

Clinton, Ginsburg, and Centrist Federalism[†]

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This Article examines Justice Ginsburg’s overlooked federalism jurisprudence and concludes that it almost perfectly complements President Bill Clinton’s New Democratic centrism, especially his pro-state federalism agenda. The Article concludes that their nuanced, “centrist” approach to federalism has two characteristics. First, they value the states’ governing autonomy and show respect for the state agents that realize that autonomy. Second, they credit the states as intersubjective actors engaged in the pursuit of their interests, albeit in political processes usually carried out at the federal level.

INTRODUCTION

Politics¹ and pathology² have converged to heighten speculation that Justice Ruth Bader Ginsburg’s tenure on the Supreme Court is nearing its end.³ Even if the

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1. Democrat Barack Obama’s election to the presidency sparked widespread speculation that the Court’s long-serving Democratic appointees and liberal-voting Republican appointees will be considering retirement. Justice Ginsburg is regularly mentioned in connection with such speculation. *See, e.g.,* David G. Savage, *Obama and the Supreme Court*, L.A. TIMES, Nov. 17, 2008, at A12 [hereinafter Savage, *Obama and the Court*]; Justin Jouvenal, *Ten Picks for Obama’s Supreme Court*, SALON.COM, Nov. 19, 2008, http://www.salon.com/news/feature/2008/11/19/supreme_court/. However, it was Justice David Souter’s retirement that gave President Obama his first Supreme Court appointment. *See* Peter Baker & Jeff Zeleny, *Souter’s*

imminence of her retirement is greatly exaggerated,⁴ the time to reflect on Justice Ginsburg's lasting contribution to American constitutional law has arrived.

Justice Ginsburg is best known for her long campaign to promote gender equality.⁵ Her successful advocacy on that issue before the Supreme Court throughout the 1970s led President Clinton to conclude, when announcing her nomination to fill Justice Byron White's vacated seat on the high court, that "she is to the women's movement

Exit to Give Obama First Opening, N.Y. TIMES.COM, May 1, 2009, http://www.nytimes.com/2009/05/02/us/02souter.html?_r=1&ref=weekinreview. President Obama nominated then-Judge Sonia Sotomayor to replace Justice Souter, and she was confirmed by the Senate in August 2009 to become only the third female Supreme Court justice. See Adam Liptak, *The Newest Justice Takes Her Seat*, N.Y. TIMES, Sept. 8, 2009, at A1; Charlie Savage, *Sotomayor Confirmed by Senate, 68-31*, N.Y. TIMES.COM, Aug. 6, 2009, <http://www.nytimes.com/2009/08/07/us/politics/07confirm.html?hp>. Speculation about imminent retirements at the Supreme Court now seems to be focused on Justice John Paul Stevens. See Adam Liptak, *A Justice Slows His Hiring, and Some Wonder About His Future*, N.Y. TIMES, Sept. 2, 2009, at A14 [hereinafter Liptak, *Justice Slows Hiring*].

2. In February 2009, Justice Ginsburg received treatment for pancreatic cancer. See Carrie Johnson, *Ginsburg's Illness Puts Focus on Choices Ahead for Obama*, WASH. POST, Feb. 7, 2009, at A2; Carrie Johnson & Rob Stein, *Justice's Surgeons Find Malignant Tumor; Ginsburg Goes Home After Procedure to Remove Spleen, Growth in Pancreas*, WASH. POST, Feb. 14, 2009, at A4; Adam Liptak, *Justice Ginsburg Undergoes Surgery for Pancreatic Cancer, Court Says*, N.Y. TIMES, Feb. 6, 2009, at A12. Justice Ginsburg was again hospitalized in October 2009 after she "became drowsy and fell from her seat aboard an airplane." See *Justice is Hospitalized*, N.Y. TIMES.COM, Oct. 15, 2009, http://www.nytimes.com/2009/10/16/us/16brfs-JUSTICEISHOS_BRF.html?scp=12&sq=ginsburg&st=cse.

3. Kentucky Senator Jim Bunning created an embarrassing sensation when he suggested this in a speech in Hardin County, Kentucky. Bunning reportedly said that Ginsburg has "bad cancer. The kind you don't get better from. . . . Even though she was operated on, usually, nine months is the longest that anybody would live." Joe Biesk, *Sen. Bunning Apologizes for Ginsburg Cancer Remark*, ABCNEWS.COM, Feb. 23, 2009, <http://abcnews.go.com/Politics/wireStory?id=6938796> (internal quotation marks omitted).

4. Justice Ginsburg made a lively return to the Court, participating in its first session of the new year. See Jesse J. Holland, *Ginsburg in Court 18 Days After Cancer Surgery*, ABCNEWS.COM, Feb. 23, 2009, <http://abcnews.go.com/Politics/wireStory?id=6938312>; Adam Liptak, *On Return to Court, Ginsburg is Quick to Question*, N.Y. TIMES, Feb. 24, 2009, at A12; see also Liptak, *Justice Slows Hiring*, *supra* note 1 (noting that speculation over the Court's next retirement now focuses on Justice Stevens: "But Justice Ginsburg, who is 76, did not miss a day on the bench, has maintained an active public schedule and has said she intends to continue to serve for some time").

5. See CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* 107 (2006) ("Justice Ruth Bader Ginsburg is one of the leading advocates for women's equality in the history of American law."); Karen O'Connor & Barbara Palmer, *The Clinton Clones: Ginsburg, Breyer, and the Clinton Legacy*, 84 JUDICATURE 262, 265 (2001) ("Ginsburg's personal encounters with sex discrimination eventually led her to use her legal talents to found the Women's Rights Project while a professor at Rutgers, and then the Women's Rights Project (WRP) of the ACLU while she was a professor at Columbia. As the Director of the WRP, she not only fashioned a litigation strategy designed to convince the Court to elevate sex to a suspect classification, she argued six sex-discrimination cases before the Supreme Court and orally argued an additional case as amicus. She won five of these cases. Consequently, when she was nominated, her positions on women's rights and abortion were well known.").

what former Supreme Court Justice Thurgood Marshall was to the movement for the rights of African-Americans.⁶ This prominent facet of Justice Ginsburg's jurisprudence reached its zenith when she authored the majority opinion in the Court's landmark decision *United States v. Virginia*,⁷ which very nearly puts gender equality on the same strictly protected constitutional footing as racial equality.⁸ This aspect of Justice Ginsburg's jurisprudence attracts considerable attention,⁹ and it seems likely that it will continue to preoccupy constitutional scholars and Court observers.¹⁰

I have chosen, instead, to examine Justice Ginsburg's federalism jurisprudence, which suggests that she also might be remembered for complementing the centrist political agenda of the President who nominated her. Justice Ginsburg's progressive gender-equality jurisprudence poses a stark challenge to this claim, a challenge made thornier by the high value President Clinton clearly put on Justice Ginsburg's

6. Remarks Announcing the Nomination of Ruth Bader Ginsburg to Be a Supreme Court Associate Justice, 1 PUB. PAPERS 842, 843 (June 14, 1993). Michael James Confusione criticized the comparison, pointing out that Marshall embraced remedial racial legislation while Ginsburg has expressed skepticism toward gender-based preferences. Michael James Confusione, Note, *Justice Ruth Bader Ginsburg and Justice Thurgood Marshall: A Misleading Comparison*, 26 RUTGERS L.J. 887, 887-98 (1995).

7. 518 U.S. 515 (1996).

In *United States v. Virginia*, the Supreme Court declared unconstitutional the exclusion of women by the Virginia Military Institute (VMI). Virginia, in response to an order from the United States Court of Appeals for the Fourth Circuit, had created the Virginia Women's Institute for Leadership at Mary Baldwin College. The Court found this insufficient to excuse VMI's gender discrimination; women still were denied an opportunity available only for men.

ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 9.4.1, at 755 (3d ed. 2006) (citations omitted).

8. In her majority opinion for the Court, holding the exclusion of women from the Virginia Military Institute (VMI) unconstitutional, Justice Ginsburg applied intermediate scrutiny but said that "[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action. . . . The burden of justification is demanding and it rests entirely on the State." *Virginia*, 518 U.S. at 531-33; see also CHERMERINSKY, *supra* note 7, § 9.4.1, at 755.

9. Of the fifty-eight law review articles "on or About Ginsburg" that Sarah Valentine catalogued in an annotated bibliography of Justice Ginsburg, twenty-five are focused on her gender-equality jurisprudence or pursue lines of inquiry directly linked to women's issues. Sarah E. Valentine, *Ruth Bader Ginsburg: An Annotated Bibliography*, 7 N.Y. CITY L. REV. 391, 439-51 (2004). For notable exceptions to this trend, see Samuel Bagenstos, *Justice Ginsburg and the Judicial Role in Expanding "We the People": The Disability Rights Cases*, 104 COLUM. L. REV. 49 (2004); David Cowan Bayne, *Insider Trading: The Misappropriation Theory Ignored: Ginsburg's O'Hagan*, 53 U. MIAMI L. REV. 1 (1998); Edward A. Fallone, *Neither Liberal Nor Laissez Faire: A Prediction of Justice Ginsburg's Approach to Business Law Issues*, 1993 COLUM. BUS. L. REV. 279; Sidney Harring & Jeffrey L. Kirchmeier, *Scrupulous in Applying the Law: Justice Ruth Bader Ginsburg and Capital Punishment*, 7 N.Y. CITY L. REV. 241 (2004). See also David von Drehle, *Redefining Fair with a Simple Careful Assault*, WASH. POST, July 19, 1993, at A1.

10. See generally HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS 307 (5th ed. 2008).

commitment to the issue.¹¹ But the usual emphasis given to gender equality in commentary on Justice Ginsburg's work highlights the progressive profiles of the Justice and her President, fueling the persistent but mistaken view that both are orthodox liberals. They are not.¹² This Article advances this claim through a study of the nexus between President Clinton's pro-state federalism policies and Justice Ginsburg's pro-state federalism jurisprudence. As regards federalism, it seems that President Clinton got exactly what he wanted from his first nomination to the Supreme Court: a judicially modest centrist that contributed to his attempt to refashion the Democrats as a party embracing "ideas and values that [are] both liberal and conservative."¹³

I begin, in Part I, by arguing that President Clinton's nomination of Justice Ginsburg was not merely a sop to the Democratic Party's liberal base, but was, instead, representative of his centrist political vision. I also explain why Justice Ginsburg's federalism jurisprudence is especially meaningful support for that argument. As I use it here and throughout the Article, the term "centrist" is meant to capture President Clinton's political theory known as the "third way."¹⁴ Then-Governor Clinton

11. Considering his Rose Garden remarks when announcing her nomination, President Clinton must have been pleased to have appointed the Justice who has taken the lead in expanding constitutional gender-equality protections. Justice Ginsburg's nomination itself, however, serves as proof of President Clinton's dedication to the classically liberal aim of promoting general equality. In nominating then-Judge Ginsburg to the Court, he used the first Democratic nomination to the Supreme Court in twenty-six years to seat only the second female justice. President Clinton can also be credited with diversifying the federal judiciary. In his evaluation of President Clinton's first-term appointments, Carl Tobias remarked:

During President Clinton's initial term in office, he apparently kept his promises relating to judicial appointments, and his administration achieved the selection goals that it had set. President Clinton appointed 202 judges to the federal bench; 62 (31%) of whom are women and 58 (29%) of whom are minorities. This judicial selection record is unprecedented. It contrasts sharply with the numbers of women and minorities chosen by the Reagan, Bush, and Carter Administrations. For instance, President Clinton named more women to the bench in his first three years as Chief Executive than President Bush appointed in one term and than President Reagan named in eight years.

Carl Tobias, *Choosing Federal Judges in the Second Clinton Administration*, 24 HASTINGS CONST. L.Q. 741, 745 (1997) (citations omitted).

12. "If Byron White wasn't a typical Democrat, neither was Bill Clinton." JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 62 (2007). "Ginsburg was hardly a radical," and she had won "great suspicion" from the left with her scholarly criticism of *Roe v. Wade*, 410 U.S. 113 (1973). TOOBIN *supra*, at 70.

13. BILL CLINTON, *MY LIFE* 366 (2004). President Clinton's centrism extended to pro-state federalism policies that constituted a centerpiece of his "New Democratic" presidency. See William A. Galston & Geoffrey L. Tibbetts, *Reinventing Federalism: The Clinton/Gore Program for a New Partnership Among the Federal, State, Local, and Tribal Governments*, PUBLIUS: J. FEDERALISM, Summer 1994, at 23. President Clinton's nomination of Ruth Bader Ginsburg was one of his efforts to shape a "new middle" in American politics. See *infra* note 23 and accompanying text.

14. See FLAVIO ROMANO, *CLINTON AND BLAIR: THE POLITICAL ECONOMY OF THE THIRD WAY* (2006); ANTHONY GIDDENS, *THE THIRD WAY AND ITS CRITICS* (2000); see also *Turning Ideas Into Action*, NEW DEMOCRAT, May 1, 1999, available at <http://www.dlc.org/print>.

explained this vision in his keynote address at the 1991 Cleveland Democratic Leadership Council (DLC) Convention¹⁵ (viewed as the event that certified his presidential bid as legitimate).¹⁶ “We have got to have a message that touches everybody,” Clinton said, “[a message] that makes sense to everybody, that goes beyond the stale orthodoxies of left and right”¹⁷ Ginsburg expressed similar sentiments during the Senate confirmation hearing on her Supreme Court nomination when she explained that “[m]y approach, I believe, is neither liberal nor conservative.”¹⁸ I establish the centrist character of President Clinton’s and Justice Ginsburg’s federalism in Part II, where I also demonstrate the intersection of their approaches with a close examination of their positions on the preemption doctrine. This effort reveals that their distinctly “centrist” approach to federalism rejects the Democrat’s long-standing preference for national authority in the state-federal balance while refusing to simply adopt the customary Republican view that the states and the federal government are mutually exclusive dual sovereigns. They achieve this through a federalism vision that has two characteristics. First, they give force to a variation on the traditionally Republican dual-sovereignty approach to federalism by showing respect for the states’ governing autonomy and the state agents empowered to realize that autonomy. Second, they credit Democratic preferences for national policy and standards by viewing the states as intersubjective actors engaged in the pursuit of their interests in the national political process.

cfm?contentid=1247 (excerpts from the transcript of a forum hosted by President Bill Clinton that served as “a public colloquy on the international Third Way political movement”); Reginald Dale, *Thinking Ahead / Commentary: What the “Third Way” Is Really About*, N.Y. TIMES.COM, Apr. 4, 2000, <http://nytimes.com/2000/04/04/business/worldbusiness/04iht-think.2.t.html> (“Hillary Clinton once reportedly portrayed the Third Way as ‘a unified field theory of life’ that will ‘marry conservatism and liberalism, capitalism and statism, and tie together practically everything: the way we are, the way we were, the faults of man and the word of God, the end of communism and the beginning of the new millennium.’”); John B. Judis, *Is the Third Way Finished?*, AM. PROSPECT, June 30, 2002, available at http://www.prospect.org/cs/articles?article=is_the_third_way_finished.

15. Governor Bill Clinton, Keynote Address at the Democratic Leadership Council’s Cleveland Convention (May 6, 1991).

16. See *id.*; Gwen Ifill, *Democratic Group Argues Over Goals*, N.Y. TIMES, May 7, 1991, at A21; Gwen Ifill, *The 1992 Campaign: Democrats: Centrist Council Exults in Success of a Member*, N.Y. TIMES, May 3, 1992, at 29; Robin Toner, *Identity Becomes Central to Debate as Democrats Prepare for 1992 Race*, N.Y. TIMES, May 5, 1991, at 28; Robin Toner, *Political Memo: Democrats Stick Toes in Waters of 1992 Race*, N.Y. TIMES, May 20, 1991, at A13; see also CHARLES O. JONES, *PASSAGES TO THE PRESIDENCY: FROM CAMPAIGNING TO GOVERNING* 44 (1998) (“[Clinton] delivered a well-received speech in Cleveland, May 6, 1991, that was bound to stir talk of his candidacy in 1992”); DAVID MARANISS, *FIRST IN HIS CLASS* 459 (1995) (“The buzz in Washington among journalists and political opinion makers was that the Cleveland speech had established Clinton as a serious national figure, one who seemed to have a clear idea of what he wanted to do as president.”); DAVID MARANISS & ELLEN NAKASHIMA, *THE PRINCE OF TENNESSEE* 263–65 (2000) (“Bill Clinton used Cleveland as the departure station for his improbable ride to the White House.”).

17. Clinton, *supra* note 15.

18. Neil Lewis, *Ginsburg Promises Judicial Restraint if She Joins Court*, N.Y. TIMES, July 21, 1993, at A1.

I. A NEW DEMOCRATIC NOMINEE AND CENTRIST FEDERALISM

In at least one respect, some are now willing to argue that President George W. Bush got the better of his predecessor in the White House. Like President Bill Clinton before him, George W. Bush had the opportunity to nominate two Justices to the Supreme Court.¹⁹ Some commentators believe that President Bush more effectively placed his stamp on the Court with his nomination of Chief Justice Roberts and Justice Alito than President Clinton succeeded in doing with his nominations of Justice Ginsburg and Justice Breyer.²⁰ Nominating the Chief Justice and the replacement for the swing-voting Justice O'Connor clearly counts toward President Bush's advantage in the comparison. But the argument also advances the view that, where President Bush made ideological nominations that will shift the Court in the direction of his conservative agenda,²¹ President Clinton's nominations lack the corresponding liberal ideological gravitas.²²

This critique of President Clinton's nominations depends on the persistent but mistaken view that he was an orthodox liberal, a view that is contradicted by his claims and record. Rather, President Clinton's nomination of Ruth Bader Ginsburg was one of his many efforts to shape a "third way" in American politics. As Christopher Smith and Kimberly Beuger explained in their survey of presidential nominations to the Supreme Court, "President Clinton's primary purpose for nominating Justice Ginsburg was 'his need for a nominee who was risk-free, one who would not only sail smoothly through

19. See David D. Kirkpatrick, *Alito Sworn in as Justice After Senate Gives Approval*, N.Y. TIMES, Feb. 1, 2006, at A21; Sheryl Gay Tolberg & Elisabeth Bumiller, *Democrats Split—Focus Now on 2nd Pick*, N.Y. TIMES, Sept. 30, 2005, at A1; see also ABRAHAM, *supra* note 10, at 315–24; TOOBIN, *supra* note 12, at 257–317; Joan Biskupic, *The Alito/O'Connor Switch*, 35 PEPP. L. REV. 495 (2008); Laura Krugman Ray, *The Style of a Skeptic: The Opinions of Chief Justice Roberts*, 83 IND. L.J. 997 (2008); Lori A. Ringhand, *The Roberts Court: Year 1*, 73 TENN. L. REV. 607 (2006); Mark Tushnet, *The First (and Last?) Term of the Roberts Court*, 42 TULSA L. REV. 495 (2008).

20. See Savage, *Obama and the Court*, *supra* note 1 ("President Clinton . . . steered away from strong liberals, instead choosing veteran appeals court judges with moderate to liberal records."); Jouvenal, *supra* note 1 ("Recent history suggests the paths Obama might follow. President George W. Bush appointed two solidly conservative justices in John Roberts and Samuel A. Alito, which excited his base. President Clinton took a different tack: He appointed two moderate liberals—Ginsburg and Stephen Breyer . . .").

21. See Jouvenal, *supra* note 1; see also SUNSTEIN, *supra* note 5, at 31 ("Under President Bush, many Republicans accused the Democrats of 'playing politics' with the judiciary. They were right; the ideological beliefs of the Bush appointees were sometimes the source of the difficulty. But the accusation neglects something important. Some appointees had controversial and even radical views about the Constitution, and they were chosen for exactly that reason."); Jeffrey Rosen, *The Unregulated Offensive*, N.Y. TIMES, April 17, 2005, § 6 (Magazine), at 42.

22. Carl Tobias noted that observers on the left "have criticized [President Clinton] for failing to appoint attorneys whom they perceived to be more politically partisan, particularly as a counterbalance to the express intent of Presidents Reagan and [George H.W.] Bush to make the courts more conservative by naming lawyers with explicit doctrinaire views." Carl Tobias, *President Clinton and the Federal Judiciary*, 24 FLA. ST. U. L. REV. 121, 122 (1996); Tobias, *supra* note 11, at 751; see also Savage, *Obama and the Court*, *supra* note 1.

the Senate but also might . . . *reconfirm his move to the political center . . .*”²³ President Clinton failed to nominate dogmatic liberals to the Supreme Court because it was not his intention to entrench a dogmatically liberal political agenda, even on the Court.

