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# FEDERALISM AND FORMALISM

Allison H. Eid\*

*Many commentators have criticized the Supreme Court's New Federalism decisions as "excessively formalistic." In this Article, Professor Eid argues that this "standard critique" is wrong on both a descriptive and normative level. Descriptively, she argues that the standard critique mistakenly downplays the extent to which the New Federalism decisions consider the values that federalism serves, and contends that they employ the same sort of formalism/functionalism blend that is found in the Court's separation of powers jurisprudence. Professor Eid then contends that the standard critique's normative prescription — a case-by-case balancing test that would weigh the federal interest against the burden on state sovereignty — will fail to protect the very federalism values the standard critique seeks to promote. According to Professor Eid, the Supreme Court, as a national institution, will have a tendency to overvalue the federal interest and undervalue the burden on state sovereignty, leading to an underenforcement of federalism norms.*

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## INTRODUCTION

A decade ago, the U.S. Supreme Court began to reinvigorate federalism principles<sup>1</sup> in a movement now known as the "New Federalism."<sup>2</sup> One of the most

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\* Associate Professor, University of Colorado School of Law. For their extremely helpful comments, I would like to thank Rick Collins, Troy Eid, Hiroshi Motomura, Bob Nagel, Dale Oesterle, Pierre Schlag, and Phil Weiser. Thanks also to Erik Cansler, Lisa Klein, and Tamara Loudon for their invaluable research assistance.

<sup>1</sup> Some commentators suggest that the New Federalism started with *New York v. United States*, 505 U.S. 144 (1992). See, e.g., ROBERT F. NAGEL, *THE IMPLOSION OF AMERICAN FEDERALISM* 35 (2001); Keith E. Whittington, *Taking What They Give Us: Explaining the Court's Federalism Offensive*, 51 DUKE L.J. 477, 504 (2001). Others point to *Gregory v. Ashcroft*, 501 U.S. 452 (1991). See, e.g., John Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1335 (1997). At least one Justice of the U.S. Supreme Court has placed it with *Gregory* as well. See Clarence Thomas, *Why Federalism Matters*, 48 DRAKE L. REV. 231, 235 (2000) (suggesting that "*Gregory* was the starting point for the Court's rejuvenation of protections for state sovereignty and for restrictions of the federal government's enumerated powers").

<sup>2</sup> I attribute the New Federalism phrase to Sai Prakash, who asked whether we were entering an era of "Brave New Federalism." Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 1957 (1993). Earlier commentators had used the term in reference to the Court's first — and relatively short-lived — attempt at reviving federalism principles in *National League of Cities v. Usery*, 426 U.S. 833 (1976), overruled by *Garcia*

persistent criticisms of the Court's New Federalism jurisprudence is that it is simply too "formalistic."<sup>3</sup> In other words, the Court has adopted — erroneously, in the minds of these commentators — an overly rigid, rule-based approach to federalism questions rather than a more flexible, functionalist approach that would fill out the contours of federalism doctrine on a case-by-case analysis. This excessively rigid approach to questions of federalism, the commentators continue, stems from the Court's overreliance on deduction from the text and structure of the Constitution and an underreliance on induction from the values that federalism serves. This criticism — the "standard critique" — has largely gone unanswered by the legal academy.<sup>4</sup>

This Article takes on the standard critique on both a descriptive and normative level. To test the standard critique's descriptive claims, it examines four of the standard critique's most frequent targets — the Tenth Amendment cases of *New York v. United States*<sup>5</sup> and *Printz v. United States*,<sup>6</sup> in the which the Court held that Congress cannot "commandeer" state officials into implementing a federal regulatory program, and the Commerce Clause cases of *United States v. Lopez*<sup>7</sup> and *United States v. Morrison*,<sup>8</sup> in which the Court held that Congress cannot regulate non-economic activity such as gun possession near a school and violence directed toward women. The Article concludes that, contrary to the standard critique's assertions, the Court's New Federalism jurisprudence — like most of the Court's separation of powers jurisprudence — is a blend of formalism and functionalism.

The Court has, of course, relied on deduction from constitutional text and historical materials from the framing, but so have the dissenters in the decisions.<sup>9</sup> More importantly, the Court has consistently backed up its formalist approach with an analysis of the values that federalism serves — a fact that the standard critique consistently downplays. For example, in *New York* and *Printz*, the Court concluded that "commandeering" violates the original design because, among other things, it

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*v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). See, e.g., Laurence H. Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977).

<sup>3</sup> See, e.g., Roderick M. Hills, Jr., *The Eleventh Amendment as Curb on Bureaucratic Power*, 53 STAN. L. REV. 1225, 1228–29 (2001) ("It is now a standard scholarly move to attack federalism jurisprudence as excessively 'formalistic.'").

<sup>4</sup> Professor Rick Hills, for example, appears to agree with the standard critique that the Court's decisions have been too formalistic, but he argues that there are pragmatic values served by the Court's outcomes. See Hills, *supra* note 3, at 1228–29; 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, 871 (1998).

<sup>5</sup> 505 U.S. 144 (1992).

<sup>6</sup> 521 U.S. 898 (1997).

<sup>7</sup> 514 U.S. 549 (1995).

<sup>8</sup> 529 U.S. 598 (2000).

<sup>9</sup> See *infra* notes 123–31 and accompanying text.

permits federal officials to take credit for creating a popular program while forcing state officials to take the heat for implementing it, in violation of federalism's "accountability" norm.<sup>10</sup> Similarly, in *Lopez* and *Morrison*, Congress's regulation of non-economic activities ran afoul of the Commerce Clause not simply because such activities might not constitute "commerce" (indeed, the Court specifically rejected Justice Thomas' suggestion that it go down this definitional path) but rather because to permit such regulation would leave nothing for the states to regulate, in violation of federalism's "laboratories of democracy" norm.<sup>11</sup> To use Professor Fred Schauer's terminology, the Court is engaging in "presumptive formalism," in which the rule is presumptively followed unless it conflicts in some egregious way with the values that underlie the rule.<sup>12</sup>

Nor has the Court been particularly rule-oriented in setting forth guidelines to inform future congressional lawmaking. To use Professor Cass Sunstein's terminology, the Court's New Federalism decisions have been far from maximalist.<sup>13</sup> In the Tenth Amendment sphere, the Court has stated that "commandeering" is off-limits, but it has left the definition of commandeering to further case development,<sup>14</sup> and most recently found that Congress had not "commandeered" state officials when it restricted their ability to share a driver's personal information without consent.<sup>15</sup> Similarly, the Court in the Commerce Clause arena has hinted that Congress cannot regulate "non-economic" activities, but it has left further definitional tasks to another day.<sup>16</sup> Indeed, while the Court has drawn the outer boundaries of congressional power, it has left Congress plenty of maneuvering room for regulation.

So why, then, has the standard critique had so much staying power? As an initial matter, "formalism" is often used as a derogatory term. Many in the legal academy disagree with the New Federalism decisions<sup>17</sup> and find them overly "formalistic" because — in the minds of these commentators — they are just plain wrong.

But there is also a certain intuitive appeal to the critique that helps to explain its longevity.<sup>18</sup> Indeed, any claim of *excessive* formalism requires a point of comparison. The standard critique implicitly employs as its point of reference the Court's federalism jurisprudence as it existed prior to the New Federalism. As

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<sup>10</sup> See *infra* notes 149–53 and accompanying text.

<sup>11</sup> See *infra* notes 154–59 and accompanying text.

<sup>12</sup> Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 547 (1988).

<sup>13</sup> CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 9 (1999).

<sup>14</sup> See *infra* notes 180–84 and accompanying text.

<sup>15</sup> See *Reno v. Condon*, 528 U.S. 141, 151 (2000).

<sup>16</sup> See *infra* notes 185–88 and accompanying text.

<sup>17</sup> See discussion *infra* notes 191–92.

<sup>18</sup> See *infra* notes 193–204 and accompanying text.

numerous commentators have noted, prior to the recent revival, there simply was no judicial oversight of Congress's federalism decisions. The fox (Congress) was guarding the henhouse (state sovereignty). It is not surprising, then, that the New Federalism jurisprudence would, at first glance, appear overly formalistic when compared to a "judge-free zone"; *any* judicial intervention of *any* degree would be.

But the standard critique is confusing *activism* — inserting law where it did not previously exist — with *formalism*.<sup>19</sup> Again, to use Professor Sunstein's terminology, the standard critique has a "baseline" problem.<sup>20</sup> The proper point of comparison is not the pre-New Federalism jurisprudence, but rather the Court's jurisprudence in other separation of powers areas, which, as noted above, is a mixture of formalism and functionalism. When viewed against these decisions, the New Federalism decisions seem to strike about the same balance.

Importantly, my dispute with the standard critique is more than a mere semantic one. Having misperceived the character of the Court's New Federalism decisions as overly formalistic, the standard critique goes on to make a normative prescription — namely, to propose a functional test for enforcement of federalism principles.<sup>21</sup> Although the formulations differ in the particulars, the theme is the same: The Court should consider the values that federalism serves and ask how a resolution in the case might serve those values. In other words, the standard critique would balance the interest served by the federal regulation against the incursion on state sovereignty.

This functional approach, I argue, is insufficiently protective of the very federalism values that the standard critique seeks to promote. The potential pitfall of any pragmatic balancing approach is that it may devolve simply into an imposition of the judge's personal policy preferences. This risk, however, is particularly great in the federalism context. First and foremost, the Court is a nationalist institution. It is, after all, the Supreme Court of the *United States*. By virtue of its nationalist scope, it will have a tendency to undervalue the incursion into state sovereignty. Indeed, it would be against its inherent nature not to. The balance, then, will be loaded in favor of the federal priority. In other words, under the standard critique's functional balancing test, the states may have simply traded one "fox" for another, more sly one.<sup>22</sup>

The standard critique's balancing approach also fails to give adequate direction to Congress. If the Court is intent on continuing its supervision of federalism — and there is every indication that it is — it must give Congress some idea of what

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<sup>19</sup> See *infra* notes 205–11 and accompanying text.

<sup>20</sup> Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 874 (1987).

<sup>21</sup> See *infra* notes 212–16 and accompanying text.

<sup>22</sup> The Court is, of course, acting counter to its nationalist tendencies in the decisions of the New Federalism, but this appears to be a historical aberration, rather than the rule. See *infra* notes 237–41 and accompanying text.

regulatory tools are at its disposal. A balancing test does not “cue” Congress (to use Professor Vicki Jackson’s terminology<sup>23</sup>) as well as a line. If there is any message to Congress in the New Federalism decisions, it is that it has broad authority to regulate, but it must do so through the right channels. A functional balancing test merely tells Congress that the Court reserves the right to re-do its balance.

Of course, formalism has its dangers as well.<sup>24</sup> The lines can be too harsh and unyielding; there is always the risk that there will be a misfit between a rule and the federalism values the rule is designed to serve. In other words, under any federalism regime with a formalist edge, the Court may sometimes err in holding a congressional exercise of power unconstitutional when in fact federalism objectives would be served by sustaining the regulation. I would argue, however, that this risk has simply not materialized with the New Federalism decisions. By using functionalism as a check on formalism, the Court has charted a modest course of federalism oversight that, so far, has reinvigorated federalism principles without hamstringing Congress. It has set the stage for a robust federalism to develop; the question is whether the nation will take up the challenge.

This Article proceeds in two parts. Part I examines the standard critique through the lenses of *New York*, *Printz*, *Lopez*, and *Morrison*. It then evaluates the claims of the standard critique using two criteria of formalism: rule-following and rule-making. It concludes by exploring the mistaken assumptions that underlie the critique and explain its longevity. Part II takes on the standard critique’s prescriptive agenda — the functional balancing test — and argues that a dose of formalism is necessary to adequately protect the values of federalism.

## I. THE STANDARD CRITIQUE

One of the most persistent and widespread criticisms of the Court’s New Federalism jurisprudence is that it is “too formalistic.”<sup>25</sup> One commentator recently

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<sup>23</sup> Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle*, 111 HARV. L. REV. 2180, 2226 (1998).

<sup>24</sup> See *infra* notes 277–87 and accompanying text.

<sup>25</sup> See, e.g., Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism: New York, Printz, and Yeskey*, 1998 SUP. CT. REV. 71 (“The jurisprudence of federalism has been bedecked with formalistic distinctions . . .”); Hills, *supra* note 3, at 1228–29; Alfred R. Light, *Conscripting State Law to Protect Volunteers: The Odd Formulation of Federalism in “Opt-Out” Preemption*, 10 SETON HALL J. SPORT L. 9, 55 (2000) (noting that the Supreme Court’s New Federalism decisions have “been rightly criticized as unduly categorical and ‘formalistic’”); Tom Stacy, *What’s Wrong with Lopez*, 44 U. KAN. L. REV. 243, 256 (1996) (noting the New Federalism’s “insensitive formalism”); Jennifer L. Benedict, Note, *United States v. Morrison: Progressive Legislation Is Down, But Not Out*, 33 U. TOL. L. REV. 411 (2002) (criticizing the Court’s “formalistic” approach to Commerce Clause jurisprudence); Note, *The Internal Affairs Doctrine: Theoretical Justifications and Tentative Explanations for its Continued Primacy*, 115 HARV. L. REV. 1480, 1498 (2002) (referring to the “formalist

summed up the standard critique as follows:

Musty formalism abounds [in the Court's New Federalism jurisprudence], with decisions turning on the "essential" attributes of sovereignty, cases carving out seemingly meaningless conceptual distinctions, and doctrine largely ignoring functional analysis. Modern scholars have . . . criticiz[ed] and sometimes even ridicul[ed] the Court for grounding its recent revival of federalism in transcendental nonsense.<sup>26</sup>

Indeed, as Professor Rick Hills has observed: "It is now a standard scholarly move to attack [the Supreme Court's recent] federalism jurisprudence as excessively 'formalistic.'"<sup>27</sup> Commentators of the standard critique may differ on the specifics; for example, they appear to disagree on the issue of just how problematic the Court's formalistic approach is, with descriptions ranging from simply "misguided"<sup>28</sup> to potentially "dangerous."<sup>29</sup> At bottom, however, they all seem to agree that the decisions are, on balance, excessively formalistic.<sup>30</sup>

This section examines the claims of excessive formalism put forward by the standard critique. First, it attempts to define the term "formalism" — no easy task to be sure. It then sets forth the arguments of three of the most prominent and thoughtful expositors of the standard critique, Professors Erwin Chemerinsky, Vicki Jackson, and Evan Caminker, and focuses on four of the critique's most frequent targets: the Tenth Amendment cases of *New York v. United States*<sup>31</sup> and *Printz v. United States*,<sup>32</sup> and the Commerce Clause cases of *United States v. Lopez*<sup>33</sup> and *United States v. Morrison*.<sup>34</sup> Finally, it critiques the standard critique.

