Justice Stevens's Theory of Interactive Federalism

Robert A. Schapiro

Recommended Citation
Available at: http://ir.lawnet.fordham.edu/flr/vol74/iss4/19
JUSTICE STEVENS'S THEORY OF INTERACTIVE FEDERALISM

Robert A. Schapiro*

INTRODUCTION

The jurisprudence of Justice John Paul Stevens advances a strong vision of national unity. Like Justice Wiley Rutledge, for whom he clerked, Justice Stevens understands the United States Constitution as a document fundamentally designed to promote and preserve the union. The primary role of federal courts is to vindicate constitutional values, including the value of national unity. These background principles of unity provide the context for Justice Stevens's conception of federalism. In his thirty-five years on the bench, Justice Stevens has elaborated a robust theory of federalism. His theory, however, contrasts sharply with the dualist federalism that became the regnant model of the Rehnquist Court.

Dual federalism, the idea that the national government and the states enjoy exclusive and nonoverlapping spheres of authority, does not describe the actual operation of government in the United States today. On the contrary, the overlap of national and state activities is ubiquitous. In areas ranging from narcotics trafficking\(^1\) to securities trading\(^2\) to education,\(^3\) concurrent federal and state regulation is the norm. With the recent wave of national crises, including the War on Terrorism and Hurricane Katrina, the growth of state and national power and the resulting overlap in authority, seems likely to increase.

* Professor of Law, Emory University School of Law. Law Clerk for Justice John Paul Stevens, October Term 1991. Email: rschapir@law.emory.edu. My thanks to Abner S. Greene, Helen Herman, Eduardo M. Pefalver, Dean William Treanor, and all others who helped to organize the conference on the Jurisprudence of Justice Stevens. Thanks also to the other participants in the panel on federalism, David J. Barron, Allison Marston Danner, Thomas H. Lee, and Adam Marcus Samaha. Noah Robbins and Gregory Sicilian provided skilled research assistance for this Article. Terry Gordon and Will Haines of the Emory University School of Law Library offered valuable aid as well. I, like so many others, owe a special debt of gratitude to Justice John Paul Stevens, a great judge, scholar, teacher, mentor, and friend.


Even in the more rarified atmosphere of the United States Supreme Court, the normative project of fully dividing state from federal power has little support. Since the advent of the New Deal Court in 1937, the Court no longer seeks to maintain strict boundaries between state and federal realms. On the present Court, only Justice Clarence Thomas has shown any inclination to return to the pre-New Deal conceptions of dual sovereignty.

While dual federalism no longer remains a credible project, dual federalism persists, at least on the Court and in the academy, if not in the operation of government in the United States. Dualist federalism does not seek to enforce strict borders between state and federal power. Dualist federalism acknowledges substantial areas of concurrent jurisdiction. However, dualist federalism defines some activities as inherently local and beyond the reach of federal power and other areas as inherently national and beyond the authority of state regulation. Dualist federalism accepts some overlap of state and federal authority, but seeks to safeguard some sacred precincts of complete state or federal hegemony. Dualist federalism defines these protected enclaves in terms of subject matter. Some activities are local; others are national. Constitutional principles of federalism protect the local sphere from federal intrusion.

A recurrent problem for dualist federalism is how to define the boundary between federal and state domains, between the “truly national” and the “truly local.” Policing this doctrinal border becomes especially difficult because of its seeming irrelevance in contemporary experience. Faced with this vexing problem, the Court has attempted to maintain the national/local boundary through various categorical distinctions, such as distinguishing between economic and noneconomic activity or between generally applicable laws and laws that regulate the states as states.

In applying these categories, the Court has ended up limiting both state and federal activities in ways that make little sense from the perspective of a normative theory of federalism. The much-noted tension between the

6. See Robert Post, Federalism in the Taft Court Era: Can It Be “Revived”? , 51 Duke L.J. 1513, 1638-37 (2002) (“Even within the narrow context of congressional power, where the Rehnquist Court has displayed a vestigial attraction to principles of dual sovereignty, the revival of pre-New Deal federalism is hardly a credible project.”).
8. See Morrison, 529 U.S. at 613 (“[T]hus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.”); Lopez, 514 U.S. at 560.
Rehnquist Court’s professed solicitude for states in its Commerce Clause and Tenth and Eleventh Amendment cases and its constriction of state authority in its preemption cases provides one illustration of the normative difficulties.\textsuperscript{10}

Elsewhere, I have proposed a different model of federalism, which, following Professor Martin Redish,\textsuperscript{11} I have termed “interactive” federalism.\textsuperscript{12} I believe that interactive federalism provides a more accurate descriptive account of the operation of government in the United States and also offers a more attractive normative approach to realizing the benefits of federalism. Interactive federalism understands the interaction, rather than the separation, of state and federal power as the principal dynamic of federalism. Interactive federalism rejects the idea of creating enclaves of exclusive state and federal power. Interactive federalism, I have argued, can advance the same values claimed for dualist federalism, while creating fewer doctrinal problems.

While the key problem for dualist federalism is how to divide local and national realms, the chief difficulty for interactive federalism is how to manage the overlap between state and federal authority. Without clearly defined regions of sovereignty, how can the potentially conflicting state and federal regimes be mediated? While I have attempted to sketch a theory of reconciliation, the more difficult task is to fill in the resulting doctrinal framework, to figure out how to resolve particular cases. Happily, a much greater mind has been laboring at this task for the last thirty-five years.

My goal in this Article is to explain how the federalism jurisprudence of Justice Stevens can be understood to reflect this interactive framework. Justice Stevens accepts the overlap of state and federal authority and rejects the notion of enclaves of exclusive state and federal power. States play an important part in Justice Stevens’s jurisprudence, but they serve as partners, not antagonists, with the national government in a federalist system. Through an examination of several doctrinal areas, I illustrate the implications of an interactive approach. I argue that Justice Stevens’s jurisprudence illustrates the capacity of federalism to empower both states and the national government. An exploration of his opinions also highlights the assumptions about states and about the nature of the political process that underlie an interactive approach to federalism. Further, this perspective on Justice Stevens’s theory of federalism serves to resolve some of the

\textsuperscript{10} See, e.g., Erwin Chemerinsky, Constitutional Law: Principles and Policies § 5.2, at 379 (2d ed. 2002) (“[I]t is somewhat surprising that the current Supreme Court, with its commitment to federalism and protecting states’ rights, has been quite willing to find federal preemption.” (footnote omitted)); Richard H. Fallon, Jr., The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions, 69 U. Chi. L. Rev. 429, 462-63 (2002); Daniel J. Meltzer, The Supreme Court’s Judicial Passivity, 2002 Sup. Ct. Rev. 343, 368-69 (noting the contrast between preemption cases and cases dealing with the scope of Congress’s affirmative legislative powers).


\textsuperscript{12} Robert A. Schapiro, Toward a Theory of Interactive Federalism, 91 Iowa L. Rev. 243 (2005).
seeming tensions within his jurisprudence, such as his relatively permissive approach to state regulation in the area of federal preemption as compared to his relatively broad conception of the preemptive sweep of the dormant Commerce Clause.13 I hope as well to shed light on how states of the United States are like or unlike Finland.14

Part I clarifies the competing models of dualist federalism and interactive federalism. Drawing on the opinions and other writings of Justice Rutledge, Part II develops the key organizing features of Justice Stevens’s overall approach to federalism. Part III explores how Justice Stevens’s opinions reflect the interactive model of federalism. This part surveys Justice Stevens’s approach to federal regulatory authority, to state and federal judicial authority, and to state regulatory authority. In this latter area, which includes federal preemption and dormant Commerce Clause cases, Justice Stevens confronts the greatest challenge to a theory of interactive federalism. Part IV examines the assumptions and implications of the interactive model, as illustrated in Justice Stevens’s jurisprudence.

I. MODELS OF FEDERALISM

Good fences make good neighbors.15

Something there is that doesn’t love a wall. . . . Before I built a wall I’d ask to know/What I was walling in or walling out.16

A. Dualist Federalism

1. The Doctrinal Conundrums of Dualist Federalism

In its recent federalism cases, the United States Supreme Court has affirmed a dualist understanding of federalism. Indeed, to emphasize the independent stature of states, the Court has used the term “dual sovereignty” to describe its conception of the federal system.17 A majority of the Court asserts that the constitutional principle of federalism requires drawing a line between the local and the national. This five-Justice majority further insists that it is up to the Court to police this boundary,

---

13. See Michael S. Greve, Federalism's Frontier, 7 Tex. Rev. L. & Pol. 93, 116 n.143 (2002) (“Justice Stevens turns aggressively preemptive when he himself, rather than some mere legislator or bureaucrat, does the preemption. He is the Court's most forceful advocate of constitutional preemption under the Due Process Clause and the dormant Commerce Clause.”).
16. Id. at 245 (Breyer, J., concurring in the judgment) (quoting Robert Frost's poem, Mending Wall).
preventing the federal government from encroaching on state turf. In the Court's conception of dual federalism, when a border dispute breaks out between two sovereigns, one sovereign should not be the judge.

As the Court has recognized, distinguishing between local and national activities is not easy. To enforce the boundary between state and national power the Court has relied on a set of categorical distinctions. This reliance on a categorical approach follows from the Court's insistence on judicially enforceable boundaries. The Court has admitted that the lines it draws may be arbitrary. However, it insists that for federalism to be judicially enforceable, there must be lines. Policing lines is something that courts can do.

In the Commerce Clause area, for example, former Chief Justice William Rehnquist defended the distinction between commercial and noncommercial activity as necessary, while acknowledging the difficulty of its application:

Admittedly, a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty. But, so long as Congress' authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the Commerce Clause always will engender "legal uncertainty." Similarly, the Court has acknowledged the formalism entailed in its Tenth Amendment jurisprudence.

In addition to relying on formalistic and often arbitrary limitations on federal power, the dualist conception of federalism also has little to contribute to sorting out the inevitable overlap of state and federal authority. Dualism accepts overlap, but has difficulty addressing it. The Court has developed no coherent approach to potential conflicts of state and federal regulation in areas that do not constitute enclaves of state sovereignty. What happens when federal and state rules operate concurrently in areas of economic activity, which are not inherently "local" and do not count as "commandeering" states? The federalism of the Rehnquist Court has no capacity to resolve these situations.

18. See United States v. Morrison, 529 U.S. 598, 608 n.3 (2000) (criticizing "the dissent's remarkable theory that the commerce power is without judicially enforceable boundaries").

19. Before this view gained majority support, Justice Sandra Day O'Connor expressed the idea pointedly in her dissent in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 588 (1985) (O'Connor, J., dissenting) ("With the abandonment of National League of Cities, all that stands between the remaining essentials of state sovereignty and Congress is the latter's underdeveloped capacity for self-restraint."); cf. Post, supra note 6, at 1578-79 (discussing the Taft Court's understanding of the role of the judiciary in safeguarding federalism).


With its formalistic framework of dual sovereignty, the Court has applied broad principles of preemption forestalling state regulatory efforts. The Court also has used the dormant Commerce Clause to strike down a wide range of state laws. As commentators have noted, it is difficult to make these areas fit within the Court’s larger theory of federalism. One can construct a doctrinal consistency: The national government has the power to regulate interstate commerce. So, the Court gives a broad preemptive scope to federal laws, regulations, and policies that relate to commerce. Indeed, the scope is so broad that not only are state laws and judicial proceedings preempted by actual federal regulations, but the dormant Commerce Clause also negates a broad sweep of state regulation as conflicting with the unexercised federal power to regulate interstate commerce. The Court’s categorical framework creates a winner-take-all approach to federalism. If the Court deems the regulated activity not sufficiently commercial, then congressional action is constitutionally prohibited. If the activity does count as commercial, then state regulation is limited. This categorical federalism does not welcome concurrent state and federal action.