Lee Epstein and Jeffrey Segal have remarked that “presidents are notorious whiners about their judicial appointees.”²⁴ This, as Henry Abraham explained, occurs because there is “a considerable element of unpredictability in the judicial appointing process.”²⁵ But President Clinton has precious little reason to complain.²⁶ His judicial nominations were consistent with his centrist “New Democratic” ideology, particularly because their judicial philosophies revealed a marked shift to the center.²⁷ Both *The New York Times* and *The Washington Post* heralded Ginsburg’s nomination as a significant nod to centrism.²⁸ Neil Lewis, writing for the *Times*, described then-Judge Ginsburg’s work on the United States Court of Appeals for the District of Columbia Circuit as “resolutely centrist” and “decidedly moderate,” and he noted that Ginsburg voted “more consistently with her Republican-appointed colleagues than with her fellow Democratic-appointed colleagues.”²⁹ Joan Biskupic concluded for *The Washington Post* that “[i]f Judge Ruth Bader Ginsburg becomes a Supreme Court justice, the court will belong to the center.”³⁰ A broad vista, taking in more than her

23. Mei-Fei Kuo & Kai Wang, *When Is an Innovation in Order?: Justice Ruth Bader Ginsburg and Stare Decisis*, 20 U. HAW. L. REV. 835, 862 (1998) (quoting Christopher E. Smith & Kimberly A. Beuger, *Clouds in the Crystal Ball: Presidential Expectations and the Unpredictable Behavior of Supreme Court Appointees*, 27 AKRON L. REV. 115, 135–36 (1993)) (emphasis added). However progressive Justice Ginsburg’s gender-equality jurisprudence was during her tenure with the ACLU’s Women’s Rights Project, by the time she was appointed to the bench she was considered conservative by the then-current leaders of the woman’s movement. As Patricia Cain remarked: “[l]itigators, like Ruth Bader Ginsburg, have been charged as being short-sighted because they adopted an assimilationist theory of equality that would benefit women only if they acted like men.” Patricia A. Cain, *Feminism and the Limits of Equality*, in FEMINIST LEGAL THEORY: FOUNDATIONS 237, 238 (D. Kelly Weisberg ed., 1993) (citing Debra Ratterman, *Liberating Feminist Jurisprudence*, OFF OUR BACKS, Jan. 1990, at 12).

24. LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 119 (2005).

25. HENRY J. ABRAHAM, *THE JUDICIAL PROCESS* 79 (7th ed. 1998).

26. Does any president have reason to complain? As Epstein and Segal note, Laurence Tribe has described the “myth of the surprised president.’ By this he means that ‘in areas of particular and known concern to a President, Justices have been loyal to the ideals and perspectives of the men who have nominated them.’” EPSTEIN & SEGAL, *supra* note 24, at 120 (quoting LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY* 50 (1985)).

27. Nancy Scherer, *Who Drives the Ideological Makeup of the Lower Federal Courts in a Divided Government?*, 35 LAW & SOC’Y REV. 191, 211 (2001).

28. See Joan Biskupic, *Judge Ruth Ginsburg Named to High Court; Nominee’s Philosophy Seen Strengthening the Center*, WASH. POST, June 15, 1993, at A1; Neil A. Lewis, *Balanced Jurist at Home in the Middle*, N.Y. TIMES, June 27, 1993, at 20.

29. Lewis, *supra* note 28 (noting that Ginsburg voted with the infamously conservative Judge Bork eighty-five percent of the time and with the well-known liberal Judge Wald only thirty-eight percent of the time).

30. Biskupic, *supra* note 28 (“In the judicial context, a ‘liberal’ approach connotes a willingness to more broadly read constitutional guarantees beyond the clear mandates of elected

gender-equality jurisprudence, confirms Justice Ginsburg's secure place in the middle of the Supreme Court where her jurisprudence has been reflective of President Clinton's centrist, New Democratic political vision. Epstein and Segal concluded that Justice Ginsburg was closely aligned with President Clinton's ideology at the time of her nomination (albeit slightly more conservative),³¹ that her voting record on the Supreme Court nearly perfectly aligns with the positions she would have been expected to take based on her political ideology;³² and that her voting record on the Supreme Court is even more closely aligned with President Clinton's ideology (proving slightly more conservative) than Justice Scalia's is or Chief Justice Rehnquist's was with President Reagan's ideology (both also proving more conservative).³³ In his intimate survey of nearly two decades in the life of the Supreme Court, Jeffrey Toobin concluded that "more than any recent president since Johnson, Clinton was able to use his appointments to shape the Court in line with his own views."³⁴ This is true, even while President Clinton's nominations proved to be unpopular with his liberal Democratic base,³⁵ because Justice Ginsburg's and later then-Judge Stephen Breyer's nominations "reflected, with great precision, the moderate-to-liberal politics of the president."³⁶

First and foremost, Justice Ginsburg's centrism is demonstrated by her incontestable judicial modesty.³⁷ She also has taken moderate positions on a number of substantive

lawmakers. A judicial 'conservative,' conversely, believes the courts should not involve themselves in social problems that are traditionally the province of legislators. . . . Neither tag captures Ginsburg.").

31. Actually, Justice Ginsburg plots as slightly more conservative than President Clinton. EPSTEIN & SEGAL, *supra* note 24, at 122 fig.5.1.

32. Of all Justices appointed, Warren through Breyer, Justices Powell, Scalia, and Ginsburg have most perfectly fulfilled ideological expectations. *Id.* at 125 fig.5.2.

33. *Id.* at 131 fig.5.4.

34. TOOBIN, *supra* note 12, at 73. Toobin's survey encompasses George W. Bush's appointments of Chief Justice John Roberts and Associate Justice Samuel Alito. Thus, this claim represents his view that President Clinton bested his successor in regard to their respective impact on the Court.

35. *Id.*, at 70 (noting skepticism for Ginsburg "among the more liberal members of the administration" because she was viewed as a "moderate-to-conservative judge . . . often . . . aligned with one-time colleagues Robert Bork and Antonin Scalia").

36. *Id.* at 73.

37. Cass Sunstein concluded that Ginsburg "is a (somewhat) liberal minimalist. She likes to decide cases, rather than set out broad principles; and she is reluctant to embrace large-scale generalities about the foundations of the law." SUNSTEIN, *supra* note 5, at 29.

In her scholarship, Justice Ginsburg has clearly articulated a commitment to judicial restraint. She urges respect for precedent and prefers the legislature as the vehicle for significant change. Writing the year before her appointment to the Supreme Court, Justice Ginsburg explained:

[J]udges play an interdependent part in our democracy. They do not alone shape legal doctrine but, . . . they participate in a dialogue with other organs of government, and with the people as well. "[J]udges do and must legislate," Justice Holmes "recognized without hesitation," but "they can do so," he cautioned, "only interstitially; they are confined from molar to molecular motions." Measured motions seem to me right, in the main, for constitutional as well as common law adjudication. Doctrinal limbs too swiftly shaped, experience teaches, may prove unstable.

issues.³⁸ For my purposes, however, it is Justice Ginsburg's commitment to state autonomy that most dramatically belies the claims of conservative commentators and empirical scholars who view her as one of the Court's most consistently liberal and activist justices.³⁹ Vilified by the right almost from the beginning of her tenure on the Court, Ginsburg was implicated as an "activist" in Senator Bob Dole's attempt to make the judiciary an issue in the 1996 presidential campaign. President Clinton's reelection, Dole cautioned, would "lock in liberal judicial activism for the next generation."⁴⁰ Jason Eric Sharp noted that "one conservative public interest group [asserted] that Clinton's judicial legacy would be an 'out of control' judiciary prone to judicial activism."⁴¹ The *National Review* regularly criticizes what it views as Justice

Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1198 (1992) (quoting *S. Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting)) [hereinafter Ginsburg, *Judicial Voice*]. This approach is most dramatically revealed in her scholarly criticism of *Roe v. Wade*, 410 U.S. 113 (1973). Justice Ginsburg argued that the Court "ventured too far in the change it ordered" in *Roe*. Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 381–85 (1985) [hereinafter Ginsburg, *Thoughts*]. She would have preferred that the reproductive-rights agenda had been advanced by the political process and in the majoritarian institutions, with the courts "point[ing] out, but not completely reshap[ing], flaws or unfairness in the majority's rules of law." Confusione, *supra* note 6, at 899; see Laura Krugman Ray, *Justice Ginsburg and the Middle Way*, 68 BROOK. L. REV. 629 (2003).

38. Neil Lewis noted that, during her tenure on the D.C. Circuit, then-Judge Ginsburg was "largely favorable to law enforcement on criminal matters." Lewis, *supra* note 28. Ginsburg has maintained a largely progovernment position in criminal cases on the Supreme Court. See THOMAS R. HENSLEY, CHRISTOPHER E. SMITH & JOYCE A. BAUGH, *THE CHANGING SUPREME COURT: CONSTITUTIONAL RIGHTS AND LIBERTIES* 81 (1997); Craig Bradley, *The Middle Class Fourth Amendment*, 6 BUFF. CRIM. L. REV. 1123 (2003); Harring & Kirchmeier, *supra* note 9, at 243–44; Christopher E. Smith, *Criminal Justice and the 1998–99 United States Supreme Court Term*, 9 WIDENER J. PUB. L. 23 (1999). For this point Jeffrey Toobin cited former Senate Judiciary Committee Chairman Orrin Hatch's belief that, with a view toward Ginsburg's moderate record on the D.C. Circuit, "she would have no problem in the Senate." TOOBIN, *supra* note 12, at 71. Her nomination was confirmed by a vote of ninety-six to three. HENSLEY ET AL., *supra*, at 81.

39. It is possible to view Ginsburg's critical engagement with *Roe* as expressing sympathy for the states' governing autonomy and their function as policy innovators, views that will prove to be central to my characterization of Ginsburg as a pro-state centrist on federalism. In her *North Carolina Law Review* article, Ginsburg drew favorable attention to the fact that, prior to *Roe*, the states had embarked on a "distinct trend . . . 'toward liberalization of abortion statutes[,]'" an exercise of state-governing autonomy that the Court disrupted with its intervention in *Roe*. Ginsburg, *Thoughts*, *supra* note 37, at 379–80 (quoting *Roe*, 410 U.S. at 140); see Biskupic, *supra* note 28.

40. William G. Ross, *The Role of Judicial Issues in Presidential Campaigns*, 42 SANTA CLARA L. REV. 391, 456 (2002) (quoting Harvey Berkman & Claudia MacLachlan, *Don't Judge a Book . . . Clinton's Picks—Not So Liberal: More Judges Are Minorities, Women, but Ike'd Like Them*, NAT'L REV., Oct. 21, 1996, at A1); see also Stephan O. Kline, *The Topsy-Turvy World of Judicial Confirmations in the Era of Hatch and Lott*, 103 DICK. L. REV. 247, 258 (1999) ("If we give President Clinton the opportunity to make just one more appointment to the Supreme Court, we could end up with the most liberal court since the Warren Court of the sixties.") (quoting Sen. Robert Dole).

41. Jason Eric Sharp, *Constitutional Law—Separation of Powers—Restoring the Constitutional Formula to the Federal Judicial Appointment Process: Taking the Vice out of*

Ginsburg's liberal Democratic agenda.⁴² In a recent editorial, Edward Whelan argued that Ginsburg "can't separate judging from politics," and he concluded that her "decisionmaking routinely indulges and entrenches her own political preferences."⁴³ Whelan documented those "political preferences" in a 2005 editorial in which he decried as a "double standard" what he felt to be the lack of scrutiny applied by the Senate to then-Judge Ginsburg's Supreme Court nomination and to the demanding review given by the Senate to then-Judge John Roberts' nomination to become Chief Justice. Whelan fumed that the Senate had misplaced its efforts because Roberts "is by any measure far more 'mainstream' than Ginsburg," who was an "established extremist."⁴⁴

Empirical scholars reach similar conclusions about Justice Ginsburg, although their tone is less shrill. In their groundbreaking "attitudinal" examination of the decision-making behavior of the Court's justices, Jeffrey Segal and Harold Spaeth call Justice Ginsburg and Justice Stevens the Court's "two most liberal justices."⁴⁵ Lori Ringhand and the teams led by Richard Wilkins and Andrew Martin give the same characterization to Justice Ginsburg's record on the Court.⁴⁶

But, with respect to "Our Federalism,"⁴⁷ there is compelling evidence of President Clinton's and Justice Ginsburg's centrism. And centrism with respect to federalism

"*Advice and Consent*," 26 U. ARK. LITTLE ROCK L. REV. 747, 766 (2004) (quoting John Anthony Maltese, *Confirmation Gridlock: The Federal Judicial Appointments Process Under Bill Clinton and George W. Bush*, 5 J. APP. PRAC. & PROCESS 1, 15 (2003)).

42. See, e.g., Matthew J. Franck, *Bench Memos; Ideology and Balance*, NAT'L REV. ONLINE, Nov. 11, 2005, <http://search.nationalreview.com/> (search "Ideology and Balance" in section "Bench Memos" and author "Franck"); Ed Whelan, *Empirical Data*, NAT'L REV. ONLINE, June 21, 2007, <http://search.nationalreview.com/> (search "Empirical Data" in section "Bench Memos" and author "Whelan"); Ed Whelan, *Ginsburg's Voice*, NAT'L REV. ONLINE, May 31, 2007, <http://search.nationalreview.com/> (search "Ginsburg's Voice" in section "Bench Memos" and author "Whelan," using start and end date of "05/31/2007"); Ed Whelan, *More on Justice Ginsburg's Political Activism*, NAT'L REV. ONLINE, Oct. 25, 2007, <http://search.nationalreview.com/> (search "More on Justice Ginsburg's Political Activism" in section "Bench Memos" and author "Whelan," using state and end date of "10/25/2007").

43. Ed Whelan, *Justice Ginsburg's Political Activism*, NAT'L REV. ONLINE, May 30, 2007, <http://search.nationalreview.com/> (search "Justice Ginsburg's Political Activism" in section "Bench Memos" and author "Whelan," using start and end date of "05/30/2007").

44. Edward Whelan, *The Ginsburg Record and Standard*, NAT'L REV. ONLINE, July 26, 2005, <http://search.nationalreview.com/> (search "The Ginsburg Record and Standard" in section "NRO Articles" and author "Whelan," using start and end date of "07/26/2005").

45. JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 172 (2002).

46. See Andrew D. Martin, Kevin M. Quinn & Lee Epstein, *The Median Justice on the United States Supreme Court*, 83 N.C. L. REV. 1275 (2005); Lori A. Ringhand, *Judicial Activism: An Empirical Examination of Voting Behavior on the Rehnquist Natural Court*, 24 CONST. COMMENT. 43 (2007); Richard G. Wilkins, Scott Worthington, Peter J. Jenkins & Elisabeth Liljenquist, *Supreme Court Voting Behavior: 2006 Term*, 36 HASTINGS CONST. L.Q. 51 (2008).

47. *Younger v. Harris*, 401 U.S. 37, 44 (1971).

This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a

counts for something in an assessment of their ideological profile. After all, federalism has been called the “heart of American constitutionalism” and thus serves as a supremely useful bellwether of constitutional values.⁴⁸ Federalism is of particular significance in a study of President Clinton and Justice Ginsburg because their centrist approach staked a claim to sacred conservative territory regarding state autonomy while spurning the nationalist credo of the “Great Society” Democrats on the left.⁴⁹ The data confirms that Justice Ginsburg forcefully has defended a secure role for the states in our federal system,⁵⁰ occupying a position far removed from the Democrat’s long-standing preference for national authority in the state-federal balance. This is so, even though Justice Ginsburg has not simply adopted the customary Republican view that the states and the federal government are mutually exclusive dual sovereigns.⁵¹

continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as ‘Our Federalism’ The concept does not mean blind deference to “States’ Rights” any more than it means centralization of control over every important issue in our National Government and its courts. . . . What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Id.

48. H. Jefferson Powell, *The Principles of '98: An Essay in Historical Retrieval*, 80 VA. L. REV. 689, 690 (1994).

49. See Michael J. Klarman, *What’s So Great About Constitutionalism?*, 93 NW. U. L. REV. 145, 191 n.250 (1998) (“In the political context of the 1990s, . . . political liberals tend to support national power (probably because of the national government’s greater redistributive capacities), while conservatives praise federalism.”).

50. Wilkins et al., *supra* note 46, at 61, 82. This wrinkle in the superficial narrative that casually labels Ginsburg a “liberal justice” exposes the general difficulty of relying on empirical analyses to characterize justices’ jurisprudence. See Caprice L. Roberts, *In Search of Judicial Activism: Dangers in Quantifying the Qualitative*, 74 TENN. L. REV. 567 (2007); Ernest A. Young, *Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival After Gonzales v. Raich*, 2005 SUP. CT. REV. 1, 9–16 (2005) [hereinafter Young, *Just Blowing Smoke?*] (stating that classifying the Justices’ preferences and votes as “liberal” or “conservative” is problematic, since neither “liberal” nor “conservative” has a set definition); see also Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEX. L. REV. 1, 6 (2004) [hereinafter Young, *Two Federalisms*] (“[P]art of my point is that the most familiar labels are misleading. Many have referred to ‘conservative’ and ‘liberal’ factions, but attaching a strong political valence to federalism issues is problematic. . . . [O]ne of my primary arguments is that the putatively nationalist four [justices, including Justice Ginsburg,] do, in fact, have their own vision of state autonomy.”). But see David R. Dow, Cassandra Jeu & Anthony C. Coveny, *Judicial Activism on the Rehnquist Court: An Empirical Assessment*, 23 ST. JOHN’S J. LEGAL COMMENT. 35, 49–50 (2008).

51. Mark Tushnet recognized the Democratic Party’s established preference for national power and noted that, what he called the “modern” Republican Party, favored limited national power and greater state sovereignty: “The Republican majority in Congress after 1994 had views about national power more in line with the Court’s than with Great Society Democrats’ views.” MARK TUSHNET, *A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW* 277 (2005).

Justice Ginsburg's nuanced embrace of this traditionally conservative issue should not be a surprise.⁵² Her respect for state autonomy is a natural consequence of her well-documented judicial modesty.⁵³ Judicial restraint is especially important with regard to federalism because, as Robert Schapiro put it, much of the Court's federalism jurisprudence is "fundamentally a theory of judicial review, not a theory of federalism."⁵⁴ That is, federalism has practical significance in the Supreme Court's jurisprudence chiefly as a framework for determining the judiciary's role in answering questions about the scope and meaning of state autonomy and federal power. Two answers have emerged. On the one hand, process federalism largely rejects a role for the judiciary in enforcing a boundary between state and federal authority.⁵⁵ On the other hand, proponents of dual sovereignty call for vigorous judicial scrutiny of federal actions to ensure that state autonomy is not compromised.⁵⁶

In the following Part, I demonstrate the centrist character of President Clinton's and Justice Ginsburg's federalism. First, I show that President Clinton's pro-state federalism policies were a showpiece of his centrist, New Democratic presidency. Second, I argue that Justice Ginsburg has shown a marked commitment to state autonomy in the opinions she has authored or joined. I conclude with a more focused examination of the preemption doctrine. Justice Ginsburg has been particularly active in the preemption field,⁵⁷ and the Clinton administration had a noteworthy engagement

52. Wilkins's team regarded Ginsburg's pro-state federalism jurisprudence as "[i]nteresting[]" and "surprising." Wilkins et al., *supra* note 46, at 61, 82; cf. Daniel R. Gordon, *Revisiting Erie*, Guaranty Trust, and Gasperini: *The Role of Jewish History in Fashioning Modern American Federalism*, 26 U. SEATTLE L. REV. 213 (2002) (placing Ginsburg in the lineage of Justices Brandeis and Frankfurter as Jewish justices whose experience of Jewish historical social experience in Europe and America infused them with a sympathy for localism and mobility amongst a diverse set of autonomous governments). A more direct link might be made as a matter of academic lineage. Paul Freund served as Brandeis's law clerk and was teaching at Harvard Law School during Ginsburg's time there.

53. *See supra* note 37.

54. Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 279 (2005).

55. *See infra* text accompanying note 150.

56. Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992, 2012 (2003) ("In *United States v. Morrison*, where the principles underlying *Lopez* and *Boerne* converge, the Court is even more explicit about protecting federalism principles. In striking down the Violence Against Women Act (VAWA) as beyond both the commerce power and the enforcement powers conferred by the Fourteenth Amendment, the majority again insisted that vigorous judicial review is essential to the preservation of dual sovereignty." (citations omitted)).