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bent" of the Court's recent federalism cases).

<sup>26</sup> Adam B. Cox, *Expressivism in Federalism: A New Defense of the Anti-Commandeering Rule?*, 33 LOY. L.A. L. REV. 1309 (2000).

<sup>27</sup> See, e.g., Hills, *supra* note 3, at 1228–29.

<sup>28</sup> Erwin Chemerinsky, *Formalism and Functionalism in Federalism Analysis*, 13 GA. ST. U. L. REV. 959, 960 (1997).

<sup>29</sup> Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1502 (1994).

<sup>30</sup> To use the label "standard critique" is, of course, to run the risk of overgeneralization and reductionism. Important differences and subtleties are lost with the utilization of any term or terms to describe a scholarly trend, and the "standard critique" terminology is no exception. The standard critique commentators, however, do share a key contention, namely, that the New Federalism decisions are overly formalistic.

<sup>31</sup> 505 U.S. 144 (1992).

<sup>32</sup> 521 U.S. 898 (1997).

<sup>33</sup> 514 U.S. 549 (1995).

<sup>34</sup> 529 U.S. 598 (2000).

### A. Formalism Defined

Perhaps the best place to begin is with a definition of formalism. Not surprisingly, the debate over the contours of formalism has occupied thousands of law review pages.<sup>35</sup> One of the most helpful definitions of the term, however, has been put forward by Professor Bill Eskridge, who defines formalism by contrasting it with its primary competitor, functionalism.<sup>36</sup>

Professor Eskridge suggests that one primary difference between the two approaches is in the way in which they approach the rules versus standards debate. "Formalism," he says, "might be associated with bright-line rules that seek to place determinate, readily enforceable limits on public actors."<sup>37</sup> Functionalism, by contrast, "might be associated with standards or balancing tests that seek to provide public actors with greater flexibility."<sup>38</sup> In other words, in terms of setting forth boundaries for future policymaking, formalism favors rules because they give clear guidance, whereas functionalism favors standards because they allow for flexibility.

Another significant difference between the two is the reasoning process they employ. Formalism is more likely to rely on "deduction" from authoritative text and precedent, while functionalism "might be understood as induction from constitutional policy and practice."<sup>39</sup> Thus, a formalist is more likely to follow a rule without regard to the values that underlie it; a functionalist is more likely to look just at the values at stake.<sup>40</sup> In sum, when confronted with a constitutional question, a formalist might ask, "What does the Constitution say?", whereas a functionalist might ask, "What have we learned from constitutional experience that will lead us to the right answer in this case?"<sup>41</sup>

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<sup>35</sup> See, e.g., Symposium, *Formalism Revisited*, 66 U. CHI. L. REV. 527 (1999). This Article does not join the definitional debate.

<sup>36</sup> William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL'Y 21 (1998). My colleague Pierre Schlag points out that the formalism/functionalism debate is part of a much larger tension between the "grid aesthetic" and the "energy aesthetic" in American law. Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1051 (2002).

<sup>37</sup> See Eskridge, *supra* note 36, at 21.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> As Larry Alexander has explained, "formalism" means:

adherence to a norm's prescription without regard to the background reasons the norm is meant to serve (even when the norm's prescription fails to serve those background reasons in a particular case). . . . A norm is formalistic when it is opaque in the sense that we act on it without reference to the substantive goals that underlie it.

Larry Alexander, "*With Me, It's All er Nuthin'*": *Formalism in Law and Morality*, 66 U. CHI. L. REV. 530, 531 (1999).

<sup>41</sup> Judge Easterbrook has described just such a conversation he had with then-U.S.



The standard critique employs these two yardsticks — rule-making and rule-following — in some form or another to conclude that the Court's New Federalism jurisprudence is overly formalistic. To explore the claims of the standard critique, the following section uses the work of three of the critique's most prominent and thoughtful scholars — Professors Erwin Chemerinsky,<sup>42</sup> Vicki Jackson,<sup>43</sup> and Evan Caminker<sup>44</sup> — as representative.

### B. *The Standard Critique*

The New Federalism is a revitalization of federalism principles on many doctrinal fronts, including the Tenth Amendment, the Commerce Clause, the Eleventh Amendment, and Section 5 of the Fourteenth Amendment.<sup>45</sup> The standard critique's most prominent targets, however, have been the Tenth Amendment and Commerce Clause cases, to which I now turn.<sup>46</sup>

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Solicitor General Robert Bork over the legislative veto, with Easterbrook filling the role of functionalist and Bork the role of formalist. Frank H. Easterbrook, *Formalism, Functionalism, Ignorance, Judges*, 22 HARV. J.L. & PUB. POL'Y 13 (1988).

<sup>42</sup> See Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. REV. 7 (2001) [hereinafter Chemerinsky, *The Federalism Revolution*]; Chemerinsky, *supra* note 28; Erwin Chemerinsky, *Justice O'Connor and Federalism*, 32 MCGEORGE L. REV. 877 (2001) [hereinafter Chemerinsky, *O'Connor & Federalism*]; Erwin Chemerinsky, *Rehabilitating Federalism*, 92 MICH. L. REV. 1333 (1994) (reviewing SAMUEL H. BEER, *TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM* (1913)); Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499 (1995).

<sup>43</sup> Jackson, *supra* note 23.

<sup>44</sup> Evan H. Caminker, Printz, *State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199 (1997).

<sup>45</sup> See, e.g., Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 153–63 (2001) (discussing the doctrinal scope of the Court's New Federalism). For an interesting look at the New Federalism's impact on Indian law jurisprudence, see David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267 (2001).

<sup>46</sup> Professor Richard Fallon has observed that “three categories of cases dominate the foreground” of the New Federalism, those involving the Commerce Clause, the Tenth Amendment, and the Eleventh Amendment. Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 431 (2002). I have chosen to concentrate on the Tenth Amendment and Commerce Clause cases because they are the primary focus of the standard critique. See *supra* notes 42–44. No doubt the standard critique has focused on these areas because the Court's own rhetoric casts the debate in terms of formalism versus functionalism. See *infra* notes 47–122 and accompanying text.

The standard critique could, of course, take aim at the Eleventh Amendment cases, given that the decisions are quite rule-bound. See Hills, *supra* note 3, at 1229 (noting that the Eleventh Amendment cases “at first glance . . . seem like mindless formalism — that is, a

### 1. The Tenth Amendment Cases: *New York* and *Printz*

According to many scholars,<sup>47</sup> the opening salvo in the New Federalism revolution came with *New York v. United States*,<sup>48</sup> in which the Court invoked the Tenth Amendment to invalidate a portion of the Low-Level Radioactive Waste Policy Amendments Act of 1985. The provision in question required states either to enact legislation providing for the disposal of waste within their borders or to “take title” to such waste that was not properly disposed of by January 1, 1996.<sup>49</sup> The Court, in a 6–3 decision written by Justice O’Connor, concluded that the “take title” provision violated the Tenth Amendment because it “commandeered” state

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bunch of byzantine rules and exceptions signifying nothing except a weirdly anthropomorphic desire to protect states’ ‘dignity’ without any account of how state ‘dignity’ is implicated by that which the doctrine forbids”). Yet the Eleventh Amendment cases are distinct from other New Federalism jurisprudence in that they build upon case law that is over a century old. Indeed, the debate over the Eleventh Amendment, at bottom, is one that focuses primarily on whether *Hans v. Louisiana*, 134 U.S. 1 (1890), was rightly decided, rather than on the mode of reasoning adopted by the Court majority. See, e.g., Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 NOTRE DAME L. REV. 953, 993 (2000). But see Chemerinsky, *supra* note 28, at 963 (attacking the “syllogistic reasoning” of the Court’s Eleventh Amendment jurisprudence).

Although not on Professor Fallon’s list, cases involving Section 5 of the Fourteenth Amendment such as *City of Boerne v. Flores*, 521 U.S. 507 (1997), have come to be seen as an increasingly important part of the New Federalism. As Professor Caminker has noted, the Court’s Commerce Clause decisions restricting Congress’s power to regulate interstate commerce “plac[ed] greater pressure on Section 5 as a potential alternative source of congressional power.” Evan H. Caminker, “Appropriate” Means-Ends Constraints on Section 5 Powers, 53 STAN. L. REV. 1127, 1129 (2001). The Section 5 cases have not been a primary focus of the standard critique presumably because they do not employ the rhetoric of the functionalism/formalism divide. In addition, it may be the case that, while the cases ratchet up the level of judicial scrutiny of congressional means and ends, they do not enforce any particular substantive “rule” that could be attacked as too formalistic. See *id.* (advocating that the Court scrutinize means and ends for a “rational relationship” rather than *Boerne*’s “congruence and proportionality”); see also Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153 (1997) (arguing that Congress should be given more leeway in legislating pursuant to Section 5 based on, *inter alia*, evidence from the framing of the Fourteenth Amendment). Ironically, Professor Chemerinsky employs his own formalistic syllogism to argue that *Boerne* was wrongly decided, suggesting that the proper major premise of the syllogism would be that Congress could expand, but not contract, constitutional rights as defined by the Court. Erwin Chemerinsky, *The Religious Freedom Restoration Act is a Constitutional Expansion of Rights*, 39 WM. & MARY L. REV. 601, 603 (1998).

<sup>47</sup> See *supra* note 2.

<sup>48</sup> 505 U.S. 144 (1992).

<sup>49</sup> *Id.* at 152–55.

legislatures to legislate according to Congress's wishes.<sup>50</sup>

The Court began by examining the framing debates. The question whether the Constitution should permit Congress "to employ state governments as regulatory agencies was," according to the Court, "a topic of lively debate among the Framers."<sup>51</sup> Indeed, the "Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States."<sup>52</sup> Thus, while "Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts" — for example, under its Commerce Clause power — "it lacks the power directly to compel the States to require or prohibit those acts."<sup>53</sup>

Such a "commandeering power," the Court continued, would "diminis[h]" the "accountability of both state and federal officials."<sup>54</sup> Thus, "where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision."<sup>55</sup> In other words, the commandeering power would permit the federal government to claim credit for creating popular federal programs while at the same time shifting the costs of implementation onto the states.

The Court expressly rejected the federal government's argument that a balancing test should govern the situation — namely, one in which the "Constitution's prohibition of congressional directives to state governments [could] be overcome where the federal interest is sufficiently important to justify state submission."<sup>56</sup> According to the Court, none of its precedents supported commandeering of state legislatures, regardless of the value of the federal program.<sup>57</sup> "Much of the Constitution is concerned with setting forth the form of our government," the Court opined, "and the courts have traditionally invalidated measures deviating from that form."<sup>58</sup> The Court continued:

The result may appear "formalist" in a given case to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity. But the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis

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<sup>50</sup> *Id.* at 161.

<sup>51</sup> *Id.* at 162.

<sup>52</sup> *Id.* at 166.

<sup>53</sup> *Id.* at 166–67.

<sup>54</sup> *Id.* at 168.

<sup>55</sup> *Id.* at 169.

<sup>56</sup> *Id.* at 177.

<sup>57</sup> *Id.* at 178.

<sup>58</sup> *Id.* at 187.

of the day. The shortage of disposal sites for radioactive waste is a pressing national problem, but a judiciary that licensed extraconstitutional government with each issue of comparable gravity would, in the long run, be far worse.<sup>59</sup>

Justice O'Connor seems to have included this passage to respond to Justice White's dissent, which derided the Court's "formalistically rigid obeisance to 'federalism'"<sup>60</sup> and "syllogistic" reasoning.<sup>61</sup> Justice White accused the Court of "undervalu[ing] the effect the seriousness of this public policy problem should have on the constitutionality of the take title provision."<sup>62</sup> "We face a crisis of national proportions in the disposal of low-level radioactive waste,"<sup>63</sup> he warned. "For me, the Court's civics lecture has a decidedly hollow ring at a time when action, rather than rhetoric, is needed to solve a national problem."<sup>64</sup>

Echoing Justice White's dissent, Professor Chemerinsky argues that the Court's "explanation" for its result "was the epitome of formalistic reasoning."<sup>65</sup> He focuses primarily on the Court's use of deductive reasoning from the constitutional structure, describing the decision in terms of the following syllogism:

*Major premise:* Congress may not compel state governments to adopt laws or regulations.

*Minor premise:* The Low Level Radioactive Waste Disposal Act compels state governments to adopt laws or regulations.

*Conclusion:* The Low Level Radioactive Waste Disposal Act is unconstitutional.<sup>66</sup>

According to Professor Chemerinsky, the Court's mistake in *New York* was that it "reasoned deductively, from largely unjustified major premises to conclusions, without consideration of what would be the most desirable allocation of power between the federal and state governments."<sup>67</sup> In other words, the Court should have engaged in a more functionalist analysis of the problem: "[T]here is no apparent relationship between the ruling and the values of federalism," he laments.<sup>68</sup>

Professors Evan Caminker and Vickie Jackson make the same sort of arguments

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<sup>59</sup> *Id.* at 187–88.

<sup>60</sup> *Id.* at 210 (White, J., dissenting in part and concurring in part).

<sup>61</sup> *Id.* at 195.

<sup>62</sup> *Id.* at 189.

<sup>63</sup> *Id.* at 206.

<sup>64</sup> *Id.* at 206–07.

<sup>65</sup> Chemerinsky, *supra* note 28, at 962.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 961.

<sup>68</sup> Chemerinsky, *O'Connor & Federalism*, *supra* note 42, at 888.

with regard to *New York's* progeny, *Printz v. United States*,<sup>69</sup> which involved a challenge to certain interim provisions of the Brady Handgun Prevention Act.<sup>70</sup> The challenged provisions required a firearms dealer to “receive” from a prospective purchaser a “Brady form,” on which the prospective purchaser attested to his or her qualification to own a firearm.<sup>71</sup> The dealer, in turn, was required to submit the form to the “chief law enforcement officer,” or CLEO, in the particular jurisdiction for a background check.<sup>72</sup> When a CLEO received a Brady form, he or she was to “make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General.”<sup>73</sup> If the dealer did not hear from the CLEO within the five-day period, he or she could consummate the sale.<sup>74</sup>

Two CLEOs challenged the background check requirement under the Tenth Amendment, arguing that they had been “pressed into federal service.”<sup>75</sup> The Supreme Court agreed. Writing for a 5–4 majority, Justice Scalia first examined the historical practice regarding “executive-commandeering statutes,” and concluded that “there is not only an absence of [such] statutes in the early Congresses, but there is an absence of them in our later history as well, at least until very recent years.”<sup>76</sup> The Court then examined the structure of the Constitution and its “essential postulates,” reiterating much of the discussion from *New York* regarding the framers’ rejection of “the concept of a central government that would act upon and through the States.”<sup>77</sup>

The Court next turned to precedent, rejecting the federal government’s attempt to distinguish *New York* on the ground that the case involved legislative, as opposed to executive, commandeering. The Court held that “[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor

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<sup>69</sup> 521 U.S. 898 (1997).