From the perspective of the formal categories of dualist federalism, one can understand why the federal government has no power to regulate violence against women at the same time that state common-law suits relating to airbags in cars are preempted. Similarly, one can understand why the federal government cannot ban the possession of a gun near a school, while state regulations of tobacco advertising near schools are deemed preempted by federal law. Outside the judicially defined sphere of commercial activity, the federal government is powerless; inside that sphere state regulation is suspect. While doctrinally consistent, the resulting doctrine is normatively puzzling. Why would one want a theory of federalism that produces such results?

2. Dualist Theories of Federalism

Academic commentators generally decry the Court’s formalistic attempt to police the boundary between state and federal power. Nevertheless, the most prominent theoretical defenses of federalism also operate within a fundamentally dualist framework. For most scholars, the dominant problem of federalism remains how to divide state and federal spheres of authority.

22. See supra note 10 (citing sources).
23. See Morrison, 529 U.S. at 598 (holding unconstitutional the private cause of action created by the Violence Against Women Act of 1994).
25. See Lopez, 514 U.S. at 549.
26. See Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001); see also id. at 598 n.8 (Stevens, J., concurring in part, concurring in the judgment in part, and dissenting in part) (pointing out tension between Lorillard and Lopez); 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, 2112-13 (2006) (discussing the tension between Lorillard and Lopez).
A brief outline of the most common justifications for federalism reveals these dualist underpinnings.

a. The Values of Dualism

Arguments for federalism generally can be grouped within three conceptual categories, based on economic, republican, and liberal approaches. From the economic perspective, states function as firms, competing in the policy marketplace. By offering differing baskets of taxes and regulations, states provide people choice and the opportunity to realize their subjective preferences. The republican approach to federalism emphasizes democratic self-governance. Federalism allows individuals to deliberate in smaller scale settings and reach reasoned judgments about political decisions. States act as republics, offering a greater opportunity for democratic participation than possible at the national level. From a liberal perspective, states act as bulwarks against tyranny. By dividing power between the states and the national government, the Constitution makes it more difficult for any one center of power to gain complete domination and oppress the people. In a federalist system, the tyrant must win control over both state and national governments.

A few fundamental principles follow from these accounts of federalism. First, the boundaries between state and federal power must be maintained. Further, the borders must be clearly demarcated; the chalk lines must be kept clean. People cannot enjoy the benefits of choice and variety offered by interstate competition if the federal government imposes a single, uniform regulatory product. The policy products also must be clearly branded so that citizen/consumers know who is responsible for what regulations. Clear lines allow citizen/consumers to be good policy shoppers. Republican self-governance can flourish only if states have real

---


29. See Shapiro, supra note 27, at 36; Friedman, supra note 28, at 402-05; Rapaczynski, supra note 28, at 380-89.
control over certain areas. Again, citizens must know which level of government has responsibility for which areas so that they can exercise their self-governance responsibly. From a liberal perspective, without a distinctive state sphere, the dual protection against tyranny ceases. Clear lines ensure against creeping encroachment.

Second, the national government cannot, itself, draw the boundary lines. The national government may not wish to promote regulatory choice. Further, states and the federal government may collude to impose a uniform national policy and avoid the discipline of regulatory competition. Republican self-governance should not be a matter of the grace of the national government. From the perspective of preventing tyranny, the national government cannot be trusted to limit itself. Allowing the national government to draw the lines between state and federal power would be putting the fox in charge of the chicken coop.

Third, the dualist models of federalism generally correspond to an understanding of states as distinctive communities of value. Citizens in different states differ in important ways. They have different goals, different ideals. These fundamental differences both serve to justify the boundaries between states and also help to demarcate the appropriate borderlines. Because the states function as loci of values, the need for local choice becomes particularly important. The diversity of views among states requires a broad policy market. Moreover, recognizing the boundaries between states allows the distinctive republican communities to realize the outcomes of their deliberations, free from outside interference. The divergence among the values in the different states also helps to suggest proper lines between national and state authority. With regard to the issues on which the states differ, states should enjoy autonomy. On matters of overlapping beliefs, federal control may be appropriate.

b. The Pathologies of Dualism

The division of state and federal power may cause harm, instead of good. From the market perspective, federalism promotes competition, choice, and innovation. Market failures, such as externalities, on the other hand, suggest the potential pitfalls of federalism.

Consideration of individual rights presents further grounds for caution. The economic perspective, like other manifestations of utilitarianism, tends not to give much regard to individuals and their rights. Federalism also can help to foster deliberative democracy in the civic republican tradition. Real opportunities for participation, however, cannot occur at the state level, given the relatively vast scale of most states. Federal intervention may be necessary to ensure republican governance at the local level. Federalism can act as a bulwark against tyranny by dividing governmental

30. See, e.g., John Rawls, A Theory of Justice 27 (1971) ("Utilitarianism does not take seriously the distinction between persons.").
power. States can function as guardians of individuals against an overweening central authority. History has amply demonstrated, though, that it can be the states that produce the worst forms of tyranny.\textsuperscript{31} A strong central government may be necessary to protect citizens from state governmental abuse.

Attempting to reconcile the promise and pitfalls of dualist federalism presents difficult problems. The dualist perspective offers few resources for addressing these challenges. Dualism can urge that the line between state and federal authority be drawn in one place, rather than another, but it offers little assistance in sorting out the inevitable overlap of state and federal authority.

B. Interactive Federalism

Interactive federalism rejects the three key elements of dualism. First, it does not seek to draw boundaries between state and federal power. Second, with regard to conflicts that may arise, its understanding of the political process does not prohibit the national government from coordinating state and federal claims. Third, interactive federalism does not conceive of states as distinctive communities of value.

Disavowing the project of drawing lines between state and federal realms, interactive federalism embraces the overlap of state and federal power. Interactive federalism still seeks to advance the values of choice, self-rule, and prevention of tyranny, but it aims to promote those goals by harnessing the interaction of governments, rather than by limiting them. Interactive federalism supports concurrent power both in the area of regulatory jurisdiction and judicial jurisdiction. In this conception, the domains of state and federal laws overlap and so do the domains of state and federal courts.

Rather than a sovereignty-based conception of state and federal power, interactive federalism relies on an organizational conception. The state and federal governments are understood as different nodes of power. The geographical expanse of state power may be more limited, but the subject matter of state and federal power need not differ. These nodes of power produce plurality and redundancy, which constitute important mechanisms for realizing the promise of federalism.

Because of its embrace of overlapping jurisdiction, interactive federalism need not draw lines between state and federal power. Interactive federalism rejects the "good fences make good neighbors" framework. Interactive federalism thus avoids the doctrinal difficulties involved in trying to distinguish between the truly local and the truly national. In this way, interactive federalism acquiesces in the vast overlap of state and federal power that characterizes the operation of government in the United States.

\textsuperscript{31} See, e.g., William H. Riker, Federalism: Origin, Operation, Significance 155 (1964) ("[I]f in the United States one disapproves of racism, one should disapprove of federalism.").
While interactive federalism need not draw lines, it still must deal with conflict. If state and federal governments regulate the same turf, what happens when their rules conflict? These potential and actual conflicts present the biggest challenge for interactive federalism. Two key components of conflict resolution are the what and the who: What are the standards for determining when conflict is impermissible, and who applies these standards?

Generally, for interactive federalism, the question whether a given situation entails valuable overlap or impermissible conflict turns on the relative values of plurality and redundancy on the one hand and the counter-values of uniformity and hierarchical accountability on the other.  

Concurrent exercise of authority tends to promote a plurality of regulatory regimes. State and federal law and state and federal courts all may be addressing a particular area. Different governments may offer different kinds of solutions. For example, the national government may impose one kind of environmental regulation, and a state government may impose a different, overlapping set of rules. The state and federal approaches each may offer a partial solution. The coexistence of state and federal regimes may yield a better overall regulatory scheme. From the interactive perspective, this pluralism constitutes one of the chief benefits of federalism.

Along with plurality, concurrent jurisdiction produces redundancy. The availability of state and federal governments means that if one fails to solve a problem, the other remains available. Federal habeas corpus review of state criminal convictions constitutes one example of such redundancy. The existence and similar enforcement activities of New York Attorney General Elliot Spitzer and the Securities and Exchange Commission provides another example.

Jurisdictional overlap may impede the values of uniformity and accountability. Sometimes, what is required is one set of rules, not many. The burden of complying with concurrent regulatory regimes may be excessive. Further, the absence of jurisdictional boundaries may blur lines of accountability. If no one entity has exclusive jurisdiction, it may be difficult to fix blame. The dualist impulse to demarcate realms of

32. In other accounts of interactive federalism, I have employed the additional principles of dialogue and finality. See Schapiro, supra note 12, at 188-94 (discussing the values of dialogue and finality). Dialogue is closely linked to plurality and redundancy, while finality is tied to uniformity and hierarchical accountability. For purposes of analyzing Justice Stevens's jurisprudence, I have streamlined that analytic framework, focusing just on plurality and redundancy on the one hand, and uniformity and hierarchical accountability on the other.


jurisdiction may promote these values. In each area, such as “local” or “national,” a single uniform regulatory regime can exist. If something does not function well within one of these realms, the party deserving blame will be clear.

While interactive federalism rejects the idea of enforcing jurisdictional boundaries for their own sake, it seeks to accommodate the organizational values of uniformity and accountability, when they are necessary. Resolving potential conflicts generally involves deciding if one government must yield because of the need for uniformity or accountability in a particular area. State and federal policies can co-exist as long as uniformity and hierarchical accountability are not required.

The question then becomes: Who decides which values predominate? From the organizational perspective of interactive federalism, Congress generally provides the best answer. Congress stands in a good position to assess the relative importance of plurality versus uniformity, of redundancy versus hierarchical accountability. Moreover, because the interactive perspective does not understand states to constitute distinctive communities of value, Congress does not stand as a hostile, self-interested force. To the extent that states and the national government are engaged in a joint effort to realize a shared core of common values, the national government becomes a sensible focus of coordination.

In sum, in place of the fundamental principles of dualist federalism, interactive federalism reflects the following basic, linked conceptions. First, no subject matter limits restrain the scope of state and federal authority. No enclaves of state or federal regulation receive constitutional protection from the encroachments of federal or state power. Second, it is the dynamic overlap of state and federal authority that provides a primary mechanism for federalism to advance its goals. Accordingly, the concurrent exercise of state and federal power should be promoted. Not only are jurisdictional lines unnecessary to advancing the aims of federalism, but they are also counterproductive. Third, conflicts between state and federal authority should generally be resolved by well-functioning political bodies, rather than by the courts. However, the courts do retain an important role in enforcing and protecting the policies decided by political bodies and in guarding against malfunctions of the political system. Fourth, when conflicts do arise, the body resolving the conflicts (generally Congress) should seek to advance the overall goals of federalism, usually by reliance on principles of plurality and redundancy, though recognizing the need for uniformity and hierarchical accountability in some areas. No resort should be had to abstract categories of “truly local” or “truly national” activity.

