

Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area

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Articles

FEDERALISM AND THE TUG OF WAR WITHIN: SEEKING CHECKS AND BALANCE IN THE INTERJURISDICTIONAL GRAY AREA

ERIN RYAN*

Federalism and the Tug of War Within *explores tensions that arise among the underlying values of federalism when state or federal actors regulate within the “interjurisdictional gray area” that implicates both local and national concerns. Drawing examples from the failed response to Hurricane Katrina and other interjurisdictional problems to illustrate this conflict, the Article demonstrates how the trajectory set by the New Federalism’s “strict-separationist” model of dual sovereignty inhibits effective governance in these contexts. In addition to the anti-tyranny, pro-accountability, and localism-protective values of federalism, the Article identifies a problem-solving value inherent in the capacity requirement of American federalism’s subsidiarity principle (that regulatory decisionmaking should take place at the most local level possible). The progression of federalism models informing Supreme Court interpretation over the 20th*

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century reflects a pendulum-like attempt to reach the proper balance between these competing values. Although the Court's federalism jurisprudence during the New Deal era prioritized the problem-solving value over the "check-and-balance" anti-tyranny value, the New Federalism decisions exalt the check-and-balance value at the expense of the problem-solving (and all other) values, protecting the bright line posited between mutually exclusive spheres of state and federal regulatory authority.

Interjurisdictional problems uncomfortably blur that boundary, pitting problem-solving and checks-and-balances against one another by demanding both local and national regulatory attention. But it is arguably the tension between these values that has made our system of government so robust—enabling it to adjust for changing demographics, technologies, and expectations without losing its essential character. The New Federalism's focus on checks and balances above all else compromises its ability to effectively mediate this critical competition, sacrificing other federalism values and obstructing even desirable regulatory activity in the interjurisdictional gray area (such as federal initiative that might have been taken in the wake of Katrina). The comparatively pragmatic cooperative federalism model affords some balance, but is critiqued by New Federalism proponents as providing insufficient checks.

To remedy the theoretical problems left unresolved by cooperative federalism and the pragmatic ones caused by New Federalism, this Article argues that the Court should adopt a model of Balanced Federalism that better mediates between competing federalism values and provides greater guidance for regulatory decisionmaking in the interjurisdictional gray area. Where the New Federalism asks the Tenth Amendment to police a stylized boundary between state and federal authority from crossover by either side, Balanced Federalism asks the Tenth Amendment to patrol regulatory activity within the gray area for impermissible compromises of fundamental federalism values. The Article concludes by introducing the outlines of a jurisprudential standard for interpreting Tenth Amendment claims within a model of Balanced Federalism dual sovereignty that affords both checks and balance. Such a framework would foster a healthier dialectic between the various federalism values that, though in tension with one another, have made our system of government so effective and enduring.

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I. INTRODUCTION

In perhaps the most famous rhetorical gesture of the New Federalism,¹ Chief Justice Rehnquist opined that “[t]he Constitution requires a distinction between what is truly national and what is truly local.”² And yet, even conceding the value of the federalism principles thereby implied, we have yet to seriously reckon with the question that hangs after the rhetorical satiety dissipates: *What about everything in between?* The question makes a simple point about a complex body of jurisprudence—the Supreme Court’s controversial “New Federalism” decisions—which, in essence, is that the New Federalism breeds controversy precisely because it imposes an overly simple theoretical model on a complex area of law. Just as such critical legal fields as environmental, public health, and national security law have begun to embrace the need for greater interconnectivity in the management of regulatory problems that span multiple jurisdictions, the New Federalism decisions chart a course toward greater jurisdictional separation, setting the stage for conflict and confusion. This Article argues that American federalism can ably weather this storm, but it will require

1. In the standard litany of the New Federalism decisions, the Court addressed: (1) the extent of the federal commerce power, *see, e.g.*, *United States v. Morrison*, 529 U.S. 598, 627 (2000) (invalidating a section of the Violence Against Women Act of 1994 (VAWA)); *United States v. Lopez*, 514 U.S. 549, 551 (1995) (overturning the Gun-Free School Zones Act of 1990 as beyond the scope of commerce power); *but see Gonzales v. Raich*, 545 U.S. 1, 32–33 (2005) (affirming federal authority to proscribe intrastate production and use of medical marijuana despite contrary state law); (2) the extent of Congress’s power under the post-Civil War Amendments, *see, e.g.*, *Bd. of Trs. v. Garrett*, 531 U.S. 356, 374 (2001) (finding that the pecuniary remedy in the Americans with Disabilities Act of 1990 (ADA) did not satisfy the requirements of congruence and proportionality, which are needed to establish a valid exercise of Congressional power under the Fourteenth Amendment), *Morrison*, 529 U.S. at 627 (refusing to sustain a section of the VAWA under Section Five of the Fourteenth Amendment), *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 82–83 (2000) (concluding that the Age Discrimination in Employment Act of 1967 (ADEA) is “not ‘appropriate legislation’ under Section Five of the Fourteenth Amendment”), *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (finding that the Religious Freedom Restoration Act of 1993 (RFRA) exceeded Congress’s authority under Section Five of the Fourteenth Amendment); (3) the extent of Congress’s ability to command state executive branch and legislative activity, *see, e.g.*, *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that Congress may not compel state and local law enforcement to implement a federal regulatory program), *New York v. United States*, 505 U.S. 144, 161 (1992) (holding that the Tenth Amendment forbids Congress from “commandeering” state legislative action under a federal regulatory program); *but see Reno v. Condon*, 528 U.S. 141, 151 (2000) (finding that a federal law regulating state action did not commandeer state legislative and administrative process); and (4) the extent of state sovereign immunity, *see, e.g.*, *Alden v. Maine*, 527 U.S. 706, 712 (1999) (limiting Congress’s power to authorize suits against state governments in state courts); *Seminole Tribe v. Florida*, 517 U.S. 44, 47 (1996) (limiting Congress’s power to authorize suits against state governments in federal courts). For further discussion, *see infra* Part III.A.

2. *Morrison*, 529 U.S. at 617–18 (emphasis added).

that we (1) recognize the interjurisdictional zone that so complicates the project; (2) better understand the tensions between underlying federalism values there exacerbated; and (3) articulate an administrable means of mediating between them so as to best realize the ultimate objectives of our constitutional design.

This the New Federalism fails to do, as have preceding interpretive movements that espoused similar ideals until they too were overcome by competing federalism concerns for which their theories could not account. In this most recent round, the Court's reasoning has proceeded from a model of state-federal relations based on a severe construction of dual sovereignty, the constitutional principle by which regulatory authority is allocated between the independently functioning federal and state governments. Under this strict-separationist model, state and federal governments are idealized as operating in mutually exclusive spheres of jurisdiction, without overlap. Regulatory matters are styled as properly local or national concerns, state and federal authority is segregated accordingly, and the Tenth Amendment polices the supposed bright-line boundary between them. The distinguishing characteristics of the New Federalism decisions are premised on this ideal, which stands in contrast to much of the existing map of American government (so characterized by areas of concurrent or interlocking state and federal jurisdiction that its dual sovereignty has been likened to the intertwining layers of a marble cake³). Nevertheless, the New Federalism's approach has altered the American federalism discourse, changing the way we think about the allocation of state and federal authority in modern regulatory endeavors.

Although they have attracted intense academic attention, these changes are hardly esoteric matters of interest only to judges and law professors. For better or worse (and in different respects, probably both), they would alter the way that Congress approaches lawmaking,⁴

3. MORTON GRODZINS, *THE AMERICAN SYSTEM* 8, 60–153 (Daniel J. Elazar ed., 1966).

4. Whether the lines of influence primarily run from the Court's decisions to Congressional legislation or vice versa is a chicken-and-egg problem over which much ink has been spilled. Still, when state actions or statutes are invalidated by the Supreme Court, Congress often seeks to repair the infirmity with conforming legislation. See, e.g., Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (authorizing the President to prosecute enemy combatants in military tribunals in direct response to *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), which invalidated the practice for lack of congressional authorization). The Court's federalism jurisprudence appears similarly motivating, as suggested by the care with which the 1994 Congress crafted the "federal interest" provision of the VAWA (albeit unsuccessfully, see *Morrison*, 529 U.S. at 613–14), presumably in response to the anticipated critique in *Lopez* of the Gun-Free School Zones Act of 1990 for failure to assert a constitutionally valid federal interest. (After a multiplicity of

and the way that the Executive approaches administration.⁵ At least in the latter case, the answer may well be “for worse” because, by many accounts, the ideals associated with the New Federalism’s project of better differentiating state from national authority may have contributed to the delayed federal response to the devastating aftermath of Hurricane Katrina in New Orleans. News reports indicate that, as pressure mounted on the White House to assume responsibility for key tasks not performed at the local level, the federal response was paralyzed as senior advisors stalled in debate over the federalism implications of providing the needed assistance.⁶ This Article takes the Katrina aftermath as a primary example of how the New Federalism’s ideological trajectory⁷ can obstruct interjurisdictional problem-solving by confusing, rather than clarifying, the proper roles of national and local regulatory authorities. But the Katrina aftermath is only the most mediagenic example of confusion spawned by the New Federalism’s intolerance for interjurisdictional complexity. Similar confusion has arisen in other like contexts, ranging from environmental to antiterrorism programs, resulting in uncertain policymaking efforts and New Federalism-inspired legal challenges to regulatory partnerships that link state and federal actors in related spheres of authority.⁸

Challenging the strict-separationist premise that all regulatory issues *can* be clearly characterized as matters of either local or national jurisdiction, this Article suggests that some regulatory targets are bet-

amendments, the VAWA was passed by the House and Senate in late August and signed into law on September 13, 1994, Pub. L. 103-322, 108 Stat. 1796, before *Lopez* was decided in April 1995 but after the relevant briefing had been submitted on June 2, 1994 (Brief for the United States, 1994 WL 242541), July 19, 1994 (Brief for Respondent, 1994 WL 396915), and August 17, 1994 (Reply Brief for the United States, 1994 WL 449691.) *But see Boerne*, 521 U.S. at 536 (invalidating Congress’s attempt to reverse the effect of a prior Supreme Court decision with the Religious Freedom Restoration Act of 1993). Although it is difficult to assert a definitive causal direction in the dialectic between legislative and judicial decisionmaking, the New Federalism’s ideals seek to impact decisionmaking at both levels, and have been embraced by decisionmakers at both levels. *See infra* Part III.A.

5. *See infra* Part II.B (discussing the role of federalism considerations in the federal response to Hurricane Katrina).

6. *See infra* Part II.B. Interestingly, the public castigation that the federal government received for its failed Katrina response suggests that the New Federalism has *not* changed the way that large sectors of the public think about the respective roles of state and federal government.

7. The strict-separation ideal extrapolated from the New Federalism decisions exceeds their doctrinal impact at present, and we continue to operate from within a predominantly cooperative federalism system. *See infra* Part V.B.3. Nevertheless, it has already infiltrated the regulatory mindset of policymakers. *See infra* Part II.B. As such, the strict-separationist trajectory of New Federalism warrants scrutiny now, before its culmination further complicates our ongoing navigation of good governance.

8. *See, e.g., infra* Part IV.A.1.b.

ter understood within a separate, interjurisdictional sphere that legitimately implicates both local and national responsibility. As defined here, an “interjurisdictional regulatory problem”⁹ is one whose meaningful resolution demands action from both state and federal regulatory authorities, either because neither has all of the jurisdiction necessary to address the problem as a legal matter,¹⁰ or because the problem so implicates both local and national expertise that the same is true as a factual matter.¹¹ Because assigning responsibility for management of such a problem to the exclusive attention of either the local or national government is an ultimately arbitrary endeavor,¹² the better criteria for federalism consideration is whether regulation within this interjurisdictional “gray area” ultimately advances or detracts from the full panoply of federalism values that underscore Tenth Amendment dual sovereignty. But the New Federalism approach vindicates some of these values to the exclusion of others, thus threatening the ability of state and federal government to cope with complex problems in adherence to a strict-separationist vision that misses the full federalism target.

Interjurisdictional problems pose special difficulty for federalism because their circumstances exacerbate inherent tension between the underlying values of American federalism, principally the promotion of government accountability, the checks and balances that dual sovereignty affords against tyranny, and the socially desirable benefits as-

9. In recognition that not every public quandary ranks among the “regulatory problems” with which we are here concerned, I note that for the purposes of this piece, “regulatory problems” are those associated with the classic targets anticipated by administrative law—such as market failures, negative externalities, and other collective action problems reasonably susceptible to efficient resolution by government activity. *See infra* Part IV.

10. An example of this type of de jure interjurisdictional regulatory problem is the regulation of stormwater pollution. *See infra* Part IV.A.1.

11. Examples of such de facto interjurisdictional regulatory problems include the regulation of air pollution and domestic efforts to combat terrorist attacks from abroad. *See infra* Part IV.A.2.

12. Establishing precise boundaries around the category of interjurisdictional regulatory problems invites disagreement, ranging from dispute over whether a given problem truly implicates both local and national concern to dispute over whether the given problem is truly amenable to a regulatory solution. I leave such legitimate arguments aside for the purpose of this piece, which introduces an interjurisdictional conceptual framework to the federalism discourse through a sample of problems that meet the criteria in a relatively uncontroversial manner. They are uncontroversial because they address matters that have remained targets of regulatory response over time, and because most would agree that they implicate the obligation or expertise of both a local and a national actor. As discussed *infra* in Part IV, these include a variety of environmental and land use problems, natural disaster management issues, public health crises, and counterterrorism and national security matters.

sociated with the protection of local autonomy (including regional diversity, regulatory efficiency, and innovation yielded by interjurisdictional competition). Each value represents an underlying principle of good government that we ask federalism to help us realize, and each is claimed in support of the need for judicially enforceable federalism constraints.¹³ But in addition to these more familiar values, the federalism premise of as-localized-as-possible governance (or “subsidiarity”) incorporates an often overlooked problem-solving value. Directing that public decisionmaking take place at the most local level *possible* implies the most local level with *capacity*—or the most local level of government that may actually be able to solve the problem. Tensions exist between the satisfaction of each of these values in any given model of federalism, but a central federalism tension is located between the anti-tyranny “check-and-balance” value and the underappreciated “problem-solving” value.¹⁴

Indeed, the historic progression of the various models of federalism that informed Supreme Court interpretation over the twentieth century reflects a pendulum-like attempt to achieve the proper balance between underlying federalism values, each model perhaps overcompensating for the excesses of its predecessor.¹⁵ After the Great Depression crippled the capacity of state and local governments to cope with unprecedented levels of social and economic despair, the Supreme Court adopted a model of federalism that exalted the problem-solving value at the expense of the check-and-balance value to approve pragmatic New Deal legislative programs that expanded federal jurisdiction into traditionally local arenas. Cooperative federalism, the predominant model of federalism since World War II, recovers some of the balance through a partnership-based approach to regulation in areas of interjurisdictional overlap, allowing state and federal governments to take responsibility for interlocking components of a collaborative regulatory program. However, cooperative federalism has also been criticized as an overly pragmatic model that insufficiently protects anti-tyranny values.¹⁶ Responding to concerns that cooperative federalism is, at best, undertheorized (and at worst, more coercive than collaborative), the New Federalism reestablishes the supremacy of the check-and-balance value over all others in an effort to bolster the line between state and federal authority against pres-

13. See *infra* Part V.A.

14. See *infra* Part V.A.4.

15. See *infra* Part V.B.

16. See *infra* Part V.B.3.

tures (some perhaps political, others genuinely interjurisdictional) that would blur the boundary.

Demanding attention from both a national and local actor, interjurisdictional problems do blur that boundary, pitting concerns about tyranny and needs for pragmatism against one another. But it is arguably the tension between federalism's check-and-balance and problem-solving values that has made our system such a robust form of government—enabling it to adjust for changing demographics, technologies, and expectations without losing its essential character. A model of federalism that engages these tensions is a model that can endure. But the New Federalism's focus on preserving bright-line boundaries above all else renders it unable to effectively mediate the competition between federalism values, contributing to a governmental ethos that obstructs even desirable regulatory activity in the interjurisdictional gray area (such as federal initiative that might have been taken in the aftermath of Hurricane Katrina). Taken to its extreme, the New Federalism model can lead to jurisdictional gridlock, posing obstacles to novel approaches to interjurisdictional regulatory partnerships¹⁷ and discouraging efficient responses to some of society's most pressing problems.¹⁸

In this ironic respect, the New Federalism simply does what New Deal federalism did in the opposite direction—shortchanging the problem-solving value in the name of the check-and-balance value, which it mistakes for federalism generally. In so doing, the New Federalism lays too proprietary a claim to the essence of American federalism itself—implying that faithfulness to the Constitution requires its approach and *only* its approach, when federalism is really a more variegated institution. Exploration of how different models of American federalism have variously prioritized different values over time reveals New Federalism's approach as merely one alternative among many, each true to constitutional design in its unique vindication of the fundamental federalism values. Like so many other constitutional con-

17. For example, the innovative state-federal partnership created by the Clean Water Act's Phase II Stormwater Rule, though negotiated with the participation of the states over a ten-year period, was challenged fiercely (though unsuccessfully) on Tenth Amendment grounds. *See* *Env'tl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 843–45 (9th Cir. 2003); National Pollutant Discharge Elimination System—Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Reg. 68,722, 68,724, 68,743 (Dec. 8, 1999); *see also infra* Part IV.A.1.b.

18. For example, federalism-related concerns may have frustrated a more efficient regulatory response during the aftermath of Hurricane Katrina. *See infra* Part II.B.

cepts, then, federalism ultimately invites interpretive choices.¹⁹ As such, we should invest in the jurisprudential development of a federalism model that more explicitly (and capably) balances all competing values than have New Deal federalism, cooperative federalism, and New Federalism, enabling a structure of governance that best realizes the demands we make upon our political institutions.

There is, of course, a wide range of views on what those demands should rightly be. Some advocate for ambitious regulatory problem-solving,²⁰ others for a government that limits itself to as little interference with private activity as possible.²¹ Some, chafing against New

19. Of course, some argue that the only valid interpretation is that of the original architects of the constitution, and that anything else reflects “judicial activism,” or inappropriate judicial aggrandizement. See, e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY* 283–84, 363–70 (1997); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 46 (1997); Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 824–25 (1986); Edwin Meese III, *Toward a Jurisprudence of Original Intent*, 11 HARV. J.L. & PUB. POL’Y 5, 7 (1988); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 698 (1976); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989). If textual directives prove problematic over time (for example, the original Constitution’s tacit approval of slavery or dated plans for federal taxation), the appropriate response is not to engage in interpretive “subterfuge” but to correct the defect by formal amendment (for example, the Thirteenth and Sixteenth Amendments, respectively). U.S. CONST. amend. XIII, XVI. See William Van Alstyne, *Interpreting This Constitution: The Unhelpful Contributions of Special Theories of Judicial Review*, 35 U. FLA. L. REV. 209 (1983).

Scholars from opposing schools of thought argue that all constitutional interpretive choices—including “originalist” interpretations—are equally subject to the hermeneutic biases of the interpreter by virtue of the pockets of ambiguity inherently embedded within written texts. See, e.g., Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 1032–34 (2002) (asserting that incorporation of historical understanding into modern constitutional interpretation is an “irreducibly normative” endeavor); Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court’s Quest for Original Meaning*, 52 UCLA L. REV. 217, 287 (2004) (reviewing the “vast body of primary historical materials . . . that support a spectrum of constitutional meaning” and the accordingly futile project of constraining judicial interpretation with originalist principles); see also Stephen R. Munzer & James W. Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029, 1032–33 (1977); Robert Post, *Theories of Constitutional Interpretation*, REPRESENTATIONS, Spring 1990, at 13. Although none dispute the proper recourse to amendment for correcting clearly defective textual provisions, they argue that some degree of interpretive lawmaking is a necessary part of the judicial function in applying vague constitutional commands to new controversies. See, e.g., Laurence H. Tribe, Comment, *in* SCALIA, *A MATTER OF INTERPRETATION*, *supra*, at 68–72 (discussing the problem of choosing the correct “level of abstraction” at which constitutional clauses should be construed). This Article proceeds from the latter assumption in finding deliberate interpretive space in the model of dual sovereignty implied by the Constitution, most directly in the text of the Tenth Amendment.

20. E.g., RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* (2004) (endorsing regulatory approach to many environmental problems).

21. E.g., MURRAY N. ROTHBARD, *FOR A NEW LIBERTY: THE LIBERTARIAN MANIFESTO* (rev. ed. 1978).

Federalism excess, have suggested that American federalism is itself an anachronistic artifact of earlier times, which may as well fade into the same obscurity to which the distinction between law and equity has retired.²² But the suggestion is as unlikely as it would be unwise.²³ In the United States, the real issue is not *whether* federalism but *what kind* of federalism best serves the hopes and needs that we hang on the continued vitality of our system of government. My first proposition is thus positivist but value-neutral: regardless of our competing views on what constitutes good government, we should recognize that the interpretive model of federalism we embrace is linked with this determination, as different blends of the foundational federalism values will foster distinctive characteristics in governance.

Acknowledging that reasonable minds will disagree on the characteristics of ideal government, I nevertheless take a normative stance in my criticism of the New Federalism ideals, making the Article's second proposition less value-neutral. In critiquing strict-separationist dual sovereignty's failure to account for the interjurisdictional gray area, I proceed from the assumption that good government should address those market failures, negative externalities, and other collective action problems that individuals are ill-equipped to resolve on their own and that so threaten public welfare as to warrant a regulatory response²⁴ despite the libertarian-highlighted risks that inher-

22. For example, Edward Rubin has observed that

[f]ederalism is indeed worth discussing; it is a basic, truly fundamental question of political organization. Fortunately, the United States has not needed to confront this question, as a matter of practical politics, for nearly a century. That is what makes it so much fun to talk about. Like a healthy person talking about medical care, a congenitally thin person talking about dieting, or a rich person talking about money problems, we can lavish exuberant attention on the subject without any sense of urgency or danger. . . . [T]here is also an intrinsic pleasure in talking about how much one has of something that one does not need, and that other people desperately require.

Edward L. Rubin, *The Fundamentality and Irrelevance of Federalism*, 13 GA. ST. U. L. REV. 1009, 1010 (1997).

23. See Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2213–23 (1998) (arguing in favor of American federalism's continued vitality despite cogent criticism of the New Federalism approach in the Tenth Amendment context); cf. Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 951 (1994) (conceding, despite skepticism, that the states serve beneficial roles as mechanisms of decentralization and that American federalism might retain value for reasons of historical and cultural identity).

24. The most basic examples include the provision of common defense, the policing of border-crossing harms, and the facilitation of efficiency in commerce. See *supra* note 9; *infra* part IV.A.

ently attend the exercise of governmental authority.²⁵ As we face interjurisdictional problems that meet these criteria, we deserve a model of federalism that anticipates the competition between federalism values that will arise in the interjurisdictional gray area so invisible to New Federalism.

The New Federalism's separationist project is evident in decisions contesting both the scope of Congress's affirmative powers and the negative structural limitations on federal power, but it is the Tenth Amendment that most directly represents the constitutional dual sovereignty directive,²⁶ and in which strict-separationist interpretive choices are rooted. Accordingly, this piece focuses on the Tenth Amendment cases to highlight their overarching implication that the check-and-balance value is the only federalism value worth protecting. These decisions interpret the relatively ambiguous Tenth Amendment²⁷ as the arbiter of a bright-line boundary between exclusive state and national jurisdiction, even at the interjurisdictional margin that belies such clarity. The New Federalism's doctrinal and rhetorical emphasis on strict separation should concern us because, though the boundary may often be well-drawn, contemporary society increasingly faces regulatory dilemmas of the interjurisdictional variety that warrant more sophisticated consideration by Tenth Amendment jurisprudence. In a mature model of dual sovereignty, Tenth Amendment jurisprudence would focus less on protecting the bright line where it is illusory and more on adjudicating whether regulation in the interjurisdictional gray area unduly compromises the federalism values that underlie constitutional dual sovereignty itself. Such adjudication would require the development of the same kinds of jurisprudential standards that enable more sophisticated interpretation of most provisions in the Bill of Rights, including such apparent bright-line constitutional dictates as "Congress shall make no law . . . abridging the freedom of speech."²⁸

25. *E.g.*, ROTHBARD, *supra* note 21, at 45–69 (outlining the dangers of state power accumulation for private property rights and personal freedoms).

26. *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

27. As famously observed by then-Justice Stone, the Tenth Amendment is a textually circular proposition, stating "but a truism that all is retained which has not been surrendered." *United States v. Darby*, 312 U.S. 100, 124 (1941).

28. U.S. CONST. amend. I. This sophistication has led to various tests for varying circumstances. *See, e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (*per curiam*) (articulating one of many standards for determining when the government may abridge freedom of speech and holding that core political speech may only be constitutionally abridged when directed to produce imminent lawless action and is likely to produce such action);

At present, cooperative federalism still predominates in large areas of American law (such as environmental law,²⁹ telecommunications regulation,³⁰ products liability,³¹ and consumer finance law³²), but New Federalism ideals have posed a formidable challenge. Legal questions that seemed settled are newly uncertain, and it remains unclear whether the revolution that began in 1992 with *New York v. United States*³³ will soon taper or expand its reach.³⁴ This Article argues that we should take what lessons are worthy from the New Federalism experiment—perhaps the importance of “hard look” federalism adjudication in the interjurisdictional gray area—and move forward toward development of a model that accounts for the federalism tensions that arise there, enabling more effective governance without sacrificing a healthy balance of state and federal power. At the very least, a federalism framework prepared for adjudication in the gray area would facilitate the kinds of wrenching decisions called for in interjurisdictional crises like Katrina-devastated New Orleans. At best, it would provide procedural tools for balancing the competing problem-solving and check-and-balance federalism values at play.

To remedy the theoretical problems left unresolved by cooperative federalism and those newly unleashed by New Federalism, this Article proposes that the Court embrace a model of Balanced Federalism that better mediates between competing federalism values and provides greater guidance for regulatory decisionmakers. Balanced Federalism may depart little from its predecessors in adjudication of the easy cases, but it would provide better tools for dealing with more difficult cases by explicitly acknowledging each of the vari-

Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) (articulating the balancing test for permitting abridgement of free speech by “reasonable time, place, or manner restrictions”).

29. *E.g.*, Clean Water Act, 33 U.S.C. §§ 1251–1387 (2000) (allocating roles between EPA and the states); Clean Air Act, 42 U.S.C. §§ 7401–7671 (2000) (delegating standard-setting authority to the federal government and program design and implementation to the states).

30. See Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692 (2001) (discussing the role of cooperative federalism in the implementation of the Telecommunications Act of 1996).

31. See Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1357–58 (2006) (discussing the vast areas of state and federal concurrent jurisdiction in the legal treatment of products liability).

32. For example, bankruptcy law is uniformly federal, but relies on state law definitions of property. Felicia Anne Nadborny, Note, “Leap of Faith” into Bankruptcy: An Examination of the Issues Surrounding the Valuation of a Catholic Diocese’s Bankruptcy Estate, 13 AM. BANKR. INST. L. REV. 839, 889 (2005).

33. 505 U.S. 144 (1992).

34. See *infra* notes 281–282 and accompanying text (discussing the likely impacts of the recent appointments of Chief Justice Roberts and Justice Alito to the Court).

ous values at play and the interjurisdictional gray area in which they are pitted against one another. It would provide a conceptual framework for evaluating whether regulation implicating dual sovereignty concerns poses an acceptable risk to check-and-balance values in service of legitimate interjurisdictional problem-solving, or vice versa. Where the New Federalism asks the Tenth Amendment to police the boundary between mutually exclusive spheres of state and federal regulatory authority from crossover by either side, Balanced Federalism asks the Tenth Amendment to patrol regulatory activity within the gray area for impermissible compromises of fundamental federalism values. The Article concludes by introducing the outlines of a jurisprudential standard for evaluating Tenth Amendment claims that is sensitive to the issues that commonly arise in the gray area. As Tenth Amendment interpretation implicitly frames all other inquiries that proceed from the dual sovereignty directive (for example, the reach of the federal commerce power), a more refined understanding of Tenth Amendment jurisprudence will redound with greater clarity in all corners of the federalism debates. The Balanced Federalism framework would foster a more thoughtful and dynamic equipoise between the various federalism values that, though in tension with one another, have made our system of government so effective and enduring.

Part II introduces the quest by reviewing how federalism concerns may have contributed to the failed Katrina response in New Orleans, demonstrating the flesh and blood dimension of a discourse that at times appears academic and removed. Part III outlines the New Federalism's strict-separationist implications, compares its Tenth Amendment cases to their predecessors, and explores how the Rehnquist Court's federalism and preemption cases join to reify mutually exclusive spheres of state and federal jurisdiction. Part IV introduces the marginal zone of interjurisdictional concern that belies the strict-separationist ideal, highlighting water and air pollution, counterterrorism efforts, and the Katrina response as examples of interjurisdictional regulatory problems. Part V probes the principles of good government on which federalism is premised, identifies the pragmatism embedded in the subsidiarity principle, and reveals how the tug of war between these values has encouraged the evolution of successive federalism models over the course of the twentieth century. Part VI proposes a model of Balanced Federalism that accounts for each of these values, and sets forth the elements of a jurisprudential standard that would help realize Balanced Federalism's goal of preserving both checks and balance in an interjurisdictional world.

II. THE STAKES: HOW THE NEW FEDERALISM FAILED KATRINA VICTIMS

A. Which Federalism?

Roughly defined, federalism refers to a system of government in which power is divided between a central authority and regional political sub-units, each with authority to directly regulate its citizens. Federal governments worldwide display a variety of structural choices by which this design is accomplished, but domestic federalism is well-defined in the concurrent sovereign authority of the central United States government and the fifty states, commonly referred to as “dual sovereignty.”³⁵ Americans are citizens of both the United States and the individual states in which they reside, and subject to the respective laws of each. The Constitution enumerates those powers under which the federal government is authorized to make law (e.g., the commerce power, the spending power, and the war power),³⁶ and the states may regulate in any area not preempted by legitimate federal law.³⁷

Yet the fact that Americans are citizens of two separate sovereigns does not resolve the precise contours of the relationship between the two. Constitutional analysis sometimes reveals pockets of textual ambiguity that must be resolved by application of some interpretive federalism theory—a model that describes how the given federal system should work.³⁸ Accordingly, there is more to the variety among models of federalism than the specific array of regional sub-units around a centrality. Even within a single structural polity, conceptual variation may exist in construing the details of the relationship between sovereigns and the framework of federalism designed to protect it. This has been aptly demonstrated in the United States by the Supreme

35. See, e.g., Douglas Laycock, *Protecting Liberty in a Federal System: The US Experience*, in PATTERNS OF REGIONALISM AND FEDERALISM: LESSONS FOR THE UK 119, 119 (Jörg Fedtke & Basil S. Markesinis eds., 2006) (“Every federalism responds to a unique history, and thus every federalism is different from every other.”). For example, the European Union, Canada, India, and Switzerland are all federalism-based polities whose federations exhibit unique characteristics. The American dual sovereignty principle is well illustrated in *Collector v. Day*, in which the Supreme Court stated that

[t]he general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, “reserved,” are as independent of the general government as that government within its sphere is independent of the States.

78 U.S. (11 Wall.) 113, 124 (1870).

36. U.S. CONST. art. I, § 8.

37. U.S. CONST. amend. X.

38. See *supra* note 19.

Court's ongoing experimentation with federalism constraints, in pursuit of its evolving vision of the dual sovereignty that is mandated but incompletely described by the Constitution.

American dual sovereignty is implied in various constitutional provisions that refer to the separate states,³⁹ but it is most encapsulated as a constitutional directive in the Tenth Amendment's affirmation that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."⁴⁰ This statement establishes that the Constitution (1) delegates some powers to the federal government, (2) prohibits some to the states, and (3) reserves powers that fit in neither of these two sets to the states (or perhaps the people). Standing alone, the Tenth Amendment's only unique contribution is to suggest that there are at least some unspecified powers that belong wholly to the states. But it does not specify what these are; we can only parse them out by negative inference to other constitutional provisions that specifically delegate federal authority or proscribe state action. It further (and unremarkably) affirms that the Constitution delegates some authority to the federal government, and, read together with the inherently vague Supremacy Clause,⁴¹ suggests that at least some of this authority may be wielded exclusively at the federal level, preempting contrary state law. However, neither the Tenth Amendment nor the Supremacy Clause nor any other provision in the Constitution decisively resolves whether there may also be regulatory spaces in which both the states and the federal government may operate (if they have not been withdrawn from either's commission by express constitutional limitation or purposeful preemption). Drawing the conclusion that such overlapping regulatory space exists requires an interpretive leap, but so does the extrapolation of wholly mutually exclusive spheres of authority.⁴² Either conclusion demands application of some exogenous theory about what American federalism means, or what, in essence, federalism is *for*. That we have relied on

39. *E.g.*, U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . .").

40. U.S. CONST. amend. X.

41. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."). The Supremacy Clause tells us that federal law is "supreme," but from there to field preemption nevertheless requires an interpretive leap.

42. *See infra* notes 153–159 and accompanying text; *see also* Jackson, *supra* note 23, at 2191 (noting that the Constitution's assumption that states would continue to exist "does not tell us whether states can be required to help carry out federal law").

one theory or another to resolve the matter (in ways that may eventually come to seem obvious if only by virtue of their repetition) does not negate the role of federalism theory in getting us to that point.

What, then, is federalism “for”? Ultimately, politics turn to federalism to promote a set of governance values that they hope federalism will yield. As elaborated in Part V, foremost among them are the preservation of individual liberties through checks and balances on accountable sovereign power⁴³ and the promotion of diversity and competition associated with local autonomy,⁴⁴ both tempered with a healthy regard for the role of government as the superintendent of regional collective action problems.⁴⁵ Nevertheless, these values are suspended in a network of tension with one another. Preserving local autonomy can conflict with the protection of individual liberty. Centralized resolution of collective action problems can undermine checks and balances. In protecting its preferred vision of dual sovereignty, each interpretive approach advances the fundamental federalism values in some way, but the tension between them means that emphasizing one value may result in the de-emphasis of another.⁴⁶ In deciding which values take precedence under what circumstances, we choose, consciously or not, among different models of federalism that then inform our lawmaking and adjudication.⁴⁷

In the United States, political discourse has tended more and more to treat the ideals of the diffusion of sovereign power and the pragmatic concerns of problem-solving as a federalism thesis and antithesis—principles in opposition to one another, rather than comple-

43. See, e.g., *New York*, 505 U.S. at 181 (“[T]he Constitution divides authority between federal and state governments for the protection of individuals. . . . [F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power.” (internal quotation marks omitted)).

44. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (noting that federalism “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”).

45. See *infra* Part V.A.

46. See *infra* Part V.

47. One might fairly ask, “[w]ho is the ‘we’ of whom you speak?” James Boyd White, *Law as Language: Reading Law and Reading Literature*, 60 TEX. L. REV. 415, 442 (1982) (internal quotation marks omitted); see *id.* at 442–43 (“In place of the constituted ‘we,’ that it is the achievement of our past to have given us, we are offered an unconstituted ‘we,’ or a ‘we’ constituted on the pages of law journals.”). As aforementioned, this Article argues that American federalism, as set forth in the text and structure of the Constitution, invites interpretive choices by judges, legislators, and policymakers. See *supra* note 19 and accompanying text. The subject thus warrants consideration by all participants in the legal community, though it is ultimately the job of the Supreme Court to provide definitive interpretive guidance to the rest (as the Article recommends).

mentary elements of the overall federalism project. Regardless, a federalism model that subordinates pragmatic concerns to the maintenance of formalist boundaries between the reservoirs of state and federal power is clearly a legitimate political choice. Despite much of the rhetoric attending the New Federalism, however, it is not the *only* interpretive possibility, nor the only model true to the principles enshrined in the Constitution.⁴⁸ The same principles support a variety of other models, many of which have been experimented with over the course of our nation's history.⁴⁹ Each serves a slightly different understanding of the dual sovereignty relationship, promises a slightly different construction of governmental priorities, and thereby leads to slightly different substantive ends.

For interpreters of the American Constitution, then, the relevant choice is not one between federalism and non-federalism, but of *which federalism*—which model of federalism best promotes the kind of governance that we seek. These are, of course, the real stakes at hand. And so it could certainly be that, in the end, most Americans want exactly the kind of government promoted by the New Federalism model, although popular reaction to the Katrina disaster raises serious questions about such a proposition.⁵⁰ Ultimately, I argue that the New Federalism model is not the best available choice, given the concerns raised here about its ability to contend with the interjurisdictional problems that confront all levels of government. Either way, however, we should at least recognize the true nature of the choice as one among alternatives—and make that choice with attention to the stakes involved. After all, this is not merely the stuff of political grandstanding and academic navel-gazing; the costs of our choices about federalism are very much extracted at the level of everyday lives (in the most tragic of cases, many at a time).

For this reason, our discussion begins with a brief consideration of the stakes of the federalism debate, illustrating the kinds of governmental decisionmaking that take place in the shadow of the model of federalism that we choose. The catastrophic aftermath of Hurricane Katrina in New Orleans provides such a scenario, one that called for governmental response from the most local to the most national level,

48. See generally David J. Barron, *Fighting Federalism with Federalism: If It's Not Just a Battle Between Federalists and Nationalists, What Is It?*, 74 *FORDHAM L. REV.* 2081 (2006) (discussing how different Supreme Court Justices have implicitly invoked different models of federalism in justifying their analyses).

49. See *infra* Part V.B.

50. See *infra* Part II.B (discussing the relationship between federal restraint during the Katrina aftermath and New Federalism ideals); *infra* note 101 (detailing public disapproval of federal restraint during the relief effort).

requiring regulatory decisionmakers to contend with questions about how federalism principles should dictate their interaction. Surely, the spectacularly failed response owes much to the unprecedented demands of the circumstances (and perhaps to more ordinary problems of incompetence) that have nothing to do with federalism. And yet, the additional overlay of federalism issues helped further derail what might otherwise have been a more effective response, thanks to uncertainty among state and federal actors about their respective roles. This uncertainty appears to have stemmed from a set of beliefs about the proper exercise of state and federal authority coincident with the strict-separationist philosophy of the New Federalism revival.

B. Federalism and Katrina

Of all that was striking during the national tragedy of the Hurricane Katrina aftermath, a few things stood out: the shameful images of abject poverty within the United States,⁵¹ the inspiring heroism of individuals who rose to the occasion, the staggering force of nature's fury, and the stunning failure of the most powerful nation on earth to respond effectively to the foreseeable effects of a predicted storm. But if we shouldn't have been surprised by the poverty, heroism, or storm surge, the latter failure was hard to fathom—and by many accounts, proceeded from unprecedented confusion among federal, state, and local responders regarding the allocation of their roles and responsibilities, and how to proceed in the face of this uncertainty.⁵²

1. "Operating System Crash" by the National Response Plan

According to eyewitness accounts and primary documents cataloging the relevant events,⁵³ the response to Katrina was characterized by failures in coordinated command and communications between local, state, federal, and volunteer responders, as authorities struggled to determine what the federalism directives in applicable federal laws

51. Equally shameful were the lingering dynamics of racial unfairness apparent in these images of abject poverty. See, e.g., Representative John Lewis, "This is a National Disgrace," *NEWSWEEK*, Sept. 12, 2005, at 52 ("It's so glaring that the great majority of people crying out for help are poor, they're black. There's a whole segment of society that's being left behind.").

52. See, e.g., Joe Whitley et al., *Homeland Security After Hurricane Katrina: Where Do We Go from Here?*, 20 *NAT. RESOURCES & ENV'T*, Spring 2006, at 3, 3 (describing the failures of state and federal coordination during the Katrina response).

53. For a compilation of documents collected by congressional investigators, including a conference call transcript between state and federal authorities before Katrina struck New Orleans, see Eric Lipton, *Key Documents Regarding the Government Response to Katrina*, <http://www.nytimes.com/ref/national/nationalspecial/10katrina-docs.html> (last visited Mar. 15, 2007).

mandated regarding whom should be responsible for which parts of the response. Revised after the 9/11 attacks and issued in 2004, the new National Response Plan (NRP) recognizes that saving lives and protecting the health of the public are top priorities of incident management.⁵⁴ However, the NRP also demarcates that, in emergency situations, states will be responsible for the implementation of police powers traditionally within their purview (such as local law enforcement, fire protection, and delivery of food and shelter), and the federal government will act in a supportive capacity, responding to specific requests by state authorities for assistance.⁵⁵

Although the Federal Emergency Management Agency's (FEMA) seeming paralysis in the face of the post-Katrina crisis may suggest incompetent leadership,⁵⁶ it is also attributable to a federalism-related "operating system crash" under the NRP, which faltered just as software does when unable to parse unanticipated inputs. According to the NRP's federalism directive, federal authorities could not act preemptively, lest they tread in the protected realm of state sovereign authority.⁵⁷ However, state authorities were unable to make the specific requests for assistance anticipated under the NRP. Local infrastructure was so damaged by the storm that communications were down,⁵⁸ and state and local authorities were apparently so over-

54. U.S. DEP'T OF HOMELAND SEC., NATIONAL RESPONSE PLAN 6 (2004) [hereinafter NRP]. For an excellent review of the federal statutory framework dictating federal involvement in disaster response, see DANIEL A. FARBER & JIM CHEN, *DISASTERS AND THE LAW: KATRINA AND BEYOND* 24–56 (2006).

55. NRP, *supra* note 54, at 8, 15.

56. In particular, former FEMA Director Michael Brown did not fare well in media accounts of his performance. See, e.g., Paul Krugman, Op-Ed., *The Effectiveness Thing*, N.Y. TIMES, Feb. 6, 2006, at A23 (characterizing Brown's performance as "ludicrous"); see also Evan Thomas et al., *How Bush Blew It*, NEWSWEEK, Sept. 19, 2005, at 30, 38 (questioning Brown's credentials for appointment as head of FEMA).

57. See NRP, *supra* note 54, at 9.

58. The *New York Times* described the crippling effect on the National Guard:

The morning Hurricane Katrina thundered ashore, Louisiana National Guard commanders thought they were prepared to save their state. But when 15-foot floodwaters swept into their headquarters, cut their communications and disabled their high-water trucks, they had their hands full just saving themselves.

For a crucial 24 hours after landfall on Aug. 29, Guard officers said, they were preoccupied with protecting their nerve center from the waves topping the windows at Jackson Barracks and rescuing soldiers who could not swim. The next morning, they had to evacuate their entire headquarters force of 375 guardsmen by boat and helicopter to the Superdome.

It was an inauspicious start to the National Guard's hurricane response, which fell so short that it has set off a national debate about whether in the future the Pentagon should take charge immediately after catastrophes.

Scott Shane & Thom Shanker, *When Storm Hit, National Guard Was Deluged Too*, N.Y. TIMES, Sept. 28, 2005, at A1.

whelmed themselves that they did not know what to ask for.⁵⁹ It may also be that state authorities were simply unprepared or incompetent to play the role anticipated of them by the NRP.⁶⁰ But as former FEMA Director Michael Brown would later testify before Congress in defense of his agency's decisionmaking: "The role of the federal government in emergency management is generally that of coordinator and supporter. . . . [a role] fully supported by the basic concept of federalism, recognizing that the sovereign states have primary responsibility for emergency preparedness and response in their jurisdictions."⁶¹ Thus, as Katrina bore down on the Gulf Coast, these departures from the NRP's script left regulatory responders struggling to decipher, in essence, which parts of the response effort were the proper purview of the state, and which the proper purview of the federal government.⁶²

Global security specialist Joe Whitley, former general counsel at the U.S. Department of Homeland Security, made the following observations following the response to Katrina:

59. WHITE HOUSE, THE FEDERAL RESPONSE TO HURRICANE KATRINA: LESSONS LEARNED 42 (2006), available at <http://www.whitehouse.gov/reports/katrina-lessons-learned.pdf>. According to the White House's own report:

An important limiting factor of the Federal response . . . is that the Federal response is predicated on an incident being handled at the lowest jurisdictional level possible. A base assumption to this approach is that, even in cases where State and local governments are overwhelmed, they would maintain the necessary incident command structure to direct Federal assets to where they are most needed. In the case of Katrina, the local government had been destroyed and the State government was incapacitated, and thus the Federal government had to take on the additional roles of performing incident command and other functions it would normally rely upon the State and local governments to provide.

Id.

60. Michael Brown told Congress that his "biggest mistake was not recognizing, by Saturday [August 27, 2005], that Louisiana was dysfunctional." *Hurricane Katrina: The Role of the Federal Emergency Management Agency: Hearing Before the H. Select Bipartisan Comm. to Investigate the Preparation for and Response to Hurricane Katrina*, 109th Cong. 12 (2005) [hereinafter *September 27 Katrina Hearing*] (testimony of Michael Brown, former Director, FEMA).

61. *September 27 Katrina Hearing*, *supra* note 60, at 3–4 (statement of Michael Brown, former Director, FEMA), available at http://katrina.house.gov/hearings/09_27_05/brown092705.pdf [hereinafter *Brown Statement*].

62. See Eric Lipton et al., *Storm and Crisis: Breakdowns Marked Path From Hurricane to Anarchy*, N.Y. TIMES, Sept. 11, 2005, § 1 [hereinafter Lipton et al., *Breakdowns*] (noting that dozens of interviews with officials showed that "the crisis in New Orleans deepened because of a virtual standoff between hesitant federal officials and besieged authorities in Louisiana"); Eric Lipton et al., *Storm and Crisis: Political Issues Snarled Plans for Troop Aid*, N.Y. TIMES, Sept. 9, 2005, at A1 [hereinafter Lipton et al., *Political Issues*] ("Interviews with officials in Washington and Louisiana show that as the situation grew worse, they were wrangling with questions of federal/state authority . . ."); Thomas et al., *supra* note 56, at 40 (reporting that as of September 2, "[a] debate over 'federalizing' the National Guard had been rattling in Washington for the previous three days").

During the first few hours and days after landfall, we saw breakdowns in communication within and among every level of government: between federal, state and local officials; and, perhaps most critically, between government and the citizens of the affected areas. We saw an inability to establish with any certainty what was actually happening and to deploy the appropriate resources to deal with each situation. Many citizens in the Gulf Coast region and elsewhere in the United States may have lost confidence in the government's ability to respond to a catastrophic event.⁶³

Whitley suggests that coordination failures stemmed partly from inconsistencies between the two primary sources of procedural guidance for state and federal cooperation during emergencies—the Robert T. Stafford Disaster Relief and Emergency Assistance Act (the Stafford Act)⁶⁴ and the NRP—and partly from the tensions inherent in catastrophic disaster management, due to the respect heeded by federal and state actors for the principles of federalism.⁶⁵

As he explains, the historic relationship between the federal, state, and local governments is best described as a “pull” approach, in which the federal government presumes that states and localities can cope independently with a disaster unless they specifically request (or pull) resources from the federal government.⁶⁶ This view of federalism in disaster response—that state officials are directly responsible for the health and safety of their citizens and that federal assistance is supplementary only—has long been the general rule, although the

63. Whitley et al., *supra* note 52, at 3. Whitley, a current member of Alston & Bird LLP's Global Security & Enforcement Practice Team, further observed:

From top to bottom, Katrina exposed some of our vulnerabilities as a nation. State and local governments must continue to address communication issues that were identified as crucial after the attacks of September 11, 2001. They must provide trained professional staff to manage response efforts. Continued and expanded coordinated training of federal, state, and local government officials is an absolute must. For emergency management lawyers, it is absolutely essential that we share “best practices” and coordinate our educational and training efforts so that government and the private sector at all levels better understands [sic] each other's needs and the legal requirements involved in disaster preparedness and relief.

Critically, DHS must immediately address areas of potential ambiguity or perceived confusion—who declares an emergency, who leads the response and recovery efforts, how are resources managed—and we must create an expedited, transparent, and effective contracting and contract oversight process.

Id.

64. 42 U.S.C. §§ 5121–5205 (2000).

65. Whitley et al., *supra* note 52, at 4–6.

66. *Id.* at 4.

role has evolved toward greater expectations of federal assistance.⁶⁷ Although this approach works in the majority of instances, Whitley argues that disasters of Katrina's magnitude show that federal policy must enable a "push" approach where needed, in which the federal government intervenes to provide assistance even without a direct request by the state or local government.⁶⁸ After all, he explains, "[t]he 'pull' approach simply cannot work when the state and local governments are, as they were after Katrina, without communication, without the ability to assess the extent of damages or needs, and without even adequate personnel to make requests for everything needed."⁶⁹ Although Whitley assigns a fair share of blame to state and local governments for their inadequate response, he holds the federal government especially accountable for failing to "promptly trigger[] the necessary federal legal authorities to begin the process of implementing federal assistance in the immediate aftermath of the storms," when the state and local authorities were so incapacitated that they could not possibly have followed the rituals anticipated by the Stafford Act or the NRP.⁷⁰ "Under such a catastrophic scenario," Whitley concludes, "the federal government, without being asked, must intervene more promptly in the immediate aftermath of an event."⁷¹

Even before Hurricane Katrina hit the Gulf Coast, NRP drafters were aware that state and local governments might become overwhelmed during the course of a catastrophic emergency.⁷² When Katrina hit, they had nearly finalized a "Catastrophic Incident Annex" to the NRP, enabling a push approach to address these concerns.⁷³ However, this is a politically complicated innovation because it contradicts the relevant language of the Stafford Act, which authorizes federal disaster assistance to the states, sets forth the primary role of state and local responders, and clarifies the supplementary nature of federal support.⁷⁴ Whitley suggests that the Stafford Act may also need to be amended to enable a push approach in catastrophic circumstances.⁷⁵ In the meantime, the Katrina experience recently motivated passage of a new federal law that enables the President to deploy

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 7.

