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ARTICLE: RETHINKING CONSTITUTIONAL FEDERALISM

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TEXT:

[\*795] I. Introduction: A Third Model of Federalism

In last term's case of *United States v. Lopez*, n1 by a five to four majority the Supreme Court held for the first time since 1937 that a federal statute was unconstitutional as exceeding "the authority of Congress 'to regulate Commerce . . . among the several States.'" n2 Not surprisingly, the decision is seen as one of potentially landmark significance, perhaps even heralding a revival of the explicit pre-1937 position that the principle of federalism has full constitutional status. According to this view, which has continued to attract much judicial and scholarly support over the intervening years, federalism provides independent and judicially enforceable substantive limits on the scope of federal power. n3

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n1 115 S. Ct. 1624 (1995).

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n2 *Id.* at 1626 (quoting U.S. CONST. art. I, § 8, cl. 3).

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n3 Judicial support for this position includes the three strongly worded dissents in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), by Justices Rehnquist, O'Connor, and Powell. Chief Justice Rehnquist and Justice O'Connor were among the five justices who arguably re-established it as the reigning view last term in *Lopez*. Among the many scholarly commentators who subscribe to this position are MARTIN H. REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* 23-61 (1994); Edward S. Corwin, *The Passing of Dual Federalism*, 36 *VA. L. REV.* 1 (1950); and William W. Van Alstyne, *The Second Death of Federalism*, 83 *MICH. L. REV.* 1709 (1985).

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The alternative view of the status of federalism in the American system, which the Court formally adopted in *Garcia v. San Antonio Metropolitan Transit Authority* n4 in 1985 but had in practice accepted since 1941, is that federalism should rather be understood as a value whose protection lies, not with the judiciary, but solely in the structure of the national political process and the legislative outcomes that it shapes. n5

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n4 469 U.S. 528, 552 (1985) ("State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.").

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n5 The two modern classics expressing this position are first, Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 *COLUM. L. REV.* 543 (1954) and second, JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* (1980). For a leading discussion of federalism in light of *Garcia*, see Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 *SUP. CT. REV.* 341. A recent and highly sophisticated account of how the national political process protects state interests is provided in Larry Kramer, *Understanding Federalism*, 47 *VAND. L. REV.* 1485 (1994).

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[\*796] Despite their diametrically opposed conclusions, however, a fundamental premise is shared by both sides in this long-standing debate -- a premise that characterizes almost all analyses of American federalism. This shared premise is that the existence of areas of exclusive state power is a necessary condition of constitutional federalism: in order for federalism to operate as a principle of constitutional law, there must in practice (and not merely in rhetoric or national myth) be areas of regulatory authority reserved

exclusively to the states -- areas in which Congress cannot regulate. Given this shared premise, the debate has focused on whether or not such areas currently exist constitutionally speaking, and its content consists largely of arguments for and against various proposed textual bases for them. Leading candidates over the years have included the Commerce Clause, n6 the Tenth Amendment, n7 and the Guarantee Clause. n8

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n6 "The Congress shall have Power . . . To regulate Commerce . . . among the several States . . ." U.S. CONST. art. I, § 8, cl. 3. Each side in the debate has claimed that the Commerce Clause supports its position. Thus, some constitutional federalists argue that a correct, narrow reading of the Clause limits federal power to the regulation of activities and goods that are themselves part of, or in, interstate commerce. See, e.g., Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1454 (1987) (arguing that the Commerce Clause should be read narrowly to give Congress power over interstate transportation, navigation, and sales only). On the other side, the standard modern understanding of the Clause grants Congress power to regulate any activity that substantially affects the national economy, an understanding that has sometimes been interpreted as effectively granting plenary authority. See *infra* text accompanying note 58.

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n7 "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. This Clause is the one most often cited as providing the textual basis for exclusive state powers. See, e.g., *Garcia*, 469 U.S. at 580 (O'Connor, J., dissenting); see also *infra* text accompanying notes 83-87. Opponents claim that the Amendment simply states a truism, reaffirming that the federal government is the government of enumerated powers but adding nothing in terms of whether there are any such reserved powers or, if so, which they are. See, e.g., *United States v. Darby*, 312 U.S. 100, 124 (1941) ("The [Tenth] amendment states but a truism that all is retained which has not been surrendered.").

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n8 U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . ."). Professor Deborah Merritt relies on this Clause as the basis for constitutional federalism. See Deborah J. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 78 (1988) (arguing that "enforcing the guarantee of republican government . . . maintains the power of the national government while preserving the benefits of Federalism" because this form of government implies that there are some areas over which states have full sovereignty or autonomy).

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Two critical assumptions underlie this shared premise of the debate, both of which have the appearance of self-evident propositions of constitutional law. First, where state power is not exclusive, there are no constitutional constraints in the name of federalism on Congress's exercise [\*797] of its concurrent powers. n9 Second, in areas of concurrent power, Congress has unlimited constitutional authority to preempt the states -- that is, legislatively to abolish constitutionally concurrent state lawmaking power and to convert concurrent federal power into exclusive power. n10 To put this second assumption another way, Congress's power to preempt the states is taken to be co-extensive with its general legislative power, whatever the outer boundaries of that power: if Congress can legislate at all in a given area, then it can always preempt state power in that area. By means of this unlimited power of preemption, Congress thus has complete and unfettered discretion to determine the actual allocation of power between itself and the states in areas of concurrent competence. The role of the courts is limited to interpreting any such determination that Congress has chosen to make; that is, preemption analysis is a matter of statutory, and not constitutional, interpretation. n11 Hence, only the attribution to the states of areas of exclusive competence (which, by definition, Congress cannot preempt) ensures them constitutional protection from the exercise of "jurispathic" n12 congressional discretion.

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n9 There are of course nonfederalism-based constitutional limits on the exercise of concurrent federal powers, such as those provided by the First Amendment and the other provisions of the Bill of Rights.

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n10 For a general analysis of the legal principle of preemption, see generally Stephen A. Gardbaum, *The Nature of Preemption*, 79 *CORNELL L. REV.* 767 (1994).

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n11 This is the standard view of preemption law. See, e.g., William Cohen, *Congressional Power to Define State Power to Regulate Commerce: Consent and Pre-emption*, in *COURTS AND FREE MARKETS: PERSPECTIVES FROM THE UNITED STATES AND EUROPE* 523, 537 (Terrance Sandalow & Eric Stein eds., 1982) ("The issue in pre-emption cases, simply stated, is not what Congress has the power to do, but what Congress has done."); see also *Retail Clerks Int'l Ass'n Local 1625 v. Schermerhorn*, 375 U.S. 96, 103 (1963) ("The purpose of Congress is the ultimate touchstone [of preemption analysis].").

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n12 Robert Cover uses this term to describe the process of modern legal

centralization, whereby the central and supreme legal system undermines and kills off norm-generating competitors. See Robert M. Cover, *The Supreme Court, 1982 Term -- Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 53 (1983).

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In short, the shared premise appears to be built on extremely firm foundations. Yet, even in *Lopez*, the Court did not clearly state that regulating the possession of guns near public schools is a field that is categorically and definitively off-limits to Congress and thus under all conceivable circumstances is a field reserved exclusively to the states. Rather, it can perhaps be interpreted as holding only the narrower position that this particular attempt by Congress to regulate the field failed, without saying anything more general that would automatically disqualify all subsequent attempts. n13 Whichever of these two propositions constitutes the [\*798] actual holding in *Lopez*, logically at least, the difference between them suggests the possibility that even if this field is not reserved exclusively to the states, there may still be constitutional constraints on Congress's power to regulate it. But can this logical possibility be converted into a practical one? In particular, (a) what type of judicially enforceable constitutional constraints could be involved, and (b) what constitutional justification could be made for them?

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n13 One way of interpreting the Court's opinion in this manner is to focus on what it said about the absence of congressional findings: "We agree with the Government that Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce . . . . But to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here." *United States v. Lopez*, 115 S. Ct. 1624, 1631-32 (1995). Indeed, in his dissenting opinion, Justice Souter complained that the majority may have permitted the absence of congressional findings to "have affected the fate of the statute here." *Id.* at 1657 (Souter, J., dissenting).

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In this Article, I answer these two questions by presenting a third model of federalism as an alternative to the two standard views deriving from the shared premise described above. In doing so, I challenge this fundamental premise by claiming that the existence of areas of exclusive state power is not a necessary condition of constitutional federalism. The reason, I argue, is that although the latter depends on a constitutional division of powers between the states and the federal government, the division between areas that only the states can regulate and those that Congress can regulate is not the only possible one. Another constitutional division may involve concurrent powers. Specifically, concurrent state and federal power is not necessarily co-equal power; in certain areas, state authority may still be primary, with federal power secondary or exceptional and, therefore, carrying a special burden of justification. More concretely, my claim is that the concurrent authority of the states may be afforded a measure of constitutional protection by virtue of the fact that certain federalism constraints should be understood to apply to congressional exercises of the two particular powers that most threaten the states in

practical terms: the power of preemption and the power to regulate local activities affecting interstate commerce.

In the case of preemption, these constraints apply to the power itself and so go beyond the nonconstitutional doctrines of statutory interpretation -- such as the presumption of nonpreemption n14 and the "plain [\*799] statement rule" n15 -- by which the Court has sought to protect the value of federalism in modern times. Unlike these doctrines, which Congress has the right to legislate around by indicating otherwise, the constitutional constraints that I suggest address the previously presumed non-issue of when, and under what conditions and circumstances, does Congress have the power to preempt the states in the first place, and not simply the interpretive issue of whether Congress has chosen to exercise this power. If I am right, then even if Congress has concurrent constitutional power to legislate in a given area, it is not automatically the case that it is also permitted to preempt the states in that area. In the case of the power to regulate local activities substantially affecting interstate commerce, a sufficient causal connection between the regulated activity and interstate commerce should no longer be understood as the sole condition of federal power. Even if local activity substantially affects interstate commerce, it does not follow that Congress may automatically regulate it. The limitations on these two powers that I am proposing (indeed, on either power by itself n16) thus provide a second basis for affording federalism constitutional status that is quite independent of the traditional one (namely, exclusive state powers).

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n14 This presumption was first established by the Court in the 1930s. See *Mintz v. Baldwin*, 289 U.S. 346, 350 (1933) ("The purpose of Congress to supersede or exclude state action . . . is not lightly to be inferred. The intention to do so must definitely and clearly appear."); see also *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) ("Congress legislated here in a field which the States have traditionally occupied. So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." (citation omitted)). Generally speaking, prior to the 1930s, congressional legislation in a given field automatically preempted the states without regard to congressional intent to do so. See Gardbaum, *supra* note 10, at 801 ("Where the states and Congress had concurrent power, 'that of the State [was] superseded when the power of Congress [over interstate commerce was] exercised.'" (quoting *Southern Ry. v. Reid*, 222 U.S. 424, 436 (1912)) (alterations in original)); see also David E. Engdahl, *Preemptive Capability of Federal Power*, 45 U. COLO. L. REV. 51, 53 (1973) ("The doctrine of preemption consistently maintained by the Supreme Court until 1933 was that the exercise of federal power was inherently exclusive of any concurrent state power over any matter reached by the federal act" (emphasis omitted)).

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n15 See *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991) (explaining that the "plain statement rule" requires Congress to make clear in the language of the statute if it intends to preempt state law).

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n16 The enormous impact on the states of federal preemption of their regulatory authority means that if the model of federalism presented in this Article applies only to this single federal power, its adoption would still represent a fundamental change from the status quo.

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Although what I am presenting is thus a model of constitutional federalism, it is based not on policing definitive and categorical jurisdictional boundaries, as with the traditional model, but on policing Congress's deliberative processes and its reasons for regulating. Specifically, the federalism constraints on these two powers are that Congress may not validly exercise either of them without first thinking seriously about the merits of disrupting the existing balance of federal-state powers and without its resulting decision to proceed being reasonably justified in terms of the respective reasons for which these two powers should be understood to exist in the first place. In the case of regulating local activity, the relevant reason is that national regulation is called for and appropriate despite the presumption that the area is one primarily regulated by the states. The mere fact that the local activity substantially affects interstate commerce is not sufficient. In the case of preemption of state authority, the relevant reason is that uniform national regulation -- one set of rules in the relevant field -- is appropriate.

**[\*800]** This type of constitutional requirement, which in certain respects is similar in function to the statutorily derived "hard look" doctrine that courts apply in their review of administrative decisionmaking, n17 I suggest reflects a better general method of protecting the value of federalism than do either of the two standard alternatives: either (1) the traditional model of judicial enforcement of categorical jurisdictional boundaries, or (2) the political model of no judicial enforcement of federalism limits at all. This method is better because it possesses most of the advantages of both without their corresponding disadvantages. First, it is flexible (unlike the traditional model) but not too flexible (unlike the political model). Thus, for example, although at Time 1, a reviewing court may find that the required congressional determination balancing relevant national and state interests does not reasonably justify national or uniform regulation, relevant circumstances and evidence may change to render the regulation reasonable at Time 2. This potential result is quite different from the traditional model's theory of hard and fast boundaries. Second, this third model involves an appropriate division of powers and functions between courts and Congress on the issue of federalism, rather than either the purely judicial or purely legislative determination of the two current models. Third, it employs and combines the partial truths of the other two: while the states look mainly to the national political process for protection of their interests and integrity, a constitutional dimension to this protection is not excluded -- in terms of both guaranteed requirements in that process and some measure of judicial review. Finally, and most importantly, this model forces Congress to think seriously about its exercise of these two powers from the perspective of federalism, something which, though it is clearly in the best position to do, it rarely does at present.