<sup>70</sup> 18 U.S.C. §§ 922, 924, 925A (1994). *Printz* came out after Professor Chemerinsky published *Formalism and Functionalism*, *supra* note 28, although presumably he would agree with Caminker’s and Jackson’s assessment of the decision. *See* Chemerinsky, *The Federalism Revolution*, *supra* note 42, at 15–16 (discussing *Printz* and implicitly criticizing the Court for not giving weight to the fact that the Brady Act was a “desirable” and “popular” federal program).

<sup>71</sup> *Printz*, 521 U.S. at 903 (citing 18 U.S.C. § 922(s)(1)(A)(I)(I)).

<sup>72</sup> *Printz*, 521 U.S. at 903 (citing 18 U.S.C. §§ 922(s)(1)(A)(I)(III) and (IV)).

<sup>73</sup> *Printz*, 521 U.S. at 903 (citing 18 U.S.C. § 922(s)(2)).

<sup>74</sup> *Printz*, 521 U.S. at 903 (citing 18 U.S.C. § 922(s)(1)(A)(ii)). The interim background check provisions were to be replaced in 1998 by a federal instant background system. *Printz*, 521 U.S. at 902 (citing Pub. L. 103-159, as amended, Pub. L. 103-322, 103 Stat. 2074, note following 18 U.S.C. § 922).

<sup>75</sup> *Printz*, 521 U.S. at 905.

<sup>76</sup> *Id.* at 916.

<sup>77</sup> *Id.* at 918–19.

command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."<sup>78</sup>

The Court also rejected the government's argument that the background check requirement did not run afoul of *New York's* accountability rationale — an argument that "fail[ed] even on its own terms."<sup>79</sup> According to the Court:

By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for "solving" problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects. Under the present law, for example, it will be the CLEO and not some federal official who stands between the gun purchaser and immediate possession of his gun. And it will likely be the CLEO, not some federal official, who will be blamed for any error (even one [caused by federal officials]) that causes a purchaser to be mistakenly rejected.<sup>80</sup>

Finally, as in *New York*, the Court rejected the government's argument that commandeering should be subject to a balancing test — a test that the background check would satisfy because, as paraphrased by the Court, "[t]he Brady Act serves very important purposes, is most efficiently administered by CLEOs during the interim period, and places a minimal and only temporary burden upon state officers."<sup>81</sup> To that argument, Justice Scalia countered: "[N]o case-by-case weighing of the burdens or benefits is necessary" because "such commands [to state officers] are fundamentally incompatible with our constitutional system of dual sovereignty."<sup>82</sup> Justice Scalia ended by repeating Justice O'Connor's language from *New York*: "The result may appear 'formalistic' in a given case to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity. But the Constitution protects us from our own best intentions

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Writing for the primary dissent, Justice Stevens suggested that the majority's opinion "rests on empty formalistic reasoning of the highest order."<sup>84</sup> Justice

<sup>78</sup> *Id.* at 935.

<sup>79</sup> *Id.* at 930.

<sup>80</sup> *Id.* (citing Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563, 1580 n.65 (1994)).

<sup>81</sup> *Printz*, 521 U.S. at 931–32.

<sup>82</sup> *Id.* at 935.

<sup>83</sup> *Id.* at 932 (quoting *New York v. United States*, 505 U.S. 144, 187 (1992)).

<sup>84</sup> *Printz*, 521 U.S. at 952 (Stevens, J., dissenting).

Stevens rejected the “assumption undergirding the Court’s entire opinion” — namely, that “if this trivial burden on state sovereignty is permissible, the entire structure of federalism will soon collapse.”<sup>85</sup> “If Congress believes that such a statute will benefit the people of the Nation, and serve the interests of cooperative federalism,” Justice Stevens concluded, “we should respect both its policy judgment and its appraisal of its constitutional power.”<sup>86</sup>

Picking up on themes developed by Justice Stevens, Professor Caminker takes aim at the Court’s “unreflective” formalist reasoning in *Printz*.<sup>87</sup> According to Professor Caminker, the “essence of the majority’s affirmative case against commandeering is its deduction, from the ‘essential postulates’ of the constitutional structure, of a particular principle of state sovereignty — one that requires state executive autonomy from congressional direction.”<sup>88</sup> Professor Caminker suggests that deduction from the text, history, and precedent only works when the text, history, and precedent provide clear guidance to the decisionmaker. Where it does not, as he argues is the case in *Printz*, such deduction “become[s] an exercise in undirected choice from among competing conceptions and formulations — choice that seems arbitrary because it appears neither dictated by the underlying sources, nor counseled by articulated purposes, values, or consequences.”<sup>89</sup> In other words, Professor Caminker makes the same criticism of *Printz* that Professor Chemerinsky makes with regard to *New York*: The Court mistakenly “eschewed a more ‘functionalist’ approach to interpretation, in that it pointedly avoided a sensitive assessment of whether such commandeering undermines any of the diverse values or purposes thought to underlie our various divisions of governmental authority, either at its founding or today.”<sup>90</sup>

Finally, Professor Jackson agrees with Professor Caminker that the *Printz* Court’s deduction from text, history, and precedent is unconvincing.<sup>91</sup> She focuses, however, on an aspect of the Court’s “excessive formalism” that Professor Caminker says he does not take issue with,<sup>92</sup> namely, the creation of a categorical rule against commandeering of state officials.<sup>93</sup> She proposes an alternative regime under which the Court would apply a “deferential, flexible, multifactor” balancing test that would weigh the magnitude of the incursion into state sovereignty against the federal

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<sup>85</sup> *Id.* at 961.

<sup>86</sup> *Id.* at 970.

<sup>87</sup> Caminker, *supra* note 44.

<sup>88</sup> *Id.* at 206.

<sup>89</sup> *Id.* at 201.

<sup>90</sup> *Id.*

<sup>91</sup> Jackson, *supra* note 23, at 2195–2205.

<sup>92</sup> Caminker, *supra* note 44, at 200 (stating that he “do[es] not quarrel here with the Court’s doctrinal formalism”).

<sup>93</sup> Jackson, *supra* note 23, at 2253.

necessity.<sup>94</sup>

In the end, the enduring theme of the standard critique is that, at least in the Tenth Amendment arena, the Court has sacrificed functionalism at the altar of formalism. Professor Phil Weiser sums up the critique as follows: “[T]he Supreme Court would enhance its legitimacy by acknowledging that the future of our federalism should be open to debate about what will provide for effective governance and not decided on the basis of a historical record that is ambiguous at best.”<sup>95</sup> In other words, the Court should stop focusing on federalism as if it were an “end in and of itself,” and start talking about the values federalism serves.<sup>96</sup>

## 2. The Commerce Clause Cases: *Lopez* and *Morrison*

The standard critique has targeted the Court’s Commerce Clause cases as well. Professor Chemerinsky, for example, applies the same syllogism critique to *United States v. Lopez*,<sup>97</sup> which invalidated the Gun-Free School Zones Act of 1990 as exceeding Congress’s power under the Commerce Clause. Writing for a 5–4 majority, Chief Justice Rehnquist began by identifying “three broad categories of activity that Congress may regulate under its commerce power,” as defined by the Court’s prior precedents.<sup>98</sup> According to the Court, these include “the use of the channels of interstate commerce,”<sup>99</sup> “the instrumentalities of interstate commerce, or persons or things in interstate commerce,”<sup>100</sup> and finally “those activities that substantially affect interstate commerce.”<sup>101</sup> Under this last category, the Court continued, “[w]here economic activity substantially effects interstate commerce, legislation regulating that activity will be sustained.”<sup>102</sup>

The problem with the Gun-Free School Zones Act, the Court concluded, was that it did not purport to regulate economic activity, “however broadly one might define [it].”<sup>103</sup> The Court rejected the federal government’s argument that gun crime has a substantial effect on interstate commerce because it, among other things, “results in a less productive citizenry.”<sup>104</sup> “[U]nder the Government’s ‘national productivity’ reasoning,” the Court observed, “Congress could regulate any activity

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<sup>94</sup> *Id.* at 2255–59.

<sup>95</sup> Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 700 (2001).

<sup>96</sup> *Id.* at 699.

<sup>97</sup> 514 U.S. 549, 567 (1995) (discussed in Chemerinsky, *supra* note 28, at 963–64).

<sup>98</sup> *Lopez*, 514 U.S. at 558.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 559.

<sup>102</sup> *Id.* at 560.

<sup>103</sup> *Id.* at 561.

<sup>104</sup> *Id.* at 564.



that it found was related to the economic productivity of individual citizens [including] family law . . . , for example.”<sup>105</sup> The Court suggested that there were no “precise formulations” for determining whether an activity could meet the “substantial effects” test, but hinted that in future cases Congress could regulate “an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.”<sup>106</sup> Gun possession near a school did not meet that test.

Justice Kennedy wrote a concurring opinion, joined by Justice O’Connor, in which he stressed two lessons from the history of the Court’s Commerce Clause jurisprudence: first, the “imprecision of content-based boundaries used without more to define the limits of the Commerce Clause,”<sup>107</sup> and secondly, the fact that Congress must be able to rely on the Court’s prior Commerce Clause precedents so that it “can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy.”<sup>108</sup> In other words, the Court was not going back to a pre-1937 Commerce Clause regime. In attempting to regulate possession of a gun near a school, however, Congress had “intrud[ed] upon an area of traditional state concern” — namely, education.<sup>109</sup> Justice Kennedy concluded that, “[i]n this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.”<sup>110</sup> In short, to Justice Kennedy, the problem with the Gun-Free School Zones Act was that it violated federalism’s “laboratories of democracy” value identified by Justice Brandeis.<sup>111</sup>

Justice Thomas wrote a separate concurrence suggesting that the “substantial effects test [was] far removed from . . . the Constitution” and indicating his willingness to “modify our Commerce Clause jurisprudence” in a future case.<sup>112</sup> Writing the principal dissent, Justice Breyer would have upheld the statute on the ground that Congress could have rationally concluded that gun violence near schools would have a significant effect on interstate commerce.<sup>113</sup>

Applying to *Lopez* the same syllogistic analysis that he developed in the Tenth Amendment arena, Professor Chemerinsky describes the Court’s reasoning as

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 567.

<sup>107</sup> *Id.* at 574 (Kennedy, J., concurring).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 580.

<sup>110</sup> *Id.* at 581.

<sup>111</sup> *Id.* (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”)).

<sup>112</sup> *Lopez*, 514 U.S. at 601–02 (Thomas, J., concurring).

<sup>113</sup> *Id.* at 618–25 (Breyer, J., dissenting).

follows:

*Major Premise:* Congress may use its commerce power in only three situations: to regulate the channels of interstate commerce; to regulate instrumentalities of interstate commerce . . . ; or to regulate activities that have a substantial effect on interstate commerce.

*Minor Premise:* The Gun-Free Schools Zone Act does not fit into any of these three categories.

*Conclusion:* The Gun-Free Schools Zone Act is unconstitutional.<sup>114</sup>

The Court, he concludes, “was highly formalistic in that it gave no consideration to the functional desirability of having Congress prohibit guns near schools.”<sup>115</sup>

Professor Chemerinsky makes a similar criticism of *United States v. Morrison*,<sup>116</sup> which held that Congress had exceeded its Commerce Clause authority in a provision of the Violence Against Women Act (VAWA) that permitted victims of gender-motivated violence to sue their attackers for civil damages. Relying on *Lopez*, the Court rejected the argument, similar to that made in *Lopez*, that gender-motivated violence inflicts costs on the national economy and therefore “substantially affects” commerce.<sup>117</sup> Although the Court stopped short of creating a categorical rule against aggregating the effects of non-economic activity to create a “substantial effect,” it held that the VAWA provision failed to meet the substantial effects test because “[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity.”<sup>118</sup>

Justice Souter, in dissent, accused the majority of adhering to the same sort of “formalistically contrived confines of commerce power [that] in large measure provoked the judicial crisis of 1937.”<sup>119</sup> According to Justice Souter, the Court was using “the formalistic economic/noneconomic distinction” as an “instrument” to enforce its mistaken view of federalism.<sup>120</sup>

Echoing Justice Souter, Professor Chemerinsky criticizes *Morrison*’s overcategorization and its failure to take the importance of fighting violence against women into account.<sup>121</sup> Professor Tom Stacy, another expositor of the standard critique, sums up the critique’s take on *Lopez* and *Morrison* as follows: “The doctrinal categories of ‘noncommercial activities’ and ‘areas of traditional state regulation’ constructed by the majority resurrect the mindless formalism of the

<sup>114</sup> Chemerinsky, *supra* note 28, at 966.

<sup>115</sup> *Id.* at 967.

<sup>116</sup> 529 U.S. 598 (2000).

<sup>117</sup> *Id.* at 612–13.

<sup>118</sup> *Id.* at 613.

<sup>119</sup> *Id.* at 642 (Souter, J., dissenting).

<sup>120</sup> *Id.* at 644.

<sup>121</sup> Chemerinsky, *The Federalism Revolution*, *supra* note 42, at 10, 15.

Lochner Court. These categories enforce a blindness to the obvious national economic consequences of education, family structure, and tort liability, and otherwise disregard federalism's underlying values."<sup>122</sup> The standard critique's objection to Commerce Clause cases is therefore the same as that directed toward the Tenth Amendment cases: too many rules and too little consideration of values.

### *C. Is the Standard Critique Right?*

There is no question that there are formalist aspects to the New Federalism decisions. The claim of the standard critique, however, is that the Court's decisions have been *excessively* formalistic. In other words, the standard critique posits that the Court has engaged in excessive rule-making and rule-following at the expense of federalism's values. The next section argues that neither of these claims withstands close scrutiny, and goes on to offer an explanation for the standard critique's shortcomings.

#### 1. Excessive rule-following

The standard critique's charge that the New Federalism decisions exhibit excessive rule-following is in fact a two-step claim — namely, that 1) the overuse of deduction from authoritative texts leads to 2) an underuse of induction from values.

