FEDERALISM VS. STATES' RIGHTS: A DEFENSE OF JUDICIAL REVIEW IN A FEDERAL SYSTEM

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FEDERALISM VS. STATES' RIGHTS: A DEFENSE OF JUDICIAL REVIEW IN A FEDERAL SYSTEM

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I. 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. These benefits are many, including the satisfaction of diverse preferences and competition both among the states themselves and between the states and federal government. While state autonomy plays a large role in sustaining the benefits of federalism, the federal government also has an important role to play in creating a framework of open trade and investment that assures that states will deliver these benefits. Sometimes federalism can be protected by only restricting the power of state governments, rather than strengthening it.

In our federal system, the people, to use economic terminology, are "principals" and state and federal officials merely their "agents."[1] This allocation of roles 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. The structure of federalism thus must be protected against the machinations of both federal and state officials. Often, the interests of the latter conflict with this structure no less than those of the former.

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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. 739 (1984).

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This Article defends the distributional model of federalism and the principal-agent model of its enforcement, arguing that together they have profound implications for modern federalism jurisprudence. 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 will not 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, it is fundamentally misguided to claim, as do some commentators, and occasionally the Supreme Court, that the political process reliably protects federalism.

Because federalism provisions are not politically self-enforcing, the courts should enforce their content no less than they do the Constitution's individual rights provisions. And as in the case of individual rights, the object of such judicial intervention is to protect the benefits that flow to citizens from a consitutional settlement—in this case the distribution of state and federal powers—and not to protect the right of states per se. Similarly, our theory shows why it is equally appropriate for the judiciary to protect the federal structure 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. In the case of either federal or state usurpation of powers that belong to the other level of government, the judiciary must exercise its power of review on behalf of citizens who often lack the incentive to enforce the distribution of powers themselves.

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 require that they enact legislation 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

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[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 LAW & CONTEMP. PROBS. 293, 295 (1993) (detailing that initial distribution of constitutional power is merely a "baseline" from which political actors make deals).

[3] New York v. United States, 505 U.S. 144, 181–82 (1992).

[4] *Id.* at 182–83.

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respect some limitations on its Commerce Clause powers, protecting the jurisdictional competition and other virtues of decentralized 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, to protect against state discrimination against out of state actors, the Court has extended the Dormant Commerce Clause to nonprofit institutions,[5] thus reinforcing interstate economic competition for non-profits as well as for 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 restricting the ability of citizens to move across state lines. Thus, while we will on occasion criticize the Court's federalism jurisprudence on the basis of our model, many of its decisions are in line with our theory. Yet, at the same time, we do not claim that the Court's approach comports with ours completely, or even comes close to doing so.

Our Article generalizes the insight of *New York v. United States* into a principal-agency model justifying the judicial enforcement of the federal structure as a whole. We will thus provide a more comprehensive explanation of the ways that the interests of government officials, both state and federal, may systematically undercut constitutional federalism unless restrained by judicial review. State officials, for instance, may at times willingly discard the state autonomy guaranteed by enumerated powers or undermine federalism in other ways. Similarly, federal officials will sometimes abdicate their responsibilities under the Commerce Clause and the Compact Clause to protect federalism against the depredations of state governments. Thus, judicial intervention on behalf of state autonomy is part of a broader model that also sometimes requires judicial intervention against state government actions.

Accordingly, our theory explains a wider range of jurisprudence than that usually associated with federalism. The judiciary needs to enforce the proper scope of the Dormant Commerce Clause for the same reasons it needs to enforce the proper scope of the affirmative Commerce Clause. The judiciary must intervene to 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 monitor, let alone punish, these officials' disregard for their constitutional responsibilities.

The arguments that we outline here are primarily structural ones, but we do not intend to denigrate the importance of text and original meaning to judicial review of federalism.[6] Rather, our analysis should be viewed as a

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[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

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supplement to analyses of text and original meaning rather than a replacement for them.

Part I outlines our main argument. It shows that Constitutional federalism is a classic example of a principal-agent problem—a situation where there is a conflict of interest between an individual or group (the "principals") and those who are given authority to act on its or their behalf (the "agent"). As in other situations where principals have less information than their agents and where the multiplicity of principals reduces the incentive 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 popular "political process" theory of federalism enforcement.[7]

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

Part III applies our approach 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. Consequently, self-interested state officials may be only too willing to give up the state authority that leads to the benefits of federalism. For instance, the Commerce Clause leads to beneficial interjurisdictional competition, but state officials, like competitors everywhere, may prefer to transfer their authority to a cartel that eliminates or at least reduces competition. States have similar incentives to support federal overreaching under Section 5 of the Fourteenth Amendment. In the area of federal spending, state officials may welcome federal grants, which allow them to augment the state's budget even at the expense of state autonomy and federalism. A prohibition on federal commandeering of the states may promote accountability in government, but state officials may benefit from diminished accountability. Sovereign immunity may benefit citizens by permitting each state greater control over its budget, but state officials may believe that their states may benefit from

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

[7] Each generation produces its own version of the political process theory. *See* Herbert Weschler, *The Political Safeguards of Federalism: The Role of the States in Composition and the Selection of the National Government*, 54 COLUM. L. REV. 543 (1954); JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 176–81 (1980); Larry D. Kramer, *Putting the Politics Back into the Safeguards of Federalism*, 100 COLUM. L. REV. 215, 278–79 (2000). For further discussion, see notes 56–62 and accompanying text.

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federal imposition of monetary liability because competitor states will suffer higher costs than theirs.[8]

As this last example shows, state officials may not only disregard the appropriate federalist distribution of power because of their own personal interests, but because of the parochial interests of their states. Nevertheless, such a departure from the proper distribution of power can harm the citizens of the nation as a whole. Our recognition that the exercise or abdication of state powers can undermine federalism underscores that ours is not a states' rights argument, but a *nationalist* one—a theory of federalism designed to benefit all the nation's citizens.

Part IV demonstrates that our theory has the broader goal 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 on parochial constituencies and interest groups for reelection support 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 affirmatively to permit states to block interstate commerce.[9] We also show that our principal-agent model calls for the judiciary to enforce the right to travel and to limit a state's imposition of punitive damages based on actions within another state. Further, we contend that the courts should vigorously protect constitutional federalism against other threats from state governments, notably by revitalizing the Compact Clause.

This Article is not a comprehensive survey of the ways in which principal-agent theory should inform federalism jurisprudence. It does, however, begin the task of drawing such connections.

II. CONSTITUTIONAL FEDERALISM AS A PRINCIPAL-AGENT PROBLEM

Allowing the political process to control the constitutional distribution of powers between the federal and state governments creates the possibility

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[8] As we discuss below, however, we have substantial 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 some justification for judicial enforcement, however. The justification for judicial enforcement may also be less strong than for enforcement of many other structures of federalism because state officials will very often have strong incentives to resist the imposition of liability by the federal government.