In this Article, I argue that Justice Stevens’s jurisprudence of federalism can be understood as an exemplification of the interactive model. Still, Justice Stevens sometimes employs the language of dualism. Given that he sits on a Court that invokes the rhetoric of dualist federalism, it is not surprising that he uses those terms to argue his points. In narrowly interpreting the preemptive force of federal law, in particular, Justice
Stevens invokes dualist concepts, such as the "historic police powers of the States"\(^3\) and the notion that "the States are independent sovereigns in our federal system."\(^5\) Nevertheless, Justice Stevens's overall vision of federalism specifically, and of government power generally, comports with the interactive model.

II. JUSTICE STEVENS'S VISION OF FEDERALISM

This part outlines the broad principles that Justice Stevens has identified as central to his conception of federalism in the United States.

A. The Rutledge Vision: The Commerce Clause As a Unifying Force

In elaborating the crucial elements of his understanding of federalism, Justice Stevens often has cited Justice Rutledge, for whom he served as a clerk. In a series of lectures, later published as a book, Justice Rutledge set forth his understanding of the Commerce Clause as a central feature of the United States Constitution.\(^3\) Indeed, Justice Rutledge asserted that the impetus behind the Commerce Clause provided the main influence in the drafting and adoption of the Constitution.\(^3\) Justice Rutledge emphasized the role of the Commerce Clause in creating a national economic unit and giving Congress the power to sustain it. In this book and in his judicial opinions, Justice Rutledge stressed the role of the Constitution in general, and the Commerce Clause in particular, in creating a strong national union.\(^3\) He acknowledged potential limits on the power of the national government\(^4\); his focus, however, clearly lay on the Commerce Clause as an instrument of empowerment, not of limitation.

Justice Rutledge also stressed the need to understand the Commerce Clause as not unduly limiting the power of states.\(^4\) Justice Rutledge was writing against the not-so-distant background of a dualist Court that had demonstrated reluctance to allow concurrent state and federal regulation.\(^4\) In view of the broad powers that the federal government could exercise after 1937, it was important to ensure that state regulation was not concomitantly restricted.

\(^3\) Wily Rutledge, A Declaration of Legal Faith (1947).
\(^3\) See id. at 25-26.
\(^4\) See, e.g., Rutledge, supra note 37, at 76.
\(^4\) See id. at 71.
\(^4\) See Barry Cushman, Formalism and Realism in Commerce Clause Jurisprudence, 67 U. Chi. L. Rev. 1089, 1121-25 (2000).
B. Justice Rutledge and Interactive Federalism

Responding to the strong dualist strains of the pre-1937 Court, Justice Rutledge emphasized the important role of concurrent state and national authority. The *locus classicus* for accepting overlapping state and federal power in certain areas was *Cooley v. Board of Wardens*, and Justice Rutledge lavished praise on this decision. He termed that case a "landmark," and it guided his understanding of federalism as facilitating joint state and federal action.

Justice Rutledge rejected the notion that federalism prohibited concurrent state and federal regulation. In language that constituted a rebuttal of the *New York v. United States* opinion written nearly fifty years later, he wrote, "It would be a shocking thing, if state and federal governments acting together were prevented from achieving the end desired by both, simply because of the division of power between them." One commentator has summarized Justice Rutledge's interactive vision as follows: "Instead of employing a 'two-value' (either/or) logic of exclusion, Justice Rutledge introduced another category of commerce clause thinking, based on the principle of synthesis. . . . [H]is primary emphasis was upon coordination as against separation of authority in the federal scheme."

Justice Rutledge's conception of federalism involved empowering both states and the federal government. He understood that the potential for conflict existed, and he stood ready to address it. However, he generally saw the broad exercise of both state and federal power as important features of the constitutional system.

When the need did arise to adjudicate potential conflicts between state and federal power, Justice Rutledge turned to the doctrine of *Cooley*. The *Cooley* framework understood some areas to require national uniformity and others to allow local variation. The question was how to tell which was which. In *Bob-Lo Excursion Co. v. Michigan*, Justice Rutledge confronted that problem. *Bob-Lo* concerned the constitutionality of

---

43. 53 U.S. (12 How.) 299 (1851).
45. See Lester E. Mosher, *Mr. Justice Rutledge’s Philosophy of the Commerce Clause*, 27 NYU L. Rev. 218, 221 & n.19 (1952); see also Fowler V. Harper, Justice Rutledge and the Bright Constellation 290 (1965) (discussing Justice Rutledge's embrace of the *Cooley* framework).
47. Mosher, supra note 45, at 228; see also id. at 227 ("Justice Rutledge’s opinion in the *Panhandle Eastern Pipe Line* case gives full play for state power to work in coordination with federal authority, thereby indirectly giving new power to the states and supplementing that of Congress in the field of commerce.").
48. See id. at 246 ("Justice Rutledge favored a liberal view of state power coexisting with broad congressional authority. He therefore sought to accommodate as fully as possible both national and local interests.").
49. 333 U.S. 28 (1948).
Michigan's civil rights statute, as applied to a company providing boating services between Michigan and an island in Canadian waters. One possibility would be to divide state from national authority based on categorical determinations of subject matter. Justice Rutledge rejected that approach and instead looked to the nature of the regulation and whether it aligned with national policy. A regulation in accordance with federal policy was permissible. A regulation that conflicted with federal policy was not. Thus, Michigan could ban discrimination in interstate commerce because that law accorded with national policy.  

In dissent, Justice Robert H. Jackson and Chief Justice Fred M. Vinson objected that under the Commerce Clause, the permissibility of the state regulation could not turn on the substantive policy it reflected. For them the state's power to regulate this kind of commerce must depend on the subject matter at issue, not whether the regulation accorded with national policy. For Justice Rutledge, the state law's conformity with federal policy was indeed the key issue. Federalism provided a way for states and the national government to pursue shared goals. Federalism was not an invitation to states to carve out protected enclaves of deviation from national policies. In a biographical sketch of Justice Rutledge, Justice Stevens noted Justice Rutledge's rejection of this kind of categorical formalism in Commerce Clause jurisprudence. 

C. Justice Stevens and Justice Rutledge

Justice Stevens frequently has cited Justice Rutledge as setting forth the definitive account of the Commerce Clause. Writing for an en banc United States Court of Appeals for the Seventh Circuit in 1975, Justice Stevens provided an extensive quotation from Justice Rutledge's book as a statement of the "central purpose" of the Commerce Clause. In opinions on the United States Supreme Court, Justice Stevens also has quoted Justice Rutledge as the guide to understanding the Commerce Clause.

For Justice Stevens, as for Justice Rutledge, the Commerce Clause provided the solution to the primary problem faced by the framers at the Constitutional Convention, how to bring the nation together. Justice Stevens has argued that the nationalizing purpose of the Commerce Clause should lead to a broad interpretation of congressional power. That

50. See id. at 40.
51. See id. at 43 (Jackson, J., joined by Vinson, C.J., dissenting) ("The sphere of a state's power has not been thought to expand or contract because of the policy embodied in a particular regulation.").
52. John Paul Stevens, Mr. Justice Rutledge, in Mr. Justice 177, 189 (Allison Dunham & Philip B. Kurland eds., 1956).
53. See United States v. Staszcuk, 517 F.2d 53, 58 (7th Cir. 1975) (en banc).
55. See EEOC, 460 U.S. at 246-47 (Stevens, J., concurring) ("[A]s the needs of a dynamic and constantly expanding national economy have changed, this Court has construed
conception of the Commerce Clause as a doctrine of empowerment, rather than as one of limitation, informs Justice Stevens’s federalism jurisprudence.

Further following Justice Rutledge, Justice Stevens generally has embraced the concurrent exercise of state and federal power. In a striking indication of his rejection of dualism, he has referred to the governmental structure in the United States as “our constitutional system of cooperative federalism.”

III. FEDERALISM DOCTRINE OF JUSTICE STEVENS

The jurisprudence of Justice Stevens illustrates the application of an interactive understanding of federalism. A variety of theories could account for Justice Stevens’s votes in particular cases. With regard to some topics, such as the dormant Commerce Clause, Justice Stevens’s approach may coincide with a dual federalist framework. In other areas, such as the scope of national authority under the Commerce Clause, Justice Stevens’s positions align with those who reject federalism altogether. As a whole though, I contend that Justice Stevens’s approach corresponds to an interactive framework.

A. Scope of Federal Regulatory Power

From the perspective of interactive federalism, questions about the scope of national power present easy questions for courts. Courts are simply not in the business of drawing boundaries around federal power. Congress is much better equipped than the courts to assess whether the national government should intervene or should let the states decide whether and how to regulate.

1. Commerce Clause

In accordance with the interactive perspective, Justice Stevens dissented in United States v. Lopez and United States v. Morrison, both of which held that Congress had exceeded its constitutional authority under the Commerce Clause. In his dissent in Lopez, Justice Stevens specified his agreement with Justice David H. Souter’s critique of the majority’s efforts the Commerce Clause to reflect the intent of the Framers of the Constitution—to confer a power on the National Government adequate to discharge its central mission.

to reinvigorate dual federalism. Justice Souter criticized the majority for creating new categories that were difficult to apply, such as commercial/noncommercial and educational/commercial, in place of the old, rejected categories of direct/indirect and commerce/manufacturing.

Justice Stevens also dissented in Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers, a statutory construction case with strong Commerce Clause overtones. Though the case turned on an issue of statutory construction, the Court adopted a narrow reading of the Clean Water Act in part because of concerns that a broader interpretation would involve unconstitutional federal regulation of noncommercial activity. In his dissent, Justice Stevens relied heavily on theories of the political process. He noted that the statute at issue made provisions for local control, allowing states to substitute their regulatory schemes for those of the federal government. Thus the political process had accommodated the federalism concern by allowing for an interplay of state and federal regulation. Judicial interference was not required. Justice Stevens further argued that given the nature of environmental concerns, federal leadership made sense. He noted the problem of “externalities” in the environmental area, in which benefits may be disproportionately local and costs borne by citizens in other states.

Indeed, Justice Stevens’s opinion in SWANCC provided an encapsulation of the interactive position. The Court in SWANCC proceeded on its dualist project of seeking to divide the local from the national by means of artificial categories, such commercial and noncommercial. Justice Stevens asserted that such attempts were conceptually incoherent and failed to acknowledge the realities of nature, or of the state political process. Instead, he urged the Court to get out of the way of the national political process, which was advancing a more realistic notion of federalism that eschewed artificial boundaries.

Most recently, Justice Stevens was able to assign himself the majority opinion in Gonzales v. Raich, upholding the power of the national government to reach marijuana grown at home for medical use. Justice Stevens restated Justice Rutledge’s emphasis on the Commerce Clause as the nationalizing solution to the primary problem motivating the Constitutional Convention: “The Commerce Clause emerged as the Framers’ response to the central problem giving rise to the Constitution itself: the absence of any federal commerce power under the Articles of Confederation.”

