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Federalism vs. States' Rights: A Defense of
Judicial Review in a Federal System

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John McGinnis and Ilya Somin

Abstract

This essay offers a new defense of judicial review of the Constitution's federal structure. It begins by showing that federalism is best understood not as a system that creates rights for states but one that provides benefits for the citizens of the nation. It achieves this goal by distributing powers best exercised at the national level to the federal government and those best exercised more locally to the states. The benefits of this distribution include catering to diverse preferences of citizens in different states and creating horizontal competition among the states for efficient provision of government services. Because these benefits flow to citizens rather than to government officials, the structure of federalism creates a classic principal-agent problem. We show in the paper that citizens will be poor monitors of these officials, because they are rationally ignorant of politics, particularly structural issues, like federalism, and because they are an extremely large group, giving them incentives to free ride on the monitoring of others. We then show that state officials have incentives to take advantage of this lax monitoring and themselves undermine federalism. State officials may surrender their powers and acquiesce in congressional overreaching in the areas of the Commerce Clause, section 5 of the Fourteenth Amendment, the spending power and sovereign immunity. To give just one example, we show that while horizontal competition among the states may benefit citizens, state officials may benefit from avoiding competition and seeking a cartel sustained by a federal regulation. For such reasons, the political process cannot be counted upon to protect the proper distribution of powers, because state officials as well as federal officials have few incentives for its preservation. Because our theory of federalism is not a states' rights theory, we also believe that judicial review is appropriate when states usurp federal power or otherwise undermine federalism. State officials have strong incentives to undermine structural federalism in such areas as the dormant Commerce Clause and

the Compact Clause. We thus call for more judicial enforcement in some of these areas as well. Ours is thus a unified theory of judicial review that justifies judicial enforcement of federalism against both federal and state governments. We end by sketching the beginnings of a theory explaining why the federal judiciary, given its structure and incentives, will improve the enforcement of this most essential constitutional distribution of power.

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INTRODUCTION

Federalism is the cornerstone of the Constitution. Yet, federalism is too often confused by both admirers and detractors with state autonomy, popularly known as “states’ rights.” The constitutional system of federalism assigns powers to state and federal government officials not for their own benefit, but for that of the people of the entire nation. As we will discuss, the benefits of this distribution of power within the federalist structure are many—the satisfaction of diverse preferences and competition both among the states and between the states and federal government to satisfy those preferences. While state autonomy plays a large role in sustaining the benefits of federalism, the federal government also has an important role to play in restricting state autonomy in specific ways so as to keep open the avenues of trade and movement among the states.

In protecting this beneficial distribution of power, the people, to use economic terminology, are “principals” and state and federal officials merely their “agents.”¹ This allocation of roles between the people and their legislators creates the possibility that principal-agent problems will arise in the maintenance of federalism when the interests of elected officials diverge from those of ordinary citizens.

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¹ For helpful reviews of the principal-agent literature, see Andrei Shleifer & Robert Vishny, *A Survey of Corporate Governance*, 52 J. Fin. 737 (1997); Kathleen M. Eisenhardt, *Agency Theory: An Assessment and Review*, 14 Acad. Mgmt. Rev. 57 (1989); Terry M. Moe, *The New Economics of Organization*, 28 Am. J. Pol. Sci. 777 (1984).

The structure of federalism thus must be protected against the machinations of both federal and state governments. Often, the interests of the latter conflict with this structure no less than those of the former.

This essay defends the distributional model of federalism and the principal-agent model for analyzing its enforcement, arguing that together they have profound implications for modern federalism jurisprudence. Political economy analysis confirms that the political process will not always protect the Constitution's beneficial distribution of power, because the people's agents--federal officials and state officials alike--are primarily motivated by their own political interests. These interests, however, have no necessary connection to the maintenance of the distribution of powers set out in the Constitution. Officials will thus often use the initial distribution of powers assigned by the Constitution as chips to trade or indeed to surrender rather than systematically defend.² Because of their rational ignorance of public policy, citizens are also unlikely to consistently protect federalism, particularly because it is a complex issue of governmental structure that lacks political salience compared to the pressing public policy issues of the day. Accordingly, the argument made by some commentators and on occasion the Supreme Court that the political process can be relied upon to protect federalism is fundamentally flawed.

Thus, the courts should enforce the Constitution's federalism provisions no less than its individual rights provisions. But the rationale for judicial intervention is not a rationale rooted in protecting the rights of the states but in protecting the benefits that flow to citizens from a proper distribution of state and federal powers. Our theory thus shows why it is equally appropriate for the Court to protect federalism against interference by the states: federal officials, like state officials, cannot be expected to stand up for federalism when such action clashes with their political interests. Judicial review in either case is exercised on behalf of citizens who often lack the incentive to enforce the distribution of powers themselves.

² See John O. McGinnis, *Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers*, 56 L. & CONTEMP. PROBS. 293, 295 (1993) (detailing that initial distribution of constitutional power is merely a baseline from which political actors make deals).

The Rehnquist Court has begun to recognize this rationale for judicial protection of federalism. In *New York v. United States*,³ the Court noted that state legislators may sometimes actually want the federal government to dictate to them so that they can blame any resulting unpopular policies on Washington.⁴ Even when it does not expressly offer this kind of structural rationale, many of the Rehnquist Court's federalism cases have often been consistent with the logic of the theory of federalism offered here. Most famously, of course, the Court has required Congress to respect some limitations on its Commerce Clause powers, protecting jurisdictional competition and other virtues of decentralizing federalism. But, in keeping with our theory, the Rehnquist Court's jurisprudence is not limited to protecting state autonomy. It has sometimes imposed limits on state autonomy when necessary to protect structural federalism. For instance, it has extended Dormant Commerce Clause protections against state discrimination to nonprofit institutions,⁵ thus reinforcing interstate economic competition for non-profits as well as commercial firms. The Rehnquist Court has also built on Warren Court precedents enforcing the right to travel, a right that protects competitive federalism by preventing states from constricting the ability of citizens to move across state lines. Thus, while we will on occasion criticize the Court's federalism jurisprudence, many of its decisions comport with our theory.

Our essay will generalize the insight of *New York v. United States* into the principal-agent problem of federalism, providing a more comprehensive theory of the ways that the interests of government officials, both state and federal, may systematically undercut constitutional federalism. State officials may also sometimes want to discard the state autonomy guaranteed by enumerated powers. Similarly, federal officials may not consistently want to exercise their responsibilities under the Commerce Clause and the Compact Clause to protect federalism against the depredations of state governments. Thus, we show that a coherent theory of judicial intervention on behalf of state autonomy is part of a larger theory that helps explain a wider range of jurisprudence than that usually associated

³ *New York v. United States*, 505 U.S. 144, 182-83 (1992).

⁴ *New York*, 505 U.S. at 181-82.

with federalism. The Court must protect the public interest in the constitutional distribution of federal and state powers because the goals of state and federal officials are often not congruent with the public interest. And citizens are unlikely to be able to monitor, let alone punish, these officials' disregard of their constitutional responsibilities.

The theory we outline is primarily a structural one. We do not, however, intend to denigrate the importance of text and original meaning to judicial review of federalism.⁶ Our argument should be viewed as a supplement to analyses of text and original meaning rather than a replacement for them.

Part I outlines our basic theory. It shows that Constitutional federalism is a classic example of a principal-agent problem. As in other situations where principals have less information than their agents and where the multiplicity of principals reduces their incentives to monitor agents' activities, citizens are unlikely to provide effective oversight of the behavior of public officials, state or federal. These officials in turn have incentives to depart from the beneficial distribution of power between the state and government officials provided by the Constitution. The systematic inability of political actors or citizens to enforce that distribution fatally undermines the political process theory of federalism enforcement.

Part II provides a brief survey of the major structural advantages of federalism: responsiveness to diverse local preferences, horizontal competition between state governments for businesses and residents, and vertical competition between the states and the federal government. Throughout this essay, we show how judicial intervention in various areas can help promote these goals.

Part III applies our theory to the protection of state government power, showing in each case that the benefits of federalism may be in systemic conflict with the interests of state officials who thus may be only too willing to give up the state authority that leads to these benefits. For instance, the Commerce Clause leads to beneficial interjurisdictional competition, but state officials, like competitors everywhere, may prefer a cartel that eliminates or at least reduces competition. States have similar incentives to

⁵ *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 584 (1997).

⁶ For strong arguments that text and original meaning require vigorous judicial review of federalism, see, e.g., Randy E. Barnett, *Restoring the Lost Constitution* chs. 7, 11 (2004); Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459 (2001).

support federal overreaching under Section 5 of the Fourteenth Amendment. In the area of federal spending, state officials may welcome federal grants that allow them to augment the state's budget even at the expense of state autonomy. Provisions that prohibit commandeering may promote accountability in government, but states officials may benefit from diminished accountability. Sovereign immunity may benefit citizens by permitting each state greater control over their budgets, but state officials may believe that their state may benefit from federal imposition of liability because competitor states will suffer more costs than will their own states.⁷

As this last example shows, state officials may not only disregard the appropriate distribution of power for their own personal interests, but for the interests of their states. Nevertheless, such a departure from the distribution of power harms the citizens of the nation as a whole. Recognizing that state officials' exercise of state powers for the benefit of citizens in their own states can undermine federalism underscores that ours is, paradoxically, a *nationalist* theory of federalism— a theory of federalism designed to benefit all the nations' citizens, rather than a state's rights theory.

Part IV demonstrates that our theory is part of a broader theory of protecting the constitutional distribution of governmental authority, both state and federal. We show that just as state officials will often fail to protect the authority that is appropriately theirs, federal officials will often have no interest in restricting the abuse of state government power in ways detrimental to federalism. For instance, citizens throughout the nation benefit from preventing states from interfering with interstate commerce. Yet federal officials who depend for reelection on parochial constituencies and interest groups may often be unwilling to take the initiative to protect the free flow of interstate commerce against state-level protectionist interests. Hence the Court has properly intervened to enforce the Dormant Commerce Clause, requiring federal legislators to affirmatively permit states to block interstate commerce. We also show that our theory calls for the judiciary to enforce a right to travel and a limitation on one state's

⁷ As we discuss below, however, we have some reservations about whether sovereign immunity actually advances the values of federalism we describe in Part II. But if it does advance these values, our principal-agent theory offers a justification for judicial enforcement.

imposition of punitive damages based on actions within another state. Further, we contend that the Court should apply this theory more vigorously to protect constitutional federalism against other threats from state government, notably by reinvigorating the Compact Clause.

I. CONSTITUTIONAL FEDERALISM AS A PRINCIPAL-AGENT PROBLEM

Leaving the constitutional distribution of powers between the federal and state governments up to the political process creates the possibility that politician-agents will resolve federalism issues in ways inimical to the interests of voter-principals. As Justice O'Connor points out in her opinion for the Court in *New York v. United States*, “[t]he Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities” but rather “for the protection of individual” citizens.⁸ In some instances, “powerful incentives might lead both federal and state officials to view departures from the federal structure to be in their personal interests.”⁹ How likely is such an eventuality?

This Part shows that principal-agent theory provides a far from reassuring answer to this question. Principal-agent problems can arise in any situation in which one person – the “agent” - is required to serve the interests of another (the “principal”) rather than his or her own, even in cases where the two may diverge. In such situations, a “moral hazard” is created for the agent, in that he or she is tempted to misuse the authority granted to her, and advance her own objectives at the expense of those of the principal. Conflicts of interest between principals and agents are common in both the public and private sectors, and a large social science literature has addressed these problems, particularly since the 1970s.¹⁰ The issue of constitutional federalism is one where classic principal-agent problems are likely to be especially severe. The literature shows that principal-agent problems are particularly likely in situations where there are multiple principals¹¹ and situations where there is a large information asymmetry between

⁸New York v. United States, 505 U.S. 144, 181-82 (1992).

⁹ *Id.* at 182.

¹⁰ See works cited in nn.

¹¹ See, e.g., Oliver Hart, *Corporate Governance: Some Theory and Implications*, 105 Econ. J. 678, 681 (1995); Shleifer & Vishny, *supra* note at 741-42.

principals and agents that favors the latter.¹² Constitutional federalism exhibits both of these problems in an unusually severe form. Moreover, as we shall see, the federalism case lacks several of the most important control mechanisms that are used to overcome principal-agent problems in the corporate setting.