[9] In speaking of the need for the intervention of the Court, we use a short hand to signify the entire judiciary, state as well as federal. All have an equal obligation to enforce the Constitution according to its terms. Our model shows why they have a distinctive role to play in enforcing federalism provisions.

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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.[10] 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."[11] How likely is such an eventuality?

This Part shows that principal-agent theory provides an unsettling answer to this question. The issue of constitutional federalism is one where classic principal-agent problems are likely to be especially acute. Principal-agent problems are particularly likely in situations where there are multiple principals,[12] and in situations where there is a large information asymmetry favoring agents over principals.[13] Constitutional federalism exhibits both of these problems in an unusually severe form. Moreover, as we shall see, federalism lacks several of the most important control mechanisms that are used to overcome principal-agent problems in the corporate setting.[14]

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.[15] As one

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[10] 505 U.S. 144, 181–82 (1992).

[11] *Id.* at 182.

[12] *See, e.g.*, Oliver Hart, *Corporate Governance: Some Theory and Implications*, 105 ECON. J. 678, 681 (1995); Shleifer & Vishny, *supra* note 1, at 741–42.

[13] *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. 1302 (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 1, at 755–57.

[14] Because the principal-agent problems are so severe, we do not believe that state and federal officials should be able to bargain away or surrender their respective powers. Thus—to use already famous terminology—in our view, the rules defining the structure of federalism are inalienability rules rather than property or liability rules. *See* Guido Calabresi & Douglas Melamed, *One View of the Cathedral: Property Rules, Liability Rules and Inalienability*, 85 HARV. L. REV. 1089, 1111–15 (1972).

[15] 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 importance of political knowledge to the democratic process); *see also* SCOTT L. ALTHAUS, COLLECTIVE PREFERENCES IN DEMOCRATIC POLITICS, OPINION SURVEYS AND THE WILL OF THE PEOPLE (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*, 89 IOWA L. REV. 1287 (2004) (analyzing implications of voter ignorance for constitutional theory) [hereinafter, Somin, *Countermajoritarian Difficulty*] ; Ilya Somin, *Voter Ignorance and the Democratic Idea*, 12 CRITICAL REV. 413 (1998) (assess-

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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."[16]

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.[17] For present purposes, it is important to stress that the majority of citizens lack basic "rules of the game" knowledge,[18] 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.[19] A related problem is that citizens are often ignorant of which political party controls what institutions of government.[20] Political knowledge has remained consistently low for decades with only modest fluctuation and no indication that a major increase is likely in the foreseeable future.[21] Without an understanding of the basic elements of the political system, most citizens are also

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ing dangers of voter ignorance and critically analyzing literature on the subject) [hereinafter, Somin, *Voter Ignorance*].

[16] John A. Ferejohn, *Information and the Electoral Process*, *in* INFORMATION AND DEMOCRATIC PROCESSES 3 (John A. Ferejohn & James H. Kuklinski eds., 1990).

[17] Stephen E. Bennett, *"Know-Nothings" Revisited: The Meaning of Political Ignorance Today*, 69 SOC. SCI. Q. 478 (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 as today as at the time of Bennett's study, see Somin, *Countermajoritarian Difficulty*, *supra* note 15, at 1311–12.

[18] The term "rules of the game" is borrowed from CARPINI & KEETER, *supra* note 15, at 69–70.

[19] *Id.* at 70–71.

[20] 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 Web site: http://www.umich.edu/~nes. This result is consistent with evidence from other elections. *See, e.g.*, W. RUSSELL NEUMANN, THE PARADOX OF MASS POLITICS 15 (1986); Stephen E. Bennett & Linda Bennett, *Out of Sight Out of Mind: Americans' Knowledge of Party Control of the House of Representatives, 1960–1984*, 46 POL. RES. Q. 67 (1993).

[21] For studies showing little or no increase in political knowledge over time, see DELLI CARPINI & KEETER, *supra* note 15, at chs. 2–3; ERIC R.A.N. SMITH, THE UNCHANGING AMERICAN VOTER (1989); Stephen E. Bennett, *Know-Nothings Revisited Again*, 18 POL. BEHAV. 219 (1996); Stephen E. Bennett, *Trends in Americans' Political Information, 1967–1987*, 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) (finding that levels of knowledge declined with education levels controlled). *But cf.* ALTHAUS, *supra* note 15, at 215 (showing a very small increase in knowledge when comparing the 1980–88 period to 1990–98). The increase shown in Althaus's 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.*

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unlikely to be informed 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 thirty percent of all state budgets.[22] 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 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.[23] The huge decrease in transportation costs and information costs in the twentieth century has created a mass culture that has largely eliminated cultural differences among states and has even substantially tempered regional distinctions.[24] 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.[25]

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[22] 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, 461 (2002).

[23] *See* Cathleen C. Herasimchuck, *The New Federalism: Judicial Legislation by the Texas Court of Criminal Appeals*, 68 TEX. L. REV. 1481, 1483 (1990) ("Increasing mobility, instantaneous national communication networks, continued momentum toward national economic, educational, and legal standards, and the emergence of a national culture suggest that American values are less state-oriented.").

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

[25] 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 (1996) (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 au-

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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 casting a "better" vote.[26] 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.[27]

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 informational 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.[28] Witness the continuing broad discussion of the need to restore civil liberties post 9-11 compared to the relative 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 the Constitution's structural provisions than provisions relating to individual rights. This reverses the conventional wisdom in constitutional law, which traditionally claims that individual rights are more in need of judicial protection than the structural constitution.[29]

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thority in cases where it worked to their advantage. *Id.* at 1034–40; *see also* Somin, *supra* note 22, at 467 n.33 (citing sources discussing the Northern states' position on fugitive slave law).

[26] *See* 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 one 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. *Id.*

[27] For general discussions of collective action theory, see the classic work 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).

[28] *See* Rebecca Kahan, Note, *Constitutional Stretch, Snap-Back, and Sag: Why* Blaisdell *Was a Harsher Blow to Liberty than* Korematsu, 99 NW. U. L. REV. (forthcoming 2005).

[29] *See, e.g.*, JESSE CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS, 175–76, 263 (1980) (giving priority to judicial review of individual rights rather than constitutional structure). For other reasons as well, the case for judicial enforcement of federalism may be more compelling than

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B. Multiple Principals

The problem of asymmetric information is exacerbated by the presence of 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.[30]

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,[31] and in any event, not numerous enough to ensure an adequately informed citizenry.[32] 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.

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. However, the problem of multiple principals has in-

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the case for individual rights. For instance, judicial enforcement of minority individual rights can easily create a backlash by depriving citizens of ordinary political forum in which to debate and compromise issues. *See* Michael Klarman, Brown, *Racial Change and the Civil Rights Movement*, 80 VA. L. REV. 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 id.* 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* demonstrates.