60. See Lopez, 514 U.S. at 602 (Stevens, J., dissenting).
61. See id. at 627-29 (Souter, J., dissenting).
63. See id. at 173-74.
64. See id. at 192 (Stevens, J., dissenting).
65. Id. at 195.
67. Id. at 2205.
In *Raich*, Justice Stevens also confronted the argument that California’s policy of allowing limited, medical use of marijuana served to immunize the activity from federal regulation. For Justice Stevens, this argument sounded in long-rejected theories of dual federalism. The argument conjured the image of brave state pioneers carefully fencing in a small piece of territory and seeking to manage their own destiny on their own little plot of earth. From an interactive perspective, federalism does not operate that way. Regulatory authority is not divided into regions with boundaries between state and federal governance. Rather, state activity cannot possibly displace federal law. States simply cannot carve out protected enclaves of authority.\(^6\)

In her dissent, Justice Sandra Day O’Connor relied on the rhetoric of dualist federalism. She wrote of the need to “protect historic spheres of state sovereignty from excessive federal encroachment.”\(^6\) She also referenced the classic federalist trope of states as laboratories, experimenting with novel social arrangements.\(^7\) From an interactive perspective, experiments are fine, but someone must supervise the lab. The subjects of the experiments are humans. Moreover, the experiment may involve dangerous substances which could harm others if the substance escaped from the lab. For matters such as these, involving both threats to human welfare and interstate effects, interactive federalism allows the national government to decide whether the experiment can proceed. In subsequent comments, Justice Stevens made clear that, as a policy matter, he personally believed California should be able to proceed with its experiment, but the decision lay with Congress, not with the Court.\(^7\)

2. “Commandeering” Cases

Cases purporting to limit federal power to regulate “states as states” or to “commandeer” state administrative and legislative functions have proved similarly easy for Justice Stevens. In accordance with the interactive approach, Justice Stevens has denied that considerations of state sovereignty place any limits on the scope of federal power.\(^7\) This area

---

\(^6\) See id. at 2212-13.

\(^6\) Id. at 2220 (O’Connor, J., dissenting).

\(^6\) See id. at 2220-21 (citing New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).


\(^7\) See Printz v. United States, 521 U.S. 898, 939 (1997) (Stevens, J., dissenting); New York v. United States, 505 U.S. 144, 188 (1992) (Stevens, J., concurring in part and dissenting in part); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); Nat’l League of Cities, 426 U.S. at 880 (Stevens, J., dissenting). From an interactive perspective, it is important that states remain as independent centers of regulatory authority. Thus, an
presents valuable illustrations of the divergence in perspectives between a dualist and an interactive approach to federalism. The differing visions of government and of ensuring government accountability emerge as especially significant.

Justice Stevens has been a strong adherent of the "political safeguards of federalism," a view which understands the political process, rather than the courts, as the primary protector of the role of states in the federal system. Justice Stevens joined Justice Harry Blackmun's majority opinion relying on the political safeguards approach in Garcia v. San Antonio Metropolitan Transit Authority. Justice Stevens recently referred to Garcia as the opinion by Justice Blackmun that he most admires, and he has relied on the political safeguards approach in several of his own opinions.

For dualist federalism, the political safeguards approach has little plausibility. One of the key models underlying dualism understands states as firms competing in a policy market. From that perspective, states might collude and induce the national government to mandate uniform policies, thus relieving states of the burdens of policy competition. Alternatively, the federal government has its own policy consumers, both local citizens and national interest groups. To serve its customers, the federal government may simply override the wishes of the states. Along these lines, the members of Congress may ignore the interests of their home states and instead become subject to the influence of national interests.

attempt by the federal government to eliminate the ability of states to enact laws would raise serious federalism concerns. However, none of the challenged federal actions in these cases came close to destroying the ability of states to develop their own policies. Of course, individual state policies may be displaced by federal law, but that result reflects principles of federal supremacy underlying the federal system in the United States. As James Gardner has demonstrated, even when it is displaced by federal law, state law still can play a significant role in the federal system. James A. Gardner, Interpreting State Constitutions: A Jurisprudence of Function in a Federal System 186-94 (2005).

73. 469 U.S. 528.
74. See John Paul Stevens, "Random Recollections," 42 San Diego L. Rev. 269, 280 (2005). Justice Stevens apparently appreciated both the substantive content of the opinion and its candor in noting that Justice Harry Blackmun had provided the fifth vote in National League of Cities, which Garcia overruled.
75. See Geier v. Am. Honda Motor Co., 529 U.S. 861, 907 (2000) (Stevens, J., dissenting); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 93 (2000) (Stevens, J., dissenting); Printz, 521 U.S. at 951 (Stevens, J., dissenting); see also Gonzales v. Raich, 125 S. Ct. 2195, 2210 n.34 (2005) (noting "political checks that would generally curb Congress' power to enact a broad and comprehensive scheme for the purpose of targeting purely local activity").
76. See Larry D. Kramer, Putting the Politics Back into the Political Safeguards of Federalism, 100 Colum. L. Rev. 215, 223-24 (2000) ("Federal politicians will want to earn the support and gratitude of local constituents by providing desired services themselves—through the federal government—rather than giving or sharing credit with state officials. State officials are rivals, not allies. . . .")
77. See, e.g., Garcia, 469 U.S. at 565 n.9 (Powell, J., dissenting); William T. Mayton, "The Fate of Lesser Voices": Calhoun v. Wechsler on Federalism, 32 Wake Forest L. Rev. 1083, 1103-04 (1997) (describing importance of a "federal majority" as opposed to state and local interests).
The Justices on the United States Supreme Court who adopt a dualist perspective articulate these concerns using the language of accountability. They argue that unless the lines between state and federal authority are clearly drawn, citizens will lose the ability to hold the proper officials accountable. Within this mindset, which posits a confused electorate, federal commandeering of state regulatory and administrative functions becomes especially pernicious. Having state officials exercise federal commands presents a great danger of confusion. In accordance with this model of governance, Justice O'Connor has expressed a specific concern that government officials may invite an unconstitutional blending of power so as to reduce their accountability for their unpopular decisions. These criticisms of the political safeguards theory and the attendant concern with ensuring accountability through clearly demarcated spheres of authority serve to illuminate the models of governance underlying the dualist perspective.

Justice Stevens understands government and the democratic process in quite different terms. Many different models of governance are consistent with interactive federalism. Justice Stevens illustrates one such approach. His conception rejects the narrow public choice model that underlies the economic account of federalism.

Justice Stevens frequently cites the duty to govern "impartially." He clearly believes that that duty can be fulfilled. His view implies that governing involves something other than selling policy positions in return for campaign contributions or other favors. He has expressed confidence in the idea that legislators can be "disinterested and fully informed." Justice Stevens certainly understands the pitfalls of governmental corruption, but he believes that impartial governance is an attainable goal. His strong support for campaign finance regulation, in the face of First Amendment

78. See United States v. Lopez, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring) ("The theory that two governments accord more liberty than one requires for its realization two distinct and discernable lines of political accountability ... "); see also United States v. Morrison, 529 U.S. 598, 611 (2000) ("Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur ... "); (quoting Lopez, 514 U.S. at 577 (Kennedy, J., concurring))); New York v. United States, 505 U.S. 144, 168 (1992) ("[W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished."). Dean Edward Rubin recently presented a cogent critique of this accountability argument. See Edward Rubin, The Myth of Accountability and the Anti-Administrative Impulse, 103 Mich. L. Rev. 2073, 2083-91 (2005).

79. See New York, 505 U.S. at 182-83.


challenges, indicates his awareness of the problems of corruption and his belief that the problems can be addressed.\textsuperscript{82} Within Justice Stevens's conception, the political process can indeed function properly, and the national political process can reflect the interests of all the people. In his dissent in \textit{Printz v. United States}, Justice Stevens asserted that recent political developments proved the effectiveness of the political safeguards thesis.\textsuperscript{83}

Similarly, Justice Stevens gives little credence to the fear of states and the national government conspiring to impose a policy cartel. For him, as for Justice Rutledge, the point of constitutional federalism may be to resolve disputes between state and national authority, but it is never to prevent the states and the national government from agreeing on a particular course. Consistent with his acceptance of the political safeguards of federalism, Justice Stevens believes that the states and the federal government generally can be trusted to represent their constituents.\textsuperscript{84}

**B. Scope of Judicial Jurisdiction**

Justice Stevens's broad view of the scope of national power accords with a variety of approaches to federalism, including a thoroughgoing nationalism that rejects constitutional principles of federalism entirely. Justice Stevens's views of judicial federalism show more clearly his interactive conception. As in the area of regulatory authority, Justice Stevens generally endorses concurrent exercises of judicial authority. With regard to courts, as with legislatures, Justice Stevens's jurisprudence illustrates how the goals of federalism can be advanced by harnessing the overlap of state and federal jurisdiction, rather than by trying rigidly to separate the two systems.

1. Sovereign Immunity/Eleventh Amendment

As the Court's Commerce Clause and "commandeering" jurisprudence corresponds to its dualist outlook, so too does its approach to sovereign immunity. In the name of accountability, the Court creates enclaves of state governance protected from federal regulatory intrusion. Similarly, the Court builds walls protecting state governments from federal judicial jurisdiction. With regard to both regulatory and judicial jurisdiction, the Court insists that good fences make good neighbors.

As Justice Stevens illustrates, interactive federalism adopts exactly the opposite approach. From an interactive perspective, accountability remains

\textsuperscript{82} See McConnell v. FEC, 540 U.S. 93 (2003).
\textsuperscript{84} Cf. Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 439 n.52 (1946) (Rutledge, J.) ("'It would be a shocking thing, if state and federal governments acting together were prevented from achieving the end desired by both, simply because of the division of power between them.'" (quoting Ribble, supra note 46, at 211)).
important, but accountability comes not from limiting regulatory jurisdiction, but from expanding judicial jurisdiction. Concurrent regulatory jurisdiction allows multiple governments, state and federal, to address important concerns. Similarly, concurrent judicial jurisdiction fosters multiple avenues for redress should governments or their agents violate the law.

Justice Stevens has summarized this view of accountability as follows: "In my opinion all Governments—federal, state, and tribal—should generally be accountable for their illegal conduct." It is the job of courts to hold officials accountable. Accordingly, Justice Stevens generally opposes all judicial immunities.

I have reviewed Justice Stevens’s sovereign immunity jurisprudence elsewhere. From the perspective of interactive federalism, three points deserve emphasis. First, judicial federalism provides a valuable means for holding governments accountable. Federal courts can help to ensure that states abide by federal law. Second, to the extent that interactive federalism does not understand states as integral communities of value, the policy arguments supporting state sovereign immunity become especially weak. In conferring sovereign immunity on the states, the Court expressed concern lest monetary judgments interfere with states’ policy discretion. However, valid federal law expresses national policy. Interactive federalism does not license states to pursue policies at odds with such national policy judgments. In Seminole Tribe v. Florida, Justice Stevens places this argument in the language of sovereignty: "In this country the sovereignty of the individual States is subordinate both to the citizenry of each State and to the supreme law of the federal sovereign." Third, Justice Stevens acknowledges that federalism or more general policy concerns might justify conferring immunity on states in certain classes of cases. In accordance with Justice Stevens’s general reliance on the political process, though, he insists that it is up to Congress, not the Court, to make that decision.

2. Intersystemic Adjudication

Interactive federalism embraces the concurrent exercise of state and federal judicial power. The dual judicial system in the United States provides broad opportunities for such concurrent jurisdiction. Federal
courts often apply state law. State courts apply federal law, as well as the law of other states. I have used the term intersystemic adjudication to describe the general phenomenon of courts applying the law of a different political system.\textsuperscript{90} Intersystemic adjudication is pervasive in the federalist system in the United States, and from the interactive perspective, intersystemic adjudication provides a significant opportunity to advance the goals of federalism.

Intersystemic adjudication raises intricate jurisdictional questions. While some amount of intersystemic adjudication is deeply embedded in the United States,\textsuperscript{91} jurisdictional standards regulate the extent of intersystemic adjudication. Federal statutes provide some rules, but most of the jurisdictional principles are judicially fashioned. Deciding the scope of intersystemic adjudication raises issues of federalism.