71. *Id.*

72. *Id.* at 4.

73. *Id.*

74. *Id.*

75. *Id.*

the military in response to natural disasters and other major domestic emergencies without consent of the states involved.⁷⁶

Although Whitley's blow-by-blow account of the post-Katrina failures are chilling, he also praises the great acts of generosity and self-sacrifice by those involved in the relief effort, commending members of the U.S. Coast Guard, FEMA, the National Guard, and first responders and law enforcement officers for their particularly heroic efforts to save lives and offer comfort to victims.⁷⁷ His seasoned observation of the details of the Katrina response indicate that failures were not the result of callous or careless behavior by individuals, but were institutional failures—namely, the rules or perceived rules of law that convinced decisionmakers not to proceed with the “push” response that was clearly necessary out of fear that doing so would, in essence, violate the Constitution.

2. *The President, the Governor, the Mayor, and the Stafford Act*

Federalism concerns were not limited to managerial choices in the field but pervaded the response effort up to the highest levels. News reports indicated that “[f]or days, Bush’s top advisers argued over legal niceties about who was in charge,”⁷⁸ that “[i]nterviews with officials in Washington and Louisiana show that as the situation grew worse, they were wrangling with questions of federal/state authority,”⁷⁹ and that “the crisis in New Orleans deepened because of a virtual standoff between hesitant federal officials and besieged authorities in Louisiana.”⁸⁰ The issues that most snarled the response effort were uncertainty about the point at which the federal government should stop waiting for instructions on how to assist the state and take initiative via its superior command capacity (through the de-

76. John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083 (2006) [hereinafter Warner Act]; see also Michael Greenberger, *Yes, Virginia: The President Can Deploy Federal Troops to Prevent the Loss of a Major American City from a Devastating Natural Catastrophe* 1–2 (U. of Md. Legal Studies Research Paper No. 2006-37), available at <http://ssrn.com/abstract=946207> (arguing that the new law neither adds to nor subtracts from the President’s existing powers but merely clarifies them after uncertainty suggested during the Katrina emergency).

77. Whitley et al., *supra* note 52, at 3.

78. Evan Thomas et al., *The Lost City*, NEWSWEEK, Sept. 12, 2005, at 41, 48.

79. Lipton et al., *Political Issues*, *supra* note 62, at A1.

80. Lipton et al., *Breakdowns*, *supra* note 62, at §1; see *id.* (reporting that “interviews with dozens of officials” supported this contention).

ployment of U.S. military or federalized National Guard troops),⁸¹ and after that, confusion about who would then be in charge.

Even as it became clear that federal assistance was necessary, uncertainty unfolded among all three levels of government as to who should be in control of the troops to be deployed.⁸² Apparently desperate for results, New Orleans Mayor Ray Nagin supported federalizing the response,⁸³ while Louisiana Governor Kathleen Babineaux Blanco balked, and President George W. Bush, hesitant to offend federalism principles in this interjurisdictional no man's land, waited for clarity.⁸⁴ In one infamous exchange four days into the crisis at a strategy session aboard Air Force One, the distraught Mayor slammed the conference table with his hand and asked the President "to cut through this and do what it takes to have a more-controlled command structure. If that means federalizing it, let's do it."⁸⁵ Mayor Nagin recommended the Pentagon's "on-scene commander," Lieutenant General Russel Honoré, to lead the flailing relief effort on behalf of the federal government.⁸⁶ According to another meeting participant, President Bush turned to Governor Blanco and said, "[w]ell, what do you think of that, Governor?"⁸⁷ But Governor Blanco declined to discuss the matter except in a private meeting with the President, which apparently followed the strategy session.⁸⁸ However, there was still no agreement over one week later,⁸⁹ leaving idle the assistance of an estimated 100,000 National Guard troops accessible on short notice in neighboring states.⁹⁰ News accounts suggest that Governor Blanco did ask the President for 40,000 federal troops, but did not agree to surrender oversight of the relief effort to the federal government.⁹¹

81. See Thomas et al., *supra* note 78, at 48–49 ("Beginning early in the week, Justice Department lawyers presented arguments for federalizing the Guard, but Defense Department lawyers fretted about untrained 19-year-olds trying to enforce local laws . . .").

82. Thomas et al., *supra* note 56, at 40.

83. *Id.*

84. See *id.* The troops of each state's National Guard report to their Governor unless they are "federalized" by Presidential order in accordance with the terms of the Stafford Act. See 42 U.S.C. §§ 5191–5192 (2000) (authorizing the President to declare disaster emergencies and direct federal government response).

85. Thomas et al., *supra* note 56, at 40.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. John M. Broder, *Guard Units' New Mission: From Combat to Flood Duty*, N.Y. TIMES, Aug. 30, 2005, at A13.

91. See Karen Tumulty et al., *4 Places Where the System Broke Down: The Governor*, TIME, Sept. 19, 2005, at 34, § 2. *Time* reported:

Further tangling the post-Katrina disaster effort was a struggle for power. On the Friday after the hurricane, as the Governor met with Bush aboard Air Force

Had Governor Blanco surrendered her claim to control over the relief effort,⁹² President Bush would have been able to reconcile the urgency of providing needed federal assistance with the federalism principles that he believed foreclosed such authorization in the interim.⁹³ Nevertheless, contemporaneous news accounts indicate that the Justice Department's Office of Legal Counsel researched the matter and "concluded that the federal government had authority to move in even over the objection of local officials."⁹⁴ Indeed, many commentators—including some close to the Bush Administration, such as former Deputy Assistant Attorney General John Yoo—argued vigorously that the President did not need the Governor's consent to federalize the response in light of available jurisdictional hooks in the Stafford Act, including state incapacity and federal obligation.⁹⁵ In

One on the tarmac of the New Orleans airport, the President broached a sensitive question: Would Blanco relinquish control of local law enforcement and the 13,268 National Guard troops from 29 states that fall under her command? . . . [S]he thought the request had a political motive. It would allow Washington to come in and claim credit for a relief operation that was finally beginning to show progress.

. . . Blanco asked for 24 hours to consider it, but as she was meeting at midnight that Friday night with advisers, [Chief of Staff Andrew] Card called and told her to look for a fax. It was a letter and memorandum of understanding under which she would turn over control of her troops. Blanco refused to sign it.

Id.; see also *Katrina Aftermath, Louisiana: Don't Want You On My Dance Card*, AMERICAN POLITICAL NETWORK, THE HOTLINE, Sept. 8, 2005, at 7 (discussing Governor Blanco's rejection of the White House proposal for federal control of troops in Louisiana).

92. It remains unclear why Blanco did not, given that the state resources at her disposal had proved insufficient to manage the relief effort independently. Viewed most generously, it may be that she was reluctant to turn control over to a federal government that had so far shown nothing but incompetence in its own handling of the disaster. Viewed less generously, her decision to refuse federal aid in the face of state incapacity tyrannically exacerbated the suffering of her own citizens by contributing to the delay. If she refused to relinquish control on federalism grounds while being unable to provide the needed resources independently, then her view of federalism warrants just as much criticism as that of the federal government. See *supra* note 61 and accompanying text (discussing Michael Brown's testimony on the role of federalism considerations during the response effort).

93. Under both the Stafford Act and the NRP, the President may federalize emergency response at the request of a state's governor. See *supra* notes 55 & 84 and accompanying text.

94. Greenberger, *supra* note 76, at 11 (internal quotation marks omitted).

95. John Yoo, Editorial, *Trigger Power*, L.A. TIMES, Oct. 2, 2005, at M5; see also Greenberger, *supra* note 76, at 14–19 (arguing that the President had clear authority to intervene even before passage of the Warner Act); Candidus Dougherty, *While the Government Fiddled Around, The Big Easy Drowned: How the Posse Comitatus Act Became the Government's Alibi for the Hurricane Katrina Disaster* 39 (Jan. 1, 2006) (unpublished manuscript), available at <http://ssrn.com/abstract=938249> (arguing that the Posse Comitatus Act did not bar the deployment of federal troops as part of the Katrina relief effort because it does not prohibit the military from providing humanitarian aid).

addition to the President's authority to unilaterally federalize a State's National Guard in time of insurrection or war,⁹⁶ the Act authorizes the President to coordinate *all* disaster relief, including the use of Federal and State assets, in a time of crisis whenever "primary responsibility for response rests with the United States because the emergency involves a subject area for which, under the Constitution or laws of the United States, the United States exercises exclusive or preeminent responsibility and authority."⁹⁷ But what exactly does that mean? What counts as "a subject area for which, under the Constitution or laws of the United States, the United States exercises exclusive or *preeminent responsibility and authority*"?⁹⁸

No court has interpreted this provision of the Stafford Act, because it has never arisen in a justiciable controversy.⁹⁹ But it goes to the heart of the federalism quandary: what does the Constitution tell us about when the United States exercises "preeminent responsibility and authority"? Although John Yoo is convinced that the text authorizes at least some measure of federal disaster response without a gubernatorial request, the question is unsettled. This uncertainty makes President Bush's decision *not* to invoke his potential authority, especially in the face of such hideous human suffering and public pressure to act,¹⁰⁰ all the more significant.

96. Insurrection Act, 10 U.S.C. §§ 331–335 (2000).

97. 42 U.S.C. § 5191(b) (2000). Unlike 42 U.S.C. § 5170, this section does not require the consent of a given state's Governor, though it does require as much consultation with the Governor as is practicable. 42 U.S.C. § 5191(b). The Stafford Act leaves the determination of when the United States exercises preeminent responsibility or authority up for interpretation, though commentators like Yoo have suggested that the particular circumstances after Katrina would have warranted unilateral federal action. *See* Yoo, *supra* note 95, at M5 (determining that Katrina would have qualified as a national emergency and that "[o]nce a national emergency has been declared, the president can send troops to provide assistance and restore order").

98. 42 U.S.C. § 5191(b) (emphasis added).

99. The Warner Act recently affirmed that the President may unilaterally deploy federal troops, including National Guard troops in federal service, to respond to a major domestic emergency such as a natural disaster. *See supra* note 76 and accompanying text. However, the Warner Act does not provide additional bases of authority to federalize a state's National Guard in the first place, leaving the Stafford Act issue unresolved. *See* Warner Act, Pub. L. No. 109-364, § 1076, 120 Stat. 2083, 2404 (2006) (to be codified at 10 U.S.C. § 333) (adding circumstances in which "[t]he President may employ the armed forces, including the National Guard in federal service").

100. For example, Anchor Brian Williams questioned Michael Brown:

Why can't some of the Chinook helicopters and Black Hawks that we have heard flying over for days and days and days simply lower pallets of water, meals ready to eat, medical supplies, right into downtown New Orleans? ["Where is the aid?"]

It's the question [] people keep asking us on camera!

NBC Nightly News: FEMA Director Michael Brown Discusses Relief Efforts in Hurricane Zone (NBC television broadcast Sept. 1, 2005) [hereinafter NBC Nightly News].

Indeed, President Bush's reluctance to respond more proactively was not well received by the public,¹⁰¹ prompting his subsequent request that Congress study proposals for guidance on federal initiative in future scenarios.¹⁰² However, what is most significant about the President's decision is *why* he declined to exercise the potential Stafford Act authority in the first place, given such overwhelming political pressure to do so and his demonstrated confidence asserting untested federal executive authority in other realms.¹⁰³ One patent explanation for the President's hesitancy to explore all potential avenues of authority during the most devastating natural disaster in U.S. history is the profound influence of strict-separationist idealism. Federalizing the Louisiana National Guard and subjecting state and city police to

101. *E.g.*, Michael A. Fletcher & Richard Morin, *Bush's Approval Rating Drops to New Low in Wake of Storm*, WASH. POST, Sept. 13, 2005, at A8 ("The bungled response to the hurricane has helped drag down Bush's job-approval rating, which now stands at 42 percent—the lowest of his presidency—in the Post-ABC poll and down three points since the hurricane hit two weeks ago."). Many members of the U.S. House of Representatives issued press releases emphasizing a popularly held sentiment about the primary role that the Federal Government should serve in disaster response and in providing aid to Katrina victims. *See, e.g.*, Press Release, Representative Marion Berry, Berry Issues Statement on Presidential Address (Sept. 15, 2005), available at <http://www.house.gov/berry/press-releases/archive/katrina3.html> ("One of the primary roles of the federal government is to step in during times of national emergency."); Press Release, Representative Elijah E. Cummings, Cummings: Brown Demonstrates Blurred Hindsight (Sept. 27, 2005), available at <http://www.house.gov/cummings/press/05sep27a.htm> ("Mr. Brown continues to blame state and local officials, many of whom were storm victims themselves, while denying the primary role of the federal government in helping its own citizens survive a catastrophe."); Press Release, Representative Jan Schakowsky, Schakowsky Statement on the Approval of \$10.5 Billion in Emergency Supplemental Appropriations for Hurricane Victims (Sept. 2, 2005), available at http://www.house.gov/schakowsky/PressRelease_9_2_05_KatrinaAid.html ("[I]t is the primary role of the federal government to aid these victims."). *Newsweek's Special Report: After Katrina* "drew more than 1,000 letters," most taking the federal government to task for its "inept response to the catastrophe." *Mail Call: In the Wake of a Devastating Hurricane*, NEWSWEEK, Sept. 26, 2005, at 18.

102. *See, e.g.*, Shane & Shanker, *supra* note 58, at A1 (noting that the hurricane response touched off "a national debate about whether in the future the Pentagon should take charge immediately after catastrophes," and that President Bush had requested that Congress evaluate the question).

103. President Bush is often noted (both with praise and criticism) for expanding federal executive authority beyond that exercised by any previous administration in U.S. history. *See, e.g.*, Jeffrey Rosen, *Bush's Leviathan State: Power of One*, THE NEW REPUBLIC, July 24, 2006, at 8, 8 ("One of the defining principles of the Bush administration has been a belief in unfettered executive power. . . . A conservative ideology that had always been devoted to limiting government power has been transformed into the largest expansion of executive power since FDR."); Press Release, Senator Patrick Leahy, Statement On Presidential Signing Statements (July 25, 2006), available at <http://leahy.senate.gov/press/200607/072506a.html> ("Whether it is torture, warrantless eavesdropping on American citizens, or the unlawful detention of military prisoners, this Republican-led Congress has been willing to turn a blind eye and rubber-stamp the questionable actions of this Administration, regardless of the consequences to our Constitution or civil liberties.").

federal command would have blurred the very lines of regulatory authority that New Federalism so endeavors to preserve.¹⁰⁴ The best alternative explanation—and one equally troubling—is that the White House relied on New Federalism rhetoric for political cover in avoiding any involvement with the unfolding mess.¹⁰⁵ Either way, that New Federalism ideals could stall effective governance at such a key moment or provide reliable cover to so monumental an abdication suggests their infirmity.

In the end, reasonable people may disagree on how best to apportion blame between the amply culpable local, state, and federal authorities for the failed response, subsequently heralded as “a national disgrace.”¹⁰⁶ That said, it remains difficult to digest the confirmed reports that after fifteen-foot floodwaters swept through the Jackson Barracks headquarters of the Louisiana National Guard Headquarters—severing communication lines, flooding high-water trucks, and converting the entire nerve center force into 375 more New Orleans refugees in need of a water rescue¹⁰⁷—White House officials stalled in Washington, debating how the finer principles of constitutional federalism dictated the scope of federal intervention.¹⁰⁸ In their defense, the debate was at least warranted by a faithful interpretation of the federalism model advanced by the sitting Supreme Court. But it raises the fair question, in light of the stakes and the results that can flow from that model—is this really the federalism we intended?

3. *The Price of Failure*

While the President’s senior advisers fiddled with federalism, New Orleans drowned. The details of the debacle are by now painfully well-known to most Americans, but they bear repeating to highlight

104. For example, Scott L. Silliman, Executive Director of Duke University School of Law’s Center on Law, Ethics and National Security, believes that delays were caused not by the limitations of the Posse Comitatus Act, which generally precludes the use of federal troops for domestic security concerns, but by confusion over the lines of authority between President Bush and Governor Blanco: “I think the problem was you had two heads of state . . . each having the authority, but one waiting for the other to act.” Anne Plummer, *Loosening Restrictions on the Military Enforcing Civil Law Unwise, Say Critics*, CONG. Q. WKLY., Sept. 24, 2005, at 2550 (internal quotation marks omitted).

105. See *id.* Silliman’s interpretation, of course, suggests another possible explanation for the administration’s reluctance to intervene despite an arguable legal basis for doing so: the desire to pass the hot potato and avoid responsibility for an intractable situation. See *infra* Part IV.B.2.b.

106. *E.g.*, Lewis, *supra* note 51, at 52.

107. Shane & Shanker, *supra* note 58, at A1.

108. See *supra* note 62 and accompanying text.

the scope of the failed response. Over a thousand residents perished in their homes and neighborhoods,¹⁰⁹ and up to thirty-four died in the makeshift mass shelters at the New Orleans Superdome and convention center,¹¹⁰ where some 39,000 evacuees were encamped without adequate food, water, power, or sanitary facilities for up to seven days.¹¹¹ Two-thirds of the occupants were women, children, or elderly, many of them infirm, and they huddled in darkness and 100-degree temperatures amidst the unbearable stench of human waste covering the floors and the ceiling debris fallen from holes torn from the roof by the storm.¹¹² Unchecked lawless behavior terrorized citizens and local law enforcement alike, both within the emergency shelters and on the flooded city streets.¹¹³ The near total collapse of landline, satellite, and cell phone communications hindered the ability of local law enforcement and the Louisiana National Guard to coordinate a response—even available radio channels were so jammed with traffic that they became useless.¹¹⁴

The chaotic rescue and evacuation efforts impacted families as well, as the National Center for Missing and Exploited Children reported in mid-September 2005 that 1,831 children from Louisiana, Alabama, and Mississippi were reported as missing in the aftermath of the storm, and that weeks later, only 360 of these cases had been resolved.¹¹⁵ At least a million evacuees took shelter in other cities and states,¹¹⁶ and by March 2006 the federal government had committed

109. *Katrina's Official Death Toll Tops 1,000*, CNN.COM, Sept. 21, 2005, <http://www.cnn.com/2005/US/09/21/katrina.impact>.

110. Lipton et al., *Breakdowns*, *supra* note 62, at A1 (quoting official reports of thirty-four deaths: ten at the Superdome and twenty-four at the convention center).

111. *Id.* Food and water supplies stashed at the planned emergency shelter of the Superdome ran out within the first few days after Katrina made landfall. *Id.* After the Superdome had filled beyond all capacity, an additional 15,000 refugees were directed to the convention center, where there were no food or water supplies. *Id.*; see also John Riley & Craig Gordon, *Katrina—What Went Wrong*, NEWSDAY, Sept. 3, 2005, at A4 (describing the deplorable conditions in the convention center).

112. Lipton et al., *Breakdowns*, *supra* note 62, at A1 (citing Chief Lonnie C. Swain, an assistant police superintendent who oversaw ninety police officers on patrol at the Superdome).

113. See *id.* (quoting Captain Jeffrey Winn, head of the convention center's police SWAT team: "The only way I can describe it is as a completely lawless situation.").

114. Shane & Shanker, *supra* note 58, at A1.

115. Barbara Kantrowitz & Karen Breslau, *Some Are Found, All Are Lost*, NEWSWEEK, Sept. 19, 2005, at 51, 51. Young children were often separated from parents during chaotic boat rescues and bus evacuations. *Id.* at 52.

116. See Lester R. Brown, *Global Warming Forcing U.S. Coastal Population to Move Inland*, EARTH POL'Y INST., Aug. 16, 2006, <http://www.earth-policy.org/Updates/2006/Update57.htm> (explaining that Hurricane Katrina forced one million people to move inland from the afflicted coastal cities); see also Eric Lipton, *Storm and Crisis: Hurricane Evacuees Face*

\$6.9 billion in shelter and direct financial assistance to Gulf Coast residents affected by the hurricane.¹¹⁷ Countless thousands of starving and injured companion animals continued to roam the streets or languish trapped within the homes of evacuated owners for weeks following the storm,¹¹⁸ most perishing before rescue but not before ghastly suffering.¹¹⁹

Damage to oil infrastructure was the worst ever experienced by the industry.¹²⁰ More than nine million gallons were reported spilled,¹²¹ and gas prices skyrocketed to as high as \$6 per gallon in the following weeks.¹²² Chemical spills, rotting remains, and flooding resulted in environmental hazards ranging from land-based toxic sludge to poisoned water supplies that will continue to threaten human health and safety into the foreseeable future.¹²³ Approximately \$88 billion in federal aid has already been allocated toward relief, recovery, and rebuilding efforts, and an additional \$20 billion has been re-

Eviction Threats at Both Their Old Homes and New, N.Y. TIMES, Nov. 4, 2005, at A20 (discussing the large influx of displaced Katrina victims to Texas). For a graphical depiction of Katrina refugee displacement, see Kantrowitz & Breslau, *supra* note 115, at 53. Refugees have fled to forty-nine different states and the District of Columbia. See Press Release, White House, Fact Sheet: Gulf Coast Update: Hurricane Relief, Recovery, and Rebuilding Continues (Mar. 8, 2006) [hereinafter Gulf Coast Fact Sheet], available at <http://www.whitehouse.gov/news/releases/2006/03/20060308-8.html> (noting the federal aid flowing to local education agencies in forty-nine states and District of Columbia for displaced school children).

117. Gulf Coast Fact Sheet, *supra* note 116. This is more than “double the combined total of Individuals and Households Assistance Program (IHP) dollars provided for six major U.S. natural disasters occurring since 1992.” *Id.*

118. See, e.g., Oscar Corral, *Stranded Pets Facing Starvation*, MIAMI HERALD, Sept. 5, 2005, at A13 (noting that many pets were abandoned because their owners could not bring them on evacuation buses); Norma Mendoza, *Task Force Members Describe Devastation in New Orleans*, EDWARDSVILLE INTELLIGENCER, Oct. 11, 2005, at 1, 3 (“Another sad sight was the dogs that were everywhere, strays and abandoned pets that rescue workers wouldn’t allow people to bring with them. Some died, trapped in the houses where they were left. Others were starving and the officers had nothing to give them.”).

119. See, e.g., *Photo Gallery: Pets, Hurricane Katrina’s Other Victims*, NATIONAL GEOGRAPHIC.COM, Sept. 8, 2005, http://news.nationalgeographic.com/news/2005/09/0908_050908_katrina_pets.html (illustrating the anguish of animals abandoned in Katrina’s wrath); cf. Karlyn Barker & Nia-Malika Henderson, *Plight of Stranded Animals Worsening Daily*, WASH. POST, Sept. 8, 2005, at B4 (estimating that thousands of animals abandoned by their owners after Katrina were in peril).

120. See Pam Radtke Russell, *Gulf Platform Damage Still Being Assessed*, NEWHOUSE NEWS SERV., Mar. 23, 2006 (on file with author) (explaining that the damage to oil and gas platforms from Katrina was the worst ever seen in the Gulf of Mexico, and that the harm caused by rigs was equally noteworthy).

121. Mike Taibbi, *Oil Coats Homes, Water After Katrina*, MSNBC.COM, Nov. 8, 2005, <http://www.msnbc.msn.com/id/9972220>.

122. Robert J. Samuelson, *Hitting the Economy*, NEWSWEEK, Sept. 12, 2005, at 54, 54.

123. See Thomas et al., *supra* note 56, at 34–35 (listing environmental hazards affecting public health).

quested to assist a variety of federal agencies in their continuing relief efforts.¹²⁴ These moneys have been earmarked for programs including unemployment assistance,¹²⁵ community disaster loans to local governments,¹²⁶ housing assistance,¹²⁷ and public assistance projects.¹²⁸ Separate grants have also been awarded, including a \$1.6 billion special congressional appropriation to the Department of Education for public and private schools where relocated students enrolled.¹²⁹

Americans watched their televisions (and increasingly agitated journalists watched on the scene) in disbelief as day after day passed before anything resembling an organized disaster response was assembled in the devastated City of New Orleans.¹³⁰ Public outrage brimmed over in the days and weeks following the crisis, exemplified by one news story's observation that "[t]he descent of the Superdome from haven to a fetid, crime-infested hellhole by the time mass evacuations began Thursday was emblematic of what appeared to many to be a government failure of epic proportions last week, leaving experts and ordinary citizens alike puzzled and infuriated."¹³¹

Of course, much of the devastation that Gulf Coast residents suffered from the winds and rain of Katrina cannot be blamed on bad disaster management. Setting aside the degree to which anthropogenic climate change contributes to the intensity of hurricanes like

124. Gulf Coast Fact Sheet, *supra* note 116. As high as this figure seems, it nevertheless falls short of the \$150 billion of federal aid that experts had predicted would be necessary for recovery efforts. Nina J. Easton, *Katrina Aid Falls Short of Promises*, BOSTON GLOBE, Nov. 27, 2005, at A1.

125. See Press Release, FEMA, By the Numbers: FEMA Recovery Update in Louisiana (Mar. 24, 2006), available at <http://www.fema.gov/news/newsrelease.fema?id=24505> (allocating \$165 million to disaster unemployment assistance).

126. See *id.* (allocating \$700 million in loans to local governments in need of assistance).

127. FEMA has already dispersed checks in the amount of \$3.5 billion for rental assistance and home restoration. *Id.*

128. Over \$1.9 billion has already been set aside for such public assistance undertakings. *Id.*

129. Gulf Coast Fact Sheet, *supra* note 116.

130. Even journalists of ordinarily studied neutrality found themselves challenging official accounts of the relief effort. For example, in an interview with FEMA Director Michael Brown three days into the crisis, NBC Nightly News anchor Brian Williams incredulously demanded to know why federal Chinook and Blackhawk helicopters circling the area could not be used to deliver food, water, and medical supplies to the encamped evacuees. See *NBC Nightly News*, *supra* note 100 ("[']Where is the aid?['] It's the question []people keep asking us on camera!"). In response, Brown indicated that the federal government had only just become aware of the thousands of desperate refugees that day. *Id.*

131. Riley & Gordon, *supra* note 111, at A4.

Katrina,¹³² hurricanes are a force of nature that we have long learned to fear. River and wetland management choices along the Mississippi Delta exacerbated the flooding that proved the worst of New Orleans's battles,¹³³ and Americans are right to ask for better long-term planning from the local, state, and federal authorities responsible for these activities.¹³⁴ Still, it was the bungled humanitarian relief effort—the disorganized response that stranded the sick and injured, separated young children from their parents, and left the most vulnerable members of society struggling to survive amidst prolonged “Lord of the Flies” conditions¹³⁵—that triggered public outrage.

4. *Coda: Which Federalism?*

Given the proven ability of the United States to respond quickly and effectively in the face of natural disaster (for example, our immediate and ambitious relief effort in response to the South Asian tsunami just nine months earlier¹³⁶), what could possibly account for this

132. Compare Stefan Rahmstorf et al., *Hurricanes and Global Warming—Is There a Connection?*, REALCLIMATE, Sept. 2, 2005, <http://www.realclimate.org/index.php?p=181> (suggesting that man-made increases in greenhouse gases have, at least in part, led to a rise in ocean temperatures, which tends to cause more destructive hurricanes like Katrina), with James K. Glassman, *Katrina and Disgusting Exploitation*, TCS DAILY, Aug. 31, 2005, <http://www.tcsdaily.com/article.aspx?id=083105JKG> (refusing to acknowledge a nexus between global warming and the severity of Hurricane Katrina).

133. See Erin Ryan, *New Orleans, the Chesapeake, and the Future of Environmental Assessment: Overcoming the Natural Resources Law of Unintended Consequences*, 40 U. RICH. L. REV. 981, 990–97 (2006) (describing the natural resource management choices made along the Mississippi River that made New Orleans particularly vulnerable to Hurricane Katrina's storm surge).

134. Cf. John Schwartz, *Army Builders Accept Blame Over Flooding*, N.Y. TIMES, June 2, 2006, at A1 (reporting that an Army Corps of Engineers' study concluded that the design of the New Orleans levees was flawed and incapable of handling a storm the strength of Katrina).

135. See, e.g., *Britons Describe Hurricane Ordeal*, BBC NEWS, Sept. 6, 2005, <http://news.bbc.co.uk/1/hi/uk/4214746.stm> (recounting the putrid conditions in the Superdome); see also Kantrowitz & Breslau, *supra* note 115, at 51–52 (describing one family that was separated when rescue helicopters dropped the children off at one location and rescue boats brought the parents to another); Evan Thomas, *Taken by Storm*, NEWSWEEK, Dec. 26, 2005/Jan. 2, 2006, at 47, 56 (recounting the same episode); Thomas et al., *supra* note 78, at 44–45 (comparing the images of helpless families and children begging for food and water to third-world conditions in Mogadishu or Port-au-Prince).

136. See Brigadier General John Allen, Principal Director of Asia and Pacific Affairs, Office of the Secretary of Defense, “Update—U.S. Government Relief Efforts in Asia,” Foreign Press Center Briefing, Washington, D.C. (Jan. 3, 2005), available at <http://www.pacom.mil/speeches/sst2005/050103-wh-presstranscript.shtml> (“Within minutes of our notification of this disaster, we began military planning to assist in the U.S. Governmental response to this crisis Within hours, U.S. forces began to move to the affected area.”); BUREAU OF INT’L INFO. PROGRAMS, U.S. DEP’T OF STATE, GOING THE DISTANCE: THE U.S. TSUNAMI RELIEF EFFORT 2005, at 1 (2005), <http://usinfo.state.gov/products/pubs/tsunami/tsunami.pdf> (reporting that, at the height of the relief effort, “more than 15,000

spectacular failure of governance? In the face of such unimaginable domestic despair, prompting ordinary Americans from the four corners of the nation to arrive at New Orleans's doorstep with whatever they had to offer, why couldn't the United States government properly protect, feed, and evacuate its own?

In his post-storm congressional testimony, former FEMA director Michael Brown provided perhaps the best answer, and in so doing invokes several of the important federalism issues with which we began this Part. In his poignant defense of his agency's performance on federalism grounds, he explained:

Princip[les] of federalism should not be lost in a short-term desire to react to a natural disaster of catastrophic proportions, for if that concept is lost, the advantages of having a robust state and local emergency management system will lead not only to waste of taxpayer dollars at the federal level, but will inherently drive decision-making best left to the local and state level, to a centralized federal government, which inherently cannot understand the unique needs of each community across this nation.¹³⁷

Brown's statement is important for three reasons. First, he correctly articulates a central problem of federalism: structural constraints are only meaningful if they are followed in difficult times as well as easy times. For Brown, allowing the federal government to cross federalism's proverbial line in the sand to satisfy a short-term desire would undermine the very principles of constitutional government. But this brings us to the second important point in Brown's statement, which is his invocation of the fallacy perpetuated by New Federalism rhetoric that strict-separationist dual sovereignty is *itself* federalism, as opposed to one vision among alternatives. Although earlier federal intervention might have violated the tenets of the strict-separationist ideal, it might have been an acceptable move within an alternative conception

U.S. military personnel were involved in providing relief support in the affected region. Twenty-five ships and 94 aircraft were participating in the effort. The U.S. military had delivered about 2.2 million pounds of relief supplies to affected nations"); *see also* Ralph A. Cossa, *President of the Pacific Forum Center for Strategic and International Studies, South Asian Tsunami: U.S. Military Provides 'Logistical Backbone' For Relief Operation*, EJOURNAL USA: FOREIGN POLICY AGENDA (Nov. 2004), <http://usinfo.state.gov/journals/itps/1104/ijpe/cossa.htm> (noting, in ironic contrast to the later Katrina relief effort, that "[w]hile the numbers of forces dedicated to the relief effort and the extent of aid they provided were impressive, the most invaluable U.S. contribution focused around another Defense Department unique capability: command, control, communications, and coordination. These attributes, critical in wartime, proved equally critical in ensuring an effective, coordinated response.").

137. *See* Brown Statement, *supra* note 61, at 3.

of federalism (such as one that acknowledges the interjurisdictional gray area).

This brings us to the third important reference point in Brown's statement—and as it happens, back to the core federalism question raised by this article—namely, that of *which federalism?* If there is a legitimate interpretive choice among alternatives, we should choose the model that best enables the kind of governance that serves the values we ascribe to government. For Brown, the regulatory impulse “to react to a natural disaster of catastrophic proportions” is little more than a “short-term desire,”¹³⁸ a crassly self-satisfying move in the foreground of a much greater drama about the grand diffusion of separately sovereign power. But to what end is power so divided, if neither one nor the other level of government can intervene to prevent the most galling (and continuing) episode of domestic human suffering in this lifetime? Is Michael Brown's FEMA the kind of federal government that we want? Or might it suggest the value of a different model of federalism, one that can afford meaningful constraints without requiring a like sacrifice?

In the end, we must remember that clear errors were made by federal, state, and local authorities that had nothing to do with federalism (for example, New Orleans failed to consider the plight of many citizens without the means or strength to evacuate themselves,¹³⁹ and the Army Corps of Engineers later acknowledged that levees protecting the City had not been designed to withstand the combination of known soil subsidence patterns¹⁴⁰ and projected levee-top overflow during a storm of Katrina's magnitude¹⁴¹). Still, we should be deeply troubled by accounts like Michael Brown's, which suggest that the

138. *Id.*

139. Joe Whitley observes that

[w]hile more than 1.2 million people were successfully evacuated from coastal areas before Katrina hit, tens of thousands of people were not, including citizens from two of Louisiana's most populous localities, New Orleans and Jefferson Parishes. Despite the eventual declaration of a mandatory evacuation on Sunday before landfall, New Orleans officials were unable to provide adequate transportation to evacuate the population.

Whitley et al., *supra* note 52, at 6.

140. See Ryan, *supra* note 133, at 990–97 (noting how channelization of the Mississippi River has led to soil subsidence in the Delta and explaining its implications for New Orleans during Hurricane Katrina).

141. Schwartz, *supra* note 134, at A1. The Corps' 6,113-page report was remarkably candid about the failed levee system:

The region's network of levees, floodwalls, pumps and gates lacked any built-in resilience that would have allowed the system to remain standing and provide protection even if water flowed over the tops of levees and floodwalls Flaws in the levee design that allowed breaches in the city's drainage canals were not

most devastating post-storm errors—those crystallized in the delayed and uncoordinated relief effort—flowed from the good-faith but ill-fated vehemence with which our leaders hewed to a principled reading of the constitutional balance of state and federal power. And while this may surprise the average outraged American, it should come as less of a surprise to those who have been following the trajectory of the New Federalism ideals promoted by the Supreme Court under the leadership of the late Chief Justice William Rehnquist.

III. THE NEW FEDERALISM'S "STRICT-SEPARATIONIST" APPROACH

A. *Dual Sovereignty and the Boundary Problem*

Michael Brown's account of federal decisionmaking during the Katrina crisis coincides with the vision of state-federal relations projected by the New Federalism jurisprudence, exemplified by Chief Justice Rehnquist's memorably expressed conviction that "[t]he Constitution requires a distinction between what is truly national and what is truly local."¹⁴² New Federalism is certainly not the first interpretive movement to herald such a distinction, which owes provenance even to such early champions of federal authority as Justice Oliver Wendell Holmes.¹⁴³ However, renewed political interest in the distinction arose in the 1970s and gathered steam in the 1980s¹⁴⁴ following President Reagan's vow in his first inaugural address "to curb the size and influence of the federal establishment and to demand recognition of the distinction between the powers granted to the federal government and those reserved to the states or to the people."¹⁴⁵ The movement reached maturity during the mid-1990s, when Republican majorities

foreseen, and those floodwalls failed even though the storm waters did not rise above the level that the walls were designed to hold.

Id.

142. *United States v. Morrison*, 529 U.S. 598, 617–18 (2000) (emphasis added).

143. *See N. Sec. Co. v. United States*, 193 U.S. 197, 402 (1904) (Holmes, J., dissenting) (noting that the federal government should refrain from regulating traditional realms of state sovereignty as "[c]ommercer depends upon population, but Congress could not, on that ground, undertake to regulate marriage and divorce").

144. *See, e.g.*, Paul D. Moreno, "So Long as Our System Shall Exist": Myth, History, and the New Federalism, 14 WM. & MARY BILL RTS. J. 711, 741–42 (2005) (noting that the New Federalism began to emerge in the 1970s and 1980s as a "cultural and intellectual reaction against the centralization of American society"). In the 1970s, President Nixon oversaw a better differentiation of the roles of the federal and state governments in some of the ambitious national regulatory endeavors that characterized his administration, including the Clean Water Act and the Clean Air Act. However, these efforts are more akin to the cooperative federalism model that the Rehnquist Court's "New Federalism" has sought to challenge. *See infra* Part V.B.3–5.

145. Ronald Reagan, First Inaugural Address (Jan. 20, 1981), available at <http://www.reaganfoundation.org/reagan/speeches/first.asp>. President Reagan further re-

elected for the first time in four decades to both the House and Senate sought to devolve regulatory authority that had come to rest with the federal government back to the state level.¹⁴⁶ And yet it is the legacy of the Rehnquist Court's federalism decisions during this period—frequently referred to as the “New Federalism” cases¹⁴⁷—that have most drawn national attention to the revival of interest in federalism issues (perhaps even disproportionately to their actual influence on American governance¹⁴⁸).

The New Federalism cases reinvigorate the distinction to which Chief Justice Rehnquist alluded by adopting an especially rigid reading of the dual sovereignty principle.¹⁴⁹ Justice Scalia set forth the New Federalism understanding of dual sovereignty in *Printz v. United States*,¹⁵⁰ the famed decision striking down portions of the Brady Handgun Violence Prevention Act (Brady Act) under the Tenth Amendment as impermissibly compelling the participation of state law enforcement officials in a federal gun control program. Justice Scalia explained:

It is incontestible that the Constitution established a system of “dual sovereignty.” Although the States surrendered many of their powers to the new Federal Government, they retained “a residuary and inviolable sovereignty” This . . . [r]esidual state sovereignty was also implicit, of

minded the nation that “the federal government did not create the states; the states created the federal government.” *Id.*

146. See CHUNG-LAE CHO & DEIL S. WRIGHT, *The Devolution Revolution in Intergovernmental Relations in the 1990s: Changes in Cooperative and Coercive State–National Relations as Perceived by State Administrators*, 14 J. PUB. ADMIN. RES. & THEORY 447, 450–51, 464 (2004) (noting that “state administrators’ perceptions of national fiscal and regulatory influence declined moderately yet significantly,” in contrast to the steady increase of national influence in prior decades).

147. *E.g.*, David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377 (2001); Allison H. Eid, *Teaching New Federalism*, 49 ST. LOUIS U. L.J. 875 (2005); Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1, 1 (2003); Marci A. Hamilton, *Nine Shibboleths of the New Federalism*, 47 WAYNE L. REV. 931 (2001).

148. *E.g.*, Hamilton, *supra* note 147, at 940–41 (noting that “[t]he new federalism is intellectually fascinating, and scholars have something wonderful to chew on, but the Court itself is nibbling,” due to the limited impact of the decisions on general federal lawmaking practices).

149. See *supra* notes 36–43 and accompanying text. For an early example of this principle, see also *McCulloch v. Maryland*:

No trace is to be found in the constitution of an intention to create a dependence of the government of the Union on those of the States, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends.

17 U.S. (4 Wheat.) 316, 424 (1819).

150. 521 U.S. 898 (1997).

course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, . . . which implication was rendered express by the Tenth Amendment[]

. . . The great innovation of this design was that "our citizens would have two political capacities, one state and one federal, each protected from incursion by the other"—"a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it."¹⁵¹

The premise of American dual sovereignty is hardly controversial; indeed, as Justice Scalia observed, the Constitution clearly anticipates a system of government in which authority is housed at both the federal and state levels,¹⁵² and there are clearly reservoirs of separate state and federal powers that do not overlap. However, the ongoing federalism debate in the United States proceeds from unresolved questions about the tricky margin between them—or where, exactly, state authority begins and federal authority ends (and vice versa) when a regulatory matter triggers legitimate authority or obligation in both spheres. In contrast to more pragmatic models of American federalism (such as contemporary cooperative federalism), the New Federalism approach adopts a "strict-separationist" ideal of dual sovereignty, characterized by exclusive realms of state and federal authority that are protected from mutual incursion by a clearly defined boundary.

The Constitution's presupposition that states would survive the Union falls short of providing a clear directive in this regard, nor does it establish the exact protocols in the relationship between state and federal authority when areas of legitimate national and local regulatory interest overlap.¹⁵³ The Supremacy Clause tells us that federal law will prevail against conflicting state authority when it is enacted pursuant to constitutionally enumerated powers,¹⁵⁴ and *McCulloch v. Maryland*¹⁵⁵ made clear that the state and federal governments are not

151. *Id.* at 918–20 (citations omitted).

152. *See id.* at 919 (quoting *Helvering v. Gerhardt*, 304 U.S. 405, 414 (1938), for the proposition that the Constitution "presupposes the continued existence of the states").

153. *See supra* Part II.A; *see also* Jackson, *supra* note 23, at 2191 (noting that the Constitution's assumption that states would continue to exist "does not tell us whether states can be required to help carry out federal law").

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

155. 17 U.S. (4 Wheat.) 316 (1819).

“dual in the sense of *equal*,”¹⁵⁶ characterizing the respective sovereignties of the federal and state governments as that “between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme.”¹⁵⁷ However, the New Federalism Tenth Amendment cases suggest that even constitutionally enacted federal laws may not intrude upon a specially protected realm of “inviolable” state sovereignty¹⁵⁸ by commanding state agents (other than judges) to execute federal laws.¹⁵⁹

1. *Take 1: National League of Cities, Garcia, and the Sovereign Functions Test*

The Rehnquist Court’s efforts to protect the boundary between state and federal regulatory authority reflect similar attempts earlier in the century to restrict the reach of the federal government into traditional realms of state power. These included the Court’s 1918 and 1922 decisions invalidating federal regulation of industrial child labor practices in *Hammer v. Dagenhart*¹⁶⁰ and *Bailey v. Drexel Furniture Co.*,¹⁶¹ and the Court’s 1935 rejection of New Deal efforts to regulate agricultural and industrial pricing and production in *A.L.A. Schechter Poultry Corp. v. United States*.¹⁶² The more significant precursor to the New Federalism’s boundary-drawing enterprise is the Court’s 1976 decision in *National League of Cities v. Usery*¹⁶³ that the Tenth Amend-

156. Jackson, *supra* note 23, at 2196 (internal quotation marks omitted) (emphasis added).

157. *McCulloch*, 17 U.S. (4 Wheat.) at 436.

158. Even the vigorous dissenters in the New Federalism cases have recognized an area of “residuary and inviolable sovereignty.” See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550 (1985) (quoting THE FEDERALIST NO. 39, at 285 (James Madison) (B. Wright ed., 1961) (internal quotation marks omitted)). But this vision of state sovereignty leans on the constitutional structure itself, allowing the tripartite structure of the federal government and its system of checks and balances to determine the realms of federal and state authority. *Id.* at 550–52.

159. *Printz v. United States*, 521 U.S. 898, 933 (1997); see also *infra* Part III.A.2.

160. 247 U.S. 251 (1918) (striking down a federal prohibition on the shipment in interstate commerce of certain goods manufactured by children under the age of fourteen).

161. 259 U.S. 20 (1922) (striking down a prohibitive federal tax on goods manufactured with underage child labor).

162. 295 U.S. 495 (1935) (invalidating parts of the National Industrial Recovery Act that attempted to regulate industrial labor standards, production, and competition).

163. 426 U.S. 833 (1976). This decision overruled contrary precedent in *Maryland v. Wirtz*, 392 U.S. 183 (1968). *Nat’l League of Cities*, 426 U.S. at 855; see *Wirtz*, 392 U.S. 183 (rejecting a challenge to the application of the federal Fair Labor Standards Act to state employees, on the grounds that such employees participate in the national market for employment and are thus regulable under Congress’s commerce authority). In *National League of Cities*, then-Justice Rehnquist suggested that even Congress’s Commerce Clause authority is subjected to structural limitations implied by the Tenth Amendment. 426 U.S. at 842–43.

ment prohibited the application of federal minimum wage and maximum hour laws to State employees.¹⁶⁴

Foreshadowing a subtle but important element of the approach the Rehnquist Court would later take in its Tenth Amendment cases, *National League of Cities* adopted a “sovereign functions” test, requiring that adjudicators distinguish between ordinary activities of state government that could be made subject to federal law (e.g., requiring that state employees conform their behavior to federally mandated environmental laws and safety standards)¹⁶⁵ and the essentially sovereign activities that could not be (e.g., requiring that state employees earn a federally mandated minimum wage).¹⁶⁶ State and federal actors struggled to make sense of the sovereign functions test for the following ten years until *National League of Cities* was finally overturned (and the test held “unworkable”) in *Garcia v. San Antonio Metropolitan Transit Authority*.¹⁶⁷

In comparison to these earlier attempts to create judicially enforceable federalism constraints, the New Federalism has been much more ambitious—invalidating large numbers of federal laws at an unprecedented rate.¹⁶⁸ However, it is also more measured, in that it es-

164. For an excellent comparison/contrast of approaches taken in *National League of Cities* and the New Federalism cases, see Barron, *supra* note 48, at 2085–2100.

165. Indeed, Justice Blackmun specified in his concurrence in *National League of Cities* that the Court’s opinion “does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential.” *Nat’l League of Cities*, 426 U.S. at 856 (Blackmun, J., concurring). In dissent, Justice Stevens listed additional areas of federal authority, where the federal government should be able to

require the State to act impartially when it hires or fires the janitor, to withhold taxes from his paycheck, to observe safety regulations when he is performing his job, to forbid him from burning too much soft coal in the capitol furnace, from dumping untreated refuse in an adjacent waterway, from overloading a state-owned garbage truck, or from driving either the truck or the Governor’s limousine over 55 miles an hour.

Id. at 880 (Stevens, J., dissenting).

166. *Id.* at 847–52 (majority opinion).

167. 469 U.S. 528, 531 (1985).

168. Professor Leon Friedman notes:

From the 1994–95 Supreme Court Term to the 1999–2000 Term, the Court has held twenty-five separate federal laws unconstitutional This rate is unprecedented in our history. The Supreme Court has nullified a total of 150 acts of Congress on constitutional grounds since *Marbury v. Madison*, . . . an average of slightly less than one act per year. The recent trend in striking down an average of more than four statutes each year is exceptional.

Leon Friedman, *Federalism*, in SUPREME COURT REVIEW 13, 15 (PLI Litig. and Admin. Practice, Course Handbook Series No. H0-009C 2000) (citations omitted). That said, it is also possible that the high rate of reversal is attributable to boundary-testing on the part of congressional lawmaking.

chews the comparatively vague “sovereign functions” test for more easily administrable, rule-based constraints—at least in its affirmative federal power and state sovereign immunity jurisprudence.¹⁶⁹ By contrast, the New Federalism Tenth Amendment cases preserve a key element of the earlier approach even within their simple, bright-line rule proscribing the commandeering of state entities to enforce federal regulations.¹⁷⁰ Although seemingly straightforward, the anti-commandeering rule proves more complicated in application, requiring renewed reliance on considerations evocative of the sovereign functions test to distinguish between appropriate federal compromise of state sovereign authority (such as that upheld in *Reno v. Condon*¹⁷¹) and impermissible commandeering of state authority (such as that invalidated in *Printz v. United States*¹⁷²).¹⁷³

2. *Take 2: New York, Printz, and Condon*

In *New York v. United States*,¹⁷⁴ the Court first set forth the anti-commandeering doctrine in overturning a provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 (1985 Act). The Act required that states without adequate disposal facilities either locate an in-state facility in accordance with its terms or assume legal liability for the waste in lieu of in-state producers.¹⁷⁵ The Court held that this “take-title” provision unconstitutionally commandeered the State’s legislative function, a “‘residuary and inviolable sovereignty,’ . . . reserved explicitly to the States by the Tenth Amendment.”¹⁷⁶ The Court further extended the anti-commandeering rule to protect state executive function in *Printz v. United States*,¹⁷⁷ in which it struck down the Brady Act’s requirement that state police administer background checks on potential gun purchasers during an interim in which the federal infrastructure to perform the checks would be created. In *Printz*, the Court emphasized that “[i]t is an essential attri-

169. See Barron, *supra* note 48, at 2095–98.

170. See *infra* Part III.A.2 (discussing the anti-commandeering rule).

171. 528 U.S. 141 (2000).