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n17 See infra text accompanying note 121.

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The constitutional justification for this third model of federalism stems from the fact that the two congressional powers at issue both derive from the Necessary and Proper Clause of Article I. n18 Simply put, my claim is that either ending the constitutionally concurrent power of the states in a given area or regulating local activities that affect interstate commerce may not always be both a "necessary" and a "proper" means for achieving a legitimate federal objective, such as the regulation of interstate commerce. n19 Specifically, the regulation of local activity is not "proper" if Congress has not first reasonably determined that the states could not [\*801] adequately achieve the same objective. Preemption of state authority is not "proper" if Congress has not discharged its burden of reasonably justifying the imposition of uniform national laws.

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n18 U.S. CONST. art. I, § 8, cl. 18 ("The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."). My argument for this derivation is contained infra Part II.

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n19 The legitimate federal objectives are not of course limited to the regulation of interstate commerce. See infra note 38.

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My argument concerning the constitutional source of the two powers is contained in Part II. I show that, contrary to widely held views, n20 Congress's power of preemption does not derive from the Supremacy Clause, n21 and its power to regulate local activities does not derive from the Commerce Clause. Rather, the source of both powers is the Necessary and Proper Clause. In Part III, I argue that this derivation of the two powers has significant constitutional implications by challenging the standard view that the Necessary and Proper Clause contains no independent, distinct, or internal limitations on exercises of federal power premised on it. I do so, however, by relying in part upon the most traditional of authorities. A careful reading of Chief Justice Marshall's opinion in McCulloch v. Maryland, n22 the locus classicus for discussion of this Clause, supports my claim that the standard view is importantly mistaken. In Part IV, I explain how the general internal limitations under the Clause apply to the two particular congressional powers at issue, and claim that the textual requirement that Congress's choice of means be "proper" as well as "necessary" imports in their case an independent concern for the value of federalism that translates into the procedural and substantive (or deliberative and justificatory) constraints on their exercise referred to above.

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n20 See infra note 28 (providing examples of the assumption that preemption derives from the Supremacy Clause); infra subpart II(A) (discussing the Necessary and Proper Clause as the source of the preemption power).

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n21 "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI.

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n22 17 U.S. (4 Wheat.) 316 (1819).

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The seemingly interminable character of the debates about the required or best conception of federalism for the United States reflects not only methodological and substantive dissensus as to how the relevant provisions of the Constitution should be interpreted, but also underlying dissatisfaction with both of the standard institutional mechanisms for protecting the value of federalism: a purely judicial or a purely legislative determination of the allocation of power between central and constituent entities. This dissatisfaction, however, is not unique to the American federal system. In Part V, I supplement the argument for a third model of federalism (that is, a second model of constitutional federalism) by adding a comparative dimension to the analysis. I introduce and discuss certain parallel ideas that characterize current thinking about federalism in the European [\*802] Union. n23 In particular, I analyze the significant affinities between the alternative model of constitutional federalism that I present in this Article and the model that is structured by the principle of "subsidiarity," n24 which has recently and with much fanfare, been incorporated into the "constitution" n25 of the European Union.

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n23 Formerly (prior to November 1, 1993) the European Community. This is the date on which the (Maastricht) Treaty on European Union came into effect, after a prolonged ratification process.

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n24 The principle of subsidiarity requires the central institutions of the European Union to act in areas of concurrent competence "only if and insofar as

the objectives of the proposed action cannot be sufficiently achieved by the Member States [the constituent political entities]." TREATY ON EUROPEAN UNION art. G(5) (amending the Treaty Establishing the European Economic Community (Treaty of Rome) and adding this provision as new Article 3B). For my discussion of subsidiarity and constitutional federalism in the European Union, see *infra* Part V.

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n25 The Treaty of Rome is often referred to as the "constitution" of the European Union, see Case 294/83, *Parti Ecologiste "Les Verts" v. Parliament*, 1986 E.C.R. 1339, 1365 (referring to the Treaty as the "constitutional charter" of the Community); *What Else Europe Might Mend*, N.Y. TIMES, June 30, 1984, at 22 (editorial) (reporting that then-President Mitterrand of France proposed to "renegotiate the community's constitution, the 1956 [sic] Treaty of Rome, to expand its concerns"), even though, formally speaking, its legal status is that of an international treaty. See G. Federico Mancini, *The Making of a Constitution for Europe*, in THE NEW EUROPEAN COMMUNITY 177, 178 (Robert O. Keohane & Stanley Hoffmann eds., 1991) (stating that "the instrument giving rise to the Community was a traditional multilateral treaty" and reciting the basic differences between a treaty and a constitution (emphasis in original)). The European Court of Justice has interpreted the Treaty to include the characteristic constitutional features of a modern federal legal and political system, such as the principles of supremacy, preemption, "direct effect" (which permits individuals to claim rights under European Union law that national courts must protect), and judicial review of European Union law for violation of individual rights. For a brilliant analysis of this development, see J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991). See also Mancini, *supra*, at 180-85 (describing how, in a series of cases before the European Court of Justice, the Treaty has gradually taken on many of the characteristics of a constitution).

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This Article seeks to change the terms of the legal debate over federalism. It does not address the prior normative question of whether federalism is a principle worth protecting but, like the two existing models, assumes that it is and focuses on the issues of the constitutional status of the principle and the methods and strategies for protecting it. n26 Ultimately, however, the normative issue itself is not likely to remain entirely unaffected by the coherence and plausibility of the answers given to the narrower legal questions. It is too early to say whether any among the majority in *Lopez* was looking forward and attempting to fashion a new and fresh approach to the issue of federalism, as distinct from looking backward to an old approach that was in substance abandoned in 1941 but formally speaking remained available even under the modern test. To the extent that the former turns out to be the case, this Article seeks to provide the enterprise with a systematic framework and constitutional foundations.

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n26 For an excellent recent book that cogently and concisely presents both sides of the normative issue (in addition to the legal arguments), see DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* (1995). For an extremely interesting and thought-provoking argument against the value of federalism, see Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 *UCLA L. REV.* 903 (1994).

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[\*803] II. The Necessary and Proper Clause as the Source of Congress's Powers to Preempt State Law and to Regulate Local Activity

A. The Power of Preemption

Congress's power to preempt state lawmaking authority is clearly and unambiguously not among those specifically enumerated in Article I of the Constitution, yet in recent times there has been no doubt that the power exists. n27 As far as constitutional source and justification are concerned, the standard view -- asserted preemptorily and without explanation both in scholarly works and in virtually every modern preemption case decided by the Supreme Court -- is that the power of preemption derives automatically and straightforwardly from the Supremacy Clause. n28 I have elsewhere shown at length not only that this common assumption of an automatic implication of the power of preemption from the Supremacy Clause is fundamentally mistaken, but also presented the stronger thesis that this congressional power cannot derive from the Supremacy Clause. n29 For current purposes and the sake of continuity, I will briefly review these arguments here.

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n27 See, e.g., Cohen, *supra* note 11, at 523 ("Congress's power to pre-empt state laws which affect interstate commerce is . . . unquestioned."). I have argued that this modern certainty contrasts with the controversy and ambivalence that surrounded the existence of the power of preemption prior to the beginning of the twentieth century. See Gardbaum, *supra* note 10, at 785-800 (analyzing the major relevant nineteenth century Supreme Court cases and arguing that the power of preemption was not clearly established until around 1910).

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n28 For examples of this standard view in scholarly works, see, for example, DAVID E. ENGBAHL, *CONSTITUTIONAL FEDERALISM* § 5.01, at 76 (2d ed. 1987) ("By virtue of the supremacy clause, every federal law 'made in Pursuance' of the Constitution, has the capacity to supersede, or preempt, state law." (emphasis added)); GERALD GUNTHER, *CONSTITUTIONAL LAW* 291 (12th ed. 1991) ("When Congress exercises a granted power, the federal law may supersede state laws and preempt state authority, because of the operation of the supremacy clause of Art. VI. In these cases, it is ultimately Art. VI . . . that overrides the state law." (emphasis added)); Cohen, *supra* note 11, at 537 ("The power of Congress to pre-empt state laws has not been subject to puzzling questions of the source of Congressional power. Acting within the scope of its delegated powers, Congress may require or permit conduct that state law prohibits, or prohibit conduct that

state law requires or permits. That is the clear meaning of the Supremacy Clause . . . ." (emphasis added)).

For examples in both recent and old Supreme Court opinions, see, for example, Justice O'Connor's opinion for the Court in *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 108 (1992) ("But under the Supremacy Clause, from which our pre-emption doctrine is derived, 'any state law . . . which interferes with or is contrary to federal law, must yield.'" (quoting *Felder v. Casey*, 487 U.S. 131, 138 (1988)) (emphasis added)); *Yellow Freight System v. Donnelly*, 494 U.S. 820, 823 (1990) ("To give federal courts exclusive jurisdiction over a federal cause of action, Congress must, in an exercise of its powers under the Supremacy clause, affirmatively divest state courts of their presumptively concurrent jurisdiction.") (emphasis added)); and *New York Cent. R.R. v. Winfield*, 244 U.S. 147, 148 (1917) ("It . . . is settled that when Congress acts upon the subject all state laws covering the same field are necessarily superseded by reason of the supremacy of the national authority." (emphasis added)).

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n29 Gardbaum, supra note 10, at 773-77.

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The common assumption that Congress's power of preemption is an [\*804] automatic implication of the Supremacy Clause poses at least two problems. First, it fails to explain how the Clause can be understood to grant any powers at all. Prima facie, the Supremacy Clause functions as the Constitution's dispute resolution mechanism, resolving a particular problem arising out of the powers granted by other parts of the Constitution: namely, conflicts resulting from concurrent state and federal powers.

Second, the purported derivation fails to appreciate that supremacy and preemption are distinct legal principles constituting two different methods of regulating the relationship between concurrent state and federal powers. n30 The supremacy of federal law means that a valid federal law trumps an otherwise valid state law in cases of conflict between their respective contents. In itself, federal supremacy does not deprive states of their general, pre-existing concurrent lawmaking powers in a given area; rather, it means that a particular state law in conflict with a particular federal law will be trumped when both apply. Preemption, by contrast, means (1) that states are deprived of their power to act at all in a given area, and (2) that this is so whether or not there is any conflict between state and federal law -- indeed, whether or not there is any existing state law at all in that area. n31 Preemption thus constitutes a greater inroad on the power and legal position of the states than the principle of supremacy alone; under the latter but not the former, for example, states retain the power to amend their conflicting legislation. n32 Once this distinction is acknowledged, and with it the consequence that concurrent powers could in principle be regulated solely by the principle of federal supremacy without the distinct regulatory principle of preemption, the following problem for the automatic derivation arises: while the Supremacy Clause [\*805] expressly contains the principle of federal supremacy, it says

nothing about preemption.

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n30 For more details of this distinction, see id. at 770-73.

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n31 This second point about the meaning of preemption -- that preemption of state authority may occur absent a conflict between state and federal law -- is quite consistent with the fact that under current preemption doctrine, the existence of a conflict is taken to be evidence of congressional intent to preempt the states ("conflict preemption"). More importantly, my major thesis concerns the source of Congress's power to preempt. Whether Congress has the power to preempt the states at all is, of course, a prior question to that of determining whether Congress has chosen to exercise it.

Although this is accordingly largely irrelevant to my general thesis, let me nonetheless briefly explain why it is mistaken to believe that all "types" of preemption involve different species of conflict between federal and state law, and thus always involve and implicate the Supremacy Clause. First (and assuming now that Congress has the power to do so), when Congress expressly preempts state law ("there shall be no state regulation of field X"), no valid state law in that field survives to be in conflict with the federal. Second, to the extent that comprehensive federal regulation of a field is accepted as evidence of intent to preempt the states in that entire field ("field preemption"), the same situation arises: no state regulation survives to be in conflict with the federal. This leaves "conflict preemption" as the only type of preemption that under current doctrine should be understood to involve a conflict between federal and state law. For a fuller discussion of these points, see Gardbaum, supra note 10, at 773-77, 783-85. For my argument that although it does involve a conflict, "conflict preemption" is not a case of preemption at all, see id. at 783-84, 808-10 and infra text accompanying note 132.

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n32 For my response to possible counterarguments, see Gardbaum, supra note 10, at 771-73.

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The basic argument for the stronger thesis that preemption cannot derive from the Supremacy Clause also follows from the analytical distinction between supremacy and preemption. It is as follows: a greater power cannot logically derive from a lesser one; preemption is a greater federal power than supremacy (more precisely, since supremacy is not a federal "power," the ability of congressional legislation to preempt state lawmaking authority constitutes a greater inroad on state power than the principle that federal law trumps conflicting state law). Therefore, preemption cannot derive from supremacy. n33

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n33 Again, for my response to possible counterarguments, see *id.* at 775-77. In particular, the power of preemption cannot be made to derive from the Supremacy Clause by arguing that in a conflict between congressional intent to preempt and state intent to regulate, the Supremacy Clause requires that Congress prevail. The reason is that the issue is precisely whether Congress has the constitutional power to preempt, i.e., whether there are two valid laws in conflict for the Supremacy Clause to resolve.