##### *a. Deductive reasoning*

The standard critique is no doubt correct that deductive reasoning is one aspect of formalism,<sup>123</sup> and that the Court has employed a deductive decision-making style in its New Federalism decisions. As explained above, the Court in *New York, Printz, Lopez, and Morrison* relied upon the text and structure of the Constitution, the historical record, and precedent to draw its conclusions. But that sort of methodology — that is, deduction from text, the historical record, and precedent — describes virtually every Supreme Court opinion, not simply those of the New Federalism. Indeed, it is difficult to find a decision of the Supreme Court that *does not* employ such reasoning, or at least one that does not purport to do so. The commonly accepted approach to judging — both by the majority and the dissenters in the Court's New Federalism decisions — starts with text, structure, and precedent and draws a conclusion from those sources. Certainly, the majority and dissenters disagree as to what conclusions can be drawn from those sources, but they do agree

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<sup>122</sup> See, e.g., Stacy, *supra* note 25, at 244.

<sup>123</sup> Eskridge, *supra* note 36, at 21 ("Formalism might be understood as deduction from authoritative constitutional text, structure, original intent, or all three working together.").

on the methodology.

Take, for example, *New York*. In that case the dissenters simply adopted a different major premise than the majority — namely, that the historical record and prior precedents cited by the Court did not give rise to an anti-commandeering principle, and that even if they did, the law in question did not violate it.<sup>124</sup> The same can be said of Justice Stevens's *Printz* dissent.<sup>125</sup> In *Lopez*, Justice Breyer's dissent simply devised its own "syllogism" — namely, that based upon precedent, the Court need only find a rational basis for Congress's judgment that the law in question regulated commerce; the law in question met that standard, according to Justice Breyer, and therefore should have been sustained.<sup>126</sup> The same could be said of Justice Souter's dissent in *Morrison*.<sup>127</sup>

In the end, the standard critique casts its net too broadly. The Court's New Federalism decisions cannot be excessively formalistic under the standard critique's definition of excessive formalism unless *all* the Court's jurisprudence is so — a claim the standard critique certainly does not intend to make. As Professor Rick Pildes has observed:

Any system of law will require the use of legal concepts and at least some degree of deductive reasoning from them. Any system of law will likely depend on rules and rule-following, at least to some extent, in some contexts. If formalism comes to mean little more than [rule-following], then we will all be Formalists . . . but the concept of formalism will have little bite.<sup>128</sup>

At bottom, the standard critique's criticism has "little bite" because it suggests that the Court is overly formalistic in relying on preexisting sources of authority and drawing conclusions from them — an apt description of the enterprise of judging.

Of course, the standard critique may simply be making the argument that the Court in its New Federalism decisions has gotten the history wrong, and therefore has come to the wrong conclusions. But this is a different claim than one based on excessive formalism. Indeed, there is much debate over the content of the historical record in the areas of the Commerce Clause<sup>129</sup> and the Tenth Amendment,<sup>130</sup> and

<sup>124</sup> *New York v. United States*, 505 U.S. 144, 202 (1992) (White, J., dissenting).

<sup>125</sup> *Printz v. United States*, 521 U.S. 898, 941–69 (1997) (Stevens, J., dissenting) (reviewing the historical record and prior precedent and concluding that they did not endorse an anti-commandeering principle).

<sup>126</sup> *United States v. Lopez*, 514 U.S. 549, 631 (1995) (Breyer, J., dissenting).

<sup>127</sup> *United States v. Morrison*, 529 U.S. 598, 636 (2000) (Souter, J., dissenting) (concluding that the VAWA would have passed constitutional muster prior to *Lopez*).

<sup>128</sup> Richard H. Pildes, *Forms of Formalism*, 66 U. CHI. L. REV. 607, 608 (1999).

<sup>129</sup> Compare Steven G. Calabresi, "A Government of Limited and Enumerated Powers": In Defense of *United States v. Lopez*, 94 MICH. L. REV. 752 (1995), with Larry D. Kramer,

indeed, on the proper role of the Court in reviewing federalism decisions at all.<sup>131</sup> A full consideration of these debates is far beyond the scope of this Article. Suffice it to say that the historical record is strongly contested, as witnessed by the close split in outcomes. But if the Court has taken the “wrong” side on these debates, as the standard critique suggests, that “mistake” should not be laid at the doorstep of formalism.

*b. Undervaluing the values of federalism*

The flip side of the standard critique’s claim that the Court has overused deductive reasoning is that it has underused the values of federalism. In other words, the standard critique asserts that the Court is reasoning from old rules and making new ones without considering the values that underlie the rules. Professor Larry Kramer puts the criticism like this:

[I]mposing new limits [on federal power] just for the sake of having limits is a useless and dangerous formalism. . . . Put another way, the test for federalism today can’t turn on which approach looks more like the original scheme in some crude, surface-like manner. It must be: Which approach does a better job of finding the appropriate balance between state and federal authority in today’s world?<sup>132</sup>

According to the standard critique, the reasoning of the New Federalism decisions boils down to “the Constitution says so.”<sup>133</sup>

The standard critique, however, seriously downplays the extent to which the Court has in fact put forward functionalist justifications for its decisions to backstop its formalism. *New York*,<sup>134</sup> *Printz*,<sup>135</sup> *Lopez*,<sup>136</sup> and *Morrison*<sup>137</sup> all cite to *Gregory v. Ashcroft*,<sup>138</sup> a decision many scholars regard as the opening salvo of the New

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*Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 290–91 (2000).

<sup>130</sup> Compare Prakash, *supra* note 2, with Caminker, *supra* note 44.

<sup>131</sup> Compare Kramer, *supra* note 129, at 290–91, with Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459 (2001).

<sup>132</sup> Kramer, *supra* note 129, at 1502–03.

<sup>133</sup> See, e.g., Caminker, *supra* note 44, at 202 (noting that the Court in *Printz* “tried to surround its construction of state sovereignty and executive unity principles with an aura of inexorability”).

<sup>134</sup> *New York v. United States*, 505 U.S. 144, 157 (1992).

<sup>135</sup> *Printz v. United States*, 521 U.S. 898, 918 (1997).

<sup>136</sup> *United States v. Lopez*, 514 U.S. 549, 552 (1995).

<sup>137</sup> *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000).

<sup>138</sup> 501 U.S. 452 (1991).

Federalism.<sup>139</sup>

In *Gregory*, the Court crafted a principle of statutory interpretation requiring Congress to speak clearly if it intended to implicate federalism interests. In writing for a 5–4 majority, Justice O’Connor began with a passing reference to the statutory text at issue (a provision of the ADEA)<sup>140</sup> and to the Tenth Amendment,<sup>141</sup> but quickly moved to a fundamentally pragmatic exploration of the *values* of federalism. “Perhaps the principal benefit of the federalist system,” she wrote, “is a check on abuses of government power.”<sup>142</sup>

Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.<sup>143</sup>

And, according to Justice O’Connor, this balance of power has a host of benefits. Indeed,

[i]t assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.<sup>144</sup>

Justice O’Connor cited two law review articles that have become classics in the field of the values of federalism — one by Judge Michael McConnell<sup>145</sup> and the other by Professor Deborah Jones Merritt<sup>146</sup> — in her discussion. It was these “values of federalism” that led the Court to devise its clear statement rule. “[I]t is incumbent upon the federal courts,” Justice O’Connor wrote, “to be certain of Congress’ intent before finding that federal law overrides’ this balance.”<sup>147</sup>

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<sup>139</sup> See *supra* note 2.

<sup>140</sup> *Gregory*, 501 U.S. at 456–57.

<sup>141</sup> *Id.* at 457–58.

<sup>142</sup> *Id.* at 458.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* (citing Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1491–1511 (1987), and Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 3–10 (1988)).

<sup>145</sup> McConnell, *supra* note 144, at 1491–1511.

<sup>146</sup> Merritt, *supra* note 144, at 3–10.

<sup>147</sup> *Gregory*, 501 U.S. at 460 (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234,

Surely the Court is entitled to “incorporate by reference” its previous discussions of the values of federalism,<sup>148</sup> but the New Federalism decisions go beyond citations to past precedent. As noted above, the Court in *New York* gave a clear accountability rationale for its anti-commandeering principle, echoing *Gregory*’s “benefit” that federalism allows for government closer to the people.<sup>149</sup> Indeed, as Professor Weiser has written, “Justice O’Connor condemned the commandeering of state governments on the ground that this practice would enable the federal government to take credit for enacting popular statutes without having to pay for them or make difficult implementation decisions.”<sup>150</sup> Even Justice Scalia — purportedly the staunchest “formalist” on the Court<sup>151</sup> — cited this same rationale in *Printz*.<sup>152</sup> As noted above, he suggested that under the Brady Act, “it will be the CLEO and not some federal official who stands between the gun purchaser and immediate possession of his gun.”<sup>153</sup>

Chief Justice Rehnquist similarly invokes the values of federalism in both *Lopez* and *Morrison*. In *Lopez*, for example, he begins with *Gregory*’s catalog of the benefits of federalism<sup>154</sup> and later suggests that these benefits would be lost under a Commerce Clause with no limitations on what Congress could regulate.<sup>155</sup> And clearly Justice Kennedy’s concurrence was aimed at supplementing the majority opinion with a lengthy discussion of the values of federalism — chiefly, the fact that the states must serve as “laboratories of democracy.”<sup>156</sup> In *Morrison*, the Chief

243 (1985)).

<sup>148</sup> In addition to *Gregory*, other frequently cited precedents include *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 580 (1984) (O’Connor, J., dissenting), and *FERC v. Mississippi*, 456 U.S. 742, 775 (1982) (O’Connor, J., concurring in part and dissenting in part).

<sup>149</sup> See *supra* notes 54–55 and accompanying text.

<sup>150</sup> Weiser, *supra* note 95, at 696.

<sup>151</sup> See Eskridge, *supra* note 36, at 25.

<sup>152</sup> Andrew S. Gold, *Formalism and State Sovereignty in Printz v. United States: Cooperation by Consent*, 22 HARV. J.L. & PUB. POL’Y 247, 262 (1998) (noting that Justice Scalia employs functionalist reasoning by citing to the benefits of a system of federalism).

<sup>153</sup> *Printz v. United States*, 521 U.S. 898, 930 (1997); see *supra* notes 79–80. Interestingly, Professor Jackson notes that the accountability value “do[es] seem latent in the constitutional structure,” although she questions whether the Court’s jurisprudence has furthered that rationale. See Jackson, *supra* note 23, at 2201.

<sup>154</sup> *United States v. Lopez*, 514 U.S. 549, 552 (1995).

<sup>155</sup> *Id.* at 565 (suggesting that, under the Government’s argument, “Congress could mandate a federal curriculum for local elementary and secondary schools because what is taught in local schools has a significant ‘effect on classroom learning,’ and that, in turn, has a substantial effect on interstate commerce” and “could just as easily look at child rearing as ‘fall[ing] on the commercial side of the line’ because it provides a ‘valuable service — namely, to equip [children] with the skills they need to survive in life and more specifically, in the workplace’”) (citations omitted) (alteration in original).

<sup>156</sup> See *supra* note 111; see also Ann Althouse, *The Alden Trilogy: Still Searching for a*

Justice cites Justice Kennedy's concurrence liberally throughout his opinion,<sup>157</sup> and includes his own discussion of the values of federalism in a lengthy footnote.<sup>158</sup> He ends his Commerce Clause discussion as he did in *Lopez*, by suggesting that the benefits of federalism would be lost if Congress could "obliterate the Constitution's distinction between national and local authority."<sup>159</sup>

It is not surprising that the Court has put forward both formalist and functionalist justifications for its New Federalism decisions. Indeed, the "Federalism Five," as the Justices in the majority have been called,<sup>160</sup> are quite a diverse lot in terms of the formalist/functionalist divide. On the formalist-functionalism continuum, Justice Scalia occupies the outermost formalist pole,<sup>161</sup> Justice O'Connor occupies the outermost functionalist pole,<sup>162</sup> with Chief Justice Rehnquist and Justices Thomas and Kennedy falling somewhere in between. It would thus be difficult for an opinion providing only formalist or only functionalist justifications for the result to garner a majority. As Professor Eskridge has suggested, "[a]s argumentative modes, the formalist argument conjoined with a functional counterpart is much stronger than either argument standing alone."<sup>163</sup> And indeed, the Court has a history of blending formalism and functionalism in its separation of powers jurisprudence,<sup>164</sup> and thus it would be natural to find a similar blend in a subset of that jurisprudence: federalism.

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*Way to Enforce Federalism*, 31 RUTGERS L.J. 631, 648 (2000) (labeling Justice Kennedy's concurrence in *Lopez* "immensely helpful" in that it "explores the normative values" of federalism). For an interesting discussion of the "laboratories of democracy" value in the federal lands context, see Dale A. Oesterle, *Public Land: How Much is Enough?*, 23 ECOLOGY L.Q. 521, 550-60 (1996).

<sup>157</sup> See *United States v. Morrison*, 529 U.S. 598, 607 (2000).

<sup>158</sup> *Id.* at 616 n.7.

<sup>159</sup> *Id.* at 615.

<sup>160</sup> See William H. Pryor, Jr., *The Demand for Clarity: Federalism, Statutory Construction, and the 2000 Term*, 32 CUMB. L. REV. 361 (2002) (contrasting the federalism five with the "nationalism four").

<sup>161</sup> See *supra* note 151 and accompanying text.

<sup>162</sup> See, e.g., Judicial Profile: Hon. Sandra Day O'Connor, Associate Justice, U.S. Supreme Court, 48 FED. LAW. 18 (2001) [hereinafter Judicial Profile: Hon. Sandra Day O'Connor] (stating that Justice O'Connor's "style is to carve out legal rules incrementally, building a body of law one case at a time and reaching for a pragmatic resolution that is driven by the facts of the specific dispute before her").

<sup>163</sup> Eskridge, *supra* note 36, at 29.

<sup>164</sup> See, e.g., *id.* at 22-27 (explaining how cases such as *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), the Steel Seizure Case, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), and *Morrison v. Olson*, 487 U.S. 654 (1988), blend formalist and functionalist reasoning); Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71, 115 (2000) ("The Supreme Court's doctrines relating to constitutional structure have shifted between formalist and functionalist readings.").



In the end, the Court in the New Federalism decisions has used functionalism as a backstop to formalism. It begins with the text and structure of the Constitution; moves to the reasons we have the text and structure to begin with; and concludes by arguing that those reasons support the Court's result in the case before it. This is hardly following rules for rules' sake. In the Tenth Amendment cases, for example, the Court finds an anti-commandeering principle not simply based on the text of the Tenth Amendment in particular or the federal-state structure in general, but because the Tenth Amendment and the federal-state design were put in place in order to avoid the accountability problems presented in the Low-Waste Act and the Brady Act. In the Commerce Clause cases, the Court draws an outer boundary on Congress's commerce power not simply based on the text of the Commerce Clause in particular or the federal-state structure in general, but because the Commerce Clause was put in place in order to allow states to experiment with different regulatory regimes — a role, in the Court's view, that the states should have been permitted to serve with regard to guns near schools and violence directed toward women.