57. *See Wyeth v. Levin*, 129 S. Ct. 1187 (2009) (Justice Ginsburg joined the majority, which held that federal labeling regulations did not preempt state law failure-to-warn claims against drug manufacturers); *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1013 (2008) (Ginsburg, J., dissenting) (Justice Ginsburg, as the sole dissenter, would have found that the federal FDA premarket approval scheme for medical equipment did not preempt state common-law tort claims); *Chamber of Commerce of the U.S. v. Brown*, 128 S. Ct. 2408, 2419 (2008) (Breyer, J., dissenting) (Justice Ginsburg joined Justice Breyer's conclusion that the federal National Labor Relations Act did not preempt state statutes governing distribution of union dues); *Mid-Con Freight Sys. v. Mich. Pub. Serv. Comm'n*, 545 U.S. 440, 440 (2005) (Justice Ginsburg joined the majority opinion holding that the federal Single State Registration System law did not

with the issue.⁵⁸ I argue that the preemption doctrine confirms their shared, centrist approach to federalism, a position bolstered by a prominent scholar's claim that, with respect to state autonomy, the preemption doctrine matters more than other federalism issues.⁵⁹

preempt a state statute requiring registration fees); *Bates v. Dow Agrosciences L.L.C.*, 544 U.S. 431, 431 (2005) (Justice Ginsburg joined the majority opinion, which held that the labeling requirement included in the federal Insecticide, Fungicide, and Rodenticide Act did not preempt state tort claims); *Nixon v. Mo. Mun. League*, 541 U.S. 125, 125 (2004) (Justice Ginsburg joined the majority, which held that the federal Telecommunications Act did not have preemptive effect on the activities of state-owned entities); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 430 (2003) (Ginsburg, J., dissenting) (Justice Ginsburg, writing for the four dissenters, would have found that federal foreign-affairs policies did not preempt the California Holocaust Victim Insurance Relief Act); *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 644 (2003) (Justice Ginsburg joined the majority opinion, which held that the federal Medicaid law did not preempt Maine's prescription drug plan); *Inyo County v. Paiute-Shoshone Indians*, 538 U.S. 701, 701 (2003) (Justice Ginsburg authored the majority opinion, which held that federal sovereign immunity provisions did not preempt state court summons served on Paiute-Shoshone Tribe); *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 424 (2002) (Justice Ginsburg authored the majority opinion holding that exceptions to federal interstate transportation laws apply to municipalities and that municipality's regulations are not preempted); *Rush Prudential HMO v. Moran*, 536 U.S. 355, 355 (2002) (Justice Ginsburg joined the majority opinion, which held that the federal Employee Retirement Income Security Act did not preempt Illinois law allowing insured persons to demand an independent review decision); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 861 (2000) (Justice Ginsburg joined the dissent, which would have held that the federal National Traffic and Motor Vehicle Safety Act did not preempt state common law tort claims.); *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 360 (2000) (Justice Ginsburg authored the dissenting opinion, which would have found that safety funds allocated pursuant to the federal Railroad Safety Act did not preempt state common law tort claims); *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358, 358 (1999) (Justice Ginsburg authored the majority opinion, which held that the federal Employee Retirement Income Security Act did not preempt state disability benefits claims); *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 199 (1996) (Justice Ginsburg authored the majority opinion, which held that a federal maritime wrongful death cause of action did not preempt state common law wrongful death claims).

58. See *infra* Part II.C.3; see also James T. O'Reilly, *Losing Deference in the FDA's Second Century: Judicial Review, Politics, and a Diminished Legacy of Expertise*, 93 CORNELL L. REV. 939, 953–54 (2007) (“The Bush Administration’s political selection of Daniel Troy as the FDA Chief Counsel was a controversial choice: Troy had once litigated for the drug and tobacco industries against the FDA and was appointed to replace Margaret Jane Porter, who disfavored federal preemption of tort cases.”); Catherine M. Sharkey, *What Riegel Portends For FDA Preemption of State Law Products Liability Claims*, 103 NW. U. L. REV. 437, 447–48 (2009) (“Twelve years before *Riegel*, under the Clinton administration, the FDA publicly endorsed an anti-preemption position vis-à-vis the MDA’s regulation of medical devices. Before the Court in *Lohr*, the [Clinton-era] FDA put forward a narrow view of its preemptive power, emphasizing the manufacturer’s ultimate responsibility for its design of medical devices. And the year following *Lohr*, in an amicus brief urging the Court to grant certiorari in another medical devices case (where the catheter device at issue had gone through the full PMA process), the [Clinton-era] FDA took the position that the MDA’s preemption provision is *not* preemptive.” (emphasis in original)).

59. If the Court’s current majority won’t stick up for the states, then who will? The answer—and it is, alas, only a partial answer—might be surprising. The Court’s

II. CLINTON'S AND GINSBURG'S CENTRIST FEDERALISM

A. President Clinton's Federalism

1. Introduction

President Clinton's New Democratic centrism sought to capture a number of policy positions that had long been the province of the right, while retaining the traditional Democratic advantage over other issues.⁶⁰ As Bruce Jansson put it, President Clinton was "[c]apable of going in liberal or conservative directions, [he] was also adept at splitting the difference."⁶¹ A shift to the center on federalism was a part of this maneuver.⁶² At the end of his first year in office, President Clinton addressed the Advisory Commission on Intergovernmental Relations, a body he reinvigorated in one

nationalist minority [including Justice Ginsburg] . . . has been quietly developing its own theory of federalism. That theory, I will argue, is strongest precisely where the majority's theory is weak—that is, in its protection for state regulatory prerogatives in preemption cases. . . . [This approach] has the potential to do a great deal of good in terms of protecting regulatory authority.

Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1380–81 (2001).

60. See BRUCE S. JANSSON, *THE SIXTEEN-TRILLION-DOLLAR MISTAKE* 296–97 (2001). "Why not, Clinton asked, make major changes in Democrats' ideology under the rubric of 'New Democrats'?" (citation omitted). *Id.* at 296. These changes would emphasize the economic needs of the middle class, emphasize a narrow range of economic reform, favor balanced budgets, and emphasize "the obligations of citizens to work, raise families, and obey laws." *Id.* at 296–97.

61. *Id.* at 296.

62. New Democratic policy statements have rarely engaged judicial and constitutional matters like federalism as interests unto themselves. If they are given attention at all it is when they are caught up in policy matters of wider appeal, like welfare and education reform. In his survey of the New Democratic movement, for example, Kenneth Baer makes only two brief references to the Supreme Court and no references to judicial activism or federalism. KENNETH S. BAER, *REINVENTING DEMOCRATS: THE POLITICS OF LIBERALISM FROM REAGAN TO CLINTON* (2000). Similarly, in his autobiography, President Clinton also fails to directly address issues like judicial activism and federalism, although he characterizes the Supreme Court's intervention in the 2000 Presidential Election recount as an "act of judicial activism that might have made even Bob Bork blush." CLINTON, *supra* note 13, at 337. His discussion of his nominations of Justices Ginsburg and Breyer merit a total of three pages with no treatment of their constitutional philosophy. *See id.* at 524–25, 592.

Political scientists and legal scholars have given President Clinton mixed scores on his federalism record. *See* James E. Kunde & Carl W. Stenberg, *How Will the Clinton Era Affect State and Local Government? Some Early Views*, 25 ST. & LOC. GOV'T REV. 207 (1993); Timothy Lynch, *Dereliction of Duty: The Constitutional Record of President Clinton*, 27 CAP. U. L. REV. 783 (1999); Michael A. Pagano & Ann O'M. Bowman, *The State of American Federalism, 1994-1995*, PUBLIUS: J. FEDERALISM, Summer 1995, at 1; David B. Walker, *The Advent of an Ambiguous Federalism and the Emergence of New Federalism III*, 56 PUB. ADMIN. REV. 271 (1996); Carol S. Weissert & Sanford F. Schram, *The State of American Federalism, 1997-1998*, PUBLIUS: J. FEDERALISM, Winter 1998, at 1; Carol S. Weissert & Sanford F. Schram, *The State of American Federalism, 1995-1996*, PUBLIUS: J. FEDERALISM, Summer 1996, at 1; Jennie H. Blake, Note, *Presidential Power Grab or Pure State Might? A Modern Debate Over Executive Interpretations on Federalism*, 2000 BYU L. REV. 293 (2000).

of the first acts of his presidency,⁶³ and asserted: “Because I served a dozen years as Governor, and worked on these federalism issues from another perspective, . . . I’m very serious about these issues, and . . . I want to pursue them vigorously, thoroughly, consistently and with the appropriate level of visibility.”⁶⁴

This was more than spin. Devolution was a focus of the DLC’s program, which regarded federalism and local autonomy as essential to freeing, engaging, and animating American society for the dynamic environment of the twenty-first century’s globalized, technologically infused market.⁶⁵ In his keynote address at the DLC’s 1991 Cleveland Convention, the event that launched his Presidential campaign,⁶⁶ then-Governor Clinton underscored the necessity of “pushing decisions down to the lowest possible level, empowering people, [and] increasing accountability.”⁶⁷ *The New American Choice Resolution*, adopted at the Cleveland Convention, reiterated the theme of devolving centralized federal authority to the states:

The new choice we offer is a new public philosophy, not a new set of programs. It is built on a set of common beliefs and broad national purposes, not on promises to disparate interest groups. *It looks for leadership not from Washington but from States and communities that have become America’s laboratories of innovation.*⁶⁸

The Cleveland Resolution explicitly staked a claim for enhancing the role and authority of the states—paraphrasing Justice Brandeis’s “laboratories of democracy”⁶⁹

63. The successor entity to the Kestnbaum Commission, President Eisenhower’s Commission on Intergovernmental Relations, was the Advisory Commission on Intergovernmental Relations (ACIR), which was created by Congress in 1959. An Act to Establish a Commission on Intergovernmental Relations, Pub. L. No. 86–380, 73 Stat. 703, 703–06 (1959) (repealed 1996). The ACIR was eliminated by the 104th Congress in 1996, An Act to Provide for the Advisory Commission on Intergovernmental Relations to Continue in Existence, and for Other purposes, Pub. L. No. 104–328, 110 Stat. 4004 (1996), somewhat in conflict with the federalist priorities of the Republican majority. *See* Richard P. Nathan, Thomas L. Gais & James W. Fosset, *Bush Federalism: Is There One, What Is It, and How Does It Differ?*, http://www.rockinst.org/pdf/federalism/2003-11-07-bush_federalism_is_there_one_what_is_it_and_how_does_it_differ.pdf.

64. Remarks to the Advisory Commission on Intergovernmental Relations, 2 PUB. PAPERS 2084, 2085 (Dec. 1, 1993).

65. Clinton was cofounder of DLC and assumed the group’s chairmanship in 1991. CLINTON, *supra* note 13, at 357; JANSSON, *supra* note 60, at 296–97.

66. *See* CLINTON, *supra* note 13, at 366–67 (“That speech was one of the most effective and important I ever made. It captured the essence of what I had learned in seventeen years in politics and what millions of Americans were thinking. It became the blueprint for my campaign message, . . . [a]nd by the rousing reception it received, the speech established me as perhaps the leading spokesman for the course I passionately believed America should embrace. Several people at the convention urged me to run for President, and I left Cleveland convinced that I had a good chance to capture the Democratic nomination if I did run, and that I had to consider entering the race.”).

67. Clinton, *supra* note 15.

68. Democratic Leadership Council, *The New American Choice Resolution* (May 1, 1991), http://www.dlc.org/documents/cleveland_proclamation.pdf (emphasis added).

69. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). In a fascinating article, Daniel Gordon links Justice Ginsburg with two Jewish predecessors on the

justification for state autonomy, an image that would prove a favorite of the President's when he spoke on the issue of federalism.⁷⁰ The public philosophy of the New Democrats, the Resolution declared, "looks for leadership not from Washington but from States and communities."⁷¹ Thus, early in the run up to his presidential campaign, Clinton wed himself to a New Democratic philosophy sympathetic to state authority. This philosophy waged open war with the Democratic Party's historical preference for the centralization of power born in F.D.R.'s New Deal, entrenched during the Civil Rights struggle championed by Presidents Kennedy and Johnson, and brought to its fullest scope in President Johnson's "Great Society" agenda.⁷² This shift represented the New Democrats' and Bill Clinton's clearest break from the thinking of the liberal faction of the Democratic Party. The New Democrats believed that the federal government should not be the primary focus for reform efforts. Instead, they argued that answers to society's problems and the provision of social goods should be sought first in the private sector, then among local and state governments, and at the federal level only as a last resort.⁷³

It must be noted, however, that this rightward realignment of the Democratic Party's relationship to state autonomy is nothing so radical as the federalism dogma of the prevailing conservative faith, which, in its extreme form, advocates a return to the system of dual sovereignty and limited federal authority that characterized early American federalism.⁷⁴ Instead, President Clinton's federalism sought a centrist realignment of the Democratic Party on the issue, while remaining firmly rooted in the well-established system of American "cooperative federalism"—the "reality of shared [state and federal] financing and administrative responsibilities that emerged during and after the New Deal in contrast to the theory of 'dual federalism' that prevailed

Court, Justices Frankfurter and Brandeis, as possessed of a distinct passion for American federalism rooted in their unique experiences with and exposure to "Jewish localism." Gordon, *supra* note 52, at 221–26, 232–40.

70. See, e.g., Remarks by the President to the National Governor's Association Conference, 1 PUB. PAPERS 154 (Feb. 1, 1994). "I do believe the States are the laboratories of democracy." *Id.* at 155. In this example, President Clinton used Justice Brandeis' "laboratories of democracy." *Liebmann*, 285 U.S. at 311 (Brandeis, J., dissenting).

71. Democratic Leadership Council, *supra* note 68.

72. See *supra* note 51.

73. BAER, *supra* note 62, at 264–65. Elsewhere, Baer describes this antifederal mandate in these terms: "[B]y stressing the need to reinvent government, the DLC stepped up its attack on the federal bureaucracy and on the theory of governance implicit in the liberal public philosophy, which called for the federal government to be the primary agent of change." *Id.* at 179.

74. See *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 751 (2002) ("Dual sovereignty is a defining feature of our Nation's constitutional blueprint."); *Printz v. United States*, 521 U.S. 898, 935 (1997) ("Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. . . . [S]uch commands are fundamentally incompatible with our constitutional system of *dual sovereignty*." (emphasis added)); see also Roger Pilon, *Federalism & Separation of Powers: Dragooning State Officials into Federal Service*, FEDERALISM & SEPARATION POWERS PRAC. GROUP NEWSL. (The Federalist Soc'y for Law & Pub. Policy), Dec. 1, 1996, available at http://www.fed-soc.org/publications/pubid.1584/pub_detail.asp (crediting the "premise of the Constitution and the theory and history of dual sovereignty").

before the 1930s.”⁷⁵ Thus, in his speeches and remarks, President Clinton repeatedly referred to the ideal intergovernmental dynamic as a “partnership.”⁷⁶

Having won the White House, President Clinton pursued New Democratic federalism, “a reinvigorated federal-state-local partnership,”⁷⁷ along three distinct lines: reinventing the federal government; reforming federal grant programs, including their attending intergovernmental implications; and a stumbling, perhaps even inconsistent engagement with the preemption doctrine.⁷⁸ The first and second of these approaches were outlined in a detailed position paper written by Clinton administration domestic-policy advisers William Galston and Geoffrey Tibbetts and published in *Publius: The Journal of Federalism* in the summer of 1994.⁷⁹ Here, I survey President

75. This term [cooperative federalism] envisions a balance between federal leadership and state autonomy. . . . The principles of cooperative federalism have been broadly applied by both the Reagan and [George H.W.] Bush administrations under Executive Order 12612, adopted October 26, 1987, and reconfirmed on February 16, 1990. Under this Executive Order, federal agencies are to accord states maximum discretion in implementing national programs administered by the states. [National programs that intend to rely on cooperative federalism often reflect] congressional intent that ‘the primary governmental responsibility for developing, authorizing, issuing and enforcing regulations for surface [pursuant to the Surface Mining] Act should rest with the states.

Denise A. Dragoo, *West of the 100th Meridian: Implementation of the Surface Mining and Reclamation Act in the Western States*, in *MOVING THE EARTH: COOPERATIVE FEDERALISM AND IMPLEMENTATION OF THE SURFACE MINING ACT* 167, 169 (Uday Desai ed., 1993) (quoting 30 U.S.C. § 1201(f) (1988)) (citations omitted) (emphasis in original); see ARTHUR GUNLICKS, *THE LÄNDER AND GERMAN FEDERALISM* 61 (2003).

Cooperative federalism was championed most enthusiastically during Lyndon Johnson’s Great Society programs in the 1960s, and it continued to grow even under the more cautious Richard Nixon, whose “new federalism” tried to remove to some extent the federal bureaucracy from its heavy involvement in state and local governments through such innovations as revenue sharing. A reaction set in with Ronald Regan, whose ‘new federalism’ was more like the old dual federalism in that he sought to “sort out” the responsibilities of the different levels and, in the process, return a number of important functions to the states. Since this was to include the financing of these activities, the support of many governors and interest groups was not very strong, and in the end little actual “sorting out” occurred.

GUNLICKS, *supra* at 386.

76. Remarks to the National Governors Association, 1 PUB. PAPERS 112 (Jan. 30, 1995). “The second thing I’d like to talk about is, very briefly, is [sic] the commitment that I made 2 years ago to have a better, stronger partnership with the States . . .” *Id.* at 113.

77. Galston & Tibbetts, *supra* note 13, at 24.

78. In his remarks to the National Governors Association in 1995, highlighting the administration’s early success with respect to devolution, President Clinton identified the first two of these approaches to the federalism issue: “[W]e have worked not simply to reduce the size of the Federal Government . . . but also to try to move more responsibility to the States.” Remarks to the National Governors Association, *supra* note 76, at 113. As examples of the latter, President Clinton cited health-care and welfare reform as well as the unfunded mandates legislation. *Id.*

79. Galston & Tibbetts, *supra* note 13; see also REBECCA M. BLANK, *IT TAKES A NATION: A*

Clinton's "reinventing" and "reform" initiatives with special consideration given to their federalism implications. I examine President Clinton's preemption-doctrine policy alongside Justice Ginsburg's preemption-doctrine jurisprudence in the concluding subpart of this Part of the Article.⁸⁰

2. Reinventing

In the first instance, President Clinton's centrist federalism took the form of an aggressive effort to reduce the size, limit the unnecessary reach, and improve the quality of service of the federal government under the banner of Vice President Al Gore's National Partnership for Reinventing Government (NPRG).⁸¹ President Clinton explained that the administration's objective for the NPRG was to "make the entire Federal Government both less expensive and more efficient, and to change the culture of our national bureaucracy away from complacency and entitlement toward initiative and empowerment."⁸² This was more than just an effort at "Creating a Government that Works Better and Costs Less."⁸³ Galston and Tibbetts described the project as "a workable and realistic philosophy of federalism that can empower federal, state, and local governments and enhance the partnership in intergovernmental service delivery."⁸⁴

At the close of the second Clinton-Gore term, the National Partnership trumpeted its major accomplishments, including reduction in the size of the federal civilian workforce by 426,200 positions between 1993 and 2000,⁸⁵ reduction in the size of thirteen of the fourteen national administrative departments,⁸⁶ elimination of 640,000

NEW AGENDA FOR FIGHTING POVERTY 229-30 (1997) ("[T]he current dissatisfaction with federally run programs and the movement to greater state control make nationally focused programs less likely to get on the political agenda. . . . Since the early 1980s, there have been a series of initiatives aimed at reducing the size of federal government (President Clinton's 'reinventing government' initiative is the latest) and at simplifying or reducing federal regulations on private industry and on state and local governments. The move to reduce federal control over public assistance programs is of a piece with these efforts." (emphasis in original)).

80. See *infra* Part II.C.3.

81. In his autobiography President Clinton repeatedly credits Vice President Gore with the responsibility for the administration's Reinventing Government initiative and its significant successes. CLINTON, *supra* note 13, at 513, 614, 647, 694.

82. Remarks Announcing the National Performance Review, 1 PUB. PAPERS 233, 233 (Mar. 3 1993); see also Galston & Tibbetts, *supra* note 13, at 25 ("On 3 March 1993 president Clinton announced his 'Reinventing Government initiative' and charged Vice President Gore to move it forward. The president stated the administration's objective: 'Our goal is to make the entire Federal government both less expensive and more efficient, and to change the culture of our national bureaucracy away from complacency and entitlement toward initiative and empowerment.'" (quoting Remarks Announcing the Initiative to Streamline Government, 29 WEEKLY COMP. PRES. DOC. 350 (Mar. 3 1993))).