A. Information Asymmetry.

Voter knowledge of the distribution of power between the federal and state governments is part of the more general problem of widespread political ignorance. Decades of social science research on political knowledge has shown that most voters have extremely low knowledge levels.¹³ As one leading political scientist puts it, “[n]othing strikes the student of public opinion and democracy more forcefully than the paucity of information most people possess about politics.”¹⁴

To borrow the terminology of political scientist Stephen Bennett, almost one third of American adults are political “know nothings” who possess little or no useful knowledge of politics.¹⁵ For present

¹² See, e.g., Armen Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777 (1972); Eric Abrahamson & Choelsoon Park, *Concealment of Negative Organizational Outcomes: An Agency Theory Perspective*, 37 Acad. Mgmt. J. (1994); Michael Jensen & William Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. Fin. Econ. 305 (1976); Moe, *supra* note at 755-57.

¹³ For the most thorough political science analysis of voter ignorance see MICHAEL X. DELLI CARPINI & SCOTT KEETER, *WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS* (1996) (documenting widespread voter ignorance and explaining the importance of political knowledge to the democratic process); *see also* SCOTT L. ALTHAUS, *COLLECTIVE PREFERENCES IN DEMOCRATIC POLITICS* (2003) (providing additional evidence of widespread political ignorance); Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the “Central Obsession of Constitutional Theory*, IOWA L. REV. (Forthcoming 2004) (analyzing implications of voter ignorance for constitutional theory [hereafter, Somin, *Countermajoritarian Difficulty*]; Ilya Somin, *Voter Ignorance and the Democratic Idea*, 12 CRITICAL REV. 413 (1998) (assessing dangers of voter ignorance and critically analyzing literature on the subject) [hereafter, Somin, *Voter Ignorance*].

¹⁴ John Ferejohn, *Information and the Electoral Process*, in *INFORMATION AND DEMOCRATIC PROCESSES* 3, 3 (eds. John Ferejohn & James Kuklinski 1990).

¹⁵ Stephen E. Bennett, *‘Know-Nothings’ Revisited: The Meaning of Political Ignorance Today*, 69 SOC. SCI. Q. 476 (1988). Bennett’s 1988 article extended a 1947 study by Herbert Hyman and Paul Sheatsley, which also found that about one third of the public are “know nothings” in their understanding of politics. *See* Herbert Hyman & Paul Sheatsley, *Some Reasons Why Information Campaigns Fail*, 11 PUB. OPINION Q. 412 (1947). For data indicating that the proportion of know-nothings remains roughly as high today as at the time of Bennett’s study, *see* Somin, *Countermajoritarian Difficulty*.

purposes, it is important to stress that the majority of citizens lack basic “rules of the game” knowledge,¹⁶ information about which public officials and agencies are responsible for what issues. For example, the majority do not know the respective functions of the three branches of government, who has the power to declare war, or what institution controls monetary policy.¹⁷ A related problem is that citizens are often ignorant of which political party controls what institutions of government.¹⁸ Political knowledge has remained consistently low for decades, with no indication that a substantial increase is likely in the foreseeable future.¹⁹ Without an understanding of the basic elements of the political system, most citizens are also unlikely to know much about the division of power between federal and state governments.

Widespread political ignorance makes it difficult for voters to control policy outcomes in general, but especially on complex and nontransparent issues such as the distribution of power between the federal and state governments. Federalism questions are unusually complex because they involve a wide range of policy areas and complicated intergovernmental relations, most notably the vast system of federal grants to state governments, which account for some 30% of all state expenditures.²⁰ Moreover, public attention rarely focuses on federalism as a general matter. Federalism is an abstract and complicated system compared to many underlying public policy issues like drugs and education, which are more concrete and

¹⁶ The term “rules of the game” is borrowed from Delli Carpini & Keeter, *supra* note at 69-70.

¹⁷ *Id.* at 70-71.

¹⁸ A survey taken immediately after the November 2002 congressional elections found that only about 32% of respondents knew that the Republicans had held control of the House of Representatives prior to the election. Data calculated from National Election Study 2002, variable 025083. Data from the 2002 National Election Study is available from the author or from the National Election Study website: <http://www.umich.edu/~nes/>. This result is consistent with evidence from other elections. *See, e.g.,* NEUMANN, *supra* note at 15; Stephen E. Bennett & Linda Bennett, *Out of Sight Out of Mind: Americans’ Knowledge of Party Control of the House of Representatives, 1960-1984*, 35 POL. RES. Q. 67 (1992).

¹⁹ For studies showing little or no increase in political knowledge over time, see Delli Carpini & Keeter, *supra* note 11 chs. 2-3; ERIC R.A.N. SMITH, *THE UNCHANGING AMERICAN VOTER* (1989); Bennett, *supra* note; Stephen E. Bennett, *Know-Nothings Revisited Again*, 18 POL. BEHAVIOR 219 (1996); Stephen E. Bennett, *Trends in Americans’ Political Information, 1967-87*, 17 AM. POL. Q. 422 (1989); Michael X. Delli Carpini & Scott Keeter, *Stability and Change in the U.S. Public’s Knowledge of Politics*, 55 PUB. OPINION Q. 583 (1991); *but cf.* Althaus, *supra* note at 215 (showing a very small increase in knowledge when comparing the 1980-88 period to 1990-98). The increase shown in Althaus’ study is extremely low (from an average of 52% correct answers in the earlier period to 54% in the later one), and may be an artifact of the particular questions studied. *Id.*

²⁰ Somin, *supra* note, at.

more likely to engage the passions of citizens. Thus, when a federalism issue becomes a matter of public controversy, it almost always focuses on the specific policy question at hand rather than on federalism more generally.

One reason that citizens may have less understanding of federalism today than they did in the past is that sentiments that may have previously motivated citizens to take an interest in and protect federalism have faded.²¹ The huge decrease in transportation costs and information costs in the twentieth century has created a mass culture that has largely extirpated state differences and has even substantially tempered regional ones.²² It is more difficult to feel strongly about states' rights if you live in New Jersey and work in New York for a company with its headquarters in Texas. The social changes responsible for this decline in local attention seem irreversible and may be accelerating. As a result citizens lack the attachments to their states that may have motivated them to pay attention to issues of federal structure in the past.²³

Low levels of political knowledge about federalism are not merely accidental, but are also in part a result of "rational ignorance" caused by the insignificance of any one vote to electoral outcomes, and the consequent lack of incentive for voters to acquire political information solely for the purpose of

²¹ See Cathleen C. Herasimchuck, *The New Federalism: Judicial Legislation by the Texas Court of Criminal Appeals*, 68 TEX. L. REV. 1483 (1990). ("Increasing mobility, instantaneous national communications networks, continued movement to national economic, educational and legal standards and the emergence of a national culture suggests that American values are less state oriented").

²² See John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485, 525 (2002).

²³ Even in the years immediately prior to the Civil War, when state attachments were much stronger, the specific issue of slavery understandably overshadowed the broader question of federal and state power. Southern leaders routinely took an anti-centralization position when such a stance favored slavery and a pro-centralization view when the reverse was true, as in their uncompromising insistence on enforcement of the federal Fugitive Slave Law. See Robert Kaczorowski, *The Tragic Irony of American Federalism: National Sovereignty Versus State Sovereignty in Slavery and Freedom*, 45 U. KAN. L. REV. 1015, 1025-40 (1997) (describing this aspect of the Southern position on the Fugitive Slave Clause). By contrast, northern state governments seeking to protect the rights of fugitive slaves insisted on a narrow construction of federal power on that issue, while supporting broader federal authority in cases where it worked to their advantage. *Id.* at 1034-40; see also Somin, *supra* note at 467 n.33 (citing sources discussing the northern states' position on fugitive slave law).

casting a “better” vote.²⁴ The acquisition of political information is a classic collective action problem, a situation in which a good (here, an informed electorate) is undersupplied because any one individual’s possible contribution to its production is insignificant. And those who do not contribute will still get to enjoy the benefits of the good if it is successfully provided through the efforts of others.²⁵

For these reasons, citizen-principals and both federal and state elected officials are divided by a vast informational asymmetry. The latter have every incentive to acquire detailed knowledge of the federal-state balance, while the former have little or none. Indeed, the information asymmetry may be greater on issues of constitutional structure than on issues of constitutional individual rights. Citizens are usually more passionately engaged and focused on their liberties than on federalism and the separation of powers. Moreover, for similar reasons, when a crisis that has caused government officials to abandon constitutional restraints has passed, citizens are more likely to be interested in restoring the original settlement on civil liberties than in reviving the original constitutional structure.²⁶ Witness the continuing broad discussion of the need to restore civil liberties post 9-11 compared to the paucity of popular discussion on whether a revival of federalism is necessary. From the perspective of rational ignorance theory, judicial review may be more necessary to restrain government agents from violating its structural provisions than provisions relating to individual rights. This important point reverses the conventional wisdom in constitutional law, which traditionally claims that individual rights are more in need of judicial protection than the structural constitution.²⁷

²⁴ ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* ch. 13 (1957). Because of the very low significance of any single vote, see William H. Riker & Peter Ordeshook, *A Theory of the Calculus of Voting*, 62 *AM. POL. SCI. REV.* 25 (1968) (demonstrating that the chance of any one vote determining the outcome of a presidential election is roughly 1 in 100 million). There is a vanishingly small payoff to acquiring political knowledge in order to vote accurately. *Id.* Even if a voter makes a tremendous effort to become highly informed, there is almost no chance that his or her well-informed vote will actually swing the electoral outcome in favor of the “better” candidate or party.

²⁵ For general discussions of collective action theory, see the classic work of Mancur Olson, *MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION* (1965). See also RUSSELL HARDIN, *COLLECTIVE ACTION* (1982) (extending Olson’s argument with various applications to political participation).

²⁶ See Rebecca Kahan, *The Expanding State* (paper on file with author).

²⁷ See, e.g., JESSE CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS*, 175-176, 263 (1980) (giving priority to judicial review of individual rights rather than constitutional structure). For other reasons as well, the

B. Multiple Principals.

The problem of asymmetric information is exacerbated by the presence of numerous multiple principals, as opposed to a single leader or a small, cohesive group. Other things equal, the larger the number of principals, the less incentive any of them have to monitor the performance of the agent. As economist, Oliver Hart, explains in the context of the monitoring of corporate executives by “dispersed shareholders,” members of a large group of principals have “little or no incentive to monitor management.” The reason is that monitoring is a public good: if one shareholder’s monitoring leads to improved company performance, all shareholders benefit. Given that monitoring is costly, each shareholder is likely to “free ride” in the hope that other shareholders will do the monitoring.²⁸ While it is certainly not the case that all citizens free ride in this way, it is undeniably true that very few do much to monitor the federal-state balance, and that those few who do engage in extensive monitoring are highly unrepresentative of the general population,²⁹ and, in any event, not numerous enough to ensure an adequately informed citizenry.³⁰ Indeed, the problem of multiple principals is especially acute among voters because there are tens of millions of people involved, which both increases the possibility of free riding and exacerbates the cost of coordinating monitoring activities.

case for judicial enforcement of federalism may be more compelling for that of individual rights. For instance, judicial enforcement of minority individual rights can easily create a backlash by depriving citizens of ordinary political fora in which to debate and compromise issues. See Michael Klarman, *Brown, Racial Change and the Civil Rights Movement*, 80 VA. REV. L. 7 (1994) (discussing judicial backlash to individual rights decisions concerning segregation and the rights of alleged communists). Sometimes there may be a backlash to the backlash, as in the civil rights movement and the cause of the individual right may be advanced. See Klarman, xx. But the consequences of such reaction depend on future political contingencies which the Court cannot easily predict. Federalism cases, by contrast, are often likely to redirect political energies to either the state or the federal level, depending on which forum the Court has held to be constitutionally appropriate to resolve the issue. While this will not always prevent backlashes, as New Deal-era agitation against the Court showed, it often will do so, as the lack of political backlash against *Lopez* and *Morrison* demonstrate.