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Once the Supremacy Clause is abandoned as the source of Congress's power to preempt the states, a second possible candidate is the Commerce Clause: the claim would presumably n34 be that preemption is simply an instance of regulating interstate commerce. I have elsewhere explained the serious problems with this attempt to "dissolve" the problem of source and demonstrated how deriving the power from the Necessary and Proper Clause manages to avoid them. n35 For the present, let me add two very brief points and then a more significant one to my previous analysis. First, because, on its face, to say there shall be no state regulation of area X (preemption) is not itself obviously and self-evidently a regulation of interstate commerce but rather sets out who is to do the regulating (or, more precisely, who is not to do it), simple assertion of the Commerce Clause derivation without argument begs the question at issue: does regulating interstate commerce include the power of preemption? Second, given the broad modern understanding of Congress's commerce power, there is a significant area in which states have concurrent power to regulate (what for federal purposes is deemed) interstate commerce. n36 No one, I [\*806] take it, would argue today that on the outer boundaries of federal power (whatever they are), Congress has exclusive power from the outset. n37 And yet, the states obviously do not have the power to preempt federal law. Accordingly, it is not clear how preemption could be part of the "mere" power to regulate interstate commerce in these areas of concurrent power; it would appear that it must be a distinct and additional power. Finally, and most importantly, if preemption is simply an instance of Congress's commerce power, it must be an instance of Congress's power to regulate local activities affecting interstate commerce. These are the only type of activities over which there is concurrent state power to be preempted. However, as I shall argue in the following subpart, Congress's power to regulate local activities affecting interstate commerce does not itself derive from the Commerce Clause, but from the Necessary and Proper Clause. If this is correct, then the Commerce Clause cannot be the source of the power of preemption.

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n34 I say "presumably" because I am not aware that anyone has explicitly made this claim (at least in print), so widespread is the assumption that the source is the Supremacy Clause.

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n35 See Gardbaum, *supra* note 10, at 777-83. Very briefly, my main arguments

are (1) the issue is not simply whether preemption can be thought of as regulation of interstate commerce, but whether it is a constitutionally permitted form; (2) contrary to the usual understanding, there would be no general congressional power of preemption, but only where Congress acts under the Commerce Clause; (3) what theory of constitutional interpretation justifies this difference among "mere" concurrent federal and state powers?

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n36 Certain types of state regulation independently violate the dormant commerce clause by unduly burdening interstate commerce. See *Quill Corp. v. North Dakota*, 504 U.S. 298, 318 (1992) (invalidating as unduly burdensome to interstate commerce a North Dakota use tax levied against the sales of an out-of-state mail-order firm); *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 286 (1987) (holding unconstitutional a Pennsylvania fee imposed on out-of-state trucks on the ground that such a discriminatory fee places an undue burden on interstate commerce in violation of the Commerce Clause). But this fact does not mean that states never have concurrent power to regulate interstate commerce; it merely places a limit on that power.

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n37 For example, had the Court upheld the federal statute at issue in *Lopez*, no one, I take it, would have argued that federal power to regulate the possession of guns within one thousand feet of public schools was exclusive ab initio. During the nineteenth century, it was often claimed that the power to regulate interstate commerce was exclusive to Congress. This argument provided a straight-forward justification for the dormant or negative aspect of the Commerce Clause: if Congress has exclusive power, then any state action amounting to a regulation of interstate commerce (including, but not limited to, state action that unduly burdens interstate commerce) is unconstitutional. Whatever its status in the nineteenth century, this argument became untenable in the twentieth with the great expansion of Congress's commerce power. Indeed, the presumption of nonpreemption, which is central to modern preemption doctrine, was the Court's response to its own expansion of the commerce power. See *Gardbaum*, supra note 10, at 805-07 (concluding that, had the Court not adopted this presumption, the dramatic New Deal expansion of Congress's power to regulate intrastate commerce would have resulted in the displacement of a vast body of existing state regulatory law); see also *Engdahl*, supra note 14, at 54-55 (arguing that the modern doctrine arose from the Court's realization that an expanded federal regulatory role, in the absence of a presumption of nonpreemption, would have resulted in a loss by states of most of their traditional regulatory power).

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Undoubtedly, the basic and most compelling argument in favor of a congressional power of preemption is a practical one -- the need for uniform national regulation, for one set of rules, in particular areas. To see the issue of preemption in terms of this need, however, is to point to a more satisfactory and straightforward constitutional justification of it. Simply put, in certain

areas and under certain circumstances, Congress must pass uniform national laws in order to exercise its specifically enumerated powers effectively. Most often, but not necessarily, n38 this need arises [\*807] under its power to regulate interstate commerce. Supremacy alone, which does not guarantee uniformity, n39 is sometimes insufficient. Yet these situations are precisely the circumstances under which Congress is authorized to use the power contained in the Necessary and Proper Clause. Since McCulloch v. Maryland, this Clause has been understood to authorize certain actions that, in themselves, are not within Congress's express Article I powers, but serve to effectuate other policies within the express powers. In this way, the Clause may authorize the preemption of state law to achieve uniform national laws. n40 Moreover, both this function and justification of the power of preemption also suggest its constitutional limits.

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n38 The standard view is that Congress has a general power to preempt the states; that is, it may preempt when it is acting on the basis of any of its specifically enumerated powers and not only when it is acting under the commerce power. See, e.g., P.S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW 58 (1987) ("Pre-emption by Congress can occur in many substantive areas, under any of Congress's enumerated powers."); see also ENGD AHL, supra note 28, at 76 ("Every federal law 'made in Pursuance' of the Constitution has the capacity to supersede, or preempt, state law."). This view, of course, would be entirely consistent with deriving the power from the Necessary and Proper Clause as a means to effectuate any of Congress's legitimate objectives. This point raises one of the problems with deriving the power to preempt from the Commerce Clause: contrary to the general understanding, preemption would not then be a general congressional power, but rather would be available only when Congress is acting under its commerce power.

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n39 Supremacy does not guarantee uniformity because it does not do away with nonconflicting state laws. Justice Frankfurter, in a dissenting opinion (and quoting originalist support for the point), noted that:

This Court has not stifled state action unless what the State has required, in the light of what Congress has ordered, would truly entail contradictory duties or make actual, not argumentative, inroads on what Congress has commanded or forbidden.

. . . .

In discussing in the Federalist Papers the respective areas of federal and state constitutional powers, Hamilton wrote that state powers would be superseded by federal authority if continued authority in the States would be "absolutely and totally contradictory and repugnant." "I use these terms," he wrote, "to distinguish this . . . case from another which might appear to resemble it, but which would, in fact, be essentially different; I mean where the exercise of a concurrent jurisdiction might be productive of occasional interferences in the policy of any branch of administration, but would not imply any direct contradiction or repugnancy in point of constitutional authority."

*Farmers Educ. & Coop. Union v. WDAY, Inc.*, 360 U.S. 525, 542-46 (1959) (Frankfurter, J., dissenting) (quoting THE FEDERALIST No. 32, at 200 (Carl Van Doren ed., 1945)) (emphasis in original).

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n40 Interestingly, my analysis does not provide a constitutional basis for preemption of state law by federal common law, as the Necessary and Proper Clause does not itself grant power to the federal courts but only to Congress.

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B. The Power to Regulate Local Activity

Surprisingly few observers have noted that the New Deal Court's own constitutional justification for its radical expansion of the scope of federal power over commerce was that the congressional measures in question were valid exercises of the power granted by the Necessary and Proper Clause and were not direct exercises of the power to regulate commerce among the several states. n41 That is, the Court did not simply and directly [\*808] enlarge the scope of the Commerce Clause itself, as is often believed. n42 Rather, it upheld various federal enactments as necessary and proper means to achieve the legitimate objective of regulating interstate commerce. In other words, the Court acknowledged that the regulation of local activity affecting interstate commerce is not itself a regulation of interstate commerce; Congress's power over commerce is not confined to that granted by the Commerce Clause.

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n41 These few include David Engdahl, Justice O'Connor, and Martin H. Redish. See, e.g., ENGDahl, supra note 28, at 31 (arguing that since the 1950s, courts and commentators have frequently misconceived Congress's broadened commerce power as a function of the Commerce Clause rather than as a result of the Necessary and Proper Clause); REDISH, supra note 3, at 52-53 (recognizing that the expansion of congressional power in Wickard and Darby was textually justified under the Necessary and Proper Clause); infra text accompanying note 55. Justices Powell and Rehnquist, who joined Justice O'Connor's dissent in Garcia, may also have recognized the New Deal Court's reliance on the Necessary and Proper Clause. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 521, 584 (1985) (O'Connor, J., dissenting).

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n42 See, e.g., Epstein, supra note 6, at 1388 ("I think that the expansive construction of the [commerce] clause accepted by the New Deal Supreme Court is wrong, and clearly so, and that a host of other interpretations are more consistent with both the text and the structure of our constitutional government."). As I explain below, infra note 57, the courts themselves are substantially responsible for this mistaken belief.

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In this way, the New Deal Court sidestepped the previous frameworks for analyzing the scope of federal power over commerce. The first of these frameworks had involved answering such categorical or conceptual questions as: What is the nature of "commerce"? Does it include "manufacture" or only "transportation"? Into which category does the challenged measure fall? Alternatively, at certain periods, the courts employed a second framework, which started from the premise that the term "interstate commerce" included those activities that "directly" affect, but not those that only "indirectly" affect, interstate commerce, and then asked into which of these two categories a challenged measure fell. n43 The new analysis ignored what both of these frameworks took to be the central issue -- whether or not federal regulation of local economic activity was itself an exercise of the specifically enumerated power to regulate interstate commerce -- and instead viewed the regulation of local activity as an available means to achieve the legitimate objective contained in the Commerce Clause. n44 Thus, the Necessary and Proper Clause is central to the structure of modern constitutional law, even though recourse to it became increasingly less explicit to the point at which it is now unclear if it is generally understood to be implicated at all. n45

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n43 See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 307-10 (1936) (striking down the Bituminous Coal Conservation Act of 1935 on the basis that it regulated local matters only indirectly affecting interstate commerce); *Schechter Corp. v. United States*, 295 U.S. 495, 551 (1935) (holding the Live Poultry Code, promulgated under the National Industrial Recovery Act, unconstitutional under the Commerce Clause on similar grounds); see also *infra* text accompanying notes 46-47.

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n44 See *infra* text accompanying notes 48-54.

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n45 Few modern cases involving local activities that affect interstate commerce make explicit (or even obviously implicit) reference to the Clause. See *infra* text accompanying note 57.

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[\*809] In *Hammer v. Dagenhart*, n46 decided in 1918 and probably the most notorious Commerce Clause case of the pre-New Deal or *Lochner* era, the Court held the federal Child Labor Act of 1916 unconstitutional as beyond Congress's power under the Commerce Clause. In framing the issue to be decided (which it answered in the negative), the Court stated: "The controlling question for decision is: Is it within the authority of Congress in regulating commerce among the States to prohibit the transportation in interstate commerce of manufactured

goods" made in factories employing children below certain specified ages. n47 In United States v. Darby, n48 the case (decided in 1941) in which it overruled Hammer, the Court explicitly rejected this framing of the issue and made clear (albeit implicit) reference to the Necessary and Proper Clause as an additional basis for assessing the scope of the federal commerce power. n49 In the words of Justice Stone,

The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce . . . as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce. n50

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n46 247 U.S. 251 (1918).

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n47 Id. at 269.

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n48 312 U.S. 100 (1941).

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n49 Id. at 117-18.

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n50 Id. at 118, 118-19 (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)).

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Stone repeated these words in his opinion the following year in *United States v. Wrightwood Dairy Co.*, n51 and Justice Jackson also quoted them as defining the scope of federal power in *Wickard v. Filburn*, another "revolutionary" case. n52 Later in his opinion in *Darby*, Stone added:

Congress, having by the present Act adopted the policy of excluding from interstate commerce all goods produced for the commerce which do not conform to the specified labor standards, it may choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate

activities. Such legislation has often been sustained with respect to powers, other than the commerce power granted to the national government, when the means chosen, although not themselves within the granted power, were nevertheless deemed appropriate aids to the accomplishment of some purpose within an admitted power of the national government. n53

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n51 315 U.S. 110, 119 (1942) (citing *Darby*, 312 U.S. at 118).

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n52 317 U.S. 111, 124 (1942) (quoting Chief Justice Stone's opinion in *Wrightwood Dairy Co.*, 315 U.S. at 119).

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n53 *Darby*, 312 U.S. at 121.

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[\*810] Thus, when intrastate activities have interstate effects, Congress may regulate them as a means to the legitimate end of regulating interstate commerce, even though power over such activities is not within that end itself. In applying this test to the facts involved in *Wrightwood*, Justice Stone again made clear that the power over local activity stemmed from the Necessary and Proper Clause. He stated: "We conclude that the national power to regulate the price of milk moving interstate into the Chicago, Illinois, marketing area, extends to such control over intrastate transactions there as is necessary and appropriate to make the regulation of the interstate commerce effective . . . ." n54

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n54 *Wrightwood Dairy Co.*, 315 U.S. at 121.

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As one of the relatively few observers to acknowledge the basis upon which the New Deal Court expanded federal power, Justice O'Connor described the new framework as follows in her important and interesting dissent in *Garcia*:

The Court based the expansion [of the commerce power] on the authority of Congress, through the Necessary and Proper Clause, "to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." It is through this reasoning that an intrastate activity "affecting" interstate commerce can be reached through the commerce power . . . . And the reasoning of these cases underlies every recent decision concerning the reach of Congress to activities affecting interstate commerce. n55

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n55 *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 584-85 (1985) (O'Connor, J., dissenting) (citations omitted). In *New York v. United States*, 505 U.S. 144, 158 (1992), Justice O'Connor stated that, "The Court's broad construction of Congress' power under the Commerce and Spending Clauses has of course been guided, as it has with respect to Congress' power generally, by the Constitution's Necessary and Proper Clause . . . ."