83. AL GORE, CREATING A GOVERNMENT THAT WORKS BETTER AND COSTS LESS (1994). The title of Vice President Gore's first report is tediously descriptive.

84. Galston & Tibbetts, *supra* note 13, at 25-26.

85. John Kamensky, History of the National Partnership for Reinventing Government: Accomplishments 1993-2000: A Summary (Jan. 12, 2001), <http://govinfo.library.unt.edu/npr/whoware/appendixf.html>.

86. *Id.*

pages of internal agency rules,⁸⁷ and the doubling of Americans' trust in the federal government.⁸⁸ The benefits accruing to the states from the resulting improvements in the functioning of the federal government were not insignificant,⁸⁹ especially when linked to specific intergovernmental collaborative projects.⁹⁰ But the gains for the states were collateral, amounting to a pruning of the federal partner in the state-federal cooperative scheme and presenting the states with an opportunity to flex their authority by filling in the gaps. In the end, federal efficiency and efficacy was the focus of the enterprise, not the emboldening of the states.

In his 1996 State of the Union address, President Clinton acknowledged this incidental, federalism-value-added aspect of the reinvention project. The last of seven challenges identified by the President in that speech was the acknowledgement that "the era of big government is over."⁹¹ The administration's embrace of this challenge had the related effect, the President noted, of shifting "more decisionmaking out of Washington, back to the States and local communities."⁹²

3. Reforming

The integrity and autonomy of the states were squarely at issue in President Clinton's welfare and unfunded mandate reforms.⁹³ Certainly, elements of these initiatives were linked to broader New Democratic aims that had no particular concern for federalism interests. But the states were so intimately entangled in the administration of the implicated federal programs that any real reform would impact them directly. President Clinton embraced the potential for bolstering the states' responsibility and authority in his welfare and unfunded mandates reform initiatives by seeking to release states from the heavy hand of the federal government in the state-federal cooperative scheme while at the same time learning from and drawing upon state-based innovations resulting from this loosening in the formulation of federal targets.

a. Welfare Reform

Entitlement reform was a fundamental tenet of President Clinton's New Democratic agenda and featured prominently in his 1992 campaign, during which he promised to

87. *Id.*

88. *Id.*

89. DONALD F. KETTL, ELAIN KAMARCK, STEVEN KELMEN & JOHN C. DONAHUE, PAPER 3-98, *ASSESSING REINVENTION AS A MAJOR REFORM: A CONVERSATION* (1998), available at <http://ashinstitute.harvard.edu/ash/kettl.pdf>; see also Kamensky, *supra* note 85.

90. *See id.* ("In 1993, NPR recommended changes to how the federal government works with states and communities to streamline the bureaucracy and increase the focus on results and services to citizens. NPR was the catalyst for a number of initiatives that brought federal agencies together with states and communities to focus on and share accountability for results and to create more seamless service delivery.").

91. Address Before a Joint Session of the Congress on the State of the Union, 1 PUB. PAPERS 79, 79 (Jan. 23, 1996).

92. *Id.* at 85.

93. *See infra* Parts II.A.3.a, II.A.3.b.

“end welfare as we know it.”⁹⁴ President Clinton saw welfare reform as a “way out of being branded [a] welfare liberal.”⁹⁵ State autonomy was both the essential driver and aim of this maneuver. Many states had freed themselves from the welfare regime’s federal shackles with the help of waivers and block grants introduced during the Reagan administration and expanded during the first years of the Clinton administration.⁹⁶ The states’ experiments with entitlement programs increased the pressure on the federal government to undertake reform and, where successful, the state policies became the models for the federal reform that ultimately was adopted.⁹⁷ The states played a significant role in the negotiations for and enactment of the federal reform. Not surprisingly, the reform seemed to complete the circle by offering the states expanded autonomy over the social policy areas implicated by entitlements.

Fulfilling his campaign promise, President Clinton signed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996⁹⁸ (“Act”) on August 22, 1996.⁹⁹ At the signing, President Clinton said “[t]oday we have a historic responsibility to make welfare what it was meant to be—a second chance, not a way of life.”¹⁰⁰ The Act worked a complete restructuring of the American welfare system, including the underlying philosophy. In regard to the latter, the reform abandoned the notion of “entitlement” and replaced it with the idea that welfare would be a form of “cash assistance for individuals . . . conditioned on meeting work (or job-seeking) requirements and adhering to personal responsibility codes or contracts.”¹⁰¹ The goal was to end cycles of poverty and dependence;¹⁰² to achieve this goal the Act authorized the federal government to establish and insist upon the fulfillment of the mandate that

94. Richard L. Berke, *The Ad Campaign; Clinton: Getting People Off Welfare*, N.Y. TIMES, Sept. 10, 1992, at A20; see also GARY C. BRYNER, POLITICS AND PUBLIC MORALITY: THE GREAT AMERICAN WELFARE REFORM DEBATE 77–78 (1998); JOEL F. HANDLER, THE POVERTY OF WELFARE REFORM 1 (1995); BRENDON O’CONNOR, A POLITICAL HISTORY OF THE AMERICAN WELFARE SYSTEM: WHEN IDEAS HAVE CONSEQUENCES 4 (2004).

95. O’CONNOR, *supra* note 94, at 7.

96. See generally *id.* at 92.

97. See generally *id.* at 93–95, 101.

98. Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended in scattered sections of 14 U.S.C.).

99. *Id.*; see also Peter Edelman, *The Worst Thing Bill Clinton Has Done*, ATLANTIC MONTHLY, Mar. 1997, at 43.

100. Elizabeth Shogren, *Clinton Accepts Broad Welfare Changes as “Last Best Chance,”* L.A. TIMES, Aug. 1, 1996, at A1; see also John F. Harris & John E. Yang, *Clinton to Sign Bill Overhauling Welfare*, WASH. POST, Aug. 1, 1996, at A1.

101. Jon Michaels, *Deforming Welfare: How the Dominant Narratives of Devolution and Privatization Subverted Federal Welfare Reform*, 34 SETON HALL L. REV. 573, 592 (2004).

102. See John P. Collins Jr., *Development in Policy: Welfare Reform*, 16 YALE L. & POL’Y REV. 221, 221 (1997); Nichola L. Marshall, *The Welfare Reform Act of 1996: Political Compromise or Panacea for Welfare Dependency?*, 4 GEO. J. FIGHTING POVERTY 333, 333–35, 339–41 (1997). *But see* Michaels, *supra* note 101, at 592–93 (“[The Act] was a declaratory manifesto describing both Congress’s abdication of its commitment to welfare as an entitlement and its refusal to subsidize the nonworking (undeserving) poor. Its intentions and goals were quite clear: replace AFDC [Aid to Families with Dependent Children] with a temporary, time-limited assistance program . . . and insist those receiving transitional benefits begin the process of finding work.” (citations omitted)).

welfare foster work rather than dependence, that it be tied to necessary education and transportation reform to make the transition to work possible, and that ending entitlements not compromise the health and well-being of needy children.

Federalism was more significantly impacted by the Act's structural reform, which devolved responsibility for administering welfare, "turning what used to be a federal, centralized system over to the states."¹⁰³ The federal government would fund the broad mandates of the new philosophy through state-specific block grants and leave the details to the states and localities in order to ensure a "maximum flexibility"¹⁰⁴ in meeting the federal targets. Particularly with respect to the Act's Temporary Assistance to Needy Families (TANF) provisions,¹⁰⁵ the common view is that the states acquired a significant degree of autonomy. Welfare became a "nationwide patchwork of block grant programs to be administered with nearly complete state discretion and little federal oversight."¹⁰⁶ Representatives and agents of state authority clamored after the reform. The Democratic Governors Association praised President Clinton for signing the Act, noting especially that it would increase state power.¹⁰⁷ The National Governors Association was instrumental in the Act's passage.¹⁰⁸ The National Conference of State Legislatures endorsed the Act and, in a letter included in the Congressional Record, declared itself particularly pleased with the administrative flexibility the reform bestowed on the states to manage the welfare system.¹⁰⁹ Representative Lee Hamilton remarked that the Act

turns upside down the relationship between Washington and the states on welfare Under this bill, the federal and state governments will continue to share the cost but each state will manage its own program and be responsible for coming up with extra money if the federal money is not enough. Much responsibility now rests with the states.¹¹⁰

Nina Mendelson noted that, upon signing the Act, President Clinton claimed that the effort had largely been in response to demands from governors.¹¹¹ "The governors," Mr. Clinton noted, "asked for this responsibility. Now they've got to live up to it."¹¹²

103. Dan Froomkin, *Welfare's Changing Face*, WASH. POST.COM, July 23, 1998, <http://www.washingtonpost.com/wp-srv/politics/special/welfare/welfare.htm>.

104. Remarks to the National Governors Association, *supra* note 76; *see also* Gary Bryner & Ryan Martin, *Innovation in Welfare Policy: Evaluating State Efforts to Encourage Work Among Low-Income Families*, 22 REV. POL'Y RES. 3325 (2005).

105. 42 U.S.C. §§ 601(a)(1)–(4) (2006).

106. Collins, *supra* note 102, at 241; *see also* Maureen Berner, *Welfare Reform: Testing the Ability of the Block Grant Formula to Meet States' Need*, SPECTRUM, Fall 1996, at 38, 38.

107. Harris & Yang, *supra* note 100.

108. MARY REINTSMA, *THE POLITICAL ECONOMY OF WELFARE REFORM IN THE UNITED STATES* 76 (2007).

109. 142 CONG. REC. 20,730 (1996) (statement of Rep. McCarthy).

110. 142 CONG. REC. 22,782–83 (1996) (statement of Rep. Hamilton).

111. Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 771 (2004).

112. Francis X. Clines, *Clinton Signs Bill Cutting Welfare; States in New Role*, N.Y. TIMES, Aug. 23, 1996, at A1.

But President Clinton coveted welfare reform no less than the states. Particularly in its devolutionary facets, the Act fed his centrist, pro-state federalism ambitions.¹¹³ Robert Cherry commented that President Clinton's centrist approach to welfare "rejected conservative views that there is no need for government to financially support [the needy] . . . and no need to be concerned with their standard of living. It also rejected traditional liberal views that welfare must remain an entitlement . . ." ¹¹⁴ In this sense, welfare reform was a piece of President Clinton's New Democratic agenda, representing a third way between the entrenched positions of liberals and conservatives. Ultimately, welfare reform, with its attendant expansion of state autonomy, featured prominently in the New Democrats' centrist self-image. "You know, Bill Clinton saved the Democratic Party," Paul Begala declared on *Crossfire*, "by pulling us back to the center, by disagreeing with the liberals on welfare reform."¹¹⁵

b. Federal Unfunded Mandates Reform

Of even greater concern to the states at the beginning of the Clinton administration, however, was the burdensome practice of "unfunded federal mandates."¹¹⁶ Unfunded mandates involve requirements imposed by Congress on state or local governments without the accompanying funding to cover the costs of the required actions or programs.¹¹⁷ While the outrage over unfunded mandates had its basis, at least partially, in budgetary concerns or disapproval of the substance of the federal policy, the

113. Franklin Foer, *Essay; The Joy of Federalism*, N.Y. TIMES, Mar. 6, 2005, at F12 ("Federalism suited [Clinton's] declared ambition to move beyond the era of 'big government.' . . . The welfare reform package he ushered into law [in 1996] gave states enormous latitude in remaking social policy."). These ambitions dated back to his tenure as Arkansas' governor, during which he "led governors' efforts to reform welfare." BRYNER, *supra* note 94, at 77.

114. ROBERT CHERRY, WELFARE TRANSFORMED: UNIVERSALIZING FAMILY POLICIES THAT WORK 19–20 (2007).

115. JOEL BLAU, THE DYNAMICS OF SOCIAL WELFARE POLICY 118 (2d ed. 2007).

116. U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, FEDERALLY INDUCED COSTS AFFECTING STATE AND LOCAL GOVERNMENTS, at iii (1993) ("In 1993, the term 'unfunded federal mandates' became the rallying cry for one of the most contentious intergovernmental issues in recent times.").

117. Markam B. Jaber explained:

The recently enacted "Unfunded Mandate Reform Act of 1995" . . . adopts (albeit for a limited purpose) a definition broader than the two definitions discussed above. . . . "[T]he term 'Federal mandate' means any provision in a statute or regulation of any Federal court ruling that imposes an enforceable duty upon State, local, or tribal governments including a condition of Federal assistance or duty arising from participation in a voluntary Federal program." Read liberally, this definition considers as an "unfunded federal mandate" any federal statute or regulation that results in any duties imposed on state or local governments, even if the state takes on such duties voluntarily, so long as the resulting costs to these governments are not directly and fully funded by the federal government.

Markam B. Jaber, Comment, *Unfunded Federal Mandates: An Issue of Federalism or a "Brilliant Sound Bite"?*, 45 EMORY L.J. 281, 287–88 (1996) (quoting 2 U.S.C. § 1555) (citations omitted).

underlying concern was federalism and state autonomy.¹¹⁸ The critics argued that unfunded federal mandates require states to “divert a portion of their resources . . . [and] displace local preferences.”¹¹⁹ The critics also argued that unfunded federal mandates blurred the lines of political accountability built into the federal structure by allowing “Congress to reap the political benefit of passing popular legislation, while state and local officials are held accountable for raising taxes—or cutting spending in another area—to pay for implementing or complying with the legislation.”¹²⁰ A final, more generalized, federalism critique argued that unfunded federal mandates represented another form of general, federal aggrandizement at the expense of the states and their often more effective or creative policies.¹²¹ Rena Steinzor summarized the objections in these terms: “In essence, state and local governments argue that they should not be compelled to carry out, much less pay for, any more bright ideas that originate at the federal level.”¹²²

The Clinton administration moved quickly to meet the states’ concerns on unfunded mandates.¹²³ In October 1993, President Clinton issued Executive Order 12,875—*Enhancing the Intergovernmental Partnership*—which recognized that “the cumulative effect of unfunded Federal mandates has increasingly strained the budgets of State, local, and tribal governments.”¹²⁴ The Executive Order concluded that “[t]hese governments should have more flexibility to design solutions to the problems faced by citizens in this country without excessive micromanagement and unnecessary regulation from the Federal Government.”¹²⁵ President Clinton responded to these concerns, ordering a “[r]eduction [in] [u]nfunded [m]andates” by: (1) prohibiting agency promulgation of unnecessary (not statutorily required) regulations that create an unfunded mandate,¹²⁶ and (2) requiring agencies to receive intergovernmental input in the development of “regulatory proposals containing significant unfunded mandates.”¹²⁷

President Clinton followed through on the promise of Executive Order 12,875 by closely consulting with the bipartisan Congressional sponsors of legislation that sought to extend his Executive Order’s agency limitations on unfunded mandates to Congress.¹²⁸ When the negotiations on the bill met with fierce opposition from Congressional Democrats,¹²⁹ President Clinton publicly endorsed the law in an effort to

118. *Id.* at 296.

119. *Id.*

120. *Id.* at 297.

121. *Id.*

122. Rena Steinzor, *Unfunded Environmental Mandates and the “New (New) Federalism”*: *Devolution, Revolution, or Reform?*, 81 MINN. L. REV. 97, 112 (1996).

123. The Republicans responded by making federalism a centerpiece of their 1994 “Contract with America.” See CONTRACT WITH AMERICA: THE BOLD PLAN BY REP. NEWT GINGRICH, REP. DICK ARMEY, AND THE HOUSE REPUBLICANS TO CHANGE THE NATION 125 (Ed Gillespie & Bob Schellhas eds., 1994).

124. Exec. Order No. 12,875, 3 C.F.R. 669, 669–71 (1994).

125. *Id.* at 670.

126. *Id.*

127. *Id.*

128. Statement on Unfunded Federal Mandates Reform Legislation, 2 PUB. PAPERS 1696 (Oct. 4, 1994).

129. David S. Broder, *Those Unfunded Mandates*, WASH. POST, Mar. 17, 2005, at A25

dislodge the logjam.¹³⁰ The Unfunded Mandates Reform Act (UMRA)¹³¹ aimed, *inter alia*, at strengthening the “partnership between the Federal Government and State, local, and tribal governments,”¹³² and at bringing to an “end the imposition, in the absence of full consideration by Congress, of Federal mandates on State, local, and tribal governments without adequate Federal funding, in a manner that may displace other essential State, local, and tribal governmental priorities.”¹³³ At the signing ceremony for the UMRA, President Clinton underscored his strong support for the law and clearly articulated the centrist, New Democratic vision of federalism he hoped it would advance:

Now, this unfunded mandates law will be another model for how we have to continue to change the way Washington does business. The best ideas and the most important work that affect the public interest are often done a long way away from Washington. This bill is another acknowledgment that Washington doesn't necessarily have all the answers, that we have to continue to push decision making down to the local level, and we shouldn't make the work of governing at the local level any harder than the circumstances of the time already ensure that it will be.

....

You know, our Founders gave us strong, guiding principles about how our governments ought to work, and they trusted us in every generation to reinvigorate the partnership they created with such wisdom so long ago. For 200 years, we've had to do that over and over and over, and about once a generation, we had to make some really big changes in the way we work together as a people, citizens in their private lives, local governments, State governments, and our Government here in Washington.

Today, we are making history. We are working to find the right balance for the 21st century. We are recognizing that the pendulum had swung too far and that we have to rely on the initiative, the creativity, the determination, and the decisionmaking of people at the State and local level to carry much of the load for America as we move into the 21st century.¹³⁴

(“Democrats, whose 40-year grip on the House of Representatives had just been shattered by the Republican revolution of 1994, were overwhelmingly opposed.”).

130. See Statement on Unfunded Federal Mandates Reform Legislation, *supra* note 128, at 1696.

131. Pub. L. No. 104-4, 109 Stat. 48 (1995) (codified in scattered sections of 2 U.S.C.).

132. 2 U.S.C. § 1501(1) (2006).

133. 2 U.S.C. § 1501(2) (2006).

134. Remarks by the President at Signing Ceremony for the Unfunded Mandate Reform Act of 1995, 1 PUB. PAPERS 381, 382 (Mar. 22, 1995). The Congressional Budget Office concluded that the number of bills containing mandates covered by the UMRA decreased by more than one third between 1996 and 2002. PIETRO NIVOLA, FISCAL MILESTONES ON THE CITIES: REVISITING THE PROBLEM OF FEDERAL MANDATES 2 (2003). Despite the UMRA, states continue to bear a considerable burden for federal policy initiatives. See *States Get Stuck with \$29 Billion Bill: Federal Unfunded Mandate Gap to Reach \$34 Billion in FY 2005*, NAT'L CONF. ST. LEGISLATURES NEWS, Mar. 10, 2005, <http://ecom.ncsl.org/programs/press/2004/pr040310.htm>.

4. Conclusion

Throughout his eight years in the White House, President Clinton sought to strengthen the position of the states, especially in their relationship with the federal government. First, he reduced the federal government's footprint. This had the residual effect of giving the states the opportunity to fill the power vacuum left by the reductionist "reinvention" of the federal government. Second, some of President Clinton's reforms depended on actualizing and expanding the states' governing autonomy. But the newly liberated states were not to be abandoned to their own devices. President Clinton saw them acting as intersubjective partners in cooperation with the federal government. This role, however, would be performed through the medium of national politics. These elements—respect for states' governing autonomy and the exercise of that autonomy as intersubjective actors in the national political process—emerge as central to Justice Ginsburg's federalism jurisprudence as well.

B. Justice Ginsburg's Federalism

1. Introduction

Congruent with the pro-state tenor of President Clinton's federalism, Justice Ginsburg has vigorously defended a secure role for the states in our federalist structure. In ways that echo President Clinton's centrist federalism, Justice Ginsburg's opinions and the opinions she joins reveal her to be a centrist on federalism.¹³⁵ She offers an affirmative vision of the states as institutions, rather than choosing to define them only as an implied foil derived from the limits on federal sovereignty and power. In her opinions, the states appear as intersubjective and autonomous centers of governing authority. In this respect, she is particularly concerned with showing respect for the integrity of state institutions, including state legislatures, state executive officials, and especially state courts. And, in a matter wholly irrelevant to President Clinton's federalism policy, Justice Ginsburg's pro-states posture is further evident in her fundamental judicial modesty.¹³⁶ Justice Ginsburg responds to Schapiro's caricature of the inflated role of judicial review in federalism jurisprudence by advocating judicial restraint on this issue.¹³⁷

Justice Ginsburg shares President Clinton's centrist federalism because, through the vision of states as autonomous and intersubjective centers of governance, she rejects the extremes in the debate. By insisting on viable and active states she necessarily credits the central facet of the dual-sovereignty model of American federalism. At the same time, Justice Ginsburg credits the nationalist model by insisting, for the most part, that the states pursue these functions in the federal political process.