[30] Hart, *supra* note 12, at 681; *see also* Shleifer & Vishny, *supra* note 1, 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).

[31] *See* Somin, *Countermajoritarian Difficulty*, *supra* note 15 (presenting evidence showing that the knowledgeable minority of voters is highly unrepresentative on a wide range of parameters); ALTHAUS, *supra* note 15.

[32] *See* Somin, *Voter Ignorance*, *supra* note 15, at 419–31 (arguing that small numbers of knowledgeable voters are not enough to offset the ignorance of the vast majority).

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dependent 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. The insignificance of any one vote to electoral outcomes may give even informed voters an incentive to stick to misleading heuristics and factually inaccurate political beliefs.[33] Collective problems limit not only the amount of information that voters acquire but "how rationally they process the information they do have."[34] 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.[35] Recent debates over federal partial birth abortion bans,[36] state medical marijuana laws,[37] and the No Child Left Behind education bill[38] 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.[39] Failure to enforce federalism constraints naturally leads to the subordination of federalism to substantive policy objectives. In the absence of a credible

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[33] *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 in holding inaccurate views).

[34] *Id.* at 5 (emphasis omitted).

[35] *See, e.g.*, Steve Chapman, *Losing Their Faith in Federalism: As the Gay Marriage Debate Shows, Conservatives Are No Longer Champions of Federalism*, NEWARK STAR-LEDGER, July 26, 2004, at 15 (noting that both liberals and conservatives have reversed their usual positions on federalism in the context of the battle over gay marriage).

[36] *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, 408–12 (2002) (noting conservative support for a federal ban on partial birth abortions, despite its incongruity with conservative views on limited federal power).

[37] Nelson Lund, *Why Ashcroft Is Wrong on Assisted Suicide*, 113 COMMENTARY 50 (2002) (criticizing the Bush Administration's effort to suppress Oregon's state law permitting medical uses of marijuana as inconsistent with federalism).

[38] *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 No Child Left Behind Act for excessive intrusion on state autonomy in education policy).

[39] On the importance of constitutional enforcement of federalist principles 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).

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commitment to federalism, it is irrational for 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 a collectively owned tree that no single owner has sufficient incentive to water by himself, federalism without systematic enforcement of rules against its abrogation can wither, even when most citizens would prefer its continued flourishing.

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.[40]

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, the threat of lawsuits for breach of fiduciary duty or violation of stockholder rights, and "hostile takeovers" by competitors of incumbent managers.[41] 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.[42] The large stockholder has much less incentive to free ride on the efforts of others than a small one, because he 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

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[40] *See* David P. Bryden, *A Conservative Case for Judicial Activism*, 111 PUB. INT. 72, 75–77 (1993) (making the point that a commitment to reciprocity is essential to the protection of free speech).

[41] *Cf.* Shleifer & Vishny, *supra* note 1 (generally discussing problems and potential solutions to the principal-agent problem).

[42] *Id.* at 753–57 (discussing incentives of stockholders to gather information); *see also* Abrahamson & Park, *supra* note 13 (noting that stockholder with significant stake has incentive to procure additional information); Mike Burkart et al., *Large Shareholders, Monitoring, and the Value of the Firm*, 112 Q. J. ECON. 693 (1997); Hart, *supra* note 12, at 683–84.

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rights.[43] 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.[44] Thus, they are not as effective proxies for the majority as large stockholders may 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.[45] Other things being 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.[46] Unfortunately, the political market generally lacks information shortcuts that are anywhere near as simple and effective as the price system.[47] 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 it informs them.[48] This is particularly true with respect to unusually complex and opaque 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.[49] For obvious

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[43] For a detailed analysis of this principle, see ROBERT DAHL, DEMOCRACY AND ITS CRITICS (1989).

[44] *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); *see also* Somin, *Voter Ignorance*, *supra* note 15.

[45] FRANK EASTERBROOK & DANIEL FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 18–19 (1991).

[46] For the classic analysis, see F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945).

[47] For a detailed analysis of the inadequacies of information shortcuts for voters, see Somin, *Voter Ignorance*, *supra* note 15, at 419–31 and literature cited therein; *see also* ALTHAUS, *supra* note 15 (providing still more evidence that shortcuts fail to offset ignorance).

[48] Somin, *Voter Ignorance*, *supra* note 15, 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).

[49] For summaries of the issues and literature, see EASTERBROOK & FISCHEL, *supra* note 45, at ch. 4; Shleifer & Vishny, *supra* note 1, at 750–53.

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reasons, such legal remedies are rarely available against political office-holders. Although the latter may be sometimes sued for committing torts against citizens[50] or for violating specific constitutional rights of individuals,[51] 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.[52] 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.[53] 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.[54]

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 interjurisdictional competition.

As the continuing problems of corporate fraud suggest, principal-agent problems still plague the corporate setting.[55] Yet such problems are considerably more severe in political markets because the standard corporate market remedies are generally absent.

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[50] *See, e.g.*, Federal Tort Claims Act, 28 U.S.C. §§ 2671–2680 (2000).

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

[52] Henry Manne was the 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. 110 (1965).

[53] *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).

[54] *See* Wells M. Engledow, *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).

[55] 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).

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E. 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 states and that the President was elected by an electoral college that also was designed to protect state interests.[56] 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 system also served to protect state interests.[57] 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 local party organizations."[58]

These claims have been attacked from several angles. Federal officials are not always motivated to protect state interests.[59] 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.[60]

We do not disagree with these criticisms of the political safeguards theory, but our critique is more fundamental. The political process 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.[61] Moreover, state officials have systematic political interests that often cause them to undermine federalism. We detail these below.

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[56] Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

[57] *See* CHOPER, *supra* note 7, at 176–81.

[58] *See* Kramer, *supra* note 7, at 278.

[59] *See* John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997) (noting that judicial safeguards are sometimes needed to protect federalism when other branches of government are unable or unwilling to do so).

[60] *See* Paul Frymer & Albert Yoon, *Political Parties, Representation and Federal Safeguards*, 96 NW. U. L. REV. 977, 1025 (2002).