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Part of the reason that the essential role of the Necessary and Proper Clause in enlarging the scope of the federal commerce power is not more widely appreciated is that, increasingly since the early 1950s, the courts themselves have tended to downplay it. n56 Usually, opinions explicitly mention only the Commerce Clause and incorporate the test under the Necessary and Proper Clause without reference. This creates the false impression that the Commerce Clause itself provides the basis for regulating local matters rather than the legitimate end to which the Necessary and Proper Clause authorizes such regulation as a means. On some occasions, however, courts, including the Supreme Court, appear to be confused [\*811] about the rationale on which federal power is based. Exemplary in this regard is the test set out in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*. n57 Citing *Darby* as support, the Court stated:

The task of a court that is asked to determine whether a particular exercise of congressional power is valid under the Commerce Clause is relatively narrow. The court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding. This established, the only remaining question for judicial inquiry is whether "the means chosen by [Congress] must be reasonably adapted to the end permitted by the Constitution." . . .

Judicial review in this area is influenced above all by the fact that the Commerce Clause is a grant of plenary authority to Congress. n58

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n56 The other (and undoubtedly more important) part of the reason is that, because the Necessary and Proper Clause is not generally thought to contain any independent constraints on congressional powers, it adds nothing to the analysis. For my argument that this general assumption is mistaken, see *infra* Part III.

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n57 452 U.S. 264 (1981).

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n58 *Id.* at 276 (brackets in original) (emphasis in original) (citations omitted). Also in *Hodel*, Justice Powell in a concurring opinion stated that "the Surface Mining Act mandates an extraordinarily intrusive program of federal regulation and control of land use and land reclamation, activities normally left to state and local governments. But the decisions of this Court over many years make clear that, under the Commerce Clause, Congress has the power to enact this legislation." *Id.* at 305 (Powell, J., concurring) (emphasis added).

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Although the result in *Lopez* makes it a potentially landmark decision, at least in the current context it is a completely typical modern commerce power case. The majority held that the federal Gun-Free School Zones Act of 1990 n59 failed the modern test of whether the regulated activity substantially affects interstate commerce without in any way acknowledging that this test states the circumstances under which the Necessary and Proper Clause authorizes federal control of local activities as the means to a legitimate end. n60 Indeed, to the extent that the Court held the statute unconstitutional because possession of guns is not a commercial activity, n61 it strongly suggests that only the Commerce Clause is implicated. Nothing in the necessary and proper rationale, as previously employed, requires that the means involve an economic activity, only that the activity in question affect interstate commerce.

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n59 18 U.S.C. § 922(q) (1) (A) (1994).

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n60 *United States v. Lopez*, 115 S. Ct. 1624, 1630 (1995).

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n61 *Id.* at 1630 ("Even *Wickard* . . . involved economic activity in a way that the possession of a gun in a school zone does not.").

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Having, I hope, established that both of these congressional powers, which are critical ones from the perspective of federalism, derive from the Necessary and Proper Clause, I now turn to consider the significance that this has for their exercise.

**[\*812] III. Reconceiving the Necessary and Proper Clause**

The thesis of this Article is that, contrary to the usual view, the constitutional status of the principle of federalism does not necessarily depend on the existence of areas of exclusive state power. A new approach is provided

by recognizing that concurrent state and federal power is not automatically co-equal power. In particular, Congress's power to preempt concurrent state authority and its concurrent power to regulate local activity substantially affecting interstate commerce are not constitutionally unlimited but should be understood in an important sense as exceptional or subsidiary powers, the exercise of which carries special burden of justification.

This approach has previously been overlooked for two reasons. First, an important consequence of the standard assumption that the power of preemption derives from the Supremacy Clause is to understand it as unlimited: if this power is an attribute of supremacy, then any limits on it would qualify the supremacy of federal law. Second, the Necessary and Proper Clause, which I have argued is the constitutional source of both powers, is generally assumed to contain no independent or intrinsic limitations on the power that it grants. Both the ends that congressional action seeks to further and (even more importantly) the means by which Congress chooses to further them are thought to be limited only by other provisions of the Constitution and not independently by the Necessary and Proper Clause itself. n62 This assumption, which explains the almost complete lack of judicial or scholarly attention paid to it, n63 has its roots in the standard reading of McCulloch, the original and still the basic source for interpreting the Clause.

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n62 See infra notes 64-82 and accompanying text. The limits on ends are extrinsic to the Necessary and Proper Clause and are to be found by consulting all the other power-conferring clauses of Article I. Other clauses of the Constitution, such as the First and Fifth Amendments, limit choice of congressional means.

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n63 Among the few sustained modern scholarly treatments of the Clause are ENGD AHL, supra note 28, at 16-51, and Gary Lawson & Patricia B. Granger, The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, 43 DUKE L.J. 267 (1993).

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In this Part, I focus on this second reason and challenge the understanding of the Necessary and Proper Clause that it describes. In the course of reinterpreting McCulloch, I present both the basis for, and the nature of, the general limitations that characterize the grant of power that the Clause authorizes. Since I claim that both preemption and many modern commerce power cases are actually Necessary and Proper Clause cases, this analysis has very significant implications for constitutional law. In Part IV, I explain these implications and show how the general limitations apply specifically and distinctively to the two powers understood as particular exercises of the necessary and proper power.

[\*813] As Gary Lawson and Patricia Granger have recently pointed out, the textually explicit requirement that a means be "proper" as well as "necessary"

has been almost completely overlooked in modern judicial and scholarly treatments of the Necessary and Proper Clause. n64 The "proper" requirement has either been simply ignored or assumed without argument to be equivalent to (synonymous with) "necessary." n65 By contrast, Lawson and Granger suggest that this requirement was originally intended and understood as "a textual guardian of principles of separation of powers, principles of federalism, and unenumerated individual rights . . . that have long been understood to animate and supplement . . . specific constitutional provisions." n66 In terms of the principle of federalism, they argue that the Tenth Amendment, which, in their view guarantees areas of exclusive state power, simply reaffirms and makes explicit what is already contained in the "proper" requirement of the Clause.

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n64 See Lawson & Granger, *supra* note 63, at 271 n.15 (listing a number of scholars who have "hinted at such an interpretation of the word 'proper,'" but who have not developed the point). The major thesis of Lawson and Granger's important and thoughtful article is that in the founding period and well into the nineteenth century, the word "proper" was generally understood to constitute a distinct, substantive constraint on actions authorized by the Necessary and Proper Clause so that only actions "peculiarly within Congress's domain or jurisdiction" are permissible. *Id.* at 271 (emphasis in original).

Although I agree with Lawson and Granger that the word "proper" constitutes a generally overlooked limitation on the power granted by the Clause and that this constraint has significant implications for federalism, our respective discussions focus on different constraints and implications. For Lawson and Granger, the "proper" constraint simply does implicitly what the Tenth Amendment does explicitly: namely, carve out areas of exclusive state power. See *id.* at 330 ("An executory law that regulates subjects outside Congress's enumerated powers is not 'proper' and therefore unconstitutional."). My analysis suggests that whether or not there are areas of exclusive state power, the "proper" constraint imposes an independent constitutional constraint in the name of federalism on Congress's power to preempt concurrent state authority and its concurrent power to regulate local activity that affects interstate commerce. See *infra* Part IV.

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n65 See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 262 (1964). The Court explicitly acknowledged only "one caveat" on congressional discretion as to the means employed to effectuate a legitimate end: "that the means chosen . . . must be reasonably adapted to the end . . . ." *Id.* (applying Marshall's test of necessity).

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n66 Lawson & Granger, *supra* note 63, at 271-72.

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This latter point about how the federalism constraint contained in the Necessary and Proper Clause should be interpreted (namely, as affirming exclusive state powers) is obviously distinct from the former and more general point that the "proper" requirement was and should be understood to refer to certain background principles and norms -- such as federalism and the separation of powers -- that inform and constrain congressional exercises of power premised on the Clause. Just as Congress's choice of means would not be "proper" if it violated the background principle of the separation of powers, so too if it violated the background principle of federalism. In terms of giving content to the federalism constraint as it [\*814] applies specifically to congressional exercises of its powers of preemption and regulating local activities with interstate effects, my suggestion is that the "proper" requirement should be understood to mean that it is inappropriate for Congress to disrupt the general balance of federal-state powers without deliberating seriously about the need and merits of so doing, and without having reasonable grounds for its decision. This understanding of the federalism constraint in the Necessary and Proper Clause thus charts a third course between viewing federalism either as requiring areas of exclusive state power or as having no constitutional status at all.

Although I believe that this interpretation of the textual requirement that Congress's choice of means (in both preemption and local activity contexts) be "proper" is independently justified as both intrinsically plausible and as providing the constitutional basis for the best and most appropriate method of protecting relevant state and national interests, it nonetheless receives strong support from a careful reading of Chief Justice Marshall's famous opinion in *McCulloch v. Maryland*.

*McCulloch* is, of course, one of the handful of foundational decisions of the Supreme Court that are automatically cited as original sources for the propositions of constitutional law that they contain. But *McCulloch* has the further (and even rarer) distinction of being treated as providing a full and complete interpretation of a particular clause of the Constitution. Analysis of the Necessary and Proper Clause has historically begun and ended with *McCulloch* and, more particularly, with the talismanic statement with which Marshall sets out the constitutional standard to determine whether Congress has "implied power" n67 to act: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." n68 Moreover, it is because *McCulloch* is not simply a case but is effectively the only case interpreting the Necessary and Proper Clause that the emphasis placed on it here is justified. It is thus not a question of choosing to give it near canonical status but of acknowledging that it has attained this status as the result of more than 150 years of constitutional practice.

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n67 I put the phrase "implied power" in quotation marks to indicate that I am using it in the conventional, but misleading, way to refer to the power granted by the Necessary and Proper Clause. As David Engdahl makes clear, the power granted by the Clause is enumerated and not implied. ENGDahl, *supra* note 28, at 17.

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n68 *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

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Most of the discussion in *McCulloch* itself and virtually all of the subsequent commentary on it focuses on the meaning of "necessary" as employed in the Clause. As is very well known, Marshall considered and [\*815] rejected the arguments of counsel for the State of Maryland that the term should be interpreted narrowly to mean that only congressional legislation that is absolutely necessary or indispensable for achieving a legitimate end is authorized under the Clause. n69 He observed that "to employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable," n70 and concluded that "necessary" should be broadly interpreted to include "all means . . . which are plainly adapted to that [legitimate] end." n71 Moreover, according to Marshall, for the courts "to undertake here to inquire into the degree of its [a law's] necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground." n72

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n69 *Id.* at 413-15.

-End Footnotes-

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n70 *Id.* at 413-14.

-End Footnotes-

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n71 *Id.* at 421.

-End Footnotes-

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n72 *Id.* at 423.

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It is important to appreciate, however, that Marshall does not commit the standard reductionist error that Lawson and Granger have identified, namely, ignoring without argument the textually explicit requirement that Congress's choice of means be "proper" as well as "necessary." n73 In addition to setting out the famous test of necessity that we have just reviewed, Marshall also addressed the distinct issue of propriety, albeit much more briefly and less explicitly. n74 Although he stressed that the "degree of necessity" between

means and legitimate end is a matter of unreviewable congressional discretion, the congressional choice of means as a whole is not stated to be unlimited but is subject to the following constraints, all of which are expressed as questions of fact and not as matters of congressional discretion: (1) the chosen means must be "plainly adapted" to ("really calculated to effect") the given end; n75 (2) they must not be prohibited by the Constitution; (3) they must be "appropriate"; and (4) they must be consistent with both the letter and the spirit of the [\*816] Constitution. n76 Accordingly, as Justice O'Connor correctly points out in her Garcia dissent (and contrary to the prevailing doctrine n77), Marshall did not say that it is sufficient under the Clause that "the end be legitimate" and that the means be "plainly adapted to that end." n78 In addition, he said that the means chosen by Congress must fulfill the latter three requirements as well; in particular, they must be both "appropriate" and "consist with the letter and spirit of the constitution." n79

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n73 The fault is less failing to give the "proper" requirement any independent meaning than doing so casually, i.e., without any reasons, or simply not appreciating that there is an issue to address.

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n74 Lawson and Granger state that Marshall "did not directly address the meaning of 'proper'" in McCulloch and, therefore, the opinion should be treated as the starting point only and not the definitive discussion of the Sweeping Clause (although they argue that a subsequent essay provides evidence that Marshall understood "proper" to constitute an independent limitation). Lawson & Granger, supra note 63, at 288, 288-89, 306. I think the situation is rather that Marshall "directly" addressed the issue of "proper," but he did not do so explicitly. This is perhaps explained not only, as Lawson and Granger note, by the fact that the State of Maryland questioned only the measure's necessity and not its propriety, but also by the fact that Marshall thought the propriety of the measure was, in any event, clear cut. Id. at 288; see *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819) ("None can deny its being an appropriate measure.").

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n75 *McCulloch*, 17 U.S. (4 Wheat.) at 423.

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n76 Id. at 421.

-End Footnotes-

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n77 See the "one caveat" language in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 262 (1964). See supra note 65.

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n78 *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 585 (1985) (O'Connor, J., dissenting) (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 421).

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n79 *Id.* (O'Connor, J., dissenting) (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 421 (emphasis in original)).