172. 521 U.S. 898 (1997).

173. See Barron, *supra* note 48, at 2097–98 (noting that the Tenth Amendment cases “raise the same conceptual difficulty posed by the sovereign functions test,” though the focus on commandeering distinguishes them from the *National League of Cities* test).

174. 505 U.S. 144 (1992).

175. *Id.* at 153–54.

176. *Id.* at 188 (quoting THE FEDERALIST NO. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961) (citation omitted)).

177. 521 U.S. 898 (1997).

bute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority."¹⁷⁸

Despite the controversial facts that attended these cases,¹⁷⁹ the anti-commandeering rule that emerged seems at least more administrable than the *National League of Cities* sovereign functions test, and most observers have been content to distinguish them on this ground. As Justice O'Connor wrote in *New York*, "[w]hatever the outer limits of [state] sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program."¹⁸⁰ Nevertheless, the third decision in the New Federalism's Tenth Amendment trio belies the simplicity of the anti-commandeering rule.

In *Reno v. Condon*,¹⁸¹ the Court held that the Driver's Privacy Protection Act of 1994 (DPPA) did *not* commandeer state executive authority in forbidding state motor vehicle departments from making drivers' personal information available to interested parties in the free market. Both *Printz* and *Condon* involved Tenth Amendment challenges to federal laws alleged to commandeer the regulatory authority of state executive agents: the former by requiring them to exercise their sovereign authority in an undesired way (to conduct background checks) and the latter by requiring them to cease exercising sovereign authority in a way they had desired (to stop selling drivers' personal information). The Court distinguished *Condon* from *Printz* not on the legally shaky grounds of an act/omission distinction,¹⁸² but by finding

178. *Id.* at 928. The Court added that "[i]t is no more compatible with this independence and autonomy that their officers be 'dragooned' . . . into administering federal law, than it would be compatible with the independence and autonomy of the United States that its officers be impressed into service for the execution of state laws." *Id.* (citation omitted).

179. In *New York*, the Court's decision was controversial in part because, prior to filing its Tenth Amendment lawsuit, New York had been part of a group of states that lobbied Congress to pass the Low-Level Radioactive Waste Policy Act of 1980 (1980 Act) and its amendments in the 1985 Act (rather than enact preempting federal legislation), effectively ratifying a state compact in which New York promised to build an in-state disposal site to temporarily preserve continued access to existing sites like South Carolina's overwhelmed Barnwell facility. See *New York*, 505 U.S. at 189–99 (White, J., concurring in part and dissenting in part). In this regard, New York's Tenth Amendment claim appeared unsavory strategic. *Printz* was controversial primarily for its extension of the commandeering doctrine from the legislative policymaking realm to the ministerial activities of the executive branch. See *Printz*, 521 U.S. at 926–33.

180. *New York*, 505 U.S. at 188.

181. 528 U.S. 141 (2000).

182. See Erwin Chemerinsky, *Empowering States: A Rebuttal to Dr. Greve*, 33 PEPP. L. REV. 91, 93–94 (2005) (arguing that the act/omission distinction is unavailing in the context of the anti-commandeering inquiry). Cass Sunstein and Adrian Vermuele reject the distinction between acts and omissions as untenable with respect to government regulation:

that the federally regulated activities of the state motor vehicle agents were *not within the protected sphere of inviolable state sovereignty*. Instead, the Court reasoned that the regulated activities were of a market-participant variety—even though the market is one in which the only vendors are state motor vehicle departments.¹⁸³ Only the states can compile such complete files of citizens' personal information, as only the state can compel citizens to relinquish such information in exchange for official identification and authorization to drive on public roads. Although such a motor vehicle department is clearly acting within a zone of authority available only to the state, it is apparently *not* within the zone of inviolable state authority that is protected by the Tenth Amendment.

Justice O'Connor's concurrence in *Printz* suggests a similar distinction. Though she agreed that “[t]he Brady Act violates the Tenth Amendment to the extent it forces States and local law enforcement officers to perform background checks on prospective handgun owners,”¹⁸⁴ she also made clear that “the Court appropriately refrains from deciding whether other purely ministerial reporting requirements imposed by Congress on state and local authorities pursuant to its Commerce Clause powers are similarly invalid.”¹⁸⁵ For example, in Justice O'Connor's view, the *Printz* decision did not reach requirements like those on state and local law enforcement agencies to relay information about missing children to the U.S. Department of Justice, which coordinates interstate searches for abducted children.¹⁸⁶ But what distinguishes the “ministerial” nature of reporting on missing children from the sovereign function of reporting on criminal history?

At least one court struggling with the distinction concluded that it is *not* because the administration of criminal justice is a core feature

In our view, any effort to distinguish between acts and omissions goes wrong by overlooking the distinctive features of government as a moral agent. If correct, this point has broad implications for criminal and civil law. Whatever the general status of the act/omission distinction as a matter of moral philosophy, the distinction is least impressive when applied to government, because the most plausible underlying considerations do not apply to official actors. The most fundamental point is that, unlike individuals, governments always and necessarily face a choice between or among possible policies for regulating third parties. The distinction between acts and omissions may not be intelligible in this context, and even if it is, the distinction does not make a morally relevant difference.

Cass R. Sunstein & Adrian Vermuele, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 720–21 (2005) (footnotes omitted).

183. *Condon*, 528 U.S. at 147, 150–51.

184. *Printz*, 521 U.S. at 935–36 (O'Connor, J., concurring).

185. *Id.* at 936.

186. *Id.*

of state sovereign power. In *American Civil Liberties Union of New Jersey, Inc. v. County of Hudson*,¹⁸⁷ a New Jersey appellate court relied on *Condon* to overcome Tenth Amendment objections raised after a federal regulation requiring nondisclosure of the identities of detained terrorist suspects was promulgated specifically to preempt a New Jersey law requiring that names of prisoners held in state facilities be released.¹⁸⁸ The court reasoned that this federal law regulated New Jersey not as a sovereign state but merely as the owner of a database of prisoners' personal information, just as the DPPA regulated the states as owners of databases about their citizens personal information.¹⁸⁹ The court observed that even then, "while the states have traditionally administered and regulated the issuance of drivers licenses, they have never been empowered to regulate immigration and naturalization matters."¹⁹⁰

Indeed they have not, but states have always been empowered to regulate the administration of criminal justice in accordance with state constitutional considerations of due process that may exceed the federal floor. This conflict highlights the interjurisdictional nature of the problem (which may ultimately offer the more compelling rationale for the outcome, if the compelling nature of the federal interests outweighed those of the state in this particular corner of the gray area). But it also reveals how the anti-commandeering inquiry forces the adjudicator into a posture that is awkward at best (and disingenuous at worst), either evaluating whether the compromised sovereign function is worthy of Tenth Amendment protection or selectively characterizing the inquiry to obscure the task.

Examples like these show that, while the New Federalism approach appears tidier than its predecessors, it nevertheless draws from the same conceptual realm as the *National League of Cities* zone of integral state authority.¹⁹¹ In comparison to the earlier approach, the

187. 799 A.2d 629 (N.J. Super. Ct. App. Div. 2002).

188. *Id.* at 638–39, 654–55.

189. *See id.* at 655 ("If federal regulations restricting the release of information compiled by state motor vehicle departments pass constitutional muster, then regulations restricting the release of information compiled by state correctional facilities about INS detainees certainly do as well.").

190. *Id.*

191. *See* Barron, *supra* note 48, at 2097 (observing that the categories of New Federalism cases "protecting state sovereign immunity and . . . barring commandeering . . . appear to rest on something like a sovereign functions test," but concluding that the anti-commandeering cases most directly raise the same difficulties posed by the invalidated *National League of Cities* test). Although the anti-commandeering cases do require the Court to "independently classify[] certain state functions . . . as being more 'sovereign' than others," Professor Barron notes that both the sovereign immunity and anti-commandeering cases

New Federalism Tenth Amendment cases focus on the more limiting prohibition against commandeering. But in differentiating between the state activities with which federal interference constitutes commandeering and the rest, the decisions inadvertently resurrect a strict-separationist understanding of dual sovereignty, complete with mutually exclusive state and federal spheres. Especially in application to the murkier realm of state executive action, the anti-commandeering rule requires that courts distinguish between the truly “sovereign” areas of state authority that are inviolable by federal regulatory commands and other areas of state authority that remain vulnerable to federal compulsion.¹⁹²

State legislative authority most clearly falls within the zone of protected sovereignty, and it is easy to see why that would be so, but the realms in which state executive agents wield their authority are harder to differentiate. State authority implicated in performing a background check on state citizens is protected, but state authority implicated in gathering and reporting information about state citizens (e.g., missing children to the federal government, or drivers’ information to willing buyers) is not. The Court explains that the distinction hinges on whether the federal law requires a state to regulate its own citizens as part of a federal regulatory program,¹⁹³ a consideration that certainly holds currency in the defense of dual sovereignty. Nevertheless, the degree of parsing required by the distinction becomes troubling when comparing (1) the activity protected by the Tenth Amendment in *Printz*, where the state would have provided information to citizens (gun dealers) in accordance with the same federal law that tells those citizens to whom they may sell guns, and (2) the activity left unprotected in *Condon*, where compliance with the relevant federal law requires that the state refrain from disseminating information directly to its own citizens. Unless the two are distinguished as act and omission—a distinction so riddled with problems that it simply cannot bear the weight this constitutional discrimination calls for¹⁹⁴—

attempt to overcome the “unworkability” problem by focusing on a prohibited mechanism of enforcement (e.g., citizen suit, commandeering), rather than on attempting to define “the distinction between those functions associated with sovereignty and those that are not.” *Id.* at 2097–98.

192. *See id.* at 2097 (noting that the Tenth Amendment decisions distinguish between the types of state activity protected by the New Federalism stance, “making state regulation somehow more sovereign than state service provision or even state information gathering and dissemination”).

193. *E.g., Condon*, 528 U.S. at 150–51 (citing *South Carolina v. Baker*, 485 U.S. 505, 514–15 (1988)).

194. *See, e.g., Chemerinsky, supra* note 182, at 93–94. Taking the challenged federal law in *Printz* as an example, Professor Chemerinsky notes that although the requirement that

then it is hard to understand without some recourse to sovereign-functions-like reasoning.

To the extent the anti-commandeering rule invokes the same conceptual difficulties that undermined the *National League of Cities* sovereign functions test, the New Federalism Tenth Amendment cases leave an unsettled jurisprudential wake. They also demonstrate how Tenth Amendment jurisprudence will inevitably do more than simply state a rule, such as the seemingly simple anti-commandeering rule. Rather, interpreting the Tenth Amendment puts flesh on the bones of constitutional dual sovereignty, providing contour to the theoretical model of federalism in play. As the principal representation of the dual sovereignty directive, the Tenth Amendment is the primary guardian of the federalism values implied by dual sovereignty, and in any given federalism model, made justiciable to vindicate that model. New Federalism renders the Tenth Amendment justiciable in terms of the anti-commandeering rule, in service of the strict-separationist ideal.

3. *The Jurisprudential Quest for Absolutes*

The debate over conflicts between essential state and federal regulatory authority have preoccupied Americans since the founding of the republic.¹⁹⁵ It continued through the Civil War era and its aftermath, during the industrial revolution and its accompanying period of Lochnerian “laissez-faire constitutionalism,” and into the New Deal and post-New Deal eras.¹⁹⁶ What is novel about the New Federalism approach is the ease and absoluteness with which it purports to recognize the distinction that so troubled the Supreme Court in both *Garcia*

states run background checks before issuing firearms permits has been characterized as a congressional command, it is just as easily characterized as a prohibition against states issuing permits unless they run background checks. Moving on to *Condon*, he explains that it seems that [the DPPA] is a prohibition against states from releasing driver’s license information. The Driver’s Privacy Protection Act of 1994 says that state Departments of Motor Vehicles cannot release certain information, such as home addresses, Social Security numbers, and driver’s license information. Dr. Greve said that is a prohibition. I think it just as easily can be understood as a command. Congress commanded the states to keep this information secret. Command or prohibition, I think they are interchangeable. To me, what is important is when do [we] allow the states to make the choices, and when not. And I think that we should empower the states to make choices unless there is clear congressional prohibition.

Id. (footnotes omitted); see also Sunstein & Vermuele, *supra* note 182, at 720–21 (discussing the problems of applying the act/omission distinction to government action).

195. See generally THE FEDERALIST PAPERS (Clinton Rossiter ed., 1961).

196. *E.g.*, Barton, *supra* note 48, at 2085–87.

and *National League of Cities*,¹⁹⁷ positing mutually exclusive state and federal regulatory spheres despite increasingly troubling areas of interjurisdictional concern.¹⁹⁸ Articulating the conviction that most animates the New Federalism decisions, Justice Scalia warned in *Printz* that “[i]t is an essential attribute of the States’ retained sovereignty that they remain independent and autonomous within their proper sphere of authority”¹⁹⁹—but without clarifying exactly what that “proper” sphere of authority is.²⁰⁰

Doubts about the theoretical resilience of this alleged boundary between the “proper spheres” of state and federal regulatory authority have engendered both scholarly criticism and practical confusion. Some have argued that the Court’s invocation of mutually exclusive spheres of state and federal jurisdiction reflects an anachronistic notion of federalism that ignores well-established realms of concurrent state and federal jurisdiction,²⁰¹ including commercial, consumer, and economic affairs,²⁰² criminal law,²⁰³ and the environment.²⁰⁴

197. It is noteworthy that in *National League of Cities*, there appeared to be no true majority adherence to the proposition that the distinction between inviolable and violable state functions could be categorically distinguished. Justice Rehnquist’s majority opinion required the vote of Justice Blackmun to overcome the dissenting Justices. In his concurrence, Justice Blackmun made clear that he believed the distinction could be made, at best, through a balancing test. See *supra* notes 163–166 and accompanying text.

198. See *infra* Part IV.A.

199. *Printz v. United States*, 521 U.S. 898, 928 (1997).

200. See, e.g., Jackson, *supra* note 23, at 2193 (noting that the *Printz* Court’s recognition of spheres of state sovereignty “begs the question of what that proper sphere of authority is”). Justice Scalia’s statement is notably similar to the *National League of Cities* approach, which asserted that the Tenth Amendment prohibits federal laws from interfering with the sovereign functions of the states, without clearly establishing how to identify such protected state functions. *Nat’l League of Cities v. Usery*, 426 U.S. 833, 851–55 (1976).

201. See, e.g., 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, 831–32, 938–39 (1998) (deeming the New Federalism’s view of mutually exclusive state and federal regulatory spheres as “palpably untrue”); Jackson, *supra* note 23, at 2196 (discussing the “outmoded” basis for the dual sovereignty approach); Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563, 1564–66 (1994) (critiquing the New Federalism model’s reliance on the territorial view of federalism).

202. See, e.g., Issacharoff & Sharkey, *supra* note 31, at 1382–85 (describing overlapping state and federal jurisdiction in products liability law); A. Brooke Overby, *Our New Commercial Law Federalism*, 76 TEMP. L. REV. 297, 299–300 (2003) (discussing the advent of cooperative federal commercial laws, with particular emphasis on the Electronic Signatures in Global and National Commerce Act); Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 145 (2001) (noting that “[s]tate and federal governments have broad concurrent regulatory authority over the economy”).

203. See, e.g., Susan R. Klein, *Independent-Norm Federalism in Criminal Law*, 90 CAL. L. REV. 1541, 1553 (2002) (“[W]here federal criminal laws regulate conduct already regulated by the states, such federal legislation does not displace the state criminal-justice system, but rather supplements it with concurrent jurisdiction.”).

Even if those realms were regarded as recent examples of federalism failure,²⁰⁵ vast areas of state and federal law have long been closely intertwined. For example, the law of bankruptcy—explicitly delegated by the Constitution to the federal government²⁰⁶—relies heavily on state law definitions of property.²⁰⁷ Confusion following the Court’s charge to protect this disputed boundary has already spawned uncertain legal challenges and regulatory failures in interjurisdictional contexts.²⁰⁸

Meanwhile, others have applauded the New Federalism’s boundary-drawing enterprise, stressing the need for judicially enforceable federalism constraints that protect strict-separationist dual sovereignty,²⁰⁹ lest expanding Commerce Clause jurisdiction enables Congress to legislate on whatever subject it chooses so long as the bill is cloaked in the disingenuous but legitimizing guise of a putative relationship to interstate commerce.²¹⁰ Even proponents of the New Federalism have taken it to task for its failure to fully protect the boundary by limiting the spending power, concerned that it enables the federal government to sidestep all other federalism constraints by coercively bribing the states to participate in federal regulatory programs.²¹¹

204. See, e.g., Hubert H. Humphrey III & LeRoy C. Paddock, *The Federal and State Roles in Environmental Enforcement: A Proposal for a More Effective And More Efficient Relationship*, 14 HARV. ENVTL. L. REV. 7, 13–14 (1990) (discussing shared federal and state jurisdiction over environmental regulation and enforcement).

205. See, e.g., Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 130, 131–33 (2005) (arguing that the federal government has become overly involved in some areas of environmental regulation in which the states would perform better in less centralized programs of regulation); Wayne A. Logan, *Creating a “Hydra in Government”: Federal Recourse to State Law in Crime Fighting*, 86 B.U. L. REV. 65, 104–06 (2006) (critiquing federal integration of state criminal law).

206. U.S. CONST. art. I, § 8.

207. See, e.g., Nadborny, *supra* note 32, at 889 (noting that although certain property interests are determined by federal standards, “[i]t is in fact common for bankruptcy courts to look to state law for guidance in determining what constitutes property of the bankruptcy estate”).

208. See *infra* Part IV.A.1.b.

209. See, e.g., Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 128 (2001) (discussing the necessity for judicial review of federalism questions to restrain Congress); Neal Devins, *The Judicial Safeguards of Federalism*, 99 NW. U. L. REV. 131, 132, 137–43 (2004) (arguing that the Supreme Court could “pursue a more ambitious theory of structural federalism” to restrict Congress’s powers).

210. William Van Alstyne, *Federalism, Congress, the States and the Tenth Amendment: Adrift in the Cellophane Sea*, 1987 DUKE L.J. 769, 782–83, 797–98.

211. See, e.g., Lynn A. Baker, *Federalism and the Spending Power from Dole to Birmingham Board of Education*, in THE REHNQUIST LEGACY 205, 205–06 (Craig M. Bradley ed., 2006) (discussing how *South Dakota v. Dole*, 483 U.S. 703 (1987), provides a loophole through which Congress may continue to regulate the states beyond what is condoned in other

In any event, the New Federalism cases jarred decades of congressional complacency about the breadth of national power by rejecting a series of federal laws held to transgress the reinvigorated boundary between state and federal jurisdiction. In the standard litany of New Federalism decisions, the Court has disqualified federal attempts to compel state participation in federal regulatory regimes,²¹² championed state immunity from citizen suits (despite congressional attempts to hold states accountable to federal antidiscrimination and other laws),²¹³ and asserted the limits of federal regulatory authority under the Commerce Clause²¹⁴ and Section Five of the Fourteenth Amendment.²¹⁵ These decisions have been variously characterized as a revival of judicial enforcement of structural limitations on federal power,²¹⁶ an assault on national antidiscrimination norms,²¹⁷ a renais-

areas of the New Federalism jurisprudence); Lynn A. Baker & Mitchell N. Berman, *Getting Off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459, 499–500 (2003) (arguing that the Court's decision in *Dole* allows Congress to pursue goals under the Spending Clause that it otherwise could not have pursued); cf. Mitchell N. Berman, Guillen and Gullibility: *Piercing the Surface of Commerce Clause Doctrine*, 89 IOWA L. REV. 1487, 1523–26, 1531–32 (2004) (suggesting ways for the Rehnquist Court to tighten its Commerce Clause jurisprudence and to clearly signal Congress of its intentions).

212. See *supra* notes 174–185 and accompanying text.

213. See, e.g., *Bd. of Trs. v. Garrett*, 531 U.S. 356, 374 n.9 (2001) (holding that Title I of the ADA does not abrogate state immunity from private citizen damage suits); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 78–79 (2000) (precluding the ADEA from abrogating states' Eleventh Amendment immunity from suit by private individuals); *Alden v. Maine*, 527 U.S. 706, 712 (1999) (holding that Congress does not have Article I power to subject states to citizen suits in their own state courts without consent); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 636 (1999) (striking down a federal statute, which explicitly abrogated the states' sovereign immunity, because it exceeded Congress's power under Article I); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 691 (1999) (concluding that federal courts did not maintain jurisdiction to entertain individual suits against states where sovereign immunity was not waived or properly abrogated by a federal statute); *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 287–88 (1997) (refusing to allow a Native American tribe to file claims against state officials in federal court on state sovereign immunity grounds); *Seminole Tribe v. Florida*, 517 U.S. 44, 47 (1996) (holding that Congress lacked authority under the Indian Commerce Clause to eliminate the states' sovereign immunity).

214. See cases cited *supra* note 1.

215. See, e.g., *Garrett*, 531 U.S. at 374 (determining that the private damages remedy against states in Title I of the ADA was not a valid exercise of Congress's Section 5 power); *United States v. Morrison*, 529 U.S. 598, 627 (2000) (finding the federal civil remedy section of the VAWA unconstitutional under Section Five of the Fourteenth Amendment); *Kimel*, 528 U.S. at 82–83 (deeming the requirements imposed on state and local governments by the ADEA as outside the scope of congressional power under the Fourteenth Amendment); *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (striking application of the RFRA to the states because it exceeded Congress's power under the Fourteenth Amendment).

216. E.g., Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951, 951–52 (2001) (arguing, that because states are not properly

sance of state sovereignty,²¹⁸ and an assertion of judicial supremacy.²¹⁹ Some opponents view the decisions as the purely partisan pursuit of a substantively conservative agenda,²²⁰ while some proponents call for a rounding out of the New Federalism jurisprudence by articulating clearer boundaries on Congress's regulatory authority under the Spending Clause.²²¹ The decisions have attracted considerable attention among jurists, lawmakers, and scholars,²²² and if they have not

protected by "political safeguards," the federal courts play an important role in protecting state sovereignty (internal quotation marks omitted)).

217. *E.g.*, Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141, 1142 (2002) (suggesting that "an *anti-anti discrimination* agenda, deeply felt but as yet poorly theorized, is working itself out in the current Court's jurisprudence").

218. *E.g.*, Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819, 821 (1999) (defending the Court's rhetoric about the inherent respect for states as separate sovereigns). *But see* Michael S. Greve, *Federalism's Frontier*, 7 TEX. REV. L. & POL. 93, 97-98 (2002) (critiquing the "dignity" theme of the Court's state sovereign immunity cases within a framework otherwise sympathetic to the New Federalism cases (internal quotation marks omitted)).

219. *E.g.*, Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 14 (2001) (noting "a subtle, unacknowledged shift in the Court's understanding of judicial review that has troubling consequences for constitutional doctrine and for constitutionalism generally" as the "Court no longer views itself as first among equals, but has instead staked its claim to being the *only* institution empowered to speak with authority when it comes to the meaning of the Constitution").

220. *See, e.g.*, William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217, 1255 (2002) (critiquing the Rehnquist Court's record as "a jurisprudence of judicial results, not of judicial method—nothing more and nothing less").

221. *See, e.g.*, Berman, *supra* note 211, at 1528 (suggesting that the Justices have not clearly articulated the boundaries of Congress's power under the Commerce Clause); Garnett, *supra* note 147, at 5-6 (maintaining that the Court's Spending Clause decisions are at odds with the New Federalism jurisprudence); *cf.* Baker, *supra* note 211, at 218 (positing that Chief Justice Rehnquist's seemingly inconsistent Spending Clause opinions can be understood when one focuses on the issue of whether Congress is regulating an area where the states are historically sovereign or regulating an area that is traditionally federal).

222. *See, e.g.*, Adler, *supra* note 205, at 172-76 (discussing the federal government's environmental management tactics and the negative consequences on state environmental policy); Bruce Babbitt, *Federalism and the Environment: An Intergovernmental Perspective of the Sagebrush Rebellion*, 12 ENVTL. L. 847, 847, 859 (1982) (explaining the New Federalism's implications for public lands and natural resources management issues in the Western United States); Berman, *supra* note 211, at 1489-90 (addressing how the Court's decision in *Pierce County v. Guillen*, 537 U.S. 129 (2003), which affirmed a federal statute restricting certain information collected by governmental agencies from use as trial evidence, fits into the larger New Federalism jurisprudence); Eric R. Claeys, *The Living Commerce Clause: Federalism in Progressive Political Theory and the Commerce Clause After Lopez and Morrison*, 11 WM. & MARY BILL RTS. J. 403, 404-05 (2002) (discussing the interaction between the New Federalism and the "living Commerce Clause" constitutional theory); Daniel J. Elazar, *Cooperative Federalism*, in COMPETITION AMONG STATES AND LOCAL GOVERNMENTS 65 (Daphne A. Kenyon & John Kincaid eds., 1991); Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 570-71 (1996) (arguing that the decentralization movement is problematic in the environmental context, where central administration is often needed); Hills, *supra*

significantly altered the continued intermingling of state and federal jurisdiction in many areas of American law,²²³ they have at least changed the way the legal community thinks about American federalism. The vocabulary of the New Federalism has altered the lexicon of the legislators (and their staff) who make new laws and the judges (and their law clerks) who interpret them—and as an entrenched element of law school constitutional law curricula,²²⁴ it is likely to continue to do so for some time.

B. Federalism, Preemption, and the Reallocation of Authority into Mutually Exclusive Spheres

Despite varying emphases in analysis, most accounts share the understanding that a unifying theme among the New Federalism decisions is the “vindication of state authority relative to the federal government.”²²⁵ However, examining them in the context of the

note 201, at 817–18 (proposing a functional theory, rather than the New Federalism’s dual sovereignty approach, to determine the proper limits on state autonomy); Jackson, *supra* note 23, at 2181–83 (maintaining that the categorical rule adopted in *Printz* is insufficient to retain the flexibility required to preserve a working model of federalism); Bradley C. Karkkainen, *Collaborative Ecosystem Governance: Scale, Complexity, and Dynamism*, 21 VA. ENVTL. L.J. 189, 237–40 (2002) (addressing the relationship between a model of collaborative ecosystem governance and decentralized environmental management); John Kincaid, *The Competitive Challenge to Cooperative Federalism: A Theory of Federal Democracy*, in COMPETITION AMONG STATES AND LOCAL GOVERNMENTS, *supra*, at 87 (positing that competitive federalism, as opposed to the cooperative model of federalism that rose to prominence in the New Deal era, is the proper solution for current federalism problems); Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CAL. L. REV. 1409, 1413–17 (1999) (noting that despite the Court’s insistence that the states and the federal government operate in separate spheres, federal courts should be an available forum for expanded individual rights in state constitutions); Van Alstyne, *supra* note 210, at 782–83 (observing that congressional use of the Commerce Clause is dubious if used for areas of traditional state authority, like marriage and divorce); Phillip J. Weiser, *Towards a Constitutional Architecture For Cooperative Federalism*, 79 N.C. L. REV. 663, 666 (2001) (proposing a view of cooperative federalism that addresses the concerns of the New Federalism movement and retains elements of federal regulatory power).

223. As discussed throughout this Article, cooperative federalism remains the norm in federal-state regulatory partnership approaches to consumer finance, air and water pollution, telecommunications, national security, criminal law enforcement, and many other areas of the law.

224. See, e.g., Eid, *supra* note 147, at 875 (examining the role of the New Federalism on the approach and extent to teaching federalism in law school); MICHAEL KENT CURTIS ET AL., CONSTITUTIONAL LAW IN CONTEXT (2003) (containing sections on the “Rehnquist Revolution” in the Commerce Clause context and on general limits of federal power).

225. Issacharoff & Sharkey, *supra* note 31, at 1355; see also Barron, *supra* note 147, at 411–12 (“Although the limitation has been criticized from many perspectives, even the critics assume that the limitation protects local autonomy.”); John O. McGinnis, *Reviving Tocqueville’s America: The Rehnquist Court’s Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485, 487 (2002) (“The Rehnquist Court jurisprudence is designed to sustain this more decentralized system of order by protecting the autonomy of decentralized ‘discovery ma-

Rehnquist Court's overall jurisprudence—especially its preemption cases over the same time period—suggests a broader project of differentiating mutually exclusive spheres of state and federal regulatory authority and protecting each from incursion by the other side. While the federalism cases doctrinally protect a realm of state authority from federal incursion, the preemption cases functionally protect an expanded realm of federal authority from state incursion—despite the long-standing presumption against preemption in cases with significant federalism implications.²²⁶

1. *Increased Protection of the Local Sphere from National Incursion*

According to the common wisdom, the Rehnquist Court's jurisprudence has resurrected political regard for state government as the best and most democratic champion of the will of the people,²²⁷ and invested with judicially enforceable clout the notion that public decisionmaking should take place as locally as possible.²²⁸ Accordingly, Professor Richard Garnett observes that the New Federalism has “brought back to the public-law table the notion that the Constitution is a charter for a [federal] government of limited and enumerated powers, one that is constrained both by that charter's text and by the structure of the government it creates and authorizes.”²²⁹ In addition to the standard litany, he points to several other areas of the Rehnquist Court's jurisprudence that further reflect an effort to protect a zone of state authority from federal incursion, including: (1) the Court's increasing use of the “avoidance canon,” which exhorts judicial interpretations that avoid raising difficult constitutional issues

chines' for social norms, like mediating institutions and state government, from the encroachments of more centralized power.”).

226. See *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (“In all pre-emption cases, and particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” (citation and internal quotation marks omitted)); *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 605–06 (1991) (applying presumption against preemption to a local regulation).

227. See, e.g., *McGinnis*, *supra* note 225, at 490–91 (explaining that the New Federalism rediscovers sections of the Constitution that leave decisionmaking authority to the citizen, state, or local levels).

228. See, e.g., *Barron*, *supra* note 147, at 378 (noting that “the current federalism revival draws strength from the current skepticism towards centralization—with the specter of big government and the constraints that it raises—and the current ascendancy of decentralization, with the prospect of self-government and freedom that it offers”).

229. Garnett, *supra* note 147, at 12. Nevertheless, Professor Garnett takes the New Federalism to task for stopping short of setting meaningful limits to Congress's authority under the Spending Power. *Id.* at 5–6.

(e.g., the scope of Congress's authority under the Commerce Clause);²³⁰ (2) the Court's body of habeas corpus cases, which "reflect New Federalism-style deference to state-law procedures, state-court determinations, and state legislatures' policy preferences;"²³¹ and (3) the Court's evolving Establishment and Free Exercise Clause jurisprudence, which promote "more variation, experimentation, and accommodation by States and localities."²³²

2. *Increased Protection of the National Sphere from Local Incursion*

However, a closer look at the entirety of the Rehnquist Court's decisions reveals a more complex jurisprudence that champions local government less consistently than suggested by the rhetoric in the areas identified by Professor Garnett. The list of New Federalism cases that curtail federal authority in favor of the states are partnered with a less conspicuous litany of aggressive preemption decisions that effectively curtail traditional state and local authority in favor of expanded exclusive federal jurisdiction²³³—even in close cases involving areas of traditional state prerogative, such as tort, health, and safety law.²³⁴

230. *Id.* at 13–14 & n.63.

231. *Id.* at 14.

232. *Id.* at 14–15. Curiously, Professor Garnett also points to the Court's preemption jurisprudence as an example of this trend, but his argument here is less persuasive and supported by reference to positions taken mostly in dissenting opinions. *Id.* at 14 & n.67.

233. *E.g.*, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992); *see also* Issacharoff & Sharkey, *supra* note 31, at 1356–58 (noting the quiet rise of federal preemption decisions by the Rehnquist Court in the state commercial law context); Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343, 369 (noting that "[t]he five Justices most protective of state autonomy in constitutional federalism cases are the Justices who most often join opinions finding state laws preempted"); David J. Barron, *Reclaiming Federalism*, DISSENT MAG., Spring 2005, <http://www.dissentmagazine.org/article/?article=249> (noting that the Rehnquist Court pursued a nationalist agenda to find many state consumer protection laws preempted by federal mandate). *But see* Michael S. Greve & Jonathan Klick, *Preemption in the Rehnquist Court: A Preliminary Empirical Assessment*, 14 SUP. CT. ECON. REV. 43, 47 (2006) (presenting empirical data that suggests "no clear decisional trend in preemption law"). However, Professors Samuel Issacharoff and Catherine Sharkey suggest that trends are evident in the voting patterns of individual Justices. Issacharoff & Sharkey, *supra* note 31, at 1366–67 n.42; *see also* Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L. J. 569, 571, 611–12 (2003) (positing that Justice Scalia, a staunch advocate of states' rights in most aspects of the New Federalism agenda, departs from the conservative bloc to approve preemption in some contexts).

234. *See, e.g.*, Issacharoff & Sharkey, *supra* note 31, at 1356–57, 1382–84, 1420–21 (noting the trend of preemption of claims in areas of products liability, medical malpractice, and punitive damages despite the fact that tort law is among the most traditional realms of state common law). This stands in contrast to the Court's past deference to traditional areas of state regulatory authority such as public health and safety. *See* *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960) ("Legislation designed to free from

While the federalism cases doctrinally enlarge an exclusive realm of state authority from federal regulatory incursion, the preemption cases functionally enlarge a realm of federal authority from state and local regulatory incursion, rounding out the strict-separationist ideal in which the states and federal government occupy mutually exclusive spheres without overlap. Voting coalitions are less coherent in the preemption cases (and some decisions more Solomon-like, preempting some but not all claims under review).²³⁵ But within them, New Federalism concerns often appear inverted: many Justices most likely to protect state authority from federal incursion in the standard New Federalism decisions are also most likely to vote in favor of federal preemption of state and local law in preemption cases.²³⁶

Of course, the Supremacy Clause clearly invests the federal government with superior power in the jurisdictional realms it is delegated by the Constitution,²³⁷ and the preemption decisions—essentially statutory interpretation cases—cannot be understood as formal statements by the Court on the question of federalism. However, neither are they wholly insignificant in a review of the functional impact of the Court's decisions since the onset of the New Federalism revival.²³⁸ In one sense, preemption cases ask the Justices not to consider their own views about the proper balance of state and federal power, but to determine what Congress intended in passing the fed-

pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power.”).

235. See, e.g., *CSX Transp.*, 507 U.S. at 673, 675 (finding that the Federal Railroad Safety Act of 1970 preempted negligence claims regarding excessive speed of the train but did not preempt claims for failure to warn); *Cipollone*, 505 U.S. at 530–31 (plurality opinion) (holding that the Federal Cigarette Labeling and Advertising Act preempted a common law failure to warn and a fraudulent misrepresentation claim but did not preempt all state law damages claims).

236. For example, in *Cipollone*, New Federalism champion Justice Scalia wrote separately to find that *all* claims were preempted under ordinary principles of statutory interpretation, 505 U.S. at 548 (Scalia, J., concurring in the judgment in part and dissenting in part), while New Federalism opponent Justice Blackmun found that *none* of the claims were preempted. *Id.* at 531–32 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part). New Federalism proponents also joined opinions finding federal preemption in *Geier*, 529 U.S. at 863 (Rehnquist, C.J., O'Connor, Scalia, Kennedy, JJ.), and *Lorillard Tobacco*, 533 U.S. at 530 (Rehnquist, C.J., O'Connor, Scalia, Kennedy, Thomas, JJ.). Justice Thomas is a notable exception, a faithful member of the New Federalism coalition who tends to be leery of preemption. See, e.g., *CSX Transp.*, 507 U.S. at 676 (Thomas, J., dissenting in part) (arguing that none of respondent's claims was preempted).

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

238. See, e.g., *Gonzales v. Oregon*, 126 S. Ct. 904, 939–41 (2006) (Thomas, J., dissenting) (suggesting that the Court had disingenuously avoided the patent federalism issues raised by the Court's statutory interpretation upholding Oregon's Death With Dignity Act, especially in light of its previous holding in *Raich*).

eral statute at issue. On the other hand, the Rehnquist Court's noted shift from the "legislative intent" to the "plain-meaning" approach to statutory interpretation empowers the Court at the expense of Congress in deciding what a statute should be taken to mean.²³⁹ This becomes especially important when coupled with the Court's threshold decision of whether or not to allow federalism considerations to inform the statutory analysis.

For example, in *Gregory v. Ashcroft*,²⁴⁰ the Court began its analysis of a Missouri constitutional provision mandating judicial retirement age with a famous statement of federalism principles that ushered in the New Federalism era.²⁴¹ The Court upheld the Missouri provision against the plaintiffs' claim that it violated the federal Age Discrimination in Employment Act and the Equal Protection Clause of the Fourteenth Amendment,²⁴² but only after reviewing how the principles of federalism informed its interpretation.²⁴³ "As every schoolchild learns," Justice O'Connor began, "our Constitution establishes a system of dual sovereignty between the States and the Federal Government," establishing a baseline of federalism concerns from which to consider the relationship between the competing state and federal laws.²⁴⁴

By contrast, the most controversial preemption cases that followed were decided without overt consideration of federalism principles—except in the vociferous dissents. For example, in its unusually broad endorsement of federal preemption in *Geier v. American Honda Motor Co.*,²⁴⁵ the Court held that a common law defective design claim for failure to equip an automobile with a driver-side airbag was preempted by a Federal Motor Vehicle Safety Standard. Interestingly, Justice Breyer's pro-preemption majority opinion was joined by four of the most consistent champions of the New Federalism cases (Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy),²⁴⁶ while most of the usual New Federalism opponents dissented (Justices Stevens, Souter, and Ginsburg, along with New Federalism supporter

239. See, e.g., Note, Michael Gadeberg, *Presumptuous Preemption: How "Plain Meaning" Trumped Congressional Intent in Engine Manufacturers Association v. South Coast Air Quality Management District*, 32 *ECOLOGY L.Q.* 453 (2005) (arguing that preemption analysis must rely either on legislative intent or plain meaning, and that in rejecting legislative history for the textualist approach, the Court empowers itself at the expense of Congress).

240. 501 U.S. 452 (1991).

241. *Id.* at 457.

242. *Id.* at 473.

243. *Id.* at 457–64.

244. *Id.* at 457.

245. 529 U.S. 861 (2000).

246. *Id.* at 863–64.

Justice Thomas).²⁴⁷ Writing for the dissent, Justice Stevens quoted from recent New Federalism cases in admonishing that “[t]his is a case about federalism, that is, about respect for the constitutional role of the States as sovereign entities.”²⁴⁸ He further explained that the Court’s holding

raises important questions concerning the way in which the Federal Government may exercise its undoubted power to oust state courts of their traditional jurisdiction over common-law tort actions. The rule the Court enforces today was not enacted by Congress and is not to be found in the text of any Executive Order or regulation. It has a unique origin: It is the product of the Court’s interpretation of the final commentary accompanying an interim administrative regulation and the history of airbag regulation generally.²⁴⁹

Given that “[t]ort law in America is built on the bedrock of state common law,”²⁵⁰ the majority’s preemption finding indicates the importance it must have attached to the national interest in what has historically been an area of traditional state concern.

Likewise, in *Lorillard Tobacco Co. v. Reilly*,²⁵¹ an opinion written by Justice O’Connor and joined by Chief Justice Rehnquist and Justices Kennedy, Scalia, and Thomas,²⁵² the Court held that state regulations prohibiting cigarette and cigar advertising on billboards within 1,000 feet of a school or playground were preempted by the Federal Cigarette Labeling and Advertising Act (FCLAA). Joined by Justices Ginsburg, Breyer, and Souter, Justice Stevens dissented,²⁵³ invoking a long line of precedent counseling judicial restraint before federal statutes are construed to preempt “the historic police powers of the States,” given that the state law “implicate[s] two powers that lie at the heart of the States’ traditional police power—the power to regulate land usage and the power to protect the health and safety of minors.”²⁵⁴

247. *Id.* at 866 (Stevens, J., dissenting); see *supra* note 236 (discussing Justice Thomas’s voting record against preemption as a marked exception to the generalization at issue).

248. *Id.* at 887 (citation and internal quotation marks omitted) (quoting *Coleman v. Thompson*, 501 U.S. 722, 726 (1991); *Alden v. Maine*, 527 U.S. 706, 713 (1999)).

249. *Id.*

250. Robert L. Rabin, *Federalism and the Tort System*, 50 RUTGERS L. REV. 1, 2 (1997).

251. 533 U.S. 525 (2001).

252. *Id.* at 530, 550–51.

253. *Id.* at 590 (Stevens, J., dissenting).

254. *Id.* at 591 (internal quotation marks omitted). In a less divided case, *Engine Manufacturers Ass’n v. South Coast Air Quality Management District*, the Court similarly overturned both lower courts in holding that local regulations requiring the purchase and leasing of fuel efficient vehicles by state-connected fleet operators was preempted as an emission “standard” under the Clean Air Act (CAA). 541 U.S. 246, 258–59 (2004). The Ninth Cir-

One wonders whether the statutory interpretations in *Geier* and *Lorillard* might have proceeded differently had the Court began with the same kind of historical federalism inquiry with which it commenced its analysis in *Gregory*. Either way, the text of *Gregory* itself provides a rationale by which to distinguish them that reinforces the New Federalism's resurrection of the hapless *National League of Cities* sovereign functions distinction. Writing for the Court, Justice O'Connor emphasized: "[t]he present case concerns a state constitutional provision through which the people of Missouri establish a qualification for those who sit as their judges. This provision goes beyond an area traditionally regulated by the States; it is a decision of the most fundamental sort for a sovereign entity."²⁵⁵ Again, the implication is that different state laws possess different degrees of sovereign integrity, warranting different levels of judicially enforceable federalism protection. In this realm, the "more sovereign" the state law, the more deferential to state interests the preemption analysis should be.

Partnered with the standard New Federalism cases, the Rehnquist Court's willingness to expand federal regulatory reach into traditional

cuit had affirmed the district court's conclusion that the local agency had not set impermissible emission standards but instead permissibly regulated the purchasing choices by state agents and state contractors of vehicles already in production and certified for sale within the state (and that it legitimately did so to protect citizens from the disproportionate incidence of asthma and other respiratory health problems suffered in the Los Angeles metropolitan area). *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 309 F.3d 550, 551 (9th Cir. 2002) (affirming *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 158 F. Supp. 2d 1107, 1109, 1117–20 (C.D. Cal. 2001)). New Federalism champion Justice Scalia authored the terse majority opinion, *Engine Mfrs. Ass'n*, 541 U.S. at 248, which was joined by all other Justices except New Federalism opponent Justice Souter, whose passionate dissent invoked federalism concerns about this incursion into the traditional realms of the state's police power to protect the public health, safety, and welfare. *Id.* at 260–61 (Souter, J., dissenting). As Justice Souter explained:

[I]n all pre-emption cases, and particularly in those [where] Congress has legislated . . . in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. . . . The pertinence of this presumption against federal preemption is clear enough from the terms of the [Clean Air] Act itself: § 101 states that "air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3) The resulting presumption against displacing law enacted or authorized by a State applies both to the question whether Congress intended any pre-emption at all and to questions concerning the *scope* of [§ 209(a)'s] intended invalidation of state law.

Id. (citations and internal quotation marks omitted).

255. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

realms of state law²⁵⁶ suggests that its federalism project is not so simply about the vindication of state authority. Though both sets of cases concern the allocation of regulatory authority between the state and federal governments, the Court's more strident rhetoric in the New Federalism decisions is matched by quieter tones in the preemption opinions²⁵⁷ that attract less attention but send potentially more powerful reverberations into the balance of state and federal power. Indeed, in stark contrast to the states' rights tenor of New Federalism, the increasing federal preemption of state laws was recently characterized by Georgia State Senator Don Balfour as "unwanted power grabs by the federal government [that] subvert the federal system, choke off innovation, and ignore diversity among states."²⁵⁸ The Court's takings jurisprudence over the same time period shows a similar willingness to second-guess the regulatory judgment of state and local governments in the traditional state realm of land use law,²⁵⁹ contrasting with the

256. See, e.g., Barron, *supra* note 48, at 2112 (consumer protection law); Keith R. Fisher, *Toward a Basal Tenth Amendment: A Riposte to National Bank Preemption of State Consumer Protection Laws*, 29 HARV. J.L. & PUB. POL'Y 981, 994–98 (2006) (state banking laws); Isacharoff & Sharkey, *supra* note 31, at 1382–85 (products liability law); Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. (forthcoming 2007) (manuscript at 19–21), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=900020 (deference to federal agencies encroaching on traditional areas of state law).

257. Compare *United States v. Lopez*, 514 U.S. 549, 557 (1995) (warning that the Court must not allow the growth of federal regulatory jurisdiction to "obliterate the distinction between what is national and what is local and create a completely centralized government" (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937))), with *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 886 (2000) (holding simply that "[t]he rule of state tort law for which petitioners argue would stand as an 'obstacle' to the accomplishment of [the federal standard]. And the statute foresees the application of ordinary principles of pre-emption in cases of actual conflict. Hence, the tort action is pre-empted.").

258. John Pendergrass, *States Heating Up As Feds Cool Off*, 23 ENVTL. FORUM 8, at 8 (May/June 2006).

259. See, e.g., *Palazzolo v. Rhode Island*, 533 U.S. 606, 627–30 (2001) (rejecting state administrative agency's determinations in regulatory takings context); *Dolan v. City of Tigard*, 512 U.S. 374, 388–96 (1994) (finding that a municipally imposed exaction constituted a taking); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030–32 (1992) (finding that a state coastal preservation statute constituted a regulatory taking); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 838–42 (1987) (concluding that a municipally imposed exaction constituted a taking). But see *Kelo v. City of New London*, 545 U.S. 469, 489–90 (2005) (finding that municipal condemnation of distressed lands for economic development fulfilled the Fifth Amendment's public use requirement); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 341–43 (2002) (declining to find a municipal temporary moratorium on regional development a per se taking). Similar to the preemption cases, the voting coalitions are notably reversed in the takings cases, with the New Federalist champions most likely to reject state and local regulations as takings, and the usual New Federalism dissenters most likely to uphold the state and local regulations against takings challenges.

New Federalism rhetoric of inviolate state “dignity” in the state sovereign immunity cases.²⁶⁰

Intended or otherwise, the combined effect of the New Federalism and coincident preemption cases is to galvanize a particular assignment of regulatory roles within the strict-separationist dual sovereignty ideal. That the preemption cases carve out a zone of federal authority from incursion by the states is unsurprising; after all, preemption cases have always done this. The very nature of a preemption case recognizes that there are arenas in which both the states and the federal government may regulate until the federal government chooses to displace state efforts under the Supremacy Clause. Still, preemption cases from the New Federalism era stand out—partly because they appear to have disregarded the presumption against preemption in realms that implicate “the historic police powers of the States”²⁶¹ and partly because they do so at the same time that the New Federalism asserts the inviolability of conceptually related realms of state sovereignty.

Considered holistically, then, perhaps the best characterization of the Rehnquist Court’s federalism legacy is that it not only seeks to protect a zone of local authority from national incursion, but also to *reallocate* powers between the states and the federal government into separate spheres according to a specific vision about the proper home for different kinds of regulatory authority.²⁶² Drawing these links between the New Federalism cases and the accompanying preemption and takings cases, Professor David Barron observes that

the current “federalism” revival does not simply protect states’ rights. It reallocates powers between the federal government and state and local ones, simultaneously limiting

Professor David Barron, among others, has accordingly observed that [h]istorically, [the Takings] clause required the government to compensate private owners when it seized their land, but not when it merely regulated how they could develop it. Over the last decade or so, the Court has treated more and more land-use regulations—such as restrictions on beachfront development or requirements that developers take steps to limit the costs imposed on the public by new construction—as if they were outright land grabs. As a result, the government increasingly risks multimillion-dollar claims by developers. By changing constitutional doctrine in this way, the Court departs from its view of states and localities as autonomous sovereigns entitled to respect. Instead, it intimates at times that they are nothing more than petty extortionists seeking to rob private businesses.

Barron, *supra* note 233.

260. See *supra* note 213 (listing the New Federalism state sovereign immunity cases).

261. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); see *supra* notes 233–236 and accompanying text.