[61] Rational ignorance is at the root of the differences in approach between Professor Levinson's very interesting forthcoming article in the *Harvard Law Review*, *Agency and Empire-Building in Constitutional Law*, and our own. Professor Levinson agrees with us that state officials do not have any sys-

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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 undermine federalism as to protect it. The case against political safeguards theory is even stronger than that made out by previous authors.[62]

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

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temic interest in protecting state autonomy and thus that the political safeguards argument is misplaced. *Id.* at 19. However, he also argues that the problem political safeguards theory is meant to solve is illusory because federal officials are not systemic empire builders with an interest on encroaching on state autonomy. *Id.* That may be true in some instances, but nevertheless federal officials will have political incentives in a range of cases to disregard the appropriate bounds of federalism. For instance, federal officials may often want to forge suboptimal national solutions that please interest groups at the expense of the public. *See* John O. McGinnis, *The Original Constitution and Its Decline: A Public Choice Perspective*, 21 HARV. J. L. & PUB. POL'Y 195 (1998) (stating that interest groups can benefit from national legislation that extinguishes jurisdictional competition). Similarly, as we show throughout this article, state governments also often have incentives to act in ways that undermine federalism.

A key assumption of Professor Levinson's theory is that democratically elected officials act as tightly constrained agents of voters. *Id.* at 10–16. Unlike Professor Levinson, we believe that principal-agent problems often prevent the public from effectively policing departures from the proper federalist distribution of powers. Thus, so long as state and federal officials are motivated by many political interests that will often be at odds with their respective federalism responsibilities, judicial enforcement of the federal structure is warranted. Furthermore, Levinson is often ambiguous as to whether his theory of constituent control of public officials implies control by the electorate as a whole, or merely by narrow coalitions of interest groups whose goals may be at odds with the interests of the majority of citizens. *Id.* If the latter holds true in at least some substantial range of cases, the argument for judicial review of federalism issues is further strengthened.

[62] Our criticism of political safeguards is also more far-reaching than that of Professors Baker and Young, as sound as their critique is. *See* Lynn A. Baker & Ernest Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75 (2002). They note correctly that some states may engage in "horizontal aggrandizement" and try to impose their preferences on other states. *Id.* The authors describe how state officials are acting in the interest of their state citizens in exporting their values, thus serving as 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. Baker 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 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.

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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 approach, 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.[63] In *New York*, the Court rejected on structural grounds a federal statute which, under certain criteria, 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 [for a nuclear waste dump] 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 personal responsibility.[64]

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."[65] 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.[66] This joint deflection of responsibility would not be likely to fool a citizenry that was well informed about federal and state policies and that had the incentive to make use of that information.[67] Unfortunately, the Court has not generalized this insight across the full range of federalism issues. We try to do so here.

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[63] 505 U.S. 144 (1992).

[64] *Id.* at 183.

[65] *Id.* at 182.

[66] *Id.* at 182–83.

[67] It might be objected that in a world of rational ignorance politicians have no need to take actions that will deceive the public because citizens will not comprehend even their transparent actions. But a world of rational ignorance is not a world of total ignorance: Many citizens obtain some knowledge about politics because of its entertainment value or through sheer inadvertence. Thus, making their actions less transparent can be politically advantageous to politicians. By raising information costs to their

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III. 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 among 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,[68] 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.[69] To the extent that local majorities in different states have divergent preferences from each other, a federal system can ensure a higher degree of citizen satisfaction than a unitary polity.[70] 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. Federalism's accommodation of diverse preferences can ease racial, ethnic, religious, and ideological conflicts by allowing each of the opposing groups to control policy in its own region.[71]

Some have challenged the idea that federalism fosters the decentralization necessary to protect diversity on the grounds that a central government could better decentralize decisionmaking by delegating authority to locali-

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political opponents, they thereby reduce the possibility that other political entrepreneurs will make use of citizens' limited knowledge and mount a campaign against them. *See* John O. McGinnis, *The Bar Against Challenges to Employment Discrimination Consent Decrees: A Public Choice Perspective*, 54 LA. L. REV. 1507, 1530 (1994) (discussing politicians' incentives to raise information costs by making their policies more opaque to the inattentive citizen).

[68] *See, e.g.*, Michael McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1507–11 (1987) (summarizing community and political participation rationales for federalism). *But cf.* Edward Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994) (arguing that this rationale is inconsistent in an era when our "true" community is national in scope).

[69] 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").

[70] For brief summaries of the diversity rationale for federalism, see DIETMAR WELLISCH, THEORY OF PUBLIC FINANCE IN A FEDERAL STATE 14–15 (2000); WALLACE E. OATES, FISCAL FEDERALISM 11–13 (1972), and McConnell, *supra* note 68, at 1493–95.

[71] DONALD L. HOROWITZ, ETHNIC GROUPS IN CONFLICT 601–28 (1985); GORDON C. TULLOCK, THE NEW FEDERALIST 39–52 (1994).

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ties within the states.[72] Such localities, the argument runs, could better serve diverse preferences than the states.

This claim is unpersuasive for two major reasons. First, for the reasons we suggest, officials within a central government will not have the incentive to carve out optimal roles for local decisionmaking and citizens will not be able to monitor decisions about the appropriate level of decisionmaking because they have low political salience. Second, more localized decisionmaking is not always better. Economies of scale, for instance, often make state rather than local provision of public goods appropriate. By contrast, there are likely to be far fewer situations where federal implementation of policy captures significant economies of scale relative to state governments. Furthermore, to the extent that decentralization to local governments is sometimes optimal, federalism should promote such decentralization better than a unitary central government. The jurisdictional competition among states fostered by federalism provides state officials the incentive to permit the local autonomy necessary to attract businesses and people from other states.[73]

The ability of federalism to satisfy diverse preferences is augmented by citizen mobility.[74] 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 Among State Governments

Horizontal competition among states is a major benefit of federalism distinct from that of interstate diversity taken in and of itself, though closely related to it.[75] Whereas the interstate diversity argument assumes merely

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[72] *See, e.g.*, Frank Cross, *The Folly of Federalism*, 24 CARDOZO L. REV. 1, 8–16 (2002).

[73] *See* discussion *infra* Part II.B.

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

[75] 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); THOMAS R. DYE, AMERICAN FEDERALISM: COMPETITION AMONG GOVERNMENTS (1990); OATES, *supra* note 70; WELLISCH, *supra* note 70; James M. Buchanan, *Federalism as an Ideal Political Order and an Objective for Constitutional Reform*, 25 PUBLIUS 19 (1995); McConnell, *supra* note 68, 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 74; Barry Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 J. L. ECON. & ORG. 1 (1995); Judge Ralph Winter, *Private Goals and Competition Among State Legal Systems*, 6 HARV. J. L. & PUB. POL'Y 127 (1983). For an early precursor to this literature, see F.A. Hayek, *The Economic Conditions of Interstate Federalism*, 5 NEW COMMONWEALTH Q. 131 (1939).

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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." [76] 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 against interest group machinations. 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.[77]

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.[78] In theory, states have an incentive to seek to attract all migrants who pay more in taxes than they receive in state-funded benefits.[79] 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 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.