The dualist and the interactive models present different frameworks from which to analyze the issues. From the dualist perspective, state and federal courts serve as agents of different sovereigns. Intersystemic adjudication therefore constitutes a suspect exercise. Applying the law of a different sovereign raises questions of interpretation and of legitimacy. Courts may not understand the law of a different sovereign. Further, the decisions may result in the failure of accountability that dualism fears with regard to legislative jurisdiction. People may not understand that the agent of one sovereign is applying the law of a different sovereign. They may be confused about where to place the blame. The ideas, sometimes associated with legal realism and positivism, that courts participate in the making of the law provide further grounds for caution. Intersystemic adjudication involves the agents of one sovereign making the law of a different sovereign.\textsuperscript{92}

Intersystemic adjudication constitutes a fairly widespread phenomenon. The field of conflict of law recognizes that courts may apply the law of other polities. Nevertheless, from the dual federalist perspective, intersystemic adjudication needs to be cabined carefully. For interactive federalism, by contrast, intersystemic adjudication may provide valuable opportunities for plural interpretation and redundancy. Interactive federalism recognizes the pitfalls of intersystemic adjudication, but it also understands the potential value. In a variety of areas, Justice Stevens's jurisprudence embraces intersystemic adjudication, consistent with the framework of interactive federalism.


\textsuperscript{91} Examples include diversity jurisdiction and state courts' deciding federal law issues arising in the course of state-law matters, including criminal prosecutions.

\textsuperscript{92} See Schapiro, \textit{Interjurisdictional Enforcement}, supra note 90, at 1423-27.
a. Federal Law in State Court: State Courts Serving the National Interest

i. Michigan v. Long

Justice Stevens’s dissent in Michigan v. Long\(^9\) represents a forceful statement of the interactive position. Justice Stevens considers the claims of uniformity and hierarchical accountability, but he ends up siding with plurality and redundancy.

The issue in Long was the standard for deciding when a state court decision rests on adequate and independent state-law grounds. The United States Supreme Court long has refused to assert jurisdiction over decisions of state courts that hinge on issues of state law. Even if federal issues are present in the cases, the Court will not review the case if the state-law matter is determinative.

In Long, the Michigan Supreme Court had cited both state and federal authority in support of its holding. The United States Supreme Court had to decide whether the decision rested on adequate and independent state grounds. Seeking to provide clarity in this area, the majority adopted a presumption that state-court decisions citing federal law do not rest on adequate and independent state grounds unless the state-court opinion clearly so states.\(^9\) If the opinion mentions both state and federal law without specifying the state-law ground as dispositive, then the United States Supreme Court could exercise jurisdiction and determine any federal issues raised by the case.

The majority emphasized the desirability of exercising review over state court decisions arguably resting on federal grounds. The Court stressed the importance of ensuring uniformity in the interpretation of federal law.\(^9\) The Court expressed concern over the confusion that might arise if state court opinions potentially resting on federal law were deemed unreviewable merely because state-law grounds were mentioned. A refusal to review such decisions would allow potentially erroneous discussions of federal law to persist.

Justice Stevens wrote a strong dissent, insisting that the Supreme Court should not adopt a presumption of reviewability. He recognized the potential for lack of uniform interpretation of federal law. In an article published one year before Long, however, Justice Stevens made clear that the uniformity of federal law did not stand as an overriding imperative. In accordance with the interactive approach, he even suggested that a certain amount of diversity might serve a valuable purpose. Federalism allowed varying perspectives on how to implement federal policy. Indeed, Justice

\(^9\) See id. at 1040-41.
\(^9\) id. at 1040 ("[I]t cannot be doubted that there is an important need for uniformity in federal law . . . ").
Stevens accepted the idea that federal law might even vary among federal courts. Justice Stevens wrote,

I would like to suggest, first, that the existence of differing rules of law in different sections of our great country is not always an intolerable evil . . . . [T]he fact that many rules of law differ from state to state is at times one of the virtues of our federal system. It would be better, of course, if federal law could be applied uniformly in all federal courts, but experience with conflicting interpretations of federal rules may help to illuminate an issue before it is finally resolved and thus may play a constructive role in the lawmaking process.96

In light of these principles, Justice Stevens found that the goal of uniformity did not justify reviewing a state court judgment upholding a claim of federal right.97 As he made clear in later opinions, Justice Stevens understood the jurisdictional structure to establish the vindication of federal rights as a higher priority than the uniformity of federal law.98

To illustrate his point, Justice Stevens deployed a somewhat startling example. Justice Stevens compared the State of Michigan to the Republic of Finland. If Finland brought a criminal prosecution against an American citizen, but ended up acquitting the American based on the Finnish court’s understanding of the United States Constitution, the United States would have no reason to complain.99 So too, Justice Stevens argued, the Michigan Supreme Court’s decision to release Long threatened no federal interest.

Academic defenders of the majority’s position in Long decry both the potential disuniformity and lack of accountability that might flow from Justice Stevens’s approach.100 In the system Justice Stevens advocates, federal law might have different meanings in different states. Finland and Italy might develop different understandings of United States law, and so might Michigan and Florida. Further, the Stevens approach might insulate the state courts from hierarchical accountability. The state court interpretation of federal law would remain immune from federal review. The state courts also might avoid review of their decisions by the state political process. By appearing to rely on federal law, the state judges might deflect scrutiny from state law. The citizens of a state can exert control over the law of the state, but only if they know which law is driving the decisions with which they disagree.101

97. See Long, 463 U.S. at 1070-71 (Stevens, J., dissenting).
99. See Long, 463 U.S. at 1068.
101. See Althouse, Normative Federalism, supra note 100, at 988-89.
For Justice Stevens, the federal policy of protecting the rights of individuals predominates. States are free to explore different ways to preserve those rights. State and federal law and state and federal courts may provide redundant levels of protection. That plurality and redundancy is how federalism helps to preserve rights. The citizens of the state remain free to change the law, either increasing or decreasing the level of state protection.

On first analysis, Justice Stevens's reference to Finland might appear to represent an extreme expression of dualist federalism. Justice Stevens likens a state to a foreign nation. To ascribe to Michigan the autonomy and sovereignty of a foreign country suggests a model of jurisdictional exclusiveness. The United States and Finland have largely nonoverlapping realms of regulatory jurisdiction. If that international model provides the paradigm for state-federal relations in the United States, then strong boundaries between state and federal power might well be appropriate. The integrity of a foreign nation must be respected.

In the context of the opinion, however, the comparison to Finland actually does not support a dualist approach. On the contrary, the reference to Finland embraces the postulates of the interactive perspective. In the example Justice Stevens uses, it is clear that the overall system he describes has little interest in the autonomy of Finland. Finland is a means toward the end of protecting the rights of citizens of the United States. As long as Finland safeguards those citizens, the United States has no interest in the functioning of the Finnish system. The concern that the misinterpretation of United States law might impede sovereign interests of Finland plays no role whatsoever in the analysis.

The point of the example is not to emphasize the sovereignty of Finland or of Michigan, but to stress that the interest of United States lies in protecting its citizens, not in protecting the autonomy of states, be they Finland or Michigan. The first priority in the interactive framework is for the interaction of state and federal law to advance any relevant national policy. States function to provide alternative means of realizing largely shared goals. Federalism does not empower states to develop conflicting policy initiatives. The primacy of protecting national interests appears sharply in the contrast between Long and Harris v. Reed. In Harris, the state court had rejected the claim of federal right. In such instances, Justice Stevens agreed that the presumption of federal reviewability should attach. State courts should be free to develop their own means for protecting the national rights of citizens, but they enjoyed no autonomy in rejecting those rights.

103. See Long, 463 U.S. at 1068 (Stevens, J., dissenting) (“I believe that in reviewing the decisions of state courts, the primary role of this Court is to make sure that persons who seek to vindicate federal rights have been fairly heard.”).
In understanding states as loci of power, rather than as integral communities of value, interactive federalism acknowledges the dominance of a variety of national policies. States provide different approaches to vindicating those policies. States offer choice, self-governance, and resistance to tyranny, but all within the context of an overall system in which a shared set of fundamental values exists without regard to geographical boundaries. Great variance may exist in how states understand and implement these values, but this model of federalism does not rest on a notion of a fundamental incommensurability of values.

The significance of a national set of values appears in jurisdictional opinions in which state courts deviate from the presumptively shared social policy. In writing for a unanimous court in *Howlett v. Rose*, Justice Stevens insisted on the constitutional presumption of a shared national policy. The issue in *Howlett* was whether Florida courts could refuse to entertain certain kinds of federal civil rights suits because such actions conflicted with Florida’s policy of not allowing suits against local government authorities.

Justice Stevens rejected the notion that Florida could have a policy different from the national policy embodied in 42 U.S.C. § 1983. He stated,

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

Federalism did not license states to dissent from national policies. Indeed, a conflict between state and national policies cannot really exist because at a fundamental level, national policies and state policies must be consistent.

In *Howlett*, Justice Stevens described the role of state courts in the federal system. At one level, the description seems in tension with the analogy to Finnish courts in *Long*. In *Howlett*, Justice Stevens wrote,

“[State and federal law] together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent.”

The courts of Michigan are no longer like the courts of Finland. State and federal courts are now emphatically courts of the same country. Though the nominal description of state courts in *Howlett* contrasts with that in *Long*, no conceptual tension exists. As discussed above, in the

105. Id. at 371 (quoting Mondou v. New York, New Haven & Hartford R.R., 223 U.S. 1, 57 (1912)).
106. Id. at 367 (quoting Claflin v. Houseman, 93 U.S. 130, 136-37 (1876)).
overall context of Long, the reference to Finland in no way implied regulatory autonomy. Indeed, quite the contrary inference was intended. Just as the United States does not care how Finland applies American law, as long as it protects American citizens, so the United States does not care how Michigan applies American law, as long as it protects American citizens. Howlett makes patent the key point that a state has no ability to define narrowly the rights of citizens. The states cannot undermine federal rights; they can just enforce them in different ways.

Johnson v. Fankell\(^{107}\) provides a further illustration of Justice Stevens’s position that state courts should enjoy broad independence, as long as they respect the broad outlines of federal policy. Johnson addressed the kind of procedural question produced by broad concurrent state and federal jurisdiction. The issue was whether state courts were required to allow an interlocutory appeal of a trial court’s rejection of a defense of qualified immunity in a § 1983 civil rights action. As the procedural law of immunity had developed in federal court, an immediate appeal was available as a way of giving full force to the immunity. In prior decisions, the United States Supreme Court had emphasized that the immunity was an immunity to suit, not just an ordinary defense on the merits.\(^{108}\) The Court had conceptualized the defense as a way to grant necessary protections to government officials. In Johnson, the state official argued that the right to interlocutory appeal formed part of the fabric of § 1983, and state courts, as well as federal courts, should be required to recognize it.