This mode of reasoning is closely akin to what Professor Fred Schauer calls “presumptive formalism.”<sup>165</sup>

Under . . . presumptive formalism there would be a presumption in favor of the result generated by the literal and largely acontextual interpretation [of the particular norm]. Yet that result would be presumptive only, subject to defeasibility when [other] norms, including the purpose behind the particular norm, . . . offered especially exigent reasons for avoiding the result generated by the presumptively applicable norm.<sup>166</sup>

Presumptive formalism, according to Professor Schauer, seeks to embrace the advantages of formalism — that is, “predictability, stability, and constraint of decisionmakers commonly associated with decision according to rule” — while at the same time attempting to avoid the costs of formalism, namely, the cases in which the application of the rule is inconsistent with the values that underlie the rule.<sup>167</sup> In the context of the New Federalism, the Court has pledged its commitment to federalism principles while at the same time leaving the door open for a case in the future where the values of federalism are not served by the application of its principles.

This backstop approach explains Justice O'Connor's often-criticized statement in *New York* suggesting that the Court must enforce federalism because it is the

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<sup>165</sup> Schauer, *supra* note 12, at 546.

<sup>166</sup> *Id.* at 547.

<sup>167</sup> *Id.*

system adopted by the framers, regardless of the benefits that federalism offers.<sup>168</sup> After citing *Gregory* and discussing the benefits of federalism, Justice O'Connor states that those benefits "need not concern us here."<sup>169</sup> She continues:

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. "The question is not what power the Federal Government ought to have but what powers in fact have been given by the people."<sup>170</sup>

This passage may, at first glance, appear to be rule-following for rules' sake. Yet as developed above, Justice O'Connor goes on to discuss extensively why the framers rejected a system by which the federal government would operate upon the states and instead adopted a plan in which Congress would exercise its legislative authority directly over individuals. She then applies the framers' rationale to the case before her.<sup>171</sup> In sum, the Court is making the claim in its New Federalism decisions that the constitutional structure must be followed not simply because it is the constitutional structure, but also because the framers adopted the constitutional structure to achieve certain goals — goals that are best served by the result the Court reaches in the case before it.

Interestingly, Justice Thomas — widely considered closer to Justice Scalia's formalism than Justice O'Connor's functionalism<sup>172</sup> — makes the case for the values of federalism even more strongly in a recent speech. First, he acknowledges that the Court has come under criticism: "To be sure, the Court has not always fully explained the larger purpose behind this resurrection of federalism. . . . [T]he Court has come in for some sharp criticism, in part because the restoration of federalism seems to some to be senseless, or without purpose."<sup>173</sup> He then goes on to describe federalism as "just a construct" — a "means that serve[s] certain ends."<sup>174</sup> Indeed, "[k]eeping the government within the written limits on its power is not a goal in itself. Rather, the framers believed that controlling the federal government, through the recognition and protection of independent state sovereigns, was necessary to

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<sup>168</sup> See Michael Dorf, *Instrumental and Non-Instrumental Federalism*, 28 RUTGERS L.J. 825, 829–30 (describing and critiquing Justice O'Connor's statement in *New York*).

<sup>169</sup> *New York v. United States*, 505 U.S. 144, 157 (1992).

<sup>170</sup> *Id.* (quoting *United States v. Butler*, 297 U.S. 1 (1936)).

<sup>171</sup> See *supra* notes 51–59.

<sup>172</sup> See Cass R. Sunstein, *Order Without Law*, 68 U. CHI. L. REV. 757, 757 n.3 (2001) (suggesting that "Justices Antonin Scalia and Clarence Thomas are fairly consistent maximalists, on the ground that they favor rule-bound decisions").

<sup>173</sup> Thomas, *supra* note 1, at 235.

<sup>174</sup> *Id.* at 234.

protect individual liberty itself.”<sup>175</sup> And, he concludes, “it is this very sovereignty that the Court continues to protect today; take away that sovereignty and you undermine the ability of the federalist structure to maintain multiple centers of legal and political power.”<sup>176</sup>

This is not to say that the Court has set forth the most elegant explanation of the rationale underlying the New Federalism decisions.<sup>177</sup> Nor is there any question that the academy has done a more thorough job elaborating the values of federalism than has the Court.<sup>178</sup> Professor Hills, in particular, has filled out the Court’s results with functionalist rationales in an extensive body of work.<sup>179</sup> But if the Court had set forth the most elegant explanation of the New Federalism, it certainly would be the first time it had done so in any subject, and indeed there would be no work for the academy — myself included — to do. The central claim of the standard critique, however, is not that the New Federalism decisions are undertheorized, but rather that they are valueless. That claim cannot be sustained.

## 2. Excessive Rule-Making

The standard critique claims not only that the Court has been excessive in its rule-following, but also that it has been excessive in its rule-making. In other words, according to the standard critique, the Court has too often opted for rules over standards going forward. But in truth, the New Federalism decisions are not as rule-creating as the standard critique might suggest.

Certainly, the Tenth Amendment cases can be characterized as having come up with a “rule” against commandeering of state executive and legislative officials to do the federal government’s bidding.<sup>180</sup> But the measure of “formalism” is not simply whether the Court has chosen a rule over a standard, but rather, how far-reaching is that rule? As Professor Sunstein has written, a Court is “maximalist” when it seeks to lay down a rule that will bind future courts in one way or another, and a measure of that “maximalism” is how “wide” the rule is.<sup>181</sup>

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<sup>175</sup> *Id.* at 236.

<sup>176</sup> *Id.* at 237.

<sup>177</sup> See, e.g., NAGEL, *supra* note 1, at 37 (suggesting that the Court’s opinion in *New York* “is unclear and, to some extent, unpersuasive in explaining the bases for its federalistic themes”).

<sup>178</sup> See, e.g., Erwin Chemerinsky, *The Values of Federalism*, *supra* note 42; Kramer, *supra* note 29; McConnell, *supra* note 144; Merritt, *supra* note 144; Robert F. Nagel, *Federalism as a Fundamental Value*, 1981 SUP. CT. REV. 81.

<sup>179</sup> See, e.g., *supra* note 4; see also H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 635 (1993) (suggesting that the Court’s anti-commandeering rule cannot be justified by the framing debates but can be defended on prudential grounds).

<sup>180</sup> See *supra* notes 47–59, 69–83 and accompanying text.

<sup>181</sup> SUNSTEIN, *supra* note 13, at 10–11. For an interesting application of Sunstein’s

The Tenth Amendment “rule” devised by the Court is simply not very wide: the definition of what constitutes “commandeering” has been left to case-by-case decisionmaking. For example, in the most recent commandeering case, *Reno v. Condon*,<sup>182</sup> the Court upheld the Drivers’ Privacy Protection Act of 1994 (DPPA), which prohibits state motor vehicle departments from disclosing personal information about licensees without their consent. The Court, in an unanimous opinion by Chief Justice Rehnquist, distinguished *New York* and *Printz* on the ground that the DPPA did not *require* state officials to do any affirmative act; on the contrary, it *prohibited* them from divulging personal information.<sup>183</sup> In other words, the Court gave the term “commandeering” a fairly narrow reading — certainly a more narrow reading than that of the Fourth Circuit, which had struck down the measure.<sup>184</sup>

Similarly, take the Commerce Clause cases. The Court has indeed come up with a “rule” that Congress can regulate an activity as long as it is in some way “economic” in character. But that requirement leaves a great deal of leeway in determining what is and what is not economic. Notably, so far the Court has not attempted to define what counts as economic, but rather has been content with determining what does not — namely, violence directed toward women (*Morrison*) and possession of a firearm near a school (*Lopez*). The Court pointedly was unwilling to go down the definitional path that Justice Thomas urged — that is, toward a definition of “commerce” that would actually require the regulated activity to involve “commerce.”<sup>185</sup> The Court’s approach thus by necessity leaves the definitional process to future case-by-case decisionmaking.

In the end, the Court seems content to pick off what it determines to be the most egregious cases of congressional overreaching, while preserving an enormous sphere of activity for Congress to regulate. As Professors Choper and Yoo observe, the Commerce Clause cases “may serve more as a reminder to the political branches that there indeed remain limits upon federal powers, and that the prerogatives of the states in regulating daily life do not exist at the mere sufferance of Washington, D.C.”<sup>186</sup> At the same time, as long as Congress refrains from regulating activity that clearly falls on the non-economic side of the line, the Court will stay its hand. “[T]he equation of commerce with economic activity,” they conclude, “may mean that the Court’s new Commerce Clause jurisprudence may pose little real obstacle

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framework to the Court’s Indian law jurisprudence, see Sarah Krakoff, *Undoing Indian Law Once Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177 (2001).

<sup>182</sup> 528 U.S. 141 (2000).

<sup>183</sup> *Id.* at 151.

<sup>184</sup> *Condon v. Reno*, 155 F.3d 453 (4th Cir. 1998), *rev’d*, 528 U.S. 141 (2000).

<sup>185</sup> See *supra* note 112.

<sup>186</sup> Jesse H. Choper & John C. Yoo, *The Scope of the Commerce Clause after Morrison*, 25 OKLA. CITY U. L. REV. 843, 854 (2000).

to *most* federal policies.”<sup>187</sup>

Finally, the definitional process — that is, determining whether something is “economic” in nature — is inherently functional because the term “economic” is a functional term. What we see as economic activity may be very different from what the founders would have seen. We are, after all, living in the post-law and economics world, a world in which the academy has become accustomed to analyzing the economic implications of virtually everything.<sup>188</sup> Thus, the very “rule” embraced by the Court is, at least in part, functional by nature.

Moreover, as noted above, a jurisprudence of excessive rule-making would be inconsistent with the Court’s general approach to separation of powers cases.<sup>189</sup> As Professor Sunstein has suggested, the New Federalism cases — like much of the Court’s case law — are “minimalist” in that they “tend to decide the case at hand, without making many commitments for the future.”<sup>190</sup>

#### *D. Why Does the Standard Critique Have So Much Staying Power?*

If one is persuaded by this critique of the standard critique, then the question becomes, why has the critique had so much staying power? First and most obviously, many law professors think the cases are wrong.<sup>191</sup> The charge of

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<sup>187</sup> *Id.* at 865. This conclusion is buttressed by the existence of the Spending Clause alternative, which was given a broad interpretation by then-Justice Rehnquist in *South Dakota v. Dole*, 438 U.S. 203 (1987). See Choper & Yoo, *supra* note 186, at 855–60 (discussing how Congress can use the Spending Clause as an end-run around the Court’s decisions in *Lopez* and *Morrison*).

<sup>188</sup> As Professors Choper and Yoo suggest, “[g]iven the success that the law and economics movement has encountered in revealing the underlying economic motivations that might underlay many actions, Congress may have little difficulty in persuasively characterizing many activities as economic in nature.” *Id.* at 865.

<sup>189</sup> See *supra* note 164.

<sup>190</sup> Sunstein, *supra* note 172.

<sup>191</sup> As Keith Whittington recently observed, “[f]or several years now, the Supreme Court has disquieted observers and commentators by reasserting the presence of constitutional limitations on national power resulting from the federal structure of the American political system.” Whittington, *supra* note 1, at 477. Indeed, I am aware of only a handful of scholars who defend the New Federalism on any grounds. See, e.g., Calabresi, *supra* note 129, at 790–99; Prakash & Yoo, *supra* note 131.

Of course, one must be cautious about placing too much weight on the critical nature of the legal scholarship on the New Federalism. After all, it is the legal academy’s “professional obligation (and favorite spectator sport)” to criticize the Supreme Court. Earnest A. Young, *Judicial Activism and Conservation Politics*, 73 U. COLO. L. REV. 1139, 1140 (2002); see also Allison H. Eid, *A Spotlight on Structure*, 72 U. COLO. L. REV. 911, 922 (2001) (noting that when the Supreme Court opens a new subject area for judicial review, legal commentary soon follows). On the other hand, the overwhelmingly critical nature of the scholarship does, I believe, help to explain why the standard critique may have had such

excessive formalism may simply be a shorthand way of expressing disagreement with the decisions. As Professor Schauer has pointed out in more general terms:

[T]he pejorative connotations of the word “formalism,” in concert with the lack of agreement on the word’s descriptive content, make it tempting to conclude that “formalist” is the adjective used to describe any judicial decision, style of legal thinking, or legal theory with which the user of the term disagrees.<sup>192</sup>

But there is certainly more going on than simply the negative use of the term “formalism.” The standard critique has a certain intuitive appeal that helps to explain its longevity. Any claim of excessiveness requires the definition of a standard of comparison. In this context, the standard critique’s standard of “non-excessive formalism” is the federalism regime as it existed prior to the New Federalism decisions — a regime in which there was virtually no judicial supervision of federalism issues.

The standard critique’s baseline is evident from its repeated references to the fact that the Court had exited the federalism scene in 1937. For example, Professor Chemerinsky writes:

From 1937 until April 26, 1995 [the date *Lopez* came down], not one federal law was found to exceed the scope of Congress’s Commerce Clause authority. From 1937 until 1992 [the year the *New York* decision was issued], only one federal law was found to violate the Tenth Amendment [in *National League of Cities v. Usery*,<sup>193</sup>], and that case was overruled less than a decade later [by *Garcia v. San Antonio Metropolitan Transit Authority*<sup>194</sup>].<sup>195</sup>

Professor Chemerinsky is certainly correct on his facts: The Court last invoked the Tenth Amendment in 1936 to invalidate the Agricultural Adjustment Act in *United States v. Butler*<sup>196</sup> and in that same year invalidated the Bituminous Coal Conservation Act of 1935 as beyond Congress’s Commerce Clause authority in *Carter v. Carter Coal Co.*<sup>197</sup> There is no question that the Court’s “federalism

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resonance in the legal academy.

<sup>192</sup> Schauer, *supra* note 12, at 510.

<sup>193</sup> 426 U.S. 833, 851 (1976).

<sup>194</sup> 469 U.S. 528 (1985).

<sup>195</sup> Chemerinsky, *The Federalism Revolution*, *supra* note 42, at 8. Chemerinsky makes the same point in Chemerinsky, *supra* note 28, and Chemerinsky, *O’Connor & Federalism*, *supra* note 42, at 879, 882.

<sup>196</sup> 297 U.S. 1 (1936).

<sup>197</sup> 298 U.S. 238 (1936).

hiatus" was a lengthy one. Indeed, federalism was a virtual "judge-free" zone.