In a forthcoming article, Professor Daryl Levinson argues that states do not really compete with each other because state "elected representatives [do not] derive any direct benefits from the popularity and increasing prosperity of their jurisdictions or from the increasing tax revenues accompany-

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[76] 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, other commentators have argued that they "may be mutually reinforcing rather than antagonistic." Ilya Somin, *Revitalizing Consent*, 23 HARV. J. L. & PUB. POL'Y 753, 795–97 (2000).

[77] 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 polices have the ability to move the state may change its policies and benefit even those who are less mobile or less sensitive to the effects of bad policies. *See* Nelson Lund & John O. McGinnis, Lawrence *and Judicial Hubris*, 102 MICH. L. REV. (forthcoming 2004).

[78] DYE, *supra* note 75, at 24–25.

[79] *See* McConnell, *supra* note 68, 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").

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ing population or commercial growth."[80] For this reason, Levinson sees no reason to expect systematic interjurisdictional competition.[81] While Levinson is right that state officials do not *directly* benefit from increasing their tax base, these officials may gain large indirect political benefits. If state political leaders can increase tax revenue without paying the political price inherent in raising taxes, they have more resources with which to pursue popular programs and purchase the support of powerful interest groups for their reelection campaigns. While this objective may not always prevail over all other goals of state governments, it certainly provides a compelling incentive to compete.[82]

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.[83] This increased mobility means that more

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[80] Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. (forthcoming 2004), *available at* http://ssrn.com/abstract=555687 (last visited Oct. 7, 2004).

[81] *Id.* at 22–26.

[82] The examples Professor Levinson cites to prove that interstate competition does not occur actually support the opposite conclusion. For instance, he notes that states do not seem to engage in a "race to the bottom" in environmental law, as predicted by some critics of decentralized federalism. *Id.* at 25. However, the absence of a "race to the bottom" in this area does not prove the absence of competition. It merely shows that competition occurs along more than one dimension. Mobile citizens and businesses care not only about economic growth but also about the environmental quality of the areas to which they consider moving. In the extreme case, few would want to live even in a very high growth area if, for example, the local air is highly toxic. As Levinson himself points out, "citizens obviously have many interests in the public sphere other than wealth maximization." *Id.* at 24. Therefore, competitive state and local governments do not completely sacrifice environmental quality to economic growth or vice versa.

Levinson's other empirical example consists of evidence that most other states do not seem to be actively competing with Delaware to attract firms to incorporate there. *Id.* at 25–26. However, this lack of activity may simply be a result of Delaware's success in fine-tuning its policies to the needs of corporations and effectively dominating the market. It is not unusual for some types of markets to experience periods where one competitor is so thoroughly dominant that other firms see little chance of mounting an effective challenge. Moreover, Nevada and a few other states have in fact actively sought to compete with Delaware. *See, e.g.*, David Mace Roberts & Rob Pivnick, *Tale of the Corporate Tape: Delaware, Nevada, and Texas*, 52 BAYLOR L. REV. 45 (2000) (discussing and evaluating Nevada's efforts to compete with Delaware); Keith Paul Bishop, *The Delaware of the West: Does Nevada Offer Better Treatment for Directors?*, INSIGHTS, Mar. 1993, at 20 (same); Robert M. Lawless, *Nevada's Position in the Market for Corporate Charters*, NEV. LAWYER, Aug. 2002, at 15 (summarizing evidence that Nevada's efforts have achieved a modest degree of success). The state of Texas is "also making a push to capture newly incorporated and reincorporated companies." Roberts & Pivnick, *supra*, at 46.

[83] The percentage of the population consisting of individuals born outside their state of current residence has risen slowly but fairly steadily from 21% in 1900 to 40% today. *See Series C-14, Native Population by Residence Within Outside State, Division and Region of Birth, by Race: 1850–1970*, *in* HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970; *see also* U.S. Census Bureau, *State of Residence in 1980 by State of Birth*, Oct. 12, 2000 (1980 data), *available at* http://www.census.gov/population/socdemo/migration/80pob.txt; U.S. Census Bureau, *State of Residence in 1990 by State of Birth*, Oct. 12, 2000 (1990 data), *available at* http://www.census.gov/population/socdemo/migration/90pob.txt; American FactFinder, *Table QT-P22: Place of Birth and Residence in 1995* (2000), *at* http://factfinder.census.gov/servlet/SAFFPeople?_sse=on.

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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,[84] it actually strengthens the case for federalism by improving the conditions for horizontal competition.[85]

It could be argued that horizontal competition between state governments is undermined by widespread political ignorance. After all, citizens must have some degree of knowledge in order to realize that policies in a neighboring state are more favorable to their interests than those in their own, thereby giving them a reason to move. However, voting with one's feet—as interstate competition is often called—has two major informational advantages over conventional ballot box voting. First, there is no "rational ignorance" collective action problem in the acquiring the relevant knowledge because a "foot voter" can take action on her knowledge even if everyone else in the state remains ignorant. Second, foot voting requires less information than ballot box voting because ballot box voters need to know which problems really are caused by public policy and which officials are responsible for what issues, while foot voters do not.[86]

C. *Vertical Competition Between States and the Federal Government*

For the Founding Fathers and their generation, the main rationale for federalism was not diversity or competition (the most familiar modern arguments), but the role of the states as a bulwark against possible federal tyranny.[87] As the case of state efforts to forestall enforcement of the federal Fugitive Slave Act dramatically illustrates,[88] state governments can sometimes use their powers to block or mitigate federal violations of fundamen-

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[84] *See* Edward L. Rubin & Malcolm Feely, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 944–45 (1994) (arguing that states have "nothing but their legal definitions to distinguish them from one another").

[85] *See* ROBERT D. COOTER, THE STRATEGIC CONSTITUTION 132 (2000) ("Parochial rights fit mobile societies and universal rights fit immobile societies.").

[86] For a more detailed discussion of these points, see Somin, *Countermajoritarian Difficulty*, *supra* note 15, at 1344–47.

[87] *See, e.g.*, THE FEDERALIST NO. 46 (James Madison) (Clinton Rossiter ed., 1961) (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).

[88] ERIC FONER, RECONSTRUCTION 134–39 (1988); ROBERT COVER, JUSTICE ACCUSED (1975); Kaczorowski, *supra* note 25. In the early twentieth century, state and local governments sometimes acted to protect the free speech rights of unpopular political activists denied protection by federal courts. *See* DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS (1997).

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tal individual rights.[89] On a more prosaic level, state governments can compete with the federal government in providing public goods and social services.[90] For example, both state and federal governments engage in environmental and social regulation, both try to foster a favorable "business climate" for industry, and both seek to win the support of a variety of interest group constituencies. Vertical competition, like horizontal, is not an unalloyed good. In some cases, states may use their competitive leverage to stymie federal efforts to eliminate highly oppressive state policies, such as the southern states' ultimately successful resistance to Reconstruction-era efforts to protect the rights of African-Americans.[91] Nonetheless, some substantial capacity for competition is a major advantage of a federal system.