Writing for a unanimous Court, Justice Stevens refused to impose the requirement of interlocutory appeal on state courts. For Justice Stevens, the case presented an instance of a state potentially overprotecting federal rights. Justice Stevens characterized the purpose of qualified immunity as protecting states and their officials from the “overenforcement” of federal rights.\(^{109}\) If states did not wish to protect themselves from this overenforcement, they were free to make that choice. In short, qualified immunity was for the benefit of states, and if they did not wish to take full advantage of it, they need not do so. Justice Stevens once again presented his vision of a federalism that functioned by allowing diversity in state practice, even with regard to matters subject to federal law, as long as the states did not trench on national policy. As long as broad principles of national policy are respected, uniformity of federal law is not essential.

iii. Nike/ASARCO

The application of federal justiciability principles to federal claims in state courts provides another perspective on intersystemic adjudication. Constitutional principles of justiciability trace to the Article III requirements for federal jurisdiction. Such requirements do not generally

---

bind state courts. With regard to federal questions, however, some scholars have urged a different approach. Commentators have noted that allowing state courts to hear federal claims in non-Article III cases raises the possibility of lack of uniformity and an absence of hierarchical accountability.\textsuperscript{110}

The Article III requirements, such as standing, ripeness, and lack of mootness, clearly apply to the Supreme Court. Accordingly, if state courts hear federal claims that do not fit within Article III, review of the federal issue in the Supreme Court may not be available. With regard to cases falling outside the scope of Article III, state courts would be rendering unreviewable interpretations of federal law. Courts in different states might interpret the federal law in divergent ways, and the Supreme Court could not reconcile the conflict. One important function of the Supreme Court is to provide a final, uniform, authoritative interpretation of federal law.\textsuperscript{111} That role would be thwarted. Further, the unreviewable state court judgments might lack preclusive effect in subsequent federal litigation.\textsuperscript{112} Finality, uniformity, and hierarchical accountability all would suffer.

The Supreme Court has developed a partial solution to this problem of losing control over the development of federal law. In \textit{ASARCO Inc. v. Kadish},\textsuperscript{113} the Court held that if a non-Article III plaintiff succeeds in vindicating a federal right, the state court judgment is subject to review in the Supreme Court. In effect, being subject to an adverse decision on a matter of federal law gives Article III standing to the original defendant. State court judgments rejecting the federal right, however, do not give rise to Supreme Court jurisdiction. In those instances, the state courts have the last word on federal law, at least in that case.

Because of the lack of uniformity, finality, and hierarchical accountability, some scholars have suggested a jurisdictional fix, consisting of requiring state courts to follow federal rules of justiciability when considering federal claims.\textsuperscript{114} The Supreme Court, however, has not indicated support for imposing federal justiciability rules on state courts. For his part, Justice Stevens has defended such state court exercises of jurisdiction.


\textsuperscript{112} See Fletcher, \textit{supra} note 110, at 274-75, 285 (discussing the implications of \textit{Fidelity National Bank & Trust Co. v. Swope}, 274 U.S. 123 (1927)).

\textsuperscript{113} 490 U.S. 605 (1989).

\textsuperscript{114} See Fletcher, \textit{supra} note 110, at 282-83.
Justice Stevens often has noted that justiciability requirements applicable in federal court do not bind state courts. He is willing to abide the consequences that state courts may issue unreviewable judgments on issues of federal law. Justice Stevens did join in the *ASARCO* opinion, allowing Supreme Court review of state court decisions favorable to non-Article III plaintiffs. However, in his opinion in *Nike, Inc. v. Kasky*, he resisted the expansion of the *ASARCO* doctrine to include interlocutory rulings allowing the trial to proceed. He felt no compulsion to review every state court judgment resting on issues of federal law.

iv. Merrell Dow

The scope of federal question jurisdiction constitutes another area in which intersystemic adjudication confronts claims of uniformity. Determining when actions “arise under” federal law and thus come within the general federal question jurisdiction of lower federal courts has been a source of continuing controversy. The treatment of state law claims that raise significant federal issues has proven especially vexing. In some instances, the Supreme Court has allowed such actions to be heard by lower federal courts. In other instances, the Court has decided that lower federal courts lack subject matter jurisdiction.

Whether the cases proceed in state or federal court, the Supreme Court will have jurisdiction to review the federal issues on appeal. However, given the rarity of the Supreme Court’s granting certiorari, if these actions proceed in state court, then state courts will, as a practical matter, have the final say on issues of federal law.

In *Merrell Dow Pharmaceuticals Inc. v. Thompson*, the Supreme Court confronted this issue. Consumers had brought state-law claims in state court against the manufacturer of Bendectin, alleging that the drug caused birth defects. The consumers asserted that the manufacturer’s violation of the federal Food, Drug, and Cosmetic Act (“FDCA”) constituted negligence. Based on that federal issue, the manufacturer sought to remove the case to federal court.

Writing for a five-Justice majority, Justice Stevens held that the lower federal courts lacked subject matter jurisdiction. In dissent, Justice William Brennan emphasized the important interest in having federal issues decided in federal court. Arguing for a broader interpretation of the federal question statute, he stressed that allowing the case to be heard in federal court would

120. 478 U.S. 804 (1986).
help to ensure a uniform interpretation of federal law.\textsuperscript{121} Justice Stevens rejected these pleas for uniformity.

The disagreement between Justices Stevens and Brennan turned in part on their understanding of the underlying federal statutory regime. Justice Stevens interpreted the statute to embody a congressional desire to keep private FDCA actions out of federal court. He understood the congressional design to contemplate intersystemic adjudication, with state courts hearing such claims.\textsuperscript{122} To Justice Brennan, such a preference for intersystemic adjudication made no sense.\textsuperscript{123} Especially in view of the important interest in uniformity, he refused to interpret the legislative scheme as preferring state-court adjudication of FDCA issues. For Justice Stevens, the congressional choice of intersystemic adjudication was plausible, and no overriding interest in uniformity undermined that interpretation.

\textbf{b. State Law in Federal Courts}

The ability of state courts to interpret federal law reflects another facet of intersystemic adjudication. In 	extit{Pennhurst State School & Hospital v. Halderman},\textsuperscript{124} Justice Stevens forcefully defended the propriety of intersystemic adjudication. That case concerned the ability of a federal court to grant an injunction against a state official based on state law. In accordance with principles established in 	extit{Ex parte Young},\textsuperscript{125} state sovereign immunity does not prevent an injunctive action against a state official based on federal law. In 	extit{Pennhurst}, the lower federal courts had relied on the reasoning of 	extit{Ex parte Young} to approve an injunction against a state official based on state law. Reversing, the Supreme Court held that the principles of state sovereign immunity embodied in the Eleventh Amendment prohibited a federal court from issuing an injunction against a state official based on state law.

In many ways, 	extit{Pennhurst} was the flip side of 	extit{Michigan v. Long}.\textsuperscript{126} For the majority in 	extit{Long}, a presumption against adequate and independent state grounds furthered important principles of uniformity and accountability. Unreviewed state court comments on federal law might promote different understandings of federal law in different states. Further, state courts might be able to deflect responsibility for their decisions by appearing to rely on federal law, when in fact state law determined the outcome. The 	extit{Long} presumption forced state courts to make clear whether their opinions rested

\begin{itemize}
\item \textsuperscript{121} See id. at 826 (Brennan, J., dissenting).
\item \textsuperscript{122} See id. at 811-12 (majority opinion).
\item \textsuperscript{123} See id. at 829-32 (Brennan, J., dissenting).
\item \textsuperscript{124} 465 U.S. 89 (1984).
\item \textsuperscript{125} 209 U.S. 123 (1908).
\item \textsuperscript{126} For a discussion of the interplay of 	extit{Pennhurst} and 	extit{Michigan v. Long}, see generally Althouse, Separate Sphere, supra note 100.
\end{itemize}
on state or federal bases and also facilitated federal review of state court interpretations of federal law.

Pennhurst performed a similar function with regard to federal court interpretations of state law. When a federal court relies on state law, it creates non-authoritative interpretations of state law. These rulings may create confusion about the actual content of state law. Such decisions also may confuse the citizens of the state about whom to hold accountable for unpopular rulings. When a federal court issues an injunction based on state law, disgruntled citizens may not know whether to blame the federal government or the state government. In addition, given the relative infrequency of Supreme Court review of federal court interpretations of state law, reliance on state law may effectively insulate a federal court’s rulings from Supreme Court supervision.

As Justice Stevens has shown in a variety of areas, he does not find the concern for uniform interpretation of law to be especially persuasive. Further, for Justice Stevens, accountability means the ability to obtain meaningful legal redress against defendants, including state agencies, who are acting in violation of law. The Pennhurst decision diminishes that accountability by denying plaintiffs the ability to advance state and federal claims together in federal court. A plaintiff wishing to pursue the federal claims in federal court must bring a separate action in state court to litigate the state claims. Such claim-splitting entails expense, inconvenience, and the hazards of possible preclusion. To avoid the problems accompanying splitting the state and federal claims, the plaintiff may feel compelled to bring both state and federal claims in state court.

For Justice Stevens, however, plaintiffs should not be forced to bring their dual claims in state court. In Justice Stevens’s view, state and federal courts are not necessarily equal. Congress has established a national policy allowing plaintiffs to bring federal claims in federal courts. For him, the Supreme Court should promote that policy, rather than impede it. Nor should permitting federal courts to apply state law to state officers infringe upon any legitimate state interest. From the interactive perspective, this kind of intersystemic adjudication fulfills the function of federalism. State and federal courts provide redundant means for enforcing state law. Surely the state has no legitimate interest in allowing the state law governing state officials to go underenforced because of formalistic jurisdictional hurdles.

128. See Stevens, supra note 96, at 183.
129. See Pennhurst, 465 U.S. at 150 (Stevens, J., dissenting) (asserting that the state’s “interest lies with those who seek to enforce its laws, rather than those who have violated them”).
3. Applying Forum Law to Out-of-State Parties

In most disputes about the appropriateness of intersystemic adjudication, the issue is primarily choice of forum, not choice of law. It is clear what law is going to apply; the question concerns the choice of appropriate forum. Is it proper for the courts of one political system to interpret the law of another political system or should litigants be directed to courts of the system whose law is being applied? Thus, in Pennhurst the issue was whether litigants could bring their supplemental state-law claims in federal court or whether they would instead be remitted to state court.

Sometimes instead, the choice of forum is clear, and the question concerns what law will be applied to the dispute. For a dualist, the forum state’s application of its own law to a multistate dispute threatens to impair the sovereignty of another state. An aspect of the autonomy of states is their ability to have their own law applied to disputes with which they have the most significant contacts. Moreover, given the dualist presumption of fundamental divergence among states, the application of one state’s law presumptively impairs the regulatory interest of another state. Strict federal supervision of states’ choice-of-law decisions is necessary to protect the sovereignty of other states.

Consistent with the interactive conception of states as alternative sources of power, rather than as integral communities of value, Justice Stevens has rejected strict limits on state courts’ choice-of-law decisions. From Justice Stevens’s perspective, states do not stand as hostile sovereigns in relation to each other; nor do state boundaries demarcate fundamental divisions of value. Rather, states form part of a single federal system and enjoy widespread agreement on a broad range of issues. In view of these principles, the application of forum state law does not presumptively impair the interests of another state.

The most dramatic choice-of-law issue of this kind concerned whether courts in California were required to recognize the sovereign immunity defense that Nevada would be allowed to assert in its own courts. In Nevada v. Hall, Justice Stevens wrote the opinion for the Court rejecting Nevada’s pleas. His opinion found that principles of federalism simply did not limit California’s ability to apply its laws to the dispute. The case further illustrated the potential of a federal system to provide alternative means for redressing injuries. In state courts in Nevada, state sovereign immunity would bar the plaintiff’s recovery. The broad jurisdictional overlap characteristic of federalism in the United States offered the plaintiff an alternative avenue for legal redress. In Nevada v. Hall, federalism ensured that rights would indeed have remedies. The case represents not a threat to federalism, but a realization of the promise of federalism.