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This requirement that the chosen means be appropriate and comport with the spirit as well as the letter of the Constitution is Marshall's distinct test of propriety. By the "spirit" of the Constitution, I submit that Marshall did not mean some free-floating, textually disembodied, openended and indeterminate metanorm, but was rather referring to certain specific and widely acknowledged background principles -- such as federalism and the separation of powers -- which even if not specifically incorporated into the text of the Constitution, nonetheless inform its interpretation. n80

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n80 This, at least, is what I mean by the spirit of the Constitution. It is what the Court was referring to when it said of the constitutional principle of the separation of powers that "it arises . . . not from Art. III nor any other single provision of the Constitution, but because 'behind the words of the Constitution's provisions are postulates which limit and control.'" *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 590-91 (1949) (citation omitted).

As far as I am aware, the Supreme Court has never explicitly discussed the question of whether the "spirit" of the Constitution is part of the Constitution for interpretive purposes, although in many cases the Court appears to have assumed so in passing. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 528 (1988) (Scalia, J., concurring) ("Only such a [race-neutral] program, and not one that operates on the basis of race, is in accord with the letter and spirit of our Constitution."); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 127 (1982) ("Ordinary human experience and a long line of cases teach that few entanglements [between church and state] could be more offensive to the spirit of the Constitution."). Additionally, the spirit of the Constitution is frequently appealed to in dissent. See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 1010 (1991) (White, J., dissenting) ("Imprisonment for an unreasonable length of time . . . is also contrary to the spirit of the constitution." (quoting BENJAMIN L. OLIVER, *THE RIGHTS OF AN AMERICAN CITIZEN* 185 (Books for Libraries Press 1970) (1832))); *Garcia*, 469 U.S. at 585 (O'Connor, J.,

dissenting) ("The spirit of the Tenth Amendment . . . is that the States will retain their integrity in a system in which the laws of the United States are nevertheless supreme." (emphasis in original) (citations omitted)).

By contrast, the European Court of Justice has explicitly stated that its methodology for interpreting the Treaty of Rome not only includes, but starts with, the spirit of the Treaty. See Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1, 12 (1963) ("To ascertain whether the provisions of an international treaty extend so far in their effects [as to permit nationals of Member States to lay claim to rights that national courts must protect] it is necessary to consider the spirit, the general scheme, and the wording of those provisions."). In fact, the court considered the spirit of the Treaty as a whole -- "the Community constitutes a new legal order . . . the subjects of which comprise not only Member States but also their nationals" -- and interpreted the specific provision at issue (Article 12) in light of that spirit. *Id.* Although this methodology for interpreting a treaty largely reverses that of orthodox international law, the latter does take into account the "object and purpose" of a treaty as its final element. See Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, art. 31, 1155 U.N.T.S. 331, 340 ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.").

Finally, although there has been much criticism of the doctrine of statutory interpretation which holds that a statute should be interpreted so as to effectuate its spirit ("the Holy Trinity Church doctrine," named after the case of that name, *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892)), most of this criticism applies specifically to employing this methodology to interpret statutes and consists in the point that statutes have no "spirit" to be interpreted. See, e.g., Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 541 (1983) (arguing that statutes have no "spirit" because their contents overwhelmingly express legislative compromise). This criticism is far less effective in the case of the Constitution, which, notwithstanding the role of compromise in its formation, remains fundamentally a document expressing a coherent set of principles.

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[\*817] Moreover, while Marshall stated that for the Court to engage in judicial review of the "degree of necessity" required under the Clause would be to tread on legislative prerogative, n81 he did not say, and it certainly does not follow, that the same may be said of congressional judgments as to what is "proper" based on the letter and spirit of the Constitution. To the contrary, he strongly suggested both that the requirement of propriety is prior to that of necessity and that it is the task of the courts to assess whether it has been satisfied. Only once the appropriateness of Congress's chosen means has first been determined does congressional discretion on the issue of the degree of necessity come into play: "But, were its [the bank's incorporation] necessity less apparent, none can deny its being an appropriate measure; and if it is, the degree of its necessity, as has been very justly observed, is to be discussed in another place [Congress]." n82 Marshall is not denying here that the courts possess the power to assess appropriateness; he is simply saying that in this particular case, the appropriateness of the means is clear. Sometimes, and particularly in the case in which preemption is the means, the appropriateness of the congressional choice will be more difficult to assess.

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n81 *McCulloch*, 17 U.S. (4 Wheat.) at 423; see supra note 72.

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n82 *McCulloch*, 17 U.S. (4 Wheat.) at 423 (emphasis added).

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In addition to pointing out that, according to Marshall, the spirit of the Constitution constrains the exercise of Congress's necessary and proper powers, Justice O'Connor in her *Garcia* dissent makes the further point that this spirit includes "concerns for state autonomy" and that, therefore, the exercise of the necessary and proper power should be understood to be subject to federalism constraints. n83 She interprets the implications of this [\*818] point, however, through the lens of the familiar premise that exclusive powers are the necessary condition of constitutional federalism, which she expresses as follows: "The central issue of federalism, of course, is whether any realm is left open to the States by the Constitution -- whether any area remains in which a State may act free of federal interference." n84 Accordingly, she proceeds to argue more particularly that the spirit of the Tenth Amendment requires the Court to carve out a "set of activities remaining beyond the reach of . . . [the federal] commerce power," n85 a task that the majority in *Garcia* specifically and controversially foreswore. n86

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n83 *Garcia*, 469 U.S. at 585 (O'Connor, J., dissenting) ("It is not enough that the 'end be legitimate'; the means to that end chosen by Congress must not contravene the spirit of the Constitution. Thus many of this Court's decisions acknowledge that the means by which national power is exercised must take into account concerns for state autonomy.").

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n84 *Id.* at 580-81 (O'Connor, J., dissenting) (emphasis omitted).

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n85 *Id.* at 588 (O'Connor, J., dissenting).

-End Footnotes-

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n86 See *id.* at 556 ("But the principal and basic limit on the federal

commerce power is that inherent in all congressional action -- the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated."); see also supra note 4. As already stated, supra note 64, Lawson and Granger also suggest that, in the federalism context, the test of propriety refers to areas of exclusive state power: a means is not proper if it regulates a subject left exclusively to the states.

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Even if Justice O'Connor is correct that this is the "central issue of federalism," however, it should be clear by now that it is not necessarily the only one: the question of "whether the federal system has any legal substance" n87 is not equivalent, and so should not be confined, to the question of whether there are any exclusive state powers. An alternative basis for constitutional federalism is suggested by taking the route that Justice O'Connor did not take because of the powerful hold of the mistaken belief that the power of preemption is part of the supremacy of federal law n88 -- that is, by detaching her latter point about exclusive state powers from the previous one that federalism is undoubtedly part of the spirit of the Constitution that structures and limits congressional choice of means under the Necessary and Proper Clause.

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n87 *Garcia*, 469 U.S. at 581 (O'Connor, J., dissenting) (emphasis in original) (quoting CHARLES L. BLACK JR., *PERSPECTIVES IN CONSTITUTIONAL LAW* 30 (1963)).

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n88 See *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 108 (1992) ("Under the Supremacy Clause, from which our pre-emption doctrine is derived, 'any state law . . . which interferes with or is contrary to federal law, must yield.'" (emphasis added) (quoting *Felder v. Casey*, 487 U.S. 131, 138 (1987) (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962)))).

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Whether or not either the letter or the spirit of the Constitution includes areas of exclusive state powers, understanding both preemption and the regulation of local activities affecting interstate commerce as instances of necessary and proper powers enables us to see that the Constitution may independently constrain their exercise on federalism grounds. That is, even if Congress has concurrent power to legislate in a given area, that aspect of what Marshall meant by the "spirit" of the Constitution which holds that "state autonomy" is an important factor "in assessing the means by which Congress regulates matters affecting [interstate] [\*819] commerce" n89 may sometimes prevent Congress from preempting the states or regulating local activities that affect interstate commerce. For example, in the case of preemption, the Constitution may on occasion require state and federal powers to be regulated by the "default" regime of concurrency plus supremacy alone. n90 This potential limitation on these two congressional powers as exercises of the Necessary and Proper Clause provides a second and alternative basis for constitutional federalism. In the next Part, I set out the specific constraints involved.

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n89 *Garcia*, 469 U.S. at 588 (O'Connor, J., dissenting).

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n90 See supra text accompanying note 32; see also Gardbaum, supra note 10, at 770-72 (arguing that supremacy and preemption constitute two different methods of regulating concurrent federal and state powers).

-End Footnotes-

#### IV. The Constitutional Constraints on the Two Congressional Powers

The two powers in question are obviously of critical importance from the perspective of federalism. By any standards, Congress's power to regulate local activities affecting interstate commerce impinges on an area for which the states are primarily and normally responsible. The power to preempt state authority triggers federalism concerns in the most direct way possible. Accordingly, if the federalism aspect of the spirit of the Constitution informs and constrains any exercises of power granted by the Necessary and Proper Clause, it is these two.

Because these constraints are the same in both cases, the analysis that follows, which focuses mainly on the power of preemption, applies equally to both powers unless specifically stated otherwise. My choice of focus is not entirely arbitrary, however, because these constraints are likely to have a greater practical impact on the preemption power because that power raises federalism concerns in the more extreme form. This is reflected in the requirement that Congress reasonably conclude not only that national regulation is called for, but also uniform national regulation. Moreover, even if the model of constitutional federalism that I am presenting applies only to preemption, this power is a sufficiently important (though neglected n91) locus of federalism concerns in terms of its enormous practical impact on state regulatory authority that such application would represent a very significant new approach to, and method of, protecting the value of federalism. In subpart D, I briefly explain how the constitutional constraints apply to the power to regulate local activities affecting interstate commerce.

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n91 Preemption is neglected precisely because of the shared assumption that there are no constitutional limits on this congressional power. See supra text accompanying note 10.

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When Congress preempts state law, it is exercising power granted by the Necessary and Proper Clause: preemption is the means chosen by Congress [\*820] to effectuate an objective authorized by a specifically enumerated power, most often (but not always n92) the power to regulate commerce among the

several states. To be a valid exercise of the power conferred by this Clause, preemption must be both a "necessary and proper" means to the given end. As suggested above, this latter requirement implicates the federalism concerns that are at the heart of the spirit of the Constitution and with which any exercise of "implied powers" must comport. In subpart B, I specify the precise constitutional constraints that the requirement of propriety should be understood to place on congressional power to preempt the states. Before I do so, let me say a brief word about the independent requirement of necessity.

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n92 See supra note 38.

-End Footnotes-

A. Necessary

To the extent that modern courts ever acknowledge that Congress is exercising power granted by the Necessary and Proper Clause, n93 they have translated Marshall's statements on the meaning of "necessary" and the congressional discretion on the degree of necessity into a rational basis test; namely, asking whether Congress's determination that the regulation in question will promote a legitimate federal end was one that could rationally be reached. n94 Moreover, as already stated, this is the sole test that courts apply when reviewing congressional exercises of the necessary and proper power, even though it does not address the second requirement that the means be "proper." n95 Putting to one side this critical flaw in the standard of review and examining the rational basis test purely as a test of necessity, a plausible case can be made for the proposition that something important in Marshall's position has been lost in the modern translation.

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n93 See supra text accompanying notes 54-55.

-End Footnotes-

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n94 See ENGDahl, supra note 28, at 35-39; see also supra text accompanying notes 57-58.

-End Footnotes-

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n95 Once again, see *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 262 (1964) (holding that Congress's exclusive discretion with respect to the regulation of commerce "is subject only to one caveat -- that the means chosen by [Congress] must be reasonably adapted to the end permitted by the Constitution").

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As we have seen, in addition to defining "necessary" broadly as all means plainly adapted to a legitimate end, Marshall also stressed that determination of "the degree of its [the law's] necessity" is within the discretion of Congress and should not be reviewable by the courts. n96 In rejecting the narrow interpretation proposed by the State of Maryland, Marshall stated that, "to have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to [\*821] circumstances." n97 Elsewhere in his opinion, Marshall adds that the legislature has the right "to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government," n98 and also that Congress "might employ those [means] which, in its judgment, would most advantageously effect the object to be accomplished." n99

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n96 *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819).

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n97 *Id.* at 415 (emphasis added).

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n98 *Id.* at 420 (emphasis added).

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n99 *Id.* at 419 (emphasis added).

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Lawson and Granger argue that such an unreviewable congressional discretion is contrary to both the text and the original understanding of the Clause, which states that "the Congress shall have Power . . . to make all Laws which shall be necessary and proper," and not which Congress deems necessary and proper, especially because several other clauses of the Constitution expressly grant Congress such discretion in the latter terms. n100 Regardless of whether or not their point is correct, however, even as Marshall states the test of necessity (still putting to one side the separate test of "proper"), the scope for judicial review under it could be understood to extend beyond the current practice of implying a congressional judgment on the means-end issue from a bare statement in the legislative text and then asking if there is a rational basis for it. Although Marshall stressed that, on the question of necessity, Congress has "the right . . . to exercise its best judgment in the selection of [means]," n101 it should be no less clear from the passages quoted in the previous

paragraph n102 that when Congress chooses to employ its power under the Clause, it also has the duty to exercise such judgment. This is what is encompassed in saying that the means must be "plainly adapted" and "really calculated" to effect the given end. n103 Moreover, judicial inquiry into whether Congress has fulfilled this duty is quite distinct from judicial inquiry into the "degree of necessity." As David Engdahl has to my mind convincingly identified and enumerated the necessary constituent elements for fulfilling this duty, I can do no better than to rely on his account. n104

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n100 U.S. CONST. art. I, § 8, cl. 18 (emphasis added); see Lawson & Granger, supra note 63, at 276 n.30, 276-85 ("Article II, Section 3 states that the President 'shall . . . recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient.' . . . Article V authorizes Congress to propose constitutional amendments 'whenever two thirds of both Houses shall deem it necessary.'" (emphasis in original)). Lawson and Granger add that "by referring to the Sweeping Clause as nondiscretionary . . . we mean only that congressional judgments of necessity and propriety are fully subject to both judicial and executive review for constitutionality." Id. at 276 n.30.