An argument can be made that judicially enforced federalism might actually undermine vertical competition, insofar as states may have little incentive to compete with the federal government if they have a guaranteed sphere of authority which is completely separate from that of the federal government. This point is not wholly lacking in validity, but it ignores two important considerations that outweigh it.

First, if state governments do not have a substantial sphere of authority that Congress cannot override, their attempts to engage in vertical competition are likely to be futile because the federal government could easily suppress them simply by passing legislation to that effect. Second, the objection ignores the fact that separate spheres of power can have overlapping effects. For example, even if the federal government's power to regulate "interstate commerce" is narrowly defined, its regulations in this area will still have substantial effects on economic activity that doesn't cross state lines. Conversely, the tax and regulatory policies of state governments will have a substantial impact on interstate trade even if—under the Dormant Commerce Clause—states are denied the power to regulate interstate trade directly. Thus, state and federal officials can often compete over the same policy area even if they each have different types of powers.

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 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

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[89] 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).

[90] BRETON, *supra* note 75, at 189–90; Pierre Salmon, *Decentralization as an Incentive Scheme*, 3 OXFORD REV. OF ECON. POL'Y 24 (1987).

[91] *See generally* FONER, *supra* note 88.

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federalism from a principal-agent perspective is that it allows us to create a unified theory that incorporates judicial limits on both state and federal authority.

IV. LIMITING FEDERAL POWER: APPLICATIONS TO SPECIFIC DOCTRINES

A. The Commerce Clause

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."[92] 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."[93] If a state's regulation reduces public welfare, citizens and businesses can leave: This is the horizontal competition argument for federalism.[94] Regulatory competition among states in particular promotes experimentation in government, thus over time improving knowledge of social policy.[95] 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.[96]

When the New Deal and Warren Courts almost completely abandoned policing of the limitations of the Commerce Clause, they dissipated many of these advantages.[97] The ordinary political process will not systematically 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 autonomy they provide states may often

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[92] U.S. CONST. art. 1, § 8, cl. 3.

[93] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194 (1824).

[94] *See* Richard Epstein, *Exit Rights Under Federalism*, 55 LAW & CONTEMP. PROBS. 147, 149 (1992).

[95] *See* New State Ice Co. v. Liberman, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (discussing federalism's advantages in experimentation).

[96] 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.

[97] *See* McGinnis, *supra* note 24, at 499.

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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.[98] Finally, interest groups may benefit from the lack of jurisdictional competition,[99] and state officials have incentives to satisfy interest groups, particularly if they could so in a way that is relatively imperceptible to ordinary voters.

State officials have incentives to behave analogously to private entrepreneurs who may benefit from a cartel even when market competition rebounds to the public good. In fact, they 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 markets force can undermine many cartels in relatively short order.[100]

The limitations of the Commerce Clause protect outlying preferences by leaving many social issues entirely to the 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.[101] 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.

The statute the Supreme Court invalidated in *United States v. Morrison*[102] illustrates another reason that state officials cannot be relied upon to make the political process work to preserve the advantages of federalism. Federalism 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 preserving state autonomy 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 public opinion will acclaim. For example, even if the Violence

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

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

[100] *See* John O. McGinnis, *The Political Economy of International Antitrust*, 45 WM. & MARY L. REV. 549 (2003) (discussing how market forces destabilize cartels).

[101] *See* Michael A. Fitts, *Can Ignorance Be Bliss? Imperfect Information as a Positive Influence in Political Institutions*, 88 MICH. L. REV. 917, 922–23 (1990) (discussing how 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 45–46 (1989) (describing how members of Congress avoid controversy by focusing on pork barrel projects and casework).

[102] 529 U.S. 598 (2001).

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Against Women Act[103] 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.[104] Thus, given the relatively low 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.[105]

Accordingly, the Rehnquist Court's judicial enforcement of the limitations of the Commerce Clause in *Lopez* and *Morrison* is justified by our agency cost model 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

The principal-agent model of federalism also provides support for the Court's decision to oversee Congress's use of its Section 5 power under the Fourteenth Amendment.[106] 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 perverse political incentives will usually prevent Congress from engaging in sensitive factual finding under Section 5 to ensure they are making appropriate use of that power.[107] 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

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[103] Violence Against Women Act of 1994, Pub. L. No. 103-322, § 40302, 108 Stat. 1941–42 (codified as amended, 42 U.S.C. § 13981 (1994)).

[104] Brief for the State of Alabama as Amicus Curiae, United States v. Morrisson, 529 U.S. 598 (2001) (Nos. 99-5, 99-29) (amicus brief of thirty-six states).

[105] See discussion *supra* notes 37–39 and accompanying text for examples of assisted suicide, partial birth abortion, and the No Child Left Behind Act.

[106] *See* City of Boerne v. Flores, 521 U.S. 507 (1997) (key Rehnquist Court decision on judicial oversight of Fourteenth Amendment Section 5 power). *But cf.* Tennessee v. Lane, 124 S. Ct. 1978 (2004) (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).

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

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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 analysis 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.[108] 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 federalism outlined above.[109] 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.[110]

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 Clause[111] 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*,[112] 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—are 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 or-

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[108] *See, e.g.*, Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).

[109] The most prominent critics of the Rehnquist Court's federalism decisions 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 be indeed no reason for the judiciary to protect the Constitution by policing Congress. But we have shown why these premises are unlikely to hold true.

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

[111] 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").

[112] 483 U.S. 203 (1987).

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der 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 constitutional provisions."[113] 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."[114]

Conditions one and four do not impose any real limits on the spending power not already imposed by "other constitutional provisions."[115] Condition two 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.[116] Condition three 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.[117] 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.[118]

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[113] *Id.* at 207–08.

[114] *Id.* at 211 (quotation omitted).

[115] *Id.* at 208. Condition two can be seen as 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.

[116] 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'").

[117] *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. Dep't 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).

[118] 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) (2000), 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's interest in safeguarding federal funds and was thus constitutional under the Necessary and Proper Clause. To the objection that the 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.

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As one of us has argued in greater detail elsewhere,[119] 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 even those "noncoercive" grants actually *desired* by state governments might nonetheless undermine constitutional federalism.[120] 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 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.[121]

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 emigration, the existence of an alternative source of revenue necessarily diminishes state incentives to compete.[122] 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.[123] 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

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One way of understanding this holding is that the 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, the majority treats "necessary and proper" as merely a requirement of loose means-end rationality. *See Sabri*, 124 S. Ct. at 1949 (Thomas, J., concurring in the judgment). 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 Barnett, *Necessary and Proper*, 44 UCLA L. REV. 745, 757 (1997). Why is a 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 is unconstitutional, see Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1, 39–59 (2003).