Other choice-of-law decisions also illustrate Justice Stevens’s interactive approach. In Phillips Petroleum v. Shutts, Justice Stevens disagreed with the majority’s decision to restrict the choice-of-law decision of the Kansas courts. He doubted that the law of other states would differ significantly from that of Kansas. Accordingly, he stated a very high standard for overcoming the presumption of a general convergence of the law of different states: “Rather than potential, 'putative,' or even 'likely' conflicts, I would require demonstration of an unambiguous conflict with the established law of another State as an essential element of a constitutional choice-of-law claim.”

Similarly, in Allstate Insurance Co. v. Hague, Justice Stevens made clear that a state’s decision to apply its own law generally did not place a constitutionally cognizable burden on another state. The focus of the constitutional question should not be whether one state was violating the prerogatives of another state, but rather whether the choice-of-law decision undermined the overall federal system. For Justice Stevens, the question was whether the choice-of-law decision “threatens the federal interest in national unity by unjustifiably infringing upon the legitimate interests of another State.”

C. Scope of State Regulatory Authority

The areas of federal preemption and the dormant Commerce Clause provide a significant elaboration of a theory of interactive federalism. Belying the idea that he is a reflexive nationalist, preemption represents an area in which Justice Stevens would give more authority to states than the Rehnquist Court often allowed. Belying the concept that Justice Stevens exhibits a reflexive pro-regulatory bent, his dormant Commerce Clause jurisprudence demonstrates a willingness to strike down certain state economic regulations.

1. Preemption

Preemption constitutes one of Justice Stevens’s most important contributions to federalism. Justice Stevens consistently has urged a narrow interpretation of the preemptive force of federal laws and regulations. He has sought to allow concurrent state regulation in a wide variety of areas.

132. Id. at 841 (Stevens, J., concurring in part and dissenting in part).
134. Id. at 323 (Stevens, J., concurring in the judgment).
Preemption directly presents the question of how to accommodate the potential conflict between state and federal regulatory regimes. The cases arise in areas in which the federal government clearly has authority to promulgate rules and, indeed, has the power to disable states from imposing their regulations. The key question is whether Congress has, indeed, sought to displace the states. On the level of policy, allowing concurrent state and federal regulation advances principles of plurality and redundancy. Uniformity and hierarchical accountability might suffer.

Dualist federalism contains no resources for deciding whether state and federal regulations can coexist. If the state policy implicates a commercial area, it enjoys no protection from federal displacement. When line drawing fails to resolve issues, the dualist approach can contribute little to answering these kinds of federalism problems. Without any inclination to protect state authority in these realms, the Court has struck down many state regulations on the grounds of federal preemption.136 With regard to preemption, dualist federalism has been no friend of state power.

Interactive federalism accepts a region for state regulation that is much broader than that contemplated by dualist federalism. Justice Stevens has been at the forefront of permitting concurrent state and federal regulation, rather than finding state law preempted.137 He has refused to join the Court’s more aggressive action in striking down state laws that arguably serve as obstacles to federal regulation.138 He has chided the Court for ignoring principles of federalism in this area. In his dissent in Geier, he stated, “This is a case about federalism.”139 In limiting the scope of federal preemption, interactive federalism shows the value of its embrace of concurrent state and federal authority. Justice Stevens’s more limited conception of preemption allows plurality and redundancy to flourish. Both states and the national government are free to address social problems and to come up with overlapping sets of solutions. Citizens can rely on both state and federal law. If one set of laws provides inadequate protection, the other remains available for relief.

---

136. See, e.g., Am. Ins. Ass’n v. Garamendi, 539 U.S. 396 (2003) (holding that a California statute requiring disclosure of information about Holocaust-era insurance policies was preempted by foreign policy of the United States); Lorillard, 533 U.S. 525 (holding that a state statute regulating the advertising of tobacco products was preempted by federal law); Buckman Co. v. Plaintiff's Legal Comm., 531 U.S. 341 (2001); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000) (holding that a state law restricting state transactions with companies doing business with Burma was preempted by the foreign policy of the United States); Geier, 529 U.S. 861; United States v. Locke, 529 U.S. 89 (2000) (holding that state regulation of oil spills was preempted by federal statute); Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88 (1992) (holding that a state law regulating workers at hazardous waste sites was preempted by federal law).

137. See Cipollone, 505 U.S. at 517 (suggesting that implied preemption would not be found in statutes containing express preemption provisions).

138. See Buckman, 531 U.S. at 341; Geier, 529 U.S. at 881-82; see also Caleb Nelson, Preemption, 86 Va. L. Rev. 225, 228-29 (2000).

2. Dormant Commerce Clause

Justice Stevens's dormant Commerce Clause jurisprudence poses the greatest obstacle to characterizing his federalism as fully interactive. Justice Stevens has supported a fairly robust form of the dormant Commerce Clause, voting to strike down a variety of state regulations.\(^{140}\) What accounts for Justice Stevens's relatively broad conception of preemption under the dormant Commerce Clause, coupled with a narrow understanding of preemption in the area of federal preemption?

Here the combination of Justice Rutledge's conception of the Commerce Clause and Justice Stevens's focus on impartial governance likely proves decisive. Recall that in Justice Rutledge's account, frequently cited by Justice Stevens, the central purpose of the Constitution in general, and of the Commerce Clause in particular, was to eliminate state barriers to trade. State interference with interstate commerce constituted the principal problem threatening the United States under the Articles of Confederation. The Constitution was adopted to eliminate that obstacle.

Justice Stevens emphasized this view of constitutional history in his opinion for the Court in *Camps Newfound/Owatonna, Inc. v. Town of Harrison*.\(^{141}\) In addition to citing Justice Rutledge, Justice Stevens quoted from Justice William Johnson's opinion in *Gibbons v. Ogden*.\(^{142}\) Justice Johnson noted that before the Constitution was adopted, states could burden commerce without regard to the costs imposed on nonresidents. Eliminating this problem provided the impetus for the constitutional convention and the primary goal of the Constitution.\(^{143}\)

The Constitution thus established the strongest possible national policy against state interference with interstate commerce. No additional statutory expressions of this principle are required; it pervades the constitutional system unless specifically displaced by Congress. State regulations that discriminate against interstate commerce or unduly burden it run contrary to this fundamental national commitment. In this area, as in others, states simply have no ability to thwart a national policy.

Justice Stevens's conception of a well-functioning political process contributes to his embrace of dormant Commerce Clause doctrine. The dormant Commerce Clause targets state regulations that impose costs on other states. This kind of cost-exporting creates a breakdown in the state political process. The state democratic process cannot be trusted in this situation in which the burdens of the laws will be borne by those who are not constituents.

---

\(^{140}\) See, e.g., *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997); W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994); see also Greve, supra note 13, at 116 n.143 (characterizing Justice Stevens as "the Court's most forceful advocate of constitutional preemption" under the dormant Commerce Clause).

\(^{141}\) 520 U.S. 564.

\(^{142}\) 22 U.S. (9 Wheat.) 1, 224 (1824) (Johnson, J., concurring in the judgment).

\(^{143}\) *Camps Newfound/Owatonna*, 520 U.S. at 571.
As did Justice Rutledge before him, Justice Stevens has relied on this political process justification for the dormant Commerce Clause. In *American Trucking Ass'ns, Inc. v. Scheiner*, Justice Stevens quoted the political process concerns that Justice Rutledge had expressed forty years previously. With regard to laws discriminating against interstate commerce, Justice Stevens wrote, ""Provincial interests and local political power are at their maximum weight in bringing about acceptance of this type of legislation. With the forces behind it, this is the very kind of barrier the commerce clause was put in the fundamental law to guard against.""\(^{145}\)

In *West Lynn Creamery, Inc. v. Healy*, Justice Stevens repeated this political process justification for the dormant Commerce Clause. He explained that the design of the tax and subsidy scheme at issue shifted the burden of the tax onto out-of-state entities. Accordingly, the ""State's political processes can no longer be relied upon to prevent legislative abuse.""\(^{147}\) Justice Stevens relies heavily on the well-functioning political process to protect federalism, and he sees an important role for the courts to intervene when structural defects impair the impartial operation of democracy.

### IV. ASSESSING INTERACTIVE FEDERALISM IN ACTION

Part III argues that Justice Stevens's jurisprudence can be understood to advance an interactive model of federalism. This part evaluates the resulting doctrine. First, it examines the extent to which interactive federalism, as illustrated in Justice Stevens's positions, advances the goals often associated with federalism. Next, the part further explores the underlying assumptions revealed in Justice Stevens's opinions. Finally, I turn to a brief methodological assessment of Justice Stevens's federalism jurisprudence.

#### A. The Values of Federalism

By harnessing the interaction of state and federal power, interactive federalism aspires to promote the values of choice, self-governance, and restraining tyranny, while avoiding the doctrinal and theoretical problems associated with dualist federalism. In the three main areas canvassed—federal regulatory jurisdiction, judicial jurisdiction, and state regulatory jurisdiction—Justice Stevens's instantiation of interactive federalism appears to advance these aims.

---

145. Id. at 281 n.12 (quoting Nippert v. Richmond, 327 U.S. 416, 434 (1946) (Rutledge, J.).)
146. 512 U.S. 186 (1994).
147. Id. at 200.
1. Choice

With regard to the scope of congressional power, Justice Stevens's votes to uphold federal regulation seem at least as likely to advance the goals of federalism as are the Court's decisions voiding the challenged enactments. Most of the federal laws did not restrict individual choice in any meaningful way. The case that presents the most difficult issues is *Raich*. Unlike *Lopez* and *Morrison*, *Raich* concerns an actual, direct conflict between state and federal law, and indeed between state and federal policy. No states endorse guns in schools or violence against women, but California did want to allow medical use of marijuana. Justice Stevens wrote the opinion prohibiting this form of state experimentation.

The justification for this restriction on state policy divergence lies in the political process. Some state choices have interstate effects. One of the roles of the national government is to address such negative externalities. Justice Stevens explained how Congress might reasonably have concluded that a comprehensive national approach to marijuana was necessary and that local deviation would undermine that larger regulatory scheme. Like the problem of externalities that Justice Stevens explicitly noted in supporting federal environmental regulation, California's marijuana use might affect other states. The choices of these other states deserved protection as well.

With regard to the scope of judicial jurisdiction, Justice Stevens supports a kind of second-order choice. Litigants enjoy broad choice of forum in pursuing their claims. Justice Stevens supports the view that plaintiffs can bring their federal claims to state court without the strictures of federal justiciability requirements. His position in *Pennhurst* would allow plaintiffs to choose a federal court as the forum for their state claims against the state. His permissive choice-of-law approach effectively allows plaintiffs substantial ability to choose the law that will apply to the dispute.

Justice Stevens's jurisprudence regarding state regulatory jurisdiction poses more difficulties. Justice Stevens's general presumption against the federal preemption of state law certainly promotes state experimentation and individual choice. His support for a relatively robust dormant Commerce Clause, however, appears to thwart state regulatory choice. Indeed, in some measure, his dormant Commerce Clause jurisprudence represents a greater judicial intrusion on choice than his position in *Raich*. In that case, the question was whether Congress rationally could have decided that national regulation was necessary. The California law presented a direct conflict with an enacted federal statute. In the dormant Commerce Clause area, by contrast, the Court speaks where Congress has

---

149. *See supra* Part III.B.2.a.iii.
150. *See supra* Part III.B.2.b.
151. *See supra* Part III.B.3.
not. Congress always can overrule the Court's decision, but the Court sets a
default rule against certain kinds of state regulations. The Court, not
Congress, defines a conflict between state and federal policy.