262. Barron, *supra* note 48, at 2116.

and extending the scope of each. . . . When it comes to nonmarket social issues, the Court carves out a domain of state and local power that is immune to federal legislative interference because of the “economic” requirement. . . . With respect to market matters, by contrast, the Court consistently decides against “overreaching” by states and localities and legitimates business-backed federal efforts to curb state and local regulations. So, the Court finds that federal statutes trump state consumer protection laws or that local government land-use measures are unconstitutional.²⁶³

In this regard, and consistent with the separationist tenor of the *National League of Cities* sovereign functions test, the Court’s jurisprudence during the New Federalism era may be better understood as curtailing federal regulatory reach into areas considered the proper realm of state authority (usually those concerning matters involving social issues, such as equal protection claims), while also limiting the assertion of state authority into realms considered the proper purview of the federal government (usually those with direct economic impacts, such as the financial liability of businesses).²⁶⁴

C. *The Tenth Amendment as New Federalism’s Line in the Sand*

Whether viewed through the “state-vindication” lens preferred by Professor Garnett or the “reallocation” lens proposed by Professor Barron, Chief Justice Rehnquist’s admonition that we ought to distinguish between the “truly national” and the “truly local” aptly captures the essence of the New Federalism as a project devoted to better definition of the boundary in between.²⁶⁵ The ideological trajectory of the New Federalism cases suggests that courts and policymakers should identify and segregate zones of properly local and national regulatory authority, and protect each from incursion by the other. The effect of this enterprise is akin to “bright-line rule jurisprudence,” in which the judiciary articulates “clearly defined, highly administrable” rules that establish easily identified lines separating permissible from impermissible activity.²⁶⁶

263. Barron, *supra* note 233; *see also* Barron, *supra* note 147, at 377–80 (critiquing the New Federalism for failing to advancing its purported goal of protecting local autonomy).

264. Barron, *supra* note 233.

265. *United States v. Morrison*, 529 U.S. 598, 617–18 (2000).

266. *See* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1685 (1976) (introducing the adjudicative rhetorical dichotomy between clear, generally applicable rules and “equitable standards producing ad hoc decisions with relatively little precedential value”); Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988) (demonstrating the fluid movement between rules-based and standards-

As the constitutional champion of dual sovereignty, it is the Tenth Amendment that stands watch over the line,²⁶⁷ earnestly if circularly promising that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”²⁶⁸ The Tenth Amendment tells us that there will be realms of respective state and federal authority, without squarely telling us what powers lie in which realm.²⁶⁹ However, the New Federalism reads the famously ambiguous text of the Tenth Amendment²⁷⁰ with new clarity, thanks to its strict-separationist premise and the bright-line rules it has developed in other federalism venues that help identify affirmative boundaries for federal action.²⁷¹ Although the very vagueness of the Tenth Amendment makes its jurisprudence less amenable to absolute statements, the New Federalism decisions nevertheless invoke the Tenth Amendment as the flip-side of the affirmative limits it has defined on Congress’s power, so organically related that bright lines in one realm suggest bright lines in the other. As Justice O’Connor explained in *New York*:

The actual scope of the Federal Government’s authority with respect to the States has changed over the years . . . but the constitutional structure underlying and limiting that authority has not. In the end, just as a cup may be half empty or half full, it makes no difference whether one views the question at issue in these cases as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment. Either way, we must determine whether [the challenged law] oversteps the boundary between federal and state authority.²⁷²

based approaches to adjudication, and suggesting that the apparent cleavage between them may be more rhetorical than real).

267. See *New York v. United States*, 505 U.S. 144, 161, 174–77 (1992) (setting forth the Tenth Amendment anti-commandeering doctrine).

268. U.S. CONST. amend. X.

269. See *supra* notes 39–42 and accompanying text.

270. See *supra* note 27 and accompanying text.

271. For example, the Court has stated that Congress, pursuant to its Commerce Clause authority, may regulate only those interstate activities that are directly economic in nature, *Morrison*, 529 U.S. at 609, and pursuant to Section Five of the Fourteenth Amendment, may regulate to enforce but not create rights. *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

272. *New York*, 505 U.S. at 159.

Defining this boundary with precision has plagued jurists since the time of the framing,²⁷³ and in closer memory, since the Court's attempt to define it in *National League of Cities*.²⁷⁴

On the surface, the small handful of New Federalism Tenth Amendment cases define the Amendment as a simple rule against federal commandeering of state apparatus. They do not pose an explicit doctrinal barrier to all regulation within the interjurisdictional gray area discussed further in Part IV. Yet the disjuncture between its application in *Printz* and *Condon*—not to mention the missing children reporting requirements distinguished in Justice O'Connor's *Printz* concurrence,²⁷⁵ the preempted New Jersey rules of due process in criminal justice,²⁷⁶ or the many other imaginable scenarios in which such differentiation becomes necessary²⁷⁷—suggests a more ambitious role required of the Tenth Amendment within the overall New Federalism project. It must do more than simply decide whether the federal government has compelled state participation in a federal regulatory program; it arbitrates between federal compulsion in protected and unprotected realms of state authority, reifying the strict-separationist ideal and framing the resolution of all other federalism inquiries. The combined doctrinal and rhetorical force of the entire New Federalism canon constructs the Tenth Amendment as all models of federalism do: as the guardian of its operative model of dual sovereignty. In the New Federalism model, the Tenth Amendment stands watch over the strict-separationist line in the sand, even as we continue to struggle with mapping it. Perhaps more than anything else, it is the mindset encouraged by this strict-separationist ethic that discourages needed regulatory initiative in the gray area.

If it has not settled this elusive boundary, the Rehnquist Court has at least reignited the debate. Attention to the quandary has once again surged, fueled most recently by the Court's decisions to uphold expansive federal law enforcement jurisdiction over medical marijuana²⁷⁸ and to scale back the federal government's jurisdiction under

273. For example, the failure of the Articles of Confederation is largely credited to its unworkable allocation of power between the centrality and the states, leading the famous public dialogue about the proper allocation of power in the *Federalist Papers*. See *THE FEDERALIST PAPERS* (Clinton Rossiter ed., 1961).

274. See *supra* notes 165–167 and accompanying text.

275. See *supra* notes 184–186 and accompanying text.

276. See *supra* notes 187–190 and accompanying text.

277. See *infra* notes 349–351 and accompanying text (describing how a sovereign functions-like analysis might be required in adjudication of the CWA's stormwater regulatory efforts).

278. *Gonzales v. Raich*, 545 U.S. 1 (2005).

the Clean Water Act (CWA).²⁷⁹ Following the medical marijuana decision, some suggested that the New Federalism revolution may be over²⁸⁰—but the recent Supreme Court appointments of conservative jurists John Roberts and Samuel Alito (as well as their votes in the CWA cases)²⁸¹ suggest that the unstable federalism coalition may shift again toward the Court’s New Federalism interpretive alliance.²⁸²

Though it may not produce the grail to end the quest, this Article reveals the true debate as one over competing interpretive models of federalism that mediate differently between the conflicting values underlying the American federal system. In so doing, it critiques the model of dual sovereignty from which the New Federalism approaches its boundary-drawing enterprise, and disputes the singular claim its proponents lay to what the Court has called “Our Federalism.”²⁸³ Although some contend that a faithful reading of the Tenth Amend-

279. *Rapanos v. United States*, 126 S. Ct. 2208 (2006).

280. Among them was Justice O’Connor herself, who suggested in her dissenting opinion in *Raich* that the death knell had been sounded on the principles in *Lopez* and *Morrison* for which the New Federalism is best known. *Raich*, 545 U.S. at 46–47 (O’Connor, J., dissenting); see also John Yoo, Commentary, *What Became of Federalism?*, L.A. TIMES, June 21, 2005, at 13 (asserting that the decision “makes a mockery of the efforts of the Constitution’s framers to place limits on federal powers”).

281. Justice Scalia’s plurality opinion cabinining the scope of navigable waters under the CWA was joined by both Chief Justice Roberts and Justice Alito. *Rapanos*, 126 S. Ct. at 2214.

282. A widely cited signal that Chief Justice Roberts might join the New Federalism interpretive alliance was his dissent as a D.C. Circuit judge from the court’s denial of rehearing en banc a case upholding the constitutionality of the Endangered Species Act under the Commerce Clause. *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting from denial of rehearing en banc) (noting the panel decision’s inconsistencies with *Lopez* and *Morrison*); see also 151 CONG. REC. S10481 (daily ed. Sept. 27, 2005) (statement of Sen. Reed) (noting that “Judge Roberts’ short record raises troubling signs that he may subscribe to this new Federalism revolution”). Similarly, cues to Justice Alito’s allegiance to the New Federalism cause could be found in the sole dissent he authored as a Third Circuit judge. *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996) (Alito, J., dissenting). In *Rybar*, the court held that a federal law prohibiting the transfer or possession of machine guns did not offend the Commerce Clause. *Id.* at 285 (majority opinion). Then-Judge Alito contended that although Congress had the authority to regulate the interstate sale of machine guns, the individual sale of a machine gun within a state did not affect interstate commerce and was thus beyond the regulatory reach of Congress. *Id.* at 291–94 (Alito, J., dissenting). The appointments may have an effect on social issues as well. See Press Release, Senator John McCain, Statement on Marriage Protection Amendment (June 6, 2006), available at http://mccain.senate.gov/press_office/view_article.cfm?id=34 (arguing that a constitutional marriage amendment would unnecessarily contravene the principles of federalism, given his confidence that the recent appointments of Chief Justice Roberts and Justice Alito will result in respect for the decisions of states banning gay marriage).

283. See *Younger v. Harris*, 401 U.S. 37, 44 (1971) (defining the concept of “Our Federalism” as the idea that the federal government will perform best if “the States and their institutions are left free to perform their separate functions in their separate ways”).

ment requires the New Federalism approach,²⁸⁴ others argue that neither its text nor its history requires the bright-line rule, and that interpretive flexibility is preserved for interactive exercise of state and federal authority when necessary and within meaningful federalism constraints.²⁸⁵ In service of its strict-separationist ideal, the New Federalism advances an important principle that undergirds American federalism: the preservation of a healthy balance between state and federal power. Yet, as explored further in Part V, it privileges this goal at the expense of other good governance values that also inform our federalism, including the problem-solving value that is partnered with the preference for localism in the subsidiarity principle.

Of course, if regulatory problem-solving could effectively take place within the separate spheres of state and federal authority idealized by this model, then this objection to New Federalism disappears. Problem-solving could simply proceed from within the appropriate sphere, preserving the boundary against erosion and enabling both levels of government to perform the obligations with which they have been respectively charged by their constitutions. A clear boundary would encourage better regulatory performance all around, as the side charged with unequivocal responsibility for a given problem would likely invest more in its solution. All would be well in this universe of clean lines and discrete regulatory problems—which may well constitute the lion’s share of those we confront. But what of those that remain—that is, those problems that don’t fit cleanly within one sphere or the other, inhabiting that murky zone between?

IV. THE INTERJURISDICTIONAL GRAY AREA

A. *Interjurisdictional Regulatory Problems*

Against this backdrop of a federalism jurisprudence neatly cleaved between the truly national and the truly local, this piece asks how “Our Federalism” can better account for the tricky regulatory matters that straddle the boundary between them. Interjurisdictional regulatory problems—ranging from the environment to telecommunications to national security—simultaneously implicate areas of such

284. *E.g.*, *Printz v. United States*, 521 U.S. 898, 918–20 (1997) (finding that dual sovereignty is “incontestable” under a textual approach to the Constitution).

285. *E.g.*, *Hills*, *supra* note 201, at 942–43 (concluding that federalism should allow for a “certain minimum of discretion in [its] implementation”); Jackson, *supra* note 23, at 2237 (arguing that there is no bright dividing line that carves out impermissible federal regulatory spheres); Robert L. Stern, *That Commerce Which Concerns More States Than One*, 47 HARV. L. REV. 1335, 1344–45, 1364–65 (1934) (asserting that the Framers intended to give the federal government as much control over commerce as would in the future be necessary).

national and local obligation or expertise that their resolution depends on exercise of authority by both a federal and a state actor. Identifying this third sphere of interjurisdictional concern should facilitate the development of a more stable American federalism by revealing where the strict-separationist premise of New Federalism fails. Where the New Federalism seeks to distinguish the local from the national,²⁸⁶ interjurisdictional problems monkey-wrench the system by being simultaneously *both*. This is so either because neither side has all the jurisdiction it needs to effectively solve the problem,²⁸⁷ or because compelling circumstances make a partnership approach necessary to solve the problem *de facto* even if the federal government could theoretically preempt all local jurisdiction *de jure*.²⁸⁸

The legal concept of an interjurisdictional problem is nothing new, having been recognized in the United States at least since the early border-crossing cases involving interstate litigation,²⁸⁹ criminal law enforcement,²⁹⁰ air pollution,²⁹¹ water pollution,²⁹² waterway management,²⁹³ and species protection.²⁹⁴ However, the advancing reach of local impacts in the post-industrial era has also given rise to interjurisdictional problems that the Framers could never have fore-

286. *United States v. Morrison*, 529 U.S. 598, 617–18 (2000).

287. For example, this is arguably the case with regard to the problem of stormwater pollution, which stems both from land uses regulated by municipal governments and water uses regulated by the federal government. See *infra* notes 333–334 and accompanying text.

288. In other words, in this type of interjurisdictional regulatory problem, though the national government could theoretically preempt local involvement as a legal matter, the regulatory target so implicates an area of local concern or expertise that to do so would obstruct, rather than facilitate, meaningful resolution of the problem (as is so regarding such national security matters as the NRP).

289. *E.g.*, *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (finding that federal courts hearing state law claims under diversity jurisdiction are to apply the substantive laws of those states and not federal common law).

290. *E.g.*, Logan, *supra* note 205, at 66–67 (examining the federal government’s use of state law “to help effectuate its burgeoning criminal justice authority” while simultaneously “infus[ing] federal law with the normative judgments of the respective states”).

291. *E.g.*, Gerald F. Hess, *The Trail Smelter, the Columbia River, and the Extraterritorial Application of CERCLA*, 18 GEO. INT’L ENVTL. L. REV. 1, 2–4 (2005) (discussing the arbitration decisions in the 1930s and early 1940s between Canada and the U.S. regarding the Trail Smelter, a facility near the border of British Columbia that pumped sulphur dioxide into Washington State).

292. *E.g.*, *City of Milwaukee v. Illinois*, 451 U.S. 304, 317–19 (1981) (finding that an interstate sewage discharge claim should be resolved under the Federal Water Pollution Control Act, rather than by federal common law).

293. *Willson v. Black-Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 251–52 (1829) (acknowledging overlapping state and federal concern in upholding the legality of a state-authorized dam through a waterway subject to the federal navigational servitude).

294. *E.g.*, Migratory Bird Treaty Act, 16 U.S.C. §§ 703–711 (2000) (prohibiting interstate taking, killing, or transporting migratory birds, and their eggs, parts, and nests).

seen—including such powerful environmental problems as stormwater pollution,²⁹⁵ greenhouse gas emissions,²⁹⁶ and mass extinctions,²⁹⁷ but also such non-environmental problems as telecommunications law,²⁹⁸ public health crises (e.g., bird flu),²⁹⁹ and localized threats to national security and infrastructure (such as failures of the power grid³⁰⁰ or Internet backbone³⁰¹). Moreover, the growing economic interdependence that accompanied us into the new millennium has transformed many problems that might once have been purely local into the interjurisdictional variety.³⁰² Products liability is such a realm, drawing attention by Professors Samuel Issacharoff and Catherine Sharkey to the “undertheorized attempts of federal courts (particularly the Supreme Court) to mediate the tensions between the claimed commitment to the states as sovereign overseers of the quotidian affairs of their citizens and the reality that the lives of citizens are increasingly accountable to broader market com-

295. *E.g.*, John R. Nolon, *Katrina's Lament: Reconstructing Federalism*, 23 PACE ENVTL. L. REV. 987, 987–91 (2006) (examining the overlapping state and federal regulatory jurisdiction of stormwater runoff); Donald J. Kochan, *Runoff and Reality: Externalities, Economics, and Traceability Problems in Urban Runoff Regulation*, 9 CHAPMAN L. REV. 409, 414–19, 427–28 (2006) (outlining regulation of stormwater pollution and the problems of traceability).

296. *E.g.*, Associated Press, *Agreement Close for Multistate Pollution Reduction Plan*, MAINE TODAY.COM, Sept. 21, 2005, <http://news.maintoday.com/apwire/D8COLE481-263.shtml> (discussing the Regional Greenhouse Gas Initiative).

297. *E.g.*, Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2000) (banning the “taking” of threatened or listed species).

298. *E.g.*, Weiser, *supra* note 222, at 675–77 (discussing interjurisdictional regulatory problems arising under the Telecommunications Act of 1996).

299. *E.g.*, Elisabeth Rosenthal, *Recent Spread of Bird Flu Confounds Experts*, N.Y. TIMES, Mar. 6, 2006, at A6 (discussing the potential global scope of the bird flu pandemic).

300. *E.g.*, Seth Schiesel, *In Frayed Networks, Common Threads*, N.Y. TIMES, Aug. 21, 2003, at G1 (examining the vulnerabilities of the vast, interconnected power networks that led to the summer 2003 blackout); *Power Returns to Most Areas Hit by Blackout*, CNN.COM, Aug. 15, 2003, <http://www.cnn.com/2003/US/08/15/power.outage> (quoting New York Governor George Pataki’s statement that the summer 2003 blackout was “the largest blackout in the history of America”).

301. *E.g.*, David McGuire & Brian Krebs, *Large-Scale Attack Cripples Internet Backbone*, WASH. POST, Oct. 23, 2002, at E5 (describing a coordinated attack on computers that serve as master directories for most computer networks and Websites around the world).

302. *See* Issacharoff & Sharkey, *supra* note 31, at 1410–12 (discussing the increase in federalization of areas traditionally regulated by state law). For example, if a hurricane of similar strength to Katrina hit New Orleans a century earlier, it would have triggered fewer national interests than it does today, since the nerve center of oil and gas infrastructure that now exists seaward of New Orleans was nonexistent, and the Port of New Orleans was less central to the nation’s economy. *See* Oliver Houck, *Can We Save New Orleans?*, 19 TUL. ENVTL. L.J. 1, 17–18 (2006) (explaining the development of oil and gas infrastructure in Louisiana from the early 1900s to present); *see also* Simon Romero, *A Barren Port Waits Eagerly For Its People*, N.Y. TIMES, Oct. 6, 2005, at C1 (noting the significance of the Port of New Orleans to the national economy).

mands.”³⁰³ Public servants at the national, state, and municipal levels are working overtime to address modern problems that defy jurisdictional boundaries—but the strict-separationist premise associated with the New Federalism ideal leaves them unclear on the rules for solving them.

In proposing the category of “interjurisdictional regulatory problem,” I should note first what I am *not* proposing to do. Although I believe that we can meaningfully discuss regulatory problems in general terms, I offer no unifying theory about the features of problems that make them more or less susceptible to regulatory solutions, other than to note that I am generally referring to such classic regulatory targets as market failures, negative externalities, and collective action problems that respond favorably to intervention.³⁰⁴ Reasonable minds may differ about the margin between the set of problems resolvable by government and the set of those that are not, but this definition enables a conversation about the best decision rules for government actors in a federal system regardless of that margin. In other words, to continue the conversation from here, we need only agree that there is such a thing as “regulatory problems” in some shape or form, allowing individuals to substitute different values for the variables in an otherwise stable equation.³⁰⁵

Similarly, reasonable minds may disagree on the absolute boundaries between legitimate local and national regulatory *concern*, and this is ultimately the more important problem. It is, of course, the central federalism problem itself, and the fact that we have failed to achieve consensus on this point thus far suggests that it will not be easily forthcoming even if we can agree to acknowledge the existence of some set of interjurisdictional problems. I return to this problem in Part V, where I propose the outlines of a jurisprudential standard to assist in

303. Issacharoff & Sharkey, *supra* note 31, at 1358.

304. For example, while common defense and law enforcement are probably widely accepted as regulatory problems in the United States, compliance with the tenets of religiously based faith would not be viewed the same way. A problem caused by externalized harms that are poorly internalized through the free market (e.g., cross-boundary air pollution) may be suitably characterized as a regulatory problem, while a problem relating to the outpacing by demand for the supply of a particular manufacturer’s widget would probably not be.

305. The best counterargument against the existence of interjurisdictional regulatory problems would be the assertion that, in fact, no authentic regulatory problems exist. Some might contend that the government has, in the past, purported to take actions that solve problems, but that no problems are truly solved by governmental methods. See ROTHBARD, *supra* note 21, at 73–78 (cataloging ills that stem from government regulation). Given that most individuals allow for *some* sphere of governmental action, and believe that a realm exists where regulatory action can effectively solve at least some problems, this Article concerns itself only with the boundaries of that sphere.

differentiating between legitimate interjurisdictional crossover and unjustifiable breach. But again, in this Section, I put off debate about the margins to make the case for the more basic proposition that there are at least some problems that truly implicate both local and national regulatory obligations—in a way that warrants attention from both.

I believe this is an easy case to make; indeed, it has already been argued persuasively in federalism scholarship such as that by Professors Robert Schapiro,³⁰⁶ William Buzbee,³⁰⁷ Kirsten Engel,³⁰⁸ and Jody Freeman.³⁰⁹ As a nation, we may lack consensus about the extent to which local regulation should be held vicariously accountable under the Endangered Species Act (ESA),³¹⁰ or to which the federal government should be able to regulate gay marriage.³¹¹ But few now argue that the federal government should not play a role in disaster manage-

306. Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 248–49 (2005) (proposing the concept of polyphonic federalism, where the focus is placed upon the interaction between state and federal authority, rather than upon where the two spheres diverge); Schapiro, *supra* note 222, at 1416–17 (applying the polyphonic concept to a defense of federal interpretations of state constitutions).

307. William W. Buzbee, *Contextual Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 108, 108–09 (2005) (noting the benefits of regulatory overlap and cooperative federalism structures); William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 IOWA L. REV. 1, 8–14 (2003) (examining how the “regulatory commons problem” can generate regulatory gaps for interjurisdictional problems like urban sprawl and global warming).

308. Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 155 (2006) (arguing that the static allocation of regulatory authority to *either* the state *or* federal government obstructs good environmental management, and that broadly overlapping state and federal regulatory jurisdiction is needed).

309. Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 4–8 (1997) (proposing a normative model of collaborative governance that involves cooperation between agencies and government in the administrative process).

310. The most famous example of such “vicarious” liability for takes prohibited by the ESA arose in *Strahan v. Cox*, in which held a state agency was held responsible for illegal takings of endangered whales because it authorized the placement of fixed gear for commercial fishing operations near the whales’ spring feeding grounds. 127 F.3d 155, 161–66 (1st Cir. 1997). A more controversial instance arose in *Loggerhead Turtle v. Council of Volusia County*, in which the Eleventh Circuit ordered a county government agency to better regulate nighttime lighting on beaches where endangered loggerhead turtles hatched. 148 F.3d 1231, 1258 (11th Cir. 1998). In *Loggerhead Turtle*, the problem was that young turtles instinctively head from the beach sands where they hatched toward the ocean, following the reflection of the moonlight in the water, but the bright lights from beachside development caused excessive hatchling mortality by encouraging the turtles to head in the wrong direction. *Id.* at 1234–36.

311. Current proposals for a federal constitutional amendment banning the states from recognizing gay marriages sometimes proceed from arguments about border-crossing harms. *E.g.*, 152 CONG. REC. S5517 (daily ed. June 7, 2006) (statement of Sen. Byrd) (discussing the state role in defining marriage and family matters and noting that the federal government’s respect for these laws “is the essence of federalism”).

ment (an area of regulatory authority traditionally assigned to the states), or that state law enforcement should not play a role in domestic efforts to prevent terrorist attacks initiated abroad (a realm in which the federal government might, if absurdly, preempt state participation as a matter of international affairs).³¹² Similarly, the federal government is more often criticized for failing to address the bird flu threat³¹³ than it is for intruding on a classic realm of the state police power, and few argue that the federal government should assume top-to-bottom control over intrastate administration of the Clean Air and Clean Water Acts, which would vastly increase the size of the federal bureaucracy in an ironic move to protect the boundary between state and federal authority.³¹⁴

No assertion about the proper realms of state and federal regulatory authority will be without controversy, but the following discussion affords sufficiently uncontroversial examples that the assertion of an interjurisdictional gray area should be convincing at least in this small sampling. Even if the boundaries of this zone remain disputed, the existence of an uncontroversial core that warrant consideration in a workable federal system pierces the armor of the bifurcated theoretical model preferred by New Federalism. We need only agree that some interjurisdictional regulatory problems exist, in that their effective resolution depends on the exercise of regulatory authority by both a local and a national actor, for one of two reasons.

1. *De Jure Interjurisdictional Problems*

In the first instance, resolution of the problem depends on activity by both a local and a national actor because neither side has all the

312. *Cf.* *ACLU of N.J., Inc. v. County of Hudson*, 799 A.2d 629, 654–55 (N.J. Super. Ct. App. Div. 2002) (allowing a federal regulation requiring that the identities of terrorist suspects be kept secret to preempt a preexisting state law requiring that their identities be disclosed). The court observed that “while the State possesses sovereign authority over the operation of its jails, it may not operate them, in respect of INS detainees, in any way that derogates the federal government’s exclusive and expressed interest in regulating aliens.” *Id.*

313. James Gerstenzang, *Bird Flu Warning Would Ravage U.S., White House Warns*, L.A. TIMES, May 4, 2006, at A6 (noting that as the Bush Administration presented its bird flu report, Senator Edward Kennedy issued a scathing report of his own, criticizing the administration for failing to prepare the country for a possible flu pandemic).

314. By contrast, some have argued that the federal government should devolve more of such regulatory responsibility to the states. *See, e.g.,* Adler, *supra* note 205, at 135 (“Because most environmental problems are local or regional in nature, there is a strong case that most . . . environmental problems should be addressed at the state and local level.” (footnote omitted)). Despite these arguments, however, few propose the abolition of the federal Clean Air Act and Clean Water Act, which fulfill a classic centralized regulatory role of preventing negative externalities and remedying collective action problems.

legal jurisdiction it needs to meaningfully address the problem. Examples of such *de jure* interjurisdictional problems include state and federal management of coastal and submerged lands under the Coastal Zone Management Act (which recognizes distinct areas of state and federal jurisdiction and requires a consultation process between the two for implicated activities);³¹⁵ the destruction of wetlands (which may be subject to both federal water pollution regulations and state land use regulations);³¹⁶ and the intersection between the ESA and state wildlife regulation and land use laws.³¹⁷

De jure interjurisdictional problems such as these often arise due to an overlap between a federally regulated interest (such as water pollution or endangered species preservation) and a local land use policy (the traditional province of state and local governments).³¹⁸ They may also arise due to an overlap between the traditionally local police power obligation to protect public safety and the related national interest in protecting national infrastructure and policing border-crossing effects. The devastation following a hurricane that hits a major port city like New Orleans—triggering the state’s police power to protect public safety but also projecting hundreds of thousands of refugees into neighboring states and jeopardizing such national security infrastructure as the nerve center of Gulf Coast oil and gas production—is an easy example.³¹⁹

315. Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451–1465 (2000).

316. *See* *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs (SWANCC)*, 531 U.S. 159, 171–72 (2001) (rejecting the application of the Corps of Engineers’ “Migratory Bird Rule” under the CWA as infringing on traditional state land and water use authority); *see also* *Rapanos v. United States*, 126 S. Ct. 2208, 2224–25 (2006) (plurality opinion) (interpreting the meaning of “the waters of the United States” under the CWA and the interplay between federal and state regulatory authority).

317. *See supra* note 310 (discussing the problem of vicarious takings by state and local government agencies, which sometimes authorize private activity that violates provisions of the ESA); *see also* *Gibbs v. Babbitt*, 214 F.3d 483, 499–504 (4th Cir. 2000) (addressing the federalism concerns stemming from an ESA regulation governing the intrastate population of red wolves on private land).

318. *See, e.g.,* *Kelo v. City of New London*, 545 U.S. 469, 480–84 (2005) (balancing a municipality’s economic development plan with the public purpose requirements of the Fifth Amendment’s Taking Clause); *Petersburg Cellular P’ship v. Bd. of Supervisors*, 205 F.3d 688, 705–06 (4th Cir. 2000) (discussing the regulatory and constitutional clash between local land use regulation and the Telecommunications Act of 1996); *Cape May Greene, Inc. v. Warren*, 698 F.2d 179, 192–93 (3d Cir. 1983) (recognizing the federal government’s interest in limiting floodplain development, but finding that local government maintained authority for coastal zone management).

319. *See infra* Part IV.B.3.

a. *Water Pollution*

A prime example of the de jure interjurisdictional regulatory problem is that of water pollution because nearly all water passes through subsequent realms of state and federal jurisdiction on its hydrological journey from sky to sea. This is not simply a matter of rivers and lakes that straddle state boundaries; water moves through state and federal jurisdiction even within state lines. When rain hits the ground, it occasionally falls directly onto areas of federal jurisdiction (federal lands, the sea, or a large body of water already under federal jurisdiction),³²⁰ but most often falls on state or privately held land. As this water makes its journey through increasingly larger watersheds back to the sea, it begins by traversing land subject to the regulatory jurisdiction of the states or their municipal subdivisions, which control the kinds of land-based contaminants this water might encounter before draining into a lake or stream. The water will dissolve traces of motor oil and automotive fluids, lawn fertilizer and pesticides, household and chemical effluents, and whatever else it comes across,³²¹ carrying the pollutants into the wetlands or small creeks that may fall under either local or national regulatory jurisdiction, depending on their relationship to navigable waters.³²² Eventually, all will flow or percolate into larger bodies that clearly fall under federal CWA jurisdiction (roughly speaking, any that are themselves navigable or that maintain a continuous surface connection to navigable waters³²³). Under the CWA, the Environmental Protection Agency (EPA) regulates the passage of pollutants into these waters by “point source” discharges (those that enter through the end of a pipe), requiring them to be permitted under the National Pollutant Discharge Elimination System (NPDES).³²⁴

320. Several statutes regulate federal lands, the sea, or large bodies of water. *See, e.g.*, Coastal Zone Management Act, 16 U.S.C. §§ 1451–1465 (2000); Rivers and Harbors Appropriations Act of 1899, ch. 425, 30 Stat. 1121 (codified as amended in scattered sections of 33 U.S.C.); Clean Water Act, 33 U.S.C. §§ 1251–1387 (2000); Submerged Lands Act, ch. 65, 67 Stat. 29 (1953) (codified as amended in scattered sections of 43 U.S.C.).

321. *See* Ryan, *supra* note 133, at 983 (discussing the movement of land-based marine pollutants from land to sea).

322. For the Supreme Court’s most recent obfuscation of what this means, see *Rapanos v. United States*, 126 S. Ct. 2208, 2235 (2006) (plurality opinion) (limiting CWA § 404 jurisdiction over waters that do not maintain a continuous surface connection with navigable waters). *See also* SWANCC, 531 U.S. 159, 171–72 (2001) (limiting CWA § 404 jurisdiction over isolated wetlands).

323. *See Rapanos*, 126 S. Ct. at 2235.

324. 33 U.S.C. § 1342.

Say, then, that you want to clean up the Chesapeake Bay's infamously hypoxic "dead zone,"³²⁵ or make it safe to eat fish caught in mercury-laced Lake Michigan,³²⁶ or enable swimming in the enterococcus-rich Boston Harbor.³²⁷ Assuming the EPA is able to perfectly regulate point source discharges under the NPDES program, should you then feel safe sending your children into the waters of Boston Harbor, or feeding them fish caught in Lake Michigan? Not if you like your kids! NPDES regulation of conventional point source discharges has done much to improve water quality, but the greatest threat to the health of our nation's waters is now acknowledged to be from stormwater³²⁸—the diffuse surface water that rains down from the heavens and picks up whatever contaminants it meets on the ground while working its way toward these larger water bodies downstream. Until you can reduce the delivery of land-based contaminants into the hydrological chain, fish and swimming remain dangerous, and state and federal agencies regularly advise against it.³²⁹

The problem in this scenario is that the accumulation of these contaminants on the surface of private and state lands is generally beyond the scope of federal regulatory jurisdiction; it is usually the states and municipalities that have authority over the local land uses that lead to such accumulation, as well as the storm sewer systems that channel collected stormwater into downstream rivers, lakes, and harbors. Some of the contaminated stormwater enters the chain at the top of the watershed, passing into the local streams and wetlands that ultimately flow to the bottom, while the rest enters after being collected in municipal storm sewers that discharge directly into the

325. See, e.g., Ryan, *supra* note 133, 1005–07 (discussing the Chesapeake Bay's "dead zone," which is a "region so polluted that it lacks sufficient oxygen to sustain marine life").

326. The EPA has issued fish consumption advisories for fish caught in Lake Michigan on account of elevated levels of mercury, PCBs, dioxins, and chlordane. EPA, FACT SHEET: NATIONAL LISTING OF FISH ADVISORIES 3 (2004), <http://www.epa.gov/waterscience/fish/advisories/factsheet.pdf>.

327. See, e.g., Brian Fitzgerald, *The People's Harbor: Metropolitan College's Bruce Berman Charts the Boston Harbor Cleanup*, BOSTONIA, Fall 2004, <http://www.bu.edu/alumni/bostonia/2004/fall/harbor/> (noting that although the cleanliness of Boston Harbor has improved greatly since the construction of improved regional sewage treatment facilities, "[t]here are still frequent beach closures when the counts of Enterococcus bacteria in swimming areas exceed the federal and state standard for swimming. . . . The culprit: filthy stormwater and sewage, much of it from leaky pipes and illegal hookups emptying into storm sewers and then into the harbor." (internal quotation marks omitted)).

328. See *Env'tl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 840–41 (9th Cir. 2003) (noting that "[s]tormwater runoff is one of the most significant sources of water pollution in the nation, at times comparable to, if not greater than, contamination from industrial and sewage sources" (internal quotation marks omitted)).

329. See *supra* notes 326–327.

federally protected water bodies that drain the watershed. At present, no technology exists to remove these pollutants from stormwater at the point of municipal discharge, but even if it did, this would eliminate only one source of the problem. Land-based contaminants would still enter the chain at the top of the watershed, where stormwater passes into creeks and wetlands after running over polluted surfaces but before entering a municipal storm sewer (which generally collects water toward the bottom of the watershed).³³⁰

Moreover, the most powerful technology for removing contaminants from stormwater before it enters free-flowing downstream water bodies remains the natural filtration feature of wetlands, which (for this reason) have become a bitter battleground between claims of state and federal jurisdiction.³³¹ The Supreme Court's recent wetlands cases have narrowed federal regulatory reach over the destruction of wetlands, leaving regulation of both the land uses that lead to the accumulation of contaminants and the fate of wetlands that remove them from the hydrological chain in predominantly state jurisdictional hands.³³²

In this way, the problem of alleviating stormwater pollution is a tricky interjurisdictional regulatory matter, a cross-media problem of local land-based pollution flowing into federally protected waters.³³³ Though most land and land uses causing water pollution are under state regulatory authority, the water bodies that ultimately drain pol-

330. Even if the federal government were to deny NPDES permits allowing discharge of collected stormwater runoff from sewer systems to federally protected waters, it could not prevent the contamination of federal waters by contaminant-bearing flows entering protected lakes, rivers, or coastal waters from non-navigable tributaries. Even if the federal government can regulate point-source discharges to these non-navigable tributaries, it cannot prevent their pollution by overland contaminants passively picked up by nonchanneled stormwater runoff. Regulation of land-based activities (like real estate development, lawn pesticide use, and oil-leaking motor vehicles) that commonly contribute to such contamination is a matter of state concern. Thus, the only effective way to prevent stormwater pollution is to pair state regulation of land-based activities that initiate the stormwater pollution cycle with federal regulation of water bodies that absorb the pollution. *See City of Abilene v. EPA*, 325 F.3d 657, 659–60 (5th Cir. 2003) (discussing the NPDES CWA permit process, where municipalities work with the EPA to prevent the discharge of pollutants in stormwater from reaching municipal sewer systems); *S.F. BayKeeper v. Whitman*, 297 F.3d 877, 879–80 (9th Cir. 2002) (noting that the CWA requires states to monitor the total maximum daily loads (TMDLs) of a pollutant that a particular water body can receive per day without violating the water quality standard).

331. *See supra* note 322.

332. *See supra* note 322.

333. *See, e.g., Nolon, supra* note 295, at 1431–32 (noting that the success of a State of New York stormwater protection program was due to its integrated approach in addressing local, state, and federal interests in water quality).

luted stormwater runoff are under federal regulatory authority.³³⁴ If the federal government must allow stormwater discharges by states to the nation's waters,³³⁵ then the stormwater pollution problem can only be solved by regulatory activity by both local actors (who govern where the pollution starts) and national actors (who govern where the pollution ends), ideally in coordination.

b. The Phase II Stormwater Rule and Environmental Defense Center, Inc. v. EPA

Accordingly, Congress authorized the EPA to propose rules for regulating the discharge of collected stormwater under the CWA as a point source discharge, since what originates as nonpoint source diffuse surface runoff is converted to a point source discharge when it is collected in the storm sewer and then piped to the receiving river, lake, or harbor.³³⁶ At the end of the pipe, the discharge of collected stormwater looks like any other point source discharge into the lake—but these regulations would be unlike previous NPDES permitting programs, which usually regulate industrial discharges.³³⁷ By contrast, stormwater is almost exclusively collected and discharged by municipalities.³³⁸ Sensitive to the federalism implications of regulating state

334. See *supra* note 330 and accompanying text.

335. As discussed in the next section, the Ninth Circuit's curious about-face in *Environmental Defense Center, Inc. v. EPA (EDC I)*, suggests that the federal government may have to accept such discharges. 319 F.3d 398 (9th Cir. 2003), *vacated and superseded by* *Envtl. Def. Ctr., Inc. v. EPA (EDC II)*, 344 F.3d 832 (9th Cir. 2003). In *EDC I*, the majority suggested that if a municipality was unwilling to comply with the terms of the federal permit, then it could find other ways of dealing with stormwater—recycle it, build terminal evaporation basins—besides discharging it to federally protected water bodies. *EDC I*, 319 F.3d at 414–15. A vigorous dissent asserted that this reasoning was absurd, because gravity forces stormwater toward those bodies of water, and because the municipal management of stormwater into such bodies of water is an aspect of municipalities' core sovereign function. *Id.* at 450–54 (Tallman, J., concurring in part and dissenting in part). In its decision following rehearing, the panel appeared persuaded enough by the dissent as to reverse itself on this point. *EDC II*, 344 F.3d at 847 & n.22.

336. See 33 U.S.C. § 1342(p)(4) (2000) (authorizing EPA to promulgate “Phase I” and “Phase II” Stormwater Rules).

337. See *id.* § 1342(p)(3) (permitting EPA to regulate municipal and industrial stormwater discharges).

338. *E.g.*, EPA, Permits for Municipal Separate Storm Sewer Systems (MS4s), <http://www.epa.gov/region8/water/stormwater/municipal.html> (last visited Mar. 15, 2007) (noting that “[p]olluted storm water runoff is often transported to municipal storm sewer systems and ultimately discharged into local rivers and streams without treatment”). Other dischargers include federal agencies, Indian Tribes, and private dischargers operating large compounds, such as university or corporate campuses. *E.g.*, EPA, PERMITTING STORMWATER DISCHARGES FROM FEDERAL FACILITY CONSTRUCTION PROJECTS (2006), <http://www.epa.gov/Region8/water/stormwater/downloads/Federal%20facility%20construction%20guidance.pdf> (federal construction projects); OFFICE OF WATER, EPA, FINAL GUIDANCE

agencies in their performance of a traditional municipal function (the maintenance of storm sewers), the EPA convened a working group of stakeholders (including representatives from the National Governors Association, the Environmental Council of the States, the Association of State and Interstate Water Pollution Control Authorities, and six state departments of natural resources) to collaborate on the development of a workable regulatory solution to this thorny interjurisdictional problem.³³⁹ After nearly a decade of negotiation, the EPA promulgated two phases of regulations that were endorsed by all working group participants. The first regulation applied only to the largest cities, while the second, the “Phase II Stormwater Rule,” applied to the vastly larger number of small municipalities with populations of less than 100,000.³⁴⁰

To minimize federalism problems associated with this unusual regulatory partnership, the Phase II Rule was designed to accomplish pollution controls while conferring as much discretion as possible to covered municipalities. The Rule enables states to seek coverage under a general permit that allows municipalities to discharge so long as they propose stormwater management plans ensuring that stormwater discharged to federal waters arrives as clean as possible.³⁴¹ Although the specifics of the management plans are left to each municipality, they must at least address a set of six primary concerns (the “minimum measures”), including a plan to discover and prevent illegal storm sewer discharges and a means of raising public awareness about the prevention of stormwater pollution.³⁴² However, one of the minimum measures required that municipalities mitigate construction-related pollution by issuing permits for construction projects that require their compliance with applicable terms in the overall municipal stormwater program.³⁴³ Acting independently from the State of

ON AWARDS OF GRANTS TO INDIAN TRIBES UNDER SECTION 106 OF THE CLEAN WATER ACT (2006), <http://www.epa.gov/owm/cwfinance/final-tribal-guidance.pdf> (Indian Tribes); EPA, The Best Management Practices (BMP) Catalog: Water Management Case Studies, http://www.epa.gov/ne/assistance/univ/bmpcasestudies_watermgt.html (last visited Mar. 15, 2007) (colleges and universities).

339. OFFICE OF WATER, EPA, STORM WATER DISCHARGES POTENTIALLY ADDRESSED BY PHASE II OF THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM STORM WATER PROGRAM 1-21 to -22 (1995); Brief of Respondent-Intervenor Natural Resources Defense Council, Inc., at 50, *EDC II*, 344 F.3d 832 (9th Cir. 2003) (Nos. 00-70014, 00-70734, 00-70822), 2001 WL 34092891 (listing participants of the Phase II Subcommittee).

340. OFFICE OF WATER, EPA, STORMWATER PHASE II FINAL RULE: FACT SHEET 2.1, at 2 (2005), <http://www.epa.gov/npdes/pubs/fact2-1.pdf>.

341. OFFICE OF WATER, EPA, STORMWATER PHASE II FINAL RULE: FACT SHEET 2.9, at 3 (2005), <http://www.epa.gov/npdes/pubs/fact2-9.pdf>.

342. *EDC II*, 344 F.3d 832, 845 (9th Cir. 2003).

343. *Id.* at 845–46 & n.20.

Texas, a group of Texas municipalities sued to invalidate the Rule on Tenth Amendment grounds, arguing that the construction measure required them to regulate their own citizens in violation of the New Federalism's anti-commandeering rule.³⁴⁴

The Ninth Circuit ultimately upheld the Rule against the Tenth Amendment challenge, but not without controversy. Writing for the court in its initial decision, Judge Browning found that the Tenth Amendment challenge failed because it compelled no state behavior; municipalities that objected to the terms of a general permit were free to file for permission to discharge under an alternative individual permitting framework that, while more administratively onerous, omitted the requirements of the construction minimum measure.³⁴⁵ However, Judge Browning volunteered the further possibility that the Tenth Amendment challenge would fail for lack of coercion because a municipality that did not want to comply with the terms of a general permit could simply choose *not* to engage in the appropriately federally regulated activity of managing discharges to the waters of the United States.³⁴⁶ Invoking spending-power-like reasoning, Judge Browning suggested that the federal government is free to condition a privilege it is not obligated to provide on the performance of a related obligation it might not otherwise compel.³⁴⁷ Municipalities remained free to dispense with stormwater by other means, such as the creation of wetlands, recycling facilities, or terminal evaporation basins, and the fact that these may be more expensive than simply discharging to the downstream water body did not alter the constitutional calculus.³⁴⁸ Judge Tallman dissented from the majority's alternative reasoning on this point, arguing that although the federal regulation was indeed within Congress's commerce power, the suggestion that the federal government could prevent municipalities from discharging stormwater in the direction of gravity was nonsensical, as such reasoning would enable the federal government to encroach upon a realm of inviolate state sovereignty—the protection of property from damage by the management of local storm sewers.³⁴⁹

344. *Id.* at 843–45. The Phase II Rule was also challenged on other grounds by the National Association of Home Builders, the American Forest & Paper Association, and the Environmental Defense Center. *Id.* at 843.

345. *EDC I*, 319 F.3d 398, 413–14, 416–19 (9th Cir. 2003).

346. *Id.* at 414–16.

347. *Id.* at 416.

348. *Id.* at 415.

349. *Id.* at 451–53 (Tallman, J., concurring in part and dissenting in part); *cf.* *SWANCC*, 531 U.S. 159, 174 (2001) (discussing the traditional state role of regulating land and water use).

Although the panel denied the Texas municipalities' subsequent petition for rehearing, the court issued a second opinion that rescinded the alternative reasoning, this time with the consensus of Judge Tallman.³⁵⁰ That the court proceeded this way is unsurprising; otherwise the panel would have been forced to engage in the very sort of sovereign functions test that plagued *National League of Cities*.³⁵¹ Is the municipal management of storm sewers a sovereign function on par with the performance of background checks by state officers in *Printz*, or the provision of a service like the personal information made available by the state motor vehicle department in *Condon*? Is the problem that the construction permitting process requires the municipality to directly regulate its own citizens? If so, why then did Judge Tallman not object to portions of the Rule that require the municipality to regulate illicit discharges by its citizens to storm sewers? Is one more "sovereign" than the other?

The Texas petitioners unsuccessfully sought Supreme Court review, and the Ninth Circuit's second decision was left standing.³⁵² But the evolving line of argument through the Ninth Circuit's progression of decisions and dissents demonstrates the fretful task of interpreting regulatory responses to interjurisdictional problems within the confines of the strict-separationist approach. The decisions suggest that the panel basically considered the Rule a respectful means of navigating the state and federal considerations at issue. Although they were inclined to uphold what appeared to a reasonable regulatory partnership, doing so within the New Federalism framework proved tortuous.

2. *De Facto Interjurisdictional Regulatory Problems*

An interjurisdictional regulatory problem may also require the exercise of authority by both a state and federal actor because, even though the federal government could theoretically exercise plenary regulatory authority all the way down the causal chain, the regulatory endeavor implicates a matter of such local concern and/or expertise that it would not make sense to attack the problem as an exclusively national regulatory project. In the de facto context, the only effective regulatory result flows from a collaborative approach.

350. *EDC II*, 344 F.3d 832, 847–48 & n.22 (9th Cir. 2003). Judge Tallman concurred in this portion of the opinion, but dissented in others. *Id.* at 880 (Tallman, J., concurring in part and dissenting in part).

351. *See supra* Part III.A.1.

352. *Tex. Cities Coal. on Stormwater v. EPA*, 541 U.S. 1085 (2004) (denying the petition for certiorari).

a. *Air Pollution*

A prime example of a de facto interjurisdictional problem is the management of air pollution under the Clean Air Act (CAA).³⁵³ The CAA authorizes the federal government to set ambient air quality management goals but delegates design and enforcement authority to the states, which implement individually tailored State Implementation Plans (SIPs).³⁵⁴ It makes sense that the federal government should set uniform air quality management goals for the nation; this avoids the negative externality problems that could arise if upwind states were allowed to choose high thresholds for pollution borne by downwind states, who would be powerless to stop the polluting activities in the upwind states. Preventing such negative externalities is a classic regulatory function of government, as is the prevention of “race to the bottom” collective action problems that might ensue if regional authorities competed with one another for industry by progressively lowering pollution standards that could ultimately leave all worse off.³⁵⁵

However, although the federal government could theoretically exert its commerce authority at every level of the regulatory endeavor,³⁵⁶ consensus emerged that better results would flow from a partnership approach, in which each state decides how best to meet the federal standards in light of its unique geographical and industrial

353. 42 U.S.C. §§ 7401–7671 (2000).

354. *Id.* §§ 7409(a), 7410(a); see also EPA, The Plain English Guide to the Clean Air Act, http://www.epa.gov/oar/oaqps/peg_caa/pegcaa02.html (last visited Mar. 15, 2007).

355. The “race to the bottom” theory of federal environmental regulation, once sacrosanct, is not without challenge. See, e.g., Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 556 n.2 (2001) (reviewing the wealth of academic dialogue on the viability of the “race to the bottom” theory in the environmental context). For example, while Professor Richard Revesz argues that such a race is apocryphal, Professors Saleska and Engel assert that empirical data prove otherwise. Compare *id.* at 583–625 (suggesting that stringent state environmental protection measures may result in a race to the top rather than to the bottom), with Kirsten H. Engel & Scott R. Saleska, “Facts Are Stubborn Things”: An Empirical Reality Check in the Theoretical Debate Over the Race-to-the-Bottom in State Environmental Standard-Setting, 8 CORNELL J.L. & PUB. POL’Y 55, 60–61 (1998) (finding that some states have actively relaxed environmental standards to attract industry). Perhaps the best account of this debate is a growing consensus that, although there was indeed a time when many states had been caught in an environmental race to the bottom, it may be that such a time has now passed for many of those states. See, e.g., Freeman, *supra* note 309, at 41–47, 97–98 (discussing a recent example of collaborative governance between states, federal agencies, and private interests in the environmental regulation context that produced implementable solutions).