In the following two subparts I demonstrate the centrist character of Justice Ginsburg's federalism jurisprudence through an examination of dissenting opinions she has either written or joined. I adopt this unique methodology for several reasons. First,

135. For this characterization of Justice Ginsburg's jurisprudence I have an acknowledged debt to Professor Ernest Young's work. See, e.g., Young, *Two Federalisms*, *supra* note 50; Young, *supra* note 59.

136. See Ginsburg, *Judicial Voice*, *supra* note 37, at 1198.

137. *Id.*; see Ginsburg, *Thoughts*, *supra* note 37, at 381–85.

she often has written or joined strong dissenting opinions that raised alarm over diminished state autonomy. Simply put, dissents are where one finds much of Justice Ginsburg's most animated federalism jurisprudence. Second, dissenting opinions are a particularly meaningful window into Justice Ginsburg's jurisprudence more generally because she intends them to serve as strategic "pathmarking" efforts.¹³⁸ "[O]verindulgence in separate opinion writing," she cautions, "may undermine both the reputation of the judiciary for judgment and the respect accorded court dispositions."¹³⁹ Dissents "are not . . . devoutly to be avoided,"¹⁴⁰ she explains, but should be deployed when they are meant to "express a conviction, honestly and sincerely maintained."¹⁴¹ According to this standard, Justice Ginsburg's dissenting opinions are uniquely expressive of her views; a claim that has been enhanced by recent occasions on which she has chosen to read her dissents from the bench.¹⁴² Third, Justice Ginsburg's dissents must serve as a fundamental part of any survey of her federalism jurisprudence because they often put her at odds with Chief Justice Rehnquist's "New Federalism" revolution. Establishing her federalism credibility, therefore, requires careful scrutiny of the dissents she joined in the leading New Federalism cases that have come to serve as the benchmark for commitment to state autonomy. That is where I turn now.

2. Dissenting from Rehnquist's New Federalism: Process Prevails

Justice Ginsburg can be credited with an "honestly and sincerely maintained"¹⁴³ respect for state autonomy in "Our Federalism,"¹⁴⁴ in spite of the fact that she joined

138. Ginsburg, *Judicial Voice*, *supra* note 37, at 1196; see Ray, *supra* note 37, at 654–73; Linda Greenhouse, *In Her First Case, Ginsburg Dissents*, N.Y. TIMES, Sept. 2, 1993, at A16.

139. Ginsburg, *Judicial Voice*, *supra* note 37, at 1191.

140. *Id.* at 1194.

141. *Id.* (quoting William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 437 (1986)) (quotation marks omitted).

142. Whatever else may be said about the Supreme Court's current term, which ends in about a month, it will be remembered as the time when Justice Ruth Bader Ginsburg found her voice, and used it. Both in the abortion case the court decided last month and the discrimination ruling it issued on Tuesday, Justice Ginsburg read forceful dissents from the bench. . . . [T]he words were clearly her own, and they were both passionate and pointed. . . . To read a dissent aloud is an act of theater that justices use to convey their view that the majority is not only mistaken, but profoundly wrong. It happens just a handful of times a year.

Linda Greenhouse, *Supreme Court Memo; Oral Dissents Give Ginsburg a New Voice*, N.Y. TIMES, May 31, 2007.

143. Ginsburg, *Judicial Voice*, *supra* note 37, at 1194 (quoting William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 437 (1986)).

144. *Younger v. Harris*, 401 U.S. 37, 44 (1971).

This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism," and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism." The concept does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system

dissents in “all of the New Federalism decisions of the modern Court.”¹⁴⁵ In these cases, a thin majority of the Court, led by Chief Justice William Rehnquist, sought to limit “the scope of Congress’s power under the Commerce Clause and Section Five of the Fourteenth Amendment; [revive] the Tenth Amendment as a constraint on federal power; and greatly [expand] the scope of state sovereign immunity.”¹⁴⁶ These cases served as the center of a renewed,¹⁴⁷ but now moribund, states’ rights movement.¹⁴⁸

in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, “Our Federalism,” born in the early struggling days of our Union of States, occupies a highly important place in our Nation’s history and its future.

Id. at 44–45.

145. Ronald D. Rotunda, *The New States’ Rights, The New Federalism, The New Commerce Clause, and The Proposed New Abdication*, 25 OKLA. CITY U. L. REV. 869, 875 (2000) (emphasis omitted).

146. Erwin Chemerinsky, *Empowering States When it Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313, 1313 (2004) (citations omitted). Chemerinsky catalogued the new federalism decisions that substantiate this proposition: *United States v. Lopez*, 514 U.S. 549 (1995) (invalidating the Gun Free School Zone Act as exceeding the scope of Congress’s commerce power); *United States v. Morrison*, 529 U.S. 598 (2000) (invalidating the civil damages provision of the Violence Against Women Act); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (invalidating the Religious Freedom and Restoration Act as exceeding the scope of Congress’s Section Five powers); *New York v. United States*, 505 U.S. 144 (1992) (invalidating provisions of the Low-Level Radioactive Waste Act as violating the Tenth Amendment); *Printz v. United States*, 521 U.S. 898 (1997) (invalidating the Brady Handgun Control Act as violating the Tenth Amendment); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); and *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999) (limiting Congress’s power to authorize suits against state governments). Chemerinsky, *supra*, at 1313 nn.1–3.

With the exception of *City of Boerne v. Flores*, in which she joined Justice Kennedy’s majority opinion, and *New York v. United States*, which was decided before she joined the Court, Justice Ginsburg joined a dissenting opinion in all of these cases. William Pryor labeled Chief Justice Rehnquist, Justice O’Connor, Justice Scalia, Justice Thomas, and Justice Kennedy the “federalism five.” William H. Pryor, Jr., *The Demand for Clarity: Federalism, Statutory Construction, and the 2000 Term*, 32 CUMB. L. REV. 361, 361–62 (2002).

147. “The Rehnquist Court . . . [has exalted] ‘states’ rights’ vis-à-vis the national government . . .” Michael S. Greve, *Federalism’s Frontier*, 7 TEX. REV. L. & POL. 93, 96 (2002); see Randy Lee, *The New Federalism: Discerning Truth in American Myths and Legends*, 12 WIDENER L.J. 537 (2003). As Harry Witte summarized:

If the Rehnquist Court is curtailing the power of Congress to regulate under the Commerce Clause, rewriting the grant of congressional authority to regulate the states under Section 5 of the Fourteenth Amendment, and all but eliminating suits by citizens against their state governments for violation of federal law, then surely this must be a Court that is friendly to the interests of states.

Harry L. Witte, *Commentary: Is the Rehnquist Court: A. A Friend of the States? B. A Friend of the People? C. A Friend of the Court? D. None of the Above?*, 12 WIDENER L.J. 585, 585–86 (2003) (citations omitted). Mark Tushnet recognized a Rehnquist “new federalism revolution” that has assumed a “states’ rights” mantle, but argued that it represented merely a revolution of “federalism doctrine” and not a revolution regarding the “actual scope of national power.”

The dissents Justice Ginsburg joined in this line of cases express neither blind devotion to national authority nor total disregard for state autonomy.¹⁴⁹ Instead, they reveal Justice Ginsburg's rejection of the dual-sovereignty approach to federalism that was being advanced by the Rehnquist Court's majority¹⁵⁰ in favor of "process federalism"—an alternative federalism approach that accepts that the autonomy of the states is ensured through the influence they have in the political processes and structures of the federal government.¹⁵¹ As noted earlier, this is primarily a claim about the adequacy of political process for preserving the constitution's federal structure and the states' interests and, concomitantly, a rejection of the need for judicial enforcement to achieve these ends.¹⁵² Process federalism, it has been said, seeks to discredit a particular species of judicial review.¹⁵³ But it is by no means synonymous with hostility to the states and the autonomy they enjoy in the constitution's federalism regime. To the contrary, Justice Ginsburg's espousal of process federalism is attended by an affirmative vision of the states as intersubjective and autonomous centers of governing authority.

Herbert Wechsler most famously articulated the process federalism thesis in his 1954 article: *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*.¹⁵⁴ He argued that two

TUSHNET, *supra* note 51, at 249–50. Sue Davis referred to Rehnquist's federalism jurisprudence as a

doctrine of state sovereignty [It] entails a vision of the relationship between the federal government and the states that is fundamentally at odds with the view that prevailed on the Court from the late 1930s until the mid-1970s. A commitment to shift power away from the federal government toward more extensive, independent authority for the states

SUE DAVIS, *JUSTICE REHNQUIST AND THE CONSTITUTION* 142, 149 (1989).

148. In 2005, a majority of the Court, including committed New Federalist Justice Antonin Scalia, seemed to turn back the New Federalism tide in a decision upholding the federal Controlled Substance Act against a commerce clause challenge. *Gonzales v. Raich*, 545 U.S. 1 (2005); Simon Lazarus, *Federalism R.I.P.?: Did the Roberts Hearings Junk the Rehnquist Court's Federalism Revolution?*, 56 *DEPAUL L. REV.* 1 (2006); Young, *Just Blowing Smoke?*, *supra* note 50, at 2 ("Last Term's decision in *Gonzales v. Raich* put the Court's seriousness [on federalism] to the test . . .").

149. Michael Greve calls Justice Ginsburg an "aggressive nationalist[.]" Greve, *supra* note 147, at 116. Ernest Young also refers to Justice Ginsburg and the dissenters in the New Federalism cases as "nationalist[s]," but he credits them with having a "federalism jurisprudence of their own," which offers some real benefits to the states, especially in those areas "that the 'states'-rights' majority has neglected." Young, *supra* note 59, at 1351–52.

150. See, e.g., *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 751 (2002) ("[Dual sovereignty is a] defining feature of our Nation's constitutional blueprint."); *Printz*, 521 U.S. at 935 (concluding that "our constitutional system of dual sovereignty" is "fundamentally incompatible" with conscripting state and local officials to carry out federal programs).

151. See Young, *supra* note 59, at 1357–61.

152. Dragoo, *supra* note 75, at 169.

153. See Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 *TEX. L. REV.* 1459, 1460 (2001).

154. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 *COLUM. L. REV.* 543 (1954). "Wechsler's article remains [process federalism's] chief intellectual prop. Remarkably, after nearly half a century, [it] continues to rank high on the list of most cited law review articles . . ."

underappreciated features of the American constitutional framework supported the claim that judicial review was not the exclusive means for protecting and preserving state autonomy and state interests in the federal system: the states' continuing existence and their still significant authority as separate regulatory and administrative organs,¹⁵⁵ and the states' "role of great importance in the composition and selection of the central government."¹⁵⁶ The former point is a facet of the autonomy Justice Ginsburg's federalism jurisprudence attributes to the states, which continue to enjoy "the positive use of governmental authority."¹⁵⁷ Ernest Young explains that, in this vision, the states are "predicated on active state governments with important responsibilities."¹⁵⁸ Wechsler focused in particular on the latter point, emphasizing the intersubjective role of the states in the composition of the Senate,¹⁵⁹ House of Representatives,¹⁶⁰ and the selection of the President.¹⁶¹ Wechsler explained that this intersubjective vision of the states, which is also a facet of Justice Ginsburg's federalism jurisprudence, "is intrinsically well adapted to retarding or restraining new intrusions by the center on the domain of the states."¹⁶² These political safeguards, in which the states themselves participate as intersubjective agents, "cannot fail to function as the guardian of state interests as such, when they are real enough to have political support."¹⁶³

The Rehnquist Court's aggressive intervention on behalf of the states starting in the early 1990s represented the fulfillment of decades of criticism of Wechsler's thesis,¹⁶⁴ which nonetheless survived to form the basis of Justice Blackmun's majority opinion in *Garcia v. San Antonio Metropolitan Transit Authority*.¹⁶⁵ The Rehnquist Court's New Federalism movement momentarily faltered in *Garcia*, as Justice Blackmun reversed

Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 217 (2000).

155. Wechsler, *supra* note 154, at 543. "[T]he existence of the states as governmental entities and as the sources of the standing law is in itself the prime determinant of our working federalism, coloring the nature and the scope of our national legislative processes from their inception." *Id.* at 546.

156. *Id.* at 543.

157. Young, *Two Federalisms*, *supra* note 50, at 14.

158. *Id.* at 63 (emphasis omitted).

159. Referring to the states' equal representation in the Senate and the resulting disproportionate strength of the least populous states, he noted that the forty-nine votes in the Senate needed for action could be secured by twenty-five states representing a mere nineteen percent of the nation's population. Wechsler concluded that the "composition of the Senate is intrinsically calculated to prevent intrusion from the center on subjects that dominant state interests wish preserved for state control." Wechsler, *supra* note 154, at 547–48.

160. Wechsler attributed the states' influence over the House of Representatives to their "control of voters' qualifications, on the one hand, and of districting, on the other." *Id.* at 548.

161. *Id.* at 553. Wechsler argued that "[f]ederalist considerations . . . play an important part even in the selection of the President," as a result of the allocation of the Electoral College votes to the states. *Id.* at 553, 557.

162. *Id.* at 558.

163. *Id.* at 548.

164. Kramer, *supra* note 154, at 218. "Today, however, Wechsler's theory is under siege. The current Supreme Court is plainly willing, perhaps eager, to rethink its position, and a growing chorus of academic voices insists that the failure of political safeguards justifies and even demands more aggressive judicial intervention to protect the states." *Id.* (citations omitted).

165. 469 U.S. 528, 550–54 (1985).

his vote from the early New Federalism case *National League of Cities v. Usery*.¹⁶⁶ In *National League of Cities*, Justice Blackmun joined a bare majority of the Court in granting states immunity from federal regulation that impacted state governmental functions judged by the courts to be “integral” or of “traditional” interest to a sovereign.¹⁶⁷ After ten years of participating in the judiciary’s flailing efforts to define the operative standards announced in *National League of Cities*, Justice Blackmun had grown disillusioned.¹⁶⁸ In *Garcia* he rejected a role for the courts in delineating a formal boundary between the states and the federal government, opting instead for Wechsler’s process federalism:

[T]he principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself. It is no novelty to observe that the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress. The Framers thus gave the States a role in the selection of both of the Executive and the Legislative Branches of the Federal Government

The effectiveness of the federal political process in preserving the States’ interests is apparent even today in the course of federal legislation. On the one hand, the States have been able to direct a substantial proportion of federal revenues into their own treasuries in the form of general and program-specific grants in aid. . . . Moreover, at the same time that the States have exercised their influence to obtain federal support, they have been able to exempt themselves from a wide variety of obligations imposed by Congress under the Commerce Clause.¹⁶⁹

Justice’s Blackmun’s switch in *Garcia* could not stanch the rising tide of the Rehnquist Court’s New Federalism. Faced with the Court’s repeated intervention on behalf of states in federalism cases, process federalists like Justice Ginsburg, who drew inspiration from Justice Blackmun’s opinion in *Garcia*, were forced into the role of dissenters.

Justice Ginsburg joined Justice Breyer’s dissent in the 1995 case *United States v. Lopez*,¹⁷⁰ which only implicitly invoked the adequacy of the political process as a safeguard for federalism. It is easy to excuse Justice Breyer’s lackluster process federalism performance. The case was the first loud volley in the New Federalism revolution; the process federalists, Justice Ginsburg among them, had been ambushed by the majority’s nullification of a piece of Commerce Clause legislation for the first time in nearly sixty years.¹⁷¹ In *Lopez* Justice Breyer could only manage to advocate

166. 426 U.S. 833 (1976).

167. *Id.* at 845, 852–54.

168. Justice Blackmun expressed this disillusionment in *Garcia*, stating: “A nonhistorical standard for selecting immune governmental functions is likely to be just as unworkable as is a historical standard. The goal of identifying ‘uniquely’ governmental functions, for example, has been rejected by the Court in the field of governmental tort liability in part because the notion of a ‘uniquely’ governmental function is unmanageable.” *Garcia*, 469 U.S. at 545 (citations omitted).

169. *Id.* at 550–53 (citations omitted).

170. 514 U.S. 549 (1995).

171. Perhaps the process federalists should not have been caught by surprise. Then-Justice

for the latitude extended to Congress under the rational basis review that the Court had long brought to bear in its consideration of Congressional assertions of authority under the Commerce Clause. “[T]he Constitution requires us to judge the connection between a regulated activity and interstate commerce, not directly, but at one remove,”¹⁷² Justice Breyer wrote for the dissenters—including Justice Ginsburg. He went on: “Courts must give Congress a degree of leeway in determining the existence of a significant factual connection between the regulated activity and interstate commerce The traditional words ‘rational basis’ capture this leeway.”¹⁷³

But worrying about the “legal uncertainty” that would result from the majority’s abandonment of the traditional rational basis review¹⁷⁴ is not an articulation of the dissenters’ vision of the states in our federalism, a challenge directly put to them by the *Lopez* majority.¹⁷⁵ Justice Breyer and the other dissenters seemed satisfied to define the states in the negative, relying on the implication that the states reside in the space left to them by the judicially enforced and highly deferential expectation that Congress at least act rationally when exercising its commerce power. The dissenters concluded that Congress had acted rationally with respect to the legislation at issue in *Lopez*,¹⁷⁶ exactly as the Court repeatedly had done over more than half a century of dramatic consolidation and centralization at the national level, often at the expense of the states.¹⁷⁷ Without more, Justice Breyer’s *Lopez* dissent seemed to confirm the notion

Rehnquist clearly signaled his commitment to reviving the *National League of Cities* “states rights” doctrine in a brief dissenting opinion in the *Garcia* case. *Garcia*, 469 U.S. at 580 (Rehnquist, J., dissenting) (“I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court.”). Just months before the Court ruled in *Lopez*, Chief Justice Rehnquist outlined his New Federalism strategy in a speech at Wake Forest University School of Law. William H. Rehnquist, *Convocation Address, Wake Forest University*, 29 WAKE FOREST L. REV. 999, 1005–06 (1994) (“It remains for those of us who strongly believe in federalism—that the historic division between the proper business of the state courts and the proper business of the federal courts should be respected unless there is good reason to do otherwise—to work hard to see that the state courts do the best possible job of enforcing the laws presently on the books.”).

172. *Lopez*, 514 U.S. at 616 (Breyer, J., dissenting).

173. *Id.* at 616–17.

174. *Id.* at 630.

175. *Id.* at 566 (majority opinion); *see id.* at 600 (Thomas, J., concurring).

176. Justice Breyer explained his conclusion that Congress had acted rationally in criminalizing gun possession near schools by explaining that “[h]aving found that guns in schools significantly undermine the quality of education Congress could also have found, given the effect of education upon interstate and foreign commerce, that gun-related violence in and around schools is a commercial, as well as a human, problem.” *Id.* at 620 (Breyer, J., dissenting). This assessment relies on the “three basic principles of Commerce Clause interpretation,” the principles that the majority’s opinion called into question: Congress’ commerce power permits it to regulate local activities that significantly affect interstate commerce; a significant effect can be revealed in the accumulation or aggregation of individual acts; and the courts should judge the connection between legislation and interstate commerce “at one remove” and with considerable deference to Congress. *Id.* at 615–18.

177. There are several dramatic examples of the Court’s erosion of state policy-making authority in the latter part of the twentieth century. The best known must surely be the Court’s articulation and enforcement of a national standard for racial equality based on the explicit limitation of state authority found in the Fourteenth Amendment. This led to the end of the

that process federalism, and the rational basis review at its heart, were nothing more than cover for a deeper agenda aligned with the Democrat's desire to nationalize American power.