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n101 *McCulloch*, 17 U.S. (4 Wheat.) at 420 (emphasis added).

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n102 See supra text accompanying notes 96-99.

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n103 *McCulloch*, 17 U.S. (4 Wheat.) at 423.

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n104 See ENGDahl, supra note 28, at 33-48.

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In applying the rational basis test, a reviewing court asks itself whether Congress's determination that the measure in question will [\*822] promote a legitimate federal end is one that could rationally have been reached. As Engdahl points out:

The precondition for applying the rational basis test in reviewing a measure under the necessary and proper clause, is that Congress have targeted some

legitimate objective and fashioned the particular measure with that end in view. Unless such a congressional judgment has been made, there is nothing to which the rational basis standard can be applied by way of review. n105

He then breaks down the nature of this required congressional judgment into its specific constituent elements:

It cannot be sufficient for . . . judges merely to speculate about what ends Congress might have had in view, or how an extraneous measure in question might conceivably conduce to such ends. If the classic approach illustrated by McCulloch is to be followed, there must be some sufficient indication that Congress did have a legitimate objective [in mind], perceived the telic connection [between the chosen means and this end], and acted upon that ground. n106

Only if each of these elements is met has Congress exercised its judgment in making a determination whose rationality can be assessed.

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n105 Id. at 40.

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n106 Id. at 46 (emphasis in original).

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The requirement is thus not simply that Congress exercise its judgment, but that it do so specifically on the means-end issue. As Engdahl puts it, "The very foundation of federal power is a telic relation which Congress is responsible to find . . . ." n107 In short, a reviewing court may legitimately ask not only whether a sufficient causal connection between means and end could rationally be found, but whether Congress actually found one. While even under such a test, the Court's statement in Lopez that Congress is not necessarily required to make formal findings would still be correct, n108 there is a distinction between exercising judgment on this issue and resorting to incantation in the legislative text -- a distinction that is not captured by a pure rational basis test. To this extent perhaps, judicial review of necessity should not be limited to the rationality of outcomes, but should include this element of process as well.

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n107 Id. at 48.

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n108 See supra note 13.

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B. Proper

Like most other commentators, however, Engdahl largely overlooks the "proper" requirement, which is distinct from that of "necessity." n109 [\*823] I have suggested that, even though the misreading of his opinion is the major source of this standard error, Marshall himself was not guilty of committing it. To the contrary, he specifically incorporated a test of propriety in McCulloch by requiring that in addition to being necessary in the sense discussed above, the means chosen by Congress must be "appropriate" and, more specifically still, must "consist with the letter and spirit of the constitution." n110 The second requirement that the chosen means be "proper" qualifies the first requirement that it be "necessary" in the sense that some means will be necessary but not proper. Moreover, in terms of judicial review, this second requirement is prior to the first in that only once the means have been deemed appropriate does the congressional discretion regarding "the degree of necessity" come into play. n111

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n109 Indeed, Engdahl conspicuously and significantly omits from his quotation of the famous McCulloch passage the key words that constitute Marshall's test of "proper." His quotation reads: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, . . . are constitutional." ENGD AHL, supra note 28, at 20. The omitted words are, of course: "which are not prohibited, but consist with the letter and spirit of the constitution." *McCulloch v. Maryland*, 17 U.S. (4 *Wheat.*) 316, 421 (1819). Engdahl thus does here what in effect the courts have done in practice.

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n110 See supra text accompanying notes 79-82.

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n111 See supra text accompanying notes 82.

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I also suggested, in line with Justice O'Connor's dissent in *Garcia*, that federalism and its constitutive concern for the position of the states is at least part of the spirit of the Constitution and should therefore be understood as a factor in assessing the propriety of Congress's chosen means when it is a relevant issue. n112 Federalism is a particularly relevant issue when Congress's chosen means is, or includes, preemption -- the elimination of concurrent state lawmaking capacity.

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n112 See supra text accompanying notes 83-86.

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The fact that preemption inherently triggers federalism concerns in the most direct way possible means that the constitutional limitations on this particular exercise of Congress's necessary and proper powers will typically play a larger role than with most other exercises, such as incorporating a bank. n113 What is in fact "appropriate" and within "the spirit of the constitution" is likely to be more restrictive when the survival of state lawmaking power is at stake than when other means are chosen; accordingly, congressional discretion should be narrower. Specifically, the "proper" test should be understood to involve both the following procedural and substantive (or deliberative and justificatory) constraints when Congress chooses to use its power under the Clause to preempt state law.

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n113 This means, of course, was the one chosen by Congress in McCulloch.

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1. The Procedural Constraint. -- Regardless of whether or not it also requires areas of exclusive state power, the background principle of federalism that the test of propriety implicates should at a minimum be [\*824] understood to require that the interests and position of the states be considered and taken seriously by Congress before it chooses to preempt them. Doing so, however, requires more than a congressional determination that there is a reasonable degree of fit between means and end, as called for under the test of necessity. Indeed, this test does not directly or necessarily involve thinking about the states at all; it is simply a causal test of whether preemption will promote the legitimate objective Congress has in mind. By contrast, under the test of propriety, Congress should be required to consider the merits of preempting the states in the sense of "exercising its best judgment" concerning the competing claims of uniformity on the one hand and federalism and continuing state authority subject to the Supremacy Clause on the other. That is, in addition to making the straightforward causal determination of a means-end relationship required under the necessity test, Congress must, under the proper test, balance the advantages and disadvantages of its proposed course of action from a federalism perspective and conclude that the claims of uniformity prevail.

In particular, Congress should also consider both the costs of preemption in terms of federalism concerns, and alternative, nonpreemptive, means of achieving the same end. That is, even if there is an extremely tight fit between means and legitimate end, consideration of the interests and capabilities of the states may still render it inappropriate to preempt. In the words of Justice O'Connor, "The proper resolution [of the problems of federalism in an integrated national economy], I suggest, lies in weighing state autonomy as a factor in the balance when interpreting the means by which Congress can exercise its authority on the States as States." n114 Although she believes this applies to the issue of whether Congress has the power to legislate in the first place, I contend that this weighing process is particularly and independently appropriate in the

distinct context of preemption.

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n114 *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 584 (1985) (O'Connor, J., dissenting).

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As an essential requirement of the legislative process, the judgment that Congress makes on the merits of uniformity and preemption should not be subject to wholesale second-guessing by the judiciary. n115 Clearly, in terms of institutional competence, Congress is in the far better position to make such an informed judgment. Yet, there is little evidence to suggest that Congress systematically takes advantage of this privileged position during the passage of most preempting legislation; indeed, there are currently no institutional arrangements for doing so. n116 The major [\*825] advantage of the approach to federalism presented here is to ensure that Congress engages in this type of deliberation. In addition to the fact that such consideration of the merits of preemption -- which, again, is quite distinct from the causal focus of the means-end test of necessity -- would be an end in itself that represents and manifests the spirit of federalism directly, it might also, like other required aspects of the national political process, significantly affect both the content of federal legislation and the regard in which such legislation is generally held. n117 Although undoubtedly a radical proposal, n118 this procedural constraint on Congress's power to preempt the states would function analogously to other, universal and formal, constitutional requirements of the legislative process, such as bicameralism and the Presentment Clause. n119

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n115 For my view of the standard for judicial review, see *infra* subpart IV(B).

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n116 For a useful summary and discussion of the available evidence on this point, and also for discussion of the types of institutional arrangements that Congress could create, see George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 *COLUM. L. REV.* 331, 407-16 (1994).

Bermann makes these points in the context of arguing that there is no basis in the Constitution for requiring this type of "subsidiarity" inquiry in the United States -- although he believes that this is how the judiciary should enforce the principle of subsidiarity in the European Union. *Id.* at 423, 456; see *infra* text accompanying notes 155-57.

-End Footnotes-

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n117 This potential effect on outcomes is of course consistent with the

manner in which federalism is protected according to the "political process" school of Wechsler and Choper. See CHOPER, supra note 5, at 186-87 (citing policies that have been affected by Congress's and the president's deference towards states' rights); Wechsler, supra note 5. Bermann suggests that requiring the European Court of Justice to verify whether the political institutions have adequately examined alternatives before legislating at the "federal" level will likely create greater trust in the European Union's legislative process and its outcomes. Bermann, supra note 116, at 391. A similar result might be expected in the American context.

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n118 The proposal is radical because it places a constitutional requirement on the legislative process, something that (among other things) raises separation of powers concerns when judicially enforced. Indeed, in his dissenting opinion in Lopez, Justice Souter expressly rejected judicial "review for [congressional] deliberateness." Such review, he stated, "would be as patently unconstitutional as an Act of Congress mandating long opinions from this Court. Such a legislative process requirement would function merely as an excuse for covert review of the merits of legislation . . . ." *United States v. Lopez*, 115 S. Ct. 1624, 1656 (1995) (Souter, J., dissenting).

First, the issue I am considering is whether there is a constitutional requirement of "deliberateness," not a judicial policy or rule of statutory interpretation, so that the analogy with an Act of Congress is flawed. If there is such a requirement, it cannot be unconstitutional (on separation of powers or any other grounds). There are already, of course, certain constitutional legislative process requirements, such as bicameralism -- in the name of which the Court held the practice of the House legislative veto unconstitutional. See *INS v. Chadha*, 462 U.S. 919 (1983). The question is thus the plausibility and desirability on the merits of adding my suggestion to the existing ones. My suggestion is that a "deliberateness" requirement is (all things considered) part of the best interpretation of the "proper" element of the Necessary and Proper Clause, a basis for the requirement that, as far as I am aware, has not previously been made or considered. Second, the belief (or fear) that the judiciary will abuse its power in this context may well be a relevant factor in assessing the merits of my proposal (depending, among other things, on one's theory of constitutional interpretation), but it is not I think in itself a conclusive one.

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n119 U.S. CONST. art. I, § 7, cl. 2 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States . . . .").

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[\*826] The scope and function of the judicial review that I am suggesting in this section has much in common with the "hard look" doctrine in

administrative law. n120 Under this doctrine, which is an interpretation of the Administrative Procedure Act's prohibition on agency decisions that are "arbitrary" or "capricious," the function of judicial review is to further transparency and rationality in decisionmaking by ensuring that the agency in question has taken a "hard look" at -- has carefully considered -- all the relevant factors before making its decision. n121 Similarly, the background principle of federalism that informs what is "proper" in the context of preemption should be understood in this context to require that before it may exercise this power, Congress (1) carefully and in good faith consider the position and interests of the states, and (2) affirmatively conclude that on the merits the claims of uniformity prevail and so justify ending the constitutionally concurrent legislative authority of the states.

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n120 I am grateful to my colleague Tom Merrill for pointing this out to me.

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n121 Technically, the "hard look" doctrine is a particular form of "process review" (for rational decisionmaking) as distinct from the review of both outcomes (for substantive reasonableness) and procedures used. I am thus using the term "hard look" a little loosely to refer to both process and procedural tests. For an excellent treatment of the distinctions between these three types or bases of judicial review of agency decisions, see Gary Lawson, Outcome, Procedure, and Process: Agency Duties of Explanation for Legal Conclusions, 48 RUTGERS L. REV. 313 (1996).

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2. The Substantive Constraint. -- The procedural constraint on Congress's power to preempt the states just described is important but not sufficient in terms of adequately reflecting and protecting the background principle of federalism. It is important because congressional rather than purely judicial consideration of the relevant issues is critical. n122 It is insufficient, however, because as a test of the process and procedure by which Congress reaches its decision to preempt, nothing in it directly constrains outcomes. As long as it demonstrated that it had carefully thought about the relevant issues, Congress would be free to exercise its power of preemption unreasonably from a federalism perspective: nothing thus far requires that its determination on the merits be a substantively reasonable one. And yet, as we have seen, even the distinct test of necessity imposes such a constraint. n123 Accordingly, the states should be entitled not only to a fair hearing and a rational decisionmaking process but [\*827] also to a reasonable outcome; the "respect that the States are due as States" under the spirit of the Constitution should be understood to have a substantive dimension in this context and not just a procedural one. n124 A reviewing court would thus first ask whether Congress has given the issue of preemption the required "hard look" as described in the previous subpart and, if so, whether the judgment that it has formed on the merits is reasonable (rather than right). Such a requirement would thus steer a course between complete deference to the congressional judgment and substituting the judicial view on the merits for the legislative one.

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n122 I say that the procedural constraint is "important" rather than "necessary" because should it be deemed too problematic, the less controversial substantive constraint that I am about to present (a rational basis test for Congress's conclusion on the relevant federalism issues) is, from the perspective of federalism, far better than (the current) nothing. To repeat, the major advantage of the procedural constraint is to obtain genuine congressional judgment on an issue that it is in the best position to judge. Of course, to the extent that Congress fulfills the procedural constraint voluntarily, without mandating it, the same result will be achieved. Experience under other rational basis tests, however, is not encouraging.