356. See 42 U.S.C. § 7410(k)(3) (authorizing the EPA to deny SIPs submitted by the states in whole or in part); *id.* § 7413(a)(2) (granting enforcement power to EPA where a state fails to enforce its SIP program).

features.³⁵⁷ For example, the unique topography and weather patterns of the Los Angeles basin might lead to different regulatory design features than a program designed for the flatlands of Houston, Texas—even though both cities face the kinds of serious air pollution problems that are the focus of the CAA.³⁵⁸ Similarly, air pollution challenges related to the auto manufacturing industry in Michigan might require different regulatory design features than plans for resolving air pollution problems associated with coal mining in West Virginia. The CAA's classic cooperative federalism partnership approach enables both levels of government to remain involved in regulating a problem of concern to each, though accountability concerns may arise if the federal government unreasonably requires unfunded regulatory activity by states.³⁵⁹

Other examples of interjurisdictional regulatory problems that may lean toward the *de facto* side include products liability,³⁶⁰ some interstate criminal law enforcement,³⁶¹ the enforcement of provisions in the Telecommunications Act,³⁶² and public health crises.³⁶³ *De facto* problems often arise in contexts where externality-producing or interstate commercial activities of national concern are matched with enforcement media most efficiently situated at the local level.³⁶⁴

357. The best counterargument of note is probably that regional experts could be employed by the federal government to supply the localized expertise that states would otherwise provide, and indeed, the EPA has regional offices in ten administrative districts across the country. However, to truly build a federal system matching state governments' full array of resources and expertise would require creating a bureaucracy that extends all the way to the most local level, absurdly duplicating efforts already in place at the state level.

358. See 42 U.S.C. § 7401(a)(2) (2000) (expressing congressional findings regarding "the growth . . . and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles").

359. See *infra* notes 478–482 and accompanying text (discussing the problem of unfunded mandates).

360. See Issacharoff & Sharkey, *supra* note 31, at 1358 (observing that legislation in the products liability context is generally unclear, as "Congress acts, in limited product realms, to define standards of liability but leaves to state law the need to provide remedies").

361. See Logan, *supra* note 205, at 66–67 (noting that despite the vast federalization of certain aspects of criminal law, the federal government still looks to state criminal law to effectuate its criminal justice authority).

362. The Telecommunications Act merges a federal regulatory regime with state implementation. See Weiser, *supra* note 222, at 677 (noting that in its current form, the Telecommunications Act allows state agencies to engage in "measures that the agencies would not otherwise be authorized to do under state law").

363. Public health crises implicate both the state's police power to regulate for health and safety and the federal concern with border-crossing and commercial impacts—for example, bird flu management and human influenza vaccine production. See, e.g., Rosenthal, *supra* note 299 (discussing the potential global implications of avian flu on humans).

364. *De facto* examples are an admittedly more difficult animal to classify than *de jure* examples, since the defining criteria that "the regulatory endeavor implicates such matters

b. Domestic Counterterrorism Efforts

Still, the very fact that some problems draw simultaneously on state and federal concerns creates a gray area for even this typology, making it occasionally disputable whether an interjurisdictional problem is more of the *de jure* or *de facto* variety. Some interjurisdictional regulatory problems may merge elements of both, such as the maintenance of antiterrorism efforts and national security.³⁶⁵

The Department of Homeland Security's National Response Plan requires cooperation between federal and state agencies,³⁶⁶ both out of respect for the traditional role of the states in providing for the safety and welfare of their citizens,³⁶⁷ and because federal preemption of local contributions (permissible in some cases that implicate clearly national interests)³⁶⁸ would be absurdly inefficient. Even if the federal government could preempt local involvement in domestic antiterrorism programs through its plenary power over international affairs, to what end? Especially in the post-9/11 world, effective national security programs must draw on both the global intelligence and expertise only available via the CIA, and the local intelligence and expertise

of peculiarly local concern" is vague (and subject to varying degrees of expansion if considerations of cost and politics are taken into account). However, the jurisprudential standard proposed in Part VI attempts to create more meaningful constraints around claims for interjurisdictional regulatory crossover on such grounds. See *infra* Part VI.

365. National security seems easily understood as a truly national regulatory concern, but some commentators have noted that the term "national security" is rarely defined, or given limiting contours. See, e.g., Mariano-Florentino Cuéllar, *The Mismatch Between State Power and State Capacity in Transnational Law Enforcement*, 22 BERKLEY J. INT'L L. 15, 37 (2004) (noting that policymakers have "move[d] away from defining national security exclusively in geo-strategic military terms"); Donald Kerwin, *The Use and Misuse of 'National Security' Rationale in Crafting U.S. Refugee and Immigration Policies*, 17 INT'L J. REFUGEE L. 749, 750 (2005) (observing that despite the rhetoric over immigration restrictions "'national security' has not been rigorously defined or applied in the U.S. immigration context"); David B. McGinty, *The Statutory and Executive Development of the National Security Exemption to Disclosure Under the Freedom of Information Act: Past and Future*, 32 N. KY. L. REV. 67, 80 (2005) (critiquing contemporary definitions of national security as "negligibly more helpful than no definition" at all). An open-ended definition of national security might dangerously threaten the check-and-balance value of a federalist system. See *infra* Part V.A.1.

366. See NRP, *supra* note 54, at 15 (explaining the interdependent relationship of federal and state agencies in disaster response management).

367. See Whitley et al., *supra* note 52, at 4 (quoting a post-Katrina October 2005 statement by the National Governor's Association that "[g]overnors are responsible for the safety and welfare of their citizens and are in the best position to coordinate all resources to prepare for, respond to, and recover from disasters").

368. E.g., 42 U.S.C. § 5191(b) (2000) (authorizing the President to coordinate all disaster relief in a crisis, including federal and state assets, whenever "primary responsibility for response rests with the United States because the emergency involves a subject area for which, under the Constitution or laws of the United States, the United States exercises exclusive or preeminent responsibility and authority").

only available at the municipal level. Not only would complete federal preemption foreclose the value of local expertise and inefficiently duplicate efforts, it would hardly please the champions of federalism. Nobody, it would seem, wants a federal government extensive enough to take the place of local police, fire fighters, and other emergency service providers;³⁶⁹ state agents are simply better able to provide the needed services due to their local placement and expertise. But whether they are more *de jure* or *de facto*, such problems help flesh out the interjurisdictional gray area of overlapping state and federal and concern.

B. Crossover into the Interjurisdictional Gray Area

1. Regulatory Crossover

Interjurisdictional problems are troubling to the strict-separationist model of dual sovereignty because they invite what might be deemed “regulatory crossover.” In strict-separationist terms, the relevant boundary is the line between proper state and federal authority, and crossover from one clearly defined side of this line to the other is impermissible. But in interjurisdictional terms, crossover is something slightly more nuanced, describing a state or federal actor’s decision to step beyond what we might consider “the uncontroversial sphere” of its traditional regulatory authority and into the gray area of interjurisdictional concern. The difference is well illustrated by recent regulatory responses to wetlands loss and mobile source air pollution.

a. Wetlands Regulation

When the federal government tries to preserve water quality by regulating end-of-pipe discharges from a factory directly into the Wisconsin River, it is regulating within the uncontroversial sphere of its Clean Water Act authority under the Commerce Clause. But when it tries to preserve water quality in the Wisconsin River watershed by regulating the dredging and filling of a small, seasonal pond on a private dairy farm (a so-called “hydrologically isolated intrastate wetland”), it has moved beyond the uncontroversial sphere of its CWA regulatory

369. See, e.g., Thomas J. Maroney, *Fifty Years of Federalization of Criminal Law: Sounding the Alarm or “Crying Wolf?”*, 50 SYRACUSE L. REV. 1317, 1338 (2000) (“Americans have innately distrusted ‘the concentration of broad police power in a national police force, and . . . have long resisted the evolution of such a broadly powerful national police force, as distinguished from specialized national police agencies.’” (alteration in original) (quoting TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, ABA, REPORT ON THE FEDERALIZATION OF CRIMINAL LAW 27 (1998))).

authority and crossed over into the gray area of state and federal concern. Indeed, while holding in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (SWANCC)³⁷⁰ that the Army Corps of Engineers had exceeded its statutory CWA authority in regulating certain isolated wetlands,³⁷¹ Chief Justice Rehnquist's opinion further suggested that it may even have exceeded the federal commerce power.³⁷² The destruction of intrastate wetlands may have real consequences for the quality of the nation's waters, triggering legitimate federal concern,³⁷³ but the regulation of intrastate land use decisions also triggers a core area of traditional state concern.³⁷⁴ Justice Scalia's plurality opinion in the most recent (and fractured) wetlands case, *Rapanos v. United States*,³⁷⁵ explicitly invokes the New Federalism canon in rejecting the Army Corps' extended assertion of wetlands jurisdiction.³⁷⁶

b. Fuel-Efficient Purchasing Requirements

Similarly, when a state tries to reduce asthma-causing auto emissions by constructing special parking lots and traffic lanes to en-

370. 531 U.S. 159 (2001).

371. This might be true if the only basis on which the federal government claimed regulatory jurisdiction was under the old "migratory bird rule." *Id.* at 164–67. Section 404 of the Clean Water Act might still confer federal jurisdiction under several other possible causal links to the federal commerce power, but notable regional variation in enforcement has followed the SWANCC decision, demonstrating that such authority, while potentially grounded in good law, is at least controversial. See Duane J. Desiderio, *Ditching It Out . . . But Can the Corps Take It?*, NAT'L WETLANDS NEWSLETTER, (Env'tl. Law Inst., Washington, D.C.) May–June 2005, at 3, 3–4 (noting federal circuit splits in interpreting SWANCC and continuing regulatory uncertainty regarding artificial ditches); Jeffrey M. Eustis, *An Inch Becomes A Mile*, NAT'L WETLANDS NEWSLETTER, (Env'tl. Law Inst., Washington, D.C.) May–June 2005, at 6, 7 (detailing lower court's varying interpretations following the SWANCC decision); Patrick Parenteau, *Preemptive Surrender*, NAT'L WETLANDS NEWSLETTER, (Env'tl. Law Inst., Washington, D.C.) May–June 2005, at 9, 9 (arguing that Army Corps districts are making "inconsistent and questionable jurisdictional calls" in the wake of SWANCC).

372. 531 U.S. at 173–74.

373. See *Rapanos v. United States*, 126 S. Ct. 2208, 2252 (2006) (Stevens, J., dissenting) (noting that wetlands adjacent to tributaries of navigable waters have an impact on the nation's waters by "providing habitat for aquatic animals, keeping excessive sediment and toxic pollutants out of adjacent waters, and reducing downstream flooding by absorbing water at times of high flow"); see also SWANCC, 531 U.S. at 174–75 (Stevens, J., dissenting) (explaining that the CWA was an extension of federal regulatory authority to combat severely polluted waters).

374. See *Kelo v. City of New London*, 545 U.S. 469, 482–83 (2005) (discussing the broad deference afforded to state governments).

375. 126 S. Ct. 2208 (2006) (plurality opinion).

376. See *id.* at 2224 (rejecting federal government's interpretation of the CWA as infringing on traditional state control over land and water use and as stretching the furthest limits of congressional commerce power).

courage carpooling, it is regulating within the uncontroversial sphere of its police powers to protect the health and safety of its citizens.³⁷⁷ But when it tries to reduce the same asthma-causing auto emissions by requiring that all state agents and contractors purchase from an approved list of fuel-efficient vehicles when purchasing new “fleet” vehicles (e.g., police cars, garbage trucks),³⁷⁸ then it is regulating beyond the uncontroversial sphere of its reserved police powers and has crossed over into the interjurisdictional gray area. In *Engine Manufacturers v. South Coast Air Quality Management District*,³⁷⁹ Justice Scalia explains that this is so because even such a “demand-side” regulation may be too close in kind to the “supply-side” emission regulations that are federally preempted under the Clean Air Act.³⁸⁰

2. *The Gray Area as Regulatory “No-Man’s Land”*

The notion of “crossing over” implies that a regulatory authority has crossed some kind of line. But it is important to isolate exactly *what* line this is. As discussed in Part III, the New Federalism’s strict-separationist ideal would characterize such crossover in clear terms: (1) there is a sphere of state concern and a sphere of federal concern, each reflected by corresponding realms of state and federal authority; (2) targets of legitimate regulation fall within one or the other; and (3) the Tenth Amendment polices this boundary in service to the principles of constitutional federalism. “Crossover” thus implies that one side has transgressed the bright line that easily differentiates the federal from the state realm—and by corollary, any such crossover *always* violates the Tenth Amendment. Yet, at least in these interjurisdictional contexts, the line between state and federal concern is not always so clear. Instead, there is an area of overlap that implicates both state and federal concern, such that regulatory crossover is not necessarily from one clearly defined sphere of concern and authority

377. See *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 260 (2004) (Souter, J., dissenting) (quoting the CAA’s recognition of the primary role of the states in preventing air pollution “at its source”).

378. *Id.* at 249–50 (majority opinion).

379. 541 U.S. 246 (2004).

380. *Id.* at 254–56. His holding, however, appears to contradict congressional intent, at least according to the ample legislative history on point. See *Engine Mfrs. Ass’n*, 541 U.S. at 261–62 (2004) (Souter, J., dissenting); see also Gadeberg, *supra* note 239, at 478–80 (arguing that in rejecting legislative history in favor of a textualist approach to statutory interpretation, the Court empowered itself to override Congress’s intentions with regard to local efforts like the one at issue). In so doing, the opinion violated the presumption against preemption of state law in traditional police power contexts unless Congress has done so explicitly. See *Engine Mfrs. Ass’n*, 541 U.S. at 260–61 (Souter, J., dissenting); Gadeberg, *supra* note 239, at 483.

into the other, but from one clearly defined sphere into the interjurisdictional gray area.

The strict-separationist ideal chills regulation in the interjurisdictional gray area by fostering a view of federalism that interprets departures from the uncontroversial spheres of state and federal authority as constitutional violations. Its binary rule assumes that a regulatory concern must be addressed from within the properly local or national sphere, as informed by an enumerated powers analysis and history, without crossover.³⁸¹ But discouraging regulatory activity in the invisible interjurisdictional gray area allows pressing interjurisdictional problems to fester, either because motivated parties fear legal liability if they stray too far from their uncontroversial sphere, or because unmotivated parties use the gray area as an excuse to abdicate responsibility.

a. The Risk of Crossover: Engine Manufacturers Ass'n v. South Coast Air Quality Management District

Even motivated regulators might avoid the interjurisdictional gray area for fear of defending against legal challenge in this uncertain zone of authority. For example, the South Coast Air Quality Management District, the regional agency that manages air pollution controls in the Los Angeles metropolitan area, was concerned about the relationship between respiratory disease among its citizens and the exceedingly poor quality of its air.³⁸² Pollution levels in the Los Angeles South Coast Air Basin are the worst in the nation, because its bowl-like geography traps emissions from extreme levels of traffic generated by the massive fleet of regional commuters and the constant stream of trucks and barges using the Port of Los Angeles shipping corridor.³⁸³ The L.A. Basin is the only region in the nation that has been designated an “extreme nonattainment area” for safe ozone levels as defined by the CAA.³⁸⁴ The agency thus attempted to reduce vehicular emissions by requiring that the operators of vehicular fleets purchase only low emissions replacement vehicles, and the Engine

381. See Robert A. Schapiro & William W. Buzbee, *Unidimensional Federalism: Power and Perspective in Commerce Clause Adjudication*, 88 CORNELL L. REV. 1199, 1203–05 (2003) (discussing the Court’s rigid, unitary focus in its recent Commerce Clause cases).

382. *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 158 F. Supp. 2d 1107, 1108–09 (C.D. Cal. 2001).

383. See *id.* at 1109 (describing the polluting effect of vehicular traffic in the Los Angeles area).

384. See *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 259 at n.1 (2004) (Souter, J., dissenting) (quoting from data in the United States’ amicus brief).

Manufacturers Association challenged the program as preempted by the Clean Air Act's emission standards.³⁸⁵

Although the District prevailed at the trial and lower appellate levels, the Supreme Court vacated the lower judgment and remanded, concerned that the District's standard was indeed preempted by the CAA³⁸⁶ (and that the agency had thus overstepped its permissible sphere of local authority). A more risk-averse municipal agency, especially one with fewer resources, would be very cautious before venturing into anything that looks like an interjurisdictional gray area, even if it strongly believed (as the District argued) that it was not only regulating within its proper sphere of authority but obliged to do so to protect the health and safety of its citizens.

b. The Risk of Abdication: New York v. United States

The New Federalism's failure to recognize a gray area may also invite more self-serving behaviors by underachieving civil servants. An interjurisdictional problem may seem so expensive or politically unpalatable that the relevant actors on both sides of the line might prefer to pass it off as the other's problem to solve—abdicating responsibility under the cover of federalism. For example, the protagonists in *New York v. United States*³⁸⁷ (the case that launched the New Federalism revival), had been faced with the particularly unpalatable problem of low-level radioactive waste disposal. Because nobody seems to want a radioactive waste disposal facility in his or her backyard, almost none had been built, and so only two to three existing sites—one in South Carolina, one in Washington State, and at times, one in Nevada—existed for the disposal of all low-level radioactive waste produced and disposed of in all the other states.³⁸⁸ When the Washington and Nevada sites temporarily closed, South Carolina's facility was left to accept all the hazardous waste in the nation, and its unhappy citizens threatened to stop accepting out-of-state shipments (though they would need congressional authorization to do so, given the implications of rejecting this stream of distasteful but undeniably interstate commerce).³⁸⁹

385. *Engine Mfrs. Ass'n*, 541 U.S. at 249–51.

386. *See id.* at 258–59.

387. 505 U.S. 144 (1992).

388. *Id.* at 150.

389. *Id.* South Carolina would have probably needed congressional authorization to bar the out-of-state shipments, given the dormant Commerce Clause implications of closing its borders to a distasteful but undeniable stream of interstate commerce.

Congress considered mandating a federal solution, but the National Governors Association urged Congress to leave the problem to the states, and developed an interstate accord by which the sited states (South Carolina, Washington, and Nevada) agreed to continue accepting out-of-state shipments until 1986.³⁹⁰ In the interim, the non-sited states would work in regional partnerships to develop local disposal sites that would relieve the unfair burden currently placed on the sited states.³⁹¹ At the request of the states, Congress ratified this agreement as the Low-Level Radioactive Waste Policy Act of 1980, thereby resolving the dormant Commerce Clause problem that would otherwise confound the sited states' plans to close their borders to waste shipments in 1986.³⁹² However, as 1985 ended, not a single new disposal site had been built. The states reconvened negotiations and urged Congress to amend the Act with a new schedule of sanctions they had developed to incentivize compliance by the non-sited states.³⁹³

New York was among the states that lobbied Congress in support of the new penalties, and Congress passed the amendments without incident.³⁹⁴ However, when New York later failed to convince any of its localities to host the disposal facility it had agreed to site, it sued under the Tenth Amendment to be relieved of the obligations imposed by the new sanctions.³⁹⁵ Despite New York's distastefully strategic posture, it persuaded the Court that Congress had moved beyond the uncontroversial sphere of its regulatory powers and commandeered state sovereign authority by requiring New York to either build a facility or take title to the waste. As detailed in Part III.A.2, the well-known outcome of the case is that New York prevailed, the Low-Level Radioactive Waste Policy Act was defanged, and the Tenth Amendment anti-commandeering doctrine was born. The outcome less well known is that, in the fifteen years since that time, *not a single net-additional waste facility has been sited*.³⁹⁶ The states have made no true progress in creating additional disposal sites for low-level radioactive waste; the nation remains tethered to a mere three overwhelmed facilities: Barnwell in South Carolina, Hanford in Washington State, and

390. *Id.* at 150–51.

391. *Id.* at 151.

392. *Id.* at 150–51.

393. *Id.* at 151.

394. *Id.* at 180–81.

395. *Id.* at 154.

396. See U.S. Nuclear Regulatory Commission, Locations of Low-Level Waste Facilities, <http://www.nrc.gov/waste/llw-disposal/locations.html> (last visited Mar. 15, 2007).

Clive in Utah (replacing the now defunct Nevada facility).³⁹⁷ South Carolina continues to accept the bulk of waste generated in the Eastern United States.³⁹⁸ Virtually nothing more has been done to address the crisis of limited low-level radioactive waste disposal facilities that set the states into a conflict requiring congressional mediation.

Considering the stakes involved, the lack of progress is stunning. South Carolina became so incensed over what it considered unfair exploitation by neighboring states that it engaged in a high-stakes constitutional standoff with North Carolina, from whom it decided to stop receiving shipments of waste in 1995 after North Carolina repeatedly failed its promises to the Southeast Compact to site its own facility.³⁹⁹ The Governor of North Carolina threatened to sue South Carolina under the dormant Commerce Clause,⁴⁰⁰ though no suit was ever filed (perhaps due to recognition of its own unclean hands, or perhaps because the Utah site became available to accept its waste around that time).⁴⁰¹ However, four other states in the Southeast Compact are currently suing North Carolina for some \$90 million in light of its various failures to comply with the terms of the Compact.⁴⁰²

South Carolina's plight suggests the dilemma of a gray area "hot potato problem" for which nobody wants to claim responsibility. Congress can claim that it is respecting federalism by staying out of the regulatory arena that the states requested be left to them, while the non-sited states can claim that the Supreme Court invalidated (on federalism grounds!) their best attempt at handling the problem. Each side can point a finger at the other, abdicating regulatory responsibility in this interjurisdictional gray area of particularly radioactive concern. Indeed, some have suggested that the failed Katrina response indicates similar abdication of responsibility in a no-win zone of interjurisdictional responsibility.⁴⁰³

397. *Id.*

398. *Id.*

399. MARK HOLT, CONG. RESEARCH SERV., CIVILIAN NUCLEAR WASTE DISPOSAL 17 (2006), available at <http://ncseonline.org/NLE/CRSreports/06Sep/RL33461.pdf>.

400. See Jim Clarke, *N.C., S.C. at Odds Over Who Can Use Barnwell Landfill*, CHARLOTTE OBSERVER, June 26, 1995, available at 1995 WLNR 1767874.

401. *LLW Compacts: Emerging Private Initiatives May be Big News in New LLW Efforts*, NUCLEAR WASTE NEWS, Sep. 5, 1996, available at 1996 WLNR 3101706.

402. See *Alabama v. North Carolina*, 539 U.S. 925 (2003) (granting leave to file complaint); 540 U.S. 1014 (2003) (appointing a special master to handle the litigation). The case is presently ongoing. E-mail from John F. Maddrey, Assistant Solicitor General, North Carolina Department of Justice, to author (Dec. 13, 2006) (on file with author).

403. E.g., Peggy Noonan, Editorial, *The Scofflaw Swimmer: Government Takes Too Much Authority and Not Enough Responsibility*, WSJ.COM, Sept. 29, 2005, <http://www.opinionjournal.com/columnists/pnoonan/?id=110007328> ("No one took charge. Thus the postgame

3. *The Aftermath of Hurricane Katrina*

Within this framework, we can understand the Katrina crisis as a colossal interjurisdictional regulatory problem. Especially in hindsight, it is hard to imagine a serious argument that preparation and response should have proceeded at an exclusively national or local level. Nevertheless, in accordance with the strict-separationist model, the White House viewed the Katrina response as a properly state regulatory affair, declining to take more aggressive federal initiative because it viewed avoiding interference with (let alone commandeering) state resources as its highest obligation.⁴⁰⁴ Nothing could have proved this view more tragically simplistic than our actual experience in the aftermath of the hurricane.

Katrina was clearly a local problem, demanding the protection of public health and safety and the maintenance of domestic law and order that lie at the heart of traditional state function.⁴⁰⁵ State regulatory concern was implicated in the dispatch of first responders with localized expertise, the provision of humanitarian aid for intrastate evacuees, and the protection and salvage of state infrastructure and private property. However, to the extent that the crisis implicated the channels of interstate commerce, the national economy, and the care of interstate evacuees, it was also a matter of national concern. The Port of New Orleans is the largest shipping port in the United States (measured by tonnage handled),⁴⁰⁶ and a sizeable percentage of our domestic energy supplies are pumped, delivered, or shipped via its channels.⁴⁰⁷ In addition, a network of 20,000 miles of oil and gas distribution lines embedded in the New Orleans wetlands provide critical supplies to the rest of the nation,⁴⁰⁸ lines so vital that the federal government tapped into the national oil reserves to make up for the

commentary in which everyone blamed someone else: *The mayor fumbled the ball, the governor didn't call the play, the president didn't have a ground game.*"

404. See *supra* Part II.B.2.

405. See 16A AM. JUR. 2D *Constitutional Law* § 313 (2006) (noting that the "state cannot surrender, abdicate, or abridge its police power").

406. Rip Watson, *New Orleans Port Opens to Relief Ships After Katrina*, BLOOMBERG.COM, Sept. 6, 2005, <http://www.bloomberg.com/apps/news?pid=10000082&sid=adNXIjdn4Z8Q>.

407. Thanks to the convenient proximity of rich carbon-based fuels in the Gulf of Mexico to the Port of New Orleans, this region is perhaps the most important energy hub in the continental United States, supplying nearly twenty percent of domestic demand for oil and natural gas. Robert Viguerie, *Coastal Erosion: Crisis in Louisiana's Wetlands*, 51 LA. B.J. 85, 86 (2003).

408. *Stemming the Tide: The Mississippi River Delta and the Davis Pond Freshwater Diversion Project*, LACOAST.GOV, <http://www.lacoast.gov/programs/DavisPond/stemming-the-tide.htm> (last visited Mar. 15, 2007).

shortfall when the network went offline.⁴⁰⁹ Residents left homeless and destitute in the wake of the storm soon became refugees requiring assistance in countless other states.⁴¹⁰ Federal responsibility in the crisis may also attach to the federal role in constructing what the Army Corps of Engineers now itself concedes were structurally faulty levees.⁴¹¹ Finally, it has even been argued that the anarchy following Katrina rendered federal intervention necessary to fulfill the Constitution's Guarantee Clause,⁴¹² which, in guaranteeing each state "a Republican Form of Government" implicitly promised federal action to preserve at least *some* functioning governance in New Orleans when state and local government had collapsed.⁴¹³

Thus, responding to Katrina was indeed the state's obligation, but it was also the nation's obligation. Despite the NRP's promise to protect lives, the relief effort failed the thousands of residents who died in their neighborhoods and nursing homes and the thirty-four who died in the Superdome and convention center.⁴¹⁴ Hundreds of thousands of evacuees sought shelter and employment in cities and towns across the nation, and federal expenditures on emergency housing for them amount to millions of dollars each day. Oil spills and damaged infrastructure spiked the price of fuel nationwide, triggering fears ranging from a national recession to an increase in domestic terrorist activity. With up to twenty-five percent of New Orleans's housing stock condemned,⁴¹⁵ an epidemic of crime that has persisted more than a year after the storm,⁴¹⁶ and environmental hazards threatening health and

409. Jad Mouawad & Vikas Bajaj, *Gulf Oil Operations Remain in Disarray*, N.Y. TIMES, Sept. 2, 2005, at C1.

410. See *supra* notes 116–117 and accompanying text.

411. See *supra* note 134 (recounting reports that the Army Corps conceded that the levee designs were flawed).

412. U.S. CONST. art. IV, § 4.

413. Greenberger, *supra* note 76, at 23.

414. See *supra* notes 109–110 and accompanying text.

415. See Adam Nossiter, *Thousands of Demolitions Near, New Orleans Braces for New Pain*, N.Y. TIMES, Oct. 23, 2005, at § 1 (noting that over 50,000 of the city's 180,000 homes could be demolished).

416. See Brandon L. Garrett & Tania Tetlow, *Criminal Justice Collapse: The Constitution After Hurricane Katrina*, 56 DUKE L.J. 127, 135–54 (2006) (describing the collapse of the criminal justice system in post-Katrina New Orleans); Adam Nossiter, *Storm Left New Orleans Ripe for Violence*, N.Y. TIMES, Jan. 11, 2007, at A24 ("The storm of violence that has burst over this city since New Year's Day can be traced in part to dysfunctional law enforcement institutions, aggravated by a natural disaster that turned the physical and social landscape of New Orleans into an ideal terrain for criminals.")

safety into the foreseeable future,⁴¹⁷ there is no quick end to the crisis in sight.

In other words, everyone had a stake—but as we now well know, the bifurcated disaster response itself proved disastrous. As the stories of failure after failure in the relief effort unfolded, culpability fell on city, state, and federal agencies alike. The City of New Orleans probably should have considered how the 100,000 New Orleans residents without motor vehicles would be able to heed Mayor Nagin's evacuation command. The State of Louisiana probably should have considered the wisdom of moving the National Guard headquarters that would coordinate hurricane response to higher ground before the storm. The federal government apparently failed to heed National Weather Service warnings about the scope of the storm and failed to deploy FEMA resources appropriately before the storm. The federal government probably should have intervened sooner when it became clear (at least to the average American watching the nightly news) that local efforts to confront the hurricane aftermath were insufficient, and when it finally did intervene, it should have been able to provide a more effective chain of command to facilitate decisionmaking.

From the constitutional perspective, it is these last failures that are most troubling, given reports about the White House debate over the federalism implications of taking initiative⁴¹⁸ and former FEMA Director Michael Brown's congressional testimony explaining the reluctant federal response (disingenuously or not) in overtly New Federalist terms.⁴¹⁹ The New Federalism decisions themselves may not have erected an explicit doctrinal barrier to the interjurisdictional response needed after Katrina,⁴²⁰ but they define a trajectory pointing state and federal leadership toward the strict-separationist extreme that either convinced or confused them about the available regulatory choices. The fact that the crisis was a legitimate matter of state concern did not foreclose the fact that it was also a matter of legitimate federal concern, demanding proactive federal intervention from within the federalism order.

The Katrina debacle illustrated the risks of applying a binary decision rule in interjurisdictional contexts—characterizing matters as “ei-

417. See EPA, Response to 2005 Hurricanes: Frequent Questions, <http://www.epa.gov/katrina/faqs.htm> (last visited Mar. 15, 2007) (providing a forum to address a host of continuing health and safety related issues for the residents of the New Orleans area).

418. See *supra* Part II.B.2.

419. See *supra* notes 61–62 and accompanying text.

420. That said, the anti-commandeering rule of *New York* and *Printz* may well have discouraged the White House from “federalizing” the Louisiana National Guard without gubernatorial consent.

ther/or”: if national, then not local; if local, then not national.⁴²¹ Taken to its extreme, this approach obstructs effective governance by assigning jurisdiction over a matter requiring both a local and national response to *either* state *or* federal agents exclusively, and then zealously guarding the boundary against defensible (even desirable) crossover by the other. But this is a nonsensical approach when the problem requires both local and national competencies. The strict-separationist model regards regulatory activity as permissible if it fits neatly within the state or federal box anticipated by its test, and impermissible if it does not. But what if the problem is not with the activity, but with the limitations of a simple, two-box test?

If nothing else, Katrina has taught us that interjurisdictional regulatory problems require us, quite literally, to think outside the New Federalism boxes. Indeed, Michael Brown memorably intoned (from squarely within the box) that the “princip[les] of federalism should not be lost in a short-term desire to react to a natural disaster of catastrophic proportions,” fretting that a more proactive federal response would have undermined the very foundations of dual sovereignty.⁴²² His testimony sadly demonstrates that the New Federalism failed Katrina victims not for lack of good intentions, but for lack of imagination.

Now that the 39,000 refugees have left the “Third World hell-hole” that became New Orleans in the first few days after the storm,⁴²³ it is easier to find sympathy for how White House officials became mired in the federalism problems suggested by the response. After all, they were fairly interpreting the trajectory of the Supreme Court’s recent federalism rulings,⁴²⁴ and thus hesitated to invoke potential Stafford Act authority to intrude upon the state’s primary role as provider of intrastate relief and law enforcement services. But the interjurisdictional nature of the Katrina emergency demonstrates how a problem shaped beyond the comprehension of the strict-separationist model can cause the entire system to crash. Indeed, interjurisdictional problems spawn circumstances that exacerbate the inherent tension between underlying federalism values, with which the New Federalism is ill-equipped to handle. Although symptoms of this mis-

421. See Schapiro & Buzbee, *supra* note 381, at 1203–05 (arguing that the Rehnquist Court’s narrow federalism perspective threatens to impermissibly impinge on proper federal legislative power).

422. Brown Statement, *supra* note 61, at 3.

423. Thomas et al., *supra* note 56, at 40.

424. See *supra* Part III.B (discussing the distinct spheres of state and federal power in the New Federalism).

match were evident in foundering regulatory responses to less mediagenic interjurisdictional problems preceding Katrina (e.g., the disposal of low-level radioactive waste and the management of respiratory disease in Los Angeles), the Katrina debacle brought home to the nation a clear message: a legal framework built around a theory that does not track the real-world targets of regulatory response is unstable and unsustainable.

It also suggested an alternative, at least in the Katrina response that most Americans collectively imagined was possible. In this vision, the federal government would have assessed claims by the emergency to its own regulatory responsibility, and then weighed the regulatory crossover alternative (here, proactive federal intervention) against each of the federalism values at stake—the reasons for our federal system of government in the first place. It would have considered the severity of the problem, the capacity of the state and local governments to respond, and the relative risks to dual sovereignty checks and balances of crossing into the interjurisdictional gray area. The state and local governments would have made a similar evaluation, to the extent of their capacity. Most Americans apparently believed that the federal interest in saving the lives and relieving the human suffering of its own citizens far overwhelmed the risks to inter-sovereign diplomacy, but in any event, a conclusion would have been reached more efficiently and decisively if freed from the paralysis provoked by the New Federalism approach.⁴²⁵

This paralysis reflects perhaps the most serious trap of binary thinking promoted by the New Federalism, which is its essential suggestion that we must choose between *either* federalism *or* interjurisdictional problem-solving. Either we are faithful to the constitutional ideal of dual sovereignty, or we can effectively grapple with the collective action problems that we ask regulation to help us control. New Federalism frames this as the choice by positing the check and balance value as synonymous with federalism in general. But as important as they are, checks and balances are only *one* of the principles of good government that undergird American federalism. Indeed, there are a host of others—accountability, localism, problem-solving—all in tension with one another. The interpretive model of federalism that we choose determines how we mediate this tension, and New Federalism's solution is to privilege checks and balances over all others. So does faithfulness to federalism require that we forsake interjurisdic-

425. See *supra* note 101 and accompanying text (reviewing public disapproval of the federal response). To facilitate an efficient decisionmaking process, this Article proposes a jurisprudential standard. See *infra* Part VI.

tional problemsolving? It depends on the operative federalism model. New Federalism suggests so, but this Article suggests not.

Instead, the Court's future federalism jurisprudence should draw from a model of federalism that continues to protect our important interest in the balance of state and federal power while also affording the flexibility necessary for government at all levels to meaningfully address the problems we entrust to their care. To the extent that the New Federalism model cannot accommodate the dimensions of the interjurisdictional gray area, then it must be adjusted until it can, enabling more effective governance in accordance with a more robust theoretical model. Whether an act of regulatory crossover should be considered a constitutional violation should depend on a consideration of all federalism values that lead us to the system of dual sovereignty symbolized by the Tenth Amendment, not just the strict separation of state and federal powers for its own sake. Once again, it is not a choice about federalism or not, but rather *which* model of federalism realizes the best balance of the values that motivate federalism to begin with.

Which leads us to consideration of what exactly those values are, or the underlying question, *why federalism?*

V. FEDERALISM AND THE TUG OF WAR WITHIN

A. *Why Federalism?*

In building a workable model of federalism, we must understand the reasons for federalism, or for creating a federal system in the first place. What are the underlying values promoted by federalism that make us willing to struggle with these problems in the first place?

With unsurprising uniformity, federalist governments have historically arisen through the union of separately functioning polities or distinctive cultural groups, such as the American colonists' original thirteen states,⁴²⁶ the provinces of Canada,⁴²⁷ or the nation-states of the European Union.⁴²⁸ The choice of a federalism-based system

426. See Laycock, *supra* note 35, at 125 (noting that the original thirteen colonies were independent political identities before the ratification of the Constitution).

427. See Allen M. Linden, *Flexible Federalism: The Canadian Way*, in PATTERNS OF REGIONALISM AND FEDERALISM: LESSONS FOR THE UK, *supra* note 35, at 17, 21–22 (discussing the agreement to form a federal union between Canada East, Canada West, and the maritime colonies).

428. See Sanford Levinson, *Is Secession the Achilles Heel of 'Strong' Federalism?*, in PATTERNS OF REGIONALISM AND FEDERALISM: LESSONS FOR THE UK, *supra* note 35, at 207, 211 (comparing the current transformation of sovereign nation-states into the European Union to the original thirteen American colonies).

makes intuitive sense in such cases, as it draws efficiently on the established competencies of preexisting laws and authorities while offering protection for the potentially diverging interests of members of the political sub-units, who may have initially organized themselves around differences of language, ethnicity, religion, and/or culture.

Enthusiasm for federalism among the early Americans is understandable on these grounds alone, given eighteenth-century uncertainties about whether the new union they would form would really be any “more perfect” than the status quo. But two centuries of success later, the value of American federalism rests on somewhat different grounds from those that support many other federalism-based systems that continue to negotiate between culturally distinctive sub-polities.⁴²⁹ Red and blue state politics notwithstanding, the modern United States are characterized by remarkable homogeneity. With some exceptions, we share a dominant language and a common heritage of immigrant origins, and most of the rich diversity that exists within the nation is relatively similarly dispersed within the fifty states.⁴³⁰ As such, our continued commitment to structural tension between local and national authority must stem from a conviction that it confers important architectural advantages beyond the historical accident of our aggregative origins. Even at that time, many of these values were championed by the early federalism theorists among the Framers, most famously chronicled in the exchanges between James Madison, Alexander Hamilton, and John Jay in the *Federalist Papers*.⁴³¹

429. Cf. Rubin & Feeley, *supra* note 23, at 908–14 (arguing that the original colonial benefits of federalism no longer apply in the modern United States).

430. See *id.* at 922–23 (noting the practically identical political and economic organization of the fifty states); see also *id.* at 944–49 (arguing that the “nation-wide dispersion of ethnic and cultural identities, paralleling the dispersion of economic or ideological identities” indicates that the truly meaningful political community within the United States is the United States). Professors McGinnis and Somin further explain this phenomenon:

One reason that citizens may have less understanding of federalism today than they did in the past is that sentiments that may have previously motivated citizens to take an interest in and protect federalism have faded. The huge decrease in transportation costs and information costs in the twentieth century has created a mass culture that has largely eliminated cultural differences among states and has even substantially tempered regional distinctions. It is more difficult to feel strongly about states’ rights if you live in New Jersey and work in New York for a company with its headquarters in Texas. The social changes responsible for this decline in local attention seem irreversible and may be accelerating. As a result, citizens lack the attachments to their states that may have motivated them to pay attention to issues of federal structure in the past.

John O. McGinnis & Ilya Somin, *Federalism vs. States’ Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89, 96 (2004) (footnotes omitted).

431. See, e.g., THE FEDERALIST NO. 46 (James Madison), *supra* note 195, at 294–300 (discussing the tension between state and federal governments).

Still, we are well advised not to take our assumptions about the importance Americans place on constitutional federalism too far. Federalism as a structural feature of government is inherently content-neutral with regard to substantive political issues.⁴³² As a result, some suggest that for most Americans, federalism is a secondary political preference that has always received less consideration than first-order substantive issues such as civil rights, gun control, abortion, or the environment.⁴³³ For example, Professor Neal Devins champions the need for judicially enforceable federalism constraints with evidence indicating that political federalism constraints alone will fail, not because voters lack the knowledge or impetus to check the behavior of their representatives, but because “[t]he problem is more pervasive: [n]o one really cares about federalism.”⁴³⁴ Tracing the history of opportunistic invocation of federalism ideals from the Louisiana Purchase to the modern day, he argues that

the willingness of lawmakers and interest groups to manipulate federalism in order to secure preferred substantive policies is the rule. Indeed, the historical record is so overwhelming that it is hard to believe that a majority of informed voters would suspend their personal policy preferences in order to reap the benefits of structural federalism.

The propensity of the American people to pay more attention to desired results than to which level of government is acting on their behalf dates back to the Framers.

. . . .

. . . Rather than adhere to a consistent position on federalism, Americans have always let their views on first order policy priorities dictate their views on federalism.⁴³⁵

Among the more famous examples of such federalism opportunism is the role reversal between pro-slavery and abolitionist interests before and after the Civil War.⁴³⁶ Beforehand, abolitionists decried fugitive slave laws as constitutionally inappropriate federal intrusions into the

432. See Moreno, *supra* note 144, at 721 (noting that “[f]ederalism was a content-neutral principle” in nineteenth-century America); see also Lynn A. Baker, *Should Liberals Fear Federalism?*, 70 U. CIN. L. REV. 433, 454 (2002) (concluding, on the basis of federalism’s content-neutrality, that states’ rights help preserve individual liberties).

433. Devins, *supra* note 209, at 133.

434. *Id.* at 131, 137. If it were really true that no one cared about federalism, of course, we would rightly ask why judicially enforceable federalism constraints would be preferable to allowing ineffective political constraints work the people’s will.

435. *Id.* at 134.

436. *Id.* at 134–35; see also Moreno, *supra* note 144, at 725–27 (“[D]uring the 1850s, many southerners became Marshallian judicial nationalists, while many northerners became Jeffersonian-Jacksonian states-rights advocates.”).

proper realm of state law (while pro-slavery interests approved of this exercise of national authority).⁴³⁷ But their views on federalism reversed after the war, when abolitionists favored the use of national law and policy to forbid slaveholding, and pro-slavery interests championed their cause under the banner of states' rights.⁴³⁸

Professors Edward Rubin and Malcolm Feeley make a similar argument in support of their contrary proposition that judicial federalism constraints are not necessary.⁴³⁹ Despite their opposing view about the value of judicial enforcement (which stems from their skepticism that federalism offers any significant value at all, at least in the United States),⁴⁴⁰ their analysis of Americans' historically opportunistic use of federalism closely reflects Devins's:

During the Kennedy-Johnson era and the heyday of the Warren Court, states' rights became a rallying cry of those who opposed desegregation, social welfare, and controls on law enforcement agents. During the years of the Reagan and Bush administrations and the Rehnquist Court, proponents of abortion, gay rights, and abolition of the death penalty became enamored of federalism for equivalent reasons. This is perfectly good political strategy, but it is hardly a convincing argument for federalism. In fact, it demonstrates the weakness of federalism as a normative principle; because federalism's force is symbolic and not truly normative, it quickly becomes a proxy for more compelling substantive views that it happens to support.⁴⁴¹

Professors Rubin and Feeley level an additional challenge to the notion that Americans care deeply about federalism, asserting that even when Americans do tout the benefits of federalism, they are really praising something other than federalism. Instead, they are celebrating *decentralization*, a managerial concept that refers to the instrumental "delegation of centralized authority to subordinate units of either a geographic or a functional character" without reference to

437. Devins, *supra* note 209, at 134.

438. *Id.* at 134–35.

439. See Rubin & Feeley, *supra* note 23, at 910–14 (arguing that the principles of federalism and the remedy of judicial intervention serve only to prevent the implementation of sound national policy). For the iconic argument that federalism values are better protected by the political process than by judicial intervention, see Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

440. See Rubin & Feeley, *supra* note 23, at 907 ("In our view, federalism in America achieves none of the beneficial goals that the Court claims for it.").

441. *Id.* at 935.

any kind of dual sovereignty.⁴⁴² In other words, American federalism proponents often point to advantages yielded by the protection of local autonomy and diversity, but these localism values are more appropriately attributed to an architectural choice of decentralized authority that may or may not have any relationship to federalism.⁴⁴³ A government can arguably preserve the benefits of decentralized localism without a federal system of dual sovereignty,⁴⁴⁴ and a system of dual sovereignty will not necessarily protect genuine local autonomy.⁴⁴⁵ The argument for a federal system over a unitary system must contend with this critical point, and a model of federalism that will live up to its billing must take account of the fact that simply protecting an exclusive realm of state authority does nothing for the values associated with local autonomy so often claimed in support of federalism.

Accordingly, some have argued that the New Federalism revival either fails to protect the localist values it claims to champion in any meaningful way, or reflects an opportunistic political ploy attempting substantive political objectives under the unrelated guise of preserving constitutional federalism.⁴⁴⁶ The criticism has become more poignant in recent years, when the same Court that so often invalidated federal authority in the name of states' rights has also enabled preemption of several high profile state laws that appeared to offend

442. *Id.* at 910.

443. *See infra* Part V.A.3.

444. *See* Rubin & Feeley, *supra* note 23, at 914–26 (arguing that the four principal justifications of federalism are in actuality policy justifications for decentralization). Professors Rubin and Feeley explain that

[o]f the standard arguments for federalism, four are really arguments that specific national policies are best implemented by decentralized decision-making; these are public participation, effectuating citizen choice through competition among jurisdictions, achieving economic efficiency through competition among jurisdictions, and encouraging experimentation. . . . They are national strategies . . . linked to federalism only by confusing that concept with decentralization, and by the airy, flag-waving-in-the-breeze rhetoric that characterizes the entire subject.

Id. at 914–15.

445. *See* Barron, *supra* note 147, at 378–79 (arguing that limiting central power may not preserve local autonomy because the two spheres are intertwined).

446. *See, e.g.,* Neal Devins, *The Majoritarian Rehnquist Court?*, 67 LAW & CONTEMP. PROBS. 63, 63–65 (2004) (suggesting that the Rehnquist Court's decisions between 1995 and 2002 "may well reflect the personal preferences of the Justices voting to invalidate these laws," but can nonetheless be explained by majoritarian forces); Albert C. Lin, *Erosive Interpretation of Environmental Law in the Supreme Court's 2003–04 Term*, 42 HOUS. L. REV. 565, 626 (2005) (noting that the paucity of federalism discussion in the Court's environmental decisions in the 2003–04 Term "support the thesis that members of the Court voice federalism concerns inconsistently and opportunistically").

competing first-order policy preferences.⁴⁴⁷ *Gonzalez v. Raich*⁴⁴⁸ remains the most famous example (though it split the New Federalism coalition),⁴⁴⁹ holding that Congress's Commerce Clause authority includes the power to prosecute purely local cultivation of marijuana for medical use, despite a statewide referendum legalizing intrastate use and production of marijuana for approved medical purposes.⁴⁵⁰ In his *Lorillard Tobacco* dissent,⁴⁵¹ Justice Stevens suggested that the New Federalism harbors a purely partisan anti-regulatory agenda, comparing (1) *Lorillard Tobacco*'s holding that the Federal Cigarette Labeling and Advertising Act preempted local efforts to protect children by banning billboard cigarette advertising near schools, with (2) the same Court's holding in *United States v. Lopez* that the federal government lacked authority to protect children by banning the sale of guns near schools.⁴⁵²

Nevertheless, there may well be more principled explanations for these departures than that of the gored ox, and this piece takes the arguments of New Federalism proponents seriously and at face value to engage the conversation they have so powerfully started. That conversation demonstrates that the rationales for American federalism have remained remarkably consistent since publication of the *Federalist Papers* (notwithstanding the challenge by theorists like Rubin and Feeley).⁴⁵³ Then and now, favorable (and content-neutral) answers to the question "*why federalism?*" tend to reference three sets of structural good governance values: (1) the erection of safeguards against tyranny; (2) the promotion of accountability in government; and (3) the socially valuable benefits associated with localism, especially in fostering diversity and encouraging innovation through interjurisdictional competition.⁴⁵⁴

447. See *supra* Part III.B.

448. 545 U.S. 1 (2005).

449. Justice Kennedy joined the majority opinion and Justice Scalia concurred separately, while Chief Justice Rehnquist and Justices O'Connor and Thomas dissented. *Id.* at 3.

450. *Id.* at 32–33; see also *id.* at 34–35 (Scalia, J., concurring in the judgment).

451. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 590 (2001) (Stevens, J., concurring in part and dissenting in part).

452. *Id.* at 598 & n.8.

453. See *supra* notes 439–445 and accompanying text (outlining the argument by Professors Rubin and Feeley that American federalism serves none of the values claimed by its proponents). For a thoughtful refutation of Rubin and Feeley's claims, see Jackson, *supra* note 23, at 2217–20.

454. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (explaining that the federalist structure assures sensitivity to diverse societal needs, increases democratic involvement, allows for governmental experimentation, and makes government responsive by fostering competition); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for*

The following discussion reviews the strengths and weaknesses of the usual claims, and surfaces an additional, less obvious value to the mix that is neither stronger nor weaker than the others: the hidden problem-solving principle of federalism. As discussed below, these values stand in some tension with one another. Ultimately, a viable model of federalism is one that delivers on the advantages claimed by its proponents, but alternative models of federalism deliver on these values in differing ratios. A choice between models of federalism is really a choice about the best balance of protection afforded these underlying values when tensions arise—in other words, which values will cede to which other values, and under what circumstances.