Two years later Justice Ginsburg joined a somewhat more sound process federalism dissent, this time authored by Justice Stevens in *Printz v. United States*.¹⁷⁸ Justice Stevens charted his course with reference to the lodestar majority opinion in *Garcia*. Stevens quoted Justice Blackmun's *Garcia* opinion when he concluded that "[T]he principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself."¹⁷⁹ With Justice Ginsburg at his side, Justice Stevens then more fully developed process federalism's vision of the states as both intersubjective and possessing significant governing autonomy:

Given the fact that the Members of Congress are elected by the people of the several States, with each State receiving an equivalent number of Senators in order to ensure that even the smallest States have a powerful voice in the Legislature, it is quite unrealistic to assume that they will ignore the sovereignty concerns of their constituents. It is far more reasonable to presume that their decisions to impose modest burdens on state officials from time to time reflect a considered judgment that the people in each of the States will benefit therefrom.¹⁸⁰

This is a more affirmative vision of the states in the federal scheme than Justice Breyer managed in *Lopez*. States are autonomous centers of regulatory authority responding to the concerns of their constituents, in part by advancing their interests through their intersubjective role in the processes of federal governance. In this

states' Jim Crow policies, including segregated public schools. *See, e.g., Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). In the 1960s, the Court began to define the Fourteenth Amendment's individual-liberty guarantees (which protect individuals against the states) in line with the terms and scope of liberty protections applicable against the federal government pursuant to the Bill of Rights. This process, known as incorporation, led to a revolution, inter alia, in the rights of those suspected or accused of crimes—and a concomitant loss of state authority over the field of criminal procedure. *See, e.g., Gideon v. Wainwright*, 372 U.S. 335 (1963). The Supreme Court's expansion of the limitations on governing autonomy based on the constitution's negative liberty or equality protections now apply with equal force against the federal and state governments (the Court's consideration of the incorporation of the Second Amendment in the October 2009 term would close the process of incorporating the Bill of Rights as a limit on the authority of the states). *See Nat'l Rifle Ass'n v. City of Chi.*, 567 F.3d 856 (7th Cir. 2009), *cert. granted*, 130 S. Ct. 48 (2009).

Over the last half century the Supreme Court also has permissively interpreted Congress's commerce clause authority at the expense of the states' fundamental governing competence and to the benefit of national policy making. *See Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *United States v. Sullivan*, 332 U.S. 689 (1948); *Am. Power & Light Co. v. SEC*, 329 U.S. 90 (1946); *United States v. Se. Underwriters Ass'n*, 322 U.S. 533 (1944); *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100 (1941); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *see also* CHEMERINSKY, *supra* note 7, § 3.3, at 259–69; *infra* Part II.B.2.

178. 521 U.S. 898 (1997).

179. *Id.* at 956 (Stevens, J., dissenting) (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550 (1985)) (alteration in original) (internal quotation marks omitted).

180. *Id.* at 956.

account, the states are more than the mere negative implication of a deferential standard of review. They are autonomous actors in an intersubjective process through which they pursue their identifiable interests with and against other states and the federal government.

Justice Stevens's *Printz* dissent went a step further, noting that the majority had failed to show that political safeguards had not been adequate to the task of guaranteeing state autonomy. He offered proof to the contrary:

Recent developments demonstrate that the political safeguards protecting Our Federalism are effective. The majority expresses special concern that were its rule not adopted the Federal Government would be able to avail itself of the services of state government officials "at no cost to itself." But this specific problem of federal actions that have the effect of imposing so-called "unfunded mandates" on the States has been identified and meaningfully addressed by Congress in recent legislation.¹⁸¹

Recalling the centrality of judicial review to the federalism debate, Justice Stevens concluded that the Unfunded Mandates Reform Act to which he referred "demonstrates that unelected judges are better off leaving the protection of federalism to the political process in all but the most extraordinary circumstances."¹⁸² Significantly—for the purposes of my thesis regarding President Clinton's and Justice Ginsburg's shared centrism regarding federalism—I have already explained that the UMRA counts strongly in favor of Clinton's pro-state stance.¹⁸³

By 2000, when a majority of the Court again overturned Commerce Clause legislation in *United States v. Morrison*,¹⁸⁴ the unrelenting onslaught of the Chief Justice's New Federalism had raised the stakes for the process federalists necessitating, finally, a comprehensive statement of their position. Justice Ginsburg joined Justice Souter's dissent, which begins with a reassertion of the adequacy of the traditional rational basis deference exercised by the Court.¹⁸⁵ The "fact of . . . a substantial effect" on interstate commerce as the basis for a Congressional exercise of Commerce Clause authority, Souter explained, "is not an issue for the courts in the first instance, but for the Congress, whose institutional capacity for gathering evidence and taking testimony far exceeds [the Court's]."¹⁸⁶ Demonstrating the remarkable breadth of the rational basis review favored by the process federalists, Souter concluded that Congress' enactment of the legislation was proof enough of its conviction that "facts support its exercise of the commerce power."¹⁸⁷ Justice Souter cautioned that greater scrutiny of Congressional Commerce Clause legislation, like that which the *Morrison* majority exercised to mark out state and federal spheres of action enforceable by the Court, is "dependent upon a uniquely judicial competence" for which there is no originalist or

181. *Id.* at 957 (citations omitted).

182. *Id.* at 958–59.

183. *See supra* Part II.A.3.b.

184. 529 U.S. 598 (2000).

185. *Id.* at 628 (Souter, J., dissenting).

186. *Id.* (citation omitted).

187. *Id.*

textual support.¹⁸⁸ The majority's assertion of judicial authority to protect the states, Justice Souter explained, was a rejection of the "Founders' considered judgment that politics, not judicial review, should mediate between state and national interests."¹⁸⁹ Justice Souter's defense of this originalist claim is thorough, accounting for the views of James Madison, James Wilson, and John Marshall, as expressed in *The Federalist Papers*, commentary on the convention debates, and seminal founding-era decisions of the Supreme Court.¹⁹⁰ These sources, Souter explained, establish the "importance of national politics in protecting the States' interests."¹⁹¹ Justice Souter also was satisfied that the text of the "Constitution remits [the states' sovereign interests] to politics."¹⁹² Souter explained that the Tenth Amendment cannot be the basis for judicially enforced state autonomy because it was "formulated . . . without any provision comparable to the specific guarantees proposed for individual liberties."¹⁹³ Furthermore, while conceding that the Seventeenth Amendment diminished the states' political leverage in the Senate, Justice Souter noted that the direct election of senators and its attending impact on the states' ability to promote their interests via the federal political process was now a command of the constitution's text that the Court was bound to honor.¹⁹⁴ "[T]he Amendment," Souter explained, "did not convert the judiciary into an alternate shield against the commerce power."¹⁹⁵

Justice Souter's dissent concludes with a clear illustration of process federalism's intersubjective and autonomous vision of the states. Far from the negation of state autonomy feared by the dual-sovereignty advocates in the *Morrison* majority,¹⁹⁶ Souter tells a story of assertive and capable state action, pursued by state institutions and actors, in the process leading to the enactment of the federal legislation at issue. "The National Association of Attorneys General supported the Act unanimously," he explained.¹⁹⁷ He noted that a vast majority of individual state Attorneys General urged Congress to enact the legislation, and that the legislation was responsive to and had taken account of the reports of state task forces.¹⁹⁸ Process federalism, in this view, is not the disregard of the states that may be evident in the Democratic Party's nationalist tendencies. Instead, it permits the actualization of state autonomy, first through the respect shown to the institutions and actors of state government—like the Attorneys General to which Stevens referred—and second through the respect shown for their often very successful intersubjective pursuit of states' interests in the processes of federal government. Thus, Justice Souter, with Justice Ginsburg in agreement, could remark that the *Morrison* majority struck the Commerce Clause legislation in the name of state autonomy in spite of the fact that the "collective opinion of state officials [was]

188. *Id.* at 638.

189. *Id.* at 647.

190. *Id.* at 647–48.

191. *Id.* at 648.

192. *Id.* at 649.

193. *Id.* at 648.

194. *Id.* at 651–52.

195. *Id.* at 652.

196. *Id.* at 615 (majority opinion).

197. *Id.* at 653 (Souter, J., dissenting).

198. *Id.* at 654.

that the Act was needed.”¹⁹⁹ This led Justice Souter to point out the irony that the states would be forced to “enjoy the new federalism whether they want it or not.”²⁰⁰

Ernest Young has defended the legitimate federalist potential of the process federalism embraced by Justice Ginsburg and the other dissenters in *Lopez*, *Printz*, and *Morrison*.²⁰¹ He very strongly advocates process federalism’s intersubjective and autonomous vision of the states, but Young is less sanguine about the limited function process federalism assigns to judicial review.

With respect to process federalism’s intersubjective vision of the states, Young largely refines points raised by Wechsler and reconsidered by generations of scholars since.²⁰² Thus, Young notes that Wechsler and Choper, like Madison before them, “emphasized the institutional role of the states in selecting and participating in the national government.”²⁰³ Young explained that the states are represented in Congress, participate in the election of the President, and extensively cooperate in the administration of federal programs.²⁰⁴ As evidence of the states’ intersubjective capacity, Young considered their role in fashioning electoral districts.²⁰⁵ Echoing Justice Stevens’ *Printz* dissent, and again underscoring the nexus I see between President Clinton’s and Ginsburg’s centrist federalism, Young also notes the states’ success in enacting the 1995 Unfunded Mandates Reform Act.²⁰⁶ The intersubjective character of the states in process federalism, Young explains, requires that federal decisions are “made through channels” where the states are, in fact, represented, and that the states must receive notice of the impending federal decision.²⁰⁷ Ultimately, as regards the intersubjective facet of process federalism’s vision of the states, Young concludes that “[p]rocess federalism’s central insight is that the federal-state balance is affected not simply by *what* federal law is made, but by *how* that law is made.”²⁰⁸

Young also illuminates process federalism’s autonomy component, contrasting it with New Federalism’s preoccupation with “a rather narrow version of state ‘sovereignty.’”²⁰⁹ Young explains that Justice Ginsburg and the New Federalism dissenters favor state autonomy, which “emphasizes the positive use of governmental authority The [*Oxford English Dictionary*] defines ‘autonomy’ as ‘[t]he right of self-government, of making [a state’s] own laws and administering its own affairs.’”²¹⁰ Young argues that the process federalists’ concern for state autonomy recognizes that there would be no reason to care about state governments, no matter how sovereign, “if those governments have nothing to do.”²¹¹ On these terms, process federalism

199. *Id.*

200. *Id.*

201. See Young, *Two Federalisms*, *supra* note 50; Young, *supra* note 59.

202. See, e.g., Jesse H. Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 *YALE L.J.* 1552 (1977); Kramer, *supra* note 154.

203. Young, *supra* note 59, at 1355.

204. *Id.*

205. Young, *Two Federalisms*, *supra* note 50, at 67–68.

206. Young, *supra* note 59, at 1358.

207. *Id.* at 1358–59.

208. *Id.* at 1364 (emphasis in original).

209. Young, *Two Federalisms*, *supra* note 50, at 3.

210. *Id.* at 14 (quoting 1 *THE OXFORD AMERICAN DICTIONARY* 575 (2d ed. 1989)).

211. *Id.* at 63.

expresses an affirmative vision of the states by stressing the states' capacity for self-government and not merely the negative definition resulting from a demand for state sovereign immunity from federal norms.²¹² Young argues that process federalism's concern for state autonomy, as opposed to mere sovereignty, is dramatically supportive of an affirmative vision of the states in our federal system. All the "values associated with federalism," Young explains, "share a common characteristic: They are predicated on active state governments with important responsibilities."²¹³ On this point, Young concludes:

[A]utonomy bears a closer relation than sovereignty to virtually all of the values that undergird our commitment to federalism. State experimentation, policy diversity, popular participation, and checks on central power all depend, to a large extent, on the states having meaningful governmental responsibilities. A state government that was perfectly sovereign—that is, perfectly unaccountable for its violations of federal norms—would nonetheless have little meaning unless it also had the authority and capacity to enact its own policies in response to the demands of its citizens.²¹⁴

Young takes exception, however, with process federalism's general rejection of judicial review as a mechanism for protecting and promoting federalism.²¹⁵ He would not go so far as to forswear any role for the judiciary in resolving federalism questions.²¹⁶ Young complains that, by staking such an "all or nothing"²¹⁷ position, the process federalists have contributed to a bankrupt debate over the judicial review of federalism, which "has generally been over whether we should have *any* judicial review or *none* at all; between *total* reliance on the political process to protect federalism or anything short of that."²¹⁸ Young makes a considerable effort to salvage process federalism from this "red herring."²¹⁹ Judicial review should not be abandoned altogether, in Young's perspective, but reserved for protecting and maintaining the political process itself. Citing John Hart Ely's work, Young explains that we should "count on the political process to resolve most substantive disputes about governmental policy, [and that we should] rely on courts to enforce the basic rules of that process."²²⁰ Young argues that "[m]ore aggressive judicial review, on this account, is justified only by some defect in the political process that undermines the ordinary rule of deference."²²¹ Judicial review of federalism, to Young's mind, must be available to ensure that the states as subjects, through their autonomous governing institutions, are able to fairly compete with the federal government for the popular loyalty of their

212. *Id.* at 4.

213. *Id.* at 63 (emphasis omitted).

214. *Id.* at 163.

215. *See* Young, *supra* note 59, at 1350–51.

216. *Id.*

217. *Id.* at 1367.

218. *Id.* at 1350 (emphasis in original).

219. *Id.* at 1386–90.

220. *Id.* at 1358 (citing JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 73 (1980)).

221. *Id.* at 1364.

citizens.²²² This limited role for judicial review acknowledges that “the political and procedural safeguards of federalism have eroded over time[,] . . . [and that c]ourts have a role in compensating for the erosion, [a role that recognizes that] they have generally been better at intervening on process grounds than at defining substantive limits on Congress’s powers.”²²³ Thus, within the parameters of process federalism, which is characterized by considerable skepticism of judicial review, Young nonetheless accepts “an orientation for judicial review—to correct malfunctions of the political and institutional checks . . . but also a technique of construing doctrines to enhance those political and institutional checks.”²²⁴

Contrary to the suggestion that the New Federalism dissenters desired a total abandonment of judicial review in federalism cases, the *Lopez*, *Printz*, and *Morrison* dissenters express a sentiment closer to that described by Young.

3. Ginsburg’s Other Federalism Dissents

Alongside the “process federalism” dissents she joined in the New Federalism cases, Justice Ginsburg has authored a number of her own federalism dissents. These opinions also portray the states as intersubjective and autonomous centers of governing authority. In some instances, Justice Ginsburg pays more attention to state autonomy, particularly by insisting that state governing institutions and actors be shown due respect. Less frequently, she accentuates the states’ intersubjectivity that was so much the focus of Wechsler. Many of the opinions combine these elements to form her affirmative vision of the states. Process federalism’s skepticism for judicial review is evident throughout the opinions. The following survey of Justice Ginsburg’s federalism dissents does not purport to be comprehensive or systematic. Rather, the survey consists of a selection of Justice Ginsburg’s federalism dissents outside the preemption doctrine area (to which I turn in a following subpart) that are, to my mind, particularly suggestive of a body of work that must be characterized as strongly supportive of state autonomy.

In her dissent in *BMW of North America, Inc. v. Gore*,²²⁵ Justice Ginsburg worried that the majority’s opinion threatened to overwhelm the states’ governing autonomy. Chief Justice Rehnquist, the architect of the Court’s New Federalism revolution, joined Justice Ginsburg on this occasion. In rejecting the majority’s conclusion that a two million dollar punitive damage award upheld by the Alabama courts was so grossly excessive as to constitute a due process violation, Justice Ginsburg protested that “[t]he Court . . . unnecessarily and unwisely venture[d] into territory traditionally within the States’ domain, and d[id] so in the face of reform measures recently adopted or currently under consideration in legislative arenas.”²²⁶ Justice Ginsburg was concerned with the states’ governing autonomy in its own right. The majority’s decision, she argued, demonstrated the Court’s “readiness to superintend” the states’ regulatory concerns and promised to embroil the Court in an inappropriate reexamination of state

222. *Id.* at 1373.

223. Young, *Two Federalisms*, *supra* note 50, at 123.

224. *Id.* at 19.

225. 517 U.S. 559, 607 (1995) (Ginsburg, J., dissenting).

226. *Id.* at 607.

court and state legislative actions.²²⁷ The Court's intrusion upon what Ernest Young called the states' "positive use of governmental authority" showed disregard for forty-one state punitive damages reform measures from across the country; statutes that Justice Ginsburg catalogued in an appendix to her dissent.²²⁸ The states' governing autonomy was also at stake in Justice Ginsburg's complaint that the majority's opinion did not give due respect to the relevant state-level governing institution through which Alabama aimed to pursue its "own policies in response to the demands of its citizens."²²⁹ In this case, introducing a theme that repeats itself in her federalism jurisprudence, Justice Ginsburg objected to the majority's failure to show deference to the state judiciary. She noted that "[t]he Alabama Supreme Court . . . endeavored to follow this Court's prior instructions,"²³⁰ the Court "provided [a] clear statement of the State's law,"²³¹ and it "'thoroughly and painstakingly' reviewed the jury's award . . . according to principles set out in its own pathmarking decisions and in this Court's opinions."²³² The Alabama Supreme Court's earnest expression of the state's governing autonomy, Justice Ginsburg concluded, merited the Court's respect.²³³

Justice Ginsburg also objected that the states' governing autonomy and intersubjectivity were threatened by the majority's "watershed decision" in *City of Chicago v. International College of Surgeons*.²³⁴ She raised several criticisms of the majority's recognition of cross-system appeals, pursuant to which federal courts gain exclusive jurisdiction over proceedings containing, in part, state law claims that seek review of purely state or local administrative actions. Showing concern for the regulatory integrity of the states, Justice Ginsburg concluded that the cross-system appeals would empower the federal court to "directly superintend local agencies by affirming, reversing, or modifying their administrative rulings."²³⁵ Justice Ginsburg argued that this constituted a "startling . . . reallocation of power" to the advantage of the federal government.²³⁶ On this point, Justice Ginsburg noted that the majority opinion directly supplanted a state statute that aimed to make the state courts the locus of review of state and local agency decisions.²³⁷ At stake, Justice Ginsburg noted, were the vital interests "States have in developing and elaborating state administrative law . . . [that] regulates the citizen's contact with state and local government at every turn."²³⁸ Justice Ginsburg also worried that the majority's expansion of federal court jurisdiction would harm the states' governing autonomy by showing disrespect for state

227. *Id.* at 613–14 (noting in the Appendix that state legislatures have enacted several measures to curtail punitive damage awards).

228. *Id.* at 614; Young, *Two Federalisms*, *supra* note 50, at 14.

229. Young, *Two Federalisms*, *supra* note 50, at 163; *see BMW*, 517 U.S. at 613–14 (Ginsburg, J., dissenting).

230. *BMW*, 517 U.S. at 607 (Ginsburg, J., dissenting).

231. *Id.* at 609.

232. *Id.* at 610 (quoting *BMW of N. Am. v. Gore*, 646 So. 2d 619, 629 (Ala. 1994), *rev'd*, 517 U.S. 559 (1995)).

233. *Id.* at 607.

234. 522 U.S. 156, 175 (1997) (Ginsburg, J., dissenting).

235. *Id.*

236. *Id.* at 177.

237. *Id.* at 184.

238. *Id.* at 185.

courts, which, like state legislatures, are agents of the states' governing autonomy.²³⁹ Justice Ginsburg concluded that this disrespect "jeopardizes the 'strong interest' courts of the State have in controlling the actions of local as well as state agencies,"²⁴⁰ and threatens an "erosion of state-court authority."²⁴¹ Justice Ginsburg also expressed alarm at the disregard the majority's opinion showed for the states' intersubjective participation in the federal law-making process. Justice Ginsburg explained that the majority should have respected the federal jurisdictional statute's failure to explicitly provide for cross-system appeals.²⁴² A resolution of the question of the propriety of cross-system appeals "should stem from the National Legislature's considered and explicit decision,"²⁴³ Justice Ginsburg argued—a process in which the states play a distinct, intersubjective role.

In *Miller v. Johnson*,²⁴⁴ a case dominated by equal protection concerns, Justice Ginsburg took pains in her dissent to object to the federalism implications of the majority's rejection of Georgia's majority-minority electoral districting scheme. Justice Ginsburg explained that she and the majority were not divided on the point that "federalism . . . weigh[s] heavily against judicial intervention" in the case.²⁴⁵ For her, however, the weight of federalism would have precluded the Court's intervention. Ginsburg's dissent chiefly raises concerns about state governing autonomy, at least as far as state legislatures' districting decisions are expressive of the states' regulatory will. To this end, Justice Ginsburg again invoked the image of the states' legislative "domain,"²⁴⁶ and she rebuked the majority with the reminder that on many occasions the Court had said that reapportionment, like that at issue in *Miller*, "is primarily the duty and responsibility of the State through its legislature."²⁴⁷ Justice Ginsburg portrays state legislatures as "arenas of compromise and electoral accountability, [that] are best positioned to mediate competing claims."²⁴⁸ This conception is similar to the regulatory agents that Ernest Young was interested in when he characterized autonomy as a defining component of federalism. Thus, the federalism facet of *Miller* amounted to a question of the degree of respect owed to states' autonomous governing competence. Justice Ginsburg's federalism jurisprudence strongly favors the states. She concluded, "the State chose to adopt the [districting] plan here in controversy—a plan the state forcefully defends before us. We should respect Georgia's choice . . ."²⁴⁹ Justice Ginsburg conceded only a very limited departure from the priority the Court should show the states in this regard. She would require federal court intervention in this state legislative prerogative in those cases "when [it is] necessary to secure to

239. *Id.*

240. *Id.*

241. *Id.* at 186.