Two factors appear to explain Justice Stevens's approach to the dormant
Commerce Clause. First, as he emphasizes in *West Lynn Creamery*, the
dormant Commerce Clause attempts to guard against failure of the political
process.\(^\text{152}\) He finds that the ability to retain benefits while exporting costs
distorts the normal state political process.

Second, the dormant Commerce Clause appears to be an area in which
Justice Stevens finds that the Constitution speaks with unusual clarity.
Justice Stevens understands the vindication of a national society and the
overcoming of divisive state practices as the central purpose of the United
States Constitution. States never enjoy the license to violate national
policy. In the area of preemption, Justice Stevens resists striking down
state regulations unless Congress has clearly expressed the need for
uniformity. With regard to the dormant Commerce Clause, We the People,
speaking through the Constitution, have made uniformity an overriding
national imperative. That constitutional history provides powerful support
for the doctrine.

2. Self-Governance

Self-governance overlaps substantially with the value of choice. Both
speak to the ability of states to produce diverse policy outcomes in light of
the differing preferences of their citizens. The republican argument for self-
governance, however, emphasizes the need to respect the integrity of state
institutions and to facilitate democratic control over the states.

The Rehnquist Court generally sought to promote self-governance by
protecting state governments from federal regulation. The interactive
approach, adopted by Justice Stevens, fosters self-governance by allowing
states to work with the national government in formulating shared solutions
to shared problems and by enforcing principles of state governmental
accountability.

In *New York v. United States*, for example, the overall regulatory regime
struck down by the Court was the product of a direct agreement among the
states, themselves.\(^\text{153}\) To understand the Court's holding to advance self-
government, one would have to adopt the majority's abstract notion of
defining clear lines of accountability, as opposed to the more practical
approach of Justice Stevens, who refused to understand federalism to
prohibit the states and the federal government from deciding to cooperate to
advance shared goals.

With regard to state sovereign immunity, the difference between the
dualist and the interactive approach is especially stark. The Court

in part and dissenting in part).
INTERACTIVE FEDERALISM understands sovereign immunity to protect state policy discretion, as well as state "dignity,"154 by safeguarding the state fisc.155 However, this kind of immunity provides limited protection to states because they remain bound by the underlying federal statutes. Given this context, state sovereign immunity seems to offer little but an invitation to states to violate the law.

From the interactive approach, federal court jurisdiction promotes self-governance by ensuring that states follow the law, both federal law and, in the Pennhurst situation, state law. Further, as Justice Stevens has pointed out, from the overall perspective of republican theory, providing special immunity to the sovereign is anomalous.156

3. Restraining Tyranny

The dualist and interactive models differ markedly in their understanding of how federalism restrains tyranny. Dualism guards against tyranny through judicially enforced limits on the scope of governmental authority. Interactive federalism, by contrast, protects against governmental overreaching by unleashing state and federal power. For interactive federalism, it is the dynamic clash of governments that protects individuals.

The Court's dualist approach to sovereign immunity strikes a strong blow in favor of tyranny. The Court's interpretation of the Eleventh Amendment licenses states to act in a lawless fashion. Justice Stevens's interactive approach allows federal courts to make sure that states do not violate important rights. Ideally, states would obey federal law, and judicial enforcement would not be necessary. If states do not obey the law, however, federal courts should remain open for redress. That kind of redundancy, a staple of interactive federalism, represents significant protection against tyranny.

B. Background Assumptions Examined

This account of Justice Stevens's interactive approach to federalism highlights certain key assumptions. Confidence in the political process and a belief in a generally shared set of national values are central characteristics of his approach.

1. Impartial Governance

A belief in a generally well-functioning political process underlies various features of Justice Stevens's federalism jurisprudence. Congress generally can be counted on to accommodate the interests of states.

155. See id. at 750-51 ("A general federal power to authorize private suits for money damages would place unwarranted strain on the States' ability to govern in accordance with the will of their citizens.").
Because Congress is better suited than the courts to assess the potentially conflicting needs of states and of the national government, courts should not supervise these congressional determinations. Conversely, matters in which the political process may not work properly require judicial intervention. Thus, the Court must aggressively enforce the dormant Commerce Clause when states burden other states.

By the same token, potential voter confusion does not constitute a substantial concern. Even without strict lines of demarcation, voters will be able to determine whether to hold state or federal officials accountable. For this reason, the federal government can regulate local activity and can commandeer state administrative processes without interfering with electoral accountability. Similarly, accountability does not suffer when state courts enforce federal law and federal courts enforce state law. Citizens can determine what law applies, and if dissatisfied, they can seek to change the law.

This generally optimistic understanding of the political process does raise questions about Justice Stevens's approach to federalism. From a public choice perspective, this view of politics is naive and misleading. Public choice theory analyzes politicians as rational maximizers of their particular interests, such as campaign contributions and electoral support. "Impartial governance" has little traction in this worldview. Justice Stevens certainly understands issues of political economy. With a strong interest in antitrust law, he is well aware of the temptations of monopolization in a variety of areas. His experience has led him to resist the equation of politics and markets. In this, as in other domains, Justice Stevens's generally optimistic disposition influences his jurisprudence.

2. Shared National Values

The interactive vision that Justice Stevens advances generally focuses on how states and the national government can cooperate and compete so as to advance a largely shared set of goals. States may be laboratories, but they are laboratories devoted to generally accepted ideas of scientific progress. They are experimenting with different policies, but they generally agree about the results they are seeking. States always must closely conform to national policies, whether embodied in federal statutes (as in the sovereign immunity cases and in Howlett v. Rose) or directly in the Constitution (as in the dormant Commerce Clause cases). To the extent the interactive model views state values as not fundamentally diverging, conformity to national policy appears less onerous.

The general agreement about national policy also helps to explain Justice Stevens's views about states' potentially "overenforcing" federal rights, as

in *Michigan v. Long*. "Overenforcing" would seem to imply a corresponding "underenforcement" of something. A state court that dismisses a criminal prosecution based on an overly broad view of what the Constitution requires might be said to be underenforcing state criminal law. From Justice Stevens's perspective, that kind of underenforcement does not constitute a problem of federal concern. Why?

One possible reason for lack of concern might be complete lack of federal interest in the proper functioning of the state legal system. That view really would equate the state of Michigan with Finland. In this conception, safeguarding the federal rights of individuals constitutes the sole concern of the national government. The states' abilities to achieve their own goals deserve no respect. An alternative position, however, would be that states and the national government are engaged in the common project of ensuring human dignity in the criminal process. States share the federal interest in protecting criminal defendants. From this perspective, "overenforcing" the rights of criminal suspects impairs neither a federal interest nor a state interest. As long as state courts engage in good faith in this joint national project, federal courts should leave them alone.

The vision of states and the national government pursuing a largely shared set of values in turn lends support for Justice Stevens's embrace of the political safeguards of federalism. To the extent that state and federal interests conflict, one might have less confidence in the national political process properly resolving the disputes. However, if states and the national government agree on fundamental goals, Congress might function well as a place to coordinate the actions of the states and the national government.

C. A Federalism of Structure

Interactive federalism rests on structural, rather than on textual or originalist premises. The model seeks to provide a normatively satisfying account of how federalism can function in the United States today. The model may correspond to arguments based on original meaning or on the constitutional text, but those are not the sources on which it rests.

Justice Stevens generally develops his federalism jurisprudence without being tethered to arguments based on history or text. Justice Stevens shows more concern with the needs of the United States today than with the vision of the framers in the late eighteenth century. Yet, through Justice Rutledge, Justice Stevens does give originalist support to his theory of federalism. Relying on Justice Rutledge's argument about the Commerce

158. See *Baker*, supra note 100, at 856-59.
159. With regard to the presumption of good faith, Justice Stevens has made clear his "confidence in the judge as an impartial guardian of the rule of law." *Bush v. Gore*, 531 U.S. 98, 129 (2000) (Stevens, J., dissenting).
160. See, e.g., *United States v. Lopez*, 514 U.S. 549, 603 (1995) (Stevens, J., dissenting) ("The market for the possession of handguns by school-age children is, distressingly, substantial. Whether or not the national interest in eliminating that market would have justified federal legislation in 1789, it surely does today." (footnote omitted)).
Clause as an instrument of national union, Justice Stevens argues that the original meaning of the Constitution justifies a jurisprudence of national empowerment. Justice Stevens’s dormant Commerce Clause jurisprudence appears closely connected to this originalist argument.

As suggested above, it is Justice Stevens’s dormant Commerce Clause doctrine that fits least well with the overall interactive approach. Much state law benefits residents of the state. Many state programs draw funds from taxing sources located both in and out of the state, and state regulations may burden those involved in interstate commerce. Targeting all such laws may disable a significant amount of worthwhile state regulatory policy. In other words, the normatively most problematic aspect of Justice Stevens’s federalism jurisprudence appears to depend heavily on originalist arguments. In this way, Justice Stevens’s jurisprudence suggests that the interactive model would do well to stick with structural arguments and to be wary of originalist supplementation.

CONCLUSION

"The creative thing in this country, the miracle of America, is that out of diversity and out of differences we have created unity." So wrote Justice Rutledge. Justice Stevens also remains firmly committed to the idea of national unity. For him, federalism is not incompatible with the ideal of a strong union. After all, for all its commitment to federalism, the Constitution of the United States was designed primarily to promote national unity.

Justice Stevens’s jurisprudence of federalism reflects that understanding of the centrality of the union. Justice Stevens takes seriously the notion that states may devise alternative regulatory solutions. His approach to preemption would grant substantially more leeway to state regulation than did the decisions of the Rehnquist Court. Uniformity, for its own sake, should not squelch diversity.

At the same time, he remains vigilant for state laws that threaten to foster economic disunity. Certain values inhere in the constitutional structure, and courts must protect them. In general, though, it is up to the political process to reconcile the conflicting values implicated by federalism. Unlike in the case of individual rights, the political process is the proper venue for disputes about federalism. Placing federalism in the national political process is not subjecting states to a hostile adversary, but ensuring that the shared goals of the union can be enjoyed by all people in the United States.

161. See Fallon, supra note 10, at 460-61 (discussing the dormant Commerce Clause doctrine of the Rehnquist Court); Ernest A. Young, Is the Sky Falling on the Federal Government? State Sovereign Immunity, the Section Five Power, and the Federal Balance, 81 Tex. L. Rev. 1551, 1591 (2003) ("Dormant Commerce Clause review has the effect of foreclosing or undermining a wide range of important state policies, such as responsible attempts at waste disposal, state safety regulation, and efforts to encourage important state industries.") (footnotes omitted)).

What remains to be determined is how the political process should go about advancing the goals of federalism, how Congress should make appropriate choices about regulatory design. What is the proper level of concurrent authority? When do the interests in uniformity and accountability outweigh concerns for plurality and redundancy? Justice Stevens's approach confers much responsibility on Congress for realizing the promise of federalism. His jurisprudence of federalism requires a robust legisprudence of federalism. Justice Stevens does not prescribe that legislative theory. Of course, that is not Justice Stevens's obligation. Ever mindful of the judicial role, Justice Stevens would not presume to tell Congress how to fulfill its duties. He does his job with full confidence that others will do theirs.