1. *Checks and Balances*

A primary value associated with American federalism—and the one least vulnerable to confusion with the values of nonfederal decentralization—is its architectural promise of checks and balances.⁴⁵⁵ The division of authority between the national and state governments is designed to curb ambition on both sides of the divide, such that neither accumulates power beyond the counter-balancing forces of the other. As Alexander Hamilton described in the *Federalist Papers*, this serves as a bulwark against tyranny, safeguarding individual liberties against assault by an unchecked, overly powerful sovereign:

[I]n a confederacy the people, without exaggeration, may be said to be entirely the masters of their own fate. Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it prepon-

a Third Century, 88 COLUM. L. REV. 1, 3–10 (1988) (identifying four positive features of federalism: (1) limitation on power of federal government, (2) citizen participation in the political process, (3) political and cultural diversity, and (4) state experimentation); *see also* Garnett, *supra* note 147, at 22 (adding that federalism also protects the contribution of non-government “associations and mediating institutions” to the preservation of political liberty against centralized authority); Jackson, *supra* note 23, at 2214 (adding to the federalism list: “enhancing personal and group liberty or empowerment, by providing multiple layers of government to which citizens may appeal”).

455. As Alexis de Tocqueville wrote, “[m]unicipal bodies and county administrations are like so many hidden reefs retarding or dividing the flood of the popular will.” DEMOCRACY IN AMERICA 263 (George Lawrence trans., J.P. Mayer ed., Anchor Books 1969) (1835); *see also* Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1504 (1987) (book review) (noting that “[t]he diffusion of power, in and of itself, is protective of liberty”).

derate. If their rights are invaded by either, they can make use of the other as the instrument of redress.⁴⁵⁶

Hamilton assured his readers that the balance of power in the new federal system would successfully check any attempt by either side “to establish a tyranny.”⁴⁵⁷ Indeed, anxiety among the Framers about unchecked governmental authority was also evident in their adoption of such structural features as the bicameral legislature, the checks and balances erected between the three federal branches, and provisions protecting individuals directly against the excesses of state power (e.g., the protection of habeas corpus, the proscription of ex post facto laws, and the additional protections for individuals defined in the Bill of Rights).

Heeding the adage that “absolute power corrupts absolutely,” the check-and-balance value thus furthers a vision of good government in which the power of the state is never stored all in one reservoir, and no governmental actor becomes so powerful that it can act beyond the law. It was perhaps the paramount federalism value to the early pioneers of American federalism,⁴⁵⁸ and it is also the value that most animates the rhetorical New Federalism ideal of better differentiating the proper realms of state and federal governance. In *Gregory v. Ashcroft*,⁴⁵⁹ the Rehnquist Court invoked Hamilton’s words in a preamble

456. THE FEDERALIST NO. 28 (Alexander Hamilton), *supra* note 195, at 180–81. James Madison further described the value of this arrangement:

In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

THE FEDERALIST NO. 51 (James Madison), *supra* note 195, at 323.

457. THE FEDERALIST NO. 28 (Alexander Hamilton), *supra* note 195, at 180–81. Indeed, history demonstrates that such assaults on individual liberties are as likely to come from either side of the divide. Just as the states harbored entrenched racial and gender oppression (via slavery, Jim Crow laws, and legalized race and sex discrimination in employment until late in the twentieth century), the federal government gave us McCarthyism, the World War II era anti-sedition laws, and alleged excesses under the Patriot Act (including the recent allegations that the executive branch bypassed the laws regarding the Foreign Intelligence Surveillance Act by arranging for warrantless wiretaps).

458. See Ilya Somin, *Closing the Pandora’s Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments*, 90 GEO. L.J. 461, 471 (2002) (“For the Founding Fathers and their generation, the main rationale for federalism was not diversity or competition (the most familiar modern arguments) but the role of the states as a bulwark against federal tyranny.”).

459. 501 U.S. 452 (1991).

to the New Federalism,⁴⁶⁰ upholding as the “prerogative [of] citizens of a sovereign State” the mandatory retirement provision in the Missouri Constitution that had been challenged as age-based discrimination by state judges.⁴⁶¹ Writing for the Court, Justice O’Connor observed:

The constitutionally mandated balance of power between the States and the Federal Government was adopted by the Framers to ensure the protection of our fundamental liberties. 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

. . . .

One fairly can dispute whether our federalist system has been quite as successful in checking government abuse as Hamilton promised, but there is no doubt about the design.⁴⁶²

And yet, she warned, the design is of no value if the states’ ability to check the power of the federal government loses credibility: “If this ‘double security’ is to be effective, there must be a proper balance between the States and the Federal Government. These twin powers will act as mutual restraints only if both are credible. In the tension between federal and state power lies the promise of liberty.”⁴⁶³

As suggested in Justice O’Connor’s admonition, the check-and-balance value is the federalism principle that New Federalism most seeks to protect in defending the boundary between state and federal jurisdiction. Nevertheless, it is not at all clear that checks and balances would be well served by realizing the ideal of strict-separationist dual sovereignty. A healthy balance of state and federal power is certainly necessary to realize the “double security” that Justice O’Connor heralds, and protecting the uncontroversial spheres of state and federal authority against erosion is important in this regard. Nevertheless, it may also be that the very jurisdictional overlap implied by the

460. *Id.* at 458–59 (citing THE FEDERALIST No. 28, at 180–81 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

461. *Id.* at 473. Although the Court decided the case by interpreting petitioners’ claims under the ADEA and Equal Protection Clause, it grounded this analysis in a detailed disposition of the proper balance of state and federal power within the American system of federalism. *Id.* at 457–64.

462. *Id.* at 458–59 (citations and internal quotation marks omitted).

463. *Id.* at 459.

interjurisdictional gray area adds force to the system of checks and balances, because it enables citizens to wield governmental power at one level when they are unsatisfied with governmental performance at the other level. For example, history reveals an array of circumstances in which both the federal government and the states have championed individual rights against neglect by the other side,⁴⁶⁴ from the federal assertion of rights for African Americans and women during the civil rights movement to the protection by certain states of rights beyond those afforded at the federal level (ranging from gay rights⁴⁶⁵ to property rights⁴⁶⁶). The increasing attention paid by state and local government to the threat of climate change in the face of federal inattention may prove the next example.⁴⁶⁷ Like the innovation of the bicameral legislature, a little redundancy may strengthen, rather than weaken, the check-and-balance value.

That a healthy balance of state and federal authority yields a bulwark against tyranny seems beyond doubt among most Americans,⁴⁶⁸ and Justice O'Connor may well be correct in citing it as the "principle benefit" of federalism.⁴⁶⁹ Surely the structural tension between state and federal power has yielded benefits claimed on both sides of the divide, from the federal vindication of constitutional rights to the preservation of state authority over taxation and land use policies. Any model of federalism true to the intention of a federal system (and not simply a decentralized system) must contend with threats to this fundamental value.

Still, checks and balances are not the only value that underlies American federalism. After all, if the only purpose of federalism were the preservation of tension between the authority of two independent sovereigns, then we might best be served by a system of dual sovereignty between true "equals"—in other words, one without the

464. See Laycock, *supra* note 35, at 119 ("Two views of federalism and liberty have competed through most of American history: that states protect liberty against the dangerous federal government, which must be kept small; and that the federal government protects liberty against recalcitrant states, and must be large enough to do so.").

465. See, e.g., Steve LeBlanc, *Massachusetts Retains Gay Marriage*, DESERET MORNING NEWS, Sept. 15, 2005, at A12.

466. See, e.g., Tim Hoover, *Eminent Domain Reform Signed*, KAN. CITY STAR, July 14, 2006, at B2 (reporting on Missouri's legislative eminent domain reform that gives citizens new rights).

467. See *infra* note 527 and accompanying text (discussing the northeastern states' Regional Greenhouse Gas Initiative).

468. *But see* Rubin & Feeley, *supra* note 23, at 928–29 (noting that "[w]hile there is an undeniable validity to this argument for federalism, it can readily be overstated," especially given the overwhelming military might of the federal government).

469. See *Gregory*, 501 U.S. at 458 ("Perhaps the principal benefit of the federalist system is a check on abuses of government power.").

Supremacy Clause, departing from the constitutional model described in *McCulloch v. Maryland*.⁴⁷⁰ But it is hard to imagine the usefulness of such a model, which seems doomed to the sort of political gridlock that forced early America's reconsideration of the Articles of Confederation. In other words, though a dual sovereignty between equals might perfect checks and balances, it would overly compromise the kinds of regulatory problem-solving that the framers hoped the new Union would enable. Moreover, the maintenance of structural tension between two independent sovereigns confounds accountability to the voters, and need not promote any of the values of localism and decentralization so often championed as advantages of federalism.⁴⁷¹ Certainly, tension between the independent sovereigns of the United States and the Soviet Union yielded few decentralizing benefits to the citizens of either nation during the Cold War.

In sum, the check-and-balance value may be a critical federalism value—certainly the one most protected by the New Federalism's quest for strict-separationist dual sovereignty, and perhaps even the one that most preoccupied the Framers—but it is not the only one that matters.

2. *Accountability*

The text of the New Federalism decisions indicates that accountability is a favorite federalism value among the New Federalism architects. As Justice Scalia observed in *Printz*, “[t]he Constitution . . . contemplates that a State’s government will represent and remain accountable to its own citizens,”⁴⁷² and federalism is often championed as a means of ensuring that government remains accountable to the electorate by enabling citizens to recognize which elected officials are responsible for which policies (and to reward or punish policy choices accordingly).⁴⁷³ In other words, if you can always tell the difference between the realms of state and federal regulatory authority, then you always know “which bums to throw out” when you don’t like how things are going in a particular regulatory context.

470. 17 U.S. (4 Wheat.) 316, 425–36 (1819); see *supra* notes 153–157 and accompanying text (discussing the relationship between the dual sovereigns in light of the Supremacy Clause).

471. See *infra* Part V.A.2–3.

472. *Printz v. United States*, 521 U.S. 898, 920 (1997).

473. See, e.g., Jackson, *supra* note 23, at 2205 (stating that “[f]ederal commandeering of states . . . can risk confusing the lines of political accountability”); Merritt, *supra* note 454, at 61–62 (describing how federal officials can escape accountability by compelling state governments into action).

Accordingly, in overturning portions of the Low-Level Radioactive Waste Policy Act held to commandeer state legislative authority in *New York*,⁴⁷⁴ Justice O'Connor warned that "where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished" by frustrating citizens' ability to keep track of which sovereign is responsible for what regulation of hazardous waste disposal.⁴⁷⁵ Justice O'Connor clarified further:

If the citizens of New York, for example, do not consider that making provision for the disposal of radioactive waste is in their best interest, they may elect state officials who share their view. That view can always be pre-empted under the Supremacy Clause if it is contrary to the national view, but in such a case it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular. But 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.⁴⁷⁶

Justice O'Connor thus identifies a primary concern regarding how state and federal regulatory overlap may blur lines of accountability—that is, by misleading voters to hold state representatives accountable for policy choices forced upon them by federal representatives who escape criticism by the same confused voters. The New Federalism decisions highlight the importance of protecting accountability in addition to checks and balances, but whether the decisions have actually succeeded in promoting greater accountability remains debatable. For example, while the Court's decision in *New York* purported to protect regulatory accountability, its ultimate legacy has been the creation of a "hot potato" political morass for which both sides appear to have abdicated regulatory responsibility.⁴⁷⁷

Perhaps a more troubling way in which regulatory overlap could compromise accountability is the possibility that the federal government may escape responsibility for policy choices that unreasonably impose forced costs on the states via "unfunded mandates." The problem of unfunded mandates has received considerable and war-

474. *New York v. United States*, 505 U.S. 144, 180 (1992).

475. *Id.* at 168.

476. *Id.* at 168–69.

477. *See supra* Part IV.B.2.b (discussing the aftermath of *New York*).

ranted attention.⁴⁷⁸ Even if voters were not confused about a scenario in which a federal program indirectly imposed costs on their state, they might have a harder time allocating disappointment about the ways that fully unconstrained cost-shifting might undermine the success of other state policies. Yet the same problem has also demonstrated, via the Unfunded Mandates Reform Act of 1995,⁴⁷⁹ how the political process may, at least in some circumstances, successfully vindicate federalism concerns. The means by which the unfunded mandates problem received repeated federal attention (by executive order⁴⁸⁰ and congressional legislation⁴⁸¹) shows that voters concerned about cost imposition on their states successfully identified the problem and voiced their dissatisfaction through their federal representatives—belying an inherent weakness in the accountability rationale for federalism. It assumes that voters either cannot understand what is happening between the federal and state governments or that they cannot voice their political preferences through their federal representation, when—at least in the case of unfunded mandates—they apparently did both.⁴⁸² Similarly, Justice O’Connor’s argument in *New York* has been criticized for resting on the unsupported empirical premises “that voters will be unable to determine what level of govern-

478. See, e.g., Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 890 (1979) (noting the quandary for states when Congress directs them to enact certain policies without providing matching funding levels, forcing the states to choose the federal agenda over their own).

479. Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (codified in scattered sections of 2 U.S.C.). A primary purpose of the Unfunded Mandates Reform Act is “to end the imposition, in the absence of full consideration by Congress, of Federal mandates on State, local, and tribal governments without adequate Federal funding, in a manner that may displace other essential State, local, and tribal governmental priorities.” 2 U.S.C. § 1501(2) (2000).

480. Both President Reagan and President Clinton have required agencies to conduct a pre-promulgation cost analysis. See Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981) (“Regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society.”); Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) (replacing previous standard with whether “the benefits of the intended regulation justify its costs”).

481. Congress has similarly enacted legislation that requires agencies to consider the costs of their proposed regulations. E.g., 2 U.S.C. § 1501(7)(B) (requiring federal agencies to consider “the budgetary impact of regulations containing Federal mandates upon State, local, and tribal governments and the private sector before adopting such regulations”); Regulatory Flexibility Act of 1980, 5 U.S.C. §§ 601–612 (2000) (requiring agencies to prepare regulatory flexibility analysis for any regulation that have will have a significant economic impact on small entities).

482. Both the executive and legislative versions of unfunded mandates reform appear to be examples of successful federally enacted political constraints on regulatory overlap, especially since they constitute votes against interest by federal representatives (if federal agents are presumed to want more power).

ment is responsible for a particular program or policy, thus permitting federal officials to escape deserved blame”⁴⁸³ and “that state and local officials are incapable of informing their constituents when ‘Washington’ is really responsible for a particular policy or outcome.”⁴⁸⁴

Moreover, although accountability concerns doubtlessly motivate the constitutional design, arguments raised about the role of federalism in preserving accountability stretch the relationship a bit taut. There are a host of constitutional features more clearly designed to accomplish the objective of preserving an accountable, noncorrupt federal government, including the requirement of regular elections at fixed intervals, limits on forms of corruption and self-dealing by elected officials, and the requirement that representatives’ voting records be made publicly available.⁴⁸⁵ By contrast, federalism is an architectural choice that muddies accountability by design, causing Americans to be subjects of two sovereigns in ways that confuse the legally uninitiated even without reference to the uncertain scope of Congress’s commerce authority.⁴⁸⁶ If accountability were all that mattered, then a unitary (or even a confederate) system would clearly be preferable; nobody would confuse which level was responsible for policy successes and failures if citizens only had to keep track of one level of government.⁴⁸⁷ And yet we chose a federal system nonetheless—likely for check-and-balance advantages discussed above (and perhaps the problem-solving advantages discussed below), further demonstrating the tensions that swirl among the competing values on which federalism is premised.

In sum, it may well be that preserving a clear boundary between state and federal regulatory spheres does advance accountability by some measure, and that a blurrier boundary sacrifices what clarity there might be in the already muddy world of dual sovereignty.⁴⁸⁸ Ac-

483. H. Geoffrey Moulton, Jr., *The Quixotic Search for a Judicially Enforceable Federalism*, 83 MINN. L. REV. 849, 877 (1999).

484. *Id.*

485. See Jackson, *supra* note 23, at 2201 & nn.96–99 (outlining these constitutional features with greater particularity).

486. Anecdotal experience among lawyers concerning their relationship with clients shows how often those without explicit legal training or experience are surprised to discover that different states maintain different statutory and common law treatments of such basic legal institutions as tort and contract principles, and how they are often ignorant of the distinction between state and federal law even in their most uncontroversially traditional realms. It might be argued that this is a result of the erosion of federalism constraints, and that similarly situated citizens would have minded the difference with greater acuity in earlier times.

487. See, e.g., Hills, *supra* note 201, at 828 (“If one’s goal is to maximize political accountability, then one would simply adopt a unitary state.”).

488. For example, addressing the deficiencies of *Printz*, Jackson notes:

cordingly, the strict-separationist model may indeed offer the greatest protection for accountability values in a federal system, by mitigating the confusion inherently caused by dual sovereignty as much as is possible. But the fact that the accountability value is already sacrificed by design in the dual sovereign system suggests a weak claim for vindication when its protection creates tension with more primary values, such as checks and balances or problem-solving. Perhaps in light of this problem, the accountability rationale for judicially enforceable federalism constraints is made less often by academic champions of federalism⁴⁸⁹ than it is in the New Federalism decisions themselves.⁴⁹⁰

3. *The Benefits of Localism*

As important as the check-and-balance value was to the authors of the *Federalist Papers* and as fiercely as the New Federalism decisions champion the accountability value, modern federalism theorists most emphasize the federalism values that attend to the socially desirable benefits of protecting local authority, including fostering localized diversity, encouraging innovation, and developing economic efficiency through interjurisdictional competition among diverse localities.⁴⁹¹ To be sure, there are important differences between the protection of state authority against federal incursion and the promotion of true local autonomy, which most treatments of federalism—including this one—threaten to conflate.⁴⁹² However, this Article evaluates alternative models of federalism, rather than the choice between federalism

Federal commandeering of states, therefore, can risk confusing the lines of political accountability—but the extent to which this is likely (or more likely than in other forms of federal-state action) depends on the substance and substantiality of the burden. Political accountability may be relevant but does not of itself justify the broad rule adopted by the Court.

Jackson, *supra* note 23, at 2205.

489. For example, Professor Ilya Somin, an enthusiastic modern champion of American federalism, does not even address the accountability rationale in his recent treatment of how federal subsidization of state programs undermines the benefits of federalism. Somin, *supra* note 458, at 464–73. Instead, Somin identifies three benefits of federalism—“responsiveness to diverse local preferences, horizontal competition between states, and vertical competition between states and the federal government”—and describes how federal subsidization of state programs undermines each benefit. *Id.*

490. See *Printz v. United States*, 521 U.S. 898, 920 (1997) (noting the relationship between the constitutional system of dual sovereignty and dual accountability); *New York v. United States*, 505 U.S. 144, 168–69 (1992) (explaining that compelling states to implement federal policies diminishes the accountability of state and federal officials).

491. See Somin, *supra* note 458, at 464–71 (discussing the benefits of interstate competition on local and state levels).

492. For a full exposition of the difference between empowering states and supporting localism (and the importance of this difference to federalism), see generally Barron, *supra* note 147.

and non-federalism, so the relevant variables for present purposes remain within the context of a federal system. As such, the following discussion focuses on the benefits of a decentralized model of federalism that are associated with the protection of local regulatory authority (by which I broadly mean the power of all regulatory bodies more localized than the national government).

The preference for localized over centralized decisionmaking proceeds from the conviction that “[t]here is a value in ensuring that local jurisdictions have the discretion to make the decisions that their residents wish them to make.”⁴⁹³ Indeed, in *Gregory v. Ashcroft*, the Court observed how several such advantages attend federalism, each fostering a “decentralized government that will be more sensitive to the diverse needs of a heterogeneous society.”⁴⁹⁴ Writing for the Court, Justice O’Connor praised federalism because “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.”⁴⁹⁵

The claim perhaps closest to most Americans’ hearts but most easily revealed as one for decentralization instead of federalism is the claim regarding public participation, which appears to be “that locating various decisions at the regional or local level will enable more people to participate in [the making of] these decisions.”⁴⁹⁶ It may be that a federal system increases citizen involvement in the democratic process, perhaps by enticing greater participation with the promise of more meaningful localized influence than might be true in a unitary system. However, to support true federalism rather than mere decentralization, the distinction must be less about the opportunity for participation and more about the appeal of making decisions independent from centralized national authority. After all, even a fully centralized polity may still rely heavily on localized participation, even if the outer bounds of local decisionmaking are constrained within a centralized plan. For example, France, a model of Western democracy, is divided into more than two dozen regions (subdivided into some 100 departments that are further subdivided into some 350

493. *Id.* at 382.

494. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

495. *Id.*

496. Rubin & Feeley, *supra* note 23, at 915.

arrondissements for administrative purposes), but operates as a unitary semi-presidential system with a bicameral legislature.⁴⁹⁷

Perhaps for this reason, the promotion of localized diversity and the encouragement of innovation and efficiency through interjurisdictional competition are usually the most enthusiastically championed localism-related federalism benefits among academic theorists.⁴⁹⁸

a. Diversity

In protecting a sphere of local authority, federalism is frequently viewed as a refuge for regional diversity and multiculturalism—or as the *Gregory* Court phrased it, federalism ensures that “government . . . will be more sensitive to the diverse needs of a heterogeneous society.”⁴⁹⁹ By enabling local majorities to pursue distinctive policymaking preferences, it is hoped that federalism will produce greater citizen satisfaction than can be accomplished by a unitary, “one-size-fits-all” government. Assuming that locally diverse preferences exist, Professor Ilya Somin describes how a federalist architecture ideally maximizes citizen satisfaction:

If, for example, some state-level majorities prefer a policy of high taxes and high levels of government services while others prefer low taxes and low service levels, they can each be accommodated by their respective state governments. A unitary government with a one-size-fits-all policy will, by contrast, likely leave a larger proportion of the population dissatisfied with the resulting package of policies.⁵⁰⁰

Moreover, at least in contexts more regionally heterogeneous than the United States (for example, in Switzerland, where four national languages and distinctive regional cultures coexist among twenty-six states),⁵⁰¹ federalism can “ease racial, ethnic, and ideological conflicts

497. Nicolas Marie Kublicki, *An Overview of the French Legal System from an American Perspective*, 12 B.U. INT’L L.J. 57, 59–60 (1994).

498. See, e.g., Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 775–77 (1995) (arguing that responsiveness to diverse local preferences and interstate competition are principal arguments in favor of federalism); McConnell, *supra* note 455, at 1493–94, 1498–1500 (same); Somin, *supra* note 458, at 464–65, 468–69 (same).

499. *Gregory*, 501 U.S. at 458.

500. Somin, *supra* note 458, at 464–65.

501. SWISS FED. STATISTICAL OFFICE, STATISTICAL DATA ON SWITZERLAND 2006, at 4–5 (2006), http://www.bfs.admin.ch/bfs/portal/en/index/themen/die_schweiz_in_ueberblick/ts.Document.76607.pdf.

by allowing each of the opposing groups to control policy in its own region.”⁵⁰²

By and large, diversity in the United States is less regionalized than it is in other federalist societies that are more markedly divided by language, religion, race, or ethnicity.⁵⁰³ Moreover, many of the political preferences that most divide contemporary Americans—such as abortion, affirmative action, or gay marriage—involve contentions about the kinds of individual rights that could trump federalism concerns, if an individual right protected against federal or state incursion is shown. In this respect, diversity-based claims for federalism that are poignantly real in other federalist nations may be overstated in the United States.

Still, as Professor Donald Regan observes, “[o]ur national culture is already too homogenized to expect great differences between the states, but what cultural differences still remain should not be further eroded by central legislation without good reason.”⁵⁰⁴ American federalism has enabled the localized expression of a host of regional preferences that do not appear to implicate clear constitutionally protected civil liberties, such as the apparent preference of most Oregonians that citizens should be entitled to the choice of euthanasia in certain circumstances,⁵⁰⁵ or of most Californians that local property taxes should be assessed on the basis of acquisition value instead of market value,⁵⁰⁶ or of most Missourians that their judges should not exceed a certain age.⁵⁰⁷ Perhaps the most important realms of localized diversity are preserved at the truly municipal level, where decisions about some of the most compelling matters of public policy are made, including crime control, education, and land use planning.⁵⁰⁸ In any event, the diversity value becomes perhaps more powerful

502. Somin, *supra* note 458, at 465.

503. *See supra* note 430 and accompanying text (discussing the homogeneity of the United States).

504. Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554, 558 (1995).

505. *See Gonzales v. Oregon*, 126 S. Ct. 904, 911 (2006) (discussing the ballot-measure-approved Oregon Death With Dignity Act).

506. This is the policy behind California’s famous “Proposition 13.” *See, e.g., CAL. TAXPAYERS ASS’N, PROPOSITION 13: LOVE IT OR HATE IT, ITS ROOTS GO DEEP* (1993), <http://www.caltax.org/research/prop13/prop13.htm> (discussing background of Proposition 13).

507. *See Gregory v. Ashcroft*, 501 U.S. 452, 471 (1991) (noting that the challenged provision of the Missouri Constitution, which established a mandatory retirement age of seventy for judges, was “approved by the people of Missouri as a whole”). For some, this case approached the scenario in which civil rights should trump federalism concerns, but the Supreme Court has not applied the same level of scrutiny in reviewing claims of age discrimination that it has for claims of race or gender discrimination. *Id.* at 470.

508. Barron, *supra* note 147, at 381.

when coupled with the possibility of interjurisdictional competition and innovation.

b. Competition and Innovation

By enabling local policymaking autonomy, federalism encourages interjurisdictional competition between local governments (horizontally) and between local and national government (vertically) toward innovative policies less likely to be discovered through centralized planning. In this respect, federalism both promotes the ideal of market-style efficiency championed by economic federalism theorists and the “laboratory of ideas” championed by Justice Brandeis⁵⁰⁹ that are now so often touted as among federalism’s chief assets.

According to the interjurisdictional competition ideal, mobile citizens vote their regulatory preferences by establishing roots in localities that are governed so as to reflect their priorities, always maintaining the option of leaving (or the potential of “exit”) if their prospects appear better elsewhere. If they become disillusioned with their chosen locality, or another adopts preferable policies, citizens can “vote with their feet” by relocating to the preferred jurisdiction.⁵¹⁰ Ideally, interstate competition, like ordinary market competition, encourages states “to provide citizens with the most attractive possible package of public services at the lowest possible cost in taxes and regulatory burdens.”⁵¹¹ Professor Somin distinguishes the force of this competition value from the more passive mechanism of the diversity value:

Whereas the theory of interstate diversity assumes merely that states are responsive to the preferences of citizen-voters already residing within their boundaries, the theory of interstate competition asserts that states actively compete with each other to attract new citizens, who can improve their lot through the power of “exit” rights. Conversely, states also strive to ensure that current residents will not depart for greener pastures offered by competitors. Citizens dissatisfied with state policy have the option not only of lobbying for changes but also of moving to another state that deliberately seeks to attract them with more favorable policies. To the

509. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (comparing the states to laboratories in which to “try novel social and economic experiments”).

510. Richard A. Epstein, *Exit Rights under Federalism*, 55 *LAW & CONTEMP. PROBS.* 147, 150 (1992).

511. Somin, *supra* note 458, at 469.

benefits of political voice provided by interstate diversity, the possibility of interstate competition adds those of exit.⁵¹²

The theory of interstate competition draws its insight from Albert Hirschman's classic theory of how the recovery mechanisms of "exit" and "voice" enable organizations to effectively adapt and survive amidst changing consumer, investor, and employee preferences.⁵¹³ However, the proposition that citizens will leave their homes in dissatisfaction over any particular local policy choices may be less convincing than Hirschman's original thesis, which applied to the behavior of firms in the marketplace. As some have argued, the cultural and family ties that bind individuals to their communities would seem to operate with more force than product, brand, or even employee loyalty.⁵¹⁴ In addition, most localities simultaneously pursue so many different policies that it would be difficult to tie a given citizen's decision to relocate to a particular failed policy choice, at least for all but the most motivated single-issue advocates.⁵¹⁵ For example, there has been no apparent influx into Massachusetts by gay couples seeking to take advantage of laws enabling gay marriage by state citizens, nor a marked exodus of citizens from Massachusetts who oppose that policy.⁵¹⁶ Moreover, citizens are statistically more likely to move within their home states than between states,⁵¹⁷ but the Constitution preserves no local autonomy within states that would prevent the states themselves from adopting centralized planning policies that would frustrate the possibility for true local diversity and competition.

512. *Id.* at 468 (footnote omitted).

513. ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* (1970).

514. See Patrick C. Jobs et al., *A Paradigm Shift in Migration Explanation*, in *COMMUNITY, SOCIETY AND MIGRATION* 1, 23 (Patrick C. Jobs et al. eds., 1992) ("Despite the prevalent metaphorical acceptance of an economic model as the explanation governing how people behave, the analyses of migration presented here indicate that noneconomic factors continue to help determine why, when, where and who moves."); Shauhin A. Talesh, Note, *Welfare Migration to Capture Higher Benefits: Fact or Fiction?*, 32 *CONN. L. REV.* 675, 712 (2000) (warning that "[c]oncentrating solely on benefit levels causes analysts to overlook such factors as relationships with family and friends, as well as safety and security in where to live").

515. See, e.g., Barry Friedman, *Valuing Federalism*, 82 *MINN. L. REV.* 317, 387–88 (1997) ("Even when moves occur, they tend to be for reasons largely unrelated to government policy decisions . . .").

516. *But see* Bill Zajac, *Gay Marriage War Heats Up*, *REPUBLICAN*, Jan. 13, 2004, at A1 (noting that anti-gay partisan groups moved into Massachusetts in the wake of the ruling).

517. Abraham Bell & Gideon Parchomovsky, *Of Property and Federalism*, 115 *YALE L.J.* 72, 77 (2005) ("According to statistics compiled by the U.S. Census Bureau, 43.4 million Americans changed their place of residence between March 1999 and March 2000, 19.4 million of whom moved to new states.").

Nevertheless, if the conventional wisdom is true that most relocations take place for economic reasons (to follow a job or educational opportunity), then state policies that encourage or discourage economic opportunities may best exemplify the power of interjurisdictional competition. In addition, state tax policy choices appear to motivate exit and loyalty choices among at least some particularly sensitive classes of citizens, such as retirees and young people. For example, Florida's decision to collect neither personal income taxes nor estate taxes may have contributed to the in-migration of many retirees in recent decades,⁵¹⁸ simultaneously raising concerns by families with school-age children about dropping local investment in school budgets.⁵¹⁹ Similarly, it has been speculated that California's famous 1978 decision in Proposition 13 to tax real estate on acquisition value rather than conventional market value may have contributed to the retention of long-time homeowners reluctant to give up their extremely favorable tax status,⁵²⁰ though at the expense of younger Californians and new families more likely to leave the state in search of affordable homes elsewhere. Some have argued that the most significant results of interjurisdictional competition are experienced not by citizens but by businesses, who flock to incorporate under Delaware's comparatively business-friendly state laws, and perhaps to states with forgiving business tax policies, such as Florida or Nevada.⁵²¹

518. See StateofFlorida.com, Florida Tax Guide, <http://www.stateofflorida.com/flortaxguid.html> (last visited Mar. 15, 2007) ("There is no personal income tax in Florida."). Another possible explanation, however, is the combination of mild winter weather and the new availability of air conditioning during the summer. Indeed, federalism scholars have debated whether the large in-migration to the southern states in recent decades is better attributed to innovative tax-incentives and other local policy choices or innovations in inexpensive air conditioning.

519. Cf. Matthew J. Meyer, *The Hidden Benefits of Property Tax Relief for the Elderly*, 12 ELDER L.J. 417, 419–20 (2004) ("Cuts in state aid to schools have also forced local governments to choose between decreasing school budgets and increasing taxes to cover the shortfalls.").

520. See Les Picker, *The Lock-in Effect of California's Proposition 13*, NBER DIS., Apr. 2005, at 4. This study confirms that residents are less likely to move from their California homes in order to reap the advantages of lower tax rates on longer-owned properties in a market where property values are increasing, but does not address the question of whether homeowners are more or less likely to leave California when they do move. It may be possible to extrapolate from the fact that Californians move less often than other state residents that they leave California less often than residents in other states leave their states, but more data is needed.

521. See, e.g., CURTIS S. DUBAY & CHRIS ATKINS, TAX FOUND., 2007 STATE BUSINESS TAX CLIMATE INDEX 2 fig.1 (2006), <http://www.taxfoundation.org/files/bp52.pdf> (finding Florida and Nevada as the fourth and fifth most-friendly states in terms of business taxes). However, although the Tax Foundation rated Wyoming above all other states for the business-desirability of its tax laws and New York forty-seventh, there is much more business conducted in New York than in Wyoming—demonstrating the limits of such conjecture.

In addition to the hope that market-like competition between localities will improve governance and keep it closely tethered to citizens' preferences, the interjurisdictional competition value enables states to function as the "laboratories of ideas" envisioned by Justice Brandeis,⁵²² exploring innovative means of solving regulatory problems in ways that might ultimately benefit the nation as a whole. In this regard, the innovation/competition value can be claimed by competing models of federalism that promote alternatively more localist or nationalist ends. From the localist perspective, federalism-enabled competition should allow states to pursue and follow different policies in order to allow citizens choices in a "marketplace" of state alternatives. From the nationalist perspective, the laboratory of ideas is valuable because it produces better regulatory solutions than a centralized planner could, enabling those proven solutions to be adopted nationally with fewer risks. Indeed, as Professors Issacharoff and Sharkey have pointed out, this is the possibility that Justice Brandeis intended to preserve in the oft-ignored second half of his famous quote, in which he praised the possibility 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*."⁵²³

The laboratory/competition value of federalism has indeed produced important regulatory innovations, many of which have later been adopted by other states or the nation as a whole, including many in the classically interjurisdictional environmental arena. For example, California pioneered the regulation of automobile emissions, leading to the adoption of a federal vehicle emissions standard,⁵²⁴ while New York recently became the first state to offer tax incentives to the builders and developers of energy-efficient and environmentally friendly buildings,⁵²⁵ a policy now followed in thirty-five other states.⁵²⁶ Similarly, a coalition of Northeastern and Mid-Atlantic states

522. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (noting that states may serve as laboratories for incubating novel regulatory approaches).

523. *Id.* (emphasis added); see also Issacharoff & Sharkey, *supra* note 31, at 1355 (noting that the latter part of Justice Brandeis's aphorism has important lessons for federalism as well).

524. Jonathan H. Adler, *The Fable of Federal Environmental Regulation: Reconsidering the Federal Role in Environmental Protection*, 55 CASE W. RES. L. REV. 93, 103 (2004).

525. See National Resources Defense Council, New York's Green Building Tax Credit, <http://www.nrdc.org/cities/building/nnytax.asp> (last visited Mar. 15, 2007).

526. See Andrew Meyerson, *The Dollars and Cents of Green Construction*, J. ACCT., May 2005, available at <http://www.aicpa.org/pubs/jofa/may2005/meyerson.htm> (appending a chart of the thirty-five states that offer a combination of income, corporate, property, or sales tax incentives to green building projects).

has recently formed the Regional Greenhouse Gas Initiative, a regulatory cap-and-trade partnership.⁵²⁷

The socially valuable benefits of localism are thus powerful rationales for federalism—or, at least, for a particular kind of federalism. The choice of a federal system more generally does not necessarily ensure that these values will actually be advanced. For example, a model of federalism that prioritizes the check-and-balance value over competing considerations could theoretically undermine localism values, since balancing power between the national and state governments offers no protection for localism at the municipal level, from which many of the benefits of local diversity and competition most organically stem. After all, dual sovereignty divides authority between a centralized national government and regional state governments, but most states are far too big to function as local communities; many are on par in size with the nation-states of Europe, and some even rank among the world's largest economies.⁵²⁸ The Constitution says nothing that would prevent state governments from becoming the very central planners, scorned by economic theory federalists, that would suppress local autonomy, diversity, and competition.

Ultimately, a federalism model can be carefully elaborated to balance consideration of localism with anti-tyranny and other federalism values, but unmodified “federalism” may or may not. For example, though New Federalism proponents claim the socially valuable benefits associated with localism in support of their movement, both the partnering preemption cases and the New Federalism's strict-separationist rhetoric suggests that the Rehnquist Court's model of federalism actually prioritizes the check-and-balance value above localism. Professor Barron similarly argues that the New Federalism model has

527. Participating states include Maine, New Hampshire, Vermont, Connecticut, New York, New Jersey, and Delaware. Regional Greenhouse Gas Initiative: An Initiative of Northeast and Mid-Atlantic States of the U.S., <http://www.rggi.org> (last visited Mar. 15, 2007). In addition, California recently set standards for carbon dioxide automobile emissions in hopes of achieving significant state-based reductions by 2016, although the Alliance of Automobile Manufacturers has asserted that the regulations are preempted by the CAA. First Amended Complaint for Declaratory and Injunctive Relief at 5, 23–24, *Central Valley Chrysler-Jeep, Inc. v. Witherspoon*, No. 1:04-cv-06663-REC-LJO (E.D. Cal. Feb. 16, 2005); *see also* Pendergrass, *supra* note 258, at 8 (describing other recent state initiatives to combat environmental problems in Washington, Maine, Maryland, Michigan, and Pennsylvania).

528. For example, in 2001 the State of California beat out the nation of France to become the world's fifth largest economy. *California Now World's Fifth-Largest Economy*, SILICON VALLEY/SAN JOSE BUS. J., June 15, 2001, available at <http://sanjose.bizjournals.com/sanjose/stories/2001/06/11/daily58.html>. In 2004, the Texas state economy ranked as the eighth largest in the world. Bus. & Indus. Data Ctr., Overview of the Texas Economy, <http://www.bidc.state.tx.us/overview/2-2te.htm> (last visited Mar. 15, 2007).

not demonstrated great regard for localism values, and indeed, that the American federalism discourse has failed to establish a meaningful baseline of localism for evaluating New Federalism's claims on this front.⁵²⁹ His work demonstrates that strong state authority (and/or weak national authority) may actually compromise localism values by suppressing municipal autonomy or otherwise frustrating a local community's ability to pursue its desired ends without outside interference.⁵³⁰

This last insight goes to the heart of interjurisdictional problem-solving, in which disparate communities discover interlinked and interdependent interests in what may at first seem an overtly local or national problem—such as local land use decisions that impact the quality of interjurisdictional waters, or national security programs that impact local law enforcement. After all, if local autonomy were all that mattered, we could always disintegrate the Union—but the fact that we turned to a federation in the first place suggests the ways in which the ability of local communities to pursue their desired ends relies on coordinated activity with other communities. For example, it was the early States' recognition that centralized coordination was necessary to realize efficient interstate commerce, provide for the common defense, and resolve interstate disputes that led to the rejection of the Articles of Confederation in favor of constitutional federalism. Indeed, the limitations of the local autonomy value in vindicating the interests of individual communities leads nicely to the problem-solving value of federalism to which we turn in the next Section.

For most academic treatments of federalism values, this might well prove the end of the discussion. Federalism can promote good government, in various degrees, by encouraging accountability and public participation, forestalling tyranny, and fostering localism. However, there is an additional, often overlooked value further embedded into the way in which Americans generally conceive of the relationship between federalism and localism values—another means by which federalism promotes good government, and a separate benefit yielded by the choice of a federal system. This is the hidden problem-solving value of federalism, inconspicuously partnered with the preference for localism in the federalism-based approach that extols

529. See Barron, *supra* note 147, at 377–81 (arguing that the Court's New Federalism principles ignore the fact that local autonomy issues are too complex to be promoted simply by reducing central power).

530. See *id.* at 382–90 (noting that leaving policy judgments in the hands of state governments may result in negative effects on local autonomy).

localized decisionmaking over centralized decisionmaking as much possible. The magic words are, “as much as possible,” and the unfamiliar name of the familiar concept is “subsidiarity.”

4. *Subsidiarity and the Hidden Problem-Solving Value of Federalism*

Colloquial accounts of American federalism generally proceed from a localist assumption that government action should be taken at the most local level possible⁵³¹—or conversely, that higher levels of government should never take action that could be accomplished as well or better at a more local level.⁵³² (An extreme localist position might argue that *all* public action should take place locally, but this would not be the approach taken by any model of American federalism.) The principle that governance should take place at the most local level possible, though easily recognized by students of American federalism, goes by the less-recognized name of “subsidiarity.”⁵³³ Literally, “subsidiarity” means “to ‘seat’ (‘sid’) a service down (‘sub’) as close to the need for that service as is feasible.”⁵³⁴

The subsidiarity principle has a rich history in the United States and Europe, drawing its origins from early Greek and Catholic philosophy. Some scholarly accounts trace it to Aristotle, though it surfaced as a modern socio-political doctrine through the writings of Thomas Aquinas.⁵³⁵ As a first principle from which to structure government,

531. This principle of subsidiarity is a primary means of reading content into the otherwise tautological text of the Tenth Amendment. See David T. Koyzis, *Subsidiarity and Federalism*, COMMENT, Aug. 2004, at 3, <http://wrf.ca/comment/article2.cfm?ID=74> (noting that the Tenth Amendment is the constitutional embodiment of the subsidiarity principle).

532. *E.g.*, Alexander Tabarrok, Presentation at University of California Hastings College of the Law: Arguments for Federalism (Sept. 20, 2001), <http://www.independent.org/issues/article.asp?id=485>.

533. For various accounts of the subsidiary principle, see David P. Currie, *Subsidiarity*, 1 GREEN BAG 2D 359 (1998); James L. Huffman, *Making Environmental Regulation More Adaptive Through Decentralization: The Case for Subsidiarity*, 52 U. KAN. L. REV. 1377 (2004); John F. Stinneford, *Subsidiarity, Federalism, and Federal Prosecution of Street Crime*, 2 J. CATH. SOC. THOUGHT 495 (2005); W. Gary Vause, *The Subsidiarity Principle in European Union Law—American Federalism Compared*, 27 CASE W. RES. J. INT’L L. 61 (1995); Jared Bayer, Comment, *Re-Balancing State and Federal Power: Toward a Political Principle of Subsidiarity in the United States*, 53 AM. U. L. REV. 1421 (2004).

534. Robert K. Vischer, *Subsidiarity as a Principle of Governance: Beyond Devolution*, 35 IND. L. REV. 103, 103 (2001) (quoting J. Bryan Hehir, *Catholic School Teaching and the Challenge of the Future*, WOODSTOCK REP., June 1998, <http://woodstock.georgetown.edu/publications/report/r-fea54a.htm>) (internal quotation marks omitted).

535. Nicholas Aroney, *Subsidiarity, Federalism and the Best Constitution: Thomas Aquinas on City, Province and Empire*, 26 LAW & PHIL. 161, 165–66 (2007). In an attempt to find a balance between laissez-faire capitalism and state-controlled socialism, Pope Pius XI articulated subsidiarity as the most effective methodology for carrying out the Catholic Church’s task of Christian charity. Pope Pius XI, *Quadragesimo Anno*, VATICAN.VA, May 15, 1931, at paras. 79–80, available at http://www.vatican.va/holy_father/pius_xi/encyclicals/docu

subsidiarity receives its most explicit treatment in the European Union's governing structure, as set forth in the Maastricht Treaty:

In areas which do not fall within its exclusive competence, the [European] Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.⁵³⁶

Just as the nationalists and the federalists negotiated the relationship between the federal and state governments during the American Constitutional Convention, the Maastricht subsidiarity rule establishes a relationship between the European Community and its member states that prevents “an overcentralization of power at the EU level and . . . thereby ensure[s] the acceptance of the EU among the citizens.”⁵³⁷

Although the term “subsidiarity” may be best known for its prominence in the Maastricht Treaty, considerations of the subsidiarity principle in the United States long predated its appearance in the European Union, though often by other names. The principle itself was in clear circulation at the time of the Constitutional Convention, prompting the movement to retire the failed Articles of Confederation. In the *Federalist Papers*, James Madison gave it indirect expression in his impassioned plea to the adversaries of the Constitution who fretted that the national government would intrude on the powers of the states. Urging that the federalism-based distribution of power contemplated by the Constitution was necessary to accomplish the very goals for which Americans looked to governance, he argued:

[I]f . . . the Union be essential to the happiness of the people of America, is it not preposterous to urge as an objection to a government, without which the objects of the Union cannot be attained, that such a government may derogate from the importance of the governments of the individual States? Was, then, the American Revolution effected, . . . not that the people of America should enjoy peace, liberty, and safety, but that the governments of the individual States, that

ments/hf_p-xi_enc_19310515_quadragesimo-anno_en.html. *But see* Reimer von Borries & Malte Hauschild, *Implementing the Subsidiarity Principle*, 5 COLUM. J. EUR. L. 369, 369 (1999) (contrasting the “subsidiary function” tenet of the Catholic Church with the constitutional law principle of “subsidiarity”).

536. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, art. 5, Oct. 2, 1997, 1997 O.J. (C 340) 1, 182–83 (modifying 1992 Treaty on European Union, art. 3b).

537. von Borries & Hauschild, *supra* note 535, at 369.

particular municipal establishments, might enjoy a certain extent of power and be arrayed with certain dignities and attributes of sovereignty? . . . It is too early for politicians to presume on our forgetting that the public good, the real welfare of the great body of the people, is the supreme object to be pursued; and that no form of government whatever has any other value than as it may be fitted for the attainment of this object.⁵³⁸

Even to Madison, for whom anti-tyranny concerns were critical, the check-and-balance principle of federalism must yield before it would threaten the federal system's ability to accomplish the overall ends for which it was created. Checks and balances are critical, but must be weighed against the need that government be enabled to solve the very problems that motivated the Union.⁵³⁹ Madison's admonition demonstrates that pragmatism is more than something exogenous to federalism, a separate goal with which federalism values must compete in the operation of government. Rather, it is built into federalism itself, a value in tension with others, as part of the allocation of powers between the national and the local level.

The subsidiarity principle was also embedded into the foundations of contemporary federalism theory by Russell Kirk, who propounded a model of federalism in the early 1960s that would inspire the proponents of the New Federalism revival decades later.⁵⁴⁰ Kirk's model adopted the principle of subsidiarity as a primary consideration in his theory of "territorial democracy," which takes as definitional that "federalism is an order in which the smaller circles and communities are granted the *maximum possible* power to direct their own affairs."⁵⁴¹ Although his model of territorial democracy never refers to subsidiarity by that name, it is an unmistakable element. In contrast to European Union federalism, American statements of federalism

538. THE FEDERALIST NO. 45 (James Madison), *supra* note 195, at 288–89.

539. See, e.g., STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 4–11 (6th ed. 2006) (discussing the ability of the federal administrative state to regulate aspects of American society); RICHARD J. PIERCE, JR., ET AL., ADMINISTRATIVE LAW AND PROCESS 1–22 (4th ed. 2004) (explaining the various political rationales for the existence of an administrative state); see also PETER L. STRAUSS, ADMINISTRATIVE JUSTICE IN THE UNITED STATES 152–86 (2d ed. 2002) (noting that "regulation to remedy the deficiencies of the economic marketplace . . . has been the prevailing form of federal government regulation over the past three decades").

540. Russell Kirk, *The Prospects for Territorial Democracy in America*, in A NATION OF STATES: ESSAYS ON THE AMERICAN FEDERAL SYSTEM 42 (Robert A. Goldwin ed., 1963).

541. *Id.* at 45 (emphasis added).

theory such as Kirk's generally situate subsidiarity as one part of a broader rubric; still it is usually stated as a primary component.⁵⁴²

Subsidiarity has received increasing scholarly and political attention in the United States in recent years.⁵⁴³ It is incorporated as a federalist premise of the Department of Homeland Security's National Response Plan, which emphasizes that "[a] basic premise of the NRP is that incidents are generally handled *at the lowest jurisdictional level possible*."⁵⁴⁴ Of note, subsidiarity has been most enthusiastically embraced—even by the name made popular by its explicit incorporation into the laws of the European Union—by conservative commentators in support of the New Federalism.⁵⁴⁵ The principle is also embraced by libertarians, who take as a natural corollary that when any government is necessary, it should be imbued with as little power as possible.⁵⁴⁶ The core libertarian position is thus consonant with subsidiarity's directive that higher government actors never be given tasks that could be accomplished as effectively by a more local actor. Professor Donald Regan has also invoked a core insight of the subsidiarity principle when he proposed a simple alternative for constraining federal authority under the Commerce Clause:

The kernel of my positive suggestion is so obvious that I would be embarrassed to offer it, if it did not seem necessary that someone should: when we are trying to decide whether some federal law or program can be justified under the commerce power, we should ask ourselves the question, "Is there some reason the federal government must be able to do this, some reason why we cannot leave the matter to the states?"

542. See, e.g., George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 451–52 (1994) (noting that subsidiarity cannot be the sole focus of a "seasoned" American federalism because of the varying considerations attendant in each policy decision, but nonetheless stressing its importance in decisionmaking).