[119] Somin, *supra* note 22. Related arguments have been advanced by other scholars, especially in the work of Lynn Baker and her collaborators. Baker & Berman, *supra* note 117; 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*].

[120] 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 22, at 470–71.

[121] For a more detailed discussion, see *id.* at 464–73.

[122] For a more detailed discussion, see *id.* at 468–71. *See also* GEOFFREY BRENNAN & JAMES M. BUCHANAN, THE POWER TO TAX 180–84 (1980) (explaining how federal subsidies to states undermine interstate competition by creating an alternative source of revenue for state governments).

[123] BRENNAN & BUCHANAN, *supra* note 122, at 182–83.

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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.[124] 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.[125] Both liberal and conservative interest groups can use such conditions to impose their preferences on recalcitrant minority states.[126]

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.[127] States are constantly in search of additional federal funds that 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 being 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.[128] In order for state governments to promote diversity, engage

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[124] *See* Somin, *supra* note 22, at 471–72.

[125] *See generally* Somin, *supra* note 22; Baker, *Conditional Federal Spending*, *supra* note 119; Baker & Berman, *supra* note 117.

[126] For an article emphasizing the fact that this coercive power cuts both ways, see Baker & Young, *supra* note 62, at 151–61. *See also* Lynn A. Baker, *Should Liberals Fear Federalism?*, 70 U. CIN. L. REV. 433 (2002).

[127] *See* Elizabeth Garrett, *Enhancing the Political Safeguards of Federalism? The Unfunded 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").

[128] 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. 898

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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. 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 this reason, state governments routinely use their political power to resist commandeering and other "unfunded mandates." Uncompensated commandeering of state officials by the federal government is a relatively rare occurrence.[129]

Nonetheless, as the Court has itself observed, circumstances may arise under which state governments are willing to accept commandeering.[130] 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 that 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 a state's authority to make its own laws. State governments may also 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

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(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*, 528 U.S. 141, 150 (2000) (holding that the Tenth Amendment constrains only such federal commandeering that seeks to "influence the manner in which States regulate private parties," but does not prevent Congress from regulating "state activities").

[129] *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 (Stevens, J., dissenting).

[130] *See New York*, 505 U.S. at 182–83.

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in conditional spending cases, state governments may agree to the commandeering as part of a political deal. 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.[131]

E. Sovereign Immunity

The Rehnquist Court's sovereign immunity jurisprudence does not fit as comfortably within our analytical framework as its other efforts on behalf of federalism.[132] 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.[133]

Nevertheless, although the Rehnquist Court has not provided a structural justification for its sovereign immunity decisions, Professor Roderick Hills has furnished one and it relies in part 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.[134] 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 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.[135]

Hills's argument provides, at best, very limited support for the Court's Eleventh Amendment jurisprudence. It is true that state bureaucracies may

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[131] *Id.* at 195–98 (White, J., concurring in part and dissenting in part).

[132] *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).

[133] 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 ("[T]he 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").

[134] Roderick Hills, Jr., *The Eleventh Amendment as Curb on Bureaucratic Power*, 53 STAN. L. REV. 1225 (2001).

[135] *Id.* at 1234–51.

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support federal regulations that voters 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.[136] Certainly, the considerations raised by Hills cannot easily justify 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 same reasons that Hills advances. 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.

V. FEDERALISM AND JUDICIAL RESTRICTION OF STATE POWER

Our position is distinct from one that calls for judicial enforcement of state autonomy, 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, so too do 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

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

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elected on a geographical basis—senators from each state and representatives from districts in each state. As a 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.[137] Accordingly, the representational nature of federalism can cause a geographic tragedy of the commons in which each representative has an incentive to block interstate trade at the expense of the nation's economic prosperity.[138] 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.

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.[139]

Under a thoroughgoing application of political process theory, it would be unclear why the Court would maintain a Dormant Commerce Clause jurisprudence. If the political process is up to the task of appropriately limiting Congressional power, why should it not also be trusted to police state obstruction of the free flow of goods and services? The same refusal to enforce the Dormant Commerce Clause is also implicit in any theory of federalism that focuses exclusively on "states' rights." After all, enforcement of the Clause necessarily limits the power of state governments. But invalidating protectionist state legislation rather than waiting for Congress to do the job represents a judicial recognition that federalism exists for the benefit of individual citizens, rather than state governments. It also addresses the reality that the distribution of powers between the states and the federal gov-

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[137] *See* John O. McGinnis, *Presidential Review as Constitutional Restoration*, 51 DUKE L.J. 901, 926 (2001); Steven Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23 (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.

[138] McGinnis, *supra* note 137, at 226.

[139] 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).

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ernment is not a smoothly self-enforcing mechanism. The interests of political actors, state and federal, are often sand in the gears of political enforcement.

Despite its reputation as a pro-states' rights court, the Rehnquist Court has actually expanded the scope of the Dormant Commerce Clause in some respects, providing some evidence that it is pursuing a structural federalism jurisprudence rather than merely 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.[140]

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 correctly invalidated other kinds of legislation that undermine federalism's advantages, such as state attempts to apply their laws extraterritorially to other states' commerce.[141] 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 requiring wholesalers to affirm that their prices in the state are no higher than those charged in other states because the provision "directly control[s] commerce occurring wholly outside the boundaries of the state."[142]

Given our structural analysis, the Supreme Court has probably been wrong to allow Congress to return to the states legislative authority within the domain of its exclusive interstate commerce power.[143] That long standing 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.[144] It is in a sense the converse of commandeer-

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[140] Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 584 (1997).

[141] For a discussion of these cases, see Maxwell L. Stearns, *A Beautiful Mend: A Game Theoretical Analysis of the Dormant Clause Doctrine*, 45 WM. & MARY L. REV. 1, 136–42 (2004).

[142] *See* Healy v. Beer Inst., 491 U.S. 324, 336 (1989).

[143] *See In re* Rahrer, 140 U.S. 545 (1890); Prudential Ins. v. Benjamin, 328 U.S. 408 (1946).