²⁸ Hart, *supra* note at 681; see also Shleifer & Vishny, *supra* note at 741-44 (summarizing literature showing that multiple principals lead to an undersupply of effective monitoring); *cf.* David Martimort, *Exclusive Dealing, Common Agency, and Multiprincipals Incentive Theory*, 27 Rand J. Econ. 1 (1996) (analyzing principal-agent problems caused by multiple principals in marketing arrangements).

²⁹ See Somin, *Countermajoritarian Difficulty* (presenting evidence showing that the knowledgeable minority of voters is highly unrepresentative on a wide range of parameters); Althaus, *supra* note (same).

³⁰ See Somin, *Voter Ignorance* at 419-31 (arguing that small numbers of knowledgeable voters are not enough to offset the ignorance of the vast majority).

Free riding and information asymmetry are integrally connected. The theory of rational ignorance suggests that collective action problems are a large part of the reason why so few voters are informed about the doings of their political agents.³¹ However, the problem of multiple principals has independent significance because it suggests that even those voters who do possess substantial knowledge of federalism issues may not have a strong incentive to use that knowledge effectively as a monitoring tool. Rational ignorance and the insignificance of any one vote to electoral outcomes may give voters an incentive to stick to misleading heuristics and factually inaccurate political beliefs.³² Collective problems limit not only the amount of information that voters acquire but “how rationally they process the information they do have.”³³ Thus the problems of rational ignorance and multiple principals combine to impede the monitoring of government officials.

C. Lack of Credible Commitment and the Tragedy of the Federalism Commons.

Partly as result of these information problems, federalism considerations are often given short shrift in policy debates. The current political battle over the Federal Marriage Amendment and same-sex marriage is an excellent example of the tendency of both liberal and conservative politicians and activists to subordinate federalism considerations to the pursuit of political advantage on specific issues. Recent

³¹ See nn. and accompanying text.

³² See Bryan Caplan, *Rational Ignorance vs. Rational Irrationality*, 54 KYKLOS 3 (2001) (showing that the insignificance of any one vote leads voters to base their decisions on misleading heuristics and poorly developed opinions because, for any individual voter, there is little or no cost to holding inaccurate views).

³³ *Id.* at 5.

debates over federal partial birth abortion bans,³⁴ state medical marijuana laws,³⁵ and the No Child Left Behind education bill,³⁶ illustrate the same trend.

But the subordination of federalism to other goals is also due in part to the lack of a credible commitment to enforcing federalism.³⁷ Failure to enforce federalism constraints naturally leads to the subordination of federalism to substantive policy objectives. In the absence of a credible commitment to federalism, it is irrational even for those who would prefer a consistent respect for federalism to their particular first order substantive policies to act on such preferences. They have no assurance that their political opponents will similarly respect federalism. If they hold back on pursuing their preferred policies for the sake of federalism, they take a risk that their forbearance will result in neither a coherent federalism nor their preferred substantive policies. Like fish in a pond without enforced rules against overfishing, federalism in a federal system without systematic enforcement of rules against its abrogation can disappear, even when most citizens would prefer its continuation. A similar dynamic would occur if citizens could not rely on a credible commitment to the First Amendment. Even those who favor free speech as a general policy would have an incentive to try to suppress speech by their political opponents because they would have no assurance that their own speech would be protected should those opponents come to power.³⁸

³⁴ See Sylvia A. Law, *In the Name of Federalism: The Supreme Court's Assault on Democracy and Civil Rights*, 70 U. Cin. L. Rev. 367, 409-11 (2002) (noting conservative support for a federal ban on partial birth abortions, despite its incongruity with conservative views on limited federal power).

³⁵ Nelson Lund, *Why Ashcroft is Wrong on Assisted Suicide*, 113 Commentary 59 (2002) (criticizing the Bush administration's effort to suppress Oregon's state law permitting medical uses of marijuana as inconsistent with federalism).

³⁶ See Sam Dillon, *President's Initiative to Shake up Education is Facing Protests in Many State Capitols*, N.Y. Times, Mar. 8, 2004 at 12 (noting liberal Democratic criticisms of the Act for excessive intrusion on state autonomy in education policy).

³⁷ On the importance of constitutional enforcement of credible commitments in providing incentives for political actors to respect valuable conventions of mutual restraint, see Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth Century England*, 49 J. ECON. HIST. 803, 803 (1989).

³⁸ See David P. Bryden, *A Conservative Case for Judicial Activism*, 111 Public Interest (Spring 1993) (making the point that a commitment to reciprocity is essential to the protection of free speech).

D. The Paucity of Non-Judicial Solutions to the Principal-Agent Problem.

Principal-agent theory first became prominent in the social sciences because of its usefulness in analyzing issues of corporate governance. The literature on principal-agent problems in the corporate field outlines four major mechanisms that stockholders use to reduce the dangers they face: the use of large stockholders to overcome collective action problems, using the market value of stock to keep track of management's performance, performance-based contracts, the threat of lawsuits for breach of fiduciary duty or violation of stockholder rights, and "hostile takeovers" by competitors of incumbent managers.³⁹ Here we briefly show why all four are either unavailable or greatly attenuated in political markets.

1. Large stockholders.

A large stockholder with a major stake in a given corporation has an incentive to both acquire information about the effectiveness of management and use that information to monitor its performance.⁴⁰ The large stockholder has much less incentive to free ride on the efforts of others than a small one because he or she internalizes far more of the benefits of effective monitoring. Unfortunately, the political market has no similar mechanism because giving some citizens disproportionate voting power violates the fundamental democratic principle of equal voting rights.⁴¹ To be sure, some citizens certainly do have a greater stake in the federal-state balance than others and they may end up acquiring disproportionate knowledge and influence as a result. However, the background, interests, and incentives of the small minority of knowledgeable political activists diverge greatly from those of the much more ignorant majority.⁴² Thus, they are not as effective as proxies for the majority as large stockholders may

³⁹ For a survey of the literature on solutions to the principal-agent problem in corporate governance, see Shleifer & Vishny, *supra* note.

⁴⁰; *Id.* at 753-57; *see also* Abrahamson & Park, *supra* note; Mike Burkart, et al., *Large Shareholders, Monitoring, and the Value of the Firm*, 112 Q. J. Econ. 693 (1997); Hart, *supra* note at 683-84.

⁴¹ For a detailed analysis of this principle, see, e.g., Robert Dahl, *Democracy and its Critics* (1989).

⁴² See, e.g., SIDNEY VERBA, ET AL., *VOICE AND EQUALITY* chs. 9-16 (1995) (showing that political activists are drawn primarily from a small, unrepresentative, high-knowledge elite) Somin, *Voter Ignorance*.

be for small ones in the corporate setting. Moreover, even in cases where the knowledgeable minority does have the same interest on federalism issues as the majority, the minority's ability to translate their superior knowledge into effective monitoring is not as great as that of large stockholders in the corporate setting because it controls only a tiny fraction of the vote.

2. Using the price of stock as an information shortcut.

Stockholders with very little knowledge of their corporations can still get some sense of management's performance by keeping track of the stock's price.⁴³ Other things equal, poor-performing executives should cause the value of their firm's stock to drop, while good ones will cause it to rise. The use of the price system as an effective information shortcut is one of the most important advantages of a market system.⁴⁴ Unfortunately, the political market generally lacks information shortcuts that are anywhere near as simple and effective as the price system.⁴⁵ Indeed, without a prior foundation of basic knowledge that large numbers of citizens lack, the use of information shortcuts in politics often misleads voters as much as informs them.⁴⁶ This is particularly true with respect to unusually complex and non-transparent issues such as the federal-state balance.

3. Fiduciary duties and minority shareholder rights.

An additional safeguard against principal-agent problems in the corporate world is the possibility of suits against corporate managers for violation of fiduciary duties or for undercutting the rights of minority shareholders.⁴⁷ For obvious reasons, such legal remedies are rarely available against political

⁴³ FRANK EASTERBROOK & DANIEL FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 18-19 (1991).

⁴⁴For the classic analysis, see F.A. Hayek, *The Use of Knowledge in Society*, 35 *Am. Econ. Rev.* 519 (1945).

⁴⁵ For a detailed analysis of the inadequacies of information shortcuts for voters, see Somin, *Voter Ignorance* at 419-31 and literature cited therein; see also Althaus, *supra* note (providing still more evidence that shortcuts fail to offset ignorance).

⁴⁶ Somin, *Voter Ignorance* at 427-29; see also Ilya Somin, *Resolving the Democratic Dilemma?* 16 *YALE J. ON REG.* 401, 410-11 (1999) (showing how shortcuts can mislead).

⁴⁷ For summaries of the issues and literature, see Easterbrook & Fischel, *supra* note at ch. 4; Shleifer & Vishny, *supra* note at 750-53.

office-holders. Although the latter may be sometimes sued for committing torts against citizens⁴⁸ or for violating specific constitutional rights of individuals,⁴⁹ they cannot generally be sued by individual plaintiffs for adopting harmful policies.

4. The Market for Corporate Control

One other important way of containing the principal-agent problem in corporate law is the market for corporate control.⁵⁰ If managers fail to obtain the highest possible value for shareholders, they face the possibility of a takeover of the corporation and the loss of their positions. This prospect aligns their interests with those of shareholders and provides incentives to better manage the corporation on their behalf.⁵¹ For this reason, while the judiciary eschews most scrutiny over the business decisions of corporate boards and their officers, it does sometimes intervene to prevent corporate management from using devices, such as the “poison pill,” that frustrate the market for corporate control and exacerbate principal-agent problems within the corporation.⁵²

Of course, states are not sold on the stock exchange and thus are not subject to such market discipline. There is no direct political equivalent to the market for corporate control. But we argue below that federalism does create something analogous to the market for governance, as individuals can exit states where their agents—state officials—are operating in a manner that does not reflect the interests of citizens. In that way, federalism too generates a market that helps align the interests of citizens and their rulers. The judiciary, as in the corporate context, should eschew most substantive oversight, but should prevent state and federal governments from adopting rules that undermine competition.

⁴⁸ See, e.g., Federal Tort Claims Act.

⁴⁹ See, e.g., *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971) (key precedent establishing principle that federal officials may be sued for violating citizen constitutional rights).

⁵⁰ Henry Manne was first to articulate the importance of this market for corporate governance. See Henry Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 1101 (1965).

⁵¹ See Troy A. Parades, *The Firm and the Nature of Control: Toward a Theory of Takeover Law*, 29 IOWA J. CORP. L. 103, 1001 (2003) (explaining how the market for corporate control aligns interests of shareholders and managers).

⁵² See Wells M. Endelow, *Handicapping the Corporate Law Race*, 28 IOWA J. CORP. L. 143, 150 (2002) (noting that the judiciary intervenes to prevent management exploitation through such devices).

As corporate scandals have recently shown, principal-agent problems still plague the corporate setting.⁵³ Yet such problems are considerably more severe in political markets because the standard corporate market remedies are generally absent.

D. The Failure of Political Safeguards .

Even if voter-principals cannot themselves monitor the activities of their agents, many scholars have argued that the federal political process can take up the slack and safeguard federalism. However, our analysis undermines the argument that the political process will prove an effective substitute for judicial review. The classic political safeguards argument asserts that the political branches can be relied upon to protect the autonomy of the states. Herbert Wechsler observed that Congress was composed of the representatives elected from the state and the President was elected by an electoral college that also was designed to protect state interests.⁵⁴ Therefore, he claimed, the political process is a powerful guarantee that the values of state autonomy would not be slighted in federal legislation. Jesse Choper deepened these arguments by noting that various lobbying groups and the structure of congressional committee and leadership systems also served to protect state interests.⁵⁵ More recently, Larry Kramer has argued that a structure outside the political system - the political parties - will protect state interests because members of Congress and the President are "politically dependent upon state and party organizations."⁵⁶

⁵³ For a summary of the principal-agent issues in Enron and other similar cases, see John C. Coffee, Jr., *What Caused Enron? A Capsule Social and Economic History of the 1990s*, 89 *Cornell L. Rev.* 269, 297-301 (2004).

⁵⁴ See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in Composition and the Selection of the National Government*, 54 *COLUM. L. REV.* 543 (1980).