543. See, e.g., Robert K. Vischer, *Subsidiarity and Suffering: The View from New Orleans*, 45 J. CATH. LEG. STUD. 183 (2007); John F. Stinneford, *Subsidiarity, Federalism and Federal Prosecution of Street Crime*, 2 J. CATH. SOC. THOUGHT 495 (2005).

544. U.S. DEP'T OF HOMELAND SEC., QUICK REFERENCE GUIDE FOR THE NATIONAL RESPONSE PLAN 3 (2006), available at http://www.dhs.gov/xlibrary/assets/NRP_Quick_Reference_Guide_5-22-06.pdf (emphasis added).

545. See, e.g., Alexander Tabarrok, *supra* note 532 (listing subsidiarity as one of four principal arguments for federalism).

546. Walter Block, *Decentralization, Subsidiarity, Rodney King and State Deification: A Libertarian Analysis*, 16 EUR. J.L. & ECON. 139, 140 (2003) (noting that for libertarians "subsidiarity is the goal," and thus a libertarian "tends to favor city government over state, and the latter vis a vis the federales").

Federal power exists where and only where there is special justification for it⁵⁴⁷

Even President Bush has appealed to subsidiarity in his philosophy of compassionate conservatism regarding social works programs, noting that his “philosophy trusts individuals to make the right decisions for their families and communities, and that is far more compassionate than a philosophy that seeks solutions from distant bureaucracies.”⁵⁴⁸

Subsidiarity is thus a clear and present element in American federalism consciousness. But what does this add to our discussion? Is it really any different from the preference for localism already addressed? Indeed so. Examined closely, the subsidiarity principle really embodies two sets of underlying values—one familiar, one new. In directing that governance take place at the most local level possible, subsidiarity fosters the very localism values discussed above—the promotion of localized diversity and the encouragement of horizontal and vertical competition toward innovative and efficient regulatory policies.

But subsidiarity implies another principle of good government as well, the implied corollary of the first, but one so easily missed that it usually is. In directing that public decisions be taken as locally as possible—in other words, by the most local level of government with *capacity*—subsidiarity couples the preference for localized decisionmaking with a problem-solving element, the requirement of capacity or competence. In other words, the principle directs that decisionmaking take place at the most local level that can get the job done. Thus, at least to the extent that citizens may rightly look to regulatory assistance in solving a given problem,⁵⁴⁹ subsidiarity directs that if the most local level of government lacks the capacity to address it, citizens should be entitled to expect that the next level up with capacity should at least be authorized to try. This is the *problem-solving* principle of federalism—the flip-side of subsidiarity’s preference for localism.

547. Regan, *supra* note 504, at 555.

548. RONALD KESSLER, A MATTER OF CHARACTER: INSIDE THE WHITE HOUSE OF GEORGE W. BUSH 58 (2004); see also Vischer, *supra* note 534, at 103 (observing that subsidiarity is inextricably tied to President Bush’s view of compassionate conservatism); Franklin Foer, *Spin Doctrine: The Catholic Teachings of George W.*, THE NEW REPUBLIC, June 5, 2000, at 18, 18 (noting that President Bush “acknowledged compassionate conservatism’s debt to subsidiarity” in a discussion with Catholic leaders).

549. Identifying which problems are indeed susceptible to solution by governmental regulation is a separate problem that I do not engage here. See *supra* note 304 and accompanying text.

It was the problem-solving value that James Madison invoked in *Federalist No. 45*, when he chided the opponents of the Constitution to recall that “the public good, the real welfare of the great body of the people, is the supreme object to be pursued; and that no form of government whatever has any other value than as it may be fitted for the attainment of this object.”⁵⁵⁰ He clarified the problem-solving of what Justice Black would later call “Our Federalism”⁵⁵¹ in explaining that our federal system was created so that “the people of America should enjoy peace, liberty, and safety,” and pointedly *not* so that “the governments of the individual States, that particular municipal establishments, might enjoy a certain extent of power and be arrayed with certain dignities and attributes of sovereignty[.]”⁵⁵²

Similarly, it was the problem-solving value of federalism that the Department of Homeland Security incorporated into the NRP when it included the statement of subsidiarity in its preamble, and even the White House invoked it in explaining the ultimate federal response to Katrina. According to the White House’s own report, *The Federal Response to Hurricane Katrina: Lessons Learned*:

An important limiting factor of the Federal response . . . is that the Federal response is predicated on an incident being handled *at the lowest jurisdictional level possible*. . . . In the case of Katrina, the local government had been destroyed and the State government was incapacitated, and thus the Federal government had to take on the additional roles of performing incident command and other functions it would normally rely upon the State and local governments to provide.⁵⁵³

Although it appears the White House did not learn this lesson in time to prevent the failures discussed in Part II, hindsight made the importance of the problem-solving principle crystalline clear. While respecting the check-and-balance principle may mean that the federal government should take a “hard look” before crossing into the interjurisdictional gray area, the White House report is at least a post-hoc acknowledgement that checks and balances should not come between the federal government and its responsibility to protect the lives and safety of citizens that the NRP considers its highest priority.⁵⁵⁴

550. THE FEDERALIST NO. 45 (James Madison), *supra* note 195, at 289.

551. *Younger v. Harris*, 401 U.S. 37, 44 (1971).

552. THE FEDERALIST NO. 45 (James Madison), *supra* note 195, at 289.

553. WHITE HOUSE, *supra* note 59, at 42 (emphasis added).

554. See NRP, *supra* note 54, at 4 (listing prevention, preparedness, response and recovery actions as top priorities for incident management).

The problem-solving principle regularly appears during the sleeves-rolled-up world of actual regulatory decisionmaking, but it has been mostly absent from consideration by the New Federalism decisions. The Supreme Court has never decided a case on the basis of subsidiarity, although Justice Breyer invoked the principle in dissenting from *United States v. Morrison*'s invalidation of the VAWA,⁵⁵⁵ pointing to the European Union's subsidiarity principle as an alternative approach to protecting the federalism values that were the subject of the case.⁵⁵⁶ Suggesting that the majority's strict-separationist approach to protecting federalism values would prove unworkable, Justice Breyer proposed that federalism values might be better protected by the sort of procedural approach that Congress had actually taken before passing the VAWA, which he analogized to subsidiarity.⁵⁵⁷ Under this approach, Congress would take a "hard look" at whether the federal regulatory intervention is truly warranted in an area in which the states have traditionally regulated, and legislation would proceed only if Congress could demonstrate that additional response is needed at the federal level.⁵⁵⁸ To state Justice Breyer's position in the vocabulary of this piece, both Congress and the Court should be able to evaluate whether federal regulation in an interjurisdictional gray area is a legitimate instance of regulatory crossover by applying a fact-responsive standard of analysis.⁵⁵⁹

As Justice Breyer's cautious endorsement indicates, appeal to the problem-solving value cannot alone be dispositive of whether a particular act of regulatory crossover is legitimate within the overall federalism framework. The problem-solving value can operate in opposition to the check-and-balance principle, and so must be considered in balance with the anti-tyranny values with which it stands in tension. In other words, the problem-solving value may not care whether resolu-

555. 529 U.S. 598 (2000).

556. See *id.* at 663 (Breyer, J., dissenting) (citing Bermann, *supra* note 542, at 378–403).

557. *Id.* at 663–64.

558. *Id.* Justice Breyer continued:

Of course, any judicial insistence that Congress follow particular procedures might itself intrude upon congressional prerogatives and embody difficult definitional problems. But the intrusion, problems, and consequences all would seem less serious than those embodied in the majority's approach

. . . But I recognize that the law in this area is unstable and that time and experience may demonstrate both the unworkability of the majority's rules and the superiority of Congress' own procedural approach—in which case the law may evolve toward a rule that, in certain difficult Commerce Clause cases, takes account of the thoroughness with which Congress has considered the federalism issue.

Id.

559. Just such an approach is recommended by this piece in Part VI, *infra*.

tion occur by local or national authority, but the check-and-balance value cares very deeply, lest *every* problem become the subject of national attention, and state authority wane accordingly. It is this concern that Professor William Van Alstyne invoked in his admonition that we would soon find federalism adrift in a “cellophane sea” if Congress were permitted to legislate on any topic it could encase in the “cellophane wrapper” of a putative connection to interstate commerce.⁵⁶⁰

However, a framework of federalism that accounts for all of the component values need not be so at risk. For starters, the subsidiarity principle has always paired the problem-solving value together with the preference for localism, providing a framework that moderates problem-solving in the direction of localized decisionmaking, supporting the anti-tyranny purposes of the check-and-balance value. Similarly, the preference for localism is moderated by the requirement for problem-solving capacity, and the federal government will lack competence in many regulatory arenas demanding local expertise. This bilateral moderating influence prevents the problem-solving principle from overwhelming the anti-tyranny principle, just as the problem-solving principle keeps the anti-tyranny principle in service of the ultimately pragmatic purposes of government acclaimed by Madison.⁵⁶¹ The careful maintenance of structural tension between these underlying principles promotes healthy federalism in the same way that the careful maintenance of structural tension between the state and federal governments promotes the health of the overall system.

The problem-solving value is not the most important federalism value, nor is subsidiarity the defining federalism principle. For example, subsidiarity-based models of federalism have been aptly criticized for encouraging too much bifurcation in localized and centralized regulatory response, even when more integrative solutions to interjurisdictional problems are needed.⁵⁶² This strict reading of the

560. See Van Alstyne, *supra* note 210, at 782–83 (noting that “[a]ll laws affect commerce in one way or another”).

561. See THE FEDERALIST NO. 45 (James Madison), *supra* note 195, at 289; see also Moreno, *supra* note 144, at 715 (“Federalism provided the most important device of constitutional government for the framers of the Constitution. By ‘constitutional’ government, the framers meant *effective* but limited government.” (emphasis added)).

562. See John R. Nolon, *Champions of Change: Reinventing Democracy Through Land Law Reform*, 30 HARV. ENVTL. L. REV. 1, 18–20 (2006) (advancing a model of integrated federalism that relies on greater cooperation based on each governmental actor’s capacity for problem-solving in a given context); Telephone Interview with John Nolon, Professor, Pace Law School, in White Plains, N.Y. (Feb. 24, 2006) (“Subsidiarity’s problem is that it tends to lead toward dual sovereignty and bifurcation, disallowing the different levels of government to cooperate in the more integrated fashion often necessary to solve problems.”).

subsidiarity principle understands it as assigning responsibility for problem-solving to one governmental actor at a time, even though certain interjurisdictional problems may demand a more collaborative approach, such as the CWA's Phase II Stormwater Rule discussed above.⁵⁶³ To that end, some proponents of subsidiarity in the United States have taken it to stand for the proposition of strict-separationist dual sovereignty that this Article critiques in the New Federalism.⁵⁶⁴

But just as federalism may be a content-neutral vessel into which any first order policy preference may be poured,⁵⁶⁵ so in this sense, is subsidiarity. Strictly speaking, the problem-solving value of subsidiarity—and of federalism generally—does not endorse one particular vision of dual sovereignty or another, so long as structural tension is maintained without overly compromising the ability of government at all levels to respond to interjurisdictional problems. Subsidiarity may start from a preference for a model of dual sovereignty that protects localism values, but its capacity requirement demands room for further negotiation if neither the local nor the national level, acting alone, possesses the needed jurisdiction or expertise.

5. *Values and the New Federalism*

In sum, the strict-separationist project of differentiating local from national authority may promote governmental accountability and acts in laudable service to the check-and-balance goal of federalism. It less faithfully serves the competition and diversity values of localism, as federal preemption of local regulation at the margin of state and federal jurisdiction has accelerated in tandem with enforcement of the increasingly rigid boundary between them.⁵⁶⁶ And to the extent that the rigid assignment of mutually exclusive regulatory jurisdiction frustrates meaningful resolution of interjurisdictional problems, it seriously compromises the problem-solving value, an equally important element in the overall federalism project.

563. See *supra* Part IV.A.1.b.

564. Cf. Foer, *supra* note 548 (noting that the Bush Administration adopted subsidiarity to further “compassionate conservatism,” which in turn emphasizes the use of local community groups in favor of state and local government, and state and local government in favor of federal government).

565. Cf. Baker, *supra* note 432, at 454 (asserting that liberals need to understand that “‘states’ rights’ are not synonymous with any particular right nor any particular state”).

566. See, e.g., Hills, *supra* note 201, at 823–24 (contrasting the rebirth of state administrative authority with the functional reality that federal law preempts “virtually all significant regulatory fields”); S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 750–52 (1991) (discussing the Supreme Court’s extension of the preemption doctrine to state laws that achieve an “improper state purpose”).

In this respect, the New Federalism does not promote federalism values indiscriminately; rather, it promotes a specific constellation of support for some federalism values at the expense of others—a distinct model of federal-state relations that is one of many possible variations. It is, of course, a legitimate choice, though its failure to contend with the interjurisdictional gray area renders it a problematic choice. But despite New Federalism's claim to the true essence of American federalism, it is merely one interpretive possibility among others.

In fact, the history of federalism in the United States reveals the development of a variety of conceptual models of federalism, each ultimately faithful to the fundamental federalism values but in different configurations. These values, the true essence of American federalism, exist in surprising tension, and the different models of American federalism that evolved over the twentieth century reflect repeated attempts to find the right balance between them.

B. From New Deal to New Federalism

Like all good tales of legal history, the story of American federalism is largely one of competition between compelling principles in tension with one another, stretching the legal framework in one direction and then overcorrecting in another. If New Federalism pushed the pendulum far toward the check-and-balance value, it was surely in response to a previous swing far toward the problem-solving side, which expanded federal jurisdiction after the Great Depression vitiated the capacity of states and localities to respond to overwhelming economic collapse.⁵⁶⁷ We might therefore understand the New Federalism as one of many iterations in the episodic tug of war between the competing federalism values, especially the anti-tyranny and problem-solving values. Even the broad outlines of federalism's progression across the twentieth century reveals this tug of war in the movement between the models embraced during the Progressive/*Lochner* era and into the New Deal, later moderated by cooperative federalism, and finally to the New Federalism of the Rehnquist Court.⁵⁶⁸ Ultimately, New Federalism's exaltation of the check-and-

567. Martin S. Flaherty, *Byron White, Federalism, and the "Greatest Generation(s)"*, 74 U. COLO. L. REV. 1573, 1596–97 (2003) (noting that the New Deal resulted in the "expansion of Federal power applied in pragmatic fashion through the national political process; a corresponding rejection of federalism constraints; and judicial acceptance of this shift combined with robust enforcement of Federal law").

568. What follows is by no means a work of legal history; I mean only to trace how the broad outlines of these historical periods correspond to different federalism values and models.

balance value above all others was a response to the New Deal's like exaltation of the problem-solving value above all else, which was itself a reaction to the preceding circumstances.

1. *The Progressive Movement and the Lochner Era*

The model of federalism adopted during the New Deal era was a reaction to the period immediately prior, characterized by the Progressive movement and the Supreme Court's infamous *Lochner* era. Although the Civil War posed the greatest challenge to federalism in American history, it was the industrial revolution that most set the stage for the parade of federalism models with which we experimented over the following century. Rapid industrialization at the turn of the twentieth century multiplied links across interstate markets while spawning working and living conditions that triggered outrage among the burgeoning Progressive movement.⁵⁶⁹ Interstate commerce flourished as industrialization began to transform the United States from a rural agrarian nation to one of rapidly developing port and manufacturing centers, and Congress began to experiment with the scope of its commerce authority.⁵⁷⁰

Still, Congress remained reserved over the first few decades of the new century (and at times, preoccupied with the international affairs leading to and from World War II). During this time, the Progressives' relentless pursuit of reform—addressing a panoply of issues ranging from voting rights to labor practices to Prohibition—was most commonly channeled toward the passage of uniform state legislation.⁵⁷¹ Although a variegated movement of diverse priorities, the Progressives were mostly champions of localism, embracing national legislation “only as a last resort, in cases where the states had failed.”⁵⁷² However, vast numbers of Progressive state laws were dubiously invalidated by the Supreme Court on due process and equal protection grounds during its *Lochner* era, in which it invalidated many

569. See, e.g., RICHARD HOFSTADTER, *THE AGE OF REFORM 174–214* (1955) (describing the rapid growth of American cities at the turn of the century and the Progressives' documentation and reform efforts to resolve the deplorable conditions). For background on many of the Progressive leaders of the era, see generally ROBERT M. CRUNDEN, *MINISTERS OF REFORM: THE PROGRESSIVES' ACHIEVEMENT IN AMERICAN CIVILIZATION 1889–1920* (1982).

570. See, e.g., Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (codified as amended in scattered sections of 49 U.S.C.) (asserting federal authority over the national railroads as channels of interstate commerce); see also Moreno, *supra* note 144, at 736–38 (noting that the Supreme Court accepted some of Congress's early attempts at Progressive legislation).

571. See, e.g., Moreno, *supra* note 144, at 732 (noting that uniform state legislation was “the most common progressive remedy for social ills”).

572. *Id.*

regulatory efforts as abridging the freedom of contract and other private rights protected by the Fourteenth Amendment.⁵⁷³ This confusing era of American federalism was characterized by the Progressives' emphatic appeal to state and local authorities to take on the perceived regulatory problems of the day,⁵⁷⁴ coupled with a Supreme Court jurisprudence that deferred neither to state legislative factfinding nor to the states' police power obligations to protect the public welfare.

As a side note, the overall Progressivist agenda drew heavily on each of the federalism values discussed above: (1) the check-and-balance value (in ambivalence about using the federal government to drive reform efforts);⁵⁷⁵ (2) the promotion of local autonomy (in efforts to grant cities and municipalities home rule authority);⁵⁷⁶ (3) governmental accountability (in campaigns for citizen entitlement to nominate candidates in open primary elections, to vote on laws directly, to elect and recall judges, and to elect U.S. senators directly, rather than by state legislatures);⁵⁷⁷ and (4) problem-solving (in ultimate willingness to support national legislation when state legislation failed to accomplish needed reforms).⁵⁷⁸ When the Progressives finally assumed the national stage through the election of Progressive Presidents Teddy Roosevelt and Woodrow Wilson, the movement prioritized the problem-solving value over the check-and-balance value—but reluctantly, and after due diligence in pursuing the state path first. In this respect, although their legacy mixes landmark legislative accomplishments (e.g., women's suffrage and the direct election of senators) with discredited regulatory goals (e.g., Prohibition), the Progressives proceeded from a recognizable federalist ethic.

By contrast, the Supreme Court's invalidation of state laws during the *Lochner* era did not appear to factor federalism values very care-

573. The 1900–1937 period is the so-called *Lochner* era, named for the Court's decision in *Lochner v. New York*, 198 U.S. 45 (1905), which struck down a state law limiting the working hours of bakers to ten per day and sixty per week. During this time, the Court struck down nearly 200 laws under the Due Process Clause (sometimes coupled with another constitutional provision). GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 755–56 (5th ed. 2005).

574. The Progressives saw almost all social problems as proper targets of government regulation, reflecting a widespread nineteenth-century view that the state had a duty to help individuals control their negative impulses. Moreno, *supra* note 144, at 733. The definition of regulatory problems that I propose in this Article is more moderate, focusing on market failures, negative externalities, and other collective action problems.

575. *Id.*

576. See HOFSTADTER, *supra* note 569, at 262–63 (discussing the Progressive push to move government reform efforts to the most local levels).

577. See *id.* at 258–64, 311 (noting Progressivists' belief that a “direct popular democracy” was the best method to political participation without self-interest).

578. Moreno, *supra* note 144, at 732–33.

fully.⁵⁷⁹ Invalidating state laws would not have advanced the accountability of state officials to their electorate, nor would it have advanced local autonomy. Nor would it have materially advanced check-and-balance values, since these laws were not invalidated for transgressing between a realm of state and federal authority, but for exercising regulatory authority that the Court would deny any level of government. To the extent these state laws addressed legitimate regulatory problems, the Court's decisions would appear to have discounted the problem-solving value as well.⁵⁸⁰

Nevertheless, the Court also invalidated federal progressive statutes, including child labor reforms, by invoking the pre-industrial model of federalism that had long viewed the states as the competent regulators of labor and employment matters. In *Hammer v. Dagenhart*,⁵⁸¹ the Court struck down a prohibition on the interstate shipment of goods produced by children under the age of fourteen,⁵⁸² and though the law suffered for a number of reasons,⁵⁸³ Justice Day reminded Congress that “[i]n interpreting the Constitution it must never be forgotten that the Nation is made up of States to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the National Government are reserved.”⁵⁸⁴ In this respect, the Supreme Court showed some sensitivity to check-and-balance values (in limiting federal authority to regulate in the employment sphere), though little concern for true local autonomy or problem-solving (in invalidating state regulations with similar objectives).

579. Cf. Barry Cushman, *Lochner, Liquor and Longshoremen: A Puzzle in Progressive Era Federalism*, 32 J. MAR. L. & COM. 1, 5 (2001) (characterizing *Lochner* era decisions as the result of various antebellum ideological beliefs, including northern free labor principles, distaste for special legislation, and enthusiasm for faction-free politics).

580. On the other hand, one might argue that the Court understood threats to the freedom of contract as the most important problem at hand, and that these decisions thus exalted problem-solving above all other concerns. The troubling feature of this argument is that it forfeits the policymaking role of the legislature to the Court, casting judges as affirmative problem-solvers rather than interpreters and adjudicators.

581. 247 U.S. 251 (1918).

582. *Id.* at 276–77; see also *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922) (invalidating a prohibitive tax on goods manufactured by child labor).

583. See *Dagenhart*, 247 U.S. at 271–72 (distinguishing between Congress's authority to regulate commerce and its lack of authority to regulate manufacturing, and between products that are inherently harmful and those that harm by means of their production).

584. *Id.* at 275.

2. *The Great Depression and the New Deal*

However, federalism concerns would soon occupy the Court's foremost attention, as the booming economy of the 1920s gave way to the Great Depression of the 1930s. In 1928, President Herbert Hoover was elected on a platform of regulatory non-interference and rugged individualism.⁵⁸⁵ After the stock market collapse of 1929, Hoover urged private and local solutions to economic despair, opposing congressional efforts to provide food and humanitarian relief to the nation's growing ranks of unemployed.⁵⁸⁶ The depression worsened despite his regular exhortations to the public, local officials, and businesses to do their parts in reversing the economic downturn.⁵⁸⁷ After leaving office, Hoover was quoted as summarizing his philosophy of government in strikingly subsidiarity-like terms:

The humanism of our system demands the protection of the suffering and the unfortunate. It places prime responsibility upon the individual for the welfare of his neighbor, but it insists also that in necessity the local community, the State government, and in the last resort, the National government shall give protection to them.⁵⁸⁸

Toward the end of his presidency, he reluctantly conceded that the time had come for national intervention, and took modest steps toward involving the federal government in the ordinary economic lives of its citizens, establishing a federal bank to forestall foreclosures of home mortgages and a finance corporation to bolster financially failing banks, corporations, and railroads.⁵⁸⁹

By 1932, states and localities had proved powerless to resolve the crippling social and economic problems associated with the depression, and social unrest appeared headed toward catastrophe.⁵⁹⁰ In the summer of 1932, 20,000 World War I veterans marched on Washington and clashed with police in their demands for prepayment of wartime bonuses not due until 1945; communists and unemployed masses staged hunger marches in Philadelphia, Chicago, New York, and other cities across the nation; and Iowan populists organized a "farm holiday" movement threatening to cease shipments of food

585. Cf. 10 ERNEST R. MAY ET AL., *THE LIFE HISTORY OF THE UNITED STATES: BOOM AND BUST (1917-1932)*, at 129, 134-35 (1974) (noting that President Hoover relied more on exhortation than regulation during his presidency).

586. *Id.* at 135.

587. *Id.* at 134-35.

588. *Id.* at 135.

589. *Id.*

590. *Id.* at 136-37.

products to the cities unless commodity prices were raised.⁵⁹¹ Toward the end of the year, American industry was operating at less than half its 1929 volume and twenty-five percent of the labor force was unemployed.⁵⁹² At this point, President Franklin Delano Roosevelt was elected on a platform of federal intervention that would become known as the New Deal.⁵⁹³

Concluding that only the national government had the capacity to address the scope of the depression and its sequelae of joblessness, homelessness, hunger, and social dislocation, Congress joined FDR in marshaling the nation's resources and directing regulatory programs into realms that were previously the sole regulatory purview of the states. Between 1932 and 1938, New Deal regulatory reforms included such federally sponsored jobs programs as the Works Progress Administration⁵⁹⁴ and the Civilian Conservation Corps;⁵⁹⁵ the Agricultural Adjustment Act⁵⁹⁶ and other farm programs; the Emergency Banking and Bank Conservation Act;⁵⁹⁷ the establishment of the Securities and Exchange Commission⁵⁹⁸ and the Federal Deposit Insurance Corporation;⁵⁹⁹ the Federal Emergency Relief Administration that became the precursor to modern social security,⁶⁰⁰ and many others.

Combining the reformist zeal of the Progressives with the power of central administration at a pivotal time of national crisis, the New Deal redefined the traditional spheres of state and federal regulatory concern.⁶⁰¹ But this federalism paradigm shift did not proceed with-

591. *Id.* at 137.

592. 11 WILLIAM E. LEUCHTENBURG ET AL., *THE LIFE HISTORY OF THE UNITED STATES: NEW DEAL AND GLOBAL WAR* (1933–1945), at 7–8 (1964).

593. The name stems from the promise he made in accepting the Democratic nomination for President that he would seek “a new deal for the American People.” MAY ET AL., *supra* note 585, at 136.

594. Exec. Order No. 7034 (May 6, 1935).

595. Civilian Conservation Corps Act of 1937, ch. 383, 50 Stat. 319 (repealed 1966).

596. Agricultural Adjustment Act of 1933, ch. 25, 48 Stat. 31 (codified as amended in scattered sections of 7 U.S.C.).

597. Emergency Banking and Bank Conservation Act of 1933, ch. 1, 48 Stat. 1 (codified as amended in scattered sections of 12 U.S.C.).

598. Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (codified at 15 U.S.C. § 78 (2000)).

599. Banking Act of 1933, ch. 89, 48 Stat. 162 (codified at 16 U.S.C. §§ 1811–1832 (2000)).

600. Federal Emergency Relief Act of 1933, ch. 30, 48 Stat. 55, *replaced by* Social Security Act, ch. 531, 49 Stat. 620 (1935) (codified as amended at 43 U.S.C. §§ 301–1397 (2000)).

601. Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 351–52 (2004). According to Professor Lobel:

[T]he New Deal brought a paradigm shift to American society. . . . Responding to the burdens and risks of the Depression and two world wars, the New Deal instigated the creation of the modern regulatory and administrative state. The

out significant hesitation on the part of traditionalists, and faced legal challenges at nearly every turn.⁶⁰² The Supreme Court did reject some early New Deal regulatory programs for exceeding enumerated federal powers, including the National Industrial Recovery Act of 1933 and the Agricultural Adjustment Act of 1933, by which the federal government had sought pricing and production controls.⁶⁰³ Justice Brandeis was particularly concerned about the centralization of regulatory authority, reportedly telling one of FDR's political advisors to "tell the President that we're not going to let this government centralize everything."⁶⁰⁴ However, the Court ultimately approved most of the second wave of "more carefully crafted" New Deal legislation, which accomplished most of the regulatory goals of the first wave in a more piecemeal but narrowly tailored fashion.⁶⁰⁵ As one historian notes, the Court at this time "abandon[ed] the two chief doctrinal limitations on government power": (1) the Lochnerian understanding of liberty-of-contract substantive due process, by which it had constrained state regulatory authority; and (2) the pre-industrial understanding of dual sovereignty, by which it had constrained federal regulatory authority in the early New Deal years.⁶⁰⁶

American federalism underwent a spectacular (some would argue, spectacularly misguided) transformation during the New Deal era—but it hardly disappeared. The body politic remained one of dual sovereignty. Then—as now—"the bulk of American law [wa]s still state law, and overwhelmingly so."⁶⁰⁷ States continued to manage the vast array of regulatory contexts in which the police power is deployed, from family law, to local law enforcement, to education. Moreover, the Supreme Court's staged acceptance of the New Deal legislation indicates that federalism controls were operating. The first wave of federal laws demanded too much unconstrained federal

New Deal paradigm invoked three Rs—relief, recovery, and reform, but it was the legal developments that united all three under the umbrella of the big "R" of regulation.

Id. at 351. Professor Laura Kalman, however, has recognized a split in the academic literature between "externalists," who assert that political reasons, such as the massive economic collapse of the Great Depression, caused the shift in federalism theory at this time and "internalists," who "point to doctrinal, intellectual causes in explaining constitutional change during the New Deal." Laura Kalman, *Law, Politics, and the New Deal(s)*, 108 *YALE L.J.* 2165, 2165–66 (1999).

602. See Moreno, *supra* note 144, at 737–38.

603. *Id.*

604. *Id.* at 738 (quoting PHILIPPA STRUM, *LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE* 352 (1984)).

605. *Id.*

606. *Id.*

607. *United States v. Morrison*, 529 U.S. 598, 661 (2000) (Breyer, J., dissenting).

power for use in the interjurisdictional gray area of economic regulation. Now that historians have largely set to rest the “switch-in-time-that-saved-nine” mythos,⁶⁰⁸ we understand the Court’s acceptance of the second wave of New Deal programs as a principled decision by ambivalently progressive Justices to approve urgently needed problem-solving legislation that had been sufficiently narrowly tailored to pass constitutional muster.⁶⁰⁹

Many disagreed with the Court’s assessment that this expansion of federal power passed constitutional muster,⁶¹⁰ but such disagreement (then and now) is really between competing models of federalism. Mature New Deal federalism, although faithful to the overall premise of dual sovereignty, exalted the problem-solving value above all other considerations. To the extent that citizens might be confused about the source of new economic regulations, accountability concerns were not given much consideration (although the overwhelming and repeated re-elections of FDR suggest that citizens had a fairly certain idea of who was responsible for New Deal programs).⁶¹¹ New Deal regulation proceeded without particular regard for localism values,⁶¹² and the vast expansion of federal power proceeded at direct cost to the check-and-balance value. As each regulatory target became the legitimate subject of federal reach under the Commerce Clause,⁶¹³ so state regulation in these areas became vulnerable to pre-emption under the Supremacy Clause.

The regulatory ambit of the national government waxed and that of the states correspondingly waned, threatening the balance between the problem-solving and anti-tyranny principles of federalism.⁶¹⁴ And yet a federalism that enabled pragmatism to eclipse checks and balances during the Great Depression years seems well-suited to the cir-

608. Moreno, *supra* note 144, at 738–39.

609. The reluctant Progressives emerged as Chief Justice Hughes and Justice Roberts. *Id.*

610. See, e.g., JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 4 (1938) (describing “fulmination” among opponents of the New Deal, who considered it unconstitutional).

611. LEUCHTENBURG ET AL., *supra* note 592, at 57.

612. However, some argue that the relevant local community targeted by the New Deal programs was the nation as a whole; indeed, never before had the nation constituted so coherent a community as it did during the New Deal era, collectively riveted to the President’s radio broadcast fireside chats, sinking or swimming economically as one. Cf. Rubin & Feeley, *supra* note 23, at 945–46 (arguing that the political community of the United States “belongs only to the nation as a single entity”).

613. See Schapiro & Buzbee, *supra* note 381, at 1210–19 (tracing the growing power of the federal government’s Commerce Clause power through New Deal legislation at the expense of traditional realms of state regulatory authority).

614. See Lobel, *supra* note 601, at 351–52 (describing the paradigmatic shift of regulatory authority from the states to the federal government).

cumstances of the time: massive unemployment, farmer uprisings and hunger marches, public rioting, and widespread fear of revolt.⁶¹⁵ If even Herbert Hoover—great champion of localism and laissez-faire economics—finally recognized that federal intervention was needed, surely most would have come to the same conclusion.⁶¹⁶ New Deal federalism did not aggrandize the federal government's power for federal expansion's sake; it was in direct response to the states' demonstrated lack of capacity to overcome a nationwide economic collapse, and was thus ultimately faithful to the premise of subsidiarity. The Supreme Court subjected the New Deal programs to forgiving but meaningful review, requiring that programs be narrowly tailored out of weakened but sincere respect for the maintenance of balance between state and federal power. A model of federalism that would have prevented a federal response under such circumstances would have, like Katrina multiplied exponentially, profoundly disserved the nation.⁶¹⁷

Perhaps New Deal federalism most proved its authenticity as a model of federalism by virtue of being falsifiable. At some point, the pendulum had swung too far to the problem-solving side, and check-and-balance concerns began to draw it back. When FDR announced plans to add new Justices to the Supreme Court in 1937, he began to lose public support,⁶¹⁸ and failed to win any further reform legislation in Congress after 1938. World War II claimed the attention of the nation, and the New Deal was over.

3. *The Growth of Cooperative Federalism*

Since World War II, cooperative federalism—in which state and federal governments take responsibility for separate but interlocking components of a unified regulatory program—has been the dominant model of interjurisdictional problem-solving. The continuing involvement of the federal government in areas once managed solely by the states reflects both the expanded reach of the federal commerce

615. See MAY ET AL., *supra* note 585, at 137 (“From one end of the country to the other, people fearfully whispered the word ‘revolution.’”).

616. See *id.* at 134–35 (recounting Hoover's continued reluctance and eventual acquiescence to limited governmental intervention).

617. Indeed, the Katrina emergency indicates how the New Deal era changed public expectations about the regulatory role of the federal government. Before the New Deal, Americans would not have expected the federal government to have done very much. Cf. JONATHAN ALTER, *THE DEFINING MOMENT: FDR'S HUNDRED DAYS AND THE TRIUMPH OF HOPE 91–92* (2006) (characterizing direct involvement by the federal government in fighting poverty as “radical” before FDR took office).

618. LEUCHTENBURG ET AL., *supra* note 592, at 70.

power achieved during the New Deal era and continued popular expectations for federal regulatory solutions following the rights revolutions of the Civil Rights era.⁶¹⁹ The incorporation of the Bill of Rights as enforceable against the states imposed greater federal limits on state and local governments, and World War II and the Korean War further galvanized national power. However, cooperative federalism matches this expansive federal role with due regard for the role of state authority. Where New Deal programs virtually preempted state involvement in the newly federally regulated realms, programs of cooperative federalism afford roles for both state and federal regulators in the interjurisdictional gray area.

For example, in its Congressional declaration of goals and policies, the CWA exemplifies the cooperative federalism approach in stating that:

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under . . . this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.⁶²⁰

Although cooperative federalism thus remains rooted in the post-New Deal expansion of federal regulatory authority, it affords greater protection to the check-and-balance value of federalism.

Programs of cooperative federalism dominate in many areas of modern law,⁶²¹ especially in environmental contexts such as the CAA's

619. See *supra* note 101 and accompanying text (detailing popular expectations for an increased federal role during Katrina); see also William W. Buzbee, *Regulatory Reform or Statutory Muddle: The "Legislative Mirage" of Single Statute Regulatory Reform*, 5 N.Y.U. ENVTL. L.J. 298, 362 & n.210 (1996) (discussing the popular support for various environmental protection programs, such as the Endangered Species Act); Christopher Yeh, *Workplace Stereotypes: The Simultaneous Eradication and Reinforcement*, HAW. B.J., May 2002, at 6, 6 (discussing public support for Title VII).

620. 33 U.S.C. § 1251(b) (2000).

621. See *supra* notes 29–32 (referencing cooperative federalism programs in environmental law, telecommunications law, products liability, and consumer finance).

division between standard-setting authority (to the federal government) and program design and implementation (to the state government), or the CWA's invitation to the states to assume the EPA's role as the in-state permitting authority for the NPDES (an invitation that all but five states have accepted).⁶²² Between consciously designed partnership programs like these and the many legal realms boasting both state and federal law,⁶²³ cooperative federalism remains the predominant model of American governance in interjurisdictional arenas.

Cooperative federalism has been championed by its proponents as "partnership federalism," enabling a collaboration in which each level of government takes responsibility for what it can do best.⁶²⁴ It is a problem-solving model, taking a pragmatic approach in the gray area, though with more careful attention to the check-and-balance value than New Deal federalism in assigning both state and federal roles. Although cooperative federalism may encourage less competition than a federalism that minimized central planning authority, some have favorably characterized it as affording greater competitive benefits than the New Deal model, by enabling laboratory-style competition among the states as they develop separate implementation strategies for their allocated tasks.⁶²⁵ True to the federalism values associated with localized diversity and competition, the laboratory element of cooperative federalism promotes regulatory efficiency and innovation, while checking political power from becoming too concentrated around a fully centralized planning regime. Cooperative federalism thus shifted the pendulum from the extreme problem-

622. EPA, National Pollution Discharge Elimination System (NPDES): State Program Status, <http://cfpub.epa.gov/npdes/statestats.cfm> (last visited Dec. 13, 2006). For a graphical depiction of authorized states, see EPA, NDPEs Authority State Program, http://www.epa.gov/npdes/images/State_NPDES_Prog_Auth.pdf (last visited Mar. 15, 2007).

623. See *supra* notes 201–204 and accompanying text (discussing the various areas of law with concurrent state and federal jurisdictions).

624. Cf. Babbitt, *supra* note 222, at 857–58 (advocating a "good neighbor policy" that permits joint decisionmaking on public lands); Esty, *supra* note 222, at 652–53 (concluding that environmental policy decisions are best handled through interaction of several levels of government); Karkkainen, *supra* note 222, at 225–26 (arguing that it is likely that "high levels of intergovernmental, interagency, and public/private collaboration" are needed for ecosystem governance). Even so, cooperative federalism at its best merely enables the state and federal governments to "take turns" at regulating; true collaboration exists only in isolated examples of federal-state regulatory partnerships, such as the new Phase II Stormwater Rule of the CWA or the Coastal Zone Management Act. See *supra* Part IV.A.

625. See, e.g., Elazar, *supra* note 222, at 67–68 (noting that cooperative federalism has elements of "antagonistic cooperation" that lead to sharing of ideas between levels of government); Kincaid, *supra* note 222, at 88 (arguing that cooperation and competition are equally necessary for effective federalism).

solving side that it occupied during New Deal federalism back toward the center (perhaps at some expense to the weaker accountability value), reflecting attention to each of the federalism values in varying degrees.

However, cooperative federalism has also been the subject of vociferous criticism from opponents who object to its continued sanctioning of New Deal-expanded federal authority,⁶²⁶ and it inspires some anxiety among federalism scholars who note theoretical questions left unresolved by this pragmatic (and perhaps undertheorized) approach to interjurisdictional problem-solving. For example, Professor Philip Weiser has called attention to the need to better justify the authority of state agencies to implement federal law, and to ensure constitutionally adequate oversight by the federal executive of state agencies' implementation of federal law.⁶²⁷ Professor Roderick Hills has raised questions regarding the unjustified preferential treatment by the Court of "generally applicable" federal laws that regulate states, and the unresolved permissibility of conditional preemption and federal "funded mandates" to states to implement federal law.⁶²⁸

From the point of view of the states, the cooperative federalism model seems preferable to that of New Deal preemptive federalism, in which the federal government displaced the state altogether in targeted arenas by crafting and staffing programs that extended all the way to the local level. Even so, cooperative federalism partnerships are often based on the federal spending power, in which Congress persuades state participation in realms that the federal government could not as straightforwardly preempt state law. Some critics of cooperative federalism thus argue that it would be more accurately characterized as "coercive federalism," in which the federal government forces state cooperation on penalty of withholding needed benefits or preempting state regulatory programs.⁶²⁹ Most important, cooperative federalism provides no clearly theorized means of mediating between the competing federalism values in a way that

626. *Cf.* Van Alstyne, *supra* note 210, at 782 (stating that the Commerce Clause was never intended to regulate "whatever affects" the movement of people or their goods across state lines").

627. Weiser, *supra* note 222, at 677-81, 713-19.

628. Hills, *supra* note 201, at 916-26, 934-38.

629. *See, e.g.*, Adler, *supra* note 205, at 169-73 (asserting that cooperative federalism in the environmental context either preempts state action or discourages state innovation); *cf.* Baker, *supra* note 211, at 217-19 (noting that the Supreme Court has suggested that Congress cannot use its Spending Clause power to coerce states in ways not directly permissible under Article I).

affords meaningful protections for the check-and-balance value or predictability for pragmatic-oriented regulators.

Frustration with cooperative federalism's solicitousness of federal authority and anxiety over its theoretical robustness ultimately inspired the New Federalism revival. However, Congress has continued to rely heavily on the cooperative federalism model in crafting regulatory solutions to interjurisdictional problems like wetlands regulation, products liability, bankruptcy, and national security.⁶³⁰ The resulting disconnect between the predominant empirical model of state-federal regulatory relationships and the strict-separationist model that animates the Court's New Federalism jurisprudence has evoked calls for everything from a complete rejection of state-federal cooperative regulatory programs⁶³¹ to a revision of the Rehnquist Court's jurisprudence to better accommodate the cooperative model.⁶³² Concerns that the pendulum has swung either too far in favor of the national or the local extreme have also motivated proposals for a cooperative model that affords greater protection for local authority,⁶³³ to adoption of a model of Polyphonic Federalism in which neither the state nor the national government wholly occupies proprietary realms of regulatory authority,⁶³⁴ to adoption of an Integrated Federalism, which would enable regulatory partnerships that draw on a more individualized evaluation of the capacity of the relevant local, state, and

630. See *supra* Part IV.A.

631. See, e.g., Michael S. Greve, *Against Cooperative Federalism*, 70 *MISS. L.J.* 557, 559 (2000) ("Cooperative federalism undermines political transparency and accountability, thereby heightening civic disaffection and cynicism; diminishes policy competition among the states; and erodes self-government and liberty."); Joshua D. Sarnoff, *Cooperative Federalism, the Delegation of Federal Power, and the Constitution*, 39 *ARIZ. L. REV.* 205, 270–80 (1997) (arguing cooperative federalism is inconsistent with the Framers' intentions, fails to conserve legislative resources, and reduces federal accountability).

632. See, e.g., Esty, *supra* note 222, at 571, 652–53 (arguing for "multiple tiers of governmental activity in the environmental domain"); John R. Vile, *Truism, Tautology or Vital Principle? The Tenth Amendment Since United States v. Darby*, 27 *CUMB. L. REV.* 445, 531–32 (1997) (concluding that more clarification is needed—perhaps by constitutional amendment—but failing to delineate an appropriate level of judicial review); Weiser, *supra* note 222, at 719–20 (concluding that a "reverse-*Erie*" doctrine is needed to balance federal supremacy and state autonomy in the administrative context); Kimberly C. Galligan, Note, *ACORN v. Edwards: Did the Fifth Circuit Squirrel Away States' Tenth Amendment Rights at the Cost of National Environmental Welfare?*, 9 *VILL. ENVTL. L.J.* 479, 508–09 (1998) (arguing for a middle-of-the-road approach to federal-state cooperation).

633. See, e.g., Baker, *supra* note 211, at 220–21 (describing Chief Justice Rehnquist's Commerce Clause opinions as prioritizing state sovereignty over federal regulatory power in areas of traditional state concern); Hills, *supra* note 201, at 816–17, 938–44 (arguing for local autonomy on a functional basis, as opposed to the New Federalism's focus on principles of dual sovereignty and political accountability).

634. See Schapiro, *supra* note 222, at 1466–68 (proposing a framework whereby federal and state courts participate together in developing constitutional law).

federal agencies to address a given interjurisdictional problem.⁶³⁵ But it is the New Federalism model that has most powerfully altered the federalism discourse, permeating legal thinking in the making, interpreting, and teaching of law.

4. *The New Federalism*

If cooperative federalism swung the pendulum away from the problem-solving extreme of New Deal federalism, the New Federalism ideal swings it from the more central position staked out by cooperative federalism toward the check-and-balance extreme. New Federalism arose out of concern that cooperative federalism fails to adequately circumscribe federal authority.⁶³⁶ Anxious to preserve the check-and-balance value against further degradation, New Federalism proceeds from the strict-separationist model of dual sovereignty, sometimes called “Dual Federalism,” that has been a primary focus of this Article.⁶³⁷

Borrowing from historical predecessors, this straightforward model of dual sovereignty provides an intuitively attractive framework from which to test assertions of regulatory jurisdiction against concerns about the balance of local and national power. However, the previous discussion shows how the model proves ill-equipped to handle the dynamics that arise in interjurisdictional contexts, where the need for adaptive approaches may overwhelm the wall of separation that dual federalism seeks to preserve at all costs.⁶³⁸ Indeed, the strict-separationist ideal does a poor job of vindicating most of the fundamental federalism values other than checks and balances, especially short-changing the problem-solving value. Its obsessive focus on segregating the local from the national threatens inefficient governance in high-stakes regulatory contests, such as the management of natural

635. Nolon, *supra* note 562, at 18–22.

636. New Federalism’s proponents were perhaps also legitimately antagonized by increasingly sloppy congressional attention to federalism boundaries, exemplified by Congress’s failure to attempt a federal jurisdictional nexus in the Gun-Free School Zones Act of 1990. *See* *United States v. Lopez*, 514 U.S. 549, 561–63 (1995).

637. “Dual federalism” posits that the state and federal governments operate with cleanly distinguishable spheres of regulatory authority that never overlap, thus refuting the justification (and obviating the need) for state-federal regulatory partnerships. *See* Hills, *supra* note 201, at 850–51 (citing *Collector v. Day*, 78 U.S. (11 Wall.) 113, 124 (1870)).

638. *See supra* Part IV.

disasters,⁶³⁹ terrorism threats,⁶⁴⁰ water pollution,⁶⁴¹ or radioactive waste.⁶⁴²

The New Federalism cases are relatively few in number (and the Tenth Amendment cases scarcer still), and reasonable minds may differ on the extent to which this pessimistic forecast reflects the status quo after the first decade of their ascendancy. Even so, the trajectory of New Federalism principles should concern us because it extends inexorably toward a separationist climax that warrants pessimism, both for the doctrinal barriers it promises and the intellectual barriers it encourages in the minds of policymakers. Indeed, the failures of leadership in the wake of Katrina, the anxiety hovering over regulation of serious environmental problems like air and water pollution, and the total abdication of state and federal responsibility for the disposal of radioactive waste after *New York* was decided all indicate the treacherous future of interjurisdictional problem-solving in the ideological shadow of New Federalism ideals.

New Federalism has thus arisen at the apex of one end of a pendulum that has been swinging for nearly a century between the competing values that underlie the essential federalism enterprise. Of course, the fact that the functional framework of American federalism continues to evolve hardly means that its underlying principles are stale. The deep political divide made visible across the nation against the backdrop of expansive post-9/11 federal authority suggests that the importance of federalism values—fostering governmental accountability, protecting ideological diversity, vindicating individual rights, and promoting efficient and innovative governance—remain as compelling as ever. Nevertheless, the increasingly interjurisdictional nature of the problems we face—from new threats to national security to new environmental harms—signals this as a moment that the framework for implementing these federalism values *must* adapt. The pendulum must continue to swing at least until we reach a model that can effectively cope with the interjurisdictional gray area.

639. See *supra* Part II.B (assessing New Federalism's effects in terms of the Katrina emergency).

640. See *supra* Part IV.A.2.b (discussing the interjurisdictional nature of domestic counterterrorism efforts).

641. See *supra* notes 344–351 and accompanying text (explaining the challenges in passing the Clean Water Act's Phase II Storm Water Rule).

642. See *supra* Part III.A.2 (discussing the New Federalism's strict-separationist vision as it applied in the commandeering cases).

VI. TOWARD A BALANCED FEDERALISM

A. *Balanced Federalism*

Developing a coherent model of federalism that will support a healthy balance between local and national authority while allowing effective regulatory response thus remains a central task of modern public law. A model that accounts for interjurisdictional problems and provides a means of evaluating crossover into the gray area pays homage to the importance of both efficient regulatory problem-solving and vigilance against unchecked power. Accordingly, this Article calls for the development of a model that fosters a more thoughtful balance between the federalism values that, through their network of tension, fortifies our system against the challenges of change. In honor of such balance, we might call this model “Balanced Federalism.” This Section offers a preliminary exploration of what a Balanced Federalism might look like, setting forth the theoretical ideal, factors for judicial consideration, and mechanics of how the model might work in practice.