In the 1950s, Professor Herbert Wechsler argued that states would be protected from an overreaching federal government by the "political safeguards of federalism" — among other things, the fact that states were represented in Congress.<sup>198</sup> Professor Choper took Wechsler's analysis one step further by arguing that, because of the political safeguards of federalism, judicial review of federalism issues was unnecessary.<sup>199</sup> The Supreme Court explicitly adopted the "political safeguards" theory in *Garcia*<sup>200</sup> but had implicitly adopted the theory through decades of federalism silence. The political safeguards theory came under fire for putting the fox (Congress) in charge of the henhouse (state sovereignty).<sup>201</sup> And indeed, the New Federalism decisions represent at least an implicit rejection of the political safeguards theory.<sup>202</sup>

By selecting the pre-New Federalism jurisprudence as a model of comparison, the standard critique's conclusion of excessive formalism is inevitable. Any "law of federalism" — no matter what size or shape — would appear overly formalistic when compared with no law at all. The standard critique, again to use the terminology of Professor Sunstein, suffers from a "baseline problem."<sup>203</sup> The proper baseline from which to judge formalism is not the pre-New Federalism decisions, for they represented a judicial hiatus. A more accurate baseline would be the Court's jurisprudence in other separation of powers areas, which, as noted above, consist of a blending of formalism and functionalism.<sup>204</sup> When viewed from this baseline, the Court's New Federalism decisions fit well within the Court's standard methodology.

Moreover, the standard critique appears to confuse judicial *formalism* with judicial *activism*. This confusion is most evident in the work of Professor Larry Kramer, who in a recent article seeks to update the "political safeguards" theory by

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<sup>198</sup> Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). Wechsler noted that representatives in both houses of Congress are allotted by state, which, he believed, ensured that the people will be represented as "the people of the states." Similarly, he pointed to the fact that the Senate would protect state interests through its provisions for equal representation by the states. And finally, he suggested that the electoral college would force presidential candidates to construct a national coalition from among the states.

<sup>199</sup> Jesse H. Choper, *The Scope of National Powers Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977).

<sup>200</sup> *Garcia v. San Antonio Metropolitan Transit Authority*, 460 U.S. 528 (1985).

<sup>201</sup> See, e.g., Calvin R. Massey, *Etiquette Tips: Some Implications of "Process Federalism"*, 16 HARV. J.L. & PUB. POL'Y 175, 179 (1994).

<sup>202</sup> See Yoo, *supra* note 1 (arguing that the Court's New Federalism decisions have essentially overruled *Garcia*).

<sup>203</sup> Sunstein, *supra* note 20, at 874.

<sup>204</sup> See *supra* note 164.

replacing the congressional fox with other political safeguards, such as political parties, “lobbies, think tanks, and the national media.”<sup>205</sup> He labels the Court’s recent revitalization of federalism norms as “ill-conceived formalism.”<sup>206</sup> According to Professor Kramer, the Court is acting in a formalistic manner because it is imposing “novel judicially-defined limits just for the sake of having judicially-defined limits.”<sup>207</sup>

It is true that there must be a connection between formalism and judicial intervention. After all, without judicial intervention in particular cases, there would be no judicial decisions to critique for formalistic reasoning. But to Professor Kramer, it seems that *any* judicial intervention is formalistic. Professor Kramer’s definition of formalism is so broad that it would include virtually any legal decision — or at least any legal decision in an area in which the Court had previously declined to intervene. And, of course, that list of “non-intervention zones” is becoming shorter and shorter.<sup>208</sup> Professor Kramer’s definition simply cannot be correct unless one accepts the notion that all law, at bottom, is inherently formalistic because it involves *law*.<sup>209</sup> Activism and formalism are obviously distinguishable. Indeed, most scholars would agree that the Warren Court was quite “activist” — it struck down acts of the popularly-elected branches, overruled precedents, and recognized fundamental rights not specifically enumerated in the text of the Constitution<sup>210</sup> — but surely no one would label it formalist. At bottom, defining formalism as “law” fails to distinguish the Court’s recent federalism decisions from any other area of Supreme Court jurisprudence. As Professor Sunstein has suggested, there is a distinction between “aggressiveness” and “maximalist”; the New Federalism decisions may be the former but not the latter.<sup>211</sup>

## II. THE FUNCTIONAL ALTERNATIVE

One might be tempted to say that the debate is purely one of semantics, but this is not the case. Based on its (mistaken) perception that the New Federalism

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<sup>205</sup> Kramer, *supra* note 129, at 219. Kramer concedes that Wechsler’s reliance on formal constitutional safeguards was flawed because “[m]ost are mechanisms that (possibly) give state and local interests a great voice in national politics, but in ways that do not necessarily protect state and local institutions.” *Id.* at 223.

<sup>206</sup> *Id.* at 292.

<sup>207</sup> *Id.*

<sup>208</sup> See Eid, *supra* note 191, at 917–21 (discussing the expanding nature of the Court’s intervention in political controversies).

<sup>209</sup> See, e.g., Alexander, *supra* note 40, at 530 (suggesting that “[l]aw is essentially formalistic” because it consists of rules).

<sup>210</sup> For a sympathetic view of the Warren Court’s “activism,” see Rebecca L. Brown, *Activism is Not a Four-Letter Word*, 73 U. COLO. L. REV. 1257 (2002).

<sup>211</sup> Sunstein, *supra* note 172, at 757 & n.3.



decisions are overly formalistic, the standard critique goes on to make a normative prescription: the adoption of a functional balancing test. This section sets forth and evaluates that test, and concludes that the functional balancing test undermines the very federalism values it seeks to serve. In other words, the standard critique has diagnosed a disease that does not exist and then prescribes a “cure” that will do more harm than good.

### A. *The Functional Balancing Test*

The standard critique’s prescription is sometimes implicit, sometimes explicit, and comes in different shapes and sizes. But the theme is always the same: jettison any formalism for a functional balancing test. For example, Professor Chemerinsky argues that:

[T]he analysis must be functional. What situations must be handled or are best dealt with by the federal government and which by the states? There is no substitute for facing these questions directly in Congress or in the courts. . . . [D]iscussions about federalism . . . should be explicit with regard to the competing values. For example, in any case concerning federalism, the Court should explicitly identify the values of federalism to be served — or compromised — by a particular judicial ruling. The Court also should identify the competing concerns, and explicitly explain the basis for its ultimate balance.<sup>212</sup>

Like Professor Chemerinsky, Professor Jackson concludes that “the nature of federalism, and the limited aspirations we should have for judicial enforcement of its limits on Congress’s power, would favor a deferential, flexible, multifactor approach to developing any substantive limits on Congress’s powers.”<sup>213</sup> Such a test “would focus on whether the nature of the command, the choices available to state officials, the reasons for the federal law, and the substantiality and nature of the burdens imposed, are inconsistent with the constitutional status and governmental functions of the states.”<sup>214</sup> And although Professor Caminker does not formally endorse a balancing test for federalism questions, he does lament the fact that the

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<sup>212</sup> Chemerinsky, *The Values of Federalism*, *supra* note 42, at 535–36; *see also* Chemerinsky, *supra* note 28, at 984 (“Federalism is ultimately about a basic policy question: how is power best divided between the national and state governments? The analysis, now and always, must be functional.”); Erwin Chemerinsky, *Right Result, Wrong Reasons: Reno v. Condon*, 25 OKLA. CITY U. L. REV. 823 (2000) (arguing that *Reno* was rightly decided but advocating that *Printz* and *New York* be overruled, or in the alternative, that the Court create a “compelling interest exception” to the Tenth Amendment).

<sup>213</sup> Jackson, *supra* note 23, at 2257.

<sup>214</sup> *Id.* at 2257–58.

Court eschewed a more functional approach “in that it pointedly avoided [in *Printz*] a sensitive assessment of whether . . . commandeering undermines any of the diverse values or purposes thought to underlie [federalism].”<sup>215</sup>

Professors Chemerinsky, Jackson, Caminker and other proponents of the standard critique<sup>216</sup> adopt precisely the sort of balancing test that the Court rejected in *New York, Printz, Lopez, and Morrison*. This sort of open-ended balancing of the federal interest against the state incursion, however, would end up where the New Federalism cases began — with little if any judicial oversight of federalism issues. Such a balancing test would, in the end, fail to serve the values of federalism the standard critique seeks to promote.

### *B. Why the Functionalist Alternative Will Not Work*

There is a large body of literature on the rules versus standards debate.<sup>217</sup> I do not intend to enter that fray at such a high level of abstraction. Instead, my aim is to draw on that literature to defend the Court’s use of formalism — tempered by a functionalist value check — in the federalism context. Formalism and functionalism both have costs and benefits. The question is whether the context is best served by a rule or a standard. In the federalism context, however, the functional balancing test will fail to serve the values of federalism, for two related reasons.

First, it is the Court — an inherently nationalistic institution — that will be doing the balancing. Predictably, the Court will systematically overvalue the federal interest at stake and undervalue the incursion into state sovereignty. The functional balancing test, then, is a loaded one — simply by virtue of the identity of the “balancer.” The values of federalism served by carving out at least some regulatory role for the states will be lost. Second, the functional balancing test fails to signal Congress with adequate clarity. It simply informs Congress that its balance will, on occasion, be re-done by the Court.

#### 1. The Supreme Court: Just Another Fox

Commentators have described the “political safeguards” theory of federalism

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<sup>215</sup> Caminker, *supra* note 44, at 201.

<sup>216</sup> See, e.g., Kramer, *supra* note 29, at 1503 (arguing that the Court should be asking “[w]hich approach [to the case] does a better job of finding the appropriate balance between state and federal authority in today’s world?”); Alfred R. Light, *Lifting Printz Off Dual Sovereignty: Back to a Functional Test for the Etiquette of Federalism*, 13 *BYU J. PUB. L.* 49 (1998) (advocating a functional balancing approach to federalism questions).

<sup>217</sup> See, e.g., Pierre J. Schlag, *Rules and Standards*, 33 *UCLA L. REV.* 379 (1985); Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 *HARV. L. REV.* 22 (1992). Professor Schlag concludes that the rules versus standards dialectic, though used throughout law, is ultimately useless. Schlag, *supra*, at 430.

as akin to the fox guarding the henhouse.<sup>218</sup> In other words, Congress cannot be trusted to protect the states' sovereignty interest because its interests are inherently contrary to those of the states. When an issue rises to the forefront of the national political agenda, for example, Congress often perceives the political need to address it on a national level and preempt action by the states — even where a state-centric solution might make more sense. “Congress has to do something” is the clarion call that Congress understandably must answer. Even the most ardent supporters of federalism in theory find it hard to practice what they preach.<sup>219</sup> In such a situation, the “political safeguards” of federalism are really no safeguards at all. The fox eats the chickens when it is in the institutional interests of Congress to do so.<sup>220</sup> As Professor Steve Calabresi has pointed out, the “political safeguards” theory seems somewhat naïve and out-moded after literally decades of congressional incursions into state sovereignty.<sup>221</sup>

Under the functional balancing test proposed by the standard critique, the states may have simply traded the Congressional fox for another, more sly one in the judicial branch. The Court, to use Professor Calabresi's terminology, is composed of “national umpires.”<sup>222</sup> Like Congress, the Court is a nationalist institution. It is, after all, the Supreme Court of the *United States*. One would anticipate that it, too, would inherently favor national interests over state sovereignty.

The Court's nationalism manifests itself on two complementary fronts. First, the Justices, by nature, prefer national uniformity to the cacophony of state-based regulation. As Professor Bob Nagel has recently suggested:

[O]ne would expect officials of the national government, including judges, to be suspicious and jealous of competing centers of power in the states. One would expect jurists to be especially put off by

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<sup>218</sup> See *supra* note 201.

<sup>219</sup> See, e.g., Allison H. Eid, *The Tort Reform Debate: A View From Colorado*, 31 SETON HALL L. REV. 740 (2001). As Professor Calabresi has noted, “many Americans [see] a complete collapse of the ability of our national politicians to distinguish *at all* between state and federal matters, and both political parties are thoroughly to blame.” Calabresi, *supra* note 129, at 793.

<sup>220</sup> Jonathan Macey has applied public choice principles to federalism and argues that Congress will permit the states to regulate when it is in its interest to do. See Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 267–69 (1990). For example, Professor Macey suggests that Congress will “franchise” its power to regulate to states when, *inter alia*, it “can avoid potentially damaging political opposition from special-interest groups by putting the responsibility for a particularly controversial issue” on the states. *Id.* at 268–69. The flip-side of this observation is, of course, that Congress will seize the opportunity to regulate when it can reap the rewards of acting on a popular issue.

<sup>221</sup> Calabresi, *supra* note 129, at 790–99.

<sup>222</sup> *Id.* at 811.

decentralization because . . . the unruly, unplanned world created by real decentralization is an affront to the decorous, rationalist, perfectionist impulses that are so much a part of the culture of American legalism.<sup>223</sup>

In other words, the Supreme Court inherently favors national solutions to national problems — the regulatory option that Congress can best provide.

Professor Weiser has explored the potential for federal courts to overvalue uniformity in interpreting the Telecommunications Act of 1996, a cooperative federalism regime that combines the authority of federal regulators, state regulators, and federal courts.<sup>224</sup> Such cooperative federalism regulatory programs, according to Professor Weiser, “strike many courts . . . as a messy and chaotic means of generating federal law.”<sup>225</sup> He warns “that federal courts unfamiliar with the cooperative federalism regulatory model will lean toward a preemption [of state authority] approach, rejecting local choices as inconsistent with the longstanding rhetorical commitment to preserving uniformity of federal law.”<sup>226</sup> Federal courts — especially the Supreme Court — understand that their mission is to provide a national, uniform legal regime.

The Court’s uniformity goal became apparent early on in the country’s history. In *Martin v. Hunter’s Lessee*,<sup>227</sup> for example, the Court held that its appellate jurisdiction extended to final decisions of the highest courts of states involving federal law. In reaching its decision, the Court emphasized the “importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution.”<sup>228</sup> Without such jurisdiction,

[j]udges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the constitution itself: If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states . . . . The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the constitution.<sup>229</sup>

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<sup>223</sup> NAGEL, *supra* note 1, at 28.

<sup>224</sup> Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1705–10 (2001).

<sup>225</sup> *Id.* at 1693.

<sup>226</sup> *Id.* at 1708.

<sup>227</sup> 14 U.S. (1 Wheat.) 304 (1816).

<sup>228</sup> *Id.* at 347–48.

<sup>229</sup> *Id.* at 348.

