25-27, *Ashcroft v. Raich*, 124 S. Ct. 2909 (2004) (No. 03-1454).

469. See generally Brief of Constitutional Law Scholars as *Amici Curiae* in Support of Respondents at 22-26, *Ashcroft* (No. 03-1454). I was the principal author of this scholars’ brief.

470. 17 U.S. (4 Wheat.) 316, 421 (1819).

471. See, e.g., *South Dakota v. Dole*, 483 U.S. 203 (1987) (articulating a very persuasive test for imposing conditions on grants of federal funds to states).

argument that regulation of home-grown medicinal marijuana is necessary to support its valid restrictions on the commercial market.

When one turns to the problem of doctrinal construction, however, one can see how difficult it may be to make workable federalism doctrines. How should the Court tighten up its "necessary and proper" analysis? One implication of the interpretive choice discussion in Section B is that the doctrine should encourage Congress to police itself; the courts might thus rely on the same sort of process-type rules that I discussed in the context of preemption. But aside from some sort of "clear statement" rule, the Frankfurter constraint suggests that judicial review in this area can never go very far. It seems likely that there will always have to be substantial deference to the political branches on necessity, because the alternative is to have judges making open-ended policy judgments that are unlikely to be perceived as "law."

CONCLUSION

Our Constitution has proved remarkably resilient over the course of our history, adapting to radical changes in circumstances while other constitutional democracies have continually redrawn their constitutive documents. One reason for this resilience is that our Constitution is remarkably *unwritten*: The text sketches broad outlines, but leaves the details to be fleshed out in a more evolutionary manner over time by the legislative, executive, and judicial institutions to which the document gives life. Many scholars have remarked on the open-ended character of particular individual rights provisions,⁴⁷² but this is even more true of structure. For all that may lie at the heart of our institutional arrangements, both separation of powers and federalism have proven extraordinarily open to re-interpretation and re-implementation over the past two-and-a-quarter centuries.

Courts are hardly the only—or even the most important—actors in this story, but they have nonetheless played an important role. The common law method that arises out of case-by-case judging is,

472. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 13 (1980).

in many ways, uniquely well-suited for the evolutionary adaptation of structural principles in the absence of any agreed-upon global theory. In any case, I have insisted that structural principles like federalism are part of the law that courts must apply in cases that come before them, and that the courts' obligation of constitutional fidelity accordingly calls them to construct doctrines to protect and preserve the federal balance.

I have concentrated here on two elements of the judicial task in developing federalism doctrine. The balance between state and national authority is dynamic, and it continually diverges from the constitutional vision in one direction or another. The first element of the judicial task thus requires an assessment of the *direction* of slippage at any given point in our history. At some times, particularly in the early Republic, that divergence required the courts to shore up national authority; today, it seems more likely that the courts should focus on protecting the remaining autonomy of the states. In any event, courts need not develop a full-blown, comprehensive theory of federalism to determine a need for compensating adjustments in one direction or the other.

The second element requires the construction of particular doctrines to meet that need. Text and history may sometimes play an important role here, but I have suggested that in most cases their influence will be limited. More functional considerations, derived from the values associated with federalism and the comparative institutional competences of courts and other actors, will generally play a more salient role. In particular, courts should seek to reinforce the ability of the federal system to police itself, and they should try to maximize the determinacy of doctrine so as to differentiate their judgments from the policy-driven decisions of the political branches.

Much work remains to be done, of course, before we can arrive at a specific set of doctrinal solutions to the problems of federalism. The unusual thing about the federalism debate, however, is that the very propriety of seeking judicial answers to those problems has been contested for much of our history. One rarely sees similar disputes today, for example, over the propriety of doctrinal construction in First Amendment law. In some sense, then, my work here has been to try to move federalism up to the point where doctrinal

discussions in constitutional law usually begin. It is high time the debate moved forward.