⁵⁵ See JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 176-181 (1980).

⁵⁶ See Larry D. Kramer, *Putting the Politics Back into the Safeguards of Federalism*, 100 *COLUM. L. REV.* 215, 278 (2000)

This theory has been attacked on the grounds that the federal political processes do not in fact protect states. Federal officials are not always motivated to protect state interests.⁵⁷ National lobbying groups of special interests are sometimes more effective than lobbying groups on behalf of the states and thus federal officials are likely to ignore state interests. Political parties are often more responsive to the demands of national special interests than those of state governments.⁵⁸

We do not disagree with these criticisms of the political safeguards theory, but our critique is more fundamental. The theory depends on the premise that either state officials or individual state citizens will prompt federal officials to respect federalism. We believe that this premise is unfounded. Because of rational ignorance, individual citizens are usually unable to protect federalism even when it would be in the public interest to do so. Moreover, state officials have systematic political interests that often cause them to undermine federalism. We detail these below. Thus, the flaws in the political safeguards argument are even deeper than previously recognized. No political actors – neither federal officials, nor state officials, nor the general public -- have an incentive to systematically protect constitutional federalism. Indeed, the political power of both state and federal office-holders is as likely to be used to

⁵⁷ See John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997).

⁵⁸ See Paul Frymer & Albert Yoon, *Political Parties, Representation and Federal Safeguards*, 96 N. W. U. L. REV. 977, 1025 (2002).

⁶⁰ Our critique of political safeguards also is more far reaching than that of Professors Baker and Young, as sound as that critique is. See Lynn A. Baker & Ernest Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L. J. 75 (2001). They note correctly that some states may engage in horizontal aggrandizement and try to impose their preferences on other states. *Id.* at x. In the cases they describe state officials are acting in the interest of their state citizens in exporting their values and this is an example of how state officials can have political interests that undermine the constitutional distribution of powers assigned to the states. But our point is more general in two ways. First, there is no necessary congruence between a state official's political interest and the distribution of powers, regardless of the preferences of his state's citizens. Professors Baker's and Young's examples are specific instances of our more general theorem that officials are unlikely to enforce sound second order constitutional structures, because there is a mismatch between their interests and enforcement of the proper distribution. Second, our theory is more comprehensive because we show that federal officials have a similar disinclination to protect the exercise of their own powers. We thus provide a comprehensive rationale for judicial intervention in favor of federalism's distribution, whether that intervention happens to be in favor of state or federal governments.

undermine federalism as to protect it. The case against political safeguards theory is even stronger than that made out by earlier critics.⁶⁰

Second, our critique does not depend on a claim that state autonomy requires special protection. Instead, state autonomy should be protected as simply one aspect of distribution of powers to state and federal actors. As we will show below, federal actors often lack the political motivation to protect constitutional federalism against infringement by state governments and the judiciary has often properly stepped in to protect federalism. Thus, the argument for judicial review of federal statutes for conformity with the constitution is not based on special pleading for state autonomy. Instead it flows from the public interest in maintaining a federal structure despite the frequent interest of both state and federal officials in subverting it. Our theory, unlike the political safeguards argument and previous critiques thereof, provides an explanation of why the federal judiciary should intervene to constrain state government encroachments on federal power, as well as the reverse.

In *New York v. United States* the Rehnquist Court began to suggest a similar critique of the political safeguards argument and asserted a justification for judicial review of federalism similar to that which we advance.⁶¹ In *New York*, the Court rejected on structural grounds a statute in which, under certain criteria, the federal government ordered states to take title to nuclear waste. The Court held that such “commandeering” was unconstitutional. One of its rationales was an implicit response to the political safeguards argument along the lines we suggest. The Court noted that it could be in the interest of both state and government officials to deflect responsibility by acquiescing in a commandeering scheme. “If a federal official is faced with the alternatives of choosing a location or directing the states to do it, the official may well prefer the latter, as a means of shifting responsibility for the eventual decision. If a state official is faced with the same set of alternatives—choosing a location or having Congress direct the choice of a location—the state official may also prefer the latter, as it may permit the avoidance of

⁶¹ *New York v. United States*, 505 U.S. 144 (1992).

personal responsibility.”⁶² Thus the political safeguards break down in a double attempt to avoid federal and state accountability.

In *New York*, the Rehnquist Court even highlighted the precise theme of this article: that “powerful incentives might lead both federal and state officials to view departures from the federal structure to be in their personal interests.”⁶³ While it did not discuss the problem of rational ignorance, that theme is also implicit in its claim that citizens may mistakenly blame state officials for federal actions or vice versa.⁶⁴ This joint deflection of responsibility would not fool a citizenry that was well informed about federal and state policies and that had the incentive to make use of that information. Unfortunately, the Court has not generalized this insight across the full range of federalism issues. We try to do so here.

II. A BRIEF SURVEY OF THE ADVANTAGES OF FEDERALISM

Three key benefits of federalism are central to our analysis: the satisfaction of diverse local preferences, horizontal competition between states, and vertical competition between the states and the federal government. While there are other potential advantages of a federal system, such as the possibility of increasing political participation and strengthening community,⁶⁵ these three are the ones most likely to be advanced by judicial review.

A. Diversity.

Responsiveness to diverse local preferences is perhaps the oldest and best known rationale for federalism, receiving an endorsement from the Supreme Court in one of the first major Rehnquist-era federalism decisions.⁶⁶ To the extent that local majorities in different states have divergent preferences

⁶² *Id.* at 183.

⁶³ *Id.* at 182.

⁶⁴ *Id.* at 182-83.

⁶⁵ See, e.g., McConnell, *supra* note at 1507-11 (summarizing community and political participation rationales for federalism); but cf. Edward Rubin & Malcolm Feely, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. Rev. 903 (1994) (arguing that this rationale is anachronistic in an era when our “true” community is national in scope).

⁶⁶ *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (noting that federalism “assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society”).

from each other, a federal system can ensure a higher degree of citizen satisfaction than a unitary polity.⁶⁷ If, for example, some state-level majorities prefer a policy of high taxes and high levels of government services while others prefer low taxes and low service levels, they can each be accommodated by their respective state governments. A unitary government with a one-size-fits-all policy will, by contrast, likely leave a larger proportion of the population dissatisfied with the resulting mix of policies. The ability of federalism to accommodate diverse preferences can ease racial, ethnic, religious, and ideological conflicts by allowing each of the opposing groups to control policy in its own region.⁶⁸ The ability of federalism to satisfy diverse preferences is augmented by citizen mobility.⁶⁹ If citizens find themselves in a state whose policies are at odds with their preferences, they can move to another state with more favorable ones. So long as there is diversity between state policies and interstate mobility is not forbidden, this benefit holds true even if state governments make no deliberate effort to attract migrants.

B. Horizontal competition between state governments.

Horizontal competition between states is a major benefit of federalism distinct from that of interstate diversity taken in and of itself, though closely related to it.⁷⁰ Whereas the theory of interstate

⁶⁷ For brief summaries of the diversity rationale for federalism, see, e.g., DIETMAR WELLISCH, *THEORY OF PUBLIC FINANCE IN A FEDERAL STATE* 14-15 (2000); WALLACE E. OATES, *FISCAL FEDERALISM* 11-13 (1972); Michael McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493-95 (1987).

⁶⁸ DONALD L. HOROWITZ, *ETHNIC GROUPS IN CONFLICT* 601-28 (1985); GORDON C. TULLOCK, *THE NEW FEDERALIST* 39-52 (1994).

⁶⁹ For the classic analysis, see Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

⁷⁰ The literature on interstate competition and its benefits is vast. For some of the more important works, see GEOFFREY BRENNAN & JAMES M. BUCHANAN, *THE POWER TO TAX* 173-86 (1980); ALBERT BRETON, *COMPETITIVE GOVERNMENTS* (1996); ALBERT BRETON & ANTHONY SCOTT, *THE DESIGN OF FEDERATIONS* 13-19 (1980); DYE, *supra* note 3; OATES, *supra* note 13; WELLISCH, *supra* note; James M. Buchanan, *Federalism as an Ideal Political Order and an Objective for Constitutional Reform*, 21 *PUBLIUS* 19 (1995); McConnell, *supra* note at 1497-1500; Wallace E. Oates, *An Essay on Fiscal Federalism*, 37 J. ECON. LIT. 1120, 1134-37 (1999); Wallace E. Oates & Robert Schwab, *Economic Competition Among Jurisdictions: Efficiency Enhancing or Efficiency Distorting?* 35 J. PUB. ECON. 333 (1988); Tiebout, *supra* note 15; Barry Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 J.L. ECON. & ORG. 1 (1995); Ralph K. Winter, *Private Goals and Competition Among State Legal Systems*, 6 HARV. J.L. & PUB. POL'Y 127 (1982). For an early precursor to this literature, see F.A. Hayek, *The Economic Conditions of Interstate Federalism*, 5 *NEW COMMONWEALTH Q.* 131 (1939).

diversity assumes merely that states are responsive to the “voice” preferences of citizen-voters already residing within their boundaries, the theory of interstate competition asserts that states actively compete with each other to attract new citizens, who can improve their lot through the power of “exit rights.”⁷¹ Conversely, they also strive to ensure that current residents will not depart for greener pastures offered by competitors. Citizens dissatisfied with state policy not only have the option of lobbying for change, but also of moving to another state that deliberately seeks to attract them with more favorable policies. To the benefits of political voice provided by interstate diversity, the possibility of interstate competition adds those of exit. Horizontal competition has the additional advantage of encouraging experimentation as governments compete with one another in social policy. Moreover, such interjurisdictional competition can often protect the general public special interest policies. The citizenry’s ability to exit makes their political leaders more responsive to them and less apt to show favor to interest groups whose objectives conflict with those of the majority of citizens.⁷²

Interstate competition is motivated, in part, by the desire of state governments to attract taxpaying citizens and corporations, which has the effect of increasing the funds available to them for public spending of all kinds. This, in turn, improves the electoral prospects of state officials.⁷³ In theory, states have an incentive to seek to attract all migrants who pay more in taxes than they receive in state-funded benefits.⁷⁴ Even some migrants who do not “pay for themselves” may be attractive to states if they increase the productivity of other citizens or enterprises sufficiently to offset the additional expenditures

⁷¹ ALBERT O. HIRSCHMAN, *EXIT, VOICE AND LOYALTY* (1970). Hirschman argues that voice and exit are often in conflict and may undermine each other. *Id.* at ch. 4. However one of us has argued elsewhere that they are more likely to be mutually reinforcing. Ilya Somin, *Revitalizing Consent*, 23 HARV. J.L. & PUB. POL’Y 753, 795-97 (2000).

⁷² Not all citizens have to be able to move for state policies to change. If some citizens whose mobility makes them particularly sensitive to bad policies have the ability to move the state may change its policies and benefit even those who are less mobile or sensitive to the effects of bad policies. See Nelson Lund and John O. McGinnis, *Lawrence and Judicial Hubris*, 102 MICH. L. REV. xx (2004).

⁷³ DYE, *supra* note at 24-25. Tiebout, *supra* note.

⁷⁴ See McConnell, *supra* note 3, at 1499-1500 (noting that “since most people are taxpayers, [interstate competition] means that there is a powerful incentive for decentralized governments to make things better for most people”).

incurred as a result of their in-migration. For example, state and local governments often have an incentive to improve schools for children - who of course don't pay taxes - in order to attract parents - who do.

As transportation costs have fallen, and a national culture makes Americans feel more at home outside the state where they were born, citizens have become more mobile.⁷⁸ This increased mobility means that more citizens are likely to move in response to suboptimal state policies. Thus, while some scholars have suggested that citizens' increasing identification with a national community makes federalism obsolete,⁷⁹ it actually strengthens the case for federalism by improving the conditions for horizontal competition.⁸⁰

C. Vertical competition between states and the federal government.

For the Founding Fathers and their generation, the main rationale for federalism was not

⁷⁸ The percentage of the population consisting of individuals born outside their state of current residence has risen slowly but fairly steadily from 21 percent in 1900 to 40 percent today. See Series C-14, Native Population by Residence within Outside State, Division and Region of Birth, by Race: 1850-1970 printed in Historical Statistics of the United States: Colonial Times to 1970; <http://www.census.gov/population/socdemo/migration/80pob.txt> (1980 data); <http://www.census.gov/population/socdemo/migration/90pob.txt> (1990); American Fact Finder, Table QT-P22; http://factfinder.census.gov/servlet/QTTable?_bm+y&01000US&-qr-name=DEC_ (2000 data).