The Court was, of course, not addressing Congress's power to regulate, but rather its own role in interpreting those regulations. Regardless, the preference for uniformity is unmistakable — a preference that still permeates the Court's procedural rules.<sup>230</sup>

The Court's nationalism manifests itself in a second, complementary way: The Justices want to "do good," and they often have the power to do so. Understandably, the Supreme Court wants to be "part of the solution" — an institutional mission supported by many commentators in the legal academy.<sup>231</sup> As noted above, the standard critique would have the Court balance the importance of the federal regulatory interest against the burden on state sovereignty the regulation would incur. A Justice who wants to be "part of the solution" is more likely to find the federal interest strong, the burden on state sovereignty small, and the regulation therefore justified.

In fact, the dissenting Justices in the New Federalism decisions have found the federal incursion justified in every respect. Is the Low-Level Radioactive Waste Policy Amendments Act of 1985 important enough to justify the minimal intrusion on state sovereignty? "Yes," according to the dissenters in *New York*.<sup>232</sup> Is the Brady Act important enough to justify the "trivial" intrusion on state sovereignty? Again, "yes" say the dissenters in *Printz*.<sup>233</sup> The same goes for the Gun-Free School

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<sup>230</sup> For example, the Court will grant a petition for certiorari, *inter alia*, when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter"; when such a court "has decided an important federal question in a way that conflicts with a decision by a state court of last resort"; or when "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." SUP. CT. R. 10(a) & (b).

<sup>231</sup> See, e.g., *Brown*, *supra* note 210, at 1271 (suggesting that "[a]ctivism must be justified by a substantive sense of the judicial mission in a democracy. I believe the Warren Court justified its activism. It had a vision of what constituted legitimate and illegitimate legislative motives, and it acted on that vision"); *Tribe*, *supra* note 2, at 1065 ("I believe that eventually the [advent of the Burger Court] will be marked not as the end of an era of misguided activism but as an unhappy pause in our progress toward a just society.").

<sup>232</sup> As Justice White observed in his dissent:

Ultimately, I suppose, the entire structure of our federal constitutional government can be traced to an interest in establishing checks and balances to prevent the exercise of tyranny against individuals. But these fears seem extremely far distant to me in a situation such as this. We face a crisis of national proportions in the disposal of low-level radioactive waste, and Congress has acceded to the wishes of the States by permitting local decisionmaking rather than imposing a solution from Washington. . . . For me, the Court's civics lecture has a decidedly hollow ring at a time when action, rather than rhetoric, is needed to solve a national problem.

*New York v. United States*, 505 U.S. 144, 206–07 (1992) (White, J., dissenting).

<sup>233</sup> *Printz v. United States*, 521 U.S. 898, 961 (1997) (Stevens, J., dissenting).

Zones Act in *Lopez*<sup>234</sup> and the Violence Against Women Act in *Morrison*.<sup>235</sup> As Professor Chemerinsky suggests:

Think about what Congress was regulating in these cases: guns within 1000 feet of schools, violence against women, cleaning up low level nuclear waste, [and] requiring background checks for handguns. All of these are unquestionably desirable federal laws in terms of their merits. These are all, unquestionably, popular federal laws.<sup>236</sup>

Professor Chemerinsky's implication seems to be that when the Court strikes down, for example, a law protecting women from violence or schoolchildren from handguns, the Court is anti-woman and anti-child.

When an "unquestionably popular" issue comes to the forefront of the nation's consciousness, it can be understandably difficult for Congress to resist the temptation to regulate — regardless of the costs to federalism. It is similarly difficult for the Supreme Court to strike down Congress's efforts in favor of a national solution. It is thus not hard to see how a balancing test could devolve into judicial nonenforcement, leaving state sovereignty under the "political safeguard" of Congress once again.

Of course, the New Federalism of the last decade represents a significant caveat to all of this nationalism. In other words, the members of the Federalism Five are acting "counter-character." The scholarship exploring why the Court majority has taken up the task of reinvigorating federalism norms is vast and conflicting. Taken at their word, the Justices in the majority believe that federalism is an important structural component of the Constitution's original design and likewise believe that the New Federalism cases are supported by constitutional text, structure, history, and precedent. Some commentators have taken on the New Federalism decisions at this level, arguing that the decisions are just plain wrong as a jurisprudential matter.<sup>237</sup> Others have sought to show that the Court is simply interested in "conservative" outcomes<sup>238</sup> (although "conservative" laws such as the Gun-Free School Zones Act

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<sup>234</sup> United States v. Lopez, 514 U.S. 549, 625 (1995) (Breyer, J., dissenting).

<sup>235</sup> United States v. Morrison, 529 U.S. 598, 628 (2000) (Souter, J., dissenting).

<sup>236</sup> See Chemerinsky, *The Federalism Revolution*, *supra* note 42, at 16 (omitting citations to *Lopez*, *Morrison*, *New York*, and *Printz*).

<sup>237</sup> See, e.g., Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011 (2000); H. Geoffrey Moulton, Jr., *The Quixotic Search for a Judicially Enforceable Federalism*, 83 MINN. L. REV. 849 (1999).

<sup>238</sup> See Whittington, *supra* note 1, at 479 ("The federalism offensive can best be understood as a product of the Court's taking advantage of a relatively favorable political environment to advance a constitutional agenda of particular concern to some individuals within the Court's conservative majority."); see also Fallon, *supra* note 46 (exploring various ways in which the Rehnquist Court can be understood as having acted "conservatively").

have fallen as well as “liberal” ones). Still others have suggested that the background of the Justices may be key.<sup>239</sup>

Whatever the explanation for the federalism revival, history suggests that the Rehnquist Court is the aberration, not the rule.<sup>240</sup> As a general matter, the Court is more likely to be filled with nationalist foxes than with state hen protectors. In more than a half a century of constitutional decisionmaking prior to the New Federalism, the Supreme Court had found *only one statute* violative of constitutional federalism norms, and that decision — *Usery* — was overruled in less than a decade.<sup>241</sup>

During the period of federalism nonenforcement, the Court in fact had in place a balancing test similar to that proposed by the standard critique. In *Fry v. United States*, for example, the Court sustained federal wage controls as applied to state employees against an attack that the regulation exceeded Congress’s power under the Commerce Clause and the Tenth Amendment.<sup>242</sup> Writing for the seven-member majority, Justice Marshall wrote that “Congress may not exercise power in a fashion that impairs the States’ integrity or their ability to function effectively in a federal system.”<sup>243</sup> According to Justice Marshall, the wage controls “constituted no such drastic invasion in state sovereignty.”<sup>244</sup> On the contrary, the intrusion was minimal and temporary, and “the effectiveness of federal action would have been drastically impaired if wage increases to [state employees] were left outside” of the federal regulations.<sup>245</sup> The importance of the federal interest was presumed by the Court,<sup>246</sup> and the intrusion into state sovereignty was found to be minimal. Indeed, in case after case, the balance always happened to favor the national interest.<sup>247</sup>

Significantly, and perhaps not surprisingly, the Rehnquist Court exhibits fox-

<sup>239</sup> See, e.g., M. David Gelfan & Keith Werhan, *Federalism and Separation of Powers on a “Conservative” Court: Currents and Cross-Currents From Justices O’Connor and Scalia*, 64 TUL. L. REV. 1443, 1472–74 (1990) (analyzing the impact that Justice O’Connor’s and Justice Scalia’s pre-judicial experience might have had on the development of their federalism jurisprudence). For example, Justice O’Connor is a former Arizona legislator, district judge, and intermediate appellate court judge. See Judicial Profile: Hon. Sandra Day O’Connor, *supra* note 162, at 19–20.

<sup>240</sup> See Robert F. Nagel, *Real Revolution*, 13 GA. ST. U. L. REV. 985, 987 (1997) (arguing that, as a historical matter, post-New Deal federalism jurisprudence has favored nationalism).

<sup>241</sup> See *supra* notes 2, 193–95 and accompanying text.

<sup>242</sup> 421 U.S. 542 (1975).

<sup>243</sup> *Id.* at 547 n.7.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* at 548.

<sup>246</sup> Indeed, writing for the Court in *Usery*, then-Justice Rehnquist distinguished *Fry* on the ground that the wage stabilization measures at issue were “emergency measures.” *Nat’l League of Cities v. Usery*, 426 U.S. 833, 853 (1976).

<sup>247</sup> See Nagel, *supra* note 178, at 84 (discussing the Court’s balancing); see also Tribe, *supra* note 2, at 1071 (suggesting that the Court’s pre-New Federalism jurisprudence “encompass[ed] little beyond [protecting] the continued formal existence of separate and independent states”).

like behavior from time to time. The federalism “revival” is a limited one. In its recent decision in *Geier v. American Honda Motor Company*, for example, four of the Federalism Five — Chief Justice Rehnquist and Justices O’Connor, Kennedy, and Scalia — joined Justice Breyer in holding that the National Traffic and Motor Vehicle Safety Act preempted state tort law governing airbags.<sup>248</sup> This case, of course, involved interpretation of federal statutes, not constitutional text. But it is significant that the Court majority found that a state tort lawsuit “actually conflicted” with a federal regulation — and was therefore preempted via the Supremacy Clause — even though congressional language on the subject of preemption was ambiguous at best.<sup>249</sup> The dissent would have adopted a “presumption against pre-emption” requiring Congress to “speak clearly” before a finding of preemption could be made.<sup>250</sup> In other words, the dissent would have put the thumb on the scale of preserving state law, whereas the majority gave federal law the benefit of the doubt.<sup>251</sup>

Thus, despite its New Federalism jurisprudence, the Court — even *this* Court — is not a consistent protector of federalism interests. The recent cases have marked an important — if modest — step toward the reinvigoration of constitutional federalism. But as Professor Nagel has noted, “the record as a whole is mixed enough to cast doubt on the idea that devotion to decentralized decision making is now an overriding value for most members of the Court.”<sup>252</sup> Nationalist impulses are simply part of the Court — today, and in the future. The challenge, then, is to find a way to restrain the nationalist tendencies of the Court in order to provide an opportunity for federalism to flourish.

## 2. Constraining Future Judicial Foxes

The formalist elements of the Court’s New Federalism may be the answer to the challenge of how to constrain future judicial foxes. An important aspect of formalism is that it constrains the latitude that later decisionmakers may make. As

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<sup>248</sup> 529 U.S. 861 (2000).

<sup>249</sup> *Id.* at 869 (discussing the fact that the Act provides that no state “shall have any authority . . . to establish . . . any safety standard” applicable to airbags while at the same time providing that compliance with federal airbag regulations “does not exempt any person from any liability under common law”).

<sup>250</sup> *Id.* at 907 (Stevens, J., dissenting).

<sup>251</sup> Richard Fallon explains *Geier* and other pro-preemption cases as a manifestation of the Justices’ conservative political leanings. According to Professor Fallon, the conservative Justices want to favor the interests of business and industry, which support federal preemption because it “minimize[s] the regulatory requirements to which businesses are subject.” Fallon, *supra* note 46, at 472. This explanation, however, is not inconsistent with — and in fact supports — the view that nationalism plays an important role in the Court’s jurisprudence.

<sup>252</sup> See NAGEL, *supra* note 1, at 28.



Professor Schauer has written, “the essence of rule-based decision-making lies in the concept of jurisdiction. [R]ules . . . narrow the range of factors to be considered by particular decision-makers, [and thereby] establish and constrain the jurisdiction of those decision-makers.”<sup>253</sup> In other words, formalism, by definition, puts some things “off limits” to the decisionmaker.

The formalist elements of the Court’s New Federalism jurisprudence indeed put some things off limits. Under the Tenth Amendment, Congress cannot “commandeer” state officials to do its bidding.<sup>254</sup> Nor can Congress invoke the Commerce Clause to regulate activity that falls on the “non-economic” side of the line.<sup>255</sup> Of course, there will be controversies over the scope of these constraints. As noted above, for now the Court has taken aim at what it views as the most egregious cases of congressional overreaching and has left Congress a good deal of maneuvering room.<sup>256</sup> The point is, the Court has erected some constraints on the nationalist tendencies of future Courts.

This is not to say, of course, that the Court has erected full-proof constraints against excessive nationalism. The legal realists taught us that any decisionmaker can get around any precedent, legalism, or formalism if she puts her mind to it.<sup>257</sup> The point is, an inherently nationalist decisionmaker — a future Court fox — will find it more difficult to reach a nationalist result under a regime with a formalist edge, such as that provided by the New Federalism, than under a functional balancing test. New Federalism puts in place some hoops through which a nationalist decisionmaker must jump before reaching a nationalist result. A clever nationalist can, of course, jump through the hoops and still reach a nationalist result, but a purely functional balancing test provides no constraint at all.

The formalist elements of New Federalism thus act much like the presumption against preemption adopted by the dissenters in *Geier*. It puts the thumb on the scale of preserving state sovereignty. Prior to the New Federalism, the thumb was on the scale of nationalism. The presumption can, of course, be overridden for good reason — and that is where the New Federalism’s functionalism comes in. Indeed, the New Federalism decisions seek to incorporate the best of both worlds: They put a thumb on the scale in favor of federalism while checking the presumption with the values that federalism serves.

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<sup>253</sup> FREDERICK F. SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISIONMAKING IN LAW AND IN LIFE* 231–32 (1991).

<sup>254</sup> See *supra* notes 47–59, 69–83 and accompanying text.

<sup>255</sup> See *supra* notes 97–113, 116–18 and accompanying text.

<sup>256</sup> See *supra* notes 189–90 and accompanying text.

<sup>257</sup> See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW* 193–212 (1992) (discussing the legacy of legal realism). Interestingly, commentators of the standard critique presume that rules can indeed be constraining — excessively so, in their view.

### 3. Constraining and Cueing Future Congressional Foxes

The formalism of the New Federalism has the added benefit of constraining future *congressional* foxes. First and most obviously, the decisions mean that the Justices will strike down congressional overreaching when they see it — that is, in cases that come before them. But the Court cannot possibly police every congressional act. The point is that the formalism of the New Federalism is more likely to encourage Congress to stay within its bounds than a functional balancing test.

In the days of judicial balancing and federalism nonenforcement, the only constraints on congressional action were the “political safeguards” — safeguards that, as discussed above, disappear when political necessity comes calling. During this period, there was simply no reason for Congress to restrain itself. There were few consequences to — and many benefits from — eating the hens.