Unlike New Federalism or cooperative federalism, Balanced Federalism explicitly recognizes the competition between the check-and-balance, accountability, localism, and problem-solving values, and provides a theoretically grounded means of mediating between them when conflicts arise. Moreover, Balanced Federalism recognizes that while most regulatory concerns may lie within uncomplicated realms of local or national jurisdiction, some straddle the imaginary bright line between them that is postulated by the strict-separationist approach. Balanced Federalism rejects New Federalism’s mutually exclusive spheres for a vision of dual sovereignty in which the clear areas of purely state and federal jurisdiction are bridged by the gray area of overlapping, interjurisdictional concern. Conflicting state law would continue to be preempted in the uncontroversial sphere of federal authority, but the preemption inquiry would shift in the interjurisdictional gray area, returning force to the longstanding presumption against preemption of traditional state police power unless Congress has explicitly required it.⁶⁴³ Correspondingly, federal policymakers would continue to respect the primacy of state authority in its uncontroversial sphere and avoid regulatory encroachment into the gray

643. See *supra* note 261 and accompanying text (discussing the presumption against preemption). Among other benefits, requiring Congress to clearly express its intent to preempt state law would enhance the accountability to the electorate of federal legislators who so choose this route, rather than allowing such decisions to be politically diluted among agency and judicial interpreters.

area until interjurisdictional factors demand capacity available only at the national level.

Balanced Federalism dual sovereignty would also require a shift in the work of the Tenth Amendment. According to the strict-separationist ideal, a state or federal authority threatens constitutional values whenever it regulates beyond the uncontroversial sphere of its own jurisdiction and into the interjurisdictional gray area at its margin. As construed in New Federalism, the Tenth Amendment implicitly polices this boundary, punishing transgressions from either side and framing other affirmative limits on federal power. In Balanced Federalism, such regulatory reach is conceived not as crossover from the permissible into the impermissible realm, but from the *unqualified* into the *qualified* realm of jurisdiction. Of course, crossover from one uncontroversial sphere past the gray area and all the way into the other would be immediately preempted (if by the state) or invalidated (if by the federal government), but crossover into the gray area would require additional consideration. As construed in Balanced Federalism, the Tenth Amendment polices regulatory activity within the gray area by either side, testing the potential threats and benefits of such crossover against the fundamental federalism values. The adjudicator must balance the degree to which the advancement of one federalism value is or is not outweighed by harm to competing values.

In essence, governmental activity in the gray area would be reviewed with heightened scrutiny for overall faithfulness to the panoply of federalism values for which the Tenth Amendment stands. Because they are engaged in perpetual tug of war, this analysis would require more explicit judicial balancing than New Federalism allows (the threat of which then becomes an incentive for balancing as a matter of *ex ante* policymaking by legislative and executive actors). A mature model of Balanced Federalism thus hinges on the development of a jurisprudential standard for adjudicating regulatory crossover within the boundaries of meaningful dual sovereignty.

B. Judicially Enforceable Balanced Federalism Constraints

Under Balanced Federalism, the Tenth Amendment would assume renewed importance as the textual ambassador of the constitutional dual sovereignty that informs all other federalism inquiries. As the Tenth Amendment most encapsulates the constitutional dual sovereignty directive,⁶⁴⁴ it is the proper point of departure for the development of a jurisprudential standard for balancing threats to

644. See *supra* notes 39–40 and accompanying text.

American federalism. As proposed here, the standard would facilitate consideration of whether the challenged regulatory activity ultimately serves or disserves Balanced Federalism as a whole, with reference to each of the foundational federalism values.

The articulation of such a standard would do for the Tenth Amendment what has already been done for nearly every other operative provision in the Bill of Rights, each of which has required the crafting of interpretative rules by which to administer the constitutional rule of law it sets forth. The Eighth Amendment tells us that cruel and unusual punishment is prohibited, but lacks specific direction as to whether the execution of minors is prohibited.⁶⁴⁵ The Fourth Amendment prohibits unreasonable searches and seizures, but remains silent on the use of drug-sniffing dogs during traffic stops.⁶⁴⁶ The Tenth Amendment tells us that powers not delegated to the federal government are reserved to the states, which offers even fewer specifics than most of its nine predecessors.⁶⁴⁷ As discussed in Part II, a penumbral reading of the Constitution confirms its premise that the state and federal governments would operate simultaneously but separately, but the Tenth Amendment itself gives no specific direction on where the line between state and federal power lies, nor even about what kind of boundary it is.⁶⁴⁸ Its directive is meaningful only in concert with other constitutional provisions enumerating federal powers and limitations, none of which has settled the debate.⁶⁴⁹

Indeed, it is not surprising that they don't, as the Constitution's resilience has so often flowed from the interpretive possibilities preserved by its brevity—just specific enough to convey the foundational rule of law, just flexible enough to allow for evolving rules of interpretation that mediate between the enduring principles and the changing circumstances of society. Formal amendment is required only when substantive textual commands must give way, for example, to

645. U.S. CONST. amend. VIII.

646. U.S. CONST. amend. IV.

647. U.S. CONST. amend. X. The exception may be found in the Ninth Amendment. See U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”). The Ninth Amendment’s textual vagueness has left it relatively off the table of constitutional interpretation, save for the efforts of Justice Goldberg to ground in the Ninth Amendment the penumbral right to privacy. *Griswold v. Connecticut*, 381 U.S. 479, 490–92 (1965) (Goldberg, J., concurring). But see Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 80 (2006) (arguing that the Ninth Amendment should be read literally to “prohibit[] constitutional constructions . . . that infringe upon the unenumerated, natural, and individual rights retained by the people”).

648. See *supra* notes 39–42 and accompanying text.

649. *Id.*

outlaw slavery, enfranchise women, or permit the general federal income tax.⁶⁵⁰ But none of the Bill of Rights has ever required amendment; indeed, it is doubtful that their directives could be improved upon without compromising their ultimate potency. In this way, the First Amendment made sense in 1789 and it makes sense today, despite ambiguous moments at the margins of interpretive turnover (such as the Tenth Amendment now invites).

But the First Amendment has received attention from the judiciary for well over 100 years,⁶⁵¹ and the body of jurisprudential rules that have developed around it reflects this volume of consideration. By contrast, Tenth Amendment dual sovereignty has been the focus of sustained judicial attention only twice in the last century, most recently in only three significant cases.⁶⁵² It is not surprising that the Tenth Amendment lacks rules of interpretation that would better translate its underlying principle into an ascertainable directive amidst the thicket of competing values in real cases and controversies. It is not surprising, but it *is* about time.⁶⁵³

Models for a Tenth Amendment jurisprudential standard are available among the rules of interpretation that have developed around the First, Fourth, Fifth, and Eighth Amendments and the Commerce Clause, bargaining rules that the Court has promulgated to constrain the federal spending power⁶⁵⁴ and municipal regulatory

650. See U.S. CONST. amend. XIII (outlawing slavery); U.S. CONST. amend. XIX (enfranchising women); U.S. CONST. amend. XVI (permitting taxation without apportionment).

651. See *Reynolds v. United States*, 98 U.S. 145, 162–67 (1878) (interpreting the Free Exercise Clause to allow an act of Congress forbidding polygamy in Utah).

652. See *supra* Part III.A.

653. It is fitting that the Supreme Court take the affirmative step of adopting such a standard, as it periodically does in providing needed guidance to governmental actors regarding complicated areas of law. For example, in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, 128 (1978), the Court adopted a three-factor balancing test for interpreting the Fifth Amendment's taking prohibition in regulatory contexts (evaluating the character of the state action, the extent of its interference with the property owner's investment-backed expectations, and the overall economic impact of the state action). Similarly, in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, the Court supplemented the Administrative Procedures Act's vague proscription of "arbitrary and capricious" agency action with a four-factor test to facilitate judicial review. 463 U.S. 29 (1983); see *id.* at 42–43 ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on tactics which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.").

654. *E.g.*, *South Dakota v. Dole*, 483 U.S. 203, 207–08 (1987) (finding that the Spending Clause limits Congress by three general restrictions and a separate constitutional bar).

exactions,⁶⁵⁵ and such common law efficiency-based tests as the Hand Formula of tort law.⁶⁵⁶ Moreover, prior scholarship has shown how to tailor such a standard to take account of the fact-rich scenarios that tend to accompany specific constitutional dilemmas. Just as Professor Michelman demonstrated in proposing the elements that helped inform the regulatory takings balancing test adopted by the Court in *Penn Central Transportation Co. v. New York City*,⁶⁵⁷ a close analysis of the tension between the federalism values promoted by dual sovereignty reveals a series of factors that warrant consideration when regulation crosses into the interjurisdictional gray area. Although a consummate proposal is beyond the scope of this treatment, the broad outlines that such a test might take follow below.

C. *Factors for Consideration*

Like the Court's balancing tests in *Penn Central*, *Pike v. Bruce Church, Inc.*,⁶⁵⁸ and other areas of law that sport competing values, the Balanced Federalism Tenth Amendment standard would be a purpose-and-effects oriented balancing test, structured around consideration of the anti-tyranny, accountability, localism, and problem-solving values explored in Part V. A Tenth Amendment challenge would not be tethered to the New Federalism commandeering construct, but would enable redress whenever a plaintiff with standing shows that regulatory activity in the gray area unduly threatens Our Federalism.

A threshold consideration for the reviewing court would be whether the challenged regulatory activity is taking place within the interjurisdictional gray area or one of the uncontroversial spheres of state and federal authority described by the Balanced Federalism model of dual sovereignty. Facilitated by a gatekeeping inquiry, this determination would control which standard the court would apply to

655. See *Dolan v. City of Tigard*, 512 U.S. 374, 386–91 (1994) (requiring that there be a “rough proportionality” between a municipal regulation and the intended use of property); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987) (requiring a demonstrable nexus between the regulatory taking and the legitimate government purpose).

656. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947); see also Ronald J. Allen & Ross M. Rosenberg, *Legal Phenomena, Knowledge and Theory: A Cautionary Tale of Hedgehogs and Foxes*, 77 CHI-KENT L. REV. 683, 695 (2002) (discussing the Hand Formula as a type of balancing approach).

657. 438 U.S. 104, 124, 128 (1978); see also Frank I. Michelman, *Property, Utility, And Fairness: Comments On The Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1226–45 (1967) (proposing the elements that would form the basis of the Court's three-factor balancing test).

658. 397 U.S. 137 (1970); see *id.* at 142, 145 (employing a balancing test to determine whether a legitimate state interest outweighed the nature of the burden imposed on interstate commerce).

evaluate the challenged regulation.⁶⁵⁹ If the challenged activity takes place within the regulator's own uncontroversial sphere, the challenge fails to state a Tenth Amendment claim. If the challenged activity represents regulatory crossover fully into the uncontroversial sphere of the other side, strict scrutiny is applied and the Balanced Federalism Tenth Amendment standard is not needed. But if there is a nonfrivolous basis for characterizing the challenged activity as within the interjurisdictional gray area, then the court applies the Tenth Amendment multifactor test.

In applying the test to evaluate challenged regulatory activity in the gray area, the Court would consider to what extent the activity would either support or derogate: (1) checks and balances, (2) governmental accountability, (3) localism values, and (4) problem-solving. After weighing these findings in consideration of the factual context of the crossover, the court would conclude whether, on balance, the challenged activity serves or disserves the principles of constitutional federalism. Based on a review of the literature and principal Tenth Amendment and interjurisdictional cases decided in all federal courts of appeal since the Court's 1992 decision in *New York v. United States*, this piece recommends that deliberation of each factor take particular account of the following considerations:

1. *Checks and Balances*

In considering whether an activity unduly burdens the check-and-balance value, decisionmakers should consider such factors as consent or waiver by the adversely affected party, the scope and duration of the crossover, the nature of the crossover, and the degree to which the crossover is designed to prevent undue exploitation by the state or federal government of its sovereign authority.

a. *Waiver by Adversely Affected Party*

Waiver by the adversely affected party should be a factor in evaluating the degree to which an act of crossover threatens the check-and-balance value, since the act of consent should generally negate concerns about a tyrannical abuse of power. For example, the *New York* holding was most convincing to the extent it addressed an act of legislative commandeering, but least convincing to the extent that the regulatory crossover had been invited by the state plaintiff. The State of New York had arguably waived its Tenth Amendment objection when, together with the other states, it asked Congress to engage in the regu-

659. See *infra* Part VI.D (discussing the mechanics of applying the standard).

latory crossover by ratifying the states' consensus as federal law (thereby granting the needed dormant Commerce Clause exception). Respecting the subsidiarity principle, New York and its sister states chose this course of action based on the conviction that they lacked capacity to resolve the radioactive waste disposal collective action problem by other means. Respecting the expressed preference of the states, Congress declined to exercise available plenary federal authority in lieu of this more localist (and arguably less tyrannical) state-based approach.

Especially troubling in the *New York* decision was Justice O'Connor's explanation that a state's consent is no defense to a Tenth Amendment violation, because the Tenth Amendment protects the rights of individuals, not state agents who might bargain away the individual rights of their citizens.⁶⁶⁰ Her analysis leaves unclear what theory of representation is employed if citizens do not elect their agents to represent their interests, and effectively abrogates the Coase Theorem in the interjurisdictional gray area. The reasoning would prevent state and federal bargaining in the gray area, rendering the Tenth Amendment an inalienability rule rather than the property or liability rules adopted by most statutory and common law regimes to facilitate efficient bargaining.⁶⁶¹ If the Tenth Amendment could provide a useful threshold around which the state and federal governments could trade, then the "no waiver" rule is a bad absolute because it overprotects checks and balances at the expense of legitimate problem-solving partnerships (such as that formed by state and federal negotiations over the terms of the Phase II Stormwater Rule).⁶⁶² We should be able to assume that a state would not bargain for crossover against its interests, and that its consent preserves the check-and-balance value against undue assault. Waiver should thus be considered as one of the factors; a challenge leveled by one who has not consented should weigh more heavily than a challenge by one who has.

660. See *New York v. United States*, 505 U.S. 144, 182–83 (1992) (stating that constitutional constraints are unaffected by the consent of government actors, who may be motivated by a desire to avoid responsibility for unpopular decisions).

661. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (proposing a model for differentiating between different ways of protecting legal entitlements).

662. See *supra* Part IV.A.1.b.

b. Scope of the Regulatory Crossover

The standard should also consider the scope of the crossover, measured over time or in degree of compromise. For example, in *Printz*, Congress was held to have commandeered the executive authority of the states in temporarily requiring state police officers to perform background checks on would-be gun purchasers while the federal government established the facilities to run such checks itself.⁶⁶³ The Court concluded that any amount of commandeering violates the Tenth Amendment,⁶⁶⁴ no matter how small or how temporary. Whether or not the challenged federal law was correctly construed as commandeering, however, both the temporariness and degree of crossover should be relevant considerations under the Balanced Federalism standard. Obviously, longer and larger crossover threatens the check-and-balance value more seriously than shorter and lesser crossover. The Court recognizes a similar series of dimensions against which it measures the degree of harm in its balancing analysis used to evaluate the scope of a regulatory taking.⁶⁶⁵

For example, Justice O'Connor distinguished the background checks required in *Printz* from the Department of Justice's missing children reporting requirement on the grounds that the latter was a more "ministerial" requirement, indicating one less severe in scope and thus less threatening to federalism.⁶⁶⁶ Alternatively, the fact that the background checks was a temporary requirement while the missing child reporting requirements are permanent indicates that the background checks were less severe over time. Indeed, when coupled with a compelling short-term problem-solving need (for example, the immediate Katrina relief effort), a large, temporary crossover may be less threatening to the check-and-balance value than a small, permanent crossover, which could threaten a more pernicious slippery slope.

c. Nature of the Crossover

The nature of the crossover is also an important consideration; outright commandeering warrants stricter scrutiny than more self-

663. *Printz v. United States*, 521 U.S. 898, 933 (1997).

664. *Id.* at 935.

665. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 331–32 (2002) ("An interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner's interest. Both dimensions must be considered if the interest is to be viewed in its entirety." (citation omitted)).

666. *Printz*, 521 U.S. at 936 (O'Connor, J., concurring).

contained regulatory activity within the gray area. However, even the nature of an alleged act of commandeering warrants consideration. Legislative commandeering (such as that invalidated in *New York*) is the most severe form of crossover, and rightly subject to the most searching scrutiny under the standard. By contrast, the evaluation of alleged executive commandeering may prove more nuanced, because it is harder to distinguish between federal rules that regulate state executive actors in legitimately ministerial or market-participant capacities and those that regulate them in capacities deserving greater protection.

As the preceding discussion of the *Condon* quandary suggests,⁶⁶⁷ persuasively differentiating the two may ultimately hinge on consideration of all the various factors in play. For example, following Justice O'Connor's intuition in her *Printz* concurrence, the complete calculus would probably weigh in favor of requiring states to report missing children to a federal database, especially if there are no other effective means for resolving kidnappings that may cross state lines. The interference with state sovereign activity is very limited in scope, and the protection of child kidnapping victims that may be left vulnerable by purely intrastate enforcement efforts spells a particularly compelling interjurisdictional problem-solving need. On the other hand, a court might conclude that requiring state law enforcement officers to report criminal background information to gun dealers as part of a federal gun safety program exceeds the acceptable level of strain on check-and-balance or accountability values, especially if evidence suggested that the federal government could fulfill the role directly within a reasonable period of time. (Of course, both analyses might shift if the stated assumptions about available alternatives were not supported by the evidence.) Meanwhile, check-and-balance concerns over the potential exploitation of state sovereign authority might justify a federal prohibition against profiteering by states from personal data extracted from their citizens, the very specter raised in *Condon*.

d. Extent to Which Crossover Thwarts Undue Exploitation by Government of Its Sovereign Power Against Individuals

As the check-and-balance value protects citizens from the undue exercise of sovereign power by both the states and the federal government, the extent to which crossover thwarts exploitation of sovereign power may also be a valid consideration. Indeed, one legal realist interpretation of *Reno v. Condon* suggests that such considerations could

667. See *supra* Part III.A.2.

have already played a (perhaps subconscious) role in the Court's Tenth Amendment jurisprudence.

In *Condon*, the Court avoided finding commandeering on the stated grounds that the Driver's Privacy Protection Act did not truly invade the states' sovereign authority.⁶⁶⁸ Perhaps, although a more cynical interpretation of the decision is that the Court simply lacked sympathy for what South Carolina wanted to do with its citizens' personal data. Although Balanced Federalism review would reject the reasoning in *Condon*, it might reach a similar outcome on grounds that the crossover here allowed (federal law preventing the nonconsensual dissemination of citizens' information by states) was intended to protect individuals against exploitation by the government when they seek official identification and permission to drive—two important gateways to participation in modern society that only the state may grant. Because a primary purpose of checks and balances is the protection of individual rights against government excess, regulatory crossover designed to protect individual rights against the state should fare better in the analysis than nakedly self-aggrandizing regulatory crossover.

2. *Accountability*

The decisionmaker should consider the extent to which accountability problems associated with the regulatory crossover would overwhelm other federalism values served by the regulation, and the extent to which these problems can be effectively mitigated.

a. *Potential for Mitigation*

In some cases, otherwise desirable crossover that threatens accountability values might be salvaged by effective public explanation. If voters can be reasonably made to understand which regulators are responsible for which regulatory choices, then accountability concerns might be overcome. For example, the Phase II Stormwater Rule upheld in *Environmental Defense Center* partnered federal and municipal regulators in an effort to abate stormwater pollution, blurring lines of accountability in an already tricky interjurisdictional zone. However, it also included a public education campaign to ensure that citizens be given the tools to understand what the program was for, how it would work within each municipality, and who was responsible for which aspects of regulatory decisionmaking in each locale. Nevertheless, the less likely it is that such problems can be effectively miti-

668. See *Reno v. Condon*, 528 U.S. 141, 151 (2000).

gated by transparency and communication with voters, the more seriously accountability concerns should weigh in the analysis.

b. Purpose and Effects

Crossover designed to shoulder the adversely affected party with significant regulatory burden, financial or political, warrants additionally heightened scrutiny. For example, objections to a federal unfunded mandate to state governments might find traction under this prong if it can be shown that the cost-shifting mandate creates unavoidable confusion among voters without a compelling rationale. An adjudicator should consider carefully whether a federal command for state assistance that saddles the states with disproportionate responsibility can truly be justified by unusual satisfaction of other federalism considerations.

3. Localism Values

The decisionmaker should consider the extent to which the regulatory crossover would assist or undermine federalism values associated with the protection of local autonomy, including the protection of localized diversity and the promotion of efficiency and innovation through interjurisdictional competition.

a. Extent to Which Crossover Protects Local Autonomy Against State or Other Local Power

Some states apply a “home-rule” system that encourages local autonomy (e.g., New York), while others regulate in a more centralized manner (e.g., “Dillon Rule” states such as Virginia). When important localism values are under-protected at the state level, regulatory crossover by a local jurisdiction that responds to a pressing localized problem may deserve greater deference than might otherwise be warranted. One such example may be the South Coast Air Quality Management District’s invalidated efforts in *Engine Manufacturers* to protect the respiratory health of its especially vulnerable children despite broad federal authority over the regulation of air pollution.⁶⁶⁹

By contrast, a centralized regulatory scheme may prove the only means of accomplishing localist objectives if it is required to police negative externalities associated with the autonomous choices of other localities (for example, to avoid the border-crossing impacts of extra-territorial land use management policies by other localities).⁶⁷⁰ Such

669. See *supra* Part IV.B.2.a.

670. See Barron, *supra* note 147, at 386–87; see *supra* note 530 and accompanying text.

a centralized scheme might also deserve greater deference than would otherwise be warranted (e.g., the Phase II Stormwater Rule's requirement that all localities participate in a national effort to combat stormwater pollution).

b. Extent to Which Crossover Marginalizes or Discriminates Against Vulnerable Localities

Consideration of localism values might also address the extent to which crossover discriminates against or otherwise marginalizes vulnerable states or localities. One example of this concern (although not within a currently justiciable controversy) is Nevada's continuing opposition to siting the nation's most dangerous high-level nuclear waste disposal facility near Las Vegas at Yucca Mountain.⁶⁷¹ Because the other states prefer not to host it, Nevada's concerns are simply outvoted each time they are raised in legislative session. But should Nevada citizens be forced to bear the brunt of all other Americans' most dangerous waste, simply because the other states can effectively gang up on Nevada's representatives in Congress? Although an appropriate remedy for Nevadans remains unclear, the scenario suggests a legitimate localism-related factor for consideration in Tenth Amendment controversies.

4. Problem-Solving

The decisionmaker should consider the extent to which regulatory crossover is necessary for an effective regulatory response to an interjurisdictional problem that satisfies the criteria described in Part IV. Careful attention to the conflict between pragmatism and anti-tyranny values is warranted, such that the problem-solving value does not automatically overcome checks and balances whenever a legitimate interjurisdictional problem arises. Moreover, it is important to remember that the problem-solving value is partnered with the preference for localism in the subsidiarity principle. If capacity exists at both levels, subsidiarity empowers the more local actor to respond.

a. Capacity Analysis

A key aspect of the problem-solving analysis will be its ability to distinguish cases where one side or the other lacks capacity to cope exclusively with the problem. In assessing the extent to which regulatory crossover is or is not warranted by problem-solving values, the

671. See EPA, Yucca Mountain Standards, <http://www.epa.gov/radiation/yucca/about.htm> (last visited Mar. 15, 2007).

decisionmaker should take a “hard look” at relative capacity. One starting point for evaluating the limits of state capacity to effectively regulate a given problem is the extent to which the matter implicates border-crossing harms or interstate commerce. A starting point for evaluating the limits of federal capacity is the extent to which the matter disproportionately affects some localities over others, or requires local expertise unavailable at the federal level. Evidence of a given party’s past performance (or undue lack thereof) may also be relevant to an evaluation of its problem-solving capacity in a given scenario.

Creating a satisfactory metric for capacity will prove the most important and difficult task of the Balanced Federalism model, since it weighs significantly in consideration of the problem-solving value. A poorly calibrated threshold for evaluating regulatory competency could allow a stated need for problem-solving to unnecessarily dominate other considerations. Future work is needed in this regard, although the literature reveals good starts on the project, including Justice Breyer’s proposal in his *Morrison* dissent,⁶⁷² and a theory of capacity separately proposed by Professors Donald Regan and Douglas Kmiec in work interpreting the Commerce Clause.⁶⁷³ In their work, Regan and Kmiec turn for inspiration to the sixth Virginia Resolution, a proposal for distinguishing between state and federal competencies that was approved by the Constitutional Convention on July 17, 1787.⁶⁷⁴ The signatories were resolved:

That the National Legislature ought to possess the Legislative Rights vested in Congress by the Confederation; and moreover, to legislate in all cases for the general interests of the union, and also in those to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation.⁶⁷⁵

The Resolution did not become part of the final text of the Constitution, but Regan notes that a proposal based on this text would “not

672. See *United States v. Morrison*, 529 U.S. 598, 663 (2000) (Breyer, J., dissenting) (suggesting that courts evaluate the rigor of congressional factfinding when deciding whether Congress has impermissibly invaded a traditionally state-controlled area of regulation).

673. Regan, *supra* note 504, at 557–58 (suggesting that differing state views should be protected and should not be infringed by Congress without sufficient justification); Douglas W. Kmiec, *Rediscovering a Principled Commerce Power*, 28 PEPP. L. REV. 547, 561–62 (2001) (proposing that courts evaluate states’ inability to rectify regulatory problems as one factor in determining the boundaries of the federal commerce power).

674. Regan, *supra* note 504, at 555.

675. *Id.* at 555–56 (quoting JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 380 (W.W. Norton & Co. ed., 1966)).

rely on it for any proposition that we could not infer from the text of the Constitution itself.”⁶⁷⁶ Still, other than affirming that the states and federal government will possess different competencies, the text does not provide explicit tools for *ex ante* evaluation of which sovereign is best suited for a specific regulatory target.⁶⁷⁷ Such a determination would likely hinge on the facts in each controversy, acknowledging that competencies may shift over time and—importantly—in response to previous determinations.

The possibility of shifting competencies places important limits on the precedential effects of capacity-based determinations under the standard. Although procedural approaches developed in performing the capacity analysis would surely have precedential effect, substantive determinations would always be vulnerable to reexamination in later cases. For example, it may be that in comparison to Louisiana (though perhaps not Mississippi), the federal government had superior capacity to cope with the Katrina emergency, and that the Tenth Amendment standard might have permitted federal crossover had it arisen. However, the Katrina experience could subsequently motivate Louisiana to improve local capacity such that, should similar circumstances arise again in the future, the more local actor would be equally capable. Even had the federal government permissibly taken charge the first time, if another Katrina were to strike Louisiana and both the state and federal government were capable of response, a second act of identical crossover by the federal government might not pass muster under the Tenth Amendment standard. The precedential effects of all decisions under the standard must take account of both subsidiarity’s ongoing preference for localism and the potential for responsively adjusted capacity.

The sixth Virginia Resolution also suggests an important sandtrap in the capacity analysis, which is the danger that how one characterizes the regulatory target might determine which side has the relevant capacity. In other words, if the regulatory objective is identified as “the need for a uniform approach” (because, in the words of the Resolution, the exercise of individual legislation would interrupt the har-

676. *Id.* at 556.

677. In other contexts, one could imagine that the enterprise might work better the other way around: if we assign roles *ex ante*, then the respective parties could develop the capacity required of them to manage their responsibilities. However, this seems less workable within the existing constitutional framework, where local and national expertise organically accumulate at the state and federal levels, and respective obligations are pre-assigned by law. An interjurisdictional regulatory problem, as defined here, draws on both sets, so unless we were willing to more substantially revise the legal responsibilities of state and federal actors, the suggestion appears to be unavailing.

mony of the nation), then only the federal government will have the capacity to act as needed. It is critical therefore to begin the analysis by asking the right question, or identifying the core regulatory problem that demands redress. A problem characterized as “the need for a uniform approach” must always be probed several analytical levels deeper. Why the need? Are we concerned about a prisoner’s dilemma in which the states, acting rationally as individuals, may nevertheless pursue an irrational end (for example, a race to the bottom on the siting of hazardous waste or the setting of stationary source air pollution standards)? Or is the problem really one of market failure in a uniquely local market, in which the need for fine-tuned regulatory solutions and local expertise are paramount (for example, the human and financial toll of a public health crisis in light of uniquely local factors)? The former concern suggests a legitimate need for national capacity; the latter less so.

b. Extent to Which Federalism-Based Objections Are Pretextual

Finally, the standard might legitimately consider whether federalism-based objections are merely pretextual, offering rhetorically appealing cover for baser motives. The behavior of the State of New York in *New York v. United States* comes again to mind, as does the suggestion that federalism concerns invoked by the federal government after the Katrina debacle were mere post-hoc rationalizations to cover for incompetence or abdication.⁶⁷⁸ The Court should treat apparently pretextual invocations of federalism concerns with at least the level of skepticism it has applied to Congress’s invocations of ties to interstate commerce in Commerce Clause cases like *Lopez* and *Morrison*. Neither the check-and-balance value nor any other principle of federalism should be opportunistically deployed as an excuse to avoid unpalatable or difficult problem-solving in the interjurisdictional gray area.

D. Mechanics

Embrace of a Balanced Federalism model would resound throughout the general federalism inquiry, but the mechanics of asserting federalism claims would remain similar to the New Federalism model in most respects.

A gatekeeping inquiry at the outset would establish a two-track system of Tenth Amendment review, screening out challenges invoking the uncontroversial spheres of state and federal authority and re-

678. See *supra* Part II.B.4.

serving application of heightened scrutiny under the balancing test to challenged activity within the interjurisdictional gray area. For example, the gatekeeping baseline might designate the uncontroversial sphere of federal authority as extending as far as there is clear constitutionally delegated authority and Congress has expressly preempted further state regulation—but if the state can raise a colorable claim as to why its action has not been preempted, then it will be treated as a gray area claim and adjudicated under the balancing test. The gatekeeping baseline might reciprocally define the uncontroversial sphere of state authority as extending as far as the Constitution has not expressly denied it regulatory authority and it has not been expressly preempted by valid federal law. If no colorable claim can be made that the challenged action falls within the gray area, then the matter is resolved according to the existing jurisprudence without recourse to the balancing test. A challenge to regulation that takes place within the regulator's own sphere fails to state a Tenth Amendment claim, and crossover fully to the sphere of the other side would be invalidated without recourse to judicial balancing. But if either party can set forth a nonfrivolous argument challenging either the clarity of the constitutionally delegated authority or the extent of congressionally intended preemption, the court proceeds to the four-factor test.

Still, the proposed Tenth Amendment standard would provide a means for evaluating only those controversies that could not be resolved under a more specific federalism inquiry, and the rest would be brought as before. For example, although Balanced Federalism dual sovereignty has theoretical implications for cases involving the scope of federal authority under the Commerce Clause or Section Five of the Fourteenth Amendment, such challenges would not be adjudicated under the Tenth Amendment standard; they would be resolved on the basis of the most specifically relevant constitutional doctrines. The principles of Balanced Federalism dual sovereignty may yet bear on the unfolding jurisprudence in these related federalism inquiries, but not by application of the Tenth Amendment standard.

Nevertheless, Tenth Amendment challenges might be more readily available under Balanced Federalism than previous models. In contrast to cooperative federalism, Balanced Federalism claims would be justiciable. In contrast to New Federalism, they would include but not be limited to commandeering challenges. Establishing the ultimate parameters of the doctrine exceeds this treatment, but states might find a broader forum to challenge other alleged federal excess that threatens federalism values. For example, if it could survive the

gatekeeping inquiry and show unjustifiable harm to accountability values, a state might attempt to challenge an unreasonable unfunded mandate. In extreme cases, a state might even attempt to bring a Tenth Amendment challenge to an unjustifiably preemptive application of federal law in the gray area. Federal actors are more likely to defend against Tenth Amendment challenges than bring them, but the standard would provide additional guidance for ex ante policymaking in anticipation of how a court might rule, as well as new defenses in litigation. For example, in extreme cases (as perhaps represented by Hurricane Katrina), the federal government might raise problem-solving values in defense of an alleged check-and-balance violation. As with all doctrinal transitions (including introduction of the New Federalism anti-commandeering rule), the new possibilities would probably lead to a bevy of federalism challenges in the short term, after which the doctrinal parameters would become settled and the volume of exploratory challenges would fall.⁶⁷⁹

Otherwise, a Balanced Federalism Tenth Amendment challenge would be brought like any other. A party with standing would claim that a regulatory initiative should be invalidated on Tenth Amendment grounds. The reviewing court would apply the gatekeeping inquiry to establish, in essence, what level of scrutiny to apply: something akin to rational basis review if within the regulator's own uncontroversial sphere, intermediate scrutiny under the balancing test if within the interjurisdictional gray area, and perhaps strict scrutiny if crossover is to the uncontroversial sphere of the other sovereign. If a challenge merits heightened scrutiny under the jurisprudential standard, then the court tests the challenged regulation against the fundamental federalism values, heeding the factors articulated above, and weighs the results of its inquiry.

679. In the fourteen years following the introduction of the anti-commandeering rule in *New York v. United States*, 505 U.S. 144, 188 (1992), 73 cases were decided in all of the federal courts of appeals (including the Supreme Court) in which *New York* was significantly cited in reference to a Tenth Amendment claim. During the first seven years after the *New York* decision (1993–1999), 44 such cases were decided. During the second seven-year period (2000–2006), an additional 29 such cases were decided, a reduction of about 34% over the first seven-year period. These figures are suggestive of the trend predicted in the main text, but even more so when the full set of 73 is winnowed to select for the most meritorious claims. After eliminating the 26 cases in which the novel anti-commandeering claim represented more of a “shot in the dark” or “kitchen-sink” argument than a persuasive application of the newly articulated doctrine, the remaining 47 cases span the fourteen-year period relatively evenly: 26 were decided between 1993 and 1999, and 21 between 2000 and 2006. (Research on file with author.) This suggests that a passing surge of cases attempted to capitalize on potential new claims available under the new doctrine, leaving a smaller and steadier stream of more appropriate claims after the Court used this first wave to clarify the parameters of the doctrine.

For example, the municipalities that challenged the Phase II Stormwater Rule in *Environmental Defense Center* could claim that the Rule should be invalidated because it compels them in their sovereign capacity to participate in the federal management of stormwater pollution by regulating the conduct of their own citizens.⁶⁸⁰ (To make this evaluation interesting, assume there is no alternative permitting scheme to enable a locality to opt out of this requirement, in contrast to the actual facts of the case.) As discussed in Part IV, the management of stormwater pollution is well within the interjurisdictional gray area, so the reviewing court would apply the Tenth Amendment standard with intermediate scrutiny.

The court would then test the regulation against the factors identified in the standard. It would consider the plaintiffs' claim that the Phase II Rule derogates from the check-and-balance value by enabling the federal government to compel state regulatory activity in a realm of traditional state authority. The Rule might similarly erode accountability, in mixing and matching state and federal responsibility within a single program of regulation. However, its incorporation of a public information campaign might alleviate accountability concerns by helping voters understand the nature of the federal-municipal partnership. Similarly, enabling a centrally imposed plan to bind municipalities threatens local autonomy, but the court would also consider the ways in which the Rule advances localism values, by couching its commands in terms that minimize federal preemption and maximize local initiative in a realm in which both central coordination and local expertise are crucial. The court might accordingly note that the Rule encourages diversity and competition between localities, and fosters the proverbial laboratory of ideas from which individual localities and the nation as a whole might ultimately benefit, as different municipalities experiment with unique approaches to satisfying the broadly stated federal requirements. Finally, the court would consider whether the Rule serves the problem-solving value. In this case, the problem-solving value makes a strong case for allowing the challenged crossover, in that stormwater pollution is a collective action problem that cannot be managed by either the federal or the local government acting alone. The problem is closely tied to the management of local land uses that are the specialty of local government, and only local actors would have the relevant expertise to create a stormwater management plan adapted for unique local characteristics. Yet stormwater pollution is a border-crossing prisoner's dilemma of the sort that pro-

680. See *supra* Part IV.A.1.b.

vides strong incentives for individual localities to do nothing, even though all would eventually suffer if nothing is done. In this instance, the force with which the Rule advances problem-solving and certain localism values might outweigh its admitted costs to checks-and-balances and certain accountability values.

On another familiar front, had the federal government taken charge of the Katrina response effort without gubernatorial consent, placing state and local first responders already on the ground within the federal chain of command, this easily could have been challenged afterward as outright commandeering. It is hard to imagine a more serious breach of the check-and-balance value—a President wresting away command of a state’s own National Guard—but if it were sufficiently constrained in time, then even this breach might have been overcome in the balancing analysis. Such federal crossover would have been large in scope but short in time, and possibly warranted in the Balanced Federalism calculus by the overwhelming need for an efficient response that ultimately would have saved lives, honored the express desires of the local government in New Orleans, and forestalled at least some of the grave externalities that were spun off throughout the rest of the nation. By contrast, it is possible that a reviewing court would have concluded that the kind of legislative commandeering in *New York* could never be excused by offsetting problem-solving advantages, waiver and pretext notwithstanding.

E. The Time for Balance

In sum, the Balanced Federalism standard would correct the strict-separationist fallacy of New Federalism while grappling with the tensions that cooperative federalism glosses over. It would provide an inventory of federalism considerations to assist both *ex ante* policymaking and *ex post* adjudication, forging a middle path between the critical but competing values that have thus far driven the federalism debate to extremes on either side.⁶⁸¹ Indeed, the Court often turns to a balancing approach when evaluating tensions between orthogonal values, such as between protection of efficient interstate commerce and conflicting but legitimate local exercise of the police power, or between legitimate exercise of the police power and private property rights.⁶⁸² In such cases, the Court is left with no real alterna-

681. See Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 122 (1992) (“Ideological poles tend to attract rules. Standards tend to dive for the middle and split the difference between ideological poles.”).

682. For example, in adjudicating dormant commerce clause challenges, the Court considers values relating to the state’s obligation to protect its citizens and values relating to

tive other than the time-honored balancing test. Rules that pretend otherwise either drive judicial balancing into the unaccountable underground or perpetuate (even irrationally) a particular balance established by the judge who articulated the rule in the first place.⁶⁸³

In addition, jurisprudential standards that could lead to inefficiencies in isolated transactions have been recognized as well-suited to adjudication between repeat players (here the state and federal governments), because they “mimic a pattern of post hoc readjustments that [the parties] *would* make if they were in an ongoing relationship with each other.”⁶⁸⁴ The classic advantage of the bright-line rule in enabling efficient bargaining between governed parties evaporates in this context, given the Court’s admonition in *New York* that the state may not bargain away a Tenth Amendment entitlement that essentially belongs to its citizens.⁶⁸⁵ Even were the Court to correct this nullification of Coasian bargaining in the gray area, irregular parties like the state and federal governments cannot be expected to bargain in the same fashion as individuals, rendering this usual bright-line rule advantage dubious in this unusual context. In the end, the flexible standard may foster the more helpful progression toward a healthy balance of state and federal power.

Of course, this preliminary exploration of Balanced Federalism is marked by important unanswered questions. It does not settle the absolute boundaries of the interjurisdictional gray area, it provides only the outlines of a proposed jurisprudential standard, and its theory of capacity remains in an early stage. Further such work is needed, and underway. In addition, the proposal heralds all the usual disadvantages associated with flexible standards in comparison to bright-line rules—enhancing the discretion of judicial decisionmakers, limiting certainty for regulated parties, promising mud instead of crystal.⁶⁸⁶ For example, precisely *how* to balance the competing inquiries would be committed to judicial discretion, distressing those who distrust the independent decisionmaking of individual judges. On the other hand, judges have long proved expert in exactly this sort of contextual

the nation’s interest in efficient interstate commerce. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145 (1970). Similarly, in adjudicating regulatory takings claims, the Court balances values relating to the protection of public interests and to the owner’s private property rights. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123–25 (1978).

683. See Joseph Singer, *Catcher in the Rye Jurisprudence*, 35 *RUTGERS L. REV.* 275, 278 (1983).

684. Rose, *supra* note 266, at 602–03.

685. See *New York v. United States*, 505 U.S. 144, 182 (1992).

686. See Rose, *supra* note 266, at 578–79 (likening clear-cut rules of decision to crystals and ambiguous rules to mud).

balancing in performing the causation analysis at the heart of the negligence standard, a foundational common law tradition that even critics of judicial discretion are happy to entrust to the judiciary. Opponents of the uncertain Balanced Federalism approach might long for the comparative simplicity of New Federalism's bright line rules—but a bright-line approach that fails to track the real world targets of adjudication is of no jurisprudential value. A rough-edged balancing test that provides meaningful protections for federalism values and genuine guidance for decisionmakers is better than a crisp rule that obstructs good government and forces difficult considerations below the radar of accountability.⁶⁸⁷

Moreover, it is unlikely that Balanced Federalism would induce balancing where there is none presently. More likely, it would give overt expression to the value-laden balancing process already covertly in use by courts and policymakers when they reason their way through the conflict between strict-separationist dual sovereignty and interjurisdictional problem-solving. Evidence of this values-based assessment appears in the progression of the *Environmental Defense Center* (Phase II Stormwater) decisions,⁶⁸⁸ the New Jersey court's reasoning in *American Civil Liberties Union*,⁶⁸⁹ and the court of public opinion regarding the Katrina response.⁶⁹⁰ Perhaps even the apparent disconnect between *Gonzales v. Raich*⁶⁹¹ and *Gonzales v. Oregon*⁶⁹² can be explained this way. Similarly, despite Justice Scalia's strong appeal to federalism in his *Rapanos* plurality opinion,⁶⁹³ Justice Kennedy's concurrence highlights the limitations of bright-line rules in his embrace of the ad hoc, "case-by-case-basis" approach that is now the governing

687. For example, Professor Vicki Jackson argues that "the particular rule drawn by *Printz* . . . is not well supported in constitutional history and is both underinclusive and overinclusive toward legitimate goals of protecting state governments and promoting political accountability." Jackson, *supra* note 23, at 2182. Professor Jackson further argues that "[d]espite the conventional association of the rule of law with more categorical approaches, . . . a multifaceted flexible standard is likely to provide more stability than the categorical (but insufficiently supported) rule of *Printz*, and better accords with both rule of law and federalism values." *Id.* at 2183.

688. *See supra* Part IV.A.1.b.

689. *ACLU of N.J., Inc. v. County of Hudson*, 799 A.2d 629, 654–55 (N.J. Super. Ct. App. Div. 2002) (allowing preemption of state law requiring release of suspected terrorist detainee names); *see supra* notes 188–190 and accompanying text.

690. *See supra* note 101.

691. 545 U.S. 1 (2005); *see id.* at 9 (approving federal jurisdiction to prosecute in-state cultivation of medical marijuana as legalized under California law).

692. 126 S. Ct. 904 (2006); *see id.* at 925 (disapproving federal jurisdiction to prosecute euthanasia as legalized under Oregon law).

693. *Rapanos v. United States*, 126 S. Ct. 2208, 2224–25 (2006) (plurality opinion).

rule.⁶⁹⁴ If covert values-balancing is really informing these decisions, far better to move that reasoning process to the surface, where it can be scrutinized and developed according to the mechanisms of the common law tradition.⁶⁹⁵ A well-defined judicial balancing test will provide a rational means of inventorying the factors that judges should consider, while providing guidance for state and federal policy-makers to formulate and defend regulatory choices about crossover in anticipation of the courts' calculus in the interjurisdictional gray area.

VII. CONCLUSION: SEEKING CHECKS AND BALANCE IN FEDERALISM

The accelerating interdependence of modernity has revived the great dilemma of constitutional federalism—that is, how to define the boundaries of state and federal jurisdiction so as to preserve checks and balances without eviscerating effective regulatory responses to interjurisdictional problems. The Tenth Amendment, representing the most direct (if nondirective) constitutional statement about the balance of local and national power, has become a site of heated political contest between those who respectively favor stronger and weaker boundaries between local and national reach. According to the former, the interlinking cooperative federalism model that drives many of our most ambitious regulatory endeavors impermissibly threatens the constitutionally intended balance;⁶⁹⁶ to the latter, the strict-separationist New Federalism approach impossibly threatens meaningful resolution of our most pressing societal problems.⁶⁹⁷ Still, the in-

694. *Id.* at 2249 (Kennedy, J., concurring).

695. Alexandra B. Klass, *Common Law and Federalism in the Age of the Regulatory State*, 92 IOWA L. REV. (forthcoming 2007) (manuscript at 30–31), available at http://papers.ssrn.com/so13.papers.cfm?abstract_id=912545 (highlighting the benefits of common law decisionmaking in arguing for an enhanced role for state common law in environmental regulation).

696. See, e.g., Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377, 399 (2005) (stating that the administration of federal programs through the states obscures federal regulatory responsibility); Greve, *supra* note 631, at 576 (arguing that a system of cooperative federalism threatens central constitutional values); Hills, *supra* note 201, at 891–908 (decrying commandeering as inefficient, unjust in cost distribution, and violative of the First Amendment as forced speech).

697. See, e.g., Esty, *supra* note 222, at 623–24 (finding that environmental programs are best enforced with both state and federal cooperation); Schapiro, *supra* note 306, at 258 (finding that the dualist federalist approach advanced by the Supreme Court may limit Congress's ability to deal with various national problems, such as environmental protection); Weiser, *supra* note 30, at 1733–34 (noting that the dual federalism approach has not worked in the telecommunications context and in fact, “defied reality”); Weiser, *supra* note 222, at 665–66 (observing that the New Federalism rhetoric does not account for the practical need for federal-state regulatory sharing); John D. Tortorella, Note, *Reining in the Tenth Amendment: Finding a Principled Limit to the Non-Commandeering Doctrine of United States v. Printz*, 28 SETON HALL L. REV. 1365, 1381 (1998) (stating that *Printz*'s non-

tractability of interjurisdictional regulatory problems like Katrina, national security maintenance, air and water pollution, and others all highlight the need to develop a model of Balanced Federalism that can more meaningfully contend with the interjurisdictional gray area.

The Court's New Federalism jurisprudence points us toward a strict-separationist model of federal-state relations that assumes a clear line between areas of properly national and inviolate local concern, policed by the Tenth Amendment. A host of controversial preemption cases, doctrinally silent on federalism but for their vociferous dissents, acts in tacit support of the project. Yet this idealistic bright line between mutually exclusive spheres of authority is illusory. At the margins, a gray area exists in which regulatory problems implicate matters of both national and local obligation. Decisionmaking that imposes the bright-line rule in the interjurisdictional gray area is doomed to arbitrariness, unable to navigate the tension there arising between the competing federalism values of checks and balances, accountability, localism, and problem-solving. The latter value is especially weakened in the strict-separationist approach, promoting inefficient regulatory response in the gray area.

Yet even if legitimate constitutional interpretation does not require the bright-line rule approach, neither does it warrant a wholesale abandonment of the check-and-balance value that the New Federalism privileges. The fact that federalism constraints enjoy no natural constituency suggests that judicially enforceable constraints may be necessary if we value federalism's underlying principles,⁶⁹⁸ as this piece argues we should. A powerful case can be made for the importance of the under-appreciated problem-solving value, but each of the others continue to exert considerable normative force.⁶⁹⁹ Federalism itself remains content-neutral, designed to realize a set of competing good government values that are suspended in a permanent tug of war.

What is needed, simply, is *balance*. The embrace of a Balanced Federalism model of dual sovereignty that anticipates interjurisdictional problems would facilitate interpretation of the Tenth Amendment so that it can police the real boundary at issue: that between

commandeering rule will impede Congress's ability to implement important policy objectives).

698. See Devins, *supra* note 209, at 133 (discussing voter disregard for federalism issues), and accompanying text.

699. Indeed, those so satisfied with the New Deal expansion of federal legislative jurisdiction that anti-tyranny constraints now seem quaint might reflect on whether the expansion of federal executive authority in the post-9/11 era alters this complacency.

legitimate and unjustifiable regulation within the interjurisdictional gray area. It would facilitate interpretation of the other controversial federalism inquiries that hinge on our conception of dual sovereignty, such as the scope of the commerce power and the relationship between federal authority under Section Five of the Fourteenth Amendment and state sovereign immunity under the Eleventh Amendment. In Balanced Federalism, the Tenth Amendment functions not as the blunt bright-line rule into which it has been caricatured by the New Federalism, but instead as the guardian of dual sovereignty by the careful application of a jurisprudential standard made sensitive to the clash of federalism values in the gray area. Dual sovereignty under Balanced Federalism may be less attractively simple than New Federalism's strict-separationist ideal, but it would be more honest, more grounded in reality, and ultimately more useful. A judicial balancing test such as that proposed in Part VI would assist application of Balanced Federalism Tenth Amendment constraints to the variety of challenges that arise in the gray area, providing guidance for courts and policymakers nationwide.

Much work is needed to bring this proposal to maturity. Still, moving toward a more Balanced Federalism would progress the discourse at a critical time for both federalism and regulatory law. At stake is the ability of state and federal government to take on confounding interjurisdictional problems without compromising the important federalism values associated with structural checks and balances, all while continuing to promote accountability and localized diversity and innovation. Moving from the bright-line approach to the jurisprudential standard would maintain a healthy balance between local and national power without catapulting any one federalism value over all competing considerations. And it would help make the difference between a faltering, ponderous response to interjurisdictional crises like Katrina and the more confident, smoothly coordinated regulatory response of which we should be capable.