⁷⁹ See Edward L. Rubin & Malcolm Feely, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 944-945 (1994) (arguing that states have "nothing but their legal definitions to distinguish them from one another").

⁸⁰ See Robert D. Cooter, *The Strategic Constitution* 132 (2000) ("Parochial rights fit mobile societies and universal rights fit immobile societies").

diversity or competition (the most familiar modern arguments), but the role of the states as a bulwark against possible federal tyranny.⁸¹ As the case of state efforts to forestall enforcement of the federal Fugitive Slave Act dramatically illustrates,⁸² state governments can sometimes use their powers to block or mitigate federal violations of fundamental individual rights.⁸³ On a more prosaic level, state governments can compete with the federal government in providing public goods and social services.⁸⁴ Vertical competition, like horizontal, is not an unalloyed good. Nonetheless, some substantial capacity for competition is a major advantage of a federal system.

Diversity, vertical competition, and horizontal competition may all be undermined by various principal-agent problems in federalism's political process. Both state and federal elected officials may be tempted to undermine them in various ways in order to advance their electoral and other interests. Thus, judicial restraint of federal government power will sometimes be necessary in order to ensure that the benefits of federalism are not lost. Importantly, however, judicial action is also needed to ensure that *state* governments do not undermine federalism. One of the important advantages of viewing federalism as a principal-agent problem is that it allows us to create a unified theory that incorporates judicial limits on both state and federal authority.

III. LIMITING FEDERAL POWER: APPLICATIONS TO SPECIFIC DOCTRINES

A. The Commerce Clause.

⁸¹ See *e.g.* FEDERALIST 46 (arguing that “the State governments will, in all possible contingencies, afford complete security against invasions of the public liberty by the national authority”). See also AKHIL AMAR, *THE BILL OF RIGHTS* (1998) (arguing that strengthening of the states as a barrier to federal tyranny was the main motivation behind the adoption of the Bill of Rights); Martin Diamond, *The Ends of Federalism*, 3 *PUBLIUS* 156 (1973) (arguing that protection against federal tyranny was the key element of the Founders' view of federalism).

⁸² FONER, *supra* note, at 134-39; ROBERT COVER, *JUSTICE ACCUSED* (1975); Kaczarowski, *supra* note. In the early twentieth century, state and local governments sometimes acted to protect the free speech rights of unpopular political activists condemned by federal courts. See DAVID RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* (1997).

⁸³ For a modern proposal to institutionalize such protection by means of state-created “converse-1983” actions against abusive federal officials, see Akhil R. Amar, *Of Sovereignty and Federalism*, 96 *YALE L. J.* 1425 (1987).

⁸⁴ BRETON, *supra* note at 189-90; Pierre Salmon, *Decentralization as an Incentive Scheme*, 3 *OXFORD REV. OF ECON. STUD.* 24 (1987).

The Interstate Commerce Clause provides only a limited power to the federal government, permitting Congress to regulate domestic commerce only if it is “among the several states.”⁸⁵ This limitation of the Commerce Clause generates some of the federalism policy advantages discussed above. It forces states to compete in social policy and the production of public goods when conduct regulated is either not commercial or “does not concern more states than one.”⁸⁶ If a state’s regulation reduces public welfare, citizens and businesses can leave: this is the horizontal competition argument for federalism.⁸⁷ Regulatory competition among states in particular promotes experimentation in government, thus over time improving knowledge of social policy.⁸⁸ Second, as the diversity argument for federalism shows, the appropriate mix of public goods depends on the preferences of citizens. Within the area of social policy reserved to them by the limitations of the Commerce Clause, states can tailor the mix of their regulations to their citizens’ preferences and citizens can move to states whose mix better matches their needs.⁸⁹

When the New Deal and Warren Court almost completely abandoned the policing of the limitations of the Commerce Clause, they dissipated many of these advantages.⁹⁰ The ordinary political process will not preserve them because political actors, state and federal, have no direct interest in their preservation. While the limitations of the Commerce Clause contribute to the public interest, the

⁸⁵ U.S. Const., Art 1, sec. 8 , cl. 3.

⁸⁶ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194 (1824).

⁸⁷ See Richard Epstein, *Exit Rights Under Federalism*, 55 L. & CONTEMP. PROBS. 147, 149 (1992).

⁸⁸ See *New State Ice Co. v. Liberman*, 285 U.S. 262, 311 (1932) (Brandeis, dissenting) (discussing federalism’s advantages in experimentation).

⁸⁹ The competitive federalism afforded by the limitations of the Commerce Clause may also have some costs as well. For instance, private entrepreneurs may try to use such competition to gain rents for themselves. To take one example, sports teams try to hold up states for subsidies by threatening to move elsewhere. They may succeed because of citizens’ rational ignorance and mistaken beliefs. Nevertheless we do not believe this kind of problem outweighs the benefits of competitive federalism. First, over the long run, providing rents to such special interests raises taxes and leads to loss of investment and the migration of citizens. Second, Congress has the undoubted power to control such interstate competition in trying to stimulate interstate moves by commercial enterprises.

⁹⁰ See John O. McGinnis, *Reviving Tocqueville’s America: The Rehnquist Court’s Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485, 499 (2002).

autonomy they provide states may often work to the detriment of state officials. Regulatory competition among the states may promote public welfare, but it can also hurt those state officials whose states fall behind in a competitive race. Experimentation has similar downsides because successful experiments in some states may undermine the competitive position of others. Therefore, some state governments may prefer a uniform federal regulation that preempts the issue.⁹¹ Finally, interest groups may benefit from the lack of jurisdictional competition⁹² and state officials have incentives to satisfy interests groups, particularly if they could do so in a way that is relatively nontransparent to voters.

State officials here have incentives to behave analogously to private entrepreneurs who may benefit from a cartel even when market competition rebounds to the public good. State officials, in fact, may have even more substantial incentives to favor the preemption of federal law than private actors have to favor a cartel, because federal coercion can prevent competition for the long term, whereas private cartels are often undermined in relatively short order.⁹³

The limitations of the Commerce Clause protect outlying preferences by leaving many social issues entirely to state regulation, but these issues may often relate to socially charged matters that pose electoral complications, because officials lack information about how they will exactly play out politically.⁹⁴ It is thus often in the political interest of state officials that the federal government address them and relieve them of responsibility for doing so.

⁹¹ Cf. Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 MO. L. REV. 285, 335 (2003) (discussing state efforts to form a tax cartel).

⁹² See Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328 (1994) (interest groups benefit from stifling jurisdictional competition).

⁹³ See John O. McGinnis, *The Political Economy of International Antitrust*, 45 Wm. & My. 549 (2003) (discussing how market forces destabilize cartels).

⁹⁴ See Michael A. Fitts, *Can Ignorance Be Bliss? Imperfect Information as a Positive Influence in Political Institutions*, 88 Mich. L. Rev. 917, 922-923 (1990) (politicians will try to avoid issues on which they lack sufficient information of electoral consequences). Cf. Morris P. Fiorina, *Congress: Keystone of the Washington Establishment* 46 (1989) (describing how members of Congress avoid controversy by focusing on pork barrel projects and casework).

The statute the Supreme Court invalidated in *United States v. Morrison*⁹⁵ illustrates another reason that state officials cannot be relied upon to make the political process work to preserve the advantages of federalism. State authority is a second order value with little political salience to voters, thus making it harder for them to monitor the federalism implications of their agents' actions. Even if it has some long-term returns for a state official, these returns may well be swamped by the advantage a state official will get by taking a position on a first order issue that courts public acclaim. For example, even if the Violence Against Women Act⁹⁶ encroaches on state authority, taking a position that can be portrayed as hostile to women may be more electorally disadvantageous than opposing the act. Indeed, thirty-six states signed an amicus brief supporting the federal statute in *Morrison*, while only one (Alabama) defended state authority.⁹⁷ Thus, given the relative lack of salience of structural issues with the electorate, we would predict over time that the constitutional distribution of powers will be continually sacrificed to position-taking on first order substantive issues.⁹⁸

Accordingly, the Rehnquist Court's judicial enforcement of the limitations of the Commerce Clause in *Lopez* and *Morrison* is entirely justified by our agency cost theory of federalism. The Court implicitly recognizes that political safeguards will not protect the benefits of federalism, because state officials have little interest in protecting second order values that may impose political costs on them. As discussed below, the judiciary does not usually face such costs, enabling its members to preserve the beneficial distribution of powers in the Constitution.

B. Section 5 of the Fourteenth Amendment

⁹⁵ 529 U.S. 598 (2001).

⁹⁶ Violence Against Woman Act of 1994, Pub. L. L. No. 103-322 §40302, 108 Stat. 1941-1942 (codified as amendment, 42 U.S. C. 13981 (1994)).

⁹⁷ Amicus Br. of 36 states.

⁹⁸ See the examples of assisted suicide, partial birth abortion, and the No Child Left Behind Act, discussed in nn. and accompanying text above.

This theory of federalism also provides support for the Court's decision to oversee Congress's use of its Section 5 power under the Fourteenth Amendment.⁹⁹ While that power can be used legitimately, it can also be used to create uniform national rules that undermine the advantages of horizontal and vertical competition. Other scholars have persuasively shown that public choice problems mean that Congress will not engage in sensitive factual finding under Section 5 that would assure that they are making appropriate use of that power.¹⁰⁰ What our framework adds is the proposition that sometimes state officials may welcome faulty fact-finding in the service of their interests and thus cannot be counted on to police congressional behavior. Such interests may include all the interests that incline state officials to prefer a national rule even when the enumerated powers will provide them authority to set their own rule. As detailed above, these interests include preventing competition, avoiding a divisive issue, or taking a position that will resonate immediately with voters even at the expense of the longer term benefits of federalism. Thus, the factors demonstrating the need for judicial policing of Congress's Section 5 power parallel those supporting the need to police the limitations of the Commerce Clause. Both provisions raise similar principal-agent problems.

While we do not have the space to provide a comprehensive defense of the Rehnquist Court's Section 5 jurisprudence, our principal-agent theory suggests that the Court is acting appropriately to protect federalism. It has required that Congress provide evidence of unconstitutional discrimination when it is seeking to protect classes that are not suspect and limits that remedy to one that is "congruent and proportional" to the evidence found.¹⁰¹ In this way, the Court prevents Congress from using Section 5 to create national rules on any subject it chooses—a process which undermines the advantages of

⁹⁹ See *City of Boerne v. Flores*, 521 U.S. 507 (1997) (key Rehnquist Court decision on judicial oversight of Section 5 power). But cf. *Tennessee v. Lane*, 124 S.Ct. 1978 (2004) (recent decision reinterpreting and possibly weakening *Boerne* in some respects, by allowing Congress greater latitude in using its Section 5 enforcement power in cases involving access to judicial services).

¹⁰⁰ See, e.g., Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L. J. 1169, 1184 (2001).

¹⁰¹ See, e.g., *Board of Trustees v. Garrett*, 531 U.S. 356 (2001).

federalism outlined above.¹⁰² At the same time, in contrast, the Rehnquist Court continues to permit Congress greater leeway to legislate under Section 5 to protect suspect classes that may face discrimination wherever they go.¹⁰³

C. The Spending Power

The Court has at least begun to revive judicial review of the Commerce Clause and Section 5. In contrast, the Supreme Court continues to construe the Spending Clause¹⁰⁴ to provide nearly a blank check for any spending that Congress chooses to undertake and to permit Congress to impose regulatory conditions that may parallel those barred by its Commerce Clause jurisprudence. In the leading case of *South Dakota v. Dole*,¹⁰⁵ written by then Associate Justice Rehnquist himself, the Court summarized its Spending Clause jurisprudence and concluded that federal grants to state governments – the form of spending that arguably poses the greatest threat to federalism values- is constitutional so long as these grants 1) serve the “general welfare” under a standard that “defer[s] substantially to the judgment of Congress,” 2) state any conditions that the states must meet in order to acquire the funds “unambiguously,” 3) ensure that conditions are not “unrelated to the federal interest in particular national projects or programs” for which the funds were provided to the state, and 4) do not violate “other

¹⁰² The most prominent critics of the Rehnquist Court fail to take account of the kinds of principal-agent problems we focus on here. They therefore overstate the ability of the political process to protect structural federalism. See, e.g., Robert Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on the Section 5 Power*, 78 IND. L. J. 1 (2003). If elected representatives, state and federal, were likely to take account of the structural advantages of federalism in ordinary politics or the people were likely to discipline them if they failed to do so, there would indeed be no reason for the judiciary to protect the Constitution by policing Congress. But we have shown why these premises are unlikely to hold true.