[144] Our position here is consistent with permitting Congress to delegate authority to federal government agencies. First, unlike state officials, federal agencies are more likely to pursue the interests of the nation as a whole rather than parochial interests. Indeed, one of us has argued that the executive is more likely to pursue the good of the citizenry as a whole than are members of Congress. *See* McGinnis, *supra* note 137, at 928–29 (2001) (suggesting that the President is more interested in pursuing policies that benefit the nation as a whole because economic growth and historical reputation matter more to him than they do to members of Congress). Moreover, enforcing the non-delegation doctrine against federal officials has very high administrative costs because the difference between ministerial action and discretionary action is a difference of degree and not of kind. Conversely, once the Court has

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ing, because it permits the *states* to exercise authority provided to the federal government in a manner that blurs lines of accountability. The Court would be better advised to return to the Taney Court rule that barred Congress from delegating this authority.[145]

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 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. If state law follows an individual even after he or she leaves that state, the utility of his exit option is greatly diminished. In the extreme case, if a state is able to apply all of its laws territorially, the departing citizen would not be able to alter his legal status at all. In such a situation, citizens would be unable to take advantage of policy differences between states, nor would states be able to compete with each other effectively. Efforts to entice in-migration with a promise of superior legal rules would be futile if the migrants could not escape the rules in force in their original home states. 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,[146] thus preserving the decentralizing principle that states should be accountable for matters that affect only their own jurisdictions. 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.[147] 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.[148] Moreover, Congress cannot

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determined the scope of Congress's authority under the Dormant Commerce Clause, it adds nothing to administrative costs to prevent them from delegating the authority to state officials. However, we do not take any position here on the constitutionality of delegation to federal government agencies, except to note that it raises issues that are distinct from those involved in federal delegation to state governments.

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

[146] *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.").

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

[148] Textually, the basis for prohibiting another 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* note 133, at 834–41 (arguing that use of term "state" in the Constitution carries over the state's traditional immunities).

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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. [149]

C. The Compact Clause

In another instance, however, the Rehnquist Court has been derelict in protecting federalism, specifically through its failure to properly enforce the Compact Clause.[150] The Supreme Court has never vigorously enforced the clause and 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."[151]

As a matter of federalism structure, this treatment of the Clause seems a serious mistake. Even without trenching 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.[152] Such cartels obviously undermine rather than advance the values of competitive federalism. Second, interstate compacts can impose externalities—exporting costs to other states that are not members of the compact.[153] 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 federal legislators cannot always 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 be-

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[149] *See* Glen S. Koppel, *Populism, Politics and Procedure: The Saga of Summary Judgment and the Rulemaking Process in California*, 24 PEPP. L. REV. 455, 478 (1997) (discussing the influence of trial lawyers in both state legislatures and Congress); Todd Zywicki, *Environmental Externalities and Political Externalities: The Political Economy of Environmental Regulation and Reform*, 73 TUL. L. REV. 845, 904 (1994) (discussing the manner in which trial lawyers will lobby to protect their investment in laws that advantage them).

[150] *See* U.S. CONST. art. I. § 10 ("No State shall without the consent of Congress . . . enter into any Agreement or Compact with any State.").

[151] *See* U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 479 n.33 (1978).

[152] 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 98, at 332.

[153] *Id.* at 325.

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holden 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.[154] As with state 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.[155]

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.[156] They prevent state governments from constricting the ability of their citizens to move across state lines. In the early 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."[157] Modern decisions have extended the principle to forbid more indirect methods of restricting interstate travel.[158]

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.

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

[155] *U.S. Steel*, 434 U.S. at 479 n.33.

[156] 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").

[157] 73 U.S. (6 Wall.) 35, 49 (1868).

[158] *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).

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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.[159] While the peonage laws were technically invalidated under the Thirteenth Amendment prohibition of involuntary servitude,[160] 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.

VI. CONCLUSION

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 incongruence 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.

This analysis immediately prompts two questions for further research. First, 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, executive and legislative branch officials may bargain away or cede their authority to gain political benefits, leaving only

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[159] 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. For more evidence demonstrating the importance of the peonage decisions, see David E. Bernstein & Ilya Somin, *Judicial Power and Civil Rights Reconsidered*, 114 YALE L.J. (forthcoming 2004).

[160] *Bailey*, 219 U.S. at 239–45.

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the judiciary to maintain the constitutionally mandated distribution of powers. 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, this analysis raises the question of why the federal judiciary would prove better than political actors, state or federal, at protecting federalism. We do not have space to fully address that question here, but we will briefly outline two important points in support of our theory that the federal judiciary may be a better guardian of federalism. Of course, we are not claiming that the federal judiciary is an immaculate guardian, only that its intervention is likely to move the federal system toward a more optimal distribution of power between the states and the federal government. Our claim is that the judiciary has a comparative advantage over political actors in protecting some aspects of federalism, not that judges will do a perfect job, or even come close to it.

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.[161] For instance, the judiciary cannot 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.[162]

Moreover, judges' preferences for first order policies, unlike analogous preferences of state officials, may often help federalism.[163] If judges oppose a law for ideological reasons, they are more likely to take federalism objections against it seriously. There is some indication that this is taking place in the aftermath of *Lopez* and *Morrison*.

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[161] It is true that 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 re-election 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. ECON. 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 the party of the 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.

[162] For a more extensive discussion of the comparative advantage of the judiciary in protecting federalism, at least in some instances, see Somin, *supra* note 22, at 495–97.

[163] For an argument that judges views in federalism cases are shaped by their ideology, see Frank B. Cross & Emerson Tiller, *Three Faces of Federalism: An Empirical Assessment of Supreme Court Federalism Jurisprudence*, 73 S. CAL. L. REV. 741, 763–64 (2000).

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In the Ninth Circuit alone, noted liberal judges have recently used federalism precedents to partially invalidate federal laws against possession of pornography[164] and medical use of marijuana,[165] and a leading conservative judge used these precedents to invalidate a federal gun control law.[166] While, of course, the other side of the coin is that ideology may inhibit some judges from applying federalist principles, such 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.[167]

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 certain state and local governments than by Washington),[168] and to block federal legislation restricting abortion and assisted suicide.[169] Judicial federalism could even help stimulate a broader political movement to restrict federal power, thus allowing the judiciary to work in tandem with the political process rather than against it.[170] 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.

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[164] United States v. McCoy, 323 F.3d 1114 (9th Cir. 2003).

[165] Raich v. Ashcroft, 352 F.3d 1222 (9th Cir. 2003). Certiorari has been recently granted in this case. *See* 124 S. Ct. 2909 (2004). The decision will be one of the most important in determining the continuing strength of the so-called federalism revolution of the Rehnquist Court. Unlike such statutes as that at issue in *Lopez*, the statute challenged in *Raich* is one that most conservatives would support on policy grounds. Thus, the larger question raised by this case is whether conservative Justices will use the principles of the federalism revolution to invalidate laws whose goals they approve of on policy grounds.

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

[167] It may be argued, however, that judges' ideologies will lead them to over-enforce 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 at all, 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 ideological decisionmaking, where it occurs, is likely to move the structure of federalism closer to that equilibrium in the medium and short term.

[168] *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).

[169] Law, *supra* note 36, at 409–17.

[170] *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).

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A second reason the protection of federalism should be at least partially entrusted to the judicial branch is that 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, among other goals, an interest in playing legal games because of the pleasure they get from the interplay of complex considerations and rules.[171] 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 at times 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. By describing the essential and coherent purpose of the federalism game, we hope to encourage more judges to play.

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[171] *See* Richard Posner, *What Do Judges Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993).

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