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n123 Of course, Lopez may have retrieved this test from being a totally nominal one.

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n124 To repeat what I said, supra note 122, the substantive constraint of a rational outcome alone is far better than nothing if this turns out to be the choice.

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Even this substantive constraint on congressional discretion, however, may be insufficient. To the extent that Congress would be free within the general bounds of reasonableness to determine the relative weight it attaches to the federal and state interests that it considers, its judgment may be both substantively reasonable and significantly unconstrained. If, on the other hand, the weight to be attached to state autonomy interests in the balancing process is constitutionally prescribed (as part of the background principle of federalism), then what would constitute a reasonable judgment on the merits is significantly more constrained, being limited to assessing the importance of federal interests and comparing the result with the weight it is required to give the states. In other words, the principle of federalism might be understood to specify a degree of weight and respect due to state interests in concurrent lawmaking power that is significantly less flexible than that provided by the inherent constraints of reasonableness itself. The judgment that Congress makes would have to be a reasonable one given the weight that the constitutional principle of federalism ascribes to the states in this context.

Such an enhanced rational basis test is actually quite familiar in other constitutional contexts, in which the courts protect certain individual rights beyond a merely rational legislative finding that limiting them will further a legitimate governmental objective. Thus, in equal protection analysis, states are not free within the general bounds of reasonableness to determine what weight to attach in their balancing process to the constitutional right of individuals not to be discriminated against on the grounds of race, national

origin, gender, or age. Rather, the Constitution determines this weight, so that only a compelling (in the case of race and national origin) or important governmental interest can constitutionally outweigh it. n125 A similar form of protection is afforded to the constitutional right of free [\*828] speech. n126 The same type of analysis could be applied to the structural constitutional right of the states to have their interests and integrity as states respected.

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n125 See, e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976) (holding that classifications by gender must be substantially related to the achievement of an important governmental objective); *McLaughlin v. Florida*, 379 U.S. 184, 193 (1964) (finding that a Florida law prohibiting interracial cohabitation does not promote an "essential" government interest).

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n126 See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992) (finding content-based regulation of speech constitutional only if it is narrowly tailored to serve a compelling state interest).

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C. Express and Implied Preemption

I now turn to an extremely important implication of the constitutional constraints on the power of preemption outlined in the previous two subparts. If, before it can exercise the power of preemption, Congress must engage in the type of self-conscious consideration of the merits of preemption that I have proposed under the test of propriety, then it would seem that Congress cannot fulfill this requirement when its intent to preempt is not expressly manifested (either in the text of the statute or during the legislative process), but is rather implied solely by the existence of a conflict between state and federal law ("conflict preemption") or by the comprehensive nature of its regulatory scheme ("field preemption"). n127 If this is correct, then a third constitutional constraint follows from the first two: Congress has no power to impliedly preempt state law; only express preemption on the part of Congress can be valid. n128 [\*829] Because judicial findings of both conflict and field preemption, the two major forms of "implied preemption," are extremely common, this limitation would have a very significant impact on the practice of preemption law.

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n127 Conflict preemption and field preemption are the two major types of "implied preemption" that the Court routinely recognizes as manifesting congressional intent to preempt. Sometimes, but not always, the category of "frustration preemption" is added as a third type of implied preemption. This type of preemption means that state law is also (impliedly) preempted when, even though it does not conflict with a federal statute, it would unduly frustrate the purposes of that statute to permit concurrent state regulation. See, e.g., *Perez v. Campbell*, 402 U.S. 637, 649 (1971) (stating that the function of the

Supreme Court "is to determine whether a challenged state statute 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). At other times, however, frustration preemption is considered a species of conflict preemption, involving some lesser degree of conflict than direct incompatibility. See *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 98 (1992) ("Absent explicit preemptive language, we have recognized at least two types of implied pre-emption: field pre-emption . . . and conflict pre-emption, where 'compliance with both federal and state regulations is a physical impossibility,' or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963) and *Hines*, 312 U.S. at 67 (citation omitted)).

Whether frustration preemption is understood as a subcategory of conflict preemption or as a distinct type of implied preemption, what I have said about conflict preemption applies equally to it. If it is deemed a subcategory, then the relevant state law is trumped under the Supremacy Clause and preemption is not involved. The lesser degree of conflict involved would not generally provide any greater evidence of congressional intent to preempt. If, on the other hand, the doctrine involves something less than actual conflict, it is still not easy to see how such congressional action presumptively manifests an intent to preempt state law.

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n128 This simply means that no inference of preemption may be drawn from legislation that does not preempt expressly. If there is a conflict, the state laws in question will be trumped but the states do not lose general legislative authority in the area (they can amend their laws to avoid the conflict). A comprehensive scheme of federal legislation will be just that, supported by the Supremacy Clause but with no preemptive effect.

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Although a seemingly radical consequence of the previous analysis, two points should be noted that help to put things into proper perspective. First, this third constitutional limitation is entirely consistent and in line with the nonconstitutional doctrines of statutory interpretation -- the presumption of nonpreemption and the plain statement rule -- that the modern Court has developed to lessen the actual impact on the states of the expanded scope of concurrent federal power. n129 Moreover, the Court has presumably developed these doctrines to honor the spirit of the Constitution, although it has not expressed itself in these terms. n130 But given that the power of preemption derives from the Necessary and Proper Clause, and that congressional exercise of the power granted by this Clause is subject to the described federalism constraints, then at least the plain statement rule of statutory interpretation can plausibly and legitimately be promoted to constitutional status as I have suggested.

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n129 See supra notes 14-15.

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n130 See, e.g., *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) ("Congress legislated here in a field which the states have traditionally occupied. So we start with the assumption [of nonpreemption]." (citation omitted)).

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Second, this third limitation on the power that is imposed in the name of the constitutional principle of federalism may well also be an independent and internal requirement of the power of preemption itself. In previous work on the nature of preemption, I argued that a major implication of my analysis of the unrecognized distinction between supremacy and preemption was that the doctrines of conflict and field preemption are based on what in practice should be considered highly questionable judicial inferences about congressional intent. n131 Without going into detail, let me briefly summarize my argument. As far as conflict preemption is concerned, once the distinction between supremacy and preemption is acknowledged, only rarely -- if ever -- should a conflict between state and federal law justify an inference that in enacting the latter, Congress intended to preempt the states rather than simply to trump the particular conflicting state laws under the Supremacy Clause, without taking from the states all legislative power in that field. n132

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n131 See Gardbaum, supra note 10, at 808, 807-12 ("Neither conflict preemption nor field preemption is justified from the perspective of ordinary statutory interpretation used to determine what Congress has actually done. In fact, these two doctrines divert attention from actual intent.").

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n132 See supra note 31.

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The doctrine of field preemption, which in effect holds that a comprehensive scheme of federal regulation automatically rebuts the [\*830] presumption of nonpreemption, n133 similarly ignores alternative interpretations of congressional intent in a way that potentially distorts the outcome that would be reached by a fair and unmediated reading of the statute. It is both overinclusive and underinclusive from the perspective of congressional intent: overinclusive because despite such regulation, Congress may intend that the states be permitted to supplement it, not have considered the issue, or considered it without reaching a conclusion; underinclusive because Congress may intend to preempt state law while leaving the field relatively, or even entirely, unregulated by any level of government.

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n133 See, e.g., *Freightliner Corp. v. Myrick*, 115 S. Ct. 1483, 1487 (1995) ("We have recognized that a federal statute implicitly overrides state law . . . when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively . . . ."); *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 605 (1991) ("Absent explicit pre-emptive language, Congress' intent to supersede state law in a given area may nonetheless be implicit if a scheme of federal regulation is 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it . . . ." (quoting *Rice*, 331 U.S. at 230)).

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Accordingly, while undoubtedly of enormous impact on the practice of preemption law, the abolition of these two doctrines of implied preemption as inconsistent with the type and degree of consideration that the states are due under the background principle of federalism, provides independent constitutional support for my previous analysis, which reached the same conclusion from the perspective of statutory interpretation. n134

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n134 Again, as far as frustration preemption is concerned, see supra note 127.

-End Footnotes-

D. The Power to Regulate Local Activity Affecting Interstate Commerce

Although, as we have seen, n135 modern courts rarely acknowledge that this power is granted by the Necessary and Proper Clause, the standard test that they apply in Commerce Clause cases is effectively the basic test of whether the means chosen by Congress are "necessary" to promote the legitimate end of regulating interstate commerce. Thus, courts apply a rational basis test to determine the causal issue of whether the local activity in question sufficiently affects interstate commerce that it can reasonably be understood as a necessary means to its regulation.

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n135 See supra subpart II(B).

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The most straightforward interpretation of the decision in *Lopez* is that the majority found that Congress's Gun-Free School Zones Act failed this test of necessity; there was no rational basis on which Congress could have determined that regulating the possession of guns near public schools sufficiently affected interstate commerce. Whereas the majority, unlike all its predecessors since 1937, refused to defer to the congressional statement that there was sufficient effect on interstate commerce to justify the regulation of local activity, Justice Breyer in dissent argued that sufficient [\*831] sociological and

psychological evidence exists to forge a rational link between guns, education, and interstate commerce. n136 In addition to this disagreement on the rationality of the outcome, the majority perhaps also hinted that there were problems with the rationality of the legislative process in terms of the basis on which Congress made its finding. n137 While Justice Souter is correct that this type of concern is irrelevant under a pure rational basis test, n138 I have suggested that such a test does not fully accord with Marshall's account of necessity and should perhaps be modified accordingly. n139

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n136 *United States v. Lopez*, 115 S. Ct. 1624, 1659-62 (1995) (Breyer, J., dissenting).

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n137 "But to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here." *Id.* at 1632; see supra note 13.

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n138 See supra note 13.

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n139 See supra text accompanying notes 100-07.

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This entire analysis, however, exclusively concerns the requirement that Congress's choice of means be "necessary" and not at all the important and independent federalism constraint that I have argued has a textual basis in the Clause's proper requirement. Even if local activity substantially affects interstate commerce, Congress may still not regulate it unless the three requirements that reflect the background principle of federalism and justify national regulation are satisfied. These are: (1) that it has taken a "hard look" at the relevant federalism issues at stake when it chooses to regulate matters that are primarily regulated by the states; (2) that it has affirmatively determined that on balance national regulation is still called for; and (3) that this determination is a reasonable one, with the courts affording the full weight that the states' interest in autonomy is due under the constitutional principle of federalism. This interest is implicated generally by federal regulation of an area for which the states otherwise have responsibility, and specifically by the potential impact of the Supremacy Clause in the case of substantive conflicts between the two regulatory schemes. In addition, of course, there is the possibility of federal preemption, which is

the exercise of a different and additional power, and must be justified as such.

V. A Comparative Perspective: Constitutional Federalism in the European Union

The model of constitutional federalism presented in this Article has close affinities with the one that is being developed for the "federal" n140 [\*832] structure of the European Union as a result of the recent incorporation of the principle of "subsidiarity" into the Treaty Establishing the European Community (the Treaty of Rome) by an amendment contained in the (Maastricht) Treaty on European Union that came into effect in November 1993. n141 The second paragraph of Article 3b of the Treaty of Rome (as amended) defines the principle of subsidiarity as follows:

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. n142

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n140 The term "federal" appears in quotation marks because the actual use of the term to describe the structure and (meta)political goal of the European Union is itself a matter of deep controversy among certain Member States. For example, the initial draft of the (Maastricht) Treaty on European Union [TEU] stated in the preamble that it "marks a new stage in the process leading gradually to a Union with a federal goal." The United Kingdom rejected use of "the F word" and prevented the adoption of this amendment to the original preamble in the Treaty of Rome, so that the metapolitical objective of the European Union as stated in the preamble has not changed: "This treaty marks a new stage in the process creating an ever closer union among the peoples of Europe." See Ian Ward, The Best of All Possible Worlds? Maastricht and the United Kingdom, 5 IND. INT'L & COMP. L. REV. 75, 80 (1994); Boris Johnson, Europe Lost for Words Over Federation, SUNDAY TELEGRAPH (London), Dec. 1, 1991, at 2, 2.

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n141 TEU art. G(5); see supra note 24. Among other things, the TEU contained a large number of amendments to the existing "constitution" of the European Community, the Treaty of Rome (formally, The Treaty Establishing the European Community).

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n142 The principle of subsidiarity is derived from Article 72 of the Basic Law of Germany, which ensures that concurrent federal powers may only be exercised upon a showing of special need. Article 72 states that:

(2) The Federation shall have the right to legislate in these matters to the extent that a need for regulation by federal legislation exists because:

1. a matter cannot be effectively regulated by the legislation of individual Lander [states], or
2. the regulation of a matter by a Land law might prejudice the interests of other Lander or of the people as a whole, or
3. the maintenance of legal or economic unity, especially by the maintenance of uniformity of living conditions beyond the territory of any one Land, necessitates such regulation.

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At the Edinburgh Summit of December 1992, the European Council n143 announced a set of "guidelines" to help ensure that the Community institutions observe the principle of subsidiarity in their daily operations. With respect to proposed legislation at the Union (federal) level, these guidelines require consideration of the following factors: (1) whether the problem being addressed "has transnational aspects which cannot be satisfactorily regulated by action by Member States," (2) whether the Community's failure to act "would conflict with the requirements of the Treaty . . . or would otherwise significantly damage Member States' interests," and (3) whether the proposed measure "would produce clear [\*833] benefits by reason of its scale or effects compared with action at the level of the Member States." n144 The guidelines also require the Commission n145 to include in its explanatory memorandum accompanying any legislative proposal sent to the Council (of the European Union) n146 a statement "justifying . . . its initiative with regard to the principle of subsidiarity." n147

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n143 The European Council is a twice-yearly summit meeting of heads of government of the Member States. Its function is to help set the legislative agenda of the European Union (a function that in practice it shares with the European Commission in Brussels) and to reach high-level agreement on policy matters.