¹⁰³ See John O. McGinnis, *Decentralizing Constitutional Provisions v. Judicial Oligarchy, A Reply to Professor Koppelman*, 20 CONST. COMM. 39 (2003) (offering reasons why the federal government may need the authority to protect discrete and insular minorities).

¹⁰⁴ U.S. Const. Art. I, § 8, cl. 1. (providing Congress with the power to “lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and the general Welfare of the United States.”).

¹⁰⁵ 483 U.S. 203 (1987).

constitutional provisions.”¹⁰⁶ Furthermore, the Court noted the possibility that federal grants might be invalidated if “the financial inducement offered by Congress [is] so coercive as to pass the point at which pressure turns into compulsion.”¹⁰⁷

Conditions 1 and 4 do not impose any real limits on the spending power not already imposed by “other constitutional provisions.”¹⁰⁸ Condition 2 likewise does not limit the substantive scope of federal grants to state governments, but merely ensures that state governments are informed of the terms under which federal funds are given to them.¹⁰⁹ Condition 3 and the additional ban on federal “coercion” could potentially serve as significant restrictions on federal power, but have not been so interpreted in practice by the courts so far.¹¹⁰ In a recent decision, the Supreme Court has loosened the restraints on the Spending Power still further by holding that federal grants to state governments that have conditions only very loosely related to any federal purpose may be upheld under the Necessary and Proper Clause.¹¹¹

¹⁰⁶ *Id.* at 207-208.

¹⁰⁷ *Id.* at 211 (quotation omitted).

¹⁰⁸ *Id.* at 208. Condition 2 can be seen as an attempt to strengthen the political safeguards of federalism by making state officials aware of the restrictions Congress wishes to impose and thus increasing their ability to mobilize against such restrictions. But if state officials lack systematic interest in protecting their authority, putting them on notice that this authority is at risk may not offer much protection. Moreover, this condition may actually increase state incentives to accept federal grants, because it protects state government officials against unanticipated unpleasant consequences that might arise from ambiguously worded attached conditions.

¹⁰⁹ This requirement was already established prior to *Dole*. See *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1982) (holding that “the legitimacy of Congress’ power to legislate [conditional grants] under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the ‘contract.’”)

¹¹⁰ See Lynn A. Baker & Mitchell N. Berman, *Getting off the Dole: Why the Court Should Abandon Its Spending Doctrine and How a Too-Clever Congress Could Provoke it to Do So*, 78 *Ind. L.J.* 459, 512-21 (2003) (discussing weakness of these two possible restraints on the spending power); Rebecca E. Zietlow, *Federalism’s Paradox: The Spending Power and Waiver of Sovereign Immunity*, 37 *Wake Forest L. Rev.* 141, 180-82 nn.254-55, 265 (2002) (citing numerous cases that reject challenges to conditional spending grants based on these two parts of the *Dole* test); *but see* *Va. Dept. of Educ. v. Riley*, 106 F.3d 559, 561 (4th Cir. 1997) (en banc) (holding a grant condition under the Individuals with Disabilities Education Act unconstitutional in part because of its “coercive” nature).

¹¹¹ In *Sabri v. United States*, 124 S. Ct. 1941 (2004), the Supreme Court recently rejected a challenge to 18 U.S.C. 666(2) (b), a provision that imposes criminal penalties on anyone who bribes a state official so long as that state received more than \$10,000 in federal funds. The Court held that the imposition of this condition was necessary and proper to Congress’ interest in safeguarding federal funds, and was thus constitutional under the Necessary and Proper Clause. To the objection that provision required no connection between the bribery and federal funds, the Court replied that “money is fungible, bribed officials are unworthy stewards of federal funds and corrupt contractors do not give dollar for dollar value.” *Id.* at 1949.

As one of us has argued in greater detail elsewhere,¹¹² the common weakness of *Dole* and its precursors is the excessive focus on the interests of state governments and the failure to consider the possibility that “noncoercive” grants that state governments actually *want* to accept might nonetheless undermine constitutional federalism.¹¹³ Federal grants to state governments in fact tend to undermine all three of the major advantages of a federal system: horizontal competition, vertical competition between states and the federal government, and diversity.¹¹⁴ It is often not recognized that federal grants with few or no attached conditions may be just as pernicious in these respects as those that impose rigorous requirements.

Federal subsidies to the states undermine interstate competition in two major ways. First, to the extent that horizontal competition is motivated by a desire to increase state tax revenue by attracting migrants or preventing outmigration, the existence of an alternative source of revenue necessarily

One way of understanding this holding is that Court is interpreting the nexus requirement of *South Dakota v. Dole* as being coterminous in scope with the Necessary and Proper Clause. While that may put the nexus requirement on a firmer textual foundation, the Court’s interpretation of the Necessary and Proper Clause is itself troubling. As Justice Thomas observed, *see Sabri v. United States*, *supra* at 1949, the majority treats “necessary and proper” as merely a requirement of loose means-end rationality. This construction does not seem in keeping with the language of the clause, which by its terms suggests that means be plainly adopted or appropriate to the congressional end, thereby requiring a closer connection than means end rationality. *See* Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 1 (2003). Why is federal bribery statute well adapted to protect a federal interest by policing a state parks commissioner if state parks receive no federal funds? Most importantly for the conception of federalism defended here, such a lax approach to the Necessary and Proper Clause permits the federal government to impose requirements that are better addressed at the state level and should be subject to intergovernmental competition.

For a strong argument that 18 U.S.C. § 666(a)(2) is unconstitutional, see Richard W. Garnett, *The New Federalism, the Spending Power, and e Federal Criminal Law*, 89 CORNELL L. REV. 1, 39-59 (2003).

¹¹² Ilya Somin, *Closing the Pandora’s Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments*, 90 Geo. L.J. 461 (2002); related arguments have been advanced by other scholars. See especially the work of Lynn Baker and her collaborators. Baker & Mitchell, *supra* note; Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911 (1995) [hereinafter Baker, *Conditional Federal Spending*]; Lynn Baker, *The Revival of States’ Rights: A Progress Report and a Proposal*, 22 HARV. J.L. & PUB. POL’Y 95 (1998) [hereinafter Baker, *Revival of States’ Rights*].

¹¹³ Indeed, “noncoercive” federal grants might well be a greater threat to federalism than coercive ones precisely because state governments are likely to use their political power to promote them. Somin, *supra* note.

¹¹⁴ For a more detailed discussion, see Somin, *supra* note.

diminishes state incentives to compete.¹¹⁵ In addition to serving as a substitute source of state revenue, federal grants can sometimes undermine interstate competition more directly by enabling the states to establish a cartel by acceding to a common federal grant condition.¹¹⁶ The federal government in this scenario acts as the cartel manager, punishing defecting states by withdrawing their funding. For example, states seeking to avoid tax competition can create a cartel by the adoption of a federal policy that denies grants to states with tax rates below a certain level.

The federal government can often crush vertical competition simply by paying the states not to compete with it.¹¹⁷ Federal grants to states are a particularly effective tool for restricting competition because, unlike in the case of preemptive mandates, state governments are actually likely to support them due to their desire to acquire additional federal funds. Finally, federal grants to state governments can undermine diversity by attaching conditions that force dissenting states to conform to the preferences of the majority.¹¹⁸ Both liberal and conservative interest groups can use such conditions to impose their preferences on recalcitrant minority states.¹¹⁹

Why might state governments be motivated to accept federal grants that undermine the key advantages of federalism as a system? The crude but accurate answer is that they want the money. The opportunity to acquire funds that are mostly paid for by taxpayers in other states is an offer that state governments cannot easily refuse.¹²⁰ States are constantly in search of additional federal funds that

¹¹⁵For a more detailed discussion, see Somin, *supra* note at 468-71. *See also* BRENNAN & BUCHANAN, *supra* note at 180-84 (explaining how federal subsidies to states undermine interstate competition by creating an alternative source of revenue for state governments).

¹¹⁶ Geoffrey BRENNAN & JAMES M. BUCHANAN, *The Power to Tax* 182-83 (1980).

¹¹⁷ See Somin, *supra* note at 471-72.

¹¹⁸ See, e.g., Dye, *supra* note; Somin, *supra* note; Baker, *Conditional Federal Spending*; Baker & Berman, *supra* note.

¹¹⁹ For an article emphasizing the fact that this coercive power cuts both ways, see Baker & Young, *supra* note at 151-61; see also Lynn A. Baker, *Should Liberals Fear Federalism?*, 70 U. Cin. L. Rev. 433 (2002).

¹²⁰ See Elizabeth Garrett, *Enhancing the Political Safeguards of Federalism? The Unfunded*

enable politicians to increase expenditures without simultaneously raising taxes for their constituents. Even state officials that are perfect agents of their voters might accept grants that undermine federalism as a system. First, the states face, to some extent, a tragedy of the commons problem: if they pass up this money their citizens will still pay in federal taxes for benefits for states that do accept it. Second, the voters might sometimes prefer additional funds to be allowed to pursue their most preferred policy without restriction by the federal government. However, the problem certainly becomes more severe as a result of serious principal-agent problems arising from most citizens' near-total ignorance of both the theory of federalism and the details of intergovernmental financial relations.

D. Commandeering

The Supreme Court's decisions striking down federal "commandeering" of state government officers also advance the interests of structural federalism.¹²¹ In order for state governments to promote diversity, engage in horizontal and vertical competition, or achieve most other goals, they must have control over their own officials. If the federal government can commandeer these officials at will, this control is imperiled. To be sure, the danger to federalism is greatly reduced if the federal government commandeers only some subset of a state's officials rather than all of them. Nonetheless, even modest forms of commandeering undermine federalism by undercutting a state's ability to pursue its own policies in whatever field the commandeered officials are responsible for.

In practice, commandeering is not nearly as great a danger to federalism as the Spending power and the Commerce power. State governments often have strong incentives to resist uncompensated commandeering because, by definition, it deprives them of resources without any offsetting benefits. For

Mandates Reform Act of 1995, 45 U. KAN. L. REV. 1113, 1140 n.98 (1997) (pointing out that "[t]he few instances when states or cities decline federal grants to avoid complying with conditions are noteworthy enough to receive extensive press coverage").

¹²¹ The two key decisions are of course *New York v. United States*, 505 U.S. 144 (1992) (invalidating portions of the Low-Level Radioactive Disposal Act), and *Printz v. United States*, 521 U.S. (1997) (invalidating portions of the Brady Act). The scope of the anti-commandeering doctrine was limited by the Court's decision in *Reno v. Condon*. *Reno v. Condon*, 528 U.S. 141, 150 (2000) (holding that the Tenth Amendment constrains only such federal commandeering as seeks to "influence the manner in which States regulate private parties," but does not prevent Congress from regulating "state activities").

this reason, state governments routinely use their political power to resist commandeering and other “unfunded mandates.” Uncompensated commandeering of state officials by the feds is a relatively rare occurrence.¹²²

Nonetheless, as the Court has itself observed, circumstances may arise under which state governments are willing to accept commandeering.¹²³ Political payoffs may create incentives for state legislators to embrace a federal decision to order their legislation to take a particular form. Regardless of whether taking action is more politically costly than doing nothing, state officials will often find the least costly alternative is to take the action without accepting responsibility for it. In that way the consequences of inaction are avoided, while the blame for the action is deflected.