242. *Id.* at 176.

243. *Id.*

244. 515 U.S. 900 (1995).

245. *Id.* at 934–35 (Ginsburg, J., dissenting).

246. *Id.*

247. *Id.* at 936 (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)).

248. *Id.*

249. *Id.* at 943–44.

members of racial minorities equal voting rights—rights denied in many states, including Georgia, until not long ago.”²⁵⁰

Justice Ginsburg returned to the theme of the respect owed to state courts as institutions and agents of the states’ governing autonomy in her dissent in *Arizona v. Evans*.²⁵¹ The majority held that, pursuant to *Michigan v. Long*,²⁵² the Supreme Court was entitled to presume that federal law formed the basis of a state-court decision in order to overcome “the adequate and independent state ground[s]” barrier to its exercise of appellate jurisdiction over state court decisions when the adequacy and independence of the state court decision is not clear on the face of the opinion.²⁵³ Justice Ginsburg objected to the application of the *Long* presumption on federalist grounds, underscoring the threat the majority’s opinion posed to state autonomy. “The *Long* presumption,” she said, “impedes the States’ ability to serve as laboratories for testing solutions to novel legal problems.”²⁵⁴ Justice Ginsburg cited Brandeis’s dissent in *New State Ice Co. v. Liebman*,²⁵⁵ when insisting that the states’ regulatory autonomy should be fostered so that they are encouraged to “explore different means to secure respect for individual rights in modern times.”²⁵⁶ As noted earlier, this also was one of President Clinton’s favorite federalism images.²⁵⁷ Justice Ginsburg regretted the Court’s intrusion into “areas traditionally regulated by the States,”²⁵⁸ and noted that the opposite presumption (that state courts decide cases on the basis of state law) would “stop this Court from asserting authority in matters belonging, or at least appropriately left, to the States’ domain.”²⁵⁹

Justice Ginsburg wrote to advance the interests of states nowhere more poignantly than in her impassioned dissent in *Bush v. Gore*.²⁶⁰ In the case that saw the Supreme Court intervene in the ongoing Florida recount of the 2000 presidential election, Justice Ginsburg reiterated her commitment to state autonomy by again lamenting the majority’s failure to respect a state supreme court’s resolution of the case.²⁶¹ The lack of deference the Court showed to the state’s judicial authority was compounded in the case because the Supreme Court faulted the state court for its interpretation of state law. “I would have thought,” Justice Ginsburg wrote, “the ‘cautious approach’ we counsel when federal courts address matters of state law, and our commitment to

250. *Id.* at 936.

251. 514 U.S. 1, 24 (1995) (Ginsburg, J., dissenting).

252. 463 U.S. 1032 (1983). Harry Witte identified *Michigan v. Long* as raising exceptionally important federalism questions. Witte, *supra* note 147, at 592–94 (“The presumption of jurisdiction demonstrates the Rehnquist Court’s antipathy both to state court analysis of federal constitutional rights and to state court analysis of *state* constitutional rights that produce greater protection than the Court itself deems appropriate.” (emphasis in original)).

253. *Evans*, 514 U.S. at 7.

254. *Id.* at 24 (Ginsburg, J., dissenting); see Ray, *supra* note 37, at 659.

255. 285 U.S. 262, 311 (Brandeis, J., dissenting).

256. *Evans*, 514 U.S. at 30 (Ginsburg, J., dissenting).

257. See *supra* note 69 and accompanying text.

258. *Evans*, 514 U.S. at 30 (Ginsburg, J., dissenting).

259. *Id.* at 33.

260. 531 U.S. 98 (2000).

261. See *id.* at 135–44 (Ginsburg, J., dissenting); see also Russell A. Miller, *Lords of Democracy: The Judicialization of “Pure Politics” in the United States and Germany*, 61 WASH. & LEE L. REV. 587, 618–19 (2004).

'build[ing] cooperative judicial federalism,' demanded greater restraint."²⁶² She described this federal restraint as an ordinary principle at the core of federalism: "two political capacities, one state and one federal, each protected from incursion by the other."²⁶³ And then, in a stirring manifesto for state autonomy, Justice Ginsburg chastised Chief Justice Rehnquist and the New Federalism majority, which ironically formed the distinctly nationalist majority in *Bush v. Gore*, for neglecting their well-known commitment to state autonomy: "Were the other Members of this Court as mindful as they generally are of our system of dual sovereignty, they would affirm the judgment of the Florida Supreme Court."²⁶⁴

4. Conclusion

The foregoing defense of the pro-state character of the dissents Justice Ginsburg joined in the New Federalism cases, and the sampling of dissents she has written in other federalism cases, reveal Justice Ginsburg's very strong concern for the states' intersubjective role in our national governance and their governing autonomy. These were precisely the elements that characterized President Clinton's federalism policy. As to the states' intersubjectivity, Justice Ginsburg repeatedly insists that the institutions and the actors that are the agents of the states' regulatory authority are owed great respect. This is especially true of the state courts. As to the states' governing autonomy, Justice Ginsburg has repeatedly taken the extraordinary measure of writing separate dissenting opinions in order to assert her concern for the states' consequential regulatory "domain."²⁶⁵

C. Preemption Doctrine

1. Introduction

It is with respect to the preemption doctrine that the nexus between President Clinton's and Justice Ginsburg's centrist federalism comes most clearly into focus. After a brief introduction to the field, I consider President Clinton's stumbling second-term engagement with the preemption doctrine followed by an examination of a final set of Justice Ginsburg's dissents, this time in the preemption-doctrine context. The first of these dissents dramatically reveals Ginsburg and President Clinton to be engaged in the shared articulation of a centrist federalism.

2. Preemption Doctrine and Federalism

In interpreting the Supremacy Clause of Article VI of the Constitution,²⁶⁶ the Supreme Court has held that federal laws and regulations displace or "preempt" state law under three broadly construed sets of circumstances:

262. *Bush*, 531 U.S. at 139 (Ginsburg, J., dissenting) (quoting *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974) (citations omitted)).

263. *Id.* at 142 (quoting *Saenz v. Roe*, 526 U.S. 489, 504, n.17 (1999)).

264. *Id.* at 142–43.

265. *Miller v. Johnson*, 515 U.S. 900, 935 (1995) (Ginsburg, J., dissenting).

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

(1) “express preemption,” where Congress [or the federal agency to which rule-making authority has been delegated] has in so many words declared its intention to preclude state regulation of a described sort in a given area; (2) “implied preemption,” where Congress [or the federal agency], through the structure or objectives of its enactments, has by implication precluded a certain kind of state regulation in the area; and (3) “conflict preemption,” where Congress did not necessarily focus on preemption of state regulation at all, but where the particular state law conflicts directly with federal law, or otherwise stands as an obstacle to the accomplishment of federal statutory objectives.²⁶⁷

While this preemption doctrine has a long and distinguished pedigree in American constitutional law,²⁶⁸ the threat it posed to state autonomy became more pronounced with the rollout of the New Deal and accompanying expansion of the federal government’s regulatory authority.²⁶⁹ Concerned for the federalism balance, the Supreme Court clearly articulated a “presumption against preemption” with respect to matters traditionally under the authority of state governments.²⁷⁰ Michael Greve described the rule in these terms: “federal law should be read to displace traditional state powers only if the statute says so on its face, or else indicates a ‘clear and unmistakable’ congressional intent to preempt the states.”²⁷¹ Thus, where Congress expressly provides for the preemption, application of the preemption doctrine is a relatively straightforward proposition.²⁷² But the Supreme Court has often ignored the

267. 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1176–77 (3rd ed. 2000).

268. *See, e.g., Pennsylvania v. Nelson*, 350 U.S. 497 (1956) (finding that a state statute was superseded regardless of whether its purpose was to supplement federal law to reach areas that the federal law was presumed not to reach); *Hines v. Davidowitz*, 312 U.S. 52 (1941) (holding that the power to register aliens is not a concurrent power of the states and of the federal government).

In *Gibbons v. Ogden*, Chief Justice Marshall stressed the statutory hierarchy of the federal system. He observed that, as “to such acts of the State Legislatures as do not transcend their powers, but . . . interfere with, or are contrary to the law of Congress, made in pursuance of the constitution, . . . [i]n every such case, the act of Congress . . . is supreme; and the law of the State, though enacted in exercise of powers not controverted, must yield to it.”

1 TRIBE, *supra*, note 267 at 1173 (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 209 (1824)).

269. Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 967, 973 (2002) (“True preemption doctrine, then, was in its infancy until the unprecedented legislative activity of the post-Depression era.”).

270. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); Davis, *supra* note 269, at 967. *See generally* Susan Raeker-Jordan, *The Pre-emption Presumption That Never Was: Pre-emption Doctrine Swallows the Rule*, 40 ARIZ. L. REV. 1379 (1998) (concluding after an analysis of Supreme Court preemption doctrine decisions that a bright-line preemption rule should prevail whereby, absent unambiguous preemptive language, courts should not find that Congress intended federal law to displace state law).

271. Greve, *supra* note 147, at 112 (quoting *Santa Fe Elevator*, 331 U.S. at 230).

272. *See* KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 324 (15th ed. 2004) (“When a valid federal statute explicitly bars certain types of state action, there are no difficulties.”). Mary J. Davis characterized the recent history of the Court’s struggle with express preemption in these terms.

presumption²⁷³ and has, in fact, suggested a number of factors that can be considered on a case-by-case basis for determining whether Congress impliedly *intended* to preempt state law.²⁷⁴

The preemption doctrine, operating without a rigorously enforced presumption in favor of state autonomy, has obvious negative ramifications for the states. It gives ominous force to the constitutional requirement that “any state law, however clearly within a State’s acknowledged power, which interferes with or is contrary to federal law, must yield.”²⁷⁵ Quoting Justice O’Connor, James Staab has noted that “the

In the early 1980s, the Court begins in earnest its struggle with the proper analysis of express preemption provisions, beginning with the preemption provision of the Employee Retirement Income Security Act (ERISA), which has a very specific express preemption provision. The Court will struggle with ERISA preemption over the next decades as it continues its struggle with preemption doctrine generally.

Davis, *supra* note 269, at 990. She continued:

The Court’s struggle with express preemption and its meaningful search for congressional intent based on Congress’s express language was soon to be resolved. One year later [after the Court’s ruling in *Norfolk & Southern Railway Co. v. Shanklin*, 529 U.S. 344 (1999)], the Court had an opportunity to clarify its express preemption analysis and the interpretive methods to be used under that analysis [in *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000)]. . . .

Geier represents a seismic shift in the Court’s preemption doctrine. The Court has returned preemption doctrine to its early focus on federal exclusivity and turned away from any meaningful attempt at discerning congressional intent that has been “the ultimate touchstone” of preemption analysis since the 1940s. Preemption analysis is now organized not only to prefer federal law, but to presume its operation to the exclusion of state law that has even a minimal effect on the accomplishment of federal objectives.

Id. at 1005–06, 1012–13.

273. Greve, *supra* note 147, at 112. “Historically, the Supreme Court has said . . . that . . . there is a presumption against preemption. There is no such presumption any longer, if, indeed, there ever really was one.” Davis, *supra* note 269, at 968; see Calvin Massey, “*Joltin’ Joe Has Left and Gone Away*”: *The Vanishing Presumption Against Preemption*, 66 ALB. L. REV. 759 (2002) (describing the presumption as animating merely a “ceremonial federalism”).

274. SULLIVAN & GUNTHER, *supra* note 272, at 324 (“The Court’s preemption rulings often turn on a determination of congressional intent in the setting of the particular text, history and purposes of the federal legislation involved.”). The factors the Court has considered include: whether the subject of the state law requires national uniformity (preemption is likely); whether the federal law is pervasive in the field (preemption is likely); whether administration of the federal and state laws would lead to a conflict (preemption is likely); whether the subject area is one traditionally dominated by state government (there is a presumption against preemption). See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 378 (7th ed. 2004) (“Congress’ intention may be clear from the pervasiveness of the federal scheme, the need for uniformity, or the danger of conflict between the enforcement of state laws and the administration of federal programs, of [sic] the state law ‘stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.’ But absent persuasive reasons evidencing Congressional intent favoring preemption, the Court will not presume the invalidity of state regulations.” (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984)) (citations omitted)).

275. *Free v. Bland*, 369 U.S. 663, 666 (1962) (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat)

preemption doctrine gives the federal government ‘a decided advantage in [the] delicate balance’ between the states and the federal government.²⁷⁶ For this reason, the preemption doctrine has become a “staple of the Court’s ongoing work [managing] . . . the balance of federal and state power in our complex and sophisticated federal structure of government”²⁷⁷ Ernest Young has gone so far as to suggest that the preemption doctrine plays a more important role in the state-federal balancing than Chief Justice Rehnquist’s New Federalism jurisprudence, which focused on constitutionally based and judicially enforceable limits on the scope of Congressional power.²⁷⁸ Federal displacement of state law, Young argued, strikes at the heart of “state regulatory prerogatives,”²⁷⁹ the very source of states’ ability to promote and engender popular loyalty.²⁸⁰

3. Clinton and Preemption

In his bid for reelection in 1996, President Clinton could point to an impressive federalism record, along with other New Democratic achievements, in underscoring the solid centrism of his Presidency. In his remarks to the National Governors Association just months after winning reelection, President Clinton burnished the federalist commitment of his first term, noting:

They said that we couldn’t have an activist Federal Government if we were going to cut the size of it and reduce regulations and give more authority to the States, but Government is 300,000 people smaller than it was the day I took office. And I think it’s clear that we’ve got a different kind of partnership [between the federal government and the states] here.²⁸¹

Not long into his second term, however, President Clinton stumbled through the worst federalism crisis of his Presidency with an inexplicable venture into the rarefied field of federal regulatory preemption. The incident contributed to persistent skepticism about the administration’s commitment to centrist policies like its pro-states stance on federalism. Those doubts shadowed President Clinton’s New Democratic agenda throughout his time in the White House. Significantly, President Clinton responded swiftly and comprehensively to the incident to correct this federalist lapse.²⁸²

1, 210–11 (1824)) (citations omitted).

276. James B. Staab, *Conservative Activism on the Rehnquist Court: Federal Preemption Is No Longer a Liberal Issue*, 9 ROGER WILLIAMS U. L. REV. 129, 140 (2003) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)).

277. Jonathan D. Varat, *Federalism and Preemption in October Term 1999*, 28 PEPP. L. REV. 757, 757 (2001).

278. See Young, *Just Blowing Smoke*, *supra* note 50, at 40–41; Young, *supra* note 59, at 1377.

279. Young, *supra* note 59, at 1380.

280. For further discussions of factors influencing a state’s ability to engender its citizens’ loyalty, see *id.* at 1377.

281. Remarks to the to the National Governors’ Association Conference in Las Vegas, Nevada, 2 PUB. PAPERS 1013, 1013–14 (July 28, 1997).

282. See JANSSON, *supra* note 60 (discussing the Clinton administration’s general antipathy to federal regulatory preemption).

The preemptive force of federal law has also been applied to rules issued by federal agencies.²⁸³ As part of his “new federalism” agenda, and conscious of the federalist implications of preemption, in 1987, President Reagan issued Executive Order 12,612—*Federalism*.²⁸⁴ Executive Order 12,612 established a catalogue of “fundamental federalism principles” and “[f]ederalism [p]olicymaking [c]riteria” to be considered and observed by executive departments and agencies in formulating and implementing policy.²⁸⁵ Strongly supportive of state autonomy, Executive Order 12,612 also included a set of “[s]pecial [r]equirements for [p]reemption” that sought to limit the preemptive effect of federal agencies’ interpretation of statutes,²⁸⁶ as well as the preemptive effect of their own regulations,²⁸⁷ to only those circumstances in which Congress expressly preempted state law or, by implication, if the state law was in direct conflict with the federal statute.²⁸⁸ President Reagan’s *Federalism* executive order remained in force, unaltered under President Bush and through the first six years of the Clinton presidency.

On May 14, 1998, while traveling in England, President Clinton issued his own federalism order, Executive Order 13,083—*Federalism*²⁸⁹—which revoked President Reagan’s Executive Order 12,612. In stark contrast with President Clinton’s centrist federalism policies, Executive Order 13,083 abandoned President Reagan’s “[s]pecial [r]equirements for [p]reemption,”²⁹⁰ replacing that standard with a considerably softer mandate for intergovernmental consultation.²⁹¹ The order stated: “Each agency shall have an effective process to permit elected officials and other representatives of State and local governments to provide meaningful and timely input in the development of regulatory policies that have federalism implications.”²⁹²

283. *Fid. Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 153–54 (1982) (“[F]ederal regulations have no less pre-emptive effect than federal statutes.”).

284. Exec. Order No. 12,612, 3 C.F.R. 252 (1988).

285. *Id.* at 254.

286. *Id.* at 255.

Executive departments and agencies shall construe . . . a Federal statute to preempt State law only when the statute contains an express preemption provision or there is some other firm and palpable evidence compelling the conclusion that the Congress intended preemption of State law, or when the exercise of State authority directly conflicts with the exercise of Federal authority under the Federal statute.

Id.

287. *Id.*

Executive departments and agencies shall construe any authorization in the statute for the issuance of regulations as authorizing preemption of State law by rule-making only when the statute expressly authorizes issuance of preemptive regulations or there is some other firm and palpable evidence compelling the conclusion that the Congress intended to delegate to the department or agency the authority to issue regulations preempting State law.

Id.

288. *Id.* at 254.

289. Exec. Order No. 13,083, 3 C.F.R. 146 (1999).

290. Exec. Order No. 12,612, 3 C.F.R. 252, 254 (1988).

291. *See* Exec. Order No. 13,083, 3 C.F.R. at 148.

292. *Id.*

The Executive Order otherwise makes no reference to federal regulatory preemption of state law. Outraged by these and other substantive facets of Executive Order 13,083 that favored the federal government²⁹³ and the total lack of consultation on the matter, a broad bipartisan coalition of Congressional representatives, representatives of state and local governments, and citizen groups, forcefully attacked the new executive order. On August 5, 1998, President Clinton responded to the backlash by suspending Executive Order 13,083.²⁹⁴

Exactly one year later, after extensive and thoroughgoing consultation with representatives of the Big Seven, President Clinton issued Executive Order 13,132—*Federalism*²⁹⁵—which reinstated and even strengthened the provisions of President Reagan’s Executive Order 12,612. Especially as regards the issue of preemption, Executive Order 13,132 goes further than President Reagan’s Executive Order 12,612, requiring “clear evidence”²⁹⁶ and not merely “firm and palpable evidence”²⁹⁷ of Congressional intent to preempt before agencies can take actions (statutory interpretation or rule making) that will displace state law.²⁹⁸ From the perspective of the states, the episode also had the positive effect of drawing attention to, and thus, making compliance with Executive Order 13,132 more likely.²⁹⁹ The attention focused on President Reagan’s Executive Order during the debate highlighted the general disregard it had been shown by all administrations,³⁰⁰ leading President Clinton to pursue an assertive campaign for compliance with Executive Order 13,132.³⁰¹

293. Executive Order 13,083 also considerably broadened the “federalism policymaking criteria” of President Reagan’s Order, permitting federal action, *inter alia*: “when decentralization increases the costs of government thus imposing additional burdens on the taxpayer”; “when States would be reluctant to impose necessary regulations because of fears that regulated business activity will relocate to other States”; “when placing regulatory authority at the State or local level would undermine regulatory goals because high costs or demands for specialized expertise will effectively place the regulatory matter beyond the resources of State authorities”; or “when the matter relates to Federally owned or managed property or natural resources, trust obligations, or international obligations.” *Id.*

294. Exec. Order No. 13,095, 3 C.F.R. 202 (1999).

295. Exec. Order No. 13,132, 3 C.F.R. 206 (2000), *reprinted in* 5 U.S.C. § 601 (2006).

296. *Id.* at 208; see Lawrence O. Gostin & James G. Hodge, Jr., *The Public Health Improvement Process in Alaska: Toward a Model Public Health Law*, 17 ALASKA L. REV. 77, 92 n.56 (2000) (“The revised order disfavors federal preemptive laws or policies, requires executive officials to defer to states whenever possible in setting national standards, and features an enforcement mechanism against implementation of federal executive policies that lack a federalism ‘impact statement.’”); see also KENNETH STARR, PATRICK E. HIGGINBOTHAM, STEPHANIE K. SEYMOUR, WILLIAM C. CLARK, JOHN CRISWELL & JOE SNEED, *THE LAW OF PREEMPTION* 40–56 (1991) (arguing that a “clear intent” requirement for preemption would advance the interests of federalism).