The New Federalism potentially makes the hen-eating more costly to Congress. In a post-New Federalism world, Congress still can legislate without considering federalism interests — but risks having its handiwork struck down if it does. Countless hours of legislative time and energy would have been wasted on unconstitutional legislation. Even Professor Choper, the preeminent expositor of judicial nonenforcement, gives grudging recognition to the argument that, without the “deterrent effect of potential judicial invalidation, the federal political branches” will engage in “the process of self-arrogation of power.”<sup>258</sup>

It is important, of course, not to overstate the effectiveness of this constraint. Indeed, Congress might be quite content with passing unconstitutional laws on popular subjects. In doing so, Congress gleans a short-term benefit of “doing something” on an issue of national importance — even if that “something” fails to accomplish its goals because it is subsequently struck down as contrary to federalism norms.<sup>259</sup> The point is that, at the very least, the formalist elements of the New Federalism give Congress a more clear idea of what it can and cannot do.<sup>260</sup>

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<sup>258</sup> Choper, *supra* note 199, at 1600. Professor Choper later dismisses this argument on the ground that Congress will abdicate its authority to judge the constitutionality of its own actions to the courts. *Id.* at 1601. This is an application of one of the general objections to formalism — that decisionmakers will regulate right up to the bright-line and perhaps cross it to test the limits of the rule.

<sup>259</sup> See Neal Devins, *Congress as Culprit: How Lawmakers Spurred on the Court's Anti-Congress Crusade*, 51 DUKE L.J. 435, 461–62 (2001) (“Congress increasingly is concerned with ‘message politics,’ that is, using the legislative process to make a symbolic statement to voters and other constituents. . . . [B]y focusing its efforts on the message it is sending, Congress places less emphasis on what happens to legislation after it is enacted.”).

<sup>260</sup> See Schlag, *supra* note 217, at 384 (“Rules draw a sharp line between forbidden and permissible conduct, allowing persons subject to the rule to determine whether their actual or contemplated conduct lies on one side of the line or the other.”).

Professor Jackson has called this concept the “cueing” function of the New Federalism.<sup>261</sup> And, indeed, Professor Jackson admits that formalism cues better than functionalism: “[O]nce Congress knows what it can and cannot do, it can use the permissible tools to achieve its regulatory ends.”<sup>262</sup>

In the end, it is up to Congress to decide whether it wants to pay attention to the cues. Professor Neal Devins suggests that the evidence is somewhat mixed in this regard. First, he notes that “when Congress has revisited its handiwork [that has been set aside by the Court], lawmakers have paid close attention to the Supreme Court’s rulings, limiting their efforts to revisions the Court is likely to approve.”<sup>263</sup> He points to the fact that Congress responded to *Lopez* with a new statute that requires the government to prove that the firearm “moved in or otherwise affects interstate or foreign commerce.”<sup>264</sup> And, as Justice Souter noted in his dissent in *Morrison*, Congress assembled a “mountain of data . . . showing the effects of violence against women on interstate commerce” in response to the Court’s suggestion that such data was lacking in *Lopez*.<sup>265</sup> Similarly, when Congress reenacted the Violence Against Women Act of 2000 in the aftermath of *Morrison*, it focused on using federal funds to prevent domestic violence rather than on enforcement through civil actions against private actors — the flaw identified by the Court in the predecessor statute.<sup>266</sup>

Professor Devins notes, however, that Congress is often simply indifferent to the Court’s cues: “Sometimes, Congress treats the Constitution as the exclusive province of the Supreme Court; on other occasions, Congress simply seems indifferent to the constitutionality of its enactments, including whether the Supreme Court is likely to approve or disapprove of its decisionmaking.”<sup>267</sup> He notes that key federalism decisions have been discussed by Congress — as revealed in the pages of the Congressional Record — only a handful of times,<sup>268</sup> and that Congress has on at least two occasions rejected suggestions that it hold hearings on the

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<sup>261</sup> See Jackson, *supra* note 23, at 2226. Other commentators believe that, rather than cueing Congress, the Court is declaring all-out-war on the institution. See, e.g., Ruth Coker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2001) (suggesting that the Court’s New Federalism is not animated by an interest in separation of powers per se, but rather by a dislike of Congress).

<sup>262</sup> Jackson, *supra* note 23, at 2256.

<sup>263</sup> See Devins, *supra* note 259, at 447.

<sup>264</sup> *Id.* at 447 n.58 (citing 18 U.S.C. § 922(a)(2)(A)).

<sup>265</sup> Devins, *supra* note 259, at 451 (citing *Morrison*, 529 U.S. at 628–29 (Souter, J., dissenting)). Of course, the mountain of data did not save the statute; in Court’s view, the subject matter of the statute was noneconomic, and thus fell outside the Commerce Clause. See *supra* notes 117–18.

<sup>266</sup> Devins, *supra* note 259, at 451 (citing Pub. L. No. 106-386, 114 Stat. 1491).

<sup>267</sup> Devins, *supra* note 259, at 441–42.

<sup>268</sup> *Id.* at 451.

constitutionality of legislative proposals.<sup>269</sup>

But regardless of whether the Court will find a receptive audience to its cues, the point is that a functional balancing test does little to “cue” at all. All that congressional actors might be able to glean from such a test would be the fact that the Court, on occasion, will re-do its balance. Professor Jackson seems to anticipate this argument against her proposal by suggesting that, in her world, the functional balancing test would be one that is deferential to Congress.<sup>270</sup> But as noted above, there is no reason to think that such deference would occur. On the contrary, a functional balancing test might, in the end, be less deferential to Congress than that adopted by the New Federalism decisions.

As Professor Ernest Young has written, the New Federalism decisions seek to proscribe the “means” by which Congress may regulate but leave intact congressional leeway in terms of “ends.”<sup>271</sup> In the Tenth Amendment cases, for example, the Court told Congress that it could not “implemen[t] through state agents,” but put no similar restriction on the “subjects that [Congress] can regulate or the purposes that it may pursue.”<sup>272</sup> The “non-economic” language of the Commerce Clause cases comes closer to a restriction on ends, but as Young points out, it “accords broad scope to Congress’s power,” by, among other things, adopting a “generou[s]” definition of commercial activity.<sup>273</sup> In other words, the ultimate policy judgment is Congress’s as long as Congress uses approved regulatory tools.

The functional balancing test, by contrast, appears to put the “ends” on the examining table as well — in the form of the judicial scrutiny of the gravity of the federal interest. Of course, as noted above, the Court might inherently tend to overvalue the federal interest — but it need not necessarily be so. The point is, the standard critique’s functional balancing test not only fails to signal Congress on the constitutionally appropriate means, it subjects the ends to judicial scrutiny as well.

Commentators made similar objections to the balancing test adopted by the Court in *Usery*, in which “the weight of the burden which each federal regulation puts upon the states [would] be weighed *ad hoc* against the importance of the federal interest and the need for state compliance.”<sup>274</sup> Professor Archibald Cox, for example, suggested that it was “unwise to have five Justices undo a deliberate legislative judgment by the Congress for no other reason than that the Justices as members of Congress would have voted” against the federal legislation.<sup>275</sup> The

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<sup>269</sup> *Id.* at 449–50.

<sup>270</sup> Jackson, *supra* note 23, at 2257.

<sup>271</sup> See Young, *supra* note 45, at 144 (discussing the commandeering and Commerce Clause cases).

<sup>272</sup> *Id.* at 154.

<sup>273</sup> *Id.* at 159.

<sup>274</sup> Archibald Cox, *Federalism and Individual Rights Under the Burger Court*, 73 NW. U. L. REV. 1, 24 (1978).

<sup>275</sup> *Id.* at 25.

Court, according to Professor Cox, was giving “too little thought to the long-run institutional consequences of successive majorities imposing their inconsistent pragmatic judgment upon the country.”<sup>276</sup> In other words, the Court was being too *functionalist*. Of course, Professor Cox no doubt would have preferred a return to the pre-*Usery* era of nonenforcement to the Court’s current blend of formalism and functionalism. But his critique of the balancing process remains valid. A functional balancing draws few *ex ante* boundaries for members of Congress; it merely tells them that, *ex post*, their balance is subject to second-guessing by the Court.

#### 4. The Costs of Formalism in Federalism Jurisprudence

There are costs to any jurisprudence that incorporates formalist elements like the New Federalism. The most commonly cited — and the most worrisome — is that the decisionmaker will apply the rule where it simply makes no sense to do so. Dean Kathleen Sullivan suggests that “the rule’s force as a rule is that decisionmakers follow it, even when direct application of the background principle or policy to the facts would produce a different result.”<sup>277</sup> In other words, while rules, as noted above, provide policymakers with firm guidance, that firmness can become a problem when — as is inevitable — the rules require a result that is contrary to the values that animated the rule in the first instance.

In the federalism context, the fear expressed by the standard critique is that the Court will ignore the values of federalism while applying the rules of federalism. At its most extreme, the standard critique raises the specter that the New Federalism decisions seek to turn back the clock to 1937 and before — a time of “dual federalism” in which the Court

tried to preserve the balance between the states and the nation by dividing up the world into two separate spheres: “local” and “national,” “intra-” and “inter-state,” “manufacturing” and “commerce,” to name just a few. These dichotomies were intended to describe distinct fields of regulatory jurisdiction in which one government or the other would have exclusive authority.<sup>278</sup>

Professor Jackson has stated that her championing of the functionalism cause “is influenced not only by my understanding of the values of federalism and the benefits of judicial enforcement, but also by my perception that the history of rigid judicial constraints on federal power based on federalism grounds has had a relatively high

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<sup>276</sup> *Id.*

<sup>277</sup> Sullivan, *supra* note 217, at 58.

<sup>278</sup> Young, *supra* note 45, at 139.

number of notable failures.<sup>279</sup> Indeed, the system of dual federalism, as Professor Young writes, “died an ignominious death in 1937 or shortly thereafter. . . . It has not been much mourned since.”<sup>280</sup>

The Supreme Court, however, has given no indication that it is interested in repeating the mistakes of the past.<sup>281</sup> In a particularly thoughtful article on the subject, Professor Young suggests that the Court’s New Federalism jurisprudence does not represent a return to 1937 because the cases “do not . . . attempt to identify particular subject-matter areas of state regulatory authority and place them off limits to federal action.”<sup>282</sup> Instead, as noted above, the Court appears to be delineating the outer boundaries of Congress’s power while permitting Congress wide latitude within those boundaries.

Moreover, again as noted above, the Court is using functionalism as a backstop to formalism — to use Professor Schauer’s terminology, it is engaging in “presumptive formalism.” It has checked its outcome under the rules against the values that gave rise to the rules. Of course, reasonable minds will differ on whether the Court has applied the value-backstop correctly. But so far, the specter that the standard critique raises — the wooden, rule-bound, value-free federalism jurisprudence — simply has not materialized. In the end, the formalism versus functionalism debate boils down to which risk — no enforcement or overenforcement — one fears most. Given the Court’s track record of nonenforcement of federalism norms, overenforcement seems unlikely.

This is not to say that the New Federalism is toothless. On the contrary, the long list of congressional efforts set aside by the Court demonstrates that this is not the case. And there certainly may be more to come. In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, for example, the Court ruled 5–4 that a rule giving the United State Army Corps of Engineers jurisdiction over intrastate waters used by migratory birds exceeded the Corps’ authority as granted by the Clean Water Act, which gives the Corps authority over “navigable waters” of the United States.<sup>283</sup> The Court reasoned that the “migratory bird rule” would “result in a significant impingement of the States’ traditional and primary power over land and water use,” and interpreted the term “navigable waters” narrowly in order “to avoid the significant constitutional and federalism questions.”<sup>284</sup> The Corps tried to change the focus of its Commerce Clause argument from migratory birds flying interstate to the fact that the land at issue was a municipal landfill — that is, economic activity. The Court, however, rejected this

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<sup>279</sup> Jackson, *supra* note 23, at 2230 n.219.

<sup>280</sup> Young, *supra* note 45, at 139.

<sup>281</sup> See Calabresi, *supra* note 129, at 806 (“Presumably, the Justices have learned from [the judicial crisis of 1937] . . .”).

<sup>282</sup> Young, *supra* note 45, at 140.

<sup>283</sup> 531 U.S. 159 (2001).

<sup>284</sup> *Id.* at 174.

attempt because it did not square with the statutory language of “navigable waters.”<sup>285</sup> The dissent, for its part, stressed the functionalist goals of the Clean Water Act, lamenting that the Court had “take[n] an unfortunate step that needlessly weakens our principal safeguard against toxic water.”<sup>286</sup>

*Solid Waste Agency* signals that the Court is serious about New Federalism. Indeed, the formalism of the New Federalism means something — namely, that certain congressional acts will fall outside the constitutional parameters set by the Court. New Federalism is not without punch, but its punch is softened by the functionalist backstop. As Professors Choper and Yoo characterize it, the New Federalism is “an evolution rather than a revolution.”<sup>287</sup>

### III. CONCLUSION

The standard critique, which posits that the Court’s New Federalism jurisprudence is excessively formalistic, is wrong both as a descriptive and as a normative matter. Descriptively, the standard critique mistakenly ignores the Court’s efforts to justify its decisions as consistent with the values that underlie the principles of federalism. Normatively, the standard critique proposes a functional balancing test that — given the inherently nationalist tendencies of the Court — will end up working against the very federalism values that the standard critique seeks to promote.

The debate over the proper role of formalism and functionalism in federalism jurisprudence is more than a semantic or even a methodological dispute.<sup>288</sup> The formalist elements of the New Federalism jurisprudence serve as a check on future decisionmakers, whether they be Justices of the Supreme Court or members of Congress. The check is not absolute, and it is still too early in the federalism revival to tell if it will even be an effective one. The point is that the balancing test proposed by the standard critique is really no check at all. History has proven that.

The Court’s New Federalism jurisprudence takes a different approach — one that attempts to garner the benefits of formalism while avoiding its pitfalls. Certainly, the New Federalism’s formalism is not without potential dangers. The most frequently cited danger is that the Court will blindly apply the rules of federalism and ignore the values of federalism. So far, the Court’s blend of formalism and functionalism belies this prediction. Indeed, the Court could not impose federalism on the country even if it wanted to. Federalism — a truly robust

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<sup>285</sup> *Id.* at 173.

<sup>286</sup> *Id.* at 175 (Stevens, J., dissenting).

<sup>287</sup> Choper & Yoo, *supra* note 186, at 854.

<sup>288</sup> Pierre Schlag’s recent work provides an important exploration of the connection between the aesthetics of law (of which the rules versus standards debate is one manifestation) and substance. *See* Schlag, *supra* note 36, at 1110–12.

federalism, that is — is a product of the political process.<sup>289</sup> It certainly cannot — and should not — be imposed from above by the Court. The formalistic aspects of the Court's New Federalism jurisprudence draw some limits on Congress's regulatory power in order to give federalism some room to flourish. It is up to the nation to see that it does.

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<sup>289</sup> Jackson, *supra* note 23, at 2228 (“Federalism is, quintessentially, a political deal among different governments. Workability is its core. It is a means to many ends, the most basic of which is the stable survival of the union it creates.”).