But commandeering may have other causes as well. The substantive issue for which Congress is commandeering the legislature may have greater political salience than the issue of protecting state authority to make its own laws. State governments may be “captured” by an interest group that benefits from the commandeering. For instance, solving a radioactive waste problem, as in *New York v. United States*, is likely to be popular, whatever the cost to federalism. And it is likely to be supported by affected interests such as industries seeking to dispose of their toxic waste.

Even if they do not support a given commandeering policy for its own sake, some state officials may be willing to engage in bargaining away authority for concessions in other areas. In situations where there may be no legally binding compensation for the “commandeered” resources as there is in conditional spending cases, state governments may agree to the commandeering as part of a political deal.

¹²² See Printz, 521 U.S. at 916 (pointing out that “the historical record” reflects “not only an absence of executive-commandeering statutes in the early Congresses, but . . . an absence of them in our recent history as well, until recent years.”). The dissent of Justice Souter disputes this conclusion, but is able to point to only a few examples of commandeering, most involving only minor regulatory legislation, and many commandeering judges rather than executive officials. *Id.* at 949-53 (Souter, J., dissenting).

¹²³ *New York v. United States*, 505 U.S. 144, 182-83 (1992).

This is, of course, exactly what happened in the *New York* case, where the state of New York initially agreed to a legislative deal that included a commandeering provision.¹²⁴

E. Sovereign Immunity

The Rehnquist Court's sovereign immunity jurisprudence does not fit as comfortably within our theory as its other efforts on behalf of federalism.¹²⁵ In and of itself, allowing state governments to be sued by individuals for violating federal law does not undermine structural federalism - at least not if the law being enforced by the lawsuits does not itself run afoul of federalism principles on substantive grounds. As many commentators have noted, there seems to be no principled reason why the federal government should be allowed to enforce a given law through direct regulation, monetary incentives, and lawsuits initiated by federal agencies, but not through lawsuits undertaken by individuals. The lack of a compelling structural rationale for state sovereign immunity under the Eleventh Amendment parallels the lack of strong textual support for this doctrine.¹²⁶

Professor Roderick Hills has presented a rare structural argument in favor of state sovereign immunity, one that relies on principal-agent theory. He claims that allowing citizen damage suits against state governments may empower state regulatory bureaucracies at the expense of state legislatures and voters.¹²⁷ Private damage suits against state governments may accomplish the goals of bureaucrats whose interests are linked to those of national interest groups and federal government officials. And the money

¹²⁴ *Id.* at 195-98 (White, J., concurring in part and dissenting in part).

¹²⁵ *See* *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (protecting state sovereign immunity against federal legislation allowing suits in federal courts); *Alden v. Maine*, 527 U.S. 706 (1999) (extending sovereign immunity to suits in state courts).

¹²⁶ Even the Rehnquist Court majority in favor of sovereign immunity concedes that the doctrine is not supported by the text of the Eleventh Amendment. *See* *Seminole Tribe*, 517 U.S. at 54 (“the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts”); but see Michael A. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 *Nw. U. L. Rev.* 819 (1999) (arguing that the textual basis for sovereign immunity can be found in the Constitution's use of the word “state”).

¹²⁷ Roderick Hills, Jr., *The Eleventh Amendment as Curb on Bureaucratic Power*, 53 *Stan. L. Rev.* 1225 (2001).

paid out to claimants usually comes out of the general state budget rather than that of the specific agency that helped push through the liability statute in question.¹²⁸

Hills' argument provides, at best, very limited support for the Court's Eleventh Amendment jurisprudence. It is true that state bureaucracies may support federal regulations that voters and/or state legislators oppose. However, it is difficult to see why federally created private rights of action against states pose an especially grave danger in this regard. After all, the state agency could accomplish the same goal simply by lobbying for a direct federal transfer of wealth to whichever interests benefit from the lawsuits. In addition, state elected officials have numerous ways of punishing subordinate bureaucrats who lobby for policies their political masters oppose.¹²⁹ Certainly, the considerations raised by Hills cannot easily justify the current doctrine's sweeping ban on nearly all federally created private causes of action against state governments.

Assuming for a moment, however, that the Constitution does protect state sovereign immunity, there are reasons that state officials would not defend state sovereign immunity on occasion. First, as in the spending area, states may be willing to bargain away their sovereign immunity for other benefits. Second, some states may already be liable for costs in a particular area because of state constitutional or statutory requirements and would like their competitor states to face the same costs.

Nevertheless, one would expect state officials generally to fight against abrogations of state sovereign immunity more strongly than other intrusions, partly for the reasons that Hills suggests sovereign immunity should be protected. It is generally not in the interest of state politicians to cede power over their budgets to bureaucrats or to private litigants. Thus, in providing vigorous judicial review for state sovereign immunity, the Court may not only be protecting a constitutional phantom, but a phantom that needs less judicial protection than the many more important federalism provisions actually contained in the Constitution.

¹²⁸ Id. at 1234-51.

¹²⁹ For a summary of methods of control over public bureaucracy, see JAMES Q. WILSON, BUREAUCRACY (1989).

IV. FEDERALISM AND JUDICIAL RESTRICTION OF STATE POWER.

Our theory is broader than one that calls for judicial enforcement of state authority, because it also provides justification for judicial enforcement of constitutional restraints on state power. Just as state officials have systematic interests that cause them to act in derogation of their powers, federal officials have systematic interests that cause them to decline to exercise the powers that the Constitution assigns to them to sustain decentralized federalism, such as the power to keep open the avenues of interstate trade and investment. In all too many cases, state governments will have incentives to undermine federalism, and federal officials will have no incentive to stop them.

The representational structure of the federal government itself undermines the incentives of federal officials to protect federalism against state encroachment. In our system of federalism, each member of Congress is elected on a geographical basis— senators from each state and representatives from districts in each state. As result, these members’ electoral fortunes are substantially influenced by the effect of their legislative actions on their particular constituents rather than on the nation as whole. Thus, each legislator has an incentive to sustain the regulatory obstructions of his state despite the damage they inflict on the nation.¹³⁰ Accordingly, the representational nature of federalism can cause a geographic tragedy of the commons in which each representative has an incentive to negate federal power at the expense of the nation's economic prosperity.¹³¹ Once again the interests of political actors—in this case the interests shaped by the structure of representation implicit in the Constitution itself-- militate against the maintenance of the Constitution’s allocation of intergovernmental authority through the political process alone.

¹³⁰ See John O. McGinnis, *Presidential Review as Constitutional Restoration*, 51 DUKE L.J. 901, 226 (2001); Steven Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. (1995). One way of conceptualizing this problem is that geographically based special interests are built into the system of representation, providing parochial and protectionist legislation with additional votes.

¹³¹ McGinnis, *supra* note x, at 226.

A. The Dormant Commerce Clause.

Parochial and protectionist legislation interferes with beneficial horizontal competition because it permits one state to interfere with the commerce of its competitors. Accordingly, under the Dormant Commerce Clause jurisprudence, Congress is given the exclusive power to regulate commerce, displacing state power in this area. Yet, because of capture by parochial interests described above, members of Congress may not take the initiative of passing legislation to get rid of protectionist legislation. Accordingly, the Court enforces the Dormant Commerce Clause against the states even in the absence of congressional legislation.¹³² Under a thoroughgoing application of the political process theory it would be unclear why the Court would maintain a Dormant Commerce Clause jurisprudence since the political process could be thought sufficient to police state obstruction of the free flow of goods and services. The same refusal to enforce the Dormant Commerce Clause could also be reached by a theory of federalism that focuses exclusively on “states’ rights.” But invalidating protectionist state legislation rather than waiting for Congress to do the job is a recognition that federalism concerns, not the rights of states, but a beneficial distribution of powers for citizens. It also addresses the reality that the distribution of powers between the states and the federal government is not a smoothly self-enforcing mechanism. The interests of the political actors, state and federal, are sand in the gears of political enforcement.

Despite its reputation as a pro-states’ rights court, the Rehnquist Court has actually expanded enforcement of the Dormant Commerce Clause, providing some evidence that it is pursuing a structural federalism jurisprudence rather than a states rights jurisprudence. For example, it has extended the Clause to protect non-profit institutions that serve out-of-state customers against state discrimination.¹³³

While legislation discriminating against the import of products and services from other states is the paradigm case of legislation appropriately invalidated under the Dormant Commerce Clause, the Court has also invalidated other kinds of legislation that undermine federalism’s advantages, such as state

¹³² The Court has asserted the existence of a Dormant Commerce Clause since dicta in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824).

¹³³ *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 584 (1997).

attempts to apply their laws extraterritorially to other states' commerce.¹³⁴ States that impose legal rules on commerce occurring within another state also undermine the virtues of federalism. If one state's commerce is regulated by another state, it is harder for a citizen to choose a state where his preferences will be best satisfied, thus weakening the diversity advantages of federalism. Regulation of in-state commerce by another state also impedes horizontal competition among states, as the first state has more difficulty in creating the climate that it believes optimal for business. Thus, the Rehnquist Court appropriately invalidated a statute that required wholesalers to affirm that their prices in the state are no higher than those charged in other states because the provisions "directly control commerce occurring wholly outside the boundaries of the state."¹³⁵

Given our structural theory, the Supreme Court has probably been wrong to allow Congress to give back to the states the authority to pass legislation within the domain of its exclusive interstate commerce authority.¹³⁶ That doctrine allows the protectionist tendencies implicit in the representational system to frustrate the free trade zone established in the Constitution while permitting Congress and the states to blur accountability for which government is responsible. It is in a sense the converse of commandeering because it permits the states to exercise authority provided to the federal government in a manner that blurs lines of accountability. This doctrine, albeit one of long standing, represents a change from the better rule in the Taney Court that barred Congress from delegating this authority.¹³⁷

B. Extraterritorial Application of State Law

Even beyond the strictures of the Dormant Commerce Clause, a state's extraterritorial application of its laws to another state undermines the advantages of federalism. If a state applies its law

¹³⁴ For a discussion of these cases, see Maxwell L. Stearns, *A Beautiful Mend: A Game Theoretical Analysis of the Dormant Clause Doctrine*, 45 WM & MY. L. Rev. 1, 136-142 (2004).

¹³⁵ See *Healy v. Beer Institute*, 491 U.S. 324, 336 (1989).

¹³⁶ See *In Re Rahrer*, 140 U.S. 545 (1890); *Prudential Ins. v. Benjamin*, 328 U.S. 408 (1946).

¹³⁷ See *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851).

to conduct that occurs wholly outside its borders, states will have more difficulty in differentiating their bundle of laws from other states and citizens will find it harder to find a state that suits their preferences. Thus, extraterritorial application of state law can undermine both the horizontal competition and diversity rationales of federalism.

Accordingly, the Court has long prohibited a state from exporting its law to punish conduct occurring wholly in another state,¹³⁸ thus preserving the decentralizing principle that states should be accountable for matters that affect only their own jurisdiction. Most recently, the Court's punitive damages jurisprudence has instructed that punitive damages cannot be awarded to punish conduct that is lawful in the jurisdiction in which the conduct takes place.¹³⁹ Whatever one thinks of the Rehnquist Court punitive damages cases in general, this aspect of their jurisprudence might be defended under our model of federalism.¹⁴⁰ Moreover, Congress cannot necessarily be expected to police this aspect of decentralization itself because in-state interest groups such as trial lawyers may benefit from punitive damages allocated on the basis of out-of-state conduct.

C. The Compact Clause.

In another instance, however, the Rehnquist Court has been derelict in protecting federalism through failure to enforce the Compact Clause.¹⁴¹ The Court has never vigorously enforced the clause and

¹³⁸ See, e.g., *Bigelow v. Virginia*, 421 U.S. 809, 824 (1975) (“A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State”).

¹³⁹ See *State Farm Mut. Auto Ins. v. Campbell*, 123 S.Ct. 1513, 1522 (2003).

¹⁴⁰ Textually, the basis for prohibiting one state from regulating conduct in another state might be derived from the Dormant Commerce Clause when the conduct at issue is commercial. When the conduct is not commercial the prohibition on extraterritorial application of state law might be derived from the meaning of state, because states were traditionally immune from extraterritorial regulation of other states. See Rappaport, *supra* at x (arguing that use of term state in the Constitution carries over the state's traditional immunities).