297. Exec. Order No. 12,612, 3 C.F.R. 252, 255 (1988).

298. See National Conference of State Legislatures, Comparison of Executive Order 12612 (Ronald Reagan, 1987) and Executive Order 13132 (William J. Clinton, 1999) (Sept. 1, 1999) (unpublished document no longer available online, on file with the Indiana Law Journal).

299. Exec. Order No. 13,132, 3 C.F.R. 206 (2000), *reprinted in* 5 U.S.C. § 601 (2000).

300. See U.S. GEN. ACCOUNTING OFFICE, FEDERALISM: IMPLEMENTATION OF EXECUTIVE ORDER 12,612 IN THE RULEMAKING PROCESS (1999).

301. Memorandum from Jacob J. Lew for Heads of Executive Dep’ts and Agencies and Indep. Regulatory Agencies, Guidance for Implementing E.O. 13132 (Oct. 28, 1999), <http://www.whitehouse.gov/the-press-office/2000/10/28/eo-13132>

4. Ginsburg and Preemption

Again recalling the significance she attaches to writing separately in dissent, and in keeping with the earlier focus on her dissenting opinions in the federalism context, it makes sense to explore Justice Ginsburg's preemption doctrine jurisprudence (and its implications for her centrist approach to federalism) by way of a few additional dissenting opinions. These opinions reveal that Justice Ginsburg has staked her strongest claim to being a centrist on federalism in the preemption doctrine context. Michael S. Greve counted Justice Ginsburg as one of the Supreme Court's secure "anti-preemption" votes.³⁰² And, as noted earlier, Ernest Young has argued that

georgewbush-whitehouse.archives.gov/omb/memoranda/m00-02.pdf. Executive Order 13,132—*Federalism*—gained renewed importance when, on May 20, 2009, newly elected President Barack Obama issued a "Memorandum for the Heads of Executive Departments and Agencies" in which he clearly articulated his administration's commitment to American federalism and directed that "preemption of State law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the States and with a sufficient legal basis for preemption." President Barack Obama, Memorandum for the Heads of Executive Departments and Agencies (May 20, 2009), available at http://www.whitehouse.gov/the_press_office/Presidential-Memorandum-Regarding-Preemption/; see Jack Park, Executive Order on Preemption, http://www.fed-soc.org/publications/pubid.1644/pub_detail.asp.

302. Greve, *supra* note 147, at 116. While she frequently joins the Court's decisions to block the preemption of state law, as Ernest Young noted,

[t]he pattern . . . is not uniform. Preemption cases do not display the same consistent five-to-four voting pattern that characterizes so many of the Court's federalism cases. And the nationalists have been far from consistent in their devotion to state regulatory prerogatives. . . . Justice Ginsburg wrote the majority opinion in a 1998 case, *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, opining that the presumption against preemption does not apply to treaty interpretation.

Young, *supra* note 59, at 1382–83 (citations omitted). Young suggested that this flexibility is a consequence of the fact that preemption cases, "while carrying profound implications for the federal balance, are fundamentally about statutory interpretation." *Id.* at 1383.

Since joining the Court, Justice Ginsburg has participated in forty-eight preemption cases. In twenty-four cases Justice Ginsburg has sided with the states. See *Wyeth v. Levine*, 129 S. Ct. 1187 (2009); *Chamber of Commerce of the U.S. v. Brown*, 128 S. Ct. 2408 (2008); *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008); *Mid-Con Freight Sys. v. Mich. Pub. Serv. Comm'n*, 545 U.S. 440 (2005); *Bates v. Dow Agrosiences L.L.C.*, 544 U.S. 431 (2005); *Nixon v. Mo. Mun. League*, 541 U.S. 125 (2004); *Am. Ins. v. Garamendi*, 539 U.S. 396 (2003); *Inyo County v. Paiute-Shoshone Indians*, 538 U.S. 701 (2003); *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644 (2003); *City of Columbus v. Ours Garage & Wrecker Serv.*, 536 U.S. 424 (2002); *Rush Prudential HMO v. Moran*, 536 U.S. 355 (2002); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000); *Norfolk S. Ry. v. Shanklin*, 529 U.S. 344 (2000); *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358 (1999); *Humana Inc. v. Forsyth*, 525 U.S. 299 (1999); *Montana v. Crow Tribe of Indians*, 523 U.S. 696 (1998); *Boggs v. Boggs*, 520 U.S. 833 (1997); *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806 (1997); *Ca. Div. of Labor Standards Enforcement v. Dillingham Constr.*, 519 U.S. 316 (1997); *Atherton v. FDIC*, 519 U.S. 213 (1997); *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996); *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996); *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995); *American Dredging Co. v. Miller*, 510 U.S. 443 (1994).

In twenty cases Justice Ginsburg has sided with the federal government. See *Rowe v. N.H. Motor Trans. Ass'n*, 128 S. Ct. 989 (2008); *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007); *Wagon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005); *Aetna Health Inc. v.*

preemption raises federalism issues of great significance for state autonomy because preemption

threatens, in a way that lawsuits against state governments or minor federal enactments like the Gun-Free School Zones Act do not, the core regulatory authority of state governments. And in so doing, preemption undermines the states' ability to win, through provision of public goods and services, the popular loyalty necessary to make a system of political safeguards work. Broad preemption of state regulatory authority thus threatens the self-enforcing nature of the Framers' original structure.³⁰³

This is unmistakably the view held by Justice Ginsburg, a fact made clear when she joined Justice Stevens's dissent in *Geier v. American Honda Motor Co.*³⁰⁴ In *Geier*, Justice Stevens argued for placing federal preemptive power

squarely in the hands of Congress, which is far more suited than the Judiciary to strike the appropriate state/federal balance (particularly in areas of traditional state regulation), and [which is required to] speak clearly when exercising that power. In this way, the structural safeguards inherent in the normal operation of the legislative process operate to defend state interests from undue infringement.³⁰⁵

Justice Stevens's dissent reads like a manifesto for process federalism, leading Ernest Young to conclude that "[t]he *Geier* dissent is probably the fullest statement of the process federalism case for a presumption against preemption."³⁰⁶ Thus, in *Geier* we see that Justice Ginsburg's preemption doctrine jurisprudence is only a subset of her broader commitment to a process-oriented approach to federalism.

Davila, 542 U.S. 200 (2004); Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246 (2004); Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461 (2004); Hillside Dairy Inc. v. Lyons, 539 U.S. 59 (2003); Entergy La., Inc. v. La. Pub. Serv. Comm'n, 539 U.S. 39 (2003); Beneficial Nat'l Bank v. Anderson, 539 U.S. 1 (2003); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001); Egelhoff v. Egelhoff, 532 U.S. 141 (2001); Buckman Co. v. Plaintiff's Legal Comm., 531 U.S. 341 (2001); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000); El Al Isr. Airlines v. Tsui Yuan Tseng, 525 U.S. 155 (1999); Am. Telephone & Telegraph Co. v. Cent. Office Tel., Inc., 524 U.S. 214 (1998); Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681 (1996); Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995); U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995); Am. Airlines v. Wolens, 513 U.S. 219 (1995); John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86 (1993).

In the remaining four cases Justice Ginsburg voted to avoid the preemption doctrine issue. See *Preston v. Ferrer*, 128 S. Ct. 978 (2008); *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677 (2006); *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998); *Rivet v. Regions Bank of La.*, 522 U.S. 470 (1998).

303. Young, *supra* note 59, at 1384; see Davis, *supra* note 269, at 969 ("On a more basic level, . . . preemption is about power and politics because it involves the fundamental balance of Congress's power in relation to the states. . . . To the extent that the Supreme Court has something to say about the power struggle of federalism, it speaks, partially at least, through its preemption decisions.").

304. 529 U.S. at 907 (Stevens, J., dissenting).

305. *Id.*

306. Young, *supra* note 59, at 1382.

Justice Ginsburg's preemption doctrine dissent in *Norfolk Southern Railway Co. v. Shanklin*³⁰⁷ firmly establishes her pro-state preemption doctrine stance. It also provides dramatic evidence of the nexus between President Clinton's and Justice Ginsburg's centrist vision of federalism. Within days of the issuance of President Clinton's corrective Executive Order 13,132,³⁰⁸ which formally sought to limit federal regulatory preemption of state law, the Norfolk Southern Railway Company petitioned the Supreme Court for a writ of certiorari, asking for review of the District Court's \$615,379 judgment, which had been upheld on appeal by the Sixth Circuit.³⁰⁹ At the trial court and again on appeal, Norfolk Southern objected to the application of Tennessee tort law to Dedra Shanklin's diversity wrongful death action.³¹⁰ Shanklin's husband had been killed when he was struck by a Norfolk Southern train at a railroad crossing along Oakwood Church Road in Gibson County, Tennessee.³¹¹ Contrary to the rulings of the district court and court of appeals on the issue, Norfolk Southern urged the Supreme Court to conclude that any state law causes of action that might have arisen from the accident had been preempted and were foreclosed by the Highway Safety Act of 1973³¹² and the attending regulations and orders concerned with safety at railroad-highway crossings that had been issued by the Secretary of Transportation by way of the Federal Highway Administration (FHWA). The Supreme Court granted certiorari review on October 18, 1999.³¹³

President Clinton's Department of Transportation and Attorney General joined the fray by filing an amicus curiae brief supporting Ms. Shanklin on January 28, 2000.³¹⁴ This required the Clinton administration to argue *against* the preemptive effect of the federal railroad crossing safety regulations.³¹⁵ It is not noteworthy that the federal government might view the preemptive force of its regulations differently than a private litigant (the defendant in the original action, Norfolk Southern), and that the federal government might intervene before the Supreme Court in order to advocate for its understanding of its regulations. But the government's opposition to the preemptive effect of the federal regulations implicated in *Shanklin* is noteworthy because it serves as a clear example of President Clinton's New Democratic federalism jurisprudence. In siding with Ms. Shanklin, President Clinton's administration urged a narrow characterization of federal preemptory authority to the significant advantage of state regulatory autonomy.³¹⁶ Without more, the Clinton administration's position in the case would be indicative of a concern for state autonomy. Viewed as an attempt to fulfill the mandate of the freshly minted Executive Order 13,132, it says quite a lot about the administration's commitment to the states. More tellingly, however, this position required the Clinton administration to reverse, for the benefit of the states, the

307. 529 U.S. at 360 (Ginsburg, J., dissenting).

308. Exec. Order No. 13,132, 3 C.F.R. 206 (2000), reprinted in 5 U.S.C. § 601 (2000).

309. Petition for Writ of Certiorari, *Shanklin*, 529 U.S. 344 (No. 99-312).

310. *Shanklin v. Norfolk S. Ry. Co.*, 173 F.3d 386, 388, 389 (6th Cir. 1999).

311. *Shanklin*, 529 U.S. at 350.

312. 23 U.S.C. § 152 (2006).

313. *Norfolk S. Ry. Co. v. Shanklin*, 528 U.S. 949, 949 (1999).

314. Brief for United States as Amicus Curiae Supporting Respondents, *Shanklin*, 529 U.S. 344 (Jan. 28, 2000) (No. 99-312).

315. *See id.* at 15-21.

316. *Id.*

nationalist position the government had taken before the Supreme Court under the first President Bush in *CSX Transportation, Inc. v. Easterwood*,³¹⁷ a case involving the same federal regulatory regime.

Justice O'Connor, writing for the majority, held for Norfolk Southern and found, in keeping with the view of the Court in *Easterwood*, that the FHWA regulations preempted Shanklin's Tennessee tort claims.³¹⁸ With none-too-little incredulity, Justice O'Connor remarked that the position taken by the majority "is precisely the interpretation [of the relevant regulations] that the FHWA endorsed in *Easterwood*. . . . Thus," Justice O'Connor continued, "*Easterwood* adopted the FHWA's own understanding [of the relevant regulation], a regulation that the agency had been administering for 17 years."³¹⁹ How is it, Justice O'Connor wondered, that the "[r]espondent and the Government now argue that [the relevant regulations] are more limited in scope,"³²⁰ especially when "[t]his construction . . . contradicts the regulation's plain text."³²¹ Although the government must have anticipated the questions a reversal of its position in *Easterwood* would pose, it only addressed the matter directly in a footnote in its amicus curiae brief.³²² The Court pressed Assistant Solicitor General Patricia Millet on the matter during oral argument:

Question: In *Easterwood*, which was what, 7 or 8 years ago, this Court laid down—wisely or unwisely it laid down a preemption rule, and the preemption rule turned on the participation of Federal funds, and the formulation that the Court used, if I remember correctly, was just about exactly what the Solicitor General at the time said was the formulation we ought to use.

. . . .

. . . But the truth is, there has been a simple rule, announced by the Court for 7 or 8 years ago, and I don't know why that does not trump [the government's current, contrary position].³²³

317. 507 U.S. 658 (1993).

318. See *Shanklin*, 529 U.S. at 358–59.

319. *Id.* at 354–55.

320. *Id.* at 355.

321. *Id.* at 356.

322. See Brief for United States as Amicus Curiae Supporting Respondents, *supra* note 314, at 23 n.29. The footnote stated:

The government's brief in *Easterwood* was similarly limited to grade-crossing improvement projects that installed "adequate" devices under 23 C.F.R. § 646.214(b)(3) and (4). . . . The brief did not address preemption under the minimum protection program. Indeed, the brief noted that federal law requiring "all crossings [to] be equipped, at a minimum with a cross-buck warning signs" is an "exception" to the general rule that the "Manual does not generally specify when particular safety devices are required."

Id. (quoting Brief for the United States as Amicus Curiae Supporting Affirmance, at 10, *CSX Trans. Inc. v. Easterwood*, 507 U.S. 658 (Aug. 27 1992) (Nos. 91-790 & 91-1206)) (citations omitted). The brief thus identifies the limits of its preemption argument.

323. Transcript of Oral Argument at 40, *Shanklin*, 529 U.S. 344 (No. 99-312).

In its amicus brief, and in Millet's response to the Court's question during oral argument, the government invoked a technical distinction in the facts of the two cases.³²⁴ The more probable explanation for the government's reversal, however, lies in the change of presidential administrations between *Easterwood* and *Shanklin*, which made the government's arguments concerning the limits of regulatory preemption in the case a matter of the Clinton administration's fiat and, thus, reflective of President Clinton's New Democratic centrism regarding federalism and state autonomy.

Significantly, Justice Ginsburg wrote the lone dissent (joined by Justice Stevens) in *Shanklin*.³²⁵ Besides lamenting that the majority's holding left Dedra Shanklin with no avenue for recovery, Justice Ginsburg emphasized the important federalism implications of the case, especially the impact the majority's decision would have for the states' governing autonomy.³²⁶ The majority's holding, Justice Ginsburg complained, "preempts all state regulation of safety devices at each individual crossing"³²⁷ and stops the state of Tennessee "from requiring the installation of adequate devices at any of the [federally] funded crossings. The upshot of the Court's decision"³²⁸ to disable the state regulatory interest in the matter on the basis of such a broad reading of the preemptive force of the federal regulations, Justice Ginsburg disapprovingly noted, "is that state negligence law is displaced"³²⁹

Justice Ginsburg has shown no sign of softening her pro-state preemption doctrine stance. In 2008, she was the sole dissenter in *Riegel v. Medtronic*,³³⁰ in which the majority held that the preemption clause of the Medical Device Amendments of 1976 (MDA)³³¹ barred the plaintiffs' state common law causes of action. The MDA explicitly preempts state requirements concerning an FDA-approved device's safety and effectiveness that are "different from or in addition to"³³² MDA requirements, and the eight-justice majority concluded that the relevant state law tort claims constituted safety and effectiveness requirements because "a liability award 'can be, indeed is designed to be, a potent method of governing conduct and controlling policy.'"³³³

But this was precisely the federalism concern that stirred Justice Ginsburg to dissent. Reiterating the language she often uses to characterize the states' governing autonomy, Justice Ginsburg complained that preemption of the state common law claims cuts "deeply into a domain historically occupied by state law."³³⁴ She reminds the majority of what is at stake in preemption cases like *Riegel*: "the historic police powers of the States,"³³⁵ "the federal-state balance,"³³⁶ and the special respect owed by

324. See Brief for United States as Amicus Curiae Supporting Respondents, *supra* note 314, at 40–42.

325. 529 U.S. at 360 (Ginsburg, J., dissenting).

326. *Id.*

327. *Id.* (emphasis added).

328. *Id.*

329. *Id.*

330. 128 S. Ct. 999 (2008).

331. 21 U.S.C. §§ 360c–k, 379, 379a (2006); 42 U.S.C. § 3512 (2006).

332. § 360k(a)(1).

333. *Riegel*, 128 S. Ct. at 1008 (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 552 (1992)).

334. *Id.* at 1013 (Ginsburg, J., dissenting).

335. *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

the federal government to “state action in fields of traditional state regulation”³³⁷ or in fields of traditional state primacy like health and safety.³³⁸ Even the MDA’s provisions, Justice Ginsburg argued, extend greater solicitude for state concerns than the majority’s construction allows.³³⁹ Justice Ginsburg, alone among the Court’s justices, refused to subscribe to such an enfeebled construction of state governing autonomy in our federalism.

5. Conclusion

Justice Ginsburg has defended the states’ autonomy against a majority of the Court bent on national aggrandizement through an expanded preemption doctrine. With Justice Ginsburg at the barricades, the majority has busily held “that ambiguous [federal] statutes preempt state law without much regard for state prerogatives at all.”³⁴⁰ Ernest Young concluded, based on this trend, that “the so-called ‘states’-rights’ majority [of Rehnquist’s New Federalism jurisprudence] may be ignoring and even doing real damage to the states in the category of cases that matters most.”³⁴¹ Throughout her preemption dissents, Justice Ginsburg returns again and again to her chief federalism concern: the states’ governing autonomy. Justice Ginsburg’s centrist federalism jurisprudence in the preemption doctrine context intersects with the strongly pro-state position on which the Clinton administration eventually settled with its second, corrective *Federalism* executive order. In *Shanklin*, Justice Ginsburg and President Clinton nearly spoke with one voice, arguing against a rising nationalist tide to insist that due respect be shown to the states’ governing autonomy.

CONCLUSION

The Clinton/Ginsburg federalism described in this Article can be fairly called centrist because it resides somewhere between the contending poles of American federalism.³⁴² The Justice and her President do not embrace the dual federalism advocated by the New Federalism Republicans.³⁴³ But that might have been expected of them. The greater challenge for those who would casually brand them liberals comes

336. *Id.* (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)).

337. *Id.* (quoting *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995)).

338. *Id.*

339. *Id.* at 1014 n.3.

340. Young, *supra* note 59, at 1377.

341. *Id.* at 1351.

342. Philip Weiser described the continuum of American federalism. Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692 (2001). “A critical feature of cooperative federalism statutes is the balance they strike between complete federal preemption (a preemptive federalism) and uncoordinated federal and state action in distinct regulatory spheres (a dual federalism).” *Id.* at 1697.

343. Rotunda argues that the Rehnquist Court’s New Federalism does not recall and should not be “confused with the ‘states’ rights’ slogan that the slave owners adopted in the pre-Civil War era or that the Dixiecrats adopted in the 1940s and later,” Rotunda, *supra* note 145, at 870, and the “old Commerce Clause of the pre-1937 Court,” *id.* at 873, which it was argued in the roll-out of the New Deal had prevented “both state governments and the federal government from regulating economic and commercial activity,” *id.*

from the fact that, in their sympathy for the states' governing autonomy and intersubjectivity, President Clinton and Justice Ginsburg moved to the right of the nationalism of the Great Society Democrats.

And now, as we begin the work of considering Justice Ginsburg's legacy, we would do well to remember that, in the shadow of Justice Ginsburg's progressive gender equality jurisprudence resides an often overlooked centrism—particularly with respect to federalism—that complements President Clinton's attempt to refashion the Democratic Party as a party “embracing ideas and values that [are] both liberal and conservative.”³⁴⁴ For this, former President Clinton and the states are much in her debt.

344. CLINTON, *supra* note 13, at 366.