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n144 European Council in Edinburgh, Conclusions of the Presidency, BULL. EC 7, No. 12-1992, at 14, 14-15, 15.

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n145 The Commission of the European Communities (to give it its formal title) proposes all new legislation, oversees compliance by Member States with their obligations under the Treaty, and administers certain of the European Union's policies (such as the Common Agricultural Policy and the Union's antitrust or competition law). See TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EC TREATY], arts. 155-163.

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n146 The Council (of the European Union, often referred to as the Council of Ministers to distinguish it from the European Council) is the European Union's major legislative body and comprises the relevant government minister (depending on the legislative business at hand) from each Member State. See EC TREATY, arts. 145-154.

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n147 European Council in Edinburgh, supra note 144, at 22.

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The Commission in turn issued an Adaptation Report in November 1993 which confirmed that as part of its subsidiarity analysis, for each legislative proposal falling within the concurrent competence of the Union and the Member States, it would, as part of its explanatory memorandum, address the following questions: (1) what are the aims of the proposed action in terms of the Union's obligations; (2) what is the most effective solution to the identified problem, given the means available to the Union and the Member States; and (3) what is the specific added value of the proposed action and the cost of failing to act? Furthermore, the Commission would publish this analysis in the Official Journal of the European Community. n148

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n148 As its name suggests, the Official Journal is a publication containing a specified list of European Union documents, available in all eleven official languages of the European Union.

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The affinity between this model of constitutional federalism based on the principle of subsidiarity and the model suggested in this Article for the American context is that both express the idea that in areas of concurrent federal and state (in the European Union context, Union and Member State) competence, exercises of federal legislative power ought in some very general, but important, sense to be understood as exceptional or "subsidiary" to regulation by the states and, therefore, to carry a special burden of justification. Moreover, both models raise this presumption in favor of state regulatory competence to constitutional status in the sense that they deny to the federal entity complete and unreviewable legislative discretion to rebut it.

In suggesting that there are close affinities between the two models of constitutional federalism, I do not mean to overlook the technical differences between them. Subsidiarity provides the standard for answering [\*834] the general question of under what circumstances may the Union legislate at all in any of its areas of concurrent power. By contrast, the model I present for the

American context decides not this single general question, but two more particular ones: (1) under what conditions and circumstances may Congress regulate local activities that substantially affect interstate commerce, and (2) when, as part of its legislation in any area of concurrent competence, may Congress preempt state lawmaking power?

There has been much debate and controversy in the last few years among European Union scholars as to whether the principle of subsidiarity is, or should be treated as, a justiciable one, n149 an issue on which the European Court of Justice has not yet given its opinion. n150 Many of those who oppose justiciability do so on familiar grounds that it would effectively involve substituting the judicial for the legislative view on matters of policy and, as such, is inappropriate. n151 In response, some of those in favor of justiciability argue that judicial review for legislative rationality addresses this concern, with the European Court of Justice asking not whether regulation at the Union level is more effective but whether the affirmative decision of the legislative institutions on the subsidiarity issue is a reasonable one. n152 Others argue that the principle [\*835] of subsidiarity should be understood and applied as a procedural rather than a substantive constraint on the legislative process, with the Court asking whether the legislative institutions gave sufficient consideration to the possibility of regulation at the Member State level. n153

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n149 Interestingly enough, the European Council in the same conclusions to the Edinburgh Summit that produced the subsidiarity guidelines for Community institutions also opined that the principle of subsidiarity was justiciable by the European Court of Justice. "The principle of subsidiarity cannot be regarded as having direct effect; however, interpretation of this principle, as well as review of compliance with it by the Community institutions are subject to control by the Court of Justice, as far as matters falling within the Treaty establishing the European Community are concerned." European Council in Edinburgh, supra note 144, at 14.

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n150 There are at least two cases pending before the Court that may provide an opportunity for it to clarify its position on the justiciability of subsidiarity: Case C-253/94, Germany v. Parliament & Council, PROCEEDINGS OF THE COURT OF JUSTICE AND THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES, Sept. 12-16, 1994, at 20 (considering the validity of a directive on deposit-guarantee schemes); Case C-84/94, United Kingdom v. Council, PROCEEDINGS OF THE COURT OF JUSTICE AND THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES, Apr. 11-15, 1994, at 23 (addressing the applicability of a work directive).

It is of interest to note that Article 72(2) of the German Basic Law, see supra note 142, has been deemed nonjusticiable by the German Constitutional Court. It stated that "the question whether there is a need for federal regulation is a question for the faithful exercise of legislative discretion that is by its nature nonjusticiable and therefore basically not subject to

review by the Constitutional Court." Decision of April 22, 1953, 2 BVerfGE 213, 224 (1953); see DAVID CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 43-49 (1995).

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n151 See, e.g., Political Union: Law-Making Powers and Procedures, House of Lords Select Committee on the European Communities, Session 1990-91, 17th Report, para. 122 ("Subsidiarity is a political principle[;] . . . responsibility for its application should lie with the legislators and not with the judges."); see also Lord Mackenzie-Stuart, A Formula for Failure, THE TIMES (London), Dec. 11, 1992, at 18 (stating that Article 3b in effect "asks judges to answer questions which are, by their nature, essentially political. . . . It is fundamentally wrong that the court should be put in this position.").

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n152 See, e.g., Akos Toth, Is Subsidiarity Justiciable?, 19 EUR. L. REV. 268, 284 (1994) (noting that the Court should "examine whether in arriving at its decision the Council has not committed a manifest error . . . or has not patently exceeded the bounds of its discretion"); J.H.H. Weiler, Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration, 31 J. COMMON MARKET STUD. 417, 438 (1993) ("The Court should not simply substitute its view of the matter for that of the majority in Council, but decide whether, in the circumstances, the Council decision could reasonably be considered to accord with subsidiarity.").

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n153 See, e.g., Bermann, supra note 116, at 391, 390-95 ("I suggest that casting subsidiarity in procedural rather than substantive terms will best allow the Court of Justice to promote respect for the values of localism without enmeshing itself in profoundly political judgments that it is ill-equipped to make and ultimately not responsible for making.").

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This development in the European Union has been the catalyst for some important and overdue comparative analyses of federalism in the two legal systems. n154 In what is undoubtedly the most systematic and sophisticated of these recent analyses, George Bermann argues that while the principle of subsidiarity is a welcome development in the context of the European Union, and should be deemed justiciable as a procedural rather than a substantive constraint on its legislative process, there is no constitutional or normative basis for any similar principle in the United States. With regard to constitutional justification, Bermann considers only the traditional textual bases for exclusive state powers -- the Tenth Amendment and a narrow reading of

the Commerce Clause -- and, finding that neither regulates concurrent powers, concludes that subsidiarity could be enforced in the United States only on nonconstitutional grounds. n155 He argues, however, that such enforcement would not be desirable, as the "generic preference for state over federal action" that the principle contains is too "crude" and inflexible for a more mature federal system than that of the European Union. n156

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n154 In addition to the Bermann article previously cited, see supra note 116, others of interest include Thomas C. Fischer, "Federalism" in the European Community and the United States: A Rose By Any Other Name . . . ., 17 *FORDHAM INT'L L.J.* 389 (1994); W. Gary Vause, The Subsidiarity Principle in European Union Law -- American Federalism Compared, 27 *CASE WESTERN J. INT'L L.* 61 (1995).

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n155 Bermann, supra note 116, at 416-23.

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n156 See *id.* at 452, 456, 448-56. However, this presumption is, of course, currently applied by the courts (albeit as a doctrine of statutory interpretation) in the preemption context.

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In a straightforward sense, Bermann is obviously correct that subsidiarity is not a recognizable principle of constitutional law in the United States, in that congressional exercise of concurrent powers is not currently understood to be subject to legal constraint on federalism grounds. Although formally speaking, subsidiarity involves the more general issue of the circumstances under which the central authority can legislate at all in any of its areas of concurrent authority, the type of [\*836] questions that it might authoritatively be interpreted to require asking and be answered during the legislative process in resolving this issue are strikingly similar to those that I have suggested could be asked concerning the two congressional powers in question. In other words, there is a more plausible constitutional basis in the American context than either the Commerce Clause or the Tenth Amendment n157 for the type of consideration that subsidiarity might be held to require the constituent political entities to be given: the Necessary and Proper Clause. It is a more plausible basis because, unlike the Tenth Amendment and the Commerce Clause, it clearly regulates (among other things) the exercise of concurrent federal powers. Like the general concurrent legislative power of the European Union under the principle of subsidiarity, the model presented here suggests that the two particular congressional powers at issue may only be exercised when the capabilities and interests of the states are genuinely considered and reasonably outweighed.

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n157 These bases are the two that Bermann considers. See *id.* at 416-23.

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As far as policy is concerned, I indicated in the introduction why this third model is arguably superior to the two existing ones. It focuses on the reasons that justify congressional change of existing federal-state relations rather than more formalistically on definitive and categorical boundaries; it involves an appropriate division of powers between courts and Congress on the issue of federalism rather than either a purely judicial or congressional determination; it looks primarily to the national political process for protection of federalism while providing certain constitutional guarantees concerning the nature of that process and without entirely excluding the courts; and it forces Congress to think seriously about the exercise of these two powers from the perspective of federalism. Moreover, it is far from clear why the burden of justification and the deliberative requirements on the legislative process that both subsidiarity and the model presented here impose are more "crude" than leaving the issue of the allocation of powers to unconstrained legislative discretion, or why the extreme flexibility of this solution is obviously an asset from the perspective of appropriately protecting the value of federalism.

VI. Conclusion

The aim of this Article is to change the focus and parameters of the legal debate over federalism. It seeks to identify an alternative approach to protecting the principle of federalism in terms of both object and method. As far as object is concerned, the Article draws attention to what in practice is an enormously important arena of federalism concerns (preemption of state regulatory authority) and presents a model that may [\*837] be particularly appropriate for it. A model of constitutional federalism that has no application in this arena is unlikely to be thought an adequate one, especially once the reigning confusion about the nature and source of Congress's power of preemption has been dispelled. As for method, the model provides an alternative to the usual and more stringent conception that is premised on the existence of exclusive state powers that are judicially enforced by means of fixed and categorical substantive limits on the scope of federal power. By contrast, the model provides constitutional (and not merely political) protection to the states by imposing requirements of deliberation, justification, and reasonableness on Congress's decision-making process. When these requirements are not satisfied in the case of local activities, Congress may not regulate them even if they substantially affect interstate commerce. In the preemption context, when these constraints operate to push Congress into an alternative to preemption, n158 the concurrency of state and federal powers remains and any conflicts that arise as a result of their respective exercise are resolved through the explicitly enumerated mechanism of the Supremacy Clause.

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n158 These constraints may push Congress into an alternative to preemption either because preempting legislation is held to be unconstitutional or because as a result of the required congressional deliberation, preemption no longer seems the best policy to adopt.

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Of course, what makes this model a version of constitutional federalism at all is that it provides specific federalism constraints that Congress cannot legislate around and that are enforced by the courts. Proponents of a political model of federalism have routinely attacked the efficacy and propriety of this latter method of protecting the value of federalism, n159 but whether judicial enforcement of federalism constraints is a good or a bad thing surely depends to a significant extent on what those constraints are. It is one thing to have judicial enforcement of exclusive state powers -- which is what the debate has generally assumed is to be enforced -- and another to judicially enforce the deliberative and justificatory constraints on concurrent powers that I have suggested and which have a plausible basis in the text of the Constitution. In this context, the Tenth Amendment and the Necessary and Proper Clause are not simply interchangeable textual bases for constitutional federalism; rather, they point to quite different judicially enforced constraints.

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n159 For a recent version of this argument, see Larry Kramer, *supra* note 5, at 1500-03 (arguing that courts lack the "institutional capacity" to evaluate issues of federalism and are unable to respond quickly to changing circumstances in determining the proper relation between state and federal power). For an even more recent defense of "traditional" judicial review of federalism, see Steven G. Calabresi, "A Government of Limited and Enumerated Powers": In Defense of *United States v. Lopez*, 94 MICH. L. REV. 752, 799-811 (1995).

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As I stated in the introduction, this Article has not raised or discussed the prior normative question of whether federalism is a value that is worth [\*838] protecting, but has, like the two existing models of federalism, assumed that this is so and focused on different methods of protecting it and their constitutional, political, and practical justifications. Moreover, since it is agnostic on the issue of exclusive state powers that divides proponents of the other two models, this Article does not provide a complete account of federalism. If there are exclusive state powers, then the model presented here would play a supplementary role, though once again, the failure of the traditional model to address the issue of preemption would ensure its role is still an important one. If there are no areas exclusively reserved to the states, then this model provides the only possible basis for constitutional federalism.

The overriding aim is to identify this model of constitutional federalism, which has hitherto been overlooked as a contender in the American context and to present it for consideration on the merits as a new approach to the old issue of the content and status of the principle of federalism, an issue that Justice O'Connor has referred to as the "conflict" between "the Constitution's dual concerns for federalism and an effective commerce power." n160

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n160 *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 581 (1985) (O'Connor, J., dissenting).

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