¹⁴¹ See Art I. Sec. 10 (“No State shall without the consent of Congress . . . enter into any Agreement or Compact with any State.”)

in 1978 formally constricted its scope by suggesting that federal consent to interstate compacts was necessary only when they “pose a threat to federal supremacy” on issues of “federal interest.”¹⁴²

As a matter of federalism structure, this treatment of the Clause seems a serious mistake. Even without entrenching on some specific federal interest, interstate compacts create special risks that state officials will undermine the beneficial consequences of the structure of enumerated powers established by the Constitution. First, states can use the power to create cartels, preventing beneficial horizontal competition among them. Thus, states that produce a commodity can combine to restrict output through a variety of regulatory arrangements, and so raise prices.¹⁴³ Such cartels obviously undermine rather than advance the values of competitive federalism. Interstate compacts can impose externalities – exporting costs to other states that are not members of the compact.¹⁴⁴ This kind of conduct also undermines horizontal competition because states can raise the costs of their competitors.

If we could be confident that federal legislators had incentives to take the initiative to legislate against compacts that undermined these principles of decentralization, the Court’s decision to effectively relegate their policing to federal initiative would not be troubling. But the Founders’ decision to invert the presumption of the legality of state action in cases where states act jointly correctly reflects the political truth that the federal legislators cannot be trusted to take the initiative in such cases. When many states are acting, it is even more likely that coalitions of members of Congress beholden to interest groups in those states may block legislation that would bar the compact.

By contrast, if the Court enforces the Clause, it is much harder for an interest group coalition to secure affirmative congressional consent to the Compact because of legislative inertia.¹⁴⁵ As with state

¹⁴² See *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 479 n.33 (1978).

¹⁴³ For example, oil-producing states for many years ran a cartel that fixed oil prices, a system that amounted to a “domestic OPEC.” See Greve, *supra* note at 332.

¹⁴⁴ *Id.* at 325.

¹⁴⁵ The Constitution makes it much harder to enact legislation than to block legislation because of its tricameral legislative procedure—two houses and the President requires a supermajoritarian consensus before legislation can be passed. See John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 705, 728 (2002).

legislation regulating interstate commerce, we cannot trust either state officials to make compacts consistent with these values nor federal officials to reach out to invalidate those compacts that are inconsistent with them. Accordingly, the Court should enforce the Compact Clause according to its text, which requires congressional consent for all interstate compacts, not simply those that affect a specific federal interest. Alternatively, the Court should hold that federalism is itself the “federal interest” justifying a requirement of congressional consent in order to preserve “federal supremacy” over a vital matter of national concern.¹⁴⁶

D. THE RIGHT TO TRAVEL AND PEONAGE

The Supreme Court’s “right to travel” cases, which have been reaffirmed and extended by the Rehnquist Court, are obvious restrictions on state autonomy.¹⁴⁷ They prevent state governments from constricting the ability of their citizens to move across state lines. In the seminal case of *Crandall v. Nevada*, the Supreme Court struck down an exit tax imposed on residents leaving the state on the ground that “[w]e are all citizens of the United States, and as members of the same community must have the right to pass . . . through every part of it without interruption as freely as in our own States.”¹⁴⁸ Modern decisions have extended the principle to forbid more indirect methods of restricting interstate travel.¹⁴⁹

Although the right to travel cases undeniably restrict state government power, they just as clearly serve the needs of structural federalism. If states can prevent their citizens from leaving, they can undercut or even wholly eliminate interstate migration and make it harder for citizens to satisfy their preferences, thus undermining both the diversity and horizontal competition advantages of federalism. In effect, each state would have a monopoly over its citizens.

¹⁴⁶ U.S. Steel, 434 U.S. at 479 n.33.

¹⁴⁷ *Saenz v. Roe*, 526 U.S. 489 (1999) (striking down time-based restrictions on welfare payments to new residents that awarded them lower payments than those enjoyed by other “bona fide residents”).

¹⁴⁸ *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 49 (1868).

¹⁴⁹ See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969) (striking down state laws requiring one year of residency prior to receipt of any welfare payments).

The federalism issues addressed by the right to travel cases are even more evident in the “peonage” cases, which struck down state laws forcing black laborers to stay in one geographic location and work for the same employer.¹⁵⁰ While the peonage laws were technically struck down under the Thirteenth Amendment prohibition of involuntary servitude,¹⁵¹ their invalidation can also be justified on structural federalism grounds similar to those applied in *Crandall*.

Obviously, there is little danger that states would today enact peonage laws or that the federal courts would uphold any such laws. Nonetheless, it is important to understand how these cases fit into a broader theory of federalism. Far from conflicting with federalism, as is sometimes thought, they reaffirm the freedom of movement that is among its most fundamental attributes.

CONCLUSION.

We believe that federal and state officials have no systematic interest in protecting the powers distributed to them by the Constitution and indeed often have an interest in trading away or abandoning these powers. Because of rational ignorance, citizens themselves are often unable to monitor the failures of their agents, either state or federal. The lack of congruence between the constitutional distribution of powers and federal and state officials’ interest in enforcing them provides a justification for judicial enforcement. This rationale, however, is not rooted in the protection of states’ rights. Judicial intervention on behalf of federalism benefits the citizens of the whole nation, not state governments, and can restrict as well as protect state autonomy, depending on whether restriction or protection advances the constitutional structure of decentralized federalism.

¹⁵⁰ During the Jim Crow era, the Supreme Court played an important role in limiting state efforts to restrict African-American mobility by striking down “peonage” laws which prevented southern blacks from leaving white employers. See *United States v. Reynolds*, 235 U.S. 133 (1914) (upholding federal anti-peonage statute); *Clyatt v. United States*, 197 U.S. 207 (1905) (same); *Bailey v. Alabama*, 219 U.S. 219 (1911) (striking down Alabama peonage law). For a detailed discussion of the peonage cases and their historical importance, see Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era, Part 2: The Peonage Cases*, 82 COLUM. L. REV. 646 (1982). Schmidt describes the peonage decisions as “the most lasting of the White Court's contributions to justice for black people.” *Id.* at 646.

¹⁵¹ *Bailey*, 219 U.S. at 239-45.

Our position immediately prompts two questions for further research. It suggests an inquiry into what other aspects of the structural constitution the judiciary must intervene to enforce because actors in the political process lack any systemic interest in protecting them. For instance, in the area of separation of powers, the executive and legislature may be pleased to bargain away or cede their authority, leaving only the judiciary to maintain the constitutionally mandated distribution. This theory may provide a justification for cases in which the Court has intervened to maintain the separation of powers and suggest additional areas, such as legislative delegation, in which such intervention may be necessary.

Second, our theory raises the question of why would the federal judiciary prove better than the political actors, state or federal, at protecting federalism. We do not have space to fully address that question here. But first and most importantly, the judiciary is unlikely to have the same kind of direct interest in undermining the distribution of powers that federal and state political actors often have.¹⁵² For instance, the judiciary does not benefit from a federally organized cartel that insulates state officials from competition. Nor does it face such focused pressure from constituents to choose a first order policy objective at the price of sacrificing constitutionally assigned authority.¹⁵³

Moreover, judges' preferences for first order policies, unlike analogous preferences of state officials, may often help federalism.¹⁵⁴ If judges oppose a law for ideological reasons, they are more

¹⁵²It is true that the judges are confirmed through a political process but this need not undermine their willingness to enforce federalism. In fact the President has a more substantial interest in maintaining the structure of decentralized federalism than other political actors. His reelection and the election of the successor of his party are dependent on economic growth and the jurisdictional competition sustained by federalism contributes to economic growth. See Ray C. Fair, *Economics and Presidential Elections*, J. ECONS. PERSP. Summer 1996 at 89-90 (concluding from a study of all elections since 1916 that growth of per capita output in the year of the election was the most important factor in determining whether incumbent party retained the presidency.) Thus, other things being equal, a president would be more likely to appoint nominees who are protective of federalism than federal and state political actors. It is also true that the Senate will have to confirm the nominees, but issues of structure will have less political salience than substantive issues and thus will usually not play a large role in the confirmation process.

¹⁵³ For a more extensive discussion of the comparative advantage of the judiciary in protecting federalism, at least in some instances, see Somin, *supra* note at 495-97.

¹⁵⁴ For an argument that judges views in federalism cases are shaped by their ideology, see Frank B. Cross and Emerson Tiller, *Three Faces of Federalism: An Empirical Assessment of Supreme Court Federalism Jurisprudence*, 73 S. CAL. L. REV. 741, 763-764 (2000).

likely to take federalism objections against it seriously. There is some indication that this is taking place in the aftermath of *Lopez* and *Morrison*.

In the Ninth Circuit alone, noted liberal judges have recently used federalism precedents to partially invalidate federal laws against possession of pornography¹⁵⁵ and medical use of marijuana¹⁵⁶ and a noted conservative judge used these precedents to invalidate a federal gun control law.¹⁵⁷ While, of course, the other side of the coin is that ideology may inhibit some judges from applying federalist principles, these instances of improper judicial inaction will simply be a missed opportunity that will not make the distribution of federal powers worse than it would have been without judicial intervention.¹⁵⁸

If judicial enforcement of federalism gains momentum, activists and judges from across the political spectrum will make use of the new doctrine. The recent Ninth Circuit decisions cited above are an example of the trend towards using federalism doctrine to protect what are usually considered left of center causes. In addition, some left-liberal scholars and activists are urging the use of federalism doctrine to protect homosexual rights (which have been more strongly supported by state and local governments than by Washington),¹⁵⁹ and block federal legislation restricting abortion and assisted suicide.¹⁶⁰ Judicial federalism could even help stimulate a broader political movement to restrict federal power, thus allowing

¹⁵⁵ *United States v. McCoy*, 323 F.3d 1114 (9th Cir. 2003).

¹⁵⁶ *Raich v. Ashcroft*, 352 F.3d 1222 (9th Cir. 2003).

¹⁵⁷ *United States v. Stewart*, 348 F.3d 1132 (9th Cir. 2003) (invalidating federal gun control law as applied to possession of homemade machineguns).

¹⁵⁸ It may be argued, however, that judges' ideology will lead them to overenforce federalism principles when the Constitution does not call for enforcement. Such false positives are, of course, theoretical possibilities but the question is how likely are they. After more than half a century in which the Court has failed to enforce federalism principles, the costs of false negatives still seem to overwhelm those of false positives. We are so far from the proper equilibrium of decentralizing federalism that ideology is likely to move the structure of federalism closer to that equilibrium in the medium and short term.

¹⁵⁹ See e.g., Stephen Clark, *Progressive Federalism? A Gay Liberationist Perspective*, 66 *Alb. L. Rev.* 719 (2003) (arguing that rigorous judicial enforcement of federalism promotes gay rights).

¹⁶⁰ Law, *supra* note at 409-17.

the judiciary to work in tandem with the political process rather than against it.¹⁶¹ The more groups develop a stake in judicial enforcement of federalism, the more difficult it will be to roll it back and the less it will be viewed solely as a narrowly “conservative” cause.

Second, judges, regardless of ideology, will be more motivated than elected officials, either state or federal, to enforce neutral principles that foster second order values like federalism. As Richard Posner has noted, justices have an interest in playing legal games because of the pleasure they get from the interplay of complex considerations and rules.¹⁶² Judges thus often put aside their political and public policy preferences to enforce the law according to a set of rules. Indeed, unlike state and federal officials, they may often positively enjoy enforcing second order values of structure at the expense of first order values. Such an exaltation of second order values is a merit badge that shows that they are playing the constitutional law game, while their life tenure insulates them from paying the consequences of disregarding citizens’ first order preferences. It will be the case that judges are more likely to play this game if they can see that it has a coherent purpose. By describing the essential purpose of the federalism game, we hope to encourage more judges to play.

¹⁶¹ See MICHAEL S. GREVE, REAL FEDERALISM (1999) (arguing that Supreme Court efforts to promote federalism and decentralization may attract the support of an ideologically diverse “Leave Us Alone” coalition of groups unhappy with federal interference in their affairs).

¹⁶² See Richard Posner, *What Judges Maximize (The Same Thing Everyone Else Does)*, 3 SUP CT. ECON. REV. 